

## **From Natural Law to Contemporary Political Conflict: A Legal Philosophical Perspective on Closing Guantanamo**

**Dr. Christie L. Richardson, LP.D**

Doctor of Law & Policy

Savannah State University

3219 College Street, Savannah, Georgia 31404

United States of America

### **Abstract**

*Conservative and liberal theorists conflict with ideological and political behaviors due to the federal government's interference with individual rights, in order to better social order at the national and international levels. Prosecuting the high-value detainees in the proper court forum will entail a third court to alleviate the detainee trials: a National Security Court System (NSCS). It would be a hybrid court to preserve the legal aspects of human rights while addressing the "not in my backyard" syndrome, terror risks, and homeland security protection. The answer is not for an NSCS to be established in the United States, but for an NSCS to be implemented in Guantanamo, which goes against years of research set forth by leading legal scholars and law review journals. This philosophical study, covering political theory concepts from antiquity to the contemporary era, involves a review of theory from four paradigms that can be applied to support the creation of an NSCS to prosecute high-value criminal detainees in Guantanamo.*

### **1. Introduction**

This article considers the implementation of a National Security Court System (NSCS) for high-value detainees within the framework of four broad categories of social theory as they relate to individual, societal, and national needs; human nature; social justice; economic efficiency; and law and policy. The application of a legal philosophical perspective is necessary in any effort to repair the credibility of the United States in the international community related to the detention of individuals at Guantanamo Bay, Cuba. Government secrecy must be eliminated among individuals in executive, legislative, and judicial positions, as the exercise of power to suppress military courts, commissions, and tribunals is damaging to national security. President Obama emphasizes transparency in his speeches; however, his transparency agenda has included closing the Guantanamo Bay Detention Center (Guantanamo) and relocating detainees to the United States in accordance with Executive Order—Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities on January 22, 2009.<sup>1</sup> Transparency is not a new concept in government; indeed, it was “promoted in the classical liberalism of John Locke, John Stuart Mill and Jean-Jacques Rousseau as well as the moral philosophy of Jeremy Bentham and Immanuel Kant, the political and ethical philosophers who had the greatest impact on western democracy.”<sup>2</sup>

In order for the reframing of Guantanamo to be effective, trust must be intertwined with a socio-political identity shift that involves setting aside disillusionment over the War on Terror in order to reshape international public perceptions of convicting terrorists. If the United States is to reestablish credibility in the global community, security detainees must be separated from criminal detainees. Security detainees are individuals who have been held for various reasons, including detainees picked up during “sweep” missions by Allied forces. Criminal detainees, on the other hand, have terrorist ties to the 9/11 attacks, Indonesian bombings, Kenyan bombings, and “other” acts.

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<sup>1</sup> *Closure of Guantanamo detention facilities*. (2009, January 22). Retrieved from [http://www.whitehouse.gov/the\\_press\\_office/ClosureOfGuantanamoDetentionFacilities](http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities).

<sup>2</sup> Mark Fenser, *The Opacity of Transparency*, 91 *Iowa L. Rev* 885, 896 (2007).

These individuals are high-value detainees and must, as the present article will argue, be criminally prosecuted in an NSCS in Guantanamo Bay, Cuba. Conservative and liberal theorists conflict with ideological and political behavior of government due to its interference with individuals and governmental agencies, in order to make fully informed decisions for the betterment of entire societies. Prosecuting the criminal detainees in the proper court will entail a third court to alleviate detainee trials: an NSCS. The NSCS would be a hybrid court that would preserve the legal aspects of human rights while addressing the “not in my backyard” syndrome, terror risk, and homeland security. The answer is not for an NSCS to be established in the United States, but for an NSCS to be implemented in Guantanamo, which goes against years of research set forth by leading legal scholars and law review journals. This philosophical study, covering political theory concepts from antiquity to the contemporary era, involves a review of theory from four paradigms that can be applied to support the creation of an NSCS to prosecute high-value criminal detainees in Guantanamo.

