PROSECUTING ALLEGED TERRORISTS BY MILITARY COMMISSION: A PRUDENT OPTION

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President Obama has announced that the detention facility at Guantánamo Bay will be closed by January 22, 2010. He has also said that at least some of the detainees facing criminal prosecution will be tried in military commissions. The system of military commissions established by President Bush after the 9/11 attacks, as well as the one which Congress enacted in 2006 following the Supreme Court's Hamdan decision, were widely criticized as being unproductive and not meeting international legal standards. The Congress has, very recently, revised the rules and procedures for military commissions to make them fair, effective and much more like those used for courts-martial. This article compares and contrasts trials in revised military commissions with trials in federal district courts. It concludes that a combination of both forums would best serve the President, and that military commissions are still a prudent option for prosecuting some detainees where there are security and admissibility of evidence concerns.

I. INTRODUCTION

Two months after the horrific terrorist attacks on the World Trade Center and the Pentagon on September 11, 2001, then-President George Bush issued a Military Order which authorized the detention and trial by military commission of non-U.S. citizens who were members of al-Qaeda, who had engaged in international terrorism, or who had knowingly harbored individuals in either category.[1] Some of those captured by our military forces in Afghanistan, or turned over to us by the Northern Alliance, were transferred to the U.S. Navy detention facility at Guantánamo Bay, Cuba, a place far from the battlefield. Guantánamo Bay was chosen, in part, because

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[1] Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (defining those affected by the military order, as well as the terms of detention and trials).

it was deemed to be outside the jurisdictional reach of the federal courts.[2] The Bush Administration claimed that it had the right under the law of war to detain those at Guantánamo Bay until the cessation of hostilities, whenever that might be. The Bush Administration also claimed to be able to prosecute a detainee by military commission for "violations of the laws of war and all other offenses triable by military commission."[3] However, between November 2001 and the summer of 2006, the U.S. completed no military commission trials, and on June 29, 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld*[4] that the military commission system established by President Bush violated two specific provisions of the Uniform Code of Military Justice (UCMJ), Articles 21[5] and 36(b).[6]

The Court held that Article 21 incorporates provisions of the Geneva Conventions of 1949 as part of the law of war, specifically the clause of Common Article 3 relating to minimal judicial guarantees for prosecutions.[7] Four months after the Court's decision in *Hamdan*, Congress responded by enacting the Military Commissions Act of 2006 (MCA).[8] Among other objectives, the MCA sought to improve the military commission system by correcting many of the deficiencies delineated by the Court in *Hamdan* and by providing military commissions with a firm statutory predicate. From 2006 until January 22, 2009, however, when President Obama directed the

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[2] In choosing the facility at Guantánamo Bay, the Bush Administration was obviously relying upon the 1950 Supreme Court opinion in *Johnson v. Eisentrager*, 339 U.S. 763, 775 (1950), which held that enemy aliens, who were captured and held outside our territory, and at no relevant time and in no stage of their captivity had ever been within our territorial jurisdiction, had neither a statutory nor a constitutional right of access to our courts.

[3] Dep't of Def., Military Commissions Order No. 1, §3(B) (Aug. 31, 2005) (superseding an earlier version of the Order dated Mar. 21, 2002).

[4] 548 U.S. 557, 618–27 (2006) (elaborating on why the Bush Administration violated two provisions of the Uniform Code of Military Justice).

[5] 10 U.S.C. § 821 (2006) (stating that "the provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders and offenses that by statute *or by the law of war* may be tried by military commissions, provost courts, or other military tribunals.") (emphasis added)).

[6] *Id.* § 836(b) (declaring that the President shall ensure that "[a]ll rules and regulations made under this article shall be uniform insofar as practicable . . . .").

[7] Under Common Article 3, it is prohibited to have "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples." Geneva Convention Relative to the Treatment of Prisoners of War art. 3(i)(d), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.

[8] Pub. L. No. 109-366, 120 Stat. 2600 (providing statutory definitions, guidelines, and jurisdictional boundaries for the U.S. military commissions).

suspension of any further military commission proceedings,[9] the U.S. completed only three trials.[10] In the Spring of 2009, the Obama administration made some changes to military commission procedures,[11] and the President has indicated his intent to use military commissions for prosecuting at least some of the detainees.[12] In furtherance of the President's decision, Congress recently amended the MCA to make the military commission system fairer and more effective.[13] Many argue, however, that those detainees for whom there is some evidence of criminality should be tried in the federal district courts rather than in military commissions because of the stigma attached to the hearings already conducted at Guantánamo.[14] Which, then, is the better prosecutorial forum to use?

