

ARTICLE

A SELF-INFLICTED WOUND: A HALF-DOZEN YEARS OF TURMOIL OVER THE GUANTÁNAMO MILITARY COMMISSIONS

by
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President Bush's November 2001 decision to try suspected terrorists by military commissions provoked immediate controversy that continues to the present day. The dispute is fueled by the adoption of judicial shortcuts unjustified by either historic practice or accepted legal principles. Commission rules are based on policy decisions rather than any higher law, and proceedings are largely ad-libbed. The right to choice of counsel and other benefits accorded the accused depend on nationality, mocking the concept of equal protection. Defendants are seriously disadvantaged in terms of resources and access to evidence. Most of the charges preferred are problematic as violations of the law of war. While the Military Commissions Act of 2006 did make some improvements, remaining defects, including the likelihood of convictions based on coerced testimony, will preclude trials from meriting approbation as "full and fair." Convictions will be irreparably tainted, and many of these problems would now follow a shift to either courts-martial or proposed national security courts. If the goal is to incapacitate identified enemies, then a straightforward preventive detention regime complying with the law of war would be a sounder approach. If it is desired to stigmatize defendants with a criminal conviction, justifying penal incarceration or even execution, then trials in regular federal courts are the best option.

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Farcical judicial trials conducted by us will destroy confidence in the judicial process as quickly as those conducted by any other people . . . experience teaches that there are certain things you cannot do under the guise of a judicial trial. Courts try cases, but cases also try courts.

—Robert Jackson, Chief Prosecutor, Nuremberg Tribunal¹

I think Robert Jackson . . . would turn over in his grave if he knew what was going on at Guantanamo.

—Henry King, Jr., Associate Prosecutor, Nuremberg Tribunal²

I. INTRODUCTION

The United States enjoyed almost universal support after the September 11, 2001 (9/11) attack. Even the shift from treating terrorism as a crime to an act of war initially received broad backing. The U.S. right of self-defense was cited by the United Nations Security Council³ while the North Atlantic Treaty Organization,⁴ Organization of American

¹ Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, Address at the Washington Meeting of the American Society of International Law (Apr. 13, 1945), in 39 AM. SOC'Y INT'L L. PROC. 10, 15–16 (1945).

² Jane Sutton, *Nuremberg Prosecutor Says Guantanamo Trials Unfair*, REUTERS, June 11, 2007, <http://www.reuters.com/article/newsOne/idUSN6B38479920070611> (quoting Henry King, Jr.).

³ S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001); S.C. Res. 1373, U.N. Doc. S/RES/1373 (Sept. 28, 2001) (both referencing the inherent right of self-defense in their perambulatory clauses).

⁴ NATO Speech, Statement by NATO Secretary General, Lord Robertson (Oct. 2, 2001), available at <http://www.nato.int/docu/speech/2001/s011002a.htm>.

States,⁵ and Australia⁶ all agreed that 9/11 constituted an armed attack. Congress overwhelmingly approved the conflict approach, enacting the Authorization for the Use of Military Force (AUMF) with only a single opposing vote.⁷

Six years later the political landscape has significantly transformed. Although war is a legal regime governed by an extensive body of law, the Bush Administration has seemed to view it more as a means to invoke broad claims of executive authority than as a meaningful alternative paradigm to criminal law.⁸ Refusal to apply the Geneva Conventions, indefinite detentions based on flimsy evidence, detainee abuse, and the questionable invasion of Iraq all have helped undermine support for U.S. policies.⁹ American stature in world public opinion has declined from sympathetic victim to pariah, almost on par with Iran and North Korea.¹⁰ In failing to achieve their stated purpose of bringing terrorists to “justice” through “full and fair” trials,¹¹ the flawed implementation of U.S. military commissions has contributed to this downward spiral in American standing.

⁵ MICHAEL BYERS, *WAR LAW: UNDERSTANDING INTERNATIONAL LAW AND ARMED CONFLICT* 67 (2005).

⁶ LEIGH SALES, *DETAINEE 002: THE CASE OF DAVID HICKS 3–4* (Melbourne Univ. Press 2007).

⁷ Congresswoman Barbara Lee cast the single opposing vote during House consideration of House Joint Resolution 64 on September 14, 2001. See Office of the Clerk, U.S. House of Representatives, Final Vote Results for Roll Call 342, <http://clerk.house.gov/evs/2001/roll342.xml>. The Senate version, which became law, passed the upper house by unanimous record vote and was then accepted by the House “without objection” that same day. See Library of Congress, S.J. Res. 23, available at <http://thomas.loc.gov/cgi-bin/bdquery/z?d107: SJ00023:@@R>.

⁸ See, e.g., David W. Bowker, *Unwise Counsel: The War on Terrorism and the Criminal Mistreatment of Detainees in U.S. Custody*, in *THE TORTURE DEBATE IN AMERICA* 183, 185–86 (Karen J. Greenberg ed., 2006).

⁹ These criticisms have been voiced by many commentators. See, e.g., Human Rights Watch, *Military Commissions Shouldn't Be Used; Pentagon Rules Shortchange Justice*, June 25, 2003, <http://hrw.org/english/docs/2003/06/25/usdom6178.htm>; Nicholas Stephanopoulos, *Solving the Due Process Problem with Military Commissions*, 114 *YALE L.J.* 921 (2005).

There are valid reasons to find the Geneva Conventions facially inapplicable to the so-called “War on Terror” but customary law provisions should still apply. See David Glazier, *Full and Fair by What Measure?: Identifying the International Law Regulating Military Commission Procedure*, 24 *B.U. INT'L L.J.* 55, 76–85, 88–90, 93–94, 103–19 (2006).

¹⁰ See, e.g., Press Release, Amnesty Int'l, Speech by Irene Khan at Foreign Press Association (May 25, 2005), <http://web.amnesty.org/library/index/engpoll00142005> (referring to Guantánamo as the Gulag of our times); Jennifer Hoar, *Poll Shows Low Global Opinion of U.S.*, CBSNEWS.COM, June 27, 2007, <http://www.cbsnews.com/stories/2007/06/27/world/main2990306.shtml>; Kevin Sullivan, *Views on U.S. Drop Sharply in Worldwide Opinion Poll*, WASH. POST, Jan. 23, 2007, at A14.

¹¹ George Lardner Jr. & Peter Slevin, *Military May Try Terrorism Cases; Bush Cites 'Emergency'*, WASH. POST, Nov. 14, 2001, at A1.

Once it was decided to treat 9/11 as an act of war, there were credible reasons for employing military trials. Only a subset of possible law of war violations are codified as federal crimes,¹² so a tribunal able to apply international law directly is required to obtain U.S. jurisdiction over the full range of war crimes. A thoughtfully constituted military trial can incorporate substantial law of war expertise in a manner impractical in a civilian criminal court, and only a military trial can render a law of war verdict by “peers;” that is, individuals also subject to the same body of law.¹³

It has not been necessary to employ military commissions to realize these advantages, however. The Uniform Code of Military Justice (UCMJ) gives jurisdiction to general courts-martial to try any law of war violations,¹⁴ and their selection could almost certainly have avoided much of the initial controversy about military commission use. The Administration has offered only cursory justification for President Bush’s November 2001 order authorizing military commissions instead, which was based on one issued by Franklin D. Roosevelt in 1942 for the trial of eight Nazi saboteurs.¹⁵ Even in defending commission use to the Supreme Court, the government just repeated the President’s unsubstantiated finding that “it is necessary for individuals subject to this order . . . to be tried for violations of the law of war and other applicable laws by military tribunals.”¹⁶ Attorney General John Ashcroft testified merely that it was appropriate to hold the 9/11 perpetrators accountable for war crimes¹⁷ while other proponents justified commissions for their posited speed, flexibility, and ability to both safeguard classified evidence and protect participants from retaliation.¹⁸ Advocates also stressed the need for evidentiary flexibility, noting that battlefield evidence collection would not meet Fourth Amendment standards and calling for hearsay admission so that soldiers need not be spared from the fight to testify.¹⁹

¹² See War Crimes Act of 1996, 18 U.S.C. § 2441 (2000) (criminalizing grave breaches of the Geneva Conventions of 1949, parts of the 1907 Hague regulations respecting war on land, violations of Geneva Common Article 3 (CA3), and a 1996 Protocol on mines and booby traps). Punishable CA3 violations are now limited by the Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

¹³ See ALEXANDER MACOMB, A TREATISE ON MARTIAL LAW AND COURTS-MARTIAL; AS PRACTISED IN THE UNITED STATES OF AMERICA 23–24 (1809).

¹⁴ Uniform Code of Military Justice, 10 U.S.C. § 818 (2000).

¹⁵ Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

¹⁶ Brief for Respondents at 2, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184) (quoting President George W. Bush’s military order of November 13, 2001).

¹⁷ *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearing Before the S. Comm. on the Judiciary*, 107th Cong. (2001) (statement of John Ashcroft, Att’y Gen. of the United States).

¹⁸ Lardner & Slevin, *supra* note 11, at A1.

¹⁹ Attorney General Alberto R. Gonzales, Prepared Remarks at the JAG Corps Leadership Summit (Oct. 23, 2006), available at http://www.usdoj.gov/archive/ag/speeches/2006/ag_speech_061023.html.

Meanwhile, critics worried that the commissions' real purpose was to facilitate convictions via judicial shortcuts, curtailing defendants' rights and admitting evidence too untrustworthy for consideration in a regularly constituted court.²⁰

As a result, controversy has dogged the commissions from the start.²¹ Basic fairness concerns contributed to the Supreme Court finding the new tribunals did not pass muster in its *Hamdan v. Rumsfeld* decision,²² even though previous commissions were uniformly upheld in the 1940s.²³ While there is no doubt that the commissions as constituted in 2008 are considerably improved over those proposed in 2001, there is still substantial reason to question their legitimacy. It is hard for many to believe that a government that doggedly defended some of the more egregious aspects of its proposed commission procedures is truly committed to "full and fair" trials. And even new rules conforming to the Military Commissions Act of 2006 (MCA)²⁴ are still sufficiently flawed to compromise fundamental fairness. Current shortcomings include charges lacking legitimate foundation in the law of war and the likelihood of convictions, perhaps even executions, based on coerced testimony. The single "trial" completed to date, the guilty plea of Australian David Hicks, only fanned the flames of criticism.²⁵ Continued commission use will only result in more adverse publicity for the United States and further undermine support for the terrorism as war paradigm, despite its legitimate advantages in other areas.²⁶

There are viable alternatives to commission employment. So it is time to step back and consider what purposes the military commission trials are intended to serve. If the goal is to incapacitate individuals posing a continuing threat to U.S. interests, this can be achieved through preventive detention authorized by the law of war. But if we want to stigmatize wrongdoing through criminal convictions and impose actual punishment, a high bar of fairness must be cleared if the results are to be considered just. Part II of this Article will briefly explore the historical rationale for military commission development and use, as well as issues

²⁰ See, e.g., Press Release, Sen. Carl Levin, Senate Floor Statement on the Senate Armed Services Committee Bill as a Substitute for the Military Commissions Bill (Sept. 27, 2006), available at <http://www.senate.gov/~levin/newsroom/release.cfm?id=263957>.

²¹ See generally Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT 261 (2002).

²² *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

²³ See, e.g., *Ex parte Quirin*, 317 U.S. 1, 20 (1942); *In re Yamashita*, 327 U.S. 1 (1946); *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

²⁴ Kenneth Hurwitz, *Human Rights First, Trials Under Military Commissions* 7 (Deborah Pearlstein ed., 2006).

²⁵ See Part III *infra*.

²⁶ See, e.g., Philip Zelikow, Annual Lecture, *Houston Journal of International Law* (Apr. 26, 2007) (articulating reasons for treating struggle with al-Qaeda as an armed conflict rather than crime).

stemming from problematic past examples. Part III will review the Bush Administration's post-9/11 military commission implementation including the evolutionary improvements made to date. Part IV will assess the key issues with the tribunals as the process stands today, while Part V will explore the rationale for continued commission employment and evaluate the merits of potential alternatives.

After more than a half a decade of hemorrhage from self-inflicted wounds, it is time to recognize that pursuing unjust trials plays into the hands of our adversaries and hinders, not helps, the pursuit of legitimate national security objectives. If we want to try suspected terrorists at all, such trials are best conducted in regular Article III courts.

II. HISTORIC MILITARY COMMISSION EMPLOYMENT

Despite concern that the current military commissions are specifically intended to permit judicial shortcuts, their historic roots are far more noble. After conforming to court-martial standards for nearly a century, their deliberate downward departure from formal military due process standards was first endorsed by proponents of FDR's 1942 Nazi saboteur commission. The current controversy should thus be no surprise given that the 2001 decision was based on a historic aberration rather than sound legal tradition.

A. *Origins and Historical Military Commission Practice*

General Winfield Scott created the military commission during the Mexican-American War to fill a critical statutory gap in the UCMJ's predecessor, the Articles of War.²⁷ The early statutes criminalized only actual military offenses such as desertion,²⁸ leaving the Army with no means to prosecute soldiers for common crimes such as murder once beyond the jurisdiction of American civil justice.²⁹ Fighting in the enemy's country,³⁰ Scott knew he had to maintain order among his men to avoid provoking the local populace. He thus drafted a general order, first issued at Tampico in February 1847, making ordinary criminal offenses triable by military commissions if committed by or upon U.S. personnel.³¹ These commissions closely conformed to court-martial

²⁷ Commission proponents invariably claim they date back to the Revolution. The author addresses these claims, as well as the actual Mexican War origin in detail. David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 31 (2005).

²⁸ See An Act for establishing Rules and Articles for the government of the Armies of the United States, ch. 20, 2 Stat. 359 (1806).

²⁹ Glazier, *supra* note 27, at 31-33.

³⁰ JOHN S.D. EISENHOWER, SO FAR FROM GOD 266, 297-98 (1989).

³¹ General Winfield Scott, General Orders (G.O.) No. 20 in Orders and Special Orders, Headquarters of the Army, War with Mexico 1847-48, Vol. 41 ½ at 140, Records Group 94, National Archives, Washington D.C.

practice from the orders convening them through actual trial procedure and post-trial review.³² The Civil War saw even greater military commission use with the trials of almost 6,000 persons during the war and Reconstruction period.³³ Their practice continued to mirror that of courts-martial.³⁴ General Henry W. Halleck directed that commissions “should be ordered by the same authority, be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise.”³⁵ Commissions continued to receive the same post-trial review as courts-martial with many trials overturned on legal “technicalities.”³⁶

Two Supreme Court cases considered commission use during the Civil War years. *Ex parte Vallandigham*³⁷ held that the Court could not exercise direct review since commissions were not Article III courts over which it had appellate jurisdiction.³⁸ It had previously reached the same result with respect to courts-martial in *Dynes v. Hoover*.³⁹ Habeas review was allowed for both tribunals, but limited to the single issue of jurisdiction. The verdict of a military court having proper jurisdiction, the Court held, “is altogether beyond the jurisdiction or inquiry of any civil tribunal whatever.”⁴⁰

The Court’s 1866 *Ex parte Milligan* decision is better known.⁴¹ In response to a petition for collateral review, the Court unanimously overturned military commission jurisdiction over an anti-war Indiana politician. Because the trial violated an 1863 law authorizing the suspension of habeas corpus, four concurring justices wanted the decision based on statutory grounds.⁴² The five justice majority went further, however, holding that the Constitution barred a military tribunal applying the law of war from being “applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.”⁴³

One of the most controversial military commissions of the era, the trial of eight accused Lincoln assassination conspirators, was conducted

³² See David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2029–31 (2003).

³³ MARK E. NEELY, JR. THE FATE OF LIBERTY 168–73, 176–77 (1991).

³⁴ See Glazier, *supra* note 27, at 40–43.

³⁵ Jno. C. Kelton, Assistant Adjutant-Gen., General Orders No. 1 (Jan. 1, 1862) reprinted in 1 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (Ser. II), at 247–49 (1894).

³⁶ NEELY, *supra* note 33, at 162.

³⁷ 68 U.S. (1 Wall.) 243 (1864).

³⁸ *Id.* at 251–54.

³⁹ 61 U.S. (20 How.) 65 (1858).

⁴⁰ *Id.* at 81.

⁴¹ 71 U.S. (4 Wall.) 2 (1866).

⁴² *Id.* at 133–36 (Chase, C.J., concurring).

⁴³ *Id.* at 121 (opinion for the Court).

in the interim between Milligan's initial trial and the Supreme Court review. Courts were open in the District of Columbia but the Attorney General justified a military trial on the grounds that the conspiracy was a belligerent act on behalf of the Confederacy.⁴⁴ The trial should provide a cautionary note about military commission employment today when other options exist. It was, and remains, highly controversial, being described by one author as "judicial murder"⁴⁵ and it was still being litigated in federal courts as recently as 2002.⁴⁶

Typically omitted from lists of America's wars⁴⁷ even though U.S. deaths exceeded those of the War of 1812 or the Mexican War,⁴⁸ the 1899–1902 Philippine Insurrection is particularly important to military commission history. The conflict is reminiscent in many respects of current events in Iraq. Some insurgents participated in a formal military structure but many simply hid among the civilian population, conducting opportunistic attacks on U.S. forces and brutally intimidating locals suspected of cooperating with the Americans. U.S. military commissions tried 769 Filipinos in 1900–1901.⁴⁹ Typical offenses tried with American victims included murders by insurgents passing as loyal civilians,⁵⁰ killings of U.S. prisoners,⁵¹ and burying a wounded sailor alive.⁵² Although these acts took place during a vicious conflict in an undeveloped country, the commissions faithfully applied court-martial standards, including application of the same common law rules of evidence employed in U.S. federal courts.⁵³ This rigorous commitment to justice was summed up in these reviewing authority comments, overturning a murder conviction:

That it is better that many guilty men should escape punishment than an innocent one suffer is too well grounded in the

⁴⁴ 11 Op. Att'y. Gen 297 (1865).

⁴⁵ See DAVID MILLER DEWITT, *THE JUDICIAL MURDER OF MARY E. SURRETT* (John Murphy & Co. 1895).

⁴⁶ Glazier, *supra* note 32, at 2041 n.151.

⁴⁷ See, e.g., U.S. Dep't of Veterans Affairs, Fact Sheet: America's Wars, November 2007, <http://www1.va.gov/opa/fact/amwars.asp>.

⁴⁸ *Id.*; Trevor K. Plante, *Researching Service in the U.S. Army During the Philippine Insurrection*, PROLOGUE, Summer 2000, available at <http://www.archives.gov/publications/prologue/2000/summer/philippine-insurrection.html>.

⁴⁹ See Letter from W.P. Hall, Assistant Adjutant-Gen., reprinted in CHARGES OF CRUELTY, ETC. TO THE NATIVES OF THE PHILIPPINES, S. DOC. NO. 57-205, pt. 1 (1st Sess. 1902). A spreadsheet documenting these totals is on file with the author.

⁵⁰ W.P. Hall, Assistant Adjutant-Gen., General Orders, No. 187 (July 22, 1901), reprinted in CHARGES OF CRUELTY, ETC. TO THE NATIVES OF THE PHILIPPINES, S. DOC. NO. 57-205, pt. 2, at 358 (1st Sess. 1902).

⁵¹ W.P. Hall, Assistant Adjutant-Gen., General Orders, No. 242 (Aug. 30, 1901), reprinted in CHARGES OF CRUELTY, ETC. TO THE NATIVES OF THE PHILIPPINES, S. DOC. NO. 57-205, pt. 2, at 363 (1st Sess. 1902).

⁵² Thomas H. Barry, Brigadier Gen., General Orders, No. 150 (Dec. 26, 1900), reprinted in CHARGES OF CRUELTY, ETC. TO THE NATIVES OF THE PHILIPPINES, S. DOC. NO. 57-205, pt. 2, at 345 (1st Sess. 1902).

⁵³ Glazier, *supra* note 27, at 53–55.

administration of justice to pass unheeded by military commissions. So, too, it is better that no person, innocent or guilty, should be convicted unfairly, in violation of his legal rights and privileges, or in defiance of the well-established and equitable laws of evidence without which the evolution of [our] system of law and justice would be impossible.⁵⁴

The Philippine history is also important because it was the most recent experience at the time Congress enacted statutory language (articles 15 and 21 of the 1916 Articles of War) which the Supreme Court subsequently interpreted to constitute congressional authorization for commission employment.⁵⁵ The language's author, Army Judge Advocate General Enoch Crowder, testified before a Senate committee:

A military commission is our common-law war court. . . . [Art. 15] just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. Both classes of courts have the same procedure.⁵⁶

B. World War II Precedent for the Bush Commission Order

Only in the 1940s did military commissions entertain substantial departure from court-martial procedure, although this approach now seems a questionable precedent. After two German U-boats landed would-be saboteurs on the East Coast in June 1942, the Roosevelt Administration faced a quandary. The public believed that the FBI had done a brilliant job cracking the case and defending the country, but the reality was quite different. An unarmed Coast Guard patrolman encountered the first group on a Long Island beach and the FBI was alerted,⁵⁷ but all eight avoided further detection until one turned himself in and facilitated the arrests of the others.⁵⁸ At a time when U-boats were wreaking havoc off the U.S. coast⁵⁹ and only twenty-five percent of Americans believed the Allies were winning the war,⁶⁰ questioning of the

⁵⁴ S. DOC. NO. 57-205, at 305.

⁵⁵ See Glazier, *supra* note 27, at 57–60 (discussing the purpose and scope of these provisions). They were relied upon by the Supreme Court in *Ex parte Quirin*, 317 U.S. 1, 25–28 (1942), and *In re Yamashita*, 327 U.S. 1, 1 (1946).

⁵⁶ S. REP. NO. 64-130, at 40–41 (1916) (testimony of General Crowder).

⁵⁷ MICHAEL DOBBS, *SABOTEURS: THE NAZI RAID ON AMERICA* 91–94, 109–10 (2004).

⁵⁸ PIERCE O'DONNELL, *IN TIME OF WAR: HITLER'S TERRORIST ATTACK ON AMERICA* 72–104 (2005).

⁵⁹ See, e.g., CLAY BLAIR, *HITLER'S U-BOAT WAR: THE HUNTERS 1939–1942*, at 694 (2000).

⁶⁰ See HADLEY CANTRIL, *THE HUMAN DIMENSION* 48 (1967) (displaying graph of U.S. public opinion during World War II). The twenty-five percent figure is from late July 1942, at which point the trial was well in progress.

saboteurs revealed that the Germans planned to send follow-on groups in the near future.⁶¹ FBI agents recognized that:

in order to deter future sabotage operations, it was necessary to convince Nazi leaders that the American coastline was impenetrable, even though this was obviously not the case. Hitler should be led to suspect that [the saboteurs] had been betrayed from within his own intelligence service, thereby creating distrust at the highest levels of the German government. Much of the propaganda and deterrence value of rounding up eight Nazi saboteurs would be lost if the real reason for their capture became known.⁶²

When J. Edgar Hoover publicly announced the arrests, there was an immediate clamor for the saboteurs' execution.⁶³ Aside from this popular sentiment, the plans for follow-on missions suggested both the need for severe punishment as a deterrent as well as covering up U.S. vulnerabilities. While some scholars now suggest that secrecy was pursued to protect personal and institutional reputations,⁶⁴ it was truly a legitimate national security concern at the time.

Beyond any potential secrecy concerns with federal trials, a larger problem was the absence of a serious offense under the criminal law of the day of which the saboteurs could credibly be convicted. Two, who had some claim to U.S. citizenship, might have been prosecuted for treason *if* constitutional requirements for a confession in court or two witnesses could have been met,⁶⁵ but for the remainder,

the most heinous statutory federal crime for which the saboteurs could be prosecuted in the federal courts was probably conspiracy to commit a federal crime . . . which at that time carried only a 2-year sentence. Indeed, some corridor wits sardonically speculated that a prosecution in the regular federal courts might have to charge the saboteurs with such ludicrous offenses as entering the United States without valid passports or visas, importing explosives in violation of customs regulations, and failing to register for the draft⁶⁶

A military trial offering possible death sentences for operating behind enemy lines in civilian disguise was consistent with historic

⁶¹ Nazi Saboteur Commission, Transcript of Proceedings before the Military Commission to Try Persons Charged with Offenses Against the Law of War and Articles of War at 1382 (July 17, 1942), *available at* http://www.soc.umn.edu/~samaha/nazi_saboteurs/nazi09.htm (statement of George Dasch).