## **2. Paradigm 1: Positive Law**

The first paradigm to be applied focuses on Aristotle’s and St. Thomas Aquinas’ formulations of Divine Law and Natural Law as positive law. Law, from this perspective, has a connection to God or a higher being. Aquinas held that “an unjust positive law is ‘no law at all’ thereby situating positive law beneath and subject to Divine Law and Natural Law.”<sup>3</sup> In contrast to a military chain of command, in which issues must be handled at the lowest level, Aquinas viewed “lower forms of law as derived from the higher form.”<sup>4</sup> Law is an instrument of human law, as it directs men and women toward achieving their goals. Aquinas would regard the NSCS as a means of obtaining justice for the acts committed by criminal detainees. His natural law philosophy reflects concern for others. In the case of the NSCS, national security would be served by ensuring that terrorist attacks would be condemned and prosecuted to the fullest extent of the law. Aristotle and Aquinas agree on the use and practice of virtue and law, as “[v]irtue maximizes happiness and allows the justice professional not only to be proficient and competent in function, but also at peace internally and externally.”<sup>5</sup> Prosecution and defense counsel can find virtue in their legal work, as both sides have a moral and ethical responsibility to represent their clients effectively and efficiently.

### **2.1 Governmental Limitation**

In Aquinas’ view, “government direction is needed to prevent chaos.”<sup>6</sup> Congress must initiate the protocol to adjudicate war crimes by creating a new legal system, utilizing resources already in place to save time and taxpayer money while keeping detainees in a secure global location. Congress must also specify that not just any terrorist will be subject to the NSCS, as its jurisdiction will be limited to criminal detainees. Congress can create an NSCS utilizing Article I, Section 8, Clause 9 of the U.S. Constitution, which grants congressional powers to initiate the protocol to adjudicate war crimes by creating a new legal system. An oversight committee would need to be developed within the Department of Justice (DOJ), as this structure would remove the stigma of a military court by implementing the federal court system in the NSCS.

Positive law provides “two distinct senses of the notion that government officials must operate within a limiting framework of the law”<sup>7</sup>:

The first sense is that officials must abide by the currently valid positive law . . . [t]he second sense is that even when government officials wish to change the law, they are not entirely free to change it in any way they desire.<sup>8</sup>

Our governmental checks and balances system exists to dispose of “limited monarchy and condemn tyranny,” which Aquinas would view as serving the common good of society as a unit.<sup>9</sup>

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<sup>3</sup> Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*. 5 ed. (Cambridge: Cambridge University Press, 2004), 19.

<sup>4</sup> Charles P. Nemeth, *Aquinas in the Courtroom: Lawyers, Judges, and Judicial Conduct* (Westport: Praeger Publishers, 2001), 29.

<sup>5</sup> *Ibid.*, 68.

<sup>6</sup> Robert W. McGee, "Thomas Aquinas: A Pioneer in the Field of Law and Economics," *Western State University Law Review* 18, no. 1 (1990): 488.

<sup>7</sup> Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*. 5 ed. (Cambridge: Cambridge University Press, 2004), 115.

<sup>8</sup> *Ibid.*

<sup>9</sup> Bailey Kuklin and Jeffrey W. Stempel, *Foundations of the Law: An Interdisciplinary and Jurisprudential Primer* (St. Paul:

In the case of the NSCS, the purpose of governmental limitation is to ensure that detaining individuals at Guantanamo is consistent with national security as governmental parameters are maintained in detainee case prosecution.

## 2.2 Appellate Review

Due to the nature of military commissions and tribunals, the NSCS must be implemented as a hybrid court with appellate reviews from the D.C. Circuit Court and the U.S. Supreme Court. This court process would meet Aquinas' positive law requirements; however, we would need to apply a second theory for appellate review, which might raise controversy. The appellate review levels, in ascending order, would be the Court of Appeals of the Armed Forces (CAAF), the D.C. Circuit Court, and the U.S. Supreme Court. CAAF includes military judges from each of the service branches, including the Coast Guard. CAAF judges specialize in military law, operational law, and laws of war.<sup>10</sup> In contrast, D.C. Circuit Court judges do not specialize in these areas. The highest level of the judiciary is the U.S. Supreme Court. There would be no guarantees that detainee cases would be heard by the highest court in the land. CAAF would provide an extra set of appellate review eyes, which would probably not be available if detainees' cases were routed directly to the D.C. Circuit Court.

Adding CAAF into the legal equation would satisfy the requirements of Aquinas' court structure, as "hierarchy implies unity, but is dedicated to a priority of one type of law over the others."<sup>11</sup> With the implementation of the NSCS (human law), cases would go to appellate review in CAAF (natural law) and then to the D.C. Circuit Court (divine law) before a writ of certiorari could be submitted to the U.S. Supreme Court (eternal law).

