A Review of U.S. Military Commissions
The History, Developments and Changes since 2001

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On November 13, 2001, almost one month to the day following one of the most shocking and catastrophic events of terrorism in the world, President George W. Bush issued a military order designed to protect U.S. citizens from terrorists.[1] This Military Order stated that "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary that individuals subject to this order…be detained, and, when tried, to be tried for violations of war and other applicable laws by military tribunals."[2] The Military Order went on to state that it covered all individuals who were non-U.S. citizens and who were believed by President Bush to be either members of al-Qaeda or individuals who had engaged in terrorist activities aimed at the United States.[3] President Bush issued this order without congressional authorization or consultation.[4] Immediately following the publication of Bush's new Military Order, criticism began to mount against the idea that the United States government would turn to military commissions rather than to the U.S. federal criminal or civil courts to try these suspects.[5]

When Barak Obama was sworn in as U.S. president on 20 January 2009, he vowed to close the U.S. prison in Guantanamo Bay, Cuba within a year. Under several different executive orders given on 22 January 2009, he ordered a prompt and thorough review of all prisoners at Guantanamo Bay. He also ordered that a Special Task Force be set-up to determine what options, including military commissions, were available to the government for making decisions concerning the Guantanamo prisoners. Now after more than three years since President Obama's inauguration, it is clear that the U.S. prison at Guantanamo Bay will not be closed at any time in the near future and that the Obama Administration will have to continue to use military commissions to adjudicate the cases of suspected terrorists, including those prisoners at the Guantanamo Bay prison, despite the intrinsic legal and political difficulties.

The word, "continue" is used reservedly because in the ten years since Bush's Military Order was issued, only seven men have been convicted by these military tribunals.[6] This number represents

[1] Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism (Nov. 13, 2001), 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter the Military Order].
[2] Id. at Sec. 1(e). Please note that "military commission" and "military tribunal" mean the same thing and are interchangeable in this article. Although the Military Order spoke of military tribunals, now ten years later, the term "military commissions" is used more frequently.
[3] Id. at 57,834, Sec. 2(a). These were only some of the categories listed in the Military Order. *See Infra* page 9 listing all the categories found in the Military Order.
[4] Harold Hongju Koh, *The Case Against Military Commissions*, 96 AJIL 337, 338 (2002).
[5] This included a letter signed by more than seven hundred American law professors sent to Patrick J. Leahy, the chair of the Senate Committee on the Judiciary, "Letter from Law Professors and Lawyers to the Honorable Patrick J. Leahy" (Dec. 5, 2001). *See* Koh, *supra* note 4, at 338.
[6] The seven are: David Hicks, Salim Ahmed Hamdan, Omar Khadr, Al Hamza Ahmed Sulayman al Bahlul, Noor Uwihman Muhammed, Ibrahim Ahmed Mahmoud al Qosi, and Majid Shoukat Khan (the last was convicted on March 1, 2012).

less than one-half of one percent of the total number of prisoners held at Guantanamo in the last ten years.[7]

In deciding whether the current military commissions are a valid means of trying civilians for suspected offenses including terrorism under a set of laws which the United States government declares are recognised laws of war, this article reviews the legal precedents for using military commissions before September 11, 2001; the military commissions envisioned by President Bush when he first announced their use in November 2001; and the modifications made to the original commissions from 2001 until 2012.

A Short History of the use of Military Commissions by the U.S. Government

Defining American Military Commissions

Traditionally during wartimes, military commissions have been military courts set-up on or near the battlefield to try persons for violations of the laws of war. In the past, military commissions have been similar to courts-martial in that they both used the same rules and the individuals acting as judge and as jury for each have been military personnel.[8] However, courts-martial are distinct from military commissions in that courts-martial panels are specifically used to try members of the U.S. military services who have violated the Uniform Code of Military Justice.[9] If a member of the U.S. military is charged with a war crime, he or she may be tried before a court-martial panel or in federal court.[10] The jurisdiction of the two types of military courts, the military commission and the court-martial, may sometimes overlap.

Reasons for the Use of Military Commissions

One of the main virtues of using military commissions is the speed at which these military proceedings can be held. This has been described as "wartime quick justice" in law of war cases.[11] With military tribunals traditionally located on or near the battlefield, the advantage is that they are at the scene of the crime, close to evidence and possible witnesses. At the same time, the U.S. Supreme Court has noted, "The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial. It developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter."[12] As can be seen by the *Ex parte Quirin* case discussed below, secrecy may also be a motive for using military commissions. Finally, if there are no courts open, such as during martial law or military occupation, military commissions may be the only alternative for trying violations of civil and criminal laws as well as violations of the laws of war.[13]

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[7] Some 800 men have been in Guantanamo since the prison opened in January 2002. *See* the Human Rights First report, *Detained & Denied in Afghanistan, How to make U.S. Detention Comply with the Law,* at 4 (May 2011), *available at:* www.humanrightsfirst.org . There are also some 3000 prisoners being held under U.S. custody at its prison at the U.S. Bagram Air Base. The number of prisoners has doubled from 2008 to March 2011, during the Obama presidency. Id.

[8] Jennifer K. Elsea, *Terrorism and the Law of War: Trying Terrorists as War Criminals Before Military Commissions,* CRS Report for Congress at 16 (updated December 11, 2001).

[9] Id. Although courts-martial jurisdiction is limited to members of the U.S. military forces, an exception to this occurred during past declared wars when certain civilians accompanying the armed forces were tried by courts-martial.

[10] Id.

[11] *Federal Military Commissions: Procedure and "Wartime Base" of Jurisdiction,* "Notes", Vol. 56 Harvard L. Rev. 631 (No. 4, Jan. 1943) [hereinafter Harvard FMC] at 642. *See* Jennifer K. Elsea, *The Military Commissions Act of 2009; Overview and Legal Issues,* CRS Report for Congress, at 4 (April 6, 2010) [hereinafter Elsea MCA 2009] stating that, historically, military commissions which tried enemy belligerents for war crimes would directly apply the international law of war without recourse to any domestic criminal statutes, except in those cases where such statutes reflected international law.

[12] *Hamdan v. Rumsfeld,* 548 U.S. 557, 624 (2006).

[13] Harvard FMC, *supra* note 11, at 632.

The past use of military commissions by the U.S. government is important as there should be a legal precedent or statute for using them as they are not specifically covered by the U.S. Constitution. Also, since they are technically a military hearing, they must fit in with other types of military courts. Historically, up until the Bush Administration's proposed military commissions of 2001, the military commissions used the court-martial rules of procedure and evidence. The offenses considered triable by past military commissions were ones defined by statute or by the international laws of war.[14]

Although there is a time and place for military tribunals and commissions, the U.S. Supreme Court has pointed out that while courts and their procedural safeguards are indispensable to the U.S. system of government, military tribunals do not have the same standing. The Court has said, "The military should always be kept in subjection to the laws of the country to which it belongs. The established principle of every free people is that the law should alone govern, and to it the military must always yield."[15]

a) Military Commissions Established During the Mexican-American War (1846-1848)
Although there are a few historical references to a type of military commission or tribunal used for trying spies during the American War of Independence (1775-1783) between the peoples of the thirteen American colonies and Great Britain,[16] military commissions were developed as a result of the Military Commissions and the Councils of War led by General Winfred Scott during the Mexican War in 1847.[17] These military commissions were set-up by Scott to settle criminal issues among both American soldiers and militiamen, who were plundering Mexicans, and among Mexican civilians, who were plundering each other. He also convened "councils of war" to adjudicate more serious war crimes. The military commissions tried more than four hundred individuals, about three-quarters of whom were Americans, and the councils of war tried twenty-one men, mostly Mexicans. These commissions used the same procedures as the military courts-martial. Scott said these commissions were a military necessity.[18]

Scott's military commissions were unanimously condemned by the U.S. Supreme Court a couple of years later in the case of *Jecker v. Montgomery* (1851), stating in its opinion that "neither the President nor any military officer can establish a court in a conquered country, and authorize it to … administer the laws of nations." The *Jecker* court went on to characterize the military tribunals as bodies of military necessity rather than judicial bodies.[19] However, military commissions were used intensively during two wars: the American Civil War (1861-1865) and the Second World War (1941-1945).

b) American Civil War Cases: The Civil War began in 1861 between the northern states of America (the Union) and the southern states (the Confederation). The Confederation withdrew from the Union over the issue of using black slaves for economic reasons. There were terrible

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[14] Id. Although the term "laws of war" is used here, other terms which refer to the same laws include "international armed conflict" and "international humanitarian law". These terms should be considered interchangeable in this article.
[15] *Dow v Johnson,* 100 U.S. 158, 169 (1879).
[16] John Evangelist Walsh, THE EXECUTION OF MAJOR ANDRÉ, ch. 2 (2001). At the time of the American War "the military laws of England were codified into articles of war, restricting the summary authority of the Sovereign to members of the military forces while civilians were liable only to the civil law." Harold L. Kaplan, *Constitutional Limitations on Trials by Military Commissions*, 92 U. of PA. L. Rev. 119, 119 (No. 2, Dec. 1943).
[17] Winthrop, MILITARY LAW AND PRECEDENTS, 2nd ed., at 832 (1920), as cited in Kaplan, *supra* note 16, at 120. Winthrop was also discussed at-length in the U.S. Supreme Court case, *Hamdan v. Rumsfeld,supra* note 12, at 590, discussed *infra* page 15.
[18] Thomas Eddlem, *Military Commissions throughout U.S. History,* New American blog, September 28, 2011. They were necessary at the time since the law of occupation did not yet exist.
[19] *Jecker v. Montgomery,* 54 U.S. 498, 515 (1851). While some definitions of the law of nations state that this means public international law, a clearer definition is that it is the rights that exist between nations or states and of the obligations that correspond to these rights.

and bloody battles between the two sides during the five years of fighting. Some 4,000 cases were heard by military tribunals including two cases which reached the U.S. Supreme Court.[20] The civil war tribunals covered martial law cases (including civil and criminal offenses) and law of war cases, sometimes mixing these two types together in one tribunal.[21] The first case, *Ex parte Vallandigham*, was denied a hearing because the U.S. Supreme Court decided it had no right (or jurisdiction) to review a military tribunal's decision. The second case, *Ex parte Milligan*, reached the Supreme Court in 1866 and is still referred to as the precedent which halted the expansion of military jurisdiction.[22]

In *Ex parte Milligan,* the Supreme Court granted a petition of habeas corpus for Lambdin P. Milligan who was challenging the jurisdiction of the military commission which tried him. The military commission sentenced him to be hanged after finding him guilty of different charges including a charge of a "violation of the laws of war" in a "theatre of military operations".[23] Milligan was a civilian who was living in Indiana (part of the Union) at the time of the alleged crime. The Supreme Court held that a military commission had no jurisdiction to decide the fate of Mr. Milligan.[24] Kaplan states that it fell to a plurality of justices to assert the proper restriction on Congress in its power to order military tribunals: "We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists. When peace exists the laws of peace must prevail. What we do maintain is, that when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion, it is within the power of Congress to determine in what states or districts such great and imminent public danger exists as justifies…military tribunals…".[25]

The Court's decision was based on the following reasoning: 1) the Fifth and Sixth Amendments of the U.S. Constitution give a right of trial by jury in criminal cases; 2) no U.S. citizen (who is also a civilian) can be tried by a military court if the civilian criminal courts are open; 3) civilian criminal courts can only be legally closed where martial law is declared; 4) martial law can only be legally declared where there is an "actual" invasion, i.e., it must be actual and present, not the mere threat of an invasion.[26]

c) First World War: Despite the use of some military tribunals during the occupation of Germany following the First World War, military tribunals were not used in the same broad sense that they would be during the next world war. In 1920, an article by Edmund Morgan was published in which he reviewed and analysed the use of military commissions for civilians.[27] Morgan focused on two sections of the U.S. Articles of War, Article 81, which covered individuals who aided or

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[20] Mark E. Neely Jr., THE FATE OF LIBERTY, at 162 (1991).
[21] The Supreme Court in *Hamdan v. Rumsfeld* states that during the Civil War, for the first time, "accused horse thieves and alleged saboteurs found themselves subject to trial by the same military commission. The Civil War precedents must, therefore, be considered with caution." "[A]s we recognized . . . commissions convened during time of war but under neither martial law nor military government may try only offenses against the law of war." *Supra* note 12, at 596. *See infra* page 15.
[22] Detlev F. Vagts, *Military Commissions: A Concise History*, 101 A.J.I.L. 35, 38 (2007). *Ex parte Milligan,* 71 U.S. (4 Wall) 2 (1866).
[23] Harvard FMC*, supra* note 11, at 633.
[24] *Milligan*, 71 U.S. (4 Wall.) 2 (1866).
[25] Kaplan, *supra* note 16, at 130 & 140.
[26] Id. at 127.
[27] Edmund M. Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War,* 4 Minn. L. Rev. 79. (1920) as discussed at length in Harvard FMC, *supra* note 11 (he was referred to as "Dean Morgan", in the *Ex parte Quirin* case, *infra* note 31). Morgan had held the rank of Lieutenant Colonel, Judge Advocate during the war, at 116. Morgan notes that the U.S. Articles of War were enacted in June of 1775 to regulate and govern the conduct of the colonial military forces. Morgan at 81. By the end of the Second World War, military branches of the forces had different versions of the Articles of War. In 1950, these were unified and restated in the Uniform Code of Military Justice (UCMJ) which continues to regulate the military today. Harvard FMC Id.

corresponded with the enemy, and Article 82, which covered individuals involved with spying for the enemy.[28] He concluded that since these offenses are committed by ordinary citizens who are not members of the military, they must be tried by the regular civil courts if they remained open because these types of acts were 'treasonous ones" which could only be tried by civil courts according to the U.S. Constitution.[29] But, when these same acts occurred in a theatre of war or zone of operations, than even a citizen could be tried by military tribunal. The Fifth Amendment of the U.S. Constitution, requiring jury trials for criminal crimes, would not apply in those circumstances because such a case would be considered "to arise in the land…forces, even though the offender never had military status."[30] Morgan went on to argue that the theatre of operations would be "reasonably confined to the area of actual hostilities [those areas]…under…military control…and not factories…under exclusively civilian control…though engaged in the production of supplies [for the Army]."[31]

The First World War was the fourth of five wars formally declared by the United States against another country or countries. The other four declared wars were: the War of 1812 against the British, the Mexican War (1846-1848), the Spanish-American War (1898-1895) and the Second World War (1941-1945).

d) Second World War Cases: It was not until shortly after the American entry into the Second World War in December 1941 that the use of military commissions had a spectacular revival. While seven decisions by military commissions reached the Supreme Court, the most significant case was *Ex parte Quirin,* decided in 1942.[32] The *Quirin* case appeared to broaden the list of situations summarised in *Ex parte Milligan* as to when military commissions could be used. It is noted more fully here as it was the basis of the Bush Administration's argument in another Supreme Court case, *Hamdan v. Rumsfeld,* that it had the right to set-up military commissions without specific Congressional authorization.[33]

The *Quirin* case was about eight members of the German Reich who infiltrated America during the Second World War with the intent of sabotage and espionage.[34] War had been declared by the U.S. on Japan on 8 December 1941 and on Italy and Germany on 11 December 1941. The German men were dropped off at night by German submarines onto beaches in New York and in Florida in mid-June of 1942. Those landing on a Long Island, New York beach had the misfortune to immediately bump into a member of the U.S. Coast Guard whom they then attempted to bribe. Once he left, they buried four boxes of explosives and some articles of German uniforms. Arrests were made after one of them, George Dasch, approached the Federal Bureau of Investigation (FBI) and informed on the other men. Ernest Burger also cooperated with the authorities.[35] The Germans were charged with four violations including that of the laws

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[28] Morgan at 102-107 (A.W. 81); and at 107-116 (A.W. 82); Articles of War at 41 Stat. 787 (1920). Harvard FMC, *supra* note 11, at 636.
[29] Morgan at 107 (Article 81); and at 113-114 (Article 82), Harvard FMC Id.
[30] Morgan. at 107.
[31] Morgan at 115; Harvard FMC, *supra* note 11, at 636. Morgan also discusses that any belief that the U.S. Constitution was a peace-time document was expressly repudiated by the majority in the *Milligan* case. At 106, he goes on to say, "it would be most unnatural to assume that the Fifth Amendment, with its express exception of cases arising in the land and naval forces, anticipates perpetual peace."
[32] *Ex parte Quirin,* 317 U.S. 1 (1942).
[33] *Hamdan, supra* note 12, *infra* page 15.
[34] *Quirin, supra* note 32, at 1.
[35] *See* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals,* 111 Yale L.J. 1259, 1280 (2002). *See* the Federal Bureau of Investigation (FBI) website, *Famous Cases & Criminals – George John Dasch and the Nazi Saboteurs* [hereinafter the FBI Cases]. *Available* at: http://www.fbi.gov/about-us/history/famous-cases/nazi-saboteurs

of war.[36] Initially, the government intended to try the men in civil court but several factors convinced the change to closed military tribunals. After the arrest of the German saboteurs-to-be, President Roosevelt issued an Executive Order[37] and Proclamation[38] authorizing the use of military commissions even though the U.S. criminal courts remained open, no martial law had been declared and there was no specific Congressional authorization to use a military commission.