This article assesses prosecuting the detainees in federal district courts and military commissions. It compares and contrasts each, and argues

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[9] Exec. Order No. 13,492, 74 Fed. Reg. 4897, 4899 (Jan. 22, 2009) (halting all Guantánamo proceedings pending in the United States Court of Military Commission Review).

[10] David Hicks pled guilty, in accordance with a pretrial agreement, to providing material support to terrorism. *See* LAW COUNCIL OF AUSTRALIA, SUMMARY OF THE REPORT OF THE INDEPENDENT OBSERVER FOR THE LAW COUNCIL OF AUSTRALIA: DAVID HICKS V. THE UNITED STATES 4–5 (July 24, 2007), *available at* http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uuid=CDFB40A7-1E4F-17FA-D2F7C11559D3CAC7&siteName=lca. He was convicted and sentenced to serve nine months of confinement (in Australia), with seven years of further confinement suspended. *Id.* Salim Hamdan, Osama Bin Laden's driver, was acquitted of conspiracy but convicted of providing material support for terrorism. *See* Hamdan v. Rumsfeld, 548 U.S. 557, 570 (2006). He was sentenced to serve sixty-six months of confinement but was credited with sixty-one months already served while awaiting trial. *See* Carol J. Williams, *The Nation: Yemeni Gets 5 1/2 Years in Prison with Credit for Time Already Served, Osama bin Laden's Driver Should Complete His Sentence by January*, L.A. TIMES, Aug. 8, 2008, at A1. Finally, Ali Hamza Ahmad Suliman al Bahlul was convicted of conspiring with al-Qaeda, solicitation to commit murder of protected persons and other specified offenses, and providing material support for terrorism. Press Release, U.S. Dep't of Defense News Release No. 926-08, Detainee Convicted of Terrorism Charge at Military Commission Trial (Nov. 3, 2008), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=12329 [hereinafter News Release]. He was sentenced to life imprisonment. *Id.*

[11] *See* Memorandum from Jeh C. Johnson, Gen. Counsel of the Dep't of Def., to Robert Gates, Sec'y of Def., Changes to the Manual for Military Commissions (May 13, 2009) ((1) declaring statements obtained by interrogation methods constituting cruel, inhuman or degrading treatment to be inadmissible in evidence; (2) reversing the burden of proof with regards to the admissibility of hearsay evidence; and (3) granting more flexibility to an accused in the selection of military defense counsel).

[12] William Glaberson, *Obama to Keep Tribunals; Stance Angers Some Backers*, N.Y. TIMES, May 15, 2009, at A1.

[13] Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 1801–07, 123 Stat. 2190 (2009).

[14] *See*, *e.g.*, The Constitution Project, *Guantánamo Detainees Should be Transferred to U.S. for Prosecution by Federal Courts*, Aug 3, 2009, *available at* http://www.constitutionproject.org/newsdetail.asp?id=402 (last visited Oct 7, 2009).

that recent legislation revising the rules and procedures for military commissions makes that forum a prudent option to be used in combination with the federal district courts.

II. ASSESSING THE TWO FORUMS

A. The Federal District Courts

High profile terrorism cases, such as the trials of Zacarias Moussaoui and José Padilla, have, in the past, been successfully prosecuted in the federal district courts. Additionally, at least one of the detainees, Ahmed Ghailani, has already been moved to New York and charged with offenses in connection to the 1998 bombings of our embassies in Kenya and Tanzania.[15] For other potential cases, there are numerous "terrorism" crimes available for U.S. attorneys to use in criminal prosecutions, most notably those statutes which proscribe providing material support for terrorists and providing material support to a foreign terrorist organization.[16]

However, prosecuting a large number of the Guantánamo Bay detainees in the federal district courts would involve unique challenges. Assuming that some of the potential evidence in many cases would be highly classified, the trial judge would need a Sensitive Compartmented Information Facility (SCIF)[17] when reading the classified documents and for securely storing the evidence when trial is not in session. Additionally, in order to assist the judge during trial, law clerks would need to have the requisite security clearances, a process which often takes months to accomplish. Ensuring court security and guaranteeing the safety of witnesses and jurors would also require significant additional resources. For example, when dealing with very high profile cases such as Khalid Sheikh Mohammed, it is not

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[15] Peter Finn, *Guantánamo Bay Detainee Brought to U.S. for Trial*, WASH. POST, June 11, 2009, at A1.

