

## CHARM OFFENSIVE IN LILLIPUT: MILITARY COMMISSIONS 3.1

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### INTRODUCTION

It's a season of anniversaries. It has been over ten years since the execution of the November 13, 2001, Military Order by which President George W. Bush revived military commissions.<sup>1</sup> Since their revival, the commissions have spawned a Niagara of scholarly analysis<sup>2</sup> and, of course, litigation<sup>3</sup>—both out of all proportion to the handful of cases they have actually tried. Both bodies of work, the scholarship and the litigation, have understandably focused on the

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1. See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 4(a), 3 C.F.R. § 918, 918 (2001), *reprinted in* 10 U.S.C. § 801 (2006) (“Any individual subject to this order shall, when tried, be tried by military commission.”).

2. See, e.g., Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT’L SEC. L. & POL’Y 295, 295–96 (2010) (noting the “mountain of popular and academic discourse” following the executive order establishing military commissions).

3. See, e.g., *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (considering Hamdan’s claim that the military commission convened by President Bush lacked the authority to try him); *Khadr v. Bush*, 587 F. Supp. 2d 225 (D.D.C. 2008) (considering whether Khadr’s upcoming trial before a military commission was unlawful).

history of military commissions and whether they comply with the requirements of the Constitution, federal statutes, and the law of war.<sup>4</sup>

We all profit from this rich vein of scholarly and judicial ore, but I would like to offer another perspective from which to examine the current generation of commissions: Is the military commission system, quite simply, too small to be viable? Answering this question, which has not yet been addressed directly in the literature, requires identification of the purposes of justice systems and how those purposes are achieved in civilian court systems.

With that as a predicate, it should be possible to gauge the reality, rather than the theory, of the administration of justice by military commissions. As I will also explain, by invoking a military adjudicatory model at a time when the country was not on a war footing,<sup>5</sup> the Bush Administration sealed the fate of the military commission system. He asked of it more than it could deliver. Despite remedial efforts by the Obama Administration, the defect persists and is by now incurable.

#### I. THE SATISFACTORY ADMINISTRATION OF JUSTICE

What is it that makes a judicial system satisfactory? At bottom, it is a matter of public confidence in the system's administration of justice.<sup>6</sup> This can be gauged by looking at discrete factors, to which I will turn in a moment, but it also entails an overall judgment that may be—no, *is*—more than the sum of its parts. Whether a system can be satisfactory without fostering public confidence is another issue that is worth considering; in a democratic society one would like to believe that a system that enjoys public confidence would also be satisfactory, but the two concepts are not identical.

One can imagine a judicial system that seems satisfactory but does not engender public confidence. For example, suppose a system enjoyed a very high batting average for convicting only the objectively guilty and acquitting only the objectively innocent, and, in cases of conviction, for dispensing sentences that were neither extravagantly onerous nor notably lenient. If that is all one knew, the system might be viewed as satisfactory, but would scarcely foster public confidence in the administration of justice. Thus, suppose the outcomes referred to were achieved without public access to the proceedings,

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4. See, e.g., *Hamdan*, 548 U.S. at 590–93; Judith Resnik, *Detention, the War on Terror, and the Federal Courts*, 110 COLUM. L. REV. 579, 590–95 (2010); Vladeck, *supra* note 2, at 296–98.

5. See JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* 87, 89 (2008); Bruce Ackerman, *This Is Not a War*, 113 YALE L.J. 1871, 1873 (2004).

6. This is a universal value. E.g., Kemal Bedri & Elena Baylis, *Constructing Credibility*, 6 GREEN BAG 2D 399, 409 (2003) (quoting Pres. Bedri of Ethiopian Federal Supreme Court) (“I want us to be credible in the eyes of the public. That is our biggest challenge.”).

only at prodigious expense, or only with grave delays. Alternatively, suppose there were no protection against bribing jurors or judges—or no particular protection for judicial independence. Suppose the rules of decision and procedure, while entirely reasonable (and such that they would be approved by an overwhelming majority of the voters), were unfamiliar and arrived at by a secret process.

An entirely different set of questions emerges if the goal is not public confidence in the administration of justice, but something else—such as victory over a dangerous adversary.

The long debate over post-9/11 military commissions raises the question whether the normal yardstick is the one to which we ought to be referring. From this perspective, what proves to be satisfactory may have far less to do with procedural regularity and transparency, and far more to do with disabling armed adversaries bent on violence against our country, its inhabitants, and its interests. It must be said that this alternative objective becomes less plausible where, as in the case of the United States during the decade since 9/11, the country is on a war footing in name only.<sup>7</sup> Aside from the selfless labors of our military personnel and the sacrifice of their immediate families, the occasional National Guard and Reserve personnel at train and bus stations in our great metropolitan areas, and high spending for defense, there is little outward domestic evidence that the United States is at war.

The choice between these two definitions of what makes for a satisfactory system of justice lurks in any consideration of the arrangements the George W. Bush Administration put in place in 2001 for military commissions<sup>8</sup> and those Congress later cemented into the United States Code with the Military Commissions Acts (“MCAs”) of 2006<sup>9</sup> and 2009.<sup>10</sup> Those who believe that the military commission system primarily serves the interest in fostering public confidence in national defense and national security programs rather than the interest in fostering public confidence in the administration of justice will be more likely to look to outcomes than to institutions and processes. Those, however, are the aspects on which I will focus.

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7. See Ackerman, *supra* note 5, at 1873.

8. See Military Order of November 13, 2001, *supra* note 1.

9. Pub. L. No. 109-366, 120 Stat. 2600 (2006) (codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

10. See National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 1801–07, 123 Stat. 2190, 2574–614 (2009) (codified as amended at 10 U.S.C. §§ 948a–950t (2010)).

## II. COMMISSION REALITIES

Since their re-establishment, the military commissions have adjudicated a grand total of seven cases.<sup>11</sup> Of those cases, five involved pretrial agreements and guilty pleas, the sixth defendant pleaded not guilty but mounted no defense, and the last was contested.<sup>12</sup> Five of those convicted remain at Guantánamo.<sup>13</sup> No cases were decided by the now-defunct non-statutory Review Panel established in 2002,<sup>14</sup> and only two cases have been the subject of final decisions by the United States Court of Military Commission Review created by the Military Commissions Act of 2006.<sup>15</sup> There have been no acquittals at trial, and no convictions have been reversed by either the convening authority or on appellate review.<sup>16</sup> Only two additional cases, involving six individuals, are currently headed for trial by military commission.<sup>17</sup> They arise out of the 9/11 attacks and the attack on the USS *Cole*.<sup>18</sup>

The overall cost of the commissions is unknown, but is surely in the many millions of dollars, including such expenses as court and detention facility

11. *By the Numbers*, MIAMI HERALD, <http://www.miamiherald.com/2007/11/27/322461/by-the-numbers.html> (last updated Apr. 2, 2012).

12. The cases of David Hicks, Omar Khadr, Noor Uthman Mohammed, Ibrahim al Qosi, and Majid Khan were disposed of with pretrial agreements and/or guilty pleas. *Id.* Defendant Ali Hamza al Bahlul was represented by counsel, but insisted that nothing be done on his behalf and even held up a boycott sign at his arraignment. David J.R. Frakt, *The Practice of Criminal Law in the Guantánamo Military Commissions*, 67 A.F. L. REV. 35, 71–72, 85 (2011). Salim Hamdan was convicted after a contested trial. *Id.* at 38 n.9.

13. Carol Rosenberg, *No Vacancy at Guantánamo*, MIAMI HERALD, Oct. 19, 2011, at 4A.

14. U.S. Dep't of Def., Military Comm'n Order No. 1 § 6(H)(4) (Mar. 21, 2002); [hereinafter Military Comm'n Order No. 1]; see *U.S. Court of Military Commissions Review (USCMCR) History*, OFF. MIL. COMMISSIONS, <http://www.mc.mil/ABOUTUS/USCMCRHistory.aspx> (last visited Mar. 30, 2012) (explaining that *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) invalidated the non-statutory Review Panel before it was able to decide any cases); see also NAT'L INST. OF MILITARY JUSTICE, ANNOTATED GUIDE: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM 73–75 (2002).

15. 10 U.S.C. § 950f (Supp. IV 2011); see *supra* note 12 and accompanying text.

16. See *supra* notes 11–12 and accompanying text.

17. *Military Commissions Cases*, OFF. MILITARY COMMISSIONS, <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (last visited Mar. 10, 2012) (showing that the “active” cases listed as “Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2)” and “Khalid Sheikh Mohammed et al (2),” charging five individuals jointly, are headed for trial by military commission, while “Majid Shoukat Khan” has entered into a pretrial agreement). As of March 10, 2012, the Office of Military Commissions website listed three cases as “pending/active” (including one that is apparently being treated as active while the government determines whether the defendant has fulfilled his obligations under a pretrial agreement). *Id.* Another five are listed as “pending/inactive.” *Id.*

18. *Id.* (charges accessed by clicking “Abd al-Rahim Hussein Muhammed Abdu Al-Nashiri (2)” and “Khalid Sheikh Mohammed et al (2)”).

construction, security, personnel pay and allowances, transportation, and drills.<sup>19</sup> Even if allowance is made for the fact that only a handful of the Guantánamo detainees will ever enter the military commission system, on a per-case basis, this is expensive justice.

