MILITARY COMMISSIONS: A PLACE OUTSIDE THE LAW'S REACH

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"We have turned our backs on the law and created what we believed was a place outside the law's reach."[1]

Ten years after 9/11, it is hard to remember that the decision to treat the attacks as the trigger for taking the country to a state of war was not inevitable. Previous acts of terrorism had been investigated and prosecuted as crimes, even when they were carried out or planned by al Qaeda.[2] But on September 12, 2001, President Bush pronounced the attacks "acts of war,"[3] and he

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1. Ed Vulliamy, *Ten Years On, Former Chief Prosecutor at Guantanamo Slams 'Camp of Torture'*, OBSERVER, Oct. 30, 2011, at 29 (quoting Colonel Morris D. Davis, former chief prosecutor of the Guantánamo military commissions).

2. Previous al Qaeda attacks that were prosecuted as crimes include the 1993 bombing of the World Trade Center, the Manila Air (or Bojinka) plot to blow up a dozen jumbo jets, and the 1998 embassy bombings in East Africa. Mary Jo White, *Prosecuting Terrorism in New York*, MIDDLE E.Q., Spring 2001, at 11, 11–14; *see also* Christopher S. Wren, *U.S. Jury Convicts 3 in a Conspiracy to Bomb Airliners*, N.Y. TIMES, Sept. 6, 1996, at A1. Other attacks, such as aircraft hijackings and bombings carried out by agents of the Libyan government, including the bombing of Pan Am 103, were also treated as crimes. Colin Boyd, *Workshop: Police Investigations of "Politically Sensitive" or High Profile Crimes: The Lockerbie Trial*, INT'L SOC'Y FOR REFORM CRIM. L., 2–3, 5 (Aug. 28, 2001), http://www.isrcl.org/Papers/Boyd.pdf. Even during the Bush presidency, the al Qaeda attacks on U.S. embassies in Africa were prosecuted as crimes in U.S. courts. Benjamin Weiser, *4 Guilty in Terror Bombings of 2 U.S. Embassies in Africa; Jury to Weigh 2 Executions*, N.Y. TIMES, May 30, 2001, at A1.

3. "The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war. . . . Freedom and democracy are under attack. . . . But make no mistake about it: We will win." Remarks Following a Meeting With the National Security Team, 2 PUB. PAPERS 1100 (Sept. 12, 2001). In a radio address on September 11, 2001, the President had not gone so far, referring to the attacks as "acts of mass murder" and saying that "our way of life, our very freedom came under attack in a series of deliberate and deadly terrorist acts." Address to the Nation on the Terrorist Attacks 2 PUB. PAPERS, 1099 (Sept. 11, 2001).

repeatedly defined himself as a "war president."[4] The war paradigm reflected and reinforced core policy dispositions of the Bush Administration—the commitment to expanding presidential power, the conviction that the president's authority in military affairs should not be constrained by law, and the desire to create a legacy as a great president, together with the belief that the great presidents have tended to be "war presidents."

President Obama campaigned on the very different paradigm of the rule of law. He pledged to eliminate reliance on novel theories of executive power, avoidance of existing legal constraints, and the use of new procedures, such as military commissions, to deny rights to suspected terrorists in order to make it easier to imprison and convict them.[5] On his first day in office he suspended the military commissions.[6] He and Attorney General Holder repeatedly stressed their determination to abide by the rule of law and to try top suspected terrorists, such as Khalid Sheikh Mohammed, in federal court.[7]

Soon, however, Congress began using its spending power to place limits on the President's ability to close down the military commissions or the detention center at Guantánamo. As of now, Congress seems to have completely foreclosed the possibility of criminal prosecution of anyone who is held at Guantánamo, despite strong objections from the Pentagon, the Justice Department, the FBI, and the CIA. Of necessity, military commission proceedings have resumed. But the Obama Administration has not given up on its preference for criminal prosecutions. It has managed to bring a number of new criminal prosecutions of international terrorists captured abroad, and to win some important concessions in legislation originally designed to require all suspected terrorists to be held in military custody and tried by military tribunals.

In Part I of this Article, I discuss the use and justification of military commissions under the Bush-era war paradigm. Part II discusses the evolution from the Bush vision of military commissions as outside the law's reach to the Obama Administration's attempt to reinstate the rule of law in detainee policy and to close the military commissions; that Part also examines congressional

4. "I'm a war president. I make decisions here in the Oval Office in foreign-policy matters with war on my mind." *Meet the Press with Tim Russert: Interview with President George W. Bush* (NBC television broadcast Feb. 8, 2004) (transcript available at http://www.msnbc.msn.com/id/4179618/ns/meet_the_press/t/transcript-feb-th/#.Ty142cVSQ7s).

5. Sen. Barack Obama, Remarks at the Wilson Center in Washington, D.C.: The War We Need To Win (Aug. 1, 2007), *available at* http://www.realclearpolitics.com/articles/2007/08/the_war_we_need_to_win.html).

6. Exec. Order No. 13,492 § 7, 3 C.F.R. 203, 206 (2010).

7. *See, e.g.*, Charlie Savage, *U.S. To Try Avowed 9/11 Mastermind Before Civilian Court in New York*, N.Y. TIMES, Nov. 14, 2009, at A1 [hereinafter Savage, *U.S. To Try Avowed 9/11 Mastermind*].

legislation using the spending power to force cases out of the federal courts and into military tribunals in order to prevent recognition of procedural rights for detainees. Parts III and IV discuss two enduring flaws of the military commission system under both President Bush and President Obama: first, their jurisdiction has consisted almost exclusively of offenses that are not triable to military commissions, and thus they are illegal under U.S. and international law; second, there is a lack of legal standards for assigning particular detainees to criminal prosecution, military commissions, or indefinite detention without charge. I close with some tentative conclusions about where we are likely to go in the near term. The current Administration will likely attempt to avoid bringing any more individuals to Guantánamo and will still endeavor to try new suspects in federal court rather than before military commissions. But because the commissions continue to be fundamentally flawed and the agenda of reinstating the rule of law in detainee policy is embodied in nothing more permanent than executive orders (with the exception of improved procedures for military commission trials), military commissions are likely to persist, and to continue to be "outside the law's reach."[8]

I. MILITARY COMMISSIONS AND THE WAR PARADIGM

Immediately following the 9/11 attacks, President Bush took a number of actions to expand executive power to use military force, gather intelligence, and detain and punish suspected terrorists free of any legal constraints or interference by the other branches of government. Within a few months of the attacks, he declared that the Geneva Conventions did not apply to suspected terrorists captured in Afghanistan or elsewhere,[9] established military

8. Vulliamy, *supra* note 1.

9. The decision is referred to in Attorney General Gonzales's memo to the President, Memorandum from Alberto R. Gonzales to George W. Bush, U.S. President, Decision re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban 1 (Jan. 25, 2002), *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.25.pdf, which followed Office of Legal Counsel opinions including Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep't of Def., Re: Application of Treaties and Laws to Taliban and al Qaeda Detainees 1 (Jan. 22, 2002), *available at* www.justice.gov/olc/docs/memo-laws-taliban-detainees.pdf; Memorandum from John Yoo, Deputy Assistant Att'y Gen., and Robert J. Delahunty, Special Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Def., Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees 1 (Jan. 9, 2002) [hereinafter Yoo Treaties and Laws Memo], *available at* http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB127/02.01.09.pdf. In response to criticism, and despite Gonzales's advice in the January twenty-fifth memo, Bush reversed this decision as to the Taliban, though not to al Qaeda. Katharine Q. Seelye, *In Shift, Bush Says Geneva Rules Fit Taliban Captives*, N.Y. TIMES, Feb. 8, 2002, at A1.

commissions by executive order to try them,[10] and began bringing them to Guantánamo Naval Base and other locations outside the United States—where, the Administration claimed, the Constitution and laws did not apply—for indefinite detention without charge.[11] The Bush Administration detained thousands of people within the United States outside the criminal process through misuse of material witness warrants and immigration proceedings,[12] and began a program of secret electronic surveillance within the United States.[13] In short, the Administration sought to create a law-free zone in which it could do whatever it chose.

As part of the law-free zone strategy, the Bush Administration sought to bypass the courts by creating new tribunals that would be under the control of the executive branch and exempt from constitutional constraints. Characterizing the attacks as "war" did not necessarily require the creation of new courts. Military commissions had not been used in more than half a century—not in Korea, Vietnam, the First Gulf War, nor other contexts involving military forces, such as the 1983 Beirut barracks bombings.[14] All of the acts that have been charged as military commission offenses are crimes under the U.S. Code and could be prosecuted as such.[15] Those captured on the battlefield could have been treated as prisoners of war ("POW"s) and either

10. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001), *reprinted in* 10 U.S.C. § 801 (2006).

11. David Cole, *Enemy Aliens and American Freedoms*, NATION, Sept. 23, 2002, at 20, 22 (noting that the Bush Administration detained "suspected terrorists" without charge and claimed the President was authorized to enforce indefinite incarceration without judicial review); Neil A. Lewis, *Disagreement Over Detainees' Legal Rights Simmers*, N.Y. TIMES, Nov. 1, 2004, at A15 (indicating that the Administration's position remained unchanged—the "notion that the U.S. Constitution affords due process and other rights to enemy aliens captured abroad and confined outside the sovereign territory of the United States is contrary to law and history").

12. Bradley A. Parker, *Abuse of the Material Witness: Suspects Detained as Witnesses in Violation of the Fourth Amendment*, 36 RUTGERS L. REC. 22, 22–23, 25–26 (2009), http://lawrecord.com/files/36_Rutgers_L_Rec_22.pdf.

13. James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

14. *See Military Commissions History*, OFF. MIL. COMMISSIONS, http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx (last visited May 8, 2012) (indicating that Military Commissions had not been used in the United States after World War II until 9/11).

15. *See* Letter from Eric H. Holder, Jr., U.S. Att'y Gen., to Sen. Mitch McConnell (Feb. 3, 2010), *available at* http://www.justice.gov/cjs/docs/ag-letter-2-3-10.pdf (arguing that the criminal justice system is a valuable national security tool that should not be taken off the table in pursuing terrorism threats); Laura Pitter, *Guantanamo's System of Injustice*, SALON (Jan. 19, 2012), http://www.salon.com/2012/01/19/Guantanamos_system_of_injustice/singleton/ (asserting that the United States does not need the military commissions system because detainees can be prosecuted in federal courts for "virtually the same offenses").

detained under the laws of war or tried before courts-martial for war crimes,[16] or if they were not entitled to POW status they could have been tried under the domestic law of the place of their capture or conduct. The Bush Administration, however, did not want to be constrained by any law in dealing with detainees and did not want to dignify terrorists by recognizing them as POWs.[17] Furthermore, creating special new courts under military authority served to emphasize that the country was on a war footing.

The executive order authorizing trials by military commission came quite early on, suggesting that the commissions were expected to play an important role in the response to the attacks. On November 13, 2001, President Bush issued an executive order authorizing the creation of military tribunals as the exclusive means of trying suspected international terrorists.[18] A Defense Department order prescribing the procedures for military commissions was issued in March 2002.[19] But the list of crimes that could be charged was not promulgated until 2003,[20] and no one was charged until 2004.[21] Instead, high-profile suspected international terrorists were prosecuted in federal court.[22]

Within two months of the executive order decreeing that suspected terrorists should be tried *exclusively* in military commissions, three high-profile criminal prosecutions of alleged al Qaeda or Taliban members were brought in federal court. Zacharias Moussaoui, a French citizen who was already in a U.S. jail on 9/11, was alleged to have been scheduled to replace the original twentieth hijacker.[23] Moussaoui was indicted on December 11, 2001, went through lengthy trial proceedings, and pleaded guilty in March 2005.[24] He was sentenced to six consecutive life terms.[25] John Walker Lindh,

16. *See* Geneva Convention Relative to the Treatment of Prisoners of War, arts. 4, 99–108, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

17. Memorandum from Alberto R. Gonzales to George W. Bush, *supra* note 9.

18. Military Order of November 13, 2001, *supra* note 10, §§ 2, 4.

19. U.S. Dep't of Def., Military Comm'n Order No. 1 § 1 (Mar. 21, 2002) [hereinafter MCO], *available at* http://www.defense.gov/news/Mar2002/d20020321ord.pdf.

20. U.S Dep't of Def., Military Comm'n Instruction No. 2 (Apr. 30, 2003), *available at* http://www.defense.gov/news/May2003/d20030430milcominstno2.pdf.

21. Neil A. Lewis, *First War-Crimes Case Opens at Guantánamo Base*, N.Y. TIMES, Aug. 25, 2004, at A14.

22. *See, e.g.*, United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010) (affirming Moussaoui's convictions and sentences for life imprisonment for his conspiracy to commit terrorist attacks, including the 9/11 attacks).

23. *Moussaoui*, 591 F.3d at 266, 273.

24. *Id.* at 266–71. In 2006, Moussaoui was sentenced to life in prison, *id.* at 277–78, which he is serving at the supermax prison in Florence, Colorado. Carrie Johnson & Walter Pincus, *Supermax Prisons in U.S. Already Hold Terrorists*, WASH. POST, May 22, 2009, at A6.