Eternal Law



Divine Law



Natural Law



Human Law

**Figure 1 Aquinas' Hierarchy of Law<sup>12</sup>**

## 2.3 Death Penalty

In July 2009, five detainees requested the death penalty in lieu of trial; however, granting their requests or sentencing death during the NSCS process is "viewed as a human rights violation with the European Union (EU)."<sup>13</sup> The five detainees are considered apostates, as they defected from their Qur'an beliefs. Punishment by death is not part of the Qur'an; however, it is based on Hadith. Traditional Islamic law prescribes "the penalty of death for a Muslim who commits apostasy."<sup>14</sup> The Law of Apostasy covers those individuals who turn their backs on religion, which may have been the basis for the detainees' reasoning in pleading guilty and requesting the death penalty. According to Aquinas, "[w]hen ... the good incur no danger, but rather are protected and saved by the slaying of the wicked, and then the latter may be lawfully put to death."<sup>15</sup> Criminals violate positive law and harm society. NSCS judges must consider their punishments wisely, as they are the public officials granted the right to award such punishment. The death penalty should be utilized only "if the accused is a citizen of a country where such punishment is authorized."<sup>16</sup>

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West Publishing Co., 1994), 50.

<sup>10</sup> Sulmasy, Glenn M., and Andrea K. Logman, "The Appropriate Venue for Trying Terrorist Case: A Hybrid Court for a Hybrid War," 42 Case Western Reserve Journal of International Law 299, no. 48 (2009).

<sup>11</sup> Charles P. Nemeth, *Aquinas in the Courtroom: Lawyers, Judges, and Judicial Conduct*. Westport: Praeger Publishers, 2001, 29.

<sup>12</sup> *Ibid.*, 30.

<sup>13</sup> Glenn Sulmasy, *The National Security Court System: A Natural Evolution of Justice in an Age of Terror* (Oxford: Oxford University Press, 2009), 192.

<sup>14</sup> Silas, January 24, 2007, [http://www.answering-islam.org/Silas/apostasy.htm#\\_Toc157226270](http://www.answering-islam.org/Silas/apostasy.htm#_Toc157226270) (accessed August 2, 2009).

<sup>15</sup> Charles P. Nemeth, *Aquinas in the Courtroom: Lawyers, Judges, and Judicial Conduct*. Westport: Praeger Publishers, 2001, 172.

<sup>16</sup> Glenn Sulmasy, *The National Security Court System: A Natural Evolution of Justice in an Age of Terror* (Oxford: Oxford University Press, 2009), 192.

### 3. Paradigm 2: Social Contract Theory

The second paradigm for consideration in relation to the NSCS is social contract theory. Social contract theory, the foundation of liberal democratic theory, addresses implied agreements by which people maintain social order to protect individual rights within a democratic government system. It is the duty of the United States to instigate such order. The United States assumed this responsibility in capturing security and criminal detainees and transporting them to Guantanamo. This action was conceived as a way to maintain social order to prevent further terrorist attacks against the United States and its allies.

#### 3.1 John Locke

Locke's *Second Treatise in Government* distinguishes between executive and legislative powers, as Locke viewed "the federative and executive powers as vested together."<sup>17</sup> He considered decisions in times of war and foreign affairs to be the province of the executive level. Developing an NSCS would require the president to authorize Congress to enact Article I, Section 8 of the Constitution and for the Department of Justice to create an oversight committee. However, the NSCS must conduct criminal detainee trials in Guantanamo in a timely manner. A court date is severely late for many detainees, who have been held for several years without due process. An NSCS would implement a speedy trial process in which 120 days from time of capture would be the mandated period in which a detainee would receive a charge. It has been argued that this period should be 90 days; however, 90 days is not enough time to interview witnesses and build a case to make it possible to charge a detainee properly. Locke believed that many people in legislatures cannot handle executive authority; therefore, it was "intended for the executive who could act with discretion, flexibility, and quickness."<sup>18</sup> Executive authority must transfer from the president to the individual put in charge of the NSCS. This individual would report to the DOJ, as it is important to separate the NSCS from traditional military courts, commissions, and tribunals.

Government intervention threatens individual liberty as well as the ability of criminal detainees to receive equal treatment in court processes. The NSCS can serve as a buffer between the federal government and the stigma surrounding the Guantanamo Detention Center, as it is "necessary to keep the government narrowly circumscribed and without discretion in order to prevent it from invading personal liberty."<sup>19</sup> The NSCS's focus would be on criminal detainees' rights, as these rights have been the focal point of international criticism of Guantanamo. Once the United States can offer full disclosure of detainee rights while processing cases within federal law, the focal point will become the justification for the punishment of criminal detainees' unlawful terrorist acts since 2001.

