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SOME OBSERVATIONS ON THE FUTURE OF U.S. MILITARY COMMISSIONS

Michael A. Newton*

The Obama Administration confronts many of the same practical and legal complexities that interagency experts debated in the fall of 2001. Military commissions remain a valid, if unwieldy, tool to be used at the discretion of a Commander-in-Chief. Refinement of the commission procedures has consumed thousands of legal hours within the Department of Defense, as well as a significant share of the Supreme Court docket. In practice, the military commissions have not been the charade of justice created by an over-powerful and unaccountable chief executive that critics predicted. In light of the permissive structure of U.S. statutes and the framework of international precedent, there is no requirement for complete consistency between the procedures applicable to military commissions and Article III courts. The synergistic efforts of the judicial, legislative, and executive branches makes the current military commissions lawful and without question “established by law” as required by international norms.

I. INTRODUCTION

The inception and implementation of the Military Commissions in the aftermath of the September 11, 2001 attacks generated a storm of legislation and litigation that may be barely abated at the tenth anniversary observances of the attacks. As the President declared a state of national emergency,¹ Americans were aroused into a frenzy of reflexive uncertainty and unified patriotism. In short order, the complacency of peaceful normality gave way to a rising urgency of warlike rhetoric and resolve. The U.N. Security Council unanimously passed Resolution 1368 categorizing the attacks as a “threat to international peace and security,” affirming the “inherent right of individual or collective self-defense” expressed in Article 51 of the U.N. Charter, and specifically directing “all States to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist

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¹ Proclamation No. 7,463, 66 Fed. Reg. 48,199 (Sept. 14, 2001).

attacks.”² For the first time in its storied existence, The North Atlantic Treaty Organization (NATO) invoked the principle of Article 5 of the Washington Treaty, thereby recognizing that the attacks constituted an “armed attack” consistent with the Treaty’s provisions that trigger NATO obligations to assist another member so attacked.³

On September 20, 2001, President Bush addressed a Joint Session of Congress, aware that the world—and perhaps the terrorist network—was listening. The President declared that “we are a country awakened to danger and called to defend freedom. Our grief has turned to anger, and anger to resolution. Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done.”⁴ The Congress responded by enacting the *Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States* (AUMF). The AUMF authorizes the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001”⁵

Almost simultaneously, the White House authorized a small interagency team of experts to develop the available options for prosecuting al-Qaeda and Taliban fighters who could reasonably be expected to enter into U.S. custody following combat operations.⁶ Drawn from the Departments of

² S.C. Res. 1368, U.N. Doc. S/RES/1368 (Sept. 12, 2001). The Security Council stressed that “those responsible for aiding, supporting or harbouring [sic] the perpetrators, organizers and sponsors of these attacks will be held accountable.” *Id.*

³ Press Release, NATO, Invocation of Article 5 Confirmed (Oct. 2, 2001), available at <http://www.nato.int/docu/update/2001/1001/e1002a.htm> (last visited Nov. 10, 2009).

⁴ Address Before a Joint Session of the Congress on the United States Response to the Terrorist Attacks of September 11, 2001, 1 PUB. PAPERS 1140 (September 20, 2001), available at <http://www.dartmouth.edu/~govdocs/docs/iraq/092001.pdf> (last visited Nov. 10, 2009). Secretary of State Powell echoed a similar sentiment in his first public comments made in Lima, Peru:

A terrible, terrible tragedy has befallen my nation, . . . but . . . you can be sure that America will deal with this tragedy in a way that brings those responsible to justice. You can be sure that as terrible a day as this is for us, we will get through it because we are a strong nation, a nation that believes in itself.

BOB WOODWARD, BUSH AT WAR 10 (2002).

⁵ Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (2001).

⁶ Following the enactment of the Military Commissions Act, a similar interagency team was assembled to draft and promulgate the rules and procedures that would be applicable to trials conducted pursuant to the statutory structure envisioned by Congress. See, e.g., U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS, Executive Summary (2007), available at <http://www.defenselink.mil/news/commissionsmanual.html> [hereinafter MANUAL FOR MILITARY COMMISSIONS].

Justice, State, and Defense, the interagency working group began to prepare an extensive and detailed decision-making memorandum to guide the Executive branch in evaluating the relative merits of the various prosecutorial and legal options.⁷ As the days turned into weeks, and the interagency experts worked towards a comprehensive document based on interagency consensus, the national mood demanded decisive progress.

Military operations began the first week of October 2001 with strikes at the heart of the Taliban controlled safe havens from which al-Qaeda planned and launched the attacks on America;⁸ the lingering legal debates took on a renewed urgency and import, as the pressure for swift action increased. Implementing the congressional authorization drawn from the AUMF, and exercising his inherent authority as Commander-in-Chief of the armed forces,⁹ President Bush bypassed the interagency experts and issued a hastily drafted Military Order on November 16, 2001.

The Military Order [PMO] authorized the Department of Defense to establish military commissions to bring to justice non-citizen members of al-Qaeda and other terrorist organizations that were complicit in the attacks against the U.S.¹⁰ Following the passage of the Military Commissions Act of 2006,¹¹ the Department of Defense completed and promulgated a wholly new Manual for Military Commissions.¹²

⁷ *See id.*

⁸ *See* Ian Christopher McCaleb, *Bush Announces Opening of Attacks*, CNN, Oct. 7, 2001, <http://archives.cnn.com/2001/US/10/07/ret.attack.bush/> (last visited Nov. 10, 2009).

⁹ U.S. CONST. art. 2, § 2.

¹⁰ Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter PMO]. Nearly four years later, Congress implicitly acceded to the President's exercise of executive authority in November of 2001 by mandating that the U.S. Court of Appeals for the District of Columbia "shall have exclusive jurisdiction to determine the validity of any final decision rendered pursuant to Military Commission Order No. 1." 10 U.S.C. § 801 note (2006).

¹¹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600, 2631-32 (2006) (codified at 10 U.S.C. § 948a (2006)).

