TERRORISM PROSECUTIONS AND THE PROBLEM OF CONSTITUTIONAL "CROSS-RUFFING"

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INTRODUCTION

Under current U.S. law, certain terrorism suspects are potentially subject to both military detention *and* civilian criminal prosecution if and when they are apprehended by the United States. And as the United States increasingly moves away from the paradigm that governed in the months and years after the September 11 attacks (in which most such individuals were sent to Guantánamo Bay, where many still remain), a small, but growing, number of terrorism suspects have been subjected to

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both—to periods of military detention followed by subsequent transfers to, and trial before, civilian federal courts. In light of the fact that no new detainees have been sent to Guantánamo since 2008, military captures and detentions followed by civilian trials increasingly appear to be an increasingly popular approach for the Obama administration, especially for terrorism suspects arrested overseas.[1]

This result may seem wholly unsurprising in light of the hybrid approach the United States has pursued with respect to combating the threats posed by al-Qaeda and its affiliates—relying simultaneously on the very separate legal regimes governing uses of military force and ordinary law enforcement. But the flexibility available to the government by combining these historically distinct paradigms raises a host of thorny legal questions, the implications of which have not adequately been explored. For example, should a detainee's time (and treatment) in military detention have any bearing on his subsequent criminal trial, whether with respect to presentment, speedy trial rights, *Miranda* rights, or other procedural protections? Should the means by which the detainee is *captured* have any bearing on what happens thereafter? Should the detainee have the right to collaterally attack his military detention even once it has ceased? And, perhaps most controversially, would anything prevent the government from *returning* a detainee to military detention upon either his acquittal or the conclusion of his prison sentence?

Federal courts have only just begun to grapple with these questions. And, at least thus far, they have imposed few (if any) constraints upon the government's ability to "cross-ruff"[2]—that is, to use military and law enforcement authorities *together* in a manner that avoids the restrictions that would attach if a detainee were subjected exclusively to one of those paradigms. A case in point is the Second Circuit's 2013 decision in

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1 To date, it appears that at least seven terrorism suspects have been subjected to both military detentions and civilian criminal processes: John Walker Lindh, Jose Padilla, Ali Saleh Kahlal al-Marri, Ahmed Ghailani, Ahmed Abdulkadir Warsame, Abu Anas al-Libi, and Ahmed Abu Khattala. *See, e.g.*, Walter E. Kuhn, *The Speedy Trial Rights of Military Detainees*, 62 SYRACUSE L. REV. 209, 209–10 & n.7 (2012). An eighth suspect—Ahmed Omar Abu Ali—was held by the government of Saudi Arabia, allegedly at the behest of U.S. authorities, before being transferred to civilian criminal proceedings in the United States. *See* Abu Ali v. Ashcroft, 350 F. Supp. 2d 28 (D.D.C. 2004).

2 FREDDIE NORTH, BRIDGE PLAY UNRAVELLED: RECOGNITION IS EVERYTHING 12 (2004). The term comes from a strategy often used in contract bridge that allows a partnership to mitigate the weaknesses of each partner's hand by taking advantage of the trump cards held by the other. In hands where the declarer's hand and that of his partner are unevenly distributed, the declarer will use a numerical advantage in "ruff" (trump) cards to strategically alternate taking tricks from his hand and from his partner's. Thus, after the declarer (or his partner) has claimed a trick, he will lead a weak non-trump card in a suit in which his partner is void, which the partner will then "trump," allowing the partnership to both claim the trick with the trump card and reduce the likelihood of losing tricks with weak non-trump cards later in the hand.

United States v. *Ghailani*,[3] in which a three-judge panel unanimously rejected the defendant's claim that his civilian trial after five years spent in military detention—first at a Central Intelligence Agency (CIA) black site and later at Guantánamo—violated his rights under the Sixth Amendment's Speedy Trial Clause.[4]

In this Article, I aim to explain why, under current law, decisions like *Ghailani* are unsurprising, and why this pattern is therefore likely to continue, with the government being able to utilize its military detention authorities to delay—perhaps indefinitely—the onset of particular procedural protections that would otherwise attach to criminal terrorism prosecutions. Thus, Part I introduces the problem by providing a survey of six different doctrines that do not prohibit (and may thereby facilitate) such "cross-ruffing": the *Ker-Frisbie* doctrine; the emerging case law making it all but impossible to collaterally attack pre-trial military detention; Rule 5 and the presentment doctrine; *Miranda*; speedy trial; and, finally, the potential return to military detention upon acquittal or the conclusion of the defendant's prison sentence. As Part I summarizes, current case law does—and would—allow the government to "cross-ruff" almost with impunity both prior to a criminal trial and, if the defendant is acquitted or receives a relatively short sentence, after he is no longer subject to confinement as a result. Although each of these individual doctrinal results may be defensible in the abstract, the concern motivating this Article is that, added together, they may well tolerate—and therefore engender—abusive governmental behavior in the future.

Part II turns to the harder question: Insofar as constitutional "cross-ruffing" *is* a problem, or at least *might* be at some future point, what, if anything, can (and should) be done to solve it? As Part II explains, there are two different moments at which "cross-ruffing" could best be regulated: The first is *prior* to a criminal trial, at which point one solution is to reconceive of when pre-trial delays should be charged to the government for purposes of the Sixth Amendment's Speedy Trial Clause (along with when such delays prejudice the defendant). The second moment is *after* an acquittal or the end of a prison sentence, at which point an analogous solution would be to read into the Due Process Clause limits on whether and under what circumstances the defendant may be returned to military detention.

To be sure, neither of these solutions is perfect. But if nothing else, the problem of constitutional "cross-ruffing" is one that is not likely to go away anytime soon—especially so long as the United States continues

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3 733 F.3d 29 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1523 (2014).

4 *Id.*

to pursue such a hybrid approach to preventing and punishing transnational terrorism by groups such as al-Qaeda and its affiliates.