25. *Moussaoui*, 591 F.3d at 277–78. Moussaoui was tried in the Eastern District of Virginia. *See id.* at 300.

an American citizen who was captured in Afghanistan in November 2001 after a firefight with Taliban forces, was interrogated in Afghanistan and on shipboard until the end of January 2002, at which point he was brought directly to the United States for indictment and trial.[26] He pleaded guilty in July 2002, in exchange for a sentence of twenty years.[27] British citizen Richard Reid, the "shoe bomber," was arrested in December 2001 after the plane he was trying to bomb over international waters was diverted to Boston, was charged with federal crimes, pleaded guilty in October 2002, and was sentenced to three life sentences without possibility of parole, to be served consecutively.[28]

Hundreds of defendants have been convicted of terrorism-related crimes in federal court since 9/11 and have been sentenced to lengthy prison terms,[29] which they are serving in supermax prisons under draconian conditions.[30] In contrast, only three persons were convicted by military commissions during the Bush Administration.[31] Only one of these was convicted after an adversary

26. United States v. Lindh, 212 F. Supp. 2d 541, 545–47 (E.D. Va. 2002); Duncan Campbell & Richard Norton-Taylor, *Prison Ships, Torture Claims, and Missing Detainees*, GUARDIAN, (June 1, 2008), http://www.guardian.co.uk/world/2008/jun/02/terrorism.terrorism. Lindh was also prosecuted in the Eastern District of Virginia. *Lindh*, 212 F. Supp. 2d at 541.

27. United States v. Lindh, 227 F. Supp. 2d 565, 566, 572 (E.D. Va. 2002). The plea bargain was offered just before a scheduled hearing on a motion to suppress Lindh's confession for being obtained under torture. *See* Dave Lindorff, *Chertoff and Torture*, NATION, Feb. 14, 2005, at 6, 6. Lindh had been shot in the leg, went without medical attention for more than two weeks, and was given morphine before the interview in which he confessed. Frank Lindh, *America's 'Detainee 001'—The Persecution of John Walker Lindh*, OBSERVER (July 9, 2011), http://www.guardian.co.uk/world/2011/jul/10/john-walker-lindh-american-taliban-father; *see also* Scott Horton, Traitor*: Six Questions for Jesselyn Radack,* HARPER'S MAG. (June 1, 2012), http://www.harpers.org/archive/2012/06/hbc-90008642 (describing Justice Department attorney Radack's advice that Lindh could not be questioned because he was represented by counsel, the Justice Department's concealment of this advice, and Radack's whistleblower complaint which ultimately led to her dismissal). He later attempted unsuccessfully to have his sentence reduced after Yasir Hamdi, among others, received much lower sentences. *Lindh Seeks Sentence Reduction*, CNN (Sept. 28, 2004), http://articles.cnn.com/2004-09-28/justice/lindh.commutation_1_taliban-american-yaser-hamdi-john-walker-lindh?_s=PM:LAW. His family's pleas for clemency or pardon from Presidents Bush and Obama have not been granted. Frank R. Lindh, *Bin Laden's Gone. Can My Son Come Home?*, N.Y. TIMES, May 22, 2011, at WK9; *Father of a U.S. Taliban Fighter Speaks Out*, N.Y. TIMES, Jan. 20, 2006, at A14 (reporting Lindh's father sought clemency from President Bush).

28. Pam Belluck, *Unrepentant Shoe Bomber Is Given a Life Sentence for Trying to Blow Up Jet*, N.Y. TIMES, Jan. 31, 2003, at A13; Richard A. Serrano, *'Shoe Bomber' Reid Given 3 Life Terms*, L.A. TIMES, Jan. 31, 2003, at 1.

29. David S. Kris, *Law Enforcement as a Counterterrorism Tool*, 5 J. NAT'L SECURITY L. & POL'Y 1, 14–16 (2011).

30. Johnson & Pincus, *supra* note 24.

31. This is not to suggest that criminal trials should be used because they result in higher conviction rates and harsher sentences. Criminal trials are more fair, more legitimate, and more

trial. David Hicks agreed to a plea bargain under which he served nine additional months in Australia;[32] Ali al-Bahlul boycotted his trial, instructing his lawyer not to put on a defense, and received a life sentence;[33] and Salim Hamdan was convicted of only one count and received a sentence of sixty-six months, with credit for sixty-one months already served.[34] Three more detainees charged during the Bush Administration have since pleaded guilty before military commissions.[35]

From the beginning, the military commissions have had more symbolic value than practical effect. The creation of special new tribunals confirmed that the country was "at war," reinforced the idea that this was "a different type of war"[36] in which old methods, old laws, and old legal constraints were inadequate, and gave assurance that the perpetrators would be treated harshly. Indeed, two recurring assumptions have persisted over the past decade: first, that the conviction rate and sentences would be higher in military commission proceedings than in criminal court because the commission proceedings would not follow the rules of evidence required in criminal prosecutions and would not have an independent judiciary, juries, or constitutional protections such as

true to American principles—though the proliferation of new offenses such as providing material support for terrorism and the prevalence of harsh sentencing have made them less fair than before. The record of terrorism prosecutions since 9/11 thoroughly refutes the argument that the criminal justice system cannot cope with terrorism trials.

32. William Glaberson, *Australian to Serve Nine Months in Terrorism Case*, N.Y. TIMES, Mar. 31, 2007, at A10.

33. David J.R. Frakt, *The Practice of Criminal Law in the Guantánamo Military Commissions*, 67 A.F. L. REV. 35, 71–72, 85 (2011); Peter Finn, *Guantanamo Jury Sentences Bin Laden Aide to Life Term*, WASH. POST, Nov. 4, 2008, at A10.

34. William Glaberson, *Panel Convicts bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1; *U.S. Sending a Convict Back to Yemen*, N.Y. TIMES, Nov. 25, 2008, at A23.

35. These are Ibrahhim Ahmed al-Qosi, who pleaded guilty under a plea agreement providing all but two years of his sentence would be suspended, Charlie Savage, *Guantánamo Detainee Pleads Guilty in Terrorism Case*, N.Y. TIMES, July 8, 2010, at A15 [hereinafter Savage, *Guantánamo Detainee Pleads Guilty*]; *The Guantánamo Docket: Ibrahim Ahmed Mahmoud al Qosi*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/detainees/54-ibrahim-ahmed-mahmoud-al-qosi (last visited June 16, 2012); Omar Khadr, who pleaded guilty under an agreement that he would serve no more than eight years and could be transferred to Canada after one year, Charlie Savage, *Delays Keep Former Qaeda Child Soldier at Guantánamo, Despite Plea Deal*, N.Y. TIMES, Mar. 25, 2012, at A24; and Noor Uthman Muhammed, who pleaded guilty under an agreement providing that he would serve no more than thirty-four months, *The Guantánamo Docket: Noor Uthman Muhammed*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/detainees/707-noor-uthman-muhammed (last visited June 16, 2012).

36. Remarks to Employees in the Pentagon and an Exchange with Reporters in Arlington, Virginia, 2 PUB. PAPERS 1117, 1119–20 (Sept. 17, 2001) ("I know that an act of war was declared against America. But this will be a different type of war than we're used to. . . . [T]his is a different type of enemy than we're used to. . . . [I]t's a new type of war.").

the right of confrontation, the right to counsel, and the requirement of proof beyond a reasonable doubt; and second, as Administration officials repeatedly emphasized, that it would be both dangerous and offensive to give suspected terrorists the procedural protections of the regular courts.

One reason for the Bush Administration's failure to actually follow through with military commission trials may have been that the government could achieve the same goals without bothering with trials. Until the summer of 2004, when the Supreme Court first held that due process and habeas protections applied to the war on terror,[37] the Administration claimed the power to detain suspected terrorists of any nationality without charge anywhere in the world, including the United States.[38] After the Supreme Court held that Guantánamo detainees had the right to habeas and to a review of the factual basis for their detention by a neutral tribunal,[39] the Bush Administration attempted to circumvent judicial review by establishing Combatant Status Review Tribunals ("CSRTs") as an alternative procedure for reviewing the factual basis for detention. CSRTs—composed of military personnel and largely devoid of procedural protections[40]—upheld the detention of virtually every Guantánamo prisoner.[41] For "high-value detainees" who were thought to have greater intelligence value and on whom the Administration sought

37. Hamdi v. Rumsfeld, 542 U.S. 507, 509, 537–38 (2004).

38. *See id.* at 510–11 (considering the government's argument that it could detain a U.S. citizen captured in Afghanistan indefinitely in a military brig within the United States); Rasul v. Bush, 542 U.S. 466, 470, 485 (2004) (considering the government's argument that it could detain foreign nationals designated as enemy combatants indefinitely at Guantánamo); Rumsfeld v. Padilla, 542 U.S. 426, 430–32 (2004) (considering the government's argument that by designating a U.S. citizen taken into custody within the United States as an "enemy combatant" it could detain him indefinitely in military custody within the United States); Janet Cooper Alexander, *John Yoo's* War Powers*: The Law Review and the World*, 100 CALIF. L. REV. 331, 334–37 (2012).

39. *Hamdi*, 542 U.S. at 509; *Rasul*, 542 U.S. at 483. The Court later held that Guantánamo detainees had a constitutional, not merely a statutory, right to habeas. Boumediene v. Bush, 553 U.S. 723, 732 (2008).

40. *See* Memorandum from Gordon England, Sec'y of the Navy, to Sec'y of Def. et al., Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba, Enclosure (1) (July 29, 2004), *available at* www.defense.gov/news/jul2004/d20040730comb.pdf.

41. Five hundred thirty-nine of the 581 reviews resulted in continued detention and classification as enemy combatants, a 92.7% rate of continued classification. *See Combatant Status Review Tribunal Summary*, U.S. DEP'T DEF., http://www.defense.gov/news/csrtsummary.pdf (last updated Feb. 10, 2009). For further information, see *Combatant Status Review Tribunals/Administrative Review Boards*, U.S. DEP'T DEF., http://www.defense.gov/news/Combatant_Tribunals.html (last updated Oct. 17, 2007)

freedom to use "enhanced interrogation techniques," the CIA continued to operate "black sites."[42]

If everyone determined to be an enemy combatant by a CSRT (that is, virtually everyone the government chose to bring to Guantánamo) could be held indefinitely, a trial would make no practical difference. In fact, a conviction by either a military commission or a court would result in a determinate sentence, which even if long would not be indefinite.

The experience so far under the military commissions reinforces this point. Of the seven defendants convicted in military commissions, two are now free and three more may be free or out of U.S. custody soon.[43] David Hicks pleaded guilty in 2007 to a single charge of providing material support for terrorism and was sentenced to nine months, which he served in Australia;[44] Hicks was released in December 2007.[45] Salim Hamdan, Osama bin Laden's driver and the petitioner in *Hamdan v. Rumsfeld*,[46] was convicted by a military jury of one count of providing material support, but was acquitted of conspiracy.[47] He was sentenced to five and a half years with credit for time served for all but five months.[48] He was transferred to Yemen and was released in January 2009.[49]

Three individuals who were charged during the Bush Administration have been convicted since he left office. Ibrahim al-Qosi, a Sudanese citizen who served as bin Laden's cook, pleaded guilty in 2010 to conspiracy and providing material support.[50] A military jury sentenced him to fourteen years, all but two years of which were suspended under a secret plea agreement.[51] He has completed serving his sentence and in July 2012 was returned to his native

42. Jonathan Karl, '*High-Value' Detainees Transferred to Guantanamo*, ABC NEWS (Sept. 6, 2006), abcnews.go.com/International/story?id=2400470#.TxsPXOVWp7M.

43. *By the Numbers*, MIAMI HERALD, http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html (last updated June 11, 2012).

44. Jackie Northam, *Judge Cuts Hicks' Sentence from 7 Years to 9 Months*, NPR (Mar. 30, 2007), http://www.npr.org/templates/story/story.php?storyId=9248761.

45. Raymond Bonner, *Australia Terrorism Detainee Leaves Prison*, N.Y. TIMES, Dec. 29, 2007, at A7. Hicks became "completely free" one year later, when he was released from a control order as well as a gag order prohibiting him from speaking to the press. *See* Raymond Bonner, *Full Freedom for Former Australian Detainee*, N.Y. TIMES, Dec. 21, 2008, at 12.

46. 548 U.S. 557 (2006).

47. Glaberson, *supra* note 34. After the Supreme Court struck down the existing military commissions in his case, *see Hamdan*, 548 U.S. at 567, Salim Hamdan was recharged and convicted. Glaberson, *supra* note 34.

48. *U.S. Sending a Convict Back to Yemen*, *supra* note 34.

49. *See Yemen Releases Former bin Laden Driver from Jail*, N.Y. TIMES, Jan. 12, 2009, at A9.

50. Savage, *Guantánamo Detainee Pleads Guilty*, *supra* note 35.

51. *The Guantánamo Docket: Ibrahim Ahmed Mahmoud al Qosi*, *supra* note 35.

