

BEYOND GUANTÁNAMO, OBSTACLES AND OPTIONS , 103 Nw. U. L. Rev ____ (2008)

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INTRODUCTION

The Military Commissions Act of 2006 (MCA),¹ passed after the Supreme Court's *Hamdan*² decision was intended to remedy shortcomings in prior military commissions. Implementing the MCA has proven difficult, as observers have witnessed the high profile resignation of the system's chief prosecutor, and Congressional hearings questioning the future of terrorism trials. These issues were punctuated by the Supreme Court's *Boumediene*³ decision holding that detainees have a Constitutional right to habeas corpus. Observers unfamiliar with the processes involved with the military commissions may have thought that the *Boumediene* decision would force the administration to forgo military commissions, perhaps opting instead for trials in Article III courts. However, nothing in the decision required such a result.

In fact, just two months after the Supreme Court's *Boumediene* decision, the trial of Osama bin Laden's alleged bodyguard Salim Hamdan—the first terrorism-related trial by military commission—concluded in a guilty verdict on charges that he provided material support for terrorism.⁴ While lower courts begin to work out the details of the *Boumediene* decision Hamdan will have a simultaneous opportunity to appeal his conviction, and the legitimacy of the tribunal that tried him. In short, when the dust settles, Congress will again be faced with a need to reform military commissions or to prepare the federal judiciary for terrorism trials. This Essay seeks to contribute to that reform discussion.

In *Boumediene*, the Court's decision focused in part on the right of aliens designated as enemy combatants and held in Guantánamo Bay, Cuba

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¹ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, 42 U.S.C.) (link).

² *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006) (link).

³ *Boumediene v. Bush*, No. 06-1195 (U.S. June 12, 2008) (link).

⁴ Carol J. Williams, *Mixed Verdict at Terror Tribunal*, L.A. TIMES, Aug. 7, 2008, at A1, available at <http://www.latimes.com/news/printedition/front/la-na-hamdan7-2008aug07,0,4784285.story> (link).

to challenge the basis for their detention through the writ of habeas corpus. The Supreme Court conducted an extensive survey of the history of the writ and the Suspension Clause stating, “given the unique status of Guantánamo Bay and the particular dangers of terrorism in the modern age, . . . courts simply may not have confronted cases with close parallels to this one.”⁵ Despite admitting that the historic record was limited, the Court nevertheless found that the writ of habeas corpus may only be suspended in cases of invasion or rebellion. The Suspension Clause, according to the Court, protects “a time-tested device, the writ” and that protection is intended “to maintain the delicate balance of governance” between the executive branch and the judiciary.⁶ This protection was intended by the Founders to prevent “cyclical abuses” by the executive branch.⁷ Accordingly, the Court concluded that Section 7 of the MCA, which stripped courts of the ability to review the propriety of detention other than by procedures established in the Detainee Treatment Act of 2005,⁸ while not intended to be a formal suspension of the writ of habeas corpus, failed to provide detainees with an adequate substitute for habeas corpus. As a result, detainees held in Guantánamo Bay were entitled to request a federal district court conduct a *habeas* review of their designation as an enemy combatant and their related detention.

Because *Boumediene*'s focus was primarily on detention, the procedures for trial by military commission were largely unaltered by the opinion itself. Nonetheless, Hamdan filed a habeas petition challenging the constitutionality of his continued detention and planned trial by military commission.⁹ That petition was denied, clearing the way for the first military commission trial to begin on July 21, 2008.¹⁰ Two weeks later, on August 6, 2008 a jury composed of six military officers returned a split verdict, convicting Hamdan of providing material support to a terrorist organization

⁵ *Boumediene*, slip op. at 22.

⁶ *Id.*, slip op. at 15 (internal quotation marks omitted).

⁷ *Id.*

⁸ Pub. L. No. 109-148, div. A, tit. X, 119 Stat. 2680, 2739 (codified as amended at 42 U.S.C. § 2000dd, 10 U.S.C. § 801 & 28 U.S.C. § 2241 (2006)) (link).

⁹ Memorandum of Law in Support of Petitioner's Motion for Preliminary Injunction, *Hamdan v. Gates*, No. 04-CV-1519-JR (D.D.C. July 3, 2008), available at <http://www.scotusblog.com/wp/wp-content/uploads/2008/07/hamdan-legal-memo-7-3-08.pdf> (link).

¹⁰ See William Glaberson and Eric Lichtblau, *Guantanamo Detainee's Trial Opens, Ending a Seven-Year Legal Tangle*, N.Y. TIMES, July 22, 2008, at A12, available at <http://www.nytimes.com/2008/07/22/washington/22detain.html?scp=1&sq=Glaberson+and+Eric+Lichtblau%2C+july+22%2C+2008&st=nyt> (link); see also Posting of Lyle Denniston to SCOTUSblog, <http://www.scotusblog.com/wp/judge-refuses-to-delay-war-crimes-trial/> (July 17, 2008, 15:55 EST) (explaining the District Court's conclusion that “all of the challenges that are raised against military commission trials can be addressed once a trial is over”) (link).

and acquitting him on conspiracy charges.¹¹ While his challenges were noted by the court, they were left to be resolved on appeal.¹² As those appellate courts sort out the infirmities in military commissions, necessary reforms will become increasingly likely.¹³

The military commission's decision in *Hamdan* makes clear that *Boumediene* did not derail military commission trials. *Hamdan*'s challenges that were left unaddressed by the District Court will resurface in subsequent litigation. That litigation will likely call into question the adequacy of military commission proceedings and may mandate additional legislation. Thus, these developments, coupled with earlier challenges to military tribunals, call into question the long-term viability of military commissions¹⁴ and have led some to propose the formation of a national security court.¹⁵

This Essay focuses on the structure of the military commission system, to date left largely unaltered by *Boumediene*, but which Congressional reformers will need to modify in order to ensure fair trials. Accordingly, I first identify structural flaws in the current military commission system which continue to undermine its legitimacy. Second, I identify obstacles reformers will face in transitioning to proposed national security courts. In Part I, I identify three specific structural reforms necessary to improve military commissions. In Part II, I focus on obstacles created by the current commissions system, which will affect the ability of Congressional reformers to abolish military commissions or transition to national security courts.

I. PROBLEMS UNDERMINING CURRENT MILITARY COMMISSIONS

If Congressional reformers intend to maintain military commissions, structural problems, which plague their implementation and affect their legitimacy must be resolved. Two major issues stem from conflicting statutory provisions, which politicize trial procedures and a third issue stems from a pattern of legislative acquiescence in matters of national security which

¹¹ See William Glaberson, *Panel Convicts Bin Laden Driver in Split Verdict*, N.Y. TIMES, Aug. 7, 2008, at A1, available at <http://www.nytimes.com/2008/08/07/washington/07gitmo.html?ref=todayspaper> (link).

¹² See *id.*

¹³ See Posting of David Glazier to National Security Advisors, <http://natseclaw.typepad.com/natseclaw/2008/08/the-hamdan-verd.html> (Aug. 6, 2008, 14:53 EST) (arguing that "the process [of trial by military commission] still has a number of legal flaws sufficient to ensure that convictions will not ultimately stand up to the test of time") (link).

¹⁴ See David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131, 185 (2008) (concluding that "... problems are so significant that they undermine the viability of continued commission employment.") (link).

¹⁵ See, e.g., HARVEY RISHIKOF, PROGRESSIVE POL'Y INST., POL'Y REPORT: A FEDERAL TERRORISM COURT (2007), available at <http://www.ppionline.org/documents/TerrorismCourt111407.pdf> (link); Stuart Taylor Jr., *The Case for a National Security Court*, NAT'L J., Feb. 24, 2007, available at http://www.theatlantic.com/doc/200702u/nj_taylor_2007-02-27 (last visited June 2, 2008) (link).

has allowed for unsupervised delegation of rulemaking authority to the Department of Defense (DoD).

A. *Undue Political Influence*

1. *Conflicting Statutory Provisions*—Conflicting statutory provisions in MCA largely account for the most recent controversies surrounding commissions. The first provision explicitly allows a political appointee to serve in the powerful role of Convening Authority.¹⁶ The second provision explicitly provides trial counsel with enhanced protection from undue influence.¹⁷ Unsurprisingly, allowing a political appointee to occupy a powerful quasi-judicial position while at the same time mandating protection from undue influence places these two statutory provisions in conflict.

