Article

An Indelicate Imbalance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial

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I. Introduction

Foreword and Disclaimer: At the time I began writing this article in the summer of 2007, the subject was largely a matter of academic interest. Little did I suspect that the procedural differences I was analyzing would become of intense personal interest. This article was accepted for publication and the revised manuscript was submitted in December 2007. In February 2008, I was contacted by the Chief Defense Counsel for the Office of Military Commissions, and offered the opportunity to serve as a defense counsel. I volunteered to begin as soon as the spring semester was over and reported for duty on April 28, 2008. Two days later, I found myself in the extraordinary world of Guantanamo. Department of Defense guidelines currently prevent me from revealing much of what I have observed at Guantanamo and learned from my clients. I hope to write about my experiences as a defense counsel in future articles. For now, I am required to make the following disclaimer: *the views expressed in this article do not reflect the views of the Air Force, the Office of Military Commissions, or the Department of Defense. The opinions expressed in this article are solely the author's. All factual information contained in this article was obtained from public sources.*

A. Overview

After the Supreme Court invalidated President Bush's original attempt to create military commissions to try alleged terrorists, Congress outlined the basic rules and procedures for a new set of military commissions to try detainees in the Military Commissions Act (hereinafter, the M.C.A.), leaving the details of implementation to the Secretary of Defense. The military commissions devised by Congress and the Defense Department are based on the pre-trial, trial, and post-trial rules and procedures for general courts-martial,[1] but there are significant differences. Some of these differ-

1 There are three types of military courts-martial: summary, special, and general. General courts-

ences were mandated by the M.C.A., and others are the result of the implementing rules and regulations crafted by the Secretary of Defense in consultation with the Attorney General. With the procedures set forth in the Manual for Military Commissions, the Secretary claims to have struck "a delicate balance" between the rights of the accused, on the one hand, and the requirements of military and intelligence activities, especially the need to protect classified information, on the other.[2]

This Article evaluates the Secretary's claim by reviewing the procedural differences between military commissions and general courts-martial. This Article also addresses several questions. Do the differences satisfy the concerns raised by the Supreme Court in *Hamdan v. Rumsfeld*[3] that the original military commissions procedures violated U.S. statutory law, the U.S. Constitution, and the Geneva Conventions? To the extent the differences were created by the implementing regulations, are those regulations consistent with the M.C.A. directive to minimize distinctions between military commission and general court-martial procedures? Are the differences justified by practical military and intelligence considerations? Viewing them in their totality, do the military commissions still provide a fair, reasonable, and legitimate forum to try suspected war criminals and terrorists?

This Article concludes that the M.C.A. and its implementing regulations fail to strike an appropriate balance between military and intelligence considerations and fairness to the accused, and that military commissions may not qualify as "regularly constituted courts" within the meaning of the Geneva Conventions. This Article recommends changes to the M.C.A. and its implementing regulations which would enhance fairness, decrease the likelihood of successful court challenges, and create greater legitimacy for military commissions with regard to both domestic and international principles of justice. Finally, this Article considers possible bases for court challenges against the M.C.A. and its implementing regulations.

B. Background

On September 11, 2001, the United States was the victim of the worst terrorist attack on American soil in its history. Ever since 9/11, the Bush administration has been determined to bring those responsible for this crime and other terrorist plots to justice. There has been considerable de-

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martial are reserved for the most serious offenses and carry the greatest potential punishment, up to and including life in prison and death, as well as a dishonorable discharge for enlisted service members or dismissal for officers, depending on the offense. Because of the potential for significant punishment, general courts-martial have the most extensive procedural safeguards of the three types of courts-martial. *See generally* 10 U.S.C. §§816-820 (2007).

2 U.S. Dep't of Defense, Manual for Military Commissions, pt. I, Preamble, § 2 (Jan. 18, 2007), *available at* http://www.defenselink.mil/news/d20070118MCM.pdf. (last visited July 12, 2008)

3 126 S. Ct. 2749 (2006)..

bate about the best forum for this. Some have advocated an ad hoc international tribunal,[4] others have suggested the federal courts,[5] and others military courts-martial.[6] There have also been recommendations for the creation of a special terrorism or national security court.[7] The chosen vehicle of the administration, at least for non-citizens, is a special military tribunal known as a military commission. The administration's efforts to establish military commissions to try suspected terrorists have been fraught with delays and setbacks; more than six years after the President announced his plan to use military commissions, the first military commission trial has yet to get underway.[8]

The President initially attempted to establish military commissions by executive order on November 13, 2001, citing the authority of sections 821 and 836 of title 10 of the United States Code.[9] Secretary of Defense Rumsfeld later issued implementing regulations.[10] The entire military commission system was challenged in federal court by detainees held at Guantanamo Bay, Cuba, and the system was ultimately invalidated by the Supreme Court on June 26, 2006 in *Hamdan v. Rumsfeld.*[11]

In response, the administration proposed legislation to Congress to create military commissions that ostensibly conformed with the guidance provided by the Supreme Court. This legislation, known as the "Military Commissions Act of 2006", was quickly passed, becoming law on October

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4 *See* Allison Marston Danner, *Beyond The Geneva Conventions: Lessons from the Tokyo Tribunal in Prosecuting War and Terrorism*, 46 VA. J. INT'L L. 83, 120 (2005).

5 Steven G. Calabresi, Letter to the Editor, *A New Court for Terror Suspects?*, N.Y. TIMES, July 16, 2007, at A12.

6 *See* David S. Cloud & Sheryl Gay Stolberg, *Rules Debated for Trials of Detainees*, N.Y. TIMES, July 27, 2006, at A20.

7 Jack L. Goldsmith & Neal Katyal, Op-Ed., *The Terrorists' Court*, N.Y. TIMES, July 11, 2007, at A19; Michael B. Mukasey, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007, at A15; Andrew C. McCarthy, *Geneva . . . Again*, NAT'L REV. ONLINE, April 4, 2007, http://article.nationalreview.com/?q=ZjE5YTU5NDE3M2M1ZGRiNWM4YTQ3MWUzMjQ4MDAwYWE.

8 One detainee, David Hicks, did plead guilty before a military commission as part of a plea bargain made directly with the convening authority. No trial was held, only a sentencing hearing. *See generally*, Scott Horton, *The Plea Bargain of David Hicks*, HARPER'S MAGAZINE, April 2, 2007, *available at* http://www.harpers.org/archive/2007/04/horton-plea-bargain-hicks.

9 Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html

10 U.S. Dep't of Defense, Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (March 21, 2002), *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf; *see also* U.S. Dep't of Defense, Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, 32 C.F.R. § 11.6 (2005).

For critiques of the original commissions, see the following: Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L. J. 1259 (2002); K. Elizabeth Dahlstrom, Note, The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay, 21 BERKELEY J. INT'L L. 662 (2003).

11 126 S. Ct. 2749 (2006).

17, 2006.[12]

Over the next few months, the Department of Defense issued implementing rules and regulations in the form of the Manual for Military Commissions[13] (the M.M.C.) and the Regulation for Trial by Military Commissions[14] (the R.T.M.C.). With these regulations in place, the military commissions began prosecuting Guantanamo detainees in the spring of 2007. Three suspects were charged. One, David M. Hicks, an Australian, pled guilty as part of a plea bargain and was released to Australian authorities before the commissions ground to a halt a second time.[15]

C. Recent Developments

The two other detainees charged, Omar Ahmed Khadr,[16] a Canadian citizen, and Salim Ahmed Hamdan,[17] a Yemeni, challenged the jurisdiction of the military commission to try them. On June 4, 2007, the military judges[18] appointed as military commission judges to hear their cases,

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12 10 U.S.C. § 948a (2007). The M.C.A. added a new chapter (Chapter 47A) to title 10 of the United States Code, to be inserted after Chapter 47, the Uniform Code of Military Justice, which governs courts-martial.

13 U.S. Dep't of Defense, Manual for Military Commissions (Jan. 18, 2007), *available at* http://www.defenselink.mil/news/d20070118MCM.pdf.

14 U.S. Dep't of Defense, Regulation for Trial by Military Commissions (April 27, 2007), *available at* http://www.defenselink.mil/news/Apr2007/Reg_for_Trial_by_mcm.pdf.

15 William Glaberson, *Plea of Guilty From Detainee in Guantánamo*, N.Y. TIMES, March 27, 2007, at A1; William Glaberson, *Terror Detainee Back in Australia*, N.Y. TIMES, May 20, 2007, *available at* http://www.nytimes.com/2007/05/20/world/asia/20hicks.html. See Jeffrey Toobin, *Camp Justice: Everyone wants to close Guantánamo, but what will happen to the detainees?*, THE NEW YORKER, April 14, 2008, at 32. Even though he pled guilty, Hicks could probably have appealed his conviction on the basis that the commission lacked jurisdiction to even try him. Clearly, his plea of guilty was improvident if the court lacked jurisdiction. Furthermore, jurisdictional defects cannot be waived under military law, R.C.M. 907(b)(1)(A). United States, Manual for Courts-Martial, R.C.M. 907(b)(1)(A) (2005), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/manual-2005.pdf. The M.M.C. contains a nearly identical provision. See U.S. Dep't of Defense, Manual for Military Commissions, R.M.C. 907(b)(1)(A) (2007). Some commentators have argued that the plea bargain was illegal. *See, e.g.,* Scott Horton, *An Illegal Plea Bargain?*, HARPER'S MAGAZINE, April 4, 2007, *available at* http://www.harpers.org/archive/2007/04/horton-an-illegal-plea-bargain.

16 Khadr was charged on February 2, 2007. U.S. Dep't of Defense, Office of the Chief Prosecutor, Office of Military Commissions, Detainee Omar Ahmed Khadr 0766, Guantanamo Bay, Cuba, Charge Sheet (Feb. 2, 2007), *available at* http://www.defenselink.mil/news/d2007Khadr%20-%20Notification%20of%20Sworn%20Charges.pdf. The charges were referred to trial on April 24, 2007. U.S. Dep't of Defense, Office of the Chief Prosecutor, Office of Military Commissions, Detainee Omar Ahmed Khadr 0766, Guantanamo Bay, Cuba, Charge Sheet (April 5, 2007), *available at* http://www.defenselink.mil/news/Apr2007/KhadrReferral.pdf.

17 Hamdan was charged on February 2, 2007. U.S. Dep't of Defense, Office of the Chief Prosecutor, Office of Military Commissions, Detainee Salim Ahmed Hamdan 0149, Guantanamo Bay, Cuba, Charge Sheet (Feb. 2, 2007), *available at* http://www.defenselink.mil/news/d2007Hamdan%20-%20Notification%20of%20Sworn%20Charges.pdf. The charges were referred to trial on May 10, 2007. U.S. Dep't of Defense, Office of the Chief Prosecutor, Office of Military Commissions, Detainee Salim Ahmed Hamdan 0149, Guantanamo Bay, Cuba, Charge Sheet (April 5, 2007), *available at* http://www.defenselink.mil/news/May2007/Hamdan_Charges.pdf.

18 Military judges are senior military attorneys (judge advocates). They usually have significant trial experience as military prosecutors or defense counsel, and they receive special training to serve in

Navy Captain Keith Allred and Army Colonel Peter Brownback, independently dismissed both cases for lack of jurisdiction.[19] The judges ruled that the jurisdiction of military commissions is explicitly limited by the M.C.A. to try those who have been determined to be "unlawful enemy combatants" by a Combatant Status Review Tribunal (CSRT) or other competent tribunal.[20] Khadr and Hamdan had been found to be "enemy combatants" in CSRTs, thus providing a nominally lawful basis for their continued detention at Guantanamo. However, neither Khadr nor Hamdan had been declared "unlawful enemy combatants" by either a CSRT or other competent tribunal.[21] In fact, the CSRTs that considered Khadr's and Hamdan's status did not even consider the lawful or unlawful distinction, and no other tribunal was ever assigned this task. The judges found nothing in the language of the M.C.A. authorizing a military commission judge to make the determination of whether an accused was a lawful or unlawful enemy combatant. The rulings dismissing the two cases seemed logically sound and consistent

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the role of judge at military courts-martial for multi-year assignments.

19 Sgt. Sara Wood, *Charges Dismissed Against Canadian at Guantanamo*, ARM. FORCES PRESS SERV., June 4, 2007, http://www.defenselink.mil/news/newsarticle.aspx?id=46281 (last visited July 12, 2008.); Sgt. Sara Wood, *Judge Dismisses Charges Against Second Guantanamo Detainee*, ARM. FORCES PRESS SERV., June 4, 2007, http://www.defenselink.mil/news/newsarticle.aspx?id=46288 (last visited July 12, 2008). *See* Opinion of Col. Brownback, United States v. Khadr, Order on Jurisdiction (June 4, 2007), *available at* http://www.nimj.org/documents/Khadr%20Order%20on%20Jurisdiction.pdf (last visited July 12, 2008).

20 *See* 10 U.S.C. § 948c (2007) ("Any alien unlawful enemy combatant is subject to trial by military commission under this chapter . . . ."); *see also id*. § 948d (jurisdiction of military commissions).

21 The military is entitled to capture persons engaged in hostilities against it in an international armed conflict and remove them from the battlefield, whether they are lawfully engaged in combat (e.g. regular armed forces defending their homeland from foreign invasion or insurgency) or unlawfully engaged in combat (e.g. non-military personnel, such as foreign terrorists who enter a country for the opportunity to kill Americans). Both types of combatants may be held for the purpose of preventing their return to the fight, but their rights under international law are quite different. The Geneva Conventions divide people into the category of combatants and non-combatants. Combatants are authorized to take part in international armed conflicts and enjoy combatant immunity so long as they comply with the laws of war. Combatants include the regular armed forces of a nation and militias or volunteer corps of such armed forces. Other persons who participate as belligerents in international armed conflicts are simply treated as criminals, and they may be lawfully prosecuted and punished under national laws for taking part in the hostilities and for any crimes they commit. One scholar has referred to such illegal combatants as "unprivileged belligerents." Major Richard R. Baxter, *So-called "Unprivileged Belligerency": Spies, Guerrillas and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323,328 (1951). The other difference between lawful combatants and illegal combatants is that captured lawful combatants are entitled to be treated as prisoners of war, whereas illegal combatants are only entitled to be treated humanely. The term "unlawful enemy combatant" is a new term coined by the administration which seems to encompass these two differences—ineligibility for POW status and lack of combatant immunity (and, therefore, eligibility to be tried as a criminal for any belligerent acts). The confusion arises from the fact that President Bush decided that persons captured in Afghanistan, whether Taliban or al Qaeda, would not be entitled to POW status (quite probably a violation of the Geneva Conventions on the part of the administration), suggesting that everyone captured was an unlawful combatant. However, Congress appears to have recognized the possibility that at least some of the people being detained may be lawful combatants. These people could be held for the duration of hostilities but would retain their combatant immunity and could be tried only for violations of the law of war or crimes committed in captivity. Although Congress has not ordered that lawful combatants be treated as POWs, it has ordered that lawful combatants be tried in regular courts-martial. 10 U.S.C. § 948d(b) (2007).

with the M.C.A. and were also supported by international law, although this was not specifically mentioned by the judges.[22] On July 4, 2007, the United States appealed the dismissal of the Khadr case to the Court of Military Commission Review (the CMCR), an appeals court established by the M.C.A.[23] The United States restated an argument made at the trial level that the military commission had the inherent power to determine its own jurisdiction, including determining the threshold question of an enemy combatant's legal status.[24] Oral argument on the motion to dismiss was held August 24, 2007; the prosecution found a more receptive audience in the CMCR. On September 24, 2007, the CMCR released its opinion, ruling that the commission had the independent authority to determine its own jurisdiction and ordering the trial judge to hold a hearing to allow the government to offer evidence to attempt to prove that Khadr met the definition, under the M.C.A., of an unlawful enemy combatant.[25]

Once again, the Commissions seemed poised to resume, but in early October, the Commissions were dealt another setback when the chief prosecutor, Air Force Colonel Morris Davis, resigned. Although Col. Davis was

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22 Protocol 1 of the Geneva Conventions, Article 45 (Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Article 45, June 8, 1977, 1125 U.N.T.S) which the U.S. has agreed is binding international law, requires that captured combatants who claim POW status are entitled to a presumption of POW status, and in case of doubt, to a status determination by a competent tribunal. Article 45(2) provides the additional safeguard of a judicial adjudication of status for those who are to be tried by the detaining power for crimes arising from the hostilities. Amicus Curiae Brief of Frank Fountain, Madeline Morris, Stephen Bornick, Landon Zimmer and Allison Hester-Haddad, United States v. Khadr, Case No. 07-001, submitted to the Court of Military Commission Review (Aug. 21, 2007) (arguing for dismissal of charges against Khadr for lack of jurisdiction), *available at* http://www.defenselink.mil/news/Aug2007/13-Khadr%20Amicus%20Brief%20(Aug%2021)%20(27%20pages).pdf.

23 10 U.S.C. § 950f (2007). This provision requires that the judges appointed be appellate military judges. Khadr's defense team unsuccessfully challenged the jurisdiction of the CMCR on the basis that the judges of the court were not properly appointed by the Secretary of Defense as required by the M.C.A. and the M.M.C. See Ruling on Motion to Abate, United States v. Khadr, CMCR Case No. 07-001 (Sept. 24, 2007), *available at* http://www.defenselink.mil/news/Sep2007/Khadr%20USCMCR%20Order%20RE%20Abatement%20(24%20Sept%2007)%20(6%20pages).pdf.