I. CONSTITUTIONAL "CROSS-RUFFING" UNDER CURRENT DOCTRINE

To understand why "cross-ruffing" could potentially be so problematic, it is worth first walking through the different doctrines that could be implicated in cases in which a terrorism suspect is subjected to military capture, detention, or both before being transferred to ordinary civilian criminal proceedings. As this Part shows, when read together, the various doctrines and precedents that come into play provide few—if any—limits on such "cross-ruffing" between the civilian and military regimes.[5]

A. *Unlawful Arrests: The* Ker-Frisbie *Doctrine*

Proceeding chronologically, the first question that could arise is what legal consequences, if any, would attach to a potentially unlawful *arrest* of a terrorism suspect. To be sure, the U.S. government has plenty of authority as a matter of *domestic* law to effect arrests,[6] whether by civilian or military authorities,[7] and whether within the United States or abroad.[8] But where overseas arrests are concerned, the *international* law question is much trickier—and turns, at least to a large degree, on whether the arrest was undertaken with the consent of the country in which it was effectuated.[9]

However interesting the international law question is in the abstract, it is of little relevance to the current topic because the Supreme Court has made clear that unlawful arrests will seldom (if ever) preclude

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5 Some of the analysis that follows derives, at least in part, from Jennifer Daskal & Steve Vladeck, *The Case of Abu Anas al-Libi: The Domestic Law Issues*, JUST SECURITY (Oct. 10, 2013, 9:00 AM), http://justsecurity.org/1850/case-abu-anas-al-libi-domestic-law-issues.

6 *See, e.g.*, 18 U.S.C. § 3052 (2012) ("[A]gents of the Federal Bureau of Investigation of the Department of Justice may . . . make arrests . . . for any felony cognizable under the laws of the United States if they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony."); *see also* 28 U.S.C. § 533(1) (2012).

7 *See, e.g.*, 18 U.S.C. § 1116(d) (authorizing the Attorney General to seek military assistance in enforcing the criminal prohibitions of § 1116—to wit, killing or attempting to kill "a foreign official, official guest, or internationally protected person").

8 *See generally* Authority of the Federal Bureau of Investigation to Override International Law in Extraterritorial Law Enforcement Activities, 13 Op. O.L.C. 163 (1989) [hereinafter Extraterritorial Law Enforcement Activities].

9 *See generally* Ashley S. Deeks, *Consent to the Use of Force and International Law Supremacy*, 54 HARV. INT'L L.J. 1 (2013) (documenting the relationship between consent and the legality of uses of force on foreign soil under international law). *But see* Extraterritorial Law Enforcement Activities, *supra* note 8 (arguing that U.S. law does not prohibit overseas arrests in violation of foreign or international law).

a subsequent criminal trial. The *Ker-Frisbie* doctrine (named after the decisions from which it derives)

> rest[s] on the sound basis that due process of law is satisfied when one present in court is convicted of crime after having been fairly appr[ais]ed of the charges against him and after a fair trial in accordance with constitutional procedural safeguards. There is nothing in the Constitution that requires a court to permit a guilty person rightfully convicted to escape justice because he was brought to trial against his will.[10]

To be sure, courts have recognized two exceptions to *Ker-Frisbie*: It will not apply (1) when the defendant was abducted in violation of express language in an extradition treaty between the United States and the country in which the defendant was captured;[11] or (2) when the manner in which the defendant was abducted and brought to the United States for trial "shocks the conscience."[12] The narrowness of these exceptions, however, along with the infrequency with which they have successfully been invoked, tend to prove the following rule: Neither the Due Process Clause nor any other legal constraint will usually prevent the trial of a criminal defendant whose apprehension was secured unlawfully.

B. *Collaterally Attacking Pre-Trial Military Detention*

The *Ker-Frisbie* doctrine is neither new nor limited to terrorism cases. Instead, the crucial added authority in at least some terrorism cases is the possibility that the suspect might be subject to some period of military detention *without* trial—and that such detention may have the effect, if not the purpose, of circumventing rules that would otherwise limit how long defendants could be (1) held (and interrogated) before being charged or presented before a neutral magistrate; (2) informed of their *Miranda* rights; (3) provided with access to counsel; and (4) subjected to criminal trial.

Under the Authorization for Use of Military Force (AUMF) enacted in September 2001,[13] Congress has authorized the government to detain any individual who "was a part of or substantially supported al-Qaeda, the Taliban, or associated forces that are engaged in hostilities

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10 Frisbie v. Collins, 342 U.S. 519, 522 (1952); *see also* United States v. Alvarez-Machain, 504 U.S. 655 (1992) (applying *Ker-Frisbie* even when the U.S. government was the abducting party).

11 *See Alvaraz-Machain*, 504 U.S. at 659 (citing United States v. Rauscher, 119 U.S. 407 (1886)).

12 *See* United States v. Toscanino, 500 F.2d 267, 273 (2d Cir. 1974).

13 Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001) (codified at note to 50 U.S.C. § 1541 (2012)).

against the United States or its coalition partners . . . ."[14] Moreover, lower courts have held—at least thus far—that such detention authority may be relied upon until the cessation of hostilities, regardless of whether the detainee poses a continuing threat to the national security of the United States.[15]

Detainees are nevertheless entitled to challenge the legality of such detention through habeas petitions. And although Congress purported to divest the federal courts of the power to entertain habeas petitions from non-citizens held as "enemy combatants" in the Military Commissions Act of 2006,[16] the Supreme Court invalidated that provision as applied to the Guantánamo detainees in *Boumediene v. Bush*,[17] and the D.C. Circuit has since clarified that *Boumediene* vitiated the habeas-stripping provision in its entirety—even in cases in which its application would not be unconstitutional.[18] In other words, *any* detainee in U.S. custody anywhere in the world has access at least to the *statutory* habeas jurisdiction of the federal courts.[19]

But insofar as habeas petitions are challenges to *custody*, the jurisdiction of the federal courts to entertain such claims is itself predicated on the existence of some kind of custodial restraint.[20] As a result, in cases in which *former* Guantánamo detainees have sought to continue to litigate the merits of their detention via habeas after they have been released, the lower federal courts have held their claims to be moot.[21] Of course, a military detainee who is transferred to civilian criminal custody is still in *custody* for purposes of the federal habeas statute, but that scenario did not stop the Supreme Court from declining

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14 National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, § 1021(b)(2), 125 Stat. 1297, 1562 (2011).

15 *See, e.g.*, Al-Bihani v. Obama, 590 F.3d 866 (D.C. Cir. 2010). *But see* Hussain v. Obama, 134 S. Ct. 1621, 1622 (2014) (Breyer, J., respecting the denial of certiorari) ("The [Supreme] Court has not directly addressed whether the AUMF authorizes, and the Constitution permits, detention on the basis that an individual was part of al Qaeda, or part of the Taliban, but was *not* 'engaged in an armed conflict against the United States' in Afghanistan prior to his capture. Nor have we considered whether, assuming detention on these bases is permissible, either the AUMF or the Constitution *limits the duration* of detention." (emphases added)).

