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## Military Commissions Revived: Persisting Problems of Perception

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## Military Commissions Revived: Persisting Problems of Perception

DEVON CHAFFEE\*

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### I. INTRODUCTION

When the first military commission proceedings began in July 2004, the Bush Administration identified fifteen Guantanamo Bay detainees subject to the military commissions.<sup>1</sup> Subsequently, Bush Administration officials asserted that they had evidence to move forward with between sixty and eighty cases within the commission

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1. Press Release, U.S. Dep't of Def., Presidential Military Order Applied to Nine More Combatants (July 7, 2004), <http://www.defense.gov/releases/release.aspx?releaseid=7525>.

system.<sup>2</sup> But, by the time President George W. Bush left office in early 2009, the commissions had resolved only three cases.<sup>3</sup>

Upon taking office, President Barack Obama initially suspended the military commission proceedings in the thirteen cases in which charges were pending, but, in May 2009, he announced his intention to move forward with some commission trials at Guantanamo Bay.<sup>4</sup> In January 2009, the Obama Administration's Guantanamo Review Task Force reported that it had identified thirty-six cases slated for prosecution.<sup>5</sup> On November 13, 2009, Attorney General Eric Holder announced that the government would pursue civilian court prosecutions of the five defendants accused of conspiring to commit the 9/11 attacks and military commissions for five other detainees.<sup>6</sup> Over a year later, military commissions have resolved only three additional cases, all resulting in plea deals, and there have been only sporadic proceedings in any pending cases.<sup>7</sup>

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2. News Transcript, U.S. Dep't of Def., DoD Press Briefing on New Military Commissions Rules (Jan. 18, 2007), <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=3868>; see Catherine Herridge, *White House Puts Military Commissions on Hold, Source Says*, FOX NEWS (Nov. 25, 2010), [www.foxnews.com/politics/2010/11/25/white-house-puts-military-commissions-hold-source-says/](http://www.foxnews.com/politics/2010/11/25/white-house-puts-military-commissions-hold-source-says/) (noting that the chief prosecutor in the military commissions was actively prepping for fifty to sixty commissions as of 2010).

3. See Press Release, U.S. Dep't of Def., Detainee Convicted of Terrorism Charge at Military Commission Trial (Nov. 3, 2008), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=12329>; Press Release, U.S. Dep't of Def., Detainee Convicted of Terrorism Charge at Military Commission Trial (Aug. 6, 2008), <http://www.defense.gov/releases/release.aspx?releaseid=12118>; Press Release, U.S. Dep't of Def., Detainee Convicted of Terrorism Charge at Guantanamo Trial (Mar. 30, 2007), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=10678>.

4. See Joseph Williams, *Obama Keeps Tribunals, Draws Ire*, BOSTON GLOBE, May 16, 2009, at A1.

5. GUANTANAMO REVIEW TASK FORCE, FINAL REPORT 9–10 (2010).

6. *Attorney General Announces Forum Decisions for Guantanamo Detainees*, U.S. DEP'T OF JUST. (Nov. 13, 2009), <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html> (statement of Eric Holder).

7. See Press Release, U.S. Dep't of Def., DOD Announces Sentence for Detainee Noor Uthman Muhammed (Feb. 18, 2011) <http://www.defense.gov/releases/release.aspx?releaseid=14278>; Press Release, U.S. Dep't of Def., Military Commission Guilty Plea (July 7, 2010) <http://www.defense.gov/releases/release.aspx?releaseid=13684>; Press Release, U.S. Dep't of Def., Details of Omar Khadr Plea

In the nine years since their inception, the military commissions at Guantanamo Bay have confronted resistance on appeal, multiple overhauls, and persistent criticism from the international and national security communities. Seven military commission prosecutors have resigned or requested transfers from their posts due to concerns that the commissions' process was not fair.<sup>8</sup> More recently, past supporters of the system have become increasingly skeptical of its viability going forward. In September 2010, Jack Goldsmith, who served as U.S. Assistant Attorney General for the Office of Legal Counsel under Attorney General John Ashcroft from October 2003 to July 2004, called on the Obama Administration to abandon the use of military commissions, which he described as "a good idea in theory but have for nine years proved unworkable in practice."<sup>9</sup>

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Agreement Released (Oct. 31, 2010), <http://www.defense.gov/releases/release.aspx?releaseid=14024>.

8. The seven military commission prosecutors who either resigned or requested transfers are: Lt. Col. Stuart Couch, Col. Morris Davis, Col. Fred Borch, Maj. Robert Preston, Capt. John Carr, Capt. Carrie Wolf, and Lt. Col. Darrel Vandeveld. See Dan Ephron, *Gitmo Grievances: Assigned to Try Detainees in the War on Terror, Three Former Guantánamo Prosecutors Now Say the Military-Commission System Is Badly Damaged*, NEWSWEEK (May 17, 2008), <http://www.newsweek.com/2008/05/17/gitmo-grievances.html>; William Glaberson, *Guantanamo Prosecutor Is Quitting in Dispute Over a Case*, N.Y. TIMES, Sept. 25, 2008, at A20; *Guantanamo Prosecutor Steps Down*, BBC NEWS (Sept. 25, 2008), <http://news.bbc.co.uk/2/hi/americas/7635028.stm>; Josh Meyer, *For Lawyer, Trial was Tribulation*, L.A. TIMES, Oct. 12, 2008, at 1; Josh Meyer, *Guantanamo Prosecutor Quits*, L.A. TIMES, Sept. 25, 2008, at 19; Ed Palattella & Lisa Thompson, *Millcreek Man vs. the U.S.: Unique Connections Between Guantanamo Bay and Erie*, ERIE TIMES-NEWS (Sept. 27, 2008), <http://www.goerie.com/apps/pbcs.dll/article?AID=/20080927/NEWS02/309279927>; Carol Rosenberg, *Army Prosecutor Quits Gitmo War Court Case*, MIAMI HERALD (Sept. 25, 2008), <http://freedetainees.org/2245>; Leigh Sales, *Leaked Emails Claim Guantanamo Trials Rigged*, ABC NEWS (Aug. 1, 2005), <http://www.abc.net.au/news/newsitems/200508/s1426797.htm>; Leigh Sales, *Third Prosecutor Critical of Guantanamo Trials*, ABC NEWS ONLINE (Aug. 3, 2005), <http://www.abc.net.au/news/newsitems/200508/s1428749.htm>; Elana Schor, *War Crimes Charges Dropped Against Five Guantánamo Detainees*, GUARDIAN (Oct. 21, 2008), <http://www.guardian.co.uk/world/2008/oct/21/guantanamo-usa>.