The example of Colonel Morris Davis shows how these provisions affect the structural independence of the Office of Military Commissions (OMC). Colonel Davis, who was widely regarded as one of the commission's best advocates, resigned from his position as Chief Prosecutor for the OMC.¹⁸ What punctuated this drama was Colonel Davis's testimony on behalf of Guantánamo detainee Salim Hamdan who argued that the military commissions were tainted by unlawful command influence.¹⁹ Colonel Davis' testimony on behalf of Hamdan, a person who he once described sympathetically for as "nauseating" highlights the seriousness of this structural conflict.²⁰

Reformers must recognize the structural nature of this interdepartmental dispute to understand how it affects the long-term legitimacy of the commissions. This structural conflict can be traced to conflicting statutory language and inadequate supervision of policy implementation. Stated more directly, Congressional drafters accepted legislation proposed by the White House in September 2006,²¹ and while Congress added to the bill an

¹⁶ Military Commissions Act of 2006, 10 U.S.C. § 948h (2006) ("Military commissions under this chapter may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose.") (link).

¹⁷ Military Commissions Act of 2006, 10 U.S.C. § 949b (discussing unlawful influence on military commissions) (link).

¹⁸ See William Glaberson, *Ex-Guantánamo Prosecutor to Testify for Detainee*, N.Y. TIMES, Feb. 28, 2008, at A18, available at http://www.nytimes.com/2008/02/28/us/28gitmo.html?_r=1&oref=slogin (link).

¹⁹ See *id.*

²⁰ See *id.*

²¹ The President announced on September 6, 2006 that he was submitting draft legislation to Congress to create military commissions to try terror suspects and enemy combatants. See Press Release, White House, Fact Sheet: The Administration's Legislation to Create Military Commissions (Sept. 6, 2006), available at <http://www.whitehouse.gov/news/releases/2006/09/20060906-6.html> (link). The legislation was adopted as S. 3861, 109th Cong. (2006) (link), S. 3886, 109th Cong. (2006) (link), and H.R. 6054, 109th Cong. (2006) (link). Each proposal had the exact same language as the U.C.M.J. regarding unlawful influence upon trial counsel. See Uniform Code of Military Justice, 10 U.S.C. § 837(a) (2006) ("No person may attempt to coerce or, by any unauthorized means, influence the action of

important protection against undue influence,²² it failed to consider how that provision would interact with other provisions within the bill. Moreover, its intended protection has been largely undermined by a broad delegation of authority to the executive branch. This delegation was troublesome given the exemption of military commission rulemaking from standard administrative procedures that could have prevented many implementation problems.²³ As a result the DoD created a structure and promulgated rules for the military commissions, which allowed for political manipulation of nearly all aspects of the trials.²⁴

2. *MCA Section 948h and the Unresolved Issue of Political Influence*—The challenge lodged by Hamdan and the testimony of Colonel Davis focused on unlawful command influence.²⁵ While Military Commission Judge Keith Allred found that the Convening Authority of Hamdan’s military commission, Judge Susan Crawford, never had actual conversations with her superiors regarding the disposition of trials,²⁶ the discussion below

a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts.”) (link); H.R. 6054, 109th Cong., at 20 (as reported by H. Comm. on the judiciary, Sept. 25, 2006) (including the same language). Senator Warner submitted an alternative proposal that added: “No person may attempt to coerce or, by any unauthorized means, influence—the exercise of professional judgment by trial counsel or defense counsel.” S. 3901, 109th Cong., at 24 (2006) (link). After negotiations on this topic and interrogation standards, a compromise proposal was reached which would become the Military Commissions Act of 2006. *See* S. 3930, 109th Cong. (2006) (enacted) (link).

For a more detailed account of the legislative history of MCA § 949(b), see Gregory S. McNeal. *An Abbreviated Legislative History and Timeline Regarding the Development of Section 949(b) of the Military Commissions Act of 2006* (Aug. 8, 2008) (unpublished manuscript), available at <http://works.bepress.com/gregorymcneal/17> (link).

²² Military Commissions Act of 2006, 10 U.S.C. § 949b (2006).

²³ *See* Letter from Barry M. Kamins, President, The Association of the Bar of the City of New York to Senators Patrick Leahy, Arlen Specter, Carl Levin and John McCain and Representatives John Conyers, Lamar S. Smith, Ike Skelton and Duncan Hunter (Mar. 12, 2008) [hereinafter Letter from Barry M. Kamins], available at <http://www.harpers.org/media/image/blogs/misc/guantanamoletterremc311.pdf> (discussing the urgent need for Congressional oversight hearings given the potential for undue political influence and organizational changes which impact the independence of the military commissions) (link); *see also* Eugene R. Fidell, *Military Commissions and Administrative Law*, 6 GREEN BAG 379, 382 (2003), available at <http://www.nimj.org/documents/GreenBag.pdf> (stating that transparency in the form of notice and comment rulemaking for military commissions can contribute to public confidence in government decisionmaking and improved decisions) (link).

²⁴ *See* Letter from Barry M. Kamins, *supra* note 23, at 3 (“[T]he supervisory structure underlying the military commissions . . . establishes a blueprint for conflict and political influence on the prosecution and conduct of the military commissions. . . . “[T]his restructuring places the General Counsel [a political appointee] at the apex of the military commissions system with the power to influence and direct it from every perspective.”).

²⁵ Defense Motion to Dismiss the Charges and Specifications for Unlawful Influence, *United States v. Hamdan*, D-026 (Military Comm’n, Mar. 29, 2008), available at <http://www.nimj.com/documents/UCI%20Motion%20with%20Attachments.pdf> (link).

²⁶ Ruling on Motion to Dismiss Unlawful Influence at 7, *United States v. Hamdan*, D-026 (Military Comm’n, May 9, 2008), available at <http://www.nimj.org/documents/Hamdan%20Hartmann%20Ruling.pdf> (link).

makes clear that his findings left the underlying structural issue caused by MCA Section 948h uncorrected.

Section 948h of the MCA declares: “Military commissions under this chapter may be convened by the Secretary of Defense or by any officer *or official* of the United States designated by the Secretary for that purpose.”²⁷ This seemingly innocuous provision allows the Secretary of Defense to select a civilian political appointee to serve in the important role of Convening Authority, a substantial departure from courts-martial practice.²⁸ This raises an obvious problem: a political appointee lacks the presumption of unbiased and apolitical decisionmaking that accompanies the role of a military commander.²⁹ The Convening Authority is a unique official with no civilian equivalent.³⁰ In the case of the commissions, she also has no *military* equivalent; her position exists solely for the purpose of trying one class of alleged offenders. The Convening Authority’s responsibilities include reviewing the sufficiency of charges and whether they should be dismissed, selecting those cases and associated charges that should be referred to trial by military commission, selecting members of the panel (the jury), and reviewing findings of guilt and sentences.³¹ These significant powers raise concerns even in courts-martial, where there is a well documented fear that the commander entrusted with the authority of convening military courts will exercise these powers over participants and the proceedings in a manner which will undermine a fair trial.³² Despite these concerns, the Convening Authority’s powers are accepted in courts-martial as part of a military leader’s command responsibility.³³ Its justification is premised upon the need to ensure morale and discipline of service members in a system of justice which can be deployed near the battlefield³⁴—a justification which is lacking in military commissions.

3. *MCA Section 948h and the Hamdan Court’s Concerns Regarding Structural Insulation*—In Section 948h, Congress created a Convening Authority with all the power found in military commanders but without the at-

²⁷ Military Commissions Act of 2006, 10 U.S.C. § 948h (2006) (emphasis added).

²⁸ Cf. Uniform Code of Military Justice, 10 U.S.C. § 822 (2006) (link).

²⁹ Convening Authority under UCMJ are commanders and military officers. *Id.* As such, they are protected from removal from their position, and any such removal would raise significant questions especially in light of their other nonjudicial responsibilities. See 10 U.S.C. § 822 (giving an officer the right to challenge his or her dismissal in a trial by court-martial).

³⁰ See Lindsay Nicole Alleman, *Who Is in Charge, and Who Should Be? The Disciplinary Role of the Commander in Military Justice Systems*, 16 DUKE J. COMP. & INT’L L. 169, 170 (2006) (link).

³¹ DEP’T OF DEF., THE MANUAL FOR MILITARY COMMISSIONS, pt. 2., § 2–3, (2007), available at http://www.defenselink.mil/news/Apr2007/Reg_for_Trial_by_mcm.pdf (outlining the responsibilities and functions of the Convening Authority) (link).

³² See, REPORT OF THE COMMISSION ON THE 50TH ANNIVERSARY OF THE UNIFORM CODE OF MILITARY JUSTICE 6–7, (2001), available at http://www.nimj.org/documents/Cox_Comm_Report.pdf (link).

³³ See Alleman, *supra* note 30, at 170–71.

