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Military commissions are odd creatures in the legal bestiary, and their history is both long and unusual. When President George W. Bush brought them back into the discussions of polite and political society in his Military Order of November 16, 2001, questions blossomed. Would the commissions resemble modern courts-martial, which look a great deal like uniformed versions of federal criminal trials? Would they look more like the commissions of earlier days, which themselves mirrored the far more inquisitorial courts-martial of their time? Would they use secret procedures, or be fully open? What kind of evidence would they consider? Would the defendants be able to select their own counsel, or would the government limit counsel to assigned military officers? Would they try key leaders, or foot soldiers?

The answers to most of these questions were disappointing. In choice after choice, the administration of President Bush opted for courses that created doubt about U.S. behavior and motives, that distanced the nation from legal standards, and that generally squandered whatever opportunities had existed to use military commissions as a tool in the battle against an ideology that is destructive to world peace and development.

This view seemed to be shared, at some level, by the new administration that assumed office in January 2009. One of President Barack Obama’s first acts was the suspension of proceedings

\[1\] Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,831 (Nov. 16, 2001) [hereinafter Military Order].
in the ongoing military commissions, while announcing that he would spend time developing an answer to the question of what to do with those who had been designated as subject to them.\textsuperscript{2}

Although as of this date the final reforms to the procedural rules have not yet arrived, the Obama Administration has announced the broad outlines of the reforms that will come. In a terse announcement on May 15, 2009, the Obama Administration announced that it intended to continue the military commissions, although with significant changes to their procedures.\textsuperscript{3} The following week the president made a major speech concerning a variety of national security issues that included five distinct changes to the military commissions that he intended to accomplish through statutory amendment or executive order.\textsuperscript{4}

History attests to the possibilities for military commissions. The Trials of the Major War Criminals—the international military commissions of the surviving leadership of Nazi Germany conducted at Nuremberg after World War II—illustrate what might have been. A series of extraordinarily wise choices ensured that those military commissions, which might have become a source of renewed German hostility, became instead an enduring weapon in the reduction of National Socialist ideology. Had the Bush Administration followed the Nuremberg model, it is possible that military commissions could have served as a weapon against al Qaeda. Although in some important ways President Obama’s reforms move the United States Military Commissions closer to the Nuremberg model, in other areas the reforms leave the commissions no better than they were before the change of administrations. Further, even the improvements may fall into the significant categories of both too little and too late.

This paper will examine three of President Bush’s initial choices in particular, and suggest that the path not taken in each of them would have done much to make the commissions effective in the war of ideas. The first of these three, a commitment to openness, would have opened up the proceedings to the eyes of the world. In this way they could have taught a global audience about compliance with international law and the nature of al Qaeda. The second

\begin{footnotes}
\footnote{Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897 (Jan. 22, 2009) [hereinafter Closure Order].}

\footnote{Joseph Williams, Obama Keeps Tribunals, Draws Ire, BOSTON GLOBE, May 16, 2009, at 1.}

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option, a real commitment to coercion-free evidence might have deprived the commissions of some small amount of evidence, but would have offset this with an extraordinary increase in credibility. The last, a removal of unlawful belligerency offenses from the purview of the commissions, would have taken away many possible targets for prosecution. Far from reducing the commissions’ effectiveness, though, this step would ensure that those cases actually tried before the commissions would have merited the extraordinary remedy that such tribunals represent. Any of these three choices, made differently, would have made the commissions better. All three of the choices rejected might have elevated them to near-Nuremberg status, and the world might be a different place today.

This paper will also evaluate the ways in which the Obama Administration changes affect these areas. In short, the announced alterations will partially succeed at making the commissions more open, completely address the problem of coerced confessions, and give no evidence that the administration even considers the inclusion of unlawful belligerency to be a problem. Although it is still possible that this problem could be addressed through executive order or prosecutorial discretion, it may be that the opportunity for a bold statement in this area expired during the course of the president’s national security discussion of late May. Finally, the paper will close with one final idea that seems to be absent from the discussion but which might prove the last, best hope for military commissions: internationalization.

Barring further changes, then, the military commissions in the United States war against al Qaeda will continue to represent a good idea poorly executed. If this is correct, the lost opportunity of the military commissions does not result not from the argument of many critics that military commissions were a bad idea for the United States as a response to the attacks of September 11, 2001. The true tragedy is that they might have provided a chance for the world to embrace and strengthen international law, and an opportunity to remove substantial appeal from a dangerous and inhumane adversary.
I. A Time of Danger and Opportunity

Whatever may be true of Chinese characters, danger is sometimes accompanied by opportunity. That was certainly the case for the United States when dawn broke on September 12, 2001. The attack of the previous morning was unprecedented and terrible. And it continued: search efforts were underway at the site of the World Trade Center’s Twin Towers, and parts of the Pentagon continued to burn. The world reaction was largely sympathetic and supportive. There was a slight, and slightly discordant, sound of warning and rejection, but

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5 At least since the middle of the last century, western writers have maintained that the Chinese language linked these two rather disparate things: “John Fitzgerald Kennedy described how the Chinese use two characters to represent the word “crisis,” one character for danger and the other signifying opportunity.” Abigail Penzell, Apology in the Context of Wrongful Conviction: Why the System Should Say It's Sorry, 9 CARDOZO J. CONFLICT RESOL. 145, 161 (2007). For an earlier occurrence, see Frank E. Baker, Danger and Opportunity, 21 PEABODY J. OF EDUCATION 162 (Nov. 1943). Unfortunately, as is the case with so many good stories, it does not appear to be true. See Victor H. Mair, danger + opportunity ≠ crisis: How a misunderstanding about Chinese characters has led many astray, available at http://www.pinyin.info/chinese/crisis.html.

6 “None of us can pretend to know exactly how to deal with this newly disclosed threat of large-scale, sophisticated terrorism,” Anthony Lewis, A Different World, N.Y. Times, Sep. 12, 2001, at A 27.


8 Steve Vogel, Defiant Workers Return to Posts At the Pentagon Amid Fire, Death, a Need to Bear Witness, WASH. POST, Sep. 13, 2001, at A 15.


10 Early reports indicated that celebrations in support of the attacks had taken place in parts of Palestine; the sweep of support for the United States is visible in Yasir Arafat’s vigorous assertion that such demonstrations had consisted of “less than 10 children in East Jerusalem, and we punished them.” James Bennet, Arafat Angrily Insists Palestinians Didn’t Rejoice Over Terror Attack on U.S., N.Y. TIMES, Sep. 13, 2001, at A 18.
the expressions of togetherness with the United States over the next several months ranged from proclamations by French newspapers\textsuperscript{11} to gifts of Masai cattle.\textsuperscript{12}

The administration of President George W. Bush was faced with an immediate series of choices. Initially, President Bush’s choices proved to be quite successful. He demanded that the Taliban government of Afghanistan surrender the al Qaeda leadership responsible for the attack.\textsuperscript{13} They predictably rebuffed the request.\textsuperscript{14} The military action that followed, coupled with the considerable ground forces of the belligerency against the Taliban known as the Northern Alliance,\textsuperscript{15} quickly resulted in opposing forces falling into the custody of the United States.\textsuperscript{16} As the Taliban government appeared to dissolve, the President issued an order outlining his plan for dealing with them: detention under the authority of the Secretary of Defense, and possible trial before military commissions.\textsuperscript{17}

\textsuperscript{11} “We are all Americans,” ran the headline in a column in the French newspaper \textit{Le Monde}, Suzanne Daley, \textit{A Pause to Ponder Washington’s Tough Talk}, N.Y. TIMES, Sep. 16, 2001, at A 4.

\textsuperscript{12} The Masai village of Enoosaen, Kenya, gave fourteen head of cattle to the United States because, in the words of one donor, “we feel the same way we would feel if we lost one of our own.” Marc Lacey, \textit{Where 9/11 News is Late, but Aid is Swift}, N.Y. TIMES, Jun. 3, 2002, at A 1, A 6.


\textsuperscript{15} Fifteen thousand members of the belligerency known as the Northern Alliance conducted much of the early ground combat against the Taliban, see Michael R. Gordon, \textit{A Month in a Difficult Battlefield: Assessing U.S. War Strategy}, N.Y. TIMES, Nov. 8, 2001, at A 1.

\textsuperscript{16} Although people were originally held at facilities in Afghanistan, by the end of the year the Department of Defense had decided to bring many to the U.S. Naval Station at Guantanamo Bay, Cuba for detention. \textit{U.S. Targets 150 War Captives for Inquiries}, CHI. TRIB., Dec. 31, 2001, at 3.

\textsuperscript{17} Military Order, \textit{supra} note 1.
The history of military commissions is lengthy, and others have explained it thoroughly and well.\(^\text{18}\) The noteworthy fact about the Military Order of November 16, 2001, was that it left open most of the significant questions bound to arise from the resuscitation of this unusual forum. Their level of openness, the nature of the offenses and offenders they would try, and their similarity to modern courts-martial, were all questions unanswered by the President’s proclamation. Academics and commentators from all sides had to speculate on the answers until the President and Secretary of Defense began to announce them.

The choices actually made, this paper will argue, did far more harm than good. Part II will consider the government’s choices concerning publicity. Initially, the Bush Administration located the tribunals, as they had the detentions, in a narrow-strip of U.S.-controlled land on a hostile island. This built into the process a set of difficulties that inevitably served to reduce their visibility. Further decisions, intended to increase security, only served to decrease further the openness of the tribunals to the world. There is no evidence that the Administration ever took seriously the possible public relations function of trials by military commissions, a function that ironically had been paramount at Nuremberg.\(^\text{19}\) The resulting perception of secrecy proved to be a burden that the commissions probably could never have overcome, no matter what other choices had been made.

Other choices, though, made the problem worse. A series of early, and odious, policy decisions appeared to commit the United States to a startling embrace of torture. Although “torture” was repeatedly and roundly denounced by the leaders of the Bush Administration, simultaneous commitment to “enhanced interrogation techniques” coupled with a refusal to define the term, heightened suspicion that the government of the United States was behaving dishonorably with the persons under its control. Part III will briefly discuss this controversy. The significant moment of intersection between coercive interrogation and the military commissions’ story came in a legislative choice that seems both pointless and potentially disastrous. The congressional decision to comply with the Administration’s request to define


\(^{19}\) See *infra* notes 46 - 53 and accompanying text.
excludable evidence before the military commissions in a particularly narrow way tainted the proceedings by its presence, even should it never operate.