#### 3.2 Thomas Hobbes

In the 1651 *Leviathan*, Hobbes developed a treatise on government that established him as the first great theorist of the social contract. Hobbes rejected the "retributive claim that punishment is a moral duty, depicting it instead as an instrumental effort to achieve deterrence and social stability."<sup>20</sup> Hobbes believed that as soon as the constitutional contract was broken, it was no longer binding and the government no longer had sovereignty. From this perspective, the United States compromised its sovereignty within the international community with reports of detainee torture, detainee due process failures, and other forms of detainee abuse. The United States could address the problem of compromised sovereignty by implementing the NSCS to improve its stance on criminal detainee prosecutions. High-value detainees are individuals with terrorist ties to the 9/11 attacks, Indonesian bombings, Kenyan bombings, and "other" acts. By dealing with this population effectively, the United States has a unique opportunity to regain its sovereignty.

There are no guarantees, however, that the NSCS process will work. The only guarantee that the United States can issue to the international community is that its criminal detainees will no longer terrorize the world if they are imprisoned.

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<sup>17</sup> Glenn Sulmasy, *The National Security Court System: A Natural Evolution of Justice in an Age of Terror* (Oxford: Oxford University Press, 2009), 28.

<sup>18</sup> *Ibid.*, 28.

<sup>19</sup> Bailey Kuklin and Jeffrey W. Stempel, *Foundations of the Law: An Interdisciplinary and Jurisprudential Primer* (St. Paul: West Publishing Co., 1994), 66.

<sup>20</sup> Alice Ristroph, "Respect and Resistance in Punishment Theory," *California Law Review* (2009): 4.

The Department of Defense (DOD) made its 43rd attempt in January 2009 to report on the number of detainees that left Guantanamo to return to the battlefield, which allegedly was 61 released detainees.<sup>21</sup> U.S. sovereignty rests with ensuring the safety of the nation and the rest of the world. Hobbes would express a commitment to equality while recognizing and punishing the criminal detainees for the deadly choices they made during and after 2001.

#### **4. Paradigm 3: Durkheim and Bentham**

The third paradigm that one may apply in the creation of the NSCS is informed by theorists such as Emile Durkheim and Jeremy Bentham. Durkheim and Bentham regarded law and criminal activity as similar in circumstances; however, Bentham's utilitarianism is a form of consequentialism, for the right action is understood entirely in terms of the consequences produced. Torture methods in Bentham's era may not agree with today's societal needs for similar methods to be used against the criminal Guantanamo detainees, in order to obtain intelligence of terrorists or future attacks. Other forms of information gathering techniques may be used to serve the same purpose; therefore, creating similar results. For Durkheim, crime became a sociological phenomenon, as he viewed contributing to crime.

##### **4.1 Emile Durkheim**

Durkheim implemented the criminal broadness process of associating sanctions with obligations. He sought to take a wide view of criminal offenses, as it "is not the offense to the individual victim but to the collective system of sentiments, the morality of the group, which gives the action its reprehensible character."<sup>22</sup> Individualism is not a factor for the criminal detainees in the present case, as they committed collective terrorist activities in the name of a higher being, Allah. Separating the detainees into security and criminal categories is necessary to implement the criminal law system in a manner that ensures that sanctions are appropriate to the crimes committed. The use of the NSCS in Guantanamo is an appropriate means to separate victims from the accused, but criminal punishment "is not a private but a public matter which society administers through a specialized agency."<sup>23</sup>

Durkheim outlined two laws of penal evolution. The first is the Law of Quantitative Variations, which states, "[t]he intensity of the punishment is greater to the extent that societies belong to a less advanced type—and the central power has a more absolute character."<sup>24</sup> The central power is the NSCS with the United States; however, it is a dilemma of the international community to ensure the criminal detainees are prosecuted appropriately. The NSCS will assist in restoring the credibility the United States once had with its allies. The naval station at Guantanamo Bay, Cuba is federal territory; therefore, federal law and prosecution must be implemented there. Federal law guarantees criminal detainees the same rights other Americans have, but we must be willing to accept this for the sake of criminal prosecution. Separating criminal detainees from security detainees allows immediate processing through appellate review. It also separates military law from federal law, which may turn around U.S. credibility with the international community. Exercising power is a factor when there is more than one key player at hand, as multiple players bring multiple views of government, religion, and social bodies to the forefront. Therefore, "if power is diffusely held by a central government through various agencies, it is erroneous to think of it as an absolute power."<sup>25</sup> The NSCS is an international court by a narrow margin, as the global community has national security at stake pending the outcome of the trials. However, the NSCS must be run by one country, and this country is the United States.