Apart from an unsuccessful effort to obtain prejudgment review by the United States Court of Appeals for the District of Columbia Circuit,<sup>20</sup> that court has not yet had occasion to exercise its statutory appellate jurisdiction over military commissions.<sup>21</sup> Without explanation, Congress excluded the underworked United States Court of Appeals for the Armed Forces from the appellate review of military commissions,<sup>22</sup> and that court has refused to exercise its power under the All Writs Act in a commission case.<sup>23</sup>

There have been three appointing (or convening) authorities, exercising the power to create military commissions and review their proceedings. Of the three, one has been a civilian,<sup>24</sup> one has been a retired major general serving as a civilian,<sup>25</sup> and the incumbent is a retired Navy vice admiral who has been recalled to active duty for this purpose.<sup>26</sup> There have been three legal advisors to the appointing or convening authority. One of those was disqualified because he had improperly sought to exert command influence over a chief

19. According to a 2010 estimate, at least \$500 million has been spent on renovations at Guantánamo. Scott Higham & Peter Finn, *Camp Costly*, WASH. POST, June 7, 2010, at A1. \$13.4 million was spent on a courthouse complex called the Expeditionary Judicial Facility, to provide a second courtroom, which has been used only once. Amnesty Int'l, *Close Gitmo and Help Solve the Debt Crisis*, HUFFINGTON POST (Aug. 24, 2011), [http://www.huffingtonpost.com/amnesty-international/close-gitmo-and-help-solv\\_b\\_934236.html](http://www.huffingtonpost.com/amnesty-international/close-gitmo-and-help-solv_b_934236.html). The original solicitation was more ambitious, and contemplated a cost range of \$75–125 million for design and construction of the legal compound. U.S. Dep't of the Navy, *Legal Compound at U.S. Guantanamo Bay, Cuba*, FED. BUS. OPPORTUNITIES (Nov. 3, 2006), [https://www.fbo.gov/index?s=opportunity&mode=form&id=367839984085f5b06f6a48f1470d3452&tab=core&\\_cview=0](https://www.fbo.gov/index?s=opportunity&mode=form&id=367839984085f5b06f6a48f1470d3452&tab=core&_cview=0). For a description of a 2011 Guantánamo drill, see Carol Rosenberg, *Weather, Technology Bedevil Trial's Dry Run*, MIAMI HERALD, Aug. 14, 2011, at 3A.

20. *Khadr v. United States*, 529 F.3d 1112, 1113 (D.C. Cir. 2008).

21. 10 U.S.C. § 950g (Supp. IV 2011).

22. See Eugene R. Fidell, *Appellate Review of Military Commissions*, BALKINIZATION (Oct. 8, 2009), <http://balkin.blogspot.com/2009/10/in-coming-weeks-there-will-be-no.html>, reprinted in 2010 GREEN BAG ALMANAC & READER 257, 258 (2009); see also Eugene R. Fidell, *The Next Judge*, 5 J. NAT'L SECURITY L. & POL'Y 303, 305 (2011).

23. *Al Qosi v. Altenburg*, 60 M.J. 461, 461–62 (C.A.A.F. 2005) (mem.).

24. See Susan J. Crawford: *Convening Authority for Military Commissions*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/d20070207crawford.pdf> (last visited Mar. 10, 2012). Susan J. Crawford served for fifteen years on the Court of Appeals for the Armed Forces. *Id.*

25. See John D. Altenburg, Jr.: *Appointing Authority for Military Commissions*, U.S. DEP'T OF DEF., <http://www.defense.gov/news/Dec2003/d20031230altenburg.pdf> (last visited Mar. 10, 2012).

26. *Senior Executive Service Appointments and Reassignments*, U.S. DEP'T OF DEF. (Mar. 30, 2010), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=13418>.

prosecutor.<sup>27</sup> The legal advisors have been a retired colonel,<sup>28</sup> a retired brigadier general who was recalled to active duty,<sup>29</sup> and a reserve brigadier general.<sup>30</sup>

Personnel turbulence has been a serious concern. There have been six chief prosecutors<sup>31</sup> and five chief defense counsel,<sup>32</sup> aided by dozens of other military prosecutors and military and civilian defense counsel, provided by the government at no expense to the defendants.<sup>33</sup> Numerous civilian defense

27. *United States v. Hamdan*, 1 M.C. 78, 87, 90 (Military Comm'n 2008); William Glaberson, *Judge's Guantánamo Ruling Bodes Ill for System*, N.Y. TIMES, May 11, 2008, at 26.

28. *Military Commissions Appointments Announced*, U.S. DEP'T OF DEF. (Sept. 19, 2008), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=12222> (Michael Chapman).

29. *Military Commission Legal Advisor Announced*, U.S. DEP'T OF DEF. (Dec. 30, 2003), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=5896> (Thomas L. Hemingway).

30. *Military Commissions Appointments Announced*, *supra* note 28 (Thomas W. Hartmann); *see also Brigadier General Thomas W. Hartmann*, U.S. AIR FORCE, <http://web.archive.org/web/20070915074851/http://www.af.mil/bios/bio.asp?bioID=10078> (last visited Mar. 20, 2012).

31. *See* Gerry J. Gilmore, *Defense, Prosecution Chiefs Differ as Guantanamo Arraignment Ends*, U.S. DEP'T OF DEF. (June 6, 2008), <http://www.defense.gov/News/NewsArticle.aspx?ID=50121> (indicating Army Colonel Lawrence Morris was chief prosecutor for the Office of Military Commissions); *Key Military Commission Officials Announced*, U.S. DEP'T OF DEF. (Apr. 20, 2004), <http://www.defense.gov/releases/release.aspx?releaseid=7278> (naming Army Colonel Robert L. Swann as Army Colonel Fred Borch's replacement for chief prosecutor for the Office of Military Commissions); *New Military Commissions Chief Prosecutor Announced*, U.S. DEP'T OF DEF. (June 23, 2011), <http://www.defense.gov/releases/release.aspx?releaseid=14598> (naming Army Brigadier General Mark Martins as Navy Captain John Murphy's replacement for chief prosecutor for the Office of Military Commissions); Sara Wood, *Prosecutor: Hicks Case Good Start for Military Commissions*, U.S. DEP'T OF DEF. (Mar. 31, 2007), <http://www.defense.gov/News/NewsArticle.aspx?ID=32659> (indicating Air Force Colonel Morris Davis was chief prosecutor for the Office of Military Commissions).

32. *See Flag and General Officer Announcements*, U.S. DEP'T OF DEF. (July 12, 2001), <http://www.defense.gov/releases/release.aspx?releaseid=2969> (indicating Marine Corps Colonel Kevin M. Sandkuhler was chief defense counsel for the Office of Military Commissions); Gerry J. Gilmore, *Defense, Prosecution Chiefs Differ as Guantanamo Arraignment Ends*, U.S. DEP'T OF DEF. (June 6, 2008), <http://www.defense.gov/News/NewsArticle.aspx?ID=50121> (indicating Army Colonel Steven David was chief defense counsel for the Office of Military Commissions); *New Military Commissions Chief Prosecutor Announced*, U.S. DEP'T OF DEF. (June 23, 2011), <http://www.defense.gov/releases/release.aspx?releaseid=14598> (indicating Marine Colonel Jeffrey Colwell would continue as chief defense counsel for the Office of Military Commissions); Doug Sample, *Military Commission Chief Prosecutor, Defense Counsel Introduced*, U.S. DEP'T OF DEF. (May 23, 2003), <http://www.defense.gov/News/NewsArticle.aspx?ID=28951> (indicating Air Force Colonel Will Gunn was chief defense counsel for the Office of Military Commissions); Sara Wood, *Charges Dismissed Against Canadian at Guantanamo*, U.S. DEP'T OF DEF. (June 4, 2007), <http://www.defense.gov/news/newsarticle.aspx?id=46281> (indicating Marine Colonel Dwight Sullivan was chief defense counsel for the Office of Military Commissions).

33. *See* Carol Rosenberg, *Guantanamo Lawyers Aren't Happy with New Work Rules*, MCCLATCHY (Mar. 18, 2011), <http://www.mcclatchydc.com/2011/03/18/110710/guantanamo-lawyers-arent-happy.html> (noting that the Pentagon has provided both military and civilian lawyers for "alleged war criminals" at no cost to defendants).

counsel from private and public interest law firms have also participated,<sup>34</sup> as have civilian federal prosecutors on loan from the Department of Justice.<sup>35</sup>

There have been fourteen military judges of the military commissions,<sup>36</sup> four members of the Review Panel,<sup>37</sup> and twenty-five judges of the Court of Military Commission Review.<sup>38</sup> All eight current appellate military judges are on loan from their normal duties as judges of the service Courts of Criminal Appeals.<sup>39</sup> The Review Panel members did not have fixed terms of office.<sup>40</sup> Trial and appellate military judges under the MCA also do not enjoy terms of office as such. Rather, “[e]ach appellate military judge assigned to the USCMCR shall remain assigned to the Court unless reassigned, retired or separated from active duty pursuant to 10 U.S.C. § 949b(b)(4).”<sup>41</sup> The Chief

34. See Stacy Sullivan, *The Minutes of the Guantanamo Bay Bar Association*, N.Y. MAG., June 26, 2006, at 44, 46.

35. *Gitmo Cases Referred to U.S. Prosecutors*, MSNBC.COM (Aug. 3, 2009), [http://www.msnbc.msn.com/id/32274673/ns/us\\_news-crime\\_and\\_courts/t/gitmo-cases-referred-us-prosecutors/](http://www.msnbc.msn.com/id/32274673/ns/us_news-crime_and_courts/t/gitmo-cases-referred-us-prosecutors/).

36. At this writing there are twelve. Biographical data for all but one may be found at *Military Judges' Biographies*, MIAMI HERALD <http://media.miamiherald.com/smedia/2008/04/02/10/judgesbios.source.prod.affiliate.56.pdf> (last visited Mar. 30, 2012). The holdout, Colonel Patrick J. Parrish, declined to make his data public. *Id.* Previously, Navy Captain Daniel E. O'Toole was a military judge, *Military Commission Charges Referred*, U.S. DEP'T OF DEF. (Dec. 19, 2005), <http://www.defense.gov/releases/release.aspx?releaseid=9177>, as was Colonel Robert S. Chester, *Military Commission Charges Referred*, U.S. DEP'T OF DEF. (Jan. 20, 2006), <http://www.defense.gov/releases/release.aspx?releaseid=9248>.

37. *Military Commission Review Panel Members to be Designated and Instruction Issued*, U.S. DEP'T OF DEF. (Dec. 30, 2003), <http://www.defense.gov/Releases/Release.aspx?ReleaseID=5897>.