16 Military Commissions Act of 2006, Pub. L. No. 109-366, § 7(a), 120 Stat. 2600, 2631–32 (2006) (codified at 28 U.S.C. § 2241(e)(1) (2012)).

17 553 U.S. 723 (2008).

18 *See* Aamer v. Obama, 742 F.3d 1023, 1028–31 (D.C. Cir. 2014).

19 *See* Steve Vladeck, *Global (Statutory) Habeas After* Aamer, LAWFARE (June 25, 2014, 4:00 PM), http://www.lawfareblog.com/2014/06/global-statutory-habeas-after-aamer. *But cf.* Maqaleh v. Hagel, 738 F.3d 312 (D.C. Cir. 2013) (holding that the Suspension Clause does not apply to detention of non-citizens at U.S. base in Afghanistan, without reaching whether statutory jurisdiction had been restored by *Boumediene*).

20 *See* 28 U.S.C. § 2241(c).

21 *See, e.g.*, Gul v. Obama, 652 F.3d 12 (D.C. Cir. 2011), *cert. denied*, 132 S. Ct. 1906 (2012); *see also* Abu Ali v. Gonzales, 387 F. Supp. 2d 16 (D.D.C. 2005) (holding that a detainee's transfer to civilian criminal custody mooted his challenge to detention by the government of Saudi Arabia allegedly at the behest of U.S. authorities).

to hear the case of Jose Padilla—one of the two U.S. citizens detained as enemy combatants—when the government transferred him to civilian criminal custody while his certiorari petition was pending.[22] As Justice Kennedy explained on behalf of himself, Chief Justice Roberts, and Justice Stevens:

> Whatever the ultimate merits of the parties' mootness arguments, there are strong prudential considerations disfavoring the exercise of the Court's certiorari power. Even if the Court were to rule in Padilla's favor, his present custody status would be unaffected. Padilla is scheduled to be tried on criminal charges. Any consideration of what rights he might be able to assert if he were returned to military custody would be hypothetical, and to no effect, at this stage of the proceedings.[23]

In other words, prudential mootness will likely militate against continuing to entertain a habeas petition from a military detainee who is transferred to civilian criminal detention, even if the detainee's continuing custody suffices to allay any jurisdictional mootness concerns.

Insofar as the detainee is seeking to challenge the legality of prior military detention, an alternative means of doing so would be to pursue a damages claim against the responsible government officers. But that, too, would be unlikely to succeed. For starters, no statute either (1) provides a cause of action; or (2) authorizes damages for military detention in violation of a statute (such as the AUMF). And even if the detainees could show that their military detention violated constitutional rights (a showing that would itself be fraught with difficulty, especially for non-citizens detained outside the territorial United States),[24] federal courts have been steadfast in their refusal to recognize *Bivens* remedies in the context of post-September 11 counterterrorism policies.[25] As the Fourth Circuit explained in refusing to allow such an after-the-fact challenge to Jose Padilla's military detention:

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22 *See* Padilla v. Hanft (*Padilla II*), 547 U.S. 1062 (2006) (Kennedy, J., concurring in the denial of certiorari).

23 *Id.* at 1063 (Kennedy, J., concurring in denial of certiorari). *But see id.* at 1064–65 (Ginsburg, J., dissenting) (arguing that the dispute is not moot, and so the Court should have granted certiorari).

24 *See, e.g.*, Hernandez v. United States, 757 F.3d 249, 259–72 (5th Cir. 2014) (analyzing in detail which constitutional rights may be invoked by non-citizens for injuries sustained outside the territorial United States).

25 *See, e.g.*, Rasul v. Myers, 563 F.3d 527, 532 n.5 (D.C. Cir. 2009) (per curiam) (refusing to recognize a *Bivens* remedy for former Guantánamo detainees); Stephen I. Vladeck, *The New National Security Canon*, 61 AM. U. L. REV. 1295, 1312–17 (2012) (summarizing these decisions). For a sustained criticism of both the analysis and the results in these cases, see Carlos M. Vázquez & Stephen I. Vladeck, *State Law, the Westfall Act, and the Nature of the* Bivens *Question*, 161 U. PA. L. REV. 509 (2013).

> Special factors . . . counsel judicial hesitation in implying causes of action for enemy combatants held in military detention. First, the Constitution delegates authority over military affairs to Congress and to the President as Commander in Chief. It contemplates no comparable role for the judiciary. Second, judicial review of military decisions would stray from the traditional subjects of judicial competence. Litigation of the sort proposed thus risks impingement on explicit constitutional assignments of responsibility to the coordinate branches of our government. Together, the grant of affirmative powers to Congress and the Executive in the first two Articles of our founding document suggest some measure of caution on the part of the Third Branch.[26]

Read together with the decisions holding habeas petitions to be moot upon a detainee's release from military custody, the necessary upshot of these rulings is to effectively insulate from judicial review the legality of the military detention of any individuals who are transferred to civilian criminal custody before their habeas challenge to their military detention is adjudicated on the merits—regardless of how long they have been held in military detention up to that point. To be sure, Justice Kennedy's opinion concurring in the denial of certiorari in *Padilla II* stressed that the courts remained available in case the government sought to abuse its authority.[27] But it is not at all clear what substantive legal limits would prevent such abuse—and Justice Kennedy identified none.

Finally, even if a detainee were able to obtain a final adjudication of the legality of his military detention through habeas or a damages action, and prevailed, such a ruling would have no bearing on whether he could subsequently be subjected to civilian criminal prosecution. Thus, after the Second Circuit had ruled in December 2003 that Jose Padilla's military detention was unlawful, it ordered the government to release Padilla within thirty days or charge him.[28]

C. *Rule 5 and Presentment*

One potential means of mitigating the concern that the government might reflexively subject all terrorism suspects to (potentially unlawful but effectively unreviewable) pre-trial military detention is to constrain the amount of time between initial arrest and "presentment"—the moment when a criminal suspect is first brought before a neutral magistrate to be informed of, among other things, the

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26 Lebron v. Rumsfeld, 670 F.3d 540, 548 (4th Cir.), *cert. denied*, 132 S. Ct. 2751 (2012).

