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Punish or Surveil

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Punish or Surveil

Diane Marie Amann*

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II. REINFORCEMENT OF ESTABLISHED PRACTICE ....................... 924

U.S. officials have campaigned since late 2001 for antiterrorism measures novel to the United States; specifically, for the indefinite and incommunicado detention of presumed terrorists, a handful of whom might one day stand trial before tribunals fashioned to avoid acquittal. The campaign to uproot U.S. legal tradition was fronted for years by the Executive.\(^1\) The Supreme Court, though it placed significant checks on the executive plan, nonetheless gave sanction to some aspects;\(^2\) the campaign won further endorsement when Congress passed the Military Commissions Act of 2006.\(^3\) There has, of course, been opposition. Criticism of the curtailment of liberties came from a host of human rights and legal organizations, from judges, legislators, and others, within and outside America. But the press of the campaign often pushed critics solely to react, to explain why an isolated initiative was wrong rather than to put forward a full picture of previous practice and present options. This Article endeavors to paint more of that picture. In so doing, it demonstrates that reinforcement of an established, two-pronged policy—

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called here, with a nod to Foucault, “punish or surveil”—is the present option that promises best to protect both individual rights and national security.

The Article begins by describing previous practice and evaluating in light of earlier practice the campaign launched after September 11, 2001. It focuses on punishment, the first prong of the policy long used to combat threats against the United States. Ordinary civilian and military courts stood ready to punish persons found guilty at public trials that adhered to fairness standards, and national security interests not infrequently were advanced through such courts. That is not to say that courts were the government’s only option. When it deemed judicial mechanisms unable to protect state security—on account, for example, of its unwillingness to disclose secrets of state—the Executive resorted to surveillance, the second prong of established policy. Americans were led to understand that U.S. intelligence agents ever were engaged in keeping their eyes open for inchoate threats, gathering information as threats took shape, and, at times, acting in secret against those threats.

As for present options, the Article finds implicit in executive innovations an assertion that the September 11 attacks proved the two-pronged policy inadequate. A new need thus is said to require blurring the line between punishment and surveillance. Though new for the United States, such blurring has been a hallmark of others’ antiterrorism measures, among them the Diplock system employed by Britain during its Troubles in Ireland. By such measures detention no longer is a way to secure presence for trial or absence from battle until war ends, but rather a way to assure custodial interrogation unfettered by the niceties of legal process. Legal process itself is diluted: in the case of the United States, newly minted military commissions may convict detainees based on statements elicited not by law enforcement agents schooled in Miranda, but by intelligence officers less encumbered by constraints against coercion.

4 See Michel Foucault, Surveiller et Punir: Naissance de la Prison (Editions Gallimard 1975). The title’s first word typically is translated “discipline,” the English term proposed in the 1970s by the renowned French social theorist himself. Michel Foucault, Discipline and Punish: The Birth of the Prison, at ix (Alan Sheridan trans., 1979). But “surveil” sounds equally apt to the ears of Twenty-First Century Americans served daily a menu of televised police dramas. Cf. Ascanio Piomelli, Foucault’s Approach to Power: Its Allure and Limits for Collaborative Lawyering, 2004 Utah L. Rev. 395, 408 n.33 (preferring to translate surveiller as “oversee”). In any event, it is “surveillance” that is under review in this Article, which does not claim to engage in any systematic manner with the work of Foucault.

This Article takes issue with the premise that the attacks of September 11 exposed elemental defects. It contends, rather, that the existing two-pronged system worked, accommodating interests to protect both human and state security. Perceived difficulties in cases like that of erstwhile enemy combatant José Padilla reveal improper use of established policy, not a need for wholesale disestablishment of that policy. The government’s third-prong option, moreover, does not improve on the established regime. The Executive itself admits that few of the 700 persons who have suffered detention at Guantánamo posed a grave threat to national security. Yet the very existence of the camp gravely harms the global standing of the United States. The five-year-old plan for military commissions has not yielded the conviction after trial of even one person; its sole, dubious achievement has been to strip the mantle of legitimacy from the government’s preferred means of punishment. Also of concern is the injury done to intelligence activities. By opening the courtroom door to cross-examination of once-covert techniques, and by pushing openly for wider surveillance even within U.S. borders, the Executive well may have shrunk the scope within which intelligence agents operate. This consequence likewise leaves the United States less secure than it was under the established punish-or-surveil regime.

I. PAST PRACTICES AND PRESENT OPTIONS

Obscured in debates surrounding post-September 11 innovations is the antiterrorism framework in place before that date. According to that framework, persons against whom the government had sufficient, publishable evidence were punished following conviction at trials that satisfied due process. Punishment occurred even for offenses that implicated national security—offenses classified in some instances as contrary to the laws of war, in others, simply, as contrary to the laws of the United States. Laws were applied to combatants and civilians, to Americans and non-Americans. A principal means of recourse was the civilian system of criminal justice. The other was U.S. military justice, which comprehended courts-martial and, on occasion, military commissions. All these mechanisms operated within constitutional constraints respecting jurisdiction and process. But the plan put in motion after September 11 departed from this framework, opting for a novel system of detention and military commissions that stood at odds with accepted fairness standards.

A. Jurisdiction to Punish

The Constitution apportions responsibilities for U.S. armed forces, for the conduct of war, and for the punishment of certain crimes among the legislative, executive, and judicial branches of government. Article I grants to the Congress the power to, inter alia: “define and punish Piracies and
Felonies committed on the High Seas, and Offenses against the Law of Nations”;6 “declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water”;7 “raise and support Armies”;8 “provide and maintain a Navy”;9 “make Rules for the Government and Regulation of the land and naval Forces”;10 “provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions”;11 and “provide for organizing, arming, and disciplining, the Militia.”12 In turn, Article II sets forth the powers and duties of the head of the executive branch: “The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States”;13 shall have the “Power, by and with the Advice and Consent of the Senate, to make Treaties”;14 and shall “take Care that the Laws be faithfully executed.”15 Finally, Article III grants jurisdiction to review disputes “arising under this Constitution, the Laws of the United States, and Treaties,”16 “in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”17 The Constitution further authorizes recourse to habeas corpus, a centuries-old writ “throwing its root,” as the Supreme Court has written, “deep into the genius of our common law.”18 With regard to this process by which the courts are obligated to examine the lawfulness of

6 U.S. CONST. art. I, § 8, cl. 10.
7 Id. at cl. 11.
8 Id. at cl. 12.
9 Id. at cl. 13.
10 Id. at cl. 14.
11 U.S. CONST. art. I, § 8, cl. 15.
12 Id. at cl. 16.
13 Id. at art. II, § 2, cl. 1.
14 Id. at art. II, § 2, cl. 2.
15 Id. at art. III, § 3.
16 U.S. CONST. art. III, § 2, cl. 1.
17 Id. at art. II, §1.
executive detention, the Constitution provides: “The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” By the broader doctrine of judicial review, moreover, federal courts may invalidate any governmental action that violates the Constitution. This network of rights and duties has governed the scope of jurisdiction of each of the punishment mechanisms under review.

1. Courts-Martial

In their struggle for independence from the British Crown and in subsequent armed conflicts, Americans have subscribed to the laws of war. President Abraham Lincoln asked a law professor named Francis Lieber to draft a code for proper conduct of war. Issued on April 24, 1863, in the middle of a bloody and protracted conflict, were a set of instructions usually referred to as the Lieber Code. Lieber was a Kantian who had served in the Prussian Army during the Napoleonic Wars and whose sons fought on either side of America’s Civil War. His landmark code remains an “extraordinarily enlightened” application of reciprocity and humanity—principles that animate contemporary humanitarian law—to international and to irregular wars. The code proclaimed that military law must “be strictly guided by the principles of justice, honor and humanity—virtues adorning a soldier even more than other men, for the very reason that he possesses the power of his

19 U.S. CONST. art. I, § 9, cl. 2.

20 See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).


22 Instructions for the Government of Armies of the United States in the Field, General Order No. 100 (1863) [hereinafter Lieber Code].


24 Id.
arms against the unarmed." Just treatment was to be preferred in order to expedite "[t]he ultimate object of all modern war": "a renewed state of peace." Virtually all captives were to be considered prisoners of war, detained humanely, and, eventually, exchanged for captives held by the enemy. The code thus admitted no justification for "cruelty"—a term that encompassed "torture to extort confessions"—even against captured enemies. As for criminal trials, the Lieber Code provided that cases governed by statutory law were to be tried by courts-martial. It allowed other cases to be tried by military commission, but only if the commission’s proceedings conformed to "the common law of war." Later codifications of U.S. military law, among them the Articles of War, applied during the two World Wars, built upon the foundation established by the Lieber Code. That code likewise formed a cornerstone of international humanitarian law, including the Geneva Conventions of 1949.

25 Lieber Code, supra note 22, art. 4.

26 THE LAWS OF ARMED CONFLICTS, at x (Dietrich Schindler & Jiří Toman eds., 3d ed., 1988) (citing Lieber Code, supra note 22, art. 4 and explaining that the laws of war advance "mutual interest" and "understanding after the end of the conflict").

27 Lieber Code, supra note 22, at art. 75 ("Prisoners of war are subject to confinement or imprisonment such as may be deemed necessary on account of safety, but they are to be subjected to no other intentional suffering or indignity."); see also id. at arts. 49-50, 105-10, 119-34, 153.

28 Id. at art. 16. See id. at art. 56 ("A prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment, want of food, by mutilation, death, or any other barbarity.") and art. 80 ("Honorable men, when captured, will abstain from giving to the enemy information concerning their own army, and the modern law of war permits no longer the use of any violence against prisoners in order to extort the desired information or to punish them for having given false information."); see also id. at arts. 73-79, 153.

29 Lieber Code, supra note 22, at art. 13.

30 Id.

31 Articles of War, 10 U.S.C. §§ 1471-1593 (1916), cited in In re Yamashita, 327 U.S. 1, 7 (1946).

Applicable today is the Uniform Code of Military Justice, typically called the UCMJ, codified at Title 10 of the U.S. Code. The Supreme Court has written that this code came about after "objections and criticisms lodged against court-martial procedures in the aftermath of World War II" led Congress in 1950 to pass legislation designed "to reform and modernize the system—from top to bottom."33 Thus the statutes that compose the UCMJ—along with the Constitution, case law developed in the military and civil courts, and detailed regulatory law such as the Manual for Courts-Martial34—now govern the conduct of American courts-martial. This ensemble of sources has given rise to a military justice system in which procedural and evidentiary rules largely conform to those that prevail in civil courts in the United States.35

Included within the UCMJ are procedures for arrest and detention, nonjudicial punishment for minor offenses, investigation, and procedures before and during trial by court-martial. The “Punitive Articles” detail offenses that fall within the jurisdiction of the UCMJ, ranging from drunken driving and crimes against property, to a host of crimes against the person, such as rape, assault, and murder, to crimes of particular relevance to the military mission, such as desertion, dereliction of duty, unlawful detention, espionage, cruelty and maltreatment, and “conduct unbecoming an officer and a gentleman."36 The UCMJ does not detail war crimes with the specificity of, to cite one example, the Statute of the International Criminal Court; nor does the UCMJ mention international offenses such as genocide


34 MANUAL FOR COURTS-MARTIAL (2005) [hereinafter MANUAL]. Article I of the Constitution grants Congress power not only to legislate on military matters, but also to assign responsibility for promulgating military regulations to the President. In turn, the President may delegate this responsibility to officials within the executive branch. See 10 U.S.C. § 121 (2007) (granting the President discretion to “prescribe regulations to carry out his functions, powers, and duties” related to the armed forces). It is well settled that ensuing regulations, no less than statutes passed by Congress, constitute laws of the United States; as such, they are subject to review by the courts. Gratiot v. United States, 45 U.S. (4 How.) 80, 117 (1845); see also Johnson v. Yellow Cab Transit, 321 U.S. 383, 390 & n.10 (1944); Standard Oil Co. of California v. Johnson, 316 U.S. 481, 484 (1942); United States v. Freeman, 44 U.S. (3 How.) 556, 567 (1845).

35 See infra text accompanying notes 202-36.

and crimes against humanity. Rather, it is the practice of U.S. military prosecutors to levy charges based on an assessment of underlying conduct. Thus someone suspected of brutality likely would be charged with "assault," which is enumerated in the UCMJ, rather than "torture," which is not. A catchall "General Article" permits prosecution for crimes that the UCMJ does not enumerate.

It is not only American servicemembers who may be called to account before the courts-martial of the United States. Also subject to the UCMJ are "prisoners of war in custody" of the U.S. military. Treatment of the latter is set forth in Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees, and Other Detainees. Jointly published by the Army, Navy, Air Force, and Marine Corps, "[t]his regulation implements international law, both customary and codified"—including Convention (No. III) Relative to the Treatment of Prisoners of War, the third of the four 1949 Geneva Conventions. AR 190-8 extends the competence of American courts-martial to anyone "who, while engaged in combat under orders of his or her government, is captured by the armed forces of the enemy." After setting forth a non-exhaustive list of examples of such "enemy prisoners of war," AR

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Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court.

Id. For an illustration of how this methodology might be applied in a case alleging that a U.S. service member abused detainees, see Maj. Martin N. White, Charging War Crimes: A Primer for the Practitioner, ARMY LAWYER 1 (Feb. 2006).


42 Id., para. 1-1(b)(1997) (listing among the relevant codifications the Third Geneva Convention, supra note 32).

43 Id. at 33 (definition of "enemy prisoner of war").
190-8 requires that doubts concerning a detainee's status be resolved, according to prescribed procedures, by a "competent tribunal" of three military officers.\textsuperscript{44} The same paragraph states that the detainee "shall enjoy the protection" of the Third Geneva Convention until this tribunal makes its decision.\textsuperscript{45} The Convention makes clear that a sentence will be valid "only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed."\textsuperscript{46} In conformity with this provision, AR 190-8 specifies that anyone entitled to treatment as a prisoner of war ordinarily will be tried by a court-martial that adheres to the UCMJ and the \textit{Manual for Courts-Martial}.\textsuperscript{47} In a case involving alleged violations of the law of war, therefore, an enemy prisoner of war and a U.S. servicemember alike would be called to appear before a general court-martial reserved for the most serious offenses.\textsuperscript{48} The sole permissible alternative forum is a "civil court"; however, the regulation makes clear that an enemy prisoner of war "will not be tried by a civil court for committing an offense unless a member of the U.S. Armed Forces would be so tried."\textsuperscript{49}

2. Civilian Courts

A person who is suspected of a crime but is not prosecuted within the parameters of the UCMJ still might be haled before the ordinary criminal courts of the United States. Such persons might include not only certain enemy captives, but also relatives who live with a servicemember on a military base.\textsuperscript{50}

\textsuperscript{44} Id. at para. 1-6.