¹² MANUAL FOR MILITARY COMMISSIONS, *supra* note 6. The Manual is made up of four separate sections: the Preamble, the Rules for Military Commissions, the Military Commission Rules of Evidence, and the Crimes and Elements. The Rules for Military Commissions set forth the procedural rules for Military Commissions. The Executive Summary notes:

This Manual is the product of a tremendous interagency effort. Principally military judge advocates and attorneys from the Departments of Defense and Justice, using the Manual for Courts-Martial as a guide, undertook the initial drafting. Drafts were then coordinated with other relevant agencies to ensure that specific rules and procedures reflect careful consideration of our nation's intelligence activities, as called for in the MCA. The overriding considerations reflected in the Manual for Military Commissions are fairness and fidelity to the Military Commissions Act of 2006. *It is intended to ensure that alien unlawful enemy combatants who are suspected of war crimes and certain other offenses are prosecuted before regularly*

Although only three trials have been completed using the military commissions process, and refinement of the procedures has consumed thousands of legal hours within the Department of Defense, as well as a significant share of the Supreme Court docket, the future remains clouded with enormous uncertainty. After more than eight years of delay and debate, the original goal of expediency and swift judicial processes seems tragically naïve in retrospect.

As the Obama Administration confronts many of the same practical and legal complexities that the interagency team began to debate in the fall of 2001, the intervening events warrant some proven conclusions. In particular, military commissions remain a valid, if unwieldy, tool to be used at the discretion of a Commander-in-Chief. This short essay will outline three of the most important conclusions that have been solidified by the post 9/11 practice of modern U.S. military commissions.

II. DEBUNKING THE MYTH OF MILITARY INADEQUACY

The Presidential Order of November 2001 was based on the conclusion that when the U.S. is actively engaged in an armed conflict, national security interests permit military authorities to enforce the substantive norms governing the conduct of hostilities by developing commission instructions and regulations consistent with the right to a fair trial for those accused of crimes.¹³ In accordance with the *lex specialis* of the laws and customs of warfare,¹⁴ the Order delegated promulgation authority to the

constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized people. This Manual will have an historic impact for our military and our country.

Id. (emphasis added).

¹³ PMO, *supra* note 10, § 4(c)(4). The President determined that the Federal Rules of Evidence are inapplicable to military commissions. The Military Order noted:

Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

Id. § 1(f). The President based his determination on the unique factors present in conducting judicial proceedings against suspected war criminals at a time when the U.S. is actively engaged in an ongoing conflict.

¹⁴ See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 240 (July 8, 1996), available at <http://www.icj-cij.org/docket/files/95/7495.pdf> (stating that the right not to be arbitrarily deprived of one's life applies during armed conflict, but the test of what constitutes an arbitrary deprivation of life during an armed conflict must be determined by the applicable *lex specialis*: humanitarian law as opposed to the broader principles of generalized human rights norms).

Secretary of Defense to develop regulations governing the conduct of the commissions that must, *inter alia*: provide a full and fair trial; admit probative evidence; protect sensitive and classified information; provide representation by counsel; and convict and sentence only upon the concurrence of at least two-thirds of commission members.¹⁵ The Secretary of Defense dutifully promulgated orders¹⁶ while the Department of Defense General Counsel issued instructions¹⁷ intended to provide potential defendants the range of rights necessary to assure a “full and fair trial” in compliance with the President’s specific order.¹⁸

Critics at the time panned this “fair trial” requirement as a hollow platitude. Some critics recalled the words of one eminent and internationally recognized expert who has used the phrase “Potemkin Justice” to describe enforcement efforts aimed at achieving only a shadow of justice through undermining the core human rights of those who will face charges under the power of overweening executive authority.¹⁹ Avoidance of this is the rationale behind the International Covenant on Civil and Political Rights

¹⁵ PMO, *supra* note 10, § 4.

¹⁶ Six Military Commission Orders have been promulgated, two of which have been revoked. See U.S. DEP’T OF DEFENSE, MILITARY COMMISSION ORDERS, *available at* http://www.defenselink.mil/news/Aug2004/commissions_orders.html.

¹⁷ Ten Military Commission Instructions were promulgated, four of which have been revised since publication. See U.S. DEP’T OF DEFENSE, MILITARY COMMISSION INSTRUCTIONS, http://www.defenselink.mil/news/Aug2004/commissions_instructions.html (last visited Nov. 10, 2009). “On March 24, 2006, the General Counsel of the Department of Defense issued *Military Commission Instruction No. 10, Certain Evidentiary Requirements* in response to growing public concern that evidence acquired through torture might be admissible in military commission proceedings.” Human Rights Watch, Q & A on Military Commission Instruction Number 10, Will it Keep Evidence Obtained by Torture or Cruel Treatment out of Commission Trials?, http://www.hrw.org/legacy/english/docs/2006/03/31/usdom13109_txt.htm (last visited Nov. 10, 2009).

¹⁸ 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 § 5 (Mar. 21, 2002), 32 C.F.R. §§ 9.1–9.12 (2004), *available at* <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> [hereinafter MCO No. 1]. MCO No.1 also contains procedural protections for an accused. In particular, each detainee tried before a military commission is entitled to: (1) the presumption of innocence; (2) trial before an impartial panel; (3) notice of charges in a language the detainee understands; (4) call witnesses and present evidence; (5) cross examine witnesses and evidence; (6) elect not to testify with no negative inference drawn there-from; (7) a detailed defense counsel and the right to civilian defense counsel at the detainee’s expense; (8) privileged communication with defense counsel; (9) open proceedings to the maximum extent possible; (10) proof beyond a reasonable doubt; and (11) appellate review by a three-member review panel. MCO No. 1 does not refer to “rights” of the accused; rather, it references “procedures to be afforded [to] the accused.” *Id.* § 5. MCO No. 1 further states that “[t]his Order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable by any party . . .” *Id.* § 10.

¹⁹ See M. CHERIF BASSIOUNI, INTRODUCTION TO INTERNATIONAL CRIMINAL LAW 703 (2003).

