



FOREWORD TO THE MILITARY COMMISSION REPORTER

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We have done this before – republishing the scholarly introduction to a worthy new series of reports of judicial decisions. See Cynthia J. Rapp, *An Introduction to In Chambers Opinions by Justices of the Supreme Court*, 5 GREEN BAG 2D 175 (2002). We are pleased to do it again with Judge Wald’s *Foreword* from the first volume of the NIMJ’s *Military Commission Reporter*.

– *The Editors*

THE OPERATIONS OF THE MILITARY COMMISSIONS, whose published rulings have been compiled by the National Institute of Military Justice (NIMJ) in this informative volume, were suspended in the early days of the Obama Administration but are now scheduled to be revived with modifications against some detainees. Conceived in controversy in the immediate aftermath of 9/11, denounced by civil libertarians for their deviations from traditional due process guarantees, and delayed for

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years in getting started, the original commissions were pronounced an unconstitutional exercise of unilateral executive power by the Supreme Court of the United States in the 2006 *Hamdan v. Rumsfeld* case¹ before a single trial could be held. Ricocheted back to Congress, an intense period of hearings and negotiations produced the Military Commissions Act of 2006 (MCA) which, in the view of original critics, was arguably more restrictive of individual rights under domestic and international law. In the last few years, a handful of Guantánamo detainees have been designated for trial before the MCA commissions but only two full-scale trials have been completed. A former Chief Prosecutor publicly labeled the Commission's handling of evidence as so "chaotic" as to make successful prosecution impossible.² The Convening Authority who oversees the post-MCA military commission system refused to convene a trial because the defendant had been subjected to torture,³ and at the beginning of his term President Obama ordered the commissions halted for 120 days.⁴ Most recently, the administration has announced that within a few months the commissions will resume operating with proposed rule changes the most important of which (1) make the ban on admissibility of evidence secured by cruel, inhuman or degrading means applicable to all proceedings, not just those evaluating coercive actions taken after passage of the Detainee Treatment Act; (2) reverse the burden of proof to require the party submitting hearsay information to demonstrate its reliability; and (3) permit detainees to choose a military counsel from among those normally available in the Office of Military Commissions.⁵

¹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

² Peter Finn, *Evidence in Terror Cases Said to Be in Chaos*, WASH. POST, Jan. 14, 2009, at A08.

³ Bob Woodward, *Detainee Tortured, Says U.S. Official*, WASH. POST, Jan. 14, 2009, at A01.

⁴ Remarks by Senator Barack Obama, Washington, D.C., Aug. 10, 2008 ("As president, I will close Guantanamo, reject the Military Commissions Act and adhere to the Geneva Conventions.").

⁵ General Counsel of the Department of Defense, Action Memo of 13 May 2009, *Re: Changes to the Manual for Military Commissions*. The Administration also an-

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So, why, one may ask, pay attention to the work product of the original commissions, confined as it is to the pretrial rulings and one interlocutory appeal in 8 cases, apart from history for history's sake? There is, I believe, a good answer. Although this genre of military commissions may disappear, as such, a national debate looms within government and outside among the press and public: should al-Qaeda adherents and other terrorists accused of war crimes against the United States be tried in our regular civilian courts or military courts-martial or instead be relegated to military commissions or to special "national security courts" which would operate under different rules as to openness, use of classified information, availability of privileges against self-incrimination and admissibility of evidence secured by coercive methods? Before giving serious consideration to the creation of a separate and less restrictive system of criminal justice for one group of defendants, we would do well to look at how this military commission experiment has played out so far and what if any lessons can be learned from its initial phase.

One thing can be said for sure. The handful of defendants represented in the military commission cases had vigorous representation from military and civilian counsel. There were well over a hundred motions – jurisdictional motions to dismiss, motions to compel discovery, motions complaining of unlawful command influence over the military judges trying the cases, motions to suppress evidence obtained through coercion, motions for expert witnesses, speedy trial motions, and motions for access to classified information. Insofar as it is possible to evaluate the energy and stamina of defense counsel from the commissions' rulings alone, it appears that they left no stone unturned in advocating for their unpopular clients.

