

2006

U.S. Military Courts and the War in Iraq

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Michael J. Frank, U.S. Military Courts and the War in Iraq, 39 *Vanderbilt Law Review* 645 (2021)
Available at: <https://scholarship.law.vanderbilt.edu/vjtl/vol39/iss3/1>

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U.S. Military Courts and the War in Iraq

*Michael J. Frank**

ABSTRACT

Throughout its history, the United States has frequently entrusted to military courts the task of prosecuting insurgents and terrorists during instances of military occupation.

Instead of carrying on this tradition in Iraq, the United States created the Central Criminal Court of Iraq (CCCI) and entrusted a band of Iraqi judges with this task. Infected with corruption, nationalism, tribal loyalties, and anti-U.S. animus, this court has repeatedly thwarted the United States by acquitting or only lightly punishing Iraqi terrorists. Thus, the terrorists have learned that they face an excellent chance of acquittal in the CCCI, or if per chance they are convicted, they must simply bide their time until their short sentences have expired, at which point they will be free to kill again.

This Article discusses the numerous problems engendered by the CCCI and proposes a return to the tradition of using military courts. It demonstrates the superiority of U.S. military courts and the advantages they would entail, including major gains toward winning the war in Iraq.

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An important incident to the conduct of war is the adoption of measures by the military command, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.¹

Long before the advent of modern warfare, the Supreme Court described martial strife as “a suit prosecuted by the sword.”² In the contemporary world, however, the sword has been replaced by more potent weapons and thus the sword is almost never used in battles anymore.³ War does continue to be the prosecution of a suit, though perhaps not in the form the Supreme Court would have recognized in 1827 when it made its observation about warfare. Increasingly, litigation in criminal, civil, or specially-created courts has become a facet of martial conflict.⁴ This is perhaps a natural extension of both warfare and litigation considering that the goal of each of these endeavors is resolution of the underlying dispute. Martial dispute resolution differs from legal dispute resolution mainly in the form of the combat, but their essence shares more similarities than most would like to admit. “What we call judicial proceeding is obviously taking the place of a fight,”⁵ and the courtrooms in which these fights occur may be thought of as simply another battlefield of increasingly complex wars.⁶

Insofar as litigation has been used to attack political foes or obtain political goals,⁷ it should come as no surprise that litigation

1. *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942).

2. *Harcourt v. Gaillard*, 25 U.S. (12 Wheat.) 523, 528 (1827).

3. Iraq is a key exception: Islamic terrorists have been known to decapitate their victims particularly for propaganda purposes. Their affinity for outdated weaponry is akin to their affection for their outdated ideology and their longing for a resurrection of the ancient Islamic caliphate. See Michael Ware, *Chasing the Ghosts*, TIME, Sept. 26, 2005, at 36 (noting that Iraqis who cooperate with U.S. troops are often subject to beheadings at the hands of Moslem terrorists).

4. Robin Tolmach Lakoff, *From Ancient Greece to Iraq, the Power of Words In Wartime*, N.Y. TIMES, May 18, 2004, at E3 (stating that “bullets and bombs are not the only tools of war”).

5. HENRY SUMNER MAINE, *INTERNATIONAL LAW: A SERIES OF LECTURES DELIVERED BEFORE THE UNIVERSITY CAMBRIDGE* 12 (Hyperion 1979) (1888).

6. In the words of Machiavelli: “You must know, then, that there are two methods of fighting, the one by law, the other by force: the first method is that of men, the second of beasts; but as the first method is often insufficient, one must have recourse to the second.” NICCOLO MACHIAVELLI, *THE PRINCE* 92 (1999) (1532). Of course, these two methods of waging war are not mutually exclusive: litigation may complement efforts at combat, and vice-versa.

7. *McCalden v. Cal. Library Ass'n*, 955 F.2d 1214, 1227 (9th Cir. 1992) (noting that litigation can “be a bludgeon for striking at political adversaries”); THOMAS F. BURKE, *LAWYERS, LAWSUITS, AND LEGAL RIGHTS* 8–11 (2002) (discussing the political

has become a key instrument of modern warfare. Warfare, after all, “is not merely a political act but a real political instrument, a continuation of political intercourse, a conduct of political intercourse by other means.”⁸ Recently martial litigation has been tactically and offensively employed against the United States,⁹ but the United States has also used this weapon during previous conflicts and in post-conflict stability and reconstruction operations.¹⁰ The recent use

nature of litigation); ARCHIBALD COX, *THE WARREN COURT: CONSTITUTIONAL DECISION AS AN INSTRUMENT OF REFORM* 1 (1968) (“Count de Tocqueville remarked more than a century ago that hardly a political issue arose in the United States that was not converted into a legal question and taken to the courts for decision. Today de Tocqueville’s observation is even closer to the mark”); ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (J. P. Mayer ed., 1969) (1840) (“[t]here is hardly a political question in the United States that does not sooner or later turn into a judicial one.”).

8. KARL VON CLAUSEWITZ, *WAR, POLITICS, AND POWER: SELECTIONS FROM ON WAR, AND BELIEVE AND PROFESS* 83 (trans. Edward M. Collins, 1962). One etymology for the word “litigation” suggests the common root of litigation and other forms of combat. JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* 5 (1949).

‘Litigation’ derives from two Latin words, *litis* and *ago*. The first, *litis*, means contention, strife, a quarrel. *Ago* means ‘to go’. So, apparently, *litigo*—from which we get our word litigate—originally meant to ‘go to it’ in a quarrel, or to carry on a quarrel, to dispute, to engage in strife, to brawl—and later, ‘to go to law’ in the sense in which the phrase is now popularly used.

9. See Jonathan Mahler, *The Bush Administration vs. Salim Hamdan*, N.Y. TIMES MAG., Jan. 8, 2006, at 87 (“The government considers the legions of adversarial defense attorneys working pro bono for the detainees . . . to be an impediment to their ability to prosecute the war on terror. Among other things, the lawyers have filed hundreds of habeas corpus petitions”); Josh White, *Levin Protests Move to Dismiss Detainee Petitions*, WASH. POST, Jan. 5, 2006, at A2 (noting that “nearly all of the approximately 500 prisoners in Guantanamo Bay now have cases pending in federal courts”); Lindsey Graham, *Rules For Our War*, WASH. POST, Dec. 6, 2005, at A29.

There are now close to 200 habeas petitions filed by enemy combatants requesting better mail delivery, more exercise, judge-supervised interrogation, Internet access and the right to view DVDs. These lawsuits are undermining our ability to gain good intelligence and are placing federal courts in a role never before known in wartime.

See also Keith Johnson, *Spanish Judge Orders Arrest of U.S. Soldiers*, WALL ST. J., Oct. 20, 2005, at A13 (“Spain’s High Court issued an arrest and extradition order yesterday for three U.S. soldiers who fired on a hotel and killed a Spanish television cameraman during the battle for Baghdad in April 2003.”).

The motive of those initiating the Guantanamo habeas litigation is, of course, irrelevant to its martial impact. Some of the attorneys behind these legal attacks presumably are well intentioned, although columnist Robert Novak suspects otherwise. See Robert D. Novak, *On Detainees, a Victory for Bush*, WASH. POST, Nov. 17, 2005, at A31 (intimating that those bringing the Guantanamo lawsuits have malevolent intentions).

10. See Tracy Wilkinson & Christina Mateo-Yanguas, *Spanish Tribunal Convicts 18 of Terror Charges*, L.A. TIMES, Sept. 27, 2005, at A1 (discussing a Spanish tribunal’s conviction of eighteen al Qaeda terrorists, some of whom were involved in the September 11, 2001 attack on the United States). This is consistent with Justice Rutledge’s observation that war “compels invention of legal, as of martial tools

of martial litigation has even resulted in the coining of a new term: “lawfare.”¹¹ Although this term originally was used primarily to denote lawsuits filed against the United States to hamper its ability to wage war against Islamic terrorists,¹² one would be remiss in failing to note that litigation—primarily the prosecution of war criminals and terrorists in occupation courts—has from time-to-time proven to be an effective weapon in the U.S. military arsenal, such as in the trials at Nuremberg after World War II.¹³

In various conflicts, lawfare has been used to demoralize the United States’ enemies and garner support for the war effort, at home and abroad, particularly when occupying enemy territory. Although lawfare is not literally an act of force, forceful litigation can affect the outcome of a war just as effectively as kinetic weaponry. Thus, for example, throughout history various individuals have attempted to use judicial proceedings to demonstrate the moral depravity of their enemies or the justness of their cause.¹⁴ This often assists the war effort by emboldening potential allies, inhibiting support for the

adequate for the times’ necessity.” *Yakus v. United States*, 321 U.S. 414, 461 (1944) (Rutledge, J., dissenting).

11. See, e.g., David B. Rivkin, Jr., & Lee A. Casey, *Friend or Foe?*, WALL ST. J., Apr. 11, 2005, at A2 (“[T]he ICRC has become the leading practitioner of ‘lawfare’—a form of asymmetrical warfare that aims to constrain American power using the law”); Editorial, *The Pentagon and ‘Lawfare’*, WASH. TIMES, Mar. 24, 2005, at A20 (“The Pentagon didn’t quite call it ‘lawfare,’ but there it was, . . . a candid reference to the ill-intentioned use of international law and the courts to harm American interests.”); John Fonte & Ivo Andric, *Democracy’s Trojan Horse*, NAT’L INT., July 1, 2004, at 117 (noting that certain NGOs have waged “‘lawfare’ against the exercise of democratic sovereignty by the American nation-state”); Dan Izenberg, *Ex-Diplomat: US Sees ‘Lawfare’ Being Waged Against It*, JERUSALEM POST, Dec. 17, 2003, at 2 (Professor David Scheffer said that “lawfare” describes “foreign attempts to hamper the US in defending its security and national interest, including the promotion of human rights in the world”). “Lawfare” may be defined as the use of legal proceedings or accusations of violations of “international law” by unelected elites in an effort to obstruct the United States’ pursuit of its interests or its attempt to promote respect for natural rights throughout the world, particularly when the United States employs or seeks to employ military force to realize these goals. Izenberg, *supra* note 11, at 2. Lawfare has harmed U.S. interests by: (a) causing the United States to divert resources to litigation that it might use more effectively elsewhere; (b) fomenting attacks by U.S. enemies by claiming the United States is violating international law; (c) discouraging potentially allies in cooperating with the United States; and (d) causing the United States to alter its policies to prevent litigation or the attacks that lawfare participants might foment.

12. This litigation requires the United States to expend its limited resources and is aimed at breaking the U.S. will to fight. As Clausewitz observed: “there are many ways to the object of war. The defeat of the enemy is not always necessary.” CLAUSEWITZ, *supra* note 8, at 99. Victory on the battlefield is unnecessary when merely destroying a nation’s will to fight is sufficient to defeat it, as the United States demonstrated in Vietnam.

13. See generally TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS* (1992).

14. The use of judicial trials for this purpose with respect to foreign enemies, however, is a phenomenon of recent origin.

enemy from its own civilian populace or third parties, and serving as a reminder to would-be aggressors that, unless they abandon their aggressive plans, their fate might include a trip to the dock.¹⁵ When properly managed and publicized, lawfare can devastate morale and sow dissension in the ranks of enemy troops, thereby inhibiting the enemy's will to fight and impeding the essential support from the civilian population.¹⁶

Martial litigation can also be used to deter war crimes, both by the immediate enemy and, more generally, against future enemies who want to avoid the same fate. As Chief Justice Stone, writing for the Supreme Court, noted, "The trial and punishment of enemy combatants who have committed violations of the law of war is . . . a part of the conduct of war operating as a preventive measure against such violations . . ." ¹⁷ The systematic presentation of reasoned arguments and objective evidence also allows for a dispassionate review of war criminals' misdeeds and an opportunity to affix guilt and apportion blame. Though always imperfect, expensive, and time-consuming, an organized system for waging lawfare can pay dividends both on and off the immediate battlefield.¹⁸ The key to its effective use, of course, is recognizing when martial litigation can supplement traditional military action—the direct use of force—and when it will prove an obstacle to traditional military operations.¹⁹

15. Charles Krauthammer, *Man For A Glass Booth*, WASH. POST, Dec. 9, 2005, at A31 (asserting that "war crimes trials are, above all and always, for educational purposes").

16. The strength of the enemy's will to fight is a key component of its capacity to resist the United States. CLAUSEWITZ, *supra* note 8, at 66–67 (An enemy's power of resistance "is a product of two factors: the extent of the means at his disposal and the strength of his will."). Once the enemy's will to fight is substantially undermined, his defeat is simply a matter of time.

Likewise, as Iraq's CCCI has demonstrated, the morale of U.S. troops—and thus their willingness to fight—can be sapped when the troops see that their efforts and the dangers they face only result in the CCCI releasing captured terrorists. See Elaine M. Grossman, *New Rules in Iraq May Make It Tougher to Keep Insurgents Behind Bars*, INSIDE THE PENTAGON, Dec. 1, 2005, available at 2005 WLNR 19334043 (noting that U.S. officers are disillusioned with the CCCI and with orders that require them to hand the terrorists over to this court and that the CCCI's "policies are also affecting U.S. troop morale"). At a certain point, the troops conclude that it is not worth the risk to capture terrorists when they will simply be released.

17. *Yamashita v. Styer*, 327 U.S. 1, 11 (1946).

18. Litigation is merely one facet of warfare insofar as it is a means of channeling force. A judge's decree, however, unless backed up by moral or physical force, is powerless against, for example, a foreign invasion. As Justice Cardozo observed: "The decree of a court will not stay the clash of war . . ." BENJAMIN N. CARDOZO, *THE PARADOXES OF LEGAL SCIENCE* 59 (1928).

19. For example, a litigation strategy heavily reliant on the testimony of combat troops when those troops are short supply will probably prove counterproductive to effective battlefield operations, unless the propaganda value enormously outweighs the reduction in combat strength that absence from the battlefield will necessarily entail for the soldiers who testify.

Unfortunately, the United States has not fully taken advantage of and enjoyed the fruits that can be reaped from the prosecution of war criminals, particularly with respect to terrorists operating in the Iraqi theatre of operations. This is due in part to the effects of the lawfare being waged against the United States with respect to the prisoners at Guantanamo Bay, Cuba.²⁰ This lawfare, in turn, has resulted in the abdication of the duty to ensure that Iraqi terrorists who murder and attack U.S. troops and British troops are properly punished for their crimes. Rather than prosecute these insurgents before U.S. military judges—a purely executive function and well within the ken of the U.S. Armed Forces—the U.S. government elected to entrust this task to Iraqi prosecutors and Iraqi judges of the Central Criminal Court of Iraq (CCCI).²¹ For reasons discussed more fully below, this has proven to be an egregious mistake.

For starters, the prosecutors and judges of the CCCI have made every effort to protect the insurgents who are tried before their court. Steeped in a peculiar brand of Islamic and European civil law,²² the CCCI judges use arcane procedures and bizarre rules to keep these terrorists from experiencing the full effect of the law and the full force

20. The Author does not question the integrity or the motives of the U.S. attorneys who have assisted the Guantanamo detainees in their legal attacks.

21. Gregg Zoroya & Rick Jervis, *When Shooting Stops, Troops Turn Detective*, USA TODAY, Aug. 10, 2005, at A1 (“In a little-noticed decision made within months of the U.S.-led invasion in 2003, the United States authorized creation of an Iraqi criminal court that would treat insurgents not as enemy combatants but as criminals.”). Besides the desire to avoid the left-wing criticism that would have resulted from using military commissions, the United States also hoped to avoid appearing as heavy-handed “occupiers” as opposed to “liberators” of the Iraqi people. See John C. Williams, *Establishing Rule of Law in Post-War Iraq: Rebuilding the Justice System*, 33 GA. J. INT’L & COMP. L. 229, 230 (2004) (“we were always mindful of not being too heavy-handed lest we ruin our image as liberators”). Some occupation forces have not been liberators, as the various Nazi forays in Europe and Africa during the 1930s and ‘40s demonstrated. But the terms “liberator” and “occupier” are not necessarily contradictory, as the United States demonstrated in Europe after World War II and, more recently, in Iraq.

The Coalition clearly liberated Iraq from a despotic regime. At the same time, the United States and its Coalition partners served as an occupying force—as that term is commonly understood in international law—to lay the foundation for the creation of a democratic government in Iraq. Justice Day, writing for a unanimous Court observed that there “has been considerable discussion in the cases and in works of authoritative writers upon the subject of what constitutes an occupation which will give the right to exercise governmental authority. Such occupation is not merely invasion, but is invasion plus possession of the enemy’s country for the purpose of holding it temporarily at least.” *MacLeod v. United States*, 229 U.S. 416, 425 (1913). Under this definition, the United States was an occupier of Iraq. See also MAINE, *supra* note 5, at 178 (“An invader is said to be in military occupation of so much of a country as is wholly abandoned by the forces of the enemy.”).

22. Iraqi criminal law is an amalgam of French, English, Ottoman, Roman, Egyptian, and Sunni and Shiite Islamic law. S.H. AMIN, *MIDDLE EAST LEGAL SYSTEMS* 165, 166, 167 n.1, 178, 179, 222 (1985).

of U.S. justice.²³ For example, the CCCI refuses to convict defendants unless at least two witnesses testify that they personally observed the defendant commit every element of the crime charged.²⁴ Ever hostile to the accusations made by U.S. soldiers, the judges refuse to cross-examine defendants and their alibi witnesses; they instead aggressively interrogate U.S. witnesses in an attempt to elicit even the smallest contradiction.²⁵ The judges then acquit the defendants based on these purported contradictions. In other cases, family members who have assisted terrorists in escaping or covering up their crimes are not convicted of obstructing justice, and instead the Iraqi judges give them complete immunity for their actions,²⁶ thereby encouraging members of dissident tribes to conspire against U.S. forces. The CCCI judiciary also refuses to impose the mandatory minimum sentences that the Coalition Provisional Authority enacted, and they find any excuse to acquit or impose laughably lenient sentences on brutal terrorists.²⁷

It would be difficult to catalogue the full panoply of tactics used by the CCCI judges to foil justice and shield their countrymen from prosecution. Accordingly, this Article discusses but a few of the more egregious policies. This Article also articulates the various motivations behind the judges' behavior, including their loyalty to the Baath Party, nationalism and tribalism, corruption, and their devotion to various tenets and practices of their Islamic faith. The Article concludes that, because the judges have greater affinity for the insurgents who share a common religion, ethnicity, citizenship,

23. Of course, the "prime object of military organization is Victory, not Justice." John H. Wigmore, *Some Lessons for Civilian Justice to be Learned from Military Justice*, 10 J. AM. INST. CRIM. L. & CRIMINOLOGY 170, 170 (1920). But in punishing terrorists, justice can be a tool in the pursuit of victory.

24. Based on the Author's firsthand experience.

25. Based on the Author's firsthand experience.

26. See Jonathan Finer & Andy Mosher, *For Soldier, A Posthumous Day in Iraqi Court*, WASH. POST, June 28, 2005, at A11 (relating that a murder defendant's "brother was acquitted because of a precedent in Iraqi law that absolves people who help family members conceal crimes after they occur").

27. The CCCI acquits almost 40% of the Iraqi defendants charged by the United States, and many cases are never even brought to trial because prosecutors know that they cannot obtain a conviction before the CCCI judges. Zoroya & Jervis, *supra* note 21, at A1; see also Bing West, *American as Jailer*, NAT'L REV., July 17, 2006, at 27 ("In the U.S., one male in 75 is in jail. In Iraq, it is one in 500. So either Iraqis are seven times more law-abiding than Americans, or the judicial system in Iraq is a mess.").

The provisional laws provided for stiff mandatory minimum sentences, but the Iraqi criminal court ignored these. COALITION PROVISIONAL AUTHORITY ORDER NO. 3, Weapons Control § 6, ¶ 2(b) (imposing a mandatory minimum sentence for the possession or transportation of "special category weapons") (Dec. 2003) available at http://www.iraqcoalition.org/regulations/20031231_CPAORD3_REV_AMD_.pdf (last visited Nov. 8, 2004).

language, and often the same political affiliation or tribe,²⁸ the judges frequently find ways to treat insurgents leniently, thereby encouraging terrorism at the expense of U.S. lives.²⁹ Of course, they frequently do so in a way that obfuscates their true motivations.

Given these biases and the travesty of justice they have produced, the Article suggests an alternative approach: trying Iraqi terrorists in U.S. military tribunals,³⁰ or perhaps even joint U.S.-Iraqi tribunals. This approach would prevent Iraqi judges from hijacking justice and instead would give Iraqis a firsthand view of the rule of law, among other things. In light of these potential benefits, the Article concludes that the better approach would have been to follow the U.S. tradition of trying insurgency cases in military courts staffed by U.S. military and civilian personnel, rather than Islamic courts run by Iraqis who sympathize with the insurgency or are hostile to U.S. influence in the Middle East.

Thus far in the war against Islamic terrorism, lawfare has been successfully waged almost exclusively to the benefit of the terrorists. But that could change. The United States can turn the tables and employ the tactics of lawfare to advance justice. This can be done by using courtrooms to demonstrate to the world the moral depravity of the terrorists, perhaps thereby convincing open-minded Iraqis and others of the justness of the U.S. efforts in Iraq. If nothing else, lawfare could be employed to effectively punish captured terrorists while demonstrating the cowardice of their terrorist acts. This, in turn, might deter their less-crazed comrades to give up the fight or at least cause potential recruits to think twice before joining the jihad.³¹

28. See Carole A. O'Leary & Karna A.J. Eklund, *Pluralism vs. Modern Iraqi Nationalism: Root Causes of State-Sponsored Violence Against Iraq's Kurdish Community and the Search for Post-Conflict Justice*, 13 MICH. ST. J. INT'L L. 91, 91 (2005) ("Iraq, like other states in the Middle East, is in fact a pluralistic society comprised of various communal groups defined on the basis of ethno-linguistic, religious or sectarian, and tribal factors.").

29. Bing West, *America As Jailer*, NAT'L REV., July 17, 2006, at 27 ("Iraqi judges, often intimidated and openly suspicious of written testimony from American soldiers, tend to free the accused. Net result: Over 85 percent of those detained are released within six months.").

30. Military Commissions are authorized under Article 21 of the Uniform Code of Military Justice, which states: "The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals." Unif. Code of Military Justice, Art. 21, 10 U.S.C.S. § 821 (2006).

31. Bing West, *America as Jailer*, NAT'L REV., July 17, 2006, at 27 ("The policy of releasing . . . insurgents has the tragic consequence of attenuating deterrence. What do insurgents have to lose from being arrested for fighting if they know they will soon be released by authorities?"). Because men will often totally abandon a cause or at least minimize their investment of time and energy in enterprises in which they foresee troubles, it is important for the United States to place as many obstacles in the path of jihadists as possible. The United States must send the message to prospective

I. THE INHERENT DEFECTS OF THE CENTRAL CRIMINAL COURT OF IRAQ

A. *Classified Evidence and Fearful Witnesses*

Since its creation by the United States in 2003, thwarting justice has been the standard procedure for many of the judges serving on the CCCI.³² They utilize a host of tactics to acquit guilty defendants, reduce more serious charges to petty offenses, and hand down paltry sentences to those few terrorists whom they ultimately do convict.³³ Yet some of the key defects of trying terrorists in Iraq's civil law courts are not attributable to the animus of the judges but are instead weakness inherent in the nature of Iraq's civil law courts and the very approach of using Iraqi courts to try Iraqi defendants.

One of the chief limitations of prosecuting terrorists in an open Iraqi forum is the inability to utilize classified or sensitive evidence to demonstrate the defendants' guilt. Frequently intelligence reports that linked various Iraqi defendants to terrorist cells were classified. Furthermore, the human sources of the intelligence reports had to remain confidential to preserve their safety and future efficacy. Information contained in these classified reports sometimes linked defendants to a coterie of Baathist or Sunni terrorists. If used in the

terrorists: Join the jihad, and the United States will do everything it can to eliminate you; survive the onslaught and the United States will still do everything in its power to have you punished.

32. In light of the CCCI's overt efforts to thwart justice, it is almost comical that the National Security Council has highlighted the efforts of the CCCI as though these were some significant accomplishments in the war or a step towards the implementation of the rule of law in Iraq. See NATIONAL SECURITY COUNCIL, NATIONAL STRATEGY FOR VICTORY IN IRAQ 16–17 (2005) (“In the first two weeks of September 2005 alone, the Court prosecuted more than 50 multi-defendant trials, and conducted over 100 investigative hearings.”). But justice is not a volume business and statistics about the quantity of legal proceedings indicates nothing about their quality, or lack thereof. Thus, the NSC's statement that, in 2005, the “Iraqi courts are on track to resolve more than 10,000 felony cases,” is practically meaningless to any attempt to ascertain whether the Iraqi courts are making progress in dispensing justice and punishing terrorists. *Id.* at 17. For all the NSC knows, the Iraqi judges “resolve” cases by acquitting substantial numbers of defendants or by imposing punishments that amount to a mere slap on the wrist. See Bing West, *American as Jailer*, NAT'L REV., July 17, 2006, at 27 (describing the Iraqi judicial system and the method of trying insurgents as “a mess”). Although these are two ways to “resolve” a case, they do nothing to promote justice or discourage attacks on U.S. soldiers. In light of the CCCI's high acquittal rate and paltry sentences—which, it is worth noting, are thorny paths down which the NSC Report chose not to tread—Americans should prefer statistics showing that the CCCI is hearing fewer cases, rather than more.

It is sad, then, that the NSC also announced that the CCCI is “expanding its reach throughout Iraq with separate branches in the separate provinces.” See *id.* at 17. If the CCCI branch offices are anything like its headquarters, this expansion will actually prove detrimental to U.S. interests.

33. Jackie Spinner, *Iraq's New Form of Justice Seems to Satisfy Few*, WASH. POST, Aug. 4, 2004, at A12 (“Americans as well as Iraqis have expressed surprise and disappointment at how light the judges have gone on security detainees . . .”).

CCCI trials—presuming fair and open-minded judges—this evidence often would have proven a defendant's participation in a conspiracy beyond a reasonable doubt.

Classified evidence would have been particularly useful to refute various defendants' alibis, claims that evidence was fabricated,³⁴ or claims that U.S. witnesses were untruthful. It also is frequently the best evidence that the United States can marshal in a particular case, because, for example, it might prove the defendant's role or rank in the jihadist command structure or his ties to a terrorist conspiracy. But because the Iraqi judges, clerks, security personnel and spectators lack the requisite security clearances, this evidence could never be submitted to the court and could not even be mentioned to the Iraqis.³⁵ Indeed, in some cases it was this classified evidence that would have unequivocally demonstrated the defendants' guilt.³⁶

In other instances, U.S. prosecutors were prevented from using valuable evidence which, though not classified per se, would have revealed the intimate details of the manner and means by which intelligence was gathered, including sources and methods of collection. Revelation of these details would have educated the insurgents on ways to evade surveillance and interception by U.S. forces, to the deadly detriment of U.S. troops.³⁷ The contents of such

34. The Federal Rules of Evidence permit the introduction of such evidence, even though it might otherwise be considered hearsay. See FED. R. EVID. 801(d)(1)(B) (a statement is not hearsay if the declarant testifies at trial or hearing and is subject to cross-examination concerning the statement, and that statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication . . ."). This rule is based on the long-standing common law practice. See *Tome v. United States*, 513 U.S. 150, 156 (1995) ("The prevailing common-law rule for more than a century before adoption of the Federal Rules of Evidence was that a prior consistent statement introduced to rebut a charge of recent fabrication or improper influence or motive was admissible if the statement had been made before the alleged fabrication, influence, or motive came into being, but was inadmissible if made afterwards.").

The CCCI investigative judges liberally admitted evidence that would constitute hearsay, so it is likely that the classified documents would have been admitted into evidence had these judges been cleared to receive such evidence.

35. Michael Chertoff, *Why Is This Ball In Our Court?*, WALL ST. J., June 17, 2004, at A18 (It is often true that "intelligence is not in a form that can be used in a criminal trial.").

36. Intelligence reports "ought not be published to the world." *Chicago & Southern Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948).

37. As Judge Bork has observed:

[I]n open trials our government would inevitably have to reveal much of our intelligence information, and about the means by which it is gathered. Charles Krauthammer notes that in the trial of the bombers of our embassies in Africa, the prosecution had to reveal that American intelligence intercepted bin Laden's satellite phone calls: "As soon as that testimony was published, Osama stopped using the satellite system and went silent. We lost him. Until Sept. 11. Disclosures in open court would inform not only Middle Eastern terrorists but all the intelligence services of the world of our methods and sources.

documentary or testimonial evidence might permit insurgent networks to determine the identities of confidential sources or the names of Iraqi citizens who occasionally provided valuable tips to the U.S. Army.³⁸ Clearly their lives would have been endangered if their identities were revealed in open court, especially since the insurgents regularly monitored CCCI proceedings and their leadership would have quickly obtained any information revealed in the court.³⁹

Unfortunately, there is no provision in Iraqi law to permit *in camera* introduction of evidence outside the presence of both the defendant and the public.⁴⁰ But even if this limited introduction were permitted by the rules—perhaps through the use of closed court sessions so that most of the trial would remain to be public—neither the CCCI judges nor the various defense counsels possessed the requisite security clearances to view the classified materials, making it impossible to utilize them in the prosecution.

Of course, U.S. prosecutors were not entrusted with the authority to declassify evidence or share it with the CCCI, thereby foreclosing another theoretical solution.⁴¹ In other cases, the evidence was merely sensitive—and releasable to the Iraqis as needed—but not classified as “secret.” In such cases prosecutors would be faced with the Hobson’s choice of: (1) presenting the sensitive information to the CCCI—and thereby ensuring its dissemination among the ranks of insurgents—with the hope, but not the guarantee, that it would convince the court of the defendant’s guilt; or (2) electing not to present the evidence but instead running

Robert H. Bork, *Having Their Day in (a Military) Court*, NAT’L REV. ONLINE, Dec. 17, 2001, available at <http://www.nationalreview.com/17dec01/bork121701.shtml>.

38. Jonathan Finer, *Informants Decide Fate of Iraqi Detainees*, WASH. POST, Sept. 13, 2005, at A1, A20 (discussing how the evidence against detainees often depends on hearsay from Iraqi informants whose identify must be kept secret to protect them from retaliation).

39. Rod Nordland et al., *Unmasking the Insurgents*, NEWSWEEK, Feb. 7, 2005, at 20 (noting that the insurgents have a “ready-made intelligence network” based on tribal, familial, and business connections). Perhaps their faces could have been shielded and their voices disguised, as has been done in the trial of Saddam Hussein, but often the very content of a witness’s testimony would reveal his identity, making such procedures useless. For example, if an IED was planted in a location visible only to one house, testimony that the witnesses saw the defendants plant the IED would immediately lead to the conclusion that the witnesses lives in the adjacent house and the terrorists would quickly take retaliatory action.

40. Iraqi law contains a provision which permits trial courts to hold non-public trials. IRAQI LAW ON CRIMINAL PROCEEDINGS ¶ 152 (1971) available at <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/85256a1c006ac77385256d34006030dc?OpenDocument> (last visited Nov. 8, 2004) (“Trial sessions must be open unless the court decides that all or part should be held in secret and not attended by anyone not connected with the cases, for reasons of security or maintaining decency.”). But the “defendant may not be removed from the court room during consideration of the case unless he violates the rules of court . . .” *Id.* ¶ 158.

41. Even if this were possible, the trustworthiness of most Iraqi judges cannot be verified to the extent that would permit sharing of such information.

the risk that the defendant could not be prosecuted or would be acquitted.⁴² Unfortunately, the second course of action was usually the more prudent one, which meant that some terrorists got off scot-free. Such cases might make it to trial but suffered from gaping evidentiary holes specifically because the key evidence was sensitive thereby precluding a conviction.⁴³ Some of the defendants who benefited from the inability to use sensitive information as evidence used their freedom to commit further attacks against the United States and its allies.⁴⁴

A third and better alternative—the best approach under the circumstances, but one not available to U.S. prosecutors—would have avoided these two problems through rules that prevent full disclosure of evidence to the terrorists.⁴⁵ That is, establishing a forum for trying terrorists where classified evidence could be shared with the court, such as would be the case in a U.S. military court.⁴⁶ One of the

42. Congress addressed this problem with respect to federal prosecutions through the Classified Information Procedures Act. 18 U.S.C. app. III, §§ 1–16; see *United States v. Baptista-Rodriguez*, 17 F.3d 1354 (11th Cir. 1994).

43. Military commissions could have ameliorated this problem. See *Military Order of Nov. 13, 2001, Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57833, at § 1(f) (Nov. 16, 2001) (providing for modified rules of evidence). Section 4(c)(4) of the Executive Order also permits the Commissions to hold closes sessions and protect classified information from disclosure.

44. Hannah Allam, *Bomb Suspect Detained in '04*, PHILADELPHIA INQUIRER, Nov. 14, 2005, at 1 (noting that one of the suicide bombers who attacked Amman Jordan in November 2005, Safah Mohammed Ali, was captured in Iraq near Fallujah by the United States military in 2004, but was released when it was determined that there was insufficient evidence to prosecute or detain him); Aparisim Ghosh, *Professor of Death*, TIME, Oct. 24, 2005, at 44 (discussing a former Iraqi Republican Guard officer—operating under the pseudonym Abu Qaqa al-Tamimi—who trains, houses, and organizes suicide bombers for Zarqawi and other terrorists, who was captured by U.S. forces and detained at Abu Ghraib prison before being released). The Author possesses no knowledge of either of these terrorists, other than news reports, and does not mean to suggest that Safah Mohammed Ali or Abu Qaqa al-Tamimi was released because only classified or sensitive evidence would have supported their prosecution.

45. The Author realizes that this is hardly a perfect solution, and prevents an enemy combatant from fully participating in his defense, perhaps when he is most needed. The Author also recognizes that intelligence is sometimes “less reliable” than the “evidence we demand in court.” Chertoff, *supra* note 35, at A18. But it may be better than the alternatives: not prosecuting terrorists, sharing intelligence with terrorists, and permitting military units to deal with captured insurgents in an ad hoc fashion. See Bing West, *America as Jailer*, NAT'L REV., July 17, 2006, at 27 (“The lack of a justice system inspires vigilantes . . .”).

46. A plurality of the Supreme Court recently opined that excluding accused terrorists from their trials while the prosecution presents classified evidence violates international law and perhaps due process. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2798 (2006) (plurality opinion) (“[A]t least absent express statutory provision to the contrary, information used to convict a person of a crime must be disclosed to him.”). Of course, the Sixth Amendment includes the right to be present at one’s trial, and the exclusion of a civilian defendant from his own trial in a U.S. civilian court would be both unconstitutional and an abomination. U.S. military courts operating during a military occupation of foreign territory and trying dangerous alien combatants who

reasons the United States elected to use military commissions to prosecute al Qaeda terrorists captured in Afghanistan was the concern about revealing classified evidence in civilian courts. Military commissions offered a workable solution to the problem that avoided acquittal or outright dismissal of all charges. It was hoped that through the adoption of certain evidentiary rules, military commissions would prove to be a suitable forum to accomplish the goal of prosecuting terrorists according to fair procedures without compromising national security and valuable intelligence.⁴⁷ Experts

refuse to abide by the Geneva Conventions, however, must be flexible, and fairness to the accused must be balanced with the need to protect intelligence and, ultimately, the national security of the United States.

With respect to this balancing, it is important to point out, first, that even American citizens can forfeit their right to be present at their own trials, so this right to be present at one's trial is not an absolute one. See *Illinois v. Allen*, 397 U.S. 337 (1970) (holding that a criminal defendant could be excluded from his own trial where his outbursts repeatedly interrupted the proceedings). Second, non-resident aliens not present on American soil are entitled to even fewer protections than non-citizens. *Demore v. Kim*, 538 U.S. 510, 522 (2003) ("Congress may make rules as to aliens that would be unacceptable if applied to citizens."); *Yamashita v. Styer*, 327 U.S. 1, 17 (1946) (holding that a military tribunal defendant is not entitled to all of the protections afforded defendants in an American criminal court). Third, the United States has a compelling interest in protecting its intelligence assets. *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam) ("The Government has a compelling interest in protecting both the secrecy of information important to our national security and the appearance of confidentiality so essential to the effective operation of our foreign intelligence service.").

Thus, a reasonable balancing of the interest of the accused with the interest of preserving the secrecy of intelligence is both necessary and lawful. Since, sharing intelligence with accused terrorists is not an option, if the *Hamdan* plurality's view is ever adopted by a majority of the Court, the only alternative may be to decline to prosecute such cases. Essentially this would leave it to individual soldiers on the battlefield to determine whether to punish accused terrorists or release them, an unacceptable and unsavory solution fraught with its own perils for the accused, yet one that will inevitably occur if unelected judges cut off other reasonable options. See *Illinois v. Allen*, 397 U.S. 337, 349 (1970) (Brennan, J., concurring) (If "resolution cannot be reached by judicial trial in a court of law, it will be reached elsewhere and by other means, and there will be grave danger that liberty, equality, and the order essential to both will be lost.").

47. Editorial, *Due Process for Terrorists?*, WALL ST. J., Mar. 22, 2002, at A14 ("A trial may be closed if classified or other sensitive material is presented. Again, this is a matter of common sense. Fighting terrorism is hard enough without compromising intelligence sources in open court. That said, the defendant's military lawyer will see every piece of evidence."). President Bush's Executive Order authorizing military tribunals for al Qaeda members mentions that applying the usual rules of evidence is not practicable, due to dangers this would pose to the United States, presumably because of the classified materials that would have to be revealed. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. at § 1(f) ("Given the danger of the safety of the United States . . . it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."); see also David B. Rivkin, Jr. & Lee A. Casey, *Hamdan*, WALL ST. J., June 30, 2006, at A12 ("Of course, military commissions were initially established because the rules applicable in courts-martial are not consistent with

can debate the suitability of military commission on other grounds, but they must concede that trials in U.S. military courts would have permitted the use of classified and sensitive information that cannot be used in the CCCI.

Another related problem concerned Iraqi witnesses who were too fearful of suffering reprisals at the hands of terrorists to testify in open court that a particular defendant committed the crime charged,⁴⁸ a problem that prosecutors of Saddam Hussein have also encountered.⁴⁹ With zealous terrorists operating in nearly every Iraqi town, it stands to reason that their activities are frequently observed by their neighbors and countrymen,⁵⁰ at least a minority of whom remains loyal to the current Iraqi government or the Coalition. But some of these cannot openly support the current government and the Coalition, nor defy the insurgents, out of fear that the guerillas will murder them or their families.⁵¹ The judges of the CCCI know this threat well, as many of them have been the targets of assassination attempts. That is why the government provides each CCCI judge with a security detail and why many of the judges have moved inside the "green zone" near the U.S. embassy. The terrorists in Iraq have repeatedly shown their willingness to murder scores of innocent women and children who never lifted a finger against

either the practical realities of the war on terror, or the illegitimate status, under the laws and customs of war, of capture al Qaeda members.").

48. These fears were justified. See, e.g., Tom Lasseter, *U.S. Soldiers Make Inroads In the Role of Private Eyes*, MIAMI HERALD, July 8, 2006 (describing how and Iraqi who had promised to become an informant was murdered shortly thereafter). Because the CCCI was likely to acquit the defendant or give him a slap on the wrist regardless of the testimony presented, it became senseless to endanger innocent Iraqi witnesses simply to prove the case, so they were infrequently used. Similarly, when U.S. military witnesses were required to travel through dangerous areas to appear at the CCCI, it was determined that their safety was more important than pursuing a case for which it was unlikely the United States would obtain justice anyway.

49. Toby Harnden & Aqeel Hussein, *Death Threats To Witnesses Halt Saddam Trial*, LONDON SUNDAY TELEGRAPH, Oct. 23, 2005, at 30 ("The trial of Saddam Hussein is in danger of collapsing because dozens of witnesses are refusing to testify against him after being told the former dictator had issued death threats from his cell."); Paul Martin, *Saddam's Lawyers Fear Shi'ite Attacks, Hiring Bodyguards*, WASH. TIMES, Oct. 23, 2005, at A1 ("Witnesses to be called in the trial [of Saddam Hussein and his accomplices for the Dujayl massacre] are reluctant to testify. . .").

50. When U.S. soldiers asked to use the roof of one Iraqi's Baghdad home as a vantage point to observe terrorists, the woman responded that she feared that her neighbors would see and would inform the terrorists of her cooperation: "You can't live in safety if you cooperate with either side What would I say to the neighbors?" Sabrina Tavernise, *Middle-Class Family Life In Iraq Withers Amid the Chaos of War*, N.Y. TIMES, Oct. 2, 2005, at 1.1 (quoting Nesma Abdul-Razzaq). A similar phenomenon was observed in Vietnam. See TOMMY FRANKS, *AMERICAN SOLDIER* 98 (2004) (recounting an IED attack in Vietnam in which the villagers knew the identity of the attackers but were too terrified of the communists to inform the U.S. troops).

51. See Morton Kondracke, *Making a Better Case*, WASH. TIMES, Sept. 13, 2005, at A21 (noting that "Saddamists and jihadists return and kill . . . those [Iraqis] who 'collaborated' with the United States).

them,⁵² so these jihadists would have no qualms about killing witnesses who cooperated with the United States by testifying against them and their comrades in the CCCI.⁵³ Sadly, a few who took the risk of cooperating with the United States did so at the cost of their lives or those of their family members.⁵⁴

It is understandable, then, that fear and the desire for self-preservation has discouraged many Iraqis from testifying against the terrorists.⁵⁵ Too often this reluctance has resulted in freedom for the worst of the insurgents, as these are the most ruthless of the bunch, and witnesses know that testimony against these insurgents will result in immediate retaliation against the witness or his family.⁵⁶ For example, in one case originating just outside of Fallujah, the Marines engaged in a firefight with several young, Arab males, completely clad in black. The men attacked the Marines by firing RPGs, automatic rifles, and by throwing hand grenades. The attackers fled when the Marines started focusing their firepower on the house invaded by the terrorists. Still clad in their black suits, the

52. Sabrina Tavernise, *Iraq's Violence Sweeps Away All the Norms*, N.Y. TIMES, May 6, 2005, at A1 ("Car bombs seem to be the weapon of choice for the insurgents. They are usually aimed at army convoys, but often kill more civilians than soldiers.")

53. The same is true with respect to witnesses testifying in U.S. courts against terrorists operating in the United States. See Eric Lichtblau, *Trial Starts for Student in Plot to Kill President*, N.Y. TIMES, Nov. 1, 2005, at A51 (In the trial of Ahmed Omar Abu Ali, accused of conspiring to assassinate President George W. Bush, spectators "in the courtroom were allowed to listen to audio of the depositions but were blocked from viewing it, to protect the Saudis' identities.")

54. Grossman, *supra* note 16 (noting that "insurgent retribution against Iraqi informants exposed in the judicial process 'has occurred several times'").

55. Nordland et al., *supra* note 39, at 20.

The insurgents had a ready-made intelligence network . . . that told them very quickly who was collaborating with the occupation and who wasn't. Intimidation aimed at those people was sometimes massive, as car bombs targeted people signing up for jobs with the Coalition, and sometimes very personal, but always ferocious.

Even the Iraqi police are afraid of the terrorists, so it should come as no surprise that the common Iraqi is also fearful.

American officers describe having Iraqi police officers who would talk to them candidly only if they were in a room without any other Iraqis. This atmosphere made working with Iraqis almost impossible. In one case, Iraqi police jumped out of the second-story windows of a police building when they saw Americans coming, to avoid being seen with them.

Richard Lowry, *What Went Right*, NAT'L REV., May 9, 2005, at 31.

56. The General Accounting Office reports that there is a nascent witness protection program in Iraq. Gen. Accounting Office, *Rebuilding Iraq*, GAO-04-902R (June 2004) ("[W]hile a team of U.S. Marshals began establishing a witness protection program in March 2004, witness intimidation continues to be a problem, according to DOJ officials."). The key term is "nascent."

common dress of many insurgent groups in and around Fallujah,⁵⁷ the Marines captured them in a neighboring home. When the Marines asked the residents of the dwellings to testify against the men, they all declined out of fear that their testimony would result in their own deaths.⁵⁸ Their qualms about testifying were entirely justified,⁵⁹ particularly in light of their location in the so-called “Sunni Triangle” which continues to be infested with dangerous militants. Had the witnesses been able to testify anonymously, or in a forum not saturated with insurgent spies, it is at least possible that they would have cooperated with the prosecution, as the insurgents had brought them only carnage and anxiety, destroying their neighborhood and making it perilous to reside in those environs.

The CCCI has further exacerbated this problem by acquitting or lightly sentencing defendants who are obviously guilty. This leads potential witnesses to conclude that: (a) their testimony will be futile because the CCCI will acquit the terrorists anyway; (b) even if the terrorists are convicted, the CCCI will not sentence the insurgents to any considerable period of imprisonment, so it is hardly worth the witnesses risking their lives; and (c) because so many insurgents whom the United States originally detained have been released (frequently for lack of evidence to prosecute them in the CCCI),⁶⁰ it is likely that any insurgent that the witnesses testify against will similarly be released⁶¹—their freedom will necessarily entail the

57. See John Hendren, *Few Foreigners Among Insurgents*, L.A. TIMES, Nov. 16, 2004, at 1 (noting a number of “insurgents believed to be foreigners wore similar black ‘uniforms,’ each with black flak vests”); Patrick J. McDonnell, *Forces Cross Key Road Into Fallouja’s Heart*, L.A. TIMES, Nov. 11, 2004, at 1 (noting in various houses in Fallujah “Iraqi soldiers found black outfits and masks similar to ones that insurgents have worn in videotapes that show foreign hostages.”); Jim Krane, *Many Fallujah Fighters Escaped, Military Says Warnings Gave the Insurgents Weeks to Flee*, PHIL. INQUIRER, Nov. 11, 2004, at A2 (U.S. military officials describing “the black garb the U.S. military says is characteristic of the insurgents” in and around Fallujah). Insurgents in Baghdad also sport the latest fashion, and thus sometimes wear these same black outfits. Richard Lloyd Parry et al., *Rebels Roam Free in Central Baghdad*, LONDON TIMES, Nov. 13, 2004, at 61.

58. See Josh Meyer & Mark Mazzetti, *In a Battle of Wits, Iraq’s Insurgency Mastermind Stays a Step Ahead of U.S.*, L.A. TIMES, Nov. 16, 2005, at 1.

59. In the words of Saddam Hussein’s defense counsel and former U.S. Attorney General Ramsey Clark, “How can you ask a witness to come in when there’s a death threat?” See Tom Vanden Brook, *Ex-Attorney General Joins Saddam Defense*, USA TODAY, Nov. 29, 2005, at A10.

60. See Bing West, *America as Jailer*, NAT’L REV., July 17, 2006, at 27 (“In Ramadi, for instance, an unemployed youth is paid \$40 to emplace a roadside bomb. It is unlikely that he will be caught in the act, and, if he is caught, he knows the odds greatly favor his release. Our soldiers mock the arrest of insurgents as a ‘catch and release’ fishing tournament.”).

61. These releases have not only discouraged witnesses from testifying, they have discouraged Iraqi troops from handing insurgents over to the United States and have created ill feelings in Iraqi officers and soldiers who would like to see an end to the insurgency. Julian E. Barnes, *Cracking an Insurgent Cell*, U.S. NEWS & WORLD

freedom to exact revenge on those witnesses who testified against them.⁶² It is no wonder, then, that Iraqis are reluctant to testify against the terrorists.⁶³

Of course, this problem of witness trepidation and intimidation is not exclusive to Iraq. The United States itself contains veritable “war zones” where the police battle sophisticated gangs who intimidate witnesses with subtle and not so subtle threats of violence.⁶⁴ As U.S. law enforcement officials have acknowledged: “If we can’t get witnesses to cooperate, the entire rule of law breaks down,”⁶⁵ a truism that transcends borders. To protect witnesses, some U.S. jurisdictions permit them to testify anonymously,⁶⁶ a practice that the CCCI judges initially did not permit.⁶⁷ By refusing to assist these witnesses in remaining anonymous, the CCCI judges made the terrorists’ threats and intimidation completely efficacious.⁶⁸ Witnesses knew that if they showed their faces in court, they would not be long for this world. Bowing to U.S. pressure, the CCCI has since relented (or at least it did in one case) and apparently now will sometimes permit witnesses to testify anonymously before the investigative judge. However, because the court security personnel, and perhaps even some of the judges, have ties to the insurgency,

REPORT, Jan. 9, 2005, at 40 (“If the evidence doesn’t meet American standards, military lawyers will release the detainees—angering the Iraqi forces who originally captured them.”).

62. Grossman, *supra* note 14 (noting that Iraqis are “more reluctant” to provide the United States with intelligence after “terrorists and criminals return to their neighborhoods”).

63. *Id.* (“It is almost impossible to get witnesses to testify.”).

64. Witness intimidation is a serious problem in parts of the urban United States:

Police and prosecutors in Boston say uncooperative witnesses are a major reason about two-thirds of last year’s homicides remain unsolved.

[Suffolk County District Attorney Daniel F.] Conley said he was surprised to learn from his gang prosecutors that 90 percent of their cases involve some form of intimidation. He heard how a man was shot while coaching a basketball game—and no one saw anything. Same story for a 10-year-old hit by a stray bullet during a crowded football practice.

Sometimes, Conley said, the intimidation comes right into the courtrooms.

Julie Bykowitz, *As Boston Boosts Witness Protection, Baltimore Take the Legal Route*, BALTIMORE SUN, Apr. 13, 2005, at 1A.

65. *Id.* (quoting Lt. Gov. Kerry Healey).