9. Jack Goldsmith, Editorial, *A Way Past the Terrorist Detention Gridlock*, WASH. POST, Sept. 10, 2010, at A25.

After months of news reports that the Administration had put the brakes on the Defense Department's use of military commissions,<sup>10</sup> the *New York Times* reported in January 2011 that Defense Secretary Robert Gates is preparing to open the doors for new cases.<sup>11</sup> The harried track record of the commissions suggests, however, that the simple lifting of a self-imposed ban will do little to address the inherent flaws that have caused the system to flounder for nearly a decade.

This article examines some of the key shortcomings of the military commissions that can be expected to beleaguer new cases going forward.<sup>12</sup> I do not attempt to recreate the comprehensive legal critiques produced by others elsewhere<sup>13</sup> but instead focus on three specific areas of concern: the lack of established judicial precedent, the opaqueness of the proceedings and rulemaking process, and the absence of a principled distinction between the cases to be sent to military commissions and those to be tried in regular federal courts. These three weaknesses have persisted through—and, in some ways, have been exacerbated by—the numerous revisions to the laws and regulations governing the military commissions. They are also likely to continue to undermine the commissions' credibility and efficacy despite efforts to remedy other procedural and substantive inadequacies.

## II. CREATING A SYSTEM FROM SCRATCH . . . THREE TIMES

The lack of existing legal precedent to direct the commissions' interpretation of governing laws and procedures has proven a perpe-

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10. See, e.g., Editorial, *Obama's Detainee Mess*, WALL ST. J., Dec. 28, 2010, at A16.

11. Charlie Savage, *U.S. Prepares to Lift Ban on Guantánamo Cases*, N.Y. TIMES, Jan. 20, 2011, at A1.

12. See *id.*

13. See, e.g., David W. Glazier, *A Court Without Jurisdiction: A Critical Assessment of the Military Commission Charges Against Omar Khadr* 5–7 (Loyola Law Sch., L.A., Working Paper No. 2010-37, 2010); David W. Glazier, *Still a Bad Idea: Military Commissions Under the Obama Administration* 65–67 (Loyola Law Sch., L.A., Working Paper No. 2010-32, 2010) [hereinafter Glazier, *Still a Bad Idea*].

tual and intractable stumbling block, which has plagued the military commissions consistently since their inception.<sup>14</sup> The Military Commissions Act (MCA) of 2009 incorporated some additional rules from the civilian justice system and the Uniform Code of Military Justice (UCMJ) and even states that UCMJ precedent may be instructive.<sup>15</sup> However, civilian court precedent remains inapplicable to the commissions,<sup>16</sup> and the MCA of 2009 explicitly states that the judicial construction and application of the UCMJ is nonbinding.<sup>17</sup> Divorcing the commissions from such existing bodies of precedent has forced judges and attorneys to confront novel legal and procedural issues of first impression at every turn. This lack of precedent has resulted in a disturbing uncertainty surrounding the state of applicable law and has created extensive delays, with striking implications for individual cases.<sup>18</sup>

From the military commissions' earliest proceedings, it was clear that devising an entirely new system of criminal justice would pose serious difficulties. During the first commission hearings in July 2004, it became apparent that the system would be mired in persistent wrangling over rudimentary issues, such as appropriate legal representation, how to handle cases where the defendants refused to participate in proceedings, and the scope of the commissions' personal jurisdiction.<sup>19</sup>

Another example of an unresolved issue of first impression arose during the December 2008 pre-trial proceedings of the five 9/11 de-

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14. See Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2575 (2009) (codified as amended at 10 U.S.C. § 948b(c) (2006)); Military Commissions Act of 2006, Pub. L. No. 109-366, § 3, 120 Stat. 2600, 2602 (2006) (amended 2009).

15. § 1802, 123 Stat. at 2575.

16. *Id.*

17. *Id.*

18. See, e.g., *Ibrahim Ahmed Mahmoud al Qosi*, HUM. RTS. FIRST, <http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions/cases/ibrahim-ahmed-mahmoud-al-qosi> (last visited Mar. 9, 2011). Al Qosi was taken into custody in 2001 and charges were first filed in 2004. *Id.* His case took over six years to resolve. *Id.*

19. See *Aug. 26: A Defendant Asks to Represent Himself*, HUM. RTS. FIRST BLOG (Aug. 26, 2004), <http://www.humanrightsfirst.org/2004/08/26/aug-26-a-defendant-asks-to-represents-himself>.

defendants, when the defendants indicated their intention to plead guilty.<sup>20</sup> When Khalid Sheik Mohammed asked Judge Colonel Stephen Henley—“[i]f we plead guilty, can we still be sentenced to death?”—Judge Henley responded that the answer to this question, though well-settled in both the regular federal courts and under the UCMJ, was not clear under military commission law.<sup>21</sup> The judge then asked counsel to submit briefs on the issue.<sup>22</sup> Later that month, the case against the 9/11 defendants continued and eventually the charges were withdrawn.<sup>23</sup> Currently, the question remains unresolved and unaddressed by the subsequently enacted MCA of 2009.<sup>24</sup>

At the appellate level, the Court of Military Commissions Review (CMCR),<sup>25</sup> a newly created court of review,<sup>26</sup> has encountered its own obstacles. The CMCR has yet to rule on a post-trial appeal, even though it heard arguments in the cases, *United States v. Hamdan* and *United States v. Al-Bahlul*, over a year ago.<sup>27</sup> Such delays at

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20. See Jennifer Daskal, *Chaos in the 9/11 Courtroom*, SALON (Dec. 11, 2008), <http://www.salon.com/news/opinion/feature/2008/12/11/guantanamo>.

21. *Id.*

22. *Id.*

23. See Charge Sheet for Khalid Sheikh Mohammed, U.S. DEPARTMENT OF DEFENSE (Apr. 15, 2008), available at <http://www.defense.gov/news/Mohamed%20al%20Kahtani%20Dismissed%20Charges%209%20May%202008%20R.pdf> (showing crossed-out charge sheets).

24. See generally Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2574–2614 (2009) (codified as amended in scattered sections of 10, 18, & 28 U.S.C.).

25. *United States Court of Military Commission Review (USCMCR)*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/courtformilitarycommissionreview.html> (last visited Mar. 9, 2011).