The second law of penal evolution is the Law of Qualitative Variation, which holds that "[p]rivative penalties of liberty, and only of liberty, for varying periods according to the gravity of crimes tend more and more to become the normal type of repression."<sup>26</sup>

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<sup>21</sup> Mark Denbeaux, "Released Guantanamo Detainees and the Department of Defense: Propaganda by the Numbers?" *Seton Hall University School of Law Review* (2009): 2.

<sup>22</sup> Edward A Tiryakian, "Durkheim's Two Laws of Penal Evolution," *Journal for the Scientific Study of Religion* 3, no. 2 (1964): 261.

<sup>23</sup> Edward A Tiryakian, "Durkheim's Two Laws of Penal Evolution," *Journal for the Scientific Study of Religion* 3, no. 2 (1964): 262.

<sup>24</sup> Ibid.

<sup>25</sup> Ibid, 263.

<sup>26</sup> Edward A Tiryakian, "Durkheim's Two Laws of Penal Evolution," *Journal for the Scientific Study of Religion* 3, no. 2

The high-value detainees in this case assume that they will be awarded life in prison or death, and they will be content either way. They completed their tasks in the name of Allah. Death will be the ultimate sentence, as they can die as martyrs. There are two types of criminality: religious and human. In cases of religious criminality, criminal detainees fail unless they die in martyrdom; in contrast, human criminality exists when the “victim is not seen as a religious or sacred entity.”<sup>27</sup> Al Qaeda has indicated through televised videos that its members have greater moral worth than Americans do. Al Qaeda is after a society rather than individuals; however, if individuals die in an attack, they are willing to accept these casualties, regardless of whether the dead are adults or children.

Durkheim makes a final point to conclude his discussion of the Two Laws of Penal Evolution: “if the intensity of punishment tends to weaken historically, this should not be construed to mean that the entire repressive system of society has weakened.”<sup>28</sup> In today’s society, this statement is far from the truth. It might have been valid in the 1800s and 1900s, but it is not today. The United States and its allies must make a commitment to the War on Terrorism to the fullest extent of the law and artillery in order to make it clear that terrorism and those who harbor terrorists will not be tolerated. The world must stand together to ensure that another 9/11 does not occur anywhere. If it could happen in the United States in 2001, it could happen elsewhere tomorrow. Developing an NSCS is the first of many steps toward reversing the Guantanamo stigma and creating a credible legal system.

#### **4.2 Jeremy Bentham**

Bentham, who “suggested that social science might be able to identify the social good, or at least how its achievement could be facilitated through law,” introduced the instrumental view of law.<sup>29</sup> In the view of the Obama Administration, the social good is achieved by allowing the detainees to plead guilty and move directly to the sentencing phase; however, this is not in the greatest public interest. Allowing detainees to plead guilty before being heard in court has a negative impact on future criminal detainees’ cases. The United States does not have a successful trial process rate from charge sheet to conviction with trial by jury, as only a handful of terrorist cases have been tried in the American criminal court system with each defendant exercising his Sixth Amendment to the U.S. Constitution to self-representation.

In the case of *United States v. Zacarias Moussaoui*, 333 F.3d. 509, 517 (4<sup>th</sup> Cir. 2003), the United States almost lost its case against Moussaoui due to the dissemination of classified material and Moussaoui’s Fifth Amendment right to have witnesses for his defense with five high-value detainees from Guantanamo granted by a federal judge. Federal judges are not trained in laws of war or laws of armed conflict; therefore, their judicial actions could lead to error in evidence admission. Allowing criminal detainees to plead guilty leads to sentences of life in prison, which eliminates the death penalty. In this way, the federal government’s action “makes it possible for them not only to influence the allocation of resources but also to define the public norms of morality and to designate which acts violate them.”<sup>30</sup> The NSCS must exercise caution when ruling on the death penalty, of which Bentham was not in favor. Rather than executing criminals, Bentham sought prison reform. NSCS judges will operate as a three-panel judge system where a vote of 2-1 is needed for the death penalty. Execution will not be performed until a case has exhausted all appellate reviews.

Bentham’s views reflect the idea that “happiness can be calculated and quantified, and it is consequently acceptable to inflict pain and suffering on the few to serve the wants and needs of the many.”<sup>31</sup> The demand for public safety and security has led the United States to focus on gathering the intelligence that is needed to protect this country. Bentham worried about “the delusive power of words” in his discussions of torture; however, his definition of torture included situations “where a person is made to suffer any violent pain of body in order to compel him to do something.”<sup>32</sup>

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(1964): 263.