66. *Id.* Of course, in U.S. courts this raises issues concerning the right to a public trial and the Confrontation Clause, but not in Iraq.

67. The author is aware of only one case in which the CCCI investigative judges permitted a witness to testify anonymously.

68. Anonymous testimony should never be the norm in any legal system, but things are far from normal in Iraq, and creative solutions must be found to combat the terrorist threat that is tearing that nation apart.

there is some question whether this anonymous testimony is sufficient to protect witnesses from reprisal.

It is also important, for Iraq's future, that the CCCI affirm that anonymous testimony is a temporary, extraordinary measure that is necessary only because of the extraordinary nature of the terrorist insurgency and the danger that it poses. The judges must ensure that this dangerous practice will be discarded after terrorism has been extirpated in Iraq, lest the court make a habit of convicting defendants on the basis of testimony from "anonymous" witnesses. It is simply too easy for corrupt police officers to manufacture evidence, and the Iraqi judges and attorneys are insufficiently skilled at cross-examination to root out these fabrications, particularly under Iraq's civil law system. Unless the new Iraqi justice system commits itself to transparency it will be no better than the Baathist courts it was designed to replace.

B. *Crime Scene Depictions and Submission of Weapons to the Court*

The difficulty of convincing frightened witnesses to testify against violent criminals is not a defect directly attributable to the Iraqi judiciary, although Iraqi judges certainly could have taken steps to ameliorate this problem. But the CCCI judges were directly responsible for imposing other impediments to the prompt and effective prosecution of Iraqi terrorists. Sometimes these took the form of picayune evidentiary or procedural rules that seemed to appear spontaneously or to have their genesis only in the whim of a particular panel of judges. For example, on more than one occasion the CCCI investigative judges demanded a photograph or sketch of the crime scene, refusing to allow a case to progress to trial without one.⁶⁹ This rule was enforced regardless of the number of witnesses and weight of the evidence and regardless of whether a sketch would be relevant or would assist the court in assessing the merits of a case.⁷⁰ For example, it would be senseless to provide a sketch of the

69. See, e.g., Bing West, *America as Jailer*, NAT'L REV., July 17, 2006, at 27 (noting that the "arresting American soldiers filed two sworn statements for each arrest, together with photos from the crime scene"). This demand was probably made pursuant to the Iraqi criminal procedure law, which states that the scene of an incident shall be examined by the magistrate and he shall "arrange for a sketch-map of the scene of the incident to be made." IRAQI LAW ON CRIMINAL PROCEEDINGS ¶ 52(B) (1971) available at <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/85256a1c006ac77385256d34006030dc?OpenDocument> (last visited Nov. 8, 2004).

70. Another creative tactic the CCCI employed to delay or completely avoid hearing a case was its requirement that the United States provide a photograph of the defendant. At one point the CCCI trial court refused to schedule trials unless it had been given a photograph of the defendant or his identification card. Since the prisoners were generally kept at Abu Ghraib Prison, which was a dangerous IED-encountering drive from the CCCI courthouse, obtaining photographs of the defendants was not a

crime “scene” in cases involving a defendant found in his car to be in possession of weapons, yet the court required sketches even in such cases and they are now a regular component of the submission to the CCCI.⁷¹

Apparently the CCCI’s demands have become enshrined as a mandatory rule of production that has expanded to include the production of other articles of sometimes-irrelevant evidence, such as notations as to the distance between a particular terrorist and incriminating evidence as well as the distances between the various pieces of contraband.⁷² Imagine how ridiculous U.S. soldiers must appear to Iraqis as they measure distances between insurgents and the weapons they threw down when they fled or surrendered. Ridicule is the least of their problems, however, insofar as this

simple task. Because the defendants appeared before the court in person, there was also little reason to also provide a mug shot, which further suggest this was simply a ploy to stymie the prosecution of the terrorists. Producing a photograph of the defendant neither ensured that the defendant was guilty nor that the defendant was who he claimed to be. Similarly, if the judges were so enamored with photographs of defendants, there was nothing to stop the investigative judges from taking these photographs themselves when the defendants appeared for their hearings. No effort was made to do this, however, which further suggests that the photograph prerequisite was simply an excuse to avoid holding trials of insurgents or at least delay them.

In a similar fashion, the CCCI informed U.S. prosecutors that it would not hear cases unless the written submission to the court contained a proper identification of the defendant, meaning the correct Arabic spelling of the defendant’s name, and his correct name. This may sound easy enough, but transliterating Arabic script into the English alphabet often results in “misspellings,” since there are numerous ways to spell the most common Iraqi names. Thus, the name “Mohammed,” the most common name in Iraq, can be spelled at least fifteen different ways, depending on the transliteration. Doug Smith & Raheem Salman, *Long Jailings Anger Iraqis*, L.A. TIMES, May 29, 2005, at A1 (“There are 15 ways to spell Mohammed,” said Lt. Col. Darwin Concon . . .”). The name can be spelled: Mohammed; Mohommed; Mohamed; Mohomed; Muhamed; Muhammed; Muhomed; Muhommed; Mahamed; Mahammed; M’hamed; M’hammed; Mohamad; Mahamad; Muhamad. Compounding this problem is the fact that defendants used various names to identify themselves, not including aliases. Thus, for example, they sometimes provided their tribal name, other times not. Some defendants also utilized a host of aliases, so it was not always possible to determine the defendant’s true name. In the end, the CCCI apparently never dismissed any cases on this ground, but the delay caused by the demand doomed some cases and is yet another example of the court’s willingness to inhibit the prosecution of terrorists.

71. Zoroya & Jervis, *supra* note 21, at 1 (noting that the files U.S. prosecutors assemble “can include details on informants, diagrams, a summary written by each Marine involved in the case, a chain-of-custody report tracing the handling of evidence and photographs from the scene of an attack or capture.”).

72. See Grossman, *supra* note 16.

The evidence packet now must also include the two direct-witness statements; diagrams of the target area that depict the locations and distances between any pieces of incriminating evidence; a chronology of events; photos of the suspect, target area, contraband and its original location, and sight lines between the suspect and the location where contraband was found; and the methodology and results of any explosives testing performed.

burden of crime-scene measurement leaves soldiers vulnerable to secondary attack by snipers.⁷³ Because the United States thus far has demonstrated a naïve willingness to play along with the CCCI's childish game of "scavenger hunt," there is no telling what additional pieces of evidence the court will require the United States to furnish in the future.

As for photographs, they are certainly a nice touch, occasionally valuable, and prosecutors worth their salt make liberal use of them whenever they are available. But photographs usually are not essential to proving beyond a reasonable doubt that a defendant committed a crime. Anyway, soldiers in deployed settings like Iraq do not always have access to digital cameras or the means to print photographs, which was particularly true in the early stages of the war, and thus they cannot always provide photographs of the defendants or contraband seized. Furthermore, when engaging the enemy in the heat of battle, soldiers usually do not have time to snap a couple of glamour shots while dodging bullets. Even after a battle subsides, the risk of snipers and secondary explosive devices limits the extent of any crime scene investigation. During "combat and immediately thereafter, the security of the occupying forces and the occupant's duty to maintain law and order are always paramount and there is little time for legal niceties."⁷⁴ Indeed, one tactic favored by insurgents involves planting multiple bombs in an area but initially detonating only one, waiting for rescue crews and investigators to arrive, and then detonating the other bombs, thereby maximizing lethality and disrupting investigations.⁷⁵ But the CCCI judges,

73. Secondary attacks are a commonly used tool of the Iraqi terrorists. Robert C.J. Parry, *The War You Didn't See*, L.A. TIMES, Feb. 12, 2006, at 1 (noting that after detonating car bombs the terrorist often initiate secondary attacks to kill those soldiers who have responded to treat the victims of the initial attack).

74. ELI E. NOBLEMAN, AMERICAN MILITARY GOVERNMENT COURTS IN GERMANY 149 (1961). As Lieutenant Colonel John Dunlap stated, "It is very, very rare to catch one of these guys [insurgents] and have what we need to nail him." Finer & Mosher, *supra* note 26, at A11. It is difficult to collect evidence while actively fighting a war and fending off lethal attacks, particularly when explosive devices litter the roads that must be used to reach "crime scenes" and these "crime scenes" are seldom in hospitable areas.

The United States should have learned this lesson long ago. Consider, for example, that "the Clinton administration declined Sudan's offer in 1996 to turn over Osama bin Laden because there was not sufficient probable cause to try him in U.S. courts." Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J. L. & PUB. POL'Y 591, 608 (2002). Bin Laden constituted a threat to the United States, and the United States therefore should have utilized its resources to defend U.S. interests, and lives, rather than waiting around for sufficient evidence to litigate the matter.

75. See David S. Cloud, *Insurgents Using Bigger, More Lethal Bombs, U.S. Officers Say*, N.Y. TIMES, Aug. 4, 2005, at A9 ("As the military has begun conducting post-bombing investigations, insurgents have increasingly been planting multiple

despite their own military experience in the Iran-Iraq War, disregarded such danger when making their evidentiary demands, probably because they were not the ones facing the dangers.

Similarly, the CCCI judges demanded that prosecutors submit to the court the weapons and armaments captured with a defendant. U.S. advisors repeatedly informed the CCCI judges that most U.S. military units lack the capacity to transport and store enemy weapons and explosives securely, and thus these weapons are usually destroyed on-site.⁷⁶ Yet judges continued to issue adverse rulings based on the failure to transport dangerous weaponry through enemy territory to the CCCI courthouse.⁷⁷

The Iraqi judges seem oblivious to the necessary prioritization of resources on the battlefield—similar to the prioritization performed by police forces when confronted with natural disasters.⁷⁸ Under the U.S. battlefield priority scheme, the task of collecting admissible evidence correctly falls somewhat lower on the list of priorities than, say, killing the enemy, protecting civilians, and evacuating the wounded.⁷⁹ Under battlefield conditions, the CCCI demand for mountains of irrefutable, non-circumstantial evidence is unrealistic and counter-productive:

[A] number of officers in Iraq say they lack the resources to consistently construct prosecutable cases for Iraqi courts—and at the same time fight the insurgency, protect the population from attack, and build and train new Iraqi security forces.

Top commanders and policymakers in Washington “are asking our soldiers and Marines to be law clerks and expert crime scene detectives,” says one officer. “Most tactical commanders do not have

devices at the same location, apparently to disrupt investigative teams sent to the blast site, or at least delay their work while they clear the site of any secondary bombs.”)

76. Sabrina Tavernise, *Along the Syria-Iraq Border, Victory is Fleeting In An Effort to Rout Out Foreign Fighters*, N.Y. TIMES, June 26, 2005, at 19 (noting that after capturing enemy machine guns, rocket launchers and other military items, they were “blown up on site”).

77. Presumably this was done in accordance with Iraqi law, which holds that courts should require “items seized be brought to the court room whenever possible . . .” IRAQI LAW ON CRIMINAL PROCEEDINGS ¶ 164 (1971) available at <https://www.jagcnet.army.mil/JAGCNETInternet/Homepages/AC/CLAMO-Public.nsf/0/85256a1c006ac77385256d34006030dc?OpenDocument> (last visited Nov. 8, 2004).

78. See Scott Gold, *Justice is Another Victim of Katrina*, L.A. TIMES, Nov. 26, 2005, at A12 (noting that in post-Katrina New Orleans police “officers are as stretched as everyone else” and that they have placed a priority on tracking “down more than 100 registered Louisiana sex offenders” as opposed to protecting property from looting); Thomas M. Burton, *In Katrina’s Wake Louisiana Legal System Is Snarled*, WALL ST. J., Sept. 9, 2005, at A13 (noting that in Louisiana after Hurricane Katrina, “most law-enforcement authorities have been preoccupied with maintaining the peace as much as they can, and haven’t had a chance to focus on courts or evidence”).

79. Those who find this assessment disturbing or are surprised by this revelation would be wise to consider that the “goal of our enemies is to kill Americans,” and they must be stopped before they do so. Jack Kelly, *Letting Down Our Troops*, WASH. TIMES, Nov. 17, 2005, at A18.

the operational patience necessary to develop the type of insurgent targets was are going after.”

Sometimes military units in Iraq “stumble on a big fish who is subsequently turned loose for lack of evidence” because the investigative groundwork typical of police detective work has not been laid, this officer says. The “result is their cells go deeper underground and are thus hard to target.”

In fact, the bigger the fish, the less likely it is he will be found with incriminating evidence, according to U.S. military personnel in Iraq. (It is the insurgent foot soldiers, rather than their commanders, who typically are found with weapons and ammunition in their car trunks, officials say.)⁸⁰

The CCCI’s outrageous evidentiary requirements are, therefore, assisting the insurgency rather than helping to dismantle it. Unfortunately these requirements are just the tip of the iceberg.

C. *The Refusal to Draw Inferences or Accept Circumstantial Evidence*

All of the foregoing obstacles to justice in the CCCI may be explained away as the requirements of a bureaucratic system typical of some civil law countries—the excuse put forward by apologists for the court. But such bureaucratization cannot explain other defects of the court, such as the CCCI’s refusal to make logical inferences and deductions.

Consistent with Islamic law, when adjudicating cases, the judges of the CCCI require direct testimony for every element of an offense.⁸¹ The trial judges usually refuse to rely on circumstantial evidence,⁸² make logical deductions, or draw inferences,⁸³ practices

80. Grossman, *supra* note 16.

81. See Bing West, *America as Jailer*, NAT’L REV., July 17, 2006, at 27 (“The American soldiers who had made the arrest were required to appear at that trial. In the majority of cases, this has not been possible. Iraqi judges, often intimidated and openly suspicious of written testimony from American soldiers tend to free the accused.”). Theoretically, in Islamic legal practice the only acceptable evidence is “testimony, confession, and oath.” Brinkley Messik, *Literacy and the Law: Documents and Document Specialists in Yemen*, in *LAW AND ISLAM IN THE MIDDLE EAST* 61 (Daisy Hulse Dwyer ed., 1990).

82. Grossman, *supra* note 16 (“The bottom line is that Iraqi judges tend to demand overwhelming physical evidence before deciding to keep a suspected insurgent locked up, U.S officials say.”). Although CCCI judges do not make the initial custody determination, they do decide guilt or innocence, and the sentence imposed on convicted terrorists, and they do so according to this obsession for physical evidence that is non-existent in many cases.

83. This has led Iraqi defense attorneys to argue vigorously that a prosecutor’s case relied on circumstantial evidence, as though this were a fatal defect requiring acquittal. See *Iraqi Man Found Guilty in Death of U.S. Reservist*, SAN JOSE MERCURY NEWS, Dec. 12, 2004, at 13A (noting that “defense lawyers argued the case was based on circumstantial evidence and a coerced confession”). Sadly, reliance on circumstantial evidence often does doom a case in the CCCI.

they probably inherited from Islamic law,⁸⁴ which in turn was probably derived from Jewish law.⁸⁵ An example of the CCCI's application of this rule demonstrates its unsuitability to modern criminal jurisprudence. Consider cases in which U.S. soldiers testify that they were fired upon with small arms and that when they were able to look in the direction from which the attack came, they saw nothing but a vehicle fleeing the scene. They gave chase and eventually came upon the car, found a rifle inside with the keys in the ignition and the car running, but no defendant. Rather, he is apprehended nearby where he is acting suspiciously, perhaps even trying to conceal himself. In such a case the court would not convict the defendant of unlawful possession of a weapon, much less attempted murder or assault, because when the soldiers originally saw the car and the defendant they did not see any weapon, but when they found the weapon in the vehicle the defendant was no longer in that car. Furthermore, they never saw the defendant in the vehicle, fire the rifle, a key element of assault or attempted murder under Iraqi law.

For some reason, the court could not or would not see the logical connection between the defendant and the recovered rifle. Although the soldiers saw the defendant in the vehicle, saw weapon in the vehicle, the vehicle fled from them, and they apprehended the defendant adjacent to the vehicle, the CCCI fixed its gaze on the fact that the soldiers never saw the rifle in the vehicle at the same time

84. MATTHEW LIPPMAN ET AL., *ISLAMIC CRIMINAL LAW AND PROCEDURE: AN INTRODUCTION* 70 (1988) ("Islamic rules of evidence stipulate that should there be no confession, a defendant's guilt must be established by direct rather than circumstantial evidence . . .").

85. Theodore Spector, *Some Fundamental Concepts of Hebrew Criminal Jurisprudence*, 15 J. CRIM. L. & CRIMINOLOGY 317, 320 (1925) (In Jewish law, no "evidence as to the prisoner's antecedents was admissible. No previous conviction might be urged against him, no proof of character good or bad, was permitted to impeach the witnesses. Hearsay evidence was rejected as worthless and circumstantial evidence was inadmissible."). In light of the presence of Judaism and Christianity in the Arab world prior to the advent of Islam, and Islam's appropriation of Jewish and Christian traditions, it is likely that this aspect of criminal jurisprudence had its origin in Jewish Law:

[At the time Islam was founded, the] bulk of the Arab population were idolaters, but there were some among them who had adopted Christianity, and some were Magians in religion. A large and influential community of Jews had for a long time settled in Medina with their own laws and usages, and also in southern Arabia. How far they influenced the customary law of the Arabs must to a great extent be a mere matter of conjecture, but that on some points it bears features of resemblance to the Rabbinical code will be apparent.

Abdur Rahim, *A Historical Sketch of Mohammedan Jurisprudence*, 7 COLUM. L. REV. 101, 105 (1907). According to Islam, the "Qur'an is a continuation of other divine books such as the Old and New Testaments, but these latter, it is believed, have been considerably tampered with." *Id.* at 186.

they saw the defendant in the vehicle. Without direct testimony from a witness that he saw the defendant with the weapon, the court would not infer that the defendant possessed the rifle, despite the spatial and temporal impossibility that someone other than the defendant placed the weapon in the vehicle.⁸⁶ The court would not deduce or infer that the defendant possessed the rifle despite the credible evidence to support this view (including his flight from the soldiers), nor would it infer that he was the person who fired the weapon.⁸⁷

More problematic, from a deterrence perspective, is the fact that the terrorists who ordered, financed, or planned the attack were immune from prosecution so long as they did not actually fire the weapon. Assuming that the terrorist who actually carried out the attack will not testify against his comrades in arms⁸⁸—and this is a safe assumption in light of experience—the masterminds of the terrorist attacks have nothing to fear from the CCCI so long as they stay at least one causal link away from the attack. They remain safe from any inference that could otherwise bridge the gap.

Of course, this is contrary to the ordinary practice of humans, who make deductions and inferences every day. Indeed, inferences and deductions are such a ordinary part of everyday life that U.S. domestic courts don't bat an eyelash when circumstantial evidence is presented.⁸⁹ As the U.S. Supreme Court has stated: "Circumstantial

86. Experienced prosecutors will wonder why the prosecution did not submit evidence that the defendant owned the vehicle. While this seems like a rather simple matter, in Iraq almost nothing is simple. For starters, in many instances there is no vehicle registration or ownership documents by which to track a vehicle. Similarly, even if such documents existed, they would have to be obtained from often-hostile locations, necessitating a small company of soldiers to obtain them. Such resources were hard to come by. Similarly, any documentation would be in Arabic, which would further necessitate the services of a translator, a commodity also in short supply. Ultimately, even if such documentation could have been obtained, the CCCI judges would not permit such evidence to substitute for the requisite eyewitness testimony that the defendant fired or possessed the weapon.

87. In contrast, in an attempted murder cases involving a defendant who shot an AK-47 at an U.S. soldier, one of the CCCI trial judges told the soldier/victim that the defendant obviously wasn't trying to kill him, since he missed. This demonstrates that the judges are capable of drawing inferences, apparently just faulty ones.

88. Even then—pursuant to the two-witness rule imposed by the CCCI—the mastermind would escape punishment unless there were two witnesses who testified that he was responsible for a terrorist attack.

89. The inferences that the court permits the jury to educe in a courtroom do not differ significantly from inferences that rational beings reach daily in informally accepting a probability or arriving at a conclusion when presented with some hard, or basic evidence. A court permits the jury to draw inferences because of this shared experience in human endeavors.

evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence.”⁹⁰ Yet the CCCI judges refuse to go down this path.

There are several explanations for the CCCI’s aversion for circumstantial evidence and logical inferences. First, Islamic law frowns upon circumstantial evidence, considering it to be unreliable, because circumstantial evidence requires inferences and deductions to make it useful in judicial proceedings.⁹¹ Commentaries on Islamic

Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 116 (3d Cir. 1980); see also *Holland v. United States*, 348 U.S. 121, 140 (1954) (in criminal cases circumstantial evidence is “intrinsically no different from testimonial evidence”).

90. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100 (2003) (quoting *Rogers v. Missouri Pacific R. Co.*, 352 U.S. 500, 508, n.17 (1957)); see CHARLES F. CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE § 15, at 18 (1911):

But circumstantial evidence has also its claim to credibility of a high order. Under the enviroing conditions of time, space and causation certain evils as fabrication, collusion and mistake, to which direct evidence is peculiarly and almost necessarily exposed, can seldom be carried over into the proof of a large number of probative facts, frequently of slight individual evidentiary effect.

Id.

91. To be sure, Islamic law—at least as understood by the Sunnis—makes use of analogical reasoning, and even on occasion logical deduction and inference. Rahim, *supra* note 85, at 266 (Because the specific proscriptions of the Quran and Hadith are limited in their scope, “the Mohammedan jurisprudence has been largely built up by means of juristic deductions.”) But some of the analogies they draw—such as that between marriage and theft—are rather peculiar.

When faced with new situations or problems, scholars sought a similar situation in the Quran and Sunna. The key is the discovery of the effective cause or reach behind a Sharia rule. If a similar reason could be identified in a new situation or case, then the Sharia judgment was extended to resolve the case. The determination of the minimum rate of dower offers a good example of analogical deduction. Jurists saw a similarity between the bride’s loss of virginity in marriage and the Quranic penalty for theft, which was amputation. Thus, the minimum dower was set at the same rate that stolen goods had to be worth before amputation was applicable.

JOHN L. ESPOSITO, THE STRAIGHT PATH 83 (1991); see also LIPPMAN ET AL., *supra* note 84, at 32 (“Analogical reasoning, or *qiyas*, is the fourth major source of Islamic law. This is the method used by jurists to broaden an existing rule to encompass what appears to be a situation not addressed by the Koran or the *Sunna*.”); Theodore P. Ion, *Roman Law and Mohammedan Jurisprudence*, 6 MICH. L. REV. 44, 46 (1907) (discussing “*Kyias*,” namely, opinions or decision by analogy or comparison”). Using analogical reasoning, some jurists “inflicted the penalty of stoning for the crime of sodomy, reasoning that sodomy is similar to the offense of adultery and therefore should be punished by the same penalty the Koran requires for adultery.” *Id.* Many of the Shia tradition have rejected the use of analogy in interpreting *sharia*. ESPOSITO, *supra*, at 91 (noting that “the Shii reject analogy and consensus as legal sources, since they regard the Imam as the supreme legal interpreter and authority”).

Of course, the Anglo-American legal tradition extensively uses analogical reasoning. See *Int’l News Serv. v. Associated Press*, 248 U.S. 215, 262 (1918) (Brandeis, J., dissenting) (“The unwritten law possesses capacity for growth; and has often satisfied new demands for justice by invoking analogies . . .”); RICHARD A.

law note that *sharia* precludes circumstantial evidence and prohibits judges from making logical inferences in criminal cases:

Islamic rules of evidence stipulate that should there be no confession, a defendant's guilt must be established by direct rather than circumstantial evidence; documents have no independent evidentiary value. A homicide, for instance, cannot be proved by the fact that witnesses overheard a violent struggle, saw the accused emerge from his house with a blood-stained knife, and then discovered the victim's body in the house.⁹²

Iraq is a pervasively Moslem nation,⁹³ and this bias against circumstantial evidence that exists in Islamic law apparently has been carried over to the "secular" legal system, which it is simply one branch of Iraq's culture, which frequently relies on the predominant religion for guidance in important legal matters.⁹⁴

Second, since at least the time Saddam Hussein began ruling Iraq, it was seldom necessary for the criminal courts to rely on circumstantial evidence. Once a suspect was apprehended, the police frequently would torture and imprison him until they obtained a confession.⁹⁵ Actual guilt or innocence was simply irrelevant. Armed with this confession, at the defendant's trial there was no need for prosecutors to rely on mere circumstantial evidence except to bolster

POSNER, *OVERCOMING LAW* 13 (1995) (Reasoning by analogy is "the standard judicial technique for dealing with novelty."); ROSCOE POUND, *LAW FINDING THROUGH EXPERIENCE AND REASON* 46 (1960) (Legal reasoning "proceeds upon analogies.").

92. LIPPMAN ET AL., *supra* note 84, at 70. Some brands of *sharia*, however, do permit circumstantial evidence and the logical inferences that this evidence entails:

Jurists differ as to whether a *qadi* may rely upon circumstantial presumptions to establish a defendant's guilt. The *Maliki* school permits fornication to be legally established by the birth of a child to a female who has never been married and who has not made a prior claim of rape. Possession of stolen property and the odor of alcohol on the breath are recognized by some jurists as presumptions that establish the crimes of theft and drinking alcohol.

Id. at 71.

93. At certain points this article discusses Islamic terrorism and the relationship of Islam and Moslems to this terrorism. In so treating these issues, it is important to note, as Pope Benedict XVI did, that "Islam is not a uniform thing. In fact, there is no single authority for all Muslims No one can speak for Islam as a whole; it has, as it were, no commonly regarded orthodoxy." Cardinal Joseph Ratzinger, quoted in John L. Allen, Jr., *Pope Benedict on Islam*, NAT'L CATH. REP., Aug. 12, 2005, at 20. In light of this heterodoxy and heteropraxy, describing something as "Moslem" or "Islamic," or stating that certain terrorists are "Moslems" or that Islam entails a certain belief does not mean that all people describing themselves as Moslems are so implicated. Some Moslems advocate terrorism. Others do not.

94. JOHN HENRY MERRYMAN, *THE CIVIL LAW TRADITION* 149 (2d ed. 1985) ("The law is rooted in the culture . . .").

95. Liz Fabian, *U.S. Attorney Plans to Return to Iraq Next Month*, THE MACON TELEGRAPH, Dec. 23, 2005, available at 2005 WLNR 20814118 (noting that—according to United States Attorney for the Middle District of Georgia, Maxwell Wood, who is working in Iraq revamping the Iraqi judicial system—the Iraqis would "make an arrest, beat a confession out of somebody and that's their trial").

their case. Having been trained under this primitive system, it is little surprise that the CCCI judges hold circumstantial evidence in such disdain.

Although this phenomenon is easily explained, it is not so easily overcome. But if Iraqi officials ever hope to create competent and respected judicial system, they must transcend their bias against inferences and their anachronistic views of evidence. Until they do so, U.S. efforts to seek justice in the CCCI will continue to be a futile endeavor.

D. *Disproportionate and Disparate Sentences*

Another of the CCCI's shortcoming is its use of disproportionately lenient sentences—sentences that are insufficiently light to punish the offender and deter similar acts—and its disparate sentences—sentences which differ in magnitude although they are meant to punish nearly identical acts. One reason for the adoption of the Federal Sentencing Guidelines in the United States was the belief that sentences should be handed out by the courts in a consistent fashion and that similar crimes warrant similar punishments.⁹⁶ Under the rule of law, sentences should be commensurate with a defendant's guilt, and should not depend, for example, on the defendant's wealth or standing in the community.⁹⁷ Sentencing disparities reek of injustice, both for the unfortunate

96. 28 U.S.C. § 991(b)(1)(B) (stating that the purpose of the Sentencing Commission is to formulate policies that avoid "unwarranted sentencing disparities"); *United States v. Haynes*, 985 F.2d 65, 69 (2d Cir. 1993) (the "sentencing guidelines were adopted by Congress to achieve uniformity in federal sentencing for similarly situated defendants."). See also KENNETH CULP DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 218-19 (1971) (noting that principles of equal justice and equal protection require similar treatment for similar crimes). They merit similar punishments, not necessarily identical punishments, because justice requires a consideration of more than merely the crime committed. *See id.*, at 209 ("[T]wo persons who have committed the same offense need not be equally treated, because the treatment should depend upon factors in addition to the offense committed . . ."); POSNER, *supra* note 91, at 181 (noting that "a difference in treatment does not violate the equal protection clause if it is justifiable . . .").

97. The Equal Protection Clause of the Fourteenth Amendment "is essentially a direction that all persons similarly situated should be treated alike." *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985). This extends to the manner in which laws are administered among different people or groups of people. *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74 (1886) (noting that if a law "is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discrimination between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution"). Similarly, "[t]he touchstone of due process is 'protection of the individual against arbitrary action of government.'" *County of Sacramento v. Lewis*, 523 U.S. 833, 845 (1998).

criminals who are treated more harshly than their leniently-treated comrades and society, which is denied the justice vital to its survival.

U.S. jurisprudence, at least since Reconstruction, has sought to minimize judicial arbitrariness and disparities in sentences. This includes U.S. military jurisprudence in occupied settings like Iraq. For example, U.S. military courts in Germany—after World War I and World War II—were forced to address the need for consistent sentences for native Germans convicted of crimes.⁹⁸ After World War I, the problem was solved, and harmony with the local population enhanced, by the creation of a council of judges where the judicial officers exchanged views and debated appropriate sentences.⁹⁹ After World War II, uniformity was produced via implementation of sentencing tables that specified an appropriate sentence for each crime.¹⁰⁰

Beyond the inherent injustice of the CCCI's sentences is the fact that disparate sentences are inimical to crime prevention insofar as they (a) inhibit a calculating criminal from ascertaining with any certainty what his crime might cost him if caught, or (b) lead him to conclude that he will bear only a slight cost for his crimes, and only if he is caught and convicted.¹⁰¹ That is, to the extent the CCCI sentences are disproportionately light, they present an insufficient

98. NOBLEMAN, *supra* note 74, at 126–27; I.L. HUNT, *AMERICAN MILITARY GOVERNMENT OF OCCUPIED GERMANY, 1918–1920* 94–95 (1943). Many aspects of the German people and the nature of the German defeat made military government of Germany much easier than the government of Iraq, which in turn lightened the load the U.S. military tribunals in Germany. Still, these tribunals tried cases involving many of the crimes which the CCCI handles in Iraq:

Violators of military government rules and orders were hailed before military government officers who served as judges in a hierarchy of military government tribunals presided over by the legal officer or some other officer assigned by the local detachment. These included cases where Germans ignored the curfew regulations, used certain highways reserved for military traffic and committed petty theft, as well as various other offenses. More serious cases involving possession of fire arms, stealing of American military property, and assault might be given a preliminary hearing in the lowest military government tribunal, but they were then referred to a general military government tribunal which operated in the areas and had as judge an officer trained in the law. A final military government tribunal heard appeals and had to concur in any sentence involving the death penalty. This tribunal which had three judges to hear or review cases was required to have at least one officer who was a professional lawyer.

HAROLD ZINK, *AMERICAN MILITARY GOVERNMENT IN GERMANY* 131 (1947).

99. HUNT, *supra* note 98, at 94–95.

100. NOBLEMAN, *supra* note 74, at 126–27.

101. See Everett P. Wheeler, *Reform in Criminal Procedure*, 4 COLUM. L. REV. 356, 356 (1904) (“The principal object of judicial punishment is to protect the innocent members of society. The authorities on criminal jurisprudence are agreed that this may most effectively be done by swift and certain punishment.”). Not every criminal is a rational maximizer, but substantial punishments have a strong deterrent effect.

deterrent to would-be attackers;¹⁰² in fact, they encourage and embolden terrorists who perceive these paltry sentences as a sign of weakness.¹⁰³ These defects are acutely felt in Iraq, where a substantial number of insurgents are simply common criminals whose primary motivation is profit.¹⁰⁴ If these criminals cannot predict what their punishment would be if caught, or accurately predict that their sentences would be extremely light, they will be more likely to commit their terrorists acts, thinking that the cost of any punishment is a manageable investment risk. Stiff penalties, consistently administered, might convince these profit-maximizing terrorists otherwise.¹⁰⁵ If the certainty of being punished increased, along with the certainty and severity of the punishment, the leadership of the insurgency would then be forced to increase expenditures to satisfy their hirelings at the risk of losing them to some less-lucrative but ultimately safer venture. At worst, this will result in a swifter depletion of insurgency funds, and therefore the end of the insurgency.¹⁰⁶ (Admittedly, this still leaves the insane

102. Bing West, *America as Jailer*, NAT'L REV., July 17, 2006, at 27 ("What do insurgents have to lose from being arrested for fighting if they know they will soon be released by authorities?"). When considering the appropriate sentences for terrorists, it is worth remembering that many terrorists are more than just common criminals: they are part of a larger military organization whose short-term goal is to drive the United States out of Iraq. CLAUSEWITZ, *supra* note 8, at 101 ("Combat in war is not a combat of individual against individual, but an organized whole made up of many parts.").

103. See Abraham D. Sofaer, *Solidarity on Iraq will Help Beat Terrorism*, WALL ST. J., July 13, 2005, at A14 ("Allowing acts or threats of terror to diminish a state's efforts against terrorism will in the long run encourage terrorism.").

104. Rowan Scarborough, *Pentagon Has Clearer View of Iraq Insurgency*, WASH. TIMES, March 29, 2005, at A9 ("Officials now think that criminals make up more of the insurgents than first thought, meaning many are driven by money, not ideology.").

105. The penalties need not be judicially administered to be effective. Indeed, the delay engendered by judicial proceedings may limit their efficacy.

Victor Davis Hanson surmises that a more forceful U.S. military response might have prevented many of the problems that the United States faced in Iraq, because the United States' enemies would have been put on notice that the United States was willing to respond to any threat with overwhelming force:

It would have been extremely messy to have shot the first 400 looters who began a cascading riot that ruined \$13 billion in Iraqi infrastructure. Storming rather than pulling back from Fallujah in April 2004 would have offended the press, the professors, and the Europeans. Arresting or killing Moqtada al-Sadr in June 2003 might have angered the Arab world and invited parlor debate among the mandarins back home, but such measures also would have shown Ironclad American resolve and eventually would have impressed even our enemies.

Victor Davis Hanson, *Postmodern War*, CITY JOURNAL ONLINE, (Winter 2005), available at http://www.city-journal.org/html/15_1_postmodern_war.html.

106. Even if it were "impossible to prevent all attacks" it is "still possible to make life more difficult for the terrorists." Walter Laqueur, *The Danger That Lies in*

suicide bombers to carry on, but they also need Iraqi money to thrive¹⁰⁷ and there are a finite number of suicidal zealots.) At best, it could discourage a sufficiently large number of insurgents to abandon their fight that organizers of the insurgency would be forced to abandon their war and seek to influence events through political channels.

Considering that the U.S. federal courts and military tribunals long suffered from sentencing disparities and disproportionate sentences before Congress's enactment of measures to prevent these problems, it is not surprising that the CCCI suffers from these same afflictions. But remember that disparities in the U.S. federal courts were among hundreds of judges dispersed throughout ninety-three judicial districts.¹⁰⁸ Contrast that to the CCCI, which has six judges that hear cases in three-judge panels. This gives the CCCI judges a greater opportunity to interact and determine amongst themselves the appropriate level of punishment for specific types of crimes. With so few judges it should be relatively easy to form a consensus as to proper sentences in particular types of cases, or at least definite sentencing ranges. But that has not happened. Instead, there are great disparities in sentences and irrational variations that show no correspondence to the severity of the underlying crimes.¹⁰⁹ Thus, in the CCCI, defendants involved in relatively minor offenses are sentenced to more severe punishments than defendants who orchestrated terrorist schemes that harmed or had the potential to disrupt Iraqi society and the U.S.-led Coalition. Furthermore, even among this latter group there were substantial disparities in the length of imprisonment imposed by the CCCI.

Take, for example, three desultory sentences handed down by a CCCI panel in 2004. In the first case, a single defendant was apprehended while transporting the following items in his car: a sniper rifle, two AK-47 rifles, a small quantity of ammunition, and an infrared scope. The CCCI panel sentenced the defendant to three years in prison.¹¹⁰

In the second case, with the exact same panel of judges, two defendants were found to possess in their vehicle: three IEDs, a 60-

Our Midst, WALL ST. J., July 12, 2005, at A16. Proportional sentences are one means of doing this.

107. Bradley Graham, *U.S. Officers In Iraq Put Priority on Extremists*, WASH. POST, May 9, 2005, at A1, A19 ("Though foreigners may drive the suicide cars, Iraqis are frequently behind the scenes operating the networks that provide safe houses, assemble the explosives and arrange other support.").

108. See United States District Courts, available at <http://www.uscourts.gov/districtcourts.html>.

109. This can be an indicator of corruption, as it suggests that bribes or an affinity for particular defendants is motivating minimized sentences.

110. News Release, United States Central Command, *Illegal Weapons Bring Insurgents Three Years in Prison* (Sept. 20, 2004) (on file with Author).

millimeter mortar round with a remote detonation transmitter attached, a 155-millimeter artillery round, a triggering device, and other materials related to emplacing improvised explosive devices.¹¹¹ The same CCCI panel sentenced these now ebullient defendants to three years in prison—the same sentence that the defendant caught carrying three rifles received.¹¹²

Similarly, in a third case involving two brothers—Qusai Mohammed Id Hamid Al Jbouri and Jassim Mohamed Id Hamid Al Jbouri—these defendants were caught in possession of three 135-millimeter mortar rounds, two of which were wired and packed with blasting caps. In other words, the defendants possessed an IED, but it lacked the remote triggering mechanism of the device discussed above in the second case. In an effort to save his brother, Jassim decided to take the wrap and admitted possessing the device. The court, therefore, acquitted Qusai based solely on his brother's testimony and disregarded the evidence that inculpated Qusai. Regardless, with respect to sentencing Jassim, because he had admitted possessing the IED, the CCCI had little basis for dissembling or claiming that a more lenient sentence was appropriate in light of uncertainties as to the defendant's guilt. The court sentenced Jassim to an unconscionable four years in prison.

Although the three sentences were nearly identical in their severity, they were factually disparate. The latter two cases—which involved IEDs—entailed substantially more danger to Iraqis and U.S. troops than merely possessing a few rifles. And among the two IED cases, the defendants with remote triggering devices possessed substantially greater lethality than those without this enhancement.

The automatic rifles transported by the first defendant clearly are a menace in the already heavily-armed Iraq,¹¹³ but one could at least argue that this defendant possessed them for a legitimate purpose: self-protection and protection of family members, particularly because firearms are the only form of protection available in the crime- and violence-ridden Iraq. Explosive devices, however, are clearly powerful offensive weapons for which there is

111. In IEDs the “explosive is typically an artillery shell, thousands of which existed in arms caches throughout the militarized country.” Rowan Scarborough, *Rebels Improve Bomb Schemes In Iraq*, WASH. TIMES, Apr. 25, 2005, at A1. “IEDs are typically bombs made from Iraqi artillery shells and other ordnance.” Eric Rosenberg, *Jammers Reduce Toll of Iraqi Road Bombs*, ALBANY TIMES UNION, Apr. 3, 2005, at A7.

112. See News Release, United States Central Command, *supra* note 110. Compare the magnitude of these paltry sentences to various illegal fireworks manufacturers, to whom United States federal courts typically hand out sentences in excess of four years of imprisonment.

113. Michael Moss, *U.S. Struggling to Get Soldiers Updated Armor*, N.Y. TIMES, Aug. 14, 2005, at 1.1 (“Gunfire has killed at least 325 troops . . .”).

really no legitimate defensive use.¹¹⁴ This fact alone suggests that the possession of explosive devices warrants a stiffer sentence than mere possession of a few automatic rifles.

It is also true that three rifles do not entail the destructive capacity possessed by the Al Jbours' explosive devices; and three rifles are certainly not as injurious as the multiple explosive devices with remote triggering devices possessed by the second set of defendants. Nearly every Iraqi male over the age of twelve possesses at least one rifle,¹¹⁵ which Iraqi law countenances—and frequently multiple rifles, which the law forbids, but which is nevertheless extremely common in Iraq. Unlike small arms—which blanket Iraq—not everyone in Iraq possesses explosive materials, nor does the average Iraqi possess the skills necessary to manufacture explosive devices, as the last two sets of defendants did. So the fact that a defendant possessed several rifles does not make him much more deadly than the average Iraqi. His lethality would depend largely on his training and ability to use the weapons effectively, particularly the sniper rifle and the infrared scope.

Defendants with explosives, on the other hand, are highly lethal and armed to the teeth, to a much greater extent than the average Iraqi. After all, a person can only fire one rifle at a time, and there is a limit as to the number of bullets than can be discharged by the rifles in a given timeframe, and thus there is a limit on the power a rifle can project. In contrast, the magnitude of the harm produced by an explosive device is limited only by its component parts and the target attacked. The greater the amount of explosive material, the greater the destructive capacity. Another relevant factor is the discriminatory ability of the two types of weapons; explosive devices are not as discriminating as carefully aimed rifles. When they explode, they produce carnage of everything within the blast radius, including innocent children.¹¹⁶ That is why the Coalition in Iraq

114. Theoretically an Iraqi could employ IEDs defensively to prevent invasion of his farm or house, but the resulting carnage would be greatly disproportionate to the benefit obtained. In short, blowing up one's home with an IED is not a rational alternative to letting a thief take what he wants from the home.

115. See Sharon Behn, *Militia ID Cards are Keys to the City*, WASH. TIMES, Oct. 31, 2005, at A1 ("Weapons are easily available in Iraq. Some come from vast arsenals of former dictator Saddam Hussein that were opened up after the U.S. military took control of the country."); Anna Badkhen, *Scared Civilians, Few Insurgents*, S.F. CHRONICLE, Oct. 7, 2005, at A14 ("Most Iraqi households have at least one gun for protection, often a Kalashnikov rifle."); Jonathan S. Landay, *Firm Arming Iraq Military Faces Charges*, MIAMI HERALD, Apr. 28, 2005, at A23 ("Iraq is awash in AK-47s and other weapons . . ."); Bill Gertz & Rowan Scarborough, *Chinese Arms for Iraq?*, WASH. TIMES, Apr. 15, 2005, at A6 ("Iraq remains awash in weapons, including thousands of new AK-47s . . .").

116. Kirk Semple, *Baghdad Bomb Kills Up to 27, Most Children*, N.Y. TIMES, July 14, 2005, at A1, A10 ("The car bomber made a deliberate decision to attack one of our vehicles as the soldiers were engaged in a peaceful operation with Iraqi citizens,")

considers crimes involving explosives to be more egregious than mere possession of an extra rifle.¹¹⁷ Explosives are considered “special category weapons,” and the United States, through the Coalition Provisional Authority, mandated that criminals found possessing or transporting such weapons would receive a mandatory sentence of thirty years in prison.¹¹⁸

Similarly, a remote triggering device magnifies the lethality of an IED while minimizing danger to the insurgent. Remote triggering devices reduce: (a) the need for the terrorist to remain near the IED, and thus the chance that an insurgent’s presence at the IED site will alert troops to its presence, thereby permitting the soldiers to discover the device and escape the danger unscathed; (b) the possibility that an insurgent is harmed by the explosion once the device is triggered, thus permitting him to carry out further attacks; (c) the chances that a terrorist will be captured or implicated in the explosion; and (d) the insurgents’ opportunity to observe the IED site and ensure that non-combatants have not wandered into the blast zone. Thus, a remote triggering device enhances both the destructive capacity of the IED and the insurgents’ chances of evading detection, capture, and conviction. Remotely-triggered devices have proven to be extremely deadly to U.S. soldiers and innocent Iraqis,¹¹⁹

said Maj. Russ Goemaere, a spokesman for the U.S. military in Baghdad. “The terrorist undoubtedly saw the children around the Humvee as he attacked.”); Sabrina Tavernise, *Iraq’s Violence Sweeps Away All the Norms*, N.Y. TIMES, May 6, 2005, at 1 (“Car bombs seem to be the weapon of choice for the insurgents. They are usually aimed at army convoys, but often kill more civilians than soldiers.”).

117. Possessing an extra rifle is so common in Iraq that U.S. soldiers frequently do not arrest Iraqis for this crime.

118. As Aristotle recognized, “unrighteousness is more pernicious when possessed of weapons,” and even more so when they are special category weapons. ARISTOTLE, POLITICS 13 (H. Rackham, trans., 1978) (circa 350 B.C.).

119. Mark Washburn, *Iraq’s Insurgents Build Bigger, Better Bombs*, MIAMI HERALD, June 10, 2005, at A20 (“Improvised explosive devices, the roadside bombs that insurgents build from castoff artillery shells and munitions, have become the No. 1 killer of American troops in Iraq this year, despite a massive U.S. campaign to blunt their effectiveness.”); Bradley Graham & Dana Priest, *Insurgents Using U.S. Techniques*, WASH. POST, May 3, 2005, at A15 (“Roadside bombs—the military calls them ‘improvised explosive devices,’ or IEDs—continue to rank as the number one killer of U.S. troops in Iraq, according to Pentagon figures. About half of all casualties in Iraq are attributed to them.”). According to an Army training report, the leading cause of death among U.S. soldiers in Iraq between March 2003 and April 2005 was actually small arms-fire, closely followed by IEDs. But if one considers car bombs to be IEDs (the military usually calls them VBIEDs, or “vehicle-borne improvised explosive devices”) IEDs are the leading cause of death.

| | |
|----------------------------------|------------|
| Small Arms Fire: | 436 deaths |
| Improvised Explosive devices: | 350 deaths |
| Car bombs: | 85 deaths |
| Rocket-propelled grenade attack: | 67 deaths |
| Mortar attack: | 60 deaths |
| Sniper attack: | 25 deaths |

particularly when the underlying explosive material is a 155-millimeter artillery round. In light of the destructive capacity and the use of remote triggering devices, in Iraq bombs have killed approximately twice as many soldiers as gunfire.¹²⁰

With these facts in mind, one would think that a defendant's possession, manufacture, or transportation of multiple explosive devices would warrant a punishment greater than mere incarceration for three or four years; one would also think that the use of a remote triggering device would entail a more substantial sentence than simple possession of an IED. Even using the distorted calculus of the CCCI judges, if possession of small arms merits three years in prison, possession of a few explosive devices should merit three years plus a few more (3 + n), and possession of multiple explosive devices with a remote triggering mechanisms should merit and even greater sentence (3 + n + x). But that is not the case with the CCCI.

These sentences are disproportionate in yet another manner. It is well-known that rifles are ubiquitous in Iraq, while improvised explosive devices are not found with the same frequency. Capturing someone with multiple IEDs is even less common. Accordingly, possession of an IED is the equivalent of holding an identity card that says: "I'm a committed member of the insurgency."¹²¹ Similarly, possession of multiple IEDs suggests not just membership in the insurgency, but a position of trust in the insurgency.¹²² Someone with two rifles might very well be seeking to protect his home and family,¹²³ and when that appears to be the case, U.S. soldiers

Suicide bombs (not in vehicles):

23 deaths

Greg Jaffe & Yaroslav Trofimov, *Iraqi Insurgents Change Their Focus*, WALL ST. J., Apr. 21, 2005, at A8. Of course, these numbers do not include non-fatal casualties. Because of the shrapnel produced by the IED explosions, IEDs produce a far greater number of injuries than do small arms.

120. Moss, *supra* note 113, at A1 ("Gunfire has killed at least 325 troops, about half the number killed by bombs, according to the Pentagon.")

121. For this reason, an Assistant Secretary of Defense in the Regan Administration recommends that those insurgents caught with IEDs "should not be turned over to the broken Iraqi system." Bing West, *America as Jailer*, NAT'L REV., July 17, 2006, at 27.

122. Those with the highest status in the insurgency probably stay far away from IEDs and instead pay underlings to handle them.

123. In a heavily armed country like Iraq, with porous borders across which arms can and do freely flow, it is foolish to expect gun control legislation like Iraq's "one man, one firearm" rule to reduce the level of violence. Indeed, the rule simply makes innocent Iraqis prey to heavily-armed insurgents, who care nothing for abiding by this ordinance. Solomon Morre, *First the Insurgents, Then Marines*, L.A. TIMES, May 14, 2005, at A1 ("The man told the Marines that that U.S. mandate limiting each Iraqi household to one firearm and a small amount of ammunition has hindered the town's ability to defend itself. He also said Iraq's porous borders were endangering residents."). Where a government cannot or will not defend its citizens from violence, it has no moral right to prevent the citizenry from defending itself. Similarly, when a government takes affirmative steps to prevent people from defending themselves, it

frequently deal leniently with the individuals and decline to arrest or prosecute them.¹²⁴ But possession of an IED cannot be minimized or explained away as a means of protecting one's life or property, much less transporting an IED or multiple IEDs. Thus, to the extent the CCCI judges factor the magnitude of certainty into their sentencing calculus—this presupposes that they have a sentencing calculus—IEDs greatly increase the magnitude of certainty that defendants found possessing them are not innocent victims of circumstance, but substantial players in the war against the United States and the Iraqi people. The IEDs speak almost as loudly as their explosions would have: “Our owners are brutal insurgents.” The rifles may say the same thing about their owner, but they do not do so with the same force.¹²⁵

Furthermore, had the CCCI judges been in tune with proportional sentencing, they also would have taken into account the concerted activity of the two sets of defendants, and the increased dangers it entailed. The two sets of defendants possessing IEDs were members of what any judge could see was at least a two-man conspiracy, although based on the size of the munitions they possessed, the extent of the conspiracy was obviously much greater. As with all conspiracies, this concerted effort increased their chance of success. That is, concerted criminal activity increases the danger posed by such criminals because their cooperation increases both their chances of success and of evading detection.¹²⁶ In contrast, the defendant with the rifles was, at least when arrested, a lone wolf and thus solely dependent upon himself for aid and assistance in

owes them a duty of protection, particularly in environments where encounters with violence are highly probable. See *Farmer v. Brennan*, 511 U.S. 825, 833 (1994) (“having stripped them of virtually every means of self-protection and foreclosed their access to outside aid, the government and its officials are not free to let the state of nature takes its course”).