A final odd choice was the nature of offenses and offenders to be tried by the tribunals. Although in some regards the Bush military commissions were significantly narrower than their predecessors, in one way they greatly expanded the traditional jurisdiction of those tribunals. The determination to focus simultaneously on unlawful combatant offenses as well as traditional war crimes was unusual, and probably unwise. The further decision to seek to punish inchoate offenses connected to unlawful combatancy was, Part IV will argue, unprecedented. This choice represented an expansion of the law of war in a way that can only prove detrimental to the United States in the future. The predictable denial that this principle would affect the United States only solidified the notion that the U.S. now viewed itself as a nation above the laws. With the choice of those who would appear first before these commissions—a motley collection of a foreign hanger-on, a hard-luck driver, and a child soldier—the nation forfeited any remaining chance to have the commissions serve as a weapon in the ideological challenge that militants had posed dramatically on the morning of September 11th, 2001.

Calls came throughout the process for their termination. Many observers believed, in fact, that the election of Barack Obama spelled the end of the twenty-first century experiment with military commissions. Indeed, that was one not-illogical way to read the President’s order, delivered within forty-eight hours of taking office, halting the military commissions. Within


21 Some observers have argued that such a belief prompted the offer of a guilty plea from Khalid Sheikh Mohammed, see William Glaberson, 5 Charged in 9/11 Attacks Seek to Plead Guilty, N.Y. TIMES, Dec. 9, 2008, at A 1.

22 Closure Order, supra note 2. As Commander-in-Chief of the Army and Navy, the President could have simply eliminated any ongoing proceedings. As a technical matter he did not, merely ordering the Secretary of Defense to “take steps sufficient to ensure” that no new charges be sworn or referred for trial, and that proceedings be halted. This choice of words caused a small dust-up when the government counsel in the trial of Abd al-Rahim
five months of taking office, however, President Obama reasserted the United States’ position that it would use military commissions for at least some of the detained persons.\textsuperscript{23} Calling them “an appropriate venue for trying detainees for violations of the laws of war,” President Obama particularly cited their ability to protect both classified information and the physical safety of the participants, as well as their capacity for the “presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.”\textsuperscript{24}

The President made clear that he did not simply intend to continue the status quo, however. Instead, he announced broad areas where he believed reform was needed to bring the military commissions into compliance with domestic and international law.\textsuperscript{25} Among these were to be a prohibition on evidence derived from cruel, inhuman, or degrading techniques, an alteration in the hearsay burden of persuasion, and increased counsel choices for those on trial.\textsuperscript{26} Whether these reforms will be enough to save the military commissions remains to be seen.

\section*{II. Openness}

Seldom noticed at the time of the issuance of the Military Order in November 2001, was the fact that there were two competing models for the conduct of military commissions. Both arose in the context of World War II, and both were Allied responses to Nazi practices. Each type was logical in its own context, but neither style of military commission would have served at all well if applied to the other circumstances.

\begin{flushright}
l-\textsuperscript{Nashiri dutifully asked for a suspension in the proceedings until May on the basis of the order, but the military judge denied it, Carol J. Williams, \textit{Judge Spurns Obama}, CHI. TRIB. Jan. 30, 2009, at 13. The impasse came to an end one week later when Appointing Authority Susan Crawford simply withdrew the pending charges against al-Nashiri, \textit{Pentagon Drops Charges in Cole Case}, N.Y. Times, Feb. 6, 2009, at A 15.


\textsuperscript{24} \textit{Id.}

\textsuperscript{25} \textit{Id.}

\textsuperscript{26} \textit{Id.}
\end{flushright}
In the earlier case, a group of Nazi saboteurs came ashore on the East Coast in 1942, with the hope of conducting a series of disruptive terrorist activities to hinder the U.S. war effort.\textsuperscript{27} The military commission convened to try them, approved by the U.S. Supreme Court under the name \textit{Ex parte Quirin},\textsuperscript{28} is now far better known than it was a decade ago. Not so long ago a resident of the Museum of Constitutional Oddities, today \textit{Quirin} is a subject of legal treatises,\textsuperscript{29} historical studies,\textsuperscript{30} and even editorial comments.\textsuperscript{31} One of the well-known aspects of the trial is that it was secret.\textsuperscript{32} The government conducted proceedings in a secured area of the Department of Justice,\textsuperscript{33} public knowledge of the military commissions was held to a minimum,\textsuperscript{34} and the witnesses were sworn to secrecy.\textsuperscript{35}

\textsuperscript{27} The operation was code named Pastorius, the name of the seventeenth-century German who led the first settlement of the American colonies from his nation, \textit{EUGENE RACHLIS, THEY CAME TO KILL}, 21 (1961).

\textsuperscript{28} 317 U.S. 1 (1942).


\textsuperscript{31} See, e.g., Anthony Lewis, \textit{Right and Wrong}, N.Y. TIMES, A 27 (Nov. 24, 2001); Michael Billok, \textit{Padilla, Quirin and Detention: Let the Commander-in-Chief Command}, WASH. TIMES A 19 (Mar. 4, 2005).

\textsuperscript{32} O’DONNELL, \textit{supra} note 30, at 121.

\textsuperscript{33} The government established barriers within a section of the fifth floor of the Justice Department, and conducted the trial in an assembly room otherwise used for Federal Bureau of Investigation training, \textit{RACHLIS, supra} note 27, at 182-3.

\textsuperscript{34} A conflict took place early between Henry Stimson, the Secretary of War, and Elmer Davis, recently appointed head of the Office of War Information, about the extent to which the trials would be made public, \textit{id.} at 177. Stimson won, of course, and the government kept reporters in a nearby press room where all that they could see was the witnesses entering and leaving the trial room, \textit{id.} at 184.

\textsuperscript{35} The government did not declassify the trial transcript itself until 1960, \textit{id.} at 185.
The reasons offered in recent studies for that secrecy have included some that are deeply cynical about the motives of the administration. Frequently commentators focus on the fact that the saboteurs fell into U.S. hands not because the Federal Bureau of Investigation did the remarkable job it freely took credit for, but because two members of the group turned them in to U.S. authorities for reasons that remain in dispute. Even allowing for the bureau’s possible wishes for aggrandizement, a legitimate reason for secrecy presents itself upon consideration of these facts. In the summer of 1942, after all, the war in Europe still continued with a fierce intensity. Rommel’s Africa Korps had pushed the British back into Egypt, Stalingrad had yet to see its pivotal battle, and the Normandy landings were still almost two years away. Should

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36 See, e.g., O’DONNELL, supra note 30, at 350 (“In truth, no sensitive information about law enforcement investigative techniques, military operations, or intelligence-gathering methods was disclosed in the closed military proceedings.”)

37 The United States awarded a medal to J. Edgar Hoover to honor him for capturing the saboteurs, id. at 246.

38 RACHLIS, supra note 27, at 139.

39 George Dasch may have decided to betray the sabotage operation because he was a “vacillating opportunist,” id. at 301, who expected that the United States would generously reward him. His colleague in the betrayal, Peter Burger, a long-time Nazi briefly imprisoned by the Gestapo after the fall of Ernst Roehm, claimed at his military commission trial that at the time of his imprisonment he had made up his mind to “get out and get even,” O’DONNELL, supra note 30, at 186. Partly because Burger seems to have cooperated in the authorship of an article in the German magazine Der Stern, and that article’s resultant hostile focus on Dasch, see RACHLIS, supra note 27, at 300, Dasch is frequently identified as the only turncoat of the operation, see, e.g., FISHER, supra note 18, at 95.

40 J. Edgar Hoover received an award for ending the menace of the saboteurs, O’DONNELL, supra note 30, at 153.


42 Id. at 558. Indeed, the month the saboteurs landed marked something of a high point for the Nazis, who began their push toward the Don River to seize the Russian oil fields, an endeavor that would end in their defeat at Stalingrad, id. at 557-558.
the German High Command learn that their attempt at sabotage of the U.S. war industry might have succeeded but for the assignment of unreliable personnel, renewed attempts to penetrate the indefensible U.S. coastline would surely follow. A trial that allowed the circumstances of the capture to become public could have led to an increase in violence on American soil.

The second set of military commissions relating to the war was extraordinarily different from that of the saboteurs. The post-war trials, beginning with the Trial of the Major Criminals, now largely known by its venue as the Nuremberg proceedings, Nuremberg trials, or simply “Nuremberg,” were as open as the trial of Quirin and his colleagues had been closed. The military commissions took place in the grand Palace of Justice in Nuremberg. The Allies announced that they chose the site for its security, but it is difficult to believe that the symbolic value of hosting the trial in “the high shrine of the Nazi party” was not part of the decision. A collateral effect of the choice, however, was its availability to the German people. Members of

43 Id. at 559.

44 Even critics of military tribunals have noted that this rationale of wanting “to discourage future attempts by Germany,” see FISHER, supra note 18, at 95.

45 The official record is the 42-volume set entitled TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL.

46 As Lord Justice Sir Geoffrey Lawrence, President of the International Military Tribunal noted during his opening of the proceedings, “this Trial is a public Trial in the fullest sense of those words,” 2 TRIALS OF THE MAJOR WAR CRIMINALS BEFORE THE INTERNATIONAL MILITARY TRIBUNAL 29 (1949).

47 The United States Army had rebuilt the war-damaged building, see Francis Biddle, The Nurnberg Trial, 33 VA. L. REV. 679, 682 (1947).

48 Justice Jackson observed to the press that General Lucius Clay had chosen the location, and his primary concern was security, Jackson Answers War-Trial Critics, N.Y. TIMES, Aug. 21, 1945, at 10.