[16] *See* 18 U.S.C. § 2339(A) (2006) (providing that it is illegal to provide material support to terrorists) and § 2339(B) (providing that it is illegal to provide material support to foreign terrorist organizations). *See also id.* § 2332 (declaring that homicide occurs when someone kills a national of the U.S. abroad); *id.* § 2332(a) (declaring imprisonment for anyone who uses, threatens, or conspires to use a weapon of mass destruction against a U.S. national); *id.* § 2332(b) (declaring that acts of terrorism transcend national boundaries); *id.* § 2339(C) (prohibiting the financing of terrorism); *id.* § 2339(D) (stating that it is illegal to receive military training from foreign terrorist organizations); *id.* §§ 884, 992, 924 (pertaining to explosives offenses); *id.* § 956 (pertaining to conspiracy to murder, kidnap or maim persons, or to damage property overseas); *id.* § 1203 (declaring it is illegal to take hostages).

[17] *See* Office of the Inspector General, U.S. Dep't of Justice, *Processing Classified Information on Portable Computers in the Department of Justice*, Audit Report 05-32 (July 2005), *available at* http://www.usdoj.gov/oig/reports/plus/a0532/intro.htm ("A SCIF is an accredited area, room, group of rooms, buildings, or installation where Sensitive Compartmented Information may be stored, used, discussed, and electronically processed.").

inconceivable that terrorist cells operating within the U.S. would target the courtroom and prisoner detention facility where he would be kept during trial proceedings.

There are evidentiary challenges as well in using the federal district courts to prosecute the Guantánamo Bay detainees. Statements taken from the detainees during their initial capture might be inadmissible either because they were taken under coercive conditions or because no advice of rights was given.[18] An admission made while a weapon is pointed directly at the detainee could hardly be considered free of coercion; and on the battlefield, the soldier's mission is to kill or capture the enemy, not to gather evidence for a criminal prosecution.

There may be specific challenges which arise during pretrial discovery with regard to exculpatory material in the government's possession[19] or written statements made by potential government witnesses.[20] The government must release this information if the detainee requests it.[21] If such material is classified, as would generally be the case, then, under the Classified Information Procedures Act (CIPA), the trial judge may conduct an in camera hearing to determine the use, relevance, or admissibility of the evidence.[22] In this situation, the determination of relevance may be difficult to make because the trial judge is acting outside the adversarial process and without the benefit of knowing how the detainee intends to proceed with his defense. If the classified material sought by the detainee is deemed relevant by the trial judge, and the government's offered unclassified substitutes or summaries are ruled inadequate, then the prosecution faces the dilemma of either having to produce the material, accept sanctions imposed by the trial judge, or forego prosecuting the detainee.[23]

Although the full scope of a detainee's constitutional protection beyond habeas corpus has not yet been ascertained, if the Sixth Amendment right to a speedy trial applies, prosecuting detainees who have been kept at Guantánamo Bay for five, six or more years may also prove to be a chal-

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[18] *See* Lego v. Twomey, 404 U.S. 477, 495 (1972) ("Just as we do not convict when there is a reasonable doubt of guilt, we should not permit the prosecution to introduce into evidence a defendant's confession when there is a reasonable doubt that it was the product of his free and rational choice.").

[19] *See* Brady v. Maryland, 373 U.S. 83 (1963).

[20] *See* Jencks v. United States, 353 U.S. 657 (1957).

[21] *See* 18 U.S.C. § 3500 (2006) (pertaining to demands for production of statements and reports of witnesses).

[22] 18 U.S.C.A. app. 3 § 6(a) (2000).