\textsuperscript{45} Id.

\textsuperscript{46} Third Geneva Convention, supra note 32, at art. 102.

\textsuperscript{47} AR 190-8, supra note 41, para. 3-7(b).


\textsuperscript{49} AR 190-8, supra note 41, para. 3-7(b). U.S. servicemembers have been tried in ordinary criminal courts only with regard to offenses that took place off base and had no connection to the military, and even then only if the military declined to exercise its own jurisdiction to prosecute and the civilian authority consequently chose itself to prosecute. Given the military's interest in conduct related to armed conflict, there is little chance that these conditions would be satisfied in a case involving violations of the laws of war.

\textsuperscript{50} Cf. Reid v. Covert, 354 U.S. 1 (1957) (holding that the Constitution forbids peacetime prosecution of civilian wives of servicemembers for crime committed overseas and punishable by death). Ordinary criminal courts also have been the locus for prosecution of private military
The civilian courts of the United States are competent to adjudicate the gamut of offenses—from minor infractions to crimes punishable by death—enumerated in the U.S. Code. This is true even if the offense alleged occurs outside the United States, provided the court first determines that Congress intended the criminal jurisdiction of the United States to extend, for the particular offense at issue, beyond U.S. territory. Decades ago that proviso might have operated to thwart many efforts to exercise extraterritorial jurisdiction. The pertinent Restatement, published by the American Law Institute in 1987, stated: “It is generally accepted by enforcement agencies of the United States government that criminal jurisdiction over activity with substantial foreign elements should be exercised more sparingly than civil jurisdiction over the same activity, and only upon strong justification.” This changed with the waging throughout the latter part of the Twentieth Century of the so-called “war” against drug trafficking and other transnational crimes. U.S. courts tended to find in some criminal statutes an implied congressional intent to reach acts abroad; in some statutes, Congress made this intent explicit. Today federal prosecutors routinely prosecute persons, citizens and non-citizens alike, for offenses that occurred, in full or in part, outside the United States.

Among these prosecutions have been several cases that arose out of or touched upon armed conflict or the use of force. Among the most famous involved General Manuel Antonio Noriega, who was Panama’s de facto ruler in the late 1980s. A federal grand jury in the United States indicted Noriega in February 1988 on ten counts relating to drug trafficking. In December contractors alleged to have committed crimes in time of conflict. E.g., Scott Shane, CIA Contractor Guilty in Beating of Afghan Who Later Died, N.Y. TIMES, Aug. 19, 2006, at A6 (reporting that a federal jury convicted David A. Passaro, a contractor whom the Central Intelligence Agency had employed in 2003 as an interrogator in Afghanistan, of three counts of simple assault and one count of assault resulting in serious bodily injury, for which he faced up to eleven-and-a-half years in prison). A little-noted attachment to a 2006 spending law would change that by allowing courts-martial of such contractors. Whether the new provision will survive legal challenge, however, remains much in doubt. See Griff Witte, New Law Could Subject Civilians to Military Trial, WASH. POST, Jan. 15, 2007, at A1.


63 See, e.g., United States v. Clark, 435 F.3d 1110 (9th Cir. 2006) (sustaining conviction under statute that expressly prohibits traveling abroad to engage in sex with minors); United States v. Thomas, 893 F.2d 1066 (9th Cir. 1990) (inferring intent to apply child pornography statute outside U.S. borders and holding that the exercise of such jurisdiction did not violate the Constitution), cert. denied, 498 U.S. 826 (1990); United States v. Baker, 609 F.2d 134 (5th Cir. 1980) (deciding similarly with respect to drug-trafficking statute). The frequent judicial willingness to infer extraterritorial intent recently was rejected by one court—notably, the civilian court that reviews convictions by courts-martial. United States v. Martinelli, 62 M.J. 52, 56-58 (C.A.A.F. 2005).
1989, Noriega declared that a state of war existed between Panama and the United States; days later, U.S. military forces were deployed to Panama, where they engaged in combat resulting in casualties and property loss. Noriega soon surrendered and was transported to the United States to stand trial in an ordinary criminal court. Eventually he was convicted of most of the charges against him and sentenced to consecutive terms totaling forty years in a civilian prison. This judgment was sustained on appellate review.

While Noriega’s case was unfolding, many persons accused of hijacking and other acts of terrorism stood trial in U.S. criminal courts. Among these defendants were persons charged with the bombings of the World Trade Center in New York in 1993 and of two U.S. embassies in East Africa in 1998. In the hijacking cases in particular, the U.S. Code’s description of certain offenses reflected similar codifications in multilateral treaties to which the United States had adhered.

Also during the 1980s and 1990s, Congress enacted three statutes designed to give internal effect to other U.S. treaty obligations. Each expanded the jurisdiction of U.S. courts over crimes of international concern. The first of these enactments was the Genocide Convention Implementation Act of 1987, passed at the same time that the United States ratified the Convention Against Genocide. This Act applies to anyone, “whether in time of peace or in time of war,” if “the offense is committed within the United States” or “the alleged offender is a national of the United States.” The national statute’s definition of genocide is almost identical to that found in

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54 This account is derived from the judgment in United States v. Noriega, 117 F.3d 1206 (11th Cir. 1997).


58 18 U.S.C. § 1091(a), (d).
the international convention.59 A federal court may sentence a person convicted of genocide to a fine of up to $1 million and imprisonment of up to twenty years, or, if the conduct resulted in death, to the death penalty or life imprisonment, plus a fine of up to $1 million.60

The second such statute was enacted in 1994 to give internal effect to the ratification by the United States of the Convention Against Torture and Other Cruel, Inhuman, Degrading Treatment or Punishment.61 The statute applies to anyone who is a national of the United States or is present in the United States and who "commits or attempts to commit torture," but only if such conduct occurred "outside the United States."62 This limitation on the statute's scope reflects the position of the United States that its laws already prohibit all conduct within its borders amounting to torture, so that there is

59 Compare id., § 1091(a):

[W]ith the specific intent to destroy, in whole or in substantial part, a national, ethnic, racial, or religious group as such, the person

(1) kills members of that group;

(2) causes serious bodily injury to members of that group;

(3) causes the permanent impairment of the mental faculties of members of the group through drugs, torture, or similar techniques;

(4) subjects the group to conditions of life that are intended to cause the physical destruction of the group in whole or in part;

(5) imposes measures intended to prevent births within the group; or

(6) transfers by force children of the group to another group; or attempts to do so . . . .

with Genocide Convention, supra note 57, at art. II (proscribing same acts, though omitting the adjectives "specific" and "substantial"). On the import of these differences, see Diane Marie Amann, Dialogue entre chercheurs de différentes traditions juridiques: Une perspective américaine [Dialogue Among Researchers from Different Legal Traditions: An American Perspective], in VARIATIONS AUTOUR D'UN DROIT COMMUN [VARIATIONS AROUND A COMMON LAW] 363, 369 (Mireille Delmas-Marty, Horatia Muir-Watt & Hélène Ruiz Fabri eds., 2002).

60 18 U.S.C. § 1091(b). Conviction for "directly and publicly incit[ing]" others to commit genocide is punishable by a fine of up to $500,000 and five years in prison. Id. § 1091(c).


62 18 U.S.C. § 2340A(a), (b).
no need for additional regulation of conduct inside its territory. The statute defines torture as an "act committed by a person acting under the color of law specifically intended to inflict severe physical or mental pain or suffering (other than pain or suffering incidental to lawful sanctions) upon another person within his custody or physical control." The crime is punishable by a fine and imprisonment of up to twenty years or, if the torture caused death, by the death penalty or imprisonment "for any term of years or for life."

The third and last of the statutes that expanded U.S. criminal jurisdiction was the War Crimes Act of 1996. This Act applies when either the accused or the victim "is a member of the Armed Forces of the United States or a national of the United States." It proscribed "war crimes," a term initially defined as certain acts listed in the Annex to the Hague Convention IV of 1907, Respecting the Laws and Customs of War on Land, as well as "grave breaches" and certain other violations of Geneva conventional law to which the United States is a party. For the most part, the Geneva Conventions of 1949 govern the conduct of armed conflict between two or more parties, even if some participants in the conflict are not parties to those conventions.

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64 18 U.S.C. § 2340(1). In contrast, Article 1 of the Convention Against Torture, supra note 61, requires that the harm be inflicted for certain purposes, such as extraction of information.


67 Id. § 2441(b).

68 Id., § 2441(c) (referring to the Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulation Concerning the Laws and Customs of War on Land, 3 Martens Nouveau Recueil (ser. 3) 461, 187 Consol. T.S., ratified by the United States Nov. 27, 1909, entered into force Jan. 26, 1910).

69 See Third Geneva Convention, supra note 32, at art. 2:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
Common Article 3 is an exception, for it obligates parties to adhere to certain “minimum” guarantees even when they are engaged in “armed conflict not of an international character.” Specifically, it requires that “[p]ersons taking no active part in the hostilities,” including former combatants in detention, “shall in all circumstances be treated humanely,” and it prohibits subjecting such persons to “[v]iolence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture,” to the “[t]aking of hostages,” to “[o]uttrages upon personal dignity, in particular, humiliating and degrading treatment,” or to “[t]he 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.” U.S. law incorporated these obligations, in that the War Crimes Act explicitly “define[d] as a war crime any conduct which constitutes a violation of common Article 3.” The Act stated that commission of any offense it enumerated would be punishable by a fine or by imprisonment for “life or any term of years” or, “if death results to the victim,” by the death penalty.

Despite the availability of these statutes, federal case law reveals not one reported instance in which a person was convicted for violating any of the newly enumerated crimes. The first indictment for a violation of the 1994 statute proscribing extraterritorial torture was returned in December 2006.
against the U.S.-born son of former Liberian President Charles Taylor.\footnote{David Johnston, \textit{Son of Liberia’s Ex-Leader Charged In Miami Under Anti-Torture Law}, \textit{N.Y. Times}, Dec. 7, 2006, at A5 (reporting that the indictment alleges that the son engaged in torture during interrogation of political opponents in Liberia’s capital, and that the father himself awaits trial by the Special Court for Sierra Leone, a hybrid tribunal established by agreement between Sierra Leone and the United Nations).} Federal civilian prosecutors, no less than their military justice counterparts, seem to prefer to employ more familiar, domestic statutes—assault rather than torture, for instance.

3. Military Commissions

Since September 11 the United States has availed itself little of military and civilian jurisdictions when dealing with allegations of anti-American violence. Prosecutions in ordinary federal courts have been few, and not one suspected enemy combatant has been tried within the ordinary system of courts-martial. The Executive preferred, rather, to relegate captives to what one official labeled "a new legal regime."\(^8\) Key components were indefinite executive detention and a system of special tribunals, known as military commissions, at which selected detainees were to be tried. This regime held sway until June 29, 2006, when the Supreme Court, by its decision in the case of Salim Ahmed Hamdan, invalidated the Executive's military commissions. The judgment in *Hamdan* has proved a watershed in U.S. policy respecting post-September 11 detainees, and this and subsequent discussions of the commissions are divided accordingly.

\(a\) Pre-

President George W. Bush launched the initiative on November 13, 2001. Declaring that "an extraordinary emergency . . . for national defense purposes" necessitated extraordinary treatment of any noncitizen whom he should determine belonged to al Qaeda or was somehow involved in "acts of international terrorism" harmful to U.S. "citizens, national security, foreign policy, or economy," Bush ordered then Secretary of Defense Donald H. Rumsfeld to detain what were called "enemy aliens."\(^8\) Used in World War II to encompass Japanese in the United States as well as enemies abroad, that term had provided the basis on which a divided U.S. Supreme Court held in 1950 that Germans serving U.S. military sentences in Germany could not

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petition U.S. courts for writs of habeas corpus. By presidential order post-September 11 detainees—many of whom eventually were held in a detention camp at the U.S. naval base at Guantánamo Bay, Cuba—were to receive humane and nondiscriminatory treatment, and "when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." The tribunals were to operate apart from the ordinary military or civilian criminal justice system. They were supposed to afford defendants "fair and equitable" trials, according to the order; nevertheless, adherence to "the principles of law and the rules of evidence generally recognized" in federal criminal courts was deemed "not practicable." Vice President Dick Cheney elaborated, saying of the detainees, "They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process.

An ensuing Defense Department regulation provided a nonexhaustive list of crimes for which a military commission could try a person as a direct participant or otherwise; for example, under the principle of command responsibility. The list first enumerated "War Crimes" that resembled the Statute of the International Criminal Court more than the UCMJ: willful killing of protected persons, attacking civilians, pillaging, denying quarter, taking hostages, employing poison or analogous weapons, using protected persons or property as shields, torture, treachery or perfidy, improper use of protective emblems, and rape. The list then addressed a second category, including hijacking or "hazarding" a vessel or aircraft, terrorism, murder or destruction of property by an "unprivileged belligerent," aiding the enemy,


83 Presidential Order, supra note 1, § 1(e). On this and other post-September 11 camps, see generally Diane Marie Amann, Abu Ghraib, 153 U. PA. L. REV. 2085, 2085, 2090-95 (2005) [hereinafter Amann, Abu Ghraib]; Diane Marie Amann, Guantánamo, 42 COLUM. J. TRANSNAT'L L. 263 (2004) [hereinafter Amann, Guantánamo].

84 Presidential Order, supra note 1, § 1(f).

85 Peter Slevin & George Lardner, Jr., Bush Plan for Terrorism Trials Defended, WASH. POST, Nov. 15, 2001, at A28 (quoting Vice President Dick Cheney).