<sup>27</sup> Ibid., 264.

<sup>28</sup> Ibid., 265.

<sup>29</sup> Brian Z. Tamanaha, *On the Rule of Law: History, Politics, Theory*. 5 ed. (Cambridge: Cambridge University Press, 2004), 79.

<sup>30</sup> Stewart Macaulay, Lawrence M. Friedman, and Elizabeth Mertz, *Law in Action: A Socio-Legal Reader* (New York: Foundation Press, 2007), 529.

<sup>31</sup> Peter J. Pham, “Torture, Democracy, and the War on Terrorism,” *The Long Term View* 6, no. 4 (2006): 8.

<sup>32</sup> Jeremy Waldron, “Torture and Positive Law: Jurisprudence for the White House,” *Columbia Law Review* 105, No. 6 (2005): 1697.

Bentham referred to pain in terms of its sudden onset "rather than its severity."<sup>33</sup> Despite allegations to the contrary, the United States insists that it did not torture the Guantanamo detainees. As long as interrogation methods complied with military standards, Bentham would agree that torture was not executed. It was the initial shock of the interrogation methods that led the public to believe that torture occurred. Bentham would explain that the severity of the pain inflicted did not characterize it as torture; however, there is debate as to whether U.S. officials were justified in their use of such drastic measures to ensure the protection of national and global security. It is necessary to separate the security detainees from the criminal detainees to dodge torture claims. High-value detainees would be housed in a separate building with its own courtroom, mimicking the federal court system. Criminal detainees would have habeas corpus rights, which would negate torture claims. The Principle of Utility offers a means of calculating pleasure and pain so that each criminal detainee may be prosecuted in the same manner with the same legal ramifications in a court of law. Each detainee's happiness level would be the same, whether he is sentenced to life in prison or to death.

### **5. Paradigm 4: Contemporary Political Philosophy**

The fourth and final paradigm involves how contemporary political philosophy reflects government at levels: federal, state, city, and local. Within this paradigm, the rights granted to the individual must be enacted and enforced. This righteous framework has led some legal scholars and political experts to question which individuals have rights under the U.S. Constitution and which individual or what governmental agency sets these rights in place. The high-value criminal detainees at Guantanamo have the same fundamental human rights as Americans. We must look to past contemporary political philosophy to answer questions we have today concerning how to prosecute these criminal detainees effectively within the framework we have lived by for over 200 years. Below, a utopian view of prosecuting cases is compared to a hands-on approach to placing today's players in the context of a theory developed in 1898.

#### **5.1 John Rawls**

In his book *A Theory of Justice*, Rawls' description of a utopian society is deficient because it is too far removed from political reality. Rawls later developed an overlapping consensus with public reasoning to develop a realistic utopia. He believed in distributing equality to all. In a sense, the United States can accomplish this by trying criminal detainee cases utilizing the federal law and court system. The United States will develop its own utopia as we "distribute fundamental rights and duties and determine the division of advantages from social cooperation."<sup>34</sup> The U.S. Supreme Court gave the criminal detainees fundamental human rights to habeas corpus in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), but it is up to the government to implement these fundamental human rights in an NSCS utilizing the Geneva Convention to ensure that the NSCS is distinguished from prior international tribunals of the International Criminal Court (ICC). There are five critical aspects of this effort:

1. Habeas appeals will be permitted but different from what was mandated in *Boumediene*;
2. The death penalty sentencing provisions will be altered;
3. There will be a right of interlocutory appeal at any point in the proceeding allowing the prosecution to challenge any court order regarding evidence, to be available if the judge deviates from the legislatively adopted rules of the new court;
4. The appellate structure will be tailored specifically to the National Security Court System; and
5. Statements obtained in violation of the Convention against Torture, the Army Field Manual, or Federal Law will be inadmissible.<sup>35</sup>

These NSCS principles directly reflect the utopia Rawls expressed in his principles of justice, which include fairness. Rawls' fairness requires that each person be treated equally in the eyes of the law. He designates an "original position" from which each player in the criminal detainee cases starts. The decision-makers move to a "veil of ignorance," which accommodates the NSCS, as this is a new court system that the eyes of the world will be watching. Implementing a special court with federal rules and laws already in place leaves a gap for error.

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<sup>33</sup> Ibid.