³⁴ *Id.* at 188–89.

tendant command responsibility justification—a serious structural flaw. Quite simply, the Military Commission Convening Authority is not responsible for detainee military discipline, soldierly bearing, or morale. This fact was clearly noted by Justice Stevens in *Hamdan*, who stated that “Hamdan is not a member of our Nation’s Armed Forces, so concerns about military discipline do not apply.”³⁵ This signal was largely ignored by Congress, who, rather than recognizing the inapplicability of Convening Authority powers for military commissions, adopted the White House’s proposed structure. Doing so situated a political appointee at the apex of a military system with the substantial discretionary powers found in courts-martial but no practical justification for those powers.

Practically, Section 948h is valid as a matter of domestic law. Justice Kennedy made this fact clear in his *Hamdan* concurrence when he stated that it is a responsibility of Congress to prescribe “the level of independence and procedural rigor” of military courts.³⁶ But 948h also implicates the broader protections of the trial process, and in this respect is governed by Common Article 3, which is concerned with “matters of structure, organization, and mechanisms to promote the tribunal’s insulation from command influence.”³⁷ Discerning what Common Article 3 requires regarding structure and insulation from command influence is a difficult task. However, in his concurrence, Justice Kennedy made clear that a major failure of the PMO military commissions was that they were not structurally independent.³⁸

Key to understanding 948h’s failing is recognizing that structural insulation (that is to say a system designed to protect against political influence irrespective of individual actors—not the motivation of any specific individuals) was central to the Court’s decision. Thus, Judge Allred’s opinion, by looking to individual actions rather than structure,³⁹ missed the key point. The Supreme Court made clear in *Hamdan* that they were not imputing ill motives to any actors within the military commission process.⁴⁰ In fact, they expressed certainty that officers in the PMO military commissions “would strive to act impartially and ensure that Hamdan receive[s] all protections to which he is entitled.”⁴¹ Nonetheless, Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, reasoned that “the legality of a tri-

³⁵ *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2771 (2006).

³⁶ *Id.* at 2804 (Kennedy, J., concurring).

³⁷ *Id.* (discussing the application of Common Article 3 in conformity with U.S. Law).

³⁸ *Id.* (“[A]n acceptable degree of independence from the Executive is necessary to render a commission ‘regularly constituted’ by the standards of our Nation’s system of justice.”).

³⁹ See Ruling on Motion to Dismiss (Unlawful Influence) at 3–5, *United States v. Hamdan*, D-026 (Military Comm’n, May 9, 2008), (discussing Legal Advisor General Hartmann’s active role in the prosecution of the case), available at <http://www.nimj.org/documents/Hamdan%20Hartmann%20Ruling.pdf> (link).

⁴⁰ 126 S. Ct. at 2771.

⁴¹ *Id.*

bunal under Common Article 3 cannot be established by bare assurances that, whatever the character of the court or the procedures it follows, individual adjudicators will act fairly.⁴² Structural independence from the influence of executive actors is the central concern.⁴³ Section 948h, by departing from this guidance, created a structure which allowed for instances of perceived and actual undue influence and coercion.⁴⁴ Moreover, this provision is in tension with MCA Section 949b.

4. *Maintaining Military Commissions Requires Removing Political Influence*—If Congress intends to retain military commissions, it must remedy the structure that allows for political influence. Revising 948h to mandate that the Convening Authority be a military officer with existing courts-martial responsibilities would be a good start. This move would add a layer of insulation from political pressure. Appropriate officers might be the Commander of the Military District of Washington⁴⁵ or the Commander of SOUTHCOM, a unified command whose jurisdiction includes Guantánamo Bay.⁴⁶ Each of these proposals will ensure that the Convening Authority for Military Commissions, rather than being an individual solely selected to bring cases against detainees, will instead occupy this position as a collateral, not primary, responsibility.

5. *MCA Section 949b—Trial Counsel Freedom from Undue Influence*—MCA Section 949b prohibits attempts to coerce, or by any unauthorized means influence, “the exercise of professional judgment by trial counsel or defense counsel.”⁴⁷ Judge Allred relied on courts-martial practice as persuasive authority for interpreting the scope of 949b.⁴⁸ While applying the definition of command influence found in courts-martial, he also

⁴² *Id.* at 2798 n.67. While Justice Kennedy did not join this part of the opinion, he did recognize the importance of ensuring that individual adjudicators would act fairly and impartially. Analyzing the powers of the Convening Authority in courts-martial, Justice Kennedy stated that “by structure and tradition, the court-martial process is insulated from those who have a interest in the outcome of the proceedings. . . . As compared to the role of the convening authority in a court-martial, the greater powers of the Appointing Authority here . . . raise concerns that the commission’s decisionmaking may not be neutral.” *Id.* at 2806–07 (Kennedy, J., concurring).

⁴³ *See id.* at 2804 (Kennedy, J., concurring); *see also id.* at 2807 (“[P]rovisions for review of legal issues after trial cannot correct for structural defects . . . that can cast doubt on the factfinding process and the presiding judge’s exercise of discretion during trial.”).

⁴⁴ *Cf.* GEORGE B. DAVIS, *MILITARY LAW OF THE UNITED STATES* 581, 623–24 (3d rev. ed. 1915).

⁴⁵ The Prosecution and Defense are headquartered in D.C.

⁴⁶ *See* Uniform Code of Military Justice, 10 U.S.C. § 822 (a)(3) (2006) (specifying that the general courts-martial Convening Authority may be “the commanding officer of a unified or specified combatant command”); *see also*, William H. Walsh and Thomas A. Dukes Jr., *The Joint Commander as Convening Authority: Analysis of a Test Case*, 46 A.F. L. REV. 195, 198–99 (1999) (explaining how the Goldwater-Nichols act enhanced the ability for commanders to create joint court-martial convening authority).

⁴⁷ Military Commissions Act of 2006, 10 U.S.C.A § 949b (2006).

⁴⁸ Ruling on Motion to Dismiss (Unlawful Influence) at 9, *United States v. Hamdan*, D-026 (Military Comm’n, May 9, 2008), *available at* <http://www.nimj.org/documents/Hamdan%20Hartmann%20Ruling.pdf> (link).

recognized that Congress sought to enhance the protections afforded to trial counsel.⁴⁹ The protections in MCA Section 949b exceed those found in Article 37 of the UCMJ by protecting against “attempts to coerce” or exercise “unauthorized influence” over trial counsel.⁵⁰

6. *Coercion Remains Despite Judge Allred’s Opinion*—Judge Allred’s reasoning was consistent with the legislative history of the MCA, which reflects a belief by Congress that trial counsel in military commissions are especially vulnerable to attempts at coercion. During the drafting of the MCA, Colonel Davis requested the enhanced protections found in 949b.⁵¹ He argued for protection against the potential for undue influence over the prosecutor’s *legal* judgment.⁵² His concern was that he and other trial counsel should be free from influence, coercion, or, in his words, “reprisal if someone above me believes waterboarding is an acceptable way to extract evidence.”⁵³ Notably, the final version guarantees freedom from influence over trial counsel’s “professional judgment,” dropping the “legal” modifier and creating even greater protection than the narrower “professional *legal* judgment” urged by Colonel Davis.⁵⁴

Judge Allred’s opinion directed that the Legal Advisor to the Convening Authority be removed from Hamdan’s case, citing “substantial doubts” about his independence from the prosecutorial function.⁵⁵ But Judge Allred failed to correct the structure which allowed for undue influence. While he recognized that undue influence might recur, and ordered additional measures to protect against “any adverse consequence, professional embarrassment, unfavorable performance rating, or other disadvantage”⁵⁶ for those who participated in the Hamdan hearing or the Tate Commission investigation, the structure that allowed for undue influence remained. As a result, Colonel Davis was later notified that because of his resignation and testimony on behalf of Hamdan he did “not serve honorably” and was denied a medal for his service as prosecutor.⁵⁷ Such an act violates the language of 949b and Judge Allred’s order. More significantly, this action sends a message to other trial counsel that, regardless of whether they are directly sub-

⁴⁹ *Id.*

⁵⁰ Compare Military Commissions Act of 2006, § 949b, with Uniform Code of Military Justice, 10 U.S.C. § 837(a) (2006).

⁵¹ Telephone interview with Colonel Morris Davis, former Chief Prosecutor, Department of Defense Office of Military Commissions (March 8, 2008); see E-mail from Colonel Morris Davis to the staff of Senator Lindsay Graham (Sept. 7, 2007) (on file with author).

⁵² See Interview with Colonel Davis, *supra* note 51; Col. Davis E-mail, *supra* note 51.

⁵³ E-mail from Colonel Morris Davis to the staff of Senator Lindsay Graham, *supra* note 51.

⁵⁴ *Id.*

⁵⁵ Ruling on Motion to Dismiss (Unlawful Influence), *supra* note 48.