38. *United States v. Hamdan*, 801 F. Supp. 2d 1247, 1253 (U.S.C.M.C.R. 2011) (naming Judges Ronald Gregory and William Orr, Jr.); Motion to Attach, Attach. A–B, *United States v. Khadr*, No. 07-001 (U.S.C.M.C.R. July 19, 2007), available at <http://www.scotusblog.com/archives/Khadr%20attachments%207-19-07.pdf> (naming Judges Amy Bechtold, Griffin Bell, John Rolph, Lisa Schenck, Dawn Scholz, and Steven Walburn); NAT'L INST. OF MILITARY JUSTICE, 2 MILITARY COMMISSION REPORTER, at xiii (2011) (naming Judges Barbara G. Brand, David L. Conn, Theresa A. Gallagher, John B. Hoffman, Joseph R. Perlak, Eric C. Price, Martin L. Sims, and Cheryl H. Thompson); NAT'L INST. OF MILITARY JUSTICE, 1 MILITARY COMMISSION REPORTER 401 (2009) (naming Judges Edward G. Beister, Jr., William T. Coleman, John F. Feltman, David R. Francis, Eric E. Geiser, Paul P. Holden, Jr., Daniel E. O'Toole, Annamary Sullivan, Frank J. Williams).

39. See Jason Jones, *Navy Judges Lend Expertise to the Court of Military Commission Review*, JAG MAG., Winter 2007, at 18, 18, available at [http://www.jag.navy.mil/news/jag\\_mag/archive/2007\\_Winter/2007\\_Winter\\_JAGMAG.pdf](http://www.jag.navy.mil/news/jag_mag/archive/2007_Winter/2007_Winter_JAGMAG.pdf). The positions of Chief Judge and Deputy Chief Judge are vacant. See *Judges U.S. Court of Military Commission Review*, OFF. MIL. COMMISSIONS (Oct. 11, 2011), <http://www.mc.mil/Portals/0/Judges%20Assigned%20to%20USCMCR%20as%20of%20Oct.%202011,%202011.pdf>.

40. NAT'L INST. OF MILITARY JUSTICE, *supra* note 14, at 73 (noting that Review Panel members “serve at the will of the Secretary of Defense”).

41. U.S. DEP'T OF DEF., REGULATION FOR TRIAL BY MILITARY COMMISSION § 25-2(c) (2011) [hereinafter REGULATION FOR TRIAL BY MILITARY COMMISSION], available at

Judge is appointed by the Secretary of Defense and serves for two years, with reappointment at the Secretary's unfettered discretion.<sup>42</sup> One trial judge left office because he was a retired regular Army officer who had been recalled to active duty and the Army did not extend his recall.<sup>43</sup>

Although (thanks to me) many lawyers who have been involved in the military commissions proudly sport baseball caps bearing the legend "Guantanamo Bay Bar Association,"<sup>44</sup> and although there seem to be two rump groups using that name,<sup>45</sup> there is actually no organized military commissions bar at either the trial or appellate level. Members of any state or federal bar may practice before the commissions,<sup>46</sup> and those appearing before the Court of Military Commission Review and the Court of Appeals for the District of Columbia Circuit must be admitted by those courts.<sup>47</sup>

There is no single professional responsibility body to which an attorney practicing before military commissions may turn for guidance. Military commissions have engendered a welter of ethical issues both before and after enactment of the MCAs, including intrusion on the professional independence of both prosecutors and defense counsel,<sup>48</sup> participation in proceedings believed to be fundamentally flawed,<sup>49</sup> conflicts of interest,<sup>50</sup> extrajudicial

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<http://www.mc.mil/Portals/0/2011%20Regulation.pdf>. Army and Coast Guard appellate military judges have protected terms of office as such, under service regulations. *See* *United States v. Paulk*, 66 M.J. 641, 642 (A.F. Ct. Crim. App. 2008).

42. REGULATION FOR TRIAL BY MILITARY COMMISSION, *supra* note 41, § 25-2(d).

43. *See* *United States v. Khadr*, 1 M.C. 246, 246 (Military Comm'n 2008); E-mail from Ralph H. Kohlmann, C.J., Military Comm'ns Trial Judiciary, to William Sowder Attorney Advisor, Military Comm'ns Trial Judiciary (June 2, 2008, 9:03 AM), *available at* [http://www.dod.mil/pubs/foi/operation\\_and\\_plans/MilitaryCommissions/MilitaryCommissions.pdf](http://www.dod.mil/pubs/foi/operation_and_plans/MilitaryCommissions/MilitaryCommissions.pdf).

44. *See* Lynne Duke, *Statutes of Liberty: Michael Ratner Is in Hot Pursuit of Justice for Guantanamo Detainees*, WASH. POST, Dec. 19, 2003, at C1.

45. *See* *Legal Eagles* (photograph of Capt. Patrick McCarthy addressing the Guantanamo Bay Bar Association), in GUANTANAMO BAY GAZETTE, Nov. 24, 2006, at 8, *available at* [http://www.cnic.navy.mil/navycni/groups/public/@cnrse/@gtmo/documents/document/cnic\\_048676.pdf](http://www.cnic.navy.mil/navycni/groups/public/@cnrse/@gtmo/documents/document/cnic_048676.pdf); Sullivan, *supra* note 34, at 46.

46. Military Comm'n Order No. 1, *supra* note 14, § 4(C)(3)(b).

47. FED. R. APP. P. 46(a); U.S. DEP'T OF DEF., COURT OF MILITARY COMMISSION REVIEW RULES OF PRACTICE 8(a) (2008) [hereinafter MILITARY COMMISSION REVIEW RULES OF PRACTICE], *available at* <http://www.mc.mil/DesktopModules/cmcr/cmcr/pdf/USCMCR%20Rules%20of%20Practice%20%282008%29.pdf>.

48. *E.g.*, Morris D. Davis, *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, at A15 (chief prosecutor); *Navy Lawyer Who Faulted Guantánamo Is Reassigned*, N.Y. TIMES, (Apr. 4, 2009), <http://www.nytimes.com/2009/04/05/us/politics/05gitmo.html> (defense counsel).

49. *See generally* Mary Cheh, *Should Lawyers Participate in Rigged Systems? The Case of the Military Commissions*, 1 J. NAT'L SEC. L. & POL'Y 375 (2005) (arguing the requirements and restrictions placed on civilian defense attorneys participating in the military commissions make it impossible to provide adequate and ethical representation).

50. *Compare* David Luban, *Lawfare and Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 2007-14 (2008) (outlining the conflicts potentially created by the Office of Military



statements by counsel,<sup>51</sup> unlawful command influence,<sup>52</sup> and the duties of defense counsel where the client wishes to dispense with their services.<sup>53</sup> Ethical issues arising from military commissions have been the subject of rulings by both military service and state professional responsibility authorities.<sup>54</sup> A disturbing number of military commission prosecutors and defense counsel have withdrawn for ethical reasons.<sup>55</sup>

A few uniformed defense counsel are said to have been passed over for promotion as a result of their zealous representation of commission clients.<sup>56</sup> The Department of the Navy refused to convene a special selection board to consider remedial promotion in one such case (involving David Hicks's zealous and effective Marine defense counsel),<sup>57</sup> but that decision was

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Counsel-Defense and explaining one specific conflict that was created for an attorney who worked there), with Charles J. Dunlap, Jr. & Linell A. Letendre, *Military Lawyering and Professional Independence in the War on Terror: A Response to David Luban*, 61 STAN. L. REV. 417, 431–32 (2008) (arguing that Professor Luban made more “of the conflict of interest that allegedly exists” than was necessary).

51. See generally Seth R. Deam, *Does Labeling the System “Unfair” Threaten Fairness? Trial Publicity Rules for Defense Attorneys in Military Commissions*, 19 GEO. J. LEGAL ETHICS 663 (2006) (focusing on two extrajudicial statements made by U.S. Marine Corps Major Michal Mori while acting as defense counsel for detainee David Hicks and analyzing the sources and scope of his ethical responsibilities as related to those statements).

52. *United States v. Hamdan*, 1 M.C. 78, 86–87 (Military Comm’n 2008).

53. See Matthew Ivey, *Challenges Presented to Military Lawyers Representing Detainees in the War on Terrorism*, 66 N.Y.U. ANN. SURV. AM. L. 211, 221–23 (2010). Compare Iowa State Bar Ass’n, Comm. on Ethics & Practice Guidelines, Op. 05-07 (2006), available at <http://www.iabar.net/ethics.nsf/e61beed77a215f6686256497004ce492/d0aa62c34b061a16862573b000158047?OpenDocument> (concluding it is ethical to comply with a military court order assigning a lawyer to represent a detainee who does not wish to be represented), with ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 07-448, at 5 n.18 (2007) (disagreeing with Iowa opinion), available at <http://www2.americanbar.org/sections/criminaljustice/CR209750/PublicDocuments/formalop.pdf>.

54. See, e.g., *Hamdan*, 1 M.C. at 90 (disqualifying the legal advisor to the convening authority of the military commission for exerting unlawful command influence); Iowa State Bar Ass’n, Comm. on Ethics & Practice Guidelines, *supra* note 53. For an insightful review of the federal-state complexities that may arise, see C. Peter Dungan, *Avoiding “Catch-22s”: Approaches to Resolve Conflicts Between Military and State Bar Rules of Professional Responsibility*, 30 J. LEGAL PROF. 31, 46–50 (2006).

55. See Shayana Kadidal, *Confronting Ethical Issues in National Security Cases: The Guantánamo Habeas Litigation*, 41 SETON HALL L. REV. 1397, 1413–14 (2011).

56. E.g., Editorial, *The Cost of Doing Your Duty*, N.Y. TIMES, Oct. 11, 2006, at A26.

57. *Mori v. Dep’t of the Navy*, 731 F. Supp. 2d 43, 44 (D.D.C. 2010), appeal dismissed, No. 10-5344, 2010 WL 5371504, at \*1 (D.C. Cir. Dec. 28, 2010); see also Luban, *supra* note 50, at 2014–19; Ellen Yaroshefsky, *Military Lawyering at the Edge of the Rule of Law at Guantánamo: Should Lawyers be Permitted to Violate the Law?*, 36 HOFSTRA L. REV. 563, 573–74 (2007).

remanded for further proceedings,<sup>58</sup> and Major Mori was promoted to lieutenant colonel and elevated to the military trial bench.<sup>59</sup>

The governing rules are today found in the 2009 Military Commissions Act,<sup>60</sup> the *Manual for Military Commissions*,<sup>61</sup> and the Regulation for Trial by Military Commission,<sup>62</sup> the latter two of which are issued under the authority of the Secretary of Defense.<sup>63</sup> With minor exception, the Military Commission Instructions that applied to the pre-MCA commissions were issued without opportunity for public notice and comment.<sup>64</sup> Nor were the 2007 and 2010 *Manuals for Military Commissions* subject to notice-and-comment rulemaking, even though the parallel document for courts-martial—the *Manual for Courts-Martial*—has routinely been the product of notice-and-comment procedures since the Carter Administration.<sup>65</sup> The George W. Bush Administration successfully resisted efforts under the Freedom of Information Act<sup>66</sup> to obtain comments received informally by Secretary of Defense Donald H. Rumsfeld on the Military Commission Instructions.<sup>67</sup> Despite its claimed liberalization

58. *Mori*, 731 F. Supp. 2d at 44.