[23] ABA STANDING COMM. ON LAW & NAT'L SEC., POST WORKSHOP REPORT—TRYING TERRORISTS IN ARTICLE III COURTS: CHALLENGES AND LESSONS LEARNED, at 13 (July 2009), *available at* http://www.abanet.org/natsecurity/trying_terrorists_artIII_report_final.pdf (last visited Oct. 7, 2009).

lenge. The Supreme Court has held that a delay of over eight years in prosecuting a drug dealer was clearly sufficient to trigger a speedy trial violation where the government was the cause of the delay.[24]

B. Revised Military Commissions

Although prosecuting the detainees in military commissions using the newly revised rules and procedures might be subject to some of the same challenges facing trials in the federal district courts, military commission prosecutions offer some distinct advantages. A military commission, like the more traditional court-martial, is "portable," meaning that it may be held anywhere,[25] thereby obviating the security risks of holding trials in New York, Washington, or other metropolitan centers in this country. Even after the detention facility at Guantánamo Bay is closed, military commissions could readily be convened at any American military installation in the world, regardless of where the alleged offense took place or where the accused is detained. Since the trial would take place within a military facility, the active duty armed forces could provide an extremely high level of security in a manner which would be virtually impossible in a civilian community. If a military commission convicted and sentenced a detainee to any period of confinement, that detainee could serve the sentence at any location under military control.

A military commission is also an extremely efficient trial forum. As in the case of courts-martial, there is seldom any period of lengthy delay in a military commission between a conviction and the decision on sentencing since attorneys for both the government and the detainee must be prepared at the outset to proceed through the findings and sentencing phases of the trial. Also, unless Congress chooses to incorporate the court-martial requirement for a formal pretrial investigation[26]—the equivalent of a grand jury—into military commission rules, a criminal charge can be referred to trial by a military commission in a relatively short period of time.

The speedy trial issue arises because many of the detainees have been held at Guantánamo Bay for years without criminal charges being brought against them. The amended MCA specifically makes inapplicable the court-martial speedy trial rule under the UCMJ which provides that an accused should be brought to trial within one hundred and twenty days after

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[24] *See* Doggett v. United States, 505 U.S. 647 (1992).

[25] *See* 10 U.S.C. § 805 (2006) ("[The Uniform Code of Military Justice] applies in all places.").

[26] *Id.* § 832(a) ("No charge or specification may be referred to a general court-martial for trial until a thorough and impartial investigation of all the matters set forth therein has been made.").

the imposition of pretrial restraint.[27] The question of whether any constitutional speedy trial protection extends to the detainees remains unanswered.

Under the revised military commission procedures, the jury panel makes the decision as to guilt or innocence and, upon conviction, determines the sentence.[28] Except when considering a capital charge, the jury panel need only have a minimum of five members,[29] and the panel's composition differs significantly from a federal jury in that it is comprised solely of commissioned officers who are chosen because they meet certain qualifications.[30] It is also highly likely that all members of the panel would hold some level of security clearance, and this would facilitate consideration of any classified material which might be introduced into evidence. As to appellate review under the new legislation, once the convening authority approves a finding of guilt, the case is referred to a Court of Military Commission Review (CMCR) which is comprised of appellate military judges.[31] What is significant about the scope of review for the CMCR is that it includes determinations of both law and fact,[32] thus permitting the appellate court to set aside a conviction based upon a finding of insufficient evidence

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[27] Military Commissions Act of 2009, Pub. L. No. 111-84, § 802, 123 Stat. 2190 (2009) (to be codified at 10 U.S.C. § 948(b)(d)(1)) ("The following provisions of this title shall not apply to trial by military commission under this chapter: (A) Section 810 (Article 10 of the Uniform Code of Military Justice), relating to speedy trial, including any rule of court-martial relating to speedy trial . . . ."). *See* 10 U.S.C. § 810; Manual for Courts-Martial, United States, at II-71, R.C.M. § 707(a) (2008), *available at* http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf (containing Executive Orders, the most current being Exec. Order No. 13,447, 72 Fed. Reg. 56179 (Sep. 28, 2007), through which the President exercises the authority vested in him by Congress in Articles 36 and 56 of the Uniform Code of Military Justice (10 U.S.C. §§ 836, 856) to prescribe rules of procedure for courts-martial and to establish maximum punishments for offenses).