27 *See* 547 U.S. at 1064 (Kennedy, J., concurring in denial of certiorari).

28 *See* Padilla v. Rumsfeld, 352 F.3d 695, 724 (2d Cir. 2003), *rev'd on other grounds*, 542 U.S. 426 (2004).

charges against him, his right to remain silent, his right to counsel, the availability of bail, and any right to a preliminary hearing.[29]

Presentment is governed by Rule 5 of the Federal Rules of Criminal Procedure, which requires the arresting officer to "take the defendant *without unnecessary delay* before a magistrate judge, unless a statute provides otherwise."[30] And as the First Circuit has explained: "Although Rule 5(a) does not specify what would constitute an 'unnecessary delay,' courts have construed the Fourth Amendment as imposing a presumptive 48-hour time limit on detentions in the absence of a probable cause determination."[31]

In its most recent decision to consider Rule 5, the Supreme Court went one step further, emphasizing that, even within that time limit, "delay for the purpose of interrogation is the epitome of 'unnecessary delay.'"[32] Although the Supreme Court's decision in *Corley v. United States* did not arise in a terrorism case, its potential significance in the terrorism context is undeniable; after all, at least in the recent cases of Warsame and al-Libi, the principal reason *why* the government engaged in an initial period of military detention appears to have been an interest in a longer period of un-Mirandized interrogation.[33]

Whereas Rule 5 would therefore appear to provide one means of circumscribing the government's ability to "cross-ruff," three critical caveats would likely limit its efficacy in the context of extraterritorial arrests of terrorism suspects. *First*—and perhaps most importantly—Rule 5 only applies to criminal arrests, and not arrests for purposes of non-criminal detention.[34] And although no court has ever considered whether military detention constitutes non-criminal detention for purposes of Rule 5, that conclusion should follow from the fact that military detention is putatively civil, not criminal.[35] Thus, the clock Rule 5 contemplates does not begin to run until the inception of criminal proceedings—and so would not run until after a terrorism suspect who is initially subjected to military detention had been transferred out of military custody and into civilian custody for purposes of prosecution.

Second, the forty-eight-hour limit is only presumptive, and can be overcome when the government can demonstrate good reasons why

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29 *See* Corley v. United States, 556 U.S. 303, 320 (2009).

30 FED. R. CRIM. P. 5(a)(1)(B) (emphasis added); *see also* 18 U.S.C. § 3501(c) (2012).

31 United States v. Ayala, 289 F.3d 16, 19 (1st Cir. 2002) (footnote omitted); *see also* Cnty. of Riverside v. McLaughlin, 500 U.S. 44 (1991).

32 *Corley*, 556 U.S. at 308.

33 *But see* Daskal & Vladeck, *supra* note 5 ("The Supreme Court has never addressed the question as to whether and in what circumstances presentment delay for intelligence gathering—rather than evidence collection—is permissible.").

34 *See, e.g.*, United States v. Encarnacion, 239 F.3d 395, 400 (1st Cir. 2001); United States v. Noel, 231 F.3d 833, 837 (11th Cir. 2000) (per curiam); United States v. Cepeda-Luna, 989 F.2d 353, 358 (9th Cir. 1993).

35 *See, e.g.*, Rumsfeld v. Padilla, 542 U.S. 426, 455 (2004) (Kennedy, J., concurring).

presentment within forty-eight hours was infeasible.[36] Especially where extraterritorial arrests are concerned, it seems at least possible—if not likely—that courts would give the government at least some deference with respect to delays caused by the circumstances of a suspect's arrest and subsequent transfer. And insofar as courts have recognized a "public safety" exception to *Miranda*, as discussed below, some have wondered if, in an appropriate case, courts might also recognize a comparable exception to Rule 5.[37]

Third, even if the government violates Rule 5, the remedy in most cases is suppression of any statements the suspect made during the period of the unnecessary pre-presentment delay under the so-called *McNabb-Mallory* rule.[38] That is to say Rule 5 is generally understood as an exclusionary rule and not as a constraint on the suspect's prosecution as such. Although courts have "contemplated" whether outright dismissal might be warranted in cases in which the government violates Rule 5 for the purpose of conducting un-Mirandized and/or involuntary interrogation,[39] there is vanishingly little authority in support of such a remedy. At most, then, not being able to introduce at trial statements made prior to presentment appears to be the most serious consequence the government would incur from violating Rule 5.

D. Miranda

A similar conclusion follows with respect to the *Miranda* rights of terrorism suspects arrested overseas. *Miranda*, of course, requires law enforcement officers to inform criminal suspects of their rights to remain silent and to consult with an attorney prior to the inception of any custodial interrogation, in order to protect the suspect's Fifth Amendment right against self-incrimination.[40] And unlike Rule 5, the trigger for *Miranda* does not depend upon whether the suspect has been civilly or criminally detained; instead, "the only relevant inquiry" in determining when a person is in "custody" for purposes of *Miranda* "is how a reasonable man in the suspect's position would have understood his situation.'"[41]

As with Rule 5, however, *Miranda* is only an exclusionary rule; assuming it can be invoked by non-citizens lacking substantial

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36 *See, e.g.*, *Ayala*, 289 F.3d at 19–21.

37 *See, e.g.*, STEPHEN DYCUS ET AL., NATIONAL SECURITY LAW AND COUNTERTERRORISM LAW: 2014–2015 SUPPLEMENT 268 (2014).

38 *See* United States v. Alvarez-Sanchez, 511 U.S. 350, 354 (1994); *see also* Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943).

39 *See* United States v. Jernigan, 582 F.2d 1211, 1213–14 (9th Cir. 1978).

40 *See* Miranda v. Arizona, 384 U.S. 436 (1966).