⁵⁶ *Id.*

⁵⁷ Josh White, *Colonel Says Speaking Out Cost a Medal*, WASH. POST, May 29, 2008, at A09, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/28/AR2008052802966.html?hpid=moreheadlines> (link).

ject to political control, they can nevertheless expect reprisals should they fail to follow the goals of their political superiors.

Military justice precedents set forth a clear standard for testing whether officials improperly influenced subordinates. The test turns on “whether a reasonable member of the public, if aware of all the facts, would have a loss of confidence in the military justice system and believe it to be unfair.”⁵⁸ In light of the public dispute and the retaliation against Colonel Davis, this test seems satisfied.

7. *Implications for Future Cases*—This coercive political influence has serious implications and cannot be resolved by merely removing outspoken individuals from the chain of command. For example, Colonel Davis tendered his resignation after William J. Haynes, the chief legal counsel at the DoD, was placed in his chain of command.⁵⁹ Almost simultaneously, Susan Crawford, Convening Authority of the Military Commissions, and her legal adviser, Brigadier General Hartmann, began to pressure Colonel Davis about which cases he would prosecute.⁶⁰ Both Ms. Crawford and Mr. Haynes are political appointees, and Brigadier General Hartmann worked for the Convening Authority and reported directly to civilian deputies of Mr. Haynes.⁶¹ While Mr. Haynes resigned amid criticism from Colonel Davis, the organizational structure that allowed for such influence remained.

This structure allows executive branch political influence over the Office of the Chief Prosecutor, thus violating the spirit of *Hamdan*—the need for structural freedom from undue influence.⁶² Allowing political officials to prepare fitness reports and make decisions regarding service medals has the same potential for influence that allowing them to direct trial decisions does because both compel officers to act in accordance with the wishes of their political superiors instead of the interests of justice. So long as trial counsel fear career impacting reprisals, they will not be free to make independent decisions regarding their trial strategy, the sufficiency of evidence against individual detainees, and the impropriety of using evidence derived

⁵⁸ United States v. Allen, 31 M.J. 572, 590 (N.M.C.M.R. 1990) (citing United States v. Rosser, 6 M.J. 267 (C.M.A. 1979); United States v. Cruz, 20 M.J. 873 (A.C.M.R. 1985)).

⁵⁹ See Josh White, *Ex-Prosecutor Alleges Pentagon Plays Politics*, WASH. POST, Oct. 20, 2007, available at http://www.washingtonpost.com/wp-dyn/content/article/2007/10/20/AR2007102000179_pf.html (link).

⁶⁰ Morris D. Davis, Op-Ed., *AWOL Military Justice*, L.A. TIMES, Dec. 10, 2007, available at <http://www.latimes.com/news/opinion/la-oe-davis10dec10,0,2446661.story?coll=la-opinion-righttrail> (link); see also Memorandum for Legal Advisor to the Convening Authority for Military Comm’n (Oct. 3, 2007), available at <http://www.harpers.org/media/image/blogs/misc/mforlgladvoffconvauthreapptofhartmann100307.pdf> (directing Brigadier General Hartmann to supervise the Chief Prosecutor and establishing that Brigadier General Hartmann reports to the Deputy General Counsel (Legal Advisor)) (link).

⁶¹ See Memorandum for Legal Advisor to the Convening Authority for Military Comm’n, *supra* note 60; Letter from Barry M. Kamins, *supra* note 23.

⁶² See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2771 (2006).

from coercion or even torture. Further, such a structure allows political appointees to escape the consequences of potentially unlawful action by pressuring military officers to act in their stead, forcing those officers to choose between resignation, reprisal, or violations of the law. No system premised upon ethical conduct, should tolerate such a result. While DoD officials may have reasonably relied upon Section 948h for structuring the OMC and creating an evaluation and merit awards structure, they are bound to respect the enhanced protections in Section 949b. As Judge Allred found, it is extremely unlikely that the OMC can be structured like courts-martial without running afoul of 949b protections.⁶³

8. *Removing the Potential for Undue Influence*—The discussion above highlights the need to restructure the OMC to remove the potential for undue influence. While Judge Allred's opinion attempted to achieve this goal, the subsequent reprisals against Colonel Davis are likely to have a chilling effect on all trial counsel. This will raise serious questions about where the authority of the Convening Authority ends and where the authority of trial counsel, specifically the Chief Prosecutor, begins.

At trial these problems will be exacerbated by decisions regarding evidence. A prosecutor considering whether to offer evidence derived from coercion may fear of reprisal if they do not introduce it. Thus, despite Judge Allred's opinion, important questions remain, such as: may political appointees decide, directly or indirectly, what evidence should be offered at trial? If a JAG refuses to offer evidence derived from waterboarding, can officials direct the Chief Prosecutor to reassign counsel until he finds a JAG willing to offer such evidence? May those JAGs who refuse to offer such evidence be punished through withholding of service medals? The practice of the DoD to date suggests that there is nothing to prevent the Convening Authority or other officials from engaging in this conduct.

9. *Congress Must Bolster the Independence of the Trial Counsel*—Congress should provide statutory clarity regarding the role of the Chief Prosecutor and other trial counsel. Specifically, Congress should mandate that trial counsel not be evaluated by, nor have service medals or other career implicating decisions made by, officials with an interest in the outcome of trials. Furthermore, Congress should address whether decisions regarding charges, evidence to be used, the trial counsel assigned to specific cases, and specific trial tactics are decisions in the exclusive domain of the Chief Prosecutor or decisions that may be overridden by individuals outside the Office of the Chief Prosecutor. Further, Congress should consider the practice of international war crimes tribunals, all of which prominently feature protections mandating the independence of the prosecutor.⁶⁴ Such protec-

⁶³ Ruling on Motion to Dismiss (Unlawful Influence), *supra* note 48, at 10.

⁶⁴ Article 15 of the Statute of the Special Court for Sierra Leone, signed by the U.N. and the government of Sierra Leone, states that "[t]he Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek or receive instructions from any Government or from any other

tions are helpful guidance for Congressional reformers.

B. *Unsupervised Delegation and Lack of Oversight*

The issues discussed above raise serious questions regarding the ability of the executive branch to implement reform. Oversight and inquiries offer one method for resolving this dispute.⁶⁵ However, the structural problems were largely attributable to the Congress's unsupervised delegation of authority which allowed the DoD to create an appointee driven structure, and even to create positions not mentioned in the MCA. For example, the position of the Legal Advisor was created not by statute, but by regulations created by the DoD. This led the DoD to the circular conclusion that its action was authorized because the regulations they promulgated authorized such action.⁶⁶ This argument conflates the authority to implement regulations with the requirement that those regulations be consistent with the intent of the MCA.⁶⁷

Debating the propriety of the nondelegation doctrine is beyond the scope of this Essay; however, discussing congressional reliance upon broad delegations is a worthy point of discussion for military commission reformers. Professor Neal Katyal, for example, has identified a clear trend toward legislative acquiescence in matters of national security. He proposes a bureaucratic system of internal checks, in part premised upon public administration principles.⁶⁸ To reform military commissions, however, Congress need not go so far.

The authority to make rules regarding military trials originates with the legislative branch, but Congress frequently delegates its authority. Normally, Congressional delegations are subjected to the Administrative Procedures Act (APA) which provides a mechanism for executive

source." Statute of the Special Court for Sierra Leone, U.N.-Sierra Leone, art. 15, Jan. 16, 2002, *available at* <http://www.sc-sl.org/Documents/scsl-statute.html> (link).

The Khmer Rouge tribunal features similar language, stating: "The Co-Prosecutors shall be independent in the performance of their functions and shall not accept or seek instructions from any government or any other source." Law on the Establishment of Extraordinary Chambers, art. 19, NS/RKM/1004/006, Oct. 27, 2004, *available at* <http://www.cambodia.gov.kh/krt/pdfs/KR%20Law%20as%20amended%2027%20Oct%202004%20Eng.pdf> (link).

⁶⁵ See Letter from Barry M. Kamins, *supra* note 23.

⁶⁶ See Memorandum from Brig. Gen. Clyde J. Tate, II to DOD General Counsel, Sept. 17, 2007, *available at* <http://www.defenselink.mil/news/Sep2007/Role%20of%20Legal%20Advisor%20to%20OMC.pdf> (link).

⁶⁷ Cf. *United States v. Swift*, 53 M.J. 439, 451 (C.A.A.F. 2000) (declining to interpret a rule for courts-martial in a manner which would place it in conflict with statutory provisions of the U.C.M.J.); *United States v. Lopez*, 35 MJ 35, 39 (CMA 1992) (discussing the military justice system's "hierarchical sources of rights," under which federal statutes prevail over provisions of the Manual for Courts-Martial").