124. Doug Smith & Raheem Salman, *Long Jailings Anger Iraqis*, L.A. TIMES, May 29, 2005, at A1 (“A farmer caught with two guns in his house, one more than the law allowed, probably would be let go . . .”) (quoting judge advocate Major Dean Lynch).

125. This does not minimize the import of such crime—rifles are also instruments of death. It does indicate, however, that under proportional sentencing standards, this defendant's crime merited less punishment than the IED-defendants; based solely on the rifles he possessed and not considering any other intelligence, it cannot be said as certainly that the rifle-defendant was an insurgent as it can with respect to the IED-defendants.

126. *United States v. Jimenez Recio*, 537 U.S. 270, 275 (2003) (“The conspiracy poses a threat to the public over and above the threat of the commission of the relevant substantive crime—both because the combination in crime makes more likely the commission of other crimes and because it decreases the probability that the individuals involved will depart from their path of criminality.”); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 230 (6th ed. 2003) (“The special treatment of conspiracies makes sense because they are more dangerous than one-man crimes.”).

completing an attack and escaping.¹²⁷ This disparity further demonstrates the irrationality of the nearly identical sentences the various defendants received. The concerted action of four of the five defendants should have led to stiffer sentences in their cases. Because the CCCI refuses to take into account aggravating factors and elementary notions of parity, consistency, and deterrence that form the bedrock principles of the U.S. legal system, disparate sentences are bound to continue for the foreseeable future, and only the terrorists benefit from such a scheme.¹²⁸

E. *Paltry and Inadequate Sentences*

It is no simple feat for U.S. prosecutors to get the CCCI to convict defendants of serious crimes. Inducing the Iraqi judges to impose proportional sentences on the defendants they do convict is yet another morass. The CCCI is extremely lenient, to put it mildly, in sentencing Iraqi terrorists.¹²⁹ Criminals convicted of heinous crimes against U.S. soldiers have repeatedly received anemic sentences that were hardly proportional to the crimes they committed.¹³⁰ At the same time the CCCI handed out particularly harsh sentences—including death-sentences—to defendants accused of attacking Iraqi officials.¹³¹ Judging by the CCCI's light

127. *Krulewitch v. United States*, 336 U.S. 440, 448–49 (1949) (Jackson, J., concurring) (“[T]he strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer.”).

128. When by indiscriminate penal laws a nation beholds the same punishment affixed to dissimilar degrees of guilt, from perceiving no distinction in the penalty, the people are led to lose all sense of distinction in the crime, and this distinction is the bulwark of all morality: thus the multitude of laws produce new vices, and new vices can call for fresh restraints.

OLIVER GOLDSMITH, *THE VICAR OF WAKEFIELD* 144 (1961) (1766).

129. Spinner, *supra* note 33, at A12 (“In cases in which Iraqis have been accused of being threats to security, the Iraqi judges have imposed light sentences . . .”).

130. *Id.* (“Americans as well as Iraqis have expressed surprise and disappointment at how light the judges have gone on security detainees . . .”).

131. James Glanz & Sabrina Tavernise, *3 Set to Hang As Executions Return to Iraq*, N.Y. TIMES, Aug. 17, 2005, at A1 (“Three men convicted of dozens of rapes, kidnappings and killings in the southern city of Kut, in one case displaying the eyeballs of an Iraqi soldier to obtain payment for his murder, will be put to death by hanging in the first execution by Iraq’s civilian courts . . .”); Jeffrey Fleishman, *Justice is Swift And Deadly in Baghdad*, L.A. TIMES, June 6, 2005, at A1 (describing the CCCI’s sentence of death by hanging for three defendants accused of murdering an Iraqi official and a sentence of ten years of imprisonment for an accomplice); Neil MacDonald, *Baathist Purge May Stall Hussein Trial*, CHRISTIAN SCIENCE MONITOR, July 28, 2005, at 6 (“In May, amid a stepped up suicide bombing campaign, Iraqi criminal courts passed death sentences on several Iraqis convicted of manufacturing bombs. Mohamed Khalaf al-Jumayli, chief prosecutor at the CCCI, confirmed that the

punishments in cases involving U.S. victims, one would think that the court deals exclusively with petty criminals, as opposed to dangerous terrorists. As critics of the court have noted, "people found to have hoarded or transported huge stashes of bombs, machine-guns and rocket-propelled grenades are frequently being treated as leniently as drunk drivers and pickpockets."¹³² The CCCI cares nothing about the harm inflicted by the insurgency on U.S. soldiers. Contrast the approach of the Iraqi judges with that of U.S. military judges in post-World War II Germany:

The paramount consideration in fixing the sentence was the protection of the interests of the military government by deterring further violations by the accused or others. Courts were also required to give consideration to the question of whether or not the crime committed was premeditated, deliberate or motivated by a desire to undermine or circumvent the policies of the military government.¹³³

The U.S. military courts in Germany knew that the success of the occupation depended upon punishing those who sought to thwart the occupation. The CCCI does not share similar concerns with respect to Iraq. It, therefore, treats many brutal terrorists with kid gloves, despite the serious nature of their crimes, and strives to find any reason to impose trivial sentences on terrorists motivated by a hatred for the U.S. occupation.

For example, the CCCI convicted defendant Alaa Sartell Khthee of murdering thirty-one-year old Navy Lt. Kylan Jones-Huffman.¹³⁴ The evidence indicated that the defendant knew that his victim was a U.S. soldier, as Khthee had closely observed Jones-Huffman before firing his weapon.¹³⁵ Despite this evidence, and the gravity of the harm that Khthee inflicted, the CCCI sentenced him to a mere *fifteen years* of imprisonment.¹³⁶ Because Khthee is only twenty-eight years

men have exhausted all of their appeals in the court system. All that remains is for President Jalal Talabani to sign their death warrants.”)

By August 2005, the Iraqi courts had handed down the death sentence in thirty-four cases, none of which involved the killing of U.S. soldiers. Glanz & Tavernise, *supra* (“The case against the men, who acted in concert, is one of the 34 in which death sentences have been handed down since the death penalty was reinstated in Iraq in August 2004.”).

132. Colin Freeman, *Saddam’s Old Judges Provoke US Fury with Their Lenient Sentences for Insurgents*, LONDON SUNDAY TELEGRAPH, Mar. 13, 2005, at 29. Actually the terrorists come off better than drunk drivers, as they do not lose their driving privileges. One objection to using the CCCI as the forum of choice for terrorism cases is that the CCCI is a general criminal court, and terrorists “should not be treated on a par with the day-to-day crime seen in stable societies . . .” Grossman, *supra* note 16.

133. NOBLEMAN, *supra* note 74, at 122–23.

134. *Iraqi Guilty in Death of Reservist*, LONG BEACH PRESS-TELEGRAM, Dec. 12, 2004, at A16.

135. *Iraqi is Convicted in Shooting Death of Md. Serviceman*, BALT. SUN, Dec. 12, 2004, at 1.

136. *Iraqi Guilty in Death of Reservist*, LONG BEACH PRESS-TELEGRAM, Dec. 12, 2004, at A16.

old, he can still look forward to a long and productive life after he completes his sentence,¹³⁷ unlike Lt. Jones-Huffman. And if the United States should eventually hand detention operations and Khthee over to Iraqi prison guards, it is unlikely the Iraqis will require Khthee to serve his full fifteen-year sentence.¹³⁸ This and other relatively miniscule sentences send a strong message to the insurgents that killing U.S. soldiers is not considered a serious offense in the CCCI.

In contrast, U.S. military courts operating in Puerto Rico following the Spanish-American War, in Germany following World War I and World War II, and in other contexts, imposed the death penalty to punish those who murdered U.S. soldiers.¹³⁹ Those courts thereby demonstrated to other would-be murderers that killing U.S. soldiers was not a wise course of action and that swift and severe punishment would follow. U.S. military courts did not often have to impose the death penalty—and even commuted a death sentence or two¹⁴⁰—as the mere possibility that one would be punished by death sufficiently inhibited homicidal activities.¹⁴¹ The threat of swift and

137. The same is true of an Iraqi terrorist by the name of Ziyad Hassan, who murdered Staff Sergeant Henry E. Irizarry. The CCCI also gave Hassan a 15-year sentence despite irrefutable proof that he killed Irizarry. Teri Weaver, *Insurgent's 15-Year Jail Sentence is Little Consolation for Murdered Soldier's Unit*, STARS AND STRIPES, Mideast Edition, June 20, 2005, available at <http://www.estripes.com/article.asp?section=104&article=29868>.

138. There is also the very real possibility that he will “escape” from prison, as the mastermind of the bombing of the U.S.S. Cole escaped from a Yemeni prison. Ahmed Al-Haj, *Plotter in USS Cole Attack Flees Jail*, WASH. POST, Feb. 6, 2006, at A10. Iraqi guards have been known to free terrorists for the right price. Paul Martin, *Interior Chief Aims to End Corruption*, WASH. TIMES, Jan. 11, 2006, at A13.

139. NOBLEMAN, *supra* note 74, at 25–26 & Appendix 10 227–28. The President commuted the death sentence of at least one of the Puerto Rican defendants. See *Ex parte Ortiz*, 100 F. 955, 956 (C.C. D. Minn. 1900).

[O]n March 27, 1899, . . . Rafeal Ortiz was put upon trial before said military commission upon the charge of murder of John Burke, private of Company C, 47th infantry, on February 24, 1899, and of carrying concealed weapons, and was convicted and sentence to suffer death, which sentence was, on May 12, 1899, commuted by the president to imprisonment at hard labor for life in the Minnesota state prison at Stillwater, Minn.

140. ERNST FRAENKEL, *MILITARY OCCUPATION AND THE RULE OF LAW: OCCUPATION GOVERNMENT IN THE RHINELAND, 1918–1923* 153 (1944) (noting that after a German national killed a U.S. soldier in 1921, the U.S. command permitted the local German court to try the case, with the caveat that the United States could remove jurisdiction at any time; after the court sentenced the defendant to death, the High Commission commuted his sentence to life imprisonment). The German courts served as adjuncts to the U.S. military courts.

141. Execution also precludes the possibility that a terrorist will escape from prison, a problem that the United States has faced in Iraq and Afghanistan. See Dan Murphy, *Escape Spotlights Troubled US Detention Efforts*, CHRISTIAN SCIENCE MONITOR, Nov. 7, 2005, at 4 (discussing “the US military’s revelation that four

severe punishment may be one of the reasons that the Germans never mounted an insurgency against U.S. forces after World War I or II.¹⁴²

Consider also the case of defendants Mahmed Ahmed Mansor, Salam Ali Ghafil, and Mutaz Abdulkarim Habari, who were caught transporting five-hundred rocket-propelled grenades in a truck marked with a red crescent.¹⁴³ Of course, the use of the red crescent symbol—which affords the vehicle protection from military attack and cloaks the activities of its occupants with a mantle of respectability—to transport weapons is itself a war crime. Perhaps more important is the magnitude of harm the cargo could have inflicted on the United States: merely one rocket-propelled grenade can bring down an U.S. helicopter or airliner, and rocket-propelled grenades can be fired from substantial distances. Thus, the defendants' cargo posed a significant danger to U.S. forces, not to mention Iraqis. But again, the CCCI chose not to see it that way. The court sentenced the defendants to incarceration for a mere six years,¹⁴⁴ which is essentially a slap on the wrist in light of the death and destruction the defendants would have created had the U.S. soldiers not confiscated the RPGs.

The court also apparently never took into consideration that, in light of quantity and destructive capacity of their cargo, the defendant must have been either weapons suppliers to the terrorist insurgency or mid-level members of the guerilla network. Apparently this made no impression on the CCCI judges, and in their eyes these factors did not warrant enhanced punishment. According to the U.S. Supreme Court, “the fairness and integrity of the criminal justice system depends on meting out to those inflicting the greatest harm on society the most severe punishments.”¹⁴⁵ Until the CCCI changes course and begins to impose sentences commensurate with the crimes

detainees, including Omar al-Faruq—the most senior Al Qaeda operative ever arrested in Southeast Asia—escaped from Bagram Airbase in Afghanistan last July”).

142. The German court at Leipzig, charged with punishing German war criminals of World War I, also handed down notoriously lenient sentences, refused to convict the guilty, and later those who were convicted managed to “escape” from prison. HOWARD S. LEVIE, *TERRORISM IN WAR—THE LAW OF WAR CRIMES* 30 (1993) (“The trials of three of the accused proposed by the British resulted in convictions, but with inadequate sentences.”). The Germans learned from this that the world did not consider their war crimes particularly weighty, which in turn led the Nazis to commit even greater atrocities. This fact more than any other demonstrates the need for strong, swift punishment, and the foolishness of entrusting judges of a defeated nation with the task of administering justice and punishing their fellow citizens. The incentive to look the other way is simply too great.

143. Bay Fang, *Tell It to the Judge*, U.S. NEWS & WORLD REP., Oct. 6, 2003, at 25.

144. Department of Defense, *Iraq Status 20* (2003), available at http://www.export.gov/iraq/pdf/dod_wklyrpt_111803.pdf.

145. *United States v. Cotton*, 535 U.S. 625, 634 (2002).

terrorists are committing, there is little point in the United States continuing to prosecute such cases in the CCCI.

F. *The Neglect of Capital Punishment*

As mentioned above, after World War I and II, U.S. military occupation courts were authorized to impose the death penalty in cases involving a threat—sometimes a minor threat—to the authority of the United States as an occupying power. This was done even for relatively minor crimes, such as possession of a weapon, to deter any opposition to the occupation authority and to quash any rebellion before it could gain traction. Similarly, in the U.S. occupation of the Philippines, insurgents who refused to abide by the law of war were frequently not even afforded a trial and, instead, were shot on sight.¹⁴⁶ Those afforded a military trial were subject to execution by hanging.¹⁴⁷ In the words of one U.S. military judge who tried, and executed, insurgents who killed U.S. soldiers during the U.S. occupation of the Philippines:

I am perfectly clear in my own mind that as society stands at present, capital punishment is a necessary part of any sensible scheme for its protection. I have no compunction about hanging any man for the lawless taking of the life of another. We owe it to the community as a measure of protection to your life and mine and all others. So far as

146. According to Judge Blount:

In his Circular Order No. 5, dated Batangas, December 13, 1901, General Bell announced that General Orders No. 100, Adjutant General's Office, 1863, approved and published by order of President Lincoln, for the government of the armies of the United States in the field, would thereafter be regarded as the guide of his subordinates in the conduct of the war. This order is familiar to all who have ever made any study of military law. Ordinarily, of course, a captured enemy is entitled to 'the honors of war,' *i.e.*, he must be held, housed, and fed, unless exchanged, until the close of the war. But where an enemy places himself by his conduct without the pale of the laws of war, *i.e.*, where he does not 'play the game according to the rules,' he may be killed on sight, like other outlaws

Under General Orders No. 100, 1863, men and squads of men who, without commission, without being part or portion of the regularly organized hostile army, fight occasionally only, and with intermittent returns to their homes and avocations, and frequent assumption of the semblance of peaceful pursuits, divesting themselves of the character and appearance of soldiers; armed prowlers seeking to cut telegraph wires, destroy bridges and the like, etc., are not entitled to the protection of the laws of war and may be shot on sight. In other words, the game being one of life and death, you must take even chances with your opponent.

JAMES H. BLOUNT, *THE AMERICAN OCCUPATION OF THE PHILIPPINES* 387 (1912).

147. *Id.* at 415–16 (1973) (Colonel Meyer got the men who killed [Captain] Clark, and, upon due and ample proof, I hung them."). Judge Blount makes clear that his court was a military one even though it was labeled a "civil" one for political and propaganda purposes. *Id.*

public order was concern in the country now under consideration [the Philippines] in 1903, the 'civil government' was simply a well-meaning sham, a military government with a civil name to it. When the constabulary would get in the various brigands, cut-throats, etc., who might be terrorizing a given district, some of them masquerading as patriots, others not even doing that, the courts would try them. None of the judges cared anything about any particular brigand in any given cases except to find out how many, if any, murders, rapes, arsons, etc., he had committed during the particular reign of terrors of which he had been part. Wherever specific murders were proven, the punishment would always be "a life for a life."¹⁴⁸

A similar approach would have gone a long way toward pacifying Iraq.

But this was not the approach used in Iraq. Besides neglecting to use U.S. military courts, the Coalition Provisional Authority neglected to employ capital punishment. Although the CCCI was initially barred from employing death as a punishment for terrorists, that proscription was eventually lifted.¹⁴⁹ Nevertheless, the CCCI, perhaps because it is divorced from the responsibilities that burden an occupying power, has refused to utilize the death penalty to deter attacks on the U.S. military and instead has used capital punishment to punish only those who have murdered Iraqis. One of the CCCI's most egregious failures to utilize the death penalty came in a case involving a riot and attack on Coalition forces that occurred in the village of Abu Ghraib. On October 31, 2003,¹⁵⁰ a small band of insurgents that included defendants Abass Majeed Rashed, Mohamad Abdul Ameer, Ali Adnan Ali, Nabeel Abdul Ameer Ateya, and Mouhand Jalil Amara, attacked a U.S. Army patrol with mortars, rocket-propelled grenades, and automatic rifles. Although the United States suffered no casualties, one Iraqi succumbed to the violence.

Armed rebellion against an occupying power normally is punishable by death, particularly where the actions also constitute felony murder.¹⁵¹ Despite their commission of felony murder, the fact that these terrorists openly conducted a rebellion against the Coalition government, their general disregard for human life, the extensive firepower and advanced weapons they employed, and despite the substantial risk that U.S. soldiers and many more

148. *Id.* at 427.

149. *Iraq Reinstates Capital Punishment*, USA Today, Aug., 8, 2004, available at http://www.usatoday.com/news/world/iraq/2004-08-08-cap-punishment_x.htm. True, during 2003, the Coalition Provisional Authority outlawed the implementation of the death penalty, but arguably this did not prevent the CCCI from sentencing terrorists to death, only from executing the sentence.

150. Alex Berenson & Susan Sachs, *The Struggle for Iraq: Security; G.I.'s Battle Guerillas as Protest Turns Violent*, N.Y. TIMES, Nov. 1, 2003.

151. U.S. Army Field Manual 27-10, *The Law of Land Warfare*, Ch. 6, § VIII, art. 438, available at <http://www.globalsecurity.org/military/library/policy/army/fm/27-10/index.html>.

innocent Iraqis could have been killed, the CCCI sentenced each defendant to a paltry two years of imprisonment. True, at that time the Coalition Provisional Authority had suspended the execution of death sentences, but arguably the CCCI still could have sentenced such defendants to death and stayed the execution of the sentence until such time as the suspension on capital punishment was lifted (as it later was by the interim Iraqi government).¹⁵² Alternatively, it could have sentenced the defendants to imprisonment for life.

The CCCI similarly shirked its duty in the case of another jihadist, Bashir Khadir, who was caught red-handed while placing an IED on a road. This explosive device made use of an artillery round and a cellular telephone triggering device, a technique commonly employed in Iraq because it permits the explosion to be detonated from great distances and virtually guarantees that the attacker will escape.¹⁵³ Of course, IEDs have killed scores of U.S. troops,¹⁵⁴ as well as caused substantial collateral damage (*i.e.*, death) to Iraqi women and children. Despite these risks and the potential for destruction that his IED entailed, the CCCI sentenced the defendant to a mere *one year* in prison. Incidentally, the defendant also possessed a loaded pistol in public, which itself is a crime.

Compare the CCCI's treatment of Khadir with that of the U.S. military courts in post-World War II Germany. There, the U.S. military courts were authorized to impose the death sentence simply for possessing a firearm like Khadir's pistol,¹⁵⁵ not to mention the possession of explosive devices, and not to mention the act of implanting an explosive device on a roadway in an attempt to kill U.S. troops. Had a U.S. tribunal tried this defendant, he would have faced execution for his possession of the IED and his emplacement of the IED, not to mention his possession of the pistol. Instead, if the United States honors the CCCI's sentence and releases Khadir when his one short year of imprisonment is up, he will be free to join the

152. Even if the suspension of the death penalty prevented the CCCI from executing terrorists or sentencing them to death, the judges of the CCCI frequently flouted the orders of the CCCI with which they disagreed. Furthermore, a suspension of the death penalty did not require the judges to sentence terrorist rebels to the mere two years of imprisonment that these defendants received.

153. Bill Johnson, *Firsthand Lessons In War*, DENVER ROCKY MOUNTAIN NEWS, Apr. 11, 2005, at 6A (recounting an attack on U.S. forces with an IED remotely detonated by a cellular telephone); Rowan Scarborough, *Cell-Phone Technology An Explosive Tool for Insurgents*, WASH. TIMES, Mar. 7, 2005, at A1 ("Bomb-makers also use cell phone to remotely set off improvised explosive devices (IEDs), the roadside devices that have killed scores of U.S. troops.").

154. See, *e.g.*, Caryle Murphy, *Roadside Bomb Kills 3 U.S. Troops in Iraq*, WASH. POST, Feb. 26, 2005, at A15 ("A roadside bomb killed three U.S. soldiers and wounded nine as they patrolled Friday in Tarmiya, a town about 20 miles north of Baghdad . . .").

155. NOBLEMAN, *supra* note 74, at 228.

battle again,¹⁵⁶ as many other Iraqi terrorist haven done when they were released.¹⁵⁷ Already a “number of high-profile attacks have been attributed to insurgents who were earlier detained in Iraq but subsequently released.”¹⁵⁸ Next time Khadir might have better luck with his IEDs, and, at best, a few more U.S. soldiers will come home missing a limb or two. Worst case, more soldiers will not make it home alive.

Fortunately for the United States, yet another defendant, Ali Ibrahim Enad did not have an IED. His weapon of choice was simply a fully-automatic AK-47 rifle, a ubiquitous weapon in Iraq.¹⁵⁹ On December 29, 2003, Enad used his automatic rifle to fire on U.S.

156. Grossman, *supra* note 16 (discussing an insurgent who, just days after being released by an Iraqi judge, “shot and wounded an Army lieutenant colonel who commanded the 1st Battalion of the 24th Infantry Regiment in Mosul”).

157. As most members of the Supreme Court have recognized, the United States has a “weighty” interest “in ensuring that those who have in fact fought with the enemy during a war do not return to battle against the United States.” Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2647 (2004) (plurality opinion); *Id.* at 2675 (Thomas, J., dissenting); see also MAINE, *supra* note 5, at 161 (“[T]he object of detaining prisoners of war is to prevent their taking part again in the operations of war.”); CLAUSEWITZ, *supra* note 8, at 66 (“the disarming or the overthrow of the enemy—whichever we choose to call it—must always be the aim of military action”).

Released Iraqi detainees have repeatedly rejoined the jihad against the United States and its allies. Grossman, *supra* note 16 (“American officers at the tip of the spear are becoming increasingly alarmed by the number of insurgents who have committed violence against troops or civilians after being freed from incarceration in Iraq.”); Allam, *supra* note 44, at 1 (noting that one of the suicide bombers who attacked Amman Jordan in November 2005, Safah Mohammed Ali, was captured in Iraq near Fallujah by the United States military in 2004, but was released when it was determined that there was insufficient evidence to prosecute or detain him).

Similarly, more than ten former detainees of Guantanamo Bay have rejoined the fight against the United States in Afghanistan, and there is every reason to believe than many Iraqi defendants would choose a similar course of action. See Derooy Murdock, *Ex-Guantanamo Detainees Trends*, WASH. TIMES, Dec. 15, 2005, at A20 (“The Pentagon knows of roughly a dozen former Gitmo detainees who did not return to the peaceful Koranic reflection from which their leftist defenders seem to believe they were sidelined. At least for some Ex-Guantanamites, U.S. military custody was a mere vacation from their violence.”); Associated Press, *Seventeen in Terror Ring Arrested, Morocco Says*, N.Y. TIMES, Nov. 21, 2005, at A8 (two former Guantanamo detainees—Brahim Enchekroun and Muhammad Mazouz—were arrested and charged with participation in an Islamic terrorist network in Morocco); Thomas Harding, *Ex-Guantanamo Prisoners Fight On*, LONDON DAILY TELEGRAPH, Sept. 2, 2005, at 15 (“More than a dozen prisoners released from Guantanamo Bay have returned to the ‘battlefield’ to fight Americans, it was disclosed yesterday.”); Rowan Scarborough, *Detainees’ Data “Best” Resource On Al Qaeda*, WASH. TIMES, Apr. 19, 2005, at 3 (“at least 10 former detainees the Pentagon knows by name have rejoined the war against coalition forces”).

158. Grossman, *supra* note 16.

159. Ashraf Khalil & Patrick J. McDonnell, *Iraq Violence Takes a Sectarian Twist*, L.A. TIMES, May 16, 2005, at 1 (quoting Deputy Speaker of the National Assembly Hussein Shabristani, “There is hardly an Iraqi household without weapons of all sorts.”); Ellen Knickmeyer, *Demise of a Hard-Fighting Squad*, WASH. POST, May 12, 2005, at A1 (AK-47s are “ubiquitous in Iraqi households”).

forces, but alas, he was no marksman, and his bullets never struck his intended targets. U.S. forces captured him and shipped him off to the CCCI for trial and sentencing. In post-war Germany's U.S. military courts, an attempt to kill U.S. soldiers would have earned Enad a death sentence. But in the CCCI, the judges believed that this crime merited only *six months* of incarceration, during which time the defendant will receive better health care and nutrition than free Iraqis generally can afford. It is obvious that this sentence is disproportionately lenient considering the nature of the offense and its potential for harm. By way of comparison, U.S. military courts in Germany handed out six-month prison sentences for cases of *simple assault*, and only when both the victim and perpetrator were German, and the assault was not an attack on the United States or its personnel.¹⁶⁰

Because the interim Iraqi government reauthorized courts to utilize capital punishment, the CCCI was one of the first courts to employ this form of punishment. But it has done so only with defendants who have attacked Iraqis,¹⁶¹ and not with terrorists who have murdered or attempted to murder U.S. soldiers. The Iraqis whom the CCCI had ordered executed had killed, kidnapped, and raped fellow Iraqis.¹⁶² In the words of one Iraqi legislator, the executions sent the message to terrorists that they will be punished "if they try to kill innocent Iraqis," but no mention is made of punishing terrorists for killing Americans.¹⁶³

It should be unnecessary to convince U.S. leaders that U.S. soldiers' lives are worth just as much as Iraqi lives, and there is no reason why terrorists who kill U.S. soldiers should not meet the same fate as those who kill Iraqis. But U.S. leaders continue to entrust insurgency cases to Iraqi judges, and Iraqi judges assign value to life

160. NOBLEMAN, *supra* note 74, at 110.

161. Williams, *supra* note 21, at 234 ("[T]he Iraqis wanted to retain the death penalty, but some of our allies in the Coalition disagreed. In the end, the death penalty was suspended for the period of the occupation."). Of course, the occupation continues and the death penalty has been restored in Iraq.

162. Jonathan Finer & Naseer Nouri, *Capital Punishment Returns to Iraq*, WASH. POST, May 26, 2005, at A16 ("The three alleged members of the insurgent group known as the Ansar al-Sunna were condemned to be hanged 'in the next 10 days,' according to the sentence imposed by the special criminal court."). Similarly, the CCCI gave a nephew of Saddam Hussein a life sentence for his efforts to aid terrorists, although a similarly culpable co-conspirator was given the typically paltry six-year sentence for manufacturing IEDs. See *Saddam's Nephew Gets Life Term*, BUFFALO NEWS, Sept. 19, 2005, at A4 ("A nephew of Saddam Hussein was sentenced today to life in prison for funding Iraq's violent insurgency and for bomb-making . . . Ayman Sabawi, the son of Sabawi Ibrahim al Hassan, a half-brother of Saddam, was captured in May by security forces during a raid on Tikrit, the former leader's hometown.").

163. Borzou Darangahi & Caesar Ahmed, *Iraq Carries Out First Post-Hussein Executions*, L.A. TIMES, Sept. 2, 2005, at A3 ("Let those terrorists know that there will be decisive laws waiting to punish them if they try to kill innocent Iraqis," said Abbas Bayati, a Shiite Muslim legislator.").

according to the nationality, tribe, and religion of the victim. These judges apparently have not realized that many terrorists who kill U.S. soldiers similarly have no qualms about killing Iraqis, so to the extent that stiff sentences deter terrorist acts, they benefit both U.S. soldiers and Iraqis. Thus, it is not surprising that a few Iraqis have also expressed disapproval of the inadequate sentences handed out by the CCCI in terrorism cases involving attacks on U.S. soldiers,¹⁶⁴ if not its refusal to fully implement the death penalty for anti-U.S. terrorists. Peace-loving Iraqis realize that their fate is inextricably tied to the ability of the United States to succeed in Iraq, and that even terrorists who target only U.S. soldiers necessarily also inflict harm on the Iraqis who depend on the United States for protection and assistance.¹⁶⁵

In light of the enormity of the harm that U.S. forces are seeking to prevent—the creation of a terrorist state such as existed in Afghanistan, violent terrorist attacks including bombings, civil war, and widespread murder—and the fact that the carnage is happening in a war zone, the death penalty is absolutely essential to control militants who comprehend only the language of force.¹⁶⁶ A prompt imposition of the death penalty for terrorists would have gone a long way toward defeating the insurgency.¹⁶⁷ Indeed, in Germany after World War II, the United States authorized capital punishment for serious crimes such as: an armed attack on Allied Forces; killing or assaulting any member of the Allied Forces, possession of a firearm or explosive, use of a firearm or explosive, and sabotage.¹⁶⁸ Realizing that even minor crimes can help destabilize an occupation government or give terrorists a foothold, relatively minor crimes—such as making a false statement to Allied authorities or misleading any member of the Allied Forces in the performance of their duties—were also capital offenses.¹⁶⁹

Of course, the U.S. military courts in Germany frequently did not impose capital punishment in these latter types of cases, nor was that

164. Spinner, *supra* note 33.

165. *Id.* (“Bashar, a 25-year-old [Iraqi] pharmacist who was kneeling on a prayer rug behind the desk in his shop, said the violence will stop only if the detainees are imprisoned longer.”).

166. As an officer from the Fourth Infantry Division noted, “the Iraqis seemed to understand only force.” “To an American, this might upset our sense of decency,” he added. “But the Iraqi mind-set was different. Whoever displays the most strength and authority is the one they are going to obey. They might be bitter, but they obey.” Dexter Filkins, *The Fall of The Warrior King*, N.Y. TIMES, Oct. 23, 2005, at 52.

167. WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 562 (1924) (“If the inhabitants of the occupied territory rise in insurrection, whether in small bodies or en masse, . . . all persons found with arms in their hand can in strict law be killed, or if captured be executed by sentence of court martial.”).

168. Military Government Ordinance No. 1, Listing Crimes and Offenses, Art. 1, Capital Offenses, *reprinted in* NOBLEMAN, *supra* note 74, at 227–28, App. 10.

169. *Id.*

penalty deemed universally necessary to deter criminal conduct or rebellions.¹⁷⁰ The mere possibility of suffering the death penalty discouraged potential insurgents and was one of the reasons that residents of the U.S.-controlled zones of Germany elected not to stage revolts, despite the efforts of Soviet spies to foment violence.¹⁷¹ No widespread insurgency was mounted even though the occupied Germans suffered from: levels of nutrition grossly insufficient for basic subsistence, horrendous living conditions, confiscation of their property, and high unemployment. Although there are notable differences between the occupation of Germany and Iraq,¹⁷² the European occupation involved the United States enduring and surmounting many of the obstacles to law and order that the Coalition is facing in Iraq, from hatred and distrust of the United States, a population suffering under extreme poverty and a total lack

170. *See id.* at 122–37.

171. *Id.*

172. There are at least eight important differences: (1) the ratio of Allied troops to Germans was greater than the ratio of Coalition troops to Iraqis, which gave the Allied powers greater control over the Germans and ensured that any resistance was futile; (2) unlike the Iraqis, the Germans had endured years of war, had hardly recovered from World War I, and perhaps were tired of fighting; (3) Germany was totally defeated and demoralized, while many Iraqis were barely affected by the war; (4) whole cities, including many houses and civilian installations in Germany were destroyed by the Allies, unlike in Iraq where the air campaign was extremely precise and thus minimized collateral damage; (5) the German national ethos generally encouraged obedience to law, unlike Iraq, where legislation from traffic ordinances to copyright regulations are universally ignored; this difference led to general orderliness in Germany, compared to widespread lawlessness and looting in Iraq; (6) the Iraqi citizens are substantially more heavily armed than the Germans were at the end of World War II; (7) the Germans had a stronger work ethic than most Iraqis, many of whom are infected with a fatalism which holds that divine powers beyond their control have placed them in this predicament, and thus there is no sense in trying to lift themselves out of their miserable condition; and (8) German clerics were not promising an eternity with sixty virgins to those insane enough to blow themselves up in suicide missions against the Allies. *See, e.g.,* HARVEY H. SMITH ET AL., AREA HANDBOOK FOR IRAQ 167 (1969).

Iraqis tend to accept events with an attitude of detachment and acceptance, generally called fatalism. This attitude has its roots in the environment and economic conditions, and to a certain extent in religion. A person who has suffered some misfortune will often say, 'It is from God,' or 'It is my portion (fate).'

As described by one Marine helping to rebuild Iraq:

We had problems getting Iraqis to show on time for work. We would provide Iraqi leaders with upfront payments for projects, but the work would not get done. We had Iraqis complaining about myriad problems, but few seemed interested in fixing them. . . . Most Iraqis have a sense of religious fatalism . . .

Beau Higgins, *Please Help Us Help You—If Allah is Willing*, L.A. TIMES, July 3, 2005, at M2.

of government, to corruption engendered by vestiges of the former regime. As to the occupation of Germany:

It involved the governing of millions of hostile natives who had been taught to believe that the Allied forces were composed of decadent degenerates, representing governments which were pursuing a course designed to destroy or enslave them. In addition, from the very first days of Allied occupation of German territory, German government on all levels collapsed completely, and officials, including judicial personnel, had, for the most part, fled in the wake of the Allied armies. In any event, 12 years of National Socialism and six years of war had reduced the German judiciary to such a feeble and corrupt stat that it could not be trusted¹⁷³

This description of post-World War II Germany is strikingly similar to that of present-day Iraq. Accordingly, it stands to reason that techniques that proved effective in governing post-war Germans—such as the use of military courts and imposition of commensurate punishments, including the death penalty—might similarly have served to overcome the same obstacles faced in governing Iraqis.¹⁷⁴

U.S. military courts in Iraq would not have had to go as far as the U.S. military courts did in Germany. That is, U.S. military judges would not have had to utilize the death penalty, for example, to punish the crime of possessing more than one rifle in cases where a defendant possessed only two or three rifles. Imposing the death sentence only on defendants involved in attacks on Coalition Forces or those found in possession of arsenals of special category weapons, such as grenades, RPGs, and IEDs, would probably have sufficed.¹⁷⁵ And the tribunals would not have had to keep this up for very long, if, as in Germany, sentences were published so that everyone knew what their fate would be if they opposed the U.S. military.¹⁷⁶ After a few executions, word would have spread among the Iraqi terrorists that the U.S. courts were serious about punishing terrorism.¹⁷⁷ A credible threat of capital punishment would deter all but the religiously-

173. NOBLEMAN, *supra* note 74, at 46–47.

174. “[C]ustomary law considers the death penalty to be the appropriate penalty for all war crimes.” William A. Schabas, *International Sentencing: From Leipzig (1923) to Arusha (1996)*, in *INTERNATIONAL CRIMINAL LAW*, Vol. III, 171 (M. Cherif Bassiouni, ed., 2d ed. 1999) (1986). Regardless, the United States is free to depart from customary law when justice so requires.

175. Ghadanfar Hamood al-Jasim, “the chief general prosecutor of Iraq” has opined that the death penalty would serve as a deterrent to violence in Iraq. Glanz & Tavernise, *supra* note 130.

176. NOBLEMAN, *supra* note 74, at 123 n.357.

177. Al Qaeda representatives in Iraq have made use of public executions to deter Iraqis from cooperating with the United States. Ellen Knickmeyer, *U.S. Claims Success in Iraq Despite Onslaught*, WASH. POST, Sept. 19, 2005, at A1 (“Al Qaeda fighters recently carried out public executions of men suspected of supporting U.S. forces or the Iraqi government.”). They clearly understand the motivational power of punishment, but perhaps have underestimated the willpower of people motivated by goodness, rather than evil.

crazed suicide bombers. The mere threat of the death penalty would thus prevent a substantial number of Iraqi and Coalition deaths. Unfortunately, however, in light of the CCCI's reluctance to sentence defendants to even ten years of imprisonment for violent crimes, there is little reason to believe they would ever impose the death penalty on anti-U.S. terrorists.¹⁷⁸

The cases discussed above are just a few of those where the CCCI has done its small part to sabotage the U.S. efforts to democratize Iraq.¹⁷⁹ Perhaps each of these woefully inadequate sentences, viewed separately, is merely an annoyance. But when viewed cumulatively, and considering the message these sentences sends to insurgents and would-be terrorists, they are nothing less than a full scale, judicial attack on the United States. And, sadly, the United States not only funded this attack insofar as it was the source of the judge's salaries, it condones and encourages this judicial assault by continuing to feed the CCCI more cases.¹⁸⁰ The insultingly trivial sentences alone should have resulted in demands for a new forum to prosecute enemy insurgents, a forum where biased judges cannot place their thumbs—or hands—on the scales of justice, and where defendants receive sentences commensurate with the magnitude of their dastardly attacks.

II. BIAS AND CORRUPTION OF CCCI JUDGES

The preceding discussion of the tactics used by the CCCI to thwart justice is necessarily an abbreviated one. It hardly scratches the surface. Indeed, the CCCI has employed approximately twenty different tactics to delay trials, acquit defendants, or hand down inadequate sentences.

The use of these various tactics demonstrates that the CCCI judges overtly favor the terrorist-defendants who stand before them for judgment. The judges have consistently exercised their judicial power to assist these terrorists in evading justice. Daily, the CCCI judges demonstrate an extreme bias in favor of Iraqi insurgents and

178. To their credit, at least one Afghan court is now utilizing the death penalty to punish those who attacked U.S. contractors. Carlotta Gall, *4 Sentenced to Death for Bomb Attack*, N.Y. TIMES, Mar. 17, 2005, at A6 ("A Kabul court sentenced four men to death for organizing a car bomb attack outside an office of the American security concern DynCorp in August in which at least 10 people, including 3 Americans, died . . ."). But the court also gave a five-year term for a separate attack. *Id.* ("The court also sentenced a man from Tunisia to five years in prison for ordering a suicide bomb attack two months later at a popular tourist street. That attack killed a U.S. woman and an Afghan girl and wounded eight other people.")

179. Notably, sabotage also carried the death penalty in post-World War II Germany. Military Government Ordinance No. 1, *supra* note 167.

180. *Id.*

enmity for the U.S. soldiers who risk their lives in an effort to make Iraq a free country.¹⁸¹ It is worthwhile to examine various explanations for the judge's biases, including nationalism and opposition to the presence of foreigners in Iraq, loyalty to the Baath Party, tribal loyalties, religious influences, and corruption.

A. Nationalism, Tribalism, and Ethnic Loyalties

It is the natural tendency of natives of any country to identify with their neighbors and countrymen, especially when they share a common language, dialect, religion, tribe, ethnicity, or culture—and particularly in times of war. When faced with outsiders who do not share the essential national characteristics, nationalists frequently will band together to oppose those whom they perceive as different from themselves.¹⁸² But these nationalistic loyalties can exist even without a nation-state—think, for example, of the Kurds—and any number of affinities can elicit this nationalistic impulse. Still, history—including the great wars of the twentieth century—has proven that allegiance to the fatherland or one's tribe is a particularly strong impetus for loyalist behavior. This national or tribal fealty frequently becomes even more pronounced when it encounters a common enemy—real or imagined—such as a competing nation, tribe, or ethnic group.

It should come as no surprise, then, that Iraqis are not immune from these influences, nor are Iraqi judges. Thus, it also should not surprise anyone that in assessing guilt and imposing punishments on

181. Freeman, *supra* note 131, at 29 (discussing the favorable treatment Iraqi terrorists receive from CCCI judges). At least one Afghani judge was found to have aided the insurgency in his country. *Afghan Authorities Arrest Judge*, WASH. POST, Jan. 9, 2005, at 24 (“Afghan authorities have arrested a judge for allegedly harboring the organizers of two bombings last year that killed about 12 people, including four Americans, and believe the ringleaders took their orders from an Iraqi member of al Qaeda . . .”).

182. John Tierney, “*Get Out, You Damned One*,” N.Y. TIMES, July 2, 2005, at A15 (“The natural impulse to dislike outsiders is so strong that it barely matters who the outsiders are.”). Similarly, when a country is invaded, even with the noble intent of liberating the populace, there “are no peaceful people.” See JOHN STEINBECK, *THE MOON IS DOWN* 34 (1942). This nationalism is manifested even in international business. Recently it was discovered that an Italian CEO, Gianpiero Fiorani, possibly with collusion by Italian central banker Antonio Fazio, concocted fictitious deals and falsified documents to ensure that the Italian company Banca Popolare Italiana would acquire Banca Antonveneta SpA, rather than a foreign suitor. See Gabriel Kahn & Sabrina Cohen, *Wiretaps of an Executive in Italy Put Central Banker on Hot Seat*, WALL ST. J., Sept. 13, 2005, at A1.

The affair is the latest example of the lengths to which national leaders in Europe sometime go to prevent foreign takeovers, in spite of the European Union's push for a unified market. France is about to publish a list of whole business sectors it regards as off limits to foreign control . . .

insurgents who attacked the United States, Iraqi judges consider—sometimes covertly, other times openly—the defendants' religion, nationality, tribe, and ethnicity.¹⁸³ Concomitantly, another ingredient of the Iraqi judicial calculus is the fact that the U.S. soldiers who were attacked generally are not Moslem, are not Iraqis, do not hail from the judges' neighborhood, tribe, or an allied tribe, and generally are not Arabs.¹⁸⁴

Beyond the regional and tribal affinities¹⁸⁵ which have long influenced judicial decisions in Iraq,¹⁸⁶ Iraqi judges are also known for their pride in their Arabic and Iraqi heritages.¹⁸⁷ They are fiercely loyal to their fellow Arabic-Iraqis,¹⁸⁸ including Iraqi insurgents, especially when they share the same religious sect, and those judges are willing to make judicial decisions based on these loyalties rather than the law. It is incontrovertible that Iraqi judges

183. Greg Jaffe, *In Iraq, One Officer Uses Cultural Skills to Fight Insurgents*, WALL ST. J., Nov. 15, 2005, at A1 (“U.S. commanders also struggled to understand Iraq’s deep tribal and sectarian divisions. American officers working with Iraq’s fledgling security forces frequently complain that police officers and soldiers sometimes put tribal allegiance ahead of their duty as officers.”); Nordland et al., *supra* note 39, at 20 (“There are so many ways Iraqis are tied together by tribe, business, dealing, family, religion or where they live. So some groups you never think are tied together may have other links.”) (quoting Major James West, an intelligence officer for the first Marine Expeditionary Force).

184. See David Romano, *Whose House is This Anyway? IDP and Refugee Return in Post-Saddam Iraq*, 18 J. REFUGEE STUD. 430, 432 (2005) (noting the Iraqi nationalism that developed amongst Arab Iraqis regardless of whether they were Sunni or Shiite).

185. Due in no small part to their matrimonial practices, many Iraqis identify with their tribe more firmly than with their nation. Tierney, *supra* note 181 (“Because marriage between cousins is so common in the Middle East—half of Iraqis are married to their first or second cousins—Arabs live in tightly knit clans long resistant to outsiders”); Sabrina Tavernise & Quais Mizher, *In Iraq’s Mayhem, Town Finds Calm Through Its Tribal Links*, N.Y. TIMES, July 10, 2006, at A1 (“The tribe in Iraq is the basic building block of society,” said Abd al-Karemm al Mahamedawy, a travel chief from Amara . . .”).

186. Craig T. Trebilcock, *Legal Cultures Clash in Iraq*, ARMY LAWYER, at 48 (Nov. 2003) (noting that “the Iraqi courts have been characterized by bias and favoritism, with verdicts being routinely influenced by payoffs and tribal affiliations,” and that many “judges also acknowledged that a litigant’s tribal and political connections under the old regime would frequently be a prime consideration in the outcome of both criminal and civil trials”); Mona Charen, *Trial, Tribalism . . . and Momentum*, WASH. TIMES, Oct. 24, 2005, available at <http://washingtontimes.com/functions/print.php?storyID=20051023-103413-3082r> (noting that frequently in Iraq “pride in one’s own” tribe “trumps every other consideration—most definitely including morality, compassion and a love of justice”).

187. Asli U. Bali, *Justice Under Occupation: Rule of Law and the Ethics of Nation-Building in Iraq*, 30 YALE J. INT’L L. 431, 450 (2005) (noting the principles of Arab unity and nationalism at work in Iraq).

188. Ion, *supra* note 91, at 206 (noting that Arab Moslems consider themselves superior to non-Arabs, and that they draw “a national division, which is that of the Arabs on one side and the foreigners on the other side.”). Obviously this is an over-generalization and is probably not universally true.

have stronger national and tribal ties¹⁸⁹—not to mention religious, Arab-ethnic, regional, and lingual affinities—to the insurgents than they do to members of the U.S. military. They also resent the U.S. soldiers, who are the objects of the terrorist attacks, and thus, the key witnesses testifying before the CCCI.¹⁹⁰ The Iraqi judges see these soldiers primarily as foreign occupiers who may justly be attacked by their fellow Iraqis,¹⁹¹ even though their very lives depend on the protection these “infidel occupiers” provide.¹⁹² This tribal and nationalistic loyalty has manifested itself in Iraq on multiple occasions,¹⁹³ most recently in a debate over whether to pardon or grant amnesty to insurgents. The Iraqis are generally opposed to

189. The United States has not demonstrated a full appreciation of the extent to which tribal influence and loyalties play in Iraq, particularly with respect to the insurgency. See Antonio Castaneda, *Iraqis Cooperate After Insurgents Slay Tribal Chief*, WASH. TIMES, Dec. 5, 2005, at A14 (“Tribalism is rooted deeply in Iraqi society and adds a dimension to the insurgency that outsiders find difficult to understand. Some tribes support the insurgency, while others back the government.”); Steve Fainaru, *A Unit’s Fitful Year At War*, WASH. POST, Dec. 13, 2005, at A1 (“The complexities of the culture and tribal lives here exceed anything that anybody understands.”) (quoting U.S. Army LTC Jody L. Petery).

190. Sean Rayment, *Poll Finds Support for Attack on Coalition Forces*, WASH. TIMES, Oct. 24, 2005, available at <http://washingtontimes.com/functions/print.php?storyID=20051023-112228-5108r> (“Forty-five percent of Iraqis think attacks against British and American troops are justified . . . Eighty-two percent are ‘strongly opposed’ to the presence of coalition troops.”).

191. Michael Matza, *Jordanians Decry Bombings*, AKRON BEACON J., Nov. 11, 2005, at A1 (“Iraqis’ resistance to occupation is often viewed as an act of Arab dignity and patriotism.”); Ghaith Abdul-Ahad, *The New Sunni Jihad: A Time for Politics*, WASH. POST, Oct. 27, 2005, at A1 (noting that an Iraqi insurgent who goes by the name “Abu Theeb” said “he will continue to wage war against the Americans, because he views them as occupiers” and that when “the infidel conquers your home, it’s like seeing your women raped in front of your eyes and like your religion being insulted every day.”). In the words of Secretary of State Condoleezza Rice: “For a proud people like the Iraqis, nobody wants to have foreign forces on your soil.” Paul Martin, *Sunnis Ready to Cooperate With U.S.*, WASH. TIMES, Dec. 18, 2005, at A1.

192. See Greg Jaffe & Yochi J. Dreazen, *As Bush Pledges to Stay in Iraq, Military Talks Up Smaller Force*, WALL ST. J., Oct. 5, 2005, at A1 (“[T]he nearly 140,000 U.S. soldiers in Iraq have become a primary source of resentment for Iraqis who blame them for the country’s ills and dislike feeling that they are under foreign military occupation.”).

Recently, some ordinary Iraqis have turned against the insurgents, by reporting them to Iraqi authorities. But, demonstrating the nationalism common among Iraqis, they admit that they are only doing so to protect fellow Iraqis, and that they would not do so to protect Americans, whom they despise. Mariam Fam, *More Iraqis Report Militants*, AKRON BEACON J., Apr. 3, 2004, at A4 (“But some of those ready to turn in militants say that have no sympathy for the U.S. forces, either. ‘I don’t think I would have reported them if they were targeting only Americans,’ [Omar Mohammed] Abdullah said. ‘After all, this is an occupier.’”).