49 The Nazis hosted their annual party gatherings at Nuremberg, see Richard J. H. Johnston, Mass Drive Opens Nuremberg Gates, N.Y. TIMES, Apr. 17, 1945, at 3.
the international press corps attended, of course, but a crowd of spectators gathered each day to watch the months of testimony.\textsuperscript{50}

This openness was not accidental. Indeed, it was in keeping with the avowed wish of the United States to have public trials. Supreme Court Justice Robert Jackson, serving as the Chief Prosecutor for the U.S., insisted upon his arrival in Europe that “there will be no censorship on what transpires in the courtroom and no part of the court proceedings will be secret.”\textsuperscript{51} A public trial, of course, would allow the Allies to present their case against the Nazis not just to their own tribunal, but to the world. After the completion of the trial of the major war criminals, Justice Jackson observed that “the importance of this case is not measurable in terms of the personal fate of any of the defendants who were already broken and discredited men.”\textsuperscript{52} Jackson noted that one of the key accomplishments of the tribunals at Nuremberg was that they:

\begin{quote}
...documented from German sources the Nazi aggressions, persecutions, and atrocities with such authenticity and in such detail that there can be no responsible denial of these crimes in the future and no tradition of martyrdom of the Nazi leaders can arise among informed people. No history of this era can be entitled to authority which fails to take into account the record of Nurnberg [Nuremberg]. While an effort was made by Goering and others to portray themselves as "glowing patriots," their admitted crimes of violence and meanness, of greed and graft, leave no ground for future admiration of their characters and their fate leaves no incentive to emulation of their examples.\textsuperscript{53}
\end{quote}

In short, openness was not merely a feature of the military tribunals at Nuremberg: openness was one of its primary goals. The role of witnessing Nazi atrocities both to the current world and the unknown future were in the forefront of every decision made by the Allies in constructing the trial process.

\textsuperscript{50} At one of the trials following that of the major war criminals, known collectively as the Subsequent Proceedings, a reporter noted the presence of almost one hundred German spectators daily, including “many erstwhile Nazis,” Dana Adams Schmidt, \emph{Nazi Medical Horrors Revealed at New Trial}, \emph{N.Y. Times}, Mar. 2, 1947, at E 4.

\textsuperscript{51} \emph{Jackson Pledges Open War Trials}, \emph{N.Y. Times}, Aug. 18, 1945, at 5.

\textsuperscript{52} \emph{Report of Robert H. Jackson, United States Representative to the International Conference on Military Trials} (1949), \textit{available at} http://avalon.law.yale.edu/imt/jack63.asp.

\textsuperscript{53} \textit{Id.}
The options that lay before the Bush Administration in preparing for a reinvigoration of military tribunals were thus stark alternatives. These new commissions, trying members of al Qaeda, might be as closed as those of the saboteurs or as open as Nuremberg. As matters developed, the current military commissions have answered that question of openness with neither a yes or no, but a maybe. The initial order authorized the Secretary of Defense to issue orders that would govern “the conduct, closure of, and access to proceedings.”\textsuperscript{54} The original set of regulations issued by Secretary Rumsfeld assumed that such proceedings would be open “except where otherwise decided by the Appointing Authority.”\textsuperscript{55} Although the specter of closed, secretive proceedings has haunted the debate about the commissions,\textsuperscript{56} the actual proceedings that have so far occurred have, in fact, been open. Members of the press corps have attended virtually all of the sessions of the military commissions.\textsuperscript{57}

Why then, was there suspicion and doubt about the openness of the recent military commissions? Such doubts appear to stem from two decisions, one large and early, one smaller and later. The smaller decision, embodied in Rule for Military Commissions 806,\textsuperscript{58} prohibits

\begin{itemize}
\item \textsuperscript{54} Sec. 4 (c)(4)(B), Military Order, \textit{supra note} 17.
\item \textsuperscript{55} \textit{Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, Dep’t of Def. Military Commission Order No. 1, (Mar. 21, 2002) at 6.B.(3)}
\item \textsuperscript{56} \textit{See, e.g.}, Neal K. Katyal and Laurence H. Tribe, \textit{Waging War, Deciding Guilt: Trying the Military Tribunals}, 111 \textit{Yale L.J.} 1259, 1262 (2002) (calling for the Secretary of Defense to promulgate regulations to eliminate “some of the dramatic problems plaguing the Order, such as its authorization for the tribunals to operate in secret, without any publicity to check their abuses and with no threshold requirement of a showing that such secrecy is needed”).
\end{itemize}
television cameras from the proceedings. This decision is not particularly surprising, and has aroused little protest. Federal criminal trials do not permit broadcasting, after all, so the ban on cameras by itself may cause little concern for many of those skeptical of the military commissions. Any concern such critics could otherwise have might also be palliated by the fact that the Defense Department rule allows attendance by “representatives of the press, representatives of national and international organizations, as determined by the Office of the Secretary of Defense, and certain members of both the military and civilian communities.” Indeed, one early session of the first military commission to consider evidence took place before a “crowded gallery of reporters and observers.” Yet none of those reporters brought with them any of the Twentieth Century—to say nothing of Twenty-First Century—recording devices, which are otherwise pervasive in our society. The Department of Defense even limited the Nineteenth Century technique of rendering drawings of the proceedings by prohibiting the portrayal of faces.

The older, and larger, decision regarding the military commissions was their location. When the Department of Defense chose to locate the detainee holding facility in Guantanamo Bay, Cuba, the rationale may have been security or an attempt to avoid the jurisdiction of federal courts. Whichever it was, the rationales no longer apply to the military commissions, if they

59 Id. Rule 806 (c) permits the military judge to “as a matter of discretion permit contemporaneous closed-circuit video or audio transmission to permit viewing or hearing by an accused removed under R. Mil. Com. 804 or by spectators when courtroom facilities are inadequate to accommodate a reasonable number of spectators.”

60 Fed. R. Crim. P. 53.

61 R. Mil. Com. 806 (a).


63 Id. at 134.

64 In the first challenge to the detention policies of President Bush to reach the Supreme Court, the government relied heavily on the notion that Guantanamo Bay, as the subject of a 1903 lease agreement with Cuba, was “outside the sovereign territory of the United States,” Brief for the Respondents at 21, Rasul v. Bush, 124 S.Ct. 2686 (2004). Coupled with the Bush Administration request to Congress to enact laws that would reverse the
ever did. The United States has proved capable of securing the detainees at Guantanamo Bay, an isolated outlet\textsuperscript{65} on a hostile island, and so could surely do so at any of a large number of military installations. \textsuperscript{66} More dramatically, the Supreme Court has now held—twice—that the writ of habeas corpus runs to the Navy base, despite the legal sovereignty of Cuba. \textsuperscript{67}

The inevitable result of the decision to locate the trials at an offshore military facility, though, is to limit access. It is true that proceedings so far have had representatives of the press and other communities in attendance. \textsuperscript{68} It is equally true that they have done so under the

\textsuperscript{65} For a sense of Guantanamo Bay’s isolation, one need only consult the accounts of some of the civilian lawyers who have traveled there. See Clive Stafford Smith, \textit{Eight O’Clock Ferry to the Windward Side: Seeking Justice in Guantanamo Bay}, 4-6 (2007) (describing the one bleak bar, the pervasive scorpions, banana rats, and iguanas, and concluding that “Guantanamo Bay is Groundhog Day.”)

\textsuperscript{66} Of course, the United States holds many of its most dangerous prisoners, including some who are clearly security threats, in maximum security prisons. The United States Bureau of Prisons holds Omar Abdel-Rahman, mastermind of the 1992 World Trade Center bombing plot, attempted airplane destroyer Richard Reid, and al Qaeda operative Zacarias Moussaoui in the “supermax” facility near Florence, Colorado, Paul Koring, \textit{Supermax Next for Al-Qaeda Plotter}, GLOBE AND MAIL (Toronto, Canada), May 5, 2006, at A20.

\textsuperscript{67} “By the express terms of its agreements with Cuba, the United States exercises “complete jurisdiction and control” over the Guantanamo Bay Naval Base, and may continue to exercise such control permanently if it so chooses.” Rasul v. Bush, 542 U.S. 466, 480 (2004); “While obligated to abide by the terms of the lease, the United States is, for all practical purposes, answerable to no other sovereign for its acts on the base.” Boumediene v. Bush, 128 S.Ct. 2229, 2261 (2008).

\textsuperscript{68} See, e.g., William Glaberson, \textit{Australian to Serve Nine Months in Terrorism Case}, N.Y. TIMES, Mar. 31, 2007, at A 10. Joint Task Force Guantanamo even maintains a web site that includes the flight schedules for the
overhanging threat that the military might change its mind and exclude them for a variety of reasons. A location controlled by the military will always appear less than fully open. A reporter, a scholar, or even a tourist may wait for a place in line hoping to see some of the proceedings of the United States Supreme Court. This was never an option with the military commissions: that fact was a direct and inevitable result of their location.

The combination of a difficult location and a lack of the kind of visual evidence so dominant in modern life reduced to a miniscule level the publicity of the military commissions. Compared to the trial of Saddam Hussein in Iraq, a televised proceeding that was visible throughout the Middle East, the military commissions’ proceedings at Guantanamo became the subject of little popular discussion. Few discussions in the marketplace will happen when their subjects are hidden.

It did not need to be this way. There were always many locations throughout the United States that offer the security of Guantanamo Bay and still could be opened to the public. The construction of new facilities at Guantanamo, which cost more than $50 million, might even have been avoided. A small portion of that money, put into increased security for an existing military location, could have allayed any concerns in that regard. Fort Leavenworth, Kansas, civilian airlines that currently fly to Guantanamo Bay, as well as a link for accredited media to arrange a visit, available at http://www.jtftgmo.southcom.mil.

69 “Access to military commissions may be constrained by location, the size of the facility, physical security requirements, and national security concerns.” R. Mil. Com. 806 (a).

70 “All oral arguments are open to the public, but seating is limited and on a first-come, first-seated basis.” Visitor’s Guide to Oral Argument at the Supreme Court of the United States, available at http://www.supremecourtus.gov/visiting/visitorsguidetooralargument.pdf.

71 See, for example, MICHAEL A. NEWTON AND MICHAEL P. SCHARF, ENEMY OF THE STATE: THE TRIAL AND EXECUTION OF SADDAM HUSSEIN 222 (2008) (noting that millions of people in the region could see the “live, gavel to gavel” coverage).