(ICCPR) requirement that a criminal trial be a “fair and public hearing by a competent, independent and impartial tribunal established by law.”²⁰ This fundamental right to a fair criminal trial that is untainted by executive interference or external manipulation reflects the very essence of human rights norms²¹ and the law of occupation (as a subset of the laws and customs of war addressing the relations between military authorities and civilians are prosecuted while in custody).²² Additional Protocol I to the 1949 Geneva Conventions refined previous articulations of this cornerstone principle by requiring an “impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure”²³

As the interagency team theorized about the possibility of commissions in the fall of 2001, the necessity of conducting trials of detained terrorist suspects in conformity with international norms permeated almost every conversation. Legal experts thought carefully about the appropriate balance between the legitimacy of any trial process following the 9/11 crimes, both from the perspective of international audiences and that of the average U.S. citizen. Though operations against al-Qaeda had the imprimatur of Security Council authority under Chapter VII,²⁴ the hostilities were focused on a non-state actor whose operations were not limited to a specific geographic scope. The military experts in the interagency working group

²⁰ See International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), U.N. GAOR, 21st Sess., Supp. No. 16 art. 14(1), U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]. The U.N. Human Rights Committee (UNHRC) has provided extensive analysis and comment on the ICCPR’s provisions to a right to a trial before a “tribunal established by law” set forth in Article 14. See U.N. Human Rights Comm., *General Comment No. 13, Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law (Art. 14)*, ¶ 4, U.N. Doc. A/43/40 (1988); ICCPR General Comment No. 17, U.N. Doc. HRI/GEN/1/Rev.1 at 14 (1994). The Commission commented on whether military courts constituted a court under “law,” stating that “the Covenant does not prohibit such categories of courts” while affirming and stressing that such courts, as any and all others, must afford the guarantees set forth in Article 14 of the ICCPR. *General Comment No. 13, supra*, ¶ 4.

²¹ Protocol Additional to the Geneva Conventions of August 12 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *adopted* June 8, 1977, 1125 U.N.T.S. 609, 612; European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 6(1), 213 U.N.T.S. 222; The American Convention on Human Rights art. 8(1), OEA/ser.K./XVI/1.1, doc. 65 rev. 1, corr.1 (1970), *reprinted in* 9 I.L.M. 673 (1970).

²² Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 147, August 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (making the deprivation of fundamental fairness during trial a grave breach of the Convention subject to universal jurisdiction) [hereinafter Fourth Geneva Convention].

²³ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75(4), *adopted* June 8, 1977, 1125 U.N.T.S. 3 [hereinafter First Additional Protocol].

²⁴ U.N. Charter arts. 39–51.

repeatedly expressed the fear that the public mind would commingle the predictably controversial military commission procedures with the advanced state of military justice as practiced under the extant Uniform Code of Military Justice (UCMJ).²⁵

The dramatic reformation of the U.S. military justice system in the aftermath of World War II honed it into perhaps the fairest, flexible, and resilient military justice system on earth. Commanders must rely on military lawyers who are able to assist them anywhere in the world, and under any conditions, in applying the UCMJ as the vehicle for the command obligation to maintain good order and discipline. The concern in late 2001 was that hastily implemented military commissions could inflict lasting damage to the hard earned perception of military justice as a dependable and durable judicial process that is resilient enough to travel around the globe alongside U.S. service members while simultaneously ensuring the essential guarantees of fairness and impartiality.

The UCMJ structure preserves the long history of self-regulation by a parallel system of law under the authority of the executive branch rather than the existing federal court system authorized in Article III of the Constitution. In fact, the entire military judiciary is composed of Article I judges who serve in a stovepiped organization designed to be insulated from the control of any commander at any level. Because military courts are convened and created under Article I authority, the interpretation and application of constitutional protections often varies slightly, and judges need not be appointed for life as they are in the federal system. The Supreme Court has upheld this *sui generis* system of Article I courts authorized by the UCMJ, thereby discounting arguments that military judges are inevitably held hostage to the demands of the executive branch or the hierarchical whims of military superiors.²⁶

Similarly, military defense attorneys freely advocate the needs of their clients without the slightest concern that their professional duties will inevitably erode their prospects for promotion or assignment due to the displeasure of any official in the military hierarchy. The Rules for Military Commissions²⁷ included a specific prohibition on external interference with

²⁵ See Uniform Code of Military Justice, 10 U.S.C. §§ 836–54 (2000).

²⁶ *Weiss v. United States*, 510 U.S. 163 (1994) (holding that the Fifth Amendment protections may be applied in a different manner in the context of military proceedings and that fixed terms for military courts judges do not violate the Fifth Amendment guarantee of due process of law).

²⁷ MANUAL FOR MILITARY COMMISSIONS, *supra* note 6, at II-8. Rule 104(a) provides:

(a) *General prohibitions.*

- (1) *Convening authorities.* No authority convening a military commission under the M.C.A. may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the

the independence of military personnel working on any aspect of the proceedings. Perhaps signaling the intense political climate within which the commissions are conducted, Rule 104 indicates a shift from the practice of the prosecutors in the ordinary system of courts-martial who are answerable to the commander towards a commission process designed to operate under an independent convening authority.²⁸

The practice of military commissions during the past seven years demonstrates that military attorneys and judges have done their duty in seeking justice according to law. Many human rights groups and lay observers unfamiliar with the discipline and dedication of military attorneys assumed that they would simply cave in to executive pressures to unfairly convict defendants with little due process. The record emphatically demonstrates otherwise.

Despite the fact that only three cases have been litigated to conclusion, more than a hundred motions have been intensely fought and judicial rulings have frequently frustrated representatives of the government. The very first ruling in the first commission case was dispositive as the military judge dismissed the case without prejudice because the filings did not comply with the technical provisions of the Military Commissions Act.²⁹ Defense attorneys have been widely lauded in both human rights circles and in the press as being diligent and dedicated in the defense of their clients. Not to put too fine a point on it, but the Commander-in-Chief in fact issued an order to the professional judges and lawyers of the U.S. military to strive for "full and fair" trials.³⁰ For knowledgeable observers, it is wholly unremarkable that military attorneys and judges have done their duty in zealously representing their clients and in upholding the law.

findings or sentence adjudged by the military commission, or with respect to any other exercises of its or his functions or in the conduct of the proceedings.

(2) *All persons.* No person may attempt to coerce or, by any unauthorized means, influence the action of a military commission or any member thereof, in reaching the findings or sentence in any case or the action of any convening, approving, or reviewing authority with respect to such authority's judicial acts or the exercise of profession judgment by trial counsel or defense counsel.

Id.