<sup>34</sup> Colin Koopman, "The Aims of Political Philosophy in John Rawls, Bernard Williams, and Richard Rorty," (2008): 7.

<sup>35</sup> Glenn Sulmasy, *The National Security Court System: A Natural Evolution of Justice in an Age of Terror* (Oxford: Oxford University Press, 2009), 189.

The decision-makers may return several times to the “original position,” as it “stops decision-makers from choosing principles that may arbitrarily favor a person in the decision-maker’s station in life.”<sup>36</sup> For the NSCS to work, the decision-makers must be the judges, prosecution and defense counsel, and appellate reviewers. Rawls claims that there are two principles of justice to support and to return to the “original position”:

1. Each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others; and
2. Social and economic qualities are to be arranged so that they are both reasonably expected to be to everyone’s advantage and attached to positions and offices open to all...<sup>37</sup>

By combining the five critical areas with Rawls’ principles of justice, the United States can use fairness and utopia as key elements of an effort to turn around the stigma surrounding Guantanamo. Processing criminal detainees and security detainees separately is the first step toward a new court utilizing our federal court system. Merit to increase international trust is needed while we provide each criminal detainee an opportunity for fairness and justice.

## 5.2 Albert Dicey

Mimicking our American society under the new presidential administration is the theory behind Albert V. Dicey’s “public opinion on social and legal change.”<sup>38</sup> Dicey spoke of “accidental conditions which enable popular leaders to seize the opportunity.”<sup>39</sup> President Obama seized the opportunity to close the Guantanamo Detention Center, which proved to be popular in the United States and the rest of the world until he increased his efforts to move the detainees to the United States for prosecution.

As depicted in Figure 2, Dicey’s theory begins with an “individual thinker” (in this case, President Obama) and proceeds to “followers” (Congress), a “school of thought” (ambiguous), the “general public” (us), a “time lag” (bipartisanship spreading its wings), and a “catalytic event, legislators, and law” (closing Guantanamo, Washington, D.C., and more bipartisanship).<sup>40</sup>

Individuals are moved by promises of change and prosperity, which formed President Obama’s campaign base. The 2008 presidential election was the first time that many Americans felt like their votes counted; therefore, it lends credence to Dicey’s definition of public policy, in which public opinion is the opinion of “the majority of those citizens who have at a given moment taken an effective part in public life.”<sup>41</sup> When dramatic changes take place in public policy that directly affect people’s rights, Americans will speak up. Americans advocating for their own rights has given rise to the “not in my backyard” (NIMBY) syndrome in the United States. An NSCS prosecuting the criminal detainees in Guantanamo would alleviate American concerns about detainees being imprisoned near their neighborhoods making it possible for the federal government to conduct trials effectively.

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<sup>36</sup> Christopher Storelli, "John Rawls's Principles of Justice," <http://www.cupr.org/VI3/Storelli-VI3.pdf> (accessed August 23, 2009), 50.

<sup>37</sup> *Ibid.*, 51.