Sudan.[52] The government had indicated that it may continue to hold him at Guantánamo as an unprivileged belligerent (enemy combatant) after he completed his sentence, but that did not happen.[53] Omar Khadr, captured at age fifteen and accused of throwing a grenade at a military convoy and killing an American serviceman, pleaded guilty mid-trial to five counts in exchange for a sentence of eight additional years;[54] after one year, he could be transferred to Canada to serve the remainder of his sentence and could apply for parole after serving two years and eight months.[55] That year is up, but statutory restrictions on transfer may keep him in Guantánamo.[56] Noor Uthman Muhammed, accused of being an al Qaeda trainer, was charged during the Bush Administration but never brought to trial.[57] In February 2011, he pleaded guilty to providing material support and conspiracy; all but thirty-four months were suspended in exchange for his promise to testify against others.[58] Noor and al-Qosi are both natives of Sudan, which is on the state sponsors of terrorism list; Congress has prohibited transferring even detainees who have cleared from being transferred to countries on that list.[59] Finally, Majid Khan, a "high-value detainee" formerly held in a CIA black site, pleaded guilty and agreed to testify in military commission trials in exchange for a reduced sentence.[60]

52. Carol Rosenberg, *Convicted al Qaida [sic] Operative Released from Guantanamo, Repatriated to Sudan in Plea Deal*, MIAMI HERALD (July 10, 2012), http://www.miamiherald.com/2012/07/10/v-fullstory/2890308/convicted-al-qaida-operative-released.html.

53. *See* Carol Rosenberg, *Pentagon: Captive Might Not Go Home After Sentence*, MIAMI HERALD (Feb. 15, 2011), http://www.miamiherald.com/2011/02/14/2067201/pentagon-captive-might-not-go.html.

54. *Times Topics: Omar Khadr*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/k/omar_khadr/index.html (last updated Nov. 2, 2010).

55. *Id.* A military jury returned a sentence of forty years, but that was superseded by the plea agreement. *Id.*

56. *See* Paul Koring, *Despite Plea-Bargain Deal, Omar Khadr to Spend His Tenth New Year's in Guantanamo*, GLOBE & MAIL (Dec. 22, 2011), http://www.theglobeandmail.com/news/world/worldview/despite-plea-bargain-deal-omar-khadr-to-spend-his-tenth-new-years-in-guantanamo/article2280409/. His transfer had been delayed by the requirement in the 2011 NDAA that the President certify to Congress that Canada is a suitable country to which to transfer him, though the U.S. Government appears willing to complete the transfer. *See id.*

57. Tyler Cabot, *Noor Uthman Muhammed's Day in Court*, ESQUIRE POL. BLOG (Feb. 16, 2012, 1:02 PM), http://www.esquire.com/blogs/politics/guantanamo-bay-trial-5245535.

58. *The Guantánamo Docket: Noor Uthman Muhammed*, *supra* note 35.

59. Rosenberg, *supra* note 53.

60. Peter Finn, *High-Value Guantanamo Bay Detainee Reaches Plea Agreement*, WASH. POST, Feb. 23, 2012, at A07; *see also* discussion *infra* notes 156–67.

Only one military commission defendant, Ali Hamza al Bahlul, a media specialist for al Qaeda, has received a life sentence after declining to cooperate with his trial or permit his lawyers to put on a defense.[61]

It seems remarkable that, after maintaining that military commissions were necessary because of the extreme dangerousness of the defendants, the government entered into plea agreements with five of them providing for only a short additional time in U.S. custody. And none of the seven was convicted of committing or planning an attack against the United States.

Moreover, in choosing to hold detainees indefinitely without charge or trial, the Administration surely understood what politicians and the public often do not: that dismissals and acquittals are possible in military commissions. A military commission jury acquitted Salim Hamdan of conspiracy while convicting him on a lesser charge.[62] Military judges have suppressed evidence, thrown out charges against Guantánamo detainees on jurisdictional and sufficiency of the evidence grounds,[63] and even dismissed charges because of torture and other ill-treatment;[64] they have also taken time served into account in setting sentences.[65] Military defense counsel have been

61. David Frakt, *Let the Military Commissions Die*, SALON (Aug. 4, 2009), http://www.salon.com/2009/08/04/military_commissions_3/. Frakt was the military defense lawyer for al Bahlul and other Guantánamo detainees. *Id.* Bahlul was convicted of providing material support for terrorism, solicitation, and conspiracy for serving as bin Laden's public relations director and personal secretary. *Military Commissions Cases*, OFF. MIL. COMMISSIONS, http://www.mc.mil/CASES/MilitaryCommissions.aspx (last visited July 4, 2012) (follow "Ali Hamza Ahmad Suliman al Bahlul" hyperlink). His conviction is under appeal in the military commission system. *Id.*

62. Glaberson, *supra* note 34.

63. *See, e.g.*, William Glaberson, *Military Judges Dismiss Charges for 2 Detainees*, N.Y. TIMES, June 5, 2007, at A1.

64. For example, Mohammed Jawad, who was either 12 (according to his family) or about 17 (according to the U.S. military) when he was captured, was charged with throwing a grenade at a passing military convoy. *Guantánamo Detainee Released*, N.Y. TIMES, Aug. 25, 2009, at A8. The presiding judge of his military commission ruled that his confession was inadmissible because he was coerced by threats against Jawad and his family, and he was released after his habeas petition was granted. *See id.* In another example, military commission charges against Mohammed al Qahtani, a sixth alleged 9/11 conspirator (in addition to those currently on trial), were dismissed in May 2008 after Susan Crawford, the convening authority for the commissions in the Bush Administration and a former judge of the U.S. Court of Appeals for the Armed Forces, found that he had been tortured. Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A1. Al Qahtani is presently being held indefinitely at Guantánamo. *See Al Qahtani v. Obama*, CENTER FOR CONST. RTS., http://ccrjustice.org/ourcases/current-cases/al-qahtani-v.-bush%2C-al-qahtani-v.-gates (last visited June 16, 2012); *The Guantánamo Docket: Mohammed al Qahtani*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/detainees/63-mohammed-al-qahtani (last visited Apr. 7, 2012).

65. David Hicks was given more than five years' credit for time served, *see supra* notes 44–45, and Salim Hamdan was given credit for sixty-one months. *U.S. Sending a Convict Back to*

zealous in advocating for their clients, and have testified before the Senate Judiciary Committee about the "rigged" nature of the proceedings.[66] A number of military prosecutors have spoken out against—and even have resigned to protest—attempted command influence and procedural unfairness.[67]

In contrast to the handful of military commission trials resulting in light sentences (when compared to criminal prosecutions during the same time), 171 men remain in indefinite custody at Guantánamo.[68] Eighty-nine of them continue to be held even though they have been approved for transfer to another county after the military's own tribunals found that they were not enemy combatants.[69] Some of these men have been imprisoned at Guantánamo since January 2002.[70] In fact, the Obama Administration has said that if Khalid Sheikh Mohammed, Abd al-Rahim al-Nashiri, and other military commission defendants are acquitted, they may still be held, indefinitely, as unlawful belligerents.[71]

II. THE RULE OF LAW AND ITS DISCONTENTS

A. The Bush Administration

Yemen, *supra* note 34. The 2009 MCA attempts to forbid consideration of time served in sentencing. U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS II-161 (2010), *available at* http://www.defense.gov/news/d2010manual.pdf ("Any period of confinement included in the sentence of a military commission begins to run *from the date the sentence is adjudged* . . . .") (emphasis added).

66. Pamela Hess, *Lawyers Criticize Bush Trials Plan*, UPI.COM (July 13, 2006, 4:01 PM), http://www.upi.com/Business_News/Security-Industry/2006/07/13/Lawyers-criticize-Bush-trials-plan/UPI-38921152820894/.

67. Those who resigned included former chief prosecutor Colonel Morris D. Davis and former prosecutor Lieutenant Colonel Darrel J. Vandeveld. *See* William Glaberson, *Ex-Prosecutor Tells of Push by Pentagon on Detainees*, N.Y. TIMES, Apr. 29, 2008, at A12 [hereinafter Glaberson, *Ex-Prosecutor Tells of Push*]; William Glaberson, *Guantánamo Prosecutor Is Quitting in Dispute Over a Case*, N.Y. TIMES, Sept. 25, 2008, at A20; Bob Herbert, *How Long is Long Enough?*, N.Y. TIMES, June 30, 2009, at A21.

68. *See By the Numbers*, *supra* note 43; *The Guantánamo Docket*, N.Y. TIMES, http://projects.nytimes.com/guantanamo/ (last updated Feb. 15, 2012).

69. *Guantánamo By the Numbers: What You Should Know & Do About Guantánamo*, CENTER FOR CONST. RTS., http://ccrjustice.org/files/Guantanamo_Numbers_18Jan2012.pdf (last updated Jan. 18, 2012).

70. *See The Guantánamo Docket*, *supra* note 68.

71. *See* Adam Serwer, *The Dilemma of Post-Acquittal Detentions*, AM. PROSPECT (July 9, 2009), http://prospect.org/article/dilemma-post-acquittal-detentions (reporting on the testimony of Defense Department General Counsel Jeh Johnson before the Senate Armed Services Committee, who stated in response to a question, "If, for some reason, [a detainee is] not convicted for a lengthy prison sentence, then, as a matter of legal authority, I think it's our view that we would have the ability to detain that person").

Although historically military commissions were governed by the same rules as courts-martial,[72] the military commission procedures initially established by executive order were dramatically devoid of procedural protections for defendants. In the order establishing the commissions, President Bush declared that "it is not practicable to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[73] The implementing regulations dispensed with virtually all of the protections known to the criminal law.

Defendants and civilian counsel could be excluded from the trial and could be denied the right even to see the evidence against defendants if the proceeding were closed.[74] Appointed military counsel would be permitted to see such evidence, but could be prohibited from discussing it with the accused or civilian counsel.[75] The accused and his lawyer could also be denied access to classified evidence that is admitted, if the presiding officer determined this would not deny a fair trial.[76] Instead of following the rules of evidence, the presiding officer could admit any evidence that "would have probative value to a reasonable person."[77] Hearsay and coerced testimony could be admitted, and live testimony need not be sworn.[78] Evidence obtained by coercion or abuse would be admissible if the judge determined that it was probative, and a majority of the commission could overturn the presiding officer's decision that evidence was not probative.[79] Although the standard of proof remains "beyond a reasonable doubt," in noncapital cases, a nonunanimous verdict is

72. JENNIFER K. ELSEA, CONG. RESEARCH SERV., R40752, THE MILITARY COMMISSIONS ACT OF 2006: BACKGROUND AND PROPOSED AMENDMENTS 1 (2009), *available at* http://assets.opencrs.com/rpts/R40752_20090908.pdf. For the history of the Military Commissions Act of 2006, see generally *id.*

73. Military Order of November 13, 2001, *supra* note 10, § 1(f).

74. *See* MCO, *supra* note 19, § 6(B)(3).

75. *Id.* ("Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof.").

76. *See id.* §§ 6(B)(1), (3) ("Grounds for closure include the protection of information classified or classifiable[;] . . . information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests.").

77. *Id.* § 6(D)(1).

78. *See id.* §§ 6(D)(2)(b), 6(D)(3).

79. *See* MCO, *supra* note 19, § 6(D)(1).

permissible to convict.[80] There was no right to judicial review for sentences of less than ten years.[81]

The composition of the commission provided scant procedural protections for the accused. Although the presiding officer had to be a lawyer, he or she was not required to have had experience as a military judge.[82] Unlike courts-martial under the Uniform Code of Military Justice ("UCMJ"), neither the presiding officer, other members of the commission, nor military prosecutors would be structurally isolated from command influence.[83] Indeed, Morris Davis, the former chief prosecutor for the military commissions, testified as a defense witness in Salim Hamdan's commission proceedings, while still on active duty, that he had been subject to command pressure in Hamdan's case and others on charging decisions and the use of coerced testimony.[84] The presiding officer of Hamdan's military commission eventually barred Brigadier General Thomas W. Hartmann, legal adviser to the convening authority, from any further role in Hamdan's case because his action directing the use of "evidence that the Chief Prosecutor considered tainted and unreliable, or perhaps obtained as the result of torture or coercion, was clearly an effort to influence the professional judgment of the Chief Prosecutor"[85] and because "[Hartmann]'s ability to continue to perform his duties in a neutral and objective manner" had been "seriously called into question."[86]

Military defense counsel charged that the commissions were "a half-hearted and disorganized effort by a skeleton group of relatively inexperienced attorneys to prosecute fairly low-level accused in a process that appears to be rigged."[87] Mohammed Jawad's former military prosecutor testified as a defense witness in Jawad's military commission proceedings that it was impossible to obtain a fair trial in the military commission system and that

80. *Id.* at § 6(F).

81. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(3)(B), 119 Stat. 2739, 2743 (codified as amended in scattered sections of 10, 28, and 42 U.S.C. (2006)); Hamdan v. Rumsfeld, 548 U.S. 577, 650 (2006) (Kennedy, J., concurring in part).