87 See id., § 6(A)(1)-(18). Cf. ICC Statute, supra note 37, at art. 8.
spying, perjury or false testimony, and obstruction of justice.\textsuperscript{88} There was disingenuity in the label given this category, “Other Offenses Triable by Military Commission,” since crimes like hijacking typically had been prosecuted within the civilian system. Similarly, the regulations included among the means by which a person could be held criminally liable “the separate offense of conspiracy,” notwithstanding that the crime of conspiracy is unknown to the law of war as it is practiced outside the United States.\textsuperscript{89}

The Defense Department regulations bestowed upon what Bush called “tribunals” a new appellation: “military commissions.” By this renaming, the government sought to link the post-September 11 initiative to an institution which had been used occasionally ever since the 1846-48 Mexican-American War and which had “received statutory recognition” from Congress during America’s Civil War.\textsuperscript{90} Among the most notable military commissions were two that took place during World War II. The first, established to try eight German saboteurs found on U.S. soil, was reviewed by the Supreme Court in its decision in \textit{Quirin}.\textsuperscript{91} The second, established to prosecute a Japanese general as the commander responsible for war crimes that his troops committed during the battle for the Philippines, was reviewed in a judgment that bears the general’s name, \textit{Yamashita}.\textsuperscript{92} U.S. military commissions operated often pursuant to statute and on occasion pursuant to the common law of war; even the latter type usually endeavored to follow court-martial procedures as much as possible.\textsuperscript{93} But the commissions that resulted from the

\textsuperscript{88} See MCI No. 2, \textit{supra} note 86, § 6(B)(1)-(8).


\textsuperscript{91} \textit{Ex parte} Quirin, 317 U.S. 1 (1942).

\textsuperscript{92} \textit{In re} Yamashita, 327 U.S. 1 (1946).

\textsuperscript{93} \textit{See} Eugene R. Fidell, Dwight H. Sullivan & Detlev F. Vagts, \textit{Military Commission Law}, ARMY LAWYER 47 (Dec. 2005); \textit{Cf.} Lieber Code, \textit{supra} note 22, at art. 13 (requiring that military commissions conform to “the common law of war”). The UCMJ itself pointed to a congressional intent that military commissions should operate within—and not apart from—the system of military justice. It gave military commissions jurisdiction concurrent with those of courts-martial over “offenders or offenses that by statute or by the law of war may be tried by military commissions,” Uniform Code Military Justice at art. 21, 10 U.S.C. § 821 (2007). Furthermore, it
President's November 13 order comported neither with the laws of war nor with the rules of American courts-martial.

Although the Executive denied that its program transgressed the common law of war, it forthrightly acknowledged that the military commissions were not courts-martial. No court-martial is required, the Executive contended, for the reason that the persons who risk trial by military commission are not "prisoners of war," but rather are "enemy combatants" to whom the Geneva Conventions' framework does not apply.°

In accordance with this rationale, the Executive refrained from giving any detainee the hearing by a "competent tribunal" that is mandated in the U.S. military regulation implementing the Third Geneva Convention.° Persons detained at the U.S. Naval Base at Guantánamo Bay, Cuba and elsewhere thus have been held pursuant to the order of the President. The Executive has maintained further that the law of armed conflict allows it to choose to hold these persons for the duration of what may be a never-ending "war on terror."°

Some noncitizen detainees at Guantánamo, as well as two Americans detained in military brigs in the United States, petitioned the civilian courts for habeas corpus relief from their incommunicado custody. As part of a trilogy of decisions issued in 2004, a divided Supreme Court permitted detention of one man designated an enemy combatant.° But the Court

94 All who fight on the other side are, of course, "enemy combatants"—even prisoners of war protected by Geneva law. Those the U.S. government would single out for exceptional treatment more properly are called "unlawful enemy combatants"; even as to them, the government's post-September 11 policy was by no means preordained by prior practice. See generally, e.g., George C. Harris, Terrorism, War and Justice: The Concept of the Unlawful Enemy Combatant, 26 LOY. L.A. INT'L & COMP. L. REV. 31 (2003); Carlton F.W. Larson, The Forgotten Constitutional Law of Treason and the Enemy Combatant Problem, 154 U. PA. L. REV. 863 (2006). See infra note 123 and accompanying text (discussing the government's eventual adoption of the term "unlawful enemy combatant").

95 See AR 190-8, supra note 41, § 1-6.

96 This policy is enunciated in George W. Bush, Memorandum for the Vice President et al., Human Treatment of al Qaeda and Taliban Detainees, Feb. 7, 2002, reprinted in THE TORTURE PAPERS 134-35 (Karen J. Greenberg & Joshua L. Dratel eds., 2005). Governmental memoranda arguing in favor of the policy are reprinted in the same volume at 29-143. Predictably, the policy appeared to have complicated matters even with respect to Guantánamo detainees whom the United States wanted to release. The Executive expressed concern that if some were returned—now that the United States has labeled them foreign terrorists—they would risk mistreatment at the hands of their own country. See Tim Golden, U.S. Says It Fears Detainee Abuse in Repatriation, N.Y. TIMES, Apr. 30, 2006, at § 1, p. 1.

rejected the Executive's argument on two key points, holding in *Hamdi* that an American detained in the United States was entitled to a judicial hearing at which, aided by counsel, he could contest the lawfulness of his detention, and in *Rasul* that non-Americans detained at Guantánamo, and perhaps at other overseas sites, were entitled to pursue actions against the government in federal, civilian courts.

These judgments opened a path for litigation of the military commissions plan. As a result of legal challenges to and executive delays in implementation of that plan, more than five years after issuance of the President's order, fewer than a dozen of the more than 700 detainees who had passed through the camp at Guantánamo stood charged with any crime, and not one witness had been called to testify at a trial by military commission.

*b) Hamdan and Its Aftermath*

Among those who sued to stop the military commissions was Salim Ahmed Hamdan, alleged to have been the chauffeur for Al Qaeda leader Osama bin Laden. His comprehensive challenge to the commissions' legality led a federal district court to rule in 2004 that under the Third Geneva

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the Authorization for Use of Military Force Resolution gave President necessary authority, "for the duration of these hostilities," to detain "an individual who . . . was part of or supporting forces hostile to the United States or coalition partners in Afghanistan and who engaged in an armed conflict against the United States there") (internal quotation marks omitted); *id.* at 589 (Thomas, J., dissenting) (arguing for broader presidential authority to detain). See *Authorization for Use of Military Force Resolution*, Pub. L. No. 107-40, 115 Stat. 224) (2001) [hereinafter AUMF].

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Convention Hamdan was to be treated as a prisoner of war, entitled to a court-martial, since there had never been a proper hearing on his prisoner of war status.\textsuperscript{101} In the view of this court, the military commissions were not equivalent to courts-martial. For this reason alone, trial by military commission of detainees in Hamdan's position was ruled illegal. The district court additionally invalidated the regulation that would have allowed the commission to consider evidence adduced outside the presence of the accused.\textsuperscript{102} One year later, however, the federal appellate court reversed. It held \textit{inter alia} that no aspect of the Third Geneva Convention applied to "enemy combatants" like Hamdan and that, in any event, the Convention was not justiciable in civilian courts.\textsuperscript{103}

The Supreme Court overturned that decision on June 29, 2006, holding by a vote of five to three that the commissions contravened both U.S. law and the international law it incorporated.\textsuperscript{104} "Recognizing . . . that trial by military commission is an extraordinary measure raising important questions about the balance of powers in our constitutional structure," Justice John Paul Stevens wrote that the commission established by the President "lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions."\textsuperscript{105}

The Court held as a threshold matter that Congress intended that a unique review procedure set out in its first legislative foray into the detention issue—the Detainee Treatment Act of 2005—would apply only to actions that might be filed after the Act took effect on December 30 of that

\textsuperscript{101} Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004). A "Combatant Status Review Tribunal" devised in the wake of the 2004 trilogy had classified the petitioner an "enemy combatant," but the district court ruled that this proceeding was not equivalent to the prisoner of war status hearing that the Third Geneva Convention and Army Regulation 190-8 require. \textit{Id.} at 162.

\textsuperscript{102} \textit{Id.} at 162, 168-70.

\textsuperscript{103} Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), \textit{cert. granted}, 126 S. Ct. 622 (2005); see Diane Marie Amann, \textit{Le Transnationalisme Face à la Transition}, \textit{REVUE DE SCIENCE CRIMINELLE ET DE DROIT PÉNAL COMPARÉE} 967 (no. 4-Oct./Dec. 2005) (discussing this judgment).

\textsuperscript{104} Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006). In the majority were Justices John Paul Stevens, Anthony M. Kennedy, David Souter, Ruth Bader Ginsburg, and Stephen Breyer; dissenting were Antonin Scalia, Clarence Thomas, and Samuel A. Alito, Jr. Chief Justice John Roberts, Jr. recused himself because he had taken part in the appellate decision before ascending to the Supreme Court. See \textit{infra} text accompanying note 145.

year.\textsuperscript{106} Actions that hundreds of detainees had filed before that date were subject to ordinary federal litigation rules; accordingly, the Court ruled that it had jurisdiction to address the merits of Hamdan's case.\textsuperscript{107}

Whether the Executive had the power to detain Hamdan "for the duration of active hostilities in order to prevent" harm was not raised by petitioner, and the Court chose not to address that question,\textsuperscript{108} but rather to focus on the military commissions. A review of U.S. history demonstrated that before September 11, such commissions had been the products of "military necessity"; indeed, each jurisdictional aspect of such tribunals was "supported by a separate military exigency."\textsuperscript{109} Even in the face of necessity, the Court continued, the government must exercise its powers within the constraints of the Constitution and other U.S. law.\textsuperscript{110} Of particular relevance was Article 21 of the UCMJ, by which courts-martial and military commissions had concurrent jurisdiction over "offenders or offenses that by statute or by the law of war may be tried by such military commissions . . . ."\textsuperscript{111} The Court held that no statute authorized the post-September 11 commissions; accordingly, it proceeded to consider whether those commissions were "justified under the 'Constitution and laws,' including the law of war."\textsuperscript{112}

A plurality of the Court concluded that the military commissions were illegal for the reason that the sole offense with which Hamdan was charged—conspiracy—was not recognized by the law of war.\textsuperscript{113} The plurality noted as well that none "of the overt acts that Hamdan is alleged to have committed violates the law of war."\textsuperscript{114} No definitive ruling issued, however, because Justice Anthony M. Kennedy, who cast the fifth vote in favor of much of the

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\textsuperscript{107} Id. at 2769. The Court further declined the government's request that it abstain from hearing Hamdan's legal challenge until the conclusion of his trial by military commission. Id. at 2769-72.

\textsuperscript{108} Id. at 2798.

\textsuperscript{109} Id. at 2773.

\textsuperscript{110} Hamdan, 126 S. Ct. at 2773-74.

\textsuperscript{111} Id. at 2774 (quoting the Uniform Code of Military Justice § 21, 10 U.S.C. § 821 (2007)).

\textsuperscript{112} Id. at 2775 (quoting Detainee Treatment Act § 1005(e)(3)).

\textsuperscript{113} Id. at 2775-86 (plurality opinion) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.).

\textsuperscript{114} Id. at 2778 (plurality opinion).
judgment, declined to reach this question.\textsuperscript{115}

The five-member majority did agree that "[t]he UCMJ conditions the President's use of military commissions on compliance not only with the American common law of war, but also with the rest of the UCMJ itself, insofar as applicable, and with the 'rules and precepts of the law of nations,' including, \textit{inter alia}, the four Geneva Conventions signed in 1949."\textsuperscript{116} The Court assumed arguendo that a habeas petitioner like Hamdan could not invoke a provision of the Convention "as an independent source of law binding the Government's actions and furnishing petitioner with any enforceable right";\textsuperscript{117} however, the UCMJ requirement that commissions adhere to "the law of war" effectively incorporated the provisions of the Geneva Conventions.\textsuperscript{118}

Recognition of the Conventions had led the district court to conclude that until Hamdan's detainee status is determined in accordance with Article 5 of the Third Geneva Convention, he must be treated as a prisoner of war, and thus he could be tried only before an ordinary court-martial.\textsuperscript{119} The Supreme Court did not reach the Article 5 question.\textsuperscript{120} Instead, it held that the underlying conflict was, at the least, a "conflict not of an international character," in which state parties such as the United States were forbidden to

\textsuperscript{115} \textit{Hamdan}, 126 S. Ct. at 2809 (Kennedy, J., concurring in part) (declining to reach issue).

\textsuperscript{116} \textit{Id.} at 2786 (opinion of the Court) (quoting \textit{Ex parte Quirin}, 317 U.S. 1, 28 (1942) and citing \textit{In re Yamashita}, 327 U.S. 1, 20-21 (1946)).

\textsuperscript{117} \textit{Id.} at 2794. Though it declined to rule on the question, the Court suggested some disagreement with this assumption by its insertion at this juncture of two footnotes. The first note described the purpose of the 1949 Conventions, in contrast with predecessor treaties, as "first and foremost to protect individuals, and not to serve state interests." \textit{Id.} at 2794 n.57 (quoting 4 INT'L COMM. FOR THE RED CROSS, COMMENTARY: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 21 (1958)). The second footnote quoted a passage stating that "[i]t should be possible in States which are parties to the Convention... for the rules of the Convention to be evoked before an appropriate national court by the protected person who has suffered a violation... " \textit{Id.} at 2794 n.58 (quoting 1 INT'L COMM. FOR THE RED CROSS, COMMENTARY: GENEVA CONVENTION FOR THE AMELIORATION OF THE CONDITION OF THE WOUNDED AND SICK IN ARMED FORCES IN THE FIELD 84 (1952)).

\textsuperscript{118} \textit{Id.} at 2794. ("For, regardless of the nature of the rights conferred on Hamdan, they are, as the Government does not dispute, part of the law of war. And compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.") (citations omitted).


violate Article 3 common to all four 1949 Geneva Conventions. Although it allowed that the article's description of minimum standards "tolerates a great degree of flexibility," the Court underscored: "requirements they are nonetheless."