⁶⁸ Neal Kumar Katyal, *Internal Separation of Powers: Checking Today's Most Dangerous Branch from Within*, 115 YALE L.J. 2314, 2318 (2006) (link).

implementation of legislative mandates by ensuring due consideration of the views of informed interest groups. However, military commissions and courts-martial are exempted from the APA.⁶⁹ Nonetheless, the DoD has recognized that public involvement in the rulemaking process for courts-martial allows for more robust procedures, greater protection of rights, and an organizational structure less subject to legal challenge.⁷⁰ Congress should mandate that the DoD follow procedures for military commissions at least as protective as those for promulgating rules in courts-martial.

However, Congress can go further. After the PMO military commissions were established, Representative Joseph M. Hoeffel proposed H.R. 248 which provided extensive procedures for review of military commission rules, but did not refer to conventional rule-making.⁷¹ Another proposal which Congress may want to revisit is subjecting the procedures to the Rules Enabling Act, under which “rules only come to Congress after they have been vetted in the quite open process of the Judicial Conference of the United States committee system and review by the Justices of the Supreme Court.”⁷²

Ideally, Congress should exercise its Constitutional authority over rules governing the military and write all of the rules governing commissions or subject the entire rulemaking process to public comment. In the absence of either policy choice, Congress should exercise greater oversight regarding the implementing regulations and rules by which the DoD has structured the OMC. Congress should pay particular attention to the roles, responsibilities, and supervisory authority of the Convening Authority, the Legal Advisor to the Convening Authority, and the Office of the General Counsel.

II. BEYOND MILITARY COMMISSIONS: OBSTACLES FACING TRANSITION TO A NATIONAL SECURITY COURT

Recently, the academic and policy debate has begun to move towards the establishment of a national security court. Both Presidential candidates have indicated interest in closing Guantánamo Bay and moving away from military commissions. Senator Barack Obama declared, “I will also reject a legal framework that does not work. . . . I have faith in America’s courts, and I have faith in our JAGs. As President, I will close Guantánamo, reject the Military Commissions Act, and adhere to the Geneva Conventions.”⁷³

⁶⁹ See 5 U.S.C. § 551(1)(f) (2008) (link).

⁷⁰ See Fidell *supra* note 23 (discussing how the Department of Defense subjects revisions to the Manual for Courts-Martial to public comment through a predictable procedure and how a similar procedure could improve military commissions).

⁷¹ *Id.* at 387.

⁷² *Id.*

⁷³ Statement of Senator Barack Obama, *The War We Need to Win*, The Woodrow Wilson Int’l Ctr. for Scholars, Aug. 1, 2006, available at <http://www.americanrhetoric.com/speeches/barackobamawilsoncenter.htm> (link).

Senator McCain has declared that he would close Guantánamo⁷⁴ while still using military commissions for trials.⁷⁵

Given these prominent positions, the academic and policy debate has begun to evolve.⁷⁶ Professors Neal Katyal and Jack Goldsmith proposed a National Security Court,⁷⁷ and Professor Amos Guiora did the same.⁷⁸ Andrew McCarthy identified why the current systems are inadequate.⁷⁹ Central to his analysis is the need to conduct interrogations and gather intelligence to prevent terrorist attacks, and the concomitant need to protect such information from unnecessary disclosure through the court system.⁸⁰

Ben Wittes of the Brookings Institution set forth a detailed reform proposal.⁸¹ He cites to multiple examples, ranging from the 1993 World Trade Center Bombing trial to the trial of Jose Padilla, noting that these were perceived successes with serious underlying flaws. Wittes suggests comprehensive reform centered on increased detention standards and a “trial regime that gives detainees enough process to satisfy the commands of the Constitution and garner international tolerance, if not quite admiration, yet at the same time facilitates the maximum number of criminal trials.”⁸²

Importantly, Wittes and other reformers recognize the need for protection of intelligence and generally set forth potential mechanisms for protecting information in a national security court. Similarly, Professor Guiora

⁷⁴ Interview of Senator John McCain, *I Have a Long Record of Working Together with Our Allies*, SPIEGEL ONLINE INT’L, Feb. 11, 2008, <http://www.spiegel.de/international/world/0,1518,534459,00.html> (link).

⁷⁵ Carol Rosenberg, *Clinton would seek to try 9/11 plotters in established Courts*, MCCLATCHY CO., Feb. 17, 2008, <http://www.mcclatchydc.com/homepage/story/27935.html> (link).

⁷⁶ See, e.g., Posting of Deborah N. Pearlstein to Convictions: Slate’s Blog on Legal Issues, <http://www.slate.com/blogs/blogs/convictions/archive/2008/06/02/a-summer-of-security-detention.aspx> (June 2, 2008, 15:25 EST) (link).

⁷⁷ Jack Goldsmith & Neal Katyal, *The Terrorists’ Court*, N.Y. TIMES, July 11, 2007, at A19, available at <http://www.nytimes.com/2007/07/11/opinion/11katyal.html?ex=1341806400&en=05af7338d0f0eb92&ei=5124&partner=permalink&exp=permalink> (link).

⁷⁸ Amos N. Guiora, *Quirin to Hamdan: Creating a Hybrid Paradigm for the Detention of Terrorists*, 19 FLA. J. INT’L L. 2 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=938202 (link).

⁷⁹ Andrew C. McCarthy & Alykhan Velshi, *We Need a National Security Court* (unpublished White Paper submitted to American Enterprise Institute), available at http://www.defenddemocracy.org/research_topics/research_topics_show.htm?doc_id=510024 (link).

⁸⁰ *Id.* at 10–11.

⁸¹ Gregory S. McNeal, *Please the Courts*, WKLY. STANDARD, Aug. 11, 2008, at 44–46 (reviewing BENJAMIN WITTES, LAW AND THE LONG WAR (2008)), available at <http://www.weeklystandard.com/Content/Public/Articles/000/000/015/381wksjs.asp> (link).

⁸² *Id.* (quoting BENJAMIN WITTES, LAW AND THE LONG WAR (2008)).

proposes a system for terrorism trials which he terms a “domestic terror court” that would protect intelligence.⁸³

Despite the robust nature of these proposals, obstacles exist which will prevent a transition to any of these systems. While these solutions may work for new terrorism suspects, the proposals do not readily resolve the challenge posed by the current detainees, especially the eighty who have been identified as candidates for trial by military commission.⁸⁴ If Congressional reformers decide to establish a new system, be it a national security court or abolishment of the military commissions, they will face significant obstacles during the transition period.

A. *Intelligence Protection Challenge and the Nonprosecution Paradox*

The current military commission system was almost entirely designed by the executive branch to meet executive concerns. The Bush Administration touted the Commissions as a central element of its counterterrorism policy.⁸⁵ To date, administration officials have identified eighty detainees they intend to subject to trial by military commission.⁸⁶ However, in the seven years since the September 11th attacks there have been no trials, one conviction by plea agreement, and only nineteen individuals charged.⁸⁷ If military commissions are truly the centerpiece of the administrations’ counterterrorism policy, what accounts for the fact that only a handful of individuals have been charged? The President’s failure to bring charges is what I term the “nonprosecution paradox,” and I contend it stems from the challenge of protecting intelligence. Proposed reforms must address this intelligence protection concern and can only endure if they provide benefits that meet or exceed those of the current system.⁸⁸ If reformers fail to garner executive support, the nonprosecution paradox will persist, and detainees will

⁸³ See generally *Improving Detainee Policy: Handling Terrorism Detainees within the American Justice System, Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2008) (testimony of Amos Guiora), available at http://judiciary.senate.gov/testimony.cfm?id=3390&wit_id=7212 (link).

⁸⁴ Press Release, Dept. of Def., *Military Commission Charges Referred* (Jan. 31, 2008), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=11655> (“Of the 275 detainees at Guantanamo, approximately 80 are expected to face trial by military commission.”) (link); see also Bill Dedman, *In limbo: Cases Are Few Against Gitmo Detainees*, MSNBC, Oct. 24, 2006, <http://www.msnbc.msn.com/id/15361740> (link).

⁸⁵ See, e.g., Press Release, White House, *President Bush Signs Military Commissions Act of 2006*, (Oct. 17, 2006), available at <http://www.whitehouse.gov/news/releases/2006/10/20061017-1.html> (President Bush stated that “[the] military commissions are lawful, they are fair, and they are necessary”) (link).

⁸⁶ See Press Release, Dept. of Def., *supra* note 84.

⁸⁷ See Carol J. Williams, *Guantánamo Detainee to be Charged with War Crimes*, L.A. TIMES, June 4, 2008, at A9, available at <http://articles.latimes.com/2008/jun/04/nation/na-gitmo4> (link).