26. See § 1802, 123 Stat. at 2603 (§ 950f).

27. See Robert Chesney, *The Court of Military Commission Review Finally Begins to Move on the Hamdan and Al-Bahlul Appeals*, LAWFARE BLOG (Jan. 24, 2011, 4:46 PM), <http://www.lawfareblog.com/2011/01/the-court-of-military-commission-review-finally-begins-to-move-on-the-hamdan-and-al-bahlul-appeals/>; Robert Chesney, *Undue Delay at the CMCR re the Viability of Material Support and Conspiracy Charges and the Ability to Raise Constitutional Arguments in Commission Proceedings*, LAWFARE BLOG (Jan. 4, 2011, 11:16 AM), <http://www.lawfareblog.com/2011/01/undue-delay-at-the-cmcr-re-the-viability-of-material-support-and-conspiracy-charges-and-the-ability-to-raise-constitutional->

the CMCR level exacerbate the lack of clarity in the state of the law at the commission level.<sup>28</sup>

The continual legislative and regulatory overhaul of the military commissions has compounded the obstacles caused by the system's lack of established precedent. The underlying military commissions' legal authority has been revamped three times over the past nine years: first with President Bush's 2001 military order; second, in 2006, with the first MCA; and, third, in 2009, with the passage of the second MCA.<sup>29</sup> Each new iteration has required the Department of Defense to issue new rules and regulations for implementation while the commissions pushed forward with proceedings before any applicable regulations were issued.<sup>30</sup> With each revamp of the relevant law and regulations, the commissions have returned to square one in answering questions of first impression, interpreting the new law, and implementing rules. As recently as January 2011, the *New York Times* reported that, yet again, new regulations for conducting military commissions were circulating among Administration officials.<sup>31</sup> Thus, after nearly nine years of the commissions' existence, there continues to be no body of military commission precedent. In future cases, the commissions will be faced with revisiting previously liti-

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arguments-in-commission-proceedings (discussing the undue delays in the *Hamdan* and *Al-Bahlul* appeals with the CMCR).

28. See Michelle Lindo McCluer, *Tuesday's Two Cents' Worth: CMCR Delays*, NAT'L INST. OF MIL. JUST. BLOG (Jan. 25, 2011, 7:32 AM), <http://www.nimjblog.org/2011/01/tuesdays-two-cents-worth-cmcr-delays.html> (discussing various issues with the CMCR delays).

29. See 123 Stat. at 2574; Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified as amended in scattered sections of 10, 18, & 28 U.S.C.); Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833-36 (Nov. 13, 2001); see also Ruling on Defense Motion for Article 5 Status Determination, or, Alternatively, Dismissal for Lack of Personal Jurisdiction, United States v. al Qosi, No. D-023 (Military Comm'n Dec. 3, 2009), available at [http://www.defense.gov/news/D-023%20Ruling-Article%205%20\(3Dec09\)%20A1%20Qosi%20\(Redacted\).pdf](http://www.defense.gov/news/D-023%20Ruling-Article%205%20(3Dec09)%20A1%20Qosi%20(Redacted).pdf) [hereinafter *al Qosi*] (illustrating the confusion in applying the various legal authorities).

30. See Andrea Prasow, *Guantanamo Military Commissions Stymied Again*, HUFFINGTON POST (Apr. 13, 2010), [http://www.huffingtonpost.com/andrea-prasow/guantanamo-military-commi\\_b\\_535823.html](http://www.huffingtonpost.com/andrea-prasow/guantanamo-military-commi_b_535823.html).

31. Savage, *supra* note 11, at A1.



gated legal issues under the 2009 law, the new 2010 Manual for Military Commissions, and any further regulatory changes promulgated by the Department of Defense.

The commissions' attempt to determine the individuals over whom they have jurisdiction is an instructive example of the difficulties resulting from the lack of precedent and the fluctuation in applicable laws. After the passage of the MCA of 2006, Military Judge Peter Browback dismissed the charges against Omar Khadr, and Judge Keith Allred dismissed charges against Salim Hamdan, because, although both Khadr and Hamdan had been designated as "enemy combatants," they had not been designated as "unlawful enemy combatants," as required by the MCA of 2006.<sup>32</sup> This issue took three months to resolve, with the CMCR issuing its first-ever decision on September 24, 2007, holding that the commission judges were, themselves, authorized to make "unlawful enemy combatant" determinations.<sup>33</sup> The military judges then had to schedule and hold hearings to determine the status of the defendants as "unlawful enemy combatants."<sup>34</sup> The MCA of 2009 altered, yet again, the commissions' scope of personal jurisdiction to cover a newly defined category of "unprivileged enemy belligerents."<sup>35</sup> This amendment left the commission judges with the task of reassessing and reinterpreting the scope of the commissions' personal jurisdiction under the new law, an issue that could very well be appealed again to the CMCR.<sup>36</sup>

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32. Decision and Order: Motion to Dismiss for Lack of Jurisdiction, *United States v. Hamdan* (June 4, 2007), in 1 NAT'L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER, 6-9 (2009); Order on Jurisdiction, *United States v. Khadr* (June 4, 2007), in 1 NAT'L INST. OF MILITARY JUSTICE, MILITARY COMMISSION REPORTER 152-54 (2009).

33. *United States v. Khadr*, No. 07-001, slip. op. at 20-21 (CMCR Sept. 24, 2007), available at [http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20\(24%20Sep%2007\)\(25%20pages\).pdf](http://www.defenselink.mil/news/Sep2007/KHADR%20Decision%20(24%20Sep%2007)(25%20pages).pdf).

34. See Ruling on Defense Motion for Article 5 Status Determination, *United States v. Hamdan*, (Military Comm'n Dec. 17, 2007), available at <http://www.defense.gov/news/Dec2007/HAMDAN%20ARTICLE%205%20RULING%2017%20Dec%202007.pdf>.

35. Compare § 3, 120 Stat. at 2602 (§ 948b(a)), with § 1802, 123 Stat. at 2575 (codified as amended at 10 U.S.C. § 948b(a) (2006)).

36. See, e.g., *al Qosi*, *supra* note 29.

The continuous reinvention of the commissions has created extensive delays in the context of specific cases, where individual defendants have encountered rules in a nearly constant state of flux. Ibrahm Ahmed Mohmoud al Qosi, for instance, was originally charged in 2004 and his case dragged on for over five years, through all three iterations of the military commission system.<sup>37</sup> In the course of those five years, the prosecution filed, withdrew, and re-filed numerous charge sheets under the different versions of the military commission law.<sup>38</sup> In December 2009, when the prosecution moved, again, to amend the charge sheet against al Qosi in response to the amendments made by the MCA of 2009, Military Judge Lt. Colonel Nancy Paul, noted that, after five years in the military commission system, the defense did not “even know what the charges are going to look like.”<sup>39</sup> Judge Paul made this comment in the midst of presiding over military commission proceedings that lacked applicable commission rules—the MCA of 2006 had been passed, but the regulations implementing the legislation had not been issued.<sup>40</sup> While al Qosi eventually pled guilty in October 2010, even his plea deal failed to go smoothly because the government reportedly agreed to conditions of confinement that, post-plea, it realized it was unable to fulfill.<sup>41</sup> Given the long history of delay in al Qosi’s case—the first case to be resolved in the military commissions under the Ob-

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37. See *United States v. Ibrahim al Qosi*, No. P-002 (Military Comm’n May 22, 2009) (Defense Response to Government Motion for Appropriation Relief (120 Day Continuance)), available at <http://www.defense.gov/news/P-002%20Ruling%20and%20Pleadings%20on%20Mot%20for%20cont%20Redac4a ug.pdf> (“[H]e has been charged under three phases of the Guantanamo debacle, without resolution of his case.”).