Key to the case was Common Article 3's ban on "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 by civilized peoples." Consulting the French treaty text as well as the Commentary published by the International Committee for the Red Cross, the Court construed Common Article 3 to bar trial by "special tribunals" and to mandate trial by courts "established and organized in accordance with the laws and procedures already in force in a country." In the United States, the Court held such courts "are the courts-martial established by congressional statutes," and no "deviations from court-martial practice" are permitted absent demonstration of a "practical need" to depart, a need that the Executive had failed to demonstrate.

This reasoning was extended to procedures. Commission regulations failed to satisfy the UCMJ's statutory preference that military commission procedures conform as far as practicable with those of the ordinary civilian and military courts, the Court held, and a plurality reached the same conclusion upon assessing procedures against the requirements of Common Article 3. In point of fact, the plurality maintained that the regulations violated the fair trial requirements of customary international law, many of which it found described in, inter alia, the first protocol to the 1949 Geneva Conventions and the International Covenant on Civil and Political Rights.

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121 Hamdan, 126 S. Ct. at 2795-96 (quoting Third Geneva Convention, art. 3).
122 Id. at 2798 (emphasis in original).
123 Id. at 2795-96 (quoting Third Geneva Convention, art. 3).
124 Id. at 2796-97, n.64 (quoting 4 INT’L COMM. OF THE RED CROSS, 1 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 355 (2005) and the French version of the Fourth Geneva Convention, supra note 32, at art. 66).
125 Hamdan v. Rumsfeld, 126 S.Ct. 2749, 2797 (2006) (quoting id. at 2803-04 (Kennedy, J., concurring in part)).
126 Id. at 2786 (opinion for the Court); see id. at 2797-98 (plurality opinion) (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.).
127 Id. at 2797-98 (plurality opinion) (citing Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 75, (June 8, 1977) [hereinafter Additional Protocol I]; International Covenant on Civil and Political Rights, G.A. Res. 2200, at art. 14, U.N. GAOR, 21st Sess., Supp. No. 16, at 49, U.N. Doc. A/6316 (1966) [hereinafter ICCPR]). The United States is a party to the second but not the first of these
The five-member majority singled out as violative of all these sources of the "wholesale" exclusion of the accused from trial proceedings against him—an exclusion to which Hamdan already had been subjected.\(^{128}\)

The judgment in \textit{Hamdan} set off a flurry of activity both in the executive branch and in Congress, the national legislature that had scarcely attended to detainee matters in the more than four years since September 11. Some, including some members of Congress, interpreted the decision to require detainees be tried by courts-martial or in UCMJ-sanctioned proceedings virtually the same as courts-martial.\(^{129}\) But supporters of the military commissions pointed to a separate opinion—in which Justice Stephen Breyer wrote that "[n]othing prevents the President from returning to Congress to seek the authority he believes necessary"\(^{130}\)—and to sundry other passages in \textit{Hamdan} in order to argue that the initial plan could be rendered legal by having Congress adopt it, with few changes, in a statute.\(^{131}\) To a great extent Congress acceded to that argument, establishing, in the Military Commissions Act signed into law on October 17, 2006, post-\textit{Hamdan} commissions much like the pre-\textit{Hamdan} version. In some instances, in fact, the new Act exceeded the prior plan. The President's 2001 order applied only to noncitizens, for example. In contrast, the Act's definition of "enemy combatants," "lawful" and "unlawful," encompassed noncitizens and citizens alike, although only the latter would be subject to military commissions.\(^{132}\)


\(^{128}\) \textit{See Hamdan}, 126 S. Ct. at 2786-93 (opinion for the Court); \textit{id.} at 2797-98 (plurality opinion).


\(^{132}\) \textit{Compare Presidential Order, supra} note 1, § 2(a), at 57834 (defining "individual subject to this order" to mean "any individual who is not a United States citizen"), \textit{with} 10 U.S.C. §§ 948a (1), (2), 948b(a), 948c, 948d(a) defining the two types of "enemy combatants" without reference to citizenship, and providing that military commissions will try "alien unlawful enemy
The Supreme Court's holding in *Hamdan* that Common Article 3 constituted a global constraint on state action raised the prospect that U.S. officials responsible for the mistreatment of detainees might be prosecuted under the War Crimes Act, by which Congress in 1996 had made violations of Common Article 3 federal offenses punishable by imprisonment or death. A number of Senators expressed dismay at this possibility. Notwithstanding an official pronouncement that Pentagon regulations unrelated to military commissions "comply with the standards of Common Article 3," Attorney General Alberto Gonzales, among others, maintained that Common Article 3 was unfairly vague. The White House push to shrink the scope of crimes punishable within the rubric of Common Article 3 succeeded. The Military Commissions Act of 2006 amended the War Crimes Act of 1996, which had proscribed all "violations," so that it would authorize criminal punishment only for "grave breaches." Definitions of offenses further circumscribed the reach of U.S. criminal law: to cite but one example, the definitions of "rape" and "sexual assault" or "abuse" appeared to exclude numerous incidents of sexual humiliation reported to have occurred at Guantánamo and other U.S. detention centers. The 2006 Act declared that

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133 See supra notes 66-73 and accompanying text (discussing War Crimes Act, 18 U.S.C. § 2441 (1996)).

134 Id.


138 18 U.S.C. § 2441(d)(1) (listing as crimes torture, cruel or inhuman treatment, performing biological experiments, murder, mutilation or maiming, rape, intentionally causing serious bodily injury, rape, sexual assault or abuse, taking hostages); 18 U.S.C. § 2441(a)(1) (declaring that this proscription encompasses all "grave breaches" of Common Article 3).

139 18 U.S.C. § 2441(d)(1)(G), (H), (d)(2)(C) (defining "rape" as involving, at the least, attempted
by enumerating certain crimes, the United States had "fully satisfied" its duty "to provide effective penal sanctions for grave breaches which are encompassed in common Article 3"—even as it acknowledged that the United States' overall obligation under that article extended to other misconduct. Amendments to the War Crimes Act were made retroactive, moreover, a move that worked to insulate from federal criminal prosecution all who played a role in post-September 11 abuses.

B. Fairness Constraints on Punishment

To describe the competence of civilian and military jurisdictions is to tell but part of the story of the punishment regime. Equally important is the quality of those jurisdictions; that is, the degree to which each adhered to guarantees of fairness that are fundamental to American and, increasingly, to international standards of justice. These include guarantees respecting independence and impartiality and the rights of the accused.

1. Independence and Impartiality

"Independence" and "impartiality" are related but have separate meanings. "Independence" points to questions of institutional design; that is,
to “structural independence” or to “freedom from interference” by, in particular, other governmental entities.\textsuperscript{143} Canada’s Supreme Court has described independence as “a status or relationship to others, particularly to the executive branch of government that rests on objective conditions or guarantees.”\textsuperscript{144} To that end, independence is first concerned with matters of financial and job security. Judges are guaranteed to serve long tenures and may not be removed except upon proof that they have engaged in specified misconduct.\textsuperscript{145} No judge should fear that the rendering of an unpopular decision will provoke a reduction in either salary or resources.\textsuperscript{146}

A second factor relating to independence is—as stated in Basic Principles adopted at a U.N. meeting in 1985—the obligation of “the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.”\textsuperscript{147} To fulfill this requirement, the judge should have a solid understanding of the law, as well as experience with the task of adjudication. Accordingly, a third factor contributing to judicial independence is the adoption of a method for choosing the best person from among those candidates who possess the requisite qualifications.\textsuperscript{148}

“Impartiality,” in contrast, is a subjective concept. Again quoting the Canadian Supreme Court, it is “a state of mind or attitudes of the tribunal in relation to the issues and the parties in a particular case.”\textsuperscript{149} An impartial


\textsuperscript{144} Valente v. The Queen [1985] 2 S.C.R. 673, 685.


\textsuperscript{146} Id. at Principle No. 12.

\textsuperscript{147} Id. at Principle No. 6.

\textsuperscript{148} Id. at pmbl., para. 9; see also id. at Principle No. 10 (calling for attention to “selection” and “training,” and requiring that “[a]ny method of judicial selection shall safeguard against judicial appointments for improper motives”).

\textsuperscript{149} Valente, 2 S.C.R. at 685. Among those discussing the interrelation of impartiality and independence was U.S. Supreme Court Justice Felix Frankfurter. Objecting to a majority ruling that government employees would not \textit{ipso facto} be biased jurors in a prosecution for willful failure to appear before the House Un-American Activities Committee, he wrote:

\begin{quote}
The reason for disqualifying a whole class on the ground of bias is the law’s recognition that if the circumstances of that class in the run of instances are likely to generate bias, consciously or unconsciously, it would be a hopeless endeavor to search out the impact of these circumstances on the mind and
\end{quote}
judge acts without bias—without having decided which side to favor before both sides have presented their evidence in court. In so doing, the judge complies with a primary injunction of the U.N. Basic Principles: “The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any quarter or for any reason.”

The courts of the United States traditionally have been both independent and impartial. Imagine an inverted pyramid: civilian courts would rest at the top, with courts-martial below. At the bottom would languish the military commissions. Both as proposed by President Bush after September 11 and as established by Congress after the decision in *Hamdan*, the commissions provoked serious questions respecting independence and impartiality.

**a) Civilian Courts**

The Constitution was framed with an eye to promoting judicial independence. In keeping with the principle of separation of powers, Article II empowers the President to nominate federal judges; nominees may not take office, however, unless confirmed by the Senate. The confirmation process often is lengthy, and often nongovernmental organizations such as the American Bar Association offer their views on whether the nominee is qualified. Once confirmed, a judge operates within the framework of Article III, which provides: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished judgment of a particular individual. ... The appearance of impartiality is an essential manifestation of its reality. This is the basic psychological reason why the Founders of this country gave the judiciary an unlimited tenure. Impartiality requires independence, and independence, the Framers realized, requires freedom from the effect of those “occasional ill-humors in the society,” which as Alexander Hamilton put it in *The Federalist* are “the influence of particular conjunctures.”

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150 Basic Principles, supra note 145, at Principle No. 2.


152 U.S. CONST. art. II, § 2.
during their Continuance in Office. The passage guarantees a baseline salary level and tenure for life absent serious misconduct. As the Constitution’s earliest supporters recognized, both promote an independent judiciary.

The federal judiciary is charged with checking against abuse of governmental power. The Constitution expressly provides for habeas corpus, the writ by which the courts may order the release of someone whom the government is detaining in contravention of the law. The Due Process Clause of the Constitution further forbids any deprivation by the state “of life, liberty, or property, without due process of law.” In enforcing this protection, the Supreme Court has held that the clause includes not only a guarantee that state action adhere to certain procedures, but also that it meet the substantive standard of fundamental fairness. Independence and impartiality partake of both procedure and substance, and it is well established in U.S. criminal jurisprudence that proceedings against a person can be judged only by an independent and impartial decision maker.

Although the federal courts incorporate many attributes that constitute impartiality and independence, threats persist. Prompting recent threats were the Supreme Court judgments that outlawed both the juvenile death penalty and the criminal prosecution of same-sex sodomy. Opponents have called for an end to life tenure, for impeachment of judges, and for exploring ways to cut judicial budgets. Congress contributed by passing jurisdiction-

153 Id. at art. III, § 1.

154 See THE FEDERALIST No. 78, at 508 (Alexander Hamilton) (1st Mod. Library ed., 1941) (arguing that “nothing will contribute” as much as “the permanent tenure of judicial offices” to promoting “that independent spirit in the judges which must be essential to the faithful performance” of their duty to protect against governmental abuse).

155 U.S. CONST. art. I, § 9; see supra text accompanying note 19.

156 U.S. CONST. amend. V. See id. amend. XIV (extending same obligation to the constituent states of the Union). Providing a further check at trial is the federal petit jury of twelve laypersons who must agree unanimously before a verdict issues. See U.S. CONST. art. III.


stripping laws that proclaimed the courts incompetent to hear certain matters.\textsuperscript{161}

The duty of impartiality is reflected in codes of ethical conduct like that promulgated by the American Bar Association.\textsuperscript{162} Judges, moreover, may recuse themselves at any time. They need not give any reason for doing so, although often their reason may be inferred from the circumstances. The availability of recusal played a role in \textit{Hamdan}, in which the Supreme Court assessed the legality of military commissions that the President had established after September 11, 2001.\textsuperscript{163} Justice Antonin Scalia had turned aside requests that he recuse himself on account of his public declaration, weeks before oral argument in the case, that it was “crazy” to think that Guantánamo detainees deserved a “full jury trial.”\textsuperscript{164} However, Chief Justice John G. Roberts, Jr., who before his elevation had been a member of the appellate panel that judged \textit{Hamdan}, decided not to take part in the case once it arrived at the Supreme Court.\textsuperscript{165}

\textit{b) Courts-Martial}

Military justice, like its civilian counterpart, is supposed to proceed in a


\textsuperscript{163} \textit{See supra} text accompanying notes 97-124.

\textsuperscript{164} Charles Lane, \textit{Scalia’s Recusal Sought in Key Detainee Case}, WASH. POST, Mar. 28, 2006, at A6 (quoting remarks Scalia made at the University of Freiburg, and noting that, although in 2004 Scalia had recused himself after making comments about a pending free speech case, in 2005 he took part in a case brought against Vice President Cheney, notwithstanding revelations that the two recently had gone duck hunting together). Scalia’s statement was curious given that the court-martial—the forum that the district court in \textit{Hamdan} ruled required by applicable law—does not entail a “full jury trial.”

fair and impartial manner. Courts-martial are organized not under Article III, but rather pursuant to Congress’ power to legislate military affairs. Article I judges are guaranteed neither life tenure nor protection against reduction in salary. A panel of the general court-martial, before which the most serious offenses are to be adjudicated, must comprise a military judge and no fewer than five members. The military judge must be a commissioned officer who is a member of the bar and certified as qualified for such service. Outside of the Army and the Coast Guard, military judges do not have an established term, but rather serve when so appointed by the Judge Advocate General of the branch to which they belong. The transitory nature of this service may endanger impartiality and independence, as contended in an article by the president of the National Institute of Military Justice:

Military trial judges . . . are not senatorially-confirmed as judges. They preside over courts that appear without warning and vanish without a trace, in contrast to the district courts, some of which have been in continuous operation for over two hundred years. Unlike their civilian counterparts, military judges are selected by the Judge Advocates General and are subject to evaluation like other commissioned officers. They enjoy no protected term of office, and are therefore subject to removal at will, subject only to the Court of Appeals’ (in my view) illusory and inadequate promise . . . that they would somehow be protected from retaliatory removal. Military judicial discipline remains a secret.