⁸⁸ The advantage of the current system is detention without trial, and the option of selecting four forums for trial: Military Commissions, Courts Martial, Article III courts, and deportation with trial abroad.

wallow without charge or will be spirited off to secret sites for unaccountable detention.

The administration argues that legal challenges to the original system delayed the charging process. However, a close analysis reveals that the President was dilatory in bringing charges against the detainees even prior to legal challenges. In fact, the President waited over two and a half years to charge the first detainees⁸⁹ in a system he created himself! Even after finally preparing charges he only charged ten detainees—a fraction of the total population, which at the time numbered more than six-hundred.⁹⁰ After the passage of the MCA the President had an opportunity to again charge a large number of detainees, but again did not bring detainees to trial.

As Part I of this Essay makes clear, the executive branch exercised a great deal of control over the development of the military commissions, exclusively writing the rules by which the trials would be conducted, without outside input, oversight, or comment. There's little doubt that the President could have swiftly charged all eighty triable detainees and publicly showcased their alleged terrorist acts. Logic would suggest that convicting high level detainees would go a long way toward justifying the propriety of the President's actions with regard to those detainees. The fact that the executive branch did not act swiftly when it seemed so in its favor to do so suggests that structural issues prevented it from acting.

I contend that intelligence protection largely accounts for the lack of trials. This contention is supported by the fact that executive branch concerns regarding intelligence protection in military commissions have been codified in law, yet the nonprosecution paradox persists.⁹¹ Furthermore, I argue that the paradox will endure in any new system that allows for detention in lieu of trial because such an option affords greater protection of intelligence sources and methods.

B. Transition Obstacles Created by the Nonprosecution Paradox and Intelligence Protection Challenges

Protecting intelligence is a key feature of nearly all transnational counterterrorism prosecutions. Further, as my summary indicates, the executive branch did not swiftly bring alleged terrorists to trial despite the clear political benefit such trials would bring for the President. Reformers must remain cognizant of this nonprosecution paradox and recognize its underlying causes in order to overcome this obstacle to transition.

While national security court proponents recognize the need for a system that protects intelligence information, reformers are apt to focus pros-

⁸⁹ See U.S. Dept. of Defense Home Page, Military Commission Charge Sheets, http://www.defenselink.mil/news/Nov2004/charge_sheets.html (link).

⁹⁰ Press Release, U.S. Dept. of Def., Transfer of Afghani and Pakistani Detainees Complete (Mar. 15, 2004), available at <http://www.defenselink.mil/releases/release.aspx?releaseid=7133> (link).

⁹¹ 10 U.S.C. § 949 (2006) (discussing procedures and methods of intelligence protection).

pectively. Forward looking reforms are appropriate; however, these proposed reforms fail to address the retrospective and transitional challenges presented by the eighty triable detainees. These transition problems are (1) challenges posed by speedy trial rights, security clearances, and secured facilities, (2) intelligence gathering methods and use authorities, and (3) the phenomenon of executive forum-discretion.

1. Speedy Trial Rights, Security Clearances, and Secured Facilities—Both candidates for President have supported transferring all Guantánamo detainees to the United States. If solutions to the controversy surrounding Guantánamo and military commissions were this simple, the nonprosecution paradox and intelligence protection problem detailed above would not be an issue. However, because the DoD has repeatedly identified a group of eighty whom they intend to hold in preventive detention, they have created a sui generis class of detainees who upon transfer to the United States will have a colorable claim for speedy trial rights. Such claims have immediate implications for the preparedness of the federal court system or even a national security court to handle an influx of cases. One senior Department of Justice, National Security Division official recently told me that “[w]e would lose all of those cases, not because of a lack of evidence or an inability to prove the case; we simply do not have enough security-cleared prosecutors for that many cases. I’d lose them all on speedy trial grounds.”⁹²

If a court extends speedy trial rights to detainees, four factors will determine whether the right to a speedy trial has been denied: “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.”⁹³ None of these factors is a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. But, in the case of the eighty triable detainees, nearly all of these factors, augur in favor of a colorable claim to denial of speedy trial rights.

Thus, the specter of the eighty triable detainees invoking speedy trial rights, along with the fact that these cases involve sensitive intelligence information, makes it likely that no President will be able to transfer that class of detainees to the United States for immediate trials until Congress prepares the federal judiciary. Congress must allocate resources to ensure there are sufficient security cleared personnel and secure facilities prior to implementing any reform proposal.

Unfortunately for any new system, terrorism trials require a lot of resources. A necessary component of any system to replace military commissions is security cleared personnel and secure facilities which protect intelligence. Even in military commissions, prosecutors have frequently been unable to convince other agencies to allow the use of intelligence in-

⁹² Interview with a senior Dept. of Justice, Nat’l Sec. Div. official in Cleveland Ohio (Jul. 13, 2007).

⁹³ *Barker v. Wingo*, 407 U.S. 514, 530 (1972) (link).

formation in military commissions.⁹⁴ This inability occurs despite the fact that military commission personnel are required to obtain Top Secret/SCI clearances, a clearance that exceeds the Secret clearance held by the average member of the military.⁹⁵ Thus, despite this high clearance, attorneys were unable to obtain the necessary use authority for intelligence information, or they were able to obtain use authority only for closed proceedings that lack the perception of legitimacy of open proceedings. If military commissions' prosecutors cannot successfully convince other government agencies to clear information for use before the current military commissions, the prospects for a transition to a reformed system are dim without specific and detailed reforms. Thus, so long as the options of detention without trial, or trial in closed session exist, those options will always trump open sessions.

The experience of the Department of Justice in Article III terrorism trials also suggests obstacles for a transition to national security courts. While a recent Human Rights First report concluded that "the criminal justice system is reasonably well-equipped to handle most international terrorism cases,"⁹⁶ the report analyzed cases individually so its conclusions are not generalizable to a scenario involving an influx of eighty detainees. Moreover, two similar reports issued by the Federal Judicial Center admit that terrorism cases present unique security challenges for the federal courts.⁹⁷ Recurring issues identified in the reports were a lack of security clearances for defense counsel impairing attorney-client communication, a lack of clearances for court staff, significant delays processing clearances, and a lack of secure facilities for reviewing classified evidence—all challenges which resulted in varied solutions which may not be duplicable across federal courts.

Article III courts, while capable of individually resolving problems posed by terrorism cases, do so on a case-by-case basis yielding different rights depending on what district the case is in. Federal districts have varied resources and facilities, which creates a disparity amongst the courts regarding how they handle intelligence information. For example, the reports show while some courts have a Sensitive Compartmented Information Facility (SCIF) for review of classified evidence, others lack a SCIF. In

⁹⁴ Telephone interview with a current military commission attorney (Mar. 17, 2008).

⁹⁵ *Id.*

⁹⁶ RICHARD B. ZABEL & JAMES J. BENJAMIN JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS 2 (2008) (white paper for Human Rights First), available at <http://www.humanrightsfirst.info/pdf/080521-USLS-pursuit-justice.pdf> (link).

⁹⁷ ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., TERRORISM-RELATED CASES: SPECIAL CASE MANAGEMENT CHALLENGES—CASE STUDIES (2008) [hereinafter FJC CASE STUDIES], available at [http://www.fjc.gov/public/pdf.nsf/lookup/ts080326.pdf/\\$file/ts080326.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ts080326.pdf/$file/ts080326.pdf) (link); ROBERT TIMOTHY REAGAN, FED. JUDICIAL CTR., TERRORISM-RELATED CASES: SPECIAL CASE MANAGEMENT CHALLENGES—PROBLEMS AND SOLUTIONS 2008 [hereinafter FJC PROBLEMS AND SOLUTIONS], available at [http://www.fjc.gov/public/pdf.nsf/lookup/tsps0007.pdf/\\$file/tsps0007.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/tsps0007.pdf/$file/tsps0007.pdf) (link).

one case, this lack of resources required the storage of documents in another district court.⁹⁸ In another case, the judge traveled to CIA headquarters to review relevant documents.⁹⁹ One case even involved a U.S. Attorney *instructing a judge* not to proceed when his questioning might reveal secret evidence!¹⁰⁰

These examples highlight the challenges courts face when handling the intelligence information found in most terrorism cases. For military commissions, the challenge was securing permission to use classified information. In federal courts, each district possesses a tenuous ability to handle terrorism cases on a small scale, but a massive influx of terrorism cases might overwhelm this ability. Before reformers can move detainees into the federal court system, Congress must allocate funding and prioritize a system for creating security cleared personnel and facilities. If reformers create a national security court, the challenge of noncooperative agencies and the administrative challenges of federal courts would be consolidated in one jurisdiction,¹⁰¹ but these problems would still need to be addressed. In transition, intelligence agencies may refuse to release the information required to successfully prosecute the eighty triable detainees.