72 David Bower and David Kaye, Guantanamo by the Numbers, N.Y. TIMES, Nov. 10, 2007, at A 15 (estimating the cost of building the detention facilities at $54 million, and the legal complex as an additional $10 to $12 million).
which is close to the major metropolitan center of Kansas City, Missouri, possesses a currently unused confinement facility, a courthouse, and its own airfield; it might have been a far better choice.\textsuperscript{73} Although costs of increased security would not be trivial, they could have been offset by the reduced costs of operations on United States soil.\textsuperscript{74}

Far outweighing the costs, however, is the benefit that the world would have gotten from a meaningful commitment to openness. Truly open, public proceedings offered the benefits of Nuremberg. An accessible location, with television for those who could not attend, would have changed immeasurably the entire character of the proceedings. The people of the world could have seen the evidence offered against the agents of al Qaeda. Images of the military commissions have to date been unhelpful to the national interests of the United States. The only meaningful glimpse that the Department of Defense initially offered to an increasingly visual world was the sight of the arrival of the hooded, shackled, jump-suited detainees.\textsuperscript{75} This image, chillingly distorted by the photos of Abu Ghraib\textsuperscript{76} which also prominently featured hoods, cast the United States in the role of bully.\textsuperscript{77} Those detained may have been, as Secretary Rumsfeld

\textsuperscript{73} \textit{But, c.f.,} David B. Rivkin, Jr. and Lee A. Casey, \textit{After Guantanamo,} WALL ST. J., Jul. 2, 2008, at A13 (asserting that moving the Guantanamo detainees to the United States “would create a security problem of unrivaled character” and make the new detention center a target).

\textsuperscript{74} Bower and Kaye, \textit{supra} note 72, at A 15 (estimating at $90 to $118 million the annual operating budget for Guantanamo).

\textsuperscript{75} \textsc{Barbara Olshansky}, \textsc{Democracy Detained} 85 (2007).

\textsuperscript{76} Abu Ghraib was a prison in Iraq long used by Saddam Hussein’s Baathist regime, Ned Parker, America Closes Abuse Prison, \textsc{London Times}, Aug. 29, 2006, at 27. It gained new fame when a series of pictures appeared documented the shameful mistreatment of Iraqi prisoners by U.S. military personnel. The Army investigation of that abuse, called “horrific” by the psychological assessment done by a member of the investigation team, was later declassified and released, see The Taguba Report, \textit{in The Torture Papers: The Road to Abu Ghraib} 405 (Karen J. Greenberg & Joshua L. Dratel, eds., 2005).

\textsuperscript{77} Smith, \textit{supra} note 65, at 271 (noting that the Abu Ghraib photos “added credibility to the abuse allegations that lawyers were making about their clients in Guantanamo.”)
said, “the worst of the worst.” Chained and hooded, though, they looked helpless and pitiable. The image, which may have been crafted to depict U.S. strength, only added to the inversion of roles that happened after September 11th. The victim of terror had become, for much of the world, the inflictor of terror.

Mere print reports of the proceedings can never begin to catch up with the power of those images. Only an open, accessible, broadcast set of trials by military commission might have shown the world that the trials were not the mistreatment of helpless pawns in the hands of a hyperpower. Rather, they were—or might have been—the calling to account of advocates of an ideology that threatens the peace and security of the world. The description of one visitor to the Nuremberg trial of major war criminals offers a vision of what might have been: “something more important is happening than the trial of a few captured prisoners. The inhuman is being confronted with the humane, ruthlessness with equity, lawlessness with patient justice, and barbarism with civilization.”

President Obama’s decision to close the facilities at Guantanamo Bay goes part of the way toward resolving this issue. The ending of detention at Guantanamo must carry with it the ending of the idea of conducting any future military commissions there. There can be little doubt that no site chosen by the President and Secretary of Defense could be worse for press coverage, domestic and international, than the Naval Base in Cuba. Although nothing in either the announcement of the closure of Guantanamo Bay or that affirming the continuation of military commissions has hinted in the smallest way that televised coverage of the proceedings


79 Harold Nicolson, quoted in Biddle, supra note 47, at 680.

80 Closure Order, supra note 2.

81 Id.

82 Military installations that have confinement facilities, such as Fort Leavenworth, Kansas, are routinely served by major metropolitan airports, such as Kansas City International.

83 Closure Order, supra note 2.

will be permitted, there remains always the possibility that the change in location will prompt a change in that policy as well.

III. An Absence of Coercion

A second question arose from the juxtaposition of the hooded-detainee photos, the Abu Ghraib photos, and comments from senior members of the Bush Administration: has the United States committed torture? This question, unthinkable a decade ago, has haunted discussion of the military commissions and significantly reduced their legitimacy in the eyes of the world. From the time the question was first raised, the President announced solemnly that “this government does not torture people.” That simple denial, though, never sufficed to eliminate the question.

The fact that the denial went unaccepted at face value was unsurprising, but was not unfair. The Bush Administration displayed a desperate desire to cabin the question: executive branch


officials refused to define acts as egregious as waterboarding as torture, and insisted on a separate legislative treatment of torture from that for “cruel, inhuman, and degrading” (CID) treatment in the Detainee Treatment Act (DTA). These statements and actions suggested strongly that there was an unpleasant “but…” following the declaration that the United States does not torture.

Disturbingly, the Military Commissions Act (MCA) cross-referenced the DTA. The congressional authorization for military commissions, at the insistence of the administration, prohibited the introduction into evidence in military tribunals those statements that were taken using either torture or cruel, inhuman, degrading treatment. Significantly, the latter types of

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87 Sadly, the reader likely needs no explanation that this term means controlled drowning to induce terror and cause compliance. For an erudite discussion of the awful term, see William Safire, *On Language: Waterboarding*, N.Y. Times Magazine, Mar. 9, 2008, at 16. The *reductio ad absurdum* came when Attorney General Mukasey’s confirmation hearings prominently featured Senators asking the nominee whether waterboarding, long denounced by the United States, was constitutional. "If waterboarding is torture, torture is not constitutional,” was Judge Mukasey’s reply, see Philip Shenon, *Senators Clash with Nominee over Torture and Limits of Law*, N.Y. Times, Oct. 19, 2007, at A 1. In a subsequent letter to the Senate Judiciary Committee, Judge Mukasey continued to decline categorically to denounce waterboarding, opining that it would be illegal if it were specifically intended to cause “severe physical pain or suffering” or “prolonged mental harm.” Letter of Michael B. Mukasey to the Honorable Patrick J. Leahy, et. al, Oct. 30, 2007, available at http://judiciary senate.gov/resources/documents/upload/10-30-07-Mukasey-to-Leahy-Kennedy-Biden-Kohl-Feinstein-Feingold-Schumer-Durbin-Cardin-Whitehouse.pdf.

88 The Detainee Treatment Act (DTA) of 2005 defined “cruel, inhuman, or degrading” treatment as that “prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution of the United States, as defined in the United States Reservations, Declarations and Understandings to the United Nations Convention Against Torture and Other Forms of Cruel, Inhuman or Degrading Treatment or Punishment.” Pub. L. No. 109-148 §1003(d) (2005).

evidence were prohibited only if taken after the date of the enactment of the DTA. The law thus made the unavoidable implication that the introduction of statements taken earlier using treatment that was merely cruel, or inhuman, or degrading might well comport with “the interests of justice.”

Hairsplitting between torture and CID is both intellectually sad and counterproductive. Retreats to legalistic parsings of torture prohibitions defeat the very purpose of those prohibitions. What is worse, they discredit everything the nation does. The fact that your jailor treats you inhumanely is not mitigated by the fact that the jailer recoils from the label “torture.” This proposition became more awful when the White House grudgingly revealed that it had used waterboarding on several detainees. This revelation raised a disturbing rhetorical question: if waterboarding is not torture, what is?

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90 Id. §948r. (d).
91 Id. §948r. (c).
92 This is why, of course, international conventions prohibit both. See, e.g., Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, entry into force Jun. 26, 1987, S. Treaty Doc. No. 100.20, 1465 U.N.T.S. 85.
93 Compounding the irony is the fact that “torture” is one of the crimes punishable by the military commissions, MANUAL FOR MILITARY COMMISSIONS, supra note 58, Part IV, 6 (11), at IV-8.
94 See Scott Shane, Documents Laid Out Interrogation Procedures, N.Y. TIMES, Jul. 25, 2008, at A19 (noting that Justice Department rules for waterboarding required all those present to be named in the logs).
Supporters of using techniques with such historical records of condemnation insist that they are necessary for intelligence purposes. From a willingness to work through “the Dark Side” to “the ticking time bomb,” hypothetical needs for such inhumane treatment of those in our custody are invoked to explain that no real patriot, and no really sophisticated thinker, could deny their use.

This is not the place to prolong the discussion of torture and CID. Others have demonstrated the consistent and terrible flaws with the use of inhumanity as a tactic. Without question, it

95 Scholars interested in defending such interrogation frequently point to alleged use of torture by authorities in the Philippines, which is said to have defeated a terrorist plan to crash multiple airplanes into the Pacific. See Alan Dershowitz, Why Terrorism Works: Understanding the Threat, Responding to the Challenge 137 (2002).

96 Vice President Cheney famously made the observation that this would be necessary shortly after the September 11th attacks, Ken Herman, After The Assault: U.S. Braces For Crusade Against ‘Evil’, ATL. J. & CONST., Sep. 17, 2001, at A1.

97 The scenario most frequently relied upon to defend the perceived necessity for torture is the hypothetical situation in which a terrorist has planted a bomb somewhere in a city before falling into the hands of the nation’s security forces. Those forces must then weigh their respect for the bodily integrity of the terrorist against their duty to safeguard the population. The hypothetical even made an appearance in the extraordinary consideration of interrogation techniques conducted by the Israeli Supreme Court in 1999. See Supreme Court of Israel, Judgment Concerning the Legality of the General Security Service’s Interrogation Methods, in Torture: A Collection (Sanford Levinson, ed., 2004), at 169.

98 Richard Weisberg, Loose Professionalism, or Why Lawyers Take the Lead on Torture, in Torture, supra note 97, at 304 (“No one, after all, wants to seem wide-eyed when facing—for example—the “ticking bomb” hypothetical”).