⁶² DOBBS, *supra* note 57, at 190 (paraphrasing Agent Duane Traynor).

⁶³ O'DONNELL, *supra* note 58, at 104–05.

⁶⁴ See, e.g., Michal Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 477–79 (2001).

⁶⁵ O'DONNELL, *supra* note 58, at 125.

⁶⁶ Boris I. Bittker, *The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction*, 14 CONST. COMMENT. 431, 434 (1997) (citation omitted).

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commission use as a jurisdictional gap-filler. Because a 1913 amendment to the Articles of War gave general courts-martial jurisdiction over law of war violations⁶⁷ while the 1916 Articles “saved” traditional military commission jurisdiction,⁶⁸ FDR could have elected either tribunal. Roosevelt actually sent Attorney General Francis Biddle a note calling for the Germans’ court-martial.⁶⁹ Although Biddle is generally considered a civil libertarian⁷⁰ he advocated trial by military commission, proposing shortcuts from court-martial procedure.⁷¹ This marks the first instance I have found of a military commission purposely advocated to provide lesser due process. Biddle included with his memo a draft proclamation making persons entering the United States to commit sabotage or espionage subject to tribunals as well as an order convening the commission.⁷² Roosevelt promptly signed both.⁷³

The military order let the commission make its own rules of procedure “as it shall deem necessary for a full and fair trial.”⁷⁴ Ignoring the rules of evidence set out in the Manual for Courts-Martial,⁷⁵ the tribunal was authorized simply to admit “[s]uch evidence . . . as would, in the opinion of the President of the Commission, have probative value to a reasonable man.”⁷⁶ Bypassing the review process established in the Articles of War that traditionally applied equally to courts-martial and military commissions, the order directed that the record of trial should be sent directly to the President.⁷⁷ Finally, the accompanying proclamation specified that the defendants would not have access to the courts unless the Attorney General and Secretary of War jointly agreed.⁷⁸

Despite this directive, lead defense counsel Kenneth Royall decided that his obligations to his clients required him to seek judicial review.⁷⁹ Royall persuaded the Supreme Court to assemble for a special July term to hear this one case *before* he even filed a habeas petition in district

⁶⁷ See Act of Mar. 2, 1913, Pub. L. No. 62-401, 37 Stat. 704, 721–722 (1913) (including an amendment to art. 12 of the Army Articles of War giving general courts-martial jurisdiction over law of war violations).

⁶⁸ See Glazier, *supra* note 27, at 57–59.

⁶⁹ Memorandum from Franklin D. Roosevelt, President, to Francis Biddle, Attorney Gen., United States of America (June 30, 1942).

⁷⁰ See, e.g., JACK GOLDSMITH, THE TERROR PRESIDENCY 43–45 (2007).

⁷¹ Memorandum from Francis Biddle, Attorney Gen., to Franklin D. Roosevelt, President (June 30, 1942) (on file with the author).

⁷² *Id.*

⁷³ See Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942); Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 7, 1942).

⁷⁴ Exec. Order No. 9185, 7 Fed. Reg. 5103.

⁷⁵ U.S. ARMY, A MANUAL FOR COURTS-MARTIAL 107–37 (1927) (hereinafter MCM 1927).

⁷⁶ Exec. Order No. 9185, 7 Fed. Reg. 5103.

⁷⁷ Glazier, *supra* note 32, at 2057.

⁷⁸ Proclamation No. 2561, 7 Fed. Reg. 5101.

⁷⁹ O’DONNELL, *supra* note 58, at 178–80.

court.⁸⁰ All concerned perceived that the Court had a very limited window to exercise review before the commission issued its verdict and any condemned defendants were executed (and that FDR might execute them regardless of what the court decided).⁸¹ After two days of oral arguments, the Court issued a brief *per curiam* opinion upholding the tribunal and promising a subsequent written opinion.⁸² It is now well documented that the Court found it difficult to craft its full opinion, but since six saboteurs had already been electrocuted, there was no turning back.⁸³ The full decision has been widely criticized. Justice Douglas later said that *Quirin* proved it was “extremely undesirable . . . to announce a decision without an opinion to back it up”⁸⁴ while even Justice Scalia has opined that “[*Quirin*] was not this Court’s finest hour.”⁸⁵

Despite the criticism, *Quirin* has significant ramifications for the Bush commissions. Simply by hearing the case, the Court repudiated Roosevelt’s claim to deny judicial review. And in basing the constitutionality of the commission proceedings on delegated congressional, not inherent executive authority, the Court thus laid groundwork for repudiating future claims of broad executive power.⁸⁶

An irony of the 1942 commission process is that the judicial shortcuts were really unnecessary. The FBI assumed that the saboteurs would be tried in a federal court and followed standard bureau procedures for collecting evidence and questioning the prisoners. Physical evidence presented to the commission included: uniform items the Germans wore ashore, sabotage equipment they had buried on the beaches, and signed confessions from all eight.⁸⁷ Each independently admitted receiving sabotage training and surreptitiously entering the United States, which was sufficient for conviction. One alleged some coercion (which the government denied), but since the FBI agents involved appeared as witnesses, any court could have assessed the credibility of the admission for itself. All the confessions included a statement of voluntariness, and several included specific acknowledgements by the defendants that they could be used in court—the confessions being given, moreover, two decades before *Miranda v. Arizona*.⁸⁸ While the commission sessions were closed to outsiders, the accused were present throughout and allowed to hear *all* the evidence against them.

⁸⁰ Bittker, *supra* note 66, at 440–41.

⁸¹ O’DONNELL, *supra* note 58, at 213.

⁸² *Ex parte Quirin*, 317 U.S. 1 (1942) (per curiam).

⁸³ See, e.g., George Lardner Jr., *Nazi Saboteurs Captured!*, WASH. POST, Jan. 13, 2002, (Magazine), at W12.

⁸⁴ *Id.* (quoting Justice William Douglas).

⁸⁵ *Hamdi v. Rumsfeld*, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

⁸⁶ *Ex parte Quirin*, 317 U.S. at 10–12.

⁸⁷ See *Nazi Saboteur Commission*, *supra* note 61.

⁸⁸ *Miranda v. Arizona*, 384 U.S. 436 (1966).

Despite legitimate concerns about the authorized departure from court-martial standards, the convictions seemed essentially fair. Nevertheless, even FDR apparently recognized that his 1942 order went too far. When another U-boat landed two spies in late 1944, he issued a new order reversing several of the departures he had originally approved, including restoring the regular court-martial post-conviction review process.⁸⁹

More than 3,000 Axis individuals were tried for war crimes by U.S. military tribunals in the aftermath of World War II.⁹⁰ Most were not contentious, but several trials should sound a further cautionary note for the present day military commissions.

General Douglas MacArthur provided guidance for Pacific theater military commissions in his role as the Supreme Commander for the Allied Powers (SCAP). A September 1945 directive provided the basis for several early trials, including that of General Tomoyuki Yamashita.⁹¹ A superseding December 1945 regulation⁹² was based on Roosevelt's 1942 directives⁹³ but went even further. It authorized trial by panels consisting of as few as three members whereas five was the minimum for a general court-martial,⁹⁴ and Roosevelt's 1942 panel had seven.⁹⁵ While adopting FDR's "probative to a reasonable man" evidentiary standard, MacArthur gave unprecedented direction that "[a]ll purported confessions or statements of the accused shall be admissible without prior proof that they were voluntarily given, it being for the commission to determine only the truth or falsity of such confessions or statements."⁹⁶ There was a threshold, however, not even MacArthur would go beyond. In 1949, SCAP ordered a retrial for a condemned Japanese officer because the

⁸⁹ Glazier, *supra* note 32, at 2059–61; Military Order, 10 Fed. Reg. 549 (Jan. 16, 1945).

⁹⁰ The Army tried 1,672 defendants in Germany. FRANK M. BUSCHER, *THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY, 1946–1955*, at 51 (1989). The Army and Navy between them tried 1,409 Japanese defendants around the Pacific. PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL: ALLIED WAR CRIMES OPERATIONS IN THE EAST, 1945–1951*, at 48 (1979).

⁹¹ 1 U.N. WAR CRIMES COMM'N, *LAW REPORTS OF TRIALS OF WAR CRIMINALS* 113 (1947) [hereinafter UNWCC].

⁹² General Headquarters, Supreme Commander for the Allied Powers, *Regulations Governing the Trials of Accused War Criminals*, Dec. 5, 1945 (on file with the author) [hereinafter SCAP Regulations].

⁹³ Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide An Outline for International Legal Procedure?*, 37 *COLUM. J. TRANSNAT'L L.* 851, 867 (1999).

⁹⁴ *Compare id.* at 862 with MCM 1927, *supra* note 75, at 2.

⁹⁵ Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942); Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 7, 1942).

⁹⁶ SCAP Regulations, *supra* note 92, ¶ 5.d.

trial panel considered a single classified document which the defendant had not been allowed to see.⁹⁷

The Supreme Court heard requests for habeas relief stemming from two trials in the Philippines, those of Generals Yamashita conducted under the original rules⁹⁸ and Masaharu Homma, conducted under the more egregious December 1945 regulations.⁹⁹ The Court upheld both, confirming (as in *Quirin*) that they were valid exercises of congressional authority and finding valid jurisdiction under the limited scope of habeas review of that era.¹⁰⁰ As Chief Justice Stone put it, “We consider here only the lawful power of the commission to try the petitioner for the offense charged.”¹⁰¹ But unlike the unanimous *Quirin* decision, these cases produced scathing dissents from Justices Murphy and Rutledge that contributed to lasting controversy about the justice of these trials.

Murphy argued in *Yamashita* for minimum constitutional standard of fairness:

The Fifth Amendment guarantee of due process of law applies to “any person” who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual . . . belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs.¹⁰²

In words that could be equally applicable to the “war on terror,” Justice Rutledge added:

More is at stake than General Yamashita’s fate. There could be no possible sympathy for him if he is guilty of the atrocities for which his death is sought. But there can be and should be justice administered according to law. . . . It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and

⁹⁷ United States v. Kato (Aug. 2, 1949), in *Reviews of Yokohama Class B and Class C War Crimes Trials by the U.S. Eighth Army Judge Advocate 1946–1949, microformed on Nat’l Archives Microform Publication M1112, Roll 5 (1980)* [hereinafter *Yokohama Reviews*].

⁹⁸ *In re Yamashita*, 327 U.S. 1 (1946).

⁹⁹ *Homma v. Patterson*, 327 U.S. 759 (1946).

¹⁰⁰ 327 U.S. at 1–26. *See also* UNWCC, *supra* note 91, at 121 (discussing scope of U.S. habeas review). The scope of issues considered by Article III courts hearing habeas challenges to military convictions was widened slightly only in the wake of *Burns v. Wilson*, 346 U.S. 137 (1953) (calling for courts to determine if the military court had “dealt fully and fairly” with the defendant’s claim).

¹⁰¹ 327 U.S. at 8.

¹⁰² 327 U.S. at 26 (Murphy, J., dissenting).

punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. . . . This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law. . . . Every departure weakens the tradition, whether it touches the high or the low, the powerful or the weak, the triumphant or the conquered.¹⁰³

Both justices expressed similar views, albeit more concisely, in dissenting from the Court's terse denial of Homma's petition a week later, highlighting MacArthur's unprecedented sanctioning of coerced confessions.¹⁰⁴ This objection was one of principle—there were no specific allegations of mistreatment by either general.

These dissents had no real ramifications; both generals were promptly executed so there was no opportunity for these concerns to morph into pressure to alter the outcomes. This was not true in the German Malmédy case, however, which generated much more controversy and resulted in the ultimate release of every condemned defendant. That case arose during the Battle of the Bulge in the winter of 1944–45 when a German SS armored unit collected over a hundred American prisoners who were subsequently shot en masse under disputed circumstances.¹⁰⁵ A few survived to make their way back to U.S. lines and the incident resulted in profound American outrage. A New York Times editorial, headlined "Murder Beyond Denial," proclaimed:

What happened near Malmédy, and probably elsewhere, was an outburst of savagery on the part of particular Nazi officers and their units. How many Nazi units of this sort there are no one knows. In so far as the guilty ones can be identified their punishment will be certain.

The Nazi party leaders and countless thousands of their sub-leaders can have no hope of survival after an Allied victory.¹⁰⁶

Despite demands for prompt justice, it was difficult to identify the perpetrators and the trial did not begin until May 16, 1946. Seventy-three Germans ranging from generals to young enlisted soldiers were tried at Dachau.¹⁰⁷ In a sweeping success for the prosecution, all seventy-three

¹⁰³ 327 U.S. at 41–42 (Rutledge, J., dissenting).

¹⁰⁴ 327 U.S. at 759–61 (Murphy, J., dissenting); *id.* at 761–62 (Rutledge, J., dissenting).

¹⁰⁵ *See, e.g.*, JAMES J. WEINGARTNER, *CROSSROADS OF DEATH* 210 (1979) (describing witness testimony that the shootings were precipitated by an American escape attempt).

¹⁰⁶ Editorial, *Murder Beyond Denial*, N.Y. TIMES, Jan. 17, 1945, at 20.

¹⁰⁷ *See 'Bulge' Killers Seek Severance*, N.Y. TIMES, May 17, 1946, at 8. A seventy-fourth accused proved to be an Alsatian rather than a German and was discharged as a defendant prior to the verdict at France's request. *See* WEINGARTNER, *supra* note 105, at 160.

were convicted with forty-three sentenced to death, twenty-two to life, and the rest to terms between ten and twenty years.¹⁰⁸

After the trial, reports began emerging that the convictions had been based largely on evidence obtained through coercive practices. Many defendants, and some supporting witnesses, claimed physical abuse was employed to extract admissions. By mid-1948, public opinion had shifted so significantly that the Chicago Tribune was calling for the court-martial of the Army investigators and prosecutors.¹⁰⁹ Secretary of the Army Kenneth Royall—the defender of the Nazi saboteurs—now had the unenviable task of representing the government. Royall asked two civilian jurists to investigate; they found that the convictions were based largely on “extra-judicial statements of the accused,” at least some of which had been obtained via such means as mock-trials that included American officers falsely posing as defense attorneys.¹¹⁰ The jurists believed the Germans were likely guilty, but recommended in fairness that all remaining death sentences (some had already been reduced during initial post-trial review) be commuted.¹¹¹ A separate review panel also found that defendants were hooded, some threatened with loss of their family’s rations, and that “in the heat of the moment on occasions the interrogators did use some physical force on a recalcitrant suspect.”¹¹²

The Senate investigated as well, largely at the instigation of Senator Joseph McCarthy, who castigated the Army in a preview of tactics he would employ during his subsequent anti-Communist crusade.¹¹³ The Senate investigation has been criticized as a whitewash, probably not unfairly given that two of three participating Senators had close personal ties to Malmédy prosecutors. Even these lawmakers ultimately acknowledged improprieties.¹¹⁴ But they sought to excuse them based on a shortage of trained interrogators and the fact that the accused were “hardened, experienced members of the SS who had been through many campaigns and were used to worse procedure.”¹¹⁵

Despite the egregious nature of the German conduct, perceived unfairness in the American investigation and trial ultimately became the larger issue. All death sentences were eventually commuted and the last defendant was released just a decade after the trial.¹¹⁶ Some of this pressure came from overseas and there were unique historic factors

¹⁰⁸ *43 Germans Doomed, 22 Get Life for ‘Bulge’ Killing of Americans*, N.Y. TIMES, July 17, 1946, at 1.

¹⁰⁹ WEINGARTNER, *supra* note 105, at 196.

¹¹⁰ Walter H. Waggoner, *Army Board Urges Commutation for 12 in the Malmédy Massacre*, N.Y. TIMES, Jan. 7, 1949, at 1.

¹¹¹ *Id.*

¹¹² *U.S. Board Critical of Malmédy Case*, N.Y. TIMES, Mar. 5, 1949, at 1.

¹¹³ See, e.g., *Malmédy Inquiry Held ‘Whitewash,’* N.Y. TIMES, July 27, 1949, at 10.

¹¹⁴ WEINGARTNER, *supra* note 105, at 199–201, 229–31.

¹¹⁵ *Id.* at 230 (quoting Senate Subcommittee on Armed Services, Malmédy Massacre Investigation at 19 (1949)).

¹¹⁶ WEINGARTNER, *supra* note 105, at 238.

involved, such as the desire to bolster West Germany as a Cold War ally. But any of the Guantánamo defendants' countries may also elect to bring diplomatic pressure on their behalf at any time, particularly should America seek their further cooperation in combating terrorism. The Yamashita, Homma, and Malmédy trials should thus serve notice that perceived injustices in the treatment, interrogation, or trial even of egregious wrongdoers can have adverse consequences, potentially undermining both the credibility of any verdicts, as well as international co-operation in the fight against terrorism.

III. POST-9/11 MILITARY COMMISSION IMPLEMENTATION

While several World War II-era trials became controversial *after* the fact, President Bush's post 9/11 decision to employ military commissions generated immediate controversy, fueling more than two and half years of dispute *before* the first defendant appeared in a courtroom.¹¹⁷ Subsequent issues with the conduct of the initial commission sessions, judicial intervention, and congressional involvement have all added to the controversy, which continues largely unabated to this day.

A. *Initial Development of the Commission Process*

The AUMF created the domestic legal foundation for employing elements of the law of war in the conflict against al-Qaeda, including preventative detention of enemy fighters and their trial for law of war violations.¹¹⁸ While an interagency working group was exploring legal options in the fall of 2001, Vice President Cheney circumvented normal governmental processes by having his counsel draw up a military order that he then persuaded the President to sign.¹¹⁹ Media accounts report that even the Attorney General was denied the opportunity to voice his concerns to the President.¹²⁰ Much of the legal foundation apparently came from a still confidential memorandum from Patrick Philbin in the Department of Justice's Office of Legal Counsel to White House Counsel Alberto Gonzales, which reportedly claimed inherent presidential authority to convene military tribunals.¹²¹ David Addington was selected

¹¹⁷ See Goldsmith & Sunstein, *supra* note 21.

¹¹⁸ Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2066–72 (2005).

¹¹⁹ Barton Gellman & Jo Becker, *Cheney's Power Illustrated in Military Commissions Decision*, WASH. POST, June 23, 2007, 2007 WLNR 11871305.

¹²⁰ *Id.*

¹²¹ Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1.

to author the order because he “was the ‘best scholar of the FDR-era order’” in Cheney’s inner circle and could write quickly.¹²²

The order began by citing constitutional and statutory authority, including the AUMF and the UCMJ, and then provided findings about continuing threats, but gave no specific reason why commissions were required beyond stating that it was so.¹²³ Following sections limited the order’s application to non-citizen members of al-Qaeda or others involved with, or supporting, terrorism against the United States¹²⁴ and authorized their military detention.¹²⁵ The order provided specific trial guidelines borrowed from Roosevelt’s 1942 precedent, calling for:

- (1) “a full and fair trial” with the commission as trier of law and fact;
- (2) admission of any evidence of “probative value to a reasonable person”;
- (3) conviction and sentencing by two-thirds vote;
- (4) post-trial review limited to the President or the Secretary of Defense;¹²⁶ and,
- (5) no review by any U.S., foreign, or international courts.¹²⁷

It is odd that a “scholar” of the FDR order would copy its denial of access to judicial review when the Supreme Court rejected that provision by hearing *Quirin*, or would base a modern directive on a 1942 order that Roosevelt himself had partially repudiated two years later. And given the major advances in U.S. military and civilian criminal justice in the last half-century as well as the substantial protections subsequently codified in both the law of war and International Human Rights Law, it was irrational for any lawyer to conclude that 1940s trial standards would be acceptable today even *if* they were proper at the time.¹²⁸

It thus should not have surprised anyone that the military commission order generated immediate criticism on a number of fronts,

¹²² Barton Gellman & Jo Becker, ‘A Different Understanding With the President’, WASH. POST, June 24, 2007, at A1. (quoting Deputy White House Counsel Timothy E. Flanigan).

¹²³ Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001).

¹²⁴ *Id.* at 57834.

¹²⁵ *Id.*

¹²⁶ *Id.* at 57835.

¹²⁷ *Id.* at 57835–36.

¹²⁸ See Glazier, *supra* note 32, at 2015–17 (comparing the military commission procedures detailed in the President’s military order with current court-martial procedures); *id.* at 2073–84 (discussing the evolution of military, civilian, and international law in the interval between the World War II-era and 2001.).

ranging from the procedural shortcuts to its overall constitutionality.¹²⁹ A number of foreign governments faxed their concerns to the State Department and even America's closest ally, the United Kingdom, warned "that they could not hand over suspects if the U.S. government withdrew from accepted legal norms."¹³⁰ Spain likewise declared it would not extradite suspects to the United States if they could face a military commission.¹³¹

The President's military order provided only the most basic details about commission procedure, tasking the Secretary of Defense to "issue such orders and regulations . . . as may be necessary" to carry out the trials.¹³² The first step in this process was the issuance of the original Military Commission Order No. 1 (MCO No. 1) in March 2001.¹³³ This order created the position of "Appointing Authority," who like the convening authority specified for courts-martial by the UCMJ,¹³⁴ would appoint the members of the trial panel, approve plea agreements, and conduct an initial post-trial review.¹³⁵ The Appointing Authority would also appoint the presiding officer and decide important interlocutory questions including challenges for cause, whereas military judges have made such decisions at courts-martial since 1968.¹³⁶

MCO No. 1 did address several serious criticisms of the President's order, updating the simple two-thirds vote requirement of the latter to require a unanimous decision by a seven-member commission to sentence an accused to death¹³⁷ and establishing a three-officer intermediate review panel.¹³⁸ By comparison, the UCMJ now requires a unanimous vote by a twelve-member panel for a death sentence¹³⁹ and

¹²⁹ See, e.g., Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2001) (arguing the Bush military commissions are unconstitutional).

¹³⁰ Gellman & Becker, *supra* note 119.

¹³¹ Gerard P. Fogarty, *Is Guantanamo Bay Undermining the Global War on Terror?*, 35 PARAMETERS 54, 62 (2005), available at <http://www.carlisle.army.mil/usawc/Parameters/05autumn/fogarty.pdf>.

¹³² Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57834 (Nov. 16, 2001).

¹³³ Dep't of Def., Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> [hereinafter MCO No. 1].

¹³⁴ See 10 U.S.C. §§ 822, 825, 828–829, 834, 860 (2000) (specifying authority and responsibility of general court-martial convening authorities).

¹³⁵ See MCO No. 1, *supra* note 133, ¶¶ 4.A.(1)–(4), 6.A.(1)–(4), 6.H.(1), (3) (identifying Appointing Authority roles).

¹³⁶ Compare *id.* ¶¶ 4.A.(3)–(5) (specifying roles of Appointing Authority in appointing presiding officer and reviewing interlocutory matters) with 10 U.S.C. §§ 826, 851(b) (2000) (specifying roles and appointment process for military judges).

¹³⁷ See MCO No. 1, *supra* note 133, ¶¶ 6.F–G.

¹³⁸ *Id.* ¶ 6.H.(4).