38. See *id.* (discussing various charges brought against the defendant at various times).

39. Devon Chaffee, *Try, Try and Try Again: The Military Commissions That Couldn’t*, HUM. RTS. FIRST BLOG (Dec. 3, 2009), <http://www.humanrightsfirst.org/2009/12/03/try-try-and-try-again-the-military-commissions-that-couldnt>.

40. See, e.g., MANUAL FOR MILITARY COMMISSIONS, UNITED STATES (2010) [hereinafter MMC 2010] (issued on April 27, 2010, several months after the 2009 al Qosi hearing).

41. *Plea Deal Pledge Unfulfilled for Gitmo Detainee*, SIFY NEWS (Oct. 13, 2010), <http://www.sify.com/news/plea-deal-pledge-unfulfilled-for-gitmo-detainee-news-others-kknplcbdbf.html>.

ama Administration<sup>42</sup>—it can hardly be heralded as a success for justice that will build credibility for the military commission system.

During proceedings in December 2008, Military Judge Colonel Ralph Kohlmann referred to the commissions' process as "a learning experience." Both defense attorneys and former prosecutors have described this comment as a disturbing characterization for any system of criminal justice, especially one adjudicating capital cases.<sup>43</sup> Moreover, after more than nine years, there is little evidence that the commissions are any closer to overcoming the obstacles inherent in creating a new legal system entirely devoid of legal precedent.<sup>44</sup>

### III. LACK OF TRANSPARENCY

In addition to problems stemming from the dearth of precedent, the military commissions have been shrouded by a persistent opaqueness, creating a veil between the commission system and the public and undermining the commissions' credibility. This lack of transparency is particularly evidenced by the restricted public access to commission proceedings, the failure to make commission documents publicly available in a timely manner, and the failure to engage in a public comment process prior to the promulgation of regulations governing the commissions.

As a general matter, trials in civilian, federal courts as well as courts-martial are open to the public.<sup>45</sup> Open trials are widely rec-

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42. Mike Melia, *Gitmo Detainee to Avoid Solitary in Plea Deal*, BOSTON GLOBE (Aug. 9, 2010), [http://www.boston.com/news/world/latinamerica/articles/2010/08/09/gitmo\\_detainee\\_to\\_avoid\\_solitary\\_in\\_plea\\_deal](http://www.boston.com/news/world/latinamerica/articles/2010/08/09/gitmo_detainee_to_avoid_solitary_in_plea_deal).

43. *Legal Issues Surrounding the Military Commissions System: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 60 (2009) (statement of Denny LeBoeuf, Director, John Adams Project, American Civil Liberties Union); Lt. Col. Darrel Vandeveld & Joshua Dratel, *Military Commissions: A Bad Idea*, SALON (Mar. 10, 2010), [http://www.salon.com/news/opinion/feature/2010/03/10/terrorism\\_trial](http://www.salon.com/news/opinion/feature/2010/03/10/terrorism_trial).

44. See Richard V. Meyer, *When a Rose Is Not a Rose: Military Commissions v. Courts-Martial*, 5 J. INT'L CRIM. JUST. 48, 48–49 (2007) (comparing certain aspects and procedures of military commissions with courts-martial).

45. See Katherine Flanagan-Hyde, Note, *The Public's Right of Access to the Military Tribunals and Trials of Enemy Combatants*, 48 ARIZ. L. REV. 585, 600 (2006).

ognized as benefiting both the public and the defendant by allowing the public to serve as a check on the judicial process, assuring the public that the trials are being conducted fairly and providing the public with an outlet for outrage in response to criminal acts.<sup>46</sup>

The military commission proceedings are ostensibly open.<sup>47</sup> But observation of the commission proceedings is severely limited because of the remoteness of, and restricted access to, Guantanamo Bay. The commission proceedings are not, as a practical matter, open to the general public; only credentialed media, select representatives from organizations with observer-status, and select victim representatives have been permitted to observe the proceedings.<sup>48</sup> In 2004, after the Department of Defense initially announced that human rights and civil liberties organizations would not be permitted to observe the military commissions,<sup>49</sup> the Department of Defense granted a limited number of these groups observer-status.<sup>50</sup> Yet, access to the commissions, including for alleged victims and the general public, remains limited to a select number of observers.<sup>51</sup>

The media has continuously complained about restrictions at Guantanamo Bay that interfere with its ability to report on the military commission proceedings, including restricted access to defense counsel and relevant documents, insufficient access to media facili-

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46. Randolph N. Jonakait, *Secret Testimony and Public Trials in New York*, 42 N.Y.L. SCH. L. REV. 407, 409–410 (1998); see also Gregory P. Noone & Diana C. Noone, *The Military Commissions—A Possible Strength Giving Way to a Probable Weakness—and the Required Fix*, 36 CASE W. RES. J. INT’L L. 523, 526 (2004) (discussing the transparency of courts-martial).

47. See Neil A. Lewis, *Rights Groups Won’t Get Seats at Guantánamo Base Tribunals*, N.Y. TIMES, Feb. 24, 2004, at A14 (discussing lack of space for human rights advocacy groups during the Guantanamo military commissions).

48. See MMC 2010, *supra* note 40, at II-73 R. 806; MANUAL FOR MILITARY COMMISSIONS, UNITED STATES, at II-68 R. 806 (2007) [hereinafter MMC 2007].

49. See Lewis, *supra* note 47, at A14.

50. Preface to 2 NAT’L INST. OF MILITARY JUSTICE, NIMJ REPORTS FROM GUANTÁNAMO (2010) (describing how, after lengthy delay, NIMJ was given alternative observer-status); Letter from American Civil Liberties Union, Amnesty International USA, Human Rights First, & Human Rights Watch to President Obama (Jan. 30, 2009), <http://www.defense.gov/pubs/pdfs/App5.pdf> (discussing how the organizations were granted observer-status in 2004).