99 For an especially powerful repudiation of torture and the “ticking bomb” hypothetical, see David Luban, Liberalism, Torture, and the Ticking Bomb, 91 VA. L. REV. 1425 (2005).
worsens the character of those who conduct it, who become hardened to human pain before returning to American society. It is also astoundingly unreliable, and we must retain the memory that that torture makes people talk, but it does not necessarily make them tell the truth. In an insurgency—where the use of torture by one side will inevitably harden the resistance of the other—it will predictably serve as a recruiting tool for the insurgents.

The rules for the conduct of military commissions categorically excluded evidence derived from torture, which is good. Sadly, the following section of Military Commission Rule of Evidence 304 outlined an intricate series of standards under which, in some circumstances, the commissions might hear coerced evidence. That section incorporated a prohibition on CID, but only where such conduct occurred after December 30, 2005, the date of passage of the Detainee Treatment Act. For lawyers accustomed to the principle of expressio unius est

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100 See, for example, Ariel Dorfman, The Tyranny of Terror: Is Torture Inevitable in Our Century and Beyond?, in TORTURE, supra note 97, at 8 (noting that torture requires “the abrogation of our capacity to imagine others’ suffering,” and that torture “demands this of the torturer.”)

101 John Langbein, The Legal History of Torture, in TORTURE, supra note 97, at 97 (“Against the coercive force of the engines of torture, no safeguards were ever found that could protect the innocents and guarantee the truth”).

102 Senator John McCain reported that an al Qaeda in Iraq member had told him that the prisoner mistreatment at Abu Ghraib was “a great recruitment tool,” Editorial, Torture is Un-American: Sen. John McCain Has a Proposal for a Corps of Specialized Interrogators to Ensure America Doesn’t Think it Needs to Torture Suspects, ROANOKE TIMES, Dec. 27, 2007, at B10.

103 MIL. COM. R. EVID. 304 (a)(1).

104 MIL. COM. R. EVID. 304 (c).

105 MIL. COM. R. EVID. 304 (c)(2).
exclusio alterius,\textsuperscript{106} and for nonlawyers accustomed to cynicism, that date seems to stand as a signal that evidence derived from CID before that date is admissible.\textsuperscript{107}

This situation should always have been utterly unacceptable to the United States. It is noteworthy that even those who have recently defended the infliction of coercive techniques, whether they are called torture or not, have done so in the context of gathering information for use in preventing terrorist attacks. Even those who seek judicial approval of warrants for “nonlethal torture,” like Professor Alan Dershowitz,\textsuperscript{108} or who would leave such matters to executive discretion, like Judge Richard Posner,\textsuperscript{109} do not argue that the fruits of such compelled interrogations such be admissible in judicial proceedings. Many scholars have argued powerfully and persuasively that the “ticking time bomb” scenario is logically incoherent or impossibly unlikely, or both.\textsuperscript{110} Whatever one’s position in that debate, it is a large and illogical step from that position to one that argues that such inherently unreliable evidence ought to be admissible in a proceeding designed not to prevent harm, but to assess blame. The President, or Congress, might have prevented the shadow that the fear of torture-derived evidence cast on the military commissions. A clear declaration from the United States, whether in the form of law or

\textsuperscript{106} “To express or include one thing implies the exclusion of the other,” BLACK’S LAW DICTIONARY 620 (8\textsuperscript{th} ed. 2004).

\textsuperscript{107} MIL. COM. R. EVID. 304 (c)(1) allows the admission of such statements if the judge finds them reliable under the totality of the circumstances and their introduction serves the interests of justice. The rule seems to exclude the possibility that the introduction of statements discovered through inhumane treatment never serve the interests of justice.

\textsuperscript{108} Alan Dershowitz, Tortured Reasoning, in TORTURE, supra note 97, at 257.

\textsuperscript{109} Richard Posner, Torture, Terrorism, and Interrogation, in TORTURE, supra note 97, at 291.

\textsuperscript{110} The historical pattern indicates that those investigators with power to authorize torture upon a showing of a certain quantum of evidence found that threshold met in an absurdly large number of cases. See, e.g., John Langbein, The Legal History of Torture, in TORTURE, supra note 97, at 93. This was the fundamental source of the European witch-craze, as tortured suspects confessed and implicated others, which began the process anew. See, e.g., ALAN C. KORS & EDWARD PETERS, WITCHCRAFT IN EUROPE (1972).
regulation, that no coerced statement could be admitted in any form, would have done much to improve the standing of the commissions throughout the world.

That Congress did not make such a determination in the MCA was regrettable. The administration was never so limited, however. The President or the Secretary of Defense need only have issued an amendment to the Rules that evidence derived from torture or other cruel treatment by interrogators might never be admitted for any purpose whatsoever. This announcement could have come with the observation that such evidence is inherently unreliable. It would have reassured the world that any participation by the United States in such abhorrent behavior was over, and would not be rewarded. There was never a justification for turning our uniformed men and women into torturers; there is certainly never a justification for using evidence from such a contemptible and unreliable source. No teaching function of the military commissions could ever coexist with the specter that coercively gathered statements might be used against an accused. Honest trials, with honest evidence, would have allowed the military commissions to serve as vehicles to demonstrate to the world the truth about al Qaeda to the world in a way which would “leave no ground for future admiration of their characters.”

It is in this area that the world most sees the power of the Executive Branch. In a single sentence, President Obama cleaned up this area by announcing that the ban on the use of evidence derived from torture would now extend to all statements gained through coercive techniques. In that single sentence, the President insulated the military commissions from future debates over whether particular techniques were torture or “merely” cruel, inhuman, or degrading. Such discussions show no signs of abating soon, but no longer is the use of particular evidence a prize to be won through victory in such a battle. Whether torture or “mere” cruelty, the products of such interrogations are now no more useful for a military commission trial than for one in federal court.

111 Jackson, supra note 52.

112 Obama, On National Security, supra n. 4 (“We will no longer permit the use of evidence -- as evidence statements that have been obtained using cruel, inhuman, or degrading interrogation methods”).

113 A simple change to Mil. Com. R. Evid. 304, whether directed by Congress or the President, will accomplish this result.
IV. Trying Only One Kind of Criminal

Lost in much of the discussion of war crimes trials that has flourished since 2001 is the understanding that there are two distinct kinds of war crimes. Some acts are crimes that are punishable no matter who does them; other acts are perfectly permissible if done by an appropriate combatant, but unlawful if done by a non-combatant. Both types of war crimes have typically been tried by military commissions, and each is represented by one of the paradigmatic trials of the World War II era. The ramifications of such trials are quite different, however, and only one type of criminal should ever have been triable by the military commissions in the war against al Qaeda.

The first genus of war crimes consists of those acts which violate the norms, derived from both treaty and custom, which govern the conduct of armed hostilities. These crimes, which we could call bad acts, consist primarily of attacking persons who are inappropriate targets, using inappropriate types or levels of force in attacking targets, and harming those who have fallen into one’s control because they are no longer able or willing to fight.

114 The notion that international norms arise from custom is a statement uncontroversial to the United States Army. The Army has long recognized custom as a source of law in its directions to soldiers, see Dep’t of Army, THE LAW OF LAND WARFARE, FM 27-10, at 4 (1956) [hereinafter FM 27-10] (identifying both sources of the law of war). Almost a half-century earlier, the War Department was noting the force of “other well-recognized usages and customs that have developed into, and have become recognized as, rules of warfare” beyond treaties and conventions, War Dep’t: Office of the Chief of Staff, RULES OF LAND WARFARE, at 13 (1914).

115 Frequently referred to as the doctrine of “protected persons.” See FM 27-10, supra note 114, at 98.

116 Often called the doctrine of “proportionality.” Id. at 19 (“loss of life and damage to property must not be out of proportion to the military advantage to be gained.”)

117 The treatment of wounded soldiers and prisoners were the subjects of the earliest law of war conventions in the West. See, e.g., Chapter II, Regulations Respecting the Laws and Customs of War on Land, Hague Convention No. IV, Oct. 18, 1907. Such treatment remains the subject of an extraordinary number of law of war treaties.
The second set of war crimes might be labeled unprivileged acts. The most fundamental legal principle at work in armed conflict is the suspension of normal rules of nonviolent human behavior. Virtually all of the effective actions of a fighting force, from the mundane act of commandeering property of the enemy government to the extraordinary act of killing another human being, are illegal under virtually any conceivable legal code. Since nearly time immemorial, the fundamental convention of war was that soldiers, as proper combatants, only became criminals if they committed acts that were prohibited by the accepted conventions of war fighting, not the acts of violence inherent in warfare.\textsuperscript{118} A soldier, killing an enemy soldier, has not committed murder. Such soldiers are protected from legal consequences for the killing done in the line of duty: they are said to have “combatant immunity.” National leaders and international law experts have always recognized the necessary and logical corollary, that those who are not proper combatants may not legally commit such acts. They formulated this principle in different ways at different times, but the fundamental idea that combatants had legal immunity that noncombatants lacked has never changed. Improper combatants, or unprivileged belligerents, might be tried for their acts of war; to subject a proper combatant to criminal trial for warlike acts was itself a violation of the law of war.\textsuperscript{119}

The Trial of the Major War Criminals at Nuremberg was about bad acts. The leaders of the Nazi war effort stood accused of crimes against peace,\textsuperscript{120} war crimes,\textsuperscript{121} crimes against

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\textsuperscript{118} Shakespeare’s King Henry V gives the order that each soldier should “kill his prisoners,” WILLIAM SHAKESPEARE, THE LIFE OF KING HENRY THE FIFTH, act 4, sc. 6, an order decried as “against the law of arms” and “an arrant…piece of knavery” by the formidable Captain Fluellen, \textit{id.} at act 4, sc. 7.