During the trial by a military commission, habeas corpus proceedings were also filed on behalf of seven of the men to the U.S. Supreme Court, questioning the legality of trying them by military commission.[39] The Supreme Court held that such military commissions were in compliance with the U.S. Constitution and the laws of war. It made much of the fact that Congress had the authority to declare war against Germany and had done so. Further, that it was Congress's authority to define and punish offenses against the law of nations which included the laws of war.

The Court discussed several articles found in the Articles of War including Articles 15, 81 and 82. The Court stated that Articles 81 and 82 "authorized trial, either by court martial or military commission, of those charged with relieving, harbouring or corresponding with the enemy and those charged with spying."[40] The Court pointed out that Article 15 which recognised the jurisdiction of military commissions for violations of the law of war was *concurrent* with the jurisdiction given to courts martial.[41] The Court read Article 15 as jurisdiction-conferring rather than jurisdiction-preserving as it should be read.[42] In its final decision, the Court relied only on Article 15, finding that a military commission was the appropriate tribunal because the Germans, by removing their uniforms with insignias, had become unlawful belligerents[43] under the law of war.[44]

It should be noted that although *Ex parte Quirin* seems to broaden the use of military commissions, it has been heavily criticised over the years. The case was rushed to be heard not only by the military commission but also by the Supreme Court. The Germans were charged on 3 July 1942 with their hearing in front of the military commission on 8 July. The proceedings of the military commission were secret and the ensuing report also remained secret.[45] The Germans' petition to the Supreme Court for a writ of habeas corpus was argued on July 29th and 30th with the Court giving its decision on July 31st. Unusually, the Court did not provide a written opinion

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[36] Id. at 1281. The other offenses were violations of two Articles of War: Article 81 & Article 82 (spying), and conspiracy to commit these offenses. No mention of the conspiracy offense was mentioned in the final judgment. Id. *See,* Morgan's discussion of Articles 81 & 82, *supra* pages 4 & 5.
[37] Order of July 2, 1942, 7 Fed. Reg. 5102 (1942).
[38] Proclamation of July 2, 1942, 7 Fed. Reg. 5102 (1942).
[39] Only seven of the alleged saboteurs filed a writ of habeas corpus. George Dasch was not included. Whilst all eight were found guilty by the military commission, only six were executed in 1942 with President Roosevelt commuting Dasch's & Burger's sentences, respectfully, to 30-years and life imprisonment. Under President Truman both men were granted executive clemency and deported to Germany in 1948. FBI Cases, *supra* note 35.
[40] *Quirin, supra* note 32, at 27 with this language echoing that of the actual first two offenses charged against the men.
[41] Id. Article 15 continues in force today as 10 U.S.C. Sec 821. *See* Katyal & Tribe, *supra* note 35.
[42] Katyal & Tribe, *supra* note 35, at 1283.
[43] This is the first Supreme Court case that refers to "combatants" rather than "belligerents" (the latter term being used by the Hague Conventions), a term which President George W. Bush also used in his Military Order. Here, the Supreme Court swings back and forth between its use of "combatant" and that of "belligerent" which only serves to confuse the reader (and perhaps the court). Several articles published shortly after the *Quirin* case used only the term "belligerents" to describe the court's decision. *See* Harvard FMC, *supra* note 11, and Kaplan, *supra* note 16.
[44] *Quirin, supra* note 32, at 35 where the Court said, "And, by Article 15 of the Article of War Congress made the provision for their [as unlawful belligerents] trial and punishment by military commission, according to "the law of war". *Supra* note 28. *See* a recent critique about these acts of sabotage being relabeled as acts of 'terrorism' rather than acts of unlawful combatants in Pierce O'Donnell's book, IN TIME OF WAR: HITLER'S TERRORIST ATTACK ON AMERICA, (2005).
[45] *See* Harvard FMC, *supra* note 11.

giving the legal basis for its decision until October, some three months after its decision was given. The FBI misled the public by taking credit for the arrests with the U.S. government taking control of the information released about the case, using it as a tool for propaganda.[46] The use of the military commission seemed to be based primarily on keeping the informers' identities secret, especially Dasch's, who had requested asylum in the United States. With the proceedings of the military commission closed to the public and the media, Dasch's family was also protected from any retribution by the German government. President Roosevelt would also not want it to be public knowledge that these men easily breached the U.S. territorial borders. Another reason could also be that the U.S. government wanted to mete out a harsher penalty to these men as a deterrent. For the crime of sabotage, the maximum imprisonment was thirty years. Here, the Germans di not accomplish any of their planned sabotage before being captured. Based on the findings of the military commission in this case, six of the Germans were executed within one month of the sentencing. Contrary to the norm in both courts-martial and criminal convictions, the prisoners were not given any right of appeal in this case.

Subsequent to the *Quirin* decision, legal experts have characterised the case, at best, as a narrow exception to the general rule given in *Ex parte Milligan,* i.e., that Congressional authorization by itself may not be a legitimate reason for establishing military commissions if the courts remain open and/or martial law has not been declared.[47] In *Quirin*, the Supreme Court stated that the president was seen as acting under the power of Congress to create a military commission.[48] The *Quirin* case did not decide whether the president as Commander-in-Chief and in the absence of such congressional authority could appoint military commissions.

When the Supreme Court had the opportunity to reinforce the use of military tribunals in another war case, *Duncan v Kahanamoku,* it did not do so.[49] The Court, harking back to *Ex parte Milligan*, held that two civilians found guilty by military tribunals should be released from custody because martial law was never intended to authorise military tribunals supplanting regular courts.[50]

Although there were other notable cases tried by military commissions that petitioned the Supreme Court to challenge their trials following the Second World War,[51] there were also several thousands of cases tried by the American military tribunals in occupied Germany and Japan. One of the most famous tribunals was the International Military Tribunal at Nuremberg where Nazi government officials and army officers were tried for war crimes. Regular military

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[46] Katyal & Tribe, *supra* note 35, at 1281.
[47] Id., *supra* note 34, at 1286. Justice Felix Frankfurter, a member of the *Quirin* Court is quoted by Katyal & Tribe as stating that "[t]he *Quirin* experience was not a happy precedent." Id., *supra* note 35, at 1291. As quoted from "Memorandum Re: *Rosenberg v U.S.",* Nos. 111 and 687, Oct Term, 1952" June 4, 1953, at 8; Frankfurter Papers, Part 1, Reel 70.
[48] *Quirin*, *supra* note 32, at 13.
[49] *Duncan v Kahanamoku*, 327 U.S. 304 (1946). This case was brought by two civilians challenging their prosecution and imprisonment by military commissions in Hawaii for ordinary criminal actions committed during the war. Immediately following the Japanese attacks on Pearl Harbor on 7 December 1941, martial law was proclaimed over the Territory of Hawaii and military tribunals were established to take the place of both civil and criminal courts. Neither of these civilians was charged with an offense under the laws of war. The Court pointed out that the case was not about the military; nor about those directly connected with such forces; enemy belligerents; prisoners of war or others charged with violating the laws of war. Id. at 313. The Court specifically noted that it was "not concerned with the recognized power of the military to try civilians in tribunals established as part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function." Id. at 314.
[50] Id. at 323. The *Duncan* Court noted, "[c]ourts and their procedural safeguards are indispensable to our system of government."
[51] *E.g., In re Yamashita,* 327 U.S. 304 (1946) and, *Homma v. Patterson,* 327 U.S. 759 (1946).

commissions tried lesser Nazi officials.[52] These military commissions occurred in occupied territories controlled by the Allied Forces which included the United States, Great Britain, France, and the Soviet Union, following the cessation of war.

e) The Korean War and the Vietnam War: Neither of these wars was a declared war by the United States government. Military commissions were not used in either of these conflicts although preparations were apparently made for them.[53] However, in May 1952, in the midst of the Korean War, the Supreme Court heard arguments concerning the overbroad reach of the executive branch in an important case called the *Youngstown Sheet & Tube Co. v. Sawyer*.[54] This case, also referred to as the "Steel Seizure Case", involved an order by President Truman to seize U.S. steel mills to avert a strike and keep the mills running and producing steel for the U.S. military efforts in Korea. President Truman said that such a strike would jeopardize the U.S. national defense and labeled the situation as a national emergency. The Court did not focus on or discuss the national security side of the case, preferring to decide, instead, on the separation of power question involving the executive branch. During oral argument, the government lawyers reminded the justices that it was wartime. Several justices disavowed this, saying that Congress had not declared war.[55] The Court found against the government, stating that President Truman could not take such action unilaterally when war had not been declared. Neither the U.S. Constitution nor Congress had given the executive branch the authority to make new laws.[56]

During the Vietnam War, the U.S. Courts of Military Appeal decided that 'in time of war' meant a war formally declared by Congress.[57]

Current Military Commissions

The Development of U.S. Military Commissions: 2001 to 2006

As discussed above, the legitimate use of military commissions up until 2001 to try civilians has been strictly and narrowly predicated on three different situations: 1) when martial law has been declared and the civilian courts are no longer open (*Milligan*); 2) when war has been declared and civilians are accused of violating the laws of war (*Quirin*); and 3) during occupation of another country's territory (Nuremberg trials).

The al-Qaeda attacks on the United States on September 11, 2001, using hijacked, commercial aircraft to fly into each of the two towers of the World Trade Center in New York City and into the Pentagon outside Washington, D.C., changed the mentality of both the American public (at least on the east coast) and the American government. These attacks ushered in a widespread

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[52] Vagts, *supra* note 22, at 45.

[53] Jordan J. Paust, A*ntiterrorism Military Commissions: Courting Illegality,* 23 Mich. J. Int'l. Law 1, 4 (2001). Paust goes on to say that the military commissions for Korea would have guaranteed the same procedural rights to due process as courts-martial and those under the Third Geneva Convention for prisoners of war. Id.

[54] *Youngstown Sheet & Tube Co. v. Sawyer,* 348 U.S. 579, 103, F. Supp. 569 (1952).

[55] Patricia L. Bellia, *Story of the Steel Seizure Case, at 30(*May 2008 Draft). *Available at:* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1147039

[56] Id.

[57] *U.S. v. Averette*, 19 C.M.A. 363, 365 (1970). *See* Lawface*, "U.S. v. Ali and Military Jurisdiction Over Civilians"* (December 8, 2011) where Steve Vladeck notes, that "the Court of Military Appeals ruled in *Averette* that Article 2(a)(10) of the Uniform Code of Military Justice (UCMJ), which authorized the trial by courts-martial "in time of war" of "persons serving with or accompanying an armed force in the field," only contemplated jurisdiction over civilians during declared wars (and not Vietnam)." This came up in a recent Iraqi case. Mr. Vladeck goes on to say, "[l]ed by Senator Lindsay Graham, though, Congress amended Article 2(a)(10) in 2006 to authorize military jurisdiction over "persons serving with or accompanying an armed force in the field" "in time of declared war *or contingency operation*," as defined by 10 U.S.C. § 101(a)(13) (emphasis added). That is, Congress effectively (if stealthily, according to Vladeck) overruled *Averette*, and purported to authorize the exercise of court-martial jurisdiction over civilian contractors, and spouses and dependents of servicemembers." *Available at*: http://www.lawfareblog.com/2011/12/united-states-v-ali-and-military-jurisdiction-over-civilians/

public fearfulness of future attacks by terrorists. While this was natural following such an excessive and unprecedented attack, members of the executive branch including President Bush seemed to fan the flames of fear by both an absence of reassurance regarding national security and by encouraging the public to take a black-and-white perception towards events. While there was an effort made by the two major political parties to work together, anyone disagreeing with or criticising the actions of President Bush or the executive branch were immediately branded as being 'unpatriotic'. During the next several months, many civil rights under the U.S. Constitution were curtailed and even disregarded in the name of U.S. national security.[58] It is against this background that the Bush Administration began announcing new laws and procedures.

On November 13, 2001, President Bush issued his Military Order[59] in response to the shocking and tragic events of September 11, 2001 without advance notice to Congressional leaders or to the public.[60] This Military Order declared that those individuals designated by President George W. Bush would be taken into custody and brought to trial before a "military commission sitting as the triers of both fact and law" for offenses that were violations of the "laws of war and other applicable laws". The military commissions were to have excusive jurisdiction and could "sit at any time and any place."[61] Under this order, an individual could be taken into custody by the U.S. government if s/he was not a U.S. citizen[62] and President Bush had "reason to believe" that the individual:

1) "is or was a member of the organization known as al Qaida;
2) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury in or adverse effects on the U.S., its citizens, national security, foreign policy, or economy; or
3) has knowingly harbored one or more [of these] individuals."[63]

Whether a suspect fit into one of the categories would be determined, unilaterally and without review, by President Bush or by the Secretary of Defense, Donald Rumsfeld.[64]

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[58] The author was living in Boston, Massachusetts at the time of the attacks. Having lived in London for the previous 17 years during which the Irish Republic Army (IRA) had made numerous terrorist attacks on London, the fear-instilling, rather than fear-calming, by the members of the U.S. executive branch following the September 11th attacks was obvious, disheartening and in contrast to the British government's response to terrorism. Laura A. Dickinson notes that after September 11th, the U.S. government began to take people in the U.S. into custody, holding them in secret detention. By early November 2001, the number of individuals being held was 1147. Due to the intense criticism surrounding this, the Bush Administration including the Justice Department refused to release further information on any individuals it was holding either in the U.S. or outside of it. Described in Laura A. Dickinson's article, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law,* 75 S. Cal L. Rev. 1407, 1414 (2002). In the months and years following September 11th, it was noted by many of the public that the Bush Administration seemed to raise the level of security threats whenever there was notable public criticism of their actions. *See,* American Civil Liberties Union, www.aclu.org , a non-partisan organization defending civil liberties in America.

[59] *Supra* note 1.

[60] Katyal & Tribe, *supra* note 35, at 1260,

[61] Military Order, *supra* note 1, Sec. 4(c)(1).

[62] Katyal & Tribe, *supra* note 35, at 1298, discuss how this differentiating between U.S. citizens and non-citizens is in conflict with the Equal Protection Clause of the U.S. Constitution. It results in the unequal treatment of citizens versus aliens by "putting people on one side or another of a crude line that makes the difference between giving them access to fundamental protections of civilian justice and relegating them to a distinctly less protective and frankly inferior, brand of adjudication." The Equal Protection Clause of the 14th Amendment of the Constitution was intentionally drafted to prohibit states from denying any "person" rather than "citizen" within its jurisdiction the equal protection of the law. The text of the U.S. Constitution is *available at*: http://constitutionus.com

[63] Military Order, *supra* note 1, Sec. 2(a).

[64] *Martial Justice, Full and Fair,* NY Times, Nov. 30, 2001 at A27 reported that Alberto Gonzales, President Bush's White House Legal Counsel said that the Military Order, "covers only foreign enemy war criminals" who are chargeable "with offenses against the international laws of war"; that the order "does not require that any trial [or

The Military Order provoked a storm of protest from a large section of the American public including lawyers, judges, top-ranking military officers, civil and human rights organisations, editors and members of Congress.[65] The criticisms included that it was overbroad in its scope,[66] vague and arbitrary, it was against the rule of law including a lack of separation of powers as required by the U.S. Constitution, it contained very limited protections for the accused while giving broad and unprecedented powers to the Executive Branch. It is possible that the Bush Administration foresaw the future difficulties and issues surrounding its detention of individuals under this Military Order. Uncertainty as to the legal implications of the Military Order may have been the reason for the Bush Administration's decisions to hold detainees at the U.S. Bagram Air Base in Afghanistan[67] and Guantanamo Bay, Cuba, as well as authorizing secret CIA detention centres.