51. See MMC 2010, *supra* note 40, at II-73 R. 806; MMC 2007, *supra* note 48, at II-68 R. 806.

ties, and overzealous photography prohibitions.<sup>52</sup> In 2010, the military banned four reporters from observing the proceedings because they had released the name of a witness whose identity was already known to the public.<sup>53</sup> The reporters were eventually reinstated.<sup>54</sup> Moreover, the time-consuming logistical requirements of traveling to and from Guantanamo Bay prevent even those news outlets authorized to observe the commissions from attending the various proceedings on a consistent basis.<sup>55</sup>

Beyond physical access to the hearings, public access to other timely information pertinent to the case records is far from adequate. While some of the orders, motions, and charge sheets are accessible from the military commissions' website,<sup>56</sup> the list of included documents is far from comprehensive, the documents generally appear after significant delays, and many of the older documents are omitted altogether.<sup>57</sup> Observers at Guantanamo Bay struggle to obtain electronic or hard copies of unclassified opinions or rulings from the commissions and are usually only able to do so long after the relevant commission proceedings have concluded.<sup>58</sup> Additionally, there

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52. Roy Gutman, *Reporters Complain They Can't Get Guantanamo Court Records*, MCCLATCHY (July 29, 2010), <http://www.mcclatchydc.com/2010/07/29/98348/do-guantanamo-media-restrictions.html>; *Pentagon Issues New Rules for Guantanamo Coverage*, REPORTERS WITHOUT BORDERS (Sept. 13, 2010), <http://en.rsf.org/etats-unis-pentagon-issues-new-rules-for-13-09-2010,38347.html>.

53. Jeremy W. Peters, *Pentagon Ends Guantanamo Reporters' Ban*, N.Y. TIMES, July 10, 2010, at A11.

54. *Id.*

55. See Jeremy W. Peters, *News Media Seek Loosening of the Pentagon's Rules at Guantanamo*, N.Y. TIMES, July 20, 2010, at A13 (addressing inconveniences faced by the media at Guantanamo); Alkaps, *Jonathan Hafetz of the Brennan Ctr Discusses Getting There*, YOUTUBE (Oct. 28, 2007), <http://www.youtube.com/watch?v=sP1AzMtr9q0>.

56. See *Military Commissions*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/commissions.html> (last visited Mar. 9, 2011).

57. For example, charges were first filed against Ibrahim Ahmed Mahmoud al Qosi in 2004, but the documents on the U.S. Department of Defense website for this case only date back to 2008. *Ibrahim Ahmed Mahmoud al Qosi*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/commissionsQosi.html> (last visited Mar. 9, 2011).

58. See, e.g., Letter from Eugene Fidell, President, Nat'l Inst. of Military Justice, to Honorable Nancy Paul, Chief U.S. Bankr. Judge, Dist. of Minn. (Dec. 3, 2009) (requesting a copy of an unclassified opinion from the court) (on file with author).

is no system that provides access to court dockets, relevant unclassified briefs, or other records of relevant case activity outside of the courtroom, even though access to such information is critical to understanding the progress of any criminal case.<sup>59</sup>

Beyond the issue of public access to the military commission proceedings and related documents, the lack of transparency is also evident in the process by which the government has established rules governing the military commissions. Allowing for notice and comment is intended to foster public confidence in the rulemaking process and to ensure that the relevant agency benefits from the input of various stakeholders and experts in the field.<sup>60</sup> Yet, the Department of Defense has repeatedly failed to use established rulemaking and notice-and-comment procedures in developing commission rules, despite the fact that the government follows such procedures when promulgating new rules for federal courts and courts-martial.<sup>61</sup>

In 2003, the Administration did informally release a draft Military Commissions Instruction, setting out the elements of crimes to be tried by military commissions.<sup>62</sup> While outside experts and interest groups submitted a number of comments in response to the draft, the Department of Defense did not release any detailed response to the comments.<sup>63</sup> On April 3, 2003, the Department of Defense

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59. The National Institute of Military Justice has taken it upon itself to publish volumes of military commission documents to which it was able to gain access. See *Military Commission Case Documents*, NAT'L INST. OF MIL. JUST., [http://www.wcl.american.edu/nimj/military\\_commission.cfm](http://www.wcl.american.edu/nimj/military_commission.cfm) (last visited Mar. 9, 2011) (providing links to compiled military commission documents).

60. Eugene R. Fidell, *Military Commissions & Administrative Law*, 6 GREEN BAG 2d 379, 382 (2003).

61. Eugene R. Fidell, *Limitations of the Military Commissions Structure*, ACSBLOG (June 25, 2010, 12:17 PM), <http://www.acslaw.org/acsblog/node/16423>; Jonathan Tracy, *The Sad Saga Continues in Guantanamo Bay*, HUFFINGTON POST (Apr. 30, 2010), [http://www.huffingtonpost.com/jonathan-tracy/the-sad-saga-continues-in\\_b\\_559080.html](http://www.huffingtonpost.com/jonathan-tracy/the-sad-saga-continues-in_b_559080.html).

62. U.S. DEP'T OF DEF., DRAFT MILITARY COMMISSION INSTRUCTION (2003), available at <http://www.defense.gov/news/Feb2003/d20030228dmci.pdf>.

63. See News Transcript, U.S. Dep't of Def., Background Briefing on the Release of Military Commission Instructions (May 2, 2003) <http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2563>. A Department of Defense official explained that this draft instruction had been released for

promulgated the instruction on the elements of crimes along with seven other instructions, for which no opportunity for public comment had been granted.<sup>64</sup> The Department of Defense ignored prior calls for a public notice-and-comment period prior to issuing the Manual for Military Commissions implementing the MCA of 2006, as well as prior to issuing the Manual for Military Commissions implementing the MCA of 2009.<sup>65</sup> The National Institute of Military Justice has actively sought to obtain additional documentation regarding whom the Department of Defense has consulted in promulgating the commission rules, but its efforts—including a lawsuit under the Freedom of Information Act—have been unsuccessful.<sup>66</sup>

In the regular federal courts, access to courtroom proceedings are generally open to the public, and briefs, motions, opinions, and associated documents can, for the most part, be freely accessed through electronic databases. Furthermore, the public is given an opportunity to submit comments before rules are finalized.<sup>67</sup> This consistent

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comment. *Id.* The official further explained that the Department of Defense had “received quite a number of comments, very useful comments, from various officials, from other governments, nongovernmental organizations, and private groups and individuals in and outside of government,” but the official provided no specifics as to how these comments were incorporated into the final rule. *Id.*

64. *See id.* (Department of Defense official explaining that the seven additional military commission instructions to be released had not been released to the public in draft form).

65. *See* Eugene R. Fidell, *Preface* to 1 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK, at v (2003) (requesting the Department of Defense to use notice-and-comment rulemaking procedures); David Frakt, *New Manual for Military Commissions Disregards the Commander-in-Chief, Congressional Intent and the Laws of War*, HUFFINGTON POST (Apr. 29, 2010), [http://www.huffingtonpost.com/david-frakt/new-manual-for-military-c\\_b\\_557720.html](http://www.huffingtonpost.com/david-frakt/new-manual-for-military-c_b_557720.html); Human Rights First, *Public Participation and the 2010 Manual For Military Commissions* (Apr. 5, 2010), <http://www.humanrightsfirst.org/wp-content/uploads/pdf/20100405-military-commissions.pdf> (joint statement by human rights advocates calling on the U.S. Department of Defense for an opportunity for public comment on the new Military Commissions Manual).