82. *See* MCO, *supra* note 19, at § 4(A)(4).

83. *See Hamdan*, 548 U.S. at 650 (Kennedy, J., concurring in part).

84. *See* Glaberson, *supra* note 67.

85. United States v. Hamdan, No. D-026, at 1, 11, 12 (Military Comm'n May 9, 2008) (Ruling on Motion to Dismiss (Unlawful Influence)) [hereinafter Hamdan Ruling on Motion to Dismiss], *available at* http://www.defense.gov/news/May2008/D026.pdf; *see* William Glaberson, *Judge's Guantánamo Ruling Bodes Ill for System*, N.Y. TIMES, May 11, 2008, at A26.

86. Hamdan Ruling on Motion to Dismiss, *supra* note 85, at 12.

87. Hess, *supra* note 66 (recounting a 2004 email written by Air Force Captain John Carr).

military investigators denied exculpatory evidence not only to the defense but also to the prosecution.[88]

Lieutenant Commander Charles Swift testified before the Senate Judiciary Committee that prosecutors were not required to disclose to defense lawyers exculpatory evidence held by other agencies, such as the CIA.[89] Documents that were disclosed were designated "protected information" and could not be disclosed to the client.[90] Because "rank hearsay" was admissible, the prosecution's case consisted mainly of testimony by law enforcement officials summarizing what others said—and the source witnesses were not made available for cross-examination.[91] The defense did not have the right to call witnesses, but had to ask the prosecution for permission, which was often refused.[92] Defendants, including Hicks and Hamdan, were excluded from their own trials during jury selection.[93] Swift also charged that the "handpicked" commissions and review panels were "stacked" in favor of the prosecution.[94]

The Bush Administration hewed determinedly to its law-free strategy, responding to setbacks in the Supreme Court by attempting to withdraw federal court jurisdiction to hear habeas claims (or "any other action") by detainees[95] and by limiting protections to the minimum it thought the Court might permit.[96] As a practical matter, these efforts seem to have been intended primarily to preserve the system of indefinite detention, for the Administration made almost no use of military commissions. But *Hamdan* was followed by the Military Commissions Act of 2006 ("2006 MCA"), which attempted to establish military commissions as "regularly constituted court[s]" (and therefore in compliance with the Geneva Conventions) and declared that the Geneva Conventions did not provide a "source of rights" for an alien unlawful

88. Darrel J. Vandeveld, *I Was Slow to Recognize the Stain of Guantanamo*, WASH. POST (Jan. 18, 2009), http://www.washingtonpost.com/wp-dyn/content/article/2009/01/14/AR2009011402319.html.

89. Hess, *supra* note 66 (reporting Colonel Swift's testimony before the Senate Judiciary Committee).

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. Hess, *supra* note 66.

95. Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(1)–(2), 119 Stat. 2739, 2742 (codified as amended in scattered sections of 10, 28, and 42 U.S.C. (2006)); Military Order of November 13, 2001, *supra* note 10, § 7(b).

96. *See* Laura A. Dickinson, *Using Legal Process to Fight Terrorism: Detentions, Military Commissions, International Tribunals, and the Rule of Law*, 75 S. CAL. L. REV. 1407, 1410 (2002) (describing the protections that the Bush Administration implemented).

enemy combatant in the military commissions system.[97] The 2006 MCA moderated some of the more egregious features of the prior regulations, but still failed to provide essential protections that would be taken for granted in federal court.

B. The Obama Administration

President Obama campaigned on a promise to close Guantánamo and shut down the military commissions,[98] and on the first day of his Administration he signed executive orders directing that Guantánamo be closed within a year,[99] requiring that all interrogations in the context of armed conflict be conducted in accordance with the standards of the Army Field Manual,[100] creating a task force to review the cases of all the Guantánamo detainees with a view to releasing, transferring, or prosecuting them in civilian courts, and closing down the military commissions pending the task force's report.[101] He also announced that the alleged mastermind of the 9/11 attacks, Khalid Sheikh Mohammed, and four others, would be tried on criminal charges in federal court in New York.[102] The President and Attorney General Eric Holder have continued to insist that criminal prosecutions are preferable to military trials and that civilian courts are fully able to try suspected terrorists in accordance with the criminal law.[103] They have been steadily forced to fall back from these goals, however, by political opposition and congressional restrictions.[104]

Vigorous political opposition to the proposed trials was triggered in part by the trial of Ahmed Ghailani, in which a federal judge ruled certain evidence inadmissible as fruit of the poisonous tree of torture, and a federal jury

97. Military Commissions Act of 2006, Pub. L. No. 109-366, § 948b(f)–(g), 120 Stat. 2600, 2602 (codified 10 U.S.C. § 948b).

98. Sen. Barack Obama, *supra* note 5 ("As President, I will close Guantanamo, reject the Military Commissions Act, and adhere to the Geneva Conventions.").

99. Exec. Order No. 13,492, *supra* note 6, § 3. President Obama also ordered the CIA to close all of its detention facilities worldwide, Exec. Order No. 13,491, 3 C.F.R. 199 § 4(a) (2009), established Common Article 3 of the Geneva Conventions as the "Minimum Baseline" for treatment of individuals detained in "any armed conflict," and explicitly directed that they be treated in accordance with the Torture Act, the Detainee Treatment Act (prohibiting cruel, inhuman, or degrading treatment), and the Convention Against Torture, *id.* § 3(a).

100. Exec. Order No. 13,491, *supra* note 99, § 3(c).

101. Exec. Order No. 13,492, *supra* note 6, §§ 4, 7.

102. Savage, *U.S. To Try Avowed 9/11 Mastermind*, *supra* note 7.

103. Jason Ryan & Huma Khan, *In Reversal, Obama Orders Guantanamo Military Trial for 9/11 Mastermind Khalid Sheikh Mohammed* (Apr. 4, 2011), http://abcnews.go.com/Politics/911-mastermind-khalid-sheikh-mohammed-military-commission/story?id=13291750#.TzSF9kxWp7M.

104. *Id.*

acquitted the defendant on all but one charge[105] (though the defendant received a life sentence).[106] Fear of acquittal eventually led to congressional funding restrictions that made it impossible to transfer any Guantánamo detainees to the United States for trial.[107]

C. Congress Takes the Wheel

Congress passed the first funding restrictions in June 2009, five months before the announcement that the 9/11 conspirators would be tried in New York.[108] These provisions required forty-five days notice to Congress before transferring detainees from Guantánamo to the United States for purposes of detention or prosecution.[109] Similar restrictions were attached to other spending bills during the remainder of 2009.[110] After the announcement that Khalid Sheikh Mohammed would be tried in New York, Congress responded with a provision in the 2011 National Defense Authorization Act prohibiting the use of funds authorized in the act to transfer or release Khalid Sheikh Mohammed or any other noncitizen held at Guantánamo into the United States.[111] Rather than simply requiring advance notice, this provision

105. Benjamin Weiser, *U.S. Jury Acquits Former Detainee of Most Charges*, N.Y. TIMES, Nov. 18, 2010, at A1.

106. Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES, Jan. 26, 2011, at A18.

107. *See* Nicolas L. Martinez, Note, *Pinching the President's Prosecutorial Prerogative: Can Congress Use Its Purse Power to Block Khalid Sheikh Mohammed's Transfer to the United States?*, 64 STAN. L. REV. 1469, 1471, 1474–78 (2012). Because Guantánamo is not within the jurisdiction of any U.S. district court, prisoners would have to be transferred in order to be tried. *See id.*

108. *See* Supplemental Appropriations Act, 2009, Pub. L. No. 111-32, § 14103(c), 123 Stat. 1859, 1920 (preventing funds from being used to transfer detainees from Guantánamo to the United States for trial after June 24, 2009); Savage, *U.S. To Try Avowed 9/11 Mastermind*, *supra* note 7 (noting that Obama's Administration did not announce the trial of Khalid Sheikh Mohammed in federal court until November of 2009).

109. Supplemental Appropriations Act, 2009 § 14103(c)–(d). President Obama refrained from objecting to § 14103 in his signing statement, even though he demurred to five other sections contained in the same bill. Presidential Statement on Signing the Supplemental Appropriations Act, 2009, 2009 DAILY COMP. PRES. DOC. 512 (June 24, 2009).

110. *See, e.g.*, Department of Defense Appropriations Act, 2010, Pub. L. No. 111-118, § 9011, 123 Stat. 3409, 3466–68 (2009).

111. Ike Skelton National Defense Authorization Act for Fiscal Year 2011, Pub. L. No. 111-383, § 1032, 124 Stat. 4137, 4351. The section states:

> None of the funds authorized to be appropriated by this Act for fiscal year 2011 may be used to transfer, release, or assist in the transfer or release to or within the United States, its territories, or possessions of Khalid Sheikh Mohammed or any other detainee who—

prohibited the use of funds to bring Guantánamo detainees to the United States for any purpose, and it referred to Mohammed by name.[112] The restriction did not apply to individuals held by other agencies, such as the CIA, or in locations other than Guantánamo, but it did cover the individuals who were scheduled for trial in New York.[113] Though President Obama signed the bill, he criticized it as "a dangerous and unprecedented challenge to critical executive branch authority to determine when and where to prosecute Guantanamo detainees, based on the facts and the circumstances of each case and our national security interests."[114] Notably, up until then, Obama had carefully avoided asserting the constitutional prerogatives of the executive as a legal basis for his actions with respect to detainees.

Without the means to bring detainees to the United States for trial,[115] the government announced that military commissions would be resumed.[116] Acknowledging that the funding ban was "unlikely to be repealed in the immediate future," Attorney General Holder officially referred the 9/11 prosecutions to the Department of Defense in order to eliminate any further delay.[117] Eleven days after that announcement, Congress passed the 2011 Defense Appropriations Act prohibiting the use of funds appropriated for that act as well as "any other Act" to transfer noncitizen detainees from Guantánamo.[118]

Before the official resumption of military commission prosecutions, the President sought legislation to improve the existing commission procedures,[119]

(1) is not a United States citizen or a member of the Armed Forces of the United States; and

(2) is or was held on or after January 20, 2009, at United States Naval Station, Guantanamo Bay, Cuba, by the Department of Defense.

Id.

112. *Id.*

113. *See id.*

114. Presidential Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, 2011 DAILY COMP. PRES. DOC. 10 (Jan. 7, 2011).

115. No federal court has jurisdiction over Cuba; a criminal trial would have to be held within the United States or one of its possessions.

116. Charlie Savage, *In a Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1 [hereinafter Savage, *In a Reversal*].

117. *Id.*

118. Department of Defense and Full-Year Continuing Appropriations Act, 2011, Pub. L. No. 112-10, § 1112, 125 Stat. 38, 104–05. In a signing statement, President Obama objected to these provisions as "dangerous and unprecedented" but did not say they were unconstitutional. *See* Presidential Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 2011 DAILY COMP. PRES. DOC. 263 (Apr. 15, 2011).

119. Presidential Statement on Military Commissions, 2009 DAILY COMP. PRES. DOC. 364 (May 15, 2009). The President had taken the position that military commissions were appropriate to try violations of the laws of war. *See* Barack Obama, U.S. President, Remarks by the President

resulting in the Military Commissions Act of 2009 ("2009 MCA").[120] Though the 2009 MCA improved many commission procedures by making them more like regular courts-martial,[121] providing additional procedural protections such as tightened hearsay rules,[122] barring the use of testimony obtained by cruel, inhuman, or degrading treatment,[123] and providing increased resources for the defense,[124] the commissions remain fundamentally flawed. Even the improved procedures under the 2009 MCA fall substantially short of the protections afforded in criminal prosecutions. As one example, the prosecution may rely on unclassified summaries of classified evidence, and neither the defendants nor their lawyers are permitted to view the classified evidence.[125] This provision has been implemented in the trial of Abd al-Rahim al-Nashiri.[126] Moreover, the military claimed authority to examine attorney-client communications, something that would not be permitted in federal court.[127] Nevertheless, commission proceedings against Nashiri,[128] Khalid Sheikh Mohammed, and others have continued.[129]

on National Security (May 21, 2009) [hereinafter Remarks by the President on National Security], *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

120. Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574–2614 (codified as amended at 10 U.S.C. §§ 948a–950t (2010)).

121. 10 U.S.C. § 949a (Supp. IV 2011).

122. *Id.* § 949a(b)(3)(D).

123. *Id.* § 948r. While statements by the accused cannot be admitted unless they were "voluntary," statements by others are not within this prohibition, nor is evidence derived from coerced statements, or evidence obtained by "clean teams" from untainted sources to duplicate tainted evidence. *See* Jane Mayer, *The Trial: Eric Holder and the Battle over Khalid Sheikh Mohammed*, NEW YORKER, Feb. 15–22, 2010, at 52, 58 (noting the use of such "clean teams" in Khalid Sheikh Mohammed's case).

124. 10 U.S.C. § 949j. The statute also replaced the provision that the Geneva Conventions could not be used as a source of rights with a provision declaring that the Conventions do not create a cause of action. *Compare* Military Commissions Act of 2006, Pub. L. No. 109-366, § 948b(g), 120 Stat. 2600, 2602 (codified 10 U.S.C. § 948b), *with* 10 U.S.C. at § 948b(e).