24 The government conceded that a finding by a CSRT or other competent tribunal would be binding on the commission, but argued that in the absence of such a finding, the Commission was free to make its own finding. The government made this argument unsuccessfully in a motion for reconsideration to the dismissal of the Khadr case. *See* Prosecution Motion for Reconsideration, United States v. Khadr (June 8, 2007), *available at* http://www.defenselink.mil/news/jun2007/KhadrPros%20Recon%20(June%208).pdf.

The argument was rejected by Col. Brownback. *See* Disposition of Prosecution Motion for Reconsideration, United States v. Khadr (June 29, 2007), *available at* http://www.scotusblog.com/movabletype/archives/Khadr%20ruling%206-29-07.pdf. The appeal to the CMCR is available at http://www.defenselink.mil/news/jul2007/KhadrPros%20U.S.C. § MCRAppeal%20(July%204).pdf.

25 United States v. Khadr, CMCR 07-001 (Sept 24, 2007), *available at* http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20(24%20Sep%2007)(25%20pages).pdf ("The military judge's ruling he lacked authority to hear evidence on, and ultimately decide, the matter of Mr. Khadr's 'unlawful enemy combatant status' under the provisions of the M.C.A. is reversed. The . . . military judge, . . . shall . . . conduct all proceedings necessary to determine the military commission's jurisdiction over Mr. Khadr.").

"ordered not to communicate with the news media about [his] resignation,"[26] it was widely reported in the press that he quit due to frustration with political pressure and intervention, especially from Brigadier General Thomas Hartmann, the legal advisor to the military commission convening authority, and William Haynes, the Department of Defense, General Counsel.[27]

Despite this setback, Khadr's trial appeared ready to resume with a scheduled arraignment on November 8, 2007. However, 36 hours before the hearing, the defense was notified of potentially exculpatory evidence—evidence that had apparently been known to the government for over five years. The defense also complained that it had been unable to interview a key prosecution witness. For these and other reasons, the Khadr matter was postponed indefinitely for the defense to present motions. The prosecution was not afforded the opportunity to present evidence allegedly showing that Khadr was an unlawful enemy combatant.[28] The defense has also appealed the CMCR ruling to the Federal Court of Appeals for the D.C. Circuit. Numerous additional motions to dismiss have been filed by the defense, all of which have been denied by the military judge.[29] A trial date was set for May 2008, but the trial has been postponed because of the refusal of the government to provide discovery to the defense. At a hearing in May 2008, the judge threatened to abate the proceedings if the government did not produce the discovery sought.[30]

Hamdan's case began to move forward again in early December 2007. On December 5, 2007, a hearing was convened to begin the process of determining whether Hamdan meets the definition of an unlawful enemy combatant and can be tried by military commission.[31] At the two-day hearing, the defense argued that Hamdan was a civilian serving in a support role to al Qaeda, and that he is entitled to prisoner-of-war status; the prosecution attempted to prove that he was an active enemy combatant who was captured in possession of surface-to-air missiles.[32] The motion was denied.[33]

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26 Carol J. Williams, *War Court Prosecutor Quits Post*, L.A. TIMES, Oct. 6, 2007, at A14.

27 *Id.*; Jess Bravin, *Dispute Stymies Guantanamo Terror Trials --- Chief Prosecutor Claims Interference; Office Is in Disarray*, WALL ST. J., Sept. 26, 2007, at A4; Evan Perez & Jess Bravin, *New Setback for Guantanamo Trials*, WALL ST. J., Oct. 5, 2007, at A4.

28 The government wanted to show the judge a video purportedly showing Khadr working with other al Qaeda operatives building explosive devices. The judge refused the government permission to show the video. Two weeks later, portions of the video aired on the CBS news program "60 Minutes," prompting outrage by Khadr's defense team, who accused the Defense Department of leaking the video, a charge the Defense Department denied. *See* Jered Stuffco, *Khadr's Lawyer Fumes Over Video*, TORONTO STAR, Nov. 20, 2007, at A25.

29 The motions and commission rulings are available online at http://www.defenselink.mil/news/commissionsKhadr.html.

30 Carol Rosenberg, *Judge Threatens to Suspend War Court Trial*, MIAMI HERALD, May 8, 2008, *available at* http://www.miamiherald.com/news/nation/story/526510.html.

31 William Glaberson, *Defense Challenges Enemy Combatant Status of Detainee*, N.Y. TIMES, Dec. 6, 2007, at A32.

32 Carol J. Williams, *Hamdan is Called More than Driver*, L.A. TIMES, Dec. 7, 2007, at A38; *see* Carol J. Williams, *Detainee Can Make POW Case*, L.A. TIMES, Dec. 6, 2007, at A24; *see also* William

Other motions to dismiss have also been denied.[34] In addition to the challenges raised within the commission process, other detainees have made additional challenges in federal court to the habeas corpus-stripping provision of the M.C.A.[35] These cases were argued before the Supreme Court on December 5, 2007, with a decision expected by June of 2008.[36] In fact, the judge in *Hamdan*, Captain Allred, has postponed the *Hamdan* trial until July 21, 2008 in expectation of a ruling from the Supreme Court, to allow the parties to determine how the ruling impacts the *Hamdan* case.[37] The credibility and continued viability of the military commissions were dealt another severe blow in March and April 2008, when a motion and hearing in the *Hamdan* case revealed that Brig. Gen. Hartmann, the legal advisor to the Convening Authority had exerted unlawful influence over the Office of the Chief Prosecutor.[38] Brig. Gen. Hartmann was barred from any future involvement with the *Hamdan* case by Judge Allred.[39]

There is also growing international and domestic pressure to close Guantanamo and devise an alternative to military commissions, with numerous critics questioning the ability of the commissions to provide a fair trial.[40]

Glaberson, *Detainee's Loyalty to bin Laden is at Issue in Hearing*, N.Y. TIMES, Dec. 7, 2007, at A20.

Hamdan's habeas corpus challenge to his detention has been dismissed. Hamdan v. Rumsfeld, 464 F. Supp. 2d 9 (D.D.C. 2006), *appeal deferred*, Hamdan v. Gates, 2007 U.S. App. LEXIS 17857 (Fed. Cir. July 24, 2007). Hamdan appealed to the U.S. Supreme Court to consolidate his case challenging the legality of the military commissions with another case (Boumediene v. Bush) challenging the detention of Guantanamo detainees generally. The writ of certiorari was denied. Hamdan v. Gates, 128 S. Ct. 372 (Oct. 1, 2007). The petition was also denied. Hamdan v. Gates, 128 S. Ct. 207, 169 L. Ed. 2d 246, (U.S. 2007).

33 See transcript of hearing and ruling at http://www.defenselink.mil/news/Dec2007/Hamdan%20VOL%20I%20December%205%20and%206%202007%20Session.pdf.

34 Motions and rulings available at http://www.defenselink.mil/news/commissionsHamdan.html.

35 10 U.S.C. § 948 (2007).

36 Boumediene v. Bush and Al Odah v. United States, 127 S. Ct. 1478 (April 2, 2007) (certiorari denied) (Breyer, J., Ginsburg, J., and Souter, J., dissenting), *order vacated and cert. granted*, Boumediene v. Bush, 127 S. Ct. 3078 (June 29, 2007) (consolidated with Al Odah v. United States, 127 S. Ct. 3067 (June 29, 2007)). For an insightful critique of the Court of Appeals decision (Boumediene v. Bush, 476 F.3d. 981 (Fed. Cir. 2007)) and a prediction of the outcome in the Supreme Court, see Marjorie Cohn, *Why Boumediene Was Wrongly Decided*, JURIST, Feb. 27, 2007, *available at* http://jurist.law.pitt.edu/forumy/2007/02/why-boumediene-was-wrongly-decided.php.

37 Ruling on Motion for Continuance of Hearing and Trial Dates, United States v. Hamdan, D-040 (May 16, 2008), *available at* http://www.defenselink.mil/news/HAMDAN%20D-040%20RULING.pdf.

38 *See* William Glaberson, *Judge's Guantánamo Ruling Bodes Ill for System*, N.Y. TIMES, May 11, 2008, *available at* http://www.nytimes.com/2008/05/11/washington/11gitmo.html?partner=MYPERSONAL; Scott Horton, *The Great Guantanamo Puppet Theatre*, HARPER'S MAGAZINE, Feb. 21,2008; Ross Tuttle, *Gitmo in Disarray*, THE NATION, May 8, 2008, *available at* http://www.thenation.com/doc/20080526/tuttle; Ross Tuttle, *Unlawful Influence at Gitmo*, THE NATION, March 28, 2008, *available at* http://www.thenation.com/doc/20080414/tuttle.

39 William Glaberson, *Judge Drops General From Trial of Detainee*, N.Y. TIMES, May 10, 2008, *available at* http://www.nytimes.com/2008/05/10/us/10gitmo.html?emc=rss&partner=rssnyt.

40 *See, e.g.*, Letter from William H. Neukom, American Bar Association President, to President George W. Bush (Feb. 27, 2008), *available at*

Despite these setbacks, the administration seems determined to move forward with military commissions at Guantanamo. Defense Department officials have indicated they plan to try as many as 80 detainees.[41] The Defense Department has spent $12-million on an "Expeditionary Legal Complex" at Guantanamo where commission proceedings will be held.[42] As of late May 2008, twelve more detainees have had charges sworn against them. Of these dozen, the Convening Authority has referred ten cases to trial (including five alleged 9-11 co-conspirators), and dismissed charges against one,[43] with one more referral decision pending.[44] I have been detailed to represent two of the thirteen defendants currently facing trial by military commission, Mohammed Jawad[45] and Ali al-Bahlul.[46]

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http://www.abanet.org/poladv/letters/antiterror/2008feb27_detainees_l.pdf ("[T]he military commission system at Guantanamo does not adhere to established principles of due process fundamental to our nation's concept of justice. . . .Under the current system, we believe that detainees will not receive due process or fair trials."); Statement of Anthony D. Romero, Executive Director, American Civil Liberties Union, *available at* http://www.aclu.org/safefree/detention/34773res20080403.html (last visited May 29, 2008) ("The military commissions set up by the Bush administration for the men imprisoned at Guantánamo Bay – including those it suspects were involved in the September 11 attacks – are not true American justice. . . . The prison at Guantánamo Bay, and the military commission proceedings set to occur there, were set up to evade the American justice system and the rule of law. The proceedings, as proposed under the Military Commissions Act and run by the Department of Defense, are nothing like the trials guaranteed by our Constitution or the long-established military commissions promulgated by the Uniform Code of Military Justice – the finest system of military justice in the world.").

41 William Glaberson, *New Detainee Rights Weighed in Plans to Close Guantanamo*, N.Y. TIMES, Nov. 4, 2007, at A1. The estimate of 80 is slightly up from earlier estimates. For example, former Chief Prosecutor Col. Davis had indicated that the government intended to try 65 to 75 detainees by military commission. Statement of Colonel Morris Davis, Military Commissions Panel on 24 October 2006, reproduced in THE REPORTER, Vol. 33, No. 4, page 151 (December 2006). For an overview of the law of habeas corpus as it relates to detainees, see Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007).

42 William Glaberson, *Portable Halls of Justice Are Rising in Guantanamo*, N.Y. TIMES, Oct. 14, 2007, at A1; Carol J. Williams, *Tent City Sets Up for Detainee Tribunals*, L.A. TIMES, Oct. 14, 2007, at A15. Defense Secretary Gates canceled plans to build a permanent $125-million judicial center at Guantanamo. I was present as detailed defense counsel for the first session held in the new ELC, an arraignment for Ali al Bahlul. The debut of the court was an unmitigated disaster. *See* Randall Mikkelsen, *Technical Flaws Mar Hearing in New Guantanamo Court*, Reuters, May 7, 2008, *available at* http://www.reuters.com/article/topNews/idUSN0717718220080508?feedType=RSS&feedName=topNews; Carol Rosenberg, *Glitches Mar Debut of Guantanamo War Court*, MIAMI HERALD, May 8, 2008, *available at* http://www.miamiherald.com/news/nation/story/525297.html.

43 Charges against Mohammed al-Qahtani, alleged to have been the twentieth 9/11 hijacker, were dismissed on May 14, possibly because he had been subjected to torture. William Glaberson, *Case Against 9/11 Detainee is Dismissed*, N.Y. TIMES, May 14, 2008, *available at* http://www.nytimes.com/2008/05/14/washington/14gitmo.html?hp.

44 A list of those currently facing charges and copies of the charges are available at http://www.defenselink.mil/news/commissions.html. A referral decision is still pending against Ahmed Khalfan Ghailani. Ghailani has already been indicted by a federal grand jury in New York. William Glaberson, *Guantánamo Detainee, Indicted in '98, Now Faces War Crimes Charges*, N.Y. TIMES, April 1, 2008, *available at* www.nytimes.com/2008/04/01/washington/01detain.html.

45 Mr. Jawad is charged with six separate crimes (three counts of attempted murder and three counts of causing serious bodily injury) for allegedly throwing a hand grenade into a vehicle containing two U.S. servicemen and their interpreter, injuring all three of them. The incident occurred in Afghanistan on December 17, 2002. Mr. Jawad was under 18 at that time. There is no allegation in the charges that he was involved in any terrorist activity. See U.S. Dep't of Defense, Office of the Chief Prosecutor, Office of Military Commissions, Detainee Mohammed Jawad, Guantanamo Bay, Cuba, Charge Sheet

Although the future of the military commissions and Guantanamo is far from certain,[47] it is still possible that at least some detainees will be tried by military commission, even if Guantanamo is ultimately closed and the detainees transferred elsewhere. When and if a trial is ever held, the military commissions will continue to be subject to intense scrutiny, both domestically and abroad, and further court challenges can be expected. This Article previews some of the issues likely to be raised.

D. *Hamdan v. Rumsfeld*

Before discussing the military commissions as currently constituted, it is important to understand why the original commissions were struck down by the Supreme Court in *Hamdan*.[48] The Court cited two reasons: failure to follow rules and procedures for courts-martial; and failure to provide due process rights guaranteed by the Geneva Conventions. While affirming the President's authority to convene and prescribe rules for military commissions, pursuant to Article 21 and 36 of the Uniform Code of Military Justice (the UCMJ), the Court held that, absent specific congressional authority, military commissions must comply with the laws of war,[49] and that rules for commissions must be consistent with the UCMJ and rules and procedures developed thereunder for courts-martial, to the extent practicable.[50] In the view of a plurality of the Court, this also precluded trying

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(Oct. 9, 2007), *available at* http://www.defenselink.mil/news/Oct2007/Jawad%20Charge%20Sheet.pdf. At a hearing on May 7, 2008 Mr. Jawad accepted my representation for the limited purpose of challenging the legality of the military commissions and the charges against him.

46 Mr. al Bahlul, who faces conspiracy and material support to terrorism charges, rejected me as his defense counsel at his arraignment on May 7, 2008, opting to represent himself. I was ordered by the Court to serve as "standby counsel."

47 Secretary of Defense Gates has openly called for the closure of Guantanamo, and President Bush has indicated a desire to shut down the facility. William Glaberson, *Hurdles Frustrate Effort to Shrink Guantanamo*, N.Y. TIMES, Aug. 9, 2007, at A1. Both Barack Obama and John McCain have also indicated a desire to close Guantanamo. Philip Sherwell, *Straight-talking McCain vows to fix world's view of the "ugly American"*, TELEGRAPH, March 17, 2007, *available at* http://www.telegraph.co.uk/news/worldnews/1545925/Straight-talking-McCain-vows-to-fix-world's-view-of-the-'ugly-American'.html; Elizabeth White, *Obama Says Gitmo Facility Should Close*, WASH. POST, June 24, 2007, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/06/24/AR2007062401046.html.

48 For a more detailed critique and discussion of Hamdan, see the following: John A. Sholar, Jr., *Habeas Corpus and the War on Terror*, 45 DUQ. L. REV. 661 (2007); Douglas A. Hass, Note, *Crafting Military Commissions Post-Hamdan: The Military Commissions Act of 2006*, 82 IND.L.J. 1101 (2007); Daniel Michael, Recent Development, *The Military Commissions Act of 2006*, 44 HARV. J. ON LEGIS. 473 (2007); Jessica C. Tully, Recent Decision, *Military Commissions are Governed by Military and International Law: Hamdan v. Rumsfeld*, 45 DUQ. L. REV. 805 (2007).

49 *See* Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2774 (2006).

50 Prior to the enactment of the M.C.A., Article 36 of the UCMJ stated:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with

detainees for crimes which were not previously recognized as war crimes, such as conspiracy.[51]

The Court held:

> Article 36 places two restrictions on the President's power to promulgate rules of procedure for courts-martial and military commissions alike. First, no procedural rule he adopts may be "contrary to or inconsistent with" the UCMJ--however practical it may seem. Second, the rules adopted must be "uniform insofar as practicable." That is, the rules applied to military commissions must be the same as those applied to courts-martial unless such uniformity proves impracticable.[52]

The Court explained further: "The uniformity principle is not an inflexible one; it does not preclude all departures from the procedures dictated for use by courts-martial. But any departure must be tailored to the exigency that necessitates it."[53]

The Court concluded:

> The Government's objection that requiring compliance with the court-martial rules imposes an undue burden both ignores the plain meaning of Article 36(b) and misunderstands the purpose and the history of military commissions. 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. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission's procedures typically have been the ones used by courts-martial. That the jurisdiction of the two tribunals today may sometimes overlap, does not detract from the force of this history; Article 21 did not transform the military commission from a tribunal of true exigency into a more convenient adjudicatory tool. Article 36, confirming as much, strikes a careful balance between uniform procedure and the need to accommodate exigencies that may sometimes arise in a theater of war. That Article not having been complied with here, the rules specified for Hamdan's trial are illegal.[54]

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this chapter.