169 Id. § 26, 10 U.S.C. §826.

170 See Eugene R. Fidell, A World-Wide Perspective on Change in Military Justice, 48 A.F. L. REV. 195, 203 & n.43 (2000) (discussing the significance of the Army’s fixing of military judges’ terms) [hereinafter Fidell, Perspective]. Noting that military judges are appointed pursuant to Congress’ Article I powers rather than pursuant to the judicial power set forth in Article III of the Constitution, the Supreme Court recently held, in a noncapital case, that a defendant’s right to due process was not violated by a trial before a military judge who does not enjoy a fixed term of office. Weiss v. Hernandez, 510 U.S. 163, 177 (1994).

As for the members who sit in judgment at courts-martial, the UCMJ states that whenever possible they shall not be junior in rank or grade to the person on trial. On conclusion of evidence, they are to vote by secret ballot on whether to convict the accused and on what sentence to levy. Most sentences require the affirmative vote of two-thirds of the members, but a vote of three-quarters is required for a sentence of more than ten years in prison, and a sentence of death requires a unanimous vote.

A person convicted by general court-martial may seek further recourse via a multi-tiered system of review. At the first tier are the appellate courts established in each of the service branches, the members of which may include civilians as well as military officers. Like the military judge at the trial level, they are assigned by a Judge Advocate General. At the second tier of review is the Court of Appeals for the Armed Forces. Judges of this court comprise civilians who have not been on active military duty for at least twenty years and who are nominated by the President subject to the advice and consent of the Senate. Their terms are lengthy, in order to promote independence. Since 1983 the decisions of the military courts have been subject to certiorari review by the Supreme Court. Matters that the Supreme Court has considered since then include the admissibility of certain

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175 See Burns v. Wilson, 346 U.S. 137, 141 (1953) ("The revised Articles. . . also establish a hierarchy within the military establishment to review the convictions of courts-martial, to ferret out irregularities in the trial, and to enforce. . .procedural safeguards.")


177 Id.

178 See Robinson O. Everett, The First 50 Years of the Uniform Code of Military Justice: A Personal Perspective, 47 FED. LAWYER 28 (Nov./Dec. 2000) (noting that at times Article III judges have sat on this court); Fidell, Perspective, supra note 170, at 206.


evidence and the availability of the death penalty in courts-martial.\textsuperscript{181}

With regard to "enemy prisoners of war" tried by court-martial, the pertinent military regulation, AR 190-8, expressly guarantees that any sentence resulting from conviction by a court-martial may be appealed and also requires that even if appeal is waived, the sentence must be reviewed.\textsuperscript{182} The regulation effectively tracks the established court-martial process, in keeping with the Third Geneva Convention, which grants detained prisoners of war a "right of appeal or petition from any sentence," to be accorded "in the same manner as the members of the armed forces of the Detaining Power."\textsuperscript{183}

c) Military Commissions

There are differences between the civilian and the military courts. The situation of military judges, in particular, creates a risk of dependence or partiality; however, the involvement of civilian appeals judges and the availability of ultimate review by the highest civilian court are designed to diminish that risk. In the post-September 11 military commissions, by contrast, these risks remain robust.

(1) Pre-Hamdan

To the extent that the President’s military commissions were grounded in a statutory authorization—whether the UCMJ or a joint resolution that Congress passed one week after September 11\textsuperscript{184}—they ought to have respected the principles of impartiality and independence at least as well as the rest of the United States’ military justice system. To the extent that those commissions were the product of the common law of war, they ought to have satisfied international norms. Among such norms is the requirement, set forth in Article 3 common to the 1949 Geneva Conventions, of "a regularly constituted court affording all the judicial guarantees which are recognized

\textsuperscript{181} Loving v. United States, 517 U.S. 748 (1996) (affirming a sentence of death that a general court-martial imposed after convicting an Army private of two murders); United States v. Scheffer, 523 U.S. 303 (1998) (holding that the military’s per se rule against admitting polygraph evidence did not violate the constitutional right of the accused to present a defense).

\textsuperscript{182} AR 190-8, supra note 41, § 3-8(h).

\textsuperscript{183} Third Geneva Convention, supra note 32, at art. 106.

as indispensable by civilized peoples."\textsuperscript{185} Convention protocols—one of which a plurality of the Court in\textit{Hamdan} judged to be enforceable as customary international law—make clear that these guarantees include independence and impartiality.\textsuperscript{186} The Executive’s post-September 11 military commissions fell short of minimum internal and international standards.

Each military commission was composed of three to seven military officers chosen by an Appointing Authority named by the Secretary of Defense, himself an appointee of the President.\textsuperscript{187} This Presiding Officer had the power to dismiss a commissioner for “good cause,” a decision to be made “in accordance with the standards established by the Appointing Authority.”\textsuperscript{188} He was further empowered to choose a Presiding Officer for each commission, as well as the Chief Prosecutor and Chief Defense Counsel; the first of these was to be an officer of the military's judge advocate corps, while the latter two also could be attorneys from the U.S. Department of Justice.\textsuperscript{189}

As is the case in courts-martial, a defendant could have been convicted if two-thirds of the commissioners were convinced beyond reasonable doubt of the defendant’s guilt, while a unanimous vote of at least seven members was required for a death sentence. Life sentences could have been imposed upon a

\textsuperscript{185} Third Geneva Convention,\textit{ supra} note 32, at art. 3.

\textsuperscript{186}\textit{Hamdan}, 126 S. Ct. at 2797-98 (Stevens, J., joined by Souter, Ginsburg, and Breyer, JJ.) (deeming Additional Protocol I, art. 75, as descriptive of customary international norms respecting fair-trial procedures). See Additional Protocol I,\textit{ supra} note 123, at art. 75(4) (stating that “[n]o sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an \textit{impartial} and regularly constituted court respecting the generally recognized principles of regular judicial procedure”) (emphasis added); Additional Protocol II,\textit{ supra} note 72, at art. 6(2) (“No sentence shall be passed and no penalty shall be executed on a person found guilty of an offense except pursuant to a conviction pronounced by a court offering the essential guarantees of \textit{independence and impartiality.}”) (emphasis added); see\textit{ supra} notes 63, 115 (stating that the United States is a signatory but not a state party to these protocols).


vote of two-thirds, a margin that was less than the three-quarters needed in courts-martial for any sentence of more than ten years in prison.\textsuperscript{190}

It was in the review of conviction and sentence that the commissions departed radically from the established system of military justice. In lieu of the multi-layered review system now in place for courts-martial, all review of commission verdicts were to remain within the executive branch.\textsuperscript{191} Defendants were forbidden from seeking recourse in any domestic, foreign, or international forum.\textsuperscript{192} And anyone whom a commission might have acquitted could have remained subject to indefinite internment at Guantánamo.\textsuperscript{193}

The military commissions were proclaimed by the President as he exercised his constitutional duties as Commander in Chief to launch an armed counterassault against terrorists. That struggle continues to this day; indeed, the Executive has taken to calling it “the long war.”\textsuperscript{194} The same President is responsible for the designation of detainees as “enemy combatants.” Executive appointees—commissioners whom the Executive had wide discretion to dismiss—were to act as judge and jury. Other appointees then were to review each case before turning it over to the President, who would have made the final decision without recourse to the Supreme Court or any other civilian judicial forum. The same military from which commission officials were drawn then would have acted as custodian and, potentially, as executioner. Clearly, the absence of structural independence and the presence of a risk that commissioners would favor the government were

\textsuperscript{190} MCO No. 1, supra note 187, § 6(F), (G); Presidential Order, supra note 1, § 4(a), (c)(6)-(7), at 57834-57835.

\textsuperscript{191} See MCO No. 1, supra note 187, § 6(H) (describing stages of review process, beginning with panel of three military officers and ending with President’s final decision); Presidential Order, supra note 1, §§ 4(c)(8), 7(a)(2), at 57835 (describing review and retaining pardon power).

\textsuperscript{192} See Presidential Order, supra note 1, § 7(b)(2), at 57835-36 (declaring that an “individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal”); see also MCO No. 1, supra note 187, § 10 (prohibiting an interpretation that the order’s provisions implicate the Constitution).


\textsuperscript{194} Ted Koppel, These Guns for Hire, N.Y. TIMES, May 22, 2006, at A25 (quoting officials at the Pentagon).
apparent.

What in fact transpired pre-Hamdan, during the preliminary stages of cases against Guantánamo detainees, confirmed these risks. One commissioner was revealed to have "served in intelligence operations in the Middle East, another sent detainees from Afghanistan to Guantánamo Bay, a third commanded a Marine who perished in the World Trade Center attack, and a fourth said he could not with certainty detail the Geneva Conventions." A Presiding Officer declined to step down despite questions about his decades-old friendship with the Appointing Authority. Commissioners tried to press forward with trials even while the challenge in Hamdan was pending before the Supreme Court, and even without a set of detailed procedural and evidentiary rules by which the commissions could operate. They did not block transfers of defendants to solitary confinement. Two prosecutors assigned to appear before the commissions resigned in 2004, alleging that the process of choosing whom to charge and what evidence to provide was aimed at avoiding all danger of acquittal. Defendants were permitted inculpatory outbursts in the courtroom, and some declared that they would boycott proceedings. In short, as decision in Hamdan approached, the military commissions lay in a shambles that undercut claims to independence and impartiality.

(2) Hamdan and Its Aftermath

Though it made no definitive ruling, the Court in Hamdan signaled


196 Id.

197 See Judge Delays Hearing in Terrorism Case, L.A. TIMES, May 13, 2006, at A10 (reporting on intervention of federal civilian judge to stay proceedings in case before military commission until after decision in Hamdan); Golden, Boycott, supra note 100; Carol J. Williams, Judge Allows Detainee's Transfer to Harsher Prison, L.A. TIMES, Apr. 27, 2006, at A14 [hereinafter Williams, Transfer]; Carol J. Williams, Defender Says Detainees Should Be Able to Represent Themselves, L.A. TIMES, Apr. 8, 2006, at A19 [hereinafter Williams, Defender].

198 See Golden, Boycott, supra note 100; Carol J. Williams, A Dilemma for the Defenders, L.A. TIMES, Apr. 30, 2006, at A11 [hereinafter Williams, Dilemma].


200 See Tim Golden, Guantánamo Terror Suspect Is Given His Say, N.Y. TIMES, Apr. 7, 2006, at A16; Golden, Boycott, supra note 100, Williams, Dilemma, supra note 198; Carol J. Williams, Detainee Defiantly Admits Charges, L.A. TIMES, Apr. 28, 2006, at A9; Williams, Transfer, supra note 197; Carol J. Williams, Teen Detainee Boycotts His War Crimes Trial, L.A. TIMES, Apr. 6, 2006, at A5.
discomfort with respect to independence and impartiality of the post-September 11 military commissions. The Court wrote favorably of the enactment of the UCMJ, a statute that an earlier Court explained was designed to “guarantee a trial as free as possible from command influence.”

In *Hamdan* the Court described the means by which commission members were appointed, as well as the procedure for review of commission verdicts. It further emphasized the Common Article 3 requirement of a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples”—guarantees that include independent and impartial decision makers. Kennedy’s opinion on behalf of four Justices expressly included among the “reasons the commission cannot be considered regularly constituted under U.S. law and thus does not satisfy Congress’ requirement that military commissions conform to the law of war” the following: “structural differences between the military commission and courts-martial—the concentration of functions, including legal decision making, in a single executive official; the less rigorous standards for composition of the tribunal; and the creation of special review procedures in place of institutions created and regulated by Congress ....” These differences, Kennedy wrote, “remove safeguards that are important to the fairness of the proceedings and the independence of the court.”

The debate on how to proceed post-*Hamdan* did not pay much attention to this question. Proposals to embrace the UCMJ would have worked to improve the independence and impartiality of military commissions for the reason that the ordinary military justice system, though weakened by the reliance on military judges at early stages, authorizes review by civilian judges and, eventually, by the U.S. Supreme Court. But the Military Commissions Act passed in fall 2006 fell short of the pre-*Hamdan* UCMJ standard. On the one hand, the Act did abandon the President’s plan to have all cases subject to final decision by the President; on the other hand, it shunned the ordinary military review process in favor of a Court of Military Commission Review comprising military personnel and civilians. Decisions of this brand-new court were made reviewable not by the Court of Appeal for the Armed Forces—the court most familiar with matters of military justice—

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201 Burns v. Wilson, 346 U.S. 137, 141 (1953) (plurality opinion).

202 *Hamdan* v. Rumsfeld, 126 S. Ct. 2749, 2760, 2788, 2795-97 (2006); Third Geneva Convention, supra note 32, art. 3.

203 *Hamdan*, 126 S. Ct. at 2807 (Kennedy, J., joined by Souter, Ginsburg, and Breyer, JJ., concurring in part).

204 See supra text notes 159-74 and accompanying text.

but rather by the U.S. Court of Appeals for the District of Columbia Circuit.\textsuperscript{206} The Supreme Court would have discretion to review appeals presented to it in petitions for writs of certiorari.\textsuperscript{207}

Further marking the post-\textit{Hamdan} period was the use of various means to limit the discretion within which courts operate. The Court's judgment drew criticism, some overt, some less so. In the latter category, Attorney General Gonzales, after allowing "that threats to the safety of judges or their families are reprehensible," admonished judges to "understand their role in our system of government," and expressed "concer[n] that some have lost sight of the role of the Judicial Branch as the Framers intended it to be."\textsuperscript{208} That role, Gonzales suggested, was simply to "uphold laws enacted by Congress and actions taken by Executive Branch officials," thus "sending a very clear message to the American people: 'You have chosen this path, and it is presumed to be the right one because you have chosen it' . . . activist judges who take that power into their own hands do not serve the Constitution or the people well."\textsuperscript{209}

Congress, meanwhile, outlawed invocation of the Geneva Conventions "as a source of rights" and, indeed, reliance on any "foreign or international source of law" as "a basis for a rule of decision."\textsuperscript{210} In a rebuff of the Justices' conclusion that they had the power to review the petition in \textit{Hamdan}, the Military Commissions Act further declared:

No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has

\textsuperscript{206} 10 U.S.C. §§ 950g(a)-(c).