²⁸ *Id.*

²⁹ See Reconsideration Ruling of Motion to Dismiss for Lack of Jurisdiction, United States v. Hamdan (Dec. 19, 2007), available at <http://www.defenselink.mil/news/Dec2007/Hamdan-Jurisdiction%20After%20Reconsideration%20Ruling.pdf> (reviewing the factual sufficiency of the evidence warranting the conclusion on reconsideration that Hamdan served as an unlawful enemy combatant taking direct part in hostilities against American forces and dismissing the defense challenge to the status hearing held by the Commission on the basis that the defendant had six attorneys present, full rights to confront witnesses and present evidence, and the open and transparent nature of the proceedings).

³⁰ PMO, *supra* note 10, § 4(c)(2).

On the other hand, as the Obama administration contemplates further refinements to the existing commissions system, the integrity of the commissions process should be reinforced by the express export of two provisions of the UCMJ. Firstly, the punitive provision of the general article, Article 134,³¹ should be made applicable to military commission proceedings. President Obama need only issue an executive order to the effect that any interference with or obstruction of the work of determining detainee status or adjudicating cases prejudices the “good order and discipline in the armed forces” and is “of a nature to bring discredit upon the armed forces.”³² In addition, the Congress should extend the provisions of Article 98 of the UCMJ³³ to include the Manual for Military Commissions. The punitive article at present applies to the UCMJ, which is contained in Chapter 47 of Title 10.

Furthermore, Congress should merely add reference to Chapter 47A in the text of Article 98 in order to make any interference with the independence or impartiality of the military commissions into a criminal act for any person subject to the UCMJ.³⁴ These salutary amendments would help to strengthen public and international perceptions of the process, though in truth they may be seldom used. At the same time, the specific inclusion of criminal sanctions for interference or obstruction with the work of military commissions would provide a remedy short of outright resignation for any military officer whose performance of duty is improperly infringed in the future.

III. THE LEGAL VALIDITY OF U.S. COMMISSIONS

As the Attorney General wrote in 1865, “Congress has power to *define*, not to make, the laws of nations.”³⁵ Because the nations of the world developed the laws of war in response to military requirements, the nearly simultaneous development of tribunals to enforce those laws is completely logical, and the concomitant practice of using military commissions to pu-

³¹ Uniform Code of Military Justice, 10 U.S.C. § 934 (2000).

³² *Id.*

³³ Uniform Code of Military Justice, 10 U.S.C. § 898 (1976). Article 98 provides:

Any person subject to this chapter who—

(1) is responsible for unnecessary delay in the disposition of any case of a person accused of an offense under this chapter; or

(2) knowingly and intentionally fails to enforce or comply with any provision of this chapter regulating the proceedings before, during, or after trial of an accused; shall be punished as a court-martial may direct.

Id.

³⁴ *See id.*

³⁵ Military Commissions, 11 Op. Att’y Gen. 297, 299 (1865) (emphasis in original).

nish violations of international law dates back to at least 1688.³⁶ In U.S. practice, military commissions originally developed as “common law war courts.” Early in our history, courts-martial tried Captain Nathan Hale and Major Andre for spying.³⁷ In 1780, Congress passed a resolution calling for a special court-martial against Joshua Hett Smith on the charge of complicity with Benedict Arnold’s treason.³⁸ As the Articles of War were being modernized, the Judge Advocate General of the U.S. Army, General Crowder publicly defined the scope of military commissions and their common law origins.³⁹ At a House hearing before the Committee on Military Affairs, Crowder testified: “the constitution, composition, and jurisdiction of these courts *have never been regulated by statute* It is highly desirable that this important war court should be continued to be governed as heretofore, *by the laws of war rather than by statute.*”⁴⁰

³⁶ See Articles of James II, art. LXIV, reprinted in COLONEL WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS*, 919–28 (1920). Subsequent military codes restated the legality of using military commissions to punish violations of the laws and customs of war. See, e.g., British Articles of War of 1765, art. II, § XX, reprinted in WINTHROP, *supra*, at 931.

³⁷ See A. Wigfall Green, *The Military Commission*, 42 AM. J. INT’L L. 832, 832–33 (1948) (discussing the history of the courts-martial of Captain Nathan Hale and Major Andre).

³⁸ *Id.*; VI RESOLUTIONS, ACTS AND ORDERS OF CONGRESS 25 (1780).

³⁹ REVISION OF THE ARTICLES OF WAR, S. REP. NO. 63-229, at 59 (1914); *Cf.* REVISION OF THE ARTICLES OF WAR, S. REP. NO. 64-130, at 54–55 (1916).

⁴⁰ S. REP. NO. 63-229, *supra* note 39, at 59 (emphasis added).

Mr. SWEET. Please explain what you mean by military commission.

Gen. CROWDER. That is our common law of war court This war court came into existence during the Mexican War, and was created by orders of Gen. Scott. It had jurisdiction to try all cases usually cognizable in time of peace by civil courts. Gen. Scott created another war court, called the “council of war,” with jurisdiction to try offenses against the laws of war. The constitution, composition, and jurisdiction of these courts *have never been regulated by statute*. The council of war did not survive the Mexican War period, since which its jurisdiction has been taken over by the military commission. The military commission received express recognition in the reconstruction acts, and its *jurisdiction* has been affirmed and supported by all our courts. It was extensively employed during the Civil War period and also during the Spanish-American War. It is highly desirable that this important war court should be continued to be governed as heretofore, *by the laws of war rather than by statute*.

Mr. SWEET: There is more elasticity, I suppose?

Gen. CROWDER: Yes, sir; and the lack of statutory recognition has not prevented the Supreme Court from supporting the jurisdiction of the military commission in the trial of the gravest cases, and supporting it in the most explicit language. It is a most important institution in time of war.

The enactment of the Military Commissions Act marked the definitive end of the American practice of convening military commissions as an unbridled aspect of the executive war-making authority. It extended the reach of military commissions beyond a setting of ongoing international conflict focused on a specific geographic area. Moreover, it introduced the term “unprivileged combatant” into U.S. law as the focus for the personnel jurisdiction of commissions. Just as in other nations, Presidents and military commanders have regularly convened commissions as a utilitarian approach to the conduct of hostilities or as a pragmatic necessity to administer occupied territory.⁴¹ Until 2006, U.S. military commissions have been guided solely by the parameters of the substantive law and customs of war rather than constrained by statute. By extension, the federal bench has largely deferred to the authority of the executive in enforcing the laws and customs of war,⁴² although many military commission results have been invalidated in practice by military authorities due to procedural irregularities or on evidentiary grounds.⁴³

Id. (emphasis added). *Cf.* S. REP. NO. 64-130, *supra* note 39, at 54–55. *See also Hearings Before the Subcomm. of the Comm. on Military Affairs of the Senate on Establishment of Military Justice*, 66th Cong., 1st Sess., 1182–83 (statement of Maj. Gen. Enoch H. Crowder).