125. 10 U.S.C. §§ 949p-1 to p-7; Warren Richey, *USS Cole Bombing: Judge Allows Prosecution to Use 'Sanitized' Evidence*, CHRISTIAN SCI. MONITOR (Jan. 18, 2012, 7:39 PM), http://www.csmonitor.com/USA/Justice/2012/0118/USS-Cole-bombing-Judge-allows-prosecution-to-use-sanitized-evidence.

126. Richey, *supra* note 125.

127. *Id.*

128. *See id.*

129. Press Release, Eric H. Holder, Jr., U.S. Att'y Gen., Statement of the Attorney General on the Prosecution of the 9/11 Conspirators (Apr. 4, 2011) [hereinafter AG Statement on the Prosecution of the 9/11 Conspirators], *available at* http://www.justice.gov/iso/opa/ag/speeches/2011/ag-speech-110404.html (announcing that Khalid Sheikh Mohammed, Walid Muhammad Bin Attash, Ramzi Bin Al Shibh, Ali Abdul-Aziz Ali, and Mustafa Ahmed Al Hawsawi would be tried by military commission).

Though Holder and Obama considered it very important to close down Guantánamo and stop or minimize the use of military commissions, they faced two problems that have turned out to be insuperable. First, the Bush Administration torture policies[130] meant that the United States was holding some number of prisoners who actually were serious terrorists, but who could not be tried in either civilian or military courts because the evidence obtained against them was obtained through illegal means.[131] Both for political and national security reasons, the President could not release such individuals, and it appears that he anticipated that some prisoners would therefore continue to be held indefinitely without charge.[132] This is the "here's another nice mess you've gotten us into" problem.

The number of individuals who inevitably fall into this category is unclear, however. The decision to try Khalid Sheikh Mohammed in federal court, despite his having been waterboarded 183 times,[133] indicates that the Justice Department was confident it had sufficient untainted evidence to secure his conviction, as well as that of the other alleged 9/11 conspirators. Additionally, the Administration has recently been entering into plea bargains with detainees in exchange for promises to testify, evidently to avoid the need to rely on evidence obtained through torture or other illegal treatment.[134]

130. Memorandum from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, Re: Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340–2340A, at 3–4 (Aug. 1, 2002), *available at* http://www.justice.gov/olc/docs/memo-gonzales-aug2002.pdf (requiring "specific intent" for a finding of torture, thus allowing physical mistreatment without a finding of torture). These "Torture Memos" were later repudiated by the Obama Administration. Exec. Order No. 13,491, *supra* note 99, § 3(c). For a discussion of the legal opinions of the Office of Legal Counsel during the early part of the Bush Administration, see generally Alexander, *supra* note 38.

131. 10 U.S.C. § 948r (Supp. IV 2011) (excluding evidence obtained by torture in the military commission context); *see, e.g.*, Sims v. Georgia, 389 U.S. 404, 407 (1967) (excluding evidence obtained by mistreatment or the threat of mistreatment in the federal court context). The President explained that there were

> detainees at Guantanamo who cannot be prosecuted yet who pose a clear danger to the American people. . . . [T]here may be a number of people who cannot be prosecuted for past crimes, in some cases because evidence may be tainted, but who nonetheless pose a threat to the security of the United States. . . . Let me repeat: I am not going to release individuals who endanger the American people.

Remarks by the President on National Security, *supra* note 119.

132. Remarks by the President on National Security, *supra* note 119.

133. *Times Topics: Khalid Sheikh Mohammed (Guantánamo 9/11 Attacks Trial)*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/m/khalid_shaikh_mohammed/index.html (last updated May 7, 2012).

134. *See infra* notes 156–67 and accompanying text (discussing the plea agreement of Majid Khan, a former "high value detainee" who pleaded guilty and agreed to testify in military commission trials in exchange for a sentence of 19 to 25 years).

Second, Republicans realized that opposing criminal trials was a political winner for them. This strategy may have blindsided the Administration, since both the Clinton and Bush Administrations had conducted many successful terrorism trials[135] and the prospect of trying the planners of the 9/11 attacks in New York City seemed to Holder a triumph for American democracy.[136] It was widely thought that the resumption of military commissions "marked a significant moment of capitulation in the Obama administration's largely frustrated effort to dismantle counterterrorism architecture left behind by former President George W. Bush."[137]

Moreover, powerful voices inside the Administration, such as Rahm Emanuel, were arguing that fighting for criminal prosecutions was a distraction from other issues and would in fact be counterproductive politically.[138] By the time the task force report was issued in 2010, [139] it became clear that it would be difficult to bring defendants to the United States for trial. Thus Obama and Holder were forced to turn to military commissions or have no trials at all. As Holder stated,

> [W]e must face a simple truth: those restrictions are unlikely to be repealed in the immediate future.
>
> And we simply cannot allow a trial to be delayed any longer for the victims of the 9/11 attacks or for their family members who have waited for nearly a decade for justice.[140]

Still, the President and the Attorney General continued to advocate for criminal trials rather than military tribunals. Holder in particular stated strongly and repeatedly that criminal trials were preferable, that he was

135. *See, e.g.*, United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010) (affirming Zacarias Moussaoui's convictions and sentences for his involvement in the 9/11 attacks, which occurred during the Bush Administration); Jo Thomas, *Appeals Process Could Delay Execution for Many Years*, N.Y. TIMES, June 14, 1997, at 1 (reporting the jury's unanimous vote for the death penalty for Timothy McVeigh, which occurred during the Clinton Administration); Jo Thomas, *Verdict is Cheered*, N.Y. TIMES, June 3, 1997, at A1 (reporting the conviction of Timothy McVeigh).

136. *See* Savage, *U.S. To Try Avowed 9/11 Mastermind*, *supra* note 7.

137. Savage, *In a Reversal*, *supra* note 116.

138. *See* RON SUSKIND, CONFIDENCE MEN: WALL STREET, WASHINGTON, AND THE EDUCATION OF A PRESIDENT 380 (2011).

139. U.S. DEP'T OF JUSTICE ET AL., FINAL REPORT: GUANTANAMO REVIEW TASK FORCE (2010), *available at* http://www.justice.gov/ag/guantanamo-review-final-report.pdf [hereinafter FINAL REPORT].

140. AG Statement on the Prosecution of the 9/11 Conspirators, *supra* note 129; Robert Chesney, *AG Holder's Statement on the Prosecution of the 9/11 Conspirators, and Link to the SDNY Indictment and Nolle Prosequi Filing*, LAWFARE BLOG (Apr. 4, 2011, 2:28 PM), http://www.lawfareblog.com/2011/04/ag-holders-statement-on-the-prosecution-of-the-911-conspirators-and-link-to-the-sdny-indictment/.

convinced that convictions could and would be obtained, and that criminal trials would vindicate the American system.[141] In referring the cases against Khalid Sheikh Mohammed and four alleged co-conspirators to a military commission, Holder stated that the case was "one of the most well-researched and documented cases I have ever seen in my decades of experience as a prosecutor"[142] and that "the best venue for prosecution was in federal court. I stand by that decision today."[143] He declared that the "unwise and unwarranted restrictions" imposed by Congress "undermine our counterterrorism efforts . . . have taken one of the nation's most tested counterterrorism tools off the table and tied our hands . . . ."[144] Obama repeated in signing statements that he wanted to eliminate military trials and that preventing the government from choosing criminal prosecutions tied its hands in the fight against terrorism.[145] John Brennan, the President's chief counterterrorism adviser, has stated repeatedly in strong terms, with apparent Administration approval, that no additional prisoners will be brought to Guantánamo.[146]

The Administration found ways to implement criminal prosecutions rather than military commissions. For example, Ahmed Abdulkadir Warsame was held and interrogated on a Navy ship for two months and then was brought directly to New York to face criminal charges.[147] Because he had not been in custody at Guantánamo this procedure did not violate the spending restrictions that were then in place[148] (nor would they have violated the 2012 NDAA as ultimately passed).[149] Suspected terrorists who were captured inside the United States—such as Faisal Shahzad, the "Times Square Bomber"[150] and

141. *See, e.g.*, AG Statement on the Prosecution of the 9/11 Conspirators, *supra* note 129.

142. *Id.*

143. *Id.*

144. *Id.*

145. *See, e.g.*, Presidential Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act, 2011, *supra* note 118; Presidential Statement on Military Commissions, *supra* note 119.

146. *See, e.g.*, John O. Brennan, Assistant to the President for Homeland Sec. & Counterterrorism, Remarks at Harvard Law School Program on Law and Security: Strengthening Our Security by Adhering to Our Values and Laws (Sept. 16, 2011) (transcript available at http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an).

147. Ken Dilanian, *Terror Suspect Held on Ship for Months*, L.A. TIMES, July 6, 2011, at A1.

148. *See supra* notes 108–13 and accompanying text (describing the spending restrictions).

149. *See* National Defense Authorization Act for Fiscal Year 2012, Pub. L. No 112-81, §1022, 125 Stat. 1298, 1563 (2011).

150. Shahzad, a naturalized U.S. citizen who admitted to being a member of the Taliban, was indicted in New York, pleaded guilty, and was sentenced to life in prison. Michael Wilson, *Judgment Day in Two High-Profile Cases*, N.Y. TIMES, Oct. 6, 2010, at A25.

Umar Farouk Abdulmutallab, the "Underwear Bomber"[151]—were handled within the criminal justice system.

Nevertheless, some military commission prosecutions that were initiated during the Bush Administration were permitted to go forward. The first trial to begin during the Obama Administration was that of Omar Khadr, the child soldier accused of killing an American soldier with a grenade.[152] The military judge ruled—perhaps unexpectedly—that Khadr's confession was admissible even though it had been obtained through grotesquely coercive threats.[153] Though officials in the White House, Justice Department, and Pentagon were reported to have preferred a plea bargain to a trial, other cases had been stayed, bringing the Khadr case to the front of the line,[154] and officials feared that intervening might violate the 2009 MCA's prohibition on command influence.[155]

The first military commission case to be brought entirely during the Obama Administration is that of Majid Khan, a "high-value detainee" who was held in the CIA's secret prisons from 2003 to 2006,[156] when he was transferred to Guantánamo.[157] Khan, a native of Pakistan who had held a U.S. green card and graduated from a suburban Baltimore high school, was accused of murder, attempted murder, spying, and providing material support to terrorism.[158] Khan allegedly worked closely with Khalid Sheikh Mohammed, and plotted to assassinate former Pakistani President Pervez Musharraf and to commit other terrorist acts.[159] Eight days after announcing the charges, the Pentagon announced that Khan had agreed to plead guilty and testify in other military commission trials for the next four years, after which he would be eligible for

151. Abdulmutallab, a Nigerian citizen who attempted to blow up a plane on Christmas Day, 2009 and admitted to working on behalf of al Qaeda, pleaded guilty in federal court in Detroit and was sentenced to four consecutive life terms. Nick Bunkley, *Would-Be Plane Bomber Is Sentenced to Life in Prison*, N.Y. TIMES, Feb. 17, 2012, at A3.

152. Charlie Savage, *U.S. Is Wary of First Case for Tribunal*, N.Y. TIMES, Aug. 28, 2010, at A1 [hereinafter Savage, *U.S. Is Wary*].

153. Khadr, who may have been as young as fifteen when he was captured, was told that an Afghan youth who had not cooperated with interrogators had been sent to prison where he died after being raped. *Id.*

154. *Id.*

155. *Id.*

156. Finn, *supra* note 60.

157. Carol Rosenberg, *Pentagon Charges Former U.S. Resident at Guantánamo in Terror Plot*, MIAMI HERALD (Feb. 14, 2012), http://www.miamiherald.com/2012/02/14/2641868/pentagon-charges-former-us-resident.html. Khan is also accused of serving as an al Qaeda courier and conspiring to blow up gas stations in the United States. He faces a maximum sentence of life in prison. *Id.*

158. *Id.*; Finn, *supra* note 60.

159. Finn, *supra* note 60.

transfer to Pakistan.[160] Presumably he will testify at the trials of Mohammed, Ali, and perhaps other alleged 9/11 conspirators.

Khan pleaded guilty to five charges, each carrying a possible life sentence.[161] Under the plea agreement, he will receive a maximum sentence of twenty-five years.[162] Sentencing will be deferred for four years,[163] after which, if he cooperates, he will receive a sentence "not to exceed 19 years."[164] Khan stipulated to conspiring with Khalid Sheikh Mohammed to assassinate the then-president of Pakistan, poison water reservoirs, explode underground gasoline storage tanks, and serve as an al Qaeda sleeper agent,[165] and to conspiring with Ali Abdul al-Aziz Ali, another alleged 9/11 conspirator charged along with Mohammed,[166] and Aafia Siddiqui, who was convicted of attempting to murder her interrogators in Afghanistan and sentenced to 86 years.[167]

The stakes in the struggle between Congress and the President over control of detainee policy rose in May 2011, when the Republican-led House passed a version of the 2012 NDAA that contained sweeping new restrictions on the President's ability to institute criminal prosecutions. The House bill would have allowed military detention of any suspected terrorist, even U.S citizens captured inside the United States, would have required military detention for most noncitizen terrorism suspects, and would have required any foreign national who has engaged in certain terrorism-related conduct to be tried by military commissions.[168] Federal court would no longer be an option for these individuals. The House version, moreover, would have extended the congressional funding restrictions to the transfer of *all* non-American detainees

160. *Id.*

161. Offer for Pretrial Agreement ¶ 20, United States v. Khan (Military Comm'n Feb. 13, 2012) [hereinafter Offer for Pretrial Agreement], *available at* http://www.lawfareblog.com/wp-content/uploads/2012/02/Khan-AE012-PTA.pdf.