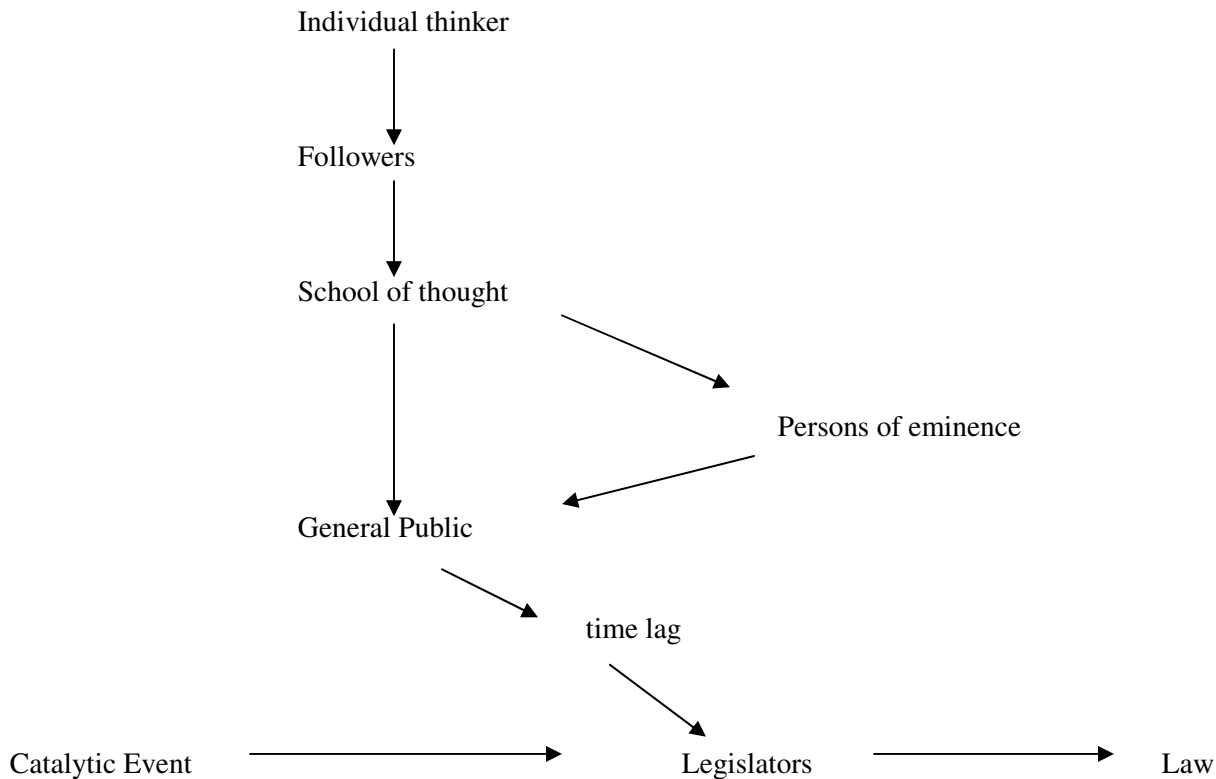
<sup>38</sup> Macaulay, Stewart, Lawrence M. Friedman, and Elizabeth Mertz. *Law in Action: A Socio-Legal Reader*. New York: Foundation Press, 2007, 187.

<sup>39</sup> *Ibid.*

<sup>40</sup> Macaulay, Stewart, Lawrence M. Friedman, and Elizabeth Mertz. *Law in Action: A Socio-Legal Reader*. New York: Foundation Press, 2007, 187.

<sup>41</sup> *Ibid.*, 188.





**Figure 2 Dicey's Great Man Theory<sup>42</sup>**

Dicey is given credit for providing the foundation for the modern rule of law. In *An Introduction to the Study of the Law of the Constitution* (1885), he outlines three principles of law:

1. Everyone is equal before the law;
2. No one can be punished unless they are in clear breach of the law; and
3. There is no set of laws which are above the courts.<sup>43</sup>

The first two rules are self-evident; however, the third rule is debatable. In the United States, there is only one set of law above the courts, which is the U.S. Constitution. The U.S. Supreme Court interprets the Constitution; therefore, no court is above it. The criminal detainees in the present situation depend on the U.S. Supreme Court for habeas corpus rights as determined in *Boumediene v. Bush*, 128 S.Ct. 2229 (2008), and the Constitution is used in the interpretation of legal rights in their particular cases. One of the many goals of an NSCS would be to implement federal rights for criminal detainees, as they are now guaranteed legal rights from the U.S. Supreme Court. Dicey's rules of law continue to be implemented; however, the third rule stands no ground in today's legal practice. The framers of the U.S. Constitution planned for their document to be the ultimate law about which the lower courts would argue.

## 6. Conclusion

The social theory perspective on prosecuting high-value detainees implies that although history will repeat itself, we have the opportunity to improve it. The War on Terror introduced ambiguity involving the law of armed conflict, the law of war, and policy issues. Trial and error led the United States down a rocky road full of criticism.

<sup>42</sup> Macaulay, Stewart, Lawrence M. Friedman, and Elizabeth Mertz. *Law in Action: A Socio-Legal Reader*. New York: Foundation Press, 2007, 188.

<sup>43</sup> A. V. Dicey, "Introduction to the Study of the Law of the Constitution," [http://www.constitution.org/cmt/avd/law\\_con.htm](http://www.constitution.org/cmt/avd/law_con.htm) (accessed August 22, 2009).

This paper has put forth the argument that a “bipartisan commission of academics, national security experts, lawyers, and human rights advocates could put their collective thoughts and ideas together” to create a National Security Court System we desperately need.<sup>44</sup> The international community must put blame aside in service of this effort to ensure global security. We need a hybrid court. We need a National Security Court System.

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<sup>44</sup> Glenn Sulmasy, *The National Security Court System: A Natural Evolution of Justice in an Age of Terror* (Oxford: Oxford University Press, 2009), 205.