10 U.S.C. § 836(a) (2000), *modified by* Pub. L. No. 109-366, § 4(a)(3), 120 Stat. 2631 (Oct. 17, 2006).

51 126 S. Ct. at 2778.

52 *Id*. at 2790.

53 *Id*.

54 *Id*. at 2792–93 (internal citations omitted).

Without defining the standard of review or the degree of deference it would give to the Executive Branch, the Court imposed on the President a burden to prove that where the procedures and rules devised deviated from courts-martial, it was impracticable to use court-martial rules and procedures.[55] For example, the original military commissions were authorized to have sessions outside the presence of the accused. The Court found this inconsistency with established court-martial procedures unacceptable:

> These rights [of an accused before a commission] are subject, however, to one glaring condition: The accused and his civilian counsel may be excluded from, and precluded from ever learning what evidence was presented during, any part of the proceeding that either the Appointing Authority or the presiding officer decides to "close." Grounds for such closure "include the protection of information classified or classifiable . . . ; information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests." § 6(B)(3). Appointed military defense counsel must be privy to these closed sessions, but may, at the presiding officer's discretion, be forbidden to reveal to his or her client what took place therein.[56]

The Court also objected to the use of significantly relaxed rules of evidence, without adequate justification:

> Another striking feature of the rules governing Hamdan's commission is that they permit the admission of *any* evidence that, in the opinion of the presiding officer, "would have probative value to a reasonable person." Under this test, not only is testimonial hearsay and evidence obtained through coercion fully admissible, but neither live testimony nor witnesses' written statements need be sworn. Moreover, the accused and his civilian counsel may be denied access to evidence in the form of "protected information" (which includes classified information as well as "information protected by law or rule from unauthorized disclosure" and "information concerning other national security interests," so long as the presiding officer concludes that the evidence is "probative" under § 6(D)(1) and that its admission without the accused's knowledge would not "result in the denial of a full and fair trial." Finally, a presiding officer's determination that evidence "would not have probative value to a reasonable person" may be overridden by a majority of the other commission members.[57] As the

55 *Id*. at 2790–91; *id*. at 2801 (Kennedy, J., concurring).

56 *Id*. at 2786 (majority opinion).

57 *Id*. at 2786–87 (emphasis in original) (internal citations omitted), *citing* Hamdam v. Rumsfeld,

> District Court observed, this section apparently permits reception of testimony from a confidential informant in circumstances where "Hamdan will not be permitted to hear the testimony, see the witness's face, or learn his name."[58]

The Court also noted with disapproval several other deviations from court-martial procedures, such as the size of the commission (only a three-members minimum, as opposed to five in a general court-martial) and the composition and independence of the appellate review panel (three officers, only one of whom need have experience as a military judge, compared to a three military-judge panel on a military court of appeal).[59]

As will be discussed below, the M.C.A. has corrected a number of these problems, but several remain. In addition, the Court held that the military commissions created by the President's order did not comply with Common Article 3 of the Geneva Conventions, which protects detainees, even if they are allegedly unlawful combatants, from "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[60] The Court held that the military commissions ran afoul of the Geneva Conventions because the authorization for hearings outside the accused's presence violated the basic judicial guarantee of the "right to be present," and because the dramatic deviations from courts-martial procedures disqualified the commissions from being considered a "regularly constituted court."[61] According to Justice Kennedy, "[a]t a minimum, a military commission . . . can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice."[62]

The M.C.A. proclaims that it has resolved these problems and is in compliance with the Geneva Conventions:

> A military commission established under this chapter 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.[63]

This provision reflects an apparent recognition of the obligation of

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344 F.Supp.2d 152, 168 (D. D.C. 2004).

58 Hamdan v. Rumsfeld, 126 S. Ct. 2749, fn. 43 (2006), (citing *Hamdan*, 344 F. Supp.2d at 168.

59 *Hamdan*, 126 S. Ct. at 2806.

60 *Id.* at 2795, (citing Geneva Convention (III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, [1955] 6 U.S.T. 3316, T.I.A.S. No. 3364 (Third Geneva Convention)).

61 *Hamdan*, 126 S. Ct. at 2792–93, 2796.

62 *Id*. at 2804 (Kennedy, J., concurring).

63 10 U.S.C. § 948b(f) (2007).

the United States to comply with the Geneva Conventions, to which the United States is a signatory. Yet, ironically, in the next paragraph of the M.C.A., Congress denies the binding effect of the Geneva Conventions: "No alien unlawful enemy combatant . . . may invoke the Geneva Conventions as a source of rights."[64] Not only are these two provisions (10 U.S.C. § 948b(f) and § 948b(g)) philosophically incompatible, but it is far from clear that a majority of the Justices of the Supreme Court would agree.

What is a regularly constituted court? According to Justice Stevens:

> The commentary accompanying a provision of the Fourth Geneva Convention, for example, defines "regularly constituted" tribunals to include "ordinary military courts" and "definitely exclud[e] all special tribunals." And one of the Red Cross' own treatises defines "regularly constituted court" as used in Common Article 3 to mean "established and organized in accordance with the laws and procedures already in force in a country."[65]

Applying these criteria to the original commissions, Justice Kennedy concluded the commissions were not regularly constituted:

> These structural differences between the military commissions and courts-martial -- the concentration of functions, including legal decisionmaking, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress -- remove safeguards that are important to the fairness of the proceedings and the independence of the court. Congress has prescribed these guarantees for courts-martial; and no evident practical need explains the departures here. For these reasons the commission cannot be considered regularly constituted under United States law and thus does not satisfy Congress' requirement that military commissions conform to the law of war.[66]

In response to *Hamdan*, the President had the option to amend the military commission's rules to mirror court-martial rules more closely and to provide specific justifications for the deviations. However, this would mean sacrificing some aspects of the military commissions that he wanted to keep, such as the relaxed rules of evidence and the ability to try detainees for crimes not traditionally treated as war crimes. Instead, the administration sought specific statutory authorization from Congress for military commissions with broader powers and more flexible rules and procedures

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64 *Id*. § 948b(g).

65 Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2796–97 (2006) (internal citations omitted).

66 *Id*. at 2807, (Kennedy, J., concurring).

than those previously authorized. The M.C.A. was quickly passed and became law on October 17, 2006.[67] In order to understand whether the new military commissions created by the M.C.A. will be upheld by the Supreme Court, it is necessary to consider the differences between conventional courts-martial and military commissions in their current incarnations.

E. The Military Commissions Act and its Implementing Regulations

The commissions created by the M.C.A. were not merely a legislative authorization of the earlier commissions; several aspects of the commissions were changed to address concerns raised by the Court. Other changes resulted from legislative initiatives. Perhaps the most significant change was not to the commissions themselves, but to their relationship with the Uniform Code of Military Justice. The M.C.A. amended Article 36 of the UCMJ so that it did not apply to military commissions convened under the Act, thereby nullifying one of the Supreme Court's principle bases for invalidating the original commissions[68] and ostensibly providing a legal foundation for the specific ways military commissions deviated from court-martial procedures under the M.C.A. The M.C.A. also specified certain other aspects of military law that did not apply to military commissions, but did not entirely dispense with the general principle that military commissions should comply with court-martial procedures. Indeed, it was Congress' express intention that procedures for military commissions mirror procedures for courts-martial as closely as possible. The M.C.A. states that "[t]he procedures for military commissions set forth in this chapter are based upon the procedures for trial by general courts-martial under chapter 47 of this title (the Uniform Code of Military Justice),"[69] and the M.C.A. instructs the Secretary of Defense to closely follow the court-martial procedures in any implementing regulations.[70]

Over the next few months, the Department of Defense issued im-

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67 10 U.S.C. § 948a (2007). The M.C.A. added a new chapter (Chapter 47A) to title 10 of the United States Code, to be inserted after Chapter 47, the Uniform Code of Military Justice, which governs courts-martial.

68 The M.C.A. amended this provision so that it now reads:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not, *except as provided in Chapter 47A of this title*, be contrary to or inconsistent with this chapter."

10 U.S.C. § 836(a) (2007), *as amended by* Pub. L. No. 109-366, § 4(a)(3), 120 Stat. 2631 (Oct. 17, 2006) (emphasis added).

69 *Id*. § 948b(c).

70 *Id*. § 949a(a) ("Pretrial, trial and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense, in consultation with the Attorney General. Such procedures shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial.").

plementing rules and regulations for the M.C.A. in the form of the Manual for Military Commissions[71] (the M.M.C.) and the Regulation for Trial by Military Commissions[72] (the R.T.M.C.). The M.M.C. contains Rules for Military Commissions[73] (R.M.C.) and Military Commission Rules of Evidence (M.C.R.E.),[74] as well as a chapter defining the crimes subject to trial by military commission.[75] Taken together, the Military Commissions Act (38-pages long), Manual for Military Commissions (236-pages long), and the Regulation for Trial by Military Commissions (177-pages long) prescribe the jurisdiction of the commissions, define the crimes,[76] establish the rules of evidence, create the procedural rules, and institute administrative procedures for all aspects of the commission's operations.[77]

In his foreword to the M.M.C., Secretary of Defense Robert Gates claims to have followed Congress' directive to closely follow military law. He states, "The M.M.C. is adapted from the Manual for Courts-Martial (2005) to comport with the M.C.A."[78] He states that, consistent with the M.C.A.'s direction, "The M.M.C. applies the principles of law and rules of evidence in trial by general courts-martial so far as I have considered practicable or consistent with military or intelligence activities, and is neither contrary to nor inconsistent with the M.C.A."[79] The preamble to the M.M.C. contains similar language:

> The rules of evidence and procedure promulgated herein reflect the Secretary's determinations of practicability and consistency with military and intelligence activities. Just as importantly, they provide procedural and evidentiary rules that not only comport

71 U.S. Dep't of Defense, Manual for Military Commissions (Jan. 18, 2007), *available at* http://www.defenselink.mil/news/d20070118MCM.pdf.

72 U.S. Dep't of Defense, Regulation for Trial by Military Commissions (April 27, 2007), *available at* http://www.defenselink.mil/news/Apr2007/Reg_for_Trial_by_mcm.pdf.

73 M.M.C. pt. II, Rules for Military Commissions.

74 M.M.C. pt. III, Military Commission Rules of Evidence.

75 M.M.C. pt. IV, Crimes and Elements. This part is beyond the purview of this article.

76 With over 400 pages of rules and regulations, it is impossible to discuss every procedural difference. I have chosen to focus on several major differences that I consider to be among the most important. Also, although there is much to say about the substantive criminal law of military commissions, this subject is largely beyond the purview of this article, which is focused on procedures. For discussions of some of the substantive crimes in the M.C.A., see *e.g.*, Jack M. Beard, *Agora: Military Commissions Act of 2006: The Geneva Boomerang: The Military Commissions Act of 2006 And U.S. Counterterror Operations*, 101 AM. J. INT'L L. 56 (2007); Allison M. Danner, *Defining Unlawful Enemy Combatants: A Centripetal Story*, 43 TEX. INT'L L.J. 1 (2007); Sean Riordan, *Military Commissions in America? Domestic Liberty Implications of the Military Commissions Act of 2006*, 23 TOURO L. REV. 575 (2007).

77 The Department of Defense also promulgated the Military Commission Trial Judiciary Rules of Court on November 2, 2007, *available at* http://www.defenselink.mil/news/Nov2007/MCTJRulesofCourt.pdf, and the Rules of Practice for the Court of Military Commission Review on June 27, 2007, *available at* http://www.defenselink.mil/news/Jun2007/d20070627cmcr.pdf.

78 Secretary of Defense Robert M. Gates, *Foreword* to M.M.C.,

79 *Id*.

> with the M.C.A. and ensure protection of classified information, but extend to the accused all the "necessary judicial guarantees" as required by Common Article 3. In this regard, these rules represent a delicate balance similar in concept, but different in detail from those provided in the Manual for Courts-Martial.[80]

The Secretary of Defense's conclusory statement cannot be taken at face value.[81] The following section reviews a number of key differences between the rules and procedures developed for military commissions and those used in general courts-martial. Individually, some of the differences may be perceived as minor, but cumulatively they create dramatically reduced procedural protections, casting significant doubt on the Secretary's claims to have to have struck a "delicate balance."

II. Differences Between Courts-Martial and Military Commissions

A. Pretrial Procedures

1. Jurisdiction and Combatant Status Review Tribunals

Personal jurisdiction in courts-martial is governed by Article 2 of the UCMJ and extends to active duty service members,[82] drilling reservists and national guardsmen in federal service,[83] military academy cadets and midshipmen,[84] POWs,[85] and certain other categories of persons rarely tried.[86] The M.C.A., in contrast, limits personal jurisdiction to "alien unlawful enemy combatants."[87] An unlawful enemy combatant is defined as:

> 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 a person who . . . 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

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80 *Id*. pt. I, Preamble, § 2.

81 One interesting question will be how much deference the courts should give to the Secretary's statement and whether the courts will require specific proof of impracticability and inconsistency with military or intelligence activities or simply accept the Secretary's determination. This issue is discussed in Part III, *infra*.

82 10 U.S.C. § 802(a)(1) (2007).

83 *Id*. § 802(a)(3).

84 *Id*. § 802(a)(2).

85 *Id*. § 802(a)(9).

86 *Id*. § 802(a)(4)–(8), (10)–(12).

87 *Id*. §§ 948b, 948c, and 948d.

President or the Secretary of Defense.[88]

According to the M.C.A., a finding by a Combatant Status Review Tribunal (CSRT) "that a person is an unlawful enemy combatant is dispositive for purposes of jurisdiction for trial by military commission under this chapter."[89] The problem, as the prosecution apparently learned for the first time when the military commissions began to get underway in the summer of 2007, was that CSRTs were not, in fact, tasked with determining whether anyone was an unlawful enemy combatant, nor was any other tribunal.

CSRTs were established in July 2004 in response to the Supreme Court's decision in *Hamdi v. Rumsfeld*.[90] In an opinion by Justice O'Connor, a plurality of the Court held that a person labeled as an enemy combatant and faced with continued long-term detention (as opposed to battlefield detention) was entitled to challenge his detention in some form of tribunal offering minimum due process rights.[91] These rights included "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[92] The Court gave considerable leeway to the executive branch to devise such a tribunal, noting that:

> [E]nemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict. Hearsay, for example, may need to be accepted as the most reliable available evidence from the Government in such a proceeding. Likewise, the Constitution would not be offended by a presumption in favor of the Government's evidence, so long as that presumption remained a rebuttable one and fair opportunity for rebuttal were provided. Thus, once the Government puts forth credible evidence that the habeas petitioner meets the enemy-combatant criteria, the onus could shift to the petitioner to rebut that evidence with more persuasive evidence that he falls outside the criteria.[93]

The court suggested that the military could conduct such a hearing:

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88 *Id*. § 948a(1)(A)(i)–(ii) (internal section designations omitted).

89 *Id*. § 948d(c).

90 542 U.S. 507 (2004) (plurality opinion). A companion case, *Rasul v. Bush*, 542 U.S. 466 (2004), decided the same day as *Hamdi*, June 28, 2004, rejected the administration's argument that the Guantanamo detainees were not entitled to seek habeas corpus review in the federal courts.

See generally Richard H. Fallon, Jr. & Daniel J. Meltzer, *Habeas Corpus Jurisdiction, Substantive Rights, and the War on Terror*, 120 HARV. L. REV. 2029 (2007); Jackson Maogoto & Benedict Sheehy, *Torturing the Rule of Law: USA and the Post 9-11 Legal World*, 21 ST. JOHN'S J. LEGAL COMMENT. 689 (2007); Kara Simard, Note, *Innocent at Guantanamo Bay: Granting Political Asylum to Unlawfully Detained Uighur Muslims*, 30 SUFFOLK TRANSNAT'L L. REV. 365 (2007).

91 *See generally, Hamdi*, 542 U.S. 507.

92 *Id.* at 533.

93 *Id.* at 533–34.

"There remains the possibility that the standards we have articulated could be met by an appropriately authorized and properly constituted military tribunal."[94]

Within ten days, the Department of Defense responded by creating Combatant Status Review Tribunals. Their only task was to "review the detainee's status as an 'enemy combatant.'"[95] CSRTs were not linked to the original military commission process. The term "enemy combatant" was defined as:

> an individual who was part of or supporting Taliban or al-Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces.[96]

The definition of an enemy combatant in a CSRT is similar to, but significantly different from, the definition of an "unlawful enemy combatant" in the M.C.A.[97] Even if the definitions were identical, the CSRTs, as currently constituted, are wholly inappropriate tribunals to make a binding legal determination that a detainee is an unlawful enemy combatant for a number of reasons.[98]

While CSRTs may arguably meet the minimum due process requirements of *Hamdi v. Rumsfeld*,[99] they clearly are not "regularly constituted courts." A regularly constituted court, for example, would guarantee a presumption of innocence.[100] In CSRT proceedings, "there is a rebuttable

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94 *Id*. at 538.