59. Alison Caldwell, *Promotion for Hicks' US Military Lawyer*, AUSTL. BROAD. CORP. NEWS (June 12, 2009), <http://www.abc.net.au/news/2009-06-12/promotion-for-hicks-us-military-lawyer/1712062>. Other military commission defense counsel have also been promoted. David J. R. Frakt, *Mohammed Jawad and the Military Commissions of Guantánamo*, 60 DUKE L.J. 1367, 1409 & n.213 (2011).

60. National Defense Authorization Act for Fiscal Year 2010, Pub. L. No. 111-84, §§ 1801–07, 123 Stat. 2190, 2574–614 (2009) (codified as amended at 10 U.S.C. §§ 948a–950t (2010)).

61. U.S. DEP'T OF DEF., MANUAL FOR MILITARY COMMISSIONS (2010) [hereinafter MANUAL FOR MILITARY COMMISSIONS], available at <http://www.defense.gov/news/d2010manual.pdf>.

62. REGULATION FOR TRIAL BY MILITARY COMMISSION, *supra* note 41.

63. See Ashton B. Carter, *Foreword* to REGULATION FOR TRIAL BY MILITARY COMMISSION, *supra* note 41; Robert M. Gates, *Foreword* to MANUAL FOR MILITARY COMMISSIONS, *supra* note 61.

64. Eugene R. Fidell, *Military Commissions & Administrative Law*, 6 GREEN BAG 2D 379, 382–84 (2003) [hereinafter Fidell, *Military Commissions & Administrative Law*].

65. See Eugene R. Fidell, *Limitations of the Military Commissions Structure*, NAT'L INST. MIL. JUST. BLOG (June 19, 2010, 6:53 PM), <http://www.nimjblog.org/2010/06/limitations-of-military-commissions.html>. The process, which is voluntary on the part of the Defense Department, see *id.* at 386 & n.41 (citing Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000)), is prescribed in 32 C.F.R. pt. 152 (2010).

66. 5 U.S.C. § 552 (2006).

67. Nat'l Inst. of Military Justice v. U.S. Dep't of Def., 512 F.3d 677, 678–79, 687 (D.C. Cir. 2008).

of FOIA policy,<sup>68</sup> the Obama Administration refused to release the withheld comments when requested to do so.<sup>69</sup>

There are rules of practice for the Court of Military Commission Review,<sup>70</sup> but they were issued without notice-and-comment rulemaking or reliance on a rules committee that involved anyone outside the government.<sup>71</sup> Similarly, trial court rules for the military commissions,<sup>72</sup> like the critical 2007 and 2011 versions of the Regulation for Trial by Military Commission, were issued without opportunity for public notice and comment.<sup>73</sup>

Rulings of military judges are not routinely handed out in court following announcement from the bench.<sup>74</sup> The Defense Department long maintained a military commissions page on its website<sup>75</sup> and posted pertinent documents there following security review. Documents were posted haphazardly and late.<sup>76</sup> Opinions issued by military judges in connection with military commission trials are published only in the unofficial *Military Commission*

68. Freedom of Information Act, Memorandum for the Heads of Executive Departments and Agencies, 74 Fed. Reg. 4683, 4683 (Jan. 21, 2009) (“In the face of doubt, openness prevails.”).

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

70. See MILITARY COMMISSION REVIEW RULES OF PRACTICE, *supra* note 47.

71. See U.S. COURT OF MILITARY COMM’N REVIEW, ADMINISTRATIVE ORDER NO. 08-02 (2008), available at <http://www.mc.mil/DesktopModules/cmcr/cmcr/pdf/USCMCR%20Rules%20of%20Practice%20%282008%29.pdf> (indicating that the rules were issued “[b]y direction of the Chief Judge, after consultation with the other judges of the Court [of Military Commissions Review],” and implying no additional consultation with anyone outside the government).

72. U.S. DEP’T OF DEF., MILITARY COMMISSIONS TRIAL JUDICIARY RULES OF COURT (2007), available at <http://www.mc.mil/Portals/0/MCTJRulesofCourt.pdf>.

73. See Letter from Nat’l Inst. of Military Justice, Nat’l Assoc. of Criminal Def. Lawyers, Am. Civil Liberties Union, Int’l Justice Network, Ctr. for Constitutional Rights, & The Constitution Project, to Hon. Robert M. Gates, Sec’y of Def., Dep’t of Def. (April 12, 2011) (on file with author) (explaining that in 2011, months before the 2011 version of the Regulation for Trial by Military Commission was issued, the military commissions still had not opened up their rulemaking process to non-governmental bodies).

74. See Eugene R. Fidell, *Brig-adoon: Report from Guantánamo*, Dec. 1–5, 2009, 2 NIMJ REP. FROM GUANTÁNAMO, 2010, at 29, 32 [hereinafter Fidell, *Brig-adoon*].

75. The former military commissions page has been removed from the Defense Department website. A new site, [www.mc.mil](http://www.mc.mil), was unveiled on September 28, 2011, and is discussed below.

76. For example, the important September 9, 2011 decision of the Court of Military Commission Review in *United States v. al Bahlul*, No. CMC 09–001, 2011 WL 4916373 (U.S.C.M.C.R. Sept. 9, 2011), available at <http://www.mc.mil/CASES/USCourtOfMilitaryCommissionReview.aspx>, was not posted until well over a week later, even though it freely circulated among lawyers and was immediately available on the *Miami Herald* website. See Carol Rosenberg, *Panel Upholds Al Qaida Filmmaker’s Life Sentence*, MIAMI HERALD (Sept. 10, 2011), <http://www.miamiherald.com/2011/09/09/2399378/military-court-upholds-al-qaida.html> (containing a link to the court’s decision).

*Reporter*, issued by the private National Institute of Military Justice.<sup>77</sup> Decisions of the Court of Military Commission Review are on occasion published in West's *Federal Supplement 2d*,<sup>78</sup> as well as the *Military Commission Reporter*.<sup>79</sup> A few of the decisions have addressed matters of substance. The appellate decisions in the *Hamdan*<sup>80</sup> and *al Bahlul*<sup>81</sup> cases reveal seriousness of purpose, although one might wonder about citing, for example, Mubarak-era Egyptian legislation (as the *al Bahlul* court did)<sup>82</sup> in seeking to show that material support for terrorism is widely recognized as a punishable offense.

All of the post-9/11 military commissions have been conducted in courtrooms located at the United States Naval Station, Guantánamo Bay, Cuba.<sup>83</sup> One of the courtrooms includes state-of-the-art equipment<sup>84</sup> and is reserved for cases involving so-called "high-value detainees" such as Khalid Sheik Muhammed.<sup>85</sup> Proceedings of the Court of Military Commission Review have been held at the National Courts Building in Washington, D.C., in a courtroom normally used by the United States Court of Appeals for the Federal Circuit.<sup>86</sup>

Travel to and from Guantánamo Bay is strictly regulated by the Defense Department, and private citizens may not board either commercial or government flights without government approval.<sup>87</sup> Private citizens permitted to attend commission trials are closely regulated in their ability to move about

77. See 1 M.C. (2009), available at <http://www.scribd.com/doc/60447251/1MC>; 2 M.C. (3d Cum. Pamphlet 2011), available at <http://www.scribd.com/doc/60444255/2MC3PAM>.

78. E.g., *United States v. Khadr*, 753 F. Supp. 2d 1178 (U.S.C.M.C.R. 2008); *United States v. Khadr*, 717 F. Supp. 2d 1215 (U.S.C.M.C.R. 2007); *United States v. Khadr*, 717 F. Supp. 2d 1212 (U.S.C.M.C.R. 2007); *United States v. Khadr*, 717 F. Supp. 2d 1203 (U.S.C.M.C.R. 2007).

79. E.g., *United States v. Khadr*, 1 M.C. 467 (U.S.C.M.C.R. 2008); *United States v. Khadr*, 1 M.C. 443 (U.S.C.M.C.R. 2007); *United States v. Khadr*, 1 M.C. 440 (U.S.C.M.C.R. 2007); *United States v. Khadr*, 1 M.C. 431 (U.S.C.M.C.R. 2007).

80. See generally *United States v. Hamdan*, 801 F. Supp. 2d 1247, 2 M.C. 88 (U.S.C.M.C.R. 2011) (affirming Hamdan's sentence and the military commission's findings).

81. See generally *al Bahlul*, 2011 WL 4916373 (affirming al Bahlul's sentence and the military commission's findings).

82. *Id.* at \*35.

83. *Facilities*, OFF. MIL. COMMISSIONS, <http://www.mc.mil/FACILITIES/SERVICES/Facilities.aspx> (last visited Mar. 11, 2012).

84. See generally Shanita Simmons, *Technology to Help Deliver State-of-the Art Judicial Proceedings*, JOINT TASK FORCE GUANTANAMO (Oct. 31, 2007), <http://www.jtftgmo.southcom.mil/storyarchive/2007/October/103107-1-courtroom21.html>.

85. See 157 CONG. REC. S2877 (daily ed. May 11, 2011) (statement of Sen. Kelly Ayotte).

86. *U.S. Court of Military Commissions Review History*, OFF. MIL. COMMISSIONS, <http://www.mc.mil/ABOUTUS/USCMCRHistory.aspx> (last visited Mar. 11, 2012).