⁴¹ Faced with the task of administering occupied Mexican territory, General Winfield Scott relied on his authority as a commander to convene tribunals authorized only by customary international law. Despite the void of codified domestic authority, the law supported General Scott’s exercise of command prerogative. In 1848, the U.S. Attorney General opined that U.S. courts had no jurisdiction over an Army officer who allegedly murdered a junior officer at Perote, Mexico. *Jurisdiction of the Federal Judiciary*, 5 Op. Att’y Gen. 55 (1848). The importance of this early opinion lies in the termination of the authority of the temporary military government at the time the military government ended. The opinion concluded that the rules and articles for the government of the Army no longer conveyed jurisdiction once the Army had been disbanded and been mustered out of the service.

For the purposes of modifying the UCMJ to have more utility during operations other than war, this early opinion is enlightening because the Attorney General recognized that “Congress can easily provide against a recurrence of the difficulties of the present case.” *Id.* at 59. General Scott convened a military commission to try the case, but the accused escaped and fled to Georgia. While acknowledging the validity of military commissions “established under the law of nations by the rights of war,” the opinion concluded that the jurisdiction of the commission ended “by the restoration of the Mexican authorities” *Id.* at 58. The Supreme Court later reaffirmed the commander’s authority to punish civilians using military commissions in occupied territory. *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176, 177–78 (1857). *Accord Mechanics’ & Traders’ Bank v. Union Bank*, 89 U.S. (22 Wall.) 276, 295–97 (1874); *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132–33 (1869); *Cross v. Harrison*, 57 U.S. (16 How.) 164, 189–90 (1853).

⁴² *See, e.g., Ex Parte Toscano*, 208 F. 938, 940 (S.D. Cal. 1913) (denying habeas corpus petitions to two-hundred and eight Mexican Federalist soldiers who fled to the U.S. during the Mexican civil war and were interned under the Hague Conventions “for the purpose of depriving them of the power to leave American soil and renew hostilities.”).

⁴³ *See, e.g., Coleman v. Tennessee*, 97 U.S. 509 (1878). Despite the jurisdictional sufficiency of military commissions, many proceedings were disapproved due to procedural

At the time of this writing, the Obama Administration is reconsidering the current statutory structure. The enactment of the Military Commissions Act of 2006 unmistakably revalidated two essential premises that mark the confluence of domestic and international law. In the first place, it is entirely permissible for military commissions to coexist with other courts and to share concurrent jurisdiction.⁴⁴ This puts the premium on the executive branch to promulgate clear guidance to military commanders and the Department of Justice as to the decision-making process for allocating jurisdiction among potential forums. This process must of necessity walk a very fine line in order to prevent trials from being tainted by executive interference or wholly improper command influence emanating from the White House or its designated proxies.

Conversely, if the guidelines for allocating jurisdiction are opaque to the public and to defendants, the Administration will be criticized for its lack of transparency and the appearance of selective and self-serving justice. Secondly, at a more basic level, the current legal debates unequivocally establish that the post-hoc creation of an accountability mechanism is permissible in light of modern human rights norms and the laws of war. Thus, despite potential friction with the President's political base, ending military commissions or further limiting their flexibility runs the risk of eroding their utility for future Commanders-in-Chief to the legal and logical vanishing point. President Obama's decisions in the near future will be made on policy grounds rather than on the basis of legal necessity.

A. *The Statutory Basis for Modern Military Commissions*

Critics of the military commissions point out that the existing federal courts have a conviction rate of more than ninety percent of the nearly three hundred defendants in terrorism-related cases in Article III courts since 9/11.⁴⁵ According to this argument, commissions are a disfavored forum of convenience because federal courts are open and functioning. To

irregularities. *See, e.g.*, Opinion of Judge Advocate General Joseph Holt to President Abraham Lincoln (Sept. 26, 1862), in *Letters Sent-JAG*, NARG 153 (Entry 1) (sentence disapproved because judge advocate not sworn); Opinion of Judge Advocate General Joseph Holt to Maj. Gen. Benjamin Butler (Nov. 4, 1862), *id.* (sentence disapproved because records forwarded to Judge Advocate General were merely copies of original records); Opinion of Judge Advocate General Joseph Holt to Maj. Gen. Benjamin Butler (Dec. 16, 1862), *id.* (sentence disapproved because record did not show sufficient procedural protections for the accused); Gen. Order No. 255, Aug. 1, 1863, *id.* (death sentence disapproved because record did not show that the order convening the commission was read to the prisoner, and the prisoner did not have opportunity to challenge members, and members not sworn).

⁴⁴ *See generally* Military Commissions Act of 2006, 10 U.S.C. § 948(a) (2006).

⁴⁵ RICHARD B. ZABEL AND JAMES J. BENJAMIN, JR., *HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS—2009 UPDATE AND RECENT DEVELOPMENTS* 9 (2009).

complicate matters, Congress has expanded the substantive crimes originally listed by the Department of Defense as being triable by military commission to include offenses that were previously subject only to Article III jurisdiction, such as material support to terrorism and conspiracy.⁴⁶

Setting aside a detailed discussion of the circumstances under which these crimes constitute violations of the laws and customs of war which are therefore appropriately within the jurisdiction of military commissions as opposed to preexisting Article III courts, a small range of offenses have proven to be the crux of commission jurisdiction. Their discontinuation would shift the bulk of cases into federal courts as a practical matter. Far from invalidating their use, the simple truth that military commission jurisdiction overlaps with that of other federal courts marks a linear continuation of the U.S. practice by which prosecutions for violations of the laws and customs of war are allocated to federal criminal jurisdiction.