\textsuperscript{207} 10 U.S.C. §§ 950g(d).


\textsuperscript{209} Id.

\textsuperscript{210} 10 U.S.C. § 948b(g) ("No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights."); \textit{id.} § 5(a) ("No person may invoke the Geneva Conventions or any protocols thereto in any habeas corpus or other civil action or proceeding to which the United States, or a current or former officer, employee, member of the Armed Forces, or other agent of the United States is a party as a source of rights in any court of the United States or territories."); \textit{id.} 10 U.S.C. § 948b(f) (2006) ("no foreign or international source of law shall supply a basis for a rule of decision in the courts of the United States in interpreting the prohibitions enumerated" the amendments to the War Crimes Act, discussed \textit{supra} text accompanying notes 117-23). The provisions were in keeping with other, recent congressional efforts to thwart judges' consultation of external law as an aid to interpreting domestic law. \textit{See generally} Diane Marie Amann, \textit{International Law and Rehnquist-Era Reversals}, 94 GEO. L.J. 1319 (2006).
been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.\footnote{18 U.S.C. § 2241(e)(1); see also id. § 2241(e)(2). On jurisdiction-stripping as an impediment to independence and impartiality, see supra text accompanying note 141.}

Stripping of jurisdiction expressly was applied to thwart legal challenges to the remade military commissions, a fact that led the trial judge who once had issued a writ in Hamdan's favor now to rule that he had no authority to hear Hamdan's petition.\footnote{Cf. Hamdan v. Rumsfeld, 464 F. Supp. 2d 9 (D.D.C. 2006) \textit{with} Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.D.C. 2004). See 10 U.S.C. § 950j:}

\begin{quote}
Except as otherwise provided in this chapter and notwithstanding any other provision of law (including section 2241 of title 28 or any other habeas corpus provision), no court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter.
\end{quote}

\textit{Id.}

2. Rights of the Accused

Even assuming that the Military Commissions Act lawfully deprived detainees of redress in ordinary federal courts, it remains worthwhile to examine the plan post-\textit{Hamdan}. First, detainees will have some opportunity to mount challenges in the course of their trials; second, there are indications that the newly elected Congress may act to alleviate the harshest aspects of the plan.\footnote{Boumediene v. Bush, 476 F.3d 981 (D.C. Cir.), \textit{cert. denied}, 127 S. Ct. 1478 (2007). Justices Breyer, Ginsburg, and Souter would have granted a petition for review of the appellate decision. 127 S. Ct. at 1479 (Breyer, J., dissenting from denial of cert.). Justices Stevens and Kennedy voted to delay habeas review until after petitioner had exhausted other available remedies; nonetheless, they indicated that they would reconsider if it should turn out that “the Government has unreasonably delayed proceedings” pursuant to the process described supra text accompanying notes 205-06, or on proof of “some other and ongoing injury.” \textit{Id.} at 1478 (Statement of Justice Stevens and Justice Kennedy respecting the denial of certiorari).}

Evaluation thus now shifts to the rights of the accused, proceeding once again in inverted-pyramid fashion. It begins, at the top, with
civilian courts, drops a level to courts-martial, and ends with a two-part
discussion of post-September 11 military commissions.

a) Civilian Courts

In countries with civil law systems, and even in common law countries
like Britain, procedures that officials must follow in the course of criminal
investigation, prosecution, adjudication, and punishment may be found in
legislatively enacted codes. This is not the case in the United States. The
statutes on criminal procedure set forth in the U.S. Code lack the detail of
their counterparts abroad; for example, they do not regulate the conduct of
interrogations. Conversely, however, this code contains a set of rules
intended to encourage a verdict grounded not in bias or emotion, but rather
in the rational consideration of the evidence presented. A single Federal
Rule of Evidence captures the principle animating the entire set of rules:

Although relevant, evidence may be excluded if its probative
value is substantially outweighed by the danger of unfair
prejudice, confusion of the issues, or misleading the jury, or
by considerations of undue delay, waste of time, or needless
presentation of the evidence.

In short, even evidence that bears some relation to matters in the case
must be excluded if it is unduly prejudicial or if admitting it would run
counter to social policy.

Many significant fair trial guarantees have their source in the
Constitution. A few may be found in the text of that 1789 charter: not only
the right to seek a writ of habeas corpus, but also the guarantee of trial by
jury, the guarantee against prosecution under a law enacted after the

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Procedure (codified at the end of 18 U.S.C.). For criticism of this aspect of the U.S. Code, see, for

216 See FED. R. EVID. (codified at the end of 28 U.S.C).

217 FED. R. EVID. 403.

218 See Edward J. Imwinkelried, A New Antidote for an Opponent’s Pretrial Discovery Misconduct:
Treating the Misconduct at Trial as an Admission by Conduct of the Weakness of the Opponent’s
concerns at base of federal evidence rules).


220 Id. at art. III, § 3.
conduct occurred, and the guarantee against conviction for treason absent either “the Testimony of two Witnesses to the same overt Act” or the defendant’s “Confession in open Court.” Many other rights are the product of the Supreme Court’s substantive due process jurisprudence. This doctrine construes the Constitution—the Due Process Clauses, in relationship to the Bill of Rights of 1791—to include a guarantee of fundamentally fair procedures. As a result of this methodology, defendants are guaranteed, inter alia, freedom from compelled self-incrimination, and freedom from conviction on account of evidence obtained either by coercion or by unreasonable search or seizure. Defendants must be afforded the assistance of counsel, as well as the rights to be present and confront adverse witnesses and secure favorable witnesses at proceedings that occur speedily and in public.

A linchpin of the fair trial is the defense attorney. Defense counsel is expected to contest the government from the moment their clients are

221 Id. at art. I, § 9.

222 Id. at art. III, § 3.

223 See Diane Marie Amann, Harmonic Convergence? Constitutional Criminal Procedure in an International Context, 75 IND. L.J. 809, 811-15 (2000) [hereinafter Amann, Convergence]. This jurisprudence is the offspring of the Court’s utilization of the Due Process Clause of the Fourteenth Amendment, which refers only to the constituent states, as a vehicle for requiring those states to obey the Bill of Rights, which by its terms constrains only the federal government. The process of “constitutionalizing” criminal procedure has engendered rich, jurisprudential articulations respecting these rights, and that fuller understanding applies with equal force to agents of the United States. See id. at 814 n.29.


228 Crawford v. Washington, 541 U.S. 36, 68-69 (2004); Illinois v. Allen, 397 U.S. 337, 338 (1970) (characterizing “the accused’s right to be present in the courtroom at every stage of his trial” as “[o]ne of the most of the basic rights guaranteed by” the right to confront adverse witnesses enumerated in the Sixth Amendment to the Constitution, yet holding that right was forfeited by defendant, whose “noisy, disorderly, and disruptive” behavior made it “exceedingly difficult or wholly impossible to carry on the trial”).


231 In re Oliver, 333 U.S. 257, 269-73 (1948).
brought into the criminal justice system until the conclusion of the case. Obliged to advocate zealously for their clients, defense counsel must remain free of any interest that could conflict with that obligation.\textsuperscript{232} Proof that counsel failed to afford a client adequate representation justifies the setting aside of a conviction or sentence.\textsuperscript{233} The right to counsel applies equally to defendants who can afford to retain an attorney and those who cannot.\textsuperscript{234} In the federal system, indigent defendants are represented either by full-time public defenders or by qualified private attorneys. All such counsel are appointed and paid by an office within the judicial branch of the government, and so stand apart from the executive branch that is home to federal prosecutors.\textsuperscript{235}

This panoply of rights applies as a matter of course to ordinary domestic crimes. But it is not limited to that context. Rather, the rights apply even if the alleged conduct occurred outside U.S. territory. They apply as well if the offense charged threatens security or otherwise has an international character, such as hijacking, which is proscribed in antiterrorism treaties, for instance. Until September 11, such cases ordinarily were adjudicated in the civilian courts, and U.S. judges endeavored to balance the rights of the accused, the sensitivity of classified information, and the safety of witnesses, jurors, and court officers. Thus in \textit{Bin Laden}, a 2001 decision arising out of the 1998 bombings of U.S. embassies in Africa, the court adjusted the defendants’ right of silence in light of the difficulty of securing the presence of defense counsel at overseas interrogations.\textsuperscript{236} The \textit{Moussaoui} case required the judiciary to fashion a means to balance the defendant’s right to adduce from other detainees statements that might tend to exculpate him against the government’s claim that to elicit live testimony from those detainees would present an undue security risk.\textsuperscript{237} A federal court resolved questions relating to the admissibility at trial of classified information in a post-

\textsuperscript{232} The Supreme Court recognized a constitutional dimension in these duties of defense counsel in its seminal judgment in \textit{Powell v. Alabama}, 287 U.S. 45 (1932).


\textsuperscript{234} Gideon v. Wainwright, 372 U.S. 335, 342-45 (1963) (holding that the right to counsel enumerated in the Sixth Amendment to the Constitution is a component of fundamental fairness and thus requires the state to provide poor defendants with attorneys).


\textsuperscript{237} United States v. Moussaoui, 382 F.3d 453, 453 (4th Cir. 2004) (reversing district court order to produce detainee witnesses for live video depositions, and ordering instead that the government provide written summaries of statements witnesses made during interrogations), \textit{cert. denied}, 544 U.S. 931 (2005).
September 11 case against a CIA contractor accused of abuse during interrogation.\textsuperscript{238} One can, of course, criticize the particular balances that have been struck.\textsuperscript{239} It is nonetheless notable that these civilian courts did manage to strike balances and managed to do so via processes that were in large part open and transparent.

\textit{b) Courts-Martial}

The transformation of American military justice in the last half-century has been called a process of "civilianization."\textsuperscript{240} This term is particularly apt with regard to procedural guarantees and the rights of the accused at courts-martial.

The same substantive due process doctrine that pertains to civilian courts has been applied to persons court-martialed under the UCMJ.\textsuperscript{241} To cite two examples, military appeals courts have held that servicemembers are entitled to the Constitution's privilege against self-incrimination\textsuperscript{242} and that they enjoy the constitutional right to cross-examine adverse witnesses.\textsuperscript{243}

The UCMJ grants both these rights and a host of others. It mandates that all court-martial proceedings, except for deliberations and the vote on the verdict, must take place in the presence of the accused.\textsuperscript{244} It makes explicit that persons subject to court-martial also are entitled, for instance, to


\textsuperscript{239} For a cogent critique of the compromises made in \textit{Moussaoui} and in German and British cases raising similar issues, see Kim Lane Schepple, \textit{The Metastasis of Torture} (unpublished manuscript), \textit{available at} http://www.law.columbia.edu/jurisprudence (last visited Feb. 1, 2007); Kim Lane Schepple, \textit{Evidence from Torture: Dilemmas for International and Domestic Law}, 99 AM. SOCY INT'L L. PROC. 271 (2005).

\textsuperscript{240} Eugene R. Fidell, \textit{The Culture of Change in Military Law}, 126 MIL. L. REV. 125, 125 (1989) (noting, however, that the term "still makes the occasional senior military lawyer see red").


\textsuperscript{242} United States v. Kemp, 32 C.M.R. 89, 97 (C.M.A. 1962); \textit{see} U.S. CONST. amend. V.

\textsuperscript{243} United States v. Sojfer, 47 M.J. 425, 428 (C.A.A.F. 1998); \textit{see} U.S. CONST. amend. VI.

\textsuperscript{244} Uniform Code of Military Justice § 39(a),(b), 10 U.S.C. § 39 (a), (b) (2007).
present a defense and to be free from double jeopardy.245 Supplementing these statutory rights are detailed articulations of procedure found in the Manual for Courts-Martial. Also there are rules of evidence that parallel those applied in federal civilian courts. This is in keeping with the UCMJ requirement that the Manual, as well as other rules promulgated by the President, are to apply, as much as “practicable,” “the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts. . . .”246 In some cases, the Manual sets forth protections with greater specificity than exists in the civilian system.247 Courts-martial are subject to the very same prohibition on unduly prejudicial or unreliable evidence.248

As for persons designated “enemy prisoners of war” and so entitled to trial by court-martial, proceedings likewise must conform to the UCMJ and the Manual for Courts-Martial.249 The military regulation, AR 190-8, further guarantees certain rights explicitly: inter alia, the United States may neither exert “moral or physical coercion . . . to induce” an enemy prisoner of war “to admit guilt for any act,” nor prosecute an enemy prisoner of war “for an act that was not forbidden by U.S. law or by international law in force at the time the act was committed.”

Persons who face trial by court-martial, like their counterparts in the civilian courts, also enjoy a right to the assistance of counsel. The UCMJ provides for the assignment of a “judge advocate,” a defense attorney who has been qualified as competent for the task.251 It affords the accused the further right to retain a civilian attorney, who may proceed alone or in conjunction

245 Id. §§ 832, 844 (defense and double jeopardy); see id. §§ 832, 844 (self-incrimination and cross-examination).

246 Id. § 836(a); see id. § 836(b) (further stating that “[a]ll rules and regulations made under this article shall be uniform insofar as practicable”).

247 For instance, Rule 304 of the Military Rules of Evidence that comprise Part III of the courts-martial. Manual, supra note 34, at pt. III. The Manual forbids the use of confessions obtained by means of “coercion, unlawful influence, or unlawful inducement.” Id. In contrast, the Federal Rules of Evidence include no such explicit ban. See Everett, supra note 178 (citing instances in which the military system offers greater protections for the accused than the civilian system).

248 See Mil. R. Evid. 403, which is virtually identical to Fed. R. Evid. 403.

249 See supra text accompanying note 46.

250 AR 190-8, supra note 41, §§ 3-8(a)-(b).

with the judge advocate.\textsuperscript{252} American courts-martial thus provide, even to “enemy prisoners of war,” the essential guarantees of fair procedure recognized in the civilian courts of the United States and, for that matter, internationally.\textsuperscript{253}

c) Military Commissions

On questions of fair procedure no less than that of independence and impartiality, the military commissions, both as initially proposed by the President and as enacted by Congress post-\textit{Hamdan}, trailed behind the civilian and courts-martial systems.