66. *See* Eugene R. Fidell, *Preface* to 3 NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK, at x (2009).

67. *The Rulemaking Process*, U.S. CTS., <http://www.uscourts.gov/RulesAndPolicies/FederalRulemaking/RulemakingProcess.aspx> (last visited Mar. 9, 2011) (providing background information on the federal rules and the rulemaking process).

transparency of multiple facets of the criminal justice system is essential to generating confidence in the fairness of the process.<sup>68</sup> It fosters, over time, a prevalent understanding that the American justice system, while not perfect, generally meets most fundamental due process standards required by international law.<sup>69</sup> Conversely, the dearth of transparency in the military commissions has been a persistent source of criticism and will continue to undermine the system's credibility and the public's confidence in the commissions' results.

#### IV. LACK OF A PRINCIPLED DISTINCTION POINTS TO SECOND CLASS OF JUSTICE

The military commissions' credibility is further undermined by the continued lack of a coherent rationale for trying some cases in commissions and others in civilian courts. In the nearly two years since the Obama Administration first announced its intention to continue with military commissions, it has struggled to articulate a principled justification of its intention to pursue different sets of rules for two categories of Guantanamo Bay defendants slated for trial. The lack of a principled distinction serves to highlight the commissions' procedural shortcomings.

At times, the Obama Administration has inferred that military commissions are the appropriate forum to try violations of the laws of war.<sup>70</sup> Yet, the substantial overlap in the subject matter jurisdictions of the military commissions and civilian courts undermines the assertion that it is the nature of the offense being tried in certain cases that necessitates the use of military commissions.<sup>71</sup> Article III

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68. See Fidell, *supra* note 60, at 382.

69. See *id.*

70. See *Legal Issues Regarding Military Commissions and the Trial of Detainees for Violations of the Law of War: Hearing Before the S. Comm. on Armed Servs.*, 111th Cong. 46 (2009) [hereinafter *Legal Issues*] (statement of Retired Maj. Gen. John D. Altenburg, Jr., Former Appointing Authority for Military Commissions); Lindsey Graham, *Guest Column: Time to Bring Terrorists to Trial*, INDEP. MAIL (Sept. 12, 2010), <http://www.independentmail.com/news/2010/sep/12/guest-column-time-bring-terrorists-trial>.

71. See *Legal Issues*, *supra* note 70, at 46 (discussing the overlap between war crimes and violations under Title 18).



courts have enjoyed clear jurisdiction to try violations of the laws of war since the passage of the War Crimes Act in 1996.<sup>72</sup> In 2006, Congress reaffirmed this principle when it amended the Act in a manner that closely tracks the description of those crimes triable before military commissions.<sup>73</sup> The definitions of crimes triable before military commissions also closely follow the language of pre-existing crimes in the federal criminal code<sup>74</sup> and, in many instances, incorporate federal criminal code definitions by reference to Title 18.<sup>75</sup>

Moreover, many scholars and a plurality of the Supreme Court have questioned whether certain crimes enumerated in the MCA of 2009 even constitute war crimes under international humanitarian law.<sup>76</sup> In the context of hearings focused on the then-proposed text of the MCA of 2009, Jeh Johnson, Department of Defense General Counsel, and David Kris, Assistant Attorney General and head of the National Security Division of the Department of Justice, submitted testimony to four congressional committees questioning the legality of trying material-support crimes before military commissions.<sup>77</sup>

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72. See War Crimes Act, 18 U.S.C. § 2441 (2006).

73. Compare Military Commissions Act of 2006, Pub. L. No. 109-366, § 6(b)(1), 120 Stat. 2600, 2633–35 (2006) (amended 2009), with § 3, 120 Stat. at 2625–630 (§ 950v).

74. Compare Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2574, 2608 (2009) (codified as amended at 10 U.S.C. § 950t(7) (2006)), with 18 U.S.C. § 1203(a) (2006) (defining crime of taking hostages); § 1802, 123 Stat. at 2610–11 (codified as amended at 10 U.S.C. § 950t(25) (2006)), with 18 U.S.C. § 2339B (defining crime of material support to terrorism); § 1802, 123 Stat. at 2610 (codified as amended at 10 U.S.C. § 950t(24) (2006)) (defining crimes of terrorism), with 18 U.S.C. § 2332b(g)(5) (defining “federal crime of terrorism”).

75. § 1802, 123 Stat. at 2608, 2611 (codified as amended at 10 U.S.C. §§ 950t(11)(B), t(25)(B) (2006)). These provisions incorporate by reference the definition of “severe mental pain or suffering” found in 10 U.S.C. § 2340(2) and the definition of “material support or resources” found in 18 U.S.C. § 2339A(b), respectively. *Id.*

76. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 603 (2006) (plurality opinion holding that the government failed to meet the burden of demonstrating that conspiracy was a recognized offense against the laws of war).

77. See *Proposals for Reform of the Military Commissions System: Hearing Before the Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 18 (2009) [hereinafter *Proposals for*

Kris's testimony asserted: "[O]ur experts believe that there is a significant likelihood that appellate courts will ultimately conclude that material support for terrorism is not a traditional law of war offense, thereby threatening to reverse hard-won convictions and leading to questions about the system's legitimacy."<sup>78</sup>

Academics have likewise questioned whether Congress has the constitutional authority to designate crimes such as material support for terrorism and conspiracy as triable by military commissions, particularly after the date that the defendant committed the accused conduct.<sup>79</sup> That Congress has given Article III courts clear jurisdiction to try war crimes, while simultaneously granting military commissions jurisdiction over domestic offenses that are not traditional violations of the laws of war,<sup>80</sup> casts serious doubt on the contention that the nature of war crimes makes them inherently better suited for the military commissions.

In addition to highlighting the "war crimes" nature of certain offenses, the Obama Administration also pointed to the "military character" of the target and victims of the alleged criminal act in justifying decisions to bring certain cases in commissions instead of Article III courts.<sup>81</sup> When explaining his decision to bring the case against

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*Reform*] (statement of Jeh Johnson, Gen. Counsel, Dep't of Def.); *Prosecuting Terrorists; Civilian and Military Trials for GTMO and Beyond: Hearing Before the Subcomm. on Terrorism, Tech. and Homeland Sec. of the S. Comm. on the Judiciary*, 111th Cong. 125 (2009) [hereinafter *Prosecuting Terrorists*] (statement of David Kris, Assistant Att'y Gen.); *Reforming the Military Commissions Act of 2006 and Detainee Policy: Hearing Before H. Comm. on Armed Servs.*, 111th Cong. 55, 61 (2009) (statements of Jeh Johnson, Gen. Counsel, Dep't of Def. & David Kris, Assistant Att'y Gen.); *Legal Issues*, *supra* note 70, at 9, 12 (statements of Jeh Johnson, Gen. Counsel, Dep't of Def. & David Kris, Assistant Att'y Gen.).