\textsuperscript{119} Indeed, following the Second World War the United States tried several members of the Japanese military for denying prisoner of war status to downed bomber pilots and trying them “by a Japanese Military Tribunal in violation of the laws and customs of war,” \textit{Trial of Lieutenant-General Shigeru Sawada and Three Others in V THE UNITED NATIONS WAR CRIMES COMMISSIONS, LAW REPORTS OF TRIALS OF WAR CRIMINALS} 1 (1948). General Sawada was convicted and sentenced to five years of hard labor, \textit{id.} at 8. The legally-trained judge of the tribunal was sentenced to nine years, \textit{id.}

\textsuperscript{120} \textit{Indictment, International Military Tribunal, The United States Of America, the French Republic, the United Kingdom Of Great Britain and Northern Ireland, and the Union Of Soviet Socialist Republics Against}
\end{footnotesize}
humanity, and conspiracy to commit each of those offenses. Several of them were members of the military, either the regular Army or Navy or Nazi augments such as the Schutzstaffeln (SS) or the Sturmabteilungen (SA); in the dock also were such civilians as ambassadors and economists. The trials focused on the evils that were done, and not on the status of those who had done the evil.

The Nuremberg trials demonstrate a critical point, which was reaffirmed in the nearly contemporaneous conventions governing the conduct of armed conflict hammered out in Geneva. Both Nuremberg and Geneva show that status questions simply do not arise in the context of bad acts. The killing of someone rendered hors de combat, whether by wounds or surrender, is always illegal. The deliberate mistreatment of civilians not engaged in the war effort is always illegal. The tribunal deliberating on the merit of the accusations need never concern itself with whether the person alleged to have committed offenses was a proper member

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121 *Id.*

122 *Id.* at 65.

123 *Id.* at 29.

124 For example, Goering himself, *id.* at 68; Field Marshal Wilhelm Keitel, *id.* at 77; and Admiral Karl Doenitz, *id.* at 78.

125 For example, Joachim von Ribbentrop, *id.* at 69.

126 For example, Hjalmar Schacht, *id.* at 74. Schacht was acquitted, *id.* at 310.

127 See Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949), 6 UST 3114 (1956; see also Geneva Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949), 6 UST 3217 (1956).


of the military, or was wearing a uniform. Civilian or soldier, none may legally commit such acts.

Unprivileged acts offer precisely the opposite lesson. Because combatant immunity extends only to those who are lawful combatants, the status of the alleged offender is the critical question before a tribunal when the alleged crime is an unprivileged act. Shooting a soldier and destroying an enemy warship are completely lawful acts when done by a legitimate combatant during armed conflict. Indeed, they represent the duty and objective of the armed forces. A military commission convened to try someone accused of such an offense must focus, not on the underlying acts, but on the status of the accused.

This fact accounts for the odd nature of the military commissions that tried Quirin and his colleagues. The conspiracy for which they were tried aimed to disrupt the American war effort by destroying armament manufacturing facilities and other military supplies. These are quintessentially lawful acts of war. Each Nazi saboteur was subject to trial by military commission because, in the words of the Supreme Court, each had “in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines and defenses or went behind those lines, in civilian dress and with hostile purpose” Critical to this determination was the fact that the saboteurs had buried their uniforms in the sandy beaches of Long Island and

\[\text{\footnotesize 130 The other prominent Supreme Court treatment of military commissions was the trial of the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army. Of course, he was unquestionably a proper combatant. \textit{See In re Yamashita}, 327 U.S. 1 (1946).}\]

\[\text{\footnotesize 131 \textit{I stand ready to deploy, engage, and destroy the enemies of the United States of America in close combat,} from The United States Army Soldier’s Creed, \textit{available at} http://www.army.mil/thewayahead/creed.html.}\]

\[\text{\footnotesize 132 Ex parte Quirin, 317 U.S. 1, 21 (1942).}\]

\[\text{\footnotesize 133 \textit{Modern warfare is directed at the destruction of enemy war supplies and the implements of their production and transportation quite as much as at the armed forces,} \textit{id.} at 37.}\]

\[\text{\footnotesize 134 Id. at 38 (emphasis added).}\]
Florida,\textsuperscript{135} and came inland in civilian clothes, with the hope of penetrating American society in secret.\textsuperscript{136}

A second observation presents itself upon consideration of this fact. When considering status for the trial of an unprivileged act, it is a methodical, fact-driven inquiry. The Nazi saboteurs were without question associated with the armed forces of a nation at war with the United States.\textsuperscript{137} Had they continued to wear uniforms as they set out to damage the American military-industrial complex, their acts would not have been criminal. Not any cosmic question of who they were, but rather the gritty reality of what they wore, determined their fate.

The recent military commissions recognized the historic right of such tribunals to try both types of war crimes. The original Department of Defense draft of crimes punishable by military commission included both bad acts such as “willful killing of a protected person” and “attacking civilians” but also unprivileged acts with labels like “murder by an unprivileged belligerent.”\textsuperscript{138} After the Supreme Court struck down the initial regulatory structure as violative of the Uniform Code of Military Justice,\textsuperscript{139} Congress responded by enacting the Military Commissions Act.\textsuperscript{140} Although the legislation made substantial modifications in some areas,\textsuperscript{141} the ability of such military commissions to try both bad acts and unprivileged acts did not change.\textsuperscript{142}

\textsuperscript{135} Id. at 21.

\textsuperscript{136} One of the specifications against the saboteurs had charged them with seeking “to destroy certain war industries, war utilities and war materials within the United States” which was “contrary to the law of war” in part because the accused were “in civilian dress,” id. at 36.

\textsuperscript{137} Although they were not members of the Marine Infantry whose uniforms they wore, the German government had trained and funded the saboteurs before transporting them in German submarines to the United States, 317 U.S., at 21-22.


\textsuperscript{139} Hamdan v. Rumsfeld, 548 U.S. 557, 613 (2006).


\textsuperscript{141} For example, the law required that a “Combatant Status Review Tribunal or another competent tribunal” find that a person was an unlawful combatant before that person could be subject to the jurisdiction of a military
Indeed, early attempts at prosecution have involved both types of crimes. Salim Hamdan, the first detainee charged, initially faced accusations that he was part of a conspiracy.\textsuperscript{143} His just concluded trial found him convicted of material support to terrorism.\textsuperscript{144} This species of crime has no real precedent in the history of war crimes tribunals; the notion of material support as an offense springs from federal criminal law.\textsuperscript{145} There is little question, though, that it does not fall squarely within the bad acts category. Driving personnel and transporting supplies to combatants are perfectly lawful acts when done by proper soldiers. Salim Hamdan was convicted of an offense that rested primarily on his status as an unlawful belligerent. Indeed, his conviction relies on a type of inchoate liability not before seen at military tribunals. Although Nuremberg itself pioneered the use of “conspiracy” as a species of war crime,\textsuperscript{146} the use of this logic for finding the liability of a driver is a far cry indeed from the Nuremberg trials of “major war criminals.” Hamdan’s sentence to sixty-six months, of which he had already served sixty-one by the time of trial, was a tribute to the fairness of the sentencing panel, but also an indictment of the choice of offense to set before the panel.\textsuperscript{147} The only other detainee convicted to date was the Australian David Hicks, who pled guilty to one specification of material support to a terrorist commission, Pub. L. No. 109-366, § 948d. (c). The original order had reserved that determination to the president himself, see Military Order, supra note 17.

\textsuperscript{142} Pub. L. No. 109-366, § 950v, in setting forth the crimes punishable by military commissions, includes not only traditional bad acts offenses as “attacking civilians” and “attacking protected property,” but also the oddly named “murder in violation of the law of war,” which seems the heir of “murder by an unprivileged belligerent.”\textsuperscript{143} Hamdan v. Rumsfeld, 548 U.S. 557, 569 (2006). The over acts Hamdan stood charged with included serving as serving as Osama bin Laden’s bodyguard and driver, transporting weapons, and receiving weapons training. \textit{Id.} at 570.


\textsuperscript{145} See 18 U.S.C. §2339A.

\textsuperscript{146} See supra note 123.

\textsuperscript{147} See Bravin, \textit{supra} note 144 (noting that the sentence “calls into question the wisdom of beginning an expected series of military commissions with a bit player, rather than a 9/11 heavyweight”).
organization engaged in hostilities against the United States.\textsuperscript{148} Many of the other detainees currently pending charges face trial for acts that would have been lawful if committed by soldiers.\textsuperscript{149} On the other hand, several high-profile detainees stand accused of what are clearly bad acts. The group of defendants originally termed the “Guantanamo Six”\textsuperscript{150}—now five in number after the dismissal of charges against Mohammed al Kahtani\textsuperscript{151}—face trials destined to worry little about their status. The crimes of which these men are accused include planning for the hijacking of the planes, and the subsequent destruction of planes, buildings, and lives, that marked the

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\textsuperscript{148} A specification alleging that David Hicks provided material support for a terrorist act was dismissed as part of the pretrial agreement which led to his guilty plea. See Record of Trial of David Matthew Hicks, Mar. 26 and 30, 2007, at 3, 518, \textit{available at} http://www.defenselink.mil/news/commissionsHicks.html (follow “Record of Trial” hyperlink).

\textsuperscript{149} Examples include Omar Khadr, a child soldier who is accused of throwing a hand grenade that killed an American soldier. He is charged with material support offenses as Hamdan and Hicks were, but also murder and attempted murder in violation of the law of war, charges which rely on his not “enjoying combatant immunity.” Charge Sheet, Omar Ahmed Khadr, Apr. 5, 2007, \textit{available at} http://www.defenselink.mil/news/Apr2007/Khadrreferral.pdf.

\textsuperscript{150} A group of important figures within al Qaeda, which includes Khalid Sheikh Mohammed, alleged to have developed the operational concept of hijacking airplanes and crashing them into buildings, and Ramzi Binalshibh, alleged to have become Khalid Sheikh Mohammed’s primary assistant in conducting the September 11\textsuperscript{th} attacks when Ramzi Binalshibh failed to acquire a visa allowing him to travel to the United States to serve as one of the pilots. Charge Sheet, Khalid Sheikh Mohammed, et. al., Apr. 15, 2008, \textit{available at} http://www.defenselink.mil/news/d20080509Mohammed.pdf.

\textsuperscript{151} The dismissal was without prejudice, Dismissal of Charges, Mohammed al Kahtani, May 9, 2008, \textit{available at} http://www.defenselink.mil/news/commissionsCo-conspirators.html (follow “Charges dismissed without prejudice” hyperlink).
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The law of armed conflict is clear: no one, soldier or civilian, may commit such acts.