During the Civil War, Union Army General Order Number 100 declared that the common law of war allowed military commissions to prosecute “cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial.”⁴⁷ By 1916, however, Congress adopted Article of War 15 to specifically recognize that commanders could prosecute violations of the law of war in either general courts-martial or military commissions.⁴⁸ Congress added explicit courts-martial jurisdiction over persons who violate the law of war in the 1916 revision to the Articles of War.⁴⁹ During hearings on the proposed amendments, Major General Enoch Crowder, the Judge Advocate General of the Army, adamantly testified that statutory courts-martial jurisdiction “saves to these war courts [military commissions] the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military

⁴⁶ See 10 U.S.C. § 950(v) (2006) (detailing the provisions of Article 3 of the Military Commissions Act).

⁴⁷ General Order No. 100: Instructions for the Government of the Armies of the United States in the Field, ¶ 13 (Apr. 24, 1863), reprinted in *THE LAWS OF ARMED CONFLICT* 3 (Dietrich Schindler & Jiří Toman, eds., 1988).

⁴⁸ In 1916, Congress held extensive hearings on revising the existing Articles of War. The revised articles added article 2 which defined the class of persons who would be subject to the jurisdiction of military courts-martial. The Judge Advocate General of the Army repeatedly reminded Congress that military commissions had jurisdiction under international law which would not change as a result of amending the American Articles of War. *Hearings on Senate Bill 3191, Subcomm. on Military Affairs of the Senate, reprinted in S. REP. NO. 64-130, supra* note 39.

⁴⁹ Article 2 of the Articles of War defined the class of “persons subject to military law.” 41 Stat. 787, art. 2 (re-enacted in 1920). In its 1916 form, Article 2 included some persons who, by the law of war, were prior to 1916 triable under the common law of war at military commissions. The 1916 version of Article 2 conveyed court-martial jurisdiction over “all retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States.” *Id.*

commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient.”⁵⁰

Article 21 of the current UCMJ is based on Article of War 15. After restating the concurrent jurisdiction of general courts-martial and military commissions, Article 21 provides that military commissions may convene “with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”⁵¹ The parallel provision for ordinary courts-martial is found in Article 18, which conveys general courts-martial jurisdiction over “any person who by the law of war is subject to trial by a military tribunal” and allows “any punishment permitted by the law of war.”⁵² The language of Article 18 mirrors that of Article 21, and the operational jurisdiction of general courts-martial is similarly restricted.

⁵⁰ *In re Yamashita*, 327 U.S. 1, 66 n.31 (1946) (quoting *Hearings on Senate Bill 3191, Subcomm. on Military Affairs of the Senate*, 64th Cong., 1st Sess., reprinted in S. REP. No. 64-130, *supra* note 39, at 40). In earlier testimony before Congress, General Crowder explained:

The next article, No. 15, is entirely new, and the reasons for its insertion are these: In our War with Mexico two war courts were brought into existence by the orders of Gen. Scott, viz, the military commission and the council of war. By the military commission, Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. The council of war did not survive the Mexican War period, and in our subsequent wars, its jurisdiction has been taken over by the military commission, which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code, the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase “Persons subject to military law.” There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts, and the question would arise whether Congress having vested jurisdiction by the statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent.

S. REP. NO. 63-229, *supra* note 39. General Crowder testified in exactly the same language to the House of Representatives Committee on Military Affairs on May 14, 1912. *Id.* at 28–29.

⁵¹ 10 U.S.C. § 821 (2006).

⁵² *Id.* § 818. Implementing this statutory authority, Rule for Courts-Martial 1003(b)(10) (2008) provides that, “in cases tried under the law of war, a general court-martial may adjudge any punishment not prohibited by the law of war.” See Fourth Geneva Convention, *supra* note 22, art. 68 (providing some limits to the discretion of military tribunals to adjudge punishments under the law of war). Rule for Court Martial 201 recognizes the dual jurisdictional grounds over violations of the law of war as well as offenses in violation of civil statutes when an occupying force declares martial law. See also *id.* arts. 4, 64, 66 (outlining the basis for declaring martial law and enforcing civil laws as an occupying power).

Even if the normal courts-martial had personal jurisdiction over unlawful enemy combatants (which would be possible only in the very rare instances that a terrorist suspect met the requirements of UCMJ Article 2), President Obama need not restrict jurisdiction of war crimes allegations against unlawful combatants to any predetermined forum in light of our practice and precedent. Such decisions must be made on an individualized, case by case basis, which in turn raises the real possibility that military commission jurisdiction will itself be viewed with inherent suspicion.

Unless Congress amends the UCMJ to permit terrorist suspects to face trial before ordinary courts-martial, military commissions would likely soon be regarded as the court of convenience to relegate the “bad cases” that might otherwise erode public confidence in the Article III courts. This possibility, in turn, raises concern among military practitioners that the reputation and credibility of the modern military justice system will be compromised, which has the collateral consequence of undermining the professional military attorneys who have done their duty in the interests of justice.

B. The Human Rights Basis for the Military Commissions Act

The reaffirmation that military commissions can have a lawful role alongside traditional Article III courts and ordinary courts-martial is perhaps the most important benchmark from which the Obama Administration can gauge forward progress. Regardless of the procedural forms adopted, international law is clear that no accused should face punishment unless convicted pursuant to a fair trial affording all of the essential guarantees embodied in widespread State practice.⁵³ Article 3 common to the 1949 Geneva Conventions states with particularity that only a “regularly constituted court” may pass judgment on an accused person.⁵⁴ Though the detailed due process requirements inherent in Common Article 3⁵⁵ are not specified,

⁵³ For a summary of State practice and its implementation in treaty norms and military manuals around the world, see 1 JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 352–75 (2005) [hereinafter ICRC Study].

⁵⁴ Fourth Geneva Convention, *supra* note 22, art. 3.

⁵⁵ The U.S. has not ratified Protocol I or Protocol II, though in fact many provisions of each are accepted and practiced as customary international norms. See, e.g., Diane F. Orentlicher and Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J. L. & PUB. POL’Y 653, 661 (2002).

The rights that must be accorded to unprivileged combatants in criminal proceedings have evolved substantially since World War II. Any doubts concerning the scope and content of these rights were put to rest with the elaboration of Article 75 of Protocol I Additional to the 1949 Geneva Conventions. Although the United States has not ratified the Protocol, it accepts many of its provisions as being declaratory of customary law; Article 75 is such a provision par excellence. Largely inspired by human rights law, this article requires that unprivileged combatants be accorded in all circumstances trials by impartial and regularly constituted courts

commentators tend to use the benchmarks enumerated in Article 75 of Additional Protocol I as a suitable proxy. Thus, it is wholly defensible under the laws and customs of war to conclude that unlawful combatants (or in the language of Article 75 those who “do not benefit from more favourable treatment under the Convention or this Protocol”)⁵⁶ are entitled to a trial before “an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.”⁵⁷ It is no accident that the Executive Summary to the Manual for Courts-Martial quotes the requirements of Article 3 and notes that the Manual is intended to meet that standard.