But the MCA's mandates and rules issued by the Department of Defense did not make for a level playing field. From my experience as a federal judge and jurist at the International Criminal Tribunal for the Former Yugoslavia (ICTY), which prosecuted and tried

nounced it intended to make "other significant changes" including ones dealing with classified evidence.

crimes very similar to those under the military commissions' jurisdiction, I was struck by the almost hopeless lopsidedness of the process. For instance, in the early stages of the *Hamdan* case (which eventually did go to trial, resulting in a conviction and a net sentence, after allowing for time served, of 4½ months), the defense sought to compel the production of nine witnesses, five of them detainees at Guantánamo, where the trials would be held. The government resisted making the detainees available, despite their relevance to the defense, because they were "highly placed members of Al Qaeda" and their testimony might reveal national security information. The trial judge would go no further than to allow the Defense to propose written questions for the five requested detainee-witnesses from which a government security officer, not associated with the Prosecution, would then redact questions or answers that he deemed to pose a security risk. If, additionally, the security officer thought that the answers attempted to transmit sensitive information to enemy comrades through the Defense team, he could delete them entirely. The military judge had no say in the matter.⁶ Still, the Defense team fared better in that instance than when it was told by the judge that "a witness who cannot, because of security prohibitions resulting from his association with al-Qaeda, appear to testify is 'unavailable' . . . [and] the Defense is not entitled to the production of an unavailable witness."⁷ Defendants of course had no access to classified information or in many cases even to the names of witnesses against them. This adversarial disadvantage is, I have been told by military lawyers, exacerbated by the notorious paucity of Arabic speaking translators who can produce for counsel and clients the kind of comprehensible translations that are necessary for effective trial preparation. Statements made by the defendants are presumptively classified and the Defense cannot make public its own pleadings without permission from the Commission.

⁶ *United States v. Hamdan*, 1 M.C. 49 (Mar. 14, 2008) (Ruling on Reconsideration on Motion for Stay and Access to High Value Detainees).

⁷ *United States v. Hamdan*, 1 M.C. 74 (Apr. 24, 2008) (Ruling on Defense Motion to Compel Production of Out-of-Country Witnesses).

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Classified information to which only military counsel has access in many cases is endemic in these proceedings, and unlike civilian courts that operate under the Classified Information Procedures Act (CIPA),⁸ if the government chooses not to make the classified matter or an adequate substitute available to the defense, the court will not dismiss the charges. In one bizarre ruling, the Defense was allowed, over the objection of the Prosecution, to view the physical conditions of detention but subject to counsel's agreement to be blindfolded on the way there.⁹ There is a distinctly Kafkaesque quality to the proceedings. It is not at all clear to me that the announced changes will do much to change the imbalance of the older commissions.

Even though only a few judges were involved in the cases represented in this volume, their approaches toward the proceedings varied widely. One judge appeared to be endeavoring within the restrictions imposed by the MCA and implementing rules to approximate regular criminal justice norms. Thus, he granted a suppression motion in the case of a juvenile accused of throwing a hand grenade at a car in which two American servicemen were wounded. The juvenile, he found, had been interrogated while under the influence of drugs by Afghan police who threatened to kill him and his family if he did not confess to being part of a terrorist network.¹⁰ The judge also suppressed confessions made hours later to American interrogators on the ground that the Prosecution had not shown that the coercive effect of the Afghan police interrogation had been dissipated when American interrogators took over his custody. The juvenile was still drugged, hooded and shackled.¹¹ The ruling was appealed to the Court of Military Commission Review, the inter-

⁸ 18 U.S.C. App. III, §§ 1-16.

⁹ *United States v. Mohammed*, 1 M.C. 295 (Oct. 26, 2008) (Motion for Access to View and Inspect the Conditions of Confinement).