Separation of Powers

One of the major concerns which drew wide-spread public criticism of the Military Order (and the subsequent Department of Defense (DoD) regulations discussed below) was the failure of the Bush Administration to adhere to the separation of powers doctrine required by the U.S. Constitution. By specifically identifying the three separate branches of government, the Constitution implicitly demonstrates the distinct and separate powers of the legislative, the executive and the judicial. This was the fledging state's attempt to prevent a concentration of power in any one branch leading to an abuse of power. It is required that all three branches must concur on those actions which are a decisive departure from the legal status quo.[68]

Soon after the terrorist attacks occurred on September 11, 2001, it became clear that the executive branch had its own unilateral agenda as demonstrated by the Military Order and the DoD regulations which followed. The Executive Branch gave itself the right to detain anyone it suspected of being directly or indirectly involved in a vague and poorly defined "war on terror"; it was making the laws, setting up its own military commissions to adjudicate these detainees, and was the final reviewer of sentences.[69] That these military commissions were to be manned by those in the military forces in the role of prosecutor, defender, judge and jury, only served to give a presumption of bias to the commissions. It is impossible to consider military personnel as being independent from the executive branch because the military are governed by it. Those in the

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portion thereof] be conducted in secret"; that "[e]veryone tried before a military commission will know the charges against him, be represented by qualified counsel and be allowed to present a defense"; and "anyone arrested, detained or tried in the U.S. by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court." The skepticism of some commentators, such as, Katyal & Tribe, *supra* note 35, at 1263, of this 'trust me' type of verbal reassurance was justified when the guarantees clarified by Gonzales were not reflected in the Department of Defense's subsequent regulations, *Military Commissions Order No. 1, Procedures for Trial by Military Commissions of Certain Non-U.S. Citizens in the War Against Terrorism* (Mar 21, 2002), *infra* note 73.

[65] Dickinson, *supra* note 58, at 1416. *See* Kol, *supra* note 4*, at 338,* discussing a letter signed by more than 700 law professors and lawyers which was sent to the Honorable Patrick J. Leahy, complaining about the Military Order and its shortcomings.

[63] Katyal & Tribe, *supra* note 35, at 1261 gave the example that a Basque separatist who killed an American citizen in Madrid would come under this order.

[67] The prison at Bagram is the Parwan Detention Facility which generally had a total news-blackout under the Bush Administration. President Obama reported in September 2009 that detainees would have more opportunity to challenge their detention. *See* Eric Schmitt*, The U.S. to Expand Detainee Review in Afghan Prison,* The New York Times, 12 September 2009. This is happening under the new Detainee Review Boards.

[68] U.S. Constitution Articles One, Two and Three, *supra* note 62. Katyal & Tribe, *supra* note 35, at 1266; Koh, *supra* note 4, at 339.

[69] Katyal & Tribe, *supra* note 35, at 1308 conclude, "President Bush has claimed the power to create and operate a system for adjudicating guilt and dispensing justice through military tribunals without explicit congressional authorization—threatening to establish a precedent that future presidents may seek to invoke to circumvent the need for legislative involvement in other unilaterally defined emergencies."

military owe their future, including positions and advancement in the military to their employers, the Department of Defense (and behind the DoD, the president). [70]

In the past, military commissions have followed the court-martial rules of procedure and evidence. The Military Order changed this tradition by intending, instead, to draft new rules to apply to individuals charged with the specific offenses. These new rules were neither courts-martial rules nor civilian trial court rules. The Military Order stated, "it is not practicable to apply in military commissions the principles of law and rules of evidence generally recognized in the trial of criminal cases in the U.S. district courts"; the proceedings need not be open; convictions and sentencing shall be "only upon the concurrence of two-thirds of the members of the commission" and defendants "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly," in any U.S., foreign or international court.[71] This last point seemed to eliminate any attempt of habeas corpus review in challenging being detained but not charged with any offense.

Beyond this very limiting language, the Military Order also removed many of the major protections and guarantees found in the U.S. Constitution under the Bill of Rights and in international treaties signed by the United States including the International Covenant on Civil and Political Rights and the Geneva Conventions of 1949.[72] Some of these discarded guarantees for the accused were: the right to be present in court; the right to choose one's own counsel; the right to remain silent; the accused's right to be presumed innocent of a crime until proven guilty; the right to be informed of charges and to equal treatment before the courts (here, commissions), independent, equitable and impartial courts and/or tribunals; the right to a speedy trial; the right to confront witnesses; the privilege against self-incrimination; and a review by a higher and independent tribunal.

After the huge public outcry following the publication of the Military Order, the Department of Defense issued regulations providing additional procedural protections for those individuals being held in detention.[73] These additional but limited protections included the right of the accused to be told of the charges against her/him; the right to review evidence before the trial and the right to a military defense counsel. The accused could also hire a civilian counsel (with certain conditions attached) and all charges must be proved beyond a reasonable doubt. One important point to note is that both these military commissions and any appeal bodies were only able to make recommendations to the Secretary of Defense or to the President; they were not authorised

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[70] This is not to say this happened in a majority of cases. In actuality, a large number of professionals in the military including military lawyers and judges voiced their opposition to the military commissions due to procedural and evidentiary rules which were inferior to courts-martial rules. Many military people refused to be part of these commissions while there were some who preferred to leave the military rather than compromise themselves. Others stayed in the military and tried to make changes from within. *See* Frakt's testimony, *infra* note 83.

[71] Military Order, *supra* note 1, Secs. 1 (f), 4 (c) (4), 4(c)(6)-(7), 7(b)(2). The order did not guarantee or even provide that the accused would be entitled to know his/her charges or to see the evidence available. The level of guilt being proved 'beyond a reasonable doubt'(as necessary in criminal trials) was not applied here. There was no legal guarantee to prevent suspects from being detained indefinitely without charge. The accused did not have any right of appeal of the judgement in *any* court – domestic, foreign, or international. Dickinson, *supra* note 58, at 1415.

[72] U.S. Constitution, amends. V, VI, VIII, *supra* note 59; The International Convention on Civil and Political Rights (ICCRP), Dec. 16, 1966, Art.14, 999 UNTS 171; Third Geneva Convention, "Convention Relative to the Treatment of Prisoners of War*",* August 12 1949, Arts. 4-5 UST 3316, 75 UNTS 135 [hereinafter Third Geneva Convention]. *See* Daryl A. Mundis, *The Use of Military Commissions to Prosecute Individuals Accused of Terrorist Acts,* 96 AJIL 320 (2002).

[73] Military Commission Order No. 1, issued by the Department of Defense, March 21, 2002 [hereinafter MCO 1]. *Available at; http://www.defense.gov/news/Mar2002/d20020321ord.pdf* . The MCO 1 set out the procedural rules for the Bush military commissions which were released originally as ten separate instructions by the DoD. Jennifer K. Elsea, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Military Justice* at 6, CRS Report for Congress (Updated September 25, 2005) [hereinafter Elsea DoD]. *Available at*: http://www.defense.gov/news/Mar2002/d20020321ord.pdf .

to make binding final judgments themselves.[74] The MCO 1 was amended in August 2005 to have the presiding officer of each commission act more "judge-like" with panel members acting more like a jury.[75] Other modifications included the clarification that the accused could be present at her/his own trial except when necessary to protect classified information or when the presiding officer concluded that the admission of such evidence would not prejudice a fair trial."[76] The accused was presumed to be innocent until proven guilty.[77] While the accused were entitled to council under the MCO 1, this only applied to those individuals detained and charged; not those who had not been charged.[78]

Although no military tribunals were actually held until April 2007, this does not negate the fact that President Bush (and the executive branch) had grossly overreached his powers as president in issuing the Military Order.[79] Congress made no move to pass its own legislation regarding military commissions until the U.S. Supreme Court made the pointed suggestion for it to do so in the *Hamdan v. Rumsfeld* case.[80]

Is this a war?

Equally problematic is the language used by President Bush shortly after September 11th when he condemned the terrorist attacks and declared a "war on terror". The use of this phrase was unfortunate for many reasons. One of which was that this declaration attempted to move terrorism from being a criminal activity to being a full-blown, worldwide war, governed by the laws of war. Also, past U.S. presidents have declared a variety of wars against different subject matter including a "war on poverty" and a "war on drugs".[81] Initially, it was difficult to assess if Bush's use of the term "war on terror" was only rhetoric or whether it reflected an actual intention on the part of the government to treat terrorists attacks, both before and after September 11th, as an actual war. Historically, terrorists have been treated as criminals and charged under a country's domestic criminal law. With time, the Bush Administration demonstrated that its "war on terror" was more than just rhetoric.

By characterising the accumulation of past terrorist attacks on the U.S. by al-Qaeda, including those of September 11th, as a war, the administration had two bodies of law to choose from when it came to charging any non-U.S. citizens it detained: domestic criminal law and the laws of war.[82] When reviewing the procedures and offenses drafted for use by the new military tribunals, it becomes clear that the Bush Administration chose certain laws from each of these bodies of law

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[74] MCO 1 Sec 6(h)(4)-(6). Rumsfeld indicated that prisoners might continue to be detained even if they were found not to be guilty of the charges against them. This is what has happened with many prisoners at Guantanamo Bay, including many Uigher and Yemen prisoners.

[75] Elsea DoD, *supra* note 73, at 4.

[76] Id.

[77] MCO 1, *supra* note 73, Sec. 5(B). The government determined what information was to be classified.

[78] Id. at Sec. 4(C)(4).

[79] As Katyal & Tribe say in their comprehensive article, *supra* note 35, at 1297, that if Congress might subsequently pass its own legislation and even if it's done before anyone has been convicted, this "by no means renders the [Military] Order, and the claim underlying it harmless. Because the executive branch has acted ultra vires in even issuing the [Military] Order, the Order lacks the constitutional basis necessary to survive separation-of-powers scrutiny." By Bush's issuance of the Military Order, he has "indelibly altered the status quo, creating numerous barriers to congressional reversal if and when Congress might be inclined to act. Moreover, reversal by Congress would require not a simple majority but a two-thirds vote (to overcome any presidential veto of the legislation), so that requiring Congress to reverse the executive decision would significantly shift power from Congress to the President."

[80] *Hamdan v. Rumsfeld, supra* note 12. *See infra* section "*Hamdan v. Rumsfeld"* beginning on page 15.

[81] President L.B. Johnson declared war on poverty in 1964. President R. Nixon declared war on drugs in 1971. There has also been "wars" on specific items such as marijuana and salt (the latter in New York in January 2010).

[82] Again, this term is also used interchangeably with, "international law of armed conflict", and, "international humanitarian law". The accepted definition of international armed conflict is found in common Article 2 of each of the four 1949 Geneva Conventions which states, "All cases of declared war or of any other armed conflict which may arise between two or more [States], even if the state of war is not recognized by one of them."

that were most advantageous to its plans while jettisoning other laws which did not serve its interests. The result of straddling two separate and distinct legal bodies of law has been to muddy the waters of each.[83]

Generally, legal scholars have agreed that the war on terror cannot be considered an actual war.[84] Perhaps what is confusing about this new war on terror is that following September 11th the U.S. entered into several different military conflicts. The first conflict began on 7 October 2001 when in retaliation against Osama bin Laden's earlier terrorist attacks, the U.S. led a coalition attack against Afghanistan. The Taliban, governing Afghanistan *de facto* rather than *de jure*, had refused to turn over bin Laden and other members of al-Qaeda to the United States for trial, as requested. The military attack on Afghanistan was sanctioned by the U.N. Security Council Resolution No. 1368 which expressed the inherent right of individual or collective self-defence including to "take all necessary steps to respond to the terrorist attacks of September 11th and to combat all forms of terrorism."[85] In March 2003, the U.S. and a smaller coalition of countries attacked Iraq on the legal basis that Iraq's leader, Saddam Hussein, breached a 1992 ceasefire agreement by allegedly having weapons of mass destruction.

As noted above, the U.S. has only officially declared war five times in the history of the country. It can be said that a declared war is an official war. There are some commentators who have stated that in the present time of smaller conflicts and attacks, the need to declare war is not necessary.

Offenses under the Military Order and Department of Defense Orders
The Department of Defense (DoD) released new rules regarding offenses on 30 April 2003 entitled, the "Military Commission Instruction No. 2" (MCI 2).[86] The MCI 2 covered the crimes and elements for the military commission trials. In an approach which differed from its earlier release of rules covering military commissions, the DoD released the MCI 2 in draft form and asked for outside comments.[87] The MCI 2 clearly labelled those offenses the DoD considered to be war crimes and those offenses it considered to be "other offenses triable by military commissions". The MCI 2 listed the following as law of war offenses: Willful Killing of

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[83] In a White House memorandum dated 7 February 2002 to the vice-president, *et al.* regarding "Humane treatment of al Qaeda and Taliban detainees", President Bush stated that the 1949 Geneva Conventions would not apply to those detained in the 'war on terror'. This meant that individuals could not be considered to be prisoners of war but also there would be no legal entitlement to even being treated humanely. As Lt. Col. David Frakt stated (quoted at page 3 in *David Frakt: Military Commissions "A Catastrophic Failure"* posted by Andy Worthington on 8 August 2008 (www.andyworthington.co.uk)), "With a stroke of the pen, the President wiped out the principle source of the laws of war and the entire existing legal framework for the treatment of persons captured in an armed conflict and replaced it with a policy preference for humane treatment, which could be readily discarded whenever it interfered with military or intelligence operations" [hereinafter Frakt's testimony]. *See:* Amnesty International, U.S.A., *Military Commissions Act of 2006—Turning Bad Policy into Bad Law,* September 29, 2006, AMR 51/154/2006; Jack M. Beard, *The Geneva Boomerang: The Military Commissions Act of 2006 and U.S. Counterterror Operations,* 101 A.J.I.L. 56 (2007); Detlev F. Vagts, *Military Commissions: Constitutional Limit on Their Role in the War on Terror*, 102 A.J.I.L 573; Devon Chafee, *Military Commissions Revived: Persisting Problems of Perception,* 9 University of New Hampshire Law Review 237.

[84] *See* the official statement on the "war on terror" by the International Committee of the Red Cross (ICRC) made by Gabor Rona, legal advisor at the ICRC Legal Division, on March 16, 2004. *Available at: http://www.icrc.org/eng/resources/documents/misc/5xcmnj.htm* . *See also:* Leila Nadya Sadat, *Terrorism and the Rule of Law,* 3 Wash. U. Global Stud. L. Rev. 135 (2004); Charles Garraway,*The 'War on Terror': Do the Rules Need Changing?,* Chatham House (September 2006). *Available at:* www.the-beacon.info

[85] U.N. Security Council Resolution No. 1368, *Available at: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/533/82/PDF/N0153382.pdf?OpenElement* .

[86] Military Commission Instruction No. 2*, Crimes and Elements for Trials by Military Commissions,* issued by the Department of Defense, April 30, 2003 [hereinafter MCI 2]. *Available at:* http://www.globalsecurity.org/security/library/policy/dod/d20030430milcominstno2.pdf

[87] Elsea DoD, *supra* note 73, at 14.

Protected Persons; Attacking Civilians; Attacking Civilian Objects; Attacking Protected Property; Pillaging; Denying Quarter; Taking Hostages; Employing Poison or Analogous Weapons; Using Protected Persons as Shields; Using Protected Property as Shields; Torture; Causing Serious Injury; Mutilation or Maiming; Use of Treachery or Perfidy; Improper Use of Flag of Truce; Improper Use of Protective Emblems; Degrading Treatment of a Dead Body; and Rape.[88] The MCI 2 then listed the following as "crimes triable by military commissions": Hijacking or Hazarding a Vessel or Aircraft; Terrorism; Murder by an Unprivileged Belligerent; Destruction of Property by an Unprivileged Belligerent; Aiding the Enemy; Spying; Perjury or False Testimony; and Obstruction of Justice Related to Military Commissions.[89] Listed as "other forms of liability and related offenses" are: Aiding or Abetting; Solicitation; Command/Superior Responsibility-Perpetrating; Command/Superior Responsibility-Misprision; Accessory After the Fact; Conspiracy; and Attempt.[90] The DoD gave clear elements of each crime, making it easier to determine when and if such offense had been committed.