Interpreting this provision in light of State practice, the International Committee of the Red Cross concluded that a judicial forum is “regularly constituted if it has been established and organized in accordance with the laws and procedures already in force in a country.”⁵⁸ Indeed, justice cannot be carried on the wings of executive mandate. The creation of specialized courts designed to serve the whims of power rather than the ends of law is one of the hallmarks of tyranny. Like the Nazi regime before them,⁵⁹ the ruling Ba’athists in Saddam’s Iraq created “Special” or “Revolutionary” courts to impose political punishments at the hands of obedient minions rather than trained legal professionals.⁶⁰ The conviction of the Chief Judge Awad Bandar of Saddam’s Revolutionary Courts for the crime against humanity of murder marks the first time since World War II that a jurist has been convicted for perverting the power of the law into a tool of political power.⁶¹ There was widespread commentary following the PMO that the

that, at a minimum, afford inter alia the presumption of innocence, the right to counsel before and during trial, the right of defendants to call witnesses and to examine witnesses against them, freedom from ex post facto laws, and the right of defendants not to testify against themselves or to confess their guilt.

Id. (footnotes omitted). Article 6 of Protocol II also applies to non-international armed conflicts, though its specified rights do not include the following rights found in Protocol I, Article 75: (1) to be tried by a “regularly constituted” court to examine or have examined witnesses against him or her; (2) to public announcement of sentence; and (3) prohibition against double jeopardy. *See* First Additional Protocol, *supra* note 23, arts. 75(4), 75(4)(i), 75(4)(h).

⁵⁶ First Additional Protocol, *supra* note 23, art. 75(7)(b).

⁵⁷ *Id.* art. 75(4).

⁵⁸ ICRC Study, *supra* note 53, at 355.

⁵⁹ INGO MÜLLER, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH 153–73* (Deborah Lucas Schneider, trans., 1991).

⁶⁰ R. Chandrasekaran, *Tribunal Planners Hope to Start Trials by Spring*, WASH. POST, Dec. 16, 2003, at A1.

⁶¹ *See* MICHAEL A. NEWTON & MICHAEL P. SCHARF, *ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN*, 181–83 (2008) (describing the import of Judge Awad al-Bandar’s conviction in light of the Alstoetter case in which ten Nazi-era judges were convicted).

U.S. had embarked down the same road of expediency and politicized justice. In fact, the sparse structure of the original PMO has been dramatically clarified and a whole superstructure of procedural regularity and detailed guidance regulates U.S. military commissions at the time of this writing.⁶²

Every domestic context is unique, even when applying normative principles of international law that are common to all nations. For example, in the domestic prosecutions in Argentina, the trials were conducted using special procedures necessitated by the volume of information and the number of victims in comparison to normal crimes.⁶³ Furthermore, tribunals enforcing international humanitarian law have permitted evidence so long as it is “relevant” and “necessary for the determination of the truth.”⁶⁴ The International Covenant on Civil and Political Rights (ICCPR) summarizes the legal consensus described above as requiring that a tribunal be “established by law.”⁶⁵ The U.N. Human Rights Commission adopted a functional test that the tribunal should “genuinely afford the accused the full guarantees” in its procedural protections.⁶⁶

Litigating its first case, the International Criminal Tribunal for the Former Yugoslavia (ICTY) was forced to determine whether the procedural rights of the perpetrator are violated *per se* by the prosecution of an accused before a post hoc tribunal created after the commission of the crimes.⁶⁷ Noting that the ICCPR drafters rejected language specifying that only “pre-established” fora would provide sufficient human rights protections, the ICTY Appeals Chamber concluded that:

The important consideration in determining whether a tribunal has been “established by law” is not whether it was pre-established or established for a specific purpose or situation; what is important is that it be set up by

⁶² See JENNIFER K. ELSEA, CRS REPORT FOR CONGRESS: THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DoD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE (Sept 27, 2007), available at <http://www.fas.org/sgp/crs/natsec/RL33688.pdf> (last visited Nov. 10, 2009).

⁶³ See UNITED STATES INSTITUTE OF PEACE, BUILDING THE IRAQI SPECIAL TRIBUNAL: LESSONS FROM EXPERIENCES IN INTERNATIONAL CRIMINAL JUSTICE, SPECIAL REPORT 122, at 10 (2004), available at <http://www.usip.org/resources/building-iraqi-special-tribunal-lessons-experiences-international-criminal-justice>.

⁶⁴ Rome Statute of the International Criminal Court art. 69(3), July 17, 1998, 2187 U.N.T.S. 90.

⁶⁵ ICCPR, *supra* note 20, art. 14(1).

⁶⁶ See U.N. Human Rights Comm., General Comment on Article 14, ¶ 4, U.N. Doc. A/43/40 (1988); U.N. Human Rights Comm., *Cariboni v. Uruguay*, U.N. Doc. A/39/40 (Oct. 27, 1987). The Inter-American Commission has taken a similar approach. See, e.g., Inter-Am. C.H.R., Annual Report 1972, OEA/Ser. P, AG/doc. 305/73 rev. 1, 14 March 1973, at 1; Inter-Am. C.H.R., Annual Report 1973, 2–4, OEA/Ser. P, AG/doc. 409/174 (March 5, 1974).

⁶⁷ MICHAEL P. SCHARF, BALKAN JUSTICE: THE STORY BEHIND THE FIRST INTERNATIONAL WAR CRIMES TRIAL SINCE NUREMBERG 104–06 (1997).

a competent organ in keeping with the relevant legal procedures, and should that it observes the requirements of procedural fairness.⁶⁸

Accepting this benchmark of legitimacy, modern U.S. military commissions meet the criteria of Common Article 3 better than the ad hoc international tribunals because they are designed to disfavor deviation from preexisting Article III and UCMJ procedures. Article 36 of the current UCMJ grants the President the flexibility to craft trial procedures for courts-martial and military commissions which “shall, so far as he considers practicable, apply the principles of law and rules of evidence generally recognized in the trial of cases in the United States district courts”⁶⁹ This provision ensures that U.S. Military Commissions hew closely to the “regularly constituted” requirement found in human rights law and Common Article 3.⁷⁰ There is no evidence in the legislative record that Congress intended to align the UCMJ with the international norms, but the fortuity strengthens President Obama’s legal argument for retaining military commissions.