193. Consider, for example, the amphictyony formed by Shiite and Sunni Iraqis to oppose the British occupation of Iraq following World War I.

amnesty for anyone who spilt Iraqi blood, but those who killed U.S. soldiers are a different story.¹⁹⁴ In the words of one Iraqi legislator:

There could be an amnesty regarding attacks on American targets. American are viewed as occupiers. Some people think they have got a right to have an armed resistance,' says Saad Jawas Kindil, a lawmaker and head of the political bureau of Supreme Council for Islamic Revolution in Iraq, the biggest component of the parliament's Shiite majority. "But Iraqi soldiers and policemen are innocent, they're here to protect the Iraqi people. Killing Iraqi soldiers is a crime."¹⁹⁵

The clear import of Kindil's comments—similarly expressed by other Iraqis¹⁹⁶—is that U.S. lives are worth less than Iraqi lives because they are U.S. lives and not Iraqi lives. According to Kindil and his ilk, Americans deserve to be attacked or at least there is nothing criminal about attacking Americans, who are not of the same tribe, nation, or ethnicity as Iraqis. Those who attack Americans are blameless and therefore justly deserve accolades for the "bravery" of their attacks.¹⁹⁷

If a legislator from one of Iraq's leading political parties openly spouts such nationalist hatred, it does not take a giant leap of faith to surmise that this is also the opinion of at least some of Iraq's judicial officers. Indeed, at least one Iraqi judge has expressed similar sentiments.¹⁹⁸ The anonymous judge—whose admission comes as no

194. Ellen Knickmeyer, *Iraqi Cleric Hails Amnesty Idea*, WASH. POST, Apr. 16, 2005, at 16 ("A prominent Sunni Muslim cleric on Friday welcomed an amnesty offer for Iraq's Sunni-led insurgency and called on President Jalal Talabani to make it a general amnesty that would also apply to those in U.S. detention.")

Of course, under the U.S. Constitution, only the President of the United States has the power to pardon crimes committed against the United States. See U.S. CONST., art. II, § 2 ("The President . . . shall have Power to grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment."). So an Iraqi pardon of terrorists could only absolve these terrorists of responsibility for crimes against Iraqi law, and not to the extent that their misdeeds were crimes against U.S. law or the law of war, even though committed in Iraqi territory.

195. Yaroslav Trofimov, *Iraqi Leaders Consider Amnesty for Insurgents*, WALL ST. J., Apr. 15, 2005, at A8, A9.

196. Awadh al-Taiee & Neil MacDonald, *Jalawla Blast Shows Not All Iraq's Suicide Bombers are Foreigners*, LONDON FINANCIAL TIMES, Aug. 6, 2005, at 7 (noting that the Sunni mother of one suicide bomber who killed two Iraqi civilians insisted "that he must have been carrying explosives for use against American U.S. military convoys," implying that this was sufficient justification for his conduct and rendered him immune from criticism for being a suicide bomber).

197. Iraqis are not the only ones who express these sentiments. See also Mamoun Fandy, *For Muslims, A Role in the War on Terror*, USA TODAY, Aug. 12, 2005, at 9A.

I have talked with many Muslims, especially in the West, who in public condemn violent acts but in private conversations say, 'The West deserves this.' In public, they will say it is a revenge for Palestine and Iraq, but in private I heard blind hatred, a virus that is taking over too many Moslem minds.

198. Instead, these judges speak through their judicial decisions, and they have spoken eloquently to anyone willing to listen.

surprise to U.S. military officers familiar with the CCCI and its decisions¹⁹⁹—admitted that his loyalty to Iraqi defendants has led him and other judges to order acquittals and lenient sentences to insurgents who have attacked their common enemy: the U.S. military.²⁰⁰ What is surprising is that the United States would continue to permit Iraqi judges with these affinities and prejudices to continue to exercise jurisdiction over Iraqi terrorist-defendants.²⁰¹ Their nationalistic and “tribal mindset precludes a genuine rule of law. The tribalist does not ask ‘what has this man done?’ but ‘to whom did he do it.’” Perhaps recognizing the power of these prejudices, the U.S. Supreme Court once noted that “there would be something incongruous and absurd in permitting an officer or soldier of an invading army to be tried by his enemy, whose country he has invaded.”²⁰² Yet, that is essentially what is happening in Iraq. The United States presents Iraqi terrorists as defendants before the CCCI, but instead the U.S. soldiers who withstood the terrorist attacks are put on trial in a forum in which they can never receive justice. It is absolutely absurd to let biased Iraqi judges try cases involving U.S. accusations made against Iraqi terrorists.²⁰³

199. “[E]ven some cases backed by strong evidence have been thrown out by [Iraqi] ‘judges who appear sympathetic to the enemy,’ says one U.S. military official.” Grossman, *supra* note 16.

200. Dhiya Rasan & Steve Negus, *Iraqi Torture of Prisoners Seen as Open Secret*, THE FINANCIAL TIMES UK, Jan. 25, 2005, at 8 (“One judge who refused to disclose his name said he tried to let off lightly insurgents who had targeted Americans. . .”).

201. It is possible that some soldiers are rebelling against such a policy, and instead are taking the law into their own hands. U.S. soldiers are learning from the CCCI that it would be better to ensure that justice is executed than to entrust this task to the CCCI. William Cullen Dennis, *Compromise—the Great Defect of Arbitration*, 11 COLUM. L. REV. 493, 494 (1911) (“[M]en will continue to appeal to force to secure what they deem to be their just rights until they become convinced that there is some surer, better way of obtaining justice . . .”). Soldiers realize that enemy combatants “must be destroyed; that is, put into such condition that they can no longer continue the war,” if not by force of law or persuasion then by force of arms. CLAUSEWITZ, *supra* note 9, at 89. If the Iraqi courts will not incapacitate terrorists through imprisonment or execution, U.S. soldiers are more than capable of taking the necessary actions. See Weaver, *supra* note 136 (upon hearing that the CCCI gave a Iraqi terrorist a mere fifteen years for killing a U.S. soldier, his fellow soldiers responded “We never should have taken them in alive . . . We should have killed them and their brothers.”).

Because the U.S. military clearly possess the authority to eliminate by force guerilla fighters, submitting their cases to an Iraqi court for its judgment is simply an act of mercy on the part of the United States. See MAINE, *supra* note 5, at 152 (“The first principle of war is that armed forces as long as they resist may be destroyed by any legitimate means.”). Soldiers might prove less merciful if they know that their forbearance will result in injustice and the death of other U.S. soldiers.

202. *Coleman v. Tennessee*, 97 U.S. 509, 516 (1878).

203. “It may be stated generally that in time of war no nation will permit a citizen of an enemy country to use its courts in any way which might be hurtful to it, or helpful to the enemy, in the prosecution of the war.” *Bernheimer v. Vurpilot*, 42 F.

Some might argue that at least a minority of Iraqi judges do not harbor such biases, or at least do not bring them into the courtroom when deciding cases. After all, they owe their freedom to the United States. But the effect of the pervasive nationalism in Iraq—both Iraqi nationalism and Arab nationalism—and tribalism, also operates on the minority of “impartial” judges. For example, in their loyalty to their fellow tribesmen and countrymen, when Iraqi judges were confronted with allegations that Iraqis have committed heinous acts of terrorism, they, like many Iraqis, denied the obvious truth of these charges and instead affirmed the superiority of Iraq and Iraqis.²⁰⁴ They denied that their fellow Iraqis and tribesmen could have committed the atrocities that prosecutors ascribed to the insurgents despite the overwhelming evidence that the insurgency is primarily an Iraqi operation,²⁰⁵ that also receives some assistance from foreigners.²⁰⁶ Instead of admitting this, the judges frequently blamed

Supp. 830, 831 (E.D. Pa. 1942). Instead, the United States currently permits the Iraqis to use their own court, the CCCI, to undermine U.S. interests.

204. Feelings of national superiority are not confined to Iraqis, of course. See BERTRAND RUSSELL, *UNPOPULAR ESSAYS* 117 (1950). (“We are all, whatever part of the world we come from, persuaded that our own nation is superior to all others.”). Russell may be overstating things a bit, but his general point is certainly applicable to Iraqis.

205. Jonathan Finer, *Among Insurgents in Iraq, Few Foreigners Are Found*, WASH. POST, Nov. 17, 2005, at A1.

In much of the country, including the north and center, commanders say, the insurgency is led and populated almost entirely by Iraqis, many of them former members of Saddam Hussein’s Baath Party, who do not work closely with Zarqawis’ group. Commanders there say Iraqi insurgents are largely responsible for the roadside bombings, some involving armor-penetrating weapons, that have been responsible for roughly half of the U.S. combat deaths in recent months.

206. *Id.* (“Both Iraqis and coalition people often exaggerate the role of foreign fighters and downplay the role of Iraqi” elements in the insurgency.); “U.S. military officials said Iraqi officials tended to exaggerate the number of foreign fighters in Iraq to obscure the fact that large numbers of their countrymen have taken up arms against U.S. troops and the American-backed interim Iraqi government.” Mark Mazzetti, *Insurgents Are Mostly Iraqis, U.S. Military Says*, L.A. TIMES, Sept. 28, 2004, at A10; al-Taiee & MacDonald, *supra* note 195, at 7 (the brother of one suicide bomber claimed that only foreigners, and not Iraqis, are suicide bombers, even though all of the evidence confirmed that his own brother was a suicide attacker); Jackie Spinner & Omar Fekeiki, *Defense Minister Exhorts Iraqis: ‘Liberate This City’*, WASH. POST, Nov. 8, 2004, at 18 (noting that Iraqis blame foreigners for the insurgency); Dexter Filkins, *2 Car Bombings in Iraq Kill 41, Many Children*, N.Y. TIMES, Oct. 1, 2004, at A1 (“One woman named Addela Jasim, whose brother, Karim, was wounded in the attack, blamed foreign militants for the violence, claiming that the crime was beyond the reach of her countrymen. ‘There is no way Iraqis can kill Iraqis,’ she said.”).

This belief that their countrymen could not be committing atrocities, might further explain some of the CCCI judges’ distrust of U.S. witnesses who testified to the contrary. This fantasy, like most fantasies, has no grounding in reality and is particularly unfounded considering that even the leader of their country, Saddam Hussein, was a butcher, and his police squads, composed of Iraqis, frequently killed and tortured their fellow Iraqis. The new Iraqi police force apparently also likes to use

foreign terrorists for violent attacks on both U.S. soldiers and Iraqis.²⁰⁷ A few others were slightly more honest, admitting that Iraqis might have committed some of the suicide attacks against U.S. personnel but denying that Iraqis ever attack their fellow Iraqis.²⁰⁸ Even these are underestimating, perhaps intentionally, the role of Iraqis and the CCCI defendants in the attacks, as statistical, anecdotal, and circumstantial evidence clearly demonstrates.

Consider, for example, the nationality of the majority of captured insurgents. Of the 14,000 suspected insurgents detained by the Coalition up to June 2005, only about three-hundred were non-Iraqi nationals.²⁰⁹ Of course, this still leaves “successful” suicide bombers, who obviously are never captured after their attacks. Although it has long been assumed that most of the suicide bombers are foreigners,²¹⁰

excessive force. So it's hard to understand why the concept of Iraqi-on-Iraqi violence is inconceivable to so many Iraqis.

207. Ellen Knickmeyer, *General Decries Call for Timetable in Iraq*, WASH. POST, Nov. 17, 2005, at A26 (“Many Iraqis insist that almost all suicide attacks are carried out by foreigners, although authorities say Iraqis carried out last week’s deadly bombings in Jordan.”); Sabrina Tavernise, *Sunnis Wary As Turning-Point Vote Nears*, N.Y. TIMES, Oct. 8, 2005, at A8 (“Most insurgents are Sunni Arab Iraqis, a fact that Sunnis are often loath to acknowledge, saying the fighters are mostly foreigners.”). One Iraqi soldier blames the insurgency on foreigners, rather than his fellow Iraqis, and claims that he would kill foreign insurgents, but not Iraqi ones, because these are his brothers. See Spinner & Fekeiki, *supra* note 205.

208. al-Taiee & MacDonald, *supra* note 195 (noting that the mother of one suicide bomber who killed two Iraqi civilians insisted “that he must have been carrying explosives for use against American U.S. military convoys”).

209. Dexter Filkins, *Foreign Fighters Captured in Iraq Come From 27 Mostly Arab Lands*, N.Y. TIMES, Oct. 21, 2005, at A10 (“Non-Iraqis make up a small percentage of the more than 10,000 suspected fighters currently detained in Iraq, and are believed to comprise less than 5 percent of the fighters in the insurgency.”); Rick Jervis & Dave Moniz, *Insurgents Are Making Road Bombs More Potent*, USA TODAY, June 17, 2005, at 10 (quoting Lt. Col. Steve Boylan noting that foreigners make up only a small fraction of the terrorists in Iraq).

210. Eric Schmitt, *U.S. And Allies Capture More Foreign Fighters*, N.Y. TIMES, June 19, 2005, at A8 (“Senior military officials say the foreigners, while small in number, play a disproportionately important role in the resistance, particularly in carrying out suicide bombing”); Rowan Scarborough, *Terrorists Retool Carnage in Iraq*, WASH. TIMES, June 12, 2005, at A1 (“The suicide car bombings are considered the work of foreign jihadists”); Barry R. Posen, *Fighting Blind in Iraq*, N.Y. TIMES, June 7, 2005, at A1 (“Many of the suicide bombers seem to be foreigners, particularly Saudis.”); Farnaz Fassih, *Iraq’s Sunnis Remain Key Part of Insurgency*, WALL ST. J., May 19, 2005, at A12 (“noting that foreign fighters continue to play a role in the suicide bombings and unrest”).

In fact, however, some suicide bombers are Iraqi. Knickmeyer, *supra* note 193 (noting that Iraqis carried out the November 2005 suicide bombing in Jordan); finer, *supra* note 204 (mentioning a mentally disabled Iraqi girl who served as a suicide bomber in Iraq); al-Taiee & MacDonald, *supra* note 195 (discussing an Iraqi suicide bomber in Jalawla, and relating the opinion of one U.S. officer that “a handful” of suicide bombers were Iraqis); Edward Wong, *Over 30 Reported Dead In Attacks Around Iraq*, N.Y. TIMES, June 12, 2005, at A1 (“a former member of an elite Iraqi commando unit called the Wolf Brigade entered the brigade headquarters in eastern Baghdad and detonated explosives strapped to his body”).

this assumption has recently been called into question.²¹¹ But even if this assumption were correct, foreigners would comprise only a tiny fraction of the terrorists hunting U.S. soldiers in Iraq,²¹² and no more than 10% of all terrorists operating in Iraq.²¹³ Furthermore, these foreigners would be ineffective and nearly impotent without the funding, assistance, and coordination provided by their Iraqi hosts.²¹⁴ Perhaps “Zarqawi’s people supply the bombers,” but “the Baathists provide the money and strategy,”²¹⁵ not to mention the training, intelligence, weapons, and safe houses.²¹⁶ Furthermore, “innocent” Iraqis not directly involved in the terrorist conspiracy frequently refuse to lift a finger to prevent the attacks or identify the perpetrators to do so,²¹⁷ despite their clear ability to do so. Instead

211. Edward Wong, *As Marine Sweeps Continue, Gunmen Kill Eight Iraqis*, N.Y. TIMES, Dec. 1, 2005, at A22 (“Some American commanders have said recently that they are beginning to doubt whether foreign fighters are really responsible for the vast majority of the country’s suicide bombings, as the military has been asserting since the start of the insurgency.”); Ghosh, *supra* note 44, at 44 (noting that “more and more Iraqis are volunteering for suicide operations”).

212. John Diamond, *Intel Chief: Iraqis In Insurgency More Elusive*, USA TODAY, Sept. 13, 2005, at A8 (“Though foreign fighters, mainly Sunni Muslim Arabs from Syria and Saudi Arabia, have grabbed headlines with suicide bombings that have killed hundreds of Iraqis, John Negroponte said Iraqis dominate the insurgency.”); Fassihi, *supra* note 209, at A12 (“Iraqis—particularly Sunni Arab extremists and members of the former ruling Baathist party—account for the majority of the violence.”). “Even with the reported rise in foreign fighters, several senior officers said, the number estimated to be coming into the country each month is still relatively small—in the neighborhood of several score. In numerical terms, they said, the insurgency remains essentially homegrown. Iraqi members of extremist Islamic factions, such as the Ansar al Sunna Army, continue to account for many insurgent attacks.” Graham, *supra* note 107, at A1, A19.

213. Dan Murphy, *Iraq’s Foreign Fighters: Few But Deadly*, CHRISTIAN SCIENCE MONITOR, Sept. 27, 2005, at 1 (“Only 4 to 10 percent of [Iraq’s] combatants are foreign fighters, according to a report from the Center for Strategic and International Studies . . .”).

214. Fouad Ajami, *Heart of Darkness*, WALL ST. J., Sept. 28, 2005, at A16 (Foreign “jihadists have sown ruin in Iraq, but they are strangers to that country, and they have needed the harbor given them in the Sunni triangle and the indulgence of the old Baathists.”); Joe Klein, *Saddam’s Revenge*, TIME, Sept. 26, 2005, at 49 (“The Baathists had helped move the [foreign] suicide bombers into the country, according to the U.S. sources, and then provided shelter, support (including automobiles) and coordination for the attacks.”).

215. Nordland, *supra* note 39.

216. Ghosh, *supra* note 44 (discussing a former Iraqi Republican Guard officer—operating under the pseudonym Abu Qaqa al-Tamimi—who trains, houses, and organizes suicide bombers for Zarqawi and other terrorists).

217. Laqueur, *supra* note 106 (“Some of them know where the terrorists are hiding but won’t tell the authorities. Terrorists cannot exist in a vacuum; they need a periphery of helpers.”); Richard A. Opiel, Jr., *U.S. and Iraqi Troops Capture a Top Militant Leader in Mosul*, N.Y. TIMES, June 17, 2005, at A1 (discussing Mohammed Sharkawa, an Iraqi insurgency leader who “was directly responsible for at least 50 car bombings”).

When the victims of attacks were primarily Americans, the Iraqis did not seem to care that their fellow Iraqis would not inform on attackers. Now that Iraqis are also

they sit by idly as U.S. soldiers and fellow Iraqis are murdered. Thus, notwithstanding the efforts by Iraqi judges to shield CCCI defendants, even attacks by “foreign terrorists” operating in Iraq involve Iraqi culpability.

It is also worth noting that the nature of the foreign terrorists’ *modus operandi*—suicidal attacks—does not afford much opportunity for mistaking foreigners for *live*, Iraqi defendants.²¹⁸ That is, after their attacks, the only thing left of foreign suicide bombers are their scattered and charred body parts, which makes them less than ideal candidates for identification, much less prosecution in the CCCI. Similarly, prosecutors would have a hard time convincing the CCCI that a live, Iraqi defendant was a “successful” suicide bomber. But beyond “successful” suicide bombers—not one of whom has ever been tried in the CCCI—the overwhelming evidence indicates that Iraqis are the primary participants in the insurrection,²¹⁹ including former Baathists and many petty criminals who are now part-time terrorists-for-hire.²²⁰ Beyond a few foreign notables like Zarqawi, the insurgency is well stocked with native-born Iraqis who are ready, willing, and able to slaughter both U.S. troops and their fellow Iraqis.²²¹ But the Iraqi judges operate with such a pro-Iraqi bias that

targets of suicide bombers, the Iraqi government is considering laws to punish those who aid attackers or who failed to report attackers to authorities. Jonathon Finer, *Iraq Plans to Pursue Insurgents’ Allies*, WASH. POST, May 18, 2005, at A10 (“The Iraqi government said Tuesday that it would push for new laws to punish people who provide logistical support for networks of insurgents, aiming to toughen its stance after a surge of violence that has claimed 450 Iraqi lives in two weeks. The new laws would also make it a crime not to share information about insurgent networks with the government.”). This, yet again, demonstrates the view of many Iraqis (including Iraqi judges) that the lives of American, non-Moslems are worth less than Iraqi ones, and therefore American lives warrant less protection under the law.

218. Admittedly it is difficult to mistake dead Iraqi suicide bombers for dead suicide bombers of other Middle Eastern countries, absent scientific tests based on the individual’s DNA. al-Taiee & MacDonald, *supra* note 195 (“little is known for certain about the perpetrators of the 100 or so suicide bombings in Iraq during the past three months.”).

219. Greg Miller & Tyler Marshall, *More Iraqis Lured to Al Qaeda Group*, L.A. TIMES, Sept. 16, 2005, at A1 (“[O]fficials said foreign fighters accounted for less than 10% of the insurgents in Iraq.”).

220. See Noah Feldman, *The Sunni Angle*, WALL ST. J., Nov. 16, 2004, at A24 (“The U.S. is fighting not one but two distinct insurgencies. The more numerous is a mobilized movement of Iraqi Sunnis, some of them former Baath party members, and all beneficiaries of Saddam Hussein’s pro-Sunni policies.”); Hendren, *supra* note 57, at 1 (“The battle for the city of Fallujah is giving U.S. military commanders some insight into this country’s insurgency, painting a portrait of a home-grown uprising dominated by Iraqis, not foreign fighters.”).

221. Take, for example, Mohammed Sharkawa, a Baathist and former member of the Iraqi Republican Guard who allied himself with Abu Musab al-Zarqawi. See Oppel, *supra* note 216, at A1 (“Mr. Sharkawa, a former Republican Guard member and onetime cigarette smuggler, commanded a force of several hundred insurgents and was directly responsible for at least 50 car bombings and 150 beheadings and assassinations in recent months. . .”).

they cannot admit the culpability of Iraqis. This bias prevents them from judging terrorism cases impartially, as they operate under the assumption that most terrorists—even those who attack U.S. soldiers—are not Iraqis. Thus, they reason, because the U.S. soldiers arrest mostly Iraqis for these crimes, the U.S. soldiers must generally be mistaken or are lying.

Claims of a foreigner-dominated insurgency make it easier for anti-U.S. CCCI judges to hide the animus behind many of their decisions with the most common tale told by Iraqi defendants, that an unknown, foreign third-party—who inevitably always escaped—was responsible for the attacks charged to the defendants, and that the defendants were mistakenly arrested by ignorant U.S. soldiers who could not distinguish an Iraqi from other Arab foreigners.²²²

Nationalist impulses are also affecting judges who see the insurgency as an act of nationalist pride or defense of the national honor in the face of foreign invaders. Such attitudes could easily justify acts of terror simply by labeling them acts of national self-defense or efforts at liberation.²²³ It is for reasons like these that commentators argue against permitting indigenous courts from adjudicating cases affecting the security of an occupying power.

[I]t is probably this element of necessity that explains and justifies, as a right, the power of jurisdiction conceded within an occupied territory to the tribunals of the occupant. Indeed, the occupying power could not very well entrust the task of its protection to foreign authorities. They would not provide adequate guaranties of impartiality. Therefore, it is absolutely necessary that the occupant's own tribunals, exclusively, shall assure the repression of acts tending to impair . . . the security of that Army and its individual members.²²⁴

222. Many non-Iraqi terrorists are not tried in the CCCI, denying the Iraqi judges the opportunity to see that the United States prosecuted foreign terrorists when they were responsible for atrocities, and they were not just picking on hapless Iraqis who just happened to be at the wrong place at the wrong time.

223. If Italian judges can whitewash terrorist acts by labeling them as part of the struggle for independence, then Iraqi judges certainly can too, especially since Iraqi judges may have greater affinity for the individual terrorists. *Terror Charges Against 5 Dropped In Italy*, N.Y. TIMES, Jan. 26, 2005, at A9:

An Italian judge was sharply criticized Tuesday after she dismissed terrorism charges against five North Africans accused of being Islamic militants. The judge, Clementina Forleo, ruled Monday evening in Milan that the evidence against three Tunisians and two Moroccans arrested on charges of recruiting suicide bombers and supplying support to Islamic terror organizations for operations in Iraq constituted wartime "guerrilla" activities, not terrorism. "Historically, the activity of the cells in question coincided with the United States attack on Iraq," said a statement explaining the decision. . . .

Id.

224. NOBLEMAN, *supra* note 74, at 10–11 (quoting RAYMOND ROBIN, *DES OCCUPATIONS MILITAIRES EN DEHORS DES OCCUPATIONS DE GUERRE* 153–54 (1913)).

Although the pro-Iraqi nationalism demonstrated by CCCI judges may prove useful in cementing rival tribes and sects in a divisive country already in the throes of civil war,²²⁵ it is counterproductive to efforts at determining guilt or innocence and makes the administration of criminal justice impossible.²²⁶ So far, it has led to acquittals in one-third to one-half of cases.²²⁷ But this tells only part of the dismal story: the CCCI hands down extremely lenient sentences to the one-half to two-thirds of defendants whom they do convict. Worse still is the fact that legions of terrorists are never even brought before the CCCI because U.S. prosecutors know they don't stand a chance in hell of prevailing there.²²⁸ A few examples demonstrate the problem.

Take the case of Ziyad Hasson. On December 3, 2004, Hassan detonated an IED under a U.S. Humvee, killing Army Staff Sergeant Harry E. Irizarry, a father of four who originally hailed from the Bronx.²²⁹ Besides gruesomely murdering Irizarry, the attack severely wounded three other soldiers:

The calm was broken by a thunderous crack that lifted the armored vehicle off the ground. A rush of shrapnel and hot smoke came shooting up through the floor and launched [Army medic John L.] Cushman out onto the ground. With his jaw broken and his face

225. Iraq's first king, Faisal I, described Iraqis this way: "There is still—and I say this with a heart full of sorrow—no Iraqi people, but an unimaginable mass of human beings devoid of any patriotic ideas, imbued with religious traditions and absurdities, prone to anarchy and perpetually ready to rise against any government whatsoever."

Fred Barnes, *The Bumpy Road to Democracy in Iraq*, WEEKLY STANDARD, Apr. 5, 2004, available at http://www.weeklystandard.com/Utilities/printer_preview.asp?idArticle=3919&R=9DE816979. Evan Smith, *The World According to Bob Inman*, TEXAS MONTHLY, Mar. 2004, at 144 ("I looked at Iraq as having a great potential for being like Yugoslavia. You've got Sunnis, Kurds, and Shiites. It could easily break apart on religious and ethnic grounds. It's going to take strong leadership from a strong central government to keep that from occurring.")

226. Judicial decisions motivated by loyalty to insurgents, on the other hand, are beneficial to mediocre or incompetent defense attorneys, since their chances of prevailing in the slanted proceedings of the CCCI are excellent, and legal acumen is by no means a prerequisite for success.

227. Grossman, *supra* note 16 ("Across Iraq, the central court has convicted just over half of the 1,301 alleged insurgents tried since the tribunal's October 2003 inception, according to the coalition Web site."); Finer & Mosher, *supra* note 26 ("Of the 490 U.S.-held detainees brought before the court, roughly two-thirds have been convicted, according to military data."). Multinational Force Iraq posts the number of convictions on its website. It does not post the sentences handed down. See Multinational Force—Iraq, Central Criminal Court of Iraq, <http://www.mnf-iraq.com/TF134/Trials.htm>.

228. Grossman, *supra* note 16 (noting that prosecutors sometimes do not even initiate cases because they know they know that the CCCI will dismiss the cases or acquit the defendants).

229. Finer & Mosher, *supra* note 26; Weaver, *supra* note 136.

bleeding from deep lacerations, Cushman rushed back toward the Humvee. 'I looked in and saw SSG Irizarry's right arm mostly missing and his legs dangling by skin from the knees down,' . . . Sgt. Adrian Melendez, who was also riding in the vehicle, suffered two broken vertebrae in the attack. Spec. Todd Reed, the Humvee driver, had fractures in both legs.²³⁰

The evidence showed that Hassan possessed and utilized a powerful explosive device to commit a terroristic attack that resulted in the murder of one soldier and the attempted murder and murder of three others. Yet even after hearing this evidence and viewing pictures of the destroyed Humvee and the lethal carnage it produce, the CCCI convicted Hassan of murdering Irizarry but sentenced him to only fifteen years of imprisonment.²³¹

In contrast, when the CCCI has been presented with defendants accused of attacking Iraqi officials, the court has acted swiftly and strongly, as noted above in the case involving three defendants accused of murdering a senior intelligence official in the Iraqi interior ministry. In that case, it took the CCCI judge just two hours to find them guilty and sentence them to death by hanging.²³² The Iraqi interim government promptly carried out the sentences.²³³ This disparate treatment of cases involving Iraqi victims unequivocally demonstrates that CCCI decisions are in part influenced by sentiments of nationalism and the judge's loyalty to their countrymen.²³⁴

230. Finer & Mosher, *supra* note 27.

231. Weaver, *supra* note 136 ("On May 25, [2005] Ziyad got 15 years by this new justice system where U.S. military lawyers are working with Iraqi prosecutors and judges to punish crimes against U.S. and other coalition forces.").

232. Fleishman, *supra* note 130 (describing the CCCI's sentence of death by hanging for three defendant accused of murdering an Iraqi official and a sentence of ten years of imprisonment for an accomplice"); *see also* Glanz & Tavernise, *supra* note 130 ("Three men convicted of dozens of rapes, kidnappings and killings in the southern city of Kut, in one case displaying the eyeballs of an Iraqi soldier to obtain payment for his murder, will be put to death by hanging in the first execution by Iraq's civilian courts . . ."); MacDonald, *supra* note 130.

In May, amid a stepped up suicide bombing campaign, Iraqi criminal courts passed death sentences on several Iraqis convicted of manufacturing bombs. Mohamed Khalaf al-Jumayli, chief prosecutor at the Central Criminal Court, confirmed that the men have exhausted all of their appeals in the court system. All that remains is for President Jalal Talabani to sign their death warrants.

233. Darangahi & Ahmed, *supra* note 162, at A3.

The transitional Iraqi government executed three convicted murders Thursday morning [September 1, 2005] in the first application of the death penalty since the fall of Saddam Hussein's regime. Bayan Ahmed Said, Uday Dawood Salman and Dhahar Jasim Hasan were hanged at 10 a.m. in Baghdad . . . The men were found guilty of murder, rape and kidnapping in southeastern Iraq.

234. Similarly, there has been on popular push by Iraqis to punish insurgents who have attacked Americans, but as the number of Iraqi deaths has mounted, they

Regardless of genesis and nature of each judge's biases, Iraqi judges encounter accusations against their fellow countrymen with a strong dose of skepticism, readily believing Arabic-speaking, Iraqi defendants over English-speaking U.S. soldiers.²³⁵ This radical skepticism, based on irrational prejudices, sometimes cannot be overcome even by overwhelming evidence²³⁶ of the defendant's guilt, which makes "trials" before such judges an exercise in futility. Consistent with the prejudices of the CCCI judges, when the CCCI announce one of its frequent acquittals of Iraqi terrorists, it is common for the security personnel who haunt the spectators' gallery to erupt in boisterous cheers of triumph, much to the chagrin of the U.S. soldiers who had traversed the dangerous byways of Iraq to offer their testimony against the now-acquitted insurgent.²³⁷ At worst, the deportment of the security personnel is further evidence that insurgents have so thoroughly infiltrated the Iraqi security forces and are so sure of their continued tenure—the CCCI judges often are relatives or arranged for their hiring—that they are willing to flaunt their anti-U.S. sympathies.²³⁸

put forth proposals to use the death penalty to punish terrorists who attack Iraqis. See Noam N. Leavey, *Iraq may Expand Death Penalty*, L.A. TIMES, Sept. 14, 2005, at A4 ("Struggling to fight back against insurgents roiling the country, Iraqi lawmakers have begun to debate sweeping anti-terrorism legislation that could significantly expand use of the death penalty.").

235. Certainly some difficulties in prosecuting Iraqis arose from the problems associated with translating the testimony of U.S. witnesses into Arabic, and the judge's questions into English.

236. See *Always Prickly, Sometimes Paranoid, Occasionally Pragmatic*, THE ECONOMIST, Aug. 7, 2004, at 47 ("Suspicion of America runs deep in the Arab world.").

237. The Iraqi court security personnel, undoubtedly infiltrated by the insurgency, posed a greater danger to U.S. forces when they would attempt to sneak family members and friends of the insurgents into the prisoner holding area at the CCCI courthouse, which was under the joint control of U.S. forces and the Iraqis.

238. Mohamad Bazzi, *Myth or Master Evader*, NEWSDAY, Dec. 21, 2004, at A4 ("[G]uerrillas have infiltrated nearly all branches of the Iraqi government"); Arnaud de Borchgrave, *Iran on Points?*, WASH. TIMES, Aug. 11, 2005, at A15 [hereinafter Borchgrave, *Iran*] ("Saddam Hussein loyalists and jihadis from neighboring countries have penetrated the new Iraqi military and intelligence service."); See Arnaud de Borchgrave, *Think Again . . . Give Chaos a Chance*, WASH. TIMES, Oct. 3, 2005, at A16 [hereinafter Borchgrave, *Think Again*] ("Iraq's National Security Advisor Mowaffak al-Rubaie told the BBC, 'Iraqi security forces in general, and the police in particular, in many parts of Iraq, I have to admit, have been penetrated by some of the insurgents, some of the terrorists as well.'"); Editorial, *Corruption in Baghdad?*, WALL ST. J., Jan. 25, 2005, at A16 ("[M]any of the security forces . . . have proven to be ineffective at best, and in some cases penetrated by enemy informers"); Yochi J. Dreazen, *On Baghdad Beat, Policeman Dodges Bombs, Turncoats*, WALL ST. J. Aug. 26, 2005, at A1 (discussing an Iraqi police officer in Baghdad who was in a shootout with a 'turncoat police officer' from the insurgency who was stealing weapons for the terrorists); Dexter Filkins, *Low Voting Rate Risks Isolation for Sunni Iraqis*, N.Y. TIMES, Feb. 3, 2005, at A1 ("[T]he Ministry of the Interior has been infiltrated by former Baathists.") (quoting Mowaffak al-Rubiae, a member of the Shiite coalition); Donna Leinwand, *Some Iraqi Guards As Bad as Prisoners, MPs Say*, USA TODAY, July 1, 2004, at A4 (discussing the

Perhaps because they were students of European history and saw firsthand the effects of nationalism and ethnic rivalries, the Framers of the U.S. Constitution were well-aware of these phenomena and the divisiveness they could engender. They took preventive action, for example, in the Establishment and Free Exercise Clauses of the First Amendment, by ensuring that the national government would not align itself with any of the competing religions that existed in the United States nor punish one set of religious adherents for their beliefs.²³⁹ Similarly, in Article III, the Framers recognized that regional and state affinities could affect judges and cause them to alter their decisions when litigants from the judge's own state are pitted against those of another state or country.²⁴⁰ Thus, they sought to ameliorate the effect of this partisanship by creating diversity jurisdiction to provide an alternative and ostensibly neutral forum untainted by whatever favoritism might exist in a state court.²⁴¹ Similarly, the Sixth Amendment guarantees a criminal defendant the right to an impartial jury, one not infected by hatred or prejudice.²⁴² Later, in

belief that Saddam loyalists have infiltrated the ranks of Iraqi prison guards and that they are "very corrupt and are known former intelligence officers and Fedayeen members"); John J. Lumpkin, *Poor Recruiting Plagues Police*, WASH. TIMES, July 26, 2005, at A19 (noting that Iraq's police force has allowed insurgents to join); MacDonald, *supra* note 130, at 6 (noting the fear that the Iraqi judiciary, including the Iraqi Special Tribunal, may have links to the Baath party); Richard A. Oppel Jr. & James Glanz, *U.S. Officials Say Iraq's Forces Founder Under Rebel Assaults*, N.Y. TIMES, Nov. 30, 2004, at A1 (noting that Iraqi security forces are "unreliable because of corruption, desertion or infiltration"); Eric Schmitt, *In Iraq, U.S. Officials Cite Obstacles to Victory*, N.Y. TIMES, Oct. 30, 2004, at 1 (noting fears that Iraqi security forces have been penetrated by spies for the insurgents); Doug Struck, *'My Hands Are Not Stained With Blood'*, WASH. POST, Feb. 3, 2005, at A21 ("We have information the Baathists and some former members of the regime have returned to their jobs and are leading the insurgency in the country. The security forces of the government are infiltrated.") (quoting Jawad Maliki, Dawa party members and deputy president of the Commission for De-Baathification).

Beyond their covert infiltration, Sunni clerics have openly issued a *fatwa* for insurgents to further infiltrate Iraq's security services. See Yaroslav Trofimov, *Iraqi Lawmakers Spar Over Role of Ex-Baathists*, WALL ST. J., Apr. 7, 2005, at A12 ("Shiite suspicions were especially piqued by an unusual *fatwa* issued Friday by key members of the Sunni Muslim Scholars Association, the influential clerical body that often extends rhetorical and moral support to the insurgency. The *fatwa* urges the faithful to join U.S.-trained Iraqi military and police forces while abstaining from aid to the occupiers—a call many interpret as an order to take over the security forces from within."); Oppel, Jr. & Glanz, *supra*.

239. U.S. CONST. amend. I.

240. *Id.* Art. III, § 2, cl. 1.

241. The purpose of Article III's creation of diversity jurisdiction is "to provide a federal forum for important disputes where state courts might favor, or be perceived as favoring, home-state litigants." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611, 2618 (2005).

242. U.S. CONST. amend. VI. See *Connors v. United States*, 158 U.S. 408, 413 (1895) (A defendant is "entitled to be tried by an impartial jury; that is, by jurors who

the Equal Protection and Privileges and Immunities Clauses of the Fourteenth Amendment, the Framers of that amendment required the states to treat their citizens equal under the law, regardless of the language they spoke, their race, ethnicity, or state of origin.²⁴³

U.S. bureaucrats who elected to utilize Iraqi courts—staffed by Iraqi judges applying Iraqi law—to prosecute Iraqi terrorists who attack U.S. soldiers could have learned something from the Framers. Unfortunately, they greatly underestimated the favoritism that Iraqi judges would show to defendants who share the judges' tribal, cultural, religious, linguistic, ethnic, and nationalistic identity.²⁴⁴

B. Baathist Affinities

Like most insurgents,²⁴⁵ almost all Iraqi judges were once card-carrying members of the Baath party.²⁴⁶ Membership in the party was the only way to obtain coveted judicial positions in the former regime,²⁴⁷ and judicial experience was required for a judicial appointment by the Coalition. As in Nazi Germany, many party members sought admission to the organization primarily to secure employment, advance their careers, or provide a better life for their children.²⁴⁸ Many Baathists were not true believers in Baathism any

had no bias or prejudice that would prevent them from returning a verdict according to the law and evidence.”).

243. U.S. CONST. amend. XIV, § 1.

244. O’Leary & Eklund, *supra* note 28, at 91–92 (noting the ethnic, tribal, and linguistic affinities at play in Iraq).

245. Thom Shanker & Eric Schmitt, *The Insurgency: Falluja Data Said to Pressure Guerrillas*, N.Y. TIMES, Dec. 3, 2004, at A12 (“Documents and computers found in Falluja are providing clues to the identity of home-grown opponents of the new Iraqi government, mostly former Baathists.”).

246. See MacDonald, *supra* note 130 (According to a U.S. official, “practically every judge who served in the Iraqi judicial system under Hussein was a member of the Baath party. You had to be, at least nominally . . .”).

247. According to Judge Ra’ad Juhi—an investigative judge of the CCCI and the chief investigative judge of the Iraqi Special Tribunal—to get into the Judiciary Institute . . . you needed ‘to be recommended by the Baath offices in the neighborhood you lived in.’” Caryle Murphy, *Hussein Judge Steps Out of the Shadows*, WASH. POST, Mar. 22, 2005, at A12; see also John F. Burns, *Hussein Tribunal Shaken by Chalabi’s Bid to Replace Staff*, N.Y. TIMES, July 20, 2005, at A9 (noting that during Saddam’s reign, “all prosecutors, judges and senior court officials were required to join the Baath Party”). The Chief Justice of Iraq’s Federal Supreme Court, Madhat Mahmood, observed that he served as a judge without being a member of the Baath Party, but that his refusal to join the party doomed any chance of promotion. Rick Jervis, *For Iraq’s Top Judge, Security Tops the Docket*, USA TODAY, July 7, 2005, at A6 (“[Judge] Mahmood started as a judicial investigator in 1960 and became a judge in 1967. But when he refused to join the Baath Party, his promotions stopped, he said.”).

248. Gaiutra Bahadur, *Biased Hiring Thwarts New Iraqi Graduates*, PHILA. INQUIRER, Apr. 25, 2005, at A3 (“Under Saddam Hussein’s grip, the rules for young and ambitious Iraqis were clear: Join the Baath Party if you want a future.”).

more than some opportunistic Nazis adhered to the Nazi creed.²⁴⁹ It is not easy to separate the sheep from the goats, however.

After the demise of the Nazi and Baath parties, many who could plausibly claim that they only sought membership for purposes of economic advancement—and show that they were not dedicated zealots—did so.²⁵⁰ But it is hard to gauge the accuracy of these self-serving claims, especially when they are made by Iraqi judges.²⁵¹ The Coalition required judges to abjure their Baath Party affiliation, but judges' words do not always conform to their inner beliefs. To paraphrase Shakespeare, oftentimes the false face doth hide what the false heart doth know.²⁵²

According to most reports, the primary leaders and the majority of participants in the Iraqi insurgency are Baath party members and loyalists,²⁵³ many of whom seek the restoration of the former regime

249. Murphy, *supra* note 246, at 12 (“But registering as a party member and being an activist were not the same, [Judge Ra’ad] Juhi said, adding that many Iraqis became nominal members to avoid the scrutiny and persecution that could make life what he called ‘a big hell.’”); ROBERT PERITO, U.S. INST. OF PEACE SPECIAL REPORT 104, ESTABLISHING THE RULE OF LAW IN IRAQ 8 (2003), available at <http://www.usip.pubs/specialreports/sr104.pdf> (last visited March 2005) (“The Baath Party has a total affiliation of 1 to 1.5 million, but only 50,000 are ‘full members.’ Most government officials, military officers, and senior administrators are party members for convenience rather than because of ideological commitment. Party membership is required to hold office, for promotions, to obtain economic advantages, and to avoid harassment.”).

250. See, e.g., Dreazen, *supra* note 237, at A1 (discussing an Iraqi policeman who claims he joined the Baath Party “solely to keep his job”).

251. For a slightly contrary view, see Williams, *supra* note 21, at 231 (“Under Saddam, membership in the Ba’ath Party was a prerequisite for advancement in the government. Nevertheless, it was possible to draw a distinction between those who participated in the party solely to ensure a livelihood and those who were zealous Ba’athists.”). Williams argues that service in the judiciary was not an avenue for quick advancement in the Baath Party; it required the investment of substantial time and effort for which one could expect little power. *Id.* True Baathist zealots, argues Williams, would have chosen a different career path. *Id.* This reasoning, while enjoying some surface appeal and a minimum of validity, fails to take into consideration that zealous Baathists might pursue a judicial career, for example, because: (1) it was part of a family tradition or (2) it entailed the potential for obtaining bribes from wealthy litigants, and thus in the long run greater wealth than, say, military service would entail.

252. WILLIAM SHAKESPEARE, *MACBETH* act 1, sc. 7, ll. 81–82 (A.R. Braunmiller ed., Cambridge Univ. Press 1997).

253. Khalid al-Ansary et al., *Ex-Hussein Aides to Hear First Charges Next Week*, N.Y. TIMES, Dec. 15, 2004, at A18 (relating that a suicide car bomber possessed in his vehicle “written materials praising Mr. Hussein and his rule”); John F. Burns, *After Falluja, U.S. Troops Fight A New Battle Just As Important, And Just as Tough*, N.Y. TIMES, Nov. 28, 2004, at 24 (“Marine intelligence officers say there are 400 to 500 ‘core leaders’ of the Sunni insurgency in the area, many of them former ranking members of Mr. Hussein’s Baath Party or senior officers in his military.”); see Fassih, *supra* note 209, at A12 (“Iraqis—particularly Sunni Arab extremists and members of the former ruling Baathist party—account for the majority of the violence...”); Noah Feldman, *supra* note 219 (“The U.S. is fighting not one but two distinct insurgencies. The more

or at least instability sufficient to prevent effective control of former Baathists.²⁵⁴ To achieve this goal or simply to thwart the successor government, the party and its leadership generously finances the insurgency.²⁵⁵ Despite the overwhelming poverty of their fellow Iraqis, they seem to have no shortage of money.²⁵⁶ They provide the

numerous is a mobilized movement of Iraqi Sunnis, some of them former Baath party members, and all beneficiaries of Saddam Hussein's pro-Sunni policies."); Hendren, *supra* note 57 ("The overwhelming majority of insurgents, several senior commanders said, are drawn from the tens of thousands of former government employees whose sympathies lie with the toppled regime of Saddam Hussein . . ."); Mazzetti, *supra* note 205 ("U.S. military officials said the core of the insurgency in Iraq was—and always had been—Hussein's fiercest loyalists, who melted into Iraq's urban landscape when the war began in March 2003."); Patrick J. McDonnell, *Troops Shrink Insurgents' Turf*, L.A. TIMES, Nov. 13, 2004, at A1 ("[M]ost of those who capitulate are Iraqis, said [Col. Craig] Tucker . . ."); Richard A. Opper, Jr., *In Northern Iraq, The Insurgency Has Two Faces, Secular and Jihad, But A Common Goal*, N.Y. TIMES, Dec. 19, 2004, § 1, at 30 (noting that the insurgency has vast amount of money at its disposal—"mostly cash that is driven by car or truck into the country from Syria . . . where scores of Baath Party officials and Saddam apparatchiks fled after the American invasion."); Thomas E. Ricks, *General: Iraqi Insurgents Directed From Syria*, WASH. POST, Dec. 17, 2004, at A29 [hereinafter Ricks, *General*] ("A top Army general said yesterday that the Iraqi insurgency was being run in part by a former senior Iraqi Baath Party officials operating in Syria..."); Thomas E. Ricks, *Rebels Aided Allies in Syria, U.S. Says*, WASH. POST, Dec. 8, 2004 at A1 [hereinafter Ricks, *Rebels Aided*] ("U.S. military intelligence officials have concluded that the Iraqi insurgency is being directed to a greater degree than previously recognized from Syria, where they said former Saddam Hussein loyalist have found sanctuary and are channeling money and other support to those fighting the established government."); Even the non-Baathist terrorist cells motivated primarily by Islamic beliefs obtain succor and support from the Baathists, perhaps based on the principle that "the enemy of my enemy is my friend." See Mohamad Bazzi, *supra* note 237, at A4 (Islamic terrorist Abu Musab al-Zarqawi "is likely moving around central and northern Iraq alone, finding shelter in Sunni Muslim areas dominated by former members of Saddam Hussein's Baathist regime").

254. There are many Baathists in the police and security services as well, and apparently they still use the same old Baathists tactics. See Doug Struck, *Torture in Iraq Still Routine, Report Says*, WASH. POST, Jan. 25, 2005, at A10 ("Iraqi police, jailers, and intelligence agents, many of them holding the same jobs they had under Hussein, are 'committing systematic torture and other abuses' of detainees. . .").

255. See Douglas Jehl, *U.S. Ties Funds for Insurgents to 4 Nephews of Hussein*, N.Y. TIMES, July 22, 2005, at A10 ("The Treasury Department identified four nephews of Saddam Hussein on Thursday who it said had operated from Syria and played significant roles in providing money, weapons, explosives and other support to the anti-American insurgency in Iraq.").

256. John F. Burns, *Marines' Raid Underline Push in Crucial Area*, N.Y. TIMES, Dec. 6, 2004, at 1 (noting that Mahmoud al-Janabi, a Baathist and strong supporter of Saddam Hussein, has been "identified by the American forces as a financier of the insurgency"); Bradley Graham & Walter Pincus, *U.S. Hopes to Divide Insurgency*, WASH. POST, Oct. 31, 2004, at A1 ("One senior defense official said more than a dozen 'financial people' from Hussein's government have been identified funneling money from Syria to insurgents in Iraq."); Mazzetti, *supra* note 205 ("[T]he traffic from Syria is largely Iraqi Baathists who escaped after the U.S.-led invasion and couriers brining in money from former members of Hussein's government."); see Ricks, *General*, *supra* note 252 (quoting General George W. Casey, Jr.'s assertion that Baathists and former members of Saddam Hussein's government are funding the insurgency from Syria); Ricks, *Rebels Aided*, *supra* note 252 ("Based on information gathered during the recent

capital used to purchase the weapons, explosives, and foot soldiers used to kill U.S. soldiers and members of the new Iraqi government.²⁵⁷ “All you need to make the insurgency go is money,”²⁵⁸ and there appears to be no shortage of currency to pay petty criminals, to emplace improvised bombs,²⁵⁹ or to bribe government officials, including judges. In light of the abundant financing available to insurgents and their demonstrated infiltration of Iraqi military, intelligence and security forces, it is almost a certainty that the Baath party has bribed or infiltrated the Iraqi judiciary. This includes the CCCI judiciary, which more than any other Iraqi judicial body has the power to assist or thwart the insurgents.²⁶⁰

fighting in Fallujah, Baghdad and elsewhere in the Sunni Triangle, the officials said that a handful of senior Iraqi Baathists operating in Syria are collecting money from private sources in Saudi Arabia and Europe and turning it over to the insurgency.”); Carla Ann Robbins & Greg Jaffe, *U.S. Sees Effort By Syria to Control Border With Iraq*, WALL ST. J., Dec. 10, 2004, at A3 (“Damascus has provided haven for former supporters of Saddam Hussein, some of whom are believed to be financing and helping direct the insurgency. . . .”); Alex Rodriguez, *Fear, Violence Reign on Haifa Street*, CHICAGO TRIB., Nov. 7, 2004, at 1 (noting that the insurgency is composed of “Sunni radicals, Syrian fighters and former regime henchmen”); Shanker & Schmitt, *supra* note 244 (“The insurgency consists of as many as 50 militant cells that draw significant money from an underground financial network run by former Baath Party leaders and Saddam Hussein’s relatives, the officials say.”); The Iranian theocratic government also funds and supports elements of the insurgency. See Ellen Knickmeyer & Salih Saif Aldin, *U.S. Raid Kills Family North of Baghdad*, WASH. POST, Jan. 4, 2006, at A12 (noting the smuggling of weapons and guerillas into Iraq from Iran).