¹³⁹ 10 U.S.C. §§ 825a, 852 (2000).

provides a formal appellate system including a court of review (comprised of three military judges), the Court of Appeals for the Armed Forces (composed of five civilian judges), and the possibility of U.S. Supreme Court review.¹⁴⁰

Although Deputy Secretary of Defense Paul Wolfowitz declared that the rules “meet[] the standard of fairness that is proper for the United States,”¹⁴¹ the improvements were more than offset by several new provisions substantially disadvantaging defendants even beyond the practices of WWII-era trials. The most objectionable new rules were regulations for the protection of classified information that allowed proceedings to be closed and the accused to be excluded from his own trial while classified evidence was discussed, which his counsel would then be barred from discussing with him.¹⁴² The prosecution was even given authority to seek the presiding officer’s ex parte approval to keep the full text of classified evidence from properly cleared defense counsel.¹⁴³ The possibility that an accused might be denied access to exculpatory information, convicted based on evidence they could never know of, and deprived of the opportunity to aid their attorney in contesting questionable facts, was unprecedented in past commission practice and quickly became a lightning rod for criticism.¹⁴⁴ MCO No. 1 also imposed stringent restrictions on representation by civilian counsel, restricting them to U.S. citizens eligible for a security clearance at a minimum level of secrecy and requiring that they sign a formal agreement to comply with all commission rules.¹⁴⁵

Despite these evident flaws, a significant dichotomy of opinion began to emerge. With a growing number of detainees now being held under harsh conditions at Guantánamo Bay, Cuba, many observers seemed to feel that indefinite detention was the greater evil and began to press for rapid trials, presumably under the expectation that those either acquitted or completing their sentences would be promptly released. Department of Defense (DOD) leadership, on the other hand, was apparently comfortable that “enemy combatants” (its term of choice from March 2002 on)¹⁴⁶ could be held for the duration of the “war” and was more concerned with extracting intelligence and planning for war in Iraq than moving trials forward.¹⁴⁷ While an initial prosecution team began to assemble evidence and consider possible charges,¹⁴⁸ it would be over a

¹⁴⁰ *Id.* §§ 866–867a (2000).

¹⁴¹ Interview by Jim Lehrer with Paul Wolfowitz, PBS NEWSHOUR, Mar. 21, 2002, http://www.pbs.org/newshour/bb/military/jan-june02/wolfowitz_3-21.html.

¹⁴² See MCO No. 1, *supra* note 133, ¶¶ 6.D.(5), 9.

¹⁴³ *Id.* ¶ 6.D.(5)(b).

¹⁴⁴ Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962, 1972–81 (2005).

¹⁴⁵ See MCO No. 1, *supra* note 133, ¶ 4.C.(3)(b).

¹⁴⁶ SALES, *supra* note 6, at 82.

¹⁴⁷ *Id.* at 79–81.

¹⁴⁸ *Id.* at 77–79.

year from the issuance of MCO No. 1 until the next public steps in the commission process.

The set of directives governing the military commission process was expanded in April 2003 when DOD General Counsel William J. Haynes II issued the first four of an eventual nine Military Commission Instructions (MCI). Curiously, there was no effort to release the instructions in sequence. The first issuances were MCI No. 1, describing the authority underlying the MCI and their status within DOD,¹⁴⁹ MCI No. 2 defining the elements of crimes the commissions could try,¹⁵⁰ MCI No. 5 amplifying criteria for civilian defense counsel,¹⁵¹ and MCI No. 7 on sentencing.¹⁵²

The most important, and controversial, of these was clearly MCI No. 2, specifying crimes triable by the commissions. As the Supreme Court had noted in *Quirin*:

Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war . . . and which may constitutionally be included within that jurisdiction. Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.¹⁵³

The challenge posed by this reliance on the “common law” is identifying the offenses that may validly be prosecuted today. MCI No. 2 itself acknowledges that “[n]o offense is cognizable in a trial by military commission if that offense did not exist prior to the conduct in question.”¹⁵⁴ But identifying such offenses is easier said than done. Despite their long history, military commissions (like courts-martial) are ad hoc bodies, and there is no coherent system of reporting or digesting decisions as there generally is for civilian common law courts. The challenge is exacerbated by the fact that it is international, not U.S., law at issue, so American decisions alone are inadequate to identify the law. And given the substantial legal evolution over the last century, it is unreasonable to assume that an offense charged in the more distant past remains valid law today. Even in the early twentieth century, it was generally assumed that the legal response to law of war violations would take the form of compensation paid by nations, not individual criminal

¹⁴⁹ Dep’t of Def., Military Commission Instruction No. 1: Military Commission Instructions (Apr. 30, 2003).

¹⁵⁰ Dep’t of Def., Military Commission Instruction No. 2: Crimes and Elements for Trials by Military Commission (Apr. 30, 2003) [hereinafter MCI No. 2].

¹⁵¹ Dep’t of Def., Military Commission Instruction No. 5: Qualification of Civilian Defense Counsel (Apr. 30, 2003) [hereinafter MCI No. 5].

¹⁵² Dep’t of Def., Military Commission Instruction No. 7: Sentencing (Apr. 30, 2003) [hereinafter MCI No. 7].

¹⁵³ *Ex parte Quirin*, 317 U.S. 1, 30 (1942).

¹⁵⁴ MCI No. 2, *supra* note 150, ¶ 3.A.

liability.¹⁵⁵ The first systematic effort to hold individuals criminally responsible for law of war violations did not occur until after the Second World War. The best evidence of the current law are reports by the United Nations War Crimes Commission (UNWCC),¹⁵⁶ the Statutes and jurisprudence of the International Criminal Tribunals for the Former Yugoslavia (ICTY)¹⁵⁷ and Rwanda (ICTR),¹⁵⁸ the Rome Statute of the International Criminal Court (ICC),¹⁵⁹ and recent work by international criminal law scholars.¹⁶⁰

Unfortunately MCI No. 2 simply identified twenty-eight offenses purportedly triable by military commission without referencing any supporting legal foundation, leaving real questions about the validity of commission jurisdiction. First, section 6.A. defined eighteen substantive “war crimes.” Few scholars would contest that the acts detailed, offenses such as the “Willful Killing Of Protected Persons,”¹⁶¹ deliberately “Attacking Civilians [N]ot taking direct or active part in hostilities,”¹⁶² “Use of Treachery or Perfidy,”¹⁶³ etc., are war crimes when committed by legitimate combatants. But it is not clear that “illegal” combatants can be prosecuted for all these offenses under the law of war. The fundamental privilege enjoyed by lawful combatants is immunity from domestic law for acts they commit in the course of an armed conflict.¹⁶⁴ The basic criteria, now incorporated in Article 4 of the Third Geneva Convention of 1949 governing eligibility for Prisoner of War status,¹⁶⁵ first appeared in the Brussels Declaration of 1874 identifying

¹⁵⁵ See, e.g., Convention (IV) Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277, available at <http://www.icrc.org/ihl.nsf/FULL/195>.

¹⁵⁶ See, e.g., U.N. WAR CRIMES COMM’N, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 220–32 (1948); 15 U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 89–154 (1949).

¹⁵⁷ The Secretary General, *Report on aspects of establishing an International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law committed in the Territory of the Former Yugoslavia*, Art. 1, U.N. Doc. S/25704 (May 3, 1993) [hereinafter U.N. Yugoslavia Resolution], adopted by S.C. Res. 827, U.N. Doc. S/RES/827, 32 I.L.M. 1203 (May 25, 1993).

¹⁵⁸ S.C. Res. 955, U.N. Doc. S/RES/955 (Nov. 8, 1994), 33 I.L.M. 1598, 1600 (1994) [hereinafter ICTR Statute].

¹⁵⁹ Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, available at http://www.icc-cpi.int/library/about/officialjournal/Rome_Statute_English.pdf [hereinafter Rome Statute].

¹⁶⁰ See, e.g., KRIANGSAK KITTICHAISAREE, INTERNATIONAL CRIMINAL LAW (2001).

¹⁶¹ MCI No. 2, *supra* note 150, ¶ 6.A.(1).

¹⁶² *Id.* ¶ 6.A.(2).

¹⁶³ *Id.* ¶ 6.A.(14).

¹⁶⁴ For an extensive list of authorities concerning combat immunity, see, e.g., Jordan J. Paust, *Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure*, 23 MICH. J. INT’L L. 677, 683 n.35 (2002).

¹⁶⁵ Project of an International Declaration concerning the Laws and Customs of War (Aug. 27 1874), available at <http://www.icrc.org/ihl.nsf/FULL/135?OpenDocument>.

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those to whom the “laws, rights, and duties of war apply.”¹⁶⁶ Chief among these “rights” is immunity from ordinary criminal law for carrying out their responsibilities as warriors.¹⁶⁷ Given this immunity, it is inherently necessary for the law of war to criminalize any killing, wounding, or destruction of property that violates armed conflict norms when committed by formal belligerents *if* there is to be any foreign or international criminal accountability for them.¹⁶⁸ But this is not true for individuals denied entitlement to combatant immunity; they can always be tried under regular domestic criminal laws for traditional offenses of murder, assault, destruction of property, etc.¹⁶⁹ As a result, there is substantive disagreement among subject matter experts as to whether persons not accorded lawful status as combatants are generally liable to prosecution under the law of war.¹⁷⁰ This is a fundamental issue for the jurisdiction of the Guantánamo military commissions.

Even more substantial questions are raised by the next section of MCI No. 2, labeled “Other Offenses Triable by Military Commission.”¹⁷¹ “Hijacking” and “[t]errorism,” for example, are clearly longstanding crimes, addressed by both U.S. federal law¹⁷² and a series of international treaties.¹⁷³ There is no doubt that these crimes can be tried in regular U.S. criminal courts. But it is far from established that they are crimes under the law of war subject to military jurisdiction.¹⁷⁴ The same is true for the next offenses listed: “Murder” and “Destruction of Property by an

¹⁶⁶ *See id.*

¹⁶⁷ *See* sources cited in note 164 *supra*.

¹⁶⁸ Even if the law of war grants immunity from the domestic law of other nations, the offender’s own nation could still try them under their military law. Thus, the United States has prosecuted several soldiers and Marines for conduct in Iraq that is exempt from prosecution under local law.

¹⁶⁹ *See, e.g.,* YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 228, 234 (2004).

¹⁷⁰ *Compare id. with* Jordan J. Paust, Am. Soc’y for Int’l Law, *There is No Need to Revise the Laws of War in Light of September 11th* (2002), <http://www.asil.org/taskforce/paust.pdf>.

¹⁷¹ MCI No. 2, *supra* note 150, ¶ 6.B.

¹⁷² *See, e.g.,* 18 U.S.C. § 2331 (2000 & Supp. V 2007).

¹⁷³ U.S. Dep’t of State, International Conventions and Other Treaties Relating to Terrorism (Nov. 6, 2001), *available at* <http://www.state.gov/r/pa/ho/pubs/fs/6093.htm>.

¹⁷⁴ I previously argued that there was a basis for doing so, *see* Glazier, *supra* note 27, at 45. One of my Loyola students, Marcus Dong, subsequently located a commission transcript online which reveals the legal basis for the charges being that the accused were Confederate officers attempting acts of war behind the lines in civilian attire, not hijacking per se. *See* TRIAL OF JOHN Y. BEALL, AS A SPY AND A GUERRILLERO, BY MILITARY COMMISSION (D. Appleton & Co. 1865), *available at* <http://dlxs.library.cornell.edu/cgi/t/text/pageviewer-idx?c=mayantislavery;idno=38922103;view=image;seq=1>. The view that hijacking is problematic as a crime triable by military commission is shared by law of war expert Geoff Corn. *See* Geoffrey Corn, *Taking the Bitter with the Sweet: A Law of War Based Analysis of the Military Commission*, 35 STETSON L. REV. 811, 865 n.136 (2006).

Unprivileged Belligerent.”¹⁷⁵ As noted previously, an individual failing to qualify as a combatant under the law of war is not immunized from domestic law and thus subject to criminal prosecution for any acts of violence they commit. But that does not provide a credible basis for trial by military commissions applying the law of war. If military commissions have tried such offenses in the past, it was most likely via the application of “domestic law” in territory under martial or occupation law, not by law of war tribunals remote from the sites of the offense.

The next defined offense, “Aiding the Enemy,”¹⁷⁶ had its own issues. While this has been a statutory offense under U.S. military law since the Revolution, and the UCMJ states that it is triable by both courts-martial and military commissions,¹⁷⁷ commentators implicitly recognize that an individual must have a duty *not* to aid the enemy in order to be prosecuted, noting that this offense is closely related to treason.¹⁷⁸ To commit this crime, then, one must logically be a citizen or resident of the U.S., or a resident of territory occupied by U.S. military forces who owes a temporary duty of allegiance to the occupier in exchange for its protection.¹⁷⁹ If this were not the case, given the broad definition of aiding, then almost any citizen of an enemy nation could be considered a criminal should they fall into the adversary’s hands.

MCI No. 2’s most controversial aspect was the adoption of the Anglo-American conception of inchoate crimes, particularly conspiracy, as triable offenses.¹⁸⁰ It is widely accepted that individuals joining together for criminal purposes can be prosecuted for reasonably foreseeable substantive offenses committed by members of the group in which they may not have personally participated. This reflects a conspiracy theory of liability, often termed as participation in a “joint criminal enterprise” by international criminal tribunals.¹⁸¹ But the idea that individuals commit the substantive offense of conspiracy merely by agreeing to commit a crime is not widely recognized outside the English common law

¹⁷⁵ MCI No. 2, *supra* note 150, ¶¶ 6.B.(3), (4).

¹⁷⁶ *Id.* ¶ 6.B.(5).

¹⁷⁷ 10 U.S.C. § 904 (2000).

¹⁷⁸ *See, e.g.*, WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* *138–42, *973–74 (Igor I. Kavass & Adolf Sprudz eds., William S. Hein & Co., Inc. 1979) (1920).

¹⁷⁹ The obligations of persons in the last category was nicely articulated by Henry Halleck (later General in Chief of the Union Army) in his 1861 international law treatise where he noted that in occupied territory, “the duty of allegiance is reciprocal to the duty of protection.” For a more complete discussion of this point, see David Glazier, *Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 *RUTGERS L. REV.* 121, 151 (2005) (quoting HENRY HALLECK, *INTERNATIONAL LAW* 791 (1861)).

¹⁸⁰ MCI No. 2, *supra* note 150, ¶ 6.C. This issue was addressed by the Supreme Court plurality in *Hamdan v. Rumsfeld*, which opined that conspiracy was not a valid law of war offense. 126 S. Ct. 2749, 2785–86 (2006).

¹⁸¹ Allison Marston Danner & Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 *CAL. L. REV.* 75, 102–17 (2005).

tradition.¹⁸² It is thus illogical to hold that this crime would be part of the customary international law of war binding on all nations. Several war crimes tribunals were specifically called upon to consider this issue after WWII, and all agreed that there was no such international offense as conspiracy to commit a war crime. The only area that “conspiracy” was specifically recognized was in conjunction with crimes against peace, that is, the waging of offense war.¹⁸³ Senior German and Japanese government officials participating or advising in their nation’s conflict decision process were held to be liable for participation in a “conspiracy.”¹⁸⁴ But since the war was actually initiated, even this charge was really more a recognition of accomplice liability rather than conviction for an inchoate offense per se.

The other two Military Commission Instructions in the first batch were less significant, although the directive on civilian counsel included several provisions that served as practical deterrents against volunteering. Among these were requirements that prospective counsel must pay the government for costs associated with granting the required security clearance and details on the written agreement civilian attorneys had to sign.¹⁸⁵ This included a gag rule barring public discussion of their work and an agreement to remain at the trial site (predictably Guantánamo) during *all* periods the commission might be in session.¹⁸⁶ MCI No. 7, covering sentencing, explicitly provided that time spent detained as an “enemy combatant” would not count towards any sentence imposed by a commission.¹⁸⁷ Over the course of the next two years, five additional instructions would be issued covering such topics as the roles and structure of prosecution¹⁸⁸ and defense teams,¹⁸⁹ administrative procedures,¹⁹⁰ and the post-trial review process.¹⁹¹

¹⁸² *Id.* at 115–16 (discussing Soviet and French objections to the use/definition of conspiracy).

¹⁸³ 15 U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 90 (1949).

¹⁸⁴ *See, e.g., id.* at 138–50.

¹⁸⁵ *See* MCI No. 5, *supra* note 151, ¶ 3.A(2)(d)(ii); Annex B § II(E)(1).

¹⁸⁶ *See id.* Annex B § II(E)(2).

¹⁸⁷ MCI No. 7, *supra* note 152, ¶ 3.A.

¹⁸⁸ Dep’t of Def., Military Commission Instruction No. 3: Responsibilities of the Chief Prosecutor, Deputy Chief Prosecutor, Prosecutors, and Assistant Prosecutors (Apr. 30, 2003) [hereinafter MCI No. 3]. This instruction reissued with the same title on Apr. 15, 2004, and again on July 15, 2005.

¹⁸⁹ Dep’t of Def., Military Commission Instruction No. 4: Responsibilities of the Chief Defense Counsel, Deputy Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel (Apr. 30, 2003) [hereinafter MCI No. 4]. This instruction was reissued with the same title on Apr. 15, 2004, and on July 15, 2005, and once more on Sep. 16, 2005.

¹⁹⁰ Dep’t of Def., Military Commission Instruction No. 8: Administrative Procedures (Aug. 31, 2004) [hereinafter MCI No. 8].

B. Progress Towards the First Trials

Senior U.S. leadership frequently portrayed the Guantánamo detainees as truly nefarious threats. Rumsfeld described the detainees as “among the most dangerous, best-trained, vicious killers on the face of the earth,”¹⁹² while his deputy Paul Wolfowitz assured the public that those tried would be “guilty of serious terrorist crimes against the United States.”¹⁹³ But officers actually assigned to prosecute were more concerned with obtaining initial convictions.¹⁹⁴ They thus sought defendants most likely to plead guilty or be easily convicted rather than those who had committed serious offenses.¹⁹⁵

Essential prerequisites for the first trials took place in mid-2003. Secretary Rumsfeld issued Military Commission Order No. 2 designating Wolfowitz as the Military Commission Appointing Authority—the individual actually empowered to approve charges and convene trials—on June 21 of that year.¹⁹⁶ But it was only on July 3, 2003 when “[t]he President determined that six enemy combatants currently detained by the United States are subject to his Military Order of November 13, 2001”¹⁹⁷ that any individuals became eligible to be subject to trial. DOD refused to release these detainees’ names,¹⁹⁸ but they have subsequently been identified as Britains Feroz Abbasi and Moazzam Begg, Australian David Hicks, Yemenis Ali Hamza Ahmed Suleiman al-Bahlul and Salim Ahmed Hamdan, and Sudani Ibrahim Ahmed Mahmoud al-Qosi.¹⁹⁹ Based on charges eventually leveled against them, however, it seems none of these men were more than “foot soldiers” for al-Qaeda or the Taliban.

As the commission process unfolded, it became clear that the nationality of the detainee would significantly impact their treatment. U.S. citizens were specifically excluded by the President’s original

¹⁹¹ Dep’t of Def., Military Commission Instruction No. 9: Review of Military Commission Proceedings (Dec. 26, 2003) [hereinafter MCI No. 9]. This instruction was reissued with the same title on Oct. 11, 2005.

¹⁹² Garry J. Gilmore, *Rumsfeld Visits, Thanks U.S. Troops at Camp X-Ray in Cuba*, AM. FORCES PRESS SERVICE, Jan. 27, 2002, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=43817>.

¹⁹³ Interview by Jim Lehrer with Paul Wolfowitz, *supra* note 141.

¹⁹⁴ SALES, *supra* note 6, at 83–84.

¹⁹⁵ *Id.*

¹⁹⁶ Dep’t of Def., Military Commission Order No. 2: Designation of Deputy Secretary of Defense as Appointing Authority (June 21, 2003), available at <http://www.defenselink.mil/news/Aug2003/d20030801ord2.pdf> [hereinafter MCO No. 2].

¹⁹⁷ Press Release, Dep’t of Def., President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=5511>.

¹⁹⁸ *Id.*

¹⁹⁹ See SALES, *supra* note 6, at 109.

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order.²⁰⁰ The U.K. also insisted that its citizens must not be tried, with its Attorney General, Lord Goldsmith, declaring:

there are certain principles on which there can be no compromise. Fair trial is one of those—which is the reason we in the UK have been unable to accept that the US military tribunals proposed for those detained at Guantánamo Bay offer sufficient guarantees of a fair trial in accordance with international standards.²⁰¹

Thanks to pressure from their government, the two Brits were subsequently released without ever having been charged.²⁰² Another example of this favoritism was the Pentagon's quiet grant of a security clearance to a civilian Australian attorney Steve Kenny, so that he could aid in Hicks' defense²⁰³ even while MCO No. 1 explicitly limited civilian counsel to U.S. citizens admitted to practice law in an American court.²⁰⁴ In mid-2007, the U.K. went even further, demanding the release of remaining detainees who had been non-citizen residents of that country.²⁰⁵ Lacking any similar intervention on their behalf, al-Bahlul, al-Qosi, and Hamdan remain in limbo at Guantánamo.²⁰⁶

Information now public calls into question the government's commitment to justice as the initial cases proceeded towards trial. When several junior prosecutors expressed concern to their chief, Colonel Fred Borch, about the viability of prosecutions, he told them not to worry in language they interpreted to mean that the tribunals would be "fixed" against the defendants.²⁰⁷ Ultimately three prosecutors were reassigned after they became convinced it would be unethical to continue serving in a process whose commitment to justice they doubted.²⁰⁸ Borch himself was let go for "leadership failure" after John Altenburg took over as Appointing Authority in 2004.²⁰⁹

Hamdan and Hicks were given military defense counsel in late 2003. This timing is suspect, coming after the Supreme Court's grant of certiorari in *Rasul v. Bush* to decide whether Guantánamo detainees

²⁰⁰ Military Order, *supra* note 15.

²⁰¹ *Lord Goldsmith's Speech in Full*, BBC NEWS, June 25, 2004, http://news.bbc.co.uk/2/hi/uk_news/politics/3839153.stm.

²⁰² SALES, *supra* note 6, at 84.

²⁰³ *Id.* at 116.

²⁰⁴ MCO No. 1, *supra* note 133, ¶ 4.C.(3)(b).

²⁰⁵ Nigel Morris, *Ministers Ask for British Residents Held at Guantanamo to be Released*, THE INDEPENDENT, Aug. 8, 2007, available at <http://news.independent.co.uk/uk/legal/article2843957.ece>.

²⁰⁶ None of these cases have proceeded past preliminary hearings as of August 2007.

²⁰⁷ SALES, *supra* note 6, at 160.

²⁰⁸ See Leigh Sales, *Third Prosecutor Critical of Guantanamo Trials*, ABC ONLINE, Aug. 3, 2005, <http://www.abc.net.au/news/newsitems/200508/s1428749.htm>.

²⁰⁹ SALES, *supra* note 6, at 164–65.

could challenge their detention in federal courts.²¹⁰ Hamdan's lawyer, Lieutenant Commander Swift, was initially told he could see his client only to try to persuade him to plead guilty,²¹¹ suggesting the assignments were more for show than reflecting any desire to see the detainees aggressively defended.

Rumsfeld announced key senior military commission appointments in late December 2003. He replaced Wolfowitz, who never seemed committed to moving the trials along²¹² as Appointing Authority, with retired Army Major General John D. Altenburg, Jr.²¹³ Rumsfeld spelled out the new Appointing Authority's role in more detail in DOD Directive 5105.70 two months later.²¹⁴ The Secretary also confirmed retired Brigadier General Thomas Hemingway as the commissions' senior legal advisor, and appointed a review panel consisting of former U.S. Attorney General Griffin Bell, former Transportation Secretary William T. Coleman, Rhode Island Supreme Court Chief Justice Frank Williams, and Pennsylvania Judge Edward G. Biester.²¹⁵

It would still be another six months until any individuals were slated for trial. On June 29, 2004, DOD announced that Altenburg had approved the referral of charges against al-Bahlul, al-Qosi, and Hicks—while DOD also appointed a panel headed by retired Army Colonel Peter

²¹⁰ See JOSEPH MARGULIES, *GUANTANAMO AND THE ABUSE OF PRESIDENTIAL POWER* 144–45 (2006) (documenting the curious chronology of Rasul case milestones and government grant of detainee access to counsel in the detention cases under judicial review).

²¹¹ Charles Swift, *The American Way of Justice*, *ESQUIRE*, Mar. 2007, at 198.

²¹² SALES, *supra* note 6, at 81.