87. *Frequently Asked Questions*, OFF. MIL. COMMISSIONS, <http://www.mc.mil/ABOUTUS/FAQs.aspx> (last visited Mar. 11, 2012).

the base.<sup>88</sup> A few non-governmental organizations, such as the ACLU, Human Rights Watch, Human Rights First, NIMJ, Amnesty International, and the Heritage Foundation, are on an official list of approved observers and are afforded free transportation to Guantánamo via Andrews Air Force Base (AFB), Maryland.<sup>89</sup> One observer has written:

Following the conclusion of the hearing, it struck me that the entire court had been transported from the Washington, DC, metro area to Guantanamo Bay, Cuba, via chartered airliner and spent nearly four days on base at Guantanamo for a hearing that lasted barely over an hour. While I grant that those involved in the proceedings do this on a regular basis out of a sense of duty to both the nation and the fair administration of justice, this use of resources is clearly inefficient.<sup>90</sup>

Even though Guantánamo can only be reached—unless you are in the Navy or Coast Guard—by airplane and only with the affirmative approval of the government, and even though visitors are closely monitored, courthouse security, provided by military personnel, is tighter than that found in post-9/11 federal courthouses. Proceedings are conducted behind soundproof glass “so that the audio feed can be delayed in case classified information needs to be censored.”<sup>91</sup> On a few occasions involving high-value detainees, family members of victims of the 9/11 attacks were flown to Guantánamo to observe the proceedings.<sup>92</sup>

Journalists are permitted to attend all open proceedings of both the military commissions and the Court of Military Commission Review.<sup>93</sup> They pay \$400

88. See Elizabeth Hillman, *Report from Guantánamo*, Apr. 6–9, 2010, in 3 NIMJ REP. FROM GUANTÁNAMO, 2010, at 3, 3.

89. Kelli Stout, *Dispatch from GTMO*, SETON HALL L., <http://law.shu.edu/ProgramsCenters/PublicIntGovServ/policyresearch/reporting-from-guantanamo.cfm> (last visited Mar. 11, 2012).

90. Michael Orlando, *Report from Guantánamo*, June 28–July 1, 2010, in 3 NIMJ REP. FROM GUANTÁNAMO, 2010, at 14, 15; see also Fidell, *Brig-adoon*, *supra* note 74, at 30. The pace of the proceedings is slow at best. As New York attorney Ronald W. Meister has commented, “[i]t was hard to avoid the feeling that the quality of mercy in these proceedings was being strained through a colander filled with molasses.” Ronald W. Meister, *Report from Guantánamo*, Nov. 16–19, 2009, in 2 NIMJ REP. FROM GUANTÁNAMO, 2010, at 26, 28.

91. Sharon Weinberger, *Doling Out Justice at Gitmo: An Inside Look*, AOL NEWS (July 1, 2010, 10:21 AM), <http://www.aolnews.com/2010/07/01/gitmo-courtroom-a-question-of-justice-and-security/>. The delay “has been advertised as 20 seconds” but one observer thought it was “much longer than that, perhaps a minute or so.” Hillman, *supra* note 88, at 4. The delay anticipated for remote telecasts will be 40 seconds. Carol Rosenberg, *More Public Viewing of Trial Proposed*, MIAMI HERALD, Nov. 6, 2011, at 3A [hereinafter Rosenberg, *More Public Viewing of Trial Proposed*].

92. William Glaberson, *5 Charged in 9/11 Attacks Seek to Plead Guilty*, N.Y. TIMES, Dec. 9, 2008, at A1; Rosenberg, *supra* note 91.

93. U.S. DEP’T OF DEF., MEDIA GROUND RULES FOR GUANTANAMO BAY, CUBA (GTMO) 7–8 (2010), available at [www.mc.mil/Portals/0/MILCOMMediaGroundRules.pdf](http://www.mc.mil/Portals/0/MILCOMMediaGroundRules.pdf).

each for a round-trip ticket on the military flights out of Andrews AFB, and are subject to extensive, and in some cases arbitrary, shifting rules.<sup>94</sup> In one episode in 2010, four reporters were told they would not be permitted to return to Guantánamo after they filed stories naming an interrogator who testified anonymously but whose name (Joshua R. Claus) had previously been disclosed in Canada in connection with disciplinary proceedings to which he had been subjected.<sup>95</sup> The Defense Department eventually relented and the expulsion order was rescinded,<sup>96</sup> but the rules governing the reporters' work remain unclear.

Competent foreign language interpretation has been a challenge from the beginning of the military commissions.<sup>97</sup> A courtroom design contract with the Center for Legal and Court Technology at William & Mary Law School included "new technology [that] provides an audio and television monitoring system that eliminates the need for translators to [be] physically present in the courtroom."<sup>98</sup>

### III. REBRANDING

Professor Muneer Ahmad has written compellingly about early (pre-MCA) military commission system miscues as well as the steps taken by the government to try to legitimize the commissions. In his account, the military commissions got off to a rocky start:

Despite the protests of defense lawyers, the commissions operated with virtually no rules of evidence, no discovery rules, no rules of decision, and no rules regarding precedent. Thus, not only was positive law in short supply, so, too, was any sense as to what interpretive practices would be followed by the commissions or what precedential value a decision in one commission would have in the same trial, in another trial before the same presiding officer, or in a trial before a different presiding officer. While any newly created legal system is bound to encounter initial problems, the failure of the commission system to

94. See Carol Rosenberg, *Commentary: For Reporters, the Rules at Guantánamo Change Daily*, MIAMI HERALD, (July 26, 2010), <http://www.miamiherald.com/2010/07/26/1819939/commentary-for-reporters-the-rules.html> [hereinafter Rosenberg, *Rules at Guantánamo Change Daily*] ("This is a court like none other I've ever seen.").

95. Eugene R. Fidell, *Military Law*, DÆDALUS, Summer 2011, at 165, 169 & 175 n.33 [hereinafter Fidell, *Military Law*] (citing *On the Media: "Veteran Reporter Barred from Guantanamo"* (NPR radio broadcast May 14, 2010), available at <http://www.onthemedial.org/transcripts/2010/05/14/01>).

96. See Eugene R. Fidell, *Ten Years On: Military Justice and Civil Liberties in the Post-9/11 Era*, 56 N.Y.L. SCH. L. REV. 103, 108 n.29 (2011/12).

97. Simmons, *supra* note 84.

98. *Id.*

contemplate or address these fundamental issues of adjudication suggests how poorly designed it was.<sup>99</sup>

....

... [T]he commission system lacked rules for the most fundamental aspects of a trial, and what rules it had changed at whim. Because the system disavowed lineage to any extant common law system, it was left no other option than to make up the law as it went along. This “law” consisted of a steady flow of often contradictory directives from the Secretary of Defense (“Military Commission Orders”), the Department of Defense General Counsel (“Military Commission Instructions”), the Appointing Authority (“Appointing Authority Regulations” and “Appointing Authority Orders”), and the presiding officers (“Presiding Officer Memoranda”). We were instructed to refer to these various rules as “Commission Law,” an invention that by its terminology, and capitalization, sought to endow the commissions with the majesty and legitimacy of law. This grasp for the mantle of law complemented the hastily decorated commission room and judicially costumed presiding officers.<sup>100</sup>

Many of the subsequent changes Professor Ahmad describes as “purely cosmetic.”<sup>101</sup> Requiring judges to wear robes is certainly desirable, but gestures like this lose their potency when combined with the kind of *trompe l’oeil* physical arrangements he describes.<sup>102</sup> Even steps to self-legitimization that might otherwise add to the credibility of the process are offset when those trial participants with speaking parts are called upon to use a “script” during the proceedings.<sup>103</sup>

99. Muneer I. Ahmad, *Resisting Guantánamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1722 (2009). A good question is *why* it was so poorly designed. One explanation that comes to mind is that the Bush Administration acted with undue haste in order to show that it was being proactive and tough in fighting terrorism in the immediate wake of the 9/11 attacks. Another is that poor design was inevitable because of the essential incompatibility of the military commission model with contemporary standards for the administration of either civilian or military justice.

100. *Id.* at 1728–29 (footnote omitted). In the end, contrary to the stated guidance of the pre-MCA presiding officers, “military commission law” wound up permitting reference to conventional sources of American law, both civilian and military. See Eugene R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, *Military Commission Law*, ARMY LAW., Dec. 2005, at 47, 52–53.

101. Ahmad, *supra* note 99, at 1721; see also JUDITH RESNIK & DENNIS CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 328 (2011) (describing government efforts to “legitimate” the Guantánamo detentions). Professors Resnik and Curtis also insightfully situate the iconography of the commissions against historical patterns and note the limited openness of the proceedings. *Id.* at 328–33; see also Resnik, *supra* note 4, at 598–608.

102. Ahmad, *supra* note 99, at 1721.

103. *Id.* at 1721 & n.162; Luban, *supra* note 50, at 2012 n.138 (quoting CLIVE STAFFORD SMITH, EIGHT O’CLOCK FERRY TO THE WINDWARD SIDE: SEEKING JUSTICE IN GUANTÁNAMO

Speaking at the Army's Judge Advocate General's School twenty years ago, Professor David A. Schlueter described the military justice system—the system that administers criminal justice for military personnel (and perhaps civilians who serve with or accompany them in the field in time of declared war or contingency operations)<sup>104</sup>—as “[a] [l]egal [s]ystem [l]ooking for [r]espect.”<sup>105</sup> Much the same thing can be said of the military commission system. Indeed, a good case can be made that when he spoke, the court-martial system enjoyed greater respect than the military commission system enjoys today. Why that is so need not detain us, although it surely has something to do with the long experience the country has had with the Uniform Code of Military Justice (enacted in 1950),<sup>106</sup> as well, *perhaps*, as the public education efforts the highest court of the military justice system has made through its “Project Outreach,” repeatedly taking the court on the road over the last several decades.<sup>107</sup> What *is* clear is that, even after 10 years, those responsible for the revived military commission system continue to believe it needs buttressing, if not heroic efforts, if it is to achieve public confidence.