The MCI 2 stated that it covered conduct that "took place in the context of and was associated with armed conflict." The instruction explains that this requires there is "a nexus between the conduct and armed hostilities".[91] The definition of armed hostilities is broader than the customary use of "war" or "armed conflict". The term, "armed hostilities" does not have to denote a declared war or "ongoing mutual hostilities".

No Military Commissions Convictions from 2001 through 2006

Those individuals who were either captured by the U.S. military forces or were turned over to these forces in Afghanistan were initially held at the U.S. prison at Bagram Air Base, Afghanistan. The majority of these detainees were then transferred to the U.S. prison at Guantanamo Bay, Cuba; this prison opened in January 2002.[92] The U.S. government indicated in July 2003 that six of the men held in Guantanamo Bay could be charged under the Military Order. The U.S. held various negotiations with other nation states which had provided military forces for the U.S.-led coalition in Afghanistan regarding their nationals being held at Guantanamo Bay. Rules were modified in some cases while in other cases, the prisoners were released to their home countries.[93] By the time of the first military commission's hearing held on 23 August 2004 fifteen prisoners had been formally charged by the government with four of these prisoners put forward for hearings.[94] Part of the delay in starting the military commissions was due to the Department of Defense's lack of foresight to review the status of each detainee to determine if they were "lawful" or "unlawful" enemy combatants.[95] Any "lawful" enemy combatant was entitled to prisoner-of-war status under the 1949 Geneva Conventions.[96] The DoD set up the

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[88] MCI 2, *supra* note 86, Section 6. *Crimes & Elements,* Subsection A. *Substantive Offenses—War Crimes.*

[89] Id., Section 6. *Crimes & Elements,* Subsection B. *Substantive Offenses--Other Offenses Triable by Military Commission.*

[90] Id., Section 6. *Crimes & Elements,* Subsection C. *Other Forms of Liability and Related Offenses.*

[91] Id. at Section 5. *Definitions*.

[92] It is difficult to ascertain how many men were held at Bagram and what percentage was sent on to Guantanamo Bay due to the lack of transparency by the Bush Administration concerning the detainees it held worldwide during the GW Bush presidency. The administration refused to release even the names of those imprisoned in Guantanamo until ordered to do so by a federal court in the Spring of 2006. It has since been acknowledged that almost 800 men were detained at one time or another in the Guantanamo prison during the period of 2002 to 2009. *See* J. Munro-Nelson, *Demographics of Guantanamo Bay Prison*, (August 2008, updated May 2011) [hereinafter Demographics of GB]. *Available* on THE BEACON website: www.the-beacon.info

[93] Elsea DoD, *supra* note 73, at 4.

[94] Jennifer K. Elsea, *The Military Commissions Act of 2006: Background and Proposed Amendments,* at 1 (August 11, 2009) [hereinafter Elsea MCA 2006].

[95] President Bush declared that all the men held at the Guantanamo Bay prison were unlawful combatants, without basing the comment on any legal foundation. Elsea DoD, *supra* note 73, at 16.

[96] The Third Geneva Convention, article 5, *supra* note 72. Unfortunately, the original review boards (the CSRTs) did not go one step farther by allowing each detainee to challenge and rebut the designation of "unlawful" enemy

Combatant Status Review Tribunals in July 2004 following the Supreme Court ruling in *Hamdi v. Rumsfeld* in June.[97] In *Hamdi,* the Court ruled that Mr. Hamdi who was imprisoned at Guantanamo Bay should know the factual basis for being labelled an enemy combatant.[98] By June 2006 when the Supreme Court released its decision for the case of *Hamdan v. Rumsfeld*, the new military commissions had yet to prove themselves a worthy judicial tribunal for trying and convicting anyone charged under the war on terror.

Hamdan v. Rumsfeld *– Supreme Court (2006)*[99]

In October 2005, the Supreme Court agreed to hear arguments in a habeas corpus case brought by another Guantanamo Bay prisoner, Mr. Salim Ahmed Hamdan. According to the Court's opinion on this case, Hamdan was turned over by militia forces to the U.S. military in November 2001 before arriving at the Guantanamo prison in June 2002.[100] One year later, he was informed by the U.S. government that the Military Order would apply to him and, as a result, he would be tried by military commission. He was not charged with any offense until July 2004 when the government charged him with "conspiracy" for acts occurring on or about February 1996 to about November 24, 2001. The government stated that during this period, Hamdan had acted as a chauffeur and bodyguard to Osama bin Laden.[101] In his petitions, Hamdan asserted that the military commissions set-up by the U.S. government lacked the authority to try him because 1) there was no Congressional act nor common law of war supporting a trial by military commission for the offense of conspiracy which Hamdan contended was not a violation of the law of war; and 2) the procedures adopted to try him violated the most basic tenets of military and international law, including the principle that a defendant must be permitted to see and hear the evidence against him. Hamdan did agree, however, that a court-martial constituted in accordance with the Uniform Code of Military Justice (UCMJ) would have the legal authority to try him.[102]

The Court considered the following questions: Did the executive branch have the right to set-up military commissions? Were military commissions the right tribunal to try Hamdan? If so, were the rules of procedure governing these commissions adequate? One comment made by the Court was that the type of military commission set-up by the executive branch to try Hamdan and others was "arguably without any basis in law and operating free from many of the procedural rules prescribed by Congress for courts-martial; rules intended to safeguard the accused and ensure the reliability of any conviction."[103]

Regarding the first question, the Court noted its earlier decision of the *Ex parte Quirin* case where it held that Article 15 of the Articles of War sanctioned the use of military commissions to try, in

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combatant. Many legal experts have viewed the war with Afghanistan as an international armed conflict due to the Taliban government being a *de facto* government and hence, legitimate despite a lack of recognition by other countries. Yoram Dinstein, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT, 2nd ed., 29 (2010). *Also,* Michael N. Schmitt, *Targeting and International Humanitarian Law in Afghanistan,* Naval War College Int. Law Studies, 307, 330 (2009). *Available* at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600272 This would mean that captured Taliban soldiers would be accorded the status of prisoner of war; which would also be true of Iraqi soldiers.

[97] *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)

[98] Id. Mr. Hamdi was a U.S. citizen. The Court said that due process is demanded for a citizen held in the U.S. with the alleged enemy combatant being "given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker." Id.

[99] *Hamdan v. Rumsfeld*, *supra* note 12.

[100] Id. at 566.

[101] Id. at 570. The U.S. government argued that Hamdan "willfully and knowingly joined an enterprise of people who shared a common criminal purpose and conspired and agreed with members of al Qaeda …to attack civilians and civilian objects, murder by an unprivileged belligerent, and terrorism." Id. at 569-570.

[102] Id. at 567.

[103] Id. at 590.

appropriate cases, offenses against the laws of war.[104] The Court did not think it was necessary to analyse whether Article of War 15 actually was a Congressional nod to the executive branch to set-up military commissions in such circumstances. Instead, it noted that even *Quirin* did not assert that Article of War 15 gave the president a sweeping mandate to invoke military commissions whenever he deemed them necessary.[105] The Court then turned to the earlier case of *Ex parte Milligan,* pointing to the wording used by the Court in that case: "Congress cannot direct the conduct of campaigns, nor can the President…without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity. "[106]

Following the September 11th attacks, there had been no specific Congressional authorization to the Bush Administration to set-up military commissions. The Court then examined the pre-conditions set-out by Colonel William Winthrop which had to be met before there could be a jurisdictional basis for convening a military commission.[107] The *Hamdan* Court noted that all the parties agreed that the Winthrop treatise accurately reflected the American common law governing military commissions.[108]

The Court then reviewed the offense of conspiracy with which Hamdan was charged. The plurality opinion noted that the alleged offenses occurred almost entirely before the attack made on the U.S. on September 11, 2001. Second, the offense also took place outside the theatre of war. Third and most seriously, the Justices came to the conclusion that the alleged offense was not triable by a law-of-war military commission.[109] The Court concluded that as a minimum basis for using military commissions, the government must make a substantial showing that the offense the accused was charged with must be acknowledged to be an offense under the laws of war. The plurality of Justices contended, "[t]hat burden is far from being satisfied here."[110] The Court pointed out that under *Quirin*, the alleged offense was by universal agreement and practice, both domestically and internationally, recognised to be an offense under the laws of war.[111]

Coming back to the majority opinion, the Court noted that even if Hamdan was charged with a recognized offense under the laws of war, the military commissions put in place by the Bush Administration lacked the power to proceed.[112] Under the UCMJ, any presidential use of military commissions is conditional upon complying with the American common law of war, the rest of the UCMJ, and with the rules and precepts of the law of nations.[113] The Court stressed that, historically, military commissions have been governed under the same procedures as those

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[104] Id. at 593. Article 15 which was quoted in the 1942 *Quirin* case had substantially become Article 21 of the UCMJ, as of 2006.
[105] Id.
[106] Id. at 592.
[107] Colonel William Winthrop's treatise, *supra* note 17, at 831, as quoted by the *Hamdan* Court, (Id. at 597 & 598) stated that at least four pre-conditions must be present before a military tribunal had the right to try a particular case. The Winthrop pre-conditions were: (1) military commissions could only hear offenses committed in what was considered "the theatre of war"; (2) the offense charged must be committed within the time of war, not before or after the war; (3) such commissions, established at a time when martial law had not been declared or no occupation existed, could then only try "individuals of the enemy's army guilty of illegitimate warfare or other violations of the laws of war" and members of one's own military; and (4) a law-of-war commission only had the right to try two kinds of offenses: violations of the laws and usages of war cognizable by military tribunals only and breaches of military orders or regulations which were not legally triable by courts-martial.
[108] *Hamdan, supra* note 12, at 598. The Court went on to say that Article 15 (which became Article 21) in the Uniform Code of Military Justice (UCMJ) reflected the Winthrop treatise.
[109] Id. at 602.
[110] Id. at 603 & 604.
[111] Id. at 603.
[112] Id. at 613.
[113] Id.

governing courts-martial. Although such uniformity was not written in stone, any departure from courts-martial procedures must be tailored to the exigency that necessitated such departure, according to the Court.[114] Article 36 of the UCMJ puts these two restrictions on the presidential power to draft rules of procedures for military commissions (and courts-martial): first, any procedural rule to be adopted must not be "contrary to or inconsistent with" the UCMJ and, second, the rules adopted must be "uniform insofar as practicable". The Court noted that "[n]othing in the record demonstrates that it would be impracticable to apply court martial rules here".[115] With that, the Court found the military commissions procedures adopted to try Hamdan were illegal under courts-martial practice[116] as well as under the four Geneva Conventions of 1949[117] which reflect universally-accepted laws of armed conflict.

The Court noted that the protections and rights found in Article 3 of each of the Geneva Conventions applied to Hamdan who was allegedly in the employ of al-Qaeda.[118] Common Article 3 applies when there is a "conflict not of an international character occurring in the territory of one of the parties to the convention".[119] Here, the Court held that common Article 3 applied to all conflicts in the territory of any party to the conventions other than conflicts between states.[120] It went on to say that common Article 3 required Hamdan to be tried by a "*regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised people*."[121]

The Supreme Court's decision in *Hamdan* summarised its opinion of the Bush military commissions by saying, "[W]e conclude that the military commission convened to try Hamdan lacks the power to proceed because its structure and procedures violate both the UCMJ and the

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[114] Id. at 620.

[115] Id. at 562 (Syllabus, (c)). Further, the Court noted that the rules of the military commissions were illegal because UCMJ Article 36 had not been complied with. Bush had noted in November 2001 that it was impractical to follow rules and procedures governing criminal cases but there had been no comments on why the courts-martial rules and procedures were not being used since, historically, they had always been used in military commissions. The Court could see no reason why they weren't being used here. Id. at 617.

[116] Here, the Court looked to Winthrop's four pre-conditions which must be present before a military tribunal would have the necessary jurisdiction to hear a case (*supra* note 107). The Court stated these conditions also reflected what was necessary under common law which governed the military commissions. The conditions are found in Article 21 of the UCMJ. Id. at 34.

[117] The four Geneva Conventions of August 12 1949 [hereinafter the Geneva Conventions] (*see infra* note 118), and the Hague Convention No. IV *Respecting the Laws and Customs of War on Land,* October 18, 1907, are the primary treaties covering the laws of war. This is accepted and recognized by the U.S. government. *See Hamdan,* Id. at 65.

[118] The Geneva Conventions are comprised of four conventions: first, the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; second, the Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; third, the Convention Relative to the Treatment of Prisoners of War of August 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [already noted as the Third Geneva Convention, *supra* note 72]; and fourth, the Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.

[119] Since Article 3 is found in each of the four Geneva Conventions, it is referred to as "common Article 3".

[120] *Hamdan, supra* note 12, at 629

[121] Id. & Article 3 (1)(d) of the Geneva Conventions [author's italics]. The Court pointed out that a "regularly constituted court" was defined to mean an "ordinary military court that is established and organized in accordance with the laws and procedures already in force in a country." (at 632) "At a minimum, a military commission "can be regularly constituted" by the standards of our military justice system only if some practical need explains" why deviations existed from court-martial practice. No such need was been demonstrated here. (at 632 & 633). The Court goes on to say that at a minimum, the intertwined concept of "all judicial guarantees which are recognized as indispensible by civilized people" would, at the least, incorporate the barest of legal protections as covered by international customary law (and reflected in Article 75 of the Additional Protocol I of the Geneva Conventions.). (at 633). Other protections given under common Article 3 include the right to be treated humanely without distinction of race, religion or faith; the prohibition of murder, cruel treatment or torture against the accused; nor should there be outrages against personal dignity especially humiliating and degrading treatment. Common Article 3(1) of the Geneva Conventions.

Geneva Conventions. Four of us also conclude that the offense with which Hamdan has been charged is not an "offense that by the law of war may be tried by military commissions". [122]

Military Commissions Act of 2006 (MCA)[123]
In response to the Supreme Court's decision in *Hamdan,* President Bush moved quickly to answer the Court's concerns while retaining the use of military commissions for adjudicating offenses committed in the "war on terror". Although it was within his power to repudiate the Court's interpretation that the rights and protections under the Geneva Conventions applied to members of both al-Qaeda and the Taliban, President Bush appeared to want to avoid a confrontation with the courts on treaty interpretation. This may be due, at least in part, to the publication of another court decision at the same time as the *Hamdan* case. In the *Sanchez-Llamas v. Oregon* case, the Supreme Court held that the courts were the authoritative expositors of treaties in the federal system.[124] When it came to drafting new legislation on military commissions, one of President Bush's objectives appeared to be to prevent the Supreme Court from ever again having an opportunity to interpret any article of the Geneva Conventions, including common Article 3.[125] To that end, he initially proposed statutory language that sought to bar any invocation of the Geneva Conventions in any court.[126] Congress did not proceed with this language but the efforts of President Bush meant that the MCA contained several provisions that, on their face, curtail the courts' ability to enforce the Geneva Conventions and, in general, international law.[127] A second objective seemed to be to unilaterally redefine the laws of war to achieve a much broader application than was universally recognised while noticeably limiting the rights and protections inherent in it.[128]

Since President Bush wanted this legislation in place by the time of the Autumn Congressional elections of 2006, it was came down to the executive branch to both lead and move the negotiations forward. President Bush sent proposed wording to the House of Representatives on September 6, 2006 which was introduced in the Senate on September 7. A week later the House Armed Services Committee approved the Bush version. At the same time an alternative version of a military commissions law was being put forward by its co-authors, Senators McCain, Warner and Graham. A compromise was reached between the two versions with the resulting compromise law entitled, the Military Commissions Act of 2006. This compromise act was agreed on September 27 and signed into law by President Bush on October 17, 2006.[129]

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[122] *Hamdan, supra* note 12, at 567.
[123] 10 U.S.C. 47A, Sec 948a. *Note*: This is not a complete discussion of the MCA. The author refers all readers to the law *available at: http://www.loc.gov/rr/frd/Military_Law/pdf/PL-109-366.pdf*
[124] *Sanchez-Llamas v. Oregon*, 126 Sup. Ct. 2669, 2684 (2006).
[125] Carlos Manuel Vázquez, *The Military Commissions Act, the Geneva Conventions, and the Courts: a Critical Guide,* 101 A.J.I.L. 73, 74 (2007).
[126] The wording of S. 3861, 109th Cong. Sec. 6(b)(1) (2006) declared, "No person in any habeas action or any other action may invoke the Geneva Conventions or any protocols thereto as a source of rights; whether directly or indirectly, for any purpose in any court of the U.S. or its States or territories."
[127] These provisions include 10 U.S.C. 948b(g); Sec. 5(a); and Sec. 6. All of the strategies used to undermine international law, including the Geneva Conventions, served only to denigrate the past commitment of the United States military to the Geneva Conventions. Scott Horton, chair of the New York City Bar Association's Committee on International Human Rights was visited several times in 2003 by a number of admirals who declared that "[t]he war on terror had ended a 50-year history in the U.S. of exemplary application of the Geneva Conventions." *See* ABC News, *JAG Lawyers, A Prisoner Warnings Ignored,* May 16, 2004, *available at: http://abcnews.go.com/WNT/story?id=131661&page=2#.T-ooj2j3AfE*
[128] Beard, *supra* note 83, at 63.
[129] Vàzquez, *supra* note 125, at 74. Jennifer K. Elsea reports in her article that there were four to five versions of military commissions legislation making their way around Congress at this time. Elsea DoD, *supra* note 73, at 31. *See* J. Munro-Nelson, *The Legal and Moral Reasons the U.S. should not use Torture against Detainees,* (2007, revised 2008), at 15, THE BEACON website, *available at* http://www.the-beacon.info "The shortness of time between the Court's June [2006] opinion and the Autumn elections, the last minute changes and the size of the act resulted in the Bush Administration backing down on many of its original proposals such as the continued use of interrogation

The MCA did make some minor positive changes to the original Bush military commissions but these changes did not go far enough to make the resulting military commissions more equal in terms of judicial fairness when compared to either courts-martial or civilian trials.[130] Overall, the major criticisms of the MCA were: the continued and destructive blurring of the boundaries between two distinct areas of law--the laws of war and the domestic civil (especially, criminal) law; contradictions between different MCA provisions; and only partial adherence to the conditions set-out by the *Hamdan* Court as being necessary for the attainment of legitimate military commissions in the future.