78. *Prosecuting Terrorists*, *supra* note 77, at 125.

79. Chad De Veaux, *Rationalizing the Constitution: The Military Commissions Act and the Dubious Legacy of Ex Parte Quirin*, 42 AKRON L. REV. 13, 83 (2009); Glazier, *Still a Bad Idea*, *supra* note 13, at 93.

80. *See supra* notes 72–75 and accompanying text.

81. *See President Obama's Fiscal 2011 Budget Request for the Justice Department's Office of Justice Programs: Hearing Before the Subcomm. on Commerce, Justice, Science, and Related Agencies of the H. Comm. on Appropriations*, 111th Cong. (2010) (statement of U.S. Att'y Gen. Eric Holder), available at [http://findarticles.com/p/articles/mi\\_8167/is\\_20100316/ai\\_n52506632/pg\\_7/?tag=content;coll](http://findarticles.com/p/articles/mi_8167/is_20100316/ai_n52506632/pg_7/?tag=content;coll) (last visited Mar. 9, 2011).

Abd al-Rahim al-Nashiri, an alleged conspirator in the bombing of the U.S.S. Cole, in the military commissions, Attorney General Eric Holder noted that “a military target was involved. The casualties were our brave sailors, military men.”<sup>82</sup> Holder stopped short, however, of explaining why the involvement of a military target influences the decision regarding which forum is most appropriate. The nature of the target of the alleged criminal conduct is clearly not a determinative factor, as the current and previous Administrations have prosecuted numerous cases involving crimes against military personnel and installations in Article III courts.<sup>83</sup> Moreover, the fact that military objectives are generally considered to be legitimate targets in armed conflict<sup>84</sup> means that, in certain cases, the fact that the target is military in nature may make it less likely that the conduct violated the laws of war even though the conduct may have violated U.S. criminal law and thereby be prosecutable in U.S. federal courts.

The Administration’s established process for making forum decisions sheds precious light on its ultimate justification for continued use of the commissions in certain cases. On July 20, 2009, the Administration Detention Policy Task Force issued a protocol governing the disposition of detainee cases at Guantanamo Bay that the Task Force had referred for possible prosecution.<sup>85</sup> The protocol

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82. *Id.*

83. *See, e.g.*, United States v. Ahmed, No. 1:07CR647, 2008 WL 5455388 (N.D. Ohio Dec. 31, 2008) (case charging conspiracy to provide material support to terrorists under 18 U.S.C. § 2339A based on defendants’ extensive planning to harm U.S. service members in Iraq and Afghanistan); United States v. Abu-Jihaad, 600 F. Supp. 2d 362, 364 (D. Conn. 2009) (disclosing classified information regarding the movement of the Fifth Fleet Battle Group, which included the aircraft carrier, the U.S.S. Constellation); United States v. Siddiqui, No. 1:08-cr-00826-RMB-1 (S.D.N.Y. Sept. 2, 2008) (defendant accused of shooting U.S. Army officers); United States v. Shnewer, No. 1:07-cr-00459-RBK (D.N.J. June 5, 2007) (accusing and ultimately convicting defendants for staging an attack against U.S. service members stationed at Fort Dix, New Jersey); C.J. Hughes, *Pakistani Scientist Found Guilty of Firing at American*, N.Y. TIMES, Feb. 3, 2010, at A21.

84. *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), art. 52, June 8, 1977, 1125 U.N.T.S. 3.

85. DET. POLICY TASK FORCE, DETERMINATION OF GUANTANAMO CASES REFERRED FOR PROSECUTION (July 20, 2009), available at <http://www.justice.gov/opa/documents/ta-ba-prel-rpt-dptf-072009.pdf>; *see also* Memorandum from Deten-

lays out the process through which the National Security Division of the Department of Justice, Department of Defense, and, ultimately, the Attorney General, in consultation with the Secretary of Defense, determine whether cases slated for prosecution should be brought in military commissions or in Article III courts.<sup>86</sup> This protocol determines that, where feasible, cases will be prosecuted in Article III courts.<sup>87</sup> It then outlines factors to be considered in forum-selection decisions.<sup>88</sup> But the protocol is strikingly vague, declining to explain how the preference for Article III courts is to be executed and what weight the various factors have on making one forum more favorable than the other. On its face, it does little to answer the question: What makes a case more appropriate for commissions? However, the protocol also includes the consideration of factors such as “evidentiary problems” and “the extent to which the forum . . . permit[s] a full presentation of the wrongful conduct allegedly committed by the accused . . . .”<sup>89</sup>

In the July 2009 hearings on the MCA of 2006, members of Congress probed David Kris and Jeh Johnson about the forum-decision criteria and voiced frustration at the lack of any principled distinction between cases belonging in one forum or the other.<sup>90</sup> It is, of course, not uncommon to afford prosecutorial discretion for forum choices in criminal cases.<sup>91</sup> But the absence of any principled explanation of why certain cases belong in military commissions begs the question as to why the creation of the military commissions

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tion Policy Task Force to the Attorney General & Secretary of Defense (July 20, 2009), <http://www.fas.org/irp/agency/doj/detention072009.pdf>.

86. DET. POLICY TASK FORCE, *supra* note 85.

87. *Id.*

88. *Id.*

89. *Id.*

90. See *Legal Issues*, *supra* note 70, at 16–18.

91. See Michael M. O’Hear, *National Uniformity/Local Uniformity: Reconsidering the Use of Departures to Reduce Federal-State Sentencing Disparities*, 87 IOWA L. REV. 721, 732 (2002) (discussing use of prosecutorial discretion in choosing between state and federal forums); Allison Boyce, Note, *Choosing the Forum: Prosecutorial Discretion and Walker v. State*, 46 ARK. L. REV. 985, 996–99 (1994) (discussing prosecutorial discretion in forum selection for juvenile cases).

is necessary in the first place.<sup>92</sup> If one concedes—as the civilian criminal justice system’s track record demonstrates—that many of the Guantanamo Bay cases can and should be appropriately handled by the civilian courts,<sup>93</sup> why continue to pursue a new system that has encountered serious obstacles and attracted significant criticism because its crimes and procedures are of dubious legality under international and constitutional law? If cases involving war crimes, acts of terrorism, and alleged military targets are appropriately brought in Article III courts, then why is it necessary to continue to try to cobble together a new system out of whole cloth?