For example, even before Congress passed the Military Commissions Act of 2006, the Bush Administration sought to garner support for military commissions by enlisting a variety of distinguished lawyers to comment on the concept. Even though the Defense Department successfully resisted releasing their communications under FOIA,<sup>108</sup> Secretary Rumsfeld deemed it important that the public know their names, presumably to reassure people. They were a lawyer's Hall of Fame: former Attorney General (and Circuit Judge) Griffin B. Bell, former Secretary of Transportation William T. Coleman, Jr., former FBI

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BAY 96 (2007)). For an example of such a script, see *Trial Guide for Military Commissions* (Aug. 17, 2004), [http://www.pegc.us/archive/DoD/illegal\\_commissions/d20040820guide.pdf](http://www.pegc.us/archive/DoD/illegal_commissions/d20040820guide.pdf). The use of scripts is normal in courts-martial (indeed, a sample appears in JOINT SERV. COMM. ON MILITARY JUSTICE, U.S. DEP'T OF DEF., MANUAL FOR COURTS-MARTIAL UNITED STATES app. 8 (2008)), but whether they are desirable is another matter. They help avert procedural errors, but they also tend to put the participants on automatic pilot, thereby compromising courtroom spontaneity and alertness.

104. Compare 10 U.S.C. § 802(a)(1) (Supp. IV 2011), with, e.g., *Reid v. Covert*, 354 U.S. 1 (1957) (considering “the power of Congress to expose civilians to trial by military tribunals, under military regulations and procedures, for offenses against the United States thereby depriving them of trial in civilian courts, under civilian laws and procedures and with all the safeguards of the Bill of Rights” and determining that “under our Constitution courts of law alone are given power to try civilians for their offenses against the United States”).

105. David A. Schlueter, *The Twentieth Annual Kenneth J. Hodson Lecture: Military Justice for the 1990's—A Legal System Looking for Respect*, 133 MIL. L. REV. 1, 1 (1991).

106. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) (codified as amended at 10 U.S.C. §§ 801–946 (2006)).

107. E.g., *United States v. Lusk*, 70 M.J. 278, 279 n.1 (C.A.A.F. 2011) (per curiam) (hearing oral arguments at Stanford University School of Law as part of “Project Outreach”).

108. *Nat'l Inst. of Military Justice v. Dep't of Def.*, 512 F.3d 677, 678 (D.C. Cir. 2008).



and CIA Director and federal judge William Webster, former FCC Chairman Newton Minow, former White House Counsel Lloyd N. Cutler, former Defense Department General Counsels Martin R. Hoffman and Terrence O'Donnell, and law professors Ruth Wedgwood and Bernard Meltzer.<sup>109</sup> Their involvement was not enough to immunize the commissions from severe criticism and, ultimately, judicial invalidation.<sup>110</sup> Nor did the commissioning of Judge Bell, Secretary Coleman, and obscure state judges from Pennsylvania and Rhode Island as temporary major generals to sit on the non-statutory Military Commission Review Panel<sup>111</sup> increase public confidence.

Despite the determined efforts of some in Congress to shunt ever more terrorism cases away from the federal courts and into the military commission system,<sup>112</sup> the intervening years have remained unkind to the system, leading to a search for other confidence-building measures. A recent one is the appointment of yet another chief prosecutor, this time a general officer with exceptional legal and military qualifications, promising a new and brighter era for the military commissions.<sup>113</sup> But a chief prosecutor—however widely admired—cannot salvage a system in which the public still lacks confidence, especially because the real power in the military commissions is wielded not by the prosecutor but by the convening authority, who alone decides who shall be prosecuted for what, and who creates the commission, names its members, enters into plea agreements, and approves the proceedings.<sup>114</sup> (This is not to say, however, that the selection of a charismatic chief prosecutor cannot make a difference; the examples of Robert H. Jackson at Nuremberg<sup>115</sup> and, more recently, Louise Arbour<sup>116</sup> and Luis Moreno-Ocampo,<sup>117</sup> teach that it can.)

109. Fidell, *Military Commissions & Administrative Law*, *supra* note 64, at 381 & n.11.

110. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 567, 635 (2006), *superseded by statute*, Military Commission Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

111. Armed Forces Press Serv., *Military Commission Review Panel Takes Oath of Office*, U.S. DEP'T OF DEF. (Sept. 22, 2004), <http://www.defense.gov/news/newsarticle.aspx?id=25238>.

112. See *infra* note 149 and accompanying text.

113. Willy Stern, *Rebrander in Chief: The Defense Department's New Man at Gitmo Hits the Reset Button*, WKLY. STANDARD, Oct. 3, 2001, at 14, 14–16.

114. 10 U.S.C. §§ 948i(b), 950b(c) (Supp. IV 2011); MANUAL FOR MILITARY COMMISSIONS, *supra* note 61, pt. III, R. 407, 503–04, 601, 705.

115. See generally John Q. Barrett, *The Nuremberg Roles of Justice Robert H. Jackson*, 6 WASH. U. GLOBAL STUD. L. REV. 511 (2007) (describing J. Robert Jackson's pivotal role as chief prosecutor in the Nuremberg Trials).

116. See Marlise Simons, *Departing Rights Official Raised Volume on Issues*, N.Y. TIMES, July 6, 2008, at 13 (describing J. Louise Arbour's role as chief prosecutor of the United Nations tribunals for war crimes in Yugoslavia and Rwanda).

117. See generally William A. Schabas, *Prosecutorial Discretion v. Judicial Activism at the International Criminal Court*, 6 J. INT'L CRIM. JUST. 731 (2008) (outlining Luis Moreno-Ocampo's powerful position as first lead prosecutor for the International Criminal Court).

Another pertinent development is the unveiling of a new Office of Military Commissions website following complaints from the media.<sup>118</sup> In this digital era, a website can be the best known face of an institution, and it is certainly commendable that serious attention is finally being paid to this aspect of the commission system. Whether or not the new website's six-figure price tag<sup>119</sup> is a wise expenditure of taxpayer money remains to be seen, although there are reasons to doubt that it is. For example, it still does not offer prompt, reliable, complete access to trial and appellate decisions, and many pleadings submitted by the parties are not yet posted, as they routinely are on the Article III courts' PACER system.<sup>120</sup> Clicking on documents that are not yet posted produces the following notice:

The document you are trying to access is currently undergoing a security review . . . . At the completion of the security review, and if the document is deemed publically releasable, it will be made available to the public 15 business days after the document was filed with the court.

Please check back often as, once documents become approved for release, they will be immediately uploaded to this website.<sup>121</sup>

A twenty-three-page motion in *United States v. al Nashiri* e-filed on October 19, 2011<sup>122</sup> did not appear on the commission's website until November 2,

118. Carol Rosenberg, *War Court Website Veiled in Secrecy*, MIAMI HERALD, Oct. 7, 2011, at 3A.

119. The taxpayers spent nearly half a million dollars on the website. Carol Rosenberg, *Guantánamo Court Website Cuts Copyright Symbol*, MIAMI HERALD, Oct. 13, 2011, at 3A [hereinafter Rosenberg, *Guantánamo Court Website Cuts Copyright Symbol*].

120. The court-martial system also does not use PACER, either at trial or on appeal. See *Individual Court Pacer Sites*, PACER, <http://www.pacer.gov/psco/cgi-bin/links.pl> (last visited Mar. 12, 2012). The Court of Appeals for the Armed Forces has improved its own website, [www.armfor.uscourts.gov](http://www.armfor.uscourts.gov), but briefs remain unavailable except for the few cases that the court sets down for hearing. Other briefs are accessible only by visiting the courthouse. The court has by degrees moved to electronic filing, see *Order in re Electronic Filing*, 69 M.J. 204 (C.A.A.F. 2010), but it remains far behind the familiar and typically smooth-running process of the Article III courts. The commissions system is even further behind. When the commission website reproduces briefs, signatures, office telephone numbers, and law firm addresses are sometimes redacted and sometimes not. See, e.g., Brief on Behalf of Appellee, *United States v. Khadr*, No. 08-003 (U.S.C.M.C.R. Sept. 17, 2008), available at <http://www.mc.mil/Portals/0/pdfs/10-Khadr%20Defense%20Brief%20Requesting%20Court%20Affirm%20Commission%27s%20.pdf> (not redacting attorney's information); Brief on Behalf of *Amicus Curiae* Office of the Chief Defense Counsel, *United States v. al Bahlul*, No. 09-001 (U.S.C.M.C.R. Oct. 15, 2009), available at [http://www.mc.mil/Portals/0/pdfs/6-Bahlul%20CDC%20Brief%20\(Oct%2015,%202009\).pdf](http://www.mc.mil/Portals/0/pdfs/6-Bahlul%20CDC%20Brief%20(Oct%2015,%202009).pdf) (redacting (presumably) the attorney's phone number).

121. *Military Commissions: Case File*, OFF. MIL. COMMISSIONS, <http://www.mc.mil/Portals/0/pdfs/FileNotAvailable.pdf> (last visited Mar. 30, 2012).

122. Defense Motion to Allow *In Camera*, *Ex Parte* Requests for Expert Assistance with Limited Notice to the Opposing Party in Compliance with R.M.C. 703, *United States v. Al-*

2011.<sup>123</sup> Even a *government* motion to provide greater public access was subject to deferred posting.<sup>124</sup> The result of the delay in posting motions and briefs is that reporters and other observers are still likely to journey to Guantánamo with only a vague idea of the issues to be addressed and the parties' positions. Equally baffling was the Sunday promulgation, without notice-and-comment rule making procedures, of the 202-page 2011 edition of the Regulation for Trial by Military Commission, on the eve of the trial participants' scheduled departure for Guantánamo for proceedings in the *al Nashiri* case.<sup>125</sup>

Curiously, despite the lavish expense, the government contractors who designed the new website were so unfamiliar with the basic legal framework that they included a transparently illegal<sup>126</sup> claim to copyright on behalf of the Office of Military Commissions.<sup>127</sup>

Other recent ostensible confidence-building measures will allow journalists whose employers are unwilling or unable to send them to Guantánamo to monitor proceedings from a 100-seat viewing center—price-tag unknown—at Fort George G. Meade, Maryland.<sup>128</sup> Members of the public will be permitted to use as many seats as are not filled by reporters.<sup>129</sup> Victims' family members will be able to observe the proceedings at a separate facility at the U.S. Naval Station in Norfolk, Virginia.<sup>130</sup> At the same time, the Pentagon has resisted permitting C-SPAN or other broadcast coverage, claiming that would violate

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Nashiri, No. AE010 (Oct. 19, 2011), *available at* <http://media.miamiherald.com/smedia/2011/10/24/15/49/1iE1bb.S0.56.pdf>.