41 Berkemer v. McCarty, 468 U.S. 420, 442 (1984).

voluntary connections to the United States,[42] the remedy for a violation of *Miranda* is the suppression of statements obtained as a result of the violation.[43] Thus, *Miranda* would not actually prohibit any direct conduct by the government; at most, it would prohibit the government from using a suspect's un-Mirandized statements against him at trial—and, if the statements are not just un-Mirandized but also *involuntary*, any "fruits" of such statements, as well.[44]

In addition, the government might nevertheless be able to introduce un-Mirandized statements under the "public safety" exception to *Miranda*. Under the Supreme Court's 1984 decision in *New York v. Quarles*,[45] "where questioning in a custodial interrogation focuses on ongoing concern for public safety, rather than the suspect's specific culpability, statements made by the suspect in response are admissible against him even if they were obtained prior to the administration of the *Miranda* warnings."[46] Although *Quarles* itself was a relatively routine criminal case, courts have not hesitated to apply the public safety exception to more undifferentiated national security concerns in terrorism cases—albeit only for relatively short periods of questioning.[47] Thus, *Miranda* is likely to exert even *less* pressure on the government's ability to "cross-ruff" than Rule 5.

E. *Speedy Trial*

Instead, perhaps the most outwardly promising vehicle through which to circumscribe "cross-ruffing" is the defendant's right to a speedy trial. Although criminal defendants are separately protected by the federal Speedy Trial Act[48] and the Speedy Trial Clause of the Constitution,[49] the *statutory* clock only begins running once the defendant appears before a judicial officer in the district in which he is to be tried.[50] Coupled with the statute's myriad other exceptions,[51] it is unlikely, at best, that time spent in pre-trial military detention would ever help to establish a violation of the Speedy Trial Act.

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42 *See, e.g.*, United States v. Dire, 680 F.3d 446 (4th Cir. 2012).

43 *See* United States v. Patane, 542 U.S. 630, 643 (2004).

44 *See id.*; *see also* Wong Sun v. United States, 371 U.S. 471 (1963).

45 467 U.S. 649 (1984).

46 DYCUS ET AL., *supra* note 37, at 263.

47 *See, e.g.*, United States v. Abdulmutallab, No. 10–20005, 2011 WL 4345243 (E.D. Mich. Sept. 16, 2011) (allowing introduction of fifty minutes of un-Mirandized statements under the public safety exception), *aff'd on other grounds*, 739 F.3d 891 (6th Cir. 2014).

48 18 U.S.C. §§ 3161–3174 (2012).

49 U.S. CONST. amend. VI.

50 *See* 18 U.S.C. § 3161(c)(1).

51 *See id.* § 3161(h).

Whereas the constitutional right to a speedy trial is generally less stringent than the requirements of the Speedy Trial Act,[52] it is significantly *broader* in its application—and therefore far more relevant to discussions of "cross-ruffing" concerns. Under the Supreme Court's 1972 decision in *Barker v. Wingo*,[53] courts considering constitutional speedy trial claims are to balance four factors: (1) the length of the delay; (2) the reason for the delay; (3) the defendant's assertion of his rights; and (4) the prejudice to the defendant.[54]

In *Ghailani*—one of the two "cross-ruffing" cases to date to raise a speedy trial challenge[55]—the Second Circuit explained why the *Barker* factors did not militate in favor of finding a Speedy Trial Clause violation, even though the defendant had spent nearly five years in CIA and military detention before being transferred to civilian criminal custody—"long enough to trigger the *Barker* analysis."[56]

With regard to the reasons for delay, Judge Cabranes distinguished between Ghailani's time in CIA detention—a delay "caused by national security concerns"—and his time in military detention at Guantánamo, which was "caused by preparations for trial before a military commission."[57] The Second Circuit held that the delay based upon "national security concerns" was justified under the *Barker* framework. As Judge Cabranes explained:

> It is true that national security is a somewhat unusual cause for trial delay in that it is not related to the trial itself. But we observe nothing in the text or history of the Speedy Trial Clause that requires the government to choose between national security and an orderly and fair justice system.[58]

Thus, "[w]hile the delay here was undoubtedly considerable," the Second Circuit held that it did not support Ghailani's challenge because "other factors strongly favor the government."[59] To wit,

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52 *See* United States v. Loud Hawk, 474 U.S. 302, 304 n.1 (1986).

53 407 U.S. 514 (1972).

54 *See id.* at 530.

55 Jose Padilla also argued that his criminal trial, after prolonged military detention, violated his constitutional right to a speedy trial, an argument that the district court rejected in an unpublished order. *See* United States v. Padilla, No. 04-60001-CR-COOKE (S.D. Fla. Apr. 3, 2007), *aff'd sub nom.* United States v. Jayyousi, 657 F.3d 1085 (11th Cir. 2011). Indeed, a divided panel of the Eleventh Circuit subsequently vacated Padilla's sentence because the district court in its view incorrectly gave Padilla *credit* for both his time in pre-trial military detention and the harshness of the conditions he endured therein. *See Jayyousi*, 657 F.3d at 1118–19; *see also Florida: New, Longer Sentence in Terrorism Case*, N.Y. TIMES, Sept. 9, 2014, at A20.

56 United States v. Ghailani, 733 F.3d 29, 46 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1523 (2014).

57 *Id.*

58 *Id.* at 47–48.

59 *Id.* at 48.

> "the decision to place Ghailani in the CIA Program was made in the reasonable belief that he had valuable information essential to combating Al Qaeda and protecting national security" and because "the evidence show[ed] that the government had reason to believe that this valuable intelligence could not have been obtained except by putting Ghailani into that program and that it could not successfully have done so and prosecuted him in federal court at the same time."[60]

The Second Circuit went on to count the time Ghailani spent at Guantánamo—where the delay was based on preparations to try him before a military commission—against the government. But it nevertheless held that the *Barker* factors did not militate in favor of relief because Ghailani had failed to show the sort of prejudice that the Speedy Trial Clause was intended to prevent, including "the fading of memories or unavailability of witnesses."[61] In other words, *Ghailani*'s Speedy Trial Clause claim failed because (1) amorphous national security concerns were sufficient to exclude the time he spent in CIA detention; and (2) he could not establish that the delay caused by his military detention at Guantánamo caused the requisite prejudice.

To be sure, the *Ghailani* court went out of its way to emphasize that it was "not concerned that permitting a delay based on the weighty national security interests present in this case will somehow undo the Speedy Trial Clause for all future cases."[62] But *Ghailani*'s significance as precedent is difficult to dispute. Not only did the Second Circuit refuse to hold against the government a delay not related to the trial itself, but it did so based on an effectively unreviewable determination that the initial period of CIA detention was justified by the reasonable belief that Ghailani was in possession of valuable intelligence. In other words, the Second Circuit did not charge to the government a delay based solely upon the government's interest in interrogating the defendant free of Rule 5, *Miranda*, and other procedural protections that would otherwise have attached to a criminal trial.