At the same time, the authors of the MCA attempted to address every comment and criticism of the *Hamdan* Court with the executive branch continuing to insist that military commissions were the necessary and legitimate means of adjudicating offenses under its war on terror. The MCA authorized the military commissions to try any "unlawful enemy combatant", defined as being:

> (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, before, on, or after the date of the enactment of the Military Commissions Act of 2006, has been determined to be an unlawful enemy combatant by a Combatant Status Review Tribunal or another competent tribunal established under the authority of the President or the Secretary of Defense.[131]

Again, these categories only applied to non-U.S. citizens or "aliens" as they were defined in the act.[132] While U.S. citizens were exempt from being tried by military commissions, any individual who fitted the definition of an "unlawful enemy combatant" could be held by the government under the MCA.[133]

As discussed above, the *Hamdan* Court discussed that Article 21 of the Articles of War gave authority to the U.S. president to establish military commissions, conditional upon compliance with the law of war.[134] The MCA, however, sidelined the necessity of complying with Article 21 by adding a new statutory authority for establishing military commissions in Section 3, 948b(b). This subsection, "Authority for Military Commissions under this Chapter", stated that the president has the authority to establish military commissions for "offenses triable by military commissions as provided in this chapter."[135] The MCA also addressed the *Hamdan* Court's concern that the structure and procedures of the Bush military commissions violated both the UCMJ and the Geneva Conventions. The drafters of the MCA did this by encapsulating the MCA as part of the UCMJ[136] and by denying any reference to the Geneva Conventions as a source of rights.[137]

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techniques such as stress positions, induced hypothermia and waterboarding. The lack of time also means that Congress did not thoroughly examine the MCA."

[130] Beard, *supra* note 83, at 56.

[131] 10 U.S.C. Sec. 948a(1).

[132] Id at Sec. 948a(3). *See supra* note 58 regarding the discrimination of designating non-U.S. from U.S. citizens.

[133] Elsea MCA 2006, *supra* note 94, at 6.

[134] Treaty law for the law of war includes the 1949 Geneva Conventions, the two Additional Protocols, and the Hague Conventions. *See, supra* note 117.

[135] 10 U.S.C. Sec. 948b(b). One would be forgiven for thinking that this is not a linear definition.

[136] The UCMJ is Chapter 47 of 10 U.S.C. whereas the MCA is the new Chapter 47A, and as such, is a subpart of the UCMJ. The MCA states that the UCMJ does not apply to trials by military commission except as provided in Chapter 47A. 10 U.S.C. 948b(c). *See* Elsea DoD, *supra* note 73, at 31.

[137] 10 U.S.C. Sec. 948b(g).

Distinction under the Laws of War

Before the Bush military commissions were conceived, the U.S. government was careful to follow one of the fundamental and cardinal principles of the law of war, the principle of distinction. Distinction refers to distinguishing between "combatants" and "civilians" in war. This is to ensure that armed conflicts are fought between combatants and to protect civilians and civilian objects.[138] Civilians have the right to be protected from attack. This protection continues until a civilian takes an "active" or "direct" part in hostilities, at which time s/he loses this protection.[139]

One problem with the MCA was that it granted unprecedented and unchecked authority to the executive branch to label individuals, including those living in the United States, as "[alien] unlawful enemy combatants".[140] It also expanded the scope of combatancy as it expanded the concept of when a civilian was "actively" participating in any hostilities. Under Section 948a of the MCA, any civilian who gave what was termed, "material support", to hostilities against the United States or any of its co-belligerents would be considered an "unlawful enemy combatant".[141] The effect of this offense was to noticeably broaden the category of civilians considered to be taking an active part in hostilities.

With this test of unlawful combatancy, offenses under the laws of war moved from the actual theatre of war to any time and place in the world. By expanding the definition of "combatant" to civilians who historically had never been considered to be *directly* involved in hostilities, the U.S. government unilaterally revised a key principle of the international law of war. This has not only caused major confusion to experts and participants in the field but it also put the lives of U.S. civilians and private contractors at risk who work for the U.S. government on or near the battlefields by making them legitimate targets under the laws of war.[142] One only has to read two different sections of the MCA to see the dilemma presented by the government.

In Section 950v(a)(1), "protected persons" are defined under the Geneva Conventions as being those "civilians not taking an *active* part in hostilities". By using this commonly accepted definition of "civilians" under international law, the drafters of the MCA seemed to be attempting to protect certain civilians employed by the U.S. government such as the Central Intelligence Agency and private contractors. This protection of civilians must be contrasted with Section 950v(a)(25) of the MCA where language is used to broaden the category of offenders covered by the MCA. As discussed above, this was done by adding the offense of "material support for terrorism" which has never been an offense under the law of war. The difference between these two sections of the MCA can be called "protection" versus "prosecution".

As with all the other offenses listed in it, the MCA explicitly stated that the crime of "material support for terrorism" was traditionally triable by military commissions (i.e., an offense under the laws of war). It is foreseeable that such a revision of the law of distinction could also impact on the future detainee status of independent contractors used by the U.S. government in foreign conflict areas. At the time the MCA became law, the U.S. government contended that

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[138] Dinstein, *supra* note 96, at 33.
[139] Id at 146. Dinstein also notes that being caught up in lawful collateral damage is the exception to the rule that civilians should not be attacked.
[140] Beard, *supra* note 83, at 59.
[141] 10 U.S.C. Sec. 948a(1)(A)(i) states that an unlawful enemy combatant is "a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the U.S. or its co-belligerents who is not a lawful enemy combatant".
[142] Or, at least to the U.S. government's understanding of the laws of war. Beard, *supra* note 83, at 66.

independent or private contractors were to be accorded "prisoner of war" status under the Third Geneva Convention.[143]

The MCA actually broaden the foundation of the earlier Military Order and the subsequent DoD orders by referring only to "hostilities" and not to the "law of armed conflict".[144] Although the MCA never defined the term, "hostilities", this term was interlaced throughout the whole act. Also, the MCA did not limit itself to offenses only against the United States. Under Section 948a(1)(A)(i), an individual could also be considered an "unlawful enemy combatant" if s/he "engaged in hostilities or who [has] materially supported hostilities" not only against the United States but against any of its co-belligerents. A "co-belligerent" was defined as, "[a]ny state or armed force joining and directly engaged with the U.S. in hostilities or directly supporting hostilities against a common enemy".[145] As can be seen, this definition of "co-belligerent" was vaguely worded, neither defining the time nor place where such hostilities may have occurred. The effect was to again broaden the list of individuals that fell under the MCA's jurisdiction.

Offenses under the MCA

While the triable offenses under the MCA were basically the same as those offenses listed in the Department of Defense's MCI 2 for the initial Bush military commissions,[146] there were a few exceptions. Three new offenses appeared in the MCA. Two of them, "Cruel or Inhuman Treatment" and "Sexual Assault or Abuse"[147] may have been included because the MCA was drafted after the pictures of prisoner abuse by members of the U.S. military and private U.S. contractors at the Abu Ghraib prison in Iraq became public. These explicit pictures were released globally at the beginning of 2006. The third new offense was for "Providing Material Support for Terrorism",[148] discussed above. This offense seemed to replace the earlier offense of "Aiding & Abetting" in the MCI 2. Minor changes occurred in the specific titles of several offenses such as the MCI 2 offense, "Murder by Unprivileged Belligerent" which became, "Murder in Violation of the Law of War".[149]

The MCA did not break its offenses into different categories as did the MCI 2.[150] In comparing the offenses set-out under the MCI 2 against the MCA offenses, the earlier MCI 2 contained clearer and more concise elements of each crime. Although the MCA set-out elements for each crime, the descriptions seem to be inferior. The MCA made the blanket statement that the listed offenses were ones triable by military commission. There was no further explanation or delineation. The following offenses listed in the MCA are viewed as legitimate offenses under the law of war for international conflicts: Wilful Killing of Protected Persons; Attacking

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[143] Id. at 67. Third Geneva Convention, *supra* note 72.

[144] The MCI 2 states that the crimes and elements therein derive from the law of armed conflict, a body of law that is sometimes referred to as the law of war. There is some confusion later because when the MCI 2 defines what it means by, "in context of and was associated with armed conflict", it doesn't refer to armed conflict but instead to armed hostilities. Id., *supra* note 86, at 5(C). The definition of "armed hostilities" is broader than the customary definition of war or "armed conflict". "Armed hostilities" does not need to be a declared war or have "ongoing mutual hostilities". An attempted hostile act or actual hostile act may, depending on its severity, reach the level of an armed attack. Elsea DoD, *supra* note 73, at 17. In contrast, the MCA does not mention "the law of armed conflict" but instead speaks of "hostilities" throughout the act.

[145] Id at Sec. 948a(1)(B).

[146] MCI 2, *supra* note 86; offenses listed *supra* pages 13-14.

[147] 10 USC Sec. 950v(b)(12) and Sec. 950v(b)(22), respectively.

[148] Id. at Sec. 950v(b)(25).

[149] This offense makes the killing (or even the attempted killing) of a lawful combatant, (e.g., an U.S. soldier) a war crime. In Frakt's testimony, *supra* note 83, at 4, Lieutenant Colonel Frakt commented that by making this an offense "the U.S. declared that it was a war crime to fight, regardless of whether the fighters comply with the rules of war." *See* Elsea MCA 2009, *supra* note 11.

[150] The MCI 2 breaks the offenses into "War Crimes", "Other Offenses Triable by Military Commission" and "Other Forms of Liability and Related Offenses". Elsea MCA 2009, *supra* note 11, at 6A-C.

Civilians; Attacking Civilian Objects; Attacking Protected Property; Rape; Pillaging; Denying Quarter; Using Poison or Analogous Weapons; Torture; Using Protected Persons as Shields; Causing Serious Injury; Using Treachery or Perfidy, and Improperly Using a Flag of Truce. However, most if not all, are not traditionally recognised offenses in non-international conflicts.[151]

The MCA states that the list of offenses contained in it "codify offenses that have traditionally been triable by military commissions" and it claims that it "does not establish new crimes that did not exist before its enactment".[152] As discussed by the *Hamdan* Court, certain offenses under the MCA did not exist under the law of war or the UCMJ at the time they were alleged to be committed. This attempt by Congress of an "*ex post facto* application" of the law has been labelled as "worrying".[153] The MCA also extended the actual timing of the "war on terror" by stating that a "military commission has jurisdiction to try any offense made punishable when committed by an alien unlawful enemy combatant before, on or after September 11, 2001."[154] Another of one of Winthrop's pre-conditions for trial by military commission—that the war offense must be committed within the time of war, not before and not after it—is not met.[155]

Amending & Rejecting Non-U.S. Sources of Law
The MCA also amended the War Crimes Act under its Section 6 *Implementation of Treaty Obligations* by stating, the "provisions of section 2441 of title 18, United States Code, as amended by this section, fully satisfy the obligation under Article 129 of the Third Geneva Convention for the United States to provide effective penal sanctions for grave breaches which are encompassed in common Article 3 in the context of an armed conflict not of an international character."[156]

It is the War Crimes Act that sets-out violations of international conventions to which the United States is or will become a party.[157] These are crimes committed by or against a U.S. national or a member of the U.S. Armed Forces.[158] Before the MCA amendment of the War Crimes Act, the

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[151] 10 U.S.C. Sects. 950p-950w. *See* Dinstein, *supra note* 96, Chapter 9. "War Crimes, Orders, Command Responsibility and Defenses", at 263-294. Several international criminal tribunals have recognized some of the offenses listed in the MCA as war crimes in *non-international* conflicts including: a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; b) wanton destruction of cities, towns, or villages, or devastation not justified by military necessity; c) attack on undefended towns, villages, dwellings or building; d) seizure of, destruction or willful damage done to institutions dedicated to religion, charity, & education, the arts and sciences; historical monuments and works of art and science. *See,* UN Doc. S/Res/827 (1993), art 3. The ICTY Statute and procedural rules are available at:
http://www.icty.org/x/file/Legal%20Library/Rules_procedure_evidence/IT032_Rev42_en.pdf
[152] 10 U.S.C. Sec. 950p(a). The statement regarding *ex post facto* offenses made in Section 3A of the MCI 2, *supra* note 86, by the DoD was mirrored by this section of the MCA. There is always a constitutional concern about retroactively applying penal or criminal laws. The U.S. Constitution, Article 1, Section 9 states that "No bill of attainder or ex post facto Law be passed." The reference to the Constitution is found at *supra* note 62.
[153] Beard, *supra* note 83, at 61.
[154] 10 U.S.C. Sec. 948d(a). Elsea MCA 2006, *supra* note 94, at 11, notes that "[t]he law of war has traditionally applied within the territorial and temporal boundaries of an armed conflict between at least two belligerents. It traditionally has not been applied to conduct occurring on the territory of neutral states or on territory not under the control of a belligerent, or to conduct that preceded the outbreak of hostilities, or to conduct during hostilities that do not amount to an armed conflict. Unlike the conflict in Afghanistan, the conflict related to the September 11, 2001 attacks does not have clear boundaries in time or space, nor is it entirely clear who the belligerents are."
[155] Winthrop, *supra* note 17. Unless one argues, as did the Bush Administration, that the war on terror started before September 11, 2001.
[156] 10 U.S.C. Sec. 6 and 6(b) [author's italics].
[157] 18 U.S.C. Sec. 2441.
[158] Michael J. Matheson, *The Amendment of the War Crimes Act,* 101 A.J.I.L. 48, 49 (2007).

list of violations included both "grave breaches" of the Geneva Conventions[159] and all of the violations covered by common Article 3.[160]

By stating that its provisions fully satisfied all obligations to provide effective penal sanctions for "grave breaches found in common Article 3", the MCA reflected a lack of understanding by its drafters of some basic principles under the law of war. Here, the MCA confused offenses which were prohibited in international conflicts as reflected in each of the four Geneva Conventions ("grave breaches") with those prohibited offenses listed in common Article 3. Common Article 3 does not contain any "grave breaches" because it concerns itself only with non-international conflicts. Nowhere in any of the four Geneva Conventions is there any mention of "grave breaches of common Article 3".