162. Appendix A to Offer for Pretrial Agreement ¶ 1, United States v. Khan (Military Comm'n Feb. 13, 2012) [hereinafter Appendix A to Offer for Pretrial Agreement], *available at* http://www.lawfareblog.com/wp-content/uploads/2012/02/Khan-AE013-Appendix-A.pdf.

163. Offer for Pretrial Agreement, *supra* note 161, ¶ 18.

164. Appendix A to Offer for Pretrial Agreement, *supra* note 162, ¶ 3.

165. Stipulation of Fact ¶ 12, United States v. Khan (Military Comm'n Feb. 13, 2012) [hereinafter Stipulation of Fact], *available at* http://www.lawfareblog.com/wp-content/uploads/2012/02/Khan-PE001-Stipulation-of-Fact.pdf.

166. *Id.* ¶ 43; AG Statement on the Prosecution of the 9/11 Conspirators, *supra* note 129.

167. Stipulation of Fact, *supra* note 165, ¶¶ 94–97; Benjamin Weiser, *Scientist Gets 86 Years for Firing at Americans*, N.Y. TIMES CITY ROOM BLOG (Sept. 23, 2010, 1:08 PM), http://cityroom.blogs.nytimes.com/2010/09/23/scientist-gets-86-years-for-firing-at-americans/.

168. *See* National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §§ 1034, 1039, 1046 (as passed by House, May 26, 2011).

held abroad by the Department of Defense, not just those incarcerated at Guantánamo.[169]

The Senate's original version was equally controversial because, in addition to codifying the President's authority to detain individuals (including U.S. citizens) perhaps indefinitely,[170] the bill also contained a mandatory military detention provision for certain foreign nationals associated with al Qaeda.[171] In an effort to dissuade the President from exercising his veto power, Senator Dianne Feinstein proposed a series of amendments to the Senate's version.[172] But the only one of Feinstein's proposed amendments that passed merely recognized that the provision codifying the President's detention authority did nothing to change existing law, effectively punting to the courts the task of defining that authority's scope.[173]

The director of the FBI testified that the restrictions introduced "uncertainty" that could hobble counterterrorism efforts of law enforcement and harm national security.[174] Retired generals opposed the bills.[175] The President threatened to veto the bill, stating that it would "disrupt the Executive branch's ability to enforce the law and impose unwise and unwarranted restrictions on the U.S. Government's ability to aggressively combat international terrorism . . . ."[176] Moreover, he demurred that the mandatory military custody provisions would "tie the hands of our intelligence and law enforcement professionals" by "limit[ing] the flexibility of our national security professionals to choose, based on the evidence and the facts and circumstances of each case, which tool for incapacitating dangerous terrorists best serves our national security interests."[177]

169. *Id.* § 1039.

170. National Defense Authorization Act for Fiscal Year 2012, S. 1867, 112th Cong. § 1031 (as passed by Senate, Dec. 1, 2011).

171. *Id.* § 1032.

172. *See Amendments for S.1867*, LIBR. CONGRESS, http://thomas.loc.gov/cgi-bin/bdquery/L?d112:./temp/~bdaBzCn:1[1-381](Amendments_For_S.1867)&./temp/~bdRplQ[[o]] (last updated Dec. 1, 2011); *see also Amendments to S.1867, DoD Authorization*, U.S. SENATE DEMOCRATS (Dec. 1, 2011, 9:30 AM), http://democrats.senate.gov/2011/12/01/amendments-to-s-1867-the-department-of-defense-authorization-act/.

173. S. 1867, § 1031(e) (incorporating amendment 1456 to S. 1867).

174. *See* Charlie Savage, *Obama Drops Veto Threat Over Military Authorization Bill After Revisions*, N.Y. TIMES, Dec. 15, 2011, at A30 [hereinafter Savage, *Obama Drops Veto Threat*].

175. Charles C. Krulak & Joseph P. Hoar, Op-Ed., *Guantánamo Forever?*, N.Y. TIMES, Dec. 13, 2011, at A35.

176. OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: S. 1867 – NATIONAL DEFENSE AUTHORIZATION ACT FOR FY 2012, at 1, 3 (2011), *available at* http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/112/saps1867s_20111117.pdf.

177. *Id.* at 2.

In the end, after additional concessions in the House-Senate conference, the Senate's mandatory military detention provision remained in the final bill,[178] but House provisions that would have required trials by military commission, created a new authorization for the use of military force against al Qaeda and associated forces,[179] and expanded the funding restrictions were deleted to avoid a presidential veto.[180] The provision authorizing mandatory military detention was also watered down from its original form in response to concerns in the White House and federal law enforcement community.[181] Although President Obama still had "serious reservations" about the 2012 NDAA's detainee-related provisions, their sweeping scope had been limited sufficiently by the end of the legislative process for him to give the final bill his grudging assent.[182] In a signing statement President Obama objected that some of the provisions "would, under certain circumstances, violate constitutional separation of powers principles."[183] It should be noted, however, that this Administration has steadfastly declined to assert Article II as the source of its powers respecting detainee policy.

Congress's increasingly stringent restrictions on transporting detainees from Guantánamo mean that criminal prosecutions will be impossible for the foreseeable future, and the D.C. Circuit's steadfast refusal to recognize any habeas rights for detainees[184] makes it unlikely that this will change unless a

178. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No 112-81, §1022, 125 Stat. 1298, 1563 (2011); *see also* Savage, *Obama Drops Veto Threat*, *supra* note 174.

179. Savage, *Obama Drops Veto Threat*, *supra* note 174.

180. *Compare* National Defense Authorization Act for Fiscal Year 2012 § 1027, *with* National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. § 1039 (as passed by House, May 26, 2011).

181. *See* National Defense Authorization Act for Fiscal Year 2012 § 1022(d) (explicitly stating that it did not affect the FBI's existing authority).

182. Presidential Statement on Signing the National Defense Authorization Act for Fiscal Year 2012, 2011 DAILY COMP. PRES. DOC. 978, at 1 (Dec. 31, 2011).

183. *Id.* at 3.

184. *See, e.g.*, Latif v. Obama, 666 F.3d 746, 248–49 (D.C. Cir. 2011) (holding that habeas courts must give the government's evidence a presumption of accuracy); Abdah v. Obama, 630 F.3d 1047, 1048 (D.C. Cir. 2011) (declining to revisit *Kiyemba II*); Kiyemba v. Obama, 605 F.3d 1046, 1047–48 (D.C. Cir. 2010) (per curiam) (holding, in *Kiyemba I* on remand, that habeas court cannot review government's decision that a country is an "appropriate" place to transfer the detainee); Kiyemba v. Obama (*Kiyemba II*), 561 F.3d 509, 510, 516 (D.C. Cir. 2009) (holding that habeas court cannot require government to notify the detainee or the court if it plans to transfer the detainee out of the jurisdiction of U.S. courts); Kiyemba v. Obama (*Kiyemba I*), 555 F.3d 1022, 1024, 1027–28 (D.C. Cir. 2009) (finding that a habeas court has no power to release detainees into the United States even if there is no other country to take them), *vacated*, 130 S. Ct. 1235 (2010), *reinstated as amended by* 605 F.3d 1046 (D.C. Cir. 2010); Saleh v. Titan, 580 F.3d 1, 5–13 (D.C. Cir. 2009) (private contractor interrogators have sovereign immunity against civil damages actions by detainees); Rasul v. Myers, 563 F.3d 527, 531 (D.C. Cir. 2009) (per curiam)

military commission results in a conviction (not a plea agreement) that can be appealed. It would be foolish to expect any such appeal to be decided anytime soon: Ali al Bahlul was convicted by a military commission in November 2008 and his appeal has yet to be decided.[185]

III. STILL ILLEGAL AFTER ALL THESE YEARS

The lack of procedural protections for the accused is not the only problem with the revived military commissions. Just as importantly, the military commissions as currently constituted are legally invalid. Military commissions are not routine in wartime: they have not been used by the United States in any previous armed conflicts since World War II.[186] Their permissible jurisdiction is strictly circumscribed. In *Hamdan*, the plurality described four well-established "preconditions" for the exercise of jurisdiction by a military commission.[187] Two go to the nature of the offenses that may be charged:

- "[A] military commission not established pursuant to martial law or an occupation may try only '[i]ndividuals of the enemy's army *who have been guilty of illegitimate warfare or other offences in violation of the laws of war*' . . . ."[188]
- "[A] law-of-war commission has jurisdiction to try only two kinds of offense: '*Violations of the laws and usages of war* cognizable by military tribunals only,' and '[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.'"[189]

(declaring, after *Boumediene*, that "basic constitutional protections" such as due process are not available to aliens abroad). On June 11, 2012, the Supreme Court denied certiorari, without dissent, in *Latif* and six other detainee cases. Adam Liptak, *Justices Reject Detainees' Appeal, Leaving Cloud Over Earlier Guantánamo Ruling*, N.Y. TIMES, June 12, 2012, at A14. This appears to complete the D.C. Circuit's reversal of *Boumediene*.

185. *Military Commissions Cases*, OFF. MIL. COMMISSIONS, http://www.mc.mil/CASES/MilitaryCommissions.aspx (last visited July 4, 2012) (follow "Ali Hamza Ahmad Suliman al Bahlul" hyperlink).

186. *See* ELSEA, *supra* note 72, at 2; *Fact Sheet: Military Commissions*, U.S. DEP'T DEF. 1 (Feb. 8, 2007), http://www.defense.gov/news/d2007OMCFactSheet08Feb07.pdf.

187. Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

188. *Id.* at 597–98 (emphasis added) (quoting WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 838 (2d ed. 1920)).

189. *Id.* at 598 (emphasis added) (quoting WINTHROP, *supra* note 199, at 839). The full quotation follows:

> The classic treatise penned by Colonel William Winthrop, whom we have called "the 'Blackstone of Military Law,'" describes at least four preconditions for exercise of jurisdiction by a tribunal of the type convened to try Hamdan. First, "[a] military commission, (except where otherwise authorized by statute), can legally assume

The Obama Administration has expressly acknowledged that military commissions may only hear violations of the laws of war—war crimes. "Their jurisdiction is substantially narrower than our federal courts: they are properly used only in connection with an armed conflict, and *only to prosecute offenses against the law of war committed in the course of that conflict*."[190]

Yet almost without exception, the charges that have been brought do not state violations of the law of war. Most of the defendants have been charged with conspiracy and/or providing material support for terrorism.[191] Neither offense is a violation of the law of war.[192] Indeed, a plurality of the Supreme Court would have held that conspiracy, one of the most common military commission charges, was not a war crime and therefore was not a legally permissible basis for a military prosecution.[193]

Another popular charge is "murder in violation of the law of war." Omar Khadr, Mohammed Jawad (another child soldier whose confession was ruled inadmissible by a military judge and who was released following a successful

jurisdiction only of offences committed within the field of the command of the convening commander." The "field of the command" in these circumstances means the "theatre of war." Second, the offense charged "must have been committed within the period of the war." No jurisdiction exists to try offenses "committed either before or after the war." Third, a military commission not established pursuant to martial law or an occupation may try only "[i]ndividuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war" and members of one's own army "who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war." Finally, a law-of-war commission has jurisdiction to try only two kinds of offense: "Violations of the laws and usages of war cognizable by military tribunals only," and "[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war."

Id. at 597–98 (citations omitted). The Court also notes:

Winthrop adds as a fifth, albeit not-always-complied-with, criterion that "the *trial* must be had within the theatre of war . . . ; that, if held elsewhere, and where the civil courts are open and available, the proceedings and sentence will be *coram non judice*."

Id. at 598 n.29.

190. Memorandum from Brad Wiegmann & Colonel Mark Martins, Det. Policy Task Force, to Att'y Gen. & Sec'y of Def. 3 (July 20, 2009) [hereinafter Preliminary Report] (emphasis added), *available at* http://www.fas.org/irp/agency/doj/detention072009.pdf.

191. *See The Guantanamo Trials*, HUM. RTS. WATCH, http://www.hrw.org/features/guantanamo (last visited May 18, 2012).

192. *Hamdan*, 548 U.S. at 598, 610 (plurality opinion) (finding that conspiracy is not a violation of the law of war); Samuel T. Morison, *History and Tradition in American Military Justice*, 33 U. PA. J. INT'L L. 121, 124 (2011) (arguing that providing material support has never before been considered a law-of-war offense).