95 Deputy Secretary of Defense, Memorandum for the Secretary of the Navy, Order Establishing CSRT 7 Jul 04, ¶ d., *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf. (hereinafter CSRT Est. Order).

96 *Id.,* at ¶ a.

97 *Compare id.* (CSRT definition of "enemy combatant")*, with* 10 U.S.C. § 948a(1)(A)(i)–(ii) (2007) (M.C.A. definition of "unlawful enemy combatant").

98 In fact, under current rules, CSRTs "are not empowered to determine whether the enemy combatants are unlawful or lawful . . . ." Jennifer K. Elsea & Kenneth R. Thomas, *Enemy Combatant Detainees:* Habeas Corpus *Challenges in Federal Court* 9 (Cong. Research Serv., CRS Report for Congress Order Code RL 33180, July 25, 2007), *available at* http://www.fas.org/sgp/crs/natsec/RL33180.pdf.

99 It is certainly debatable whether CSRTs offer a "fair opportunity for rebuttal" by detainees. Numerous articles have criticized CSRTs. *See, e.g.*, Kristine A. Huskey, *Standards and Procedures for Classifying "Enemy Combatants": Congress, What Have You Done?*, 43 TEX. INT'L L.J. 41 (2007); Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L.J. 667 (2006); Robert A. Peal, Special Project Note, *Combatant Status Review Tribunals and the Unique Nature of the War on Terror*, 58 VAND. L. REV. 1629 (2005).

100 The administration frequently touts the presumption of innocence afforded by military commissions as proof of their regularity. *See, e.g.*, Morris D. Davis, Op-Ed., *The Guantanamo I Know*, N.Y. TIMES, June 26, 2007, at A21. But this is not the Founding Fathers' presumption of innocence. While the accused may be presumed innocent of the specific crimes charged, under the current rules, if a CSRT previously determined that he was an unlawful combatant, this would be a binding determination. A determination that one is an unlawful combatant is tantamount to a finding that one violated the law of

presumption that the Government Evidence . . . submitted by the Recorder to support a determination that the detainee is an enemy combatant, is genuine and accurate."[101] Thus, there is a presumption of guilt, rather than innocence. Even if the detainee convinces the CSRT that he is not an enemy combatant, he will not automatically be released, for such a decision may be referred back to the tribunal for further proceedings.[102] One officer who participated in such tribunals, Lieutenant Colonel Stephen Abraham, a reserve intelligence officer and a civilian attorney, submitted an affidavit to the Supreme Court.[103] Describing the CSRTs as "fundamentally flawed," he told the Washington Post that "legal standards for the unusual tribunals were nearly nonexistent."[104] Regarding the evidence used to establish enemy combatant status, he stated that "what were purported to be specific statements of fact lacked even the most fundamental earmarks of objectively credible evidence."[105]

Further evidence that CSRTs are not regularly constituted courts can be found in the official CSRT procedural regulations. According to these rules, CSRTs are "non-adversarial proceedings,"[106] a highly ironic designation for a tribunal tasked with determining whether one is an enemy combatant. As if to underscore their non-adversarial nature, the Department of Defense determined that detainees are not entitled to be represented by counsel at CSRTs. Rather, detainees are assigned a "personal representative." The only qualification of the personal representative is that he or she be "a military officer" with an "appropriate security clearance"—no legal training is required. In fact, military judge advocates[107] are prohibited from

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war, i.e. that one is a war criminal. Thus, one who appears before a military commission is not really presumed innocent, but rather has already been determined to be a war criminal. In fact, even if acquitted—even if there is a unanimous determination that the accused engaged in no unlawful behavior—the accused would still be an unlawful combatant and could continue to be detained indefinitely.

101 Memorandum from Deputy Secretary of Defense, Implementation of Combatant Status Review Tribunals Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba, July 14, 2006 (hereinafter "CSRT Implementing Directive"), Enclosure 1, CSRT Process, ¶ G (11) *available at* http://www.defenselink.mil/news/Aug2006/d20060809CSRTProcedures.pdf.

102 Id. ¶ I(8)

103 Reply to Opposition to Petition for Rehearing, Appendix, Declaration of Stephen Abraham, Lieutenant Colonel, United States Army Reserve, Al Odah v. United States, No. 06-1196 (U.S. June 15, 2007), *available at* http://www.scotusblog.com/movabletype/archives/Al%20Odah%20reply%206-22-07.pdf (hereinafter Abraham Declaration).

104 Carol D. Leonnig & Josh White, *An Ex-Member Calls Detainee Panels Unfair*, WASH. POST, June 23, 2007, at A3.

105 Abraham Declaration, *supra* note 103 at ¶ 22; William Glaberson, *Military Insider Becomes Critic of Hearings at Guantanamo*, N.Y. TIMES, July 23, 2007, at A1.

106 CSRT Implementing Directive, *supra* note 95, Enclosure 1, CSRT Process, ¶ B.

107 Judge advocates are attorneys licensed to practice in at least one U.S. jurisdiction, serving in the Armed Forces, and assigned to the Judge Advocate Generals Corps of a military service. Judge advocates receive a minimum of two months of additional training in military law, after completing their J.D., before being certified as judge advocates. They serve a variety of roles such as military prosecutors, defense counsel, and general counselors to military commanders. Judge advocates also provide legal services to service members. Only a few judge advocates are judges. Military judges are judge advocates with substantial military justice experience (typically twelve years or more and normally with the rank of Lieutenant Colonel/Commander or higher, but at least a Major/Lieutenant Commander).

fulfilling this role.[108] In contrast, the Recorder, who presents the Government's case against the detainee, "should be a judge advocate."[109] Because the personal representative is not an attorney,[110] there is no duty of loyalty, confidentiality, or zealous representation of the detainee. The personal representative is allowed to see "reasonably available information" pertinent to the detainee's designation as an enemy combatant but may not share it with the detainee if it is classified.[111] Furthermore, CSRTs are "not bound by the rules of evidence such as would apply in a court of law."[112] Although the personal representative is ensured an opportunity to consult with the detainee, the tribunal must be held within 30 days of the consultation. This leaves little time for the personal representative to try to construct a meaningful defense by gathering far-flung witnesses or exculpatory evidence, assuming he or she is inclined to do so. The tribunal itself consists of three commissioned officers with an appropriate security clearance, one of whom is a judge advocate—not necessarily a military judge.[113] The detainee can ask for witnesses, and they will be provided if "reasonably available," a standard left solely to the discretion of the tribunal.[114] If two of three members agree that the preponderance of the evidence supports an enemy combatant designation and the Convening Authority[115] approves, then he is an enemy combatant and may continue to be detained indefinitely.[116] However, a decision favorable to the detainee can be sent back for "further proceedings."[117] For example, Lt. Col. Abraham described how in a CSRT in which he was personally involved, a detainee was initially found, by unanimous vote, to be "not properly classified as an enemy combatant and . . . not associated with al Qaeda or the Taliban."[118] The findings were rejected by the Convening Authority and sent back to a new panel, which unanimously found that "[t]he detainee [was] properly classified as an enemy combatant and [was] a member of or associated with Al Qaeda."[119]

While such minimal due process, as set forth in the CSRT regulations and described by Lt. Col. Abraham, may have satisfied Justice

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Military judges receive additional training prior to becoming military judges and are assigned to serve as judges on a full-time basis for a multi-year tour.

108 CSRT Implementing Directive, *supra* note 101, at ¶ C3.

109 *Id.* at ¶ C2.

110 Unless, by chance, he or she happens to be a civilian attorney like Lt. Col. Abraham.

111 CSRT Implementing Directive, *supra* note 101, ¶ F8.

112 *Id.*, at ¶ G9.

113 *Id.*, at ¶ E.

114 *Id.* at ¶ G8.

115 U.S. Navy Rear Admiral James McGarrah has been designated as the Convening Authority for CSRTs. U.S. Dep't of Defense, Office of the Ass. Sec. of Defense (Public Affairs), News Release, *First Combatant Status Tribunal Conducted at Guantanamo Today*, July 30, 2004, http://www.defenselink.mil/releases/release.aspx?releaseid=7593.

116 CSRT Est. Order, *supra* note 95, at ¶ G12.

117 CSRT Implementing Directive, *supra* note 101, at I8.

118 Glaberson, *supra* note 105.

119 *Id.*

O'Connor's requirements for a review of one's continued detention as an enemy combatant, such procedures are singularly inappropriate for making a legal determination of whether the detention of an enemy combatant is lawful or unlawful. Such a determination involves highly complex matters of international law and the laws of war. For example, notwithstanding President Bush's highly questionable and much criticized[120] decision not to afford POW status to members of the Taliban, the Chief Military Commission Defense Counsel has commented:

> There's a very good argument that before the Northern Alliance prevailed over the Taliban, a member of the Taliban would fall under the Geneva Convention category for prisoner of war status as the regular armed force of an unrecognized state. [121]

If Taliban were the regular armed force entitled to POW status, as Col. Sullivan suggests, then they would be entitled to combatant immunity for most acts directed at U.S. forces during the invasion and occupation of Afghanistan. Furthermore, they could not be tried by a commission under the M.C.A.[122] Enemy combatants fighting on behalf of Afghanistan might also have a legitimate self-defense argument that would render their actions "lawful."[123] Shortly after 9/11, President Bush declared the Taliban and al Qaeda to be "hostile forces." This designation meant that they became lawful military targets, and it was legal for U.S. forces to kill them—unless they were trying to surrender—since U.S. forces have combatant immunity for killing hostile forces. According to the administration, we can announce that we are coming to kill the Taliban and al Qaeda, invade the country where they are citizens or lawful visitors or residents, and then kill them; but if they fight back, they are war criminals, not lawful combatants. According to the President, the only lawful options for the Taliban and al Qaeda were to be killed or captured without resistance. The official U.S. position at the time we invaded Afghanistan was that, once captured, the U.S. had a right to hold Taliban and al Qaeda indefinitely in austere prison conditions without charges or trial, without access to any courts, foreign or domestic. There, they could be subjected to harsh interrogation techniques that many observers considered tantamount to torture and be denied the

120 *See, e.g.*, Jamie Mayerfeld, *Playing by Our Own Rules: How U.S. Marginalization of International Human Rights Law Led to Torture*, 20 HARV. HUM. RTS. J. 89 (2007); George H. Aldrich, Editorial Comments, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002); Barbara J. Falk, *The Global War on Terror and the Detention Debate: The Applicability of Geneva Convention III*, 3 J. INT'L L. & INT'L REL. 31 (2007).

121 Colonel Dwight Sullivan, USMC, Chief Defense Counsel, Office of Military Commissions, *quoted in* THE REPORTER, Volume 33, Number 4 at p.147 (December 2006). *See also* Joseph Blocher, Comment, *Combatant Status Review Tribunals: Flawed Answers to the Wrong Question*, 116 YALE L. J. 667 (2006).

122 10 U.S.C. § 948d(b) (2007) ("Military commissions under this chapter shall not have jurisdiction over lawful enemy combatants.").

123 U.N. Charter, art. 51.

benefit of Geneva Convention protections and privileges declared "quaint" by the Chief White House Counsel.[124] Under these conditions, it could certainly be argued that Taliban and al Qaeda affiliates would be entitled to use force to resist capture or defend themselves from the use of deadly force. It was not as if the U.S. was merely seeking to arrest only fugitive, indicted terrorists after some judicial process had determined they were subject to trial. For example, according to the charges against Omar Khadr, all of his alleged crimes occurred after the U.S. invasion of Afghanistan, in June and July of 2002.[125] He was not involved in 9/11 or any other terrorist plots. Recent reports emerging from Khadr's case indicate that Khadr was "one of four enemy fighters surrounded and bombarded by U.S. forces" in Afghanistan. Khadr was the only one "who survived the July 27, 2002, attack."[126] During the attack, Khadr allegedly threw a hand grenade that killed a U.S. Army soldier.[127] Assuming the government can prove Khadr threw the grenade, Khadr has a plausible argument that he was acting in self defense when he did so.

The designation of a detainee as an "unlawful enemy combatant" subjects the detainee to the jurisdiction of military commissions and potentially to the death penalty. Such a critical designation should not be left to military officers with no legal training and no judge to guide them. With such high stakes, the detainee should be entitled to a vigorous defense before a legitimate court. Unfortunately, when Congress linked the military commissions to the CSRTs in the M.C.A., it failed to mandate needed changes to CSRTs to account for their potential new role. Since CSRTs may essentially function as a pretrial chamber for the M.C.A., determining whether the military commission will have jurisdiction, they should be regularly constituted courts just like military commissions.

In order to satisfy *Hamdan v. Rumsfeld*, there appear to be a few different options to change the way that personal jurisdiction before military commissions is determined. First, the M.C.A. could be amended to specify that the determination of unlawful enemy combatant status by a CSRT or other competent tribunal is "dispositive" on the issue of a detainee only if the CSRT or other tribunal is a regularly constituted court affording all the judicial guarantees recognized as "indispensable" by civilized peo-

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124 *See* Memorandum from Alberto Gonzalez, Attorney General, to President George W. Bush (Jan. 25, 2002), *available at* http://news.lp.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb.html (arguing that the new paradigm of the war on terrorism "renders obsolete Geneva's strict limitations on questioning of enemy prisoners and renders quaint some of its provisions.").

125 *See* Khadr Charge Sheet (April 5, 2007), *supra* note 16.

126 Carol J. Williams, *Case Could Turn on Eyewitness; Lawyers' Late Awareness of a Potentially Helpful Onlooker Renews Unease Over U.S. Commissions in Terrorism Cases*, L.A. TIMES, Nov. 9, 2007, at A19.

127 The Government has never produced an eyewitness or otherwise disclosed details of why they believe Khadr threw the hand grenade. *Id*. In fact, on November 8, 2007, the Government disclosed to the defense, for the first time, the identity of a witness who could potentially exonerate Khadr. *Id.* This blatant violation of discovery will be discussed in Part II.A.7, *infra*.

ples, such as representation by counsel and a right to review the evidence. If that were done, either the rules and procedures for CSRTs would need to be completely rewritten, or an entirely new type of tribunal would need to be created. In the alternative, the M.C.A. could be amended so that the finding of a CSRT is not dispositive, but merely a preliminary determination which authorizes the military commission to proceed but is not binding on the military commission: the ultimate determination of status would be made by the commission itself. Now that the Court of Military Commission Review has determined that commission judges have the power to determine personal jurisdiction, it would be best to require the commission to make the determination in all cases, in the interest of uniformity. Clearly, the commission and the CSRTs are not currently using the same standard of proof. According to the CMCR, the "burden of raising the special defense that one is entitled to lawful combatant immunity rests upon the individual asserting the claim. Once raised before a military commission, the burden then shifts to the prosecution to prove beyond a reasonable doubt that the defense does not exist."[128] In other words, in the military commission, the government must prove beyond a reasonable doubt that an individual is an unlawful combatant, a much more stringent standard than the preponderance of the evidence standard applied by CSRTs.[129] It would be unfair for some detainees to be subject to the jurisdiction of a commission on a finding under a lower standard of proof at a CSRT. Such a rule would be inconsistent with well-recognized principles of due process, and would be tantamount to allowing a finding in a civil case to be binding in a criminal trial.

2. Minimum Age Limitations

Courts-martial have jurisdiction over active duty military personnel.[130] This creates a minimum age limitation. In order to be eligible for active duty military service in the United States, one must be 18, or 17 with the permission of a parent and guardian.[131] This age limitation is incorporated by reference into the jurisdiction of courts-martial, thereby creating a minimum age requirement of 17 to be tried by court-martial.[132] Is there a minimum age limit for trial by military commission? Can juveniles be tried? Should they be? The M.C.A. is silent on this point. The M.C.A. indicates only that "alien unlawful enemy combatants" may be tried by military commission, and there is no reference to any age limitation. However, the M.C.A. indicates several provisions of the UCMJ that do not apply, and

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128 U.S. v. Khadr, CMCR 07-001, at 7 (CMCR 2007) (citations omitted) .

129 CSRT Implementing Directive, *supra* note 95, ¶ G8

130 10 U.S.C. § 802(a)(1) (2007).

131 *Id*. § 505(a).

132 *See id*. § 802(c)(2).

Article 2 (10 U.S.C. § 802) is not one of them.[133] Thus, arguably, the age limit should apply. Certainly, if we apply "principles of law" from courts-martial, juveniles should not be tried by military commission.

This issue has more than theoretical relevance because one of the two persons currently under military commission charges, Omar Khadr, was only fifteen at the time of his alleged crimes: clearly a child under military law. For example, under the UCMJ, the age of consent for sexual intercourse is sixteen, indicating that those under sixteen are not considered to be capable of adult decision-making.[134] Other punitive articles specifically define one under the age of sixteen years as a child.[135]

It is inconsistent with military law (and international law as well[136]) to try a fifteen year old juvenile for war crimes or terrorism. Rather, the child soldier should be treated as a victim of war. The Supreme Court certainly might find it to be a judicial guarantee recognized as indispensable by civilized people that fifteen year olds not be treated as adults and tried as war criminals.[137] The administration has noted that at least one recently established war crimes tribunal, the War Crimes Tribunal for Sierra Leone, authorizes the trial of fifteen-year-olds; however, the Sierra Leone court is the only war crimes tribunal to authorize trial of fifteen-year-olds, and no fifteen-year-old has ever been charged.[138] If charges against Omar Khadr are reinstated, they may be dismissed yet again on these grounds. The M.C.A. should be amended to state a minimum age for trial by military commission. If Congress will not act, the Secretary of Defense, or the Military Commission Court of Review, should explicitly state an age limitation

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133 *See id.* §§ 821, 828, 848, 850(a), 904, and 906 (Articles 21, 28, 48, 50(a), 104, and 106) (amended to end with the sentence ''This section does not apply to a military commission established under chapter 47A of this title.").