Putting that aside, the offenses which the MCA set-out as being "grave breaches of common Article 3" were not grave breach offenses but were, instead, the prohibited offenses found in common Article 3. Despite listing the common Article 3 offenses, the MCA drafters neglected to include all of them. Several of the key prohibitions of common Article 3 omitted from the MCA listings were: 1) the prohibition against "outrages upon personal dignity, in particular, humiliating and degrading treatment", and 2) the prohibition against "the passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilised peoples".[161]

The publicly expressed reason for these omissions as given by President Bush and some members of Congress was that the language contained in common Article 3 such as "outrages upon personal dignity, in particular, humiliating and degrading treatment" was too vague for anyone to know what was meant.[162] While the language of the Geneva Conventions including Article 3 may not always be illuminating or succinct, these conventions have been the benchmark used by the U.S. military forces for many decades. It is familiar language. Unfortunately, the amended language used in the MCA did not lend itself to increased clarity. The MCA's description of many of the violations covered by it appeared to be ambiguous and, also, subjective. For example, "cruel or inhuman treatment" only occurred if the person doing the abuse "intend[ed] to inflict severe or serious physical or mental pain or suffering." The MCA then defined "severe physical pain or suffering" as being the same pain as a "bodily injury involving a substantial risk of death" or "extreme physical pain".[163] Is it an "intentional infliction" or is it an "intention to inflict a severe or serious pain or suffering"? Under these definitions, cruel treatment to an individual would only occur if an intention to actually inflict severe pain or suffering was present. If the protagonist actually intended to inflect some physical pain but not severe pain, it is unclear whether this would exclude such treatment under the MCA.[164] Some of the indicators as to

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[159] Grave breaches are particularly serious violations committed against persons or property as protected by the 1949 Geneva Conventions and include: Wilful Killing, Torture or Inhuman Treatment, Wilfully Causing Great Suffering or Serious Injury to Body or Health, or Wilfully Depriving a Prisoner of War of the Rights of a Fair and Regular Trial. The "Grave Breaches" provisions are present in each of the four 1949 Geneva Conventions, e.g., they are contained in the Third Geneva Convention, Sections 129 & 130, *see supra* note 72. Grave breaches are generally considered to apply only to international armed conflicts.

[160] Common Article 3 prohibits, among other things, Violence to Life and Person, Torture, Cruel or Inhuman Treatment, Outrages upon Personal Dignity, in particular, Humiliating and Degrading Treatment. *Supra* note 113.

[161] Beard, *supra* note 80, at 62. These are listed sequentially in common Article 3 as (1)(c) & (d).

[162] Matheson, *supra* note 155, at 51 points out that one turns to the U.S. military manuals for more detailed instruction to supplement this wording. Also, *see* Beard, *supra* note 80, at 62 stating that various international criminal tribunals have been able to figure out if such "outrages against personal dignity" have occurred and have, subsequently ruled that these incidents are a criminal offense.

[163] 10 U.S.C. Sec. 950v(b)(120(B)(i).

[164] Id. at Sec. 6(d)(2)(D). Not so long ago but before "waterboarding" became a recognized term, burning someone by putting cigarettes out on the skin was recognized as a form of torture. Torture is considered a step more severe than

whether the treatment towards another is prohibited seems to be subjective from the inflictor's point of view rather than from the damage actually suffered by the recipient. Michael J. Matheson, who took a substantial part in the formulation of the War Crimes Act in 1997, stated that the "net effect [of the MCA] is not to achieve greater clarity but, rather, to limit in an uncertain way the scope of acts to which criminal sanctions apply.[165]

In amending the War Crimes Act, the MCA took the unprecedented step of dividing the listed common Article 3 offenses into three levels of severity with only one level having any type of punishment attached to it. At the most serious level were the offenses labelled as being "the grave breach[es] of common Article 3". These so-called breaches were subject to criminal penalties and included the following: "torture", "cruel or inhuman treatment" and intentionally causing "serious bodily injury". The second level was, "degrading treatment or punishment" which consisted of prohibited offenses but these were not subject to any criminal penalties. The last level contained all other violations of common Article 3. For these last offenses, the president had the authority to prescribe administration regulations on enforcement.[166] While the Geneva Conventions do not state that all breaches of common Article 3 must be punished, the conventions that any state party to them must do something to prohibit or, at the least, deter any future offense from occurring. Common Article 3 states, "the following acts are and shall remain prohibited in any time and in any place whatsoever."[167] The MCA does not list another type of deterrent. Several legal scholars speculate that the reason for the MCA's more narrow definitions of and lack of punishment for the violations of common Article 3 was to protect a certain group of individuals. They speculated that the group being protected was not any members of the military since they remained subject to possible prosecution under the UCMJ (set-out in chapter 47) for any mistreatment of detainees under common Article 3. Instead, the individuals protected by the MCA would be the personnel working for CIA and independent U.S. contractors."[168]

The MCA also contained several prohibitions against using any foreign or international source of law or relying on the rights under any international instrument or treaty. Under Section 948b(g), the MCA noted that "[n]o alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights." A second reference was found in Section 6 of the MCA discussing the amendment of the War Crimes Act: "[n]o foreign or international source of law shall supply a basis for a rule of decision in the courts of the U.S. in interpreting the prohibitions enumerated".[169] The implication of both these sections was that neither the detainees being tried by military commission nor any court hearing such cases could refer to the Geneva Conventions. This would be an impossible task.

It was also something that some of its drafters never intended. When the compromised version of the MCA was being finalized, the three senators who helped to co-author it publicly disavowed that there had been any changes made that would affect the Geneva Conventions, stressing instead that the MCA was intended to "preserve intact the U.S. obligations under the Geneva

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cruel and inhuman treatment. One has to wonder who these offenses were drafted for. These are defined as offenses under the MCA which means the accused, the non-U.S. citizen is the one who has committed the torture and/or the cruel and inhuman treatment. Instead, they appear to have been drafted to protect those U.S. individuals who were committing these types of offenses on the non-U.S. detainees.

[165] Matheson, *supra* note 158, at 52.

[166] Id. at 51.

[167] Common Article 3, *supra* note 118 & 119.

[168] Matheson, *supra* note 155, at 52; Vázquez, *supra* note , at 125. Matheson believes any damage done by these amendments can be undone if the supporting Army Field Manual clarifies that U.S. personnel will comply with all offenses under common Article 3, at 53.

[169] Matheson, *supra* note 158, at 55.

Conventions."[170] Despite such statements, the legal meaning of MCA must be read as prohibiting any reference to international sources including to the Geneva Conventions by the accused in any trial by military commission or by any court. Some writers have attempted to put a positive spin on this by saying that the prohibition of prisoner/detainee rights only applies for those being tried by military commissions. They have argued that any accused individual could continue to use the Geneva Conventions as a source of law in any court-martial proceedings or in federal district court.[171]

The prohibition on using the Geneva Conventions as a source of rights also illustrates one of several implicit problems contained in the MCA: one of contradicting provisions. Although the MCA prohibited the right of any accused person (or the courts) to invoke the Geneva Conventions, the government had to rely on the Geneva Conventions for prosecuting war crimes since they form the foundation of the laws of war. Many of the offenses listed in the MCA are ones listed in the Geneva Conventions.[172] These types of contradictions between provisions should have been resolved before the MCA was signed into law to ensure good and succinct law.

Trial Standards—Evidence & Procedure
In response to concerns stated by the *Hamdan* Court, the MCA stated that any military commission established in accordance with it would be "a regularly constituted court, affording all the necessary judicial guarantees which are recognized as indispensable by civilized peoples". This language echoed the language of common Article 3(1)(d) of the Geneva Conventions with the exception of the added word, "necessary", in the MCA version."[173]

The MCA continued to allow the admission of hearsay evidence with the proviso that the proponent must give the accused sufficient notice that such evidence would be presented. Hearsay evidence was only ever prohibited under the MCA if the accused could demonstrate that the hearsay evidence was unreliable or lacking in probative value. Allowing hearsay evidence in a judicial hearing was a substantial deviation from the practice found in both civilian court trials and courts-martial. The MCA also allowed into evidence any statement made by the accused which was obtained by coercion although several conditions had to first be met.[174] In these cases, the military judge had to determine "if the totality of the circumstances renders the statement reliable and possessing sufficient probative value and that the interests of justice would be best served by admission of the statement into evidence."[175] In addition, if the coerced statement was

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[170] This and the subsequent examples indicate where the MCA lacks clarity. Part of the problem may be due to an insufficient understanding and knowledge of international law by most members of Congress. *See* Senator John McCain's statement, 152 Cong. Rec. Sec. 10,354, Sec 10,413-14 (Sept. 28, 2006): "[T]his legislation before the Senate does not amend, redefine or modify the Geneva Conventions in any way. The conventions are preserved intact…[T]his bill makes clear that the U.S. will fulfill all of its obligations under those Conventions."
[171] Vázquez, *supra* note 125, at 79.
[172] Id. at 84. The example he gives is that any accused under the MCA must "clearly…be able to rely on the Geneva Conventions in rebutting the government's argument that the person s/he allegedly murdered or used as a shield was a "protected person" under the conventions. *See, also,* Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions,* 101 A.J.I.L. 322, 328 (2007).
[173] 10 U.S.C. Section 948b(f). It is doubtful whether this was a legitimate declaration since the military commissions were not yet set-up under this act when it was made. Further, neither the pretrial nor trial procedures had yet been written by the secretary of defense. Are the legislators saying they are confident that any military commission will have all necessary judicial guarantees? Is it a legislative or presidential interpretation of the Geneva Conventions? Although the president has the right of treaty interpretation, there are no cases indicating that a presidential interpretation will be binding on courts. One view held by Vàzquez (*supra* note 125, at 79) was that this wording was an affirmation by Congress of its intent under the MCA to abide by common Article 3. This section then would be a reminder or instruction to the secretary of defense to use his/her discretion in a manner that complies with U.S. obligations under common Article 3.
[174] 10 U.S.C. 948r(c) & (d). The Geneva Conventions strictly prohibit the use of any torture or coercion to obtain any statement or confession.
[175] Id.

made on or after 30 December 2005, the judge must also find that the interrogation methods used to obtain the statement did not amount to cruel, inhuman, or degrading treatment."[176] The MCA explicitly stated under 948r(b) that statements made as a direct result of torture were not allowed although it did not address any concerns about the fruits of torture. "Fruits of torture" is a phrase referring to when there is an initial act or acts of torture against someone who, some time later, makes a statement or confession. By appearances, the act of torture and the statement are not directly related although they are always, at least, indirectly related. The MCA also did not cover those situations when a statement was obtained by a "lesser" abusive treatment, albeit one that was prohibited under common Article 3, such as when "humiliating and degrading treatment" was used.

Hundreds of prisoners held at Guantanamo Bay have filed writs of habeas corpus challenging the legality of their detention. The MCA sought to close off this right by stating that in the future and for any action already pending, "no court, justice or judge shall have the jurisdiction to hear or consider …a writ of habeas corpus filled by or on behalf of an alien detained by the United States."[177] Taken on its face, the MCA denied any individual detained by the U.S. any means to challenge her or his detention. The stripping of habeas corpus is not considered to be an acceptable means of curtailing prisoners' or detainees' rights. Instead, the stripping of habeas corpus is more often found in certain countries ruled by dictators and autocratic leaders. Certain human rights, including the right not to be imprisoned indefinitely when one has not been charged with a crime, are routinely curtailed and even denied during a "state of emergency" which may involve torture and cruel and inhuman treatment.[178]

Section 3 of the MCA gave authority to the Department of Defense (DoD) for enacting additional pretrial and trial procedures for military commissions. In response to the *Hamden* Court's point, the MCA noted that these pretrial and trial procedures did not have to follow court-martial procedures if the DoD deemed such procedures as being impracticable or inconsistence with military or intelligence operations. Contrary to the requirement stated by the *Hamdan* Court, the MCA did not require the DoD to give any rationale for such impracticality or inconsistency.[179]

The MCA expressly exempted military commissions from certain court-martial rules such as the right to a speedy trial, self-incrimination warnings and pretrial investigations.[180] The accused was presumed innocent unless proven guilty.[181] S/he had the right not to testify during her/his military commission's hearing and also was given the opportunity to present evidence and cross-examine witnesses.[182] Under these military commissions, the accused's right to counsel attached much later in the trial process than it did in a court-martial.[183] A civilian attorney could also be hired by the accused. The MCA, like the earlier DoD rules for the Bush commissions, required that all

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[176] Id (d). This is the date the Detainee Treatment Act went into effect. Generally, the DTA called for the complete prohibition of any cruel, inhuman or degrading treatment or punishment towards any individual under U.S. control. This act is not covered here as the *Hamdan* Court found it did not apply to the military commissions or to detainees as the U.S. government expected. *Hamdan, supra* note 12, at 594.

[177] 10 U.S.C. Sec. 7(a), amending 28 U.S.C. Sec 2241(e). This section covers aliens being held outside of Guantanamo Bay, too. In an earlier case, *Rasul v. Bush,* 542 U.S. 466 (2004), the Supreme Court held that federal courts had the jurisdiction to determine the legality of potentially indefinite detention of foreign nationals. The U.S. Constitution in Article 1, Section 9, provides, "The Privilege of the Writ of Habeas Corpus may not be suspended unless in Cases of Rebellion or Invasion the public Safety may require it." *Supra* note 64. The language in this section refers to "persons" rather than "U.S. citizens".

[178] Beard, *supra* note 83, at 70.

[179] 10 U.S.C. Sec. 949a(a). The Court discussed this point as reported, *supra* page 17.

[180] Id. at Sec. 948b(d)(A-C).

[181] Id. at Sec 949l(C)(1).

[182] Id. at Sec. 949a(b).

[183] Elsea MCA 2006, *supra* note 94, at 16. The MCA requires that at least one qualifying military defense counsel be assigned to the accused as soon as practicable after the swearing of charges." Id. at 17.

civilian attorneys had to meet strict qualifications including having a SECRET clearance or higher before being granted the right to represent the accused.[184]

In an interview published on October 19, 2006, Jakob Kellenberger, president of the International Committee of the Red Cross, reported the ICRC's concerns about the MCA included, "[t]he very broad definition of who is an "unlawful enemy combatant" and that 'there is not an explicit prohibition on the admission of evidence attained by coercion". He warned that the legislation could weaken the basic guarantees given by the Geneva Conventions for protecting any detainee from humiliating and degrading treatment.[185]

Boumediene v. Bush – Supreme Court (2008)
Two years after the *Hamdan* decision, the Supreme Court in *Boumediene v. Bush* held that Section 7 of the MCA, purporting to abolish habeas corpus rights, was unconstitutional.[186] The *Boumediene* Court's ruling was limited in its application to only those detainees being held at the U.S. prison in Guantanamo Bay, Cuba. The United States, under a lease with Cuba, has maintained complete *de facto* control over what is known as the naval base at Guantanamo Bay. This control by the U.S. has been uninterrupted for over one hundred years and does not allow Cuba to have any sovereign control over the U.S. base.[187] This is in contrast to other places of detention where the prisoners may be held under the control and command of the U.S. government but the law of the sovereign state is still supreme. In its discussion, the *Boumediene* Court said that the guarantee of habeas corpus was so central to the Founding Fathers that it was one of the few individual rights included before the Bill of Rights was even contemplated.[188]

Convictions by Military Commissions during the Bush Administration 2001-2009
Although it is undisputed that the Bush Administration expected it would subsequently obtain a very large number of convictions by the military commissions at the time the Military Order was announced, there were only three convictions obtained during this eight-year period. Three convictions must be considered a diminutive number when compared with the total of some 800 men imprisoned at Guantanamo Bay since it was opened in January 2002. If the convictions are calculated against the total being imprisoned at Guantanamo, one can see that less than one-half of one percent of all the men held at Guantanamo were actually convicted. The Secretary of Defense, Donald Rumsfeld noted in 2002 that the prison at Guantanamo Bay was set-up to hold the "worst of the worst".[189]

The very first conviction took place at the end of March 2007 when David Hicks stopped his military commission proceedings following the first full day of trial to plead guilty to the charge of giving "material support to terrorism". Salim Hamdan (of the earlier Supreme Court ruling) was sentenced on August 6, 2008 for giving "material support for terrorism" but was acquitted of "conspiracy to commit terrorism". Both men received sentences of less than one year. Ali

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[184] 10 USC Sec. 949c.
[185] Article, "ICRC "Concerned" Over Anti-Terorism Law" (19 October 2006). *Available at*: http://www.swissinfo.ch/eng/Home/Archive/ICRC_concerned_over_US_anti-terrorism_law.html?cid=5512874
[186] *Boumediene v. Bush*, 553 U.S. 723 (2008).
[187] Beard, *supra* note 83, at 70. *See Rasul v. Bush*, 542 US, 466, 484 (2004); J. Munro-Nelson, *Demographics of GB, supra* note 92.
[188] *Boumediene, supra* note 186, at 735. The narrowness of this decision was illustrated by *Munaf v. Geren,* decided by the Supreme Court in the same year, where two U.S. citizens each voluntarily decided to go to Iraq and were later charged with criminal offenses under Iraqi law. The Supreme Court said that because they were U.S. citizens and despite that they were abroad, they were entitled to file habeas corpus petitions. But, as to ruling on the merits of the case, the Court ruled that habeas corpus gave neither of the men any relief as the United States could not comment on another sovereign state's law. 128 S.Ct. 2207, 2213/14 (2008).
[189] This was reported widely in the media. E.g., *Rumsfeld Knew: DoD's "Worst of the Worst" and Recidivism Claims Refuted by Recently Declassified Memo,* by M. Denbeaux, Sean Camoni, Paul Taylor & Philip Taylor, Seton Hall University School of Law.