(1) Pre-\textit{Hamdan}

Persons whom the United States detained in the wake of the terrorist attacks of September 11, 2001 have been denied the rights set forth above. Before the Supreme Court issued its decision in \textit{Hamdan} in June 2006, the only forum in which the hundreds held at Guantánamo could hope to acquit themselves of claims that they engaged in unlawful combat was the military commission established by President Bush.\textsuperscript{254} His November 13, 2001, order called for “fair and equitable” trials, and yet made a categorical determination that it was “not practicable” for military commissions to proceed according to the procedural and evidentiary rules of the civilian courts of the United States.\textsuperscript{255} Those civilian protections also apply in large part at regular courts-martial. But the military commission regulations issued subsequent to the President’s order omitted protections, and those omissions posed grave obstacles to the right of the accused to a fair trial.

First, there was a lack of procedures. Even as the decision in \textit{Hamdan} was about to be handed down, the military had failed to publish a procedures guidebook along the lines either of the \textit{Manual for Courts-Martial} or federal rules relating to evidence and criminal procedure.\textsuperscript{256} During pretrial

\textsuperscript{252} 10 U.S.C. § 838.

\textsuperscript{253} See generally Amann, \textit{Convergence, supra} note 223; Maggs, \textit{supra} note 241. Courts-martial lag behind civilian courts on matters of independence and impartiality, as explained \textit{supra} text accompanying notes 159-74.

\textsuperscript{254} See \textit{supra} note 85 and accompanying text (noting \textit{inter alia} that as of this writing, fewer than a dozen of the many hundreds in custody at Guantánamo have been charged with any crime within the jurisdiction of these military commissions).

\textsuperscript{255} Presidential Order, \textit{supra} note 1, § 1(f), at 57833.

\textsuperscript{256} See, \textit{e.g.}, Williams, \textit{Dilemma, supra} note 198, at Part A, para. 11 (reporting a comment by the head of the Guantánamo defense team that representation is “extraordinarily difficult’ because
proceedings at Guantánamo in April 2006, there had been evident “confusion over which body of law—military, civilian or international—applies,” so that a Marine lieutenant colonel assigned to defend one detainee told the commissioners, “[W]hat I desperately want to know here is: What are the rules?”

Second, the procedures that were announced lacked essential protections. Other systems under review guarantee that a defendant will not be charged with a crime defined *ex post facto*, yet the defendant in *Hamdan* and other pending commission cases stood charged with conspiracy, a crime unknown to the international law of war. As for the guarantee of public proceedings, commission regulations did state a preference for openness. Nonetheless, the regulations gave a commission’s Presiding Officer wide discretion to close hearings, not only to the public, but also to the defendant and to any defense attorney except the one appointed by the Department of Defense. The Presiding Officer was also authorized to keep secret the identities of judges, witnesses, and other participants. In stark contrast with the lengthy rules of evidence governing federal criminal courts and courts-martial, the military commission regulations stated only: “Evidence shall be admitted if . . . the evidence will have probative value to a reasonable person.” This lone rule turned on its head the traditional ban on overly prejudicial or unreliable evidence, and so created an undue danger of conviction based on unreliable and unjust evidence. That such evidence exists is not hypothetical given that many detainees have undergone harsh interrogations. The regulation could be read to invite evidence extracted in those sessions. The regulation stated the legal guidance for the commission was ‘so vague, so ambiguous and constantly changing’

\[257\] Williams, *Defender*, supra note 197. For commentary both on what was and was not spelled out in the regulations, see generally 1 NATIONAL INSTITUTE OF MILITARY JUSTICE, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK (2003); JENNIFER ELSEA, REPORT FOR CONGRESS: THE DEPARTMENT OF DEFENSE RULES FOR MILITARY COMMISSIONS: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PROPOSED LEGISLATION AND THE UNIFORM CODE OF MILITARY JUSTICE (Jan. 18, 2005), available at http://www.fas.org/irp/crs/RL31600.pdf.

\[258\] See *supra* text accompanying note 207 (citing *ex post facto* provision); *supra* text accompanying notes 88, 111-13 (discussing conspiracy).

\[259\] See *supra* text accompanying note 207 (citing *ex post facto* provision); *supra* text accompanying notes 88, 111-13 (discussing conspiracy).

\[260\] MCO No. 1, *supra* note 187, §§ 6(B)(3), 6(D)(2)(d). See also id. §§ 4(C)(3)(b), 6(D)(5) (making clear that Presiding Officer could exclude civilian defense attorney from certain hearings notwithstanding security clearance, and further specifying the conditions under which document containing “Protected Information” could be edited or submitted by substituting another document).

\[261\] *Id.*, §§ 6(B)(3), 6(D)(2)(d).

\[262\] *Id.*, § 6(D)(1); see Presidential Order, *supra* note 1, § 4(c)(3), at 57835.
that "the Accused shall not be required to testify during trial"; however, it granted no right to remain silent outside of court, and it made clear that the bar on trial testimony "shall not preclude admission of evidence of prior statements or conduct of the Accused." The regulation also entertained the admissibility of others' "unsworn written statements," and it did not prohibit the admission of out-of-court statements obtained by coercive means.

The regulations outlined the defense team permitted to the accused; that is, either a member of the judge advocate corps chosen by the defendant or a Detailed Defense Counsel assigned by the Chief Defense Counsel. The accused could retain a civilian defense lawyer to assist Detailed Defense Counsel, but only if that lawyer was a U.S. citizen, held a security clearance of "SECRET or higher," and signed an agreement to comply with all tribunal rules and to permit government monitoring of client-counsel communications—"for security and intelligence" but not evidentiary, purposes. The regulation stirred debate within the civilian bar on whether a lawyer could give a client ethical representation under these conditions. At least one civilian attorney, moreover, was denied the requisite security clearance.

(2) *Hamdan* and Its Aftermath

Since opening the camp at Guantánamo in January 2002, the Executive

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263 See MCO No. 1, supra note 187, § 5(F).

264 *Id.*, § 6(D)(3) (stating only that admissibility is subject to the "probative value to a reasonable person" standard in *id.*, § 6(D)(1)). Days before oral argument in *Hamdan*, the Executive issued a regulation forbidding the military commission from admitting evidence obtained by means of torture against an accused. Department of Defense Military Commission Instruction No. 10, Certain Evidentiary Determinations, Mar. 24, 2006, available at http://defenselink.mil/news/ Mar2006/d20060327MCI10.pdf. By its terms, the regulation did not apply to evidence gained through techniques that constitute cruel, inhuman, and degrading treatment but not quite torture.


268 Williams, *Dilemma*, *supra* note 198.
claimed vast discretion to dispose of cases involving persons the President designated "enemy combatants." Administration officials contended that a joint resolution passed by Congress a week after September 11 gives the President almost total control; indeed, at times they asserted that the President has been acting in a wartime context that gives him plenary power, not subject to the check-and-balance process incorporated into the structure of the Constitution.  

The Supreme Court twice rejected such arguments. In its 2004 judgment in Rasul, the Court authorized Guantánamo detainees to pursue habeas corpus and other legal actions against the government. But that case turned solely on the question of the jurisdiction of the federal courts, and so the judgment did not rule on what rights detainees may pursue in those courts. It is true that on the same day the Court held in Hamdi that due process availed an "enemy combatant" at least of a meaningful hearing before a neutral decision-maker on the question of detainee status. Yet the majority made no mention of standards to be applied at a criminal trial. Given that Yaser Esam Hamdi was an American citizen detained in the United States, moreover, the extent to which the substantive rulings in Hamdi applied to non-citizens detained offshore remained uncertain. As for Rasul itself, there was little indication of how the six-member majority would have ruled on the merits.

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269 See U.S. Hamdan Brief, supra note 184, at 15-23 (asserting both statutory and constitutional authorization to establish commissions); see also supra text accompanying notes 6-11 (setting forth the Constitution's division of powers among Congress, the President, and the judiciary); see supra note 83 (quoting congressional resolution).


272 Two dissenters did address this question, for they maintained that the Constitution required the Executive either to release the petitioner—an American citizen being held without charge—or place him in the custody of the civilian justice system and proceed to trial in the ordinary criminal courts of the United States. Hamdi, 542 U.S. at 554-79 (Scalia, J., joined by Stevens, J., dissenting).

273 The only hint occurred in a footnote:

Petitioners' allegations—that, although they have engaged neither in combat nor in acts of terrorism against the United States, they have been held in executive detention for more than two years in territory subject to the long-term, exclusive jurisdiction and control of the United States, without access to counsel and without being charged with any wrongdoing—unquestionably describe "custody in violation of the Constitution or laws or treaties of the..."
Two years later, in its decision in *Hamdan*, the Court stressed that the President, no less than Congress or the courts, was constrained by law even in a time of war. In holding that the American “Constitution and laws,’ including the law of war” required that detainees like Hamdan receive fair trials, the Court determined that a number of the procedures authorized for the President’s military commissions were fundamentally unfair. A plurality rejected the charge of conspiracy on the ground that the crime, though common in ordinary U.S. criminal courts, is not part of the law of war. The five-member majority further held it illegal to conduct trial proceedings in the absence of the accused.

The post-*Hamdan* period saw but few alterations of the plan as originally proposed by the President. The Military Commissions Act retained conspiracy as an offense punishable by military commission, for example. The Act did place limits on the reasons that a military judge might permissibly exclude the accused from his own trial; however, discretion remained to close proceedings to the public. As for evidence, the Act required the exclusion of statements obtained by torture, yet permitted admission of statements obtained by other cruel, inhumane or degrading

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Id. at 2775 (quoting Detainee Treatment Act of 2005, 42 U.S.C. § 2000dd-1(2005)). The Court reserved judgment on whether the detainee at bar was an enemy prisoner of war subject to trial only by court-martial. Rather, it held that at the least he merited the protections of Article 3 common to the Geneva Conventions—and that the President’s plan did not meet even these minimum requirements. *Id.*

*Hamdan*, 126 S. Ct. at 2775-86 (Stevens. J., joined by Kennedy, Souter, Ginsburg, and Breyer, JJ.).

Id. at 2786-93.

Military Commission Act of 2006 § 3(a)(1), 10 U.S.C. § 950v(b)(25)-(28) (2006). Other offenses not common to the law of war, such as terrorism and giving of material support to terrorists, also remained. See generally id. § 950v.

Id. § 949d(d)-(e) (stating that an accused might be removed “after being warned,” “to ensure the physical safety of individuals” or “to prevent disruption of the proceedings,” and allowing closure to the public for reasons of safety or “to protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities”).
treatment, if such maltreatment occurred before December 30, 2005.280 Sure to be a source of confusion to litigants and judges alike, the Act included not only the brief and permissive rule of evidence found in the President’s plan, but also a provision that tracks the careful and comprehensive evidentiary regulations governing the ordinary military and civilian justice system.281

Congress declared that it had solved the problem posed in Hamdan: “A military commission established under this chapter is a regularly constituted court, affording all the necessary ‘judicial guarantees which are recognized as indispensable by civilized peoples’ for purposes of common Article 3 of the Geneva Conventions.”282 In truth, however, the Act did little to assuage Justices’ concerns respecting commission procedures.

II. REINFORCEMENT OF ESTABLISHED PRACTICE

The painstaking exposition of the American way of punishment is offered here as an essential counterweight to the willy-nilly manner in which policies were made, and practices changed, since September 11. By long tradition ordinary judicial mechanisms—civilian courts and courts-martial—were used to incapacitate persons who posed a threat to the United States. In these courts were secured the convictions of the de facto ruler of another nation-state, of war criminals, and of sundry bombers, hijackers, and other terrorists.283 Developments in the substantive and procedural laws of these two systems enabled judges to accommodate competing interests; that is, to advance the collective interest of the country while respecting the individual rights of the accused.284 Measured by criteria of fairness and efficacy, mechanisms constituting the first prong of established punish-or-surveil policy had proved their worth.

One would expect a society that embraces the rule of law as vocally as does the United States to resort without question to such established policy. Justice Kennedy said as much in his opinion in Hamdan: “The Constitution

280 Id. § 948r(b)-(d) (adding that all such statements must appear reliable and probative, and that admission must serve the interests of justice).

281 Compare id. § 3(a)(1), 10 U.S.C. § 949a(b)(2)(A) (stating, as did MCO No. 1, supra note 187, § 6(D)(1), that “[e]vidence shall be admissible if the military judge determines that the evidence would have probative value to a reasonable person”) with Military Commissions Act of 2006, § 3(a)(1), 10 U.S.C. § 949a(b)(2)(A) (requiring the military judge to exclude probative evidence if it fails the same balancing test in Fed. R. Evid. 403, quoted supra text accompanying note 192, and MIL. R. EVID. 403, discussed supra note 236).


283 See supra text accompanying notes 50-52.

284 See supra text accompanying notes 213-24.
is best preserved by reliance on standards tested over time and insulated from the pressures of the moment.\textsuperscript{285} And yet, that is not what happened after September 11. Operating on the apparent premise that the attacks demonstrated the inadequacy of existing mechanisms—a premise that does not withstand careful consideration of the quality of those mechanisms—the Executive embarked on a campaign to upend American legal tradition. In place of prosecution and punishment was put a system of detention, both before charges and, perhaps, after acquittal.\textsuperscript{286}

Under past practice detention had been considered proper to secure an accused's presence at a criminal trial, or, in the case of armed conflict, a captive's absence from combat until war's end.\textsuperscript{287} Instances of detention that deviated from that model, such as the U.S. internment of persons of Japanese heritage during World War II, widely were seen as unwarranted abuses.\textsuperscript{288} Notwithstanding, soon after September 11, the President authorized indefinite detention for interrogation of persons captured during what was labeled the "global war on terror."\textsuperscript{289} Eventually some 700 persons passed through the camp at Guantánamo, tens of thousands more were detained elsewhere, and a few were held at so-called "black sites"; accounts of inmate abuse surfaced at many of these centers.\textsuperscript{290} Arrival at the sites sometimes


\textsuperscript{286} On Administration statements respecting the fate of detainees who might be acquitted, see supra note 184 and accompanying text.