¹⁰ *United States v. Jawad*, 1 M.C. 345 (Oct. 28, 2008) (Ruling on Defense Motion to Suppress Out-of-Court Statements of the Accused to Afghan Authorities).

¹¹ *United States v. Jawad*, 1 M.C. 349 (Nov. 19, 2008) (Ruling on Defense Motion to Suppress Out-of-Court Statements by the Accused Made While in U.S. Custody).

mediate appellate body created by the MCA, but the proceedings were halted by order of President Obama before a decision could be issued.¹² Now that the commissions will recommence a decision is likely later this year. Other judges, however, ruling summarily, denied without explanation what seemed like plausible defense arguments. Typically, one held: “The Commission finds that the documents sought are not relevant.”¹³ That’s it. Should these inherently controversial commissions continue to operate, minimal fairness requires that the presiding judges explain the bases of their rulings apart from mere citation to the Act or the rules. While the proposed change [apply]ing the ban on cruel and inhuman treatment to all proceedings is a step forward, it still allows some forms of coerced or involuntary testimony to be admitted if the statement is reliable, sufficiently probative, and the judge believes the interests of justice would be best served by admission.

The danger of unlawful command influence on these commissions has been highlighted by critics. That charge surfaced repeatedly in the proceedings memorialized in this volume, focusing on remarks made to the Chief Prosecutor by the Legal Adviser to the Convening Authority (as well as the Defense Department’s General Counsel) about bringing more “sexy” cases, making greater use of classified information and being less resistant to the use of information elicited by coercive methods in preparing cases for trial.¹⁴ One Chief Prosecutor resigned for alleged command “nano-management,” declaring publicly that “full, fair and open trials were not possible under the current system.”¹⁵ Charges were made in one case that a military trial judge had been replaced under suspicious circumstances.¹⁶ In another, the Legal Adviser whose duties usually

¹² 10 U.S.C. §§ 948a-950w.

¹³ *United States v. Khadr*, 1 M.C. 221 (Apr. 23, 2008) (Ruling on Defense Motion to Compel Discovery).

¹⁴ *United States v. Hamdan*, 1 M.C. 78 (May 9, 2008) (Ruling on Motion to Dismiss).

¹⁵ Morris Davis, *AWOL Military Justice*, LA TIMES, Dec. 10, 2007, at A-15.

¹⁶ *United States v. Khadr*, 1 M.C. 246 (Aug. 15, 2008) (Ruling on Defense Motion to Dismiss for Unlawful Command Influence-Removal of Military Judge).

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encompassed making recommendations to the Convening Authority after a trial was completed was disqualified by the trial judge from any participation in the post-trial phase:

The Commission finds the current Legal Adviser's editorial writings and interviews defending the military commissions system combined with his active and vocal support of and desire to manage the military commissions process and public statements appearing to directly align himself with the prosecution team have compromised the objectivity necessary to dispassionately and fairly evaluate the evidence and prepare the post trial recommendation.¹⁷

Of course it is not possible to judge from these rulings whether unlawful command influence actually occurred, but they do point out the great risk of a system that was created uniquely for a widely despised group of defendants with substantially fewer rights or protections, precedents or traditions than the one used for regular civilian or military populations. Lawyers inside the military commission system place independent judges as their highest-priority concern. Despite the MCA's assurance of judicial independence from unlawful command influence,¹⁸ these early cases are troubling. It remains to be seen how the Administration plans to create a less disquieting atmosphere in which the second round of commissions will operate as far as the independence of the judges is concerned.

It bears comment how many significant substantive rulings were made in the earlier troubled process. While not binding or even citable in any other tribunal,¹⁹ these rulings are still accessible to future judges and could still have some effect on the thinking of judges in future cases. Among these are holdings that Guantánamo defendants – even after the 2008 Supreme Court's *Boumediene* decision²⁰ granting them habeas corpus rights – had no other constitu-

¹⁷ *United States v. Jawad*, 1 M.C. 322, 325 (Aug. 14, 2008) (Ruling on Motion to Dismiss).