193. *Hamdan*, 548 U.S. at 611–12.

habeas petition[194]), and others were charged with this offense for attacking U.S. soldiers or convoys.[195] Such conduct also is not a violation of the law of war—at least if the victim is not a "protected person" and the means is not a prohibited means.[196]

The question whether providing material support is an offense triable by military commission is currently before the D.C. Circuit in Salim Hamdan's appeal of his military commission proceedings.[197] Hamdan argues that the offense of providing material support for terrorism is not triable before a military commission because it is not a violation of the law of war.[198] The government responds that even if providing material support is not a violation of the law of nations, it is triable by military commission under the "U.S. common law of war."[199]

It is far from clear that there is any such thing as a "U.S. common law of war" distinct from the international law of war (or law of nations). In *Ex Parte Quirin* the Supreme Court declared: "The law of war, like civil law, has a great

194. *Mohammed Jawad - Habeas Corpus*, AM. CIV. LIBERTIES UNION (Aug. 24, 2009), http://www.aclu.org/national-security/mohammed-jawad-habeas-corpus.

195. *See* United States v. Jawad, 1 M.C. 338, 338 & n.4, 339 & n.8 (Military Comm'n 2008) (Ruling on Defense Motion to Dismiss – Lack of Personal Jurisdiction: Child Soldier (D-012)).

196. Civil War military tribunals did try an offense for murder in violation of the law of war, which involved killing soldiers after they had surrendered or while they were held as prisoners of war; such killings are indeed violations of the law of war. *See* Government's Motion: Request for Finding's [sic] Instruction on Charge I, II and III (as It Pertains to Murder in Violation of the Law of War) at 5–6, United States v. Khadr (Military Comm'n Nov. 14, 2008) [hereinafter Government's Motion], *available at* http://www.defense.gov/news/AE-295-AE295-E(P009).pdf; Defense Response to Government's Request for Finding's Instruction on Charges I, II and III (as It Pertains to Murder in Violation of the Law of War) and Defense Cross-Motion to Dismiss and Strike at 2, United States v. Khadr (Military Comm'n Nov. 28, 2008) [hereinafter Defense Response], *available at* http://www.defense.gov/news/AE-295-AE295-E(P009).pdf. Civil War commissions also tried unlawful combatants who killed soldiers or civilians, but Civil War military commissions tried both offenses against the laws of war and ordinary crimes committed in occupied territory. *See* Government's Motion, *supra*, at 5–6; *see also Hamdan*, 548 U.S. at 590. The current military commissions are law-of-war tribunals, not occupation tribunals. *See Hamdan*, 548 U.S. at 597 ("Since Guantanamo Bay is neither enemy-occupied territory nor under martial law, the law-of-war commission is the only model available.").

197. Steve Vladeck, *Government Brief in* Hamdan*: The Looming Article III Problem . . .*, LAWFARE BLOG (Jan. 17, 2012, 8:28 PM), http://www.lawfareblog.com/2012/01/government-brief-in-hamdan-the-looming-article-iii-problem/. The D.C. Circuit heard argument on May 3, 2012. Wells Bennett, *Oral Argument Recap in* Hamdan, LAWFARE BLOG (May 4, 2012, 1:21 PM), http://www.lawfareblog.com/2012/05/oral-argument-recap-in-hamdan/.

198. *See* Brief for the United States at 22, Hamdan v. United States, No. 11-1257 (D.C. Cir. Jan. 17, 2012), *available at* http://www.lawfareblog.com/wp-content/uploads/2012/01/Hamdan-Brief-for-US-As-Filed.pdf.

199. *See id.* at 22–23. The Government was not willing to concede altogether that the act does not also violate the law of nations. *See id.* at 51–55.

lex non scripta, its own common law. This 'common law of war' is a centuries-old body of largely unwritten rules and principles of international law which governs the behavior of both soldiers and civilians during time of war."[200] This statement seems to indicate that this "common law of war" is international law. Even if it is the law of the United States, its content is that of international law.[201]

Providing material support and conspiracy are defined in the 2009 MCA as offenses triable by military commissions,[202] and one might argue that Congress can do so under its Article I power to "define and punish . . . Offenses against the Law of Nations . . . ."[203] Here again, the question is whether Congress can define any offense it pleases as an offense against the law of war, or whether its power is limited to offenses that are recognized under international law. The drafters of the Constitution certainly viewed the "Law of Nations" as a real body of law that was international in character.

Even if Congress could call offenses that are unknown to international law—such as "providing material support for terrorism"—violations of the "U.S. common law of war," it is not clear that Congress could constitutionally authorize military commissions to try them. Certainly it would be contrary to the United States' long history of leadership in developing and assuring compliance with international humanitarian law to accept the position that the law of nations is whatever the U.S. Congress and President feel like saying it is.

The 2009 MCA seems to incorporate the Bush Administration view that all hostile acts committed by "unprivileged belligerents" are war crimes.[204] But under international law, the distinction between lawful and unlawful belligerency is simply that lawful belligerents have combatant immunity and are not subject to prosecution under domestic law.[205] Unlawful—more precisely, "unprivileged"—belligerents have no such immunity and may be prosecuted for offenses such as murder and attempted murder.[206] But attacks

200. *Ex Parte* Quirin, 317 U.S 1, 13–14 (1942) (Argument for Respondent) (citation omitted).

201. In *Hamdan* the Court said that the UCMJ requires military commissions to comply "not only with the American common law of war, but also with the rest of the UCMJ itself, . . . *and with the 'rules and precepts of the law of nations* . . . .'" *Hamdan*, 548 U.S. at 613 (emphasis added) (citation omitted).

202. 10 U.S.C. § 950t (25), (29) (Supp. IV 2011).

203. U.S. CONST. art. I, § 8, cl. 10.

204. *See* 10 U.S.C. §§ 948a(7), 950t (Supp. IV 2011). The Obama Administration apparently agrees; the very first military commission trial during the Obama presidency was that of Omar Khadr, charged with throwing a grenade at American soldiers and killing one. *See Times Topics: Omar Khadr*, *supra* note 54.

205. *See* Government's Motion, *supra* note 196, at 1–2.

206. *See id.*

using conventional weapons on military targets such as soldiers are not violations of the law of war.[207] Indeed, while U.S. combat troops remained in Iraq, insurgents who planted roadside bombs were arrested and tried before the Central Criminal Court of Iraq.[208] Following similar logic, military judges have dismissed charges of "murder in violation of the law of war" against several detainees.[209]

The Preliminary Task Force Report and Attorney General Holder's designation of five detainees for criminal prosecution and five for military commissions also imply that the Administration's view is that the primary dividing line between offenses triable by military commissions and criminal offenses is that an attack on a military target is triable before a military commission.[210] Thus al-Nashiri was charged before a military commission for the attack on the U.S.S. Cole,[211] and Omar Khadr[212] and Mohammed Jawad were charged before a military commission for attacks on U.S. soldiers in Afghanistan.[213] In contrast, Khalid Sheikh Mohammed, charged with the 9/11 attacks on civilians, was designated for criminal trial (until funding restrictions made such a trial impossible),[214] and Ahmed Ghailani, charged with the embassy bombings,[215] and Umar Farouk Abdulmutallab, the "Underwear Bomber,"[216] were charged and tried in federal court.[217] This distinction has it backward: attacks on civilian populations ("protected persons") are violations of the law of war, as are attacks by prohibited weapons, but attacks on military targets are not violations of the law of war even if they are carried out by

207. Defense Response, *supra* note 196, at 1–4, 9.

208. Am. Forces Press Serv., *Iraq's Central Criminal Court Convicts Insurgents*, U.S. DEP'T DEF. (Aug. 2, 2004), http://www.defense.gov/News/NewsArticle.aspx?ID=25603.

209. *Proposals for Reform of the Military Commissions System: Hearing Before the Subcomm. on the Constitution, Civil Rights, & Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 104 (2009) (statement of David J.R. Frakt, Lead Defense Counsel, Office of Military Commissions) (noting that three military commissions considering the cases of Salim Hamdan, Ali Hamza al-Bahlul, and Mohammad Jawad rejected the idea that "murder in violation of the law of war" included all murders committed by an unlawful combatant).

210. Preliminary Report, *supra* note 190, at 4 (noting the factors for determining whether an offense is triable before a military commission); *The Guantanamo Trials*, *supra* note 191.

211. *See* Richey, *supra* note 125.

212. Savage, *U.S. Is Wary*, *supra* note 152.

213. *See* William Glaberson, *Judge Orders a Detainee to Be Freed in August*, N.Y. TIMES, July 31, 2009, at A14; *Military Commissions Cases*, OFF. MIL. COMMISSIONS, http://www.mc.mil/CASES/MilitaryCommissions.aspx (last visited Apr. 14, 2012).

214. *See* Peter Landers, *Congress Bars Gitmo Transfers*, WALL ST. J. (Dec. 23, 2010), http://online.wsj.com/article/SB10001424052748704774604576036520690885858.html.

215. *See* Weiser, *supra* note 105.

216. *See* Bunkley, *supra* note 151.

217. *See id.*; Weiser, *supra* note 105.

unprivileged belligerents.[218] They may, of course, be crimes under ordinary domestic law, triable in regular domestic courts.

Only one detainee, Abd al-Rahim al-Nashiri, has been charged with an actual violation of the law of war: a charge of perfidy in connection with the attack on the U.S.S. Cole.[219] For al-Nashiri to have been guilty of perfidy (feigning civilian or non-combatant status[220]), however, the United States would have had to have been at war with al Qaeda in 2000.[221] Neither Congress nor President Clinton referred to the attack as an act of war at the time, however, and it was treated by both military and civilian authorities as a criminal act, not a war crime.[222]

The other two "preconditions" for trial by military commission, as stated by the *Hamdan* plurality, are that the offense must have occurred within the "theatre of war" and within the "period of war."[223] Some military commission charges do not meet these requirements either. For example, al-Nashiri is charged with the bombing of the U.S.S. Cole, an attack that occurred outside the theater of war (Afghanistan or Iraq), before the period of the war (the Cole attack occurred in 2000).[224]

IV. THE SORTING HAT

One of the most disturbing aspects of the current status of military commissions is that both Congress and the executive branch seem to believe that there are no legal standards governing the decision whether to prosecute in federal court, to bring charges before a military commission, or to simply detain indefinitely without charge. All are seen as equally possible options, to be determined on a "case-by-case basis."[225] For example, Khalid Sheikh Mohammed and Abd al-Rahim al-Nashiri were both initially indicted in

218. *See* Defense Response, *supra* note 196, at 2–3, 4 (pointing out that "if the law of war made killing combatants a crime, then war itself would be illegal").

219. *Charge Sheet, Abd Al Rahim Hussayn Al Nashiri*, OFF. MIL. COMMISSIONS 3 (Sept. 28, 2011), http://www.mc.mil/CASES/MilitaryCommissions.aspx (accessed by clicking on "Abd Al Rahim Hussayn Al Nashiri (2)," then "Show All Case Documents," then "Referred Charges Dated 09/28/2011").

220. *See id.*

221. Frakt, *supra* note 61.

222. Nick Baumann, *Obama Administration Fires Up the Military Commissions (Again)*, MOTHER JONES (Jan. 20, 2011), http://motherjones.com/mojo/2011/01/obama-administration-fires-military-commissions-again.

223. Hamdan v. Rumsfeld, 548 U.S. 557, 597 (2006), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

224. *See* Baumann, *supra* note 222.

225. *See* Preliminary Report, *supra* note 190, at 5.

federal court.[226] When Congress made it impracticable to transport them to the United States, the charges were dropped and they were charged before a military commission.[227]

In May 2010 the Justice Department's Task Force Report was released, and the Attorney General announced that the remaining detainees referred for prosecution would be assigned to three categories: prosecute in federal court, try before military commissions, or continue to detain without charge either in Guantánamo or in a maximum security prison in the United States.[228] Attorney General Holder designated five detainees for criminal prosecution on charges related to the 9/11 attacks, and six for trial before military commissions.[229]

The Report did not clearly enunciate the criteria by which the decision was made. One criterion was evidently whether the target of the attack was military (trial by military commission) or civilian (criminal trial).[230] The legal basis for this distinction is questionable. As discussed above, military commissions can try only violations of the law of war, and attacks on military targets are not violations of the law of war, whereas attacks on civilians can be. So if anything, the detainees were designated to the wrong tribunals.

More deeply troubling is the apparent assumption that the government can choose the level of due process it provides based on whether is has enough admissible evidence to obtain a conviction. According to the Report, the decision is to be made "case by case," based in part on "evidentiary issues" and "the extent to which the forum would permit a full presentation of the accused's wrongful conduct"[231]—an apparent reference to the possibility that certain evidence would be inadmissible in federal court. As former military commission chief prosecutor Morris Davis wrote, "The evidence likely to clear the [evidentiary] high bar gets gold medal justice: a traditional trial in our

226. *See* Charlie Savage, *Accused Qaeda Leader Arraigned in 2000 Cole Attack*, N.Y. TIMES, Nov. 10, 2011, at A21 [hereinafter Savage, *Accused Qaeda Leader Arraigned*]; Savage, *In a Reversal*, *supra* note 116.