The same charge could also be leveled at the court of appeals' discussion of prejudice. It is certainly the case that the delay in Ghailani's trial did not produce the kinds of prejudice courts had previously held the Speedy Trial Clause to protect. But prejudice in the "cross-ruffing" context may well look a lot different from prejudice in the context of ordinary criminal prosecutions. After all, the delay in a "cross-ruffing" case is arguably at least in part to allow the government to take maximal advantage of the suspect's intelligence value without

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60 *Id.* (alteration in original) (quoting United States v. Ghailani, 751 F. Supp. 2d 515, 535 (S.D.N.Y. 2010)).

61 *Id.* at 51.

62 *Id.* at 48.

allowing him to consult with counsel—something that Rule 5 and *Miranda* would likely inhibit in more run-of-the-mill cases. The Second Circuit's response to these concerns in *Ghailani* was that any prejudices stemming from his interrogations "were not caused by the delay and were properly remedied in other ways."[63] As the above analysis makes clear, however, these "other ways" to remedying pre-trial misconduct are elusive—if not downright illusory—in "cross-ruffing" cases.[64]

Thus, even though the Speedy Trial Clause could theoretically provide a means of cabining the government's ability to "cross-ruff" between military detention and civilian criminal prosecutions, decisions like *Ghailani* suggest that courts will be reluctant in practice to look behind the government's justification for subjecting terrorism suspects to pre-trial military detention—even in cases in which the justification appears to be tied directly to avoiding criminal procedure protections that would otherwise kick in.

F. *Return to Military Detention*

Ghailani is instructive in one final respect as well. As Judge Kaplan explained in a pre-trial ruling in which he barred one of the government's key witnesses from testifying, Ghailani's "status as an 'enemy combatant' probably would permit his detention as something akin to a prisoner of war until hostilities between the United States and Al Qaeda and the Taliban end even if he were found not guilty in this case."[65] Ghailani was ultimately convicted on only one of the more than 280 charges against him. Had he been acquitted on that charge as well, the question would have arisen as to whether Judge Kaplan was correct—that he could have been returned to military detention, with his acquittal having no bearing on whether he was still lawfully subject to detention without charges under the AUMF.

Logically, this analysis makes perfect sense. Whether the government can prove to a jury beyond a reasonable doubt that an individual has committed a specific crime is an entirely different question from whether it can show to a judge by a preponderance of the evidence that the same individual is a member of al-Qaeda. Nor would either showing follow from—or be precluded by—the other. And so—at least at first blush—nothing appears to stop the government from relying upon it to continue to incapacitate a criminal defendant who is

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63 *Id.* at 51.

64 *But see* Kuhn, *supra* note 1, at 250 (arguing that the Due Process Clause might provide an adequate constraint on such manipulation by the government).

65 United States v. Ghailani, No. S10 98 Crim. 1023(LAK), 2010 WL 4006381, at *1 (S.D.N.Y. Oct. 6, 2010).

either acquitted or who has finished serving his sentence, at least so long as the AUMF remains on the books. Indeed, in both the *Padilla* and the *al-Marri* cases, the suspects were initially subjected to criminal process (Padilla was held on a material witness warrant; al-Marri was arrested on credit card fraud charges), then transferred to military detention before ultimately ending up back in the civilian criminal justice system.

Thus, had Padilla, for example, been returned to military detention following the criminal prosecution that mooted his habeas petition, there does not appear to be any specific legal constraint that would have prevented such conduct by the government. In light of this reality, consider the curious end of Justice Kennedy's concurring opinion in *Padilla II*:

> Padilla, it must be acknowledged, has a continuing concern that his status might be altered again. That concern, however, can be addressed if the necessity arises. . . . In the course of its supervision over Padilla's custody and trial the District Court will be obliged to afford him the protection, including the right to a speedy trial, guaranteed to all federal criminal defendants. Were the Government to seek to change the status or conditions of Padilla's custody, that court would be in a position to rule quickly on any responsive filings submitted by Padilla. In such an event, the District Court, as well as other courts of competent jurisdiction, should act promptly to ensure that the office and purposes of the writ of habeas corpus are not compromised. Padilla, moreover, retains the option of seeking a writ of habeas corpus in this Court.[66]

Justice Kennedy was clearly correct that these courts—including his—would have jurisdiction to provide Padilla with relief. But relief on what ground(s)? If the above analysis is to serve as a guide, no judicial doctrine, federal statute, or constitutional provision would actually have prevented the government from "cross-ruffing" between the civilian criminal justice and military detention regimes. The harder question is whether there *should* be such a constraint.

II. RETHINKING CONSTITUTIONAL "CROSS-RUFFING"

As Part I demonstrates, existing doctrines—and the judicial decisions applying them—provide the government with a fair amount of flexibility with respect to terrorism suspects who are both subject to military detention under the AUMF and triable for ordinary criminal offenses in the civilian federal courts. In one sense, this may be a temporary problem. In a May 2013 speech, President Obama committed

[66] 547 U.S. 1062, 1063 (2006) (Kennedy, J., concurring in denial of certiorari) (citations omitted).

to engaging Congress on refining, and perhaps even repealing, the AUMF.[67] Others have suggested that the upcoming withdrawal of combat troops from Afghanistan may also reduce the number of individuals who can lawfully be held under the AUMF.[68] And, in any event, the longer the AUMF remains on the books, the stronger the arguments become that the detention authority it provides should not be indefinite.[69]

But as the analysis in Part I underscores, "cross-ruffing" is a potential problem even in cases in which the government does *not* have the legal authority to subject the suspect in question to military detention. After all, even assuming the detainee could avail himself of some kind of remedy for such unlawful detention, that remedy will in no way undermine the government's ability to subsequently subject the detainee to civilian criminal trial—nor should it, in the typical case.

Thus, the question of whether there should be limits on "cross-ruffing" will be relevant even if—or when—the AUMF is repealed or replaced. One critical limit, of course, is the Executive Branch's discretion—and the potential political costs that might result from taking advantage of these precedents. But, as Chief Justice Roberts put it in an analogous context, the Constitution "protects against the Government; it does not leave us at the mercy of *noblesse oblige*. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly."[70] Instead, the far harder question is whether—should the government ever resort to such "cross-ruffing"—any legal constraints will stand in the way. Part I makes clear that, under current law, the answer is no—that the result of a series of neutral doctrinal principles, when added together, is to tolerate, if not incentivize, such conduct. This Part endeavors to explain how "cross-ruffing" *could* be accounted for, both prior to, and at the conclusion of, civilian criminal proceedings.