134 *See generally* 10 U.S.C. § 920 (2007) (UCMJ, Art. 120, Rape, sexual assault, and other sexual misconduct); *id*. § 920(t)(9) ("The term 'child' means any person who has not attained the age of 16 years.").

135 *Id*. § 920(t)(9) (defining child as "under 16 years of age").

136 Since the 1970s, international law has, in recognition that child soldiers are victims of war, not criminals, specifically banned the recruitment and the direct involvement in hostilities of those under fifteen years into any form of armed forces, armed groups, or any type of armed conflict, international or non-international. Convention on the Rights of the Child, G.A. Res. 44/25, 44 U.N. GAOR. Supp. No. 49, U.N. Doc. A/44/736, Art. 38 (1989). The United States is one of only two nations not party to the CRC, Somalia being the other. The Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, which entered into force on February 12, 2002, prohibits armed groups from recruiting or using in hostilities any persons under 18. Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, Art. 4 (2002). The Rome Statute of the ICC also makes it a crime to conscript those under 15. *See* Chen Reis, *Trying the Future, Avenging the Past: The Implications of Prosecuting Children for Participation in Internal Armed Conflict*, 28 COLUM. HUM. RTS. L. REV. 629, 632 (1997); John R. Morss, *The Status of Child Offenders Under International Criminal Justice: Lessons From Sierra Leone*, 9 DEAKIN L. REV. 213 (2004).

137 For example, noting a consensus under international law, the Supreme Court recently held it unconstitutional to impose capital punishment on the mentally retarded, *Atkins* v. *Virginia,* 536 U.S. 304 (2002), and those who committed crimes as juveniles, *Roper v. Simmons*, 543 U.S. 551 (2005).

138 Barbara Crossette, *Sierra Leone to Try Juveniles Separately in U. N. Tribunal Plan*, N.Y. TIMES, Oct. 6, 2000, at A7.

of seventeen, at the time the alleged offenses were committed, as a jurisdictional prerequisite.

3. Statute of Limitations

In courts-martial, there is a statute of limitations of five years from the time of the offense to the time of referral of charges, except for cases in which death is an authorized punishment and for certain wartime offenses for which there is no statute of limitations.[139] The M.C.A. includes no statute of limitations. In fact, it applies to "any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant, before, on, or after September 11, 2001."[140] The language "before, on, or after September 11, 2001" is superfluous and could have been more simply stated as, "at any time."

This retroactive application of a criminal statute raises the principle of legality, or the *ex post facto* criminalization of behavior which was legal at the time it was committed. The M.C.A. claims that it does not violate this principle:

> The provisions of this subchapter codify offenses that have traditionally been triable by military commissions. This chapter does not establish new crimes that did not exist before its enactment, but rather codifies those crimes for trial by military commission. . . . Because the provisions of this subchapter . . . are declarative of existing law, they do not preclude trial for crimes that occurred before the date of the enactment of this chapter [Oct. 17, 2006].[141]

Congress' claim that the M.C.A. created no new crimes is dubious. Even if the crimes were "declarative of existing law" at the time of the enactment of the M.C.A., the M.C.A. does not require that the crime existed *at the time it was committed*. For example, the offense of "providing material support to terrorism" became a federal crime for the first time in 1994,[142] but the M.C.A. purports to apply to crimes committed at any time in the past. [143] Furthermore**,** to the extent the crimes covered by the M.C.A. existed in some form, they did not necessarily have extraterritorial application, nor were all the crimes traditionally triable before military commis-

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139 10 U.S.C. § 843 (2007) (UCMJ, Art. 43, Statute of Limitations).

140 *Id*. § 948d(a).

141 *Id*. § 950p (internal section designations omitted).

142 18 U.S.C. § 2339A (2007). This offense was enacted by Pub. L. No. 103-322, 108 Stat. 2022, on September 13, 1994, as part of the Violent Crime Control and Law Enforcement Act of 1994. The definition of this offense was further amended by the USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 377, 380, 381.

143 The M.C.A. states that it applies to offenses committed "before, on, or after September 11, 2001." 10 U.S.C. § 948d(a) (2007).

sions, as the Court noted in *Hamdan*.[144] For example, the crimes of terrorism, providing material support to terrorism, conspiracy, and perjury are not traditional war crimes, although all are listed in the M.C.A. and M.M.C. The idea that a state may prosecute crimes of an international character that occurred both outside its national boundaries and before specific legislation existed within the state to do so is a well-settled principle of international humanitarian law, known as the principle of universal jurisdiction, which dates back to the Nuremberg Trials.[145] But this principle has been applied only to war crimes, genocide, and crimes against humanity, not to ordinary crimes. The M.C.A. stretches this principle beyond recognizable limits by including crimes not previously recognized as international crimes and potentially criminalizing acts retroactively. Such significant deviation from court-martial rules and procedures and well-established principles of international law may violate the Geneva Conventions and the U.S. Constitution.[146]

The combination of retroactive application coupled with a lack of a statute of limitations means that suspected terrorists can be held without trial for an unlimited period of time for crimes committed decades ago. This is unacceptable. The M.C.A. should be amended to include a statute of limitations for non-capital offenses. I would propose a limit of ten years for offenses punishable by life and five years for other offenses, starting from the date the government became aware of the crime and the identity of the perpetrator. This would still be longer than statutes of limitations for military members, but such a difference could probably be justified by military and intelligence concerns, and the disparity would be within reasonable limits. The statute of limitations should be reduced to two years from the date the offenses are known to the United States if the accused is in U.S. custody. Holding detainees indefinitely without charges, once their crimes are known, is incompatible with civilized standards of justice and fairness. Other bases for tolling the statute of limitations should be adopted from Article 43 of the UCMJ.[147]

4. Pre-Trial Detention

Normally, military members remain free while pending trial by

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144 Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2784 (2006).

145 *See, e.g.*, The Nuremberg Trial 6. F. R. D. 69, 107–11 (1947); *see also* Quinn v. Robinson, 783 F. 2d 776 (9th Cir. 1986); R. v. Finta, [1994] 1 S.C.R. 701 (Can.); Attorney General of Israel v. Eichmann, 36 I.L.R. 277 (Israel S. Ct. 1962).

146 *See* Mireille Delmas-Marty, *The Paradigm of the War on Crime: Legitimating Inhuman Treatment?*, 5 J. INT'L CRIM. JUS. 584 (2007); Edel Hughes, E*ntrenched Emergencies and the War on Terror: Time to Reform the Derogation Procedure in International Law?*, 20 N.Y. INT'L L. REV. 1 (2007); Dr. David L. Nersessian, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity*, 43 STAN. J. INT'L L. 221 (2007).

147 10 U.S.C. § 843(c) (2007). This provision excludes from the period of limitation any period of time when the accused has fled from justice or is otherwise beyond the reach of the United States.

court-martial. In the minority of cases where they are subjected to pretrial detention, they enjoy a variety of procedural rights. R.C.M. 305 governs pretrial confinement. Pretrial confinement may be ordered only upon probable cause to believe that an offense triable by court-martial has been committed by the individual and confinement is required by the circumstances.[148] When placed in confinement, the accused is promptly informed of the nature of the offenses for which he is being held, his rights to remain silent and to counsel, and of the procedures for review of his pretrial confinement status.[149] Within 72 hours of being placed in confinement, the commander or a neutral and detached officer conducts a probable cause determination to determine if the military member shall remain in confinement.[150] The requirements for continued confinement are that a crime has been committed by the prisoner, confinement is necessary to ensure the prisoner's appearance at future proceedings or to prevent further serious misconduct, and lesser forms of restraint (such as restriction to specified limits) will not suffice.[151] If the commander orders continued confinement, then, within seven days of the imposition of confinement, a neutral and detached pretrial confinement review officer reviews the probable cause determination and the necessity for continued confinement.[152] Under normal circumstances, the pretrial confinement review officer (sometimes called the seven-day reviewing officer) conducts a hearing at which the prisoner is present and represented by counsel. At the hearing, the prisoner and prisoner's counsel may make a statement[153] and cross-examine the government witness or witnesses, typically the prisoner's commander or the officer who initially ordered the pretrial confinement. The decision to order pretrial confinement can be reconsidered on request based on significant information.[154] It will also be reviewed by the military judge when charges are referred to trial based on an abuse of discretion standard.[155]

Imposition of pretrial confinement triggers a right to speedy trial.[156] The prisoner must be tried or released within 120 days.[157] If the accused asserts his constitutional right to a speedy trial and the government deprives him thereof, the charges will be dismissed with prejudice.[158]

None of these rules apply to those subject to military commissions.

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148 United States, Manual for Courts-Martial, R.C.M. 305(d) (2005).

149 R.C.M. 305(e).

150 R.C.M. 305(h)(2)(A); R.C.M. 305(i).

151 R.C.M. 305(h)(2)(B).

152 R.C.M. 305(i)(2).

153 R.C.M. 305(i)(2)(A)(i).

154 R.C.M. 305(i)(2)(E).

155 R.C.M. 305(j).

156 10 U.S.C. § 810 (2007) ("When any person subject to this chapter is placed in arrest or confinement prior to trial, immediate steps shall be taken to inform him of the specific wrong of which he is accused and to try him or to dismiss the charges and release him.").

157 R.C.M. 707(a)(2).

158 R.C.M. 707(d)(1).

According to the administration, alien unlawful enemy combatants may be detained indefinitely, without trial, so long as the "Global War on Terrorism" continues.[159] There is no requirement of reasonable grounds to believe that a detainee has committed a crime triable by military commission or that less severe forms of restraint are inadequate. Although entitled to a CSRT, an individual may be subject to continued detention as an enemy combatant, based on the traditional civil "preponderance of the evidence" standard.

Guantanamo detainees are in a different category from our own service members and cannot be afforded all the rights of a pretrial detainee, but the administration has also said that the detainees are not POWs under the Geneva Conventions.[160] By denying POW status, as well as the kind of hearing required under Article 5 of the Geneva Conventions to determine the status of a detained person, and by attempting to deny the right to habeas corpus review through the M.C.A., the administration and Congress have deprived detainees of any meaningful ability to challenge the lawfulness of their detention.

These limitations have resulted in severe criticism of the M.C.A. by outside observers. For example, the United Nations Special Rapporteur Martin Scheinin, has stated:

> A number of provisions of the M.C.A. appear to contradict the universal and fundamental principles of fair trial standards and due process enshrined in Common Article 3 of the Geneva Conventions. One of the most serious aspects of this legislation is the power of the President to declare anyone . . . , without charge as an "unlawful enemy combatant"—a term unknown in international humanitarian law—resulting in these detainees being subject to the jurisdiction of a military commission . . . . Further, in manifest contradiction with article 9, paragraph 4 of the International Covenant on Civil and Political Rights the M.C.A. denies non US citizens (including legal permanent residents) in US custody the right to challenge the legality of their detention.[161]

Of course, detainees may challenge their detention in the CSRT.[162]

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159 Bill Dedman, *U.S. to Hold Detainees at Guantanamo Indefinitely*, Boston Globe, April 25, 2004.

160 Alec Russell, *U-turn as White House agrees to Geneva Conventions protection for detainees*, THE DAILY TELEGRAPH (London) July 12, 2006, at 14.

161 Press Release, UN Expert on Human Rights and Counterterrorism Concerned that Military Commissions Act is Now Law in United States (Oct. 27, 2006), *available at* http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/9A78DBC02294E830C1257 2140033DE76?OpenDocument.

162 U.S. Dep't of Defense, Deputy Secretary of Defense Paul Wolfowitz, Order Establishing Combatant Status Review Tribunal (July 7, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040707review.pdf; U.S. Dep't of Defense, Secretary of the Navy Gordon England, Memorandum for Distribution, Implementation of Combatant Status Review

After the initial CSRT, detainees are eligible for annual Administrative Review Boards (ARBs) to determine if they should continue to be held.[163] But, as discussed above, CSRTs are woefully inadequate as a method for detainees to challenge their detention.[164] ARB procedures are even more cursory.[165] Furthermore, the annual administrative review process is suspended when charges are sworn against a detainee.[166]

5. Speedy Trial

For military members not placed in pretrial detention, the preferral of court-martial charges starts the running of a 120-day speedy trial clock.[167] The M.C.A. is very specific that speedy trial rights do not apply based on the date of imposition of detention.[168] The R.M.C. does, however, include a 120-day speedy trial clock that begins upon the service of charges.[169] In other words, while the government may hold a detainee without limitation, once military commission charges are served on the detainee, the commission must be convened within 120 days or the charges will be dismissed. However, the dismissal may be without prejudice to the government's ability to reinstitute proceedings for the same offenses.[170] No constitutional right to a speedy trial is recognized in the R.M.C., and the accused's demand for a speedy trial is not a factor to be considered in determining whether charges should be dismissed,[171] although such a demand may be considered in granting sentence relief.[172]

Certainly, there are a number of practical military and intelligence

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Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba (July 29, 2004), *available at* http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.

163 DEPSECDEF Memo on Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay Cuba, available at: http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf (hereinafter ARB Procedures); *See also* DoD News Brief, attributed to "Senior Defense Officials" available at http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=3902.

164 In fairness to the Defense Department, only 93 percent of detainees were classified as "enemy combatants," while the other seven percent were found to be non-combatants eligible for release. Therefore, at least some detainees received meaningful relief from the CSRT process. Carol D. Leonnig & Josh White, *An Ex-Member Calls Detainee Panels Unfair*, WASH. POST, June 23, 2007, at A3.

165 ARB Procedures, Enclosure 4, "Administrative Review Boards Process Step-by-Step" note 163, *supra*.

166 *Id.* para 1a. "If . . . the enemy combatant has been charged in a Military Commission, that enemy combatant is not eligible for ARB review until the disposition of any charges against him or the service of any sentence imposed upon him by a Military Commission."

167 R.C.M. 707(a)(1).

168 10 U.S.C. § 948b(d)(1)(A) (2007). Title 10 U.S.C. § 948b(d)(1) reads as follows: ''The following provisions of this title shall not apply to trial by military commission under this chapter: (A) Section 810 (article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of courts-martial relating to speedy trial.").

169 U.S. Dep't of Defense, Manual for Military Commissions, R.M.C. 707(a)(2) (2007).

170 R.M.C. 707(d)(1).

171 *See* R.M.C. 707(d)(1).

172 R.M.C. 707(d)(2).

justifications for not placing stringent time limitations on the government to bring detainees to trial. Many detainees are believed to possess information which is of critical intelligence value, and the process of extracting this information through interrogation can be very protracted. Requiring a detainee to be brought to trial within 120 days of capture, for example, would be unreasonable. But the idea of indefinite detention without notice of the reason therefore, or an opportunity to prove one's innocence, is repugnant to universal ideals of justice and due process. Once a detainee's intelligence value has been exhausted and his complicity in any crimes has been established, some reasonable time limitation should be imposed, at the end of which the detainee should be charged or released.

The ability to hold a detainee for an unlimited period before preferring charges is particularly unfair given that there is no statutory or regulatory basis for providing credit for pretrial detention. Under military case law and DoD regulation, a service member ordered into pretrial confinement gets day-for-day credit of legal pretrial confinement time against any sentence to confinement.[173] However, the M.C.A. states explicitly that precedents from military courts of appeal are inapplicable to military commissions.[174] The position of the government is that a detainee should get no credit towards a sentence imposed by a military commission for time served while detained as an enemy combatant. Although the length of prior detention is a factor the defense may raise and ask to be considered in mitigation in sentencing, the rules state that a commission sentence begins to run from the date the sentence is adjudged.[175] A fairer rule would be to give detainees credit for each day of pretrial detention against any confinement sentence ultimately imposed.

The combined effect of the lack of statute of limitations, the lack of speedy trial rights, and the lack of pretrial detention credit means that a detainee can, theoretically, be detained prior to trial for a period of time greater not only than the sentence he ultimately receives, but also greater than the maximum period of confinement authorized for his crimes. This is unfair and should be remedied by changes to the Rules for Military Commission or Military Commission Act.

6. Referral of Charges

Before charges can be referred to a general court-martial, there are a number of procedural steps that must be satisfied. The most significant

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173 United States v. Allen, 17 M.J. 126, 128 (C.M.A. 1984); United States v. Mason, 19 M.J. 274 (C.M.A. 1985); *see also* United States v. Suzuki, 14 M.J. 491 (C.M.A. 1983). A service member may be granted additional credit against his sentence for illegal pretrial punishment under R.C.M. 305(k). DoD Instruction 1325.7 (July 17, 2001), *Administration of Military Correctional Facilities and Clemency and ParoleAuthority*, para 6.3.1.2.

174 10 U.S.C. § 948b(c) (2007) ("The judicial construction and application of [Chapter 47 of the UCMJ] are not binding on military commissions established under this chapter.").