[28] Military Commissions Act of 2009, Pub. L. No. 111-84, § 949(l)(a), (m)(a), 123 Stat. 2190 (2009). Interestingly, a military commission may convict a detainee, except for death cases, upon a vote of only two-thirds of the panel. *Id.* § 949(m)(a). Sentencing requires only a two-thirds vote for imprisonment up to ten years and a three-fourths vote for sentences which are more than ten years up to life imprisonment, but a unanimous vote is required for a death sentence and the jury panel must be comprised of twelve members. *Id.* § 949(m)(a), (b)(2), (c)(1). This is identical to what is required in courts-martial under the Uniform Code of Military Justice. *See* 10 U.S.C. § 852(a), (b).

[29] *See* Military Commissions Act of 2009, Pub. L. No. 111-84, §§ 948(m)(a), 949(m)(c), 123 Stat. 2190 (2009).

[30] *Id.* § 948(i)(a)–(b) (stating that "[a]ny commissioned officer of the armed forces on active duty is eligible to serve on a military commission under this chapter" and that "[w]hen convening a military commission . . . the convening authority shall detail as members of the commission such members of the armed forces eligible under subsection (a), as in the opinion of the convening authority, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament.").

[31] *Id.* § 950(f)(a), (b).

[32] *Id.* § 950(d).

to support the jury panel's verdict. The model for this expanded scope of appellate review is the service courts of criminal appeal, the highest appellate courts in each of the armed services for review of courts-martial.[33] Following action by the CMCR, a detainee may petition for further review in the Court of Appeals for the District of Columbia Circuit and then to the Supreme Court.[34]

There is one particular issue with regard to using revised military commissions which remains unresolved. Under the new legislation, "material support for terrorism," a crime codified in 18 U.S.C. 2339(a) and (b), is deemed to be a violation of the law of war—the traditional subject matter jurisdiction of a military commission—and listed among the offenses which may be prosecuted by military commission.[35] Whether material support for terrorism constitutes a recognized violation of the law of war will, in large part, depend upon how the courts interpret the scope of Congress' authority to define violations of the law of war in a statute.[36] If a court rules that the offense is not a violation of the law of war, and is therefore outside the subject matter jurisdiction of military commissions, such offenses could be prosecuted only in the federal district courts. The resolution of this issue may come when the case of Ali Hamza Ahmad Suliman al Bahlul, who along with Salim Hamdan was convicted of material support for terrorism,[37] reaches its final stage of appeal.

III. CONCLUSION

As mentioned earlier, the Obama Administration has signaled its intention to prosecute alleged terrorists using a combination of the federal district courts and military commissions operating under revised rules of procedure. There will be cases where security reasons or evidence admissibility problems make it more advisable to use military commissions. On the other hand, in the event it is ruled that the crime of material support for terrorism can only be prosecuted in the federal district courts, then the difficulties of using a military forum are obvious. The Administration should not be reticent, though, to use military commissions to prosecute those at Guantánamo Bay whenever possible. Now that Congress has revised the rules and procedures to make them adhere more closely to the protections afforded to

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[33] *See* 10 U.S.C. § 866(c).

[34] Military Commissions Act of 2009, Pub. L. No. 111-84, § 950(g)(a)(e), 123 Stat. 2190 (2009).

[35] *See id.* §§ 950(p)(d), (t)(25).

[36] U.S. CONST. art. I, § 8, cl. 10 (stating that Congress has authority "[t]o define and punish Piracies and Felonies committed on the high Seas, *and Offenses against the Law of Nations*." (emphasis added)).

[37] *See* News Release, *supra* note 10.

our own service personnel under the UCMJ, there is a greater probability that military commissions will be upheld in the courts and, notwithstanding their early notoriety, accepted by the American people and the global community.[38]

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[38] *See* Hamdan v. Rumsfeld, 548 U.S. 557, 632–33 (2006) (holding that courts-martial under the UCMJ meet the requirements of Common Article 3 of the Geneva Conventions, whereas the system of military commissions at issue in the case did not). The case noted:

> The Government offers only a cursory defense of Hamdan's military commission in light of Common Article 3. As Justice Kennedy explains, that defense fails because "[t]he regular military courts in our system are the courts-martial established by congressional statutes." At a minimum, a military commission "can be 'regularly constituted' by the standards of our military justice system only if some practical need explains deviations from court-martial practice."

Id. at 785–86 (Kennedy, J., concurring in part) (citations omitted) (alteration in original).