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67 *See* Barack H. Obama, President of the U.S., Remarks by the President at the National Defense University (May 23, 2013), *available at* http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

68 *See* John Bellinger, *Released Taliban Detainees: Not So "Innocent" After All?*, LAWFARE (June 1, 2014, 8:28 AM), http://www.lawfareblog.com/2014/06/released-taliban-detainees-not-so-innocent-after-all.

69 *See, e.g.*, Stephen I. Vladeck, Response, *Access to Counsel, Res Judicata, and the Future of Habeas at Guantánamo*, 161 U. PA. L. REV. PENNUMBRA 78, 86–87 (2012); *cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004) (plurality opinion) ("[W]e understand Congress' grant of authority for the use of 'necessary and appropriate force' to include the authority to detain for the duration of the relevant conflict, and our understanding is based on longstanding law-of-war principles. If the practical circumstances of a given conflict are entirely unlike those of the conflicts that informed the development of the law of war, that understanding may unravel.").

70 United States v. Stevens, 559 U.S. 460, 480 (2010) (citation omitted).

A. *Pre-Trial "Cross-Ruffing"*

With regard to pre-trial "cross-ruffing," the problem that Part I identifies is the possibility that the government might use its military detention authority (or at least the difficulty of remedying unlawful military detention) as a means of side-stepping procedural protections that would otherwise kick in soon after the arrest of a terrorism suspect. Thus, the question is whether those protections themselves can be tweaked to prevent such manipulation.

For obvious reasons, the *Ker-Frisbie* doctrine would be a poor vehicle for such reform. There is no necessary correlation between the legality (or lack thereof) of an overseas arrest and the military detention that may or may not follow. And so modifying *Ker-Frisbie* to impose more severe consequences for unlawful arrests would be overinclusive (by also affecting cases in which "cross-ruffing" is not a concern) and underinclusive (by not affecting cases in which suspects are subject to "cross-ruffing" after lawful arrests). That is to say, *Ker-Frisbie* facilitates "cross-ruffing," but is not a viable means for circumscribing it.

A more realistic possibility is to provide clearer remedies for unlawful military detention even once a suspect has been transferred to civilian criminal process. Courts could effectuate such a result either by reaching the merits of such individuals' habeas petitions (which, as explained above, would not be *jurisdictionally* moot upon the detainee's transfer to criminal process), or by recognizing clearer damages remedies in such cases. If nothing else, such remedies would—or at least should—have a moderate deterrent effect on the government, such that it would not abuse its military detention authority in cases in which the suspect is not even plausibly subject to such confinement. But for cases like *Ghailani*, where the defendant *was* properly subject to military detention, such remedies would have no effect on "cross-ruffing," since the detainee would be almost certain to lose on the merits.[71] Thus, if the "cross-ruffing" concern is only about cases in which the suspect is not properly subject to military detention, more clearly-available remedies would likely be sufficient. But insofar as "cross-ruffing" is a concern regardless of whether the detainee is properly subject to military detention, better vehicles for challenging that detention will, again, be insufficient to redress the problem.

To similar effect, revisiting elements of *Miranda* jurisprudence is not likely to have any meaningful impact on "cross-ruffing." After all, even if *Miranda* were to kick in from the beginning of military detention, the government could avoid its strictures either by (1)

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71 *See* United States v. Ghailani, 733 F.3d 29 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1523 (2014).

declining to use any un-Mirandized statements at trial; or (2) seeking to introduce them through the "public safety" exception. Although scaling back that exception might appear to be one possible response to "cross-ruffing" concerns, such a measure, again, would be both overinclusive and underinclusive. It would be overinclusive because it would affect cases (like *Abdulmutallab*) in which "cross-ruffing" is not at issue. And it would be underinclusive because it would impose at most a modest cost on the government's ability to take advantage of "cross-ruffing"—without in any way preventing it.

A more promising candidate is presentment, which focuses more on timing, and thus appears more precisely calibrated to the specific concerns raised by pre-trial "cross-ruffing." As noted in Part I, courts historically have interpreted Rule 5 to not apply to non-criminal detention; and some have also suggested that presentment, like *Miranda*, might also be subject to a "public safety" exception. But even if these concerns were addressed, it is still unclear whether presentment reform could meaningfully circumscribe "cross-ruffing." As with *Miranda*, the traditional remedy for a Rule 5 violation is suppression of statements obtained during the "unnecessary" delay, and not outright prevention of the criminal trial. Thus, even if presentment reform is not overinclusive, it suffers from similar underincusivity concerns insofar as it would only impose a small cost on government "cross-ruffing." In *Ghailani*, for example, had the presentment clock run from the moment of Ghailani's initial capture in 2004, nothing would have changed—since the government did not use Ghailani's post-capture statements against him at trial.[72]

Instead, the most promising vehicle for pre-trial "cross-ruffing" reform appears to be the Speedy Trial Clause, as embodied by the analysis—if not the result—in *Ghailani*. After all, the *Barker* factors are designed to be flexible, and to account for both whether the government had a sufficiently strong (and valid) justification for the pre-trial delay and the extent to which the defendant was prejudiced by the delay. Thus, if the Second Circuit in *Ghailani* had recognized that (1) delay for purposes of intelligence gathering should still be charged to the government; and (2) prejudice can include the informational advantage the government reaps as a result of such intelligence gathering, the result may well have been different.

More fundamentally—even if the result in *Ghailani* had come out the same way—a more candid recognition that such pre-trial delays should be charged to the government even when they are appropriate—and that delays for the purpose of interrogation create different forms of prejudice—would likely have a far more robust effect on constraining

72 *See id.*

"cross-ruffing" than any of the other possibilities considered above. Such an application of the *Barker* factors would not *prevent* "cross-ruffing" (nor should it); it would just require the government to offer exceptionally persuasive justifications for why it was necessary in individual cases, and not just why it was legally possible. If nothing else, a more skeptical application of the *Barker* factors appears to be the most tailored approach to circumscribing pre-trial "cross-ruffing" because it asks what at least appears to be the relevant question: Did the government resort to "cross-ruffing" simply because it *could*, or did it have some specific and legally compelling reason why, in that specific case, it was not able immediately to proceed to criminal trial? Like the *Barker* test more generally, such an approach will be intensely case-specific—as it should be.