In the absence of any principled justification for pursuing military commissions in certain cases, it becomes difficult to argue that the commissions are anything other than a second-tier system of justice created and maintained primarily to make it easier to secure convictions by providing defendants with fewer rights. The military commissions, as laid out in the MCA of 2009 and the Manual for Military Commissions of 2010, include several deviations from proceedings under the UCMJ and federal court proceedings that disadvantage the defendant.<sup>94</sup> These deviations include permitting the admission of hearsay evidence and, in limited circumstances, involuntary statements of the accused, both of which would be barred from Article III courts or courts-martial.<sup>95</sup> While the MCA of 2009

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92. See Deborah Pearlstein, *Holder Speaks*, BALKINIZATION BLOG (Nov. 13, 2009, 5:48 PM), <http://balkin.blogspot.com/2009/11/holder-speaks.html> (noting the lack of any articulated principled distinction between Al Nashiri (accused U.S.S. Cole bomber), slated for military commission, and the case against the 9/11 defendants, who, Attorney General Holder announced would be tried in the Southern District of New York).

93. See RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE, PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 55–56 (2008) (discussing cases in federal courts brought under applicable U.S.C. statutes).

94. See JENNIFER K. ELSEA, CONG. RESEARCH SERV., R 40932, COMPARISON OF RIGHTS IN MILITARY COMMISSION TRIALS AND TRIALS IN FEDERAL CRIMINAL COURT, 10–11 & 19–20 (2010) [hereinafter COMPARISON OF RIGHTS]; JENNIFER K. ELSEA, CONG. RESEARCH SERV., R. 41163, THE MILITARY COMMISSIONS ACT OF 2009: OVERVIEW AND LEGAL ISSUES, 25–27 (2010) [hereinafter OVERVIEW AND LEGAL ISSUES].

95. See COMPARISON OF RIGHTS, *supra* note 94, at 10–11 & 19–20; OVERVIEW AND LEGAL ISSUES, *supra* note 94, at 25–27.

is silent on the issue of derivative evidence, the Manual for Military Commissions explicitly interprets the law as allowing for the admission of evidence derived from statements obtained by torture, cruel, inhumane, or degrading treatment, or other coercion if “use of such evidence would otherwise be consistent with the interests of justice.”<sup>96</sup> If this rule is upheld, it would certainly permit the admission of evidence not permitted under federal court rules. Such evidentiary laxity has led some U.S. allies to refuse to provide key witnesses and evidence for use in the military commissions.<sup>97</sup>

Former military commission chief prosecutor Morris Davis characterized the problematic double legal standard created by the commissions’ laxer rules on evidence admissibility as follows:

The evidence likely to clear the high bar gets gold medal justice: a traditional trial in our federal courts. The evidence unable to clear the federal court standard is forced to settle for a military commission trial, a specially created forum that has faltered repeatedly for more than seven years. That is a double standard I suspect we would condemn if it was applied to us.<sup>98</sup>

Davis bemoaned that this double standard perpetuates the negative perception of the U.S. government’s commitment to the rule of law and the sense that that U.S. government continues to evade the rights-protecting standards of its own courts.<sup>99</sup>

A few proponents state outright that they support the use of military commissions because of, and not despite, the double standard that the commissions create.<sup>100</sup> They assert that individual “terrorists” should be afforded fewer rights.<sup>101</sup> Members of Congress who

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96. MMC 2010, *supra* note 40, at III-9, R. 304(a)(5)(A)(ii).

97. Charlie Savage, *Judge Delays Resumption of Guantánamo Trial*, N.Y. TIMES, Oct. 14, 2010, <http://www.nytimes.com/2010/10/15/us/15gitmo.html>.

98. Morris Davis, Editorial, *Justice and Guantánamo Bay*, WALL ST. J., Nov. 11, 2009, at A21.

99. *See id.*

100. *See, e.g., Legal Issues, supra* note 70, at 38–39 (statement of Sen. Joseph Lieberman arguing that the 9/11 defendants do not deserve the greater constitutional protections of Article III courts because of the barbaric nature of the crimes they allegedly committed).

101. *Id.*

take this position, such as Senator Joseph Lieberman, have offered legislation that would expand the reach of commissions by purporting to revoke the citizenship of defendants suspected of acts of terrorism,<sup>102</sup> prohibiting the use of Article III courts for trials of designated “unlawful enemy combatants,” and prohibiting the reading of *Miranda* warnings to any such individuals.<sup>103</sup>

Such proposals to create a second-tier set of evidentiary rules for criminal trials of certain categories of individuals threaten to undermine the process guaranteed by the criminal justice system. For the government, it provides an avenue for circumventing the system’s evidentiary requirements. Moreover, basing a determination of which set of rules a defendant is afforded on the nature of her or his alleged conduct is antithetical to the fundamental principle that a defendant is innocent until proven guilty.

## V. CONCLUSION

Despite the likelihood that military commissions will continue to be dogged by the same continuous growing pains, missteps, legal uncertainties, and lack of credibility that they have encountered since 2001, the Obama Administration appears intent on continuing to pursue some category of cases in the system for the near term. But the severe drawbacks of the commissions’ process should, at a minimum, prompt policymakers to examine more closely the viability of the commission system beyond select cases of detainees currently in U.S. custody at Guantanamo Bay. The very fact that the Administration advocated for the inclusion of a sunset clause or a similar durational limitation in the MCA of 2009,<sup>104</sup> a recommendation that

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102. Garance Franke-Ruta, *Legislative Proposal to Revoke Citizenship of Accused Terrorist Called Unconstitutional*, WASH. POST, May 6, 2010, <http://www.washingtonpost.com/wp-dyn/content/article/2010/05/06/AR2010050605155.html>.

103. Enemy Belligerent Interrogation, Detention, and Prosecution Act of 2010, S. 3081, 111th Cong. § 3(b)(3) (2010).

104. See *Proposals for Reform*, *supra* note 77, at 31 (statement of David Kris, Assistant Att’y Gen.); *Prosecuting Terrorists*, *supra* note 77, at 27 (statement of David Kris, Assistant Att’y Gen.).

Congress failed to heed, appears to indicate a lack of confidence in the viability of the commissions' process over the long term.

As the new cases are brought in the military commissions, and as the older cases move slowly through the appellate process, policy-makers should keep a close eye on how the commissions proceed. Over time, the U.S. government and the American public may determine that they expect more from this criminal process than a "learning experience"<sup>105</sup> that does little to advance justice while continuing to erode confidence in U.S. adherence to the rule of law.

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105. Vandeveld & Dratel, *supra* note 43.