2. *Foreign Evidence and Coerced Testimony*—Two evidentiary challenges also face reformers who seek to transition away from military commissions. These challenges are use exceptions placed on intelligence information provided by foreign governments, and the desire of intelligence agencies to keep secret their intelligence gathering techniques, particularly those which relate to coercive interrogations.

a. Foreign evidence

Intelligence agencies seek to control the dissemination of information that they have collected through classification and use procedures. When an intelligence agency shares information with an allied power it often does so by placing requirements on how the recipient will protect and use that information.¹⁰² The most appropriate method that exists for sharing information is the concept of originator controlled information. This method ensures that intelligence labeled as such “cannot be used or disseminated without the consent of the originator.”¹⁰³

This approach requires time consuming negotiations in order to gain the information.¹⁰⁴ For national security courts a problem arises when re-

⁹⁸ FJC PROBLEMS AND SOLUTIONS, *supra* note 97, at 7–8.

⁹⁹ *Id.* at 13–14.

¹⁰⁰ *Id.* at 11.

¹⁰¹ Consolidation in one location presents a separate fairness challenge for geographically distant defendants.

¹⁰² Jeff A. Breinholt, Counterterrorism Cooperation and the Silver Bullet: A Game Theory Illustration 3 (June 7, 2006) (unpublished manuscript), *available at* <http://ssrn.com/abstract=907342> (link).

¹⁰³ *Id.* at 12.

¹⁰⁴ *Id.* at 15.

stricted foreign evidence shared by an allied power for use in detention of suspected terrorists or intelligence that was shared for use in military commissions was shared conditionally. Allied nations may refuse to allow U.S. officials to use such evidence in any other forum such as courts-martial, federal courts, or a national security court. This phenomenon of originator controlled information presents a significant yet unaddressed obstacle which may prevent a transition to a system other than military commissions. Unless a reform system has protections at least as robust as military commissions that convinces allies their information is secure, some defendants may be beyond prosecution.

b. Coerced evidence

Evidence derived from coercion also presents a challenge for reformers. Many organizations have argued that techniques such as “waterboarding” are torture *per se* and should result in criminal prosecutions for those responsible.¹⁰⁵ Many released detainees or counsel for those currently held have described even more serious forms of coercive interrogation practices.¹⁰⁶ As the trials of detainees are likely to reveal further details regarding the nature of the interrogation practices, many government officials have a strong interest in preventing the dissemination of or declassification of information revealing those practices.

A second factor compelling those officials to resist declassification is possible evidence of detention in secret CIA facilities prior to a detainee’s incarceration in Guantánamo.¹⁰⁷ Civil rights groups have alleged that many detainees were subjected to illegal interrogation practices while in those prisons.¹⁰⁸ Given the problem of illegal interrogation practices, some argue that the only realistic course of action is to craft restrictive plea agreements. For example, Australian citizen David Hicks pleaded guilty to the charge of providing material support to terrorism. The terms of his plea preclude him from discussing his detention with the media for a period of one year after making the agreement.¹⁰⁹ This type of plea agreement, critics argue, is the

¹⁰⁵ See, e.g., Press Release, Amnesty Int’l, Amnesty Int’l Calls for Criminal Investigation Following CIA “Waterboarding” Admission (Feb. 6, 2008), available at <http://www.amnesty.org/en/for-media/press-releases/usa-amnesty-international-calls-criminal-investigation-following-cia-%E2%80%98wa> (link).

¹⁰⁶ Brent Mickum, *Guantánamo’s Lost Souls*, GUARDIAN.CO.UK, Jan. 8, 2007, http://commentisfree.guardian.co.uk/brent_mickum/2007/01/post_885.html (link).

¹⁰⁷ David Johnston, *C.I.A. Tells of Bush’s Directive on the Handling of Detainees*, N.Y. TIMES., Nov. 15, 2006, at A14, available at <http://www.nytimes.com/2006/11/15/washington/15intel.html?ref=washington> (link).

¹⁰⁸ See, e.g., AMNESTY INT’L, U.S. / YEMEN: SECRET DETENTION IN CIA “BLACK SITES” (2005), available at <http://www.amnesty.org/en/library/info/AMR51/177/2005> (link).

¹⁰⁹ The Australian posted what it claims is the full transcript of David Hicks’s plea agreement on its website. Section 2(b) of the purported agreement explicitly prohibits Hicks from “communicat[ing] with the media in any way regarding the illegal conduct alleged in the charge and the specifications or about the circumstances surrounding my capture and detention as an unlawful enemy combatant for a period of one (1) year.” *Hicks’s Pre-Trial Agreement (Full Transcript)*, AUSTRALIAN, March 26, 2007,

only possible course for an administration that wants action but is handicapped by the inadmissibility of statements obtained under coercion or fear of the potential of criminal liability.¹¹⁰

The challenges presented by foreign evidence and coerced evidence both suggest that reformers should temper their optimism regarding a clean reform of either the military commissions or indefinite detentions. The solution to both problems may require the continued use of military commissions, at least for the current eighty triable detainees, and may even suggest a need to maintain a system of administrative detention for selected individuals¹¹¹—a conclusion that presents substantial impediments to comprehensive reform.

3. *Executive Forum-Discretion*—Any reform which allows for adjudication of guilt in different forums, each with differing procedural protections, raises serious questions of legitimacy and also incentivizes the Executive to use “lesser” forms of justice—nonprosecution or prosecutions by military commission. In this section, my focus is on the incentives which compel the Executive to not prosecute, or to prosecute in military commissions rather than Article III courts. Understanding the reason for these discretionary decisions will guide reformers pondering whether a new system will actually be used by the next President.

There are two primary concerns that executive actors face when selecting a forum: protecting intelligence and ensuring trial outcomes. Executive forum-discretion is a different form of prosecutorial discretion with a different balancing inquiry from the one engaged in by courts. Where prosecutorial discretion largely deals with the charges a defendant will face, executive forum-discretion impacts the procedural protections a defendant can expect at both the pretrial and trial phase. Where balancing by Courts largely focuses on ensuring a just outcome which protects rights, the balancing engaged in by executive actors has inwardly directed objectives

<http://www.theaustralian.news.com.au/story/0,20876,21486066-17281,00.html> (link); see also Agence France-Presse, *Terror Detainee Back in Australia*, N.Y. TIMES, May, 2007, § 1, at 8, available at <http://www.nytimes.com/2007/05/20/world/asia/20hicks.html> (link).

¹¹⁰ Press Release, Human Rights First, Hicks Plea Illustrates Problems with Military Commissions (Mar. 30, 2007), available at <http://www.humanrightsfirst.org/media/usls/2007/statement/247/index.htm> (link).

¹¹¹ See Posting of Benjamin Wittes to Opinio Juris, *Thoughts on Detention*, <http://opiniojuris.org/2008/07/30/thoughts-on-detention/> (Jul. 30, 2008, 15:05 EST) (advocating for “the detention of someone who is (1) operating on behalf of and subject to the direction of any group against which Congress has authorized the use of force, (2) who is engaged in, planning, or intentionally contributing to activity that poses a danger to the United States, and (3) against whom a criminal trial is impracticable at this time”) (link); Posting of Benjamin Wittes to Opinio Juris, *Al-Marwallah and Standards for Detention*, <http://opiniojuris.org/2008/07/31/al-marwallah-and-standards-for-detention/> (Jul. 31, 2008 17:31 EST) (further elaborating on his proposed detention standards) (link). *But see* Posting of Marty Lederman to Opinio Juris, <http://opiniojuris.org/2008/07/31/the-al-marwalah-detention-rubicon-dont-cross-it/> (Jul. 31, 2008, 16:07 EST) (arguing that dangerousness alone is not enough to justify indefinite administrative detention) (link).

which value rights only to the degree they impact the Executive's self interest.

Given the unique implications flowing from forum determinations, reformers can benefit from understanding why an executive actor chooses one trial forum over another. I contend that there are seven predictive factors that influence executive discretion; national security court reformers should be aware of at least the two most salient predictive factors: trial outcomes and protection of intelligence equities.¹¹² The Executive's balancing of factors yields outcomes with direct implications for fundamental notions of due process and substantial justice. Any proposed reform is incomplete without thoroughly addressing the factors that the Executive balances.