B. *Post-Trial "Cross-Ruffing"*

Whereas the concerns raised by pre-trial "cross-ruffing" go specifically to the government's ability to side-step procedural protections that would otherwise attach to the defendant, the concerns raised by post-trial "cross-ruffing" are more amorphous: Should the government have the authority to return to military detention a criminal defendant who was subject to military detention prior to his trial, and who has either been acquitted or has served the entirety of his sentence? As Part I explained, the answer under current law appears to be "yes."

In one sense, perhaps this is as it ought to be. Military detention is not for a fixed period of time, and the government presumably has discretion to release and re-detain individuals (at least where release was not compelled by a judicial order in a habeas case). Thus, had the United States repatriated a World War II German prisoner of war, only to capture him again in subsequent fighting, no one would argue that the government lacked the authority to re-detain the individual.

In one critical respect, though, post-trial "cross-ruffing" is different. Inasmuch as the government retains the right to return the defendant to military detention, it is arguably never in the jeopardy that we usually associate with criminal trials. To be sure, the Supreme Court has long-since held that the Constitution does not forbid post-trial civil detention, as, for example, in the context of civil commitment of dangerous sex offenders.[73] But those cases have recognized and imposed a range of rigorous procedural and substantive due process constraints to prevent the government from abusing such authority—and it is worth

[73] *See, e.g.*, Kansas v. Hendricks, 521 U.S. 346 (1997).

considering whether similar constraints might be deployed to circumscribe post-trial "cross-ruffing" in this context as well.

Arguably, a detainee subjected to post-trial military detention would already benefit from meaningful procedural due process protections, since he would be fully entitled under *Boumediene* and its progeny to a meaningful opportunity to challenge the legality of such detention through a habeas petition.[74] The more interesting question is whether the detainee should be entitled to any additional *substantive* due process protections, as well. In the context of other forms of civil detention, at least, the Supreme Court has recognized that substantive due process requires the government to make some kind of individualized showing that the detainee represents an ongoing danger to himself or the community that cannot be mitigated through less restrictive means. Thus, one possible means of circumscribing post-trial "cross-ruffing" in the terrorism context is to require a similar showing from the government—why, notwithstanding his acquittal or completion of a relatively short prison sentence, the detainee in question is still a sufficient threat to national security to justify his continuing confinement.[75]

Although civil libertarians might object that such a standard is too weak to justify potentially long-term military detention, it is worth stressing that it is far more rigorous than that which the government must currently meet in the same context. And whereas the government would no doubt object that such individualized showings have not historically been required to justify military detention during times of armed conflict, courts might conclude that it is a necessary accommodation to ensure that the government does not abuse its existing detention authority, especially in cases in which it has (unsuccessfully) sought to subject the detainee to the ordinary criminal justice system.[76]

CONCLUSION

Most readers will surely find the solutions outlined above to be either unnecessary or wholly unsatisfying (or perhaps both). For some,

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74 *See* Boumediene v. Bush, 553 U.S. 723 (2008); *see also In re* Guantanamo Bay Detainee Continued Access to Counsel, 892 F. Supp. 2d 8 (D.D.C. 2012).

75 I have argued elsewhere that such an approach is the least-worst solution for post-AUMF detention of those Guantánamo detainees who the government refuses to clear for release. *See* Stephen I. Vladeck, *Detention After the AUMF*, 82 FORDHAM L. REV. 2189 (2014).

76 One objection might be that such a constraint would thereby create disincentives for the government to *ever* seek to try in a civilian criminal court individuals who are initially subject to potentially long-term military detention, lest such a move subject the government to a more rigorous detention standard after an acquittal than it would otherwise have faced without any trial. Of course, if the goal is to prevent "cross-ruffing," that's exactly the idea.

the problem identified in this Article (insofar as it is even a problem) does not merit a solution. After all, there is no evidence that, thus far, the government has consciously engaged in "cross-ruffing" for the purpose of frustrating the rights of individual detainees. For others, the modest constraints that a reinvigoration of the *Barker* factors would provide on pre-trial "cross-ruffing"—and that heightened, individualized dangerousness showings would provide on post-trial "cross-ruffing"—will almost certainly seem too weak and amorphous to meaningfully constrain the government's conduct, much of which these same observers already decry as unlawful.

In a more general sense, the shortcomings of the solutions outlined above may be that they are largely in response to a problem that has yet to fully arise—and, indeed, that may have far more effective *non*-legal solutions (such as the political pressure that might result from government efforts to more systematically "cross-ruff" between the civilian and military paradigms). But perhaps most fundamentally, the real problem with the solutions proposed above is that they assume the answer to the far more fundamental question at the core of this Article: Is "cross-ruffing" actually wrong?

As should hopefully be clear by now, my own view is that "cross-ruffing" should be disfavored, but not altogether prohibited. The government should retain the flexibility to take advantage of both paradigms in the rare cases in which it is absolutely necessary (and legally permissible) to do so, but should not be able to do so simply because it legally can. Needless to say, different answers to this fundamental question will no doubt bear on which solutions (if any) readers are most likely to support—and how effective they are likely to be. But wherever one is inclined to draw the line, the mere existence of such authorities may in the long term engender the abuse of such authorities—to the point that "cross-ruffing" could become a far more prevalent practice in a not-so-dystopian future.[77]

Thus, whether or not "cross-ruffing" is problematic, it is at least worth underscoring how and why it is currently available. And because the U.S. government has, at least for the time being, forsworn sending new terrorism suspects to Guantánamo and/or to trial before a military commission, "cross-ruffing" may become an increasingly attractive option to Executive Branch officers as new cases present themselves in which immediately subjecting terrorism suspects to civilian criminal processes appears incompatible with intelligence gathering and other security interests.

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77 *Cf. Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 125 (1866) ("Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.").

Simply put, "cross-ruffing" has already happened, and is likely only to proliferate in the months and years to come. Even if we cannot agree on how to cabin its proliferation, we should at least educate ourselves as to its existing doctrinal origins and the as-yet-unchecked possibilities for its future expansion.