257. Shanker & Schmitt, *supra* note 244.

258. Lowry, *supra* note 55, at 30 (internal quotations omitted); see also Shaun Waterman, *Saddam’s Cash May Fund Rebels*, WASH. TIMES, Nov. 15, 2004, at 7 (noting CIA official Charles Duelfer’s plan to “testify about ‘how Saddam Hussein manipulated the [Oil-for-Food] program . . . to generate billions of dollars of illicit funds, and procure conventional weapons. . . .’”).

259. Burns, *supra* note 252 (“In many cases, American officers say, captured men have told them that they were paid sums ranging from \$20 to \$200 to stage ambushes or plant explosives that are detonated by ‘part-time triggermen,’ many of them also paid.”); Opper, Jr., *supra* note 252 (“It used to cost just \$50 to hire an Iraqi youth to fire a rocket-propelled grenade at American troops; it now costs \$100 to \$200”); Rodriguez, *supra* note 253 (“Aware of the poverty burdening many Iraqis, they enlist new recruits with the lure of hundreds or even thousands of dollars for the placement of a roadside bomb or the killing of an American soldier.”); see Richard Whittle, *Purpose of Iraqi Insurgency Questioned*, DALLAS MORNING NEWS, Dec. 20, 2004, at 2A (“You can hire somebody for a hundred bucks and say, ‘Plant this IED.’”).

260. Borchgrave, *Iran*, *supra* note 237 (“Saddam Hussein loyalists and jihadists from neighboring countries have penetrated the new Iraqi military and intelligence service.”). There are allegations that the Baath Party has even infiltrated the Iraqi Special Tribunal, some judges of which were members of the Baath Party under Saddam’s reign. See John F. Burns, *Hussein Jousts with Iraqi Judge Over His Rights In a Court Hearing*, N.Y. TIMES, July 22, 2005, at A10 (discussing allegations “that the tribunal has been infiltrated by former members of Mr. Hussein’s ruling Baath Party, and that they plan to spare the former Iraqi leaders, in party by delaying their trials”); see also Danny Hakim & Jeremy W. Peters, *Praise and Hard Questions for Iraqi Prime Minister in Michigan*, N.Y. TIMES, Sept. 14, 2005, at A18 (Prime Minister Ibrahim al-Jaafa admits “that there were very likely [some] hostile elements even inside the

Unfortunately, CCCI decisions usually assist the terrorists, perhaps because of the orders or cash flowing from Baathist leaders of the insurgency. Or perhaps it is simply a matter of loyalty to Baathism, insofar as most Baathists do not consider violent opposition to the Coalition a crime.²⁶¹ Rather, they view such conduct as commendable acts of patriotism and therefore perceive the insurgents as martyrs for the cause, much as the Leipzig judges viewed their fellow Germans who fought against the Allies in World War I.²⁶² In the words of one Iraqi police cadet: "Attacks on the American Army are attacks of resistance" and not terrorism.²⁶³ Under this worldview, violence constitutes terrorism only when Iraqi civilians are targeted.²⁶⁴ Expecting similar conduct of German judges following World War II, Justice Robert Jackson ensured that only non-Germans served as judicial officers in the war crimes trials.²⁶⁵ Unfortunately there was no Justice Jackson around during the liberation of Iraq.

The CCCI judges obviously retain at least some Baathist leanings,²⁶⁶ especially since the Baath party was and perhaps still is "part of the fabric of Iraqi society, a complex, interrelated pyramid of economic, political, religious, and tribal links."²⁶⁷ At best, some CCCI judges conduct themselves in a way that suggests they approve of the Baathist-instigated insurgency.²⁶⁸ At worst, some of their rulings suggest that many of the judges are simply puppets of the remnants

different institutions within the government."); *Ties to bin Laden Alleged*, KANSAS CITY STAR, Aug. 12, 2005, at A17 (noting that the Iraqi-born Tarik A. Hamdi, a U.S. citizen with ties to Osama bin Laden, works for the Iraqi Foreign Ministry in Turkey).

261. Drew Brown, *Iraq Poll: 47% Back Attacks On U.S. Troops*, PHILA. INQUIRER, Jan. 31, 2006, at A2 ("A new poll found that nearly half of Iraqis approve of attacks on U.S.-led forces Among Sunni Muslims, 88 percent said they approved of the attacks. That approval was found among 41 percent of Shiite Muslims and 16 percent of Kurds.").

262. JOHN P. KENNY, MORAL ASPECTS OF NUREMBERG 5 (1949) ("They looked upon the accused as martyrs"); Freeman, *supra* note 131 (discussing the loyalty that the CCCI judges have to the insurgents).

263. Rana Sabbagh-Gargour & Stephen Farrell, *Police Cadets Betray Torn Loyalty*, LONDON TIMES, June 30, 2005, at 36.

264. *Id.*

265. At Nuremberg, Justice Jackson recognized the stupidity of permitting German judges try the German war criminals. EUGENE C. GERHART, AMERICA'S ADVOCATE: ROBERT H. JACKSON 314 (1958) ("There was obviously no point in trying the German leaders before a German court; the Leipzig trials in 1921 had proved the folly of that course.").

266. Freeman, *supra* note 131 ("Some Shia judges have even complained privately that their Sunni colleagues are giving out light sentences to Sunni defendants to show a degree of sympathy with the insurgents.").

267. John Lee Anderson, *Out on the Street*, NEW YORKER, Nov. 15, 2004, at 72.

268. *Id.* at 74 (noting that Baathist recruiters "helped to build the insurgency"); Mazzetti, *supra* note 205; see also Shanker & Schmitt, *supra* note 244 ("Documents and computers found in Falluja are providing clues to the identity of home-grown opponents of the new Iraqi government, mostly former Baathists.").

of the Baath party, as in the days when the Baathists openly controlled Iraq.²⁶⁹

As discussed, attacks on U.S. forces are being funded and coordinated by members of the party.²⁷⁰ Indeed, cognizant that they could never win a conventional war with the United States, plans for the insurgency were probably hatched by Saddam and the Baathists even before the invasion began.²⁷¹ Religious elements of the

269. Judicial independence is a foreign concept to totalitarian philosophies. Thus, it is common for leftist parties to dictate to the judiciary decisions in particular cases, and the Baath party, though exceptionally ruthless, was no exception to this rule. Philip P. Pan, *In China, Turning the Law Into the People's Protector*, WASH. POST, Dec. 28, 2004, at A1 (discussing Communist party control of Chinese courts); Mary Anastasia O'Grady, *Chavez's Tyranny Emboldens Nicaragua's Ortega*, WALL ST. J., Dec. 24, 2004, at A11 (discussing the Sandinista party's control of the Nicaraguan judiciary).

270. The Iranian government is also responsible for some of the attacks:

[T]op Iraqi police officials in the southern city of Basra said an Iranian citizen was among three men detained in a raid Sunday that uncovered a large amount of arms and explosives. One of the officials said some of the seized ordnance had markings showing it had been made in Iran. ***

U.S. Ambassador Zalmay Khalilzad recently warned Iran against sending weapons into Iraq. A top U.S. military official, who spoke on condition that he not be identified further, had said repeatedly that weapons and guerrillas were entering Iraq from Iran.

Knickmeyer & Aldin, *supra* note 255. A destabilized Iraq is a boon for Iran insofar as it: (1) precludes Iraq from posing a military threat to Iran; (2) ties up U.S. forces that otherwise could be focused on Iran and its nuclear program; (3) increases the cost, while decreasing the apparent benefits, of U.S. intervention in Iraq, thereby discouraging U.S. support for future military action against Iran; (4) makes Iraq less desirable as a staging area for any possible U.S. military strikes against Iran; (5) permits Iranian government officials to appear benevolent as they offer aid, and the entangling alliances that this aid entails, to the Iraqi government; (6) gives the Iranian government bargaining power in any subsequent negotiations with Iraq; and (7) appears to demonstrate U.S. ineffectiveness, particularly against terrorists purportedly guided by Allah.

271. John F. Burns, *Iraq's Election, Its Outcome Murky, Is Seen as a 'Jungle of Ambiguity'*, N.Y. TIMES, Dec. 18, 2004, at A8 (U.S. officials believe that Saddam Hussein "laid the groundwork for the insurgency before the March 2003 invasion by ordering the preparation of underground cells, the stashing of large amounts of money and the stocking of extensive weapons caches."); Editorial, *The Enemy in Plain View*, WALL ST. J., Dec. 21, 2004, at A18 ("Saddam and his allies 'appear to have planned for an insurgency before the beginning of Operation Iraqi Freedom.'"); Graham & Pincus, *supra* note 255.

The dominant element of the insurgency . . . is a loose group referred to in U.S. military documents as "Sunni Arab rejectionists," consisting largely of former members of Hussein's government. These are onetime military officers and intelligence agents who U.S. officials have come increasingly to believe had some kind of plan to reorganize into cells and wage an insurgency if U.S. forces invaded.

insurgency—Moslems who see the United States as a Christian nation and therefore the “Great Satan” who must be opposed—similarly receive support from the deposed Baathists.²⁷² Because the largest portion of the insurgency is composed of members of the Baath party and its intelligence organizations,²⁷³ and many of the Baath party still have hopes of restoring a Baathist dictatorship and the privileges it would entail for them,²⁷⁴ it is a foregone conclusion that the Baath party would infiltrate the CCCI judiciary. These judges aid the insurgency by ensuring that insurgents who are prosecuted in their courts receive lenient treatment,²⁷⁵ if not solely out of loyalty to the party, then perhaps out of mixed loyalty to Baathist ideology and Baathist dinars. Ironically, the creation of the CCCI was “an attempt to ensure that corrupt judges don’t let sympathizers of the former regime back on the streets.”²⁷⁶ In this regard, the CCCI has proven to be a dismal failure.

C. Corruption

At least some of the problems with the CCCI may be due to the corruption of Iraq’s judicial system.²⁷⁷ According to Chief Justice

See Sofaer, *supra* note 103 (“Saddam knew he would lose a conventional war, but counted on eventual success through an insurgency inflicting sufficient casualties to undermine international resolve.”).

272. Austin Bay, *Thugs Are Fueled By Arrogance, Fear*, SAN ANTONIO EXPRESS-NEWS, Sept. 23, 2004 (“[T]he Baghdad rumor mill says Baath warlords pay bombers anywhere from \$1,000 to \$3,000 per attack...”); Ghosh, *supra* note 44, at 44 (discussing a former Iraqi Republican Guard officer who trains suicide bombers and who claims to receive financial and moral support from former Baathists); Klein, *supra* note 213, at 49 (“The Baathists had helped move the suicide bombers into the country, according to the U.S. sources, and then provided shelter, support (including automobiles) and coordination for the attacks.”).

273. See Editorial, *Kofi Does It Again*, WALL ST. J., Nov. 8, 2004, at A14 (noting that many members of the terrorist insurgency are “remnants of Saddam’s regime who are trying to restore their Baathist dictatorship.”).

274. Donald E. Walter, *Taking Justice to Iraq*, 9 NEXUS J. OP. 3, 5 (2004) (“The many Baathists, who lived well under Saddam (mostly in the Sunni areas), are thugs who still hope to return to power.”); Hannah Allam, *Two Hussein Aides Called To Account*, PHILADELPHIA INQUIRER, Dec. 19, 2004, at A2 (noting that Iraqi violence is “financed and organized by Saddam’s followers, who still believe he’ll come back to power someday”); The Enemy in Plain View, *supra* note 270 (the insurgency is composed of “members and allies of the old regime who want to restore Sunni Baathist political domination. Or to put it more bluntly, we haven’t yet defeated Saddam Hussein’s regime”).

275. “There are also concerns that former Baathists may be unwilling to stand too strongly against insurgents.” Edward Wong & Erik Eckholm, *Allawi Presses Effort to bring Back Baathists*, N.Y. TIMES, Oct. 13, 2004, at A12. “[F]ormer Baathist who are readmitted to the government without enough precautions can aid the insurgency from within.” *Id.* It is worth noting that, despite lax security and its location outside the “green zone,” the courthouse of the CCCI has never been attacked by insurgents.

276. David Luhnnow, *Overhauling Iraq’s Courts*, WALL ST. J., June 18, 2003, at A14.

Marshall, the greatest scourge ever inflicted on man is a corrupt judiciary.²⁷⁸ That is certainly the case in Iraq, especially with respect to its criminal justice system.²⁷⁹ But the corruption of Iraq's judiciary should come as no surprise to anyone familiar to Iraq's history and culture,²⁸⁰ as Iraq has had a longstanding problem with malversation in all spheres of its government,²⁸¹ and continues to face this problem to this very day throughout its many government ministries.²⁸²

277. Judge Zuhair Al-Maliky, former Chief Judge of the CCCI, stated that corruption was deep-seated in Iraqi culture. See Scott Peterson, *Demoted Iraqi Judge Fears for his Country's Future*, CHRISTIAN SCI. MONITOR, Nov. 1, 2004, at 11 ("Maliky acknowledges that imposing law and order has been an uphill battle, after decades of corrupt rule and a deep-seated culture giving gifts for favors.").

278. JOSEPH BORKIN, *THE CORRUPT JUDGE* 205 (1962) (quoting Chief Justice John Marshall).

279. Brian Knowlton, *U.S.-Installed Government in Iraq is Cited by U.S. for Rights Abuses*, N.Y. TIMES, Mar. 1, 2005, at A1 ("[C]orruption was a problem at every level of government."); U.S. Department of State, 2004 Country Report on Human Rights Practices: Iraq, available at <http://www.state.gov/g/drl/rls/hrrpt/2004/412722.htm>. (last visited Mar. 2, 2005) [hereinafter 2004 Report on Human Rights Practices] ("Corruption remained a problem in the criminal justice system." For example, one judge was accused of engaging in "professional misconduct, including bribery.").

280. Richard A. Oppel, Jr., *Courting Sunnis, G.I.'s Hope for Relative Safety*, N.Y. TIMES, July 17, 2005, § 1, at 1 (discussing how bribery is part of the cultural norm in Iraq).

281. See PHILIP W. IRELAND, *IRAQ: A STUDY IN POLITICAL DEVELOPMENT* 79 (1970) (1937); see also Nicholas Riccardi, *A Culture of Corruption*, L.A. TIMES, Feb. 1, 2004, at A1:

Under Hussein, public employees were so poorly paid that they demanded bribes from the public to feed their families. Because the totalitarian regime sought total control of its citizens' lives, payoffs pervaded virtually every level of society: Kickbacks were needed to get a passport for the hajj pilgrimage, evade a police checkpoint, build a house or get out of the army. Top officials plundered the treasury to the extent that even Hussein's personal poets were recently arrested by Interpol on the suspicion of financial crimes.

And the corruption has continued since the regime's ouster.

Leinwand, *supra* note 237 (noting the corruption of Iraqi prison guards, some of whom quit when U.S. military personnel prohibited them from seeking bribes from the prisoners' family members); see also Frank J. McGovern, *Rebuilding A Shattered System*, 25 PA. LAWYER 34, 35 (Oct. 2003) (discussing the corruption and bribery in Iraqi courts); see also Peterson, *supra* note 276, at 11 (noting in Iraq there is a "deep-seated culture of giving gifts for favors").

282. Thanassis Cambanis, *Corruption Pervades Government In Basra*, BOSTON GLOBE, Aug. 8, 2005, at A1 (noting that the city of Basra is saturated with a "pervasive, murderous, gangland-style corruption," where the dominant Islamic religious parties "ran for office on a platform of using Islamic values to root out corruption"); Antonio Castaneda, *Smuggling Across Syria Border Seen Funding Insurgency*, WASH. TIMES, Aug. 11, 2005, at A11 (noting that some Iraqi border guards are corrupt); Celia W. Dugger, *Iraq Susceptible to Corruption, Survey Finds*, N.Y. TIMES, Oct. 21, 2004, at A8 (noting that a survey ranked Iraq "among the world's most corrupt nations," and that according to an international watchdog group, corruption will increase "unless the United States, Britain, and other powerful nations take aggressive steps to combat battery and theft of public money."); James Glanz, *Iraqis*

Much of the problem stems from the pervasive corruption that existed in Saddam Hussein's government. Under Saddam, the Iraqi courts "suffered from the corruption that has infected the rest of Iraq's institutions."²⁸³ Before the liberation of Iraq, "most judges earned more money accepting bribes than meting out impartial justice. 'Lawyer' and 'fixer' came to be used interchangeably . . ." ²⁸⁴ Verdicts were "routinely influenced by payoffs" and most Iraqi judges candidly admit that "widespread corruption characterized" the justice system under Saddam Hussein.²⁸⁵ Corruption—epitomized by Saddam Hussein himself—was part of the Iraqi national character.²⁸⁶ Indeed, the Coalition Provisional Authority was so concerned about this corruption that it sought to create a purified judiciary, starting with the CCCI.²⁸⁷ Sadly, these lofty goals have run up against the impenetrable reality of Iraqi society.

The general consensus is that this corruption did not cease when Saddam Hussein's tenure as leader of Iraq ended, but rather remains an "essential" aspect of the Iraqi politico-social system. Bribery has become such a normal part of life in Iraq that many officials are unashamed to openly solicit kickbacks. Indeed, the main function of many lawyers is to facilitate bribing the judiciary.²⁸⁸ Government

Tallying Range of Graft in Rebuilding, N.Y. TIMES, June 24, 2005, at A1 ("Allegations of widespread corruption have dogged the Iraqi government since the invasion in 2003 . . ."); Bassem Mroue, *Iraqi Military Investigating Bad Purchases*, WASH. TIMES, Aug. 10, 2005, at A12 ("Iraqi authorities have opened inquiries into several cases of corruption at the Defense Ministry" concerning hundreds of millions of dollars "wasted on unnecessary and overpriced equipment for Iraq's new army."); Dan Murphy, *Iraqis Thirst for Water and Power*, CHRISTIAN SCI. MONITOR, Aug. 11, 2005, at 1 (discussing how officials of Iraq's Ministry of Public Works solicit bribes when electricity service is interrupted); see Alex Rodriguez, *Graft Holds Back Economy*, CHI. TRIB., Sept. 25, 2005, at 3 (noting that almost \$2 billion of Iraq's oil wealth is stolen annually, much of it due to government corruption). Some Iraqi police officers have reportedly made false arrests to extort bribes from detainees and their families. 2004 Report on Human Rights Practices, *supra* note 278.

283. PERITO, *supra* note 248, at 6 (Perito was speaking of the Iraqi judiciary prior to the invasion, but his sentiments are also largely accurate post-invasion).

284. JOSEPH BRAUDE, *THE NEW IRAQ* 175 (2003); Williams, *supra* note 21, at 231 (noting that the Iraqi Courts were rife with corruption).

285. Trebilcock, *supra* note 185, at 48.

286. See Talcott H. Russell, *The National Idea*, 7 YALE L.J. 346, 347 (1898) ("Every nation has its character which results from its history, the traits of its people and the organization of its government.").

287. Gregory H. Fox, *The Occupation of Iraq*, 36 GEO. J. INT'L L. 195, 214 (2005) (noting that "the CPA viewed the Iraqi judiciary as having been widely politicized and corrupted under the Ba'athist regime").

288. McGovern, *supra* note 280, at 35:

One woman to whom we spoke in Najaf stated that no one worked according to the law; rather, the legal system worked through personal relationships. The lawyers would invite the judges and the police commissioner to a feast and they would work things out regardless of the law. She stated that if she wanted to win a criminal case, she had to have a sexual relationship with the policeman.

jobs go to the highest bidder and those unable or unwilling to pay the price are excluded from consideration.²⁸⁹ Security forces complain that their leaders pocket a portion of their underlings' salaries.²⁹⁰ Furthermore, corruption is not just a characteristic of middle managers. High-ranking officials from various departments of the Iraqi government have raided the treasury for personal gain.²⁹¹ Corruption is such a part of Iraqi culture that even the former interim Iraqi Prime Minister, Iyad Allawi, thought nothing of bribing media personnel for favorable coverage during the 2005 Iraqi elections.²⁹² He explained it as simply a form of Iraqi "hospitality."²⁹³ Similarly, some Iraqi judges see nepotistic decisions merely as manifestations of loyalty to one's tribe or love for one's family.²⁹⁴ These cultural oddities might seem quaint in a Tammany Hall sort of way until one considers that the CCCI judges are also part of this culture of graft,²⁹⁵ these judges decide the fate of dangerous terrorists who have pledged their lives to killing Americans.

While a number of CCCI judges have demonstrated integrity and a desire to put Iraq's interests before their own, it is not difficult to conclude that corruption has infected some portions of the Iraqi judiciary²⁹⁶ and that some of the CCCI acquittals and mild

Demonstrating that some things never change, even in the 1800s the chief function of Middle Eastern lawyers was to act as a conduit for bribes. See *Oriental Laws and Lawyers*, 2 ALB. L.J. 42, 43 (1870) ("In giving counsel to a client it is not in reference to the points of law to be established, or any specific declarations which are to be sustained by evidence. On the contrary the lawyers endeavor to explain the surest and most economical method of bribing the kadi.").

289. Bahadur, *supra* note 247 (Those who seek government employment "complain that they have lost out in the competition for government positions because they haven't paid bribes . . .").

290. Oppel, Jr. & Glanz, *supra* note 237 (discussing the corruption of Iraqi military and security forces).

291. Paul Martin, *Iraq Accuses 23, Cites Graft In Defense Deals*, WASH. TIMES, Oct. 12, 2005, at A1 ("Iraq's government has issued arrest warrants against a former defense minister and 22 other current and former officials, accusing them in involvement in the misappropriation of hundreds of millions of dollars . . .").

292. See London Daily Telegraph, *Allawi Aides Call \$100 Gifts to Reporters "Just Hospitality"*, WASH. TIMES, Jan. 13, 2005, at A13.

293. *Id.*

294. See MALISE RUTHVEN, *ISLAM IN THE WORLD* 170-71 (2d ed. 2000). This is consistent with the general Iraqi culture, where tribal or familial nepotism is perceived as a commendable act of loyalty. See David Axe, *Tribe, Family Take Priority Over the Law*, WASH. TIMES, July 27, 2005, at A1 (noting that Iraqis maintain strong ties to their families and tribes, and that Iraqi government officials distribute benefits according to these loyalties.). For example, a former official hired three-hundred new policemen, many of whom were from his tribe, despite their illiteracy. *Id.*

295. See Bruce Fein, *Exit Strategy*, WASH. TIMES, Nov. 29, 2005, at A19 (opining that the Iraqi judiciary and the Interior Ministry combine "incompetence with corruption").

296. Former CCCI Chief Judge Zuhair Al-Maliki hinted as much. See Peterson, *supra* note 276. To add insult to injury, Judge Al-Maliki was assigned to a post in

punishments have been the result of bribery. It has been reported that Osama bin Laden purchased his freedom with bribes paid to Afghan officials who were directed by the United States to capture him.²⁹⁷ There are substantial parallels with the CCCI's treatment of Iraqi insurgents. As in Afghanistan, Iraqi officials are notoriously corrupt. Like Afghan officials, CCCI judges have little affinity for or loyalty to the United States, and derive little direct benefit from advancing U.S. interests.²⁹⁸ Like bin Laden, the Baath Party has substantial wealth at its disposal and can easily afford a few well-placed bribes. Thus, it is easy to understand how CCCI officials might enrich themselves at the expense of U.S. interests.

In a few CCCI cases, some involving wealthy defendants or defendants with wealthy backers,²⁹⁹ the CCCI judges seemed to take on a friendlier tone toward the defendant and an unreasonably skeptical view of the evidence, which resulted in defendant-friendly acquittals and sentences.³⁰⁰ Such results necessarily give rise to suspicions of corruption, especially since Iraq is rife with corruption. Of course, corruption is a necessary result of a concentration of power.³⁰¹ Corruption thrives under totalitarian systems and during periods of martial law,³⁰² since greater restrictions and government

Sadr city, a particularly violent slum in Baghdad in which Al-Maliky's life would be in particular danger.

297. Richard Bernstein, *Bin Laden Bribed Afghan Militias For His Freedom, German Says*, N.Y. TIMES, Apr. 13, 2005, at A12 ("The head of the German intelligence agency, in an interview published here Tuesday, said Osama bin Laden had been able to elude capture after the American invasion of Afghanistan by paying bribes to the Afghan militias delegated the task of finding him.").

298. The United States has consistently used military commissions to adjudicate cases that affect its interests, a practice sanctioned by the law. A. Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 842 (1948) ("Military government courts, including military commissions, legally may assume jurisdiction over all criminal offense committed in occupied territory and over civil cases affecting the military government.").

299. Baathist money continues to make its way into Iraq, fueling the insurgency and perhaps verdicts of acquittal. See Graham & Pincus, *supra* note 255 ("One senior defense official said more than a dozen 'financial people' from Hussein's government have been identified funneling money from Syria to insurgents in Iraq."); see also Mazzetti, *supra* note 205 ("[T]he traffic from Syria is largely Iraqi Baathists who escaped after the U.S.-led invasion and couriers bringing in money from former members of Hussein's government.").

300. Ambassador Bremer established a Judicial Review Committee to investigate possible corruption and bias. See ESTABLISHMENT OF THE JUDICIAL REVIEW COMMITTEE, COALITION PROVISIONAL AUTHORITY ORDER NO. 15 (2003), available at http://www.iraqcoalition.org/regulations/20030623_CPAORD_15_Establishment_of_the_Judicial_Review_Committee.pdf. It has not seemed to help much.

301. Clarence Manion, *Cause of Corrupt Government*, (1952), in 2 ESSAYS ON LIBERTY (1954), available at <http://www.fff.org/freedom0501F.asp> (last visited May 1, 2005) ("Governmental corruption is a necessary consequence of the unreasonable, unconstitutional, and scandalous concentration of power . . .").

302. "[A]lthough corruption is a . . . pervasive phenomenon and occurs in all systems, a recent correlation running the Transparency International Corruption

control give corrupt bureaucrats opportunities to release from the generally-applicable strictures those wealthy or desperate enough to pay bribes.³⁰³ Unfortunately, corrupt officials also present a golden opportunity for terrorists because by greasing the palms of corrupt officials, terrorists can multiply the effects of their terrorist acts. The Russians learned this at Beslan, where armed terrorists paid corrupt guards to let them pass checkpoints unmolested, resulting in the deadly kidnapping and siege that took the lives of 339 Russians, mostly women and children.³⁰⁴ Monied terrorists and greedy bureaucrats form a deadly combination, as the United States is learning in Iraq. By feeding insurgency cases to the CCCI, the United States further encourages corruption and the insurgency that benefits from the dishonesty that plagues all spheres of the Iraqi government.

D. Religious Bias

Religious bias also plays a role in the pro-insurgency decisions of the CCCI. Although ostensibly secular, both the Iraqi judicial system and penal law are based in part on Islamic law insofar as Islamic law is a source of law for judges to apply.³⁰⁵ Thus, Islamic law influences

Perceptions Index against levels of economic freedom shows a strong positive skew toward increased corruption as societies become less free.” See John Norton Moore, *Beyond the Democratic Peace: Solving the War Puzzle*, 44 VA. J. INT’L L. 341, 350 (2004); see also Edward Cody, *Hundreds are Reproved by China for Corruption*, WASH. POST, Dec. 17, 2004, at A25 (discussing the extent of corruption in China and the fact that “corruption among government and party officials has been cited as a major reason for dissatisfaction among China’s 1.3 billion people”).

303. Many insurgents are well financed, making it easy for them to raise the capital necessary to bribe judges. See Ann Scott Tyson, *U.S. Faces Gap in “Intelligence War” In Iraq*, CHRISTIAN SCI. MONITOR, Nov. 5, 2004, at 2 (“Iraq’s growing insurgency has no shortage of funds”); Graham & Pincus, *supra* note 255 (Islamic elements of insurgency contains “facilitators’ operating inside and outside of Iraq and having access to substantial sums of money”).

304. See Marion Baillot, *Bribery Greases Terrorists Path*, WASH. TIMES, Dec. 5, 2004, at A6.

In Russia, bribe-taking police and crooked officials have become the terrorists’ friends Law enforcement corruption is suspected to have played a major role in recent terrorist attacks, including the Sept. 1 school seizure in Beslan. Hostages who survived the massacre at the school in southern Russia said the terrorists told them they had easily reached the school by bribing police along the way.”

See also Kim Murphy, *Russia May Pay for Bribes in Lives*, L.A. TIMES, Nov. 8, 2004, at A1 (same).

305. AMIN, *supra* note 22, at 222 (noting that the 1951 Civil Code of Iraq “instructed judges to fill any gap in the secular law by reference to the principles of traditional Islamic law” and that Islamic law is considered a “formal source of law” in Iraq); EZZELDIN FODA, *THE PROJECTED ARAB COURT OF JUSTICE* 126–27 (1957) (noting that the Egyptian code, which Iraq subsequently adopted, wove together European and

the Iraqi judiciary and the Iraqi customary law in various ways.³⁰⁶ Indeed, in light of the pervasively Moslem culture in Iraq, it could hardly be otherwise, for government institutions “are ultimately determined by the natures of the citizens living under them,”³⁰⁷ and Iraq is a pervasively Moslem country.

Since the 2003 invasion, Iraq has become increasingly Islamicized, in part because Moslem clerics were the only authority figures to successfully traverse the chasm between Saddam’s Iraq and a liberated Mesopotamia; thus, the Iraqi people look to them, and Islam, for guidance.³⁰⁸ Moslem clerics—some steeped in anti-U.S. sentiment from their training in Iran—hold enormous power over the people of Iraq.³⁰⁹ Unfortunately, many of these clerics—of both the Sunni and Shiite variety—preach an Islam inextricably tied to hatred of the United States, and their teachings have slipped into the mainstream culture of Iraq.

Furthermore, Islam necessarily affects Iraqi law because Islam cannot be divorced from its legalistic foundations. The law of Islam is part of its essence, and indeed, most Moslems see Islam as the supreme law which no secular law can contradict. Thus, according to one Iraqi insurgent, the “Koran is a constitution, a law to govern the

Islamic law); SMITH ET AL., *supra* note 171, at 181 (“The judicial system is based partly on the French model as first introduced during Ottoman rule and modified since then and based partly on religious traditions, Islamic and others.”); Wael B. Hallaq, “Muslim Rage” and Islamic Law, 54 HASTINGS L.J. 1705, 1713 (2003) (The Ottoman Penal Code of 1858 was “closely modeled after the French Penal Code of 1810.”); A. Kevin Reinhart & Gilbert S. Merritt, *Reconstruction and Constitution Building in Iraq, Addresses at Vanderbilt University Law School* (Jan. 23, 2004), in 37 VAND. J. TRANSNAT’L L. 765, 781 (2004) (Iraqi law “is a civil law system which came through Egypt because Egypt, during the time of Napoleon’s campaign, adopted a kind of Napoleonic code system with Islamic elements in it that was later passed along to Iraq.”).

306. This is consistent with many other courts in the Islamic Middle East. DWYER, *supra* note 81, at 3. For example, the CCCI is free to look to religious texts and standards in determining the weight of evidence in criminal cases. Grossman, *supra* note 16 (“Judges in Iraq are given enormous latitude in determining cases based on ‘the weight of the evidence,’ and may choose to implement standards laid out in any of three, often conflicting sources—the 1971 Iraqi Law on Criminal Proceedings, religious texts or precedents established by prior cases.”).

307. Herbert Spencer, *Anglo-American Philosophies of Penal Law*, 1 J. AM. INST. CRIM. L. & CRIMINOLOGY 862, 862 (1911).

308. Farnaz Fassih, *Clerics Hold Sway as Iraqis Ponder New Constitution*, WALL ST. J., Oct. 13, 2005, at A1.

Religion’s role in Iraqi political life has ratcheted steadily higher since U.S.-led forces overthrew Mr. Hussein in 2003. In the post-invasion chaos, mosques were the only authority left in many communities, and clerics helped organize everything from security patrols to trash removal. Outlawed Islamist political parties . . . emerged from exile or the underground as instant political forces.

309. Many Iraqis openly stated that in national elections, they vote according to the orders of their clerics. See Jonathan Finer & Naseer Nouri, *Loyalties Lie With Clerics, Not With Politicians*, IN NAJAF, WASH. POST, Oct. 17, 2005, at A11.

world.”³¹⁰ This key tenet of Islam is widely accepted among the faithful in Iraq and has been incorporated into the criminal law.³¹¹

The Iraqi judiciary also seems to ascribe to this view, and for CCCI judges, this means that their decisions must conform to the dictates of the Islamic holy book, regardless of whether they comport with Western notions of fairness and justice and regardless of whether they result in legions of guilty terrorists escaping justice. In the words of one Islamic academician: “Islam is a religion of law, and this is a fact of crucial importance. Islam means nothing if religious law were to be extracted from it.”³¹² Thus, the idea of a completely secular law, or court decisions uninfluenced by Islamic beliefs, is nonsensical to Moslems.

Islamic law constitutes a key element of Islamic identity.³¹³ This fact has substantial ramifications for Iraqi government, particularly Iraqi courts, which apparently have chosen to apply an Islamic jurisprudence that favors Moslems when their legal interests conflict with those of non-Moslems, such as the U.S. soldiers attacked by Moslem insurgents. Indeed, from its founding, Islam has called for the discrimination in favor of Moslems and against Christians and Jews.³¹⁴ Thus, even “moderate” Iraqi clerics like the Ayatollah Sistani have made legal rulings that Christians and Jews are

310. Ghaith Abdul-Ahad, *Outside Iraq But Deep in the Fight*, WASH. POST, June 8, 2005, at A1 (quoting Abu Ibrahim, a Syrian insurgent); Peter J. Hamilton, *Germanic and Moorish Elements of the Spanish Civil Law*, 30 HARV. L. REV. 303, 311 (1917) (“Mohammedan law is founded upon the Koran, the decisions of the prophet . . .”). For Moslems, the Koran is a collection of God’s revelations to Mohammed, including legal rules: “The Prophet [Mohammed] was the Messenger of God, and to him He revealed in His own words, His wishes and commands through the medium of the angel Gabriel. The collection of these revelations is called the Qur’an, but its text which existed from eternity was communicated from time to time in pieces called Ayahs, or verses. The verses that lay down rules of law were mostly revealed when cases actually arose requiring decision according to the principles of Islam.” Rahim, *supra* note 85, at 186.

311. Allen, Jr., *supra* note 93, at 20 (“The Quran is a total religious law, which regulates the whole of political and social life and insists that the whole order of life be Islamic . . .”) (quoting Cardinal Joseph Ratzinger); Dan Murphy, *Iraqi Women Urge Limited Sharia in New Constitution*, CHRISTIAN SCI. MONITOR, Aug. 9, 2005, at 11 (noting that the debate in Iraqi government concerns the extent to which Islamic law will control Iraq; it is recognized by everyone that *sharia* will have a vital role in Iraqi government, and nobody argues that it should have no influence on the country).

312. Hallaq, *supra* note 304, at 1715.

313. Mark A. Drumbl, *Rights, Culture, and Crime: The Role of Rule of Law for the Women of Afghanistan*, 42 COLUM. J. TRANSNAT’L L. 349, 365 (2004).

314. THOMAS SOWELL, *MIGRATIONS AND CULTURES: A WORLD VIEW* 238 (1996) (“Throughout the Islamic world, a non-Moslem dared not strike a Moslem, even in self-defense, and merely verbal retaliation was dangerous.”). Modern apologists for Islam quote excerpts from the Koran that all people are equal, but the facts are crystal clear that non-Moslems are treated as second-class in Moslem countries.

“unclean” and therefore may face discriminatory treatment at the hands of Iraqi government officials.³¹⁵

The influence of Islamic law and Islamic clerics in Iraq is vast. After all, Islam was once Iraq’s official state religion and even now it essentially enjoys official status.³¹⁶ In non-Islamic countries, judges grow up exposed to the predominant religion, manners, and mores of their respective societies, and it would take an extremely thick exoskeleton to prevent society’s influence from penetrating the outlook of these judges. These influences later come to affect judicial decisions, even though some judges are not consciously aware of this. In the words of Justice Cardozo: “Manners and custom (if we may not label them as law itself) are at least a source of law. The judge, so far as freedom of choice is given to him, tends to a result that attaches legal obligation to the folkways, the norms or stands of behavior exemplified in the life about him.”³¹⁷ As products of Islamic culture,³¹⁸ it would be foolish to think that the religious tenets of Islam have not entered the hearts, minds, and chambers of the CCCI judges, even if they were not themselves Moslem.³¹⁹

But indeed, the CCCI is further steeped in Islam because all of its judges are Moslem. Moslems control the CCCI and other courts in part because they are the majority in Iraq and, because of persecution

315. Hannibal Travis, *Freedom or Theocracy?: Constitutionalism In Afghanistan and Iraq*, 3 NORTHWESTERN UNIV. J. OF INT’L HUMAN RIGHTS 4, 118 (2005).

316. *Id.*

317. CARDOZO, *supra* note 18, at 15. Chief Justice John G. Roberts, however, claimed that religion will have no effect on his decisions. Amy Goldstein & Charles Babington, *Roberts Avoids Specifics On Abortion Issue*, WASH. POST, Sept. 14, 2005 (“[M]y faith and my religious beliefs do not play a role in judging. When it comes to judging, I look to the law books and always have. I don’t look to the Bible or another other source.”) (quoting then-Judge John G. Roberts, testifying at his confirmation hearing). But the fact that Chief Justice Roberts does not consult religious sources when making his judicial decisions is beside Justice Cardozo’s point. Under Justice Cardozo’s understanding, judges are unconsciously influenced by their religious beliefs, societal customs, and moral values when deciding difficult cases in which legal materials do not obviously dictate the “correct” decision. Likewise, Iraqi judges may not be consulting the Koran every time they hear a witness testify in a case, but they may, without even realizing it, be influenced by Islamic legal doctrines like the discounting of testimony from infidels and women, especially when it is directed against a Moslem defendant.

318. Iraqi culture is becoming extremely Islamic, to the point that the police assault those who fail to comply with Islam’s stricture: “Physicians have been beaten for treating female patients. Liquor salesmen have been killed. Even barbers have faced threats for giving haircuts judged too short or too fashionable. Religion rules the streets of this once cosmopolitan city [Basra], where women no longer dare go out uncovered.” Louise Roug, *Islamic Law Controls the Streets of Basra*, L.A. TIMES, June 27, 2005, available at 2005 WLNR 10123509.

319. Judges who were educated at *madrassahs*—some of which have been called “jihad factories” for teaching a virulent hatred of non-Moslems—are particularly susceptible to an Islamic jurisprudence that favors Moslem litigants over non-Moslem ones. Abigail Cutler & Saleem Ali, *Madrassah Reform is Key to Terror War*, CHRISTIAN SCIENCE MONITOR, June 27, 2005, at 9.

from Islamic terrorists, the population of non-Moslems is ever declining.³²⁰ But their dominance of the judiciary is also due to discrimination against—not to mention murder of³²¹—Christians who would like to pursue careers in the law.³²² Any chance of recruiting them for judicial posts is rapidly dwindling as many are fleeing Iraq for safer havens.³²³ Iraqi Jews also probably would have chosen the legal profession, but most have long since fled Iraq in an effort to preserve their lives,³²⁴ and anyway it is unlikely they would have fared any better than the Christians.³²⁵ Thus, the CCCI has only Moslem judges in part because of the pervasiveness of discrimination against non-Moslems in Iraqi society.

This discrimination which causes Islamic dominance of the judiciary is, in turn, sometimes justified by the same Islamic tenets that influence the decisions of the CCCI. Under many brands of Islamic law, Christians are considered inferior to Moslems. Under this view, it is natural that Christians are prohibited from serving as

320. 2004 Report on Human Rights Practices, *supra* note 278. Of course, there are so few Christians in Iraq in part because some Moslems have a tendency to kill non-Moslems—now mostly Christians, because the majority of Iraq's Jewish population fled the violence decades ago. This further encourages the surviving Christians to flee elsewhere, so they do not encounter the same fate. Arnold Beichman, *The Other Iraq War*, WASH. TIMES, Mar. 29, 2005, at 15 ("Though Iraqi Christians are a minuscule minority, they suffer unrelenting Muslim persecution. The Iraqi Christian population, once was more than 15 percent, decreases daily due to emigration to the safety in Western countries.").

321. Scheherezade Faramarzi, *Christians Fleeing For Their Lives*, WASH. TIMES, Feb. 9, 2005 (noting that Christians are being systematically murdered in Iraq by Moslems and that many Christians are seeking to flee Iraq); Jack Fairweather, *Christians Flee Genocide as Fear Sweeping Iraq*, LONDON DAILY TELEGRAPH, Jan. 8, 2005 (estimating that one quarter of Iraq's Christians have fled Iraq to escape murder by Moslems, which the author calls "genocide").

322. 2004 Report on Human Rights Practices, *supra* note 278 ("Some Christian professionals complained that corruption in the Government excludes them from jobs for which they are qualified."); Beichman, *supra* note 319, at 15 (noting discrimination against Christians both at Iraqi universities and in public sector hiring, and noting that many Christian students have stopped attending universities for fear that they will be murdered). There also was once a thriving Jewish community in Iraq, particularly Baghdad, which has now been decimated.

323. Thomas Harding, *Baghdad Elite Flees Iraq and the Daily Threat of Death*, LONDON DAILY TELEGRAPH, Aug. 10, 2005 ("Quietly, in their ones and twos, the professional classes of Baghdad are slipping out of the country to avoid becoming another fatal statistic."). This flight of the professionals is occurring across sectarian lines and is not limited solely to Christians.

324. Dana Ledger, Note, *Remembrance of Things Past: The Iraqi Jewish Archive and the Legacy of The Iraqi Jewish Community*, 37 GEO. WASH. INT'L L. REV. 795, 814–15 (2005) (recounting the history of the Jews in Iraq and noting that only a few Jews remain in Iraq).

325. Cal Thomas, *Islam Has Double Standard on Tolerance*, AUGUSTA CHRON., June 6, 2005, at A4 ("But the denigration of Jews and Christians throughout the Islamic world is theological and political business as usual. Jews are regularly referred to as 'apes and pigs,' mostly because that is what the Koran calls them.").

judges of Moslem litigants.³²⁶ Probably because it is forbidden by Islamic law³²⁷ and tribal traditions, there are no women judges on the CCCI (there are a handful elsewhere in Iraq, but only since the 2003 invasion). Thus, the CCCI has a distinct Islamic flavor to the extent that it is an appendage of these discriminatory notions and an active agent in their perpetuation. Because of their Moslem heritage and the pervasive Moslem influence in Iraq, even if judges did not consciously permit Islamic law to influence their decisions, it is likely that when these judges exercise discretion—as judges on the CCCI must do at some point—they will inevitably turn to their religious doctrine for guidance.³²⁸

Islamic law inherently makes non-Moslems second-class citizens by, among other things, prohibiting them from testifying against Moslem criminals.³²⁹ Indeed, pursuant to Islamic law, before the

326. LIPPMAN ET AL., *supra* note 84, at 123–24:

Dhimmis, of course, also receive unequal treatment, since they are not of the *umma*. While enjoying freedom of religious belief and practice, in several countries they are subject to a head-tax [hopefully while their head is still attached] (*Jizya*) they often are disqualified from judicial and political office; they are not permitted to testify against Muslims; they customarily must yield the way to Muslims and may not bear arms; traditionally they are required to wear distinctive clothing; and their houses must not be built higher than those of Muslims and must be marked with identifiable symbols. They also have limited legal rights in relation to Muslims; for instance, they cannot serve as a guardian of a Muslim child or marry a Muslim woman.

Id. Of course, in some Middle Eastern countries merely being a Christian is a crime. See Ali Al-Ahmed, *Hypocrisy Most Holy*, WALL ST. J., May 20, 2005, at A14.

The Bible in Saudi Arabia may get a person killed, arrested, or deported. In September 1993, Sadeq Mallallah, 23, was beheaded in Qateef on a charge of apostasy for owning a Bible. The State Department's annual human rights reports detail the arrest and deportation of many Christian worshipers every year.

Some elements of Iraqi society are similarly intolerant. Are these the people America should be entrusting with the responsibility of punishing insurgents, some of whom attack American forces because they see them as Christian Crusaders?

327. McGovern, *supra* note 280, at 38 (“As to whether women can be judges, we received a variety of responses. A majority said that women could become judges under Iraqi law. Another groups said that women were completely barred from serving as judges because of Muslim law and culture.”). Of course, there are probably some Moslem scholars who would argue that women can serve as judges. But they must be an extreme minority, and regardless, their views do not yet have much influence in Iraq. Although there are some female attorneys and judges, women are generally treated as second-class citizens in Iraq. See, e.g., Fassihi, *supra* note 307, at A8 (noting that Judge Zakia Haaki, an ethnic Kurd, is Iraq's first female judge”).

328. See POSNER, *supra* note 91, at 197 (“But a judge's philosophical or religious or economic or political views are bound to shape his response to specific cases in the open area where the judicial decision-making is discretionary.”).

329. June Starr, *Islam and the Struggle Over State Law in Turkey*, in LAW AND ISLAM IN THE MIDDLE EAST 78 (Daisy Hilse Dwyer ed., 1990) (“The admissibility of Christian testimony against Muslims represented another breakthrough . . .”); Ann

1800s, the testimony of Christians and Jews was prohibited in Ottoman courts, including those operating in present-day Iraq.³³⁰ (There was similar discrimination against female witnesses, who share this Islam-induced disability, regardless of their religious views.³³¹) Pursuant to this view, it is a common practice of CCCI judges to inquire into the religious beliefs of witnesses and complainants³³² thereby facilitating discrimination by judges who are

Elizabeth Mayer, *Reinstating Islamic Criminal Law in Libya*, in *LAW AND ISLAM IN THE MIDDLE EAST* 106 (under Islamic law, male “witnesses may testify only if they are Muslims”); LIPPMAN ET AL., *supra* note 84, at 60 (“Non-Muslims may testify against other non-Muslims, but they cannot testify against a Muslim.”); *Id.* at 89 (the primary requisite for a witness is that he should be a Muslim male of good character). This makes sense in the Moslem world view, as Christians (and especially U.S. Christians, not to mention Jews) are distrusted and seen as the cause of the world’s evils, including natural disasters like Tsunamis, which are punishments from Allah:

[T]he Egyptian nationalist weekly *Al Usbu* published a piece speculating that Indian-Israeli-American nuclear testing caused the tsunami. These countries had acted “together to test a way to liquidate humanity.” (Perhaps the newspaper thought they intended to “liquefy” humanity but the nuance was lost in translation.) A Friday sermon aired on Palestinian Authority TV dwelt on Thai corruption in the form of “tourist paradise” beaches where “Zionist and American investments” triggered divine wrath. An advisor to the Saudi minister of justice claimed on Saudi TV that the people who suffered did so for lying, sinning and being infidels. Another Saudi cleric felt the tsunami’s timing was significant: “It happened at Christmas when fornicators from around the world come to commit fornication and sexual perversion. That’s when this tragedy took place striking them all.”

Melik Kaylan, *They’re Paranoid, We’re Blasé*, *WALL ST. J.*, Jan. 28, 2005, at A8.

330. Daisy Hulse Dwyer, *Introduction*, in *LAW AND ISLAM IN THE MIDDLE EAST* 3. This is akin to some southern states in the United States, which prohibited black men and women from testifying against white defendants, since they were viewed as second-class citizens and inferior to whites.

331. Fortunately, the U.S. prosecutors in the CCCI never had to rely on the testimony of women, which also is excluded under Islamic law, though ostensibly permissible under Iraqi law. Mayer, *supra* note 328 (“The testimony of women is absolutely excluded.”); LIPPMAN ET AL., *supra* note 84, at 61 (“Women have an inferior status. They are prohibited from serving as witnesses, although in certain cases two female witnesses may substitute for a man.”).

Witnesses must be male Muslims, although certain jurists, in isolated instances (for example, involving property or employment), permit the testimony of two female witnesses to substitute for that of a single male witness. Women are disqualified in the generality of cases because they are viewed as having “weakness of understanding want of memory and incapacity of governing”.

Id. at 69.

332. This is done ostensibly to determine which oath to administer to the individual. The practice, however, may have a more malevolent design and certainly facilitates discrimination against non-Moslems, a practice which Islamic law countenances in numerous ways. See e.g., Amir Taheri, *Exhibition Killing*, *WALL ST. J.*, Sept. 30, 2004:

inclined to discount the testimony of non-Moslems. Of course, the vast majority of witnesses in CCCI terrorism cases are U.S. soldiers, and most of these are at least nominally Christian and generally are not followers of Mohammed.³³³ True, the court is not so saturated with Islam that it manifestly prohibits the testimony of U.S. Christians, perhaps because the judges know that such a policy would absolutely preclude the United States from utilizing the court to try terrorism cases. But if the judges are sufficiently imbued with the notion that Christians cannot give credible testimony against Moslems, or that Christian testimony is entitled to less weight when it inculcates a Moslem defendant, there is no chance of U.S. victims obtaining justice in such a court. Since it is obvious that the CCCI judges regularly discount the testimony of U.S. soldiers, it is at least possible—some would say probable—that this practice is attributable to Islamic influences and the pervasive Islamic culture of the CCCI.³³⁴

The Islamic influence extends beyond these procedural and evidentiary biases. A number of the CCCI judges' substantive decisions also could be interpreted as acts of jihad against non-

In the Arabia of the seventh century, where Islam was born, seizing hostages was practiced by rival tribes, and 'exhibition killing' was a weapon of psychological war. The Prophet codified these practices, ending freelance kidnappings and head chopping. One principle of the new code was that Muslims could not be held hostage by Muslims. Nor could Muslims be subjected to 'exhibition killing.' *Such methods were to be used solely against non-Muslims*, and then only in the context of armed conflict.