²¹³ See, e.g., U.S. Dep't of State, Defense Department Picks Officials for Military Tribunal Posts (Dec. 30, 2003), available at <http://usinfo.state.gov/dhr/Archive/2003/Dec/31-861825.html>. Although this decision was announced in December, the formal directive implementing it was not issued until mid March. See Dep't of Def., Military Commission Order No. 5: Designation of Appointing Authority (Mar. 15, 2004), available at <http://www.defenselink.mil/news/Mar2004/d20040317ord5.pdf> [hereinafter MCO No. 5]. In the interim, Wolfowitz tried to empower Hemingway to act for him (see Dep't of Def., Military Commission Order No. 4: Designation of Deputy Appointing Authority (Jan. 30, 2004), available at <http://www.defenselink.mil/news/Feb2004/d20040206ord4.pdf> [hereinafter MCO No. 4]), despite an explicit prohibition on delegation of his duties in his original appointment (see MCO No. 2, *supra* note 196). Rumsfeld subsequently repudiated this attempt in Dep't of Def., Military Commission Order No. 6: Revocation of Military Commission Order No. 4 (Mar. 26, 2004), available at <http://www.defenselink.mil/news/Mar2004/d20040329no6.pdf> [hereinafter MCO No. 6].

²¹⁴ Dep't of Def. Directive No. 5105.70, Appointing Authority for Military Commissions (Feb. 10, 2004).

²¹⁵ Press Release, Dep't of Def., Defense Department Picks Officials for Military Tribunal Posts (Dec. 30, 2003), available at <http://usinfo.state.gov/dhr/Archive/2003/Dec/31-861825.html>. Wolfowitz had previously sought to delegate his appointing authority duties to Hemingway.

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E. Brownback III as the presiding officer to try all three cases.²¹⁶ Two weeks later a fourth set of charges were referred for trial against Hamdan.²¹⁷ Despite the problematic nature of the charge, al-Bahlul, al-Qosi, and Hamdan were accused only of conspiracy.²¹⁸ Conspiracy was the primary charge against Hicks as well, but he was additionally accused of “attempted murder by an unprivileged belligerent” and “aiding the enemy.”²¹⁹ The latter charges were also flawed. There were no specific allegations that Hicks had ever tried to kill anyone,²²⁰ while it was illogical to assert that a foreign enemy combatant captured overseas owed a duty of loyalty to the United States.²²¹

In preparation for the initial commission sessions Colonel Brownback added another set of governing directives to the existing military commission directive hierarchy, issuing the first of an eventual fourteen numbered “Presiding Officer Memorandums,” or “POMs.” POM # 1 explained that the purpose of these directives was to “serve as interim Rules of Commission Trial,”²²² supplementing “Commission Law,” which was controlling.²²³ It then defined “Commission Law” as consisting of “the President’s Military Order of November 13, 2001, DOD Directive 5105.70, Military Commission Orders, Military Commission Instructions, and Appointing Authority/Military Commission Regulations in their current form and as they may be later issued, amended, modified, or supplemented.”²²⁴ Oddly, this effort at defining the governing “Law” made no mention of the Constitution (even though the Supreme Court held commission authority stems from Article I), the

²¹⁶ Press Release, Dep’t of Def., Military Commission Charges Referred (June 29, 2004), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=7504>.

²¹⁷ Press Release, Dep’t of Def., Additional Military Commission Charges Referred (July 14, 2004), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=7553>.

²¹⁸ Charge Sheet at 1, United States v. al Bahlul, No. 04-0003 (Military Comm’n June 29, 2004), *available at* <http://www.defenselink.mil/news/Feb2004/d20040224AlBahlul.pdf>; Charge Sheet at 1, United States v. al Qosi, No. 04-0002 (Military Comm’n June 4, 2004), *available at* <http://www.defenselink.mil/news/Feb2004/d20040224AlQosi.pdf>; Charge Sheet at 1, United States v. Hamdan, No. 04-0004, (Military Comm’n July 13, 2004), *available at* <http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf>.

²¹⁹ Charge Sheet at 5, United States v. Hicks, No 04-0001 (Military Comm’n Feb. 2, 2007), *available at* <http://www.defenselink.mil/news/Jun2004/d20040610cs.pdf>.

²²⁰ *See id.*

²²¹ *See* Transcript at 172–73, United States v. Hicks, No. 04-0001 (Military Comm’n Aug. 25 and Nov. 1–3, 2004) (Redacted Version), *available at* <http://www.defenselink.mil/news/Oct2005/d20051006vol6.pdf> [hereinafter Hicks transcript].

²²² Peter E. Brownback III, Office of the Presiding Officer, Mil. Comm’n, Presiding Officers Memorandum # 1: Presiding Officers Memoranda (July 19, 2004), *available at* <http://www.defenselink.mil/news/Aug2004/d20040811pres.pdf>.

²²³ *See id.*

²²⁴ *Id.*

UCMJ (nine separate articles address military commissions),²²⁵ or the law of war—which is the ultimate source of the applicable substantive law. It thus signaled that commission practice would be governed by policies established by the Executive Branch rather than actual law.

Two other POMs issued concurrently addressed the role of the Assistant to the Presiding Officers²²⁶ and use of email for official communications.²²⁷ Over the next several weeks additional POMs addressed such various topics as motions practice,²²⁸ courtroom decorum,²²⁹ and trial exhibits.²³⁰ The extremely fluid nature of commission procedures is demonstrated by the sporadic proliferation of these POMs. The original versions were released over a fourteen month period from July 2004 to September 2005.²³¹ Most POMs went through several iterations;²³² some were replaced mere weeks after issuance,²³³ with one going through four separate editions during this span.²³⁴

²²⁵ See Glazier, *supra* note 32, at 2014 n.23, for a list of UCMJ articles mentioning military commissions.

²²⁶ Peter E. Brownback III, Office of the Presiding Officer, Mil. Comm'n, Presiding Officers Memorandum (POM) # 2: Appointment and Role of the Assistant to the Presiding Officers (July 19, 2004), *available at* <http://www.defenselink.mil/news/Sep2005/d20050920pom2.pdf>.

²²⁷ Peter E. Brownback III, Office of the Presiding Officer, Mil. Comm'n, Presiding Officers Memorandum (POM) # 3: Communications, Contact, and Problem Solving (July 19, 2004), *available at* <http://www.defenselink.mil/news/Oct2004/d20041006military.pdf>.

²²⁸ Peter E. Brownback III, Office of the Presiding Officer, Mil. Comm'n, Presiding Officers Memorandum (POM) # 4: Motions Practice (July 22, 2004), *available at* <http://www.defenselink.mil/news/Sep2005/d20050920pom4.pdf>.

²²⁹ Peter E. Brownback III, Office of the Presiding Officer, Mil. Comm'n, Presiding Officers Memorandum # 5: Spectators to Military Commissions (Aug. 2, 2004), *available at* <http://www.defenselink.mil/news/Aug2004/d20040811brown.pdf>.

²³⁰ Peter E. Brownback III, Office of the Presiding Officer, Mil. Comm'n, Presiding Officer Memorandum # 8: Trial Exhibits (Aug. 12, 2004), *available at* <http://www.defenselink.mil/news/Aug2004/d20040819pom8.pdf>.

²³¹ The last of the original fourteen POMs was Peter E. Brownback III, Office of the Presiding Officer, Mil. Comm'n, Presiding Officers Memorandum (POM) # 11: Qualifications of Translators/Interpreters and Detecting Possible Errors or Incorrect Translation/Interpretation during Commission Trials (Sept. 7, 2005), *available at* <http://www.defenselink.mil/news/d20050911POM11.pdf>.

²³² Of the fourteen original POMs, only the last issued, POM # 11, was never superseded by a subsequent version.

²³³ *See, e.g.*, Peter E. Brownback III, Office of the Presiding Officer, Mil. Comm'n, Presiding Officers Memorandum (POM) # 4-1: Motions Practice (Aug. 12, 2004), *available at* <http://www.defenselink.mil/news/Aug2004/d20040818pom4-1.pdf>, replacing POM # 4, *supra* note 228, after just three weeks; Peter E. Brownback III, Office of the Presiding Officer, Mil. Comm'n, Presiding Officers Memorandum # 10-2: Presiding Officer Determinations on Defense Witness Requests (Sept. 30, 2005), *available at* <http://www.defenselink.mil/news/Oct2005/d20051011POM10-2.pdf>, replacing Peter E. Brownback III, Office of the Presiding Officer, Mil. Comm'n, Presiding Officers Memorandum # 10-1: Witness Requests, Requests to Depose a Witness, and Alternatives to Live Testimony (Sept. 20, 2005), *available at*

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In case the President's order, DOD MCOs, the DOD directive, the MCIs, and POMs were insufficient, Altenburg added a new intermediate level to this regulatory hierarchy the Friday before the initial hearings, issuing the first Appointing Authority Regulation.²³⁵ While its stated purpose was to "establish[] confidentiality" for attorney-client and detainee-psychotherapist communications, the exceptions seem so broad as to call the protections' basic value into question.²³⁶

The first military commission since the World War II-era was finally convened at Guantánamo Bay on August 24, 2004 to consider preliminary issues in the four cases. Despite the lapse of thirty-three months since the President's November 2001 order, the hearings revealed a government embarrassingly unprepared to conduct the promised "full and fair" trials, resulting in substantial adverse publicity for the United States. Outside observers noted commission rules that were unsettled even as the hearings were in progress. Deborah Pearlstein of Human Rights First observed:

There is a sense here that the U.S. military leaders overseeing these trials are making much up as they go. In the preceding weeks and months, it's been a new rule every time we turn around. The law has been a moving target. For instance, in an ordinary trial, there would be preemptory challenges if one side felt the jury was biased. Here there is a "good cause" standard—that's what's written in the rules. The laws of the land right now are the "commission rules"—that's what the Presiding Officer keeps talking about and referring to—yet these rules are being made up anew each day. This confounds the very notion of the "rule of law." Here, the Presiding Officer writes a memoranda and that becomes the law.²³⁷

Even the Department of Defense's own reporting documented significant problems with the quality of translation during the initial hearings and the inequality of resources between prosecution and defense, noting each prosecution team had multiple attorneys while the overmatched defense generally had one lawyer and perhaps a paralegal.²³⁸ One of two exceptions was the only "white" defendant, Australian David Hicks,

<http://www.defenselink.mil/news/Sep2005/d20050921pom10-1.pdf>, just ten days after the prior's issuance.

²³⁴ See Peter E. Brownback III, Office of the Presiding Officer, Mil. Comm'n, Presiding Officers Memorandum # 4-3: Motions Practice (Sept. 20, 2005), *available at* <http://www.defenselink.mil/news/Sep2005/d20050911pom4-3.pdf>.

²³⁵ Dep't of Def., Appointing Authority Regulation No. 1 Disclosure of Communications (Aug. 20, 2004).

²³⁶ See *id.*

²³⁷ Human Rights First, Day One: Four Issues of Concern, http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm#day1.

²³⁸ Kathleen T. Rhem, *Many Issues Raised in First Week of Commissions Hearings*, AM. FORCES PRESS SERVICE, Aug. 27, 2004, <http://www.defenselink.mil/news/newsarticle.aspx?id=25432>.

leading one commentator to suggest racial bias.²³⁹ More likely was national favoritism; the U.S. logically took steps to accommodate a close ally and attempt to defuse Australian public criticism of the commission process which was emboldened by the United Kingdom getting its citizens exempted from trial.²⁴⁰ Ironically, the second exception was a Yemeni—al Bahlul—who had two military counsel that he did not want to represent him at all.²⁴¹

Although the U.S. military has thousands of officers from which the commission panel could have been chosen, voir dire revealed that virtually all those selected had significant issues, ranging from an embarrassing lack of knowledge about the law of war to prior personal participation in activities related to the detainees. The primary feature of the first day of commission sessions was voir dire by Hamdan's counsel, Charlie Swift.²⁴² Swift established that the Presiding Officer was only an associate member of the Virginia Bar, ineligible to actually practice in any civilian or military court, had met *ex parte* with prosecutors, and that he and his assistant had significant discussions about altering trial rules with the Appointing Authority after Hamdan was charged.²⁴³ In questioning individual panel members, Swift established that one had lost a reservist under his command on 9/11,²⁴⁴ a second had been involved in coordinating the transfer of detainees from Afghanistan to Guantánamo,²⁴⁵ while a third had served as an intelligence officer in Afghanistan.²⁴⁶ Another believed that terrorists would seek him and his family out for retribution for his participation in the commissions²⁴⁷ and admitted that he did not know what the Geneva Convention (*sic*) was²⁴⁸—a remarkable admission for a serving Lieutenant Colonel given that law

²³⁹ Posting of Anthony Romero to ACLU Blog, <http://blog.aclu.org/index.php2/archives/109-August-25,-2004.html> (Aug. 25, 2004).

²⁴⁰ See generally SALES, *supra* note 6 (detailing the full history of Hicks' prosecution including public pressure in Australia and the limited intervention—at least compared to the UK—by his government).

²⁴¹ See Transcript of Record, 1st Volume at 3–12, United States v. al Bahlul, No. 04-0003 (Military Comm'n Aug. 26, 2004 & Jan. 11, 2006), available at <http://www.defenselink.mil/news/Jan2006/d20060125Bahlulvol6.pdf> [hereinafter al Bahlul transcript].

²⁴² See Transcript of Record, 1st Volume at 1–136, United States v. Hamdan, No. 04-0004 (Military Comm'n Aug. 24 & Nov. 8, 2004), available at <http://www.defenselink.mil/news/Nov2005/d20051110Hamdanvol6.pdf> [hereinafter Hamdan transcript].

²⁴³ See *id.* at 10–24.

²⁴⁴ *Id.* at 63.

²⁴⁵ Human Rights First, Day Two: Good People, Flawed System, http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm#day2.

²⁴⁶ Hamdan transcript, *supra* note 242, at 68.

²⁴⁷ *Id.* at 44.

²⁴⁸ *Id.* at 80.

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of war training is a mandatory part of an officer's professional development.²⁴⁹

Panel members insisted that a number of the questions Swift wished to ask would require classified answers and refused to answer them in open session.²⁵⁰ Swift asserted that it was "fundamental [to] my client's faith in the process . . . that [he] believes that he has . . . members who are able to hear his case without any other prejudice," and requested that permission be sought to allow his client to hear the information developed during voir dire.²⁵¹ The prosecutor insisted, however, that Hamdan must be excluded if classified information was discussed and Brownback agreed, so the voir dire was completed in closed session with the defendant excluded.²⁵² After the defense identified those members it would challenge, Hamdan's commission recessed with the intent to reconvene in early November to hear defense motions.²⁵³

The second day of proceedings featured the same trial panel convened for the case of Australian David Hicks. Hicks had a U.S. civilian attorney, Joshua Dratel, two military counsel, Marine Corps Major Dan Mori and Army Major Jeffrey Lippert, and (omitted from the government record) was advised by Australian counsel Steve Kenny.²⁵⁴ The attorneys were given copies of the voir dire by Hamdan's counsel.²⁵⁵ Moving beyond Swift's questions, Dratel focused on the close personal relationship between presiding officer Brownback and the Appointing Authority Altenburg,²⁵⁶ and the senior non-lawyer panel member's visit to the smoldering World Trade Center ruins shortly after 9/11.²⁵⁷ Mori then delved into a second member's role as an operational planner for the Afghan War leading to the defendant's capture,²⁵⁸ and established that a third member provided personnel under his command to support Afghanistan operations.²⁵⁹ Although that officer minimized his role during questioning, defense counsel read quotes from his official performance evaluation that cited "fantastic results tracking and killing Taliban."²⁶⁰

Hicks' counsel questioned the ability of a single panel to conduct four trials concurrently, suggesting it was unreasonable to expect that

²⁴⁹ See, e.g., Dep't of Def., Directive 2311.01E, DoD Law of War Program (May 9, 2006), ¶ 5.7.2.

²⁵⁰ See, e.g., Hamdan transcript, *supra* note 242, at 58, 72.

²⁵¹ *Id.* at 82.

²⁵² *Id.*

²⁵³ *Id.* at 130.

²⁵⁴ SALES, *supra* note 6, at 116–17, 180. *But cf.* Hicks transcript, *supra* note 221 (not listing Kenny among the defense counsel before the first page).

²⁵⁵ Hicks transcript, *supra* note 221, at 7–8.

²⁵⁶ *Id.* at 11–12.

²⁵⁷ *Id.* at 39–40.

²⁵⁸ *Id.* at 42–49.

²⁵⁹ *Id.* at 51.

²⁶⁰ *Id.* at 52 (statement by Major Mori).

they could keep the factual and legal issues from the cases sufficiently separated.²⁶¹ They questioned having a lay panel sit as triers of law and fact, fearing panelists would default to Brownback as the one attorney in the midst rather than researching and deciding the legal points for themselves.²⁶² Hicks' lawyers also had to ask some of their questions in closed session, and they, too, objected "to holding proceedings without Mr. Hicks present."²⁶³ After Hicks pleaded not guilty, a session to hear defense motions was set for November, to be followed by trial in January 2005.²⁶⁴

The issues were quite different on the third day of hearings. In an exchange hampered by very poor interpretation, al-Bahlul demanded the right to represent himself or to be defended by a Yemeni attorney instead of his military counsel.²⁶⁵ The session turned bizarre when al-Bahlul asserted "I am from al Qaida, and the relationship between me and September 11th," at which point he was cut off by the Presiding Officer before he could say any more.²⁶⁶ Although commission rules mandated that "[t]he Accused must be represented at all relevant times by Detailed Defense Counsel,"²⁶⁷ Brownback directed the military attorneys to prepare a brief for the Appointing Authority arguing al-Bahlul's right to self-representation as *amici curiae* rather than as his counsel.²⁶⁸ The session was adjourned after less than two hours, with no follow-on date set pending resolution of the representation issue.²⁶⁹

General Hemingway, the commissions' senior legal advisor, conducted a press briefing that afternoon in Washington with remote participation from Guantánamo that did nothing to enhance the government's credibility. Despite real concerns voiced by the on scene observers, Hemingway stuck to the "party line," insisting the trials were fair, defending the commission rules, and trying to minimize the issues raised.²⁷⁰

The final day of hearings lasted just an hour. Al-Qosi had no objection to his assigned attorney, Lieutenant Colonel Sharon Shaffer,

²⁶¹ *Id.* at 109–10.

²⁶² *Id.* at 8–10.

²⁶³ *Id.* at 107.

²⁶⁴ *Id.* at 121–22.

²⁶⁵ *See* al Bahlul transcript, *supra* note 241, at 4–7.

²⁶⁶ *Id.* at 11.

²⁶⁷ Dep't of Def., Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, ¶ 4.C.(4) (Mar. 21, 2002), *available at* <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

²⁶⁸ *See* al Bahlul transcript, *supra* note 241, at 12–13.

²⁶⁹ *Id.* at 1, 16–17.

²⁷⁰ Brigadier General Thomas Hemingway, Legal Advisor for the Office of Military Commissions, Defense Department Briefing on Preliminary Hearing for Guantanamo Detainees (Aug. 26, 2004), *available at* <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2703>.

except that she faced a team of three prosecutors without benefit of assistant counsel or even a paralegal.²⁷¹ Voir dire was delayed until October to give the defense time to prepare and the week's proceedings were closed.²⁷² Speaking to the press that afternoon, Shaffer said that the translation had been so problematic that all her client got were "broken, fractions of sentences."²⁷³

In the two cases in which voir dire was completed, Hamdan and Hicks challenged the Presiding Officer, three of four primary members, and the alternate.²⁷⁴ These challenges were then referred to the Appointing Authority who had originally selected the members. In his decision, Altenburg first decided what standard he should apply, then declared that his personal relationship with Brownback was not a problem,²⁷⁵ neglecting to mention that he had selected his friend from a list of thirty-four candidates on which he was the least qualified in terms of recent experience.²⁷⁶ While all the others were engaged in full-time work involving legal matters, Brownback alone had no employment listed.²⁷⁷ His voir dire questionnaire showed his only professional activity between his July 1999 retirement and July 2004 recall was part-time work such as census taker and "safety person for beach renewal operations."²⁷⁸ Altenburg also rejected the challenges to "COL S," who attended a 9/11 victim's funeral and visited ground zero.²⁷⁹

Challenges for cause to three panelists were upheld: "LTC C" who harbored anger about 9/11 and fears for his family,²⁸⁰ and "LTC T" and "COL B" who despite heavy redacting appear to have personally participated in events related to detainees' capture and transfer to Guantánamo.²⁸¹ The government initially opposed all the challenges, but

²⁷¹ See Transcript of Record, 1st Volume at 4–5, 8, *United States v. al Qosi*, No. 04-0002 (Military Comm'n Aug. 27, 2004), available at <http://www.defenselink.mil/news/Nov2005/d20051110alQosivol6.pdf> [hereinafter *al Qosi transcript*].

²⁷² *Id.* at 10–12.

²⁷³ Posting of Deborah Pearlstein on Human Rights First, Day Five/Aug.27: The End of the Beginning, http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary.htm#day5.

²⁷⁴ See Appointing Authority Decision on Challenges for Cause, *United States v. Hamdan*, No. 04-0004 (Military Comm'n Oct. 19, 2004), available at <http://www.defenselink.mil/news/Oct2004/d20041021panel.pdf> [hereinafter *Challenges Decision*].

²⁷⁵ *Id.* at 2–11.

²⁷⁶ See *id.* at 18–24; see also Hicks transcript, *supra* note 221, Review Exhibit 12 (listing thirty-four candidates for the presiding officer position, including current employment).

²⁷⁷ See Hicks transcript, *supra* note 221, Review Exhibit 12.

²⁷⁸ See *id.*, Review Exhibit 9 at 8. A defense counsel told the author privately that "safety person" was Brownback's euphemism for construction site flagman.

²⁷⁹ *Challenges Decision*, *supra* note 274, at 11–13.

²⁸⁰ *Id.* at 11.

²⁸¹ *Id.* at 14–16.

a subsequent brief by the Chief Prosecutor withdrew opposition to the three challenges subsequently approved.²⁸² The strategic, if not actually collusive, outcome of this unexpected shift was revealed on the last page of Altenburg's decision, where he directed the remaining three officers to proceed with Hamdan's and Hicks' trials without any additional members. The prosecution now needed just two votes of three to convict versus the original four of five, while the defense had to get two out of three to avoid conviction instead of the original two of five. The perverse outcome of these successful *defense* challenges was thus to substantially better the *government's* odds of prevailing, and the resulting panel gave the appearance of fulfilling the prophecy that they would be selected to convict. Altenburg did agree that the additional members would be added to this panel when it met again to consider the cases of the two defendants that did not get to conduct voir dire in August.²⁸³ This overt discrimination against the two defendants who had challenged his panel selections suggested a deliberate attempt to chill further exercise of this right.

Hearings resumed in Hicks' case on November 1–2, 2004 with the panel composed of just the presiding officer and two members.²⁸⁴ Joshua Dratel argued that the three member panel precluded a “full and fair” trial, noting the impropriety of forcing a defendant to choose between keeping biased members and the mathematical disadvantage of a smaller panel, and contended that the failure to appoint a new alternate expressly violated MCO No. 1.²⁸⁵ Other defense objections to the commission process included blanket Appointing Authority exclusion of officers in paygrades O-1 to O-3 whereas the President's order merely required “officers,” and the POMs issued by a presiding officer lacking express rule-making authority.²⁸⁶ (Six new or revised POMs were issued in the interval between Hicks' hearings).²⁸⁷ The defense also argued the lack of commission jurisdiction because (1) none of the charges stated an actual violation of the law of war,²⁸⁸ (2) the alleged offenses took place before hostilities commenced,²⁸⁹ (3) it sat outside the theater of war,²⁹⁰ and (4) it was convened by a civilian without lawful command authority.²⁹¹ All these challenges were either denied or decision was deferred.

²⁸² *See id.* at 1.

²⁸³ *See id.* at 28.

²⁸⁴ Hicks transcript, *supra* note 221, at 124.

²⁸⁵ *Id.* at 125–30.