Hamza al Bahlul[190] was convicted of "conspiracy", "solicitation to commit murder", and "material support of terrorism" on November 3, 2008 and was given the maximum life sentence. This last conviction was exceptional since Mr. al-Bahlul did not present a defence to any of the charges against him. His appointed military counsel, Major David Frakt (now Lieutenant Colonel) pointed out that the arraignment's original judge, Colonel Peter Brownback, had granted Mr. al-Bahlul's request for self-representation. Col. Brownback was then involuntarily retired from the army and replaced. The new judge denied Mr. al-Bahlul the right to self-representation so that he had no defence.[191] It should be noted that no challenge to the MCA reached the Supreme Court before Barak Obama took over the presidency from George Bush.

THE OBAMA YEARS 2009

On 22 January 2009, two days after he was sworn in as president of the United States, President Barack Obama signed an Executive Order halting all trials by military commission until a review of all aspects concerning the detainees at Guantanamo Bay could be completed.[192] The review report was due within 180 days from the date of the Executive Order. By 15 May 2009, President Obama made certain announcements regarding the military commissions. He announced that the use of military commissions would be frozen for another four months. At that time, there were some thirteen prisoners, including five charged in conjunction with the September 11th, 2001 attacks, already in the military commissions system. The president stated that he wanted to continue using military commissions for prosecuting certain Guantanamo Bay prisoners as well as continuing to try prisoners in U.S. federal courts.[193] Finally, President Obama announced that the Department of Defense would be making the following rule changes regarding future military commissions: 1) "statements obtained from detainees using cruel, inhuman and degrading interrogation methods would no longer be admitted as evidence at trial; 2) the use of hearsay would be limited with the burden of proof no longer on the accused to disprove its validity; 3) the accused would have greater latitude in selecting their counsel; 4) basic protections would be provided for those refusing to testify; and 5) military commission judges could establish the jurisdiction of their own courts."[194] These reforms were part of the larger military commission reforms the Obama Administration was undertaking at that time. In the summer of 2009, both houses of Congress listened to reports on the MCA military commissions. Although given the opportunity to completely abolish the use of military commissions in the United States' "war on terror", Congress chose instead to amend the MCA and put in its place, the "Military Commissions Act of 2009".

Military Commissions Act of 2009

Included in one of the National Defense Authorization Act, the Military Commissions Act of 2009 was signed into law by President Obama on 28 October 2009. This new law, referred to here as the "MCA 2009", attempts to correct the numerous problems and shortcomings contained in the MCA. Unfortunately, the MCA 2009 does not manage to correct the more egregious problems of the first MCA.[195] Although President Obama gave his own views on amending the

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[190] Frakt's testimony, *supra* note 83, at 2, where Mr. al-Bahlul was described as a low-level al-Qaeda media specialist by his military lawyer, Lt. Colonel Frakt. Frakt had been instructed by his client not to mount a defense for the trial.
[191] Id. at 2.
[192] Executive Order No. 13492, Section 7, Barak Obama (22 January 2009).
[193] The Telegraph, *"Obama to Relaunch Military Courts for Guantanamo Suspects"*, 15 May 2009, available at: http://www.telegraph.co.uk/news/worldnews/northamerica/usa/5328297/Obama-to-relaunch-military-courts-for-Guantanamo-suspects.html
[194] The Atlantic, *Obama: Military Commissions "Appropriate," "Legitimate",* by Marc Ambinder, 15 May 2009, available at: http://www.theatlantic.com/politics/archive/2009/05/obama-military-commissions-appropriate-legitimate/17623/
[195] As with the two previous reincarnations, the MCA 2009 continues to state that individuals can be held indefinitely without being charged with a crime. Also, being found either not guilty of the charges or, if the accused is found guilty but due to the length of incarceration, has already served the applied sentence, there is no guarantee the accused will let

MCA, including deleting the offense of "Providing Material Support for Terrorism", his amendments were not always accepted by Congress. It can be seen, however, that the Obama Administration did not disagree with every contentious point of the earlier MCA, contrary to what many human rights organizations and individuals were hoping for. "The new law can't salvage these discredited commissions," said Joanne Mariner, Terrorism and Counterterrorism Director at Hunan Rights Watch. "Rather than risk endless litigation on military commission rules, the Obama Administration should prosecute detainees in federal courts whose record of trying terrorism cases is solid."[196]

Distinction under the MCA 2009

The MCA 2009 redefines the category of individuals the government can prosecute under the military commissions. Instead of "unlawful enemy combatants", the jurisdiction of the new act covers "alien unprivileged enemy belligerents".[197] Since "alien" in Section 948a(1) is defined as a non-citizen of the U.S., it would to continue to apply to permanent resident aliens who may be arrested in the United States if they meet the conditions of being an "unprivileged enemy belligerent".[198] One concern is that yet again, the MCA 2009 treats "aliens" and "U.S. citizens" differently by discriminating against those who are not U.S. citizens. This type of discrimination breaches the Equal Protection Clause of the U.S. Constitution.[199] It also continues to broaden the category of civilians that can be tried by military commissions.

As with the MCA, the MCA 2009 expands its jurisdiction under the laws of war by covering any civilian who has "purposefully and materially supported hostilities against the U.S. or its coalition partners". The same arguments against this language in the MCA apply here for the MCA 2009. Identical to the MCA, the MCA 2009 does not provide examples or parameters of "material support". Due to the historical reluctance of courts to try civilians in front of military tribunals

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out of prison. As of September 11, 2012, there were approximately 87 prisoners in Guantanamo prison who have been cleared of all charges; making them eligible for release. This has not happened. Several days before September 11, 2012, one of the prisoners, Adnan Farhan Abdul Latif, died. He had been in Guantanamo more than 10 years but became mentally unstable and lost the will to live. He was cleared of charges but because he came from Yemen, the U.S. government would not release him to his home country. *See,* http://www.andyworthington.co.uk/2012/09/11/a-call-for-90-men-to-be-freed-from-guantanamo-on-the-11th-anniversary-of-the-911-attacks/ There are approximately 37 men remaining in the prison from Yemen. The U.S. government, stating it is afraid these men will be tortured, has denied any repatriation to Yemen until such time the Yemani government is more stable. The U.S. also is having much difficulty in finding countries that will take any of these prisoners. This problem can be laid directly at the door(s) of Congress. Congress has passed several recent laws stating that no funds can be used for the movement of any of the detainees onto U.S. soil and that certain conditions must be met by any potential host country before prisoners can be released. *See, infra* pages 32-34.

[196] Human Rights Watch, *U.S.: Revised Military Commissions Remain Substandard,* (28 October 2009) *available at* http://www.hrw.org/news/2009/10/28/us-revised-military-commissions-remain-substandard

[197] 10 U.S.C. Sec. 948b(a). A "privileged enemy belligerent" is defined as fitting into one of the eight categories given in Article 4 in the PoW Convention, *supra* note 69. The "Unprivileged Enemy Belligerent" category is similar to the MCA's "Unlawful Enemy Combatant" one. The "Unprivileged Enemy Belligerent is "an individual who has 1) engaged in hostilities against the US or its coalition partners [previously, "co-belligerents"]; 2) has purposefully and materially supported hostilities against the same; or 3) was part of al-Qaeda at the time of the alleged offense under this chapter." Id. at Sec. 948a(7). What is new is that being part of al-Qaeda (3)) seems now to be a separate, distinct ground for inclusion. The words "or part of Taliban or associated forces" has been omitted from the last point reflecting, perhaps, on current negotiations with the Taliban.

[198] Elsea MCA 2009, *supra* note 11, at 8. Generally, resident aliens in the U.S. are entitled to the same protections in criminal trials as those enjoyed by U.S. citizens. Thus, constitutional questions could be raised for any one to be tried by military tribunal who does not meet the exception for "unlawful belligerent" set-out by the *Quirin* Supreme Court. Id.

[199] Joanne Mariner, *A First Look at the Military Commissions Act of 2009, Part One,* (November 4, 2009). *Available at*: http://writ.news.findlaw.com/mariner/20091104.html . The Equal Protection Clause is part of the 14th Amendment of the U.S. Constitution and prohibits states from denying any person within the jurisdiction equal protection of the law. This point was discussed by Katyal & Tribe, *supra* note 62.

when other courts are available, there may be lawsuits filed in the future when this happens.[200] Unlike the MCA, "hostilities" is defined by the MCA 2009 as being "any conflict subject to the laws of war."[201] This definition somewhat narrows the concept since one isolated attack won't be considered a conflict under the laws of war. Other factors such as the severity and length of attack must also be considered.[202]

Offenses 2009
There is no substantial change in the list of offenses from the MCA to the MCA 2009. What could, arguably, take an offense out of the jurisdiction of these military commissions is the additional wording found in Section 950p(c) limiting the jurisdiction to only those offenses "committed in the context of and associated with hostilities." The MCA 2009 again sets-out offenses which are a mixture of domestic crimes and international war crimes.[203] The same criticisms that applied to the MCA offenses continue to apply here to the MCA 2009.

An improvement has been made concerning the definition of "Cruel or Inhuman Treatment". The definition has been changed in Section 950t(12) to refer to treatment "that constitutes a grave breach of common Article 3 of the Geneva Conventions."[204] A definition for "serious bodily injury" is also added into the MCA 2009 at Section 950t(13)(B).[205] As with the MCA, there is no legal precedent for defining "Material Support of Terrorism" as a war crime. The Obama Administration had requested that this offense be eliminated from the list of offenses drafted for the MCA 2009 on the grounds that material support for terrorism has not a traditional law of war offense.[206]

The MCA 2009 once again declares that no new crime is being established and that all the offenses listed in the act are traditionally triable under the law of war or otherwise triable by military commission.[207] The MCA 2009 continues to broaden the period of time during which an offense can be committed by declaring that the MCA 2009 covers offenses "committed before, on or after September 11, 2001."[208]

Amending & Rejecting Non-U.S. Sources of Law 2009
Two legal improvements to the MCA 2009 involve the Geneva Conventions. Section 948b of the MCA stated that the Geneva Conventions could not be invoked as "a source of rights". Under the MCA 2009, this language has been deleted. However, there is new language regarding the Geneva Conventions, now found in 948b(e), stating that no one subject to trial by military commission under the MCA 2009 has right to use the Geneva Conventions "as a basis for a

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[200] Elsea MCA 2009, *supra* note 11, at 8.
[201] 10 U.S.C. Sec. 948a(9).
[202] Yoram Dinstein, in his lecture on *International Humanitarian Law* at the International Institute of Humanitarian Law, San Remo, Italy (July 2007).
[203] The list once again includes but is not limited to the following offenses: Murder of Protected Persons, Pillaging, Denying Quarter, Taking Hostages, Employing Poison or similar Weapons, Torture, Cruel or Inhuman Treatment, Murder in Violation of the Law of War, Treachery or Perfidy, Improperly Using a Flag of Truce or a Distinctive Emblem; Hijacking or Hazarding a Vessel or Aircraft, Terrorism, Providing Material Support for Terrorism, Wrongfully Aiding the Enemy, Attempted Offenses, Conspiracy, Solicitation, Contempt and Perjury.
[204] This definition would, at least, bring the definition back to common Article 3. As discussed above, *supra* note 159, it is generally accepted that the grave breaches provisions of the 1949 Geneva Conventions do not apply to common Article 3, which pertains only to non-international conflicts.
[205] The definition of "serious bodily injury" contains not only "a substantial risk of death" but also "extreme physical pain" (no longer associated with a major organ failure); "protracted and obvious disfigurement; or "protracted loss of impairment of the function of a bodily member, organ or mental faculty".
[206] U.S. Congress, Senate Committee on Armed Services, *Military Commissions,* 111th Cong., 1st sess., July 7, 2009.
[207] 10 U.S.C. Sec. 950p. Elsea MCA 2009, *supra* note 11, at 14, stating that the Obama Administration has expressed misgivings regarding the offense of "material support for terrorism" for another reason, too: because it is *ex post facto*.
[208] Id. at Sec. 948d.

private right of action." This is a definite improvement but is still limiting if someone has been the victim of any prohibited treatment under the conventions. Many of the international treaties, such as the "Convention Against the Torture and other Cruel, Inhuman or Degrading Treatment or Punishment" (the Torture Convention), require States that are party to them to ensure that their legal systems allow victims of any breach of that treaty redress for such treatment. For example, the Torture Convention goes on to state that each victim of torture "has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible".[209] The second change is the complete omission of the statement in the MCA that any "military commission established under the act is a regularly constituted court, affording all the necessary 'judicial guarantees which are recognized as indispensable by civilized peoples' for purposes of common Article 3 of the Geneva Conventions."[210]

Trial Standards--Evidence and Procedure 2009

The most important improvements under the MCA 2009 are the changes to evidentiary matters. The 2009 MCA follows the MCA by not allowing any statement to be admitted into evidence if it was made as a result of torture. It then goes further by prohibiting any statement made because of coercion or cruel, inhuman or degrading treatment.[211] While other statements may be allowed as evidence, certain conditions must be met first. A statement will be allowed into evidence only if the military judge finds that (1) the statement is reliable and it possesses sufficient probative value, when looking at the total circumstances surrounding it, and, (2) such statement is made "incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement…."[212] Further, evidence will be suppressed if is neither reliable or probative. Any statement voluntarily given by the accused may also be admitted with the MCA 2009 providing guidelines for the "determination of voluntariness".[213] These new standards are close to those being used in federal court. It is reported that President Obama requested a blanket voluntariness standard to be used.[214]

Again, pretrial, trial and post-trial procedures may be prescribed by the Secretary of Defense but the MCA 2009 declares that courts-martial procedural and evidence rules are to apply to these military tribunals unless exceptions exist elsewhere in the act or the UCMJ states otherwise.[215] The same court-martial rules are again expressly exempted from military commissions as they were under the MCA: the right to a speedy trial, self-incrimination warnings and pre-trial investigations.[216] In sub-section (b)(2) of Section 949a, the act sets out the minimum rights of the accused which include the right: to be present for all sessions, unless disruptive or to physically protect other people present; to present evidence in her/his defense; to cross-examine witnesses; to examine and respond to all evidence; and, in non-capital cases, to be represented by civilian attorney. The accused continues to be able to represent her/himself. One improvement occurs with the MCA 2009 in a capital case (with there being a possible death sentence) with the accused being "entitled to be represented to the greatest extent practicable by at least one additional council" who has capital case experience. This additional attorney may be a civilian.[217]

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[209] Article 14, 1. of the Torture Convention sets-out these requirements of member States. http://www2.ohchr.org/english/law/cat.htm

[210] This was found in the MCA at 10 U.S.C. Sec. 948b.(f).

[211] Id. at Sec. 948r(a).

[212] Id. at Sec. 948r(c).

[213] Id at Sec. 948r(d).

[214] Joanne Mariner, *A First Look at the Military Commissions Act of 2009, Part Two,* November 30, 2009. *Available at: http://writ.news.findlaw.com/mariner/20091130.html*

[215] Id. at Sec. 949a (a)

[216] Id. at Sec. 948b(d).