175 R.M.C. 1113(d).

procedural hurdle is the Article 32 [176] pretrial investigation. The Article 32 investigation is frequently referred to by the popular media as the "military equivalent of a grand jury."[177] This is true in the sense that both procedures are preliminary reviews of the evidence to determine if there are reasonable grounds to go forward to trial. However, the accused's rights are significantly more robust in an Article 32 investigation, and it is hardly a rubber stamp of the prosecution's case, as grand jury indictments often appear to be. The oft-quoted phrase that "a prosecutor could convince a grand jury to indict a ham sandwich"[178] is not true of the Article 32 investigation. For one thing, the Article 32 investigating officer is almost always an experienced judge advocate.[179] In addition, unlike a grand jury, an Article 32 investigation is not conducted in secret. The investigation is generally open to the public,[180] and the accused is entitled to be present[181] and to be represented by counsel.[182] The accused also has the right to cross-examine government witnesses[183] and to present witnesses and other evidence. The accused may compel the government to produce witnesses and evidence under the government's control.[184] The accused has the right to make a sworn or unsworn statement, orally or in writing,[185] and to produce and "[p]resent anything in defense, extenuation, or mitigation for consideration by the investigating officer".[186] Also, the Article 32 investigating officer is not limited to merely indicating approval or disapproval of the charges recommended by the government. The investigating officer is empowered to investigate additional charges,[187] to recommend changes to the charges, and to recommend any appropriate disposition of the charges, including trial at

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176 10 U.S.C. § 832 (2007) (UCMJ, Art. 32, Investigation); R.C.M. 405.

177 *See, e.g.*, John McChesney, *Haditha Proceedings Begin with Marine Lawyer* (May 8, 2007), www.npr.org/templates/story/story.php?storyId=10069336; Susan Candiotti, *New Hearing for Soldier Over Abu Ghraib Charges* (May 19, 2005), http://www.cnn.com/2005/LAW/05/19/england.courtmartial/index.html.

178 Marcia Kramer & Frank Lombardi, *New top state judge: Abolish grand juries & let us decide,* N.Y. DAILY NEWS, Jan. 31, 1985, at 3.

179 Although R.C.M. 405 requires only that the investigating officer be a commissioned officer, the official discussion accompanying the rule indicates that "[t]he investigating officer should be an officer in the grade of major or lieutenant commander or higher or one with legal training." R.C.M. 405(d)(1), Discussion. In military practice, the investigating officer is virtually always a judge advocate and normally one with significant criminal trial experience, particularly in high-profile cases. I have personally been appointed to serve as an investigating officer approximately a dozen times, with the majority of these appointments coming after I was promoted to major and had several years of experience as both a military prosecutor and defense counsel. In my 12 years of military experience, I have never seen or heard of a non-lawyer being appointed as an investigating officer.

180 R.C.M. 405(h)(3), Discussion ("Ordinarily the proceedings of a pretrial investigation should be open to spectators.").

181 10 U.S.C. § 832 (2007) (UCMJ, Art. 32(d)(1), Investigation); R.C.M. 405(f)(3).

182 10 U.S.C. § 832(b) (2007); R.C.M. 405(f)(4).

183 10 U.S.C. § 832(b) (2007); R.C.M. 405(f)(8).

184 10 U.S.C. § 832(b) (2007); R.C.M. 405(f)(9)–(10).

185 R.C.M. 405(f)(12).

186 R.C.M. 405(f)(11); *see* 10 U.S.C. § 832(b) (2007).

187 R.C.M. 405(e).

a lower level,[188] nonjudicial punishment or lesser forms of discipline, or dismissal.[189] Upon submission of the investigating officer's report of investigation, the defense is entitled to submit objections.[190]

Article 32 is one of three provisions of the Uniform Code of Military Justice which the M.C.A. rendered inapplicable.[191] In other words, an accused is not entitled to a "thorough and impartial investigation" before charges are referred to a military commission. It is unclear why Congress did not believe such a thorough and impartial investigation was warranted. Perhaps Congress was aware that, ultimately, the recommendations of an Article 32 investigating officer are just that—recommendations. They are not binding on the convening authority, which is free to completely disregard them.[192] Congress may have feared the backlash that would be likely if an Article 32 investigating officer recommended dismissal of some charges and the convening authority ignored the recommendation and referred the charges to the commission anyway. By removing the Article 32 requirement, Congress has deprived the convening authority of an important opportunity to receive an unbiased, unfiltered recommendation.

The lack of an investigation comparable to that required by Article 32 puts the defense at a considerable disadvantage, compared to the defense in a general court-martial, in terms of pre-trial preparation. The Article 32 investigation serves as an excellent vehicle for discovery for the defense, by giving it the opportunity to preview the government's case against the client. After an Article 32 investigation, the defense is better able to evaluate the charges, if any, to which the accused should plead guilty, and it is better able to gauge the relative strengths and weaknesses of the government's case. The Article 32 investigation may be the only opportunity to question important witnesses.

Whatever Congress' reason for removing the Article 32 requirement, there seems to be no compelling reason why the Secretary of Defense could not impose a similar process, by regulation, through the creation of a Rule for Military Commission 405 (there is not one now). [193] Although Congress rendered Article 32 inapplicable, it did not preclude the Secretary from adopting some alternate form of pretrial investigation. In fact, the Rules for Military Commission seem to contemplate the possibility that a pretrial investigation could be ordered. R.M.C. 406, which defines the pre-

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188 I.e., special or summary court-martial, which carry much lower potential penalties.

189 R.C.M. 405(j)(2)(G)–(I), Discussion.

190 R.C.M. 405(j)(4).

191 10 U.S.C. § 948b(d)(1) (2007) reads as follows: ''The following provisions of this title shall not apply to trial by military commission under this chapter: . . . (C) Section 832 (article 32 of the Uniform Code of Military Justice), relating to pretrial investigation."

192 R.C.M. 407.

193 The Rules for Military Commissions track the numbering system of the Rules for Courts-Martial so that rules with the same numbers cover the same subject matter. Rule for Courts-Martial 405, which provides the procedures for conducting pretrial investigations, is one of a few Rules for Courts-Martial which currently has no counterpart under the Rules for Military Commissions.

trial advice to be given to the convening authority, directs the legal advisor to the convening authority to state a "[c]onclusion with respect to whether the allegation of each offense is warranted by the evidence indicated in the report of investigation (if there is such a report)."[194] However, according to the Discussion to the Rule, "[t]he advice need not set forth the underlying analysis or rationale for its conclusions."[195] Thus, there is no requirement that the convening authority get any detailed analysis before acting. If the Secretary of Defense does not wish to require an independent investigation by regulation, the convening authority undoubtedly has the inherent authority to order an investigation in any given case.[196] The convening authority should exercise that authority robustly and demand a thorough and impartial investigation prior to referring charges to the military commission.[197] Doing so would be a significant step toward making the commissions more open, and even-handed. At the very least, the convening authority should give the defense the opportunity to comment on the pretrial legal advice received prior to referral. Under the R.M.C., however, the defense is provided a copy of the advice only after charges are referred.[198]

7. Discovery: Access to Witnesses and Evidence

The lack of a pretrial investigation requirement is not the only impediment to discovery faced by the defense in a military commission. In a general court-martial, "[e]ach party shall have adequate opportunity to prepare its case and *equal opportunity to interview witnesses and inspect evidence*. No party may unreasonably impede the access of another party to a witness or evidence."[199] Compare this to the counterpart rule created for

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194 R.M.C. 406(b)(2). This paragraph is identical to R.C.M. 406(b)(2), which refers to the report of investigation prepared by the Article 32 investigating officer. The only reason that there would not be a report of investigation prior to a general court-martial is that the Article 32 investigation is the right of the accused and may be waived. R.C.M. 405(k).

195 R.M.C. 406(b), Discussion. Although identical language appears in the discussion to R.C.M. 406 concerning the advice of the Staff Judge Advocate to the convening authority, the SJA advice is accompanied by the Article 32 report of investigation unless the pretrial investigation was waived pursuant to R.C.M. 405(k). The defense rarely waives the pretrial investigation unless it is a foregone conclusion, due to overwhelming evidence of guilt, that the charges will be referred to a general court-martial.

196 Although the authority to order a pretrial investigation is not explicitly mentioned in the Regulation for Trial by Military Commissions, it does give the convening authority the responsibility to "order that such investigative or other resources be made available to defense counsel and the accused as deemed necessary by the convening authority for a fair trial." U.S. Dep't of Defense, Regulation for Trial by Military Commissions, ch. 2, § 2-3.a.9 (April 27, 2007). Although this section contemplates assigning investigative resources to the defense, it would seem to encompass the assignment of an independent investigator to conduct a pretrial investigation if that would facilitate a fair trial.

197 The current Convening Authority is Susan J. Crawford, former United States Court of Appeals for the Armed Forces Judge. U.S. Dep't of Defense, Office of the Ass. Sec. of Defense (Public Affairs), News Release, *Seasoned Judge Tapped to Head Detainee Trials* (Feb. 7, 2007), http://www.defenselink.mil/releases/release.aspx?releaseid=10493.

198 R.M.C. 406(c).

199 R.C.M. 701(b)(5)(e) (emphasis added).

military commissions: "Each party shall have adequate opportunity to prepare its case and no party may unreasonably impede the access of another party to a witness or evidence."[200] The right to witnesses and evidence has been reduced from the "right to equal access" to the right "not to be unreasonably impeded." No explanation is given for reducing this right, although it is presumably related to concern about disrupting or compromising military and intelligence activities. If that is the case, a better, fairer rule would read as follows: The defense shall have equal opportunity to interview witnesses and inspect evidence unless such access would negatively impact national security. I can think of no other compelling rationale for hampering the defense's preparation for trial.

The potential for weakened discovery rules to adversely impact the defense has already been demonstrated. In the *Khadr* case, the prosecution knew of a potentially exculpatory witness for over five years before it revealed the existence of the witness to the defense—nine months after Khadr was charged and hours before he was scheduled to be arraigned.[201] Also, an FBI agent scheduled to testify in Khadr's case refused to meet with the defense, hampering their pretrial preparations.[202] Further impeding the defense, when the government provided a witness list to the defense, defense counsel were ordered not to share the names of the witnesses against Khadr with their client or anyone else.[203] These early experiences with military commissions do not inspire confidence that the defense will be provided full and fair access to the witnesses and evidence they need to put on a robust defense. The imbalance in procedures continues after the pretrial phase concludes and the trial begins.

B. Trial Procedures

1. Production of Witnesses and Evidence

A similar diminution of defense rights can be found in the rules pertaining to the production of witnesses and evidence for trial. For general courts-martial, "[t]he prosecution and *defense* and the court-martial *shall have equal opportunity* to obtain witnesses and evidence, including the benefit of compulsory process."[204] This critical right is significantly diminished for defendants facing military commissions: "*The defense shall have reasonable opportunity* to obtain witnesses and other evidence as provided

200 R.M.C. 701(j).

201 Williams, *supra* note 126.

202 *Id*.

203 William Glaberson, *Witness Names to be Withheld From Detainee*, N.Y. TIMES, Dec. 1, 2007, at A1.

204 R.C.M. 703(a) (emphasis added).

in these rules."[205] Again, no justification is offered for this change. However, the potential impact of this rule has already been demonstrated in the *Hamdan* case. The Government refused to allow Hamdan's defense counsel access to interview several high-value detainees, including Khalid Shaikh Mohammed, whom they believed could explain Hamdan's role within al Qaeda, potentially exonerating him.[206] When defense lawyers asked that the detainees be brought to Hamdan's pretrial jurisdictional hearing, the request was denied by the military judge, citing the untimeliness of their request and security concerns.[207] These significant modifications leave a strong appearance that the Secretary of Defense is not interested in creating a military commission that seeks truth through a fair adversarial process.

The rules further hinder the defense in that the right to confront witnesses has been diminished. The opportunity for direct confrontation of witnesses is less likely because it is easier for a witness to be declared "unavailable" in a military commission than in a general court-martial.[208] This finding of unavailability makes it more likely that hearsay evidence will be admitted.[209] Coupled with the relaxation of hearsay rules, (discussed *infra*, section II.C.4.), this gives a decided advantage to the prosecution.

2. Right to Counsel

Another significant difference between the rights of the accused in a military commission and those of an accused in a general court-martial is in the area of the accused's right to counsel. Military members are entitled to free military defense counsel, regardless of their ability to pay.[210] In addition to the counsel assigned to represent them, military members may also request representation by a specific military attorney, known as an individual military counsel request.[211] So long as that person is "reasonably available" and doesn't have an ethical conflict, he or she will be made available.[212] Members of the military who have been accused may also hire civilian defense counsel of their own choosing, at their own expense, and may release their military counsel. Civilian counsel need not be United States citizens, or even licensed to practice in the United States, as long as the attorney is licensed somewhere and the military judge finds the attorney qualified.[213] Thus, foreign attorneys can represent military members in

205 R.M.C. 703(a) (emphasis added).

206 Glaberson, *supra* note 32.

207 *Id*.

208 *Compare* R.M.C. 703(b)(3), *with* R.C.M. 703(b)(3). Also compare the discussions to these rules.

209 *See* MIL. R. EVID. 804 ("Hearsay exceptions; declarant unavailable.")

210 R.C.M. 506(a).

211 R.C.M. 506(b).

212 *Id*.

213 R.C.M. 502(d)(3)(B).

courts-martial. A military member has the right to release any attorney representing him and may represent himself.

Accused parties appearing before military commissions have been given the right to represent themselves[214] and to be represented by competent counsel, but their choice of counsel is much more limited. Just as with a member of the military who has been accused, a military defense counsel will be assigned, but the "accused has no right to a specific defense counsel" and is not entitled to request individual military counsel.[215] An accused may request a different military counsel than the one assigned, but the right is severely limited: "Any accused who is materially dissatisfied with his detailed defense counsel, or who reasonably believes that his counsel's representation has been ineffective, may request that the Chief Defense Counsel, in his sole discretion, appoint a different attorney from among those assigned or detailed to, or performing duties with, the Office of the Chief Defense Counsel . . . ."[216]

Military commission regulations also limit the accused's choice of civilian counsel. The M.C.A. authorizes the retention of civilian counsel by the accused, but the civilian counsel must be a U.S. citizen, admitted to practice in a U.S. jurisdiction, and eligible for a Secret security clearance.[217] In addition, the attorney may not have been sanctioned or disciplined by any court, bar, or other governmental authority for "relevant misconduct" and must sign a written agreement to comply with regulations and instructions for counsel.[218] If a civilian counsel is retained, the assigned military counsel is required to remain on the case as associate counsel.[219]

These differences in rights to counsel do not seem justified by military or intelligence needs. While it makes sense that a civilian counsel must be eligible for a security clearance if he or she is going to be exposed to classified information, there may not be classified information presented in every trial. If there is not, this requirement should be waivable. The requirement that all attorneys be U.S. citizens is even harder to justify. If foreign attorneys who aren't even admitted to practice in a U.S. jurisdiction can represent U.S. service members, why shouldn't such attorneys be able to represent non-citizens if the military judge determines they are qualified? And why are attorneys required to be eligible to practice in a U.S. jurisdiction, when the commissions, at least for the present, take place on foreign soil at Guantanamo, a place the administration has adamantly argued is beyond the reach of any U.S. court?[220] Even if the requirement of eligibility

214 10 U.S.C. § 949a(b)(1)(d), (b)(3)(a) (2007).

215 R.T.M.C. ch. 9, § 9-2.d.

216 R.T.M.C. ch. 9, § 9-2.

217 10 U.S.C. § 949c(b)(3)(A)–(B), (D) (2007).

218 *Id*. § 949c(b)(3)(C), (E); *id*. § 949c(b)(4).

219 *Id*. § 949c(b)(5).

220 *See, e.g.*, Brief for the Respondents, Rasul v. Bush, No. 03-334 (U.S. Mar. 3, 2004), 2004 WL 425739.

to practice in a U.S. court arguably makes sense, there are many attorneys licensed to practice in the U.S. who are not U.S. citizens. Indeed, there are many active duty U.S. service members who are not U.S. citizens. It is an extreme irony that we allow foreign citizens to defend our country and fight the "global war on terrorism" but will not allow foreign citizens, even legal residents or citizens of coalition partners, to defend other foreign citizens when the fight moves to the courts.

Although some have questioned the independence of military defense counsel, such counsel have repeatedly demonstrated that they will zealously and competently defend their clients.[221] Unfortunately, competence and zealousness are not the only ingredients required to put on an effective defense. In order to have an effective defense, an accused must have trust and confidence in his attorney. Those accused of being "unlawful enemy combatants" are not likely to fully trust a member of the U.S. military assigned to represent them, especially one who must communicate with them through an interpreter.[222] Few detainees speak English as their primary language, and many do not speak English at all. Few American at-

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221 A number of commentators have questioned the independence of military defense lawyers in light of their perceptions that Lt. Cmdr. Swift, Hamdan's military attorney, was passed over and forced to retire because of his success in *Hamdan v. Rumsfeld*. *See, e.g.*, Stephen Ellmann, *The "Rule of Law" and the Military Commission*, 51 N.Y.L. SCH. L. REV. 760 (2006) (stating that provisions in M.C.A. designed to ensure independence of defense counsel "would be more reassuring if Lt. Cmdr. Charles Swift, the military lawyer who represented Hamdan, had not been passed over for promotion, thus ending his military career, shortly after the Supreme Court's decision in favor of his client"); Erwin Chemerinsky, *Navy Is Wrong to Force Out Guantánamo Lawyer*, DAILY J., Oct. 23, 2006; Editorial, *The Cost of Doing Your Duty*, N.Y. TIMES, Oct. 11, 2006, at A26.