Seized in combat, a non-Muslim would be treated as a war prisoner, and could win freedom by converting to Islam. He could also be ransomed or exchanged against a Muslim prisoner of war. Non-Muslim women and children captured in war would become the property of their Muslim captors. Female captives could be taken as concubines that is, raped or given as gifts to Muslims.

Id. (emphasis added). Notice that under this system Moslems enjoy more rights and privileges than non-Moslems.

333. Like most generalizations, there are a few exceptions. James Barron & Kirk Semple, *Soldiers, Friends from Queens, Die on a "Routine" Patrol in Iraq*, N.Y. TIMES, Mar. 5, 2004, at B1 (noting that one of the fallen soldiers was Moslem and the other was a Buddhist). The vast majority of the approximately 1.5 million members of the U.S. Armed Forces identify themselves as belonging to a Christian denomination of some sort. But 4,371 identify themselves as Buddhist; there are 4,332 atheists; 3,990 are Jewish; 3,729 are Moslem; and 1,803 claim to be Wiccan. Alan Cooperman, *Military Wrestles with Disharmony Among Chaplains*, WASH. POST, Aug. 30, 2005, at A1, A4.

334. Chibli Mallat, *From Islamic to Middle Eastern Law A Restatement of the Field*, 51 AM. J. COMP. L. 699, 700 (2003) (The "common law of the Middle East, in so far as it can be discerned, is Islamic. If there is one shared, dominant, and distinctive historical background to Middle Eastern legal systems, it would vest in the special historical role taken by Islam in the development of the law. Islamic law—the shari'a—constitutes the prevailing common historical legal tradition in the region.").

Moslem victims, or acts of religious loyalty to Islamic insurgents whom some of the judges perceive as Islamic brothers waging a religious struggling against the “Great Satan,” the United States.³³⁵ Accordingly, there is a religious basis for these jurists to act leniently with their comrade-defendants.³³⁶ Some judges have gone even further, by acting in accordance with the sentiments of Islamic clerics,³³⁷ particularly Sunni clerics, who have glorified the insurgency; still others have called for the murder of Americans,³³⁸ and have commanded lenient treatment for captured terrorists.³³⁹ Indeed, in most Sunni mosques—when they are not serving as arsenals for the terrorists³⁴⁰—“the insurgency is celebrated as an act

335. Of course, religious discrimination, along with discriminating on the basis of race or ethnicity (but not sex) is contrary to the CPA Order establishing the CCCI. See COALITION PROVISIONAL AUTHORITY ORDER NO. 13 (Revised), The Central Criminal Court of Iraq § 6(2) (Apr. 2004), available at <http://www.iraqcoalition.org/regulations/> (last visited Nov. 8, 2004).

336. LIPPMAN ET AL., *supra* note 84, at 61 (“Aicha, the wife of the Prophet, reportedly admonished Muslims ‘to avoid condemning the Muslim to *Hudud* whenever you can, and when you can find a way out for the Muslim then release him for it.’”).

337. See Anderson, *supra* note 267, at 78 (“In Baghdad, I had attended a Friday prayer session at a mosque led by Imam Abdul Salaam Daud al-Qubeisi, a prominent Sunni cleric. He sermonized against the American ‘occupiers’ while lauding ‘heroic resistance fighters’ in Falluja and Ramadi.”).

338. Borzou Daragahi, *Rising Call by Clerics for Jihad*, S.F. CHRONICLE, Sept. 22, 2005, at A1 (discussing the Moslem clerics calling for violence against Americans).

339. See Borzou Daragahi, *Sunni Clerics Back Insurgents’ Efforts*, WASH. TIMES, Sept. 28, 2004, at 15 (“on the streets, the clerical calls for holy war are reaching the mainstream, seeping into a popular culture liberated by the same occupation they’re opposing.”); Ian Fisher & Somini Sengupta, *Iraq to Offer Amnesty, But No Killers Need Apply*, N.Y. TIMES, Aug. 4, 2004, at 1 (As soon as the idea of offering amnesty to insurgents “was announced, leaders from Shiite and Sunni quarters soundly declared their opposition. They insist that those who resist the American occupation are patriots and have no need for official pardon.”).

340. al-Taiee & MacDonald, *supra* note 196, at 7 (noting that a suicide bomber retrieved his explosive vest from a Sunni mosque in Jalawla); Mariam Fam, *Iraqi Terrorists Rallies Troops as U.S. Soldiers Raid Mosul*, CHIC. SUN-TIMES, Jan. 21, 2005, at 32 (discussing a January 2005 raid on a mosque in Mosul found to contain a cache of weapons); Tini Tran, *Sunnis in Iraq Request Delay in January Vote*, CHIC. SUN-TIMES, Nov. 26, 2004, at 36 (discussing the largest weapons cache found in Fallujah “was discovered Wednesday in the Saad Bin Abi Wagas Mosque”); Dexter Filkins & James Glanz, *In City’s Ruins, Military Faces New Mission: Building Trust*, N.Y. TIMES, Nov. 16, 2005, at A12 (describing a battle around a mosque which “the insurgents have surrounded with ramparts and firing positions, and where they have placed weapons caches”); Edward Harris, *Rebels Try to Break Out of Fallujah*, CHIC. SUN-TIMES, Nov. 12, 2004, at 6 (Major General Richard Natonski, commander of the 1st Marine Division, said that his troops had found arms caches in “almost every single mosque in Fallujah.”); Edward Harris, *Military Tightens Grip on City As Insurgents Launch Strikes in Mosul*, GRAND RAPIDS PRESS, Nov. 12, 2004, at A3 (“In Baghdad today, Iraqi security forces, backed by U.S. troops, arrested a hardline Sunni cleric and about two dozen others after a raid of his Baghdad mosque uncovered weapons caches along with photographs of recent attacks on American troops . . .”). This use of mosques as arsenals, storage depots, and command centers invites the Coalition to attack them, as

of resistance against a faithless and deceitful American occupier.”³⁴¹ Of course, this is consistent with the shrill exhortations of some Moslem clerics who espouse the killing of all non-Moslems.³⁴² They apparently base their cries for death on the Koran’s exhortation: “When you encounter those [infidels] who deny [the truth of Islam], then strike their necks.”³⁴³ Take for example, one Iraqi scholar who proclaims: “If you read the Koran, you see that Allah gave us the right to terrorize the enemy.”³⁴⁴ With this attitude pervading the

they are serving a military purpose. The use of religious buildings for military purposes violates both international law and, arguably, Islamic law.

[A] fight must be carried out in certain recognized places or war should not be conducted where it is prohibited. This very important and significant principle is stated by the words, ‘but fight them not at the Inviolable Place of Worship unless they attack you in it.’ A broader and proper modern interpretation of this principle is that one should not attack civilians, civilian installations, hospitals, agricultural fields, schools, churches, mosques or any other places which are not traditionally and conventionally recognized as places of war. All civilian needs must be recognized as inviolable and places of worship must be provided for by both conflicting parties. Attacks should only be carried out against military installations and military activities.

FARHAD MALEKIAN, *THE CONCEPT OF ISLAMIC INTERNATIONAL CRIMINAL LAW: A COMPARATIVE STUDY* 60 (1994).

341. Anthony Shadid, *In Iraq: One Religion, Two Realities*, WASH. POST, Dec. 20, 2004, at 1. Even Shiite clerics, though they gained much from the liberation, including the opportunity to ensure a Shia-dominated government, sometimes rail against Americans. *Id.* And a substantial minority of Moslems throughout the world approve of the terrorists attacks on U.S. troops in Iraq. Robin Wright, *Support For Bin Laden Down Among Muslims*, WASH. POST, July 15, 2005 (“Roughly half of Muslims in Lebanon, Jordan and Morocco said that” attacks on United States personnel in Iraq “are justifiable.”).

342. See Steve Coll & Susan B. Glasser, *In London, Islamic Radicals Found A Haven*, WASH. POST, July 10, 2005 (discussing Abu Hamz Masri, a Moslem cleric indicted for “incitement to murder for speeches that allegedly promoted mass violence against non-Muslims. In one speech cited in a British documentary film, Masri urged followers to get an infidel ‘and crush his head in your arms, so you can wring his throat. Forget wasting a bullet, cut them in half!’”).

343. Koran, sura 47, verse 4. Apparently this doctrine provided the late al Qaeda leader Abu Musab Zarqawi a religious justification for his terrorism:

Iraq’s al Qaeda leader Abu Musab Zarqawi said militants were justified under Islam in killing civilians as long as they are infidels, according to a new audiotape attributed to him yesterday. “Islam does not differentiate between civilians and military, but rather distinguishes between Muslims and infidels,” said the man on the tape posted on the Internet, who sounded like Zarqawi. “Muslim blood must be spared . . . but it is permissible to spill infidel blood,” said the speaker.

Reuters, *Zarqawi Justifies Killing of Civilians*, WASH. TIMES, Oct. 8, 2005, at A1.

344. James Brandon & John Thorne, *The Sidewalks Where Terror Breeds*, CHRISTIAN SCIENCE MONITOR, July 22, 2005 (quoting an unnamed Iraqi living in England). These sentiments are preached on the sidewalks of London; they give a glimpse at what is standard fare on Iraqi sidewalks and mosques. See also Ion, *supra* note 91, at 207 (“According to the Islamic doctrine, as the ‘faithful’ carry on war in all

Iraqi bench, bar, and mosque, it is not surprising that mosques have become arsenals and recruiting grounds for terrorists.³⁴⁵ One Sunni Cleric, Sheik Harith Al-Dari—leader of the Muslim Scholars Association which claims the support of three thousand Iraqi mosques—is a regular exponent of anti-U.S. and pro-insurgency propaganda.³⁴⁶ Notably, Dari has substantial influence in Sunni Iraqi legal circles, and previously taught Islamic law at the University of Baghdad Law School, where many of the CCCI judges obtained their law degrees.³⁴⁷ Judges infected with the viewpoints spouted by radical law professors like Dari undoubtedly will act upon them—if only incrementally—to the detriment of U.S. victims of the insurgency.³⁴⁸

There is also some evidence indicating that the CCCI's pro-terrorist decisions are not motivated solely by an Islamic anti-Christian animus.³⁴⁹ These decisions may have more to do with their loyalty to fellow Sunnis or Shiites, respectively, rather than just loyalty to Moslems generally. For example, a Shia CCCI judge recently blamed the court's lenient treatment of insurgents on his Sunni colleagues. In his words: "Many of the judges are Sunnis from the old Saddam regime and, even though the insurgents are trying to

parts of the world, for the sole object of propagating the Mussulman faith, they believe that it is the duty of all people either to embrace the religion of Mohammed or to submit to the dominion of the Mohammedans, and that until the 'infidels' accept either of these alternatives they are to be considered enemies.").

345. Monte Morin, *In Iraq, To Be a Hairstylist is to Risk Death*, L.A. TIMES, Feb. 22, 2005, at 1 ("But as the insurgency continues, religious fundamentalism has become entwined with opposition to the U.S. presence. Mosques have become gathering places, weapons-storage depots and recruiting grounds for guerrillas."); Bruce Finley, *Dispatches from Iraq*, DENVER POST, May 15, 2005, at A29 ("Around June 2003, Sunni Iraqis who run the Al-Farouk mosque began recruiting jobless young men to attack Americans"); *Forces Hit Ramadi Mosques*, GRAND RAPIDS PRESS, Oct. 12, 2004, at A2 ("The seven mosques in Ramadi are suspected of harboring terrorists, storing weapons caches, promoting violence and encouraging insurgent recruitment, the U.S. command said.").

346. Robert F. Worth, *Sunni Leader Vows Support for Insurgents*, N.Y. TIMES, March 29, 2005, at 1.

347. *Id.*

348. CARDOZO, *supra* note 18, at 17–18:

The state in commissioning its judges has commanded them to judge, but neither in constitution nor in statute has it formulated a code to define the manner of their judging. The pressure of society invests new forms of conduct in the minds of the multitude with the sanction of moral obligation, and the same pressure working upon the mind of the judge invests them finally through his action with the sanction of law.

349. Freeman, *supra* note 131, at 29 ("Some Shia judges have even complained privately that their Sunni colleagues are giving out light sentences to Sunni defendants to show a degree of sympathy with the insurgents.").

kill them now, they don't like sentencing their Sunni brothers to long stints in jail."³⁵⁰

Regardless of whether Sunnis or Shiites are responsible for this judicial activism, arguably the Iraqi positive law supports this religious discrimination in favor of Islamic insurgents. For example, Iraq's transitional Constitution ordained Islam as the official religion of Iraq, making Islam the supreme law which all judges must follow.³⁵¹ Absent U.S. advisors who advocated a "secular" state, the transitional Constitution would have been considerably more explicit in mandating the use of Islamic law in the government.³⁵² Furthermore, Iraq's "permanent" Constitution—its eighth—orders that "Islam is the official religion of the state and is a basic source of legislation: (a) No law can be passed that contradicts the undisputed rules of Islam"³⁵³ This is completely in accordance with Iraqi

350. Freeman, *supra* note 131, at 29.

351. See 2004 Report on Human Rights Practices, *supra* note 278 ("Islam is the official religion of the State"); Law of Administration for the State of Iraq for the Transitional Period, Art. 7(A) (March 8, 2004), <http://www.cpa-iraq.org/government/TAL.html> (last visited July 1, 2004) ("Islam is the official religion of the State and is to be considered a source of legislation. No law that contradicts the universally agreed tenets of Islam . . . may be enacted during the transitional period."). This language apparently was acceptable to Grand Ayatollah Ali Sistani, who seems to have had veto power over legislation. See David Ignatius, *Turning a Political Corner*, WASH. POST, Feb. 17, 2005, at A25 ("The transitional law approved a year ago by Sistani provides that Islam will be Iraq's state religion and a source for legislation . . ."). This language is similar to that of Sudan's 1973 Constitution which provided that "Islamic law and custom shall be the main source of legislation." See LIPPMAN ET AL., *supra* note 84, at 105. Of course, Sudan's government, and its genocide, is hardly a suitable model for ostensibly civilized countries to emulate.

Despite concerted efforts to make Iraqi law consistent with Islamic law, Osama bin Laden has called the transitional Iraqi law "man-made, pagan, not based on Islamic sharia law and therefore 'one of the infidels.'" Walter Pincus, *Iraqis Urged to Boycott Jan 30 National Elections*, WASH. POST, Dec. 28, 2004, at A16 (quoting Osama bin Laden). This just demonstrates how ultra-extreme bin Laden is, as opposed to the normal extremism that flourishes in the Middle East.

352. *One Draft of Iraq's Constitution Makes Islam Main Source of Legislation*, USA TODAY, July 27, 2005, at 6.

During the U.S.-run occupation, which ended June 28, 2004, key Shiite and some Sunni politicians sought to have Islam designated as the main source of legislation in the interim Constitution, which went into effect in March 2004.

However, U.S. Administrator Paul Bremer blocked the move. He said that Islam would be considered 'a source'—but not the only one.

Edward Wong, *Leading Shiite Clerics Pushing Islamic Constitution in Iraq*, N.Y. TIMES, Feb. 6, 2005, at A1 ("The Americans also persuaded the authors to designate Islam as just 'a source' of legislation. That irked senior Shiite clerics here, who, confident they now have a popular mandate from the elections, are advocating Islam to be acknowledged as the underpinning of the government.").

353. CONSTITUTION OF IRAQ, Art. 2 (2005); see *Iraq's Constitution: Democracy or Division*, WALL ST. J., Oct. 15, 2005; *One Draft of Iraq's Constitution Makes Islam Main Source of Legislation*, USA TODAY, July 27, 2005, at 6 ("Framers of Iraq's new constitution are considering designating Islam as the main source of legislation in the

tradition: Iraq's 1958 provisional Constitution and its 1964 "permanent" Constitution plainly stated that Islam is the basis of all law and is the state religion.³⁵⁴ In full accordance with this outlook, numerous Iraqi politicians have struggled to have Islam again recognized as Iraq's official state religion,³⁵⁵ along with the legal and policy ramifications that this entails.³⁵⁶ "Moderates and radicals alike see the un-Islamic nature of their societies, as epitomized by Western-inspired legal codes, and clamor for implementation of Islamic law."³⁵⁷ Through Iraq's Constitution the "foundations for a future theocratic state are being rolled into place."³⁵⁸ According to one U.S. official, Iraq is becoming "some form of an Islamic republic."³⁵⁹

Many Middle Eastern states have already enacted Constitutions that give Islam preeminence in government affairs. For example, Egypt's Constitution contains an Islam primacy provision similar to the one found in Iraq's interim Constitution. It states: "Islam is the religion of the state . . . and the principal source of legislation is Islamic jurisprudence (Shari'a)."³⁶⁰ This provision has been interpreted to mean at least that judges and government officials adhere to Islamic law,³⁶¹ presumably including provisions that preclude the testimony of non-Moslems in criminal cases involving

country . . ."); Wong, *supra* note 351; see also Edward Wong, *Iraqi Constitution Draft Includes Curbs to Women's Rights*, N.Y. TIMES, July 20, 2005, at A1 ("A working draft of Iraq's new constitution would cede a strong role to Islamic law . . ."); Ellen Knickmeyer & Omar Fekeiki, *Iraqi Charter To Give Religion A Big Role*, WASH. POST, July 28, 2005, at A18 ("Iraq's constitution will enshrine 'a significant role for religion in the state,' the Shiite Muslim Arab who is leading the drafting of the charter said Wednesday, in one of the strongest statements yet that the new Iraq will follow the religious will of its Muslim majority."); Alissa J. Rubin, *U.S. Voices Concern On Direction of Iraq Charter*, L.A. TIMES, July 27, 2005, at A1 (A draft of Iraq's Constitution states that "Islam is the official religion of the state. It is the basic source for legislation. It is forbidden to pass a law that contradicts its fixed rulings."). The draft Constitution "proposes an explicitly Islamic state." *Id.* It simply makes explicit the reality that already exists in Iraq, or at least in the Iraqi courts.

354. SMITH ET AL., *supra* note 171, at 177, 179.

355. Harold Meyerson, *Fighting for Islamic Law*, WASH. POST, Feb. 9, 2005, at A23 ("some Shiite clerics can't stop talking about codifying Koranic law in the new constitution").

356. Dan Murphy, *View Emerging of Shiite-Ruled Iraq*, CHRISTIAN SCIENCE MONITOR, Feb. 7, 2005, at 1 ("We shouldn't have anything that conflicts with Islam. Islam is the religion of the majority, so it should be the official religion of the state.") (quoting Ibrahim Jaafari, head of the Iraqi Dawa Party).

357. ESPOSITO, *supra* note 91, at 202.

358. Borchgrave, *Iran*, *supra* note 237.

359. Robin Wright & Ellen Knickmeyer, *U.S. Lowers Sights on What Can Be Achieved In Iraq*, WASH. POST, Aug. 14, 2005, at A1 (quoting an unnamed U.S. official).

360. EGYPT CONST. Art. 2, *quoted in* Ibrahim Saleh, *The Writing of the 1971 Egyptian Constitution*, in CONSTITUTION MAKERS ON CONSTITUTION MAKING 288, 325 (Robert A. Goldwin & Art Kaufman eds., 1988).

361. Saleh, *supra* note 357, at 327.

Moslem defendants. At least according to some Moslem scholars, Islamic law requires this discrimination against non-Moslem accusers,³⁶² although it is claimed that Mohammed did not teach discrimination against "people of the book" (*i.e.*, Christians and Jews). The problems this discriminatory approach would engender are manifold and obvious. Despite rhetoric about equality for all, such discriminatory treatment of non-Moslem defendants makes Moslems "more equal," to paraphrase George Orwell, than those who do not share this faith.³⁶³ Exemption from the strictures of the criminal law for members of one religious group at the expense of those who adhere to some other creed is not justice, at least not as the term is understood in the modern Judeo-Christian world.³⁶⁴ But this seems to be the approach taken by CCCI judges, and Islam seems to be the impetus behind their discriminatory decisions.³⁶⁵

Even if there were no explicit statement of the influence Islam has over the Iraqi judiciary, Islamic law "remains central to Islamic identity and is an ideal to which Moslem societies aspire,"³⁶⁶ this includes Iraqi society. In these Moslem societies a "governmental or judicial decision must be consistent with the *Shari'a*, otherwise it is a

362. MUHAMMAD ASAD, *THE PRINCIPLES OF STATE AND GOVERNMENT IN ISLAM* 31 (1980) (internal quotations and citation omitted).

363. GEORGE ORWELL, *ANIMAL FARM* (1946).

364. This favoritism is similar to that which existed in the German courts under the Nazis:

If a party member commenced a proceeding or was a complainant against a non-party member, the party member usually prevailed. Conversely, if a non-party member commenced a proceeding or lodged a complaint against a party member, the party member usually prevailed, regardless of the merits of the controversy. . . . Equality before the law was a forgotten concept in Germany under Nazi government. The group to which a person belonged determined his status before law and public authority.

NOBLEMAN, *supra* note 74, at 69.

365. Even when the practice of discriminating against Christians and Jews is not explicitly mandated by law, the greater the "Islamicization" of a country, especially the law, the greater the degree of discrimination against adherents of other religions. Consider, for example, Iran and Afghanistan, and now Iraq. ESPOSITO, *supra* note 91, at 209:

The revivalist mood and orientation of resurgent Islam has also affected the status and rights of non-Muslims. In recent years, tensions and clashes between Muslims and non-Muslim communities have increased: the Copts in Egypt, Bahai in Iran, Chinese in Malaysia, and Christians in the Sudan, Pakistan, and Nigeria. The creation of more Islamic-oriented societies, especially the introduction of Islamic laws, has resulted in vary degrees of tension, conflict, violence, and killing in the name of religion.

This correlation between Islamic law and violence against non-Moslems raises the question why U.S. officials elected to adjudicate insurgency cases in a court like the CCCI, where the judges are infected with this discriminatory legal mindset.

366. LIPPMAN ET AL., *supra* note 84, at 3.

nullity.”³⁶⁷ “The Islamic legal system is rooted in divinity; its sources are divine and thus cannot be altered. Moslems seek to conform to the dictates of their legal system in an effort to fulfill their religious duties.”³⁶⁸ In this spirit, some Iraqi judges openly invoke *sharia* in the courts, while others do so surreptitiously.³⁶⁹ Both approaches have the same effect, and it is likely that those judges who implement *sharia* on the sly will become emboldened and eventually make the basis of their rulings explicit, encouraging other jurists to follow suit.

Christianity and Islam have more similarities than either Christians or Moslems are likely to admit, but there are also key differences. Unlike Christianity or even Judaism,³⁷⁰ Islam does not lend itself to a separation of mosque and state.³⁷¹ Indeed, the concept of separating church and state is completely foreign to Islam.³⁷² Islam started out as a political force and central to its foundation is a

367. *Id.* at 60. The “permanent” Iraqi Constitution is thus projected to include an explicit statement of this view. Wong, *supra* note 351 (“The clerics generally agree that the constitution must ensure that no laws passed by the state contradict a basic understanding of *Sharia* as laid out in the Koran.”).

368. Umar F. Moghul, *Approximating Certainty in Ratiocination*, 4 J. ISLAMIC L. 125, 130 (1999).

369. Wong, *supra* note 351 (“Conservative judges are invoking *Sharia* in some courts.”).

370. Spector, *supra* note 85, at 317 (“There is no army of police to compel obedience to a Jewish Law or ‘Judge’s’ decision and no person to incarcerate the insolent for Contempt of Court. But Jewish Law, Civil as well as Ecclesiastical enjoys the homage of the bulk of the Jewish race.”).

371. “Islamic law is so broad, and Shiite Islamic law has so many branches. There is an answer from Islam for everything in society.” Wong, *supra* note 351 (quoting Sheik Ali Smesim). One criticism of Islamic law, however, is its imperviousness to change. Much of *sharia* seems stuck in the milieu of its origin, unable to apply its core principles to changes in technology and international relations. See ESPOSITO, *supra* note 91, at 84 (“Jurists were no longer to seek new solutions or produce new regulations and law books but instead study the established legal manuals and write their commentaries. Islamic law, the product of an essentially dynamic and creative process, now tended to become fixed and institutionalized.”). Thus, the common law system stands in stark contrast to *sharia*. ROSCOE POUND, *THE SPIRIT OF THE COMMON LAW* 182 (1921):

The chief cause of the success of our common-law doctrine of precedents as a form of law is that it combines certainty and power of growth as no other doctrine has been able to do. . . . Growth is insured in that the limits of the principle are not fixed authoritatively once for all but are discovered gradually by a process of inclusion and exclusion as cases arise which bring out its practical workings and prove how far it may be made to do justice in its actual operation.

372. SMITH ET AL., *supra* note 171, at 150 (“In the history of Islam there has never been a separation of church and state.”); M.H.A. Reisman, Comment, *Some Reflections on Human Rights and Clerical Claim to Political Power*, 19 YALE J. INT’L L. 509, 511 (1994) (Islam “recognized no divisions among the spiritual, social, economic, and political sectors of life. . . . Islam thus cannot leave outside its domain the affairs of the state and the exercise of official power.”); Hamilton, *supra* note 309, at 311 (noting that in Islam, the “state and church were never separated”).

belief that political power, including the judiciary,³⁷³ should be used to promote Islam and eradicate conflicting belief systems, including individuals who hold these “errant” beliefs:

In contrast to Christianity, which in its earliest form was nongovernmental and which, by and large, has returned to a nonpolitical, nonstate form, Islam was in its origins and constantly strains to become again a church militant and powerful. Muhammad was a social critic who attained political power and used the military power and the apparatus of government to promote religion. The link between Islam and temporal rule is emphasized by the dating of the Islamic calendar from the *Hijra*, the initial step in the founding of an Islamic community, rather than from the date of Muhammad’s birth or revelation.³⁷⁴

Islam “simply does not have the separation of the political and the religious sphere, which Christianity had had from the beginning. The Quran is a total religious law, which regulates the whole of political and social life and insists that the whole order of life be Islamic.”³⁷⁵ Furthermore, “Mohammedans consider the Koran the principal source of their jurisprudence;”³⁷⁶ thus, judges steeped in Islam and the Koran are essential to “sound” judicial decision-making according to the ideals of Moslem jurisprudential system. Under Islam, the connection between religion and state “is indeed so intimate that it has been hitherto deemed necessary that in order to master the principles of Jurisprudence one must possess a considerable acquaintance with the doctrines of Mohammedan theology.”³⁷⁷

Attempts to separate Islam from the government, particularly the judiciary, have met with strong resistance in the Islamic world.³⁷⁸

373. Mohammedan jurisprudence is purely the outcome of theocracy, or at least, it is supposed to be so. It is God, according to the Mussulman belief, that gave them their laws, through Mohammed the “Prophet;” consequently, it was to the ‘Holy Book,’ *i.e.*, the Koran, that the faithful had to look for guidance and inspiration in all their affairs, be they temporal or spiritual.

Ion, *supra* note 91, at 45.

In the countries professing the faith of Mohammed, theology and jurisprudence were firmly linked together. The Arabs, who were the first converts to that religion, accepted the “divine messages,” not only as a new faith, prescribing their duties to God, but also a law enjoining upon them adherence to certain rules in their relations to man.

Id. at 44.

374. LIPPMAN ET AL., *supra* note 84, at 118.

375. Cardinal Joseph Ratzinger, *quoted in* John L. Allen, Jr., *Pope Benedict on Islam*, NAT’L CATH. REP., Aug. 12, 2005, at 20. Cardinal Ratzinger is now Pope Benedict XVI.

376. Ion, *supra* note 91, at 45.

377. Rahim, *supra* note 85, at 101.

378. F.R.A. Williams, *The Making of the Nigerian Constitution*, in CONSTITUTION MAKERS ON CONSTITUTION MAKING 397, 412 (Robert A. Goldwin & Art

Most Moslems consider the concept of separation of religion and state—particularly the laws of the state—an absurdity:³⁷⁹

Law, as is well-known, has never been separated in the Mohammedan system from the domain of religion, and in theory at all events no line of demarcation can be drawn between civil law and canon law. Both are of the same divine origin. The notion of legal rights and legal wrongs are generally speaking dominated by considerations of spiritual merit or demerit.³⁸⁰

“It is laid down that a magistrate should seek his law first in the text of the Qur’an and then in the precepts and usages of the Prophet himself, and if both of these sources fail him, he must rely upon his judgment.”³⁸¹

Some Iraqi judges who ascribe to this understanding of Islam and Islamic law consider it an outrage that an infidel nation like the United States is exercising governmental power in Iraq. Mere U.S. presence in Iraq is absolutely contrary to such extremists’ version of Islam. The “followers of Mohammed divide the human race into that of the ‘faithful’ on one side and that of the ‘infidels’ on the other side;”³⁸² and infidels are not permitted to exercise power over the faithful.³⁸³ Jihad against infidel-U.S. usurpers is the only permissible response to this foreign domination of Iraq.³⁸⁴ In the words of an Egyptian attorney and Islamic legal expert who traveled to Iraq to fight against the U.S. military forces: “Islamic teachings say that if Moslem lands are occupied, you must perform jihad.”³⁸⁵ That is, you must kill the U.S. occupiers of Iraq, even though they

Kaufman, eds., 1988) (“The close connection between religion and law among Moslems posed very serious and delicate problems for those on the Constitution Drafting Committee” Non-Moslems “saw no need to set up a federal court to administer Islamic law.”).

379. And their idea of a religious state is frightening: According to one Moslem convert in England: The idea of the Islamic state is terror against anyone who doesn’t support Islamic ideology.” Brandon & Thorne, *supra* note 343.

380. Rahim, *supra* note 85, at 101. Thus, for example, if a judge believed that an Islamic terrorist was committing a spiritually meritorious act by killing U.S. infidels, he would be obliged by his religion not to punish the terrorist. Recall that many *imams* have announced that attacking U.S. soldiers in Iraq is not only permissible under Islam, but is required.

381. *Id.* at 190.

382. Ion, *supra* note 91, at 206.

383. According to some Moslems, Jews and Christians are not “infidels” per se, insofar as they believe in one God (although the Christian doctrine of the trinity is a sticking point for some Moslems), and consider only atheists, Buddhists, Hindus, and others to be infidels. But still other Moslems consider Christians to be infidels, in part because of the doctrine of the trinity.

384. It is worth noting that “[a]nti-Americanism is deeper and broader than at any time in modern history,” and it “is most acute in the Muslim world,” a fact confirmed by the Moslem clerics in Iraq. Lionel Barber, *America’s Soft Power Needs Hard Work*, LONDON FINANCIAL TIMES, July 22, 2005.

385. Daniel Williams, *Cairo Woman Attacked by Mob Says Fight Isn’t Finished*, WASH. POST, May 27, 2005, at A17 (quoting Rabaa Fahmy).

freed you from slavery at the hands of a putative Moslem dictator, Saddam Hussein. Apparently it is better to be enslaved by a fellow Moslem than to be gradually set free by infidels.

In accordance with these views, Islamic law arguably compels the CCCI judges to do their best to assist the jihadist-insurgents in their struggle against the non-Moslem, U.S. occupiers of Iraq,³⁸⁶ so that a fully-Islamic government (or more likely, Islamic anarchy) can be created.³⁸⁷ Some judges see Islam as requiring them to participate in minor acts of resistance, perhaps by punishing terrorists leniently or not at all; under this view, such acts of leniency demonstrate their own morality and loyalty to Islam.³⁸⁸ When many Moslems consider it their religious duty to murder any Moslem who converts to

386. Shadid, *supra* note 340, at 1 (“In Sunni mosques such as Um al-Qura, there is no hesitation about the insurgency that rages in Baghdad and Sunni areas to the north and west. The insurgents are fighting for God, and the occupiers are infidels.”); Daragahi, *supra* note 337, at 15 (“among the Sunni ‘ulema’—the clerical leaders who guide the Sunni masses—the calls are increasingly strident for armed opposition to the United States, no matter the cost.”).

Sadly, intolerance and the preaching of hatred of non-Moslems is not isolated to Iraq or even the Middle East. In Germany, England, and France, Moslems are taught to hate non-Moslems and support jihad against Western civilization. See Don Van Natta, Jr. & Lowell Bergman, *Militant Imams Under Scrutiny Across Europe*, N.Y. TIMES, Jan. 25, 2005, at A9 (noting that Sheik Omar Bakri Muhammad of London broadcasts nightly sermons on the internet calling for “young Muslim men all over the world to support the Iraq insurgency on the front line of ‘the global jihad’”); David Crawford, *West’s Relations With Saudis Face Growing Strains*, WALL ST. J., Dec. 7, 2004, at A12 (At one Islamic school in Bonn, two-thirds of the textbooks “teach students to hate non-Muslims, while one in five praise martyrdom, urge violence against non-Muslims or threaten hell for infractions against Muslim ritual.”).

Even the United States is not immune: “Mosques across the U.S. continue to carry books and pamphlets describing non-Moslems as ‘infidels’ and promoting intolerance against Western society” David S. Cloud, *Some American Mosques Carry Extremist Tracts, Study Says*, WALL ST. J., Jan. 28, 2005, at B5; see Arnaud De Borchgrave, *Message in the Mosques*, WASH. TIMES, Feb. 8, 2005, at A14 (noting that hate-mongering pamphlets were collected from mosques and Islamic centers in Los Angeles, Oakland, Dallas, Houston, Chicago, New York City, and Washington, D.C.); Katherine Clad, *Group Cites Saudi ‘Hate’ Tracts*, WASH. TIMES, Jan. 29, 2005 (noting the presence of “hate propaganda” in religious tracts sent to mosques throughout the United States, telling Moslems to hate Christians and Jews and to kill any Muslim who converts to another religion,” and instructing Muslims living in the United States to “behave as if on a mission behind enemy lines.”). So it is not difficult to surmise that a number of Iraqi judges—who live in a culture that is much more pervasively Islamic than the United States—subscribe to these hate-infested views.

387. According to one Moslem cleric, Moslems should even strive to conquer “the land of the infidels.” See Dorothy Rabinowitz, *The Other War*, WALL ST. J., Aug. 11, 2005, at A12 (“We conquer the land of the infidels, and we spread Islam by calling the infidels to Allah.”) (quoting Sheikh Omar Abdul Rahman).

388. Cf. Daisy Hilse Dwyer, *Introduction*, in LAW AND ISLAM IN THE MIDDLE EAST 11 (Daisy Hilse Dwyer, ed.) (1990) (“a substantial number of political leaders in the Middle East testify to their personal allegiance to Islamic law as proof of their political worth”).

Christianity³⁸⁹—based on Mohammed’s command: “Whoever changes his Islamic religion, then kill him”³⁹⁰—it is not difficult to imagine that some of the CCCI’s Moslem judges feel a religious duty to aid their fellow Moslem terrorists in killing U.S. soldiers. Sadly, the idea that helping insurgents is a religious duty for all Moslems is also in accordance with other more “moderate” clerics who, although they do not openly advocate attacks on U.S. civilians, argue that U.S. soldiers are themselves to blame for terrorist attacks because they are occupying Iraq.³⁹¹ Consequently, according to this reasoning, U.S. soldiers deserve the death and suffering they encounter at the hands of the terrorists,³⁹² and the CCCI judges are simply performing their

389. Beichman, *supra* note 319, at 15 (“It is considered justifiable homicide to kill a Muslim convert to Christianity.”). Consider the case of Abdul Rahman, a Christian convert who was tried for apostasy in Afghanistan. See Nina Shea, *Sharia Calling*, NAT’L REV. ONLINE, Mar. 24, 2006, available at <http://www.nationalreview.com/comment/shea200603240704.asp>. Christians had a similar practice with Jews who proselytized Christians, but that was in the Middle Ages. See SOWELL, *supra* note 313, at 245 (“The death penalty was decreed for Jews who proselytized Christians, and Jews were ordered expelled from government posts where they exercised power over Christians.”). As Justice Black observed: “People with a consuming belief that their religious convictions must be forced on others rarely ever believe that the unorthodox have any rights which should or can be rightfully respected.” *Adamson v. California*, 332 U.S. 46, 88 (1947) (Black, J., dissenting). This helps explain why Christians fare so poorly in the CCCI, a court composed of judges with this “consuming belief.”

390. Julia Duin, *Indonesian Women On Trial for Offering Youths Sunday School*, WASH. TIMES, Aug. 29, 2005, at A1 (quoting Mohammed); Elizabeth Peiffer, *The Death Penalty in Traditional Islamic Law and as Interpreted in Saudi Arabia and Nigeria*, 11 WM. & MARY J. WOMEN & L. 507, 511 (2005) (“the Sunnah later provided that an apostate is subject to the death penalty, based on the statement of Muhammad, ‘Whoever changed his Islamic religion, kill him.’”); see also Shima Baradarann-Robison, et al., *Religious Monopolies and the Commodification of Religion*, 32 PEPP. L. REV. 885, 908 (2005) (“In many modern-day Islamic countries, such as Iran, and other areas, such as Nepal and some provinces in India, it is crime to convert from the dominant faith. In the case of Sudan, Pakistan, and Iran, apostasy from Islam is punishable by death.”).

Some “moderate” Moslems have elected to forego killing converts to Christianity. Instead they beat converts, throw them in prison, kidnap their children, confiscate their homes, or torture family members. Julia Duin, *Indonesian Women On Trial for Offering Youths Sunday School*, WASH. TIMES, Aug. 29, 2005, at A1 (“Enforcement of this rule varies widely. A few Islamic societies merely shun the convert; others remove all civil liberties from the apostates; their children are taken away, their marriages are dissolved, their family inheritance is lost and their right to burial in a Muslim graveyard removed.”). If this is moderation, imagine the form extremism must take.

391. It is a “common Islamic sentiment that Muslims should help expel U.S. ‘occupation’ forces from Iraq.” Bill Powell, *A War Without Borders*, TIME, Nov. 21, 2005; Matza, *supra* note 190, at A1 (“Iraqis’ resistance to occupation is often viewed as an act of Arab dignity and patriotism.”); Hussein Dakroub, *Muslim Scholars Support Attacks Against U.S. Forces in Iraq*, AP ONLINE, Nov. 20, 2004, at 15:20:55 (“A group of Sunni and Shiite Muslim clerics expressed support for attacks on the U.S.-led multinational force in Iraq, saying Saturday that to fight the occupation is ‘a religious duty.’”).

392. Thomas Wagner, *Muslim Scholars Condemn London Attack, but Say Some Suicide Bombings are OK*, ASSOC. PRESS, July 17, 2005 (“the 22 imams and scholars

duty as Moslems in protecting these terrorists from justice. Furthermore, since Islam counsels its adherents to perform spiritually meritorious acts—and because for some Moslems killing U.S. soldiers constitutes such an act—Iraqi judges uphold their duty to Islam by ensuring that their fellow Moslems are not punished, or receive only minimal punishment, for attacking U.S. infidels.³⁹³ Although these religio-political ideas are not universally held by all Moslems, CCCI judges, steeped in a pervasive Moslem culture, might find it difficult or impossible to cast aside Islamic principles and clerical influences in judging Moslem insurgents whose only accusers are non-Moslems.³⁹⁴

Even if the foregoing analysis is completely incorrect and there is no overt discrimination against non-Moslem witnesses or victims (or women), the mere intrusion of Islamic rules of evidence into the trial process creates almost insurmountable hurdles to fair proceedings, thereby permitting dangerous criminal to escape justice.³⁹⁵

These rules, set forth in the Koran, differ strikingly from the rules in modern codes of evidence and have the effect of reducing the chances of conviction. For example, the testimony of women is absolutely excluded. So, too, is the testimony of a victim of brigandage unless he is giving testimony regarding the charges as they affect other parties. Male witnesses may only testify if they are Muslims and possess the technical standard of moral rectitude, meaning that they have committed no major sins and few minor ones. For conviction there must be at least two such eyewitnesses to the crime, unless the accused

stopped short of condemning all suicide bombings, saying those that target occupying forces in countries such as Israel and Iraq are sometimes justified"); Lee Keath, *Some Say Arab Voices Must Stop Using "Buts,"* THE STAR LEDGER, July 9, 2005, at 6 ("Islamic leaders insisted the United States and Britain, with their wars in Iraq and Afghanistan, are ultimately to blame for fueling militant violence."). One big debate among the "moderate" Moslems in Basra is whether all Iraqis should be forced to comply with Islamic law or should merely be "persuaded" to do so. Cambanis, *supra* note 281, at 1.

393. In the words of one Islamic scholar: "[I]f anyone removes a calamity from another Muslim, God will remove from his some of the calamities of the day of Resurrection; and if anyone shields another Muslim from disgrace, God will shield him from disgrace on the Day of Resurrection." ASAD, *supra* note 361, at 31. (internal quotations and citation omitted). Notice that the benefit inures only for assisting other Moslems, not for helping Christians, Jews, or men and women generally.

394. Iraq was once one of the most secular countries in the Middle East, but "secular" is a relative term, particularly in the Middle East, which is chock full of religious zealots. It is now know "that Iraq is a deeply Islamic country." Murphy, *supra* note 310, at 11.

395. *Sharia* "makes the prosecution of criminal cases difficult, if not impossible, in practice." THE NEW ENCYCLOPEDIA OF ISLAM 419 (Cyril Glasse ed., 2001); Michael M.J. Fischer, *Legal Postulates In Flux: Justice, Wit, And Hierarchy in Iran*, in LAW AND ISLAM IN THE MIDDLE EAST 117 (noting that Islamic provides "considerable protection for the accused," to put it mildly); Ferris K. Nesheiwat, *Honor Crimes In Jordan: Their Treatment Under Islamic and Jordanian Criminal Laws*, 23 PENN. ST. INT'L L. REV. 251, 266 (2004) (noting that under Islamic criminal law a "conviction can only be attained by evidence of a high degree of reliability").

makes a confession, which he is privileged to withdraw up to the time of judgment.³⁹⁶

Thus, it is often the case that Islamic evidentiary rules “are a practically insurmountable barrier to any conviction . . .”³⁹⁷ In light of these rules of evidence and the probability that they are influencing at least some of the judges, it makes little sense to waste the U.S. taxpayer’s money trying to prosecute insurgents before a foreign court tainted with religious hatred and encumbered by anachronistic evidentiary rules.

E. *Fear and Apprehension*

Finally, there may be nothing more sinister motivating some CCCI judges than fear and a desire for self-preservation—an intuition that helps to keep human alive in a world lurking with

396. Ann Elizabeth Mayer, *Reinstating Islamic Criminal Law in Libya*, in LAW AND ISLAM IN THE MIDDLE EAST, *supra* note 328, at 107; LIPPMAN ET AL., *supra* note 84, at 45 n.* (“Witnesses must be adult male Muslims of pious character.”).

In many respects these extensive restrictions concerning the suitability of witnesses are similar to those found in Jewish law, from which this aspect of Islamic law was probably derived:

The qualifications of witnesses were most exacting and high. The following persons were incompetent to be witnesses: women, slaves, minors, demented persons, deaf and mute, blind men, persons convicted of irreligion, or immorality, or strongly suspected thereof, gamblers, usurers, and farmers, or collectors of imposts, illiterate or immodest persons, relatives by consanguinity or affinity and persons directly interested in the case

Spector, *supra* note 85, at 319. It is unclear why farmers are excluded. These restrictions are likewise similar to those criteria for witnesses used in the English chancery courts:

The criteria for this determination were designed to exclude those who would be most likely to commit perjury for various reasons. . . . [T]he judge was to allow a witness to testify only if he was satisfied that he would not perjure himself. The most important, certainly the most emphasized, criterion was integrity and good reputation; truthfulness in the past should be a fair indication of veracity in the future. Also the social status or rank of the proposed witness should be considered; the upper classes would be better educated and more conscious of the duty to testify truthfully. The wealthy witness was to be preferred over the poor one since the temptation to swear falsely for money would be less. Friendship, moreover, with one of the parties was to be noted, as was enmity towards the opposite party.

William Hamilton Bryson, Note, *Witnesses: A Canonist’s View*, 13 AM. J. LEGAL HIST. 57, 59 (1969). Fortunately law has progressed beyond these restrictions. U.S. law has abandoned these qualifications. See *Benson v. United States*, 146 U.S. 325, 337 (1892) (“the merely technical barriers which excluded witnesses from the stand have been removed”).

397. See Hossein Esmaeili & Jeremy Gans, *Islamic Law Across Cultural Borders: The Involvement of Western Nationals in Saudi Murder Trials*, 28 DENV. J. INT’L L. & POL’Y 145, 155 (2000).

dangers.³⁹⁸ Although a judge motivated by terror is not considered to be as culpable as one given to venality, when a judicial officer makes a decision based on fear, he has abandoned his charge to administer justice impartially just as much as the judge who tailors his decisions according to the bribes he receives.³⁹⁹ Fear is just as much a corrupting influence as prejudice or cupidity for it also prevents the judicial mind from making impartial decisions based solely on the law and the facts of a particular case.⁴⁰⁰

Because of the precarious situation in Iraq, many Iraqi officials live in apprehension of the terrorists⁴⁰¹; the Iraqi terrorists' program of intimidation has been extremely successful. Many government officials, including several CCCI judges, have been targeted by assassins.⁴⁰² Assassinations have felled many high-ranking Iraqi officials,⁴⁰³ including over twenty-six judges,⁴⁰⁴ at least one of whom had served on the CCCI.⁴⁰⁵ In particular, former Baathists who have

398. Ryan J. Liebl, *Rule of Law in Postwar Iraq: From Saddam Hussein to the American Soldiers Involved in the Abu Ghraib Prison Scandal, What Law Governs Those Actions?*, 28 HAMLIN L. REV. 91, 104 (2005) (noting that CCCI judges have been the target of death threats).

399. *A Few Words On Judicial Integrity*, 6 ALB. L.J. 265, 265 (1872):

Fear is another form of corruption not less injurious, and not a whit more respectable than partiality or prejudice. Upon any just gauge and measure of the three, fear should be accounted the basest and meanest of all. To be afraid is the miserable condition of a coward. To do wrong, or omit to do right from fear, is to superadd delinquency to cowardice.

400. *Id.* ("It seems to be supposed in some quarters that the only forms of corruption are venality and partiality. But there are two others quite as bad, if not worse than partiality, and they are prejudice and fear.")

401. Lowry, *supra* note 56, at 31 (discussing Iraqi police officers who refused to be seen with U.S. soldiers out of fear of ostracism or retaliation from insurgents).

402. For example, Judge Raid Juhi, an investigative judge with the CCCI and the chief investigative judge for the Iraqi Special Tribunal was targeted by terrorists loyal to Saddam Hussein for his role in Hussein's case. See John F. Burns, *Tribunal Leader in Hussein's Case Is Target of Plot*, N.Y. TIMES, Nov. 28, 2005, at A1; Liebl, *supra* note 397, at 104 (discussing some assassinations of Iraqi judges).

403. See Jackie Spinner & Bassam Sebti, *Suicide Blast At Baghdad Bus Depot Kills 7*, WASH. POST, Sept. 24, 2005, at A17 (discussing the assassination of Ali Abdul Ridha, a member of the Iraqi de-Baathification committee); Robert F. Worth, *Gunmen Kill a Lawmaker in an Attack Near Baghdad*, N.Y. TIMES, Sept. 19, 2005, at A14 (discussing a terrorist attack that resulted in the wounding of Iraqi National Assembly member Haydar Qasim Shanoun and the murder of Assembly member Faris Nasir Hussein); Sabrina Tavernise, *25 are Killed as Insurgents Press Attacks on Shiites*, N.Y. TIMES, Sept. 17, 2005, at A6 (noting an insurgent attack on a town official Amer al-Khafagi and the fact that insurgents "consider any Iraqi cooperation with the American effort a traitor"); Karl Vick, *Baghdad Governor Slain by Insurgents*, WASH. POST, Jan. 5, 2005, at A1 (discussing a terrorist attack that resulted in the death of a provincial governor).

404. Fleishman, *supra* note 130, at 1.

405. Sebti & Spinner, *supra* note 402, at A12 ("[U]nknown gunman shot and killed Judge Munquith Faroun and two of his bodyguards in the Ameriya neighborhood

cooperated with the United States have been targeted for murder by the insurgents.⁴⁰⁶ Even the police refuse to arrest criminals for fear that they or their families will be slain in retaliation.⁴⁰⁷ Whole military units have refused to attend military training run by the United States because they “feared reprisals from locals if they were seen to have cooperated with the Americans.” In the words of Iraq’s Chief Justice of the Federal Supreme Court, Madhat Mahmood: “Judges are human. The fear factor applies to him the same as it applies to any other human.”⁴⁰⁸

Perhaps some of the CCCI judges, in the throes of fear, believe that rather than continually risking death, they would be better off cooperating with the insurgency by treating terrorists with kid gloves when they appear in the CCCI. Close encounters with death may have intimidated some judges, and their anti-U.S. decisions may simply be an attempt to appease the terrorists.⁴⁰⁹ Fear is a powerful weapon, and if the Iraqis succumbed to it they are no worse than Spanish leaders, who withdrew their troops from Iraq out of fear of further terrorist attacks.⁴¹⁰ But they will also be no better off, and will face the same fate as the Spanish: an increase in bullying by terrorists.⁴¹¹ The fact that throughout history such appeasement always fails perhaps has not yet registered with the CCCI judges. But the terrorists are receiving the message sent back by the judges

of western Baghdad Faroun was on his way to work at the Central Criminal Court of Iraq when he was attacked around 8 a.m.”).