²⁸⁶ *Id.* at 134–39.

²⁸⁷ *Id.* at 139.

²⁸⁸ *Id.* at 162–72 (arguing invalidity of charge of murder/attempted murder by an unprivileged belligerent), 172–78 (same for aiding the enemy), 182–95 (conspiracy).

²⁸⁹ *Id.* at 209–22.

²⁹⁰ *Id.* at 265–70.

²⁹¹ *Id.* at 262–65.

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The defense requested six expert witnesses to testify about relevant law of war issues.²⁹² One, Michael Schmitt, was a DOD employee at the George Marshall Center who the Appointing Authority had approved as a consultant for the defense, but the Center's dean refused to make him available during the academic year.²⁹³ The presiding officer refused to reschedule hearings until Schmitt could be present,²⁹⁴ and the commission denied requests for any of the six to be procured as expert witnesses.²⁹⁵

Perhaps the most unusual defense motion was an unsuccessful request for a continuance pending final determination of the fate of the British citizens held at Guantánamo. The defense asserted, but the government denied, that Australia had been given a "most-favored nation" assurance that any breaks the U.K. negotiated for its citizens would be extended to the Australians as well.²⁹⁶ The government acknowledged that Australia was given specific promises, including no capital charges, no monitoring of attorney-client communications, no use of classified evidence, family attendance at commission sessions, and an Australian attorney as a defense "consultant."²⁹⁷ Since all the British detainees were subsequently released without trial while Hicks was not, it appears that either Australia did not receive a most-favored nation assurance after all, or else declined to enforce it, to Hicks' detriment.

The defense also tried a direct equal protection challenge, arguing that the exclusion of U.S. citizens by the President's order and British citizens due to diplomatic pressure made the commissions "a political lottery . . . rather than a system of justice."²⁹⁸ Again the commission deferred decision.²⁹⁹ While there were no translation issues with Hicks, one observer noted that "[t]he tenor of the proceedings . . . seems to be marked by a troubling indifference to established principles of law and procedure."³⁰⁰ Additionally, it surely did nothing to enhance the tribunal's credibility when the presiding officer sarcastically referred to Hicks' military counsel several times as "sunshine."³⁰¹

The three members reconvened the following week to consider Hamdan's motions. Most replicated Hicks' efforts, but new approaches included a request to dismiss for violations of Common Article 3 (CA3)

²⁹² *Id.* at 151.

²⁹³ *Id.* at 143–46.

²⁹⁴ *Id.* at 143–47.

²⁹⁵ *Id.* at 150–55.

²⁹⁶ *Id.* at 451–54 (Defense Request for Continuance, Aug. 20, 2004, Review Exhibit 14).

²⁹⁷ *See id.* at 458–59 (attachment 3 to Review Exhibit 15).

²⁹⁸ *Id.* at 242–43.

²⁹⁹ *Id.* at 245.

³⁰⁰ Human Rights First, Nov. 1–2 2004: Setting the Stage for Justice (Nov. 2, 2004), http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary_02.htm#day1.

³⁰¹ Hicks transcript, *supra* note 221, at 214, 238.

of the 1949 Geneva Conventions and requests to obtain defense witnesses from Yemen.³⁰² One major inequity during the August hearing, the imbalance between the prosecution team and the single defense attorney was addressed by the formal addition of Professor Neal Katyal and a junior military attorney to the defense.³⁰³ Argument had just begun on the first motion when the presiding officer suddenly announced that “we are going to have an indefinite recess,” and adjourned the commission.³⁰⁴ The cause of this surprising turn of events was a decision issued in Washington D.C. that morning by federal Judge James Robertson on a habeas petition filed on Hamdan’s behalf.³⁰⁵ It placed his commission on hold, and two and one-half years would elapse until Hamdan’s next hearing.

C. The Courts Weigh-in While Proceedings Temporarily Resume

Two distinct lines of judicial challenge to the government’s detainee policies had been launched even before the first commission hearings. The larger set of litigants sought habeas review of the detentions per se, purporting to,³⁰⁶ or actually, representing both foreign clients held at Guantánamo³⁰⁷ and two citizens detained in the continental United States, Yaser Hamdi³⁰⁸ and Jose Padilla.³⁰⁹ In the second line, Hamdan’s counsel challenged his client’s trial in a petition filed in his own home state of Washington.³¹⁰

Following disparate decisions by several federal trial and appellate courts, the Supreme Court heard three detainee habeas cases in the

³⁰² See Hamdan transcript, *supra* note 242, at 4–12; 6th Volume of Review Exhibits at 1–13, United States v. Hamdan, No. 04-0004 (Military Comm’n Nov. 8, 2004) (Redacted Version), available at <http://www.defenselink.mil/news/Nov2005?d20051110Hamdanvol12.pdf>.

³⁰³ See Hamdan transcript, *supra* note 242, at 137–38.

³⁰⁴ *Id.* at 145.

³⁰⁵ Human Rights First, Nov. 8 (cont.): Enter the Federal Court (Nov. 8, 2004), http://www.humanrightsfirst.org/us_law/detainees/military_commission_diary_03.htm#day2.

³⁰⁶ These challenges included an unsuccessful attempt by individuals with no direct ties to the Guantánamo detainees to seek habeas relief in the Ninth Circuit. Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036 (C.D. Cal.), *aff’d in part, rev’d in part*, 310 F.3d 1153 (9th Cir. 2002).

³⁰⁷ A more credible 9th Circuit challenge by a detainee’s brother was *Gherebi v. Bush*, 262 F. Supp. 2d 1064 (C.D. Cal. 2003), *rev’d*, 352 F.3d 1278 (9th Cir. 2003). Family members of Kuwaiti detainees brought challenge in Washington D.C. in *Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *aff’d*, *Al Odah v. United States*, 321 F.3d 1134 (D.C. Cir. 2003).

³⁰⁸ *Hamdi v. Rumsfeld*, 316 F.3d 450 (4th Cir. 2003).

³⁰⁹ *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002), 243 F. Supp. 2d 42 (S.D.N.Y. 2003); *Padilla ex rel. Newman v. Rumsfeld*, 256 F. Supp. 2d 218 (S.D.N.Y. 2003).

³¹⁰ Nina Totenberg, *‘Hamdan v. Rumsfeld’: Path to a Landmark Ruling*, NPR, Sep. 5, 2006, available at <http://www.npr.org/templates/story/story.php?storyId=5751355>.

spring of 2004.³¹¹ In the decision most relevant to the military commissions, *Rasul v. Bush*, the Court held that the federal habeas statute, 28 U.S.C. § 2241, allowed courts to hear cases from Guantánamo.³¹² In hope of curtailing these judicial challenges, the government quickly established a system of “Combatant Status Review Tribunals” (CSRTs) to provide an administrative procedure for reviewing detentions.³¹³

After the Court confirmed habeas availability, Hamdan’s action was transferred from Washington State to Washington D.C., where it resulted in Judge Robertson’s decision halting the commission.³¹⁴ The ruling was largely based on two core holdings. First, Judge Robertson held, the Third Geneva Convention limited Hamdan’s trial to an actual court-martial unless a competent tribunal found he was not entitled to POW status.³¹⁵ Second, while the UCMJ could fairly be construed as a limited delegation of authority to conduct military commission trials, these commissions’ departure from statutory court-martial procedure, including specifically hearing secret evidence out of the presence of the accused, exceeded the scope of the congressional authorization.³¹⁶

The government promptly appealed, and on Friday, July 15, 2005, the Court of Appeals for the D.C. Circuit reversed, holding trials could continue in an opinion written by Judge Arthur Randolph joined by Judge (now Chief Justice of the United States) John Roberts.³¹⁷ The Circuit Court held that the Third Geneva Convention did not create judicially enforceable individual rights,³¹⁸ and that any specific flaws in trial procedure should be examined *ex post* rather than on a speculative basis *ex ante*.³¹⁹

The government wasted no time, announcing the following Monday that it would both move ahead with the existing commission cases “immediately” and “continue to prepare charges against eight other individuals.”³²⁰ The promise exceeded the reality. Only six more

³¹¹ See *Rumsfeld v. Padilla*, 542 U.S. 426 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

³¹² *Rasul*, 542 U.S. at 480–82.

³¹³ LOUIS FISHER, *MILITARY TRIBUNALS & PRESIDENTIAL POWER* 249–50 (2005). Overall guidance for the CSRT process was initially provided by a Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to the Secretary of the Navy (July, 7 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

³¹⁴ *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 156 (D.D.C. 2004).

³¹⁵ *Id.* at 173.

³¹⁶ *Id.*

³¹⁷ *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005).

³¹⁸ *Id.* at 38–40.

³¹⁹ *Id.* at 42.

³²⁰ Press Release, Dep’t of Def., *Military Commissions to Resume* (July 18, 2005), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=8696>.

individuals were charged during the next two years³²¹ and no further hearings took place until January 2006.³²²

On August 31, the government did respond to tribunal criticism by releasing a revised MCO No. 1.³²³ The primary change was to remove the Presiding Officer from the voting trial panel and bring his role more into line with that of an actual court-martial judge, making him responsible for deciding most questions of law although the panel could still overrule his evidentiary decisions.³²⁴ The new MCO revised the wording about classified evidence; use of substitute information that the defendant could hear was encouraged although he still could be excluded and denied access to evidence if the Presiding Officer determined it would not “result in the denial of a full and fair trial.”³²⁵ But this change is purely symbolic *unless* presiding officers were previously going to admit evidence whose consideration they believed would result in denial of a fair trial! (And doing so would have violated the general mandate of the President’s order that trials be “full and fair”). The separation of the presiding officer from the panel, even if a step forward towards achieving commonality with court-martial procedure, seems to facially violate the President’s overarching order directing the “commission” to sit as “triers of both fact and law.”³²⁶ So while on the one hand the changes might be seen as enhancing fairness, on the other hand they demonstrated a cavalier approach towards having the commissions comport with any higher authority.

The Supreme Court agreed to review the D.C. Circuit’s decision reinstating the military commissions in a grant of certiorari announced on Nov. 7, 2005.³²⁷ But the possibility of another reversal did not deter the government from finally gearing up the commissions again. That same day charges were announced against five more detainees. Four were charged only with conspiracy while the fifth, youthful Canadian citizen

³²¹ See Dep’t of Def., Military Commissions Charge Sheets, *available at* http://www.defenselink.mil/news/Nov2004/charge_sheets.html.

³²² See Human Rights First, Military Commission Trial Observation, January 9, 2006, http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-010906.asp.

³²³ Dep’t of Def., Military Commission Order No. 1: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (Aug. 31, 2005) [hereinafter Revised MCO No. 1].

³²⁴ See Press Release, Dep’t of Def., Secretary Rumsfeld Approves Changes to Improve Military Commission Procedures (Aug. 31 2005), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=8837>; see also Revised MCO No. 1, *supra* note 323, §§ 4.A.(5), 6.D.(1).

³²⁵ Revised MCO No. 1, *supra* note 323, § 6.D.(5)(b).

³²⁶ See Military Order of Nov. 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833, 57835 (Nov. 16, 2001).

³²⁷ *Hamdan v. Rumsfeld*, 546 U.S. 1002 (2005) (granting certiorari).

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Omar Khadr, was also charged with murder and attempted murder “by an unprivileged belligerent” as well as “aiding the enemy.”³²⁸

Ending four years of silence since its enacted the AUMF, and after weeks of give and take, Congress weighed in on Guantánamo issues the next month by passing the Detainee Treatment Act (DTA) of 2005.³²⁹ The compromise law barred persons in U.S. custody from being “subject to cruel, inhuman, or degrading treatment”³³⁰ and limited DOD interrogation techniques to those listed in the Army’s field manual on interrogation.³³¹ But the Act also purported to limit habeas review of Guantánamo detentions to a single forum, the Court of Appeals for the District of Columbia Circuit, and to questions of whether DOD rules for CSRTs had been followed and whether those standards were “consistent with the Constitution and laws of the United States.”³³² It also specifically addressed military commission appeals, again granting exclusive jurisdiction to the D.C. Circuit to hear questions limited to whether the trial was consistent with the provisions of MCO No. 1 and whether the order was consistent with federal law.³³³ The DTA made this appeal “of right” for detainees sentenced to 10 years or more, and at the court’s discretion for any other conviction.³³⁴

Less than two weeks later hearings resumed in al-Bahlul’s case, ending a seventeen-month hiatus. Due to difficulties with the interpretation set-up, it required four attempts interrupted by two separate recesses just to get the hearing’s opening formalities properly completed.³³⁵ Once the hearing got past this hurdle, it focused almost entirely on the issue of representation. Al-Bahlul was told his August 2004 request to represent himself had been denied and that he must be assisted by newly assigned counsel, Major Thomas Fleener.³³⁶ Al-Bahlul then read a statement articulating his objections to the commission process. Although many points were polemic, he rationally voiced the unfairness of British nationals being exempt from trial while those from Muslim countries were not.³³⁷ Al-Bahlul said that he could not trust either an “enemy” officer or a volunteer civilian seeking personal fame as his defense counsel and again requested to select his own foreign attorney.³³⁸

³²⁸ Press Release, Dep’t of Def., Military Commission Charges Approved (Nov. 7, 2005), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=9052>.

³²⁹ Detainee Treatment Act of 2005, Pub. L. No. 109-163, 119 Stat. 3136 (2006) [hereinafter DTA]. For a brief history of the enactment process, see Arsalan M. Suleman, *Detainee Treatment Act of 2005*, 19 HARV. HUM. RTS. J. 257 (2006).

³³⁰ DTA § 1403(a).

³³¹ *Id.* § 1402(a).

³³² *Id.* § 1405(e).

³³³ *See id.* § 1405(e)(3).

³³⁴ *Id.*

³³⁵ *See* al Bahlul transcript, *supra* note 241, at 20–39.

³³⁶ *Id.* at 65–69.

³³⁷ *Id.* at 58–59.

³³⁸ *Id.* at 50–53, 59.

This desire was glossed over both at the hearing and in media coverage, which focused on al-Bahlul's announcement that he was "boycotting" the proceedings even if forced to be present. Fleener, meanwhile argued that it would be unethical for him to represent a client who rejected his services.³³⁹ The prosecutors also supported al-Bahlul's "right" to self-representation,³⁴⁰ probably because it would virtually ensure his conviction. Only the presiding officer seemed concerned that al-Bahlul have assistance negotiating the military commission process, noting the imbalance between the four assigned prosecutors and single defense attorney.³⁴¹ The Chief Defense Counsel later raised the same issue with the media.³⁴² But the real issue was that al-Bahlul wanted a co-national in his corner. Only if that was impossible did he prefer to defend himself rather than be forced to rely on an American attorney he could not trust.

The first session of Omar Khadr's military commission took place that same afternoon. This commission featured separate membership and was chaired by a presiding officer new to the commission process, Marine Colonel Robert S. Chester.³⁴³ Khadr's hearing, which ran over to the next day, focused on two main issues: his request for a specific military attorney, Lieutenant Colonel Colby Vokey, whom the government had not yet agreed to provide, and defense allegations of prosecutorial misconduct. The defense unsuccessfully objected to having the commission proceed before receiving a decision on whether Khadr could have his requested counsel.³⁴⁴ Khadr also made a request to be allowed assistance of a Canadian counsel of his choosing which was deferred.³⁴⁵ The second day's proceedings focused entirely on the issue of extra-judicial statements by the Chief Prosecutor. The presiding officer agreed that the government must ethically seek justice, not just convictions, but ruled that the defense had not met its burden of proving that the prosecutor's statements would prevent a "full and fair trial."³⁴⁶

The next defendant to make an initial appearance, Sufyian Barhoumi, had his hearing on March 2, 2006, lasting only sixteen

³³⁹ See *id.* at 69–93. For a typical media account of the session, see David S. Cloud, *Prisoner boycotts Guantanamo proceedings*, INT'L HERALD TRIB. Jan. 12, 2006, available at <http://www.iht.com/articles/2006/01/12/news/gitmo.php>.

³⁴⁰ Human Rights First, *Chatty Prosecutors and Old Camp X-ray* (Jan. 11, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-011106.asp.

³⁴¹ See al Bahlul transcript, *supra* note 241, at 112.

³⁴² *Prosecutors Outnumber Defence Lawyers 4–1 at Guantanamo Bay*, GUELPH MERCURY, Jan. 14, 2006, at A10.

³⁴³ See Press Release, Dep't of Def., *Military Commission Charges Referred* (Dec. 1, 2005), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=9123>.

³⁴⁴ 1st Volume of Review Exhibits (RE): REs 1–53, *United States v. Khadr*, No.05-0008 (Military Comm'n Jan. 11 & 12, 2006) (Redacted Version), available at <http://www.defenselink.mil/news/Feb2006/d20060222KhadrV7.pdf> [hereinafter *Khadr transcript*].

³⁴⁵ *Id.* at 24.

³⁴⁶ *Id.* at 223–30.

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minutes³⁴⁷ and focused on his request for a specific U.S. civilian attorney. The presiding officer directed the assigned military counsel to assist Barhoumi in pursuing this representation.³⁴⁸

On March 28, 2006, the Supreme Court heard oral argument in *Hamdan*, asking counsel whether the DTA foreclosed review, if conspiracy was a law of war violation, about the applicability of the Geneva Conventions, and the extent to which the commissions must conform to court-martial procedure.³⁴⁹ In the interim between the oral arguments and the Court's judgment, the government pressed on with additional hearings in Guantánamo. This series of sessions raising continuing issues about what law was actually being applied, the legitimacy of the charges, the right of self-representation, and the ethical challenges posed to military lawyers ordered to defend clients who declined their services. Initial appearances were made by Abdul Zahir,³⁵⁰ Binyam Ahmed Muhammad,³⁵¹ Jabran Said bin al-Qahtani,³⁵² and Ghassan Abdullah al-Sharbi³⁵³ while follow-on pre-trial sessions were held in the cases of Khadr,³⁵⁴ al-Bahlul,³⁵⁵ and Barhoumi.³⁵⁶

³⁴⁷ Transcript of Record, 1st Volume at 1, 16–18, *United States v. Barhoumi*, No. 05-0006 (Military Comm'n Mar. 2, 2006), available at <http://www.defenselink.mil/news/Mar2006/d20060329Barhoumivol8.pdf>.

³⁴⁸ *Id.* at 12–14.

³⁴⁹ See Transcript of Oral Argument, *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (No. 05-184).

³⁵⁰ Human Rights First, April 4, 2006: Open Questions Remain on Use of Torture Evidence (Apr. 4, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-040406-patel.asp.

³⁵¹ Human Rights First, April 6, 2006: Muhammad Challenges the Commissions; His Lawyer Raises an Ethical Objection and Pleads the Fifth (Apr. 6, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-040606-patel.asp.

³⁵² Human Rights First, April 25, 2006: Al Qahtani Joins Line of Defendants Refusing to Participate in Military Commissions (Apr. 25, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-042506-patel.asp.

³⁵³ Human Rights First, April 27, 2006: Another Guantanamo Detainee Asks to Represent Himself (Apr. 27, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-042706-patel.asp.

³⁵⁴ Human Rights First, April 5, 2006: Khadr Boycotts Hearings, Challenges Conditions of Confinement (Apr. 5, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-040506-patel.asp.

³⁵⁵ Human Rights First, April 7, 2006: On Trial: U.S. Detention and Interrogation Practices at Guantanamo (Apr. 7, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-040706-patel.asp.

³⁵⁶ Human Rights First, April 26, 2006: Defendant Testifies Before the Military Commissions Regarding Confinement (Apr. 26, 2006), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-042606-patel.asp.

On June 29 the Court handed down a 5–3 decision (with Chief Justice Roberts recused) halting the commissions once again.³⁵⁷ The Court held that the DTA applied only to cases filed after its enactment and thus did not deny it jurisdiction here.³⁵⁸ It agreed with Judge Robertson that these commissions exceeded the scope of congressional delegation, holding that UCMJ article 36 which authorized presidential rulemaking called for uniformity between court-martial and military commission procedure.³⁵⁹ Reserving decision as to whether the full Geneva Conventions applied to the conflict with al-Qaeda, the Court held that at a minimum CA3—applicable to non-international armed conflicts—did, and that the commissions fell short of its requirement for trial by a “regularly constituted court.”³⁶⁰ A four justice plurality would have held that conspiracy was not a triable war crime, but Justice Kennedy felt it was unnecessary to reach that issue and withheld his vote.³⁶¹

D. The Military Commissions Act of 2006 and Subsequent Developments

In deciding that the commissions exceeded the scope of congressional delegation, the Court left the door open for Congress to provide the President more specific legislative authorization addressing its concerns. Taking strategic advantage of the forthcoming 2006 elections, President Bush sought to ensure that outcome by drafting the legislation he wanted and then announcing the surprise transfer of fourteen “high value” detainees from secret CIA “black sites” to Guantánamo.³⁶² The President misrepresented commission history, claiming use “by Presidents from George Washington to Franklin Roosevelt to prosecute war criminals, because the rules for trying enemy combatants in a time of conflict must be different from those for trying common criminals or members of our own military.”³⁶³ He then placed the burden squarely on the Legislative Branch, declaring that “[a]s soon as Congress acts to authorize the military commissions I have proposed, the men our intelligence officials believe orchestrated the deaths of nearly 3,000 Americans on September the 11th, 2001, can face justice.”³⁶⁴

³⁵⁷ Sgt. Sara Wood, *Detainee Operations Will Continue at Guantanamo, Officials Say*, AM. FORCES PRESS SERVICE, June 29, 2006, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=15916>.

³⁵⁸ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2765 (2006).

³⁵⁹ *Id.* at 2790.

³⁶⁰ *Id.* at 2795.

³⁶¹ *Id.* at 2809 (Kennedy, J., concurring).

³⁶² See The White House, *President Discusses Creation of Military Commissions to Try Suspected Terrorists* (Sept. 6, 2006), <http://www.whitehouse.gov/news/releases/2006/09/20060906-3.html>. See also, Dep’t of Def., *Detainee Biographies*, <http://www.defenselink.mil/pdf/detaineebiographies1.pdf> [hereinafter *Biographies*].

³⁶³ The White House, *supra* note 362.

³⁶⁴ *Id.*

The Administration's legislation had a few positive attributes (which it could have unilaterally implemented at any time it chose), such as increasing the minimum trial panel from three to five, and creating a new two-tier appellate process similar to that for courts-martial.³⁶⁵ It banned evidence obtained by torture, but statements obtained through coercion were to be admissible unless the judge found them unreliable, and it would have overruled the Court's concern by formally authorizing exclusion of the accused when classified evidence was introduced.³⁶⁶ The draft also clarified that the DTA limitations on habeas review applied to all pending cases, not just those filed after its enactment.³⁶⁷

After some debate, the Republican-controlled 109th Congress passed the Military Commissions Act of 2006³⁶⁸ as one of its final measures, giving the President most of what he wanted. But to its credit, Congress did draw the line on secret evidence, restricting trial panels to hearing only evidence that the accused also heard, and assuring his right to be present unless excluded due to his own misconduct.³⁶⁹

The heart of the MCA is section 3, adding a new Chapter 47A to Title 10, U.S. Code following the current UCMJ that provides statutory guidance for trying "unlawful enemy combatants," who it defines as either:

(i) a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces); or

(ii) a person who . . . has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal [CSRT] or another competent tribunal established under the authority of the President or the Secretary of Defense.³⁷⁰

Section 948b of the U.S. Code declares that the UCMJ only applies where so provided in the MCA.³⁷¹ The UCMJ's speedy trial, self-incrimination, and pretrial investigation provisions are specifically declared inapplicable.³⁷² Section 948b also bars the introduction of military commission holdings into courts-martial, declares military commissions to be "regularly constituted court[s]" meeting the requirements of Geneva Common Article Three, and denies the 1949

³⁶⁵ The White House, Fact Sheet: The Administration's Legislation to Create Military Commissions (Sept. 6, 2006), *available at* <http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html>.

³⁶⁶ *Id.*

³⁶⁷ *Id.*

³⁶⁸ Military Commissions Act of 2006 (MCA), 10 U.S.C. §§ 948a–950w.