The language of the current Article 36 derives from the 1920 Articles of War and thus predates any hint of military commission jurisdiction over transnational terrorist acts. Although the purpose in drafting a uniform code was to unify procedures between and among the services as to courts-martial,⁷¹ Article 36(b) further stipulates that the procedures for military commissions be as uniform as possible between the services.⁷² Thus, the

⁶⁸ Prosecutor v. Tadić, Case No. IT-94-1-AR72, 1995 WL 17205280, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, ¶ 45 (Oct. 2, 1995).

⁶⁹ 10 U.S.C. § 836(a) (2006).

⁷⁰ See, e.g., Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

⁷¹ *A Bill to Unify, Consolidate, Revise and Codify the Articles of War, the Articles for the Gov’t of the Navy, and the Disciplinary Laws of the Coast Guard, and to Enact and Establish a Uniform Code of Military Justice: Hearings on H.R. 2498 Before the H. Sub Comm. on Armed Services*, 81st Cong. 597 (1949) (statement of Secretary of Defense James Forrestal) [hereinafter *Hearings on H.R. 2498*].

⁷² 10 U.S.C. § 836(b) (2006). “All rules and regulations made under this article shall be uniform insofar as practicable” See also *Hearings on H.R. 2498*, *supra* note 71, at 1015. Chairman Brooks commented on this provision and stated, “I think it would be unthinkable, after we go to all this painstaking trouble to get a unified bill, that the President would prescribe three separate rules.” *Id.* Mr. Rivers also asked, “[a]s a result of this, neither the President nor any of the three services could have any authority to agree on any rules of procedure contrary to the discussion before this committee or the intent of the Congress?” *Id.* Mr. Larkin: “I think that is provided” *Id.* Mr. Smart: “But it will show what the intent of Congress is, that it shall be uniform in every possible instance.” *Id.* Mr. Hardy: “With respect to all the services?” *Id.* Mr. Smart: “Yes, sir.” *Id.* In further discussing Article 39(a), Mr. Larkin highlighted certain instances in which the rules applicable to federal courts would not be “practicable,” noting rules of evidence on search warrants and authentication that might be impracticable to apply in a battlefield situation. *Id.* at 1017.

legislative record of the UCMJ establishes that military commissions were considered to be common law courts with distinctive rules and procedures drawn from, but not identical to, those found in court-martial or Article III courts.⁷³

In light of the permissive structure of the UCMJ and of uniform U.S. practice regarding past “common law war courts,” it would be illogical and incorrect to postulate that U.S. practice requires complete consistency between the procedures applicable to courts-martial, military commissions, and Article III courts. For example, when debating the applicable UCMJ procedures for commissions during hearings in 1949, the Assistant General Counsel to the Secretary of Defense, replied to a question regarding the type of rules used to try the German *Quirin* saboteurs, “[t]hey are rules that are promulgated by the President.”⁷⁴ Professional Committee staff member Mr. Robert Smart noted that “[w]e are not prescribing rules of procedure for military commissions here. *This only pertains to courts martial.*”⁷⁵

For the purposes of human rights law, U.S. military commissions are “established by law” because they are designed to provide the full range of human rights to the accused and are based on the almost unassailable confluence of legislative power, judicial construction, and executive mandate. The PMO was based on the uncoordinated assertion of executive power. In *Hamdan v. Rumsfeld*, the Supreme Court invalidated the commissions created by President Bush based on the mere invocation of executive power on the basis that the structure was noncompliant with the requirements of Article 36.⁷⁶ In the aftermath of *Hamdan*, President Bush consulted with the Congress and developed an extensive Manual for Courts Martial that was promulgated by executive order and authorized by the Military Commissions Act of 2006.

Thus, the synergistic efforts of the judicial, legislative, and executive branches make the current military commissions completely defensible from a legal perspective and without question meet the “established by law” criteria.

IV. CONCLUSION

The interlocking procedures of the current Military Commissions Act as implemented in the Manual for Military Commissions signal the end of unregulated and unexamined executive discretion in the pursuit of national security interests. President Obama faces difficult legal and policy dilemmas at the time of this writing. The legal quandaries are heightened by

⁷³ *Id.* at 1016–17.

⁷⁴ *Id.* at 1017.

⁷⁵ *Id.* (emphasis added).

⁷⁶ *Hamdan v. Rumsfeld*, 548 U.S. 557, 561 (2006).

the presence in the dock of alleged co-conspirators responsible for the attacks of September 11. In practice, the military commissions have not been the charade of justice created by an over-powerful and unaccountable chief executive that critics predicted.

Military judges have been vigorous in demanding respect for the full range of defendants' rights. Professional judges have ensured to date that the processes never serve as a subterfuge for subverting defendants' rights. No commission proceedings have admitted hearsay evidence, much less any evidence derived from tainted interrogation techniques. Furthermore, Federal courts are active in overseeing, and on occasion overturning, the work of the military commissions and the Combatant Status Review Tribunals that are a necessary gateway for so-called "unlawful combatants" to stand trial in a military commission.

Franklin Delano Roosevelt told the American people and the assembled Congress at the beginning of World War II that "[t]he mighty action that we are calling for cannot be based on a disregard of all things worth fighting for. . . ."⁷⁷ The new administration will determine whether the role of the commissions expands beyond the core al-Qaeda defendants, and will prescribe the roles and regulations applicable to commissions in the future. The synergy of Article III courts and military commissions is wholly new in American history, and if nothing else, the past eight years of legal wrangling and legislative mandate have wrought a system that balances individual rights and liberties with the overarching interests of the U.S. in securing her citizens and seeking justice.

⁷⁷ Franklin Delano Roosevelt, *The Four Freedoms*, U.S. House of Representatives, January 6, 1941, reprinted in GREAT AMERICAN SPEECHES 161, 164 (Gregory R. Suriano ed., 1993).