The non-promotion story is a widespread and persistent myth that I have attempted, apparently unsuccessfully, to debunk by proving that Lt. Cmdr. Swift was passed over for promotion prior to, and unrelated to, the *Hamdan* decision. Although the public release of his promotion board results did come closely on the heels of *Hamdan,* there was nothing insidious about the timing of the release. *See* David Frakt, *Winning Detainee Hamdan's Case Didn't Prevent Navy Lawyer's Promotion*, DAILY J., Nov. 8, 2006.

Possibly in response to a perception of a possible conflict of interest between career advancement and zealous representation, the M.C.A. has adopted special rules to protect the independence of defense counsel. *See* 10 U.S.C. § 949b(b) (2007). Title 10 U.S.C. § 949b(b) reads as follows:

> In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of any such officer or whether any such officer should be retained on active duty, no person may—
>
> (1) consider or evaluate the performance of duty of any member of a military commission under this chapter; or
>
> (2) give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission under this chapter.

Id.

222 I have personally experienced the difficulty of establishing an effective attorney-client relationship with both of my detailed clients.

torneys speak the languages of the Guantanamo detainees. Religious differences may further inhibit the attorney-client relationship. Many detainees are likely to be uncomfortable being represented by a non-Muslim, particularly if they consider all non-Muslims to be infidels. Detainees should be able to retain counsel with whom they are comfortable, counsel they can trust completely and with whom they can communicate freely and openly. So long as an attorney is willing to abide by the commission's rules and is not a security threat to the U.S., any qualified attorney with reasonable English fluency should be eligible to represent defendants before the commission. Expanding eligibility to foreign counsel would undoubtedly enhance the legitimacy of the military commissions in the eyes of the international community.[223] At the very least, we should expand eligibility to U.S. legal aliens and attorneys from coalition partners in the war on terrorism. While the right to counsel is likely sufficient to meet international minimums, it is not as broad as it could or should be. Congress should amend the M.C.A. to authorize qualified non-United States citizen counsel.

3. Composition of Military Commissions

The composition of military commissions is now quite similar to general courts-martial, and should satisfy the Supreme Court. The M.C.A. corrected a deficiency in the earlier version of military commissions[224] by providing a minimum of five-officer juries, and twelve-officer juries for capital cases, just like general courts-martial.[225] However, unlike general courts-martial, there is no provision for enlisted members to serve where the accused is, himself, enlisted.[226] One could argue that those claiming to be mere "foot-soldiers," or otherwise the functional equivalent of enlisted men, should be entitled to have enlisted members serve on their commissions. However, given the fact that that commissions are open only to "unlawful enemy combatants" and not regular soldiers, it might be difficult to evaluate claims of which defendants were equivalent to officers and which to enlisted. The exclusion of enlisted members seems justified and does not

223 It should be noted that the Department of Defense has authorized those facing trial by military commission to have a "foreign consultant" at counsel table with them during commission proceedings, subject to the approval of the convening authority or the military judge. R.T.M.C. ch. 9, § 9.6.a. Such foreign consultants must apply for, or have, a security clearance and must sign non-disclosure agreements. *Id*. Although foreign consultants may confer with the accused and accused's counsel, they are not authorized to address the commission on behalf of the accused.

224 The original military commissions at issue in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, had to consist of "at least three but no more than seven members." U.S. Dep't of Defense, Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, § 4(a)(2) (March 21, 2002).

225 10 U.S.C. § 816(1)(a) (2007) (UCMJ, Art. 16(1)(a), Courts-martial classified); *id*. at § 825a (UCMJ, Art. 25a, Number of members in capital cases); R.C.M. 501(a)(1)(A).

226 In general courts-martial, enlisted members may request enlisted members who outrank them to serve as members of the court-martial, and if they so request, they are entitled to a minimum of one-third enlisted members. R.C.M. 503(a)(2); *see also* R.C.M. 903(a)(1), (c)(1).

detract from the overall fairness of military commissions.

Just as in general courts-martial, two-thirds of the commission members must agree on any verdict or sentence.[227] For sentences in excess of ten years of confinement, three-fourths of the commission members must agree. For the death penalty, a unanimous verdict of twelve or more is required. This is also identical to general court-martial procedure.[228]

The process for challenges to members is also identical to challenges in general courts-martial—unlimited challenges for cause, and one peremptory challenge.[229] Commissions will use military judges, just like general courts-martial. This is an improvement over the original commission, in which a judge advocate (not necessarily a military judge) served as both "Presiding Officer" and as a voting member of the commission.[230]

4. Pretrial Agreements (Plea Bargains)

Plea bargains in general courts-martial are known as Pretrial Agreements (PTAs) and are authorized by Rule for Courts-Martial 705. Rule for Military Commissions 705 is very similar and authorizes the convening authority to enter into pretrial agreements in military commissions.[231] Further guidance on pretrial agreements in military commissions can be found in Chapter 12 of the R.T.M.C.[232] The only significant difference between pretrial agreements in military practice and in commissions is that PTAs in a court-martial may include maximum sentences but do not include minimum sentences.[233] Thus, an accused member of the military may agree to plead guilty to certain offenses in exchange for a promise that the convening authority will approve no sentence greater than X (for example, five years of confinement). The accused and defense counsel are still free to try to convince the court-martial to sentence him to a lighter sentence. And, in fact, the court is not informed of the limitations on the sentence until after announcing its verdict.[234] The accused gets the benefit of whichever is lower, the sentence agreed to in the PTA, or the sentence imposed by the court-martial. In contrast, PTAs in military commissions may include an agreed sentence range, with both a maximum and minimum.[235] The maximum and minimum could presumably be the same sentence, or

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227 If there are five members appointed, this means four must agree.

228 10 U.S.C. § 852 (2007) (UCMJ, Art. 52, Number of votes required); R.C.M. 1006(d)(4)(A).

229 *Compare* R.C.M. 912, *with* R.M.C. 912. In commissions, the parties get an extra peremptory challenge if additional members are detailed.

230 Military Commission Order No. 1, § 4(A)(4).

231 R.M.C. 705.

232 R.T.M.C. ch. 12.

233 See R.T.M.C. Figure 12-2, Note 6: "Contrary to limitations imposed by case-law in the court-martial system, the convening authority may approve . . . a 'range limitation' of confinement."

234 R.C.M. 910(f)(3) ("[T]he military judge ordinarily shall not examine any sentence limitation contained in the [pretrial] agreement until after the sentence of the court-martial has been announced.").

235 R.T.M.C. ch. 12, Figure 12.2, note 6.

perhaps as little as one day's confinement less (for example, a maximum of ten years, and a minimum of nine years, 364 days). This enables the convening authority and accused to agree to a fixed sentence, offering more certainty to the government and the accused, but removing an opportunity for effective advocacy by defense counsel to try to secure a sentence below the guaranteed minimum in the sentencing hearing. Although it is unclear what military or intelligence consideration required this change,[236] this deviation from military practice does not detract from the overall fairness of military commissions.

C. Evidentiary Matters

The Military Rules of Evidence (M.R.E.) are based on the Federal Rules of Evidence. In fact, aside from a few minor word changes, and a couple of military-specific rules,[237] the rules are identical to those utilized in United States criminal courts. The M.C.A. gave the Secretary of Defense the option of prescribing more relaxed rules of evidence.[238] Not surprisingly, he did so. Since the changes were authorized, but not mandated, by Congress, it is unclear whether these changes fall under the requirement that military commissions apply the "rules of evidence in trial by general courts-martial" so long "as the Secretary considers [it] practicable or consistent

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236 Arguably, the ability to require some minimum length of confinement may be necessary to protect national security in a given case.

237 *See, e.g.*, MIL. R. EVID. 313 ("Inspections and inventories in the armed forces.").

238 S*ee* 10 U.S.C. § 949a(2) (2007). Section 949a(2) provides as follows:

> In establishing procedures and rules of evidence for military commission proceedings, the Secretary of Defense may prescribe the following provisions:
>
> (A) Evidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person.
>
> (B) Evidence shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization.
>
> (C) A statement of the accused that is otherwise admissible shall not be excluded from trial by military commission on grounds of alleged coercion or compulsory self-incrimination so long as the evidence complies with the provisions of section 948r of this title.
>
> . . . .
>
> (E)(i) Except as provided in clause (ii), hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial may be admitted in a trial by military commission if the proponent of the evidence makes known to the adverse party, sufficiently in advance to provide the adverse party with a fair opportunity to meet the evidence, the intention of the proponent to offer the evidence, and the particulars of the evidence (including information on the general circumstances under which the evidence was obtained). The disclosure of evidence under the preceding sentence is subject to the requirements and limitations applicable to the disclosure of classified information in section 949j(c) of this title.
>
> (ii) Hearsay evidence not otherwise admissible under the rules of evidence applicable in trial by general courts-martial shall not be admitted in a trial by military commission if the party opposing the admission of the evidence demonstrates that the evidence is unreliable or lacking in probative value.

with military or intelligence activities."[239] If this standard does apply, it is not clear that the Secretary could meet it.

1. Compulsory Self-Incrimination

By explicitly declining to apply Article 31(a), (b), and (d) of the UCMJ, the M.C.A. makes clear that detainees do not have the rights against compelled self-incrimination that United States citizens and military service members enjoy.[240] Article 31(a) prohibits military members from compelling "any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."[241] Article 31(b) requires that persons accused or suspected of an offense must be advised of their right to remain silent and the nature of the accusation before any interrogation may be conducted.[242] Article 31(d) provides that statements obtained in violation of Article 31(a) or (b), or through the use of coercion, unlawful influence, or unlawful inducement, may not be used against an accused in a court-martial.[243] To some extent, it makes sense that these rules should not apply to military commissions. The primary purpose of detaining suspected terrorists is to interrogate them in order to collect evidence of military and intelligence value, to disrupt ongoing terrorist plots, and to bring to justice perpetrators of prior terrorist acts. However, the removal of Article 31 rights effectively means not only that warnings are not given, but that coercion, unlawful influence, and unlawful inducement may be used to compel a person to incriminate himself, and that the resulting statements may then be used in a military commission.

Interrogation methods amounting to "cruel, inhuman or degrading treatment or punishment" were prohibited by the Detainee Treatment Act of 2005.[244] Thus, statements obtained using such methods after December 30, 2005 (the date of the enactment of the Act), are not admissible.[245] The M.C.A. does provide a limited right of protection against compelled self-incrimination, but only in the commission process itself.[246] Presumably, an accused may be interrogated right up to the eve of trial, or even during breaks in the trial. The M.C.A. excludes the use of any statement obtained by torture [247] but expressly allows the admission of a statement where (1) the "degree of coercion is disputed," (2) the statement appears to be reli-

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239 *See* 10 U.S.C. § 949 (a).

240 *See* 10 U.S.C. § 948b(d)(1) (2007) ("The following provisions of this title shall not apply to trial by military commission under this chapter: . . . (B) Sections 831(a), (b), and (d) (articles 31(a), (b), and (d) of the Uniform Code of Military Justice), relating to compulsory self-incrimination.").

241 *Id*. § 831(a).

242 *Id*. § 831(b).

243 *Id*. § 831(d).

244 42 U.S.C. § 2000dd (2007).

245 10 U.S.C. § 948r(d) (2007).

246 *Id*. § 948r(a).

247 *Id*. § 948r(b).

able, and (3) the "interests of justice would best be served" by the statement's admission.[248]

The M.C.A. provisions are incorporated into the Military Commission Rules of Evidence (M.C.R.E.) as Rule 304. M.C.R.E. 304 represents a major deviation from the Military Rules of Evidence (M.R.E.). M.R.E. 304 and 305 protect the service member from compelled self-incrimination by excluding statements obtained involuntarily from an accused, and any evidence derived therefrom.[249] "Involuntary statements" in courts-martial mean not only those that are compelled, but also unwarned statements, or statements taken in violation of the right to silence or counsel, if invoked.[250] Detainees are not afforded any warnings, and their right to counsel is dramatically different from that afforded service members by the Fifth and Sixth Amendments and Article 31 of the UCMJ. Detainees do not have any right to counsel prior to being charged, and it is unclear if the right to counsel for the accused, before a military commission, extends to having counsel present during interrogations after adversarial proceedings have commenced. According to the R.T.M.C., the right to counsel extends to "every stage of the proceedings,"[251] but this appears to mean during proceedings of the Commission itself. Thus, the right to the assistance of counsel at trial is quite different from the Sixth Amendment right to counsel, which requires counsel during any post-indictment questioning,[252] and which extends to all "critical stages" of the criminal prosecution, such as lineups.[253] The Military Commission Rules of Evidence should be clarified to make it clear that once a detainee has been charged, interrogation without the presence of counsel must stop, or at least that the government may not use statements obtained from a detainee outside the presence of counsel after referral of charges.

Another difference in the self-incrimination rules is that M.C.R.E. 304 "contains no requirement for corroboration for admission of an inculpatory statement by the accused . . . ."[254] In other words, an accused may be convicted at a military commission solely on the basis of confession, without any corroboration whatsoever. This is in sharp contrast to the military rule, which prohibits service members from being convicted by court-martial on the basis of an uncorroborated confession, even a wholly voluntary one.[255] In combination with the broadly expanded admissibility of in-

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248 *Id*. § 948r(c)–(d).

249 MIL. R. EVID. 304(c)(3), (b)(3).

250 MIL. R. EVID. 304(c)(3).

251 R.T.M.C. ch. 9, § 9-1.

252 Massiah v. United States, 377 U.S. 201, 205–06 (1964).

253 United States v. Wade, 388 U.S. 218, 237–38 (1967).

254 MIL. COMM'N. R. EVID. 304(g), Discussion.

255 MIL. R. EVID. 304(g) ("An admission or a confession of the accused may be considered as evidence against the accused on the question of guilt or innocence only if independent evidence, either direct or circumstantial, has been introduced that corroborates the essential facts admitted to justify sufficiently an inference of their truth.").

voluntary confessions, this creates an extreme danger of erroneous conviction, the principal evil intended to be safeguarded by the Geneva Conventions.[256] Suppose, for example, that a detainee intentionally provides false information to his interrogators about a terrorist plot in which he was involved, either to appease them or to intentionally mislead them. The military investigates the information but cannot corroborate existence of the plot. Nevertheless, based on his inculpatory statement, the detainee could still be convicted for his involvement in the plot, even though it was a figment of his own imagination. The removal of the safeguard of the corroboration requirement cannot be justified by military or intelligence exigency and casts significant doubt on the fairness of the military commissions. In light of the very high danger of false confessions in the context of extended detention and interrogation, the M.C.R.E. should be amended to include a corroboration requirement.

Admissibility of statements of the accused obtained through unwarned and coercive interrogation is not the only evidentiary rule changed in military commissions.

2. Relevance

Military Commission Rule of Evidence 401 changes the familiar definition of relevance in use in federal courts and courts-martial from, "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence",[257] to a requirement of "probative value to a reasonable person."[258] This is defined as "when a reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence."[259] It is unclear how the addition of the "reasonable person" requirement changes or improves the rule, or why this change was even adopted, although it was apparently intended to be less rigorous than the traditional relevance requirement. There is no military or intelligence justification for relaxing a relevance requirement. Addressing one concern of the Supreme Court,[260] the M.C.A. leaves the determination of probative value solely in the hands of the military judge, unlike the original military commissions, which allowed the other commission members to overrule the legal officer.

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256 International Committee of the Red Cross, Commentary: Convention III Relative to the Treatment of Prisoners of War (1949) ("All civilized nations surround the administration of justice with safeguards aimed at eliminating the possibility of judicial errors. The Convention has rightly proclaimed that it is essential to do this even in time of war.").

257 MIL R. EVID. 401; FED. R. EVID. 401.

258 MIL. COMM'N. R. EVID. 401. This is the same formulation to which Justice Stevens objected in the original commissions. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786–87 (2006).

259 MIL. COMM'N R. EVID.. 401.

260 *Hamdan v Rumsfeld*, 126 S. Ct. 2749, 2787 (2006).

3. Search and Seizure

Another major difference between the M.R.E. and the M.C.R.E. is that there are no counterparts to M.R.E. 311 through 321 in the M.C.R.E. These M.R.E. rules incorporate Fourth Amendment limitations on unreasonable searches and seizures and warrants and govern the admissibility of evidence obtained by various types of searches, seizures, inspections, wiretaps, and eyewitness identifications. M.R.E. 311 states that "[e]vidence obtained as a result of an unlawful search or seizure made by a person acting in a governmental capacity is inadmissible against the accused . . . ."[261] The lack of an equivalent to this rule in the M.C.R.E. might be seen as the Secretary of Defense's way of incorporating Congress' permission to prescribe the following provision: "Evidence shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or other authorization."[262] However, although the authorization to create such a rule is noted in the preamble to the Manual for Military Commissions,[263] no such rule was actually promulgated in the M.M.C. It is unclear whether this omission was an oversight, or intentional, but this seems to leave the door open for the defense to seek to exclude evidence obtained from searches within the United States that violate domestic search and seizure law. However, the right to have evidence from illegal searches excluded is sharply limited by the standing doctrine. The defense would be limited to objecting to searches where the accused had a "legitimate expectation of privacy."[264] Domestic searches that violated the privacy rights of others, but yielded evidence against a detainee, would not provide a basis for exclusion. All the detainees at Guantanamo were captured overseas and any searches or seizures of their persons, papers, and effects likely also took place beyond the reach of the Constitution. However, any non-citizen can be tried by a military commission, including lawful resident aliens. It is conceivable that an illegal warrantless search within the United States might reveal evidence that could be used against a United States resident alien before a military commission. In such a case, the resident alien might be able to seek to exclude the evidence.