³⁶⁹ *Id.* § 949a.

³⁷⁰ *Id.* § 948a(1)(A).

³⁷¹ *Id.* § 948b(c).

³⁷² *Id.* § 948b(d).

Geneva Conventions as a source of individual rights.³⁷³ Section 949a authorizes the Secretary of Defense, in consultation with the Attorney General, to make specific rules of procedure, calling for commission principles of law and rules of evidence to conform with those for courts-martial to the extent practicable.³⁷⁴ Congress must be notified of commission rules sixty days before they take effect.³⁷⁵ This section specifically provides that hearsay is admissible if the opponent is given advance notice and the opportunity to demonstrate that it is “unreliable or lacking in probative value.”³⁷⁶ Although the accused must now be able to hear all the evidence against them, section 949d(d)(2) still allows proceedings to be closed to the public to avoid general disclosure of classified information.³⁷⁷

Overall the MCA brings the commission process much closer to the judicial form of a court-martial. Section 948j replaces the previous presiding officer with an actual military judge.³⁷⁸ Section 950f creates a new first tier appellate review consisting of one or more panels of three appellate military judges called the “Court of Military Commission Review” (CMCR), limited to reviewing matters of law.³⁷⁹ This parallels the first tier of court-martial review, the service Court of Criminal Appeals, except that the latter has authority to “weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact.”³⁸⁰ The MCA then retains the DTA’s reliance on the U.S. Court of Appeals for the D.C. Circuit as its second tier review,³⁸¹ whereas the UCMJ established the Court of Appeals for the Armed Forces (CAAF) consisting of five civilian judges.³⁸² Keeping DTA limitations on appellate review, the D.C. Circuit remains limited to considering whether the result was consistent with the MCA and “to the extent applicable, the Constitution and the laws of the United States.”³⁸³ The Supreme Court is then authorized to review the circuit court’s final judgments by writ of certiorari.³⁸⁴ Section 950j establishes the finality of military commission judgments, subject only to the review provided by the act. It explicitly states that “no court, justice, or judge” has jurisdiction to hear any other claim related to military commissions, including any pending at the time of MCA enactment.³⁸⁵ This comprehensive effort to strip federal courts of

³⁷³ *Id.* § 948b(e)–(g).

³⁷⁴ *Id.* § 949a(a).

³⁷⁵ *Id.* § 949a(d).

³⁷⁶ *Id.* § 949a(b)(2)(E).

³⁷⁷ *Id.* § 949d(d)(2).

³⁷⁸ *Id.* § 948j.

³⁷⁹ *Id.* § 950f.

³⁸⁰ 10 U.S.C. § 866(c) (2000).

³⁸¹ MCA § 950g.

³⁸² 10 U.S.C. §§ 941–945 (2000).

³⁸³ MCA § 950g(c).

³⁸⁴ *Id.* § 950g(d).

³⁸⁵ *Id.* § 950j(b).

all collateral jurisdiction over military commissions is one of the most controversial provisions of the MCA.³⁸⁶ It is a clear departure from past practice—historically both courts-martial and military commissions have always been open to collateral review.³⁸⁷

The MCA specifies crimes triable by military commission. Based on both its wording and the order in which the offenses appear, this portion was clearly modeled on MCI No. 2.³⁸⁸ The MCA adds several new offenses, however, most significantly “providing material support for terrorism” in section 950v(b)(25).³⁸⁹ One substantive improvement over MCI No. 2 is that the statute clarifies that “aiding the enemy” now explicitly requires that the accused “breach . . . an allegiance or duty to the United States, [and] knowingly and intentionally aid[] an enemy of the United States, or one of the co-belligerents of the enemy.”³⁹⁰ The MCA proclaims that it codifies existing offenses “traditionally” triable by military commissions and therefore does “not preclude trial for crimes that occurred before the date of the enactment.”³⁹¹ But this blanket declaration does nothing to resolve the problematic offenses included in MCI No. 2, such as conspiracy. And while providing material support to terrorism is clearly an offense against U.S. federal law,³⁹² its trial as a war crime seems unprecedented.

In providing an explicit statutory foundation for the commissions, the MCA returned the process to square one, invalidating all the existing procedural directives and pending charges which were ultimately derived from the President’s 2001 military order. President Bush would quietly replace his original order with an abbreviated new version in February 2007, which “established” new commissions consistent with the MCA.³⁹³

The Appointing Authority, John Altenburg, oversaw the hurried initial compilation of a rule manual implementing the MCA but after submitting the draft in October 2006, he resigned to return to private practice.³⁹⁴ The final version was formally promulgated in mid-January

³⁸⁶ For detailed academic discussion of the MCA, see Detlev F. Vagts, *Military Commissions: A Concise History*, 101 AM. J. INT’L L. 35 (2007), and Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT’L L. 322 (2007).

³⁸⁷ See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* § 17-23 (6th ed. 2004) (describing collateral review of courts-martial). Part II *supra* describes military commission habeas challenges reaching the Supreme Court.

³⁸⁸ Compare MCI No. 2, *supra* note 150, with MCA § 950v(b).

³⁸⁹ MCA § 950v(b)(25).

³⁹⁰ *Id.* § 950v(b)(26).

³⁹¹ *Id.* § 950p.

³⁹² See, e.g., 18 U.S.C. §§ 2339A–2339B (2000).

³⁹³ Press Release, White House, Executive Order Trial of Alien Unlawful Enemy Combatants by Military Commission (Feb. 14, 2007), available at <http://www.whitehouse.gov/news/releases/2007/02/print/20070214-5.html>.

³⁹⁴ Jess Bravin, *Head of Military Commission Quits*, WALL ST. J. ONLINE, Nov. 15, 2006, <http://blogs.wsj.com/washwire/2006/11/15/head-of-military-commissions-quits/?mod=blogs>.

2007 as the Manual for Military Commissions (MMC).³⁹⁵ Modeled on the Manual for Courts-Martial (MCM), the MMC provided the detailed rules of procedure and evidentiary guidelines mandated by the MCA.³⁹⁶

The new Secretary of Defense, Robert M. Gates, appointed Judge Susan Crawford as Altenburg's successor with the new job title of "Convening Authority" rather than the previous "Appointing Authority."³⁹⁷ On paper, the selection of a civilian judge looked like a positive development for commission fairness. The press release announcing her appointment proclaimed:

A veteran lawyer of 30 years, Crawford served as a member of the court of appeals [for the Armed Forces] bench from 1991–2006 and also served as general counsel of the Army, special counsel to the secretary of defense, and inspector general of the Department of Defense. . . .

A noted expert on military law, the depth and breadth of her experiences as a lawyer and judge over three decades was taken into consideration for this appointment.³⁹⁸

Although unstated, it is highly likely that her ties to senior Administration officials and significant pro-government bias during her tenure on the CAAF factored into her selection. The Washington Post describes Crawford as "a Cheney loyalist who served in four positions under the future vice president at the Pentagon."³⁹⁹ An analysis of the 136 CAAF decisions during the last two years of her tenure (the 2005 and 2006 terms) is also revealing. The court ruled for the government in fifty-six percent of the cases it heard (76 of 136) but Crawford stood alone at the forefront, voting that way seventy-eight percent of the time while the next closest judge came in at sixty percent.⁴⁰⁰ She never voted for a defendant unless all four other judges were on that side, and in several of these cases she wrote separately trying to limit the scope of her colleagues' holdings.⁴⁰¹ Crawford authored just one of the court's sixty

³⁹⁵ DEP'T OF DEF., THE MANUAL FOR MILITARY COMMISSIONS (2007), *available at* <http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf> [hereinafter MMC].

³⁹⁶ DEP'T OF DEF., *Foreword to MMC*.

³⁹⁷ *See* Press Release, Dep't of Def., Seasoned Judge Tapped to Head Detainee Trials (Feb. 7, 2007), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=10493>.

³⁹⁸ *Id.*

³⁹⁹ Washington Post.com, Angler: The Cheney Vice Presidency, Cast of Characters, http://blog.washingtonpost.com/cheney/about/cast_of_characters.

⁴⁰⁰ Opinions organized by term for the last decade are available at the official website of the Court of Appeals for the Armed Forces, <http://www.armfor.uscourts.gov/Opinions.htm>. A spreadsheet documenting the votes of each judge for cases decided during the 2005 and 2006 terms is on file with the author.

⁴⁰¹ *See, e.g.*, United States v. Rodriguez-Rivera, 63 M.J. 372, 386–87 (C.A.A.F. 2006) (J. Crawford concurring).

rulings against the government, a modest holding that a replacement military judge who had not presided over the actual court-martial should have held a hearing before denying the defendant's motion for a new trial.⁴⁰² Every other judge wrote at least seven majority opinions ruling against the government during this period while a "fair" share would have been one-fifth of the sixty decisions, or twelve. The majority of Crawford's written opinions over these two years, thirty of fifty-nine, were dissents from rulings granting relief to a defendant.

Although its government had backed the Bush Administration's military commission policy from the outset, Australian public opposition grew during Hick's years in detention.⁴⁰³ (Australia's only other detainee, Mamdouh Habib, was released after Altenburg decided there was insufficient evidence to press charges even though he likely had advance knowledge of 9/11).⁴⁰⁴ Facing an upcoming election, the Australian government finally demanded that the Bush Administration either press on smartly with Hicks' trial or release him.⁴⁰⁵ This was the result, at least in part, of an extended campaign in Australia by Hicks' military attorney, Dan Mori, to stimulate public pressure on behalf of his client in the belief that he was unlikely to prevail in the courtroom.⁴⁰⁶ In February 2007, Cheney promised Prime Minister John Howard that "Hicks is near the head of the queue" for trial, that he could serve any sentence awarded in Australia, and that he would be given credit for time spent in detention.⁴⁰⁷ Less than a week later, Crawford referred Hicks to trial on the single charge of "providing material support for terrorism."⁴⁰⁸ The Chief Prosecutor, meanwhile, reportedly threatened Mori with prosecution for his lobbying on behalf of his client,⁴⁰⁹ conduct that itself seemed to violate an MCA prohibition against coercing "the exercise of professional judgment by . . . defense counsel."⁴¹⁰

On March 26, Hicks appeared before the first military commission convened since the *Hamdan* decision. Observers describe him as looking very tired and his father told the media that the government was

⁴⁰² United States v. Meghdadi, 60 M.J. 438 (C.A.A.F. 2005).

⁴⁰³ SALES, *supra* note 6, at 212–13.

⁴⁰⁴ *Id.* at 191–92.

⁴⁰⁵ *Id.* at 215–16.

⁴⁰⁶ *Id.* at 221–23.

⁴⁰⁷ ABC Online, *Cheney Says Hicks Will be Among First Detainees Tried*, Feb. 24, 2007, <http://www.abc.net.au/news/newsitems/200702/s1856137.htm>.

⁴⁰⁸ See Charge Sheet, United States v. Hicks, No. 04-0001 (Military Comm'n 2007), available at <http://www.defenselink.mil/news/d20070301hicks.pdf>; Dep't of Def., Military Commission Charges Referred (Mar. 1, 2007) available at <http://www.defenselink.mil/releases/release.aspx?releaseid=10563>.

⁴⁰⁹ Tom Allard, *Hicks Lawyer Faces Removal from Case*, SYDNEY MORNING HERALD, Mar. 5, 2007.

⁴¹⁰ MCA § 949b(a)(2).

continuing to disrupt his sleep.⁴¹¹ Despite the replacement of the ad hoc collection of orders, instructions, and memoranda governing the previous commission process with the MCA and MMC, observers still reported a session “marked by ad hoc decision-making.”⁴¹² The military judge, Colonel Ralph Kohlman, asked Hicks if he was satisfied with his defense team. Hicks replied that he wanted more help to match the prosecution’s resources.⁴¹³ Kohlman then declared one of Hicks’s attorneys ineligible to represent him because she was a civilian government employee and under his strained interpretation of the MCA did not fall within the criteria for either military or civilian defense counsel.⁴¹⁴ It got worse:

[Kohlman] asked Joshua Dratel, Hicks’s long-time civilian counsel, to sign a form stating he would comply with applicable regulations. Dratel explained . . . that he could not ethically agree to comply with regulations that did not yet exist. . . . Dratel therefore offered a compromise: instead of signing a document that said he would comply with “all applicable regulations”, Dratel was willing to say he would comply with “all *existing* regulations”. Kohlmann was not satisfied and held that Dratel was not qualified to serve as Hicks’s civilian counsel.⁴¹⁵

Within minutes Hicks had lost two-thirds of his defense team and every subsequent ruling that day reportedly went against him as well.⁴¹⁶ Later that evening Hicks decided to plead guilty, accepting a deal worked out by his attorneys and the convening authority without the prosecution’s participation. The Chief Prosecutor said he wasn’t considering anything less than ten years, but the agreed deal required Hicks to serve only nine more months.⁴¹⁷ Hicks also had to declare that he had not been mistreated and remain silent about his activities for a year, well after the latest possible date for the Australian election.⁴¹⁸ The plea mooted

⁴¹¹ See SALES, *supra* note 6, at 214; Hina Shamsi, Military Commission Trial Observation (Mar. 27, 2007), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-032707-shamsi.asp.

⁴¹² Shamsi, *supra* note 411.

⁴¹³ SALES, *supra* note 6, at 217.

⁴¹⁴ Record of Trial at 45–60, United States v. Hicks, No. 04-0001 (Military Comm’n 2007), available at <http://www.defenselink.mil/news/commissionsHicks.html> (follow “Record of Trial” hyperlink). This 544-page .pdf file is a collection of a number of individual documents and lacking coherent pagination. For simplicity, all page cites to this source are to the .pdf pagination generated by Adobe Acrobat Reader.

⁴¹⁵ Shamsi, *supra* note 411.

⁴¹⁶ *Id.*

⁴¹⁷ Josh White, *Prosecutors Left Out of Deal With Australian Detainee*, VIRGINIAN-PILOT & LEDGER-STAR, Apr. 1, 2007.

⁴¹⁸ See *id.* The full text of the plea agreement can be found in Hicks, Record of Trial *supra* note 414, at 513–17.

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consideration of a motion the defense had filed requesting relief based on improper conduct by the Chief Prosecutor.⁴¹⁹

The government sought to portray Hicks's "conviction" as a victory,⁴²⁰ but realistically it represents a combination of U.S. concessions to a close ally and Hicks's realization that it was better to plead to an offense over which the commission lacked jurisdiction and go home, rather than continue contesting his guilt before a biased tribunal.

The next month DOD issued the "Regulation for Trial by Military Commissions," complementing the guidance of the MCA and MMC.⁴²¹ Hicks's rushed appearance before trial rules were finalized thus clearly suggests that it was a political accommodation for a favored ally rather than an orderly exercise of due process.

Buoyed by its self-proclaimed success with Hicks, the government then referred new charges against both Hamdan and Khadr. Hamdan was again charged with conspiracy as well as providing material support for terrorism.⁴²² Khadr faced an even more robust spread of charges, including murder and attempted murder in violation of the law of war, conspiracy, providing material support for terrorism, and spying.⁴²³

Proceedings resumed at Guantánamo on June 4, 2007, as Khadr and Hamdan faced arraignment. Both sessions were short-lived as the military judges, Colonel Brownback in Khadr's case and Navy Captain Keith J. Allred in Hamdan's, dismissed the charges without prejudice due to lack of jurisdiction under the MCA.⁴²⁴ In Khadr's case the issue was raised *sua sponte* by Brownback; Khadr wanted to be represented only by Canadian counsel and his newly assigned military defense attorney said he could not speak for him because he had not yet met with him.⁴²⁵ Nevertheless Brownback decided that the case could not proceed since the MCA limited commission jurisdiction to "unlawful enemy combatants" but

⁴¹⁹ See Record of Trial *supra* note 414, at 516.

⁴²⁰ See, e.g., Press Release, Dep't of Def., Detainee Convicted of Terrorism Charge at Guantanamo Trial (Mar. 30, 2007), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=10678>.

⁴²¹ See Dep't of Def., Regulation for Trial by Military Commissions (Apr. 27, 2007), available at http://www.defenselink.mil/news/Apr2007/Reg_for_Trial_by_mcm.pdf.

⁴²² Charge Sheet at 3, United States v. Hamdan, No. 04-0004, (Military Comm'n Jul. 13, 2004), available at http://www.defenselink.mil/news/May2007/Hamdan_Charges.pdf.

⁴²³ Charge Sheet, United States v. Khadr, No. 05-0008 (Military Comm'n Apr. 5, 2007), available at <http://www.defenselink.mil/news/Apr2007/Khadrreferral.pdf>.

⁴²⁴ Priti Patel, Is This the End of the Military Commissions? (June 5, 2007), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-060507-patel.asp.

⁴²⁵ Priti Patel, Back to Guantanamo One Year Later (June 4, 2007), http://www.humanrightsfirst.org/us_law/detainees/gitmo_diary/post-060407-patel.asp; Sgt. Sara Wood, *Charges Dismissed Against Canadian at Guantanamo*, AM. FORCES PRESS SERVICE, June 4, 2007 available at <http://www.defenselink.mil/news/newsarticle.aspx?id=46281>.

Khadr's earlier CSRT had found him to be only an "enemy combatant" under different legal criteria.⁴²⁶ Captain Allred then heard a defense motion arguing that Hamdan's charges should be dismissed on the same ground. He, too, ruled that the government had failed to determine "that the accused is an 'unlawful enemy combatant' using the definition established by Congress" and thus "has not shown . . . that the accused is subject to the jurisdiction of this Commission."⁴²⁷ Allred noted that the government had several options, including holding a new CSRT to make the required determination.⁴²⁸ It seems inexplicable that the government was unprepared for these rulings, having specifically required that Hicks acknowledge that he was "an alien unlawful enemy combatant, as defined by the [MCA]" in his plea two months prior.⁴²⁹

Logically, the simplest response would have been for the government to modify its CSRT directive to call for the tribunals to consider the specific finding required by the MCA and then hold new status review hearings for Hamdan and Khadr. Judge Allred even suggested that the evidence presented at the initial CSRTs might be sufficient to support the new requirement.⁴³⁰ Instead, the government sought an immediate appeal to the new CMCR defined by the MCA. While it was entirely predictable that the renewed hearings could generate interlocutory questions requiring review, the government had not bothered to have the appellate court up and running in its haste to resume the commission proceedings. Although not announced at the time, Rumsfeld had appointed one of the members of his initial military commission review panel, former Attorney General Griffin Bell, to a CMCR judgeship before his own departure from DOD in December 2006.⁴³¹ Additional judges had been appointed in May 2007,⁴³² but the court lacked any organization, structure, or rules of procedure at the time the commissions resumed. After two months of frenetic activity to rectify these shortfalls, the prosecution's appeal was heard on August 24, 2007.⁴³³ Thanks to procedural shortcuts taken, however, the court had to

⁴²⁶ Wood, *supra* note 425.

⁴²⁷ Order Granting Motion to Dismiss for Lack of Jurisdiction, *United States v. Hamdan*, No. 04-0004 (Military Comm'n June 4, 2007), *available at* <http://www.nimj.com/documents/Hamdan%20Order.pdf>.

⁴²⁸ *Id.*

⁴²⁹ SALES, *supra* note 6, at 274.

⁴³⁰ Order Granting Motion to Dismiss for Lack of Jurisdiction, *supra* note 427, at 3.

⁴³¹ *See* Ruling on Motion to Abate at 1, *United States v. Khadr*, C.M.C.R. No. 07-001 (Military Comm'n Sept. 24, 2007), *available at* [http://www.defenselink.mil/news/Sep2007/Khadr%20USCMCR%20Order%20RE%20Abatement%20\(24%20Sept%202007\)%20\(6%20pages\).pdf](http://www.defenselink.mil/news/Sep2007/Khadr%20USCMCR%20Order%20RE%20Abatement%20(24%20Sept%202007)%20(6%20pages).pdf).

⁴³² *Id.*

⁴³³ William Glaberson, *Military Says It Can Repair Guantánamo Trial Defects*, N.Y. TIMES, Aug. 25, 2007, at A9, *available at* <http://www.nytimes.com/2007/08/25/us/nationalspecial3/25gitmo.html?th&emc=th>.

hear both the prosecution's original jurisdictional appeal and challenges by the defense team to its own hasty establishment.⁴³⁴

The CMCR handed down its decision in Khadr's case in two parts on September 24, 2007. First, it rejected the challenges to the court's establishment in a ruling on a defense motion to abate the appellate proceedings.⁴³⁵ It then agreed with the trial judges that the government had not properly established the commissions' jurisdiction over the defendants because they had never been found to be "unlawful enemy combatants" under the definition established in the MCA. But, the CMCR concluded, the military commissions had jurisdiction to hear evidence on this point and the judges could rule on their own jurisdiction before proceeding with the rest of the trial.⁴³⁶ The case was thus remanded to the trial judge to conduct the necessary jurisdictional proceedings, and proceedings resumed towards a scheduled May 2008 trial date.⁴³⁷ Similarly, the judge overseeing Hamdan's case reached a finding that he was an "unlawful enemy combatant" and the commission had jurisdiction.⁴³⁸ With this issue resolved, the government proceeded to schedule a May 2008 trial for him.⁴³⁹ It also has taken steps towards recharging previous defendants al-Bahlul⁴⁴⁰ and al-Qosi⁴⁴¹ as well as bringing new charges against two additional low-level figures, Ahmed Mohammed Ahmed Haza al-Darbi⁴⁴² and Mohammed Jawad.⁴⁴³

⁴³⁴ See U.S. Court of Military Comm'n Review, Scheduled Hearing, *available at* <http://www.defenselink.mil/news/Aug2007/Khadr%20Issues%20for%20Oral%20Argument.pdf>.

⁴³⁵ Ruling on Motion to Abate, *supra* note 431, at 4.

⁴³⁶ United States v. Khadr, C.M.C.R. No. 07-001, (Military Comm'n Sept. 24, 2007), *available at* [http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20\(24%20Sep%2007\)\(25%20pages\).pdf](http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20(24%20Sep%2007)(25%20pages).pdf).

⁴³⁷ Schedule for Trial, United States v. Khadr, C.M.C.R. No. 07-001 (Military Comm'n Nov. 28, 2007), *available at* <http://www.defenselink.mil/news/Nov2007/Khadr%20Trial%20Schedule%20MCTJ%20Official%20%2028%20Nov%2007.pdf>.

⁴³⁸ On Reconsideration Ruling on Motion to Dismiss for Lack of Jurisdiction, United States v. Hamdan, No. 04-0004 (Military Comm'n Dec. 19, 2007), *available at* <http://www.defenselink.mil/news/Dec2007/Hamdan-Jurisdiction%20After%20Reconsideration%20Ruling.pdf>.

⁴³⁹ Final Trial Schedule, United States v. Hamdan, No. 04-0004 (Military Comm'n Dec. 20, 2007), *available at* <http://www.defenselink.mil/news/Dec2007/Hamdan%20MCTJ%20Trial%20Schedule%2012%2020%202007.pdf>.

⁴⁴⁰ See Charge Sheet, United States v. al Bahlul, No. 04-0003 (Military Comm'n Feb. 8, 2008) *available at* <http://www.defenselink.mil/news/Feb2008/d20080208bahlul.pdf>.

⁴⁴¹ See Charge Sheet, United States v. al Qosi, No. 04-0002 (Military Comm'n Feb. 8, 2008), *available at* <http://www.defenselink.mil/news/Feb2008/d20080208qosi.pdf>.

⁴⁴² See Charge Sheet, United States v. al Darbi (Military Comm'n Dec. 20, 2007), *available at* <http://www.defenselink.mil/news/d20071220darbi1.pdf>.

⁴⁴³ Press Release, Dep't of Def., Military Commission Charges Referred (Jan. 31, 2008), *available at* <http://www.defenselink.mil/releases/release.aspx?releaseid=11655>.