The military commissions of the Bush Administration sought to try both types of offenses in an undifferentiated fashion. Indeed, the trials of child soldier Omar Khadr and the terrorism planner Khalid Sheikh Mohammed proceeded simultaneously. Several problems arise from the conjoining of these types of offenses. The first difficulty, a rather minor one, is the increased level of confusion caused by such a combination. Because one type of offense depends upon the status of its perpetrator, administration officials as well as many critics have made inaccurate and unproductive statements regarding the importance of status. Early in the discussion, acting upon dubious legal advice, President Bush announced that members of neither al Qaeda nor the Taliban military were lawful combatants entitled to protection under the Geneva Conventions. This decision was suspect substantively, and procedurally, and ultimately made irrelevant

152 See Charge Sheet, Khalid Sheikh Mohammed, supra note 150.

153 George Bush, Memorandum, Subject: Humane Treatment of al Qaeda and Taliban Detainees, Feb. 7, 2002, in THE TORTURE PAPERS, supra note 76, at 135 (“I determine that the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war under Article 4 of Geneva”).

154 President Bush based his “determination” in large measure upon the advice of Department of Justice attorneys that “combatants must fall within one of several categories in order to receive POW status,” Jay S. Bybee, Memorandum, Re: Application of Treaties and Laws to al Qaeda and Taliban Detainees, Jan. 22, 2002, in THE TORTURE PAPERS, supra note 76, at 110. Judge Bybee largely ignored the first of Geneva Convention III’s categories “members of the armed forces of a Party to the conflict,” and focused on the test the treaty sets forth for “other militias and volunteer corps.” This occurred despite the fact that the treaty specifically protects those who “profess allegiance to a government or an authority not recognized by the Detaining Power” Geneva Convention III, Art. 4. A. 3.

155 Geneva Convention III provides the clear direction that if “any doubt” should arise that a prisoner in the hands of an enemy did not properly qualify as a combatant that prisoner would nevertheless receive prisoner of war protection “until such time as their status has been determined by a competent tribunal,” Geneva Convention III, Art. 5. In response, Judge Bybee wrote that a “presidential determination of this nature [that all Taliban detainees
by the Supreme Court. What may be worse is that it was always utterly unnecessary to any trial of the bad acts category of war crimes. Whatever the status of Khalid Sheikh Mohammed—and even many critics would agree that he would not be a privileged combatant, were that ever the question—his trial should no more focus on his status than did that of General Yamashita.

No one, soldier or civilian, may orchestrate the hijacking of civilian aircraft to use as missiles against civilian buildings. The focus of any trial of such a person should be about whether and how such acts occurred. The status of the hijacker, or the hijacker’s adviser, ought to be completely irrelevant.

On the other hand, the trial of Omar Khadr must by definition focus on status. The act of throwing a hand grenade at advancing soldiers is clearly lawful if done by a privileged combatant. Although without question not a member any official armed force, the fifteen year old Khadr threw the grenade in question at the conclusion of the firefight that involved his father and brothers and U.S. Special Forces. The firefight ended when American attack helicopters and close air support airplanes struck and leveled the house. Any military commission that ultimately hears this case will need to focus on testimony resembling that heard in Quirin.

were outside the protection of Geneva Convention III] would eliminate any legal “doubt” as to the prisoners’ status, as a matter of domestic law, and would therefore obviate the need for Article 5 tribunals,” See Bybee, supra note 154, at 110.

The Court held that the protections of Common Article III applied to those detained by the United States and prevented their trial unless by “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples,” Hamdan v. Rumsfeld, 548 U.S. 557, 631-2 (2006) (quoting Geneva Convention III, Art. 3).

See supra note 130.

See supra note 149.


Id.
commission must determine who Khadr was, who he was associated with, and what behavior he
had taken to signify to the American forces that he was a combatant and an enemy.\footnote{161}

This fact raises a second and more serious problem. Because of the position of the United
States regarding the law of armed conflict, especially our non-accession to Protocol 1 to the 1949
Geneva Conventions,\footnote{162} there was nothing that Khadr could do that would make him a lawful
combatant. No uniform that he could wear, no arms that he could bear, would, in the U.S. view,
have gained for him combatant immunity.\footnote{163} Even service in a numbered, equipped unit of the
Taliban Army would not have made him a legitimate combatant, according to the Bush
Administration.\footnote{164} This always appeared inappropriate on its face. It is difficult to defend a
legal regime that grants immunity to U.S. soldiers firing at their enemies, while denying that
same immunity to those enemies should they fire back. Upon a trial of all the facts, it might
have appeared even more unjust to both the international and domestic public. After all, the U.S.

\footnote{161} Carol Rosenberg, Pentagonal Defense Attorneys Try Out a Buried-Beneath-the-Rubble Defense Ahead of
23878436 (discussing the prosecution argument that “Khadr was an al Qaeda fighter who had no authority to fight
anyone in Afghanistan”).

\footnote{162} During the administration of President Reagan, the United States decided not to ratify the Protocol
because it “served the interests of terrorists,” George H. Aldrich, Prospects for United States Ratification of

\footnote{163} Article 43 of the Protocol recognized as combatants all those who participated in the combat under the
command of a responsible party; Article 44 required them to distinguish themselves (for targeting purposes) from
the civilian population by carrying their arms openly during or “preparatory to an attack,” Protocol Additional to the
Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
(Protocol I), 16 ILM 1391 (1977). This requirement, replacing as it did the 1949 requirement that combatants were a
fixed insignia visible at a distance, see Geneva Convention III, Art. 4, reflected the recognition by the international
community that in many asymmetric conflicts one side would continue to be “bakers by day and soldiers by night,”
Aldrich, supra note 162, at 9.

\footnote{164} See supra note 153.
has expressed outrage and even tried as war criminals\textsuperscript{165} representatives of nations who denied immunity to American combatants based on political hostility. Quirin and his colleagues, the argument may go, could have avoided criminality by wearing rather than burying their uniforms.\textsuperscript{166} No such a course was available to Khadr, despite the fact that he and his family had demonstrated their combatant intentions sufficiently to be targeted by the United States.\textsuperscript{167}

The charge of hypocrisy against the United States in such circumstances is inevitable and unavoidable. Such a construction of the law of war permits the asymmetry of one side being able to target the other lawfully, while the second faces criminal charges for fighting back. The United States should not be surprised if the rest of the world does not respect such a standard. Indeed, deployment of precisely this sort of legal argument weakens the international and domestic credibility of the nation.\textsuperscript{168}

This spectacle could have been avoided. The Congress, the President, or the Secretary of Defense might have limited the jurisdiction of military commissions to bad act offenses. The trials of Khalid Sheikh Mohammed and his cohorts alleged to be leaders within al Qaeda could have proceeded; those of small fish like Hicks, Hamdan, and Khadr would have had to cease. The removal of the unprivileged belligerency category of offenses from the jurisdiction of the military commissions would have effectively eliminated the divisive question of status. The commissions might then have put aside the trials of foot soldiers and proceeded with the trials of those accused of masterminding events that threatened peace around the world and shocked people of good will everywhere. They might, like their predecessors at Nuremberg, have become trials of major war criminals.

\textsuperscript{165} See discussion of General Sawada, \textit{supra} note 119.

\textsuperscript{166} Ex parte Quirin, 317 U.S. 1, 31 (1942) (noting that it was the fact of combatants being “without uniform” that “renders their belligerency unlawful”).

\textsuperscript{167} Their weapons fire that led to the air strikes, Shephard, \textit{supra} note 159.

\textsuperscript{168} Indeed, it requires little imagination to foresee such a standard being turned against American military personnel. A future enemy need merely declare that the United States is not a proper party to the conflict, and U.S. soldiers are therefore subject to trial for ordinary acts of combat.
To date, there is no evidence that the current Administration views the distinction of bad acts war crimes and status offenses in any way significantly different from their predecessor. Nothing in the White House speeches or announcements suggests any pulling back from jurisdiction over status offenses in the commissions. This is unfortunate, but it is not unalterable. The administration might at any time announce that the United States will no longer try cases in which the only offense is the lack of status. Alternatively, the government could make no such announcement, but simply dismiss cases like those involving Omar Khadr. This would focus the energy of the tribunals on those whose alleged acts make their status irrelevant, such as the Guantanamo five. Either way, the commissions would be restored to a Nuremberg model.

V. Conclusion

Three choices, three errors. The decisions that the Bush Administration rejected, to hold truly open trials, to reject utterly coerced evidence, and to limit the jurisdiction to bad acts offenses, might have radically altered the story of the military commissions in the conflict with al Qaeda. The commissions have been fitful things, notoriously stopping and starting, and offering a bewildering array of procedural difficulties in a bewildering array of cases. The one consistent thing about them was bad publicity. Because of their limited access, the overhanging nemesis of torture, and the spectacle of grand proceedings for petty crimes, they never really told the world the story of the wrongfulness of al Qaeda.

169 Indeed, the fact that the Khadr case has continued with battles over representation indicates a seeming lack of interest by the Administration in removing this category of offenses from the purview of the military commissions. See, e.g., Carol Rosenberg, Guantanamo Detainee Tries to Fire U.S. Lawyers, Fails, MIAMI HERALD, Jun. 1, 2009, available at 2009 WLNR 10365276.

The greatest possible benefit of military commissions was the objective that remained most firmly out of reach. By focusing on the perceived cruelty, secrecy, and unfairness of the United States, both critics and friends missed the real story: a handful of men accused of planning one of the most outrageous acts in world history had been captured. Those men, advocates of an ideology that openly advocated the killing of innocents to achieve their grand aims, might have been shown to the world as they are. A global audience might have watched as families members of the very international group of victims of the attack on the World Trade Center told of their losses.\textsuperscript{171} Viewers from around the globe might have listened to experts discussing the ideas, both clever and the loathsome, contained in al Qaeda manuals\textsuperscript{172} and materials found at scattered sites around the world, from Afghanistan\textsuperscript{173} to Britain.\textsuperscript{174} The world might have listened in rising horror to the stories of destruction in places as diverse as a nightclub in Bali\textsuperscript{175} and a wedding in Jordan.\textsuperscript{176}

The continuing tragedy is that such trials never happened. Choices designed to gain convictions rather than teach a global audience meant that the monstrous nature of al Qaeda has never appeared before the world. Instead, what the world saw was a superpower with a handful of “broken and discredited men” in its custody. These men were seen not like the wicked Nazis in the dock at Nuremberg, but as hooded and isolated fellow humans, separated by threat of


torture from any evidence of their wrongdoing. Thus the victim became the villain, and those facing trial have too often been objects of pity rather than condemnation.