For more than forty years judges, lawyers and scholars have become accustomed to the concept of judicial balancing. Courts however, are not the only constitutional actors engaged in such balancing. Executive actors similarly engage in balancing. In the counterterrorism context, the rights implicated in the Executive's balancing consideration are paramount because decisions affect trial rights and thus life in the most direct sense. In this context, two of the Executive's most powerful constitutional duties are implicated, his responsibility to "take care that the laws be faithfully executed,"¹¹³ and with that, the responsibility to bring individuals to trial and subject them to potential punishment.

To understand my executive forum-discretion framework, it is necessary to understand several key assumptions. I begin by assuming that the Executive is a rational actor: that executive behavior based on rational ordering of policy preferences will result in deliberate and consistent conduct.¹¹⁴ This assumption highlights the importance of my analytical approach: if the Executive has ordered policy preferences that govern his choices, and his choices are expected to result in deliberate and consistent conduct, some factor must contribute to the Executive's decision to choose one trial forum over another for similarly situated defendants.

Where we observe alleged terrorists who could satisfy the jurisdictional predicate for military commissions who are instead tried in an Article III court, or vice versa, I theorize that a multitude of factors are balanced by the Executive and account for the differences in conduct. Thus, a thorough exposition of the Executive's potential policy preferences can provide predictive guidance regarding what the Executive considers when making

¹¹² The other factors, organized in ordinal fashion, are: internal bureaucratic politics, inter-branch conflicts, electoral politics, and diplomacy.

¹¹³ U.S. CONST. art. II, § 3.

¹¹⁴ See Thomas S. Ulen, *Rational Choice Theory in Law and Economics*, in 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 790, 791 (Boudwijn Bockaert & Gerrit De Geest eds., 1999), available at <http://encyclo.findlaw.com/0710book.pdf> (link).

decisions.¹¹⁵ Quite simply, this analytical approach leads me to the conclusion that, so long as a forum exists which better protects intelligence or allows for easier convictions, the Executive will choose that forum over any other.

I have categorized the factors that influence executive judgment in order of preference. Admittedly, I face two theoretical problems: first, that the post-September 11 counterterrorism playing field has been the sole purview of just one executive actor (George W. Bush) and, second, the current bimodal forum choice (Article III courts or military commissions). These problems are mitigated by my methodological approach: by focusing on the factors an executive actor must balance, my theory's predictive utility is actor-neutral (albeit the order in which each factor is placed is actor specific). Nonetheless, to reapply the analytical approach one need only take guidance from the new executive actor's stated policy preferences. From such observation a scholar or policy maker could rearrange a new Executive's ordinal preferences. Additionally, while I address the factors of trial outcomes and intelligence equities in this section, bear in mind that they form just two components of the Executive's overall policy preferences.

Consistent with the theme of this Essay, I theorize that protecting intelligence equities enjoys primary importance in the eyes of the Executive, and that trial outcomes are a close second. Since September 11, 2001, 1,562 individuals have been charged in Article III courts with terrorism-related offenses,¹¹⁶ while only a handful of individuals have been charged in military commissions. The number of detainees tried in Article III courts reveals that Article III courts are adequate in most cases. The system though, is under strain. A recent NPR report indicated that while the number of counterterrorism-related FISA warrants requested by the federal government has increased, the number of counterterrorism prosecutions has decreased.¹¹⁷ Reinforcing the intelligence protection principle discussed above, a former FBI official interviewed by NPR stated that once prosecutors indict a terrorism suspect, "you start rolling a public process that after a point you can no longer really control. It becomes very public what you knew about this person, and that avenue of gathering more information or creating new sources is kind of cut off."¹¹⁸ This fact, coupled with the continued use of Guantánamo suggests that the Executive perceives some value in the military

¹¹⁵ See *id.* (discussing the rational decisionmaker as one without "inexplicable swings in the objects of their choices" and rational choices as ones in which the means chosen to effectuate the desired ends are "reasonably well-suited to the attainment of those goals").

¹¹⁶ Trac Reports, Terrorism Enforcement: International, Domestic and Financial, available at <http://trac.syr.edu/tracreports/terrorism/177/#T1> (follow the "Table 1. Terrorism Prosecutions" link, then add the number of prosecutions in the "International Terrorism" and "Domestic Terrorism" columns, which total 1,562 prosecutions on terrorism-related charges) (link).

¹¹⁷ Ari Shapiro, *As Domestic Spying Rises, Some Prosecutions Drop*, NPR Morning Edition (July 11, 2008), available at <http://www.npr.org/templates/story/story.php?storyId=91968094> (link).

¹¹⁸ *Id.*

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commission system. Clearly, some specific factors must influence the Executive to prefer trial by military commission over trial in Article III court. Otherwise those cases would be brought in Article III courts as many others have. I argue that two benefits of military commissions explain this phenomenon.

First, military commissions provide a marginal intelligence protection benefit over Article III courts. The language of the MCA related to protecting intelligence is nearly identical to the procedures detailed in the U.C.M.J.¹¹⁹ Despite these similarities, military commissions provide the intelligence protection benefit of: security cleared counsel for the parties, security cleared panel members (jurors), security cleared administrative staff, and regimented procedures for reviewing all documents offered in pleadings or filed with the court. Perhaps most importantly, military commissions do not require as many disclosures as those required in Article III courts and allow for the admission of hearsay.¹²⁰ These procedures enable evidence to be admitted in a manner which protects intelligence (such as *ex parte* affidavits) and are also more likely to secure a conviction.

Consider the intelligence protection benefit of these procedures as compared to Article III courts. In the 1993 World Trade Center bombing case, a letter was revealed to the defense during discovery listing “200 names of people who might be alleged as unindicted co-conspirators.”¹²¹ Six years later, that letter turned up as evidence in the trial of those who bombed U.S. embassies in Africa. Within days “the letter had found its way to Sudan and was in the hands of bin Laden (who was on the list), having been fetched for him by an al-Qaeda operative who had gotten it from one of his associates.”¹²² Based on this information, bin Laden was able to determine which of his operatives had been compromised. Disclosures such as this, which are mandated in Article III courts, threaten the protection of intelligence, and also provide defendants with greater rights which may result in an acquittal. Protecting intelligence and securing convictions

¹¹⁹ See JENNIFER K. ELSEA, CONGRESSIONAL RESEARCH SERVICE REPORT FOR CONGRESS: THE MILITARY COMMISSIONS ACT OF 2006: ANALYSIS OF PROCEDURAL RULES AND COMPARISON WITH PREVIOUS DOD RULES AND THE UNIFORM CODE OF MILITARY JUSTICE 28–30 & 42 tbl.1 (2007) *available at* <http://www.fas.org/sgp/crs/natsec/RL33688.pdf> (discussing the treatment of “classified evidence” and providing a side by side comparison of the rules governing courts-martial and military commissions) (link).

¹²⁰ *Id.* at 27. “The MCA allows for the admission of hearsay evidence that would not be permitted under the Manual for Courts-Martial only if the proponent of the evidence notifies the adverse party sufficiently in advance of the intention to offer the evidence, as well as the ‘particulars of the evidence (including [unclassified] information on the general circumstances under which the evidence was obtained).’” *Id.* (quoting 10 U.S.C. § 949a(b)(3)) (alteration in original).

¹²¹ Posting of Andrew C. McCarthy to LibertyPost.org, <http://www.libertypost.org/cgi-bin/readart.cgi?ArtNum=45612%20> (Apr. 14, 2004, 23:34 EST) (proposing solutions to the “intelligence mess”) (link).

¹²² *Id.*

are considerations that weigh heavily on the mind of the Executive, who will seek to maximize both.

Congressional reformers must be aware of executive forum-discretion and limit the availability of alternative fora, especially in any transition to a national security court. Otherwise, the benefits of trial in military commissions will prove too alluring to the Executive, making any new forum underutilized.

CONCLUSION

Reformers must recognize that to continue trials by military commission reforms are necessary. First, the structure of the commissions must be modified to eliminate political influence. Second, military commissions require greater supervision in the promulgation and implementation of their rules.

If reformers decide to eliminate military commissions, they will face three obstacles. First, Congress must provide adequate resources to prepare for an influx of detainees to the federal courts or a national security court. Because of speedy trial challenges, these resources must be provided prior to the transfer of any detainees to the United States. Second, Congressional reformers must recognize that the transitional problem posed by the eighty triable detainees implicates the protection of foreign intelligence and intelligence collection methods. Both issues may force the Executive to avoid prosecution in a forum other than a military commission rather than risk revealing intelligence information, damaging transnational intelligence cooperation, or incurring sanctions from illegal interrogation methods. Finally, reformers must recognize that, so long as the Executive has the discretion to select which forum alleged terrorists will be tried in, and so long as one forum provides an intelligence protection or trial outcome benefit, the Executive will prefer that forum and the new forum will be underutilized.