¹⁸ 10 U.S.C. § 949b(a)(2).

¹⁹ 10 U.S.C. § 948b(e).

²⁰ *Boumediene v. Bush*, 128 S.Ct. 2229 (2008).

tional rights. Thus it was decided that a statutory right against self incrimination in the MCA²¹ applied only to testimony given at trial and not to interrogations conducted prior to trial, and the Fifth Amendment did not apply so as to fill the gap;²² that multiple charges for acts of terrorism and supporting a terrorist organization could be based on a single act of tossing a hand grenade;²³ that juveniles could be prosecuted in the military commission system;²⁴ and that Congress could itself legislate as to what the common law of war encompassed and include conspiracy even though international customary law does not recognize it as such.²⁵ It was disappointing to me that in these rulings there were few if any references to decisions by international courts that have ruled on similar issues. The Commission decisions – right or wrong – seem to have been made in a vacuum. The spirit of the MCA’s rejection of international law in interpreting war crimes prosecuted in U.S. courts²⁶ appears to have pervaded military commission law as well. The creation of a separate body of constitutional and international common law in a radically different setting and under dramatically different procedures and rules of evidence poses vexing questions for the integrity and consistency of U.S. law which proposals for new hybrid national security courts must confront as well.

Finally, the publication of these rulings verifies the practice of torture and coercion at Guantánamo which is still disputed by some government officials. Intentional sleep deprivation designed to “dis-

²¹ 10 U.S.C. § 948r.

²² *United States v. Hamdan*, 1 M.C. 112 (Jun. 6, 2008) (Ruling on Motion to Suppress Statements of the Accused).

²³ *United States v. Khadr*, 1 M.C. 183 (Mar. 14, 2008) (Ruling on Defense Motion to Dismiss Specification 2 of Charge IV for Multiplicity and Unreasonable Multiplication of Charge).

²⁴ *United States v. Khadr*, 1 M.C. 223 (Apr. 30, 2008) (Ruling on Defense Motion for Dismissal Due to Lack of Jurisdiction Under the MCA in Regard to Juvenile Crimes of a Child Soldier).

²⁵ *United States v. Hamdan*, 1 M.C. 60 (Apr. 2, 2008) (Ruling on Motion to Dismiss); compare *Hamdan*, *supra*, at [597-98], with 10 U.S.C. § 950v(b)(28).

²⁶ 10 U.S.C. § 948b.

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orient selected detainees . . . disrupt their sleep cycles . . . make them more compliant and break down their resistance to interrogation” was found to have been practiced on a juvenile as part of an officially abandoned “frequent flyer” program that moved him from cell to cell, mostly at night at three-hour intervals, shackled much of the time. The same juvenile was “beaten, kicked and pepper sprayed” and had his nose broken for disobeying a guard; subjected to “excessive heat, constant lighting, loud noise, linguistic isolation . . . and . . . physical isolation,” when, according to the judge, he had “no intelligence value.” It was, the judge found, “cruel and inhuman treatment” indicating “flagrant misbehavior” on someone’s part but in the end not sufficient to dismiss the charge in the military commission system.²⁷ It is to be hoped that the proposed changes would prevent a repetition of that result, but which forms of “coerced” or involuntary testimony are still admissible must give cause for concern.

A new Administration is in pursuit of a safe and fair way to handle detainees, including those charged with war crimes, as it fulfills its promise to close Guantánamo. It appears to have concluded that the MCA military commission system is not a failed experiment but rather amenable to enough changes to render it a forum for fair and effective trials. There are many who doubt that. In the forthcoming debate, this compilation will be useful, and the National Institute of Military Justice deserves much credit for assembling these rulings. A careful reading should assist the government and the bench and bar in deciding how to go forward and what history not to repeat.



²⁷ *United States v. Jawad*, 1 M.C. 349 (Nov. 19, 2008) (Ruling on Defense Motion to Suppress Out-of-Court Statements by the Accused While in U.S. Custody).