406. Anderson, *supra* note 266 (“an assassination campaign had begun against former Baathists who were cooperating with the occupation”).

407. Rasan & Negus, *supra* note 199, at 8.

408. Jervis, *supra* note 246.

409. Recall that the CCCI was founded in part so that crimes committed against U.S. soldiers could be tried in a neutral forum, not one steeped with anti-U.S. animus. Doug Simpson, *Louisiana-Trained Lawyers Become a Legal Force in Iraqi Courtrooms*, ASSOCIATED PRESS, July 16, 2005 (“The court was created . . . to prosecute insurgent fighters because the military was concerned that Iraq’s provincial courts would be influenced by anti-Americanism and be more likely to acquit those guilty of attacks.”). Obviously this goal is not being realized in the CCCI.

410. Editorial, *Europe Wakes Up*, WALL ST. J., Feb. 1, 2005, at A12 (“Consider Spain, where the government thought that withdrawing its troops from Iraq after last year’s Madrid train bombings would take it off the terrorist target list. No such luck. Security services have since foiled Islamist attacks against such targets as the main criminal court and Madrid’s soccer stadium.”).

411. See Oliver Roy, Commentary, *Why Do They Hate Us? Not Because of Iraq*, N.Y. TIMES, July 22, 2005, at A19 (“Even their calls for the withdrawal of European troops from Iraq ring false. After all, the Spanish police have foiled terrorist attempts in Madrid even since the government withdrew its forces” from Iraq.); Elaine Sciolino, *Spain Continues to Uncover Terrorist Plots, Officials Say*, N.Y. TIMES, Mar. 13, 2005, at 1.17 (“Despite sweeping measures to improve their ability to investigate potential terrorist threats since the March 11, 2004 bomb attacks that left 191 people dead, the officials estimate that there are hundreds of people scattered in cells around the country committed to attacking centers of power in Spain.”).

loud and clear: keep up the attacks because they are spreading the fear that continues to paralyze Iraq.⁴¹²

III. U.S. MILITARY TRIBUNALS

Regardless of the precise motivations behind the CCCI's pro-terrorism decisions, it is obvious from the foregoing discussion that the CCCI judges are not well-situated to make fair and unbiased decisions in cases involving Iraqi terrorists. The judges are subject to substantial external influences that could easily lead the most stalwart judge to decide cases on factors other than their merits. Whether they decide cases out of fear of the insurgents, spite for the United States, or love for Islam, the CCCI judges assist the Iraqi terrorists by their decisions. Every time they order the release of guilty insurgents—regardless of whether the U.S. military effectuates these releases—the CCCI judges hand the insurgents at least a moral victory.⁴¹³

412. In the words of Lieutenant General Lance Smith of U.S. Central Command: “the intimidation campaign that is ongoing is very effective. We see it permeate many levels of the Iraqi government and the Iraqi security forces.” Rowan Scarborough, *Al Qaeda Ties to Zarqawi Stronger*, WASH. TIMES, Nov. 20, 2004, at A1.

413. Under Iraqi Law, a defendant is usually released upon acquittal. IRAQI LAW ON CRIMINAL PROCEEDINGS ¶ 182(E) (1971) (“A detainee is released when a verdict of not guilty . . . is issued, as long as there is no other legal reason for his detention.”).

Many, though not all, of the defendants acquitted by the CCCI are retained in custody by the United States as security detainees, because they continue to pose a threat to Coalition Forces. Because Insurgents may lawfully be held as security detainees, U.S. retention of acquitted insurgents violates neither international nor Iraqi law. Indeed, this practice is consistent with the Geneva Conventions and common sense. See *Rumsfeld v. Padilla*, 542 U.S. 426, 465 (2004) (Stevens, J., dissenting) (“Executive detention of subversive citizens, like detention of enemy soldiers to keep them off the battlefield, may sometimes be justified to prevent persons from launching or becoming missiles of destruction.”).

Although their continued detention is lawful and necessary to prevent insurgents from rejoining the battle, the United States' act of flouting CCCI orders of release has created ill feelings and suggests to the Iraqis that U.S. individuals do not respect their judicial orders. This was yet another predicament created by the U.S. decision to adjudicate insurgency cases in the CCCI. As a general matter, an occupying power should make reasonable efforts to minimize this type of friction with the citizens of the occupied country. HUNT, *supra* note 98, at 218 (“A military occupation which accomplished its purpose with the least possible friction with the inhabitants, is, in the end, the most successful.”). Thus, in the long run, it would have been better to completely bypass the Iraqi courts, and permit U.S. officers to adjudicate these cases.

Because of the threat that the Supreme Court will grant detainees in Iraq the right to litigate claims in U.S. courts and the deleterious effects on the military that this would entail, the U.S. military may feel pressure to transfer custody to the Iraqis, as it has done with detainees at Guantanamo Bay. See Robin Wright & Josh White, *U.S. Holding Talks on Return of Detainees*, WASH. POST, Aug. 9, 2005, at A13 (“The Bush administration is nearing agreements with 10 Muslim governments to return their

The United States learned early in its history that if it wants justice done right, it had better bear that burden itself, particularly during war or when acting as an occupying power.⁴¹⁴ Occupying powers are entrusted, by default, with plenary executive, legislative, and judicial authority in the occupied territory.⁴¹⁵ The occupier is free to delegate this authority to natives of the occupied land and this is frequently done with respect to certain executive and judicial matters that have little or no bearing on the occupation itself. Thus, oftentimes an occupying force will permit local courts staffed by local judges to adjudicate criminal and civil cases in which all of the

detainees held at Guantanamo Bay . . .”); Josh White & Robin Wright, *Afghanistan Agrees to Accept Detainees*, WASH. POST, Aug. 5, 2005, at A1 (noting that the United States intends to transfer custody of detainees held at Guantanamo Bay to countries such as Afghanistan, Yemen, and Saudi Arabia, which would largely foreclose litigation in U.S. courts). This has already proven disastrous in Iraq, where detainees released to Iraqis are promptly freed to commit new attacks. See Victor Davis Hanson, *Western World Shows too Much Softness in Different Kind of War*, CHICAGO TRIB., Sept. 2, 2005, at C25 (“It turns out that the terrorist had been captured earlier in December 2004, on suspicion of being involved in a deadly suicide attack on an American base. Then he was turned over to the Iraqis, sent to the notorious Abu Ghraib jail and released. Once free, he returned to his job of killing Americans . . .”).

414. The United States, therefore, created three types of military courts in post-World War II Germany, where the amount of due process was commensurate with the severity of the crime committed and the potential penalty that the courts could impose:

Military Government Ordinance No. 2 established three types of courts—summary, intermediate and general. The basic differences between these courts lay in their powers of sentence and their composition. General courts were empowered to impose any lawful sentence including death; intermediate courts were authorized to impose any lawful sentence except death, imprisonment in excess of ten years and/or fines in excess of \$10,000; and summary courts were limited to the imposition of prison sentences of one year and/or fines not exceeding \$1,000. General courts were required to be composed of not less than three members.

NOBLEMAN, *supra* note 74, at 52–53.

415. In the event of a military occupation the authority of the regular Government is supplanted by that of the invading army. The rule imposed by the invader is the law of war. It is not the law of the invading state nor the law of the invaded territory. It may in its character be either civil or military, or partly one and partly the other. In every case the source from which it derives its authority is the same, namely the customs of war, and not any municipal law; and the General enforcing the rule is responsible only to his own Government and not to the invaded people.

MAINE, *supra* note 5, at 179.

There is a slight qualification to the rule announced by Sir Henry Maine: whenever practicable, the occupying power should endeavor to keep the local criminal law in place and should not supplant it with a foreign law unless absolutely necessary. GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, Art. 64 (1949) (“The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying power in cases where they constitute a threat to security . . .”).

concerned parties are natives of the occupied country.⁴¹⁶ In contrast, judicial matters that could impinge upon the occupation force and a successful occupation are carefully kept within the confines of the occupation army. Similarly, there is a need to exercise tighter control in areas plagued by ongoing hostilities or terrorist attacks.⁴¹⁷ This includes the prosecution in special military courts of terrorists or insurgents who have attacked the occupying forces.⁴¹⁸ Were such cases left to the local tribunals, even if the local judiciary were ostensibly loyal to the United States, there is no guarantee of zealous prosecution and little opportunity for oversight consistent with the rule of law. As explained by Dr. Fraenkel:

The Judicial process is essentially different from other forms of administration, for it is subject to no orders from superiors. Administrative agencies of the executive branch of government can be subjected to outside supervision and control without changing their basic structure, because in any case they function on the principal of hierarchical authority. The activities of courts, however, can only be accepted or rejected; if the independence of the judiciary is to be respected at all, the courts cannot be subjected to interference. For this reason an occupation regime must create its own courts for all litigation that it is not willing to entrust to the free functioning of the courts of the occupied country.⁴¹⁹

So the U.S. military has frequently created tribunals run by U.S. military officers to try offenses committed against the peace and U.S. forces.⁴²⁰ In various theatres of war, these tribunals proved to be a resounding success, and not only as a tool for punishing offenders. They also prevented or inhibited insurrections and served as a means of inculcating democratic values and respect for the rule of law. For example, between 1944 and 1948, U.S. military tribunals in post-war Germany tried over 400,000 cases with an 85% conviction rate.⁴²¹

416. MAINE, *supra* note 5, at 180 ("As a general rule, military occupation extends only to such matters as concern the safety of the army, the invader usually permitting the ordinary civil tribunals of the country to deal with ordinary crimes committed by the inhabitants. The course, however, to be adopted in such a case is at the discretion of the invader.").

417. "Greater severity may be exercised in places or regions where actual hostilities exist, or are expected and must be prepared for." MAINE, *supra* note 5, at 181 (1888) (quoting the U.S. rules for the government of armies in the field).

418. *Id.* ("The special tribunals created by an invader for carrying into effect the rule of military occupation in the case of individual offenders are usually military courts, framed on the model and carrying on their proceedings after the manner of courts-martial . . .").

419. FRAENKEL, *supra* note 138, at 21-22.

420. ZINK, *supra* note 98, at 108-09.

421. NOBLEMAN, *supra* note 74, at 137.

American military government courts in Germany functioned from September 1944 until August 1948, when they were succeeded by an integrated system of civilian courts, modeled after the American judicial system. During the four years of their operation, as an integral part of the United States Army, these

The courts were universally respected for their fairness and integrity, and German defendants were often surprised, and thankful, that they were given a right to state their case before such tribunals. The acquittal rate demonstrated that the results were not fixed and that the United States practiced the rule of law that it preached throughout Germany. A similar system of military tribunals could have been successfully implemented in Iraq (where the Iraqi judges had an anemic 61% conviction rate and mete out paltry sentences)⁴²² and could have produced similarly positive results.

International law has long recognized the right and duty of an occupying power to create military tribunals; this right and duty arises out of the need to provide a safe environment for the occupying troops as well as the local populace.⁴²³ Furthermore, military commissions have a long history in the United States,⁴²⁴ and the executive, legislative,⁴²⁵ and judicial branches have all repeatedly approved of the use of military commissions.

courts tried nearly 400,000 cases, approximately 85 percent of which resulted in conviction.

When German courts began to function again, the United States still retained the authority to try in U.S. courts any cases "affecting the security, interest, or prestige of the Government of the United States, or any case in which it was felt that for any reason whatever, a proper trial would not be afforded the accused in the" German courts. *Id.* at 141 n.425.

422. Zoroya & Jervis, *supra* note 21.

423. NOBLEMAN, *supra* note 74, at 2.

The right of an occupying power, either *flagrante* or *cessante bello*, to establish its own tribunals and, in some degree, the laws applicable thereto, is well established in international law. It arises out of the necessity for the occupant to provide for the security of his army and to contribute to the success of his military operation, as well as the obligation imposed upon him by international law to maintain and restore law and order in the occupied area.

424. Madsen v. Kinsella, 343 U.S. 341, 346–47 (1952) ("Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war.").

425. It has been argued that "the legal basis for military commissions derives from the constitutional provisions conferring the power to wage war on Congress," although "it has historically left the establishment of such tribunals to the executive branch." Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorists Acts*, 96 AM. J. INT'L L. 320, 321 (2002). In light of the Constitutional provisions conferring on the President specific war powers, and the concomitant duty of the President to protect the troops under his command, it is likely that the President has concurrent power to establish military tribunals, particularly when they are deemed necessary to punish those who have attacked U.S. soldiers. *Brig Amy Warwick*, 67 U.S. (2 Black.) 635, 668 (1862) ("If a war be made by invasion of a foreign nation, the President is not only authorized but bound to resist force by force. He . . . is bound to accept the challenge without waiting for any special legislative authority."). "As commander-in-chief, he [the President] is authorized to direct the movements of the naval and military forces placed by law at his command, and to employ them in the manner he may deem most effectual to harass and conquer and subdue the enemy. He may invade the hostile country, and subject it to the

Besides the trial of British Major John Andre during the U.S. Revolutionary War, the United States used military commissions in a succession of "major" foreign occupations: in Spanish Florida during the First Seminole War; in Mexico, including California and New Mexico during and after the Mexican American War; in the Confederate States during and after the Civil War; in Cuba, Puerto Rico, and the Philippines after the Spanish American War; in the Rhineland after World War I; and in Japan, China, Austria, Italy, and Germany during and after World War II.⁴²⁶ The United States was also prepared to use military tribunals in Korea had the events of the Korean War turned out differently. In each instance, the occupying forces of the United States protected their security and maintained law and order in the areas under their control by means of military courts.⁴²⁷ Not surprisingly, this practice was endorsed by some of the greatest minds of the U.S. government. Military commissions were created, authorized, or approved by a veritable who's who of U.S. history: then-General George Washington, Thomas Jefferson, then-General Andrew Jackson, James Monroe, then-President James K. Polk, then-General Zachary Taylor,⁴²⁸ General

sovereignty and authority of the United States." *Fleming v. Page*, 50 U.S. 603, 615 (1850). Presumably, then, the President has the authority to direct military forces to utilize military commissions to punish war criminals, especially since part of subjecting a nation to the sovereignty of the United States might entail subjecting its malefactors to trials for any unlawful attacks against the United States. *See, e.g.*, Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 5 (2001) ("The President's Commander-in-Chief power to set up military commissions applies . . . during actual war within a war zone or relevant occupied territory . . ."). Regardless of where this power resides, Congressional approval of various military tribunals can be inferred from its silence on the matter and its decision repeatedly to fund military tribunals with full knowledge of the commission's duties, functions, and accomplishments.

426. NOBLEMAN, *supra* note 74, at 14 ("During the past 130 years, the United States Government has engaged in 13 major occupations: Florida; Mexico (twice); the Confederate States; Cuba; Puerto Rico; the Philippines; the Rhineland; Japan; Korea; Austria; Italy; and Germany. In every instance, the occupying forces of the United States have protected their security and maintained law and order in the arena under their control by means of military courts."); Green, *supra* note 297, at 833 ("During the past seven years, the military commission has operated with quiet efficiency in the United States, France, Germany, Austria, Italy, Japan, and Korea in bringing to trial individuals and organizations engaging in terrorism, subversive activity, and violation of the laws of war.").

427. NOBLEMAN, *supra* note 74, at 14; *see also* LEVIE, *supra* note 141, at 13 ("Violations of the law of war committed in Mexico against troops of the United States . . . during the 1848 war between those two countries, caused the American commander, General Winfield Scott, to establish 'Councils of War' and 'military commissions' for the trials of such offenses."); *Id.* at 16 (In the Spanish-American war "a number of Filipino guerillas were tried by American military courts").

428. K. JACK BAUER, ZACHARY TAYLOR: SOLDIER, PLANTER, STATESMAN OF THE OLD SOUTHWEST 212 (1985) ("As part of his effort to retard hostilities between the occupiers and the occupied, Taylor in late September authorized this trial of Mexicans

Winfield Scott, Abraham Lincoln, Ulysses S. Grant (while a General and again when he was President), Andrew Johnson,⁴²⁹ Associate Justice Edwin Stanton (while serving as Secretary of War), William McKinley, Theodore Roosevelt,⁴³⁰ President and Chief Justice William H. Taft (then serving as Civil Governor of the Philippines and Secretary of War),⁴³¹ General John Pershing, Woodrow Wilson, Warren G. Harding, then-General Dwight D. Eisenhower, Franklin D. Roosevelt,⁴³² Harry S. Truman, and General Douglas MacArthur.⁴³³ It is worth noting that these leaders found military courts to be useful in a variety of political settings during and following a wide variety of wars and conflicts. This is a testament to the versatility of military law and the adaptability of military courts.

A. Judicial Precedent for Utilizing Military Tribunals During an Occupation

The U.S. Supreme Court has also repeatedly recognized the right of the United States—especially when acting as an occupying power of foreign lands—to create and utilize military commissions for the adjudication of criminal cases and civil disputes.⁴³⁴ For example:

accused of murder and other major offenses against Americans before military commissions.”).

429. It should be noted that although Johnson supported the use of military commission in certain circumstances, he also opposed their widespread use in the occupation of the former Confederacy.

430. Theodore Roosevelt expressed approval of trying Kaiser Wilhelm before a military tribunal following World War I. JAMES F. WILLIS, PROLOGUE TO NUREMBERG: THE POLITICS AND DIPLOMACY OF PUNISHING WAR CRIMINALS OF THE FIRST WORLD WAR (1982)

Americans were reminded that a principal precedent for such proceedings had been established when the government of the United States had hanged a Confederate officer, Captain Henry Wirz, following the end of the Civil War, for having murdered Union soldiers at the infamous prisoner of war camp at Andersonville, Georgia. Privately, Theodore Roosevelt and his former secretary of war and state, Elihu Root, expressed approval of such measures.

431. JAMES FORD RHODES, HISTORY OF THE UNITED STATES Vol. IX, 201–02 (1929). Taft was appointed Civil Governor of the Philippines on July 4, 1901. *Id.* at 202.

432. *See, e.g.*, Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 2, 1942).

433. NOBLEMAN, *supra* note 74, at 13; Bork, *supra* note 37 (“In the Revolutionary War, before there was a Constitution, George Washington employed such tribunals freely, as did Abraham Lincoln in the Civil War, and Franklin Roosevelt in World War II.”).

434. *See generally* JAMES H. BLOUNT, AMERICAN OCCUPATION OF THE PHILIPPINES (1912). A number of U.S. courts have expressed their disapproval of trying U.S. citizens in military courts, particularly for conduct committed in the United States in an area where the civil courts are operational. *See, e.g.*, *In re Egan*, 8 F. Cas. 367 (N.D.N.Y. 1866) (holding that the United States military lacked jurisdiction to try a South Carolinian man for the September 24, 1865 murder of a black child committed

- (1) In 1819, Justice Story writing for a unanimous Court, held that when the British occupied Castine Harbor, Maine during the War of 1812, as an occupying power, the English commander had the right to exercise full civil authority over the occupied territory and its residents.⁴³⁵ "By the conquest and military occupation of Castine, the enemy acquired that firm possession which enabled him to exercise the fullest rights of sovereignty over that place."⁴³⁶
- (2) In 1853, the Supreme Court implicitly held that the creation of a U.S. military government after the conquest of California, which at that time was Mexican territory, was a lawful exercise of President Polk's military power: "California, or the port of San Francisco, had been conquered by the United States as early as 1846. Shortly afterward the United States had military possession of all of Upper California. Early in 1847 the President, as constitutional commander-in-chief of the army and navy, authorized the military and naval commander of our forces in California to exercise the belligerent rights of a conqueror, and to form a civil government for the conquered country No one can doubt that these orders of the President, and the action of our army and navy commander in California, in conformity with them was according to the law of arms and the right of conquest"⁴³⁷
- (3) In 1857, in *Leitensdorfer v. Webb*, the Court approvingly noted the creation of U.S. military courts in New Mexico in 1846 after the Mexican-American War and held that this creation was a legitimate exercise of military power "during which time the territory was held by the United States as an occupying conqueror."⁴³⁸
- (4) In 1869, in *The Grapeshot*, the Court held that the commander-in-chief has the military duty to ensure that justice is administered in occupied territories.⁴³⁹

in Union-occupied South Carolina after the end of the Civil War). But the reasoning behind these decisions is inapplicable to the Iraqi theatre, where the United States is operating in a hostile, foreign land in which the no U.S. court operates and where the defendants are not U.S. citizens.

435. *United States v. Rice*, 17 U.S. (4 Wheat.) 246, 254 (1819).

436. *Id.*

437. *Cross v. Harrison*, 57 U.S. (16 How.) 164, 190 (1853).

438. *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 177-78 (1857).

439. *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132-33 (1869). Similarly, Justice Swayne, writing for the Court, noted that the war "power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the

- (6) In 1874, in *New Orleans v. The Steamship Company*, the Court made clear the great breadth of the United States' power when creating an occupation government: "Although the City of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National government in the Confederate States, that government had the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government. It may appoint all the necessary officers and clothe them with designated powers, larger or smaller, according to its pleasure. It may prescribe the revenues to be paid, and apply them to its own use or otherwise. It may do anything necessary to strengthen itself and weaken the enemy. There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war."⁴⁴⁰
- (7) In 1878, the Court noted in *Coleman v. Tennessee* that "[t]he right to govern the territory of the enemy during its military occupation is one of the incidents of war, being a consequence of its acquisition . . ."⁴⁴¹
- (8) In 1901, the Supreme Court decided *Neely v. Henkel*, and in doing so discussed the plenary power enjoyed by the United States when it occupied Cuba. The Court stated: "It cannot be doubted that when the United States enforced the relinquishment by Spain of her sovereignty in Cuba and determined to occupy and control that island . . . it succeeded to the authority of the displaced government,"⁴⁴² which included the power to create criminal courts.

power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress." *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 507 (1870). The war power entails the power to punish war criminals and terrorists for crimes committed during military actions.

440. *New Orleans v. The Steamship Co.*, 87 U.S. (20 Wall.) 387, 393–94 (1874) (footnote omitted). Justice Swayne wrote the opinion for the court. *Id.* at 392.

441. *Coleman v. Tennessee*, 97 U.S. 509, 517 (1878) (citations omitted).

442. *Neely v. Henkel*, 180 U.S. 109, 121 (1901).

- (9) Similarly, in *Dooley v. United States*, also decided in 1901, the Court stated that a conquering power clearly has the right to erect a military government in the occupied territory.⁴⁴³
- (10) In 1909, in *Santiago v. Nogueras*, the Court held that U.S. military authority during the U.S. occupation of Puerto Rico must have included “the authority to establish courts of justice, which are so essential a part of any government.”⁴⁴⁴
- (11) In 1913, in discussing the occupation of the Philippines during and after the Spanish American War, Justice Day wrote for the unanimous Court: “The right to thus occupy an enemy’s country and temporarily provide for its government has been recognized by previous action of the executive authority and sanctioned by frequent decisions of this court. The local government being destroyed, the conqueror may set up its own authority and make rules and regulations for the conduct of temporary government”⁴⁴⁵
- (12) In 1946, in *In re Yamashita*, the Supreme Court plainly stated the authority of an occupying power to try enemy combatants for war crimes. The Court stated: “An important incident to the conduct of war is the adoption of measures . . . to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. The trial and punishment of enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operations as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war.”⁴⁴⁶
- (13) In 1952, in *Madsen v. Kinsella*, the Supreme Court held that the President may “establish and prescribe the jurisdiction and procedures of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. His authority to do this sometimes survives cessation of hostilities. The President has the urgent

443. *Dooley v. United States*, 182 U.S. 222, 230 (1901).

444. *Santiago v. Nogueras*, 214 U.S. 260, 266 (1909).

445. *Macleod v. United States*, 229 U.S. 416, 425 (1913).

446. *In re Yamashita*, 327 U.S. 1, 11 (1946) (citations omitted).

and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms.”⁴⁴⁷

- (14) In 2006, in *Hamdan v. Rumsfeld*, despite invalidating the particular military commissions at issue in the case, the Supreme Court recognized yet again that: “Military Commissions have been established to try civilians ‘as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.’”⁴⁴⁸

Despite this precedent, the authority for creating military tribunals, the United States’ past success with military commissions, when the United States announced that it intended to use military tribunals to try al Qaeda terrorists, it was immediately met with harsh criticism from elements of the U.S. bar and members of legal academia.⁴⁴⁹ Eventually the tribunals resulted in a blizzard of lawsuits—including the lawfare discussed in the opening of this Article. The constant criticism eventually had its desired effect. Under this pressure and in attempt to avoid becoming embroiled in a similar debate concerning military commission in Iraq,⁴⁵⁰ the U.S. government capitulated to its critics and abandoned any thought of using U.S. military courts in occupied Iraq.⁴⁵¹ The government announced that instead of using

447. *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952) (footnotes omitted).

448. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2776 (2006) (plurality opinion) (quoting *Duncan v. Kahanamoku*, 327 U.S. 304, 66 S. Ct. 606, 90 L. Ed. 688 (1946)).

449. See Anderson, *infra* note 523, at 592 (the order creating military commissions “has provoked a storm of protest from various civil libertarians, civil and human rights organizations, newspaper editorialists, academics, members of Congress, and sundry others, mostly on the political left”).

450. The Supreme Court eventually held that that the United States could not utilize one particular form of military commissions to prosecute combatants captured in Afghanistan and later detained at Guantanamo Bay, Cuba. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006). This decision was issued long after the United States elected to utilize the CCCI to prosecute insurgents in Iraq, but it was the fear of this type of decision that prompted the United States to utilize the CCCI as opposed to military commissions. These fears may have been misplaced, however. Even the *Hamdan* plurality recognized that military tribunals have long been used by the United States when operating as an occupying power. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2776 (2006) (plurality opinion) (“Military Commissions have been established to try civilians ‘as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.’”) (quoting *Duncan v. Kahanamoku*, 327 U.S. 304 (1946)). So the *Hamdan* opinion does not speak to the propriety of using military commission in Iraq and certainly does not prohibit the United States from using military courts in an occupation setting so long as the defendants are afforded fundamental rights.

451. By now it is well known that the United States was not adequately prepared for the expansive insurgency in Iraq, as opposed to World War II, where U.S.

military commissions, it would let Iraqi judges adjudicate cases against Iraqi terrorists.⁴⁵² Of course, this decision completely ignores the fact that the primary victims of the Iraqi insurgents are U.S. soldiers⁴⁵³—not Iraqis⁴⁵⁴—and the goal of the insurgency is to

troops expected a widespread insurgency that never materialized. ZINK, *supra* note 98, at 243.

it was generally anticipated that the Germans would present so many dangers to the occupying forces that the most careful steps would be required to maintain anything like adequate security. The Nazis were reported to have dug themselves in various redoubts; and extensive underground movement was predicted; werewolves aimed at decimating Allied forces were supposedly lurking in every nook and corner.

Perhaps if the Pentagon had been a little less optimistic it would also have laid the groundwork for a system of military courts prior to the invasion of Iraq. See Heather Mac Donald, *How to Interrogate Terrorists*, CITY JOURNAL, Winter 2005, http://www.city-journal.org/html/15_1_terrorists.html, visited Feb. 24, 2005 (the Pentagon failed “to plan for any outcome of the Iraq invasion except the most rosy scenario”).

452. There are now also plans to let Afghan judges get in on the act with respect to Afghan terrorists. See Amy Waldman, *Afghans Courts to Try Locals Held by Americans*, N.Y. TIMES, Aug. 26, 2004, at A12 (“Afghans now being held in American detention centers in Afghanistan will be tried and sentenced by the Afghan government But because Afghanistan barely has a functioning judicial and prison system, the detainees will remain in American custody indefinitely.”) One can only guess what the Afghan courts will look like, so it is impossible at this time to determine whether they will offer defendants more rights than they would enjoy under a system of military commissions. It is also uncertain whether these Afghan courts will have the courage to dispense justice and thus hopefully deter similar attacks on U.S. forces in Afghanistan. But at least one Afghani judge has already been arrested for aiding the guerillas, mirroring a problem with the Iraqi judiciary. See Associated Press, *supra* note 180, at 24 (“Afghan authorities have arrested a judge for allegedly harboring the organizers of two bombings last year that killed about 12 people, including four Americans . . . They believe the ringleaders took their orders from an Iraqi member of al Qaeda . . .”).

453. Iraqi defense attorneys recognize this fact. Ironically, they have argued that the CCCI cases have been investigated and assembled by the victims of attacks, U.S. soldiers, and because of the bias engendered by being a victim, the cases are suspect. Zoroya & Jervis, *supra* note 21, at 1 (“Some Iraqi defense attorneys question whether the victims of a crime can fairly investigate it.”). This argument, however, makes little sense. If anything, the victims will ensure that they convict the right individual, as opposed to some bureaucrat prosecutor, who lacks a personal stake in the case and thus might be happy with obtaining a conviction regardless of whether the defendant is guilty. Also, in light of the sad state of the Iraqi government, if U.S. victims did not investigate the crimes perpetrated against them, nobody else would. They take on this role of investigator by default.

454. True, some insurgents have increasingly targeted vulnerable Iraqis, but that is largely due to the fact that Iraqis are easier targets, and the insurgents can therefore inflict higher casualty rates on Iraqis because: (1) there are more Iraqis than U.S. soldiers in Iraq; (2) the U.S. soldiers are better protected than the Iraqis (they have better body armor, armored vehicles, air mobility, and medical services); (3) U.S. soldiers are always armed, whereas Iraqi civilians on the streets generally are not; and (4) even as compared to armed Iraqi forces, engaging U.S. forces in battle entails for terrorists a greater magnitude of peril, not similarly found in engagements with either Iraqi citizens or the Iraqi armed forces. See Scarborough, *supra* note 209, at A1.

frustrate the U.S. occupation at every turn. Despite efforts to weed out bad apples, Iraqi judges favor their countrymen over U.S. soldiers. The discussion above demonstrates how these factors should have received greater consideration and that if they had, the CCCI would not be in the business of trying terrorism cases.

The United States sacrificed its prestige to placate a minority of vocal critics, and it is now paying the price. As discussed above, although a significant number of CCCI cases end in conviction, the CCCI judges convict terrorists only of petty crimes and sentence them as though their misdeeds were no worse than jay-walking. It is now obvious that due to judicial biases and various anomalies of Iraqi law and the CCCI, the United States cannot obtain justice in the CCCI, and the use of U.S. military courts would have been the better approach.⁴⁵⁵

B. *The Wisdom of Using U.S. Military Courts to Try Iraqi Terrorists*

The debate about the use of U.S. military courts to try members of the Taliban and al Qaeda has been extensive and there is

With American soldiers exercising better force protection, thanks to improved armor and training, the insurgents have shifted their attacks to more vulnerable Iraqi troops and civilians. "Terrorists always look for the weakest point," said Dick Bridges, spokesman for the Pentagon's IED task force [on IEDs]. "We are no longer the weakest point."

Jill Carroll, *Evolution in Iraq's Insurgency*, CHRISTIAN SCIENCE MONITOR, Apr. 7, 2005, at 6 (noting that Iraqi soldiers discovered a "fatwa issued by a radical cleric during a raid in Samarra. It ordered jihad on Iraqi forces instead of American troops because the Iraqis are easier to attack.").

It is simple economics: insurgents want to produce the greatest damage for the least cost, and U.S. forces frequently compel the terrorists to pay a steep price for attacks, while Iraqi victims do not. CLAUSEWITZ, *supra* note 8, at 96 (a key to military success is to raise "the price of success" for the enemy).

Thus, it is still accurate to say that U.S. soldiers are the primary targets of belligerents, and were it not for these four factors, the militants would almost exclusively attack U.S. soldiers. Louise Roug & Patrick J. McDonnell, *8 U.S. Troops Killed in Iraq*, L.A. TIMES, May 9, 2005, at A1 (noting that insurgents have shifted "their sights from U.S. forces to Iraqi police and troops, who are perceived as easier targets than better-armed U.S. forces"); Jaffe & Trofimov, *supra* note 120, at A8 (noting an Army report that attacks "have shifted away from U.S. troops to more vulnerable Iraqis"); Austin Bay, *Al Qaeda's Worst Nightmare*, WASH. TIMES, Apr. 15, 2005, at A21 ("U.S. forces, however, are 'hard targets'—unlike civilians standing in line to vote, U.S. troops shoot back.").

455. In endorsing military commissions, the author has in mind a system similar to that used in the Uniform Code of Military Justice, with some modifications of the evidentiary rules (such as a more liberal use of hearsay evidence) as the situation in Iraq necessitates. As Defense Secretary Rumsfeld has indicated, the relaxation of hearsay rules may be necessary in wartime situations where it is not always possible to locate or transport witnesses. See Sally Buzbee, *Pentagon Says Tribunal Rules Protect Terror Suspects—But Limited Right to Appeal and Looser Evidence Standards Draw Criticism*, NEWARK STAR-LEDGER, Mar. 22, 2002, at 5.

insufficient space to do justice to that debate here. But in many respects that debate is different than one concerning the wisdom of using military courts in the setting of a U.S. occupation, namely Iraq. Suffice it to say that the use of military commissions to try Iraqi terrorists would entail advantages that cannot be achieved either by continuing to try them in the CCCI or by using other means, such as international tribunals or U.S. civilian courts. Below is a discussion of a few of these advantages.

1. Trials by Fair and Impartial Judges

Initially, U.S. military courts would obviate the problems engendered by submitting cases to biased and corrupt Iraqi judges. Cases would no longer be decided by judges who sympathize with the insurgency or who are of the same nationality, religion, political party, or tribe as the defendants in the dock.⁴⁵⁶ Instead, United States military judges, judges from the militaries of Coalition nations, or even U.S. civilian lawyers or judges, would be utilized to perform the judicial function.⁴⁵⁷ Military judges in particular, who have spent most of their careers in the military, and who have demonstrated a capacity for impartiality in countless criminal cases, would prove a source of experience upon which to build a sound system for trying Iraqi terrorists.⁴⁵⁸

Although some critics would object that U.S. military judges would simply rubber stamp the prosecution's case,⁴⁵⁹ there is little

456. True, the officers would have a natural affinity for the soldiers who fell victim to the insurgents, but that should not prevent them from judging the case dispassionately, as they must often do in military courts where the defendants, and sometimes the victims, are soldiers.

457. Since it might be difficult to find enough military judges to try all of the insurgency cases, the military might need to appoint some judge advocates to serve in a solely judicial capacity, or, as in post-World War II Germany, use U.S. civilian judges or lawyers. NOBLEMAN, *supra* note 74, at 54 ("by an amendment to Ordinance No. 2, 'civilian military government officials of United States citizenship were also authorized as members'). And there is no need to waste judicial resources on petty cases. In the German occupation after World War II, petty crimes were handled by tribunals composed of officers who were not lawyers, but felonies were always adjudicated before a military judge. ZINK, *supra* note 98, at 109. Eventually the reconstituted German courts were utilized to try petty offenses, but the military courts retained jurisdiction over more serious crimes, as they should in Iraq. *Id.* at 109, 125.

458. See *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955) ("It is true that military personnel because of their training and experience may be especially competent to try soldiers" or insurgents.).

459. In civilian courts, judicial bias is a denial of due process. *Concrete Pipe & Products of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'"); *Tumey v. Ohio*, 273 U.S. 510, 523 (1927):

[I]t certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the

evidence to support such a view. Indeed, the military attorneys for the Guantanamo detainees are presumably patriotic individuals, yet this has not prevented them from zealously advocating freedom for their clients. Like these lawyers, military judges have demonstrated time and again that they can remain neutral in adjudicating criminal cases, and they frequently have had experience setting aside their personal opinions and retaining an objective viewpoint.⁴⁶⁰ Their impartiality has been demonstrated repeatedly. For example, after World War I, U.S. military judges in the Rhineland regularly acquitted German defendants accused of committing crimes against U.S. soldiers, much to the surprise of the defendants and their attorneys, who expected to encounter kangaroo courts.⁴⁶¹

It should also be remembered that the CCCI judges currently adjudicating the insurgency cases are not exactly operating at the pinnacle of impartiality. Rather, they continue to exhibit extreme bias as they regularly acquit obviously-guilty insurgents of serious offences, and instead convict them for inane minor crime or sentence them to a few months in prison. So even assuming for the sake of the argument that U.S. military judges could not be objective, partial military judges would prove no worse than partial Iraqi judges. Nearly anything would be an improvement over the status quo.

Furthermore, under the judicial rule of necessity, U.S. judges are qualified to hear cases against insurgents even though they may have an interest in seeing insurgents punished for their misdeeds.⁴⁶² This principle of jurisprudence—having currency since at least 1430 when it was invoked by the Chancellor of Oxford⁴⁶³—holds that where all

judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in his case.

460. In the words of Judge Bork:

I sat on the [military] court, and never saw an innocent man convicted but did see a guilty man acquitted. . . . Even then, before the widespread reform of the military justice system, military courts manned by officers, in my opinion and that of many others, were superior to the run of civilian courts, more scrupulous in examining the evidence and following the plain import of the law.

Bork, *supra* note 38.

461. FRAENKEL, *supra* note 139, at 164.

462. See *Will v. United States*, 499 U.S. 200, 214 (1980).

463. See *id.* at 213–14 (“The rule of necessity had its genesis at least five and a half centuries ago. Its earliest recorded invocation was in 1430, when it was held that the Chancellor of Oxford could act as judge of a case in which he was a party when there was no provision for appointment of another judge.”); *Evans v. Gore*, 253 U.S. 245, 247–48 (1920) (holding that the Court had jurisdiction to hear a case challenging the federal government’s imposition of a tax that affected the entire federal judiciary because “there was no other appellate tribunal to which under the law” appeal could be made, and “precedents reaching back many years” supported the exercise of jurisdiction in the case).

qualified judicial officers have a personal interest in a case and none can be found lacking such an interest, by necessity, the lot must fall to the existing judiciary to render a decision in the case.⁴⁶⁴ This doctrine has been held to be applicable in the United States when federal judges were called upon to adjudicate a claim by federal judges concerning an alleged reduction in pay and their interests under the Tenure and Salary Clause of Article III of the Constitution.⁴⁶⁵ Because every federal judge would be affected by the decision, all judges had an interest in the case. Nevertheless, under the rule of necessity, the courts considered themselves fit to hear the case.⁴⁶⁶ Likewise, since both U.S. and Iraqi judges ostensibly have an interest in the outcome of terrorism cases, and somebody must decide these cases, there is nothing improper about a U.S. judge taking on this role. Furthermore, even if some impartial judges could be found from other nations—ostensibly negating the necessity of using U.S. judges—only the United States enjoys a special moral right to try the terrorists who have killed U.S. soldiers. In short, the United States owes a duty to its soldiers, both living and dead, to have U.S. jurists try the terrorist who have murdered or attacked U.S. soldiers.⁴⁶⁷ The “United States as a democratic polity owes its citizens, its people, and particularly those who died and lost loved ones, justice according to *United States* traditions. It owes *our* people *our* justice and should see that our justice is done to those who have attacked us.”⁴⁶⁸

464. *Will*, 449 U.S. at 213 (“although a judge had better not, if it can be avoided, take part in the decision of a case in which he has any personal interest, yet he not only may but must do so if the case cannot be heard otherwise”) (quoting F. POLLACK, A FIRST BOOK OF JURISPRUDENCE 270 (6th ed. 1929)).

465. *Id.*

466. *Id.*

467. Military tribunals could also be an effective tool in teaching Iraqi judges how cases should be adjudicated. Iraqi judges could observe first-hand how to administer justice fairly, something they had little experience with under Hussein’s regime. Military judges could prove to be effective tutors for any Iraqi judge interested in learning about the rule of law as it exists in criminal proceedings.

468. See Anderson, *infra* note 523, at 597 (emphasis in original).

Anderson was speaking about the September 11 terrorists and their supporters, but his analysis also holds true with respect to Iraq. Although it is true that even when U.S. troops are attacked in Iraq this is also an attack on the Iraqi people, Americans are the primary victims and the primary targets. And because such conduct violates two sets of laws, American and Iraqi, if the Iraqis are serious about prosecuting such terrorists, under a theory of dual sovereignty they should be free to do so, after the insurgents have finished sentences imposed by the U.S. courts. See *Heath v. Alabama*, 474 U.S. 82, 88 (1985) (noting that when “a defendant in a single act violates the ‘peace and dignity’ of two sovereigns by breaking the law of each, he has committed two distinct ‘offenses’” and can be held criminally liable for both).

Similarly, under international law, when one sovereign inadequately punishes its own citizens for war crimes, the offended sovereign may itself punish the criminals for their misdeeds. FRAENKEL, *supra* note 139, at 66 (quoting ALFRED VON VERDROSS, *DIE VÖLKERRECHTSWIDRIGE KRIEGSHANDLUNG UND DER STRAFANSPRUCH DER STAATEN* 25 (1923)) (“There is nothing in international law that would oblige any state to refrain

2. The Protection of Witnesses

Trials before U.S.-run occupation courts would also permit Iraqi witnesses to testify with a diminished fear of reprisal. As it stands now, almost no Iraqis ever testify in the CCCI for the United States, despite the fact that almost all attacks that lead to criminal prosecution are witnessed by numerous Iraqi citizens. Besides the loyalty to terrorists that some Iraqis feel, the reason for this dearth of testimony is obvious. In Iraq, "assassins mix with ordinary people and any man who squeals to authorities is all but guaranteed a quick death for himself, and probably his wife and children as well."⁴⁶⁹ The halls of the CCCI courthouse are a regular haunt of those loyal to the insurgency (including the guards assigned to defend the courthouse), and only Iraqis with suicidal ideations would agree to testify there. Moving trials to a U.S. military courtroom would ensure a level of safety for Iraqis that they do not currently enjoy.

Of course, the only practicable way to ensure the safety of Iraqi witnesses is to permit them to testify as they do before the Iraqi Special Tribunal, from behind a screen and with their voices distorted to protect their identities.

The alternative to such modifications are: (1) holding no trials of insurgents and either: (a) detaining them indefinitely; or (b) releasing them (a bad idea, since it allows them to continue fighting for the insurgency); (2) holding trials in which Iraqi witnesses are unprotected (another bad idea, since they would promptly be killed and cooperation would soon dry up faster than a raindrop in an Iraqi dessert); (3) holding trials in which there are no Iraqi witnesses (this only works if there are other witnesses to satisfy the prosecution's burden of proof); or (4) providing round-the-clock protection to witnesses and their families indefinitely, for any Iraqi who testifies (not practicable insofar as it would take a brigade or two to accomplish this task—recall that many Iraqi men have multiple wives and numerous children—and even then insurgents could strike relatives of the witnesses or assassinate them after U.S. forces have left Iraq). So anonymous testimony seems to be a reasonable accommodation of the rights of witnesses and the rights of defendants.

Such practices obviously are not ideal and do not comport with an original understanding of the Confrontation Clause of the U.S. Constitution. For these reasons they should never become the common practice in Iraq. But the situation in Iraq—a war—is hardly

from prosecuting those violators of law who would otherwise be inadequately punished or not punished at all: if violators of the rules of warfare are not punished by their own state 'a concurrent criminal jurisdiction of the violated state seems to be justified.'")

469. Borzou Daragahi, *Insurgent Suspects Spurn "Peace Day,"* WASH. TIMES, Jan. 19, 2005, at A13.

the ideal one, and reasonableness dictates some compromises in the pursuit of justice.

3. A Reasonable Accommodation of the Rights of Accused Terrorists and the Responsibility for Waging War Effectively

Undoubtedly alien enemy combatants—usually Iraqis—captured while attempting to murder U.S. soldiers are entitled to some rights and protections. They are not, however, entitled to all the constitutional rights that U.S. citizens enjoy. Furthermore, although they are entitled to some process to safeguard their rights, the exigencies of combat, and the fact that Iraqi terrorists do not comply with the Geneva Conventions, means that they are entitled to less process than would otherwise be due.⁴⁷⁰ It is important to remember that the “U.S. Constitution is not a document for the entire world. It is not a pact with the world, or a pact among people generally in the world. It is a document among the members of a particular political community, and its burdens and benefits accrue to them.”⁴⁷¹ Were this not the case, any alien terrorists operating in Iraq would be fully entitled to the same rights as U.S. citizens. Courts would be compelled to exclude evidence whenever insurgents were not given *Miranda* warnings or because they confessed during custodial interrogation after they had requested an attorney.⁴⁷² Soon interrogators would be compelled to give *Miranda* warnings and sources of actionable intelligence would quickly dry up. Soldiers would also be required to obtain search or arrest warrants, or demonstrate probable cause before detaining terrorists. They would have to risk their lives to ensure prompt arraignment after arrest. Many U.S. soldiers would quickly conclude that the risks to their lives that these rules impose is not worth the potential benefit.⁴⁷³

470. Cf. *Demore v. Kim*, 538 U.S. 510, 522 (2003) (“Congress may make rules as to aliens that would be unacceptable if applied to citizens.”); *Landon v. Plasencia*, 459 U.S. 21, 34 (1982) (“The constitutional sufficiency of procedures provided in any situation . . . varies with the circumstances.”); *In re Yamashita*, 327 U.S. 1, 17 (1946) (holding that a military tribunal defendant is not entitled to all of the protections afforded defendants in an U.S. criminal court); Anderson, *infra* note 525, at 612 (“The case for full U.S. constitutional protection is strongest when dealing with U.S. citizen on the territory of the United States . . . while the weakest case is a non-U.S. citizens on foreign territory”).

471. Anderson, *supra* note 524, at 611–12.

472. Bruce Fein, *War is Not a Criminal Trial*, WASH. TIMES, Feb. 8, 2005, at A14 (“The Supreme Court has never even hinted that the exclusionary rule should be employed to free a known enemy.”).

473. U.S. soldiers in Iraq, in response to the CCCI’s bizarre rules, are already asking why they should risk their lives to capture terrorists alive when the result is merely acquittals and inadequate sentences. In the words of one soldier. “I’m constantly asking myself, ‘Why should I risk my life and the lives of my soldiers to

They would simply choose not to arrest the terrorists, particularly since even an innocent or unwitting failure to comply with the letter of these rules would result in suppression of the arrest or the evidence.⁴⁷⁴

Of course, treating unlawful foreign combatants as U.S. criminal defendants would also entail the necessity of training soldiers on the finer points of constitutional law, which itself would require significant time and valuable resources that otherwise could be utilized to defeat the enemy.⁴⁷⁵ Rights entail a cost, and the cost of giving terrorists the full panoply of constitutional rights would be paid with U.S. blood. In the end, such a policy would prove suicidal. Many lives, both Iraqi and U.S., would be sacrificed on the altar of distorted due process simply to satisfy the concerns of the overly scrupulous.⁴⁷⁶ "Due process" is necessarily "flexible and calls for such procedural protections as the particular situation demands."⁴⁷⁷ "[W]hat is due process of law depends on circumstances. It varies with the subject-matter and the necessities of the situation."⁴⁷⁸ Frequently, "military exigency renders resort to the traditional criminal process impracticable."⁴⁷⁹ Fair trials conducted in light of the totality of wartime circumstances—not perfect trials according to civilian due process standards⁴⁸⁰—are all that law, morality, and common sense require for captured terrorists.⁴⁸¹

detain someone who will only be put back on the streets in a matter of months?" Grossman, *supra* note 16.

474. Daniel Philpott, Commentary, *Along With Trials, Iraq Needs Truth*, BOSTON GLOBE, Dec. 8, 2005, at A19 ("Due process, legal procedures, and adversarial incentives often hinder the public revelation of the truth . . ."). Philpott was speaking about trials involving major war criminals, but his words ring equally true with respect to minor war criminals, like the terrorists in Iraq.

475. For that reason, they were not used by the U.S. military courts in Germany following World War II. NOBLEMAN, *supra* note 74, at 39–40 (U.S. military courts in Germany "conformed closely to the procedures followed by courts-martial, and lacked, of necessity, many of the safeguards of the Anglo-American system of justice to which we are accustomed. For the most part, they were concerned with the protection of the security of the armed forces of the occupant.").

476. The "due process analysis need not blink at" the realities of war. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2647 (2004) (plurality opinion).

477. *Greenholtz v. Neb. Penal Inmates*, 442 U.S. 1, 12 (1979).

478. *Moyer v. Peabody*, 212 U.S. 78, 84 (1909) (Holmes, J.).

479. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2664 (2004) (Scalia, J., dissenting).

480. *Delaware v. Van Arsdall*, 475 U.S. 673, 681 (1986) (noting that the Constitution "entitles a criminal defendant to a fair trial, not a perfect one."). It is important to remember that the insurgents in Iraq have no rights under the U.S. Constitution, but some constitutional principles are expressions of natural rights enjoyed by all men and women, regardless of citizenship. The point here is that if the Constitution itself does not compel a perfect trial even for U.S. citizens, there is no reason to believe that morality requires a perfect trial for captured terrorists.

481. "The right of the accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973).

It is beyond doubt that constitutional protections have immense value in civil and military justice, but it would be ludicrous to attempt a dispassionate application of these principles while in the midst of a raging war. In waging war against a murderous insurgency the criminal law must give way to the law of necessity, including the necessity of administering justice as the exigencies of war permit.⁴⁸² U.S. military courts are better suited to deciding when such exigencies require the curtailing of criminal process than is the CCCI.

This is not to say that military courts would necessarily decline to provide many of the rights available to defendants in the United States. Some departure from such extensive rights is warranted by the extreme circumstances of warfare, the fact that terrorists refuse to abide by the Geneva Convention and other aspects of international law,⁴⁸³ and the costs that extensive rights entail. But there are also important reasons for providing as many rights as the particular situation permits, particularly in occupation courts where the native population requires instruction in and experience with the rule of law.⁴⁸⁴ The military commissions created for the Al Qaeda and Taliban terrorists ensure a long list of rights for those defendants. These include:

- (1) the rebuttable presumption that the accused is innocent;
- (2) the right to be informed of the charges in advance of trial and in a language that the defendant understands;
- (3) the right to review, before trial, the evidence the prosecution intends to present at trial;
- (4) the right to receive from the prosecution exculpatory or *Brady* evidence;

482. See Editorial, *Setting Rules for Detainees*, WASH. POST, Jan. 21, 2005, at A16 ("Only the most doctrinaire civil libertarian would contend that foreign nationals making war on American in foreign theaters are entitled to the full protections of the criminal justice system.").