Is it, then, too late? It may well be. Numerous commentators have long ago given up on any notion of fairness or justice from the military commissions. Although commentators have no legal standing, their analysis may well inform the view taken of the enterprise by the federal courts that will invariably hear the habeas challenges following any guilty verdicts in restarted military commissions. The reforms mentioned by President Obama will play some role in convincing skeptics, but may never be enough to restore enough of a sense of regularity and legitimacy to the commissions to enable them to survive.

It is possible that the only course that might salvage the commissions at this point is internationalization. Nuremberg had been an international military tribunal, and from that fact may have gained a certain built-in legitimacy. Much of the unease about military commissions stems from the fact that they are irregular courts, created for this specific purpose. Intriguingly, although exactly the same charge could be laid at various international tribunals, it virtually never is. Part of the reason is the obvious practical one: until the advent of the International

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177 See, e.g., Katyal & Tribe, supra note 20, Koh, supra note 20, JORDAN J. PAUST, BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR (2007). See also Eugene R. Fidell, The Trouble with Tribunals, N.Y. Times, A 8 (Jun. 14, 2009) (arguing that the history of commissions is an ambiguous one, and that they should only proceed upon a showing that federal courts cannot adequately try a particular case).

178 Not even President Franklin Roosevelt’s order denying the Nazi Saboteurs access to civilian courts could prevent such review, as the Supreme Court noted in Quirin (“neither the Proclamation nor the fact. that they are enemy aliens forecloses consideration by the courts of petitioners’ contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission”) 317 U.S. 1, 25 (1942). Of course, in the case of the current military commissions, even a purported jurisdiction-stripping provision in the Detainee Treatment Act failed to prevent the Supreme Court from evaluating the legality of the proceedings, Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

179 Paust, supra note 177, at 103 (“a regional or more general international criminal court with jurisdiction over impermissible acts of terrorism and related international crimes would be able to prosecute accused long after peace is reinstated in Afghanistan.”) Note that Professor Paust is one of those who believes that military
Criminal Court (ICC),\textsuperscript{180} which is still in a fitful infancy,\textsuperscript{181} there was no “regular” international tribunal. In a regime without a regular court, all trials must by definition be conducted in ad hoc “special” tribunals.

This necessity cannot by itself explain the lack of criticism of international tribunals compared to the U.S. military commissions. Many of the criticisms of the military commissions might well have been leveled at the various United Nations sponsored war crimes tribunals over the past two decades. They, like the U.S. military commissions, allow hearsay,\textsuperscript{182} allow commissions cannot legally try prisoners of war because Article 102 of the Third Geneva Convention requires those prisoners to be tried by the same courts using the same procedures as the capturing nation’s armed forces. He understands this provision to limit such trials to Article III federal courts and courts-martial. \textit{Id.} at 127. It is not clear why this limitation does not also affect ad hoc international tribunals, which invariably lack jurisdiction over the capturing nations’ soldiers.

\textsuperscript{180} The ICC was established by the Rome Statute, which was signed in July 1998. Article 126 of the treaty provided that it would come into force on the first day of the month following ratification by the sixtieth nation; that did not take place until July 2002. Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90, 37 I.L.M. 1002.

\textsuperscript{181} In its 2009 report to the United Nations, the ICC noted that it had ongoing proceedings against four persons detained in the custody of the ICC, and four other ongoing proceedings. These cases occupied more than six hundred staff in established posts at a cost of more than one hundred million euros. International Criminal Court, \textit{Facts And Figures From Registry as at 30 April 2009, available at} http://www.icc-cpi.int/NR/rdonlyres/302CA5E0-E2B5-4663-96DE-93E55B1FD26C/280383/Facts_and_figures_30_April_2009_ENG.pdf.

after notice is given to the adverse party unless that party “demonstrates by a preponderance of the evidence that the
evidence is unreliable under the totality of the circumstances”). It must be noted that the changing of the burden of
proof to the offering party is one of the proposed amendments to the military commissions suggested by the
witnesses to use pseudonyms for security purposes, limit counsel choices, and so on. Nonetheless, any criticism they receive tends to be over jurisdictional issues and not these kind of procedural rules which so concern many opponents of military commissions.

There would be a price for internationalization, of course. In return for gaining the help of jurists from the United Kingdom, or Australia, or Poland, or any other member of the coalition forces, the United States would almost certainly have to forfeit the ability to impose the death penalty. The obligation to comply with all applicable regulations or instructions for counsel, including any rules of court, was added to the military commissions rule. Again, this last is one of the proposed reforms of the president, see Obama, On National Security, supra note 4 (“we will give detainees greater latitude in selecting their own counsel”).

183 Compare ICTY and ICTR Rules 75(B) with Mil. Com. R. Evid. 611 (d)(2).

184 Compare ICTY and ICTR Rules 44 with Mil. Com. R. Evid. 611 (d)(2). Intriguingly, while the Rwanda tribunal requires only that the counsel be admitted to practice law in a State or be a University law professor, the Yugoslavia tribunal adds that the proposed counsel must not have been found guilty of crime or misconduct, and must also be “a member in good standing of an association of counsel practicing at the Tribunal recognised by the Registrar.” The military commissions rule notoriously adds that the civilian counsel must be a U.S. citizen admitted to practice in the U.S., and must sign an agreement, required by statute, “to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the proceedings,” 10 U.S.C. 949c (b)(3)(E). Again, this last is one of the proposed reforms of the president, see Obama, On National Security, supra note 4 (“we will give detainees greater latitude in selecting their own counsel”).

185 Gabor Rona, A Bull in a China Shop: The War on Terror and International Law in the United States, 39 CAL. WEST. INT’L L. J. 135 (Fall 2008) (“You have probably already heard of the many ways that trials under the Military Commissions Act (MCA) are unfair, including the possible use of secret evidence, torture-based evidence, non-confrontable hearsay, and the plain fact that the entire process is not independent, but highly tainted by political and command influence.”) Note that of Mr. Rona’s four objections, the first and third are unequivocally true of the International Tribunal for the Former Yugoslavia. As noted above, I agree completely with Mr. Rona’s objection to the use of torture to gather evidence for the military commissions—as does, more importantly, President Obama. It is troubling how often commentators use the unnecessary, and I would argue unnatural, combination of “torture-based evidence” and hearsay, see, e.g., David Cole, Against Citizenship as a Predicate for Basic Rights, 75 FORD. L. REV. 2541, 2543 (April 2007), Benjamin Davis, No Third Class Processes for Foreigners, 103 NW. U. L. REV. COLLOQUY 88, 92 (Sep. 2008).
The only way to gain internationalization while maintaining the possibility of capital sentencing would be to limit participation to the handful of other nations that allow the death penalty—Afghanistan\(^{187}\) and Iraq\(^{188}\) come immediately to mind. It is extremely doubtful, though, that a U.S.-Afghani War Crimes Tribunal would have any more legitimacy than a U.S. only operation.

Giving up the possibility of an execution of alleged plotters of the September 11\(^{th}\) attacks would be a bitter pill for many in the United States. To Americans concerned by this, one might answer that federal courts could still offer the possibility of capital punishment. For any truly bad actors the United States should be willing to conduct the trial in Article III courts. For any remaining individuals, a truly international military tribunal would allow for the presentation of evidence to the world, evidence that might show not only the extent of culpability of the particular accused, but the moral and ideological depravity of the terrorist organization that has repeatedly attacked innocents throughout the world. Al Qaeda, like all non-government

\(^{186}\) The European Union opposes the death penalty in any circumstance, and routinely calls upon the United States to abolish it. See, e.g., EU Demarche on the Death Penalty, Presented to the US Administration on May 10, 2001, available at http://www.eurunion.org/eu/ (follow “Hot Topics::Death Penalty” hyperlink; then follow “EU Demarche on the Death Penalty, Presented to the US Administration on May 10, 2001” hyperlink). Australia, like the United Kingdom, has both abolished the death penalty itself and also ratified the Second Optional Protocol to the International on Civil and Political Rights, which calls for the elimination of capital punishment. The protocol allows reservations, at the time of accession, for “the application of the death penalty in time of war pursuant to a conviction for a most serious crime of a military nature committed during wartime,” but neither Britain nor Australia made such a reservation, see United Nations Treaty Collection, Declarations and Reservations, Second Optional Protocol to the International on Civil and Political Rights available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-12&chapter=4&lang=en.

\(^{187}\) Afghanistan: 15 Prisoners Executed, N.Y. TIMES, Oct. 9, 2007, at A 6 (reporting the executions for ordinary crimes that marked the end of Afghanistan’s three-year moratorium on capital punishment).

\(^{188}\) Newton and Scharf, supra note 71, at 59 (the death penalty “has always been a part of the Iraqi legal tradition”).
organizations, must depend heavily on its public image for recruiting and finance. This leaves it vulnerable to a series of military commissions, augmented by the legitimacy of participation by disparate states throughout the world community, which could demonstrate to a global audience the monstrosity of its crimes. For the battle to characterize the events of September 11th will continue for the foreseeable future, just as the Second World War truly ended in Europe with a judicial battle fought to establish the meaning of the Nazi party for Germany and the world.

Neo-Nazism exists today, of course, even in Germany. Justice Jackson seems to have been correct in his assessment, though, that the potential for a cultic view of Goering and his co-defendants was greatly reduced by a formal, patient, and public airing of the evidence of Nazi cruelty. With some senior leaders of al Qaeda in the hands of a nation that had suffered greatly because of them, history is in the rare position of possibly being able to repeat in a positive way. That it has not yet, that the United States has still not yet chosen to learn from history, may prove nearly as great a tragedy over time as the September 11th attacks themselves.

190 Jackson, supra notes 52-53 and accompanying text.