\textsuperscript{287} See Diane Marie Amann, Interrogation Paradigm, or A Prince Unclothed (unpublished manuscript), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955430 (last visited Feb. 1, 2007) (setting forth these standard justifications for detention and demonstrating degree to which post-September 11 practices depart from them).

\textsuperscript{288} \textit{E.g.}, \textsc{William H. Rehnquist, The Supreme Court} 145 (2001) ("[P]ostwar public opinion reached the conclusion that the forced relocation and detention of the entire population of ethnic Japanese on the West Coast was a grave injustice."); see \textit{generally Peter Irons, Justice at War: The Story of the Japanese-American Internment Cases} (1993); \textsc{Geoffrey R. Stone, Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism} (2004).


\textsuperscript{290} Dana Priest, \textit{CIA Holds Terror Suspects in Secret Prisons}, \textsc{Wash. Post}, Nov. 2, 2005, at A1 (reporting that officials themselves referred to CIA-led secret prisons as "black sites"); \textit{see generally} Amann, \textit{Abu Ghraib, supra} note 83. President Bush effectively acknowledged
was preceded by "extraordinary renditions," transfers conducted in circumvention of established legal frameworks such as extradition. In the pressures of the post-September 11 moment, Congress, for the most part, went along with these innovations.

The President's detention order did contemplate that at least some detainees would one day face trial. Again, however, the President preferred novelty to tradition. Trial was to take place in a new forum, eventually called a "military commission," with more than passing similarity to the nonjury Diplock courts that Britain instituted during the heyday of political violence in Northern Ireland. The making of a wholly new body of law for a wholly new institution occurred in fits and starts; the result fell far short of improving on established policy. Thus it was that in invalidating the commissions as contrary to the Uniform Military Code of Justice, a statute Congress had enacted in 1950, members of the Supreme Court took issue with rules of procedure and evidence, with provisions for independence and impartiality, and with even the offense charged, conspiracy. It is unfortunate that the Military Commissions Act that became law in October


\[\text{\textsuperscript{294}}\] See supra notes 98-113, 179-81 and accompanying text.
2006 did little to address these failings—and shameful that in it Congress stripped detainees of further judicial review.\textsuperscript{295} It must be noted, moreover, that the shortchanging of legal tradition did not achieve its asserted goal of swift and sure proceedings. As late as the fifth anniversary of the opening of the camp at Guantánamo, only a handful of detainees had been charged and none had stood trial; in contrast, the few persons the government brought to justice in ordinary criminal courts after September 11 already were serving long sentences in maximum security prisons.\textsuperscript{296} Both before and after the watershed decision in \textit{Hamdan}, therefore, military commissions failed to satisfy criteria of fairness and also, stunningly, the criterion of efficacy on which the plan was founded.

To this list of failures must be added America’s loss of standing. Each revelation of detainee abuse, each reaffirmation of detention for interrogation, each reinforcement of the plan for extraordinary military trials, further eroded the international goodwill that the United States had earned in World War II and had worked to promote in most of the decades that followed. Not only U.N. Secretary-General Kofi Annan, but also his more cautious successor, Ban Ki-Moon, called for closure of Guantánamo.\textsuperscript{297} Outcry was heard not only in parts of the globe long hostile to the United States, but also in conference rooms and legislative chambers of the United States’ staunchest allies.\textsuperscript{298} Increasingly many Americans joined their voices in protest; however, the official response of the United States remained dismissive. Examples occurred in summer 2006, when the Committee against Torture and the Human Rights Committee, which monitor compliance with treaties to which the United States belongs, called on the United States to refrain from transferring captives to states where they risked suffering torture and further to end abuses at Guantánamo.\textsuperscript{299} In each case the United

\textsuperscript{295} See supra notes 116-23, 182-89, 247-51 and accompanying text.

\textsuperscript{296} See supra notes 65 and 100 and accompanying text.

\textsuperscript{297} See Warren Hoge, \textit{Revisiting Issue, U.N. Chief Clarifies Death-Penalty Stance}, N.Y. TIMES, Jan. 12, 2007, at A6 (reporting on Ban’s agreement with Annan on Guantánamo, as well as his more measured position on international law and capital punishment).

\textsuperscript{298} See Amann, \textit{Abu Ghraib}, supra note 83, at 2089-90; Amann, \textit{Guantánamo}, supra note 83, at 270-76.

States refused, asserting that the recommendations evinced a loss of "perspective and credibility" and were "skewed and reache[d] well beyond the scope and mandate of the committee."\(^{300}\) Such sniping undercut U.S. claims to global leadership—all for the dubious purpose of defending a policy that, it is here argued, advances neither American legal tradition nor American national security.

Detractors no doubt would point to a case that seems at first glance to expose the weakness of the instant argument favoring a system of punishment that accords with accepted fairness standards. That is the case of thirty-six-year-old, Brooklyn-born José Padilla, who had belonged to a gang while a teenager in Chicago, then later converted to Islam.\(^{301}\) On May 8, 2002, federal agents arrested him at O’Hare Airport following a trip to Pakistan. At first held as a material witness, Padilla soon was designated an “enemy combatant” and transferred to a brig in South Carolina. Attorney General John Ashcroft told reporters that while abroad Padilla had plotted with al Qaeda members to detonate radioactive explosives inside the United States. Known thereafter as “the dirty-bomber,” Padilla spent more than three-and-a-half years in solitary confinement broken only by repeated interrogation sessions and, as depicted in later-disclosed photographs, at least one manacled visit to the dentist. He saw no attorney until shortly before the Supreme Court’s 2004 ruling in *Hamdi* that even an “enemy combatant” could not be denied access to counsel.\(^{302}\) His indefinite detention did not end until the Court in 2006 authorized a governmental request to transfer Padilla to the federal criminal courts and declined to review his habeas petition for the reason that his executive detention had ended.\(^{303}\)

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\(^{302}\) Stevenson Swanson, *Padilla Gets to Talk with His Lawyers; 2-year Detainee's 1st Meeting in Brig Monitored*, CHI. TRIB., Mar. 4, 2004, at 1; see *Hamdi*, 542 U.S. at 538.

The criminal case has not seemed a slam-dunk for the Executive. The federal public defenders assigned to represent Padilla moved to dismiss the case on grounds of outrageous government misconduct, charging that throughout executive detention Padilla had been "tortured" in "myriad forms, each designed to cause pain, anguish, depression and, ultimately, the loss of will to live." On account of this mistreatment, Padilla's attorneys contended that he is incompetent to assist in his defense. But the trial court ruled Padilla competent and it rejected the government misconduct claim in mid-April, days before trial was set to begin. The prosecution's case itself posed difficulties. Notably absent from the indictment returned against Padilla was any mention of the so-called dirty bomb; in its place were rather vague allegations of nefarious plotting. The federal trial court judge complained that even these allegations were "very light on facts," and eventually she dismissed one count against Padilla as duplicitous. "[F]rom Day One, we've never had sufficient admissible evidence to fully prosecute Jose Padilla," one expert told a reporter. "That's the real problem they have, and it's been a problem from the beginning.

These apparent obstacles do not reveal weakness in the federal criminal justice system, however. The trial judge's dismissal of one count already has been reversed on appeal; even if the dismissal of one count had been sustained, a jury well might be persuaded that, as alleged in the other count, Padilla unlawfully conspired to give material support to terrorists. Conspiracy is no less the prosecutor's darling today than it was in the time of Judge Learned Hand. The material support statute is a new arrival in the

petition had been improperly filed).

Eggen, Questions, supra note 301 (quoting Padilla's defense team); see also Songtag, Videotape, supra note 286.


Eggen, Questions, supra note 301 (quoting Professor Robert M. Chesney); see also Deborah Sontag, In Padilla Wiretaps, Murky View of 'Jihad' Case, N.Y. TIMES, Jan. 4, 2007, at A1.


See Harrison v. United States, 7 F.2d 259, 263 (2d Cir. 1925) (L. Hand, J.) (referring to
prosecutor's nursery, and in any event, terrorism charges are not easily shaken. Even an acquittal would not, by that fact alone, mean failure. Built into the American system of criminal justice is a tolerance for acquittal. A "fundamental value determination of our society," to repeat Justice John M. Harlan's oft-repeated maxim, is "that it is far worse to convict an innocent man than to let a guilty man go free." This is scarcely less the case when acquittal results because governmental misconduct has placed certain evidence outside the bounds of a properly constituted court. Judicial exclusion of such evidence—indeed, a prosecutorial decision not even to adduce such evidence—serves the liberty interests both of the defendant on trial and of the society at large.

That conclusion likely will not satisfy those who have pushed these last years, with considerable success, for a third option, a "new legal regime." Time and again they have argued that state security requires sacrificing the human security that lies at the heart of fair-trial guarantees. The argument presupposes that if a person cannot be convicted fairly, the only thing for government to do is to convict him unfairly. The assumption ignores certain curiosities of the post-September 11 campaign. The government has succeeded in detaining many thousands of persons for as long as it wishes; it has indicated that it contemplates charges and trials for no more than a few score of them; and it has reserved the option of continued, post-trial detention of any captive whom a military commission might acquit. This last option in particular begs the question of why the government has pushed for conspiracy as the "darling of the modern prosecutor's nursery"); see also Krulewitch v. United States, 336 U.S. 440, 452 (1949) (Jackson, J., concurring) (arguing that the "loose practice" of charging conspiracy rather than the underlying substantive offense "constitutes a serious threat to fairness in our administration of justice") Id. at 446.

311 See Harrison, 7 F.2d. at 263. See Abrama, supra note 75 (offering critique of material support statute). Critical examination of the significance of September 11 remains rare more than five years after the attacks; a notable exception is David A. Bell, Putting 9/11 into Perspective, L.A. TIMES, Jan. 28, 2007, at M1 (stating, in commentary by historian, a "need to overcome long habit and remind ourselves that not every enemy is in fact a threat to our existence").


313 In addition to numerous condemnations of tainted evidence, dating at least to Bram v. United States, 168 U.S. 532 (1897) (reversing murder conviction based on involuntary confession elicited by government agent), consider, for example, Speiser v. Randall, 357 U.S. 513, 525 (1958) (writing that "an interest of transcending value—as a criminal defendant his liberty"—justifies requiring proof beyond a reasonable doubt and shifting the risk of an erroneous verdict onto the prosecution), and Berger v. United States, 295 U.S. 78, 88 (1935) (stating that because the prosecutor "is the representative. . . of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done[,]" writes that it is the prosecutor's "as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one").

314 Richey, supra note 80. See also supra text accompanying note 80.
trials at all. Perhaps the push reflects a desire on the part of some officials to appear fairer by going through the trial-like motions expected of an increasingly legalistic global polity; perhaps also, a fear that either Congress or the Court, one day, will put a stop to open-ended executive detention.

To argue that unfair conviction is the only option is to ignore the second prong of established policy: surveillance. It has long been understood that a person whom the government suspects but cannot convict of serious crime does not truly “go free”; rather, the person remains subject to surveillance conducted within defined boundaries. Though “surveillance” provokes immediate thoughts of extraterritorial spying, the term refers as well to domestic investigations by state and federal agents. The law has tolerated such intelligence gathering, but at a cost. Police may ask questions without regard to protections set forth in Miranda, for example, but the resulting statements well may prove inadmissible at a criminal trial. The CIA was accorded greater secretiveness, but on the understanding that its aims differed from those of police and that its information would not become the centerpiece of a prosecution case.

Since September 11, the Executive has blurred the line between intelligence and law enforcement, between surveillance and punishment. It has intensified questioning and secured itself immunity from federal civilian prosecution for unduly harsh interrogations. It has sidestepped statutorily established oversight mechanisms while stepping up surveillance within the United States. The very fact that September 11 happened is said to prove a

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315 For an exhaustive study of intelligence activities in Afghanistan in the years before September 11, 2001, see STEVE COLL, GHOST WARS (2004).

316 The warnings set forth in Miranda v. Arizona, 384 U.S. 436, 475 (1966), are required only when a suspect is “in custody” and under “interrogation,” terms the Court has construed narrowly. See Berkemer v. McCarty, 468 U.S. 420, 430-31, 442 & n.35 (1984); Rhode Island v. Innis, 446 U.S. 291, 300-02 (1980). Cf. New York v. Quarles, 467 U.S. 649, 665 (1984) (O’Connor, J., concurring in the judgment in part and dissenting in part) (writing that “Miranda has never been read to prohibit the police from asking questions to secure the public safety,” but that, “[r]ather, the critical question Miranda addresses is who shall bear the cost of securing the public safety when such questions are asked and answered,” and “Miranda, for better or worse, found the resolution of that question implicit in the prohibition against compulsory self-incrimination and placed the burden on the State”).

317 See supra text accompanying notes 5, 136, 271.

318 Comprehensive discussion of surveillance is beyond the scope of this Article, which points to its role as a counterpoint to punishment yet focuses analysis on punishment. For examples of post-September 11 issues relating to intelligence operations, see Dan Eggen, Records on Spy Program Turned Over to Lawmakers, WASH. POST, Feb. 1, 2007, at A2; Eric Lichtblau & David Johnston, Court to Oversee U.S. Wiretapping in Terror Cases, N.Y. TIMES, Jan. 18, 2007, at A1; Adam Liptak, Secrecy at Issue in Suits Opposing Domestic Spying, N.Y. TIMES, Jan. 26, 2007, at A1; supra text accompanying notes 259-60 (discussing revelations about post-September 11 CIA activities).
need for such radical change. The premise is faulty. Even assuming that the
attacks of that day occurred because of a gap in surveillance, that alone says
little about how well surveillance worked on other days before and after
September 11. The premise simply cannot support the calls for curtailment of
liberties made on its account. One fears, moreover, that overt demands for
greater surveillance capability and overt defense of intelligence activities
well may have had the perverse effect of shrinking intelligence officers’
freedom of covert movement. Surely it has exposed their activities to scrutiny
not seen for decades. These results have left the United States less secure—
no more free of terrorism, and far less free of warranted criticism from allies
and enemies alike—and gives more reason for return to the established
punish-or-surveil regime.