123. See Carol Rosenberg, *Military: Court Can't Free Cole Suspect*, MIAMI HERALD, Nov. 3, 2011, at 6A.

124. Rosenberg, *More Public Viewing of Trial Proposed*, *supra* note 91.

125. See REGULATION FOR TRIAL BY MILITARY COMMISSION, *supra* note 41; Carol Rosenberg, *Pentagon Publishes War Court Procedures*, MIAMI HERALD (Nov. 7, 2011), <http://www.miamiherald.com/2011/11/07/2491574/pentagon-publishes-war-court-procedures.html>.

126. 17 U.S.C. § 105 (2006).

127. Rosenberg, *Guantánamo Court Website Cuts Copyright Symbol*, *supra* note 119; see E-mails from Mark H. Gordon, Webmaster, Office of Military Comm'ns, to author (Oct. 12, 2011, 7:53 AM EDT, Oct. 18, 2011, 8:31 AM) (on file with author); E-mails from author to Webmaster, Office of Military Comm'ns, (Oct. 17, 2011, 3:30 PM, Oct. 11, 2011, 5:38 AM, & Oct. 11, 2011, 9:52 AM EDT) (on file with author). For a history of the government works doctrine, see David A. Kluft, *The Guantanamo Copyright SNAFU and the History of the Government Works Doctrine*, LEXOLOGY (Oct. 18, 2011), <http://www.lexology.com/library/detail.aspx?g=fae35789-429f-40a9-814a-621a79238e7a>.

128. Rosenberg, *More Public Viewing of Trial Proposed*, *supra* note 91.

129. *Id.*

130. *Id.*

federal court rules,<sup>131</sup> even though the top court of the military justice system has repeatedly permitted televised coverage of its proceedings.<sup>132</sup>

Despite the website's prominent invocation of "Fairness, Transparency, [and] Justice,"<sup>133</sup> it and the other steps I have noted still seem little more than a tardy charm offensive for the military commission system. "Rebrand[ing]," to use a term employed by Willy Stern and Carol Rosenberg,<sup>134</sup> the undisputed dean of the Guantánamo Bay press corps,<sup>135</sup> is unlikely to change the basic product line.

#### IV. DOES SIZE MATTER?

In the Dartmouth College Case,<sup>136</sup> Webster famously remarked of his alma mater, "It is, Sir, as I have said, a small college. And yet *there are those who love it!*"<sup>137</sup> The military commission system is certainly small, and even its staunchest partisans are unlikely to grow as tearily emotional over it as Webster did for Dartmouth; but the question is not whether this system should be loved, but whether it is such a runt that it cannot reasonably be expected to elicit public confidence. Can a judicial system with the characteristics surveyed here be viable? To what extent are mere caseload numbers a useful metric?<sup>138</sup>

Small jurisdictions are inherently problematic. Apart from the danger that officials may perform incompatible functions,<sup>139</sup> it takes a certain amount of through-put to make sure the wheels of justice turn more or less smoothly.

131. *Id.*

132. See EUGENE R. FIDELL, GUIDE TO THE RULES OF PRACTICE AND PROCEDURE FOR THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES 264 (13th ed. 2010), available at <http://www.scribd.com/doc/60447836/CAAF13RulesGuide> (collecting cases allowing cameras in the courtroom for the U.S. Court of Appeals for the Armed Forces).

133. See OFF. MIL. COMMISSIONS, <http://www.mc.mil/> (last visited Mar. 12, 2012).

134. Rosenberg, *Guantánamo Court Website Cuts Copyright Symbol*, *supra* note 119; Stern, *supra* note 113, at 14.

135. Ms. Rosenberg was honored with the Robert F. Kennedy Journalism Award in 2011 for her coverage of Guantánamo Bay over nine years. Julie Brown, *Herald Reporter Wins Top Award*, MIAMI HERALD (Apr. 23, 2011), <http://www.miamiherald.com/2011/04/23/2181935/herald-reporter-carol-rosenberg.html>.

136. *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819).

137. See 3 THE PAPERS OF DANIEL WEBSTER: LEGAL PAPERS 154 (Andrew J. King ed., 1989); Maurice G. Baxter, *Daniel Webster: The Lawyer*, in DANIEL WEBSTER: "THE COMPLETEST MAN" 138, 145, 168–69 (Kenneth E. Shewmaker ed., 1990).

138. See RESNIK & CURTIS, *supra* note 101, at 264–65 (considering the International Court of Justice by using, among other metrics, usage, measured through the number of filings and decisions), 271–72 (examining the caseload of the International Tribunal for the Law of the Sea), 281–82 & fig. 182 (comparing regional and international court caseloads).

139. See, e.g., *McGonnell v. United Kingdom*, 30 Eur. Ct. H.R. 289, 300–01 (2000) (highlighting the multiple roles of the Bailiff of Guernsey).

Court systems that are rarely used may not inspire confidence,<sup>140</sup> especially if other attributes that contribute to confidence are lacking. Judges and counsel may have a tenuous grip on how the pieces are intended to fit together, as Professor Ahmad's account suggests.<sup>141</sup> Or the limited bench and prosecution and defense bars may be too chummy or incestuous. Observers may not know what to expect.<sup>142</sup> Research into governing sources may be difficult or impossible,<sup>143</sup> as I was reminded when, recalling a murder in the Vatican's

140. One such was the U.S. Court for Berlin. *See, e.g.,* *United States v. Tiede*, 86 F.R.D. 227, 237 (U.S. Ct. Berlin 1979) (Stern, J.) (noting that Tiede's case was the first time in the court's 24-year history for the court to convene). The Department of State dismissed Judge Stern when he entertained an environmental case it thought was beyond his charter. *See generally* HERBERT J. STERN, *JUDGMENT IN BERLIN* 340–41, 373–74 (1984). For other U.S. micro court systems, see Wake Island Code, 32 C.F.R. pt. 935 (2011); Midway Islands Code, 32 C.F.R. pt. 762 (repealed 2001). For a recent Privy Council case that deserves a prize for the obscurity of the jurisdiction from which it arose, see *Christian v. The Queen* [2006] UKPC 47, [2007] 2 A.C. 400 (appeal taken from Pitcairn Is.). There, Lord Hope of Craighead, concurring, commented on the unavailability of English statutes or legal texts on Pitcairn. *Id.* at [68]. *See generally* Sue Farran, *The Case of Pitcairn: A Small Island, Many Questions*, 11 J.S. PAC. L. 124 (2007) (decrying the lack of attention to human rights issues in trials related to sexual offenses on the small Pitcairn Island); Helen Power, *Pitcairn Island: Sexual Offending, Cultural Difference and Ignorance of the Law*, 2007 CRIM. L. REV. 609 (noting a population of only forty-seven persons and considering the "ignorance of the law" issue raised by *Christian v. The Queen*); Anthony Trenwith, *The Empire Strikes Back: Human Rights and the Pitcairn Proceedings*, 7 J.S. PAC. L. (2003), <http://www.paclii.org/journals/fJSPL/vol07no2/3.shtml> (describing Pitcairn law as "an untested hybrid of local and United Kingdom law fraught with issues of applicability, justiciability, constitutionality and relevance."). Lord Woolf found it "reassuring that such care has been taken to achieve justice for a small community of limited means." *Christian*, [2006] UKPC 47, [32]. The challenges of administering justice in British microjurisdictions is somewhat alleviated by the availability of Privy Council review, *see, e.g.,* *Attorney Gen. for the Sovereign Base Areas of Akrotiri & Dhekelia v. Steinhoff*, [2005] UKPC 30, but there is naturally a trade-off in the jurisdiction's autonomy. Small jurisdictions may simply be unable to afford much justice. For example, *Argersinger v. Hamlin* announced the right to counsel for indigent defendants in misdemeanor cases. 407 U.S. 25, 37 (1972). Justice Powell, concurring in the result, drew attention to *Wright v. Town of Wood*, 407 U.S. 918 (1972), where, in response to a request from the Court that a response be filed to a certiorari petition, "a lawyer occasionally employed by the town . . . explained that Wood, South Dakota, has a population of 132, that it has no sewer or water system, . . . and that the town had decided that contesting this case would be an unwise allocation of its limited resources." *Id.* at 60–61 (Powell, J., concurring). Certiorari was granted, the judgment vacated, and the case remanded for further consideration in light of *Argersinger*. *Wright*, 407 U.S. at 918. In the end, Wright's habeas petition was granted. *In re Wright*, 199 N.W.2d 599, 600 (S.D. 1972).

141. *See supra* notes 99–100 and accompanying text.

142. *See, e.g.,* Rosenberg, *Rules at Guantánamo Change Daily*, *supra* note 94.

143. *See, e.g.,* *Christian*, [2006] UKPC 47, [32]. For an effort to compile governing sources of small jurisdictions, see Andrew Grossman, *Finding the Law: the Micro-States and Small Jurisdictions of Europe*, GLOBALEX (Feb. 2005), <http://www.nyulawglobal.org/Globalex/Microstates.htm>; *see also* Viola Heutger, *Introduction to FINDING THE LAW: MICRO STATES AND SMALL JURISDICTIONS: FREEDOMS AND CHALLENGES OF WORKING IN A SMALL JURISDICTION* 5

Swiss Guard some years before,<sup>144</sup> I asked in vain for the pertinent regulations so they might be referred to in a military justice casebook.<sup>145</sup> Case outcomes may seem capricious where there is no yardstick or body of settled precedent against which to measure them. Small jurisdictions may seek to be exempted from generally applicable procedural protections.<sup>146</sup> None of this is to say that it is impossible for a small jurisdiction's administration of justice to enjoy public confidence, but it is to say that achieving that result may be harder than one might think.<sup>147</sup>

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(Viola Heutger & Bastiaan D. van der Velden eds., 2011) (noting there is a single law school in the Netherlands Antilles, limited textbooks adapted to local laws, a single legal journal, a small bar, and paucity of published judgments). Access to precedent may also be a challenge in Native American tribal courts, whose judgments are selectively available through *West's American Tribal Law Reporter* and other resources. For an impressive step towards broader understanding of the jurisprudence of the many small tribal court systems in the United States, see generally MATTHEW L.M. FLETCHER, *AMERICAN INDIAN TRIBAL LAW* (2011). Definitive accounts of customary law are likely to be a challenge in any jurisdiction, but the problems multiply in inverse proportion to the size of the jurisdiction.