Meanwhile, the military commission saga took another odd turn on October 5, 2007, as Chief Prosecutor Colonel Morris Davis announced his sudden resignation. Subsequent reporting indicates he did so in response to partisan political pressures to complete trials of high-level terrorists prior to the November 2008 elections.⁴⁴⁴ This pressure included a desire by seniors in the military commission hierarchy that he conduct closed sessions using classified evidence, despite the fact that any such hearings would undoubtedly impair the tribunal's public credibility.⁴⁴⁵

At the time it seemed odd that the government would be so willing to alienate the single most articulate public defender of the military commission process.⁴⁴⁶ But the underlying motivation was confirmed in February 2008, with the surprise announcement that Davis' successor was asking the Convening Authority to approve capital charges and a joint trial against six high-level figures accused of conspiring to plan and carry out the 9/11 attacks.⁴⁴⁷ At least that was the public pronouncement. But it would seem a remarkable coincidence that construction of a dedicated courtroom capable of accommodating precisely six defendants had begun five months earlier to the day, i.e., on September 11, 2007.⁴⁴⁸ And given that the State Department was able to transmit a detailed defense of the prosecutions to every diplomatic post around the world later that same day, it seems likely that the decision was already vetted at a high level within the Administration.⁴⁴⁹ If so, Convening Authority approval is a preordained conclusion rather than the independent determination called for by the MCA. And in any event, the fact that the senior 9/11 planner being charged, Khalid Sheik Mohammed, is known to have been subjected to waterboarding prior to making admissions of his role is certain to taint world opinion of his trial.⁴⁵⁰

Human Rights First's observer Priti Patel perhaps best summed up the first three years of actual commission proceedings when she noted that "the military commissions are like a game of whack-a-mole—just when the administration thinks it has taken care of one emerging crisis,

⁴⁴⁴ See, e.g., Josh White, *Ex-Prosecutor Alleges Pentagon Plays Politics*, WASH. POST, Oct. 20, 2007 at A3.

⁴⁴⁵ *Id.*

⁴⁴⁶ See, e.g., Morris D. Davis, *In Defense of Guantanamo*, 117 YALE L.J. POCKET PART 21 (2007), <http://thepocketpart.org/2007/08/13/davis.html>.

⁴⁴⁷ William Glaberson, *U.S. Seeking Execution for 6 in Sept. 11 Case*, N.Y. TIMES, Feb. 11, 2008, available at http://www.nytimes.com/2008/02/11/us/11gitmo.html?_r=1&bl&ex=1202878800&en=5b2e43ca6568b375&ei=5087&oref=slogin.

⁴⁴⁸ Andy Worthington, *Guantanamo Trials: Where Are the Terrorists?* (Feb. 8, 2008), <http://www.andyworthington.co.uk/?p=222>.

⁴⁴⁹ Matthew Lee, *US Compares 9/11 Trials to Nuremberg*, LAS VEGAS REV.-J., Feb. 12, 2008, available at http://hosted.ap.org/dynamic/stories/S/SEPT_11_TRIALS_NAZIS?SITE=NVLAS&SECTION=HOME&TEMPLATE=DEFAULT

⁴⁵⁰ *Id.*

another appears.”⁴⁵¹ While the government is determined to press on with hearings at Guantánamo, substantially raising the stakes with capital prosecutions of high-value detainees before it has managed to conclude a single low-level trial, these renewed proceedings will be challenged on a number of grounds, both substantive and procedural, legal and political. Moreover, prevailing in the courtroom will be insufficient to establish the commissions’ credibility. The trials must be perceived as fair in the court of public opinion, which seems most unlikely given their history to date and the unresolved issues with many aspects of commission procedure.

IV. ASSESSMENT OF CURRENT MILITARY COMMISSION PROCEDURES

Viewed objectively, commissions conducted under the MCA rules are a substantial improvement over those originally envisioned back in 2001. But the fundamental issue is not whether they have gotten better; it is whether they are now sufficiently fair to comply with international legal standards and to merit general public acceptance of their verdicts. Despite the improvements, the remaining problems are so significant that they undermine the viability of continued commission employment.

A. *Problematic Charges*

For a full year after the President insisted that legislation was urgently required to permit bringing those responsible for 9/11 to justice, only three low-ranking individuals (Hamdan, Hicks, and Khadr) had been charged with offenses under MCA. Although it might be hoped that the government would have learned by this point to choose its legal ground more carefully, each case still had potentially fatal jurisdictional flaws.

For Hicks the issue was whether providing material support to terrorism, a federal crime since 1994 (at least if committed in the United States),⁴⁵² was also triable by a military commission applying the law of war. Logically he could have challenged this issue even after his plea via a petition for habeas corpus in the United States (if not precluded by MCA jurisdiction stripping) or in Australia, another heir of the English common law. This option was facially foreclosed by terms of his plea agreement, however, which required Hicks to waive “all rights to appeal or collaterally attack my conviction . . . under . . . United States or Australian law.”⁴⁵³ Nevertheless, it will forever tarnish the legacy of Hicks “conviction.”⁴⁵⁴

The government seemingly doubled its chances by charging Hamdan with two offenses: conspiracy, even though four Supreme Court

⁴⁵¹ Patel, *supra* note 424.

⁴⁵² See 18 U.S.C. § 2339A (2000).

⁴⁵³ SALES, *supra* note 6, at 275.

⁴⁵⁴ See, e.g., SALES, *supra* note 6, at 214–15.

Justices have already rejected this offense as applied to him,⁴⁵⁵ and the same potentially flawed material supports the charge Hicks faced.⁴⁵⁶ It seems almost certain that Hamdan, having already been to the Supreme Court once, would ultimately challenge any finding of guilt in the courts. So it is extremely likely that these issues will be litigated further if he is ever convicted, and it is far from certain that it would stand up to judicial challenge.

Khadr faces five charges.⁴⁵⁷ Two of these—conspiracy and providing material support—raise the same issues as Hamdan’s. The other three are unique to his case but equally problematic under the factual circumstances. Khadr is charged with “murder in violation of the law of war” for killing a U.S. Army non-commissioned officer with a hand grenade during the engagement in which he was badly wounded and captured, and with “attempted murder in violation of the law of war” for allegedly planting improvised explosive devices.⁴⁵⁸ Finally, he is charged with “spying” for conducting covert surveillance of U.S. convoys in Afghanistan in June 2002.⁴⁵⁹

The murder and attempted murder charges reveal a fundamental contradiction in the U.S. effort to apply the law of war to suspected terrorists. In war time persons legally divide into two broad categories—combatants and non-combatants. Combatants may be killed on sight, but in exchange are privileged to commit acts of violence for which they are immunized from domestic prosecution. Non-combatants are generally exempt from direct attack, but in exchange for this protection have no lawful right to participate in hostilities; they may be deliberately killed only when they are participating in hostilities, but are liable to prosecution for any of their acts of violence.⁴⁶⁰ In other words, they are essentially placed in the role of criminals in our ordinary domestic experience with military forces, like police officers, able to shoot them in self-defense or to prevent the commission of a serious offense. The flaw in the U.S. approach is that it wants to have it both ways, treating its adversaries as being both subject to being killed wherever found like traditional combatants, yet also denied legal authority to fight, as are non-combatants. If upheld, Khadr would have the legal status of a deer during hunting season—fair game for coalition forces to kill at will yet possessing no right to fight back. He might save himself by surrendering, but a key distinction between the law of war and that of ordinary domestic policing is that under the former, one need not offer the opportunity to surrender before firing, merely having to accept a

⁴⁵⁵ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2780 (2006).

⁴⁵⁶ See Charge Sheet, *supra* note 408, at 3.

⁴⁵⁷ See Charge Sheet, *supra* note 423.

⁴⁵⁸ See *id.*

⁴⁵⁹ *Id.*

⁴⁶⁰ See, e.g., A.P.V. ROGERS, *LAW ON THE BATTLEFIELD* 8 (2d. ed. 2004).

surrender *if* it is offered.⁴⁶¹ Any conviction on these charges will therefore be subject to both extensive legal appeal and serious public criticism.

Unlike the other charges, spying *is* clearly an offense historically triable by military commission and jurisdiction was plainly authorized by the existing language of the UCMJ at the time of Khadr's acts.⁴⁶² The problem here is in the application of the law to the facts rather than the law itself. The law of war authorizes trying spying (which is distinct from espionage, a separate offense under U.S. domestic law)⁴⁶³ only if the accused is caught behind enemy lines. Once a spy successfully rejoins their own force, or returns to their lines, they are exempt from future prosecution for that act.⁴⁶⁴ Khadr's charge sheet accuses of him spying "in or about June 2002" but then alleges he received additional training and engaged in open combat against coalition forces the next month.⁴⁶⁵ So the charge sheet provides prima facie evidence that he successfully rejoined his force after the alleged June spying, and he thus cannot lawfully be prosecuted for it.

Commission jurisdiction over all three defendants is therefore highly problematic. Even if the government proves all the conduct alleged, it is unclear that it constitutes law of war violations properly subject to military trial. Insistence on pursuing these charges calls into serious question the government's commitment to the rule of law. This issue is likely to be present even in the case of the six high ranking detainees as each of them is charged with "conspiracy" as a substantive offense⁴⁶⁶ despite the well-documented issue with this charge.

B. *Flawed Rules of Evidence*

Should subject matter jurisdiction be established, the most troublesome area of current military commission trial procedure is the potential for convictions based entirely on untrustworthy evidence. Regardless of whether interrogation practices employed in the so-called "war on terror" rise to the level of "torture" or even constitute lesser violations of law, it is clear that detainees have been deliberately

⁴⁶¹ See *id.* at 48 (describing the modern obligation to accept surrender).

⁴⁶² See 10 U.S.C. § 906 (2000).

⁴⁶³ See 10 U.S.C. § 906a, 18 U.S.C. § 794 (2000).

⁴⁶⁴ This admittedly counterintuitive rule is explicitly explained in Article 31 of the 1907 Hague Regulations concerning the Laws and Customs of War on Land, annexed to the 1907 Hague Convention (IV) respecting the Laws and Customs of War on Land. The real significance of this lies in the fact that since judgment of the 1946 Nuremberg Tribunal, these rules have formally been considered to be declaratory of customary international law. See, e.g., DOCUMENTS ON THE LAWS OF WAR 68 (Adam Roberts & Richard Guelff eds., 3d. ed. 2000). The full text of the 1907 Regulations are found at 73–82.

⁴⁶⁵ Charge Sheet, *supra* note 423.

⁴⁶⁶ Press Release, Dep't of Def., Sept. 11 Co-Conspirators Charged (Feb. 11, 2008), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=11682>.

subjected to significantly coercive interrogations as a matter of U.S. policy.⁴⁶⁷ Aside from legitimate questions of the fairness of basing convictions on self-incrimination, an even more fundamental issue is the credibility of information obtained under these circumstances. A number of former U.S. detainees report making false admissions simply to end the pressure placed on them.⁴⁶⁸ Hicks' plea colloquy, which provides the best available indication of the government's evidence, revealed that a trial would have depended almost entirely on statements made by the defendant and other detainees.⁴⁶⁹ The MCA bars evidence obtained via torture per se, but that protection is of limited application given how narrowly the Administration has sought to define torture.⁴⁷⁰ But of more concern, it allows the military judge considerable latitude to admit evidence obtained via coercion. To admit evidence obtained prior to the 2005 DTA (presumably that likely to be used against the individuals first charged in 2004), the judge need only find that "(1) the totality of the circumstances renders the statement reliable and possessing sufficient probative value; and (2) the interests of justice would best be served by admission of the statement into evidence."⁴⁷¹

This issue becomes even more significant when coupled with the MCA's provision allowing the introduction of hearsay.⁴⁷² Some of the early criticism of commission hearsay admission was essentially just vocalization of longstanding Anglo-American common law rules.⁴⁷³ Commission proponents respond by arguing that past and current international criminal tribunals have consistently allowed this evidence,⁴⁷⁴ ignoring the distinction that those courts feature experienced civil law system judges vice the "lay" panel members employed in military commissions. It is theoretically possible that hearsay could be used to the defendant's advantage, particularly given the likelihood that potential defense witnesses from Muslim countries would be unwilling to risk travel to Guantánamo for fear of ending up in custody themselves. This was actually the case during trials conducted by the Navy on Guam after World War II, when requests from both prosecution and defense for

⁴⁶⁷ See generally DAVID ROSE, GUANTÁNAMO: THE WAR ON HUMAN RIGHTS 81–129 (2004); ERIK SAAR & VIVECA NOVAK, INSIDE THE WIRE (2005).

⁴⁶⁸ See, e.g., ROSE, *supra* note 467, at 121.

⁴⁶⁹ See Record of Trial, *supra* note 414, at 117–19.

⁴⁷⁰ See Memorandum from Daniel Levin, Acting Assistant Attorney Gen., to James B. Comey, Deputy Attorney Gen. (Dec. 30, 2004), reprinted in THE TORTURE DEBATE IN AMERICA, *supra* note 8, at 361–76 (providing updated definition of torture to replace the infamous "torture memo" of August, 2002, which is reproduced starting on page 317).

⁴⁷¹ MCA § 948r(c). Statements made after the DTA's enactment must meet the additional requirement of not having been obtained through treatment constituting "cruel, inhuman, or degrading treatment" as defined by that act. See *id.* § 948r(d)(3).

⁴⁷² *Id.* § 949a(b)(2)(E).

⁴⁷³ See, e.g., Andrew Buncombe, *Campaign Against Terrorism*, INDEPENDENT, Dec. 29, 2001.

⁴⁷⁴ See, e.g., Davis, *supra* note 446.

hearsay admission were considered on a case-by-case basis.⁴⁷⁵ But the fundamental concern at Guantánamo must be that the government would seek the admission of statements obtained from third parties through coercion. Without the opportunity to question the declarant, the defense would be unable to meet its burden of demonstrating the evidence's unreliability to the judge, enabling the government to avoid even the MCA's limited restrictions on coerced testimony.

This issue may be further exacerbated by limits on discovery disadvantaging the defense. First, the government has no obligation to reveal exculpatory information unless it is "known to trial counsel."⁴⁷⁶ Interrogators and intelligence personnel can thus shield the government from any obligation to reveal information helpful to the defense by ensuring that they only turn over adverse information to the prosecution. It appears that this type of "shield" has already been employed to keep exculpatory information out of the hands of the CSRTs determining who qualifies for detention and trial.⁴⁷⁷ And while the defendant must be given access to any evidence actually introduced against him at trial, the prosecution may be authorized to keep classified details about sources and methods even from properly cleared defense counsel,⁴⁷⁸ impairing their ability to challenge its credibility.

These concerns are all too real. Several prosecutors have already voiced concern that the government concealed knowledge that detainees had been tortured.⁴⁷⁹ Marine Lieutenant Colonel Stuart Couch returned to active duty to "get a crack at the guys who attacked the United States" but then felt ethically compelled to refuse to:

prosecute Mohamedou Ould Slahi, who he considers to be the Guantanamo detainee with "the most blood on his hands." Couch found that his prosecution was undermined because the prisoner had made incriminating statements—after being beaten, subjected to extreme temperatures, sexually humiliated and told that his family would be incarcerated and his mother raped.⁴⁸⁰

Given the well-documented history of harsh treatment sanctioned by the government, *any* military commission convictions based on *any* statements made by detainees during interrogations not required to conform to U.S. constitutional standards are certain to be viewed as fundamentally flawed. The Malmédy experience provides clear warning

⁴⁷⁵ See Glazier, *supra* note 32, at 2070, 2088.

⁴⁷⁶ MCA § 949j(d).

⁴⁷⁷ See Petitioner's Reply Brief to Opposition to Petition for Rehearing at 1–2, *Al Odah v. United States*, No. 06-1196 (June 15, 2007), available at <http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf>.

⁴⁷⁸ MCA § 949j(c)(2).

⁴⁷⁹ Neil A. Lewis, 2 *Prosecutors Faulted Trials for Detainees*, N.Y. TIMES, Aug. 1, 2005, at A1.

⁴⁸⁰ Editorial, *Guantanamo Taint*, SACRAMENTO BEE, Apr. 4, 2007.

that such abuses can eclipse concern over the original criminal conduct and result in the offender's early release even in cases of very serious crimes.

C. Unequal Access to Evidence and Resources

Modern international criminal jurisprudence stresses the fundamental requirement for "equality of arms" between the prosecution and defense to render a fair trial.⁴⁸¹ Throughout the military commission process to date, however, the prosecution has clearly been much better resourced than the defense. The MCA itself only assures a defendant one military counsel, no matter how complex the issues or large the prosecution team.⁴⁸² One judge, Colonel Brownback, has at least been willing to voice concern about this issue and made some accommodations to overmatched defense counsel, such as delaying voir dire in al-Qosi's case. But another judge, Colonel Kohlmann, actually stripped Hicks of two-thirds of his defense team even though the Appointing Authority had specifically recognized the civilian counsel's authority by having him negotiate and sign the plea agreement.⁴⁸³

Although the MCA is based on court-martial procedure, it entitles the defense only to "a reasonable opportunity to obtain witnesses and other evidence"⁴⁸⁴ whereas the UCMJ assures court-martial defendants "equal opportunity" in this area.⁴⁸⁵ This equality is also mandated by Article 75 of Additional Geneva Protocol I of 1977, which provides that "anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."⁴⁸⁶ Although the United States is not a party to the Protocol, previous public statements by U.S. government officials have said that this article is one of the parts of that accord which have achieved binding status on all nations as being declaratory of customary international law.⁴⁸⁷ Coupled with the potentially flawed discovery process

⁴⁸¹ See, e.g., Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment of the Appeals Chamber, ¶¶ 29-56 (July 15, 1999).

⁴⁸² MCA § 949c(b)(6).

⁴⁸³ See *supra* notes 414-16 and accompanying text (describing Kohlmann's exclusion of Hick's counsel) as well as Hicks' plea agreement in SALES, *supra* note 6, at 271-76.

⁴⁸⁴ MCA § 949j(a).

⁴⁸⁵ 10 U.S.C. § 846 (2000).

⁴⁸⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75(4)(g), adopted June 8, 1977, 1125 U.N.T.S. 3, available at <http://www2.ohchr.org/english/law/protocol1.htm>.

⁴⁸⁷ See Glazier, *supra* note 9, at 116 (discussing declarations that the United States government considers Additional Geneva Protocol of 1977 article 75 declaratory of customary international law).

discussed above, commission evidentiary rules fail to measure up to current international fair trial standards.

D. Restrictions on Effective Representation by Counsel of Choice

The government has placed formal impediments on the defendant's representation. The most obvious of these is the restriction on civilian counsel to U.S. citizens. It seems self-evident that a defendant who does not trust his attorney will be constrained in his ability to adequately contest the charges against him. While Hamdan and Hicks seem to have been comfortable with their counsel, other defendants, particularly al-Bahlul, are clearly unwilling to trust Americans whose motives they question. As many detainees begin their sixth year at Guantánamo, press reports indicate that a growing number are displaying increasing distrust of U.S. lawyers, in no small part because they perceive no improvement in their situation resulting from their legal representation.⁴⁸⁸ With the exception of those few trials actually conducted during wartime of enemy nationals, virtually every war crimes tribunal conducted to date has allowed the defendants representation by counsel of their own nationality; in fact such representation has often been provided at the expense of the trying power.⁴⁸⁹ While the U.S. may consider itself at war with al-Qaeda, it is not at war with the detainees' home nations, so there is no coherent basis for denying co-national counsel a role in the proceedings. At worst, they may be ineligible for security clearances, but this could presumably be accommodated through the continued assignment of supporting U.S. attorneys acceptable to the foreign counsel. The current statutes of the ICTY, ICTR, and the International Criminal Court all provide the right to defense by counsel of choice,⁴⁹⁰ as does the International Covenant on Civil and Political Rights (ICCPR).⁴⁹¹ Whether or not this right is now mandated by customary international law, it is fair to conclude that denying a defendant choice of counsel will taint any trial's outcome.

E. Equal Protection Concerns

The notion of equal treatment under the law is a long-standing fundamental principle of Anglo-American jurisprudence now internationally codified by the ICCPR which declares that "[a]ll persons

⁴⁸⁸ William Glaberson, *Many Detainees at Guantánamo Rebuff Lawyers*, N.Y. TIMES, May 5, 2007, at A1.

⁴⁸⁹ See, e.g., Glazier *supra* note 32, at 2070, 2082.

⁴⁹⁰ U.N. Yugoslavia Resolution, *supra* note 157, art. 21, §4(b); S.C. Res. 955, *supra* note 158, art. 20, §4(b); Rome Statute of the International Criminal Court, *supra* note 159, art. 67, §1(d).

⁴⁹¹ International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 6 I.L.M. 368, 999 U.N.T.S. 171.

shall be equal before the courts and tribunals.”⁴⁹² This is hardly true of the military commissions, however, which exempt Americans from trial by statute, Brits from trial by demand of their government, and granted an Australian special head-of-the-line privileges and concessions such as a security clearance for a foreign counsel officially proscribed by the governing directives.⁴⁹³ Khadr was also allowed to have two Canadian counsel participate pro hac vice in his brief to the CMC, with one even sharing oral argument with his military attorney.⁴⁹⁴

Assuming trials eventually resume, it will be particularly revealing to see both whether citizens of Muslim countries are given any right to assistance from co-national counsel and how sentences they are awarded compare with Hicks’ ultimate slap-on-the-wrist punishment. Back in early 2002, the original Appointing Authority, Paul Wolfowitz, promised that “we’re going to operate in a way that common law courts, which is our court system, operate[], which is you [mete out] justice in an equal way. If you start with one set of punishments for one kind of individual, that will probably set a standard for others.”⁴⁹⁵ The disparate treatment accorded defendants to date can only set the United States up for a lose-lose dilemma should trials resume. If citizens of other countries, particularly Muslim nations, receive less favorable treatment than those sharing the Anglo-American heritage, there will be loud international cries of discrimination. On the other hand, if more convicted individuals receive only minor punishment, the U.S. public will likely conclude either that the government is failing to adequately protect the country, or that it has seriously misrepresented the dangers of international terrorism and the threat posed by the detainees. In either case the government will be subject to withering criticism likely to further erode support for its conduct of the “war on terror.”

F. Violation of the Law of War

Normally, procedural flaws in a criminal proceeding are addressed through direct or collateral review, with remedies generally consisting of overturned convictions or mitigation of punishment. If a violation is particularly egregious, there may be an award of monetary compensation as well. But the stakes are raised considerably in the case of a wartime tribunal based on the common law of war. Denial of a fair trial to both prisoners of war as well as unlawful combatants was clearly established as a common law war crime during a variety of post-World War II trials, and conformance with national law was clearly rejected as a defense.⁴⁹⁶ By

⁴⁹² *Id.* art. 14 § 1.

⁴⁹³ *See supra* notes 201–06 and accompanying text.

⁴⁹⁴ *See* United States v. Khadr, C.M.C.R. No. 07-001, at 1 (Military Comm’n Sept. 24, 2007).

⁴⁹⁵ Interview by Jim Lehrer with Paul Wolfowitz, *supra* note 141.

⁴⁹⁶ Glazier, *supra* note 9, at 75–76.

electing to conduct military commission trials failing to meet international due process standards, the government places participants, including judges, prosecutors, trial panel members, and those involved with post-trial review at risk of subsequent prosecution for war crimes themselves.⁴⁹⁷ Although the actual likelihood of such prosecution may be remote, it provides another basis on which the tribunals may be criticized and any remaining moral high ground surrendered.

Although the commission rules have improved substantially over the past five years, the unfortunate reality is that they still fall short of recognized fair trial standards and there is little reason to believe that the government has any sincere commitment to further improvement. Rather than a faithful effort to seek out and apply the rule of law, the evolution of the commission rules has consistently seemed to be based on securing the maximum advantage to the government by granting defendants the minimum rights DOD officials felt they could get away with while still paying lip service to a “full and fair” trial. Rulemaking has consistently been conducted behind closed doors with no public participation,⁴⁹⁸ and there is simply no reason to believe that the process will undergo any further improvement unless mandated by Congress or the courts.