[217] Id. at Sec. 949a(b)(2)(C)(ii). Sec. 949c(b)(3) of the act sets-out the requirements for all civilian attorneys, i.e., "counsel" including, must have a security clearance of SECRET or above, with no past disciplinary actions against her/him, and be a US citizen.

Hearsay evidence continues to be admissible under the MCA 2009 although there are tighter rules requiring that anyone giving such evidence against the accused must supply more extensive background information. The MCA 2009 sets down certain conditions that must be met before any hearsay evidence is accepted by the judge into evidence.[218] The military commission proceedings may be closed to the public in whole or in part at the discretion of the military judge. The MCA 2009 states that this is to protect information, including non-classified information, and to ensure the physical safety of individuals.[219]

The MCA 2009 provides some reform for the resources available to the legal defense team which has been lacking in the past. This reform provides that the defense counsel is to be afforded a reasonable opportunity to obtain witnesses, key experts and other evidence.[220] While this is an improvement, it still falls short of the federal rules for trial and the court-martial rules where there is an equal opportunity for the prosecution and the defense to obtain evidence.[221] The timing of when a defense attorney is detailed for the accused occurs sooner in the process under the MCA 2009; being "as soon as practicable".[222]

The MCA 2009 gives the accused an automatic referral to appeal every guilty decision to the U.S. Court of Military Commission Review, a body made up of not less than three appellate military judges.[223] If this review body affirms the guilty conviction or sets it aside as incorrect in law, the accused can then go to the U.S. Court of Appeals in Washington, D.C. in respect of the findings and the sentence.[224] This is in contrast to the MCA which said the accused could go to the Appeal Court only for questions of law.[225] The exception to the right to appeal to the Court of Appeals is there is the possibility of the death penalty being imposed.

Events following the 2009 MCA to June 2012

It has been no secret that the Obama Administration would prefer to be using the civilian courts to try those civilians charged with offenses under the laws of war rather than going to the military commissions. After taking office in January 2009, the administration worked on a "hybrid approach" that would utilize the civilian courts where possible, and use the commissions where such possibility didn't exist. It has been reported that there is a small group of prisoners held by the U.S. government who are thought to be too dangerous to be released but who are considered to be too difficult to try in either venue (or, at least, to get a conviction). It is expected that they will be held indefinitely and without trial.[226]

Despite wanting to use the civilian courts for trying detainees, the Obama Administration has been thwarted from this option primarily by Congressional action. In 2009 and 2010, Congress placed funding restrictions on the Executive Branch in six separate laws regarding military spending. With Congress being responsible for the allocation of military funding and since the

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[218] Id. at Sec. 949a(b)(3)(D) generally states that the proponent is required to give the accused a fair opportunity to rebut the asserted hearsay evidence and that the military judge should determine if such evidence is a material fact; is probative and on point; that direct testimony from witness is not available; and that for general purposes of the rules of evidence and for the interests of justice will best be served if the statement be allowed into evidence.
[219] Id. at Sec. 949d(c).
[220] Id. at Sec. 949j.
[221] Mariner, Part 2, *supra* note 214.
[222] 10 U.S. C. Sec. 948k.
[223] Id. at Sec. 950c(a).
[224] Id. at Sec. 950g.
[225] MCA (2006) at 950g(b).
[226] Charlie Savage, I*n a Reversal, Military Trials for 9/11 Cases,* The New York Times, 4 April 2011. *Available at:* http://www.nytimes.com/2011/04/05/us/05gitmo.html Lt. Col. Frakt notes that after review by the Obama team, only thirty-six of the detainees at Guantanamo Bay were determined to be "viable candidates for prosecution or prolonged detention with forty-eight more deemed too dangerous to release." David Frakt, *Mohammed Jawad and the Military Commissions of Guantanamo,* 60 Duke Law Journal 1367, 1409 (2011).

detainees at Guantanamo Bay are being held in a military prison, Congress has a direct means of controlling what happens to them. Each of these laws contained an exception that allowed the president to try or to detain individuals for legal proceedings if certain conditions were met.[227]

In 2010, U.S. Attorney General Eric Holder announced plans to try the five prisoners charged with planning the September 11, 2001 attacks (including Khalid Sheikh Mohammed) in federal court in Manhattan.[228] The Justice Department sought and obtained grand-jury indictments against the five in the southern Manhattan federal court.[229] Throughout 2010, Holder continued to press his wish to hold the trial in federal court. Elected New York City officials thwarted this by refusing to allow the federal government to bring these men to trial in New York. This was despite these officials being located in the three federal jurisdictions where the terrorist attacks took place in 2001.[230] The Obama Administration's preference to use federal courts was then handily defeated when the 2011 National Defense Authorization Act was passed by Congress and signed into law by President Obama on January 7, 2011.

In the 2011 National Defense Authorization Act (NDAA-2011) for the 2011 fiscal year, Congress prohibited the use of any funds authorized under the act with regards to detainees held at Guantanamo Bay to, "transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions . . .". This time the act did not contain any exception for prosecuting detainees.[231] The NDAA-2011 effectively cut-off any funding for prosecutions in U.S. federal court and for any transfer of prisoners to federal prisons to facilitate the closure of the Guantanamo prison. It also specifically denied funds for the transfer of Khalid Sheikh Mohammed while expanding the denial to other detainees held at Guantánamo Bay.[232] Also barred was the use of any funding for the construction of any facilities in the United States to house detainees being transferred from the Guantanamo prison. The new act also severely limited the number of potential countries that the Obama Administration could consider sending cleared detainees to if their native countries were deemed unsuitable. The NDAA-2011 set-out six different stipulations that had to be met by any potential sponsor country. These country stipulations included, "has agreed to share intelligence information with the U.S." and "is not a sponsor of terrorism".[233] When President Obama signed the NDAA-2011 into law, he issued a statement expressing his opposition to these limits on executive discretion when transferring detainees into the United States. He also stated that his Administration would work with the

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[227] Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103(c), 123 Stat. 1859, 1920 (2009). *See* Michael John Garcia, *Guantanamo Detention Center: Legislative Activity in the 111th Congress 3-4,* Cong. Research Service R40754, (Jan. 13, 2011). One such condition in the first law allowed President Obama only 45 days each year for the detainees to be in the U.S., with the additional requisite of first submitting a classified plan of movement for each prisoner. Id. at *Sec.* 14103(d).

[228] Jerry Markon, *September 11 Terrorism Trials Still in Search of a Venue,* The Washington Post, July 4, 2010. *Available at:* http://www.washingtonpost.com/wp-dyn/content/article/2010/07/03/AR2010070302964.html Markron reflecting on the frustration of the Obama Administration regarding restrictions imposed by Congress in 2010 and the lack of options for trying the suspected terrorists.

[229] Kenneth Roth, *Justice Cheated,* The New York Times, May 6, 2012. *Available at:* http://www.nytimes.com/2012/05/07/opinion/justice-cheated.html

[230] Savage commenting on the frustration of Attorney General Eric Holder regarding the financial restrictions that banned the Obama Administration from using any military funds to transfer detainees onto U.S. soil, even for trials, *supra* note 226.

[231] Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4351 (2011). The restriction is limited to detainees held at Guantánamo Bay "on or after January 20, 2009," and does not apply to non-citizen members of the U.S. Armed Forces. Id. The National Defense Authorization Acts are an annual event for Congress.

[225] Id. at Sec. 1032.

[233] Id. at Sec. 1033 (a) – (b).

Congress to seek repeal of these restrictions, it would seek to mitigate their effects, and would oppose any attempt to extend or expand them in the future.[234]

In March 2011, President Obama announced a resumption of the military commissions, putting an end to the two-year freeze on these military trials.[235] For detainees not slatted to be brought to trial (basically, indefinite detention without charge), President Obama set-out new rules in an Executive Order requiring a review of their status within a year and every three years after that to determine whether they remained a threat or if they should be scheduled for a military trial or be released. This order also requires compliance with the Geneva Conventions and the international treaty that bans torture and inhumane treatment.[236]

The blanket restrictions in the NDAA-2011 including those on transfers of detainees held at Guantanamo Bay into the United States were extended to the 2012 fiscal year by two further Congressional instruments.[237] The extension of these prohibitions for 2012 means that trial by military commissions is the only viable option for the U.S. government at this time.

Military Commissions Convictions 2009 to 2012

Since President Obama came to office in 2009, there have been four more convictions from the military tribunals, bringing the total over the last ten-plus years to seven convictions. The additional four men convicted are: Ibrahim Ahmed Mahmoud al Qosi, Omar Khadr, and Noor Uthman Muhammed and Majid Shoukat Khan. At the beginning of May 2012, the five men alleged to have planned the September 11, 2001 attacks were arraigned. All five deferred from entering a plea. There have been hundreds of pretrial motions filed by legal council on both sides which need to be litigated before any hearing date can be set up. The next pretrial hearing has been set for October 15, 2012.[238] These prisoners were all held in secret overseas prisons by the CIA and reports indicate that they were subjected to harsh interrogation techniques. They are now held at Guantanamo Bay.

CONCLUSION

With the recent Congressional activity, the only present and future option left open for the executive branch, headed by President Obama, is to use military commissions for trying the remaining charged prisoners still held at Guantanamo. As set-out above, the military commissions were set-up to try individuals for alleged war crimes in the "war on terror", a concept which was designed and implemented by President George W. Bush and his administration beginning with the Military Order of November 13, 2001. Several times, the Supreme Court rebuffed the Bush Administration's overbroad executive branch powers of detaining individuals, drafting the laws, adjudicating against those detainees being tried and, finally, passing sentence on them with the culmination of *Hamdan v. Rumsfeld* in 2006.

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[234] Garcia, *supra* note 227, at 6.

[235] Scott Shane & Mark Landler, *Obama Clears Way for Guantanamo Trials,* The New York Times, March 7, 2011. The article also mentions that among the detainees who will soon face a military commission is Abd al-Rahim al-Nashiri, a Saudi accused of planning the bombing of the American destroyer Cole in Yemen in 2000. He was subjected to waterboarding, which could open the way to assertions by the defense that he was tortured, complicating any trial. *Available at:* http://www.nytimes.com/2011/03/08/world/americas/08guantanamo.html?_r=1&ref=militarycommissions

[236] Executive Order 13567 "Periodic Review of Individuals Detained at Guantanamo Bay Naval Station Pursuant to the Authority for Use of Military Force, March 7, 2011. *Available* at: http://www.whitehouse.gov/the-press-office/2011/03/07/executive-order-13567-periodic-review-individuals-detained-guant-namo-ba

[237] These being, the "Consolidated and Further Continuing Approbations Act", 2012 (2012 Minibus, P.L. 112-55) and the "Consolidated Appropriations Act", 2012 (2012 CAA, P.L. 112-74).

[238] *Questions and Answers on the 9/11 War Crimes Trial,* Wall Street Journal, September 8, 2012. *Available at:* http://online.wsj.com/article/AP09c3d42363bd40ac8d343e98fb5a0a26.html

The rules governing these military commissions have been drafted three different times but they still do not reflect the rules and principles currently required and observed by the American legal justice system nor do they offer all the judicial guarantees recognized as indispensible by civilized people under international law. This means that the current military commissions continue to be lacking when it comes to meeting the basic requirements set-out by the Supreme Court in the *Hamdan* case for military commissions. Despite the most recent overhaul in 2009, military commissions make it easier for information to be entered into evidence which would not be allowed in either civil or criminal trials or in courts-martial. Witnesses do not have to appear as is generally required in court trials. Hearsay evidence is still allowed. The MCA 2009 offers different rules to U.S. citizens versus non-U.S. citizens.

One major problem with those being tried by military commissions which may be insurmountable is that most, if not all, the men who are currently imprisoned at Guantanamo Bay (and every other detention facilities around the world) have suffered some type of torture or coercion under the direction of the U.S. government since the September 11, 2001 attacks whether it has been done by the hands of a private contractor, a prison worker, or U.S. government employee including military or a CIA operative. Although statements that were made by the accused directly following torture, coercion or even cruel, inhuman or degrading treatment are no longer allowed as evidence, statements are still allowed into evidence which were made subsequent to any abusive treatment; the so-called "poison fruit'. Along those same lines, it will be difficult for any military commission's panel to know exactly what hearsay statements by witnesses are not the product of torture or coercion to that witness. It has been reported that prisoners held in Guantanamo Bay were offered some leniency by the U.S. government if they were willing to 'report' on another prisoner's guilt.[239] In contrast to this, court trials prohibit all involuntary statements while the military commissions allow them for witnesses. [240] This is on top of what little evidence the U.S. government has personally collected for each of these detainees being tried. [241] The defense lawyers, working for the accused prisoners, do not have equal access to information, witnesses or to funding for their defense work. This makes for an unequal playing field.

Finally, the MCA 2009 (as with preceding acts and orders) continues to unilaterally merge two separate and distinct bodies of law. The offenses found in the act are from the law of international armed conflict and the U.S. domestic criminal and civil law. Many of them are not crimes which are covered by common Article 3 of the Geneva Conventions. Of the seven men convicted by military commissions, each one of them has been found guilty of at least one crime which did not exist under the U.S. laws of war or international laws of war at the time they were allegedly committed. These exceptional offenses are domestic civil and criminal ones which remain unrecognized as being crimes of war by international law, either by custom or by treaty. As they are not war crimes, there appears to be no legal precedent in U.S. law for using military commissions. The laws of war are important and need to remain as clear and concise as they have been traditionally.

Having reviewed where these military commissions began under George Bush and arriving at the

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[239] *ACLU Statement on Ten Years of Guantanamo,* January 9, 2012. *Available* at: http://www.aclu.org/national-security/aclu-statement-ten-years-guantanamo

[240] Roth, *supra* note 229.

[241] *See* J. Munro-Nelson, *supra* note 92, at 6 & 7, stating that of all the some 800 prisoners held at Guantanamo Bay, only 7% were actually captured by U.S. or other coalition forces.

[242] Lieutenant Colonel David Frakt is an associate professor of Law at Barry University School of Law and a lieutenant colonel in the U.S. Air Force Reserve. He has studied the MCA in depth and served as Lead Defense Counsel for the Office of Military Commissions from 2008-2009, serving as military defense attorney for two prisoners tried by military commissions.

Military Commissions Act of 2009, the conclusion is that the military commissions have not improved enough to be equal to other judiciary hearings including courts-martial and criminal or civil court trials. They offer an inferior justice; a second-tier justice.

In a statement before a House Committee in July 2009, Lt. Colonel David Frakt[242] expressed the following comments which will form the conclusion here.

"One point on which all sides should be able to agree is that the military commissions of the Bush administration were a catastrophic failure. After more than seven years and hundreds of millions of dollars wasted, the military commissions yielded only three convictions, all of relatively minor figures. Not a single terrorist responsible for the planning or execution of a terrorist attack against the United States was convicted.[243]

Why, with the entire resources of the Department of Defense, the Justice Department and the national intelligence apparatus at their disposal, were the military commissions such an abysmal failure? The answer is simple: the military commissions were built on a foundation of legal distortions and outright illegality. The rules, procedures and substantive law created for the commissions were the product of, or were necessitated by the wholesale abandonment of the rule of law by the Bush administration in the months after September 11th."[244]

The worst that could be said about many of them [detainees held in Guantanamo Bay prison] was that they had fought against the US and coalition forces that had invaded Afghanistan, conduct that, under the law of war, would not be considered a war crime. A small group of those captured [and now held in Guantanamo Bay] were guilty of terrorism crimes, but not crimes of war. The administration was also keenly aware that, to the extent that there was some evidence of criminal acts by a small fraction of the detainees, much, if not most of this evidence had been developed through highly coercive interrogations which would not be admissible in a regular court of law.

The Bush administration's motive for creating military commissions was to establish a forum in which American standards of due process did not apply and convictions could be obtained for terrorism crimes (not law of war offenses) under summary procedures using evidence which would not be admissible in a regular court of law. The Obama administration has now [Summer of 2009] rightly concluded that constitutional due process standards should apply to military commissions, and that normal rules of evidence should apply. Modifying the military commissions to comport with due process and the rule of law will mean eliminating the very reason for their existence. Partially amending them with some minor cosmetic changes will result only in many more years of protracted litigation." [245]

THE END

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[243] Frakt's testimony, *supra* note 83.
[244] Id. at 3.
[245] Id. at 7.