4. Hearsay

The military hearsay rules are virtually identical to the federal rules. Under these rules, hearsay is generally inadmissible, unless it falls into a specific exception.[265] There are two sets of exceptions. One set of exceptions applies when the declarant (the person who made the out-of-court

261 MIL. R. EVID. 311.

262 10 U.S.C. § 949a(2)(B) (2007).

263 M.M.C., pt. I, Preamble, § 1(h)(2).

264 *See, e.g.*, Minn. v. Carter, 525 U.S. 83 (1998).

265 MIL. R. EVID. 802 ("Hearsay is not admissible except as provided by these rules . . . .").

statement that is being offered in evidence) is unavailable,[266] and another set of exceptions applies irrespective of the availability of the declarant.[267] M.C.R.E. 803 replaces the 23 exceptions of M.R.E. 803 and the five exceptions of M.R.E. 804 with a simple statement that hearsay is admissible if it would be admissible under Military Rules of Evidence.[268] In other words, all 28 exceptions apply. In addition, M.C.R.E. 803 replaces the presumption against the admissibility of hearsay of M.R.E. 802 with a presumption in favor of hearsay—hearsay is admissible unless the opposing party demonstrates by a preponderance of the evidence that the evidence is unreliable under the totality of the circumstances.[269] This "unreliability" standard replaces the residual hearsay exception of M.R.E. 807, which requires that in order for hearsay to be admitted if it does not fall under a specific exception, that the evidence have "equivalent circumstantial guarantees of trustworthiness" to one of the existing exceptions in M.R.E. 803 and 804.[270] M.R.E. 807 also requires of hearsay that the evidence be "material," that the statement be "more probative on the point for which it is offered than other evidence which the proponent can procure through reasonable efforts," and that admission of the statement will best serve the "interests of justice."[271] M.C.R.E. 803 relaxes this standard in several ways. First, the requirement that hearsay pertain to a "material fact" is reduced to "any fact that is of consequence."[272] Second, there is no requirement that hearsay in military commissions be the most probative evidence available on the point. Third, there is no requirement for prosecutors to make reasonable efforts to procure more probative, non-hearsay evidence. And fourth, unlike in courts-martial, there is no requirement to balance the interests of justice in determining whether to admit hearsay. According to the White House, the relaxed rules for hearsay are justified: "It is imperative that reliable hearsay evidence be admissible because many witnesses are likely to be foreign nationals who are not amenable to process, and other witnesses—for both the prosecution and the defense—may be unavailable because of military necessity, incarceration, injury, or death."[273] However, exceptions already exist to admit reliable hearsay when a declarant is unavailable, and as previously noted, the Rules for Military Commissions make a finding of

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266 MIL. R. EVID. 804 ("Hearsay exceptions; declarant unavailable.").

267 MIL. R. EVID. 803 ("Hearsay exceptions; availability of declarant immaterial.").

268 *See* MIL. COMM'N. R. EVID. 803(a) ("Hearsay evidence may be admitted in trials by military commission if the evidence would be admitted under the rules of evidence applicable in trial by general courts-martial, and the evidence would otherwise be admissible under these Rules [M.C.R.E.] or this Manual [M.M.C.].").

269 *See generally* MIL. COMM'N. R. EVID. 803.

270 MIL. R. EVID. 807.

271 *Id*.

272 MIL. COMM'N. R. EVID. 803.

273 THE WHITE HOUSE, *Myth/Fact: The Administration's Legislation to Create Military Commissions*, Sept. 6, 2006, http://www.whitehouse.gov/news/releases/2006/09/20060906-5.html.

unavailability easier than for a court-martial.[274] The further weakening of the hearsay rules is not justifiable in light of our legal tradition, which recognizes that hearsay evidence is of substantially less value in determining truth than direct testimony, where the witness is subject to cross-examination and his demeanor and credibility may be assessed by the jury.

The administration is quick to point out that hearsay is admissible in other international war crime tribunals,[275] and that a "ban on hearsay" is neither "among the indispensable rights listed in the Geneva Conventions" nor "an internationally recognized judicial guarantee."[276] While this is true, it is not relevant to the standard against which deviations from court-martial rules are to be judged. The administration sidesteps the question of why it was impracticable or inconsistent with military or intelligence activities to hew more closely to the Military Rules of Evidence. Why is it "impracticable" for a prosecutor to make reasonable efforts to procure evidence? Why is the burden shifted from the proponent (most likely the prosecution), to prove the reliability of the hearsay offered, to the opponent (most likely the defense), to prove its unreliability? The changes to the hearsay rules are another example of slanting the playing field in favor of the prosecution without legitimate military or intelligence justification.

5. Classified Evidence

The Supreme Court strenuously objected to the practice of conducting proceedings outside the presence of the accused, [277] and the M.C.A. changed the practice.[278] Specifically, it no longer allows the accused to be removed from proceedings in order to protect classified information.[279] The accused may now be removed only for disruptive behavior or to protect the physical safety of individuals.[280] This is similar to exceptions for the accused in general courts-martial.[281] However, the accused still does not have completely unfettered access to the evidence against him. In lieu of excluding the accused from closed sessions involving classified evidence, Congress has authorized three "alternatives to disclosure" in order "to protect classified information."[282] These changes are incorporated into

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274 *Compare* R.M.C. 703(b)(3)(B) ("A party is not entitled to the presence of a witness who is deemed 'unavailable' in the discretion of the military judge."), *with* R.C.M. 703(b)(3) ("[I]f the testimony of a witness who is unavailable is of such central importance to an issue that it is essential to a fair trial, and if there is no such adequate substitute for such testimony, the military judge shall grant a continuance or other relief in order to attempt to secure the witness' presence or shall abate the proceedings . . . .").

275 *Id*.

276 Morris D. Davis, Op-Ed., *The Guantanamo I Know*, N.Y. TIMES, June 26, 2007, at A21.

277 Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2798, n.67 (2007).

278 *See* 10 U.S.C. § 949a(b)(1)(B) (2007).

279 *Id*. § 949d(f).

280 *Id*. § 949d(e)(1).

281 R.C.M. 804(b)(2); 10 U.S.C. § 949d(d)–(e) (2007).

282 10 U.S.C. § 949d(f)(2)(A) (2007) ("To protect classified information from disclosure, the mil-

M.C.R.E. 505.[283] Since the sources of the evidence may not be revealed, this could present a problem of the accused not being able to confront the witnesses against him. However, there are a number of procedural safeguards in place to ensure that the accused is not unfairly prejudiced by the use of unclassified substitutes, which I believe strike an appropriate balance of fairness to the accused while remaining consistent with intelligence activities. For example, if the government refuses to provide full disclosure of "evidence [it] seeks to use at trial, exculpatory evidence, or evidence necessary to enable the defense to prepare for trial," the military judge is given broad discretion to fashion an appropriate remedy.[284] Under M.C.R.E. 505(e)(4), the judge "shall issue any order that the interests of justice require," up to and including dismissing the charges with prejudice.[285] It remains to be seen whether the military commission judges will have the judicial independence and will to force the government to reveal classified evidence, or risk losing a case. Although the classified procedures have been criticized,[286] given the national security justification for these rules, it is unlikely that the courts will second-guess Congress, the Secretary of Defense, or the military commissions for refusing to disclose classified information to accused terrorists.

D. Post-Trial Procedures -- Appellate Rights

Overall, appellate rights are significantly improved by the M.C.A. and the R.C.M. over the original military commissions and should be deemed adequate by the Supreme Court. In the original military commissions, appeal was to a "review panel" of three military persons or specially commissioned civilians, only one of whom need have "experience as a judge."[287] Such review panels were to look for "material errors of law," a term which was not defined.[288] The Secretary of Defense then reviewed the recommendations of the review panel and forwarded the case to the Presi-

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itary judge, upon motion of trial counsel, shall authorize, to the extent practicable—(i) the deletion of specified items of classified information from documents to be introduced as evidence before the military commission; (ii) the substitution of a portion or summary of the information for such classified documents; or (iii) the substitution of a statement of relevant facts that the classified information would tend to prove.").

283 There is a M.R.E. 505, but its primary concern is not the revelation of classified information to the accused, who, being a service member, is likely to have a security clearance. Rather, its primary concern is the protection of classified information from release to the public. Thus, although M.C.R.E. 505 and M.R.E. 505 share a few common features, they are quite different.

284 MIL. COMM'N R. EVID. 505(e)(4).

285 MIL. COMM'N R. EVID. 505(e)(4)(E).

286 *See, e.g.*, Press Release, UN Expert on Human Rights and Counterterrorism Concerned that Military Commissions Act is Now Law in United States (Oct. 27, 2006), *available at* http://www.unog.ch/unog/website/news_media.nsf/(httpNewsByYear_en)/9A78DBC02294E830C1257 2140033DE76?OpenDocument ("Another concern is the denial of the right to see exculpatory evidence if is deemed classified information which severely impedes the right to a fair trial.").

287 Military Commission Order No. 1, § 6(H)(4).

288 *Id*.

dent for "final decision."[289] No regularly constituted court of law was involved. In the new commissions, the accused has the right to seek clemency from the convening authority[290] and review by the Court of Military Commission Review (a court composed of three military appellate judges),[291] which can be followed by an appeal to the Court of Appeals for the D.C. Circuit,[292] and finally the Supreme Court of the United States.[293] Although not identical, rights of appeal are the functional equivalent of what a service member convicted in a general court-martial receives, and this would certainly satisfy the Geneva Conventions. Of course, robust appellate rights cannot make up for pre-trial and trial procedures that impair the rights of the accused.

III. Challenging the Military Commissions

Defense counsel will almost certainly dispute the legitimacy of the entire scheme of the M.C.A. and the implementing regulations. The M.C.A., like all statutes, is subject to objection on the basis that it violates the Constitution or treaty obligations of the United States. The validity of the implementing regulations can be attacked on these grounds, on the basis of failure to comply with the M.C.A., or on the grounds that that the Secretary of Defense has abused his discretion. As I have sought to demonstrate in this article, the Secretary of Defense's claim that all deviations from ordinary court-martial rules and procedures are due to impracticability or are required by military and intelligence needs is conclusory and will be very difficult to defend if a court were to decide to make an issue of this requirement. But all that is required by the M.C.A. is that differences be necessary "in the judgment of the Secretary of Defense."[294] While he may sincerely believe that he has struck an appropriate balance in implementing the M.C.A., how much deference should be given to the Secretary's opinion by the courts reviewing the rules and procedures that he has devised? *Hamdan* provides some insight. In *Hamdan*, the Court reviewed a statutory provision, Article 36 of the UCMJ, with similar language to the M.C.A. Even though Article 36 seemed to give the President considerable leeway to do "as he considers practicable" in his judgment, the Supreme Court still required in *Hamdan* that the President provide justification for his deviations from traditional court-martial rules.[295] As the Court stated, the requirement of uniformity, absent impracticability, "does not preclude all departures from the procedures dictated for use by courts-martial. But any departure

289 *Id*. at § 6(H)(5)–(6).
290 10 U.S.C. § 950b (2007).
291 *Id*. § 950f.
292 *Id*. § 950g.
293 *Id*.
294 10 U.S.C. § 949a.
295 Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2791-92 (2006).

must be tailored to the exigency that necessitates it."[296] The President's failure to prove that the departures were "tailored to the exigency" was a key element in the decision to strike down the rules.

Justice Kennedy provided some additional guidance on the meaning of practicability:

> [T]he term "practicable" cannot be construed to permit deviations based on mere convenience or expedience. "Practicable" means "feasible," that is, "possible to practice or perform" or "capable of being put into practice, done, or accomplished." Webster's Third New International Dictionary 1780 (1961). Congress' chosen language, then, is best understood to allow the selection of procedures based on logistical constraints, the accommodation of witnesses, the security of the proceedings, and the like. Insofar as the "[p]retrial, trial, and post-trial procedures" for the military commissions at issue deviate from court-martial practice, the deviations must be explained by some such practical need.[297]

While the language of the M.C.A is not identical to Article 36, it is quite similar; it seems likely the Court will require the Secretary of Defense to provide a rationale for the deviations found in the M.M.C. from the rules and procedures for general courts-martial beyond a simple declaration of impracticability, at least where the rationale is not self-evident.

In *Hamdan*, Justice Stevens referred to the "absence of any showing of impracticability" for holding sessions outside the presence of the accused as part of the basis for invalidating the commissions, given that the right to be present was "so basic."[298] This suggests that at least major deviations from military rules and procedures will require some specific justification from the Secretary of Defense. Assuming the Secretary of Defense proffers a justification, the Court indicated "such a determination would be entitled to a measure of deference."[299] The Court seems to be split fairly evenly on how large a measure of deference should be given to the Executive Branch on national security matters, with Justices Breyer, Souter, Ginsburg, and Stevens prepared to give minimal deference, and Justices Thomas, Scalia, Alito, and Chief Justice Roberts willing to offer substantial deference. Justice Kennedy, the crucial swing vote, seems to be somewhere in the middle.[300] Given the sharp divide on the Court, predicting how any

296 *Id*. at 2790.

297 *Id*. at 2801 (Kennedy, J., concurring.)

298 *Id*. at 2792 (majority opinion).

299 *Id*. at 2791, n.51.

300 *See* Thomas J. Miles & Cass R. Sunstein, Editorial, *Verdict on the Supremes*, L.A. TIMES, Oct. 22, 2007, at A21 (analyzing the Justices' voting patterns). *See also, e.g.*, Statement of Justice Stevens and Justice Kennedy respecting the denial of certiorari, *Boumediene v. Bush*, 127 S. Ct. 1478, 1479 (April 2, 2007), *order vacated and cert. granted*, 127 S. Ct. 3078 (2007). *See also Hamdan*, 126 S. Ct. at 2799 (Kennedy, J., concurring); Rasul v. Bush, 542 U.S. 466, 485 (2004) (Kennedy, J., concurring).

challenges to the M.C.A. and M.M.C. will be resolved is highly problematic, even though precedent and the rule of law, both domestically and internationally, may seem to provide a clear answer. A better solution to fixing the problems with the military commissions would be for Congress to substantially revise the M.C.A. The conclusions reached in this Article, which are summarized below, offer a blueprint for Congressional action.

IV. Conclusion

Although the M.C.A. itself is far from perfect, many of its flaws could have been fixed through fair and balanced implementing regulations. Unfortunately, the rules and procedures developed by the Secretary of Defense not only failed to correct the shortfalls of the M.C.A., but exacerbated them, resulting in commission rules and procedures that are unnecessarily unfair to defendants. Rather than resolve problems created by the M.C.A., the regulations have created additional bases for legal challenges to the commissions.

While military commissions are a legitimate forum for trying suspected international terrorists captured on the battlefield, the commissions created by the M.C.A. do not yet conform to Geneva Conventions requirements. Although a significant improvement over the blatantly unlawful and unconstitutional original military commissions, the military commissions created by the M.C.A. still fall well short of "affording all the judicial guarantees which are recognized as indispensable by civilized peoples."[301] Furthermore, the implementing regulations, contrary to the Secretary of Defense's claim to have struck a "delicate balance," unnecessarily favor the prosecution, causing both the perception and reality of unfairness to detainees and leading to newspaper headlines like "Detainee lawyers see stacked deck."[302] A more appropriate balance, that would still recognize the needs for national security and the protection of our soldiers and citizens while honoring the American devotion to justice, would be achieved by adopting the changes outlined in this Article.

Congress should amend the M.C.A. to create an age limit and reasonable statutes of limitations for non-capital offenses, provide a reasonable speedy trial right and give credit for prolonged pretrial detention, limit the determination of personal jurisdiction to the military commissions themselves (or at least modify Combatant Status Review Tribunals so they provide robust due process comparable to military commissions themselves), and remove the citizenship and other unreasonable restrictions on defense counsel to provide greater choice to detainees. In addition to these legislative changes, the Secretary of Defense can and should amend the implementing regulations to provide the following: equal access to, and an equal

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Kennedy provided the crucial, determining votes in the respective cases.

301 Geneva Convention, Common Article 3.

302 Carol J. Williams, *Detainee Lawyers See Stacked Deck*, L.A. TIMES, Nov. 13, 2007, at A14.

right to produce, witnesses and evidence (absent a legitimate national security justification); some form of pretrial investigation or guarantee to the defense of the right to present its views to the convening authority prior to referral; a corroboration requirement for confessions; expanded protection against self-incrimination once charges have been preferred; and tightened hearsay rules to put the burden back on the prosecution to prove the reliability of the hearsay and make reasonable efforts to procure non-hearsay evidence. Such changes would go a long way toward enhancing both the perception and reality of fairness of military commissions, increasing worldwide acceptance of their legitimacy, and demonstrating that even with the real threat of terrorism, this country still adheres to our underlying devotion to justice.