483. "[C]ontrary to the fantasies of the international-law and human rights lobbies, a world in which . . . rights are indiscriminately doled out is not a safer or more just world." See Mac Donald, *supra* note 451.

484. HUNT, *supra* note 98, at 100-01:

As that army conducts itself, so is the world largely to regard the country which it represents. If its army is dishonorable in its relations with a fallen foe and treats the population with injustice and subjects the people to a rule more harsh than is necessary for the preservation of order and the establishment of proper decorum and respect, that army and the country it represents are bound to stand in disrepute before the civilized world.

- (5) the requirement that the prosecution prove the defendant's guilt beyond a reasonable doubt;
- (6) a full and fair trial;⁴⁸⁵
- (7) a public trial, except when classified materials are presented or the safety of witnesses requires otherwise;
- (8) the right to be present at his trial (except during the presentation of classified materials or when the safety of witnesses requires otherwise);
- (9) the opportunity to make opening and closing statements;
- (10) the opportunity to present a defense, to testify in his own defense, submit evidence, and to call defense witnesses (subject to rules protecting sensitive information);
- (11) the opportunity to cross-examine prosecution witnesses;
- (12) the right to remain silent;⁴⁸⁶
- (13) the right not to have the military commission draw an adverse inference from the decision to remain silent;⁴⁸⁷
- (14) the right to submit rebuttal evidence;

485. All rights granted to defendants are meant to ensure a fair trial. Thus, all of these rights are negated and meaningless if the trials are rigged, as some have alleged. See Jess Bravin, *Two Prosecutors At Guantanamo Quit in Protest*, WALL ST. J., Aug. 1, 2005, at B1 ("Two Air Force prosecutors quit last year rather than take part in military trials they considered rigged against alleged terrorists held at Guantanamo Bay, Cuba."); Neil A. Lewis, *Two Prosecutors Faulted Trials for Detainees*, N.Y. TIMES, Aug. 1, 2005, at A1 ("two senior prosecutors complained in confidential messages last year that the trial system had been secretly arranged to improve the chance of conviction and to deprive defendants of material that could prove their innocence"); but see Guy Taylor, *Pentagon Finds No Fault with Gitmo Trial System*, WASH. TIMES, Aug. 2, 2005, at A3 ("The Pentagon yesterday said it had conducted an internal probe into criticisms by military prosecutors about the fairness of the trial system for terror suspects detained at U.S. Naval Base Guantanamo Bay, Cuba, and concluded that the accusations were unfounded.").

486. This is a right that was not enjoyed by German defendants in U.S. military courts following Post World War II Germany. NOBLEMAN, *supra* note 74, at 103:

[A]n accused was afforded no privilege whatever against self-incrimination, and the court was not permitted to warn him that he was not required to answer when questions were put to him. However, neither was the court permitted to compel the accused to answer any questions or to testify on his own behalf, and no punishment could be imposed for so refusing.

487. This right, too, was not extended to Germans tried in U.S. military courts. *Id.* (If a defendant refused to answer a question, "the court was permitted to draw an unfavorable inference from such refusal.").

- (15) the right to legal counsel of the defendant's choice (so long as the counsel can obtain a Secret level security clearance);
- (16) the right to appointed legal counsel, at no cost to the defendant;
- (17) the right not to be convicted absent the concurrence of two-thirds of the commission panel members;
- (18) the right to submit mitigating evidence during sentencing;
- (19) the right to testify at sentencing;
- (20) the right to receive a sentence in which at least two-thirds of the panel members concur;
- (21) the right not to be sentenced to death absent the unanimous concurrence of the panel members;
- (22) the right to review of the trial and sentence by the Appointing Authority, the Review Panel, and the Secretary of Defense;
- (23) the right to present a written appeal to reviewing authorities;⁴⁸⁸ and
- (24) the right to appeal the decision to an Article III court composed of civilian judges.⁴⁸⁹

These are significant rights which are afforded to defendants at considerable expense to the United States.⁴⁹⁰ They also exceed the

488. See 32 C.F.R. §§ 9.1–9.10, available at http://www.defenselink.mil/news/Aug2004/commissions_orders.html (promulgated March 21, 2002). This list obviously lacks the right to speedy trial, which would not always be possible in light of extraordinary circumstances associated with war. To the extent that the defendant can be excluded when certain witnesses testify or when classified evidence is presented, these procedures also would not comport with the Confrontation Clause, even though the Supreme Court has minimized the effect of this clause. See *Maryland v. Craig*, 497 U.S. 836 (1990) (permitting testimony of child abuse victim to be transmitted into the courtroom via one-way television so that the victim need not encounter the defendant).

489. Thus, these unlawful combatants enjoy rights beyond those safeguarded in the U.S. Constitution insofar as even American Criminal defendants do not have a constitutional right to appeal their sentences. *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (“There is, of course, no constitutional right to an appeal”); *Abney v. United States*, 431 U.S. 651, 656 (1977) (“[I]t is well settled that there is no constitutional right to an appeal.”). Rather, a defendant’s right to appeal his sentence is a statutory one. See 18 U.S.C. § 3742(a); *United States v. Blick*, 408 F.3d 162, 167 (4th Cir. 2005) (“A criminal defendant’s right to appeal a sentence arises under 18 U.S.C. § 3742.”).

490. Despite these significant rights, “it still remains true that military tribunals have not been and probably never can be constituted in such a way that they can have the same kind of qualifications that the Constitution has deemed essential to fair trials of civilians in federal courts.” *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 17 (1955). The U.S. military commissions in Germany following World War I had similar procedures:

rights provided defendants in many European countries where, for example, defendants do not always enjoy the right to cross examine or confront adverse witnesses and where an adverse inference can be drawn from the defendant's refusal to answer questions.⁴⁹¹ They also exceed the rights that defendants now enjoy in the CCCI (unless a right to biased judges is counted among the rights that the terrorists now enjoy). Thus, there is every reason to believe that U.S. military courts employed in Iraq could operate in a fashion that affords accused terrorists similar rights.⁴⁹² They could also remain sufficiently flexible so as not to jeopardize the safety of military personnel or the success of their missions. Thus, military courts could prove both fair to defendants and effective bodies for assessing guilty and administering punishments.⁴⁹³ Ultimately, if Iraq ever became more stable, it might be possible to give Iraqi defendants almost identical rights to those enjoyed by U.S. military personnel

Procedure in Provost Courts, both Superior and Inferior, was required to be uniform. Written charges were filed. They were not required to be formal, but to state only the substance of the offense, the name of the alleged offender, and the place where and time when the offense was said to have occurred. It was required that every person tried by a Provost Court should be informed of the charges upon which he was to be tried, that he should be present in person at the trial, and that he should be confronted with the witness against him. It was further required that he should be permitted to be heard either in person or by counsel. Bail was denied the accused, but a speedy hearing was guaranteed him. All evidence was required to be under oath. Sentences were put into immediate execution without awaiting action of the reviewing authority.

HUNT, *supra* note 98, at 93–94. Military commissions dealing with more serious crimes—those involving punishments in excess of six months of imprisonment—generally followed the rules of a general court martial. *Id.* at 94.

491. Civil law countries generally permit their judges to draw an adverse inference from a defendant's refusal to answer questions. MERRYMAN, *supra* note 94, at 130 (A defendant's "refusal to answer, as well as his answers, will be taken into account in deciding questions of guilt or in fixing the penalty.").

492. The full extent of the rights enjoyed by the Guantanamo defendants is not clear. A commission set up in Iraq could make explicit that the defendants enjoy the right to reasonable adjournments, the right to self representation, the right to compel witnesses to testify and subpoena witnesses (within limits), the right not to be tried for ex post facto crimes, the right to a speedy trial under the circumstances, and a right against double jeopardy.

493. Using military commissions would also entail the use of stare decisis and precedent, a concept with both *sharia* and the civil law fail to fully appreciate. ESPOSITO, *supra* note 91, at 86 ("Islamic law does not recognize a case law system of legally binding precedents."); Rahim, *supra* note 85, at 266 ("The Mohammedan jurisprudence . . . does not accept legislation by the State as a legitimate source of law. Nor does it admit the principle of judge-made law. The Qadhi's legal pronouncement were binding only for the decision of the particular case before him, but had no value as a precedent."). These two concepts would undoubtedly benefit both the prosecution and the defense.

under the Uniform Code of Military Justice,⁴⁹⁴ as the United States did in its military courts in Germany.⁴⁹⁵ This is a lofty goal towards which U.S. military lawyers could strive, and a realization of this goal would permit Iraqis to observe first-hand how the rule of law operates in a democracy.⁴⁹⁶

Military courts would also permit Iraqi defendants a level of fairness they do not currently enjoy in the CCCI. This is particularly important for accused insurgents who lack the funds to pay bribes or who are members of a tribe that has an acrimonious relationship with one of the judges' respective tribes. Rather than half-hearted representation by Iraqi defense attorneys of dubious quality, the defendants would have the benefit of a U.S. military lawyer well versed in the Uniform Code of Military Justice. These skilled advocates could assist the defendants in presenting a cogent defense, perhaps thereby preventing the conviction of the innocent.⁴⁹⁷ Their zealous advocacy would prove to be a substantial improvement over the lackluster performance exhibited by many of the Iraqi defense attorneys.

4. Implementation of Fair and Modern Evidentiary Rules

With respect to evidentiary law, U.S. military tribunals would entail a system much closer to the Western standards of due process and would not involve *sharia*-based rules of evidence. Because the

494. The United States, when occupying a nation, should always strive to create parity between its treatment of the inhabitants of the occupied zone and its own troops, to the extent circumstances permit, and only when the inhabitants are not terrorists and are not openly hostile to the military power. *Johnson & Graham's Lessee v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 589 (1823) (Marshal, C.J.) (offering that as a matter of human dignity the conquered should not be wantonly oppressed). Moves have been made to make the Guantanamo trials more like U.S. civilian courts. See Jess Bravin, *U.S. Moves to Bolster Rights of Guantanamo Terror Defendants*, WALL ST. J., Aug. 31, 2005, at A4 ("The Bush administration, responding to criticism that it had stacked procedures to favor convictions of Guantanamo Bay prisoners, will introduce procedures that will significantly expand defendants' rights before military commissions.").

495. NOBLEMAN, *supra* note 74, at 178.

496. "It may seem paradoxical that the one agency of the military government, created primarily for the protection of the occupation forces, [the military courts], has developed into the foremost example of democracy in action in the United States Area of Control of Germany." *Id.* at 192.

497. This would require additional Arabic translators, a scarce resource in Iraq. See Thomas X. Hammes, *Lost in Translation*, N.Y. TIMES, Aug. 25, 2005, at A23 (noting the dearth of Arabic translators and Iraq, the problems this presents for troops seeking to communicate with Iraqis and vice versa); John M. Glionna & Ashraf Khalil, "Combat Linguists" *Battle On Two Fronts*, L.A. TIMES, June 5, 2005, at 1 ("U.S. troops often must rely on hand signals in communicating with Iraqis as entire combat brigades struggle to make do with only one native Arabic-speaking U.S. soldier."); Morre, *supra* note 123, at 1 (relating how Iraqis "struggle to communicate with the troops, who often lack interpreters.").

sharia law entailed harsh penalties—including stoning, whipping, amputation, and decapitation—there was a need for almost absolute certainty in convictions.⁴⁹⁸ Accordingly, Islamic evidentiary law—elements of which the CCCI apparently has adopted—requires an extremely high standard of proof, what some might call proof “beyond any doubt, reasonable or not.”⁴⁹⁹ Furthermore, Islamic evidentiary law, in a misguided effort to admit only evidence ostensibly of the highest quality,⁵⁰⁰ is irrationally hung up on the form of the evidence—namely, oral testimony, and only oral testimony, from multiple eyewitnesses.⁵⁰¹ Indeed, as mentioned above, *sharia* only allows three types of evidence which were thought to entail a high degree of accuracy: eyewitness testimony, confessions, and religious oaths.⁵⁰² Barring a confession, which jihadists are unlikely to utter voluntarily, eyewitness testimony is seen by Islamic law as the pinnacle of reliability. This is not so in the United States, where eyewitness testimony is valued more realistically. In U.S. courts, eyewitness testimony is understood to have substantial shortcomings, which have been widely discussed of late.⁵⁰³

These shortcomings are really defects inherent in human memory and character. Because eyewitness testimony relies on the

498. LIPPMAN ET AL., *supra* note 84, at 2–3 (“The proof of offenses under Islamic law requires the satisfaction of strict evidentiary requirements which establish a certainty of guilt. This certainty is said to legitimate infliction of the relatively harsh Koranic penalties.”). “[I]t is held that the rigidity of Islamic criminal procedure, which requires a certainty of guilt, both limits and legitimizes severe punishment of offenses against the rights of God.” *Id.* at 121.

499. RUTHVEN, *supra* note 293, at 146 (noting that *sharia* is “divorced from reality’ particularly in the realm of criminal procedure, where rigid standards of proof make conviction difficult.”); *see also* SEYYED HOSSEIN NASR, *THE HEART OF ISLAM* 152–53 (2002) (noting the difficulty of convicting a defendant under *sharia* evidentiary law). Characterizing the prosecutor’s tasks as “difficult” is a gross understatement. “Impossible” would be more accurate.

500. LIPPMAN ET AL., *supra* note 84, at 68 (The “Islamic criminal process is preserved by rules that permit only evidence having a high degree of reliability. This is said to limit conviction and punishment to cases in which there is a certainty of the defendant’s guilt.”). The goal may be certainty, but the reality is far from it.

501. RUTHVEN, *supra* note 293, at 172.

502. LIPPMAN ET AL., *supra* note 84, at 68 (“Islamic law . . . limits the evidence admissible at trial to three types that are thought to possess a high degree of reliability: eyewitness testimony, confessions, and religious oaths.”).

503. “Eyewitness descriptions are notoriously full of inaccuracies.” Gramenos v. Jewel Companies, Inc., 797 F.2d 432, 438 (7th Cir. 1986) (citing ELIZABETH F. LOFTUS, *EYEWITNESS TESTIMONY: PSYCHOLOGICAL RESEARCH AND LEGAL THOUGHT*, 3 *CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH* 105 (1981)); Jackson v. Fogg, 589 F.2d 108, 112 (2d Cir. 1978) (“Centuries of experience in the administration of criminal justice have shown that convictions based solely on testimony that identifies a defendant previously unknown to the witness is highly suspect. Of all the various kinds of evidence it is the least reliable”); Sharon Begley, *Inertia, Hope, Morality Score TKO in Bouts With ‘Solid Science,’* WALL ST. J., June 6, 2003, at B1 (“Decades of research have demonstrated the fallibility of eyewitness memory of crimes.”).

fallible memory of humans—or in some cases humans who have mastered the art of deceit—it does not always provide an accurate and unbiased picture of the events at issue. The U.S. law of evidence, though itself imperfect, is further advanced than *sharia* insofar as it recognizes these inherent flaws. U.S. law places a substantial but reasonable burden on the prosecution to prove its case with the available evidence. U.S. evidence law also protects defendants from obviously unreliable or incredible evidence (though not absolutely). In balancing the interests of excluding unreliable evidence and permitting the parties to submit the evidence they think most helpful, U.S. law permits a greater breadth of evidence than just eyewitness testimony—such as scientific evidence—which the Iraqis eschew.⁵⁰⁴ As many U.S. jurists have learned, on the reliability spectrum a small strand of DNA is often worth much more than an army of eyewitnesses.⁵⁰⁵

Because some of the evidence necessary to convict insurgents is classified “secret,” military commissions are also the better venue for these prosecutions. These tribunals would permit the utilization of classified information by both the prosecution and the defense. Because the judges, prosecutors, and defense attorneys would all possess security clearances, they could review evidence presented by the prosecutors and any exculpatory classified materials the defense counsel might present.

A military court could also clarify when hearsay evidence, deposition testimony, and opinion evidence would be permitted.⁵⁰⁶

504. Fabian, *supra* note 95 (noting that—according to United States Attorney for the Middle District of Georgia, Maxwell Wood, who is working in Iraq revamping the Iraqi judicial system—the Iraqis are not experienced with scientific evidence and prefer to rely on direct testimony).

505. “Of the scores of people exonerated by DNA evidence, about three-quarters were convicted based on incorrect eyewitness IDs.” Begley, *supra* note 502, at B1.

506. The military tribunals at Guantanamo Bay, Cuba permit the admission of hearsay if the judge determines that the evidence would be probative to a reasonable person. See Department of Defense, Military Commission Order No. 1, ¶ 6(D)(1) (March 21, 2004), available at <http://www.defenselink.mil/newsMar2002d20020321ord.pdf> (“Evidence shall be admitted if, in the opinion of the Presiding Officer . . . the evidence would have probative value to a reasonable person.”); Editorial, *Due Process for Terrorists*, WALL ST. J., Mar. 22, 2004, at A14 (noting that the order relating to the Guantanamo tribunals “requires that military courts consider any evidence deemed ‘probative’ (or tending to prove) to a ‘reasonable person.’”). As mentioned above, the Uniform Code of Military Justice permits the admission of deposition testimony in certain cases. See 10 U.S.C. § 849(d).

Some tinkering with certain evidentiary rules is not fatal to the fairness of proceedings. At various times evidentiary rules have been characterized as “discretionary canons for the guidance of the trial court” from which a court may depart “where their particular application seems unwise.” Charles T. McCormick, *The Borderland of Hearsay*, 39 YALE L.J. 489, 489 (1930) (criticizing this idea); see also A.A.S. ZUCKERMAN, *THE PRINCIPLES OF CRIMINAL EVIDENCE* 183 (1989) (The hearsay “rule is at odds with common sense and as a result our judges have had to resort to numerous ploys to arrest the more extreme excesses of its operation.”). Some legal

Traditionally these types of evidence have been admitted in U.S. military courts, and presumably these would be admitted with greater liberality than in civilian courts,⁵⁰⁷ so as to minimize the disruptions to military operations that court appearances by U.S. soldiers would create.⁵⁰⁸ This is particularly important in Iraq, because absence of soldiers from the theatre of operations can deleteriously affect military actions.⁵⁰⁹ Also, because Iraqi

scholars will balk at any alteration of hearsay rules, but under the law as it now stands, there are numerous exceptions to the general rule excluding hearsay. See FED. R. EVID. 801(d), 803, 804(b).

507. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2649 (2004) (plurality opinion):

[E]nemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive in time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise the Constitution would not be offended by a presumption in favor of the Government's evidence so long as the presumption remained a rebuttable one and fair opportunity for rebuttal were provided.

Notably, the *Hamdi* plurality made these evidentiary concessions for the habeas proceedings in a civilian court involving an U.S. citizen held in the United States. Thus, military tribunals in a foreign jurisdiction involving non-U.S. aliens would presumably be afforded similar latitude in light of the diminished applicability of the Constitution to such fora.

508. Otherwise, "military officers who are engaged in the serious work of waging battle would be unnecessarily and dangerously distracted by litigation" of insurgency cases. *Id.* at 2648 (paraphrasing the government's argument); Civilian evidentiary rules would also endanger troops as they would be forced to pursue an oftentimes "futile search for evidence buried under the rubble of war" or found in dangerous areas of Iraq. *Id.*

U.S. soldiers in Iraq chafe under the burdens the CCCI has placed on them with respect to evidence collection. Grossman, *supra* note 16. ("Yet a number of officers in Iraq say they lack sufficient resources to consistently construct prosecutable cases for Iraqi courts—and at the same time fight the insurgency, protect the population from attack, and build and train the new Iraqi security forces."). So any replacement system must be mindful of the limited resources and the priorities of a soldier.

509. The *Hamdi* plurality opined that "arguments that military officers ought not to have to wage war under the threat of litigation lose much of their steam when factual disputes at enemy-combatant hearings are limited to the alleged combatant's acts." *Hamdi*, 124 S. Ct. at 2649. This makes little sense to anyone who has been in battle, or even read accounts of battles. The plurality appears to be clueless about the realities of many battlefields, especially those in Iraq and Afghanistan. At least in Iraq, these battles frequently involve ambushes by non-uniformed guerillas who give no warning. Not only are the troops taken by complete surprise, the ambushes are frequently preceded by detonation of explosive devices. Besides trying to keep their wounded buddies from dying, and protecting their own lives, the troops are frequently receiving enemy fire, from machine guns, and often rocket propelled grenades. In returning fire—their only hope of extricating themselves alive—they must discriminate between enemy combatants—who don't wear uniforms—and the civilian population, which frequently includes screaming women and children, which further adds to the confusion and impedes communication among the troops. In the back of their minds, they have to worry about being tried for a law of war violation themselves, perhaps for mistakenly killing a civilian, perhaps one carrying a stick which during the firefight looked like a rifle.

defendants might choose self-representation or representation by Iraqi counsel—and presumably they are not intimately familiar with common law evidentiary rules and trial procedures—incorporation of these complexities would also prove inimical to the defense. Thus, in fairness to defendants and to promote the consideration of a broad scope of relevant evidence, U.S. military courts presumably would strive to keep procedural and evidentiary rules as uncomplicated and straightforward as possible.⁵¹⁰

This liberality and evidentiary simplicity has been used before in military courts—particularly in post-World War II Germany⁵¹¹—and also in U.S. civilian courts. At the time of the United States' founding, hearsay was liberally admitted in courts, although it was sometimes held insufficient to support a conviction when it was the only evidence establishing a particular fact.⁵¹² Thus, greater liberality in admission of hearsay is not unprecedented. More recently, the hearsay rule has been much criticized as excluding highly probative evidence without producing a benefit (the exclusion of unreliable evidence) commensurate with the extent of the exclusion.⁵¹³ In short, its costs may outweigh its benefits in some

In such trying times, the troops are not in a position to collect evidence, preserve chains of custody, or carefully craft affidavits describing their ordeal. And since they have not had a chance to spend quality time with their attackers, they can hardly identify them by name. Zoroya & Jervis, *supra* note 21, at 1 (noting that 8,800 Iraqis have been released by U.S. forces in part because “there was not enough evidence to prosecute them”).

510. U.S. military courts in post-World War II Germany sought simplicity in rules and procedures because “it was assumed that continental people would not be able to comprehend the Anglo-American system with its pleas, privileges and immunities and other fundamental safeguards.” NOBLEMAN, *supra* note 74, at 61. “There would have been no point in requiring the observance by military government courts of technical rules of evidence, which are unknown to German defendants and their attorneys and would have served only to complicate matters.” *Id.* at 101. But, when matters were controverted, extra effort was made to obtain direct testimony of witnesses, as opposed to hearsay. *Id.*

511. *Id.* at 94.

512. Crawford v. Washington, 124 S. Ct. 1354, 1374 n.1 (2004) (Rehnquist, C.J., concurring in the judgment) (“Modern scholars have concluded that at the time of the founding the law had yet to fully develop the exclusionary component of the hearsay rule and its attendant exceptions, and thus hearsay was still often heard by the jury.”) (citing T.P. Gallanis, *The Rise of Modern Evidence Law*, 84 IOWA L. REV. 499, 534–35 (1999)). Professor Gallanis noted that until at least 1780, English courts permissively admitted hearsay evidence. *Id.* at 514–15.

513. In the words of one scholar:

The principal criticism of the hearsay rule is that it is wider than its rationale requires. Exclusions may be justified if hearsay is evidentially inferior, but the rule excludes hearsay even when it is by no means inferior and even when it represents the best available source of information. There are situations in which hearsay, far from being inferior to direct oral testimony, is superior to it, but the rule excludes evidence irrespective of its probative superiority. Thus a witness is allowed to state his present recollection of a car registration number

cases. Of course, the hearsay rules arose to ensure that laymen serving on juries were not misled,⁵¹⁴ and this concern is not implicated in trials conducted by a panel of military officers or a military judge.⁵¹⁵

Furthermore, the admission of some hearsay is probably essential to the adjudication of cases against Iraqi terrorists, since battlefield conditions will almost certainly prevent the appearance of some witnesses.⁵¹⁶ "We cannot forget that we are at war, one our enemy declares is a fight to the death."⁵¹⁷ In light of the difficulties combat engenders, hearsay, deposition testimony, and affidavits have been liberally admitted in U.S. military courts. For example, British Major John Andre was tried, convicted, and sentenced to death by a Revolutionary War military tribunal in which the only witness who testified was the defendant himself.⁵¹⁸ The rest of the evidence against him consisted of letters and reports from others who could not be present at the trial. Similarly, deposition testimony was widely used in occupation courts in Germany,⁵¹⁹ at the Nuremberg tribunal,

he fleetingly observed many months before, but he is not allowed to produce as independent evidence a note of the number he made soon after the observation.

A.A.S. ZUCKERMAN, *THE PRINCIPLES OF CRIMINAL EVIDENCE* 182 (1989).

514. See MERRYMAN, *supra* note 94, at 117 (The desirability of "the rule excluding hearsay, "particularly in nonjury trials, is often questioned, and the rule itself is riddled with exceptions; but it survives to complicate trials and keep otherwise competent and relevant evidence out of common law cases.").

515. NOBLEMAN, *supra* note 74, at 97 ("Because military government court cases were never tried to a jury, the formal rules of evidence which bind Anglo-American courts were neither provided for nor necessary" in occupation courts in post-World War II Germany). The English chancery courts liberally permitted hearsay because there was no jury in the proceedings and the judge was considered competent to give hearsay evidence its proper weight: "The canon law courts allowed the witnesses to give hearsay evidence. The reasons we today do not allow it is that a jury is not felt to be able to cope with it as well as a judge . . ." William Hamilton Bryson, *Witnesses: A Canonist's View*, 13 AM. J. LEGAL HIST. 57, 63 (1969) ("The witness should not only testify to those thing of which he has first-hand knowledge but also to that which he learned from others."). This history of permitting hearsay evidence, and the many exceptions to the rule excluding hearsay, "suggest that the rule is not a foreordained, immutable decree of the Fates." *Id.*

516. *United States ex rel. Toth v. Quarles*, 350 U.S. 11, 18 (1955) ("To the extent that those [soldiers] responsible for performance of this primary [military] function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served."). "Unlike courts, it is the primary business of armies and navies to fight . . ." *Id.* at 17.

517. Chertoff, *supra* note 35, at 18.

518. Thomas C. Marmon et al, *Military Commissions* 70 (1953) (unpublished LL.M. thesis) (on file with the Judge Advocate General's School, Charlottesville, Virginia).

519. In post-World War II Germany:

It was found in Bavaria that, when cases were referred to higher courts for trial, considerable time had elapsed between the date of the arraignment and reference and the date upon which the case came on for trial before the higher

and in General Yamashita's trial⁵²⁰— perhaps too liberally in General Yamashita's case.⁵²¹ But in Iraq, a U.S. military judge could make the appropriate admissibility determination on a case-by-case basis and thereby ensure that any hearsay evidence is reliable.⁵²²

Although *sharia* forbids the admission of some hearsay evidence,⁵²³ in accordance with its civil law tradition the CCCI generally permits hearsay evidence (particularly since neither the Iraqi prosecutor nor the Iraqi defense counsel is likely to object), but will also ignore hearsay according to the court's unbounded discretion.⁵²⁴ Assuming that this capriciousness sometimes inures to the benefit of the prosecution and other times to the accused, a consistent application of a rule regarding the admissibility or excludability of hearsay evidence before a military court would prove a boon to both the prosecution and defense. The CCCI already relies

court. As a result of this lag, civilian witnesses were no longer available, military witnesses had been redeployed and the court had no evidenced upon which to proceed. To meet this situation, the Chief Legal Office for Bavaria issued a directive to all summary court officers directing them to make a record of the military government's case, so as to perpetuate the testimony, in all cases in which it appeared that the case would be referred to a higher court for trial. This practice proved helpful, since Military Government Regulations provided that the record of any evidence taken in the summary court must be made available to the intermediate or general court, after hearing the prosecution and defense, could receive in evidence the record of the testimony of the witnesses in the lower court. This enabled the higher courts to proceed with trial in the event the important witnesses were no longer available.

NOBLEMAN, *supra* note 74, at 94.

520. *Yamashita v. Styer*, 327 U.S. 1, 18 (1946) (noting the admission of hearsay evidence and deposition testimony).

521. The standard for admissibility in General Yamashita's trial was rather broad. *See id.* at 47 n.9 (Rutledge, J., dissenting) ("The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission's opinion would have probative value in the mind of a reasonable man.") (quoting General MacArthur's directive). Federal Rule of Evidence 401 initially defines the term "relevant evidence" broadly, but the other rules of evidence place significant limitations on admissibility. *See* FED. R. EVID. 401 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.").

522. Again, this is not the ideal, but battlefield conditions sometimes necessitate compromises.

523. LIPPMAN ET AL., *supra* note 84, at 70 ("Testimony is limited to directly observed events. Hearsay is inadmissible; one may not testify concerning events that another allegedly observed.").

524. IRAQI LAW ON CRIMINAL PROCEEDINGS ¶ 213(A) (1971):

The court's verdict in a case is based on the extent to which it is satisfied by the evidence presented during any stage of the inquiry or the hearing. Evidence includes reports, witness statements, written records of an interrogation, other official discoveries, reports of experts and technicians and other legally established evidence.

on the equivalent of deposition testimony—a written record of witnesses' testimony before the investigative judge—so in a U.S. tribunal a defendant would be no worse off than he currently stands in the CCCI.⁵²⁵

5. Trials According to U.S. Law as Opposed to *Sharia*-Influenced Iraqi Law

Perhaps the best reason for using U.S. military courts in Iraq is their ability to supplant the CCCI's practice of utilizing *sharia*-influenced Iraqi law, which is full of anachronistic practices and doctrines.⁵²⁶ Among these is the rejection of the rule of law, insofar as *sharia* and Iraqi law rejects the doctrine of *stare decisis*,⁵²⁷ instead

525. "A U.S. civilian court would probably exclude such testimony." See *Motes v. United States*, 178 U.S. 458, 473 (1900) (holding that admission of deposition testimony of an absent witness where the defendant was not responsible for the witness's absence violated the defendant's Sixth Amendment right to confront adverse witnesses). Where a witness-soldier is absent because of his duties related to militarily thwarting the terrorists, it could be argued that in some sense the defendant caused this absence where the defendant is part of the insurgent conspiracy the soldier-witness is fighting. Like the CCCI, European criminal courts and the Yugoslavia tribunal both admit hearsay evidence. Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J. L. & PUB. POL'Y 591, 609 (2002).

526. It's worth noting that in various places Moslems have created a separate, secular court system to avoid the strictures of Islamic law, especially the anachronistic burdens of proof, evidentiary standards, and presumptions that benefit guilty criminals to the detriment of justice. LIPPMAN ET AL., *supra* note 84, at 97:

A second element in the development of a vigorous secular jurisdiction was the inefficiency of the *Shari'a* courts as a result of their complicated and stringent standards of procedure and evidence. . . . The rigid, formalistic and mechanical nature of *Shari'a* made these procedures slow and inefficient, and it was impossible to convict criminals, thus in some cases promoting injustice and militating against the plaintiff. Rulers had therefore to provide a more practical criminal justice system to meet the every day needs of the state.

It is interesting the way the evolution of the courts is completely opposite in the Anglo-American world. That is, in Islamic society, the secular courts arose to overcome the formalism of the religious courts, while the Church-sponsored equity courts arose in England to overcome the formalism and rigidity of the law courts.

527. AMIN, *supra* note 22, at 180 (noting that Iraqi law "does not recognize judicial precedent as binding").

The most striking difference between the Iraqi legal system, being that of a civil law country, and the Anglo-American legal system is that judicial precedent is not recognized in Iraq as a binding source of law. The doctrine of *stare decisis*, never adopted unconditionally in Iraq, has been given the rank of only secondary source of law in the Iraqi Civil Code 1951. Being a secondary source, judicial precedent is not commonly adhered to by Iraqi courts.

Id. at 227.

holding that each case is *sui generis*.⁵²⁸ Military courts also would free prosecutors from the onerous two-witness rule of the CCCI, which requires that every element of a charged offense be proven by the testimony of two witnesses.⁵²⁹ A system of military trials would permit convictions where only one witness or some other evidence is sufficiently convincing. U.S. military courts would also allow prosecutors to prosecute terrorists for attempted crimes and conspiracies.⁵³⁰ In contrast, the CCCI does not currently permit such prosecutions or strongly disfavors them,⁵³¹ in part because of its adherence to Islamic law, which frowns upon these practices.⁵³² Similarly, military prosecutors would not be constrained by the limits of the anachronistic Iraqi-penal code. Currently, the offenses listed in that code—and only those offenses—constitute the whole spectrum of potential charges against the terrorists. A military tribunal would permit U.S. prosecutors to charge insurgents with other crimes—particularly terrorism offenses—which would more effectively combat

528. ESPOSITO, *supra* note 91, at 86 (“Islamic law does not recognize a case law system of legally binding precedents.”); J.N.D. Anderson, *A Law of Personal Status for Iraq*, 9 INT’L & COMP. L.Q. 542, 545 (1960) (noting that “the doctrine of *stare decisis* is unknown” in the Islamic tradition); Rahim, *supra* note 85, at 266 (“The Mohammedan jurisprudence . . . does not accept legislation by the State as a legitimate source of law. Nor does it admit the principle of judge-made law. The Qadhi’s legal pronouncement were binding only for the decision of the particular case before him, but had no value as a precedent.”). *Stare decisis* and the rule of law would undoubtedly benefit both the prosecution and the defense.

529. LIPPMAN ET AL., *supra* note 84, at 69.

530. A plurality of the Supreme Court recently held that “conspiracy” is not a crime under the law of war. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780–81 (2006) (plurality opinion). Justice Thomas’s dissent, however, refutes this position. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2836 n.14 (2006) (Thomas, J., dissenting) (The law of war and of the United States “has consistently recognized that conspiracy to violate the laws of war is an offense triable by military commission.”). Regardless, the plurality’s view would not affect an American military occupation court from prosecuting Iraqi insurgents for conspiracy because under international law an occupation government has the legislative power to create and define crimes. HENRY SUMNER MAINE, *INTERNATIONAL LAW: A SERIES OF LECTURES DELIVERED BEFORE THE UNIVERSITY CAMBRIDGE* 179 (1888). Also, conspiracy is already an offense under Iraqi criminal law, and under principles of international law, an occupation government should retain as much of the occupied country’s criminal law as is possible. See Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Art. 64 (1949) (“The penal laws of the occupied territory shall remain in force, with the exception that they may be repealed or suspended by the Occupying power in cases where they constitute a threat to security . . .”).

531. See HERBERT J. LIEBSNY, *THE LAW OF THE NEAR & MIDDLE EAST* 228 (1975) (“Penal law is that area of law which was least developed by the Muslim jurists . . .”).

532. Islam rejects the law of conspiracy to the extent that it will not ascribe responsibility for a co-conspirator’s criminal actions to other members of the conspiracy. Nesheiwat, *supra* note 394, at 266 (Under Islamic law “a person cannot be held responsible for the acts of other people. This principle is articulated in the Prophetic Sunnah and in the Quran with such verses as ‘Each soul is rewarded on its own account,’ and ‘No burdened soul can bear another’s burden.’”).

the insurgency than the current reliance on Iraqi, civilian criminal law.

Military tribunals would also be able to rely on a defendant's confession, a practice Islamic law does not permit insofar as a defendant can withdraw a voluntary confession at any time. This tactic can render confessions and guilty pleas meaningless.⁵³³ Contrary to the practices of the CCCI, U.S. military courts would also be free to use circumstantial evidence and reasonable inferences,⁵³⁴ hearsay evidence,⁵³⁵ documentary evidence,⁵³⁶ scientific evidence, cross-examination,⁵³⁷ and rebuttal evidence,⁵³⁸—all of which are forbidden or severely circumscribed in the CCCI. The burden of proof would still be on the prosecution, but the burden would be a fixed standard rather than one that changes from cases to case. The burden of proof also would not be an insurmountable one, as it sometimes is under Islamic law.⁵³⁹ It would not—as in the CCCI—be set so high that many terrorists are guaranteed acquittal.⁵⁴⁰ Military courts would also ensure that cases would be heard by judges who would give equal weight to testimony from Iraqis as well as non-Iraqis—regardless of what tribe they come from—Christians, Jews,

533. Hossein Esmaeili & Jeremy Gans, *Islamic Law Across Cultural Borders: The Involvement of Western Nationals In Saudi Murder Trials*, 28 DENV. J. INT'L L. & POLY 145, 157 (2000) ("A general principle of Islamic criminal law is that an accused person can withdraw a confession, even a voluntary one, at any time.").

534. ESPOSITO, *supra* note 91, at 86 (noting that *sharia* does not look kindly upon circumstantial evidence); LIPPMAN ET AL., *supra* note 84, at 70 (same). This disdain for circumstantial evidence was probably inherited from Jewish law. Arnold N. Enker, *Aspects of Interaction Between The Torah Law, The King's Law, and the Noahide Law in Jewish Criminal Law*, 12 CARDOZO L. REV. 1137, 1137 (1991) ("circumstantial evidence is not allowed").

535. LIPPMAN ET AL., *supra* note 84, at 70.

536. *Id.* at 70.

537. ESPOSITO, *supra* note 91, at 84 (noting "the absence of cross examination of witnesses" under *sharia*); LIPPMAN ET AL., *supra* note 84, at 121.

538. LIPPMAN ET AL., *supra* note 84, at 121.

539. In the CCCI, the prosecution's burden of proof varies from case to case:

Part of the hurdle is in meeting Iraqi judicial tests of proof that a crime has been committed. Judges in Iraq are given enormous latitude in determining cases based on "the weight of the evidence," and may choose to implement standards laid out in any of three, often conflicting sources—the 1971 Iraqi Law on Criminal Proceedings, religious texts or precedents established by prior cases.

Grossman, *supra* note 16.

540. In the CCCI, the "burden of proof is in favor of the insurgents," says one officer in Iraq. *Id.*

and Moslems,⁵⁴¹ women and men,⁵⁴² and testimony from people who might not be considered to be of “good character” under *sharia*.⁵⁴³

6. Reaping the Benefits of Plea Bargaining

The U.S. practice of plea bargaining—which is not permitted in the CCCI—could also be utilized in a U.S. forum, creating a boon for both the defense and prosecution. Plea bargaining would permit less-culpable terrorists to exchange intelligence or testimony against ringleaders for more lenient treatment, a practice explicitly permitted under the Guantanamo tribunal rules.⁵⁴⁴ This device alone could save the United States countless personnel hours, while offering defendants a substantial benefit for sharing their valuable knowledge.⁵⁴⁵ By tapping a new source of evidence and intelligence, plea bargaining itself could save prosecutorial and judicial resources now wasted in litigating issues that could be resolved indisputably simply by the admissions of one defendant. Plea bargaining could also save intelligence resources that are wasted trying to gain the knowledge that many CCCI defendants carry within their own brains.

Moreover, in an effort to save their own skins, terrorists likely will turn on their comrades, some of whom may not yet have been apprehended and may not even be known to U.S. intelligence agencies. Such information would undoubtedly save U.S. and Iraqi lives and would be worth providing a reduced sentence to the cooperating individual. As it stands now, captured insurgents have

541. LIPPMAN ET AL., *supra* note 84, at 69.

542. *Id.* When not completely prohibited, testimony from women is given less weight than a man’s testimony. Murphy, *supra* note 310, at 11.

543. LIPPMAN ET AL., *supra* note 84, at 69. Although Iraqi law may or may not have derived its substantive and procedural rules from Islamic law, it is an interesting coincidence that Iraqi law, to a greater or lesser extent, has adopted all of these Islamic rules. The fact that the *sharia* is probably the source of these rules means that the Islamic judges will give them respect, and thus will show little respect for evidence or practices that are contrary to these rules. Because Islamic law, like the civil law tradition, eschews judicial discretion, it is doubtful that judges will find novel solutions to overcome these onerous rules. *Id.* at 121 (noting the lack of judicial discretion permitted in Islamic law). Of course, limiting judicial discretion is not always a negative, but it is when it inhibits judges from addressing the problem engendered by ancient legal rules that cannot be adapted, modified, or overridden in an attempt to address the complexities of the modern world.

544. See Department of Defense, Military Commission Order No. 1, ¶ 6(D)(1) (March 21, 2004), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (“The Accused, through Defense Counsel, and the Prosecution may submit for approval to the Appointing Authority a plea agreement mandating a sentence limitation or any other provision in exchange for an agreement to plead guilty, or any other consideration.”).

545. As it stands now, it “is almost impossible to get witnesses to testify”—including CCCI defendants—against terrorists. Grossman, *supra* note 16.

no incentive to turn on their comrades, as they will face the same penalty regardless, and by testifying against a colleague, they run the risk of suffering reprisals at the hands of other terrorists. Because these defendants lack any incentive to cooperate with the United States, a wealth of intelligence is squandered, thereby leaving many insurgents at large and free to kill Coalition and Iraqi personnel.

C. *The Resources that U.S. Military Courts Would Require*

Needless to say, military tribunals would be a drain on scarce military and judicial resources, just as they were in post-World War II Germany.⁵⁴⁶ This is particularly true in light of the number of Iraqi detainees.⁵⁴⁷ At first blush, U.S. military courts might also be perceived as more expensive than the CCCI insofar as military judges receive compensation far in excess of that which Iraqi judges receive. The due process afforded by military courts also is greater than that afforded in Iraqi courts, and due process does not come cheap. Because the terrorists are not prisoners of war, and thus are not entitled by law to the same procedural rights afforded to members of the U.S. Armed Forces, there are ways to ensure justice while minimizing costs.⁵⁴⁸ For example, cumbersome rules of evidence that are not essential to the fundamental fairness of judicial proceedings could be modified.⁵⁴⁹ Similarly, as discussed above, techniques such as plea bargaining would undoubtedly save substantial time and money, while ensuring that the guilty are punished rather than released to further attack U.S. soldiers. So the financial savings

546. In the occupation of Germany after World War II, judicial matters required "a considerable amount of time." ZINK, *supra* note 98, at 109. "One of the most serious problems encountered throughout the United States zone of Germany with respect to the operation of the military government courts was the acute shortage of trained legal personnel to staff these courts." NOBLEMAN, *supra* note 74, at 145.

547. Hannah Allam, *Prison Chief Finds Reform No Easy Task*, MIAMI HERALD, Jan. 22, 2005 ("The American prison system in Iraqi—Abu Ghraib and the three other prisons throughout the country—is teeming with detainees, 12,000, the highest number since the insurgency began in 2003."). In Germany after World War II, 80,000 prisoners were held in August 1945 in just the U.S. zone, although this numbered dropped to 66,500 by September 1946. ZINK, *supra* note 98, at 140 n.1.

548. Because governments—or at least democratic ones—possess finite financial means, minimization of costs is an essential element of military success. Money spent on one front of a complex and protracted war cannot be used to defeat the enemy at another front. "The object of war in a military point of view is to procure the complete submission of the enemy at the earliest possible period *with the least possible expenditure of men and money.*" MAINE, *supra* note 5, at 132 (quoting the Manual for English Officers) (emphasis added).

549. Many rules "determining the admissibility or inadmissibility of offered evidence, have as their prime historical explanation the desire to prevent the jury from being misled by untrustworthy evidence." MERRYMAN, *supra* note 94, at 117. The fact that military commissions will not be composed of lay jurors, therefore, obviates the need for some evidentiary rules.

attributed to using the CCCI to try terrorism cases may not be so great.

But by far the strongest reason for using military tribunals is to ensure that justice is done. In this respect, trials in U.S. military courts would be far superior to “trials” in the CCCI. Time and time again the CCCI judges have proven themselves incapable or unwilling to administer justice to their countrymen.⁵⁵⁰ It is time to put an end to the charade of justice that daily occurs in the CCCI and adjudicate terrorism cases in U.S. military courts.⁵⁵¹ True, some would argue that permitting military officers to try these cases would be a case of “victor’s justice.” But sometimes the ones most qualified to do justice—both morally and logistically—are the victors.⁵⁵² U.S. soldiers have “earned the right and obligation to conduct such trials not only because of victory; but also because of their own payment in blood.”⁵⁵³

IV. CONCLUSION

It is unprecedented in U.S. military history for the United States to permit nationals of an occupied land to adjudicate criminal cases involving defendants of the same nationality who are charged with attacking the U.S. occupation army. The need to punish any individual who uses violence to thwart a military occupation is so integral to the success of a military occupation that most occupying armies would never surrender this sword to native judges who may not be fully loyal to the occupying power. Indeed, in a situation like Iraq, which suffers from a broad anti-occupation insurgency that enjoys substantial popular support, entrusting local judges with the power to punish insurgents might be considered suicidal. Such an

550. “[E]ven some cases backed by strong evidence have been thrown out by [Iraqi] ‘judges who appeared sympathetic to the enemy,’ says one U.S. military official.” Grossman, *supra* note 16.

551. “If America is to win its world-wide battle with Islamist insurgents and terrorists, it will have to do its own dirty work whenever it has a chance” Michael Scheuer, *Battling the Terrorists*, WASH. TIMES, Dec. 27, 2004, at A21.

552. [V]ictor’s justice is sometimes the morally correct position Under some circumstances, it seems to me, victor’s justice is precisely what justice requires, because it signifies that you have been willing to pay the price in blood to achieve it, while those who stood aside from the fight have no moral standing with regard to justice against evil at all.

Kenneth Anderson, *The Role of the United States Military Lawyer in Projecting a Vision of the Laws of War*, 4 CHIC. J. OF INT’L LAW 443, 452 n.10 (2003).

553. Kenneth Anderson, *What to Do with Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J. L. & PUB. POLY 591, 597 (2002).

approach leaves too much to chance and threatens to undermine the entire war effort.

Particularly in an occupation setting, the courtroom can become an extension of the battlefield, a setting for lawfare. In occupation courts, military opponents square off for courtroom combat, the outcome of which is oftentimes as important as victory on the battlefield. By gaining their freedom to reenter the fray, or by using the court as a propaganda tool to demonstrate the occupier's impotence to punish them, insurgents can thwart the occupier almost as effectively as they can by utilizing terrorist attacks. Conversely, the occupier can use its occupation courts to demonstrate its strength and nobility, and contrast these with the insurgents' weakness and depravity. Because success against a terrorist insurgency requires the cooperation of the populace, these "secondary" goals are particularly important.

U.S. military occupation courts would provide the most suitable venue for the United States to carry out the duty of protection that it owes its soldiers and the people of Iraq. These military courts could mete out swift justice to those whose only goal is to kill, destroy, and thwart the creation of a democratic Iraq. The CCCI has repeatedly proven itself to be incapable or unwilling to shoulder this burden. Whether motivated by nationalism, tribalism, greed, or incompetence, its coddling of terrorists not only has failed to deter terrorist attacks,⁵⁵⁴ it has emboldened the terrorists and proclaimed to them in no uncertain terms that they have little to fear from being captured by U.S. forces.⁵⁵⁵ Armed with the knowledge that they will escape punishment if captured, and the promise from religious

554. The CCCI has squandered—or intentionally thwarted—multiple opportunities to strike back at the terrorists and thereby deter further aggression. A swift and forceful response to terrorist violence has proven to be an effective deterrent against future confrontations. An example was the swift and forceful response by Army Lieutenant Colonel Nathan Sassaman when his troops were mortared:

Once when Sassaman was returning from a mission in Samarra, insurgents fired a single mortar round into his compound, as if to welcome him back. He responded by firing 28 155-millimeter artillery shells and 42 mortar rounds. He called in two airstrikes, one with a 500-pound bomb and the other with a 2,000-pound bomb. Later on, his men found a crater as deep as a swimming pool.

"You know what?" Sassaman told me. "We just didn't get hit after that."

Filkins, *supra* note 164, at 652. Of course, the results of judicial proceedings purposefully are not as swift or severe as a military counter-strike, but they can have a proportionate deterrent effect, particularly because their results—long prison sentences—have a greater duration than the explosions generated by artillery or airstrikes.

555. Bing West, *America as Jailer*, NAT'L REV. July 17, 2006, at 27 ("What do insurgents have to lose from being arrested for fighting if they know they will soon be released by authorities?").

leaders that those slain while attacking U.S. infidels will enjoy a rich afterlife, there is little to deter Iraqi terrorists from continuing their jihad. By delegating to the CCCI the occupier's right and duty to ensure swift justice for those who disturb the peace, the United States has neglected a potential weapon to defeat the terrorists. This weapon will continue to be neglected until the United States decides to aggressively prosecute terrorists in U.S. military courts.⁵⁵⁶

Perhaps it is too late to hope that the U.S. government will alter its course in Iraq, but if nothing else the CCCI and political experiment should prove to succeeding generations of U.S. military leaders that lawfare has become an essential part of warfare. Just as military leaders would not lightly agree to wage battle according to the rules and terms specified by the enemy, so too they should not agree to wage lawfare in a venue where the enemy—or those sympathetic to the enemy—control not only the terms and rules of the lawfare, but the outcome of the contest itself.

556. Another alternative would be a joint Iraqi-U.S. court, where the United States enjoys the ultimate power to decide guilt and impose a sentence, perhaps a three-judge panel composed of two U.S. officers and an Iraqi civilian or military judge. The problem with such a system, however, is that it ties up two U.S. officers for a job that could easily be performed by one.