V. MILITARY COMMISSION ALTERNATIVES

Detainees in the “war on terror” seem to fall in to three general categories. First, a substantial number seem to be unfortunates caught in the wrong place at the wrong time and swept up by coalition forces unable to distinguish them from actual combatants or innocents “sold” to U.S. forces for the large rewards offered.⁴⁹⁹ A second, smaller group, including all those with finally approved charges to date, seem to have been low-level members affiliated with al-Qaeda or the Taliban. These generally do seem to be legitimately classified as “combatants”; as many likely remain hostile to the United States and might again take up arms against U.S. interests if able to do so. Government estimates suggesting that a maximum of eighty individuals might ultimately face military commission trial⁵⁰⁰ seem to provide a rough metric for the size of this group. The third group consists of a very small number of individuals who actually may have played substantial roles in plotting terrorist

⁴⁹⁷ *Id.* at 75.

⁴⁹⁸ See Eugene R. Fidell, *Military Commissions & Administrative Law*, 6 GREEN BAG 2D 379 (2003) (arguing for the application of standard notice and comment decision making to the military commission process).

⁴⁹⁹ See, e.g., MARK DENBEAUX & JOSHUA DENBEAUX, REPORT ON GUANTANAMO DETAINEES: A PROFILE OF 517 DETAINEES THROUGH ANALYSIS OF DEPARTMENT OF DEFENSE DATA (2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=885659.

⁵⁰⁰ See John B. Bellinger, *Remarks on the Military Commission Act*, 48 HARV. INT’L. L.J. ONLINE 1, 12 (2007), <http://www.harvardilj.org/attach.php?id=85>.

operations against the United States. Some, but not all, of the fourteen “high level” detainees transferred to Guantánamo in September 2006 seem to fall into this category.⁵⁰¹ The issue with the first group is that their continued presence at Guantánamo indicates the need for more detailed and objective review than the current CSRT process provides; even Administration officials concede that “we are not anxious to continue holding them for very long.”⁵⁰² So while their situation urgently cries out for attention, it is unlikely that any members of this category will ever be tried, and the challenge is to develop adequate means for their reliable classification and prompt release. It is the individuals in the latter two categories that require the development of long-term solutions for their detention and/or trial.

Although the government has seemed preoccupied with the military commission approach, Secretary Rumsfeld acknowledged the existence of other options five years ago:

One is to put them in the criminal justice system in the United States. Second would be to put them in the military justice system in the United States. A third would be to send them back to their countries of origin. A fourth would be to release them for reasons that it appears that there isn't any law enforcement purpose left and there isn't any further intelligence we think we could get. A fifth—if I'm counting correctly—would be to just keep them, as you would a person you did not want to get back out there and rejoin a Taliban or an al Qaeda outfit, and keep them during the period of the conflict so that they can't go back and kill more people. That's kind of the range, I think.⁵⁰³

At a minimum, the first, second, and fifth of these options should be considered today as potential alternatives to military commission trials for those detainees posing sufficient threat to justify their continuing captivity.

A. *Preventive Detention Consistent With the Law of War*

The law of war clearly permits preventive detention of the enemy's combatants for the duration of hostilities. While most commentators seem focused on the Third Geneva Convention of 1949 as the relevant law, the reality is that governing principles firmly ensconced in customary international law apply even where that treaty is facially inapplicable. Although a century old, at a minimum the provisions of Chapter II of Section I of the 1907 Hague Regulations Respecting the Laws and Customs of War on Land, which was held declarative of customary law by

⁵⁰¹ See Biographies, *supra* note 362.

⁵⁰² Bellinger, *supra* note 500, at 12.

⁵⁰³ Dep't of Def., DoD News Briefing—Secretary Rumsfeld and General Myers, Feb. 26, 2002, <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=2798>.

the Nuremberg Judgment,⁵⁰⁴ would apply. The common criticism that such detention could be open ended in a “war on terror” is emotional rather than legal. As State Department legal advisor John Bellinger validly notes, as long as the “war” is properly defined as being versus al-Qaeda and the Taliban, which is what Congress has authorized, rather than an amorphous “global war on terror,” it will ultimately have an end and no one has ever known how long a war would last while it was in progress.⁵⁰⁵ The Thirty and the Hundred Years Wars were both necessarily named only after the fact.

The fear that actual innocents might be detained, potentially for life, is a valid concern meriting attention. Whether or not the government can convincingly demonstrate that those persons it detains for a prolonged period are in fact actual enemies will logically be the single most critical factor in establishing the legitimacy of any such policy. While there is ground to dispute whether the first individuals facing military trial have committed criminal violations of the law of war, the evidence against them *does* seem sufficient to demonstrate that they are properly classified as combatants. Their detention under conditions specified by international law for POWs should thus be much less problematic than a trial per se, particularly if fuel would be thrown on the public relations fire by continuing to hold them even if they are acquitted or after their completion of any penal sentence awarded by a military commission.

In addition to these concerns over who is being detained, there are also substantial grounds to take legal issue with the current conditions of detention. Administration officials note with apparent pride that the new Guantánamo facilities are based on state-of-the-art U.S. prisons.⁵⁰⁶ But the law of war seems clear that those held in preventative detention who have not been convicted of criminal conduct must be held in camp conditions with quarters equivalent to the detaining nation’s military forces, *not* its prison population. The United States has endorsed this view since before the adoption of the Constitution,⁵⁰⁷ and it was accepted as binding law in the Hague Land Warfare Regulations, which mandate that prisoners of war “shall be treated as regards [to] board, lodging, and clothing on the same footing as the troops of the Government who captured them.”⁵⁰⁸ While Guantánamo proponents will argue that the detainees do not qualify as prisoners of war under the criteria contained in Hague Regulation article 2 (or the more familiar Geneva Convention III article 4), there was no other category of individual for whom preventive

⁵⁰⁴ DOCUMENTS ON THE LAWS OF WAR, *supra* note 464, at 68.

⁵⁰⁵ See Bellinger, *supra* note 500, at 3–4, 7–8.

⁵⁰⁶ See, e.g., Davis, *supra* note 446.

⁵⁰⁷ See Treaty of Amity and Commerce Between His Majesty the King of Prussia, and the United States of America, Sept. 10, 1785, art. 24, *available* at <http://www.yale.edu/lawweb/avalon/diplomacy/germany/prus1785.htm>.

⁵⁰⁸ See DOCUMENTS ON THE LAWS OF WAR, *supra* note 464, at 74 (article 7).

detention was traditionally authorized under the law of war. The Fourth Geneva Convention of 1949, the first international agreement specifically addressing the status of civilians caught in armed conflict, does now recognize limited authority of a conflict party to intern civilians for security purposes.⁵⁰⁹ But this authority is subject to explicit limitations, including restricting such detention to the individuals' residences or internment camps with "spacious" sleeping quarters, premises suitable for religious services, a canteen, educational and recreational facilities.⁵¹⁰

Although it may seem odd, even distasteful, to many observers that alleged terrorists should be detained under the same physical conditions as lawful combatants, the legal distinction between the two is that the unlawful combatant may be placed on trial any time the detaining nation finds sufficient evidence of a legal violation. After a conviction, the detainee may be shifted to actual penal incarceration for the duration of the sentence imposed, or potentially even executed, while the lawful combatant enjoys immunity from prosecution for any acts of violence committed in conformance with the law of war. So long as the detainees are held purely as a preventive measure without benefit of a trial, however, then their detention conditions should be equivalent to those mandated for POWs or civilian-security-internees, not convicts.

A formal U.S. policy of indefinite detention will undoubtedly face some tangible opposition. But if it is based upon a credible and substantive review of the facts in each case, with detention in facilities based on international standards for prisoners of war or civilian internees, it is likely to be far less controversial in the long run than pushing on with military commissions widely perceived as "kangaroo courts." Moreover, it would stand on much sounder legal ground than efforts to convict detainees for conduct that likely fails to constitute a violation of the law of war.

B. Trials by General Courts-Martial

A decision in 2001 to try suspected terrorists by general courts-martial could have avoided almost all of the controversy that dogged the commissions since the President issued his 2001 military order. Since court-martial procedure is formally defined by federal statute,⁵¹¹ thus providing the Executive Branch guidance authorized by Congress,⁵¹² there would have been virtually no grounds for questioning either the constitutional foundation or procedural rules governing the trials. Moreover, since the universally ratified Third Geneva Convention of

⁵⁰⁹ Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

⁵¹⁰ *Id.* art. 82.

⁵¹¹ Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2000).

⁵¹² U.S. ARMY, MANUAL FOR COURTS-MARTIAL UNITED STATES (2005), *available at* <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf>.

1949 specifically calls for POWs to be subject to the same laws as the detaining nation's own servicemen,⁵¹³ international criticism and equal protection objections would have been largely muted. Politically, it would have been very difficult for any American to call for suspected terrorists to receive more favorable treatment than U.S. military personnel, particularly given widespread belief that U.S. military justice is first rate.⁵¹⁴ And since the general court-martial has statutory authority "to try any person who by the law of war is subject to trial by a military tribunal,"⁵¹⁵ charges could have been based directly on the law of war and not limited to the specific punitive articles enumerated in the UCMJ.

Therein, of course, lies the primary rub today: court-martial employment is subject to the same law of war jurisdictional constraints as is the military commission. They would have no more authority to try conspiracy or other problematic violations than the commissions do. So long as fundamental questions remain about the validity of the charges, nothing can be gained today by switching the trials from military commissions to courts-martial, except, perhaps to taint the generally well-regarded court-martial with the stigma that the commissions have accumulated over the past six years.

C. *Trials by Special National Security Court*

A proposal that gained some support in mid-2007 is to create a dedicated "National Security Court" to conduct trials of suspected terrorists incorporating some mix of regular military and/or federal court standards with the secrecy permitted the Federal Intelligence Surveillance Court (FISC) considering intelligence surveillance warrants.⁵¹⁶ President Bush's new Attorney General, Michael Mukasey, urged serious consideration of this approach in a pre-appointment op-ed.⁵¹⁷ While specifics obviously differ among these various proposals, the general consensus seems to be the need to obtain convictions while protecting evidence from disclosure, presumably from the accused as well as from the terrorist organizations—and hence the American public as well.⁵¹⁸

⁵¹³ Geneva Convention Relative to the Treatment of Prisoners of War art. 82, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁵¹⁴ *See, e.g.*, Neal Katyal, *Invent This Wheel!!!*, SLATE, July 11, 2006, <http://www.slate.com/id/2145512>.

⁵¹⁵ 10 U.S.C. § 818.

⁵¹⁶ *See, e.g.*, Andrew C. McCarthy & Alykhan Velshi, *We Need A National Security Court* (2006), *available at* http://www.defenddemocracy.org/usr_doc/NationalSecurityCourt.doc (unpublished submission for AEI). The FISC was established by the Foreign Intelligence Surveillance Act (FISA) of 1978, Pub. L. No. 95-511, 92 Stat. 1783 (codified as amended in scattered sections of 50 U.S.C.).

⁵¹⁷ Michael B. Mukasey, Editorial, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15, *available at* <http://www.opinionjournal.com/extra/?id=110010505>.

⁵¹⁸ *See id.*

Two leading proponents of this approach, Andrew C. McCarthy and Alykhan Velshi, argue in their paper that the United States needs to do a better job in obtaining intelligence cooperation from other nations and that risk of disclosing evidence chills this cooperation.⁵¹⁹ Yet they ignore the fact that the perceived unfairness of the military commission process has caused other nations to restrict law enforcement cooperation with the United States and to demand that their nationals be exempt from trial. So it is hard to see how creating a new court deliberately structured to accord a lesser standard of due process to aliens and permitting use of secret evidence—a practice already rejected for the military commissions—can possibly overcome the taint associated with the military tribunals. Given that the security redactions evident in the CSRT transcripts released to date from Guantánamo seem intended to conceal only the specific interrogation techniques employed on the detainees, it seems clear that the primary “classified” evidence in the war on terror is simply coerced statements. Whether true or not, it seems almost certain that any conviction based on “secret” evidence will be generally assumed to be based on such grounds and will never enjoy any credibility in world public opinion. If convictions cannot be obtained in open court, it is far better to simply detain an individual preventively than to lose any residual American high ground by compromising the integrity of the U.S. justice system.

D. Trials by Federal District Courts

Practical concerns have been raised about using federal courts to try suspected terrorists,⁵²⁰ and it would undoubtedly be naïve to consider them as a true panacea. Nevertheless, there is good reason to consider them as clearly the best choice among the existent or postulated options, particularly when the ability to preventively detain enemy combatants remains available as a viable option for those whose trials are problematic.

Unlike all the other options under consideration, federal courts have a proven track record of convictions in contested terrorism cases, resulting in dozens of convictions to date.⁵²¹ Moreover, there is little room to criticize them on the due process or equal protection grounds that compromise both the current military commissions and proposed National Security Courts. The federal district courts undoubtedly would qualify as “regularly constituted courts” under Common Article 3 of the 1949 Geneva Conventions which was adopted by the Supreme Court as

⁵¹⁹ McCarthy & Velshi, *supra* note 516, at 12.

⁵²⁰ See, e.g., Mukasey, *supra* note 517.

⁵²¹ See, e.g., CTR. ON LAW AND SEC., TERRORIST TRIAL: REPORT CARD: U.S. EDITION (Karen J. Greenberg et al. eds., 2006), <http://www.lawandsecurity.org/publications/TTRCCComplete.pdf>.

the minimum bar for judging terrorist trials at Guantánamo.⁵²² They would also meet the more explicit requirements established by Article 75 of Additional Geneva Protocol I or the International Covenant on Civil and Political Rights, should either of these later be determined to provide the governing standards by which international legitimacy is to be judged.⁵²³ And since U.S. military personnel are subject to concurrent federal court jurisdiction in addition to military trial under the UCMJ, a federal court trial would even be legally sufficient even in the unlikely event that a suspected terrorist was held to fall within the protections of the Third Geneva Convention governing prisoners of war.⁵²⁴

Many of the evidentiary objections raised to federal trials are red herrings at best. As experienced federal prosecutor Kelly Anne Moore has noted, the Classified Information Protection Act (CIPA) provides a legal foundation for safeguarding sensitive methods and sources in federal terrorism trials.⁵²⁵ And concern voiced about the inability of soldiers on the battlefield to meet Fourth Amendment standards is wholly specious; the Supreme Court has specifically ruled that amendment does not apply to evidence collection that takes place outside the United States.⁵²⁶

Although contrary to earlier expectations, an area in which federal courts now appear demonstrably superior to military commissions is the availability of suitable charges on which to try suspected terrorists. While virtually all military commission charges levied to date are on shaky legal ground under the law of war, federal law provides a reasonable spectrum of potential charges ranging from explicit terrorism-related crimes down to numerous conventional crimes that may nevertheless be applicable to some individual conduct. To date, according to one analysis, no less than 104 different offenses have been used to charge individuals in terrorism related investigations.⁵²⁷ Since the United States has honored its obligations under a number of international treaties⁵²⁸ to criminalize traditional terrorist offenses such as hijacking⁵²⁹ or destroying aircraft,⁵³⁰ as well as any homicide, attempted homicide, or conspiracy to commit a

⁵²² See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2795–97 (2006).

⁵²³ See Glazier, *supra* note 9, at 97–98 (outlining the fair trial standards specified by the International Covenant on Civil and Political Rights), 112–18 (discussing the fair trial standards of Additional Geneva Protocol I article 75 and their potential applicability to terrorist trials).

⁵²⁴ Geneva Convention Relative to the Treatment of Prisoners of War art. 82, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁵²⁵ Kelly Anne Moore, Editorial, *Take Al Qaeda to Court*, N.Y. TIMES, Aug. 21, 2007, available at <http://www.nytimes.com/2007/08/21/opinion/21moore.html>.

⁵²⁶ *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

⁵²⁷ CTR. ON LAW AND SEC., *supra* note 521, at 3, 8–11.

⁵²⁸ See U.S. Dep't of State, *supra* note 173.

⁵²⁹ See 49 U.S.C. § 46502 (2000).

⁵³⁰ See 18 U.S.C. § 32 (2000).

homicide as an act of terrorism,⁵³¹ there should be no lack of suitable offenses for charging al-Qaeda higher-ups.

Even “foot soldiers” in this “war” are more likely to be successfully prosecuted in federal courts than before the military commissions where virtually all charges brought to date are highly problematic. While a 2004 addition to Title 18 U.S. Code explicitly proscribed attending military training conducted by a foreign terrorist organization,⁵³² federal courts had already held that this exact conduct could be prosecuted under the more ambiguous language of 18 U.S.C. § 2339B.⁵³³ This latter statute dates back to 1996,⁵³⁴ with the maximum penalty increased from ten to fifteen years imprisonment by the USA PATRIOT Act in October 2001.⁵³⁵ So, for example, Omar Khadr, who is alleged to have received al-Qaeda training in June and again in July of 2002 could presumably be prosecuted for two separate § 2339B violations, both qualifying for the enhanced penalty. And of course, any individual whose conduct does not qualify as an explicit violation of federal law would still be eligible for preventive detention if the government could credibly demonstrate they were part of al-Qaeda or Taliban forces.

While regular federal courtrooms may provide a more challenging forum for the government to secure convictions, the flip-side is that any convictions obtained are far more likely to stand up to both contemporary public scrutiny and the judgment of history than those of any alternative proposed to date. Equally, if not more important, the prospect of regular federal criminal trials is also far more likely to result in meaningful international cooperation in gathering and sharing evidence as well as in the arrest and extradition of identified suspects. This point was articulately anticipated in a Naval War College student paper written back in 2002:

[I]f we view international terrorism as a world issue in which we expect the assistance of others, we should resist the easy solution of conducting *ad hoc* proceedings just because we can . . . we should seek to maximize the appearance of fairness so as to limit avenues for complaint of victor’s justice. The appearance of fairness may best [be] achieved by prosecution of terrorist suspects in United States Federal District Courts.

The members of al-Qaeda may or may not “deserve” trials in a time-tested and jurisprudentially sound forum. However, the world-respected reputation of United States criminal courts has not been built nor maintained for the benefit of any evil person The use

⁵³¹ See 18 U.S.C. § 2332 (2000).

⁵³² See 18 U.S.C. § 2339D (Supp. V 2005).

⁵³³ See *United States v. Goba*, 220 F. Supp. 2d 182, 194 (W.D.N.Y. 2002).

⁵³⁴ See 18 U.S.C. § 2339B (Supp. V 2005).

⁵³⁵ *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001*, Pub. L. No. 107-56, § 810, 115 Stat. 272, 380.

of an established court system at this critical time should not be viewed as a action on behalf of accused terrorists, but rather as a representation to needed international partners that the course of our ship of state is steady, and properly charted for the rough waters ahead.⁵³⁶

The author of these prescient words was a U.S. Marine Corps Judge Advocate, Lieutenant Colonel Ralph Kohlmann. Subsequently promoted to full Colonel, his current assignment is Chief Judge for the Guantánamo military commissions.⁵³⁷

VI. CONCLUSION

The United States' post-9/11 implementation of military commission trials has been a national embarrassment, adversely impacting the country's standing in world public opinion while doing nothing to improve its national security. The Administration has ignored the commissions' historic use as a jurisdictional gap-filler, created to allow the conduct of common law trials providing the full due process standards and post trial review established for courts-martial in cases falling outside the bounds of statutory military justice. Instead it sought to capitalize on the short-sighted, and partially repudiated, view of the tribunal adopted for the 1942 Nazi saboteur trial as a forum permitting traditional due process to be shortchanged.

Although the tribunals were advocated at least in part for their ability to try cases expeditiously, only a single case has been decided in the six years since 9/11 as the government has interminably dragged out the overall commission process, allowing the accused to linger for years in the purgatory of Guantánamo confinement. Paradoxically, when it has sporadically pressed forward to conduct additional hearings, it has done so without taking the time necessary to ensure that adequate preparations for the efficient and fair conduct of trials, ranging from clear legal rules to adequate translation services, were in place. As a result, entirely predictable flaws have dogged every step of the proceedings, undermining the credibility of the tribunals as a serious effort to do justice. If commission convictions and the resulting penal

⁵³⁶ Record of Trial at 443, *United States v. Hicks*, No. 04-0001 (Military Comm'n), available at <http://www.defenselink.mil/news/commissionsHicks.html> (follow "Record of Trial" hyperlink).

⁵³⁷ Curiously, the government has insisted on redacting all identification of the judge from Hicks's transcript, although it does identify him elsewhere on its official website. It is thus necessary to piece the support for this citation together from three sources. *See id.* at 86 (identifying the trial judge as the author of "Forum Shoppers Beware"); *id.* at 40 (identifying the judge presiding over Hicks's trial as the chief judge for the military commissions); Sgt. Sara Wood, *Judge Accepts Australian Detainee's Guilty Plea*, AM. FORCES PRESS SERVICE, Mar. 30, 2007, available at <http://www.defenselink.mil/news/newsarticle.aspx?id=32642> (identifying Marine Colonel Ralph Kohlmann as the judge presiding over Hick's case).

sentences are sought as a means to justify the prolonged incapacitation of individuals deemed to pose a continuing threat, it needs to be recognized up front that this approach is fraught with peril. If the commissions are at all fair, it is inevitable that some may result in acquittals, or short sentences (as Hicks' already has). As Supreme Court Justice and Nuremberg prosecutor Robert Jackson observed, "[Y]ou must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. . . . [T]he world yields no respect to courts that are organized merely to convict."⁵³⁸ If the U.S. continues to detain these individuals under actual prison conditions after acquittal or the completion of their sentences, additional international outrage is the absolutely predictable result, particularly given that Hicks is already slated for release at the end of his short term. For those detainees for whom simple incapacitation is the goal, the government should dispense upfront with the idea of trying them and adopt an aboveboard detention regime that is fully compliant with customary law of war requirements.

On the other hand, if it is desired to stigmatize terrorists with the shame of a criminal conviction and justify their prolonged imprisonment, or even execution, then trials commanding far more respect than the current commissions can muster are required for verdicts that will stand up in the court of public opinion. As one military commission defense lawyer argued:

We cannot help but see that military commissions, if suffered to go on, will be used for pernicious purposes. I have made no allusion to their history in the last five years. But what can be the meaning of an effort to maintain them among us? Certainly not to punish actual guilt. All the ends of true justice are attained by the prompt, speedy, impartial trial which the courts are bound to give. Is there any danger that crime will be winked upon by the judges? Does anybody pretend that courts and juries have less ability to decide upon facts and law than the men who sit in military tribunals? What just purpose, then, can they serve? None.⁵³⁹

This counsel's client was Lambdin P. Milligan a century and a half ago, but his words ring even more true for the flawed tribunals of our day. For those defendants for whom trial is appropriate, Article III courts have a proven track record, valid jurisdiction, and most importantly, domestic and international credibility. Returning to the insights of Robert Jackson reminds us:

We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it

⁵³⁸ Robert H. Jackson, Assoc. Justice, U.S. Supreme Court, Address at the Washington Meeting of the American Society of International Law (Apr. 13, 1945), *in* 39 AM. SOC'Y INT'L L. PROC. 10, 16 (1945).

⁵³⁹ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 83–84 (1866).

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to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.⁵⁴⁰

After six years of this self-inflicted damage, the commissions seem too tainted to ever regain credibility, a point now recognized by critics on both the left and right.⁵⁴¹ Even many of the officers assigned to the commission process reportedly now believe that they have become "an embarrassment" for the military.⁵⁴² It is long past time to abandon the commissions entirely.

⁵⁴⁰ 2 TRIAL OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL, NUREMBERG, 14 NOVEMBER 1945–1 OCTOBER 1946, at 101 (1947).

⁵⁴¹ For an example of a critic on the right joining the chorus against military commissions, see Glenn M. Sulmasy, *The Legal Landscape After Hamdan: The Creation Of Homeland Security Courts*, 13 NEW ENG. J. INT'L & COMP. L. 1, 2 (2006).

⁵⁴² Scott Horton, *At Gitmo, No Room For Justice*, HARPER'S, Oct. 22, 2007, available at: <http://www.harpers.org/archive/2007/10/hbc-90001470>.