227. *See* Savage, *Accused Qaeda Leader Arraigned*, *supra* note 226; Savage, *In a Reversal*, *supra* note 116.

228. FINAL REPORT, *supra* note 139, at 11.

229. *Id.*

230. *See* FINAL REPORT, *supra* note 139, at 20 (considering "the nature of the offenses to be charged; the identity of the victims; the location of the crime; the context in which the defendant was apprehended; and the manner in which the case was investigated and by which investigative agency" to determine the proper forum); Preliminary Report, *supra* note 190, at 4 (noting that "the identity of the victims of the offense" was one of the factors considered in determining forum). For example, the Task Force announced that the September 11th attackers would be tried in federal court, while the U.S.S. Cole bomber and others captured abroad for acts against soldiers or other military targets would be tried before military commission. FINAL REPORT, *supra* note 139, at 21.

231. Preliminary Report, *supra* note 190, at 4.

federal courts. The evidence unable to clear the federal court standard is forced to settle for a military commission trial . . . ."[232] In other words, if there is strong and admissible evidence, prosecute in federal court. If, on the other hand, evidence obtained by coercion would be inadmissible in federal court, use a military commission. And if a person cannot be convicted even under the lower standards of a military commission, why, we can just hold him in a cell in Guantánamo or a maximum security prison without bothering to charge or try him at all.[233] Attorney General Holder has consistently attempted to bring all charges in federal court,[234] but he lent credibility to this view when, asked by the Senate Judiciary Committee what would happen if Khalid Sheikh Mohammed were acquitted, he replied, "Failure is not an option."[235]

Moreover, the government has recently suggested that even if a defendant is acquitted by a military commission, he will still be held indefinitely as an unlawful belligerent;[236] and similarly, if he is convicted and completes his sentence, he also may be held indefinitely.[237] In other words, even if a defendant wins acquittal in this system, which is stacked against him, it will make no difference—he may still face a lifetime of imprisonment at Guantánamo.

Such a system is completely contrary to the rule of law. And it is at odds with the law as it exists. As the Obama Administration has recognized, existing law defines what kinds of offenses can be tried by military commissions.[238] Only violations of the laws of war—war crimes—can be tried by law-of-war military commissions, not ordinary crimes under domestic law such as murder or providing material support to terrorism. Additionally, executive detention without trial has historically been considered foreign to the

232. Morris Davis, Opinion, *Justice and Guantanamo Bay*, WALL ST. J., Nov. 11, 2009, at A21.

233. *See* FINAL REPORT, *supra* note 139, at 22–23 (explaining that some detainees cannot be prosecuted in any forum because "[w]hile the intelligence about them may be accurate and reliable, that intelligence, for various reasons, may not be admissible evidence or sufficient to satisfy a criminal burden of proof in either a military commission or federal court. . . . [also] [i]n many cases . . . the Task Force did not find evidence that the detainee participated in a specific terrorist plot. The lack of such evidence can pose obstacles to pursuing a prosecution in either federal court or a military commission.").

234. *See id.* at 20 (noting a "presumption that prosecution will be pursued in a federal court wherever feasible").

235. *Oversight of the U.S. Department of Justice: Hearing Before S. Comm. on the Judiciary*, 111th Cong. 16 (2009) (statement of Eric Holder, Att'y Gen. of the United States).

236. *See supra* note 71 and accompanying text.

237. *See, e.g.*, Koring, *supra* note 56 (describing how Omar Khadr was being held at Guantánamo past his transfer date despite a plea deal providing he was only to remain there for one more year).

238. *See supra* note 190 and accompanying text.

American system of government; in fact, the core purpose of the writ of habeas corpus was to prevent executive detention without trial.[239]

CONCLUSION

In the end, military commissions in this incarnation are not "of necessity."[240] Their proponents have insisted on them on the grounds that regular trials "won't work" because evidence obtained by coercion or torture is inadmissible, juries are unpredictable, regular trials aren't harsh enough, or criminal trials dignify terrorists too much by affording them the same rights as citizens. Such claims lack a rational basis. Hundreds of terrorism-related criminal convictions have been obtained in federal court, including well-known cases against John Walker Lindh,[241] Zacharias Moussaoui,[242] Richard Reid,[243] Umar Farouk Abdulmutallab,[244] and Ahmed Khalfan Ghailani.[245] Contrary to fear mongering over the supposed impossibility of bringing successful prosecutions in federal court because of difficulties with classified information, befuddled juries, or terrorist-sympathizing judges, from 2001 to 2009, the Justice Department has brought roughly 828 terrorism-related prosecutions in federal court, obtaining 523 convictions.[246] Three hundred forty-six prosecutions have been brought under core terrorism statutes, or because of national security violation or hostage taking.[247] Of the 223 such prosecutions that had been resolved as of 2009, 174, or 78%, resulted in

239. *See* Amanda L. Tyler, *The Forgotten Core Meaning of the Suspension Clause*, 125 HARV. L. REV. 901, 1011–12 (2012) ("By its very design, [the Suspension] [C]lause rejects the idea that where the privilege has not been suspended, the liberty interests that traditionally find enforcement in its remedy could be balanced against governmental interests in preserving national security.").

240. Hamdan v. Rumsfeld, 548 U.S. 557, 624 (2006) ("The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter."), *superseded by statute*, Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

241. United States v. Lindh, 227 F. Supp. 2d 565, 566 (E.D. Va. 2002).

242. United States v. Moussaoui, 591 F.3d 263, 266 (4th Cir. 2010).

243. United States v. Reid, 369 F.3d 619, 619–20 (1st Cir. 2004).

244. Monica Davey, *Would-Be Plane Bomber Pleads Guilty, Ending Trial*, N.Y. TIMES, Oct. 13, 2011, at A17.

245. United States v. Ghailani, 761 F. Supp. 2d 167, 170, 200 (S.D.N.Y. 2011) (denying Ghailani's motion for a judgment of acquittal or a new trial).

246. CTR. ON LAW & SEC., N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001–SEPTEMBER 11, 2009, at 1 (2010), *available at* http://www.lawandsecurity.org/Portals/0/documents/02_TTRCFinalJan142.pdf.

247. *Id.* at 3–4.

conviction on terrorism or national security charges.[248] An additional twenty-four, or 10.8%, resulted in conviction on lesser charges.[249] Thus, for that group, the overall conviction rate was 88.8%.[250] There was no need to invent and litigate new procedures in these cases.

Unfortunately, Congress has taken the rare step of using the spending power to thwart presidential policies concerning military affairs and criminal prosecutions, and it does not appear that the situation will change in the foreseeable future. Thus, the only prosecutions of individuals now held at Guantánamo will be before military commissions, and there may be a couple of dozen of those (though as in the past, most of these may be resolved through plea agreements).[251] The Obama Administration intends to hold another forty-six people in indefinite detention there,[252] and because of the difficulty of releasing detainees to the United States or other countries, most of the eighty-nine current detainees who have been determined by the military *not* to be a danger to the United States will probably continue to be held at Guantánamo without charge.[253]

The numbers of new detainees subject to military commissions, however, will probably be negligible, at least so long as President Obama is in office. Unlike the previous Administration, the current one is not kidnapping people off the streets in Germany, Italy, or Indonesia and bringing them to Guantánamo. The American combat role in Afghanistan and Iraq is winding down and new prisoners captured there are being held by those countries' forces rather than by American forces. Plans are being made to turn detainees now in U.S. custody in Afghanistan over to the Afghan government (though that process has been slowed by the difficulty in assuring that they will be treated humanely).[254] John Brennan, President Obama's chief terrorism

248. *Id.* at 4.

249. *Id.*

250. *Id.* According to the Department of Justice, from September 11, 2001 through March 18, 2010, 403 terrorism-related convictions were obtained—more than 150 for violation of statutes related to international terrorism. DEP'T OF JUSTICE, INTRODUCTION TO NATIONAL SECURITY DIVISION STATISTICS ON UNSEALED INTERNATIONAL TERRORISM AND TERRORISM-RELATED CONVICTIONS 1–2 (2010), *available at* http://www.fas.org/irp/agency/doj/doj032610-stats.pdf; DEP'T OF JUSTICE, NATIONAL SECURITY DIVISION STATISTICS ON UNSEALED INTERNATIONAL TERRORISM AND TERRORISM-RELATED CONVICTIONS 9/11/01–3/18/10 (2010), *available at* http://www.fas.org/irp/agency/doj/doj032610-stats.pdf.

251. *See By the Numbers*, *supra* note 43 (indicating that thirty-six have been designated could go to trial, three of whom have already pleaded guilty).

252. *Guantánamo By the Numbers: What You Should Know & Do About Guantánamo*, *supra* note 69.

253. *Id.*

254. Rod Nordland, *U.S. and Afghanistan Agree on Prisoner Transfer as Part of Long-Term Agreement*, N.Y. TIMES, Mar. 10, 2012, at A8.

adviser, has repeatedly declared that the Administration will not bring any more prisoners to Guantánamo.[255] Noncitizens captured outside the United States can, like Ahmed Warsame,[256] be brought directly to the United States for prosecution, as the 2012 NDAA only limits transfers of noncitizens held at Guantánamo.[257] And persons taken into custody within the United States can still be prosecuted in federal court.

The announcement of Majid Khan's plea bargain only a week after charges were filed[258] suggests that in the near term the Obama Administration will be concentrating on the military commissions of the five 9/11 conspirators, particularly that of Khalid Shiekh Mohammed. Commission proceedings involving other detainees will likely be used primarily as they were with Majid Khan—to strike plea bargains to obtain testimony against the five primary defendants. By the time those trials are completed, the political situation may have changed, one way or another.

Regardless of what happens in the near term, however,[259] a significant number of military commission proceedings will continue, whether by full trial or by plea bargains, and these will remain in violation of multilateral treaties, customary international law, and U.S. law. Critically, these proceedings will stand as a precedent for any future president who wishes to avoid the rule of law in combating terrorism or whatever threat to national security appears so new and so dangerous that it justifies extralegal means to counteract.

Moreover, the Obama policy of restraint is, for the most part, simply that; with the exception of the changes in military commission procedures contained in the 2009 MCA, the changes from Bush Administration practices are contained only in signing statements, policy statements from the President and members of his Administration, or at most are embodied in executive orders. All of these are subject to unilateral change by his successors. Similarly, while President Obama has withdrawn and repudiated the legal opinions of the Bush Office of Legal Counsel and has scrupulously avoided basing any assertions of

255. *See supra* note 146 and accompanying text.

256. *See supra* notes 147–49 and accompanying text.

257. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No 112-81, §1027, 125 Stat. 1298, 1566–67 (2011).

258. *See supra* note 160 and accompanying text.

259. "Near term" may be a misnomer in the context of the military commissions. The five alleged 9/11 conspirators were finally arraigned in May 2012; their trial will not begin for at least a year. Charlie Savage, *At a Hearing, 9/11 Detainees Show Defiance*, N.Y. TIMES, May 6, 2012, at A1; Benjamin Wittes & Wells Bennett, *9/11 Arraignment #14: Wherein We Actually Have an Arraignment*, LAWFARE BLOG (May 6, 2012, 1:20 PM), http://www.lawfareblog.com/2012/05/911-arraignment-13-wherein-we-actually-have-an-arraignment/ (reporting that defense attorneys requested a delay of the start of trial, and the court agreed on a date of May 5, 2013 as a "placeholder").

presidential power in detainee matters on his Article II powers, he has not even issued an executive order renouncing such an interpretation. A future president could thus reassert the extreme constitutional claims of the Bush Administration without even having to issue a new formal executive order.

On the other hand, the limitations on presidential ability to prosecute detainees in federal court, release them to other countries, or transfer them to facilities within the United States for detention or to serve their sentences are contained in statutes and thus will apply regardless of who is president. These include the mandatory military detention provisions of the 2012 NDAA.[260] Indeed, the Feinstein amendment to the 2012 NDAA, designed in part to meet objections to mandating military custody or trial of U.S. citizens, could well turn out to support that very outcome.[261] The compromise, which helped to secure passage of the 2012 NDAA without a provision for mandatory military custody or trial, is worded simply to state that the statute does not change "existing law." Many argued at the time—apparently supported by a phrase in *Hamdi*—that existing law already permits treating U.S. citizens and permanent residents who are determined to be "enemy combatants" or unprivileged belligerents exactly the same as foreign nationals, even if they are taken into custody inside the United States. If in the future the Supreme Court, the D.C. Circuit, or another federal circuit, so holds, then the trial, detention, and waiver provisions of the 2012 NDAA will apply equally to U.S. citizens.

Thus, because Congress has frustrated the executive branch's efforts to bring the treatment of suspected terrorists back to fundamental principles of the rule of law and the Obama Administration has abandoned as futile any attempt to secure legislation to make the changes permanent, the military commissions—however improved over the Bush era—remain "outside the law's reach."[262]

260. *See supra* notes 171, 178–81.

261. *See supra* text accompanying note 173.

262. Vulliamy, *supra* note 1.