144. See Alessandra Stanley, *Despite Vatican, Case of Swiss Guard's Murder Remains Alive*, N.Y. TIMES, Feb. 18, 1999, at A13.

145. I was politely informed that "the disciplinary rules and procedures that govern the Swiss Guard are strictly confidential and only for the internal use." Letter from Colonel Elmar Th. Mäder, Commander, Guardia Svizzera Pontificia, to author, July 1, 2003 (on file with author). My effort to obtain the rules governing the Duke of Atholl's army (the last private army in Europe, see generally *The Atholl Gathering*, BLAIR CASTLE, [http://www.blair-castle.co.uk/events\\_parade\\_gathering.cfm](http://www.blair-castle.co.uk/events_parade_gathering.cfm) (last visited Mar. 12, 2012)) were even less successful. Inexplicably, His Grace did not respond to my request.

146. The armed force in which I served as a baby lawyer, the U.S. Coast Guard, is much smaller than the other U.S. armed forces, and happily does not generate much of a disciplinary case load. At times it has sought relief from various provisions of American military law, typically to no avail. *E.g.*, *United States v. Clevidence*, 14 M.J. 17, 19 (C.M.A. 1982) (suggesting, in a post-trial delay case, that "in view of the relatively small number of cases tried by the Coast Guard which require verbatim records, that Service can make arrangements with the other uniformed Services for loan of court reporters"); *United States v. Moorehead*, 20 C.M.A. 574, 579–80 (1971) (rejecting argument that, as the smallest armed force, the Coast Guard was not required to comply with provision of Article 26(c) of the U.C.M.J., 10 U.S.C. § 826(c), that judging must be the primary duty of general court-martial military judges).

147. The disadvantages that flow from a paucity of cases is ironic in one sense: according to the U.N. Human Rights Committee's General Comment No. 32, ¶ 22, to the International Covenant on Civil and Political Rights, U.N. Doc. CCPR/C/GC/32 (Aug. 23, 2007), "[t]rials of civilians by military or special courts *should be exceptional*, i.e., limited to cases where the State party can show that resorting to such trials is necessary and justified by objective and serious reasons, and where with regard to the specific class of individuals and offences at issue the regular civilian courts are unable to undertake the trials." (emphasis added). In other words, it is inherently the case that there will be few such trials.

## CONCLUSION

As things stand, it is difficult to see an improved basis for public confidence in the military commission system. It remains, after ten full years, more of a work in progress than it should be, and that in itself is a bad sign. In my view, even if many—and perhaps most Americans—support the use of military commissions over the federal courts as a forum for prosecuting persons charged with terrorism<sup>148</sup> (a proposition that should have federal judges scratching their heads), it's too late.

Might it have been otherwise? Perhaps: had there been less personnel turbulence among prosecutors and defense counsel. Had there been greater transparency in the rule-making process under both the Bush and Obama Administrations. Had the details of the legislation enacted in 2006 and 2009 been subjected to more meaningful congressional hearings. Had the Pentagon been more effective in explaining and justifying the system. Had the Bush Administration been willing to provide greater procedural protections from the beginning, rather than having them forced on it through litigation (and the threat thereof) and a welter of public opposition. Finally, had the Obama Administration been more proactive and effective in explaining why some terrorism cases should be tried in military commissions and some in federal district court, and had it been willing to stick to its guns in proposing to prosecute the high-value detainees in district court.

All of these were forks in the road. Had the roads not taken *been* taken, my conviction is that despite the continuing string of congressional efforts to tie President Obama's hands,<sup>149</sup> the military commissions would still be a tall

148. Data from a 2010 Rasmussen poll indicated that sixty-three percent of American voters prefer military commissions over district court trials. Josh Gerstein, *Poll: 63% Favor Military Tribunals Over Civilian Trials*, POLITICO (Dec. 15, 2010, 2:23 PM), [www.politico.com/blogs/joshgerstein/1210/Poll\\_63\\_favor\\_military\\_tribunals\\_over\\_civilian\\_trials.html](http://www.politico.com/blogs/joshgerstein/1210/Poll_63_favor_military_tribunals_over_civilian_trials.html). More recent data showed a slight decline to sixty percent. *Poll: Most Favor Keeping Gitmo Open*, UPI.COM (Mar. 14, 2011, 4:41 PM), [upi.com/Top\\_News/2011/03/14/Poll-Most-favor-keeping-Gitmo-open/UPI-69781300135319](http://upi.com/Top_News/2011/03/14/Poll-Most-favor-keeping-Gitmo-open/UPI-69781300135319).

149. Congress has enacted (and President Obama has signed) legislation preventing closure of Guantánamo and severely impeding his ability both to bring detainees to the mainland for civilian trial and to repatriate detainees. See National Defense Authorization Act for Fiscal Year 2012, H.R. 1540, 112th Cong. §§ 1031–42 (2011) (enacted). A remarkable proposed amendment to the 2012 defense authorization bill would have gone even further to require that all suspected terrorists be brought to Guantánamo and tried by military commission. Jeh C. Johnson, Gen. Counsel, Dep't of Def., Speech to the Heritage Foundation, Wash., D.C., at 8 (Oct. 18, 2011), available at <http://media.miamiherald.com/smedia/2011/10/18/16/22/119Nv5.S0.56.pdf>. The Obama Administration has made it clear that it objects to these provisions. See *id.* at 7–9. The noxious “Ayotte amendment” failed in the Senate. Robert Pear, *Senate, at Least for a Day, Gets Back to Legislating*, N.Y. TIMES, Oct. 22, 2011, at A10 (referring to amendment proposed by Sen. Kelly Ayotte); see also Editorial, *Peddling Fear: Just When the United States Was Repairing its Reputation, the Senate Tries to Shred it Again*, N.Y. TIMES, Oct. 23, 2011, at SR10

order, and not only because of their checkered history.<sup>150</sup> The fatal flaw is that they remain an exceptional jurisdiction that lacks the deep roots, solid foundations, and, for lack of a better term, *normalcy* that Americans should demand of institutions that are responsible, even in a small way, for the administration of justice.

One thing that might suggest a different outcome would have been a real sense that the country was at war. Because, however, of the manner in which the post-9/11 military campaigns in Iraq and Afghanistan have been conducted, eschewing conscription and demanding little beyond the timely payment of normal taxes of most Americans, the only people who have actually felt the country to be on a war footing are our fighting men and women and their immediate and extended families. For the rest of us, it has been business as usual.<sup>151</sup> A population that has this experience is unlikely to embrace unfamiliar institutions from long ago that smack of war, or, more to the point, to give those measures the modest presumption of validity that may be necessary in order to earn and maintain public confidence. By invoking a controversial wartime measure while taking pains to avoid wartime conditions, therefore, the Bush Administration's resort to a military commission system was a doomed effort to have its cake and eat it too.

The body of scholarship that has grown up around the revived military commissions is impressive. Because so little has actually occurred in the trial and appellate courtrooms of the current system and because the lion's share of media outlets have not made sustained commitments to covering the proceedings in Guantánamo, the situation on the ground has largely been ignored, with attention understandably focusing instead on matters of theory, politics, and litigation conducted on the mainland. Without denigrating that body of work, the fact that the high-value detainees will be tried by military

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(referring to Ayotte amendment and another proposed by Sen. Carl Levin); Charlie Savage, *G.O.P. Takes Hard Line in Pushing Military Trials for All Terror Suspects*, N.Y. TIMES, Oct. 28, 2011, at A4. Legislation *compelling* the use of military commissions perversely stands on its head the Human Rights Committee's observation that special courts should be the exception rather than the rule. *See supra* note 147. The concept of complementarity—that the International Criminal Court may be resorted to only when a nation is unwilling or unable to prosecute in its own courts—provides a useful analogy that militates against the use of military commissions for offenses that are within the jurisdiction of the district courts. *See Rome Statute of the International Criminal Court* art. 17, July 17, 1998, 2187 U.N.T.S. 90.

150. *See* Eugene R. Fidell, *The Trouble with Tribunals*, N.Y. TIMES, June 14, 2009, at WK8.

151. "At home, wartime had become a policy, rather than a state of existence." MARY L. DUDZIAK, *WAR TIME: AN IDEA, ITS HISTORY, ITS CONSEQUENCES* 135 (2012). "We are routinely asked to support our troops, but otherwise war requires no sacrifice of most Americans, and as conflict goes on, Americans pay increasingly less attention to it." *Id.* at 8; *cf.* William Deresiewicz, *An Empty Regard*, N.Y. TIMES, Aug. 21, 2011, at SR1 ("Now, instead of sharing the burden, we sentimentalize it. It's a lot easier to idealize the people who are fighting than it is to send your kid to join them. This is also a form of service, I suppose: lip service.").



commissions after all suggests that the commission system will be with us for the foreseeable future.

An examination of the system as it actually exists under the Military Commissions Act of 2009 suggests that despite recent efforts at rebranding, and even if its basic framework otherwise passed muster, the system has been, is, and will remain too small to be viable in light of the criteria for evaluating any system of justice in a democratic society. What legislators and federal judges will make of this can only be a matter of speculation. The congressional persistence in seeking to channel terrorism-related cases to the military forum suggests that this basic proposition will have no effect.<sup>152</sup> Still, it is an important perspective that should be borne in mind, not only by legislators but also by the executive branch so that future inter-branch consultations on the punishment of terrorists can be more fully informed and a greater measure of confidence achieved in the overall administration of justice in such cases. Until such time as the country comes to be on a war footing in fact rather than just as a matter of political rhetoric,<sup>153</sup> the commissions should be a hard sell.

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152. See *supra* note 149. Although this perspective may change as budgetary pressures increase, questions of fiscal austerity seem to play little role when it comes to military legal matters. If Congress were serious about cutting the military budget, there would not be three separate military law schools. Nor would there be four separate intermediate military appellate courts. Fidell, *Military Law*, *supra* note 95, at 170.

153. See DUDZIAK, *supra* note 151, at 124, 127.

