2010

Beyond the Court of Public Opinion: Military Commissions and the Reputational Pull of Compliance Theory

Keith A. Petty

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Keith A. Petty*

Abstract

The decision to prosecute the suspected co-conspirators of the 9/11 terrorist attacks in either federal court or by military tribunal has reached a critical juncture. Central to this debate is whether the military commissions are consistent with domestic and international standards of justice. Utilizing the analytical framework of compliance theory, this article discusses the U.S. reputation for compliance in the context of the revised military commissions.

A decidedly negative reputation of the military commissions contributed to policies to amend the tribunal process, culminating in the Military Commissions Act of 2009. This supports empirical findings that States are pulled toward compliance with legal norms in part out of concern for reputation among transnational actors, such as governments, multi-national institutions, non-governmental organizations, and legal commentators. This article argues for policy-makers to engage in the interpretive, discursive process of normative compliance theory when formalizing national security strategy. Applying this process will minimize the need to engage in post hoc reputation shaping and, more importantly, will facilitate internalization of applicable legal norms in counter-terrorism policy.
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I. Introduction

In July of 2008, just days before the first United States war crimes trial since the Second World War, the defendant’s lawyers made a final effort to stay the proceedings.¹ Salim Hamdan’s legal team argued before the D.C. District Court that the recently authorized habeas petitions² should not only allow challenges to the legality of detention, but also to the legal framework of the military commission that would try him. Allowing the trial to go forward, they argued, would be contrary to Hamdan’s rights – a sentiment shared by many. Judge Robertson disagreed. Denying the defense request for injunctive relief, he stated, “The eyes of the world are on Guantanamo Bay. Justice must be done there, and must be seen to be done there, fairly and impartially….A real judge is presiding over the pretrial proceedings in Hamdan’s case and will preside over the trial.”³

Today, once again, the eyes of the world are on Guantánamo Bay. After President Barack Obama revitalized the military commissions designed to prosecute terrorist suspects in May 2009,⁴ Congress moved to adopt his proposed amendments.⁵ In conjunction with these efforts, Attorney General Eric Holder announced that the accused co-conspirators of the terrorist attacks of 9/11 would be tried in federal court, while other alleged offenders would be tried by military commission.⁶ These reform efforts must be viewed in light of the negative perception many have of the military commissions, and how this reputation generated a pull toward perceived compliance with the rule of law.

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² Boumediene v. Bush, 128 S. Ct. 2229, 2262 (2008) (holding that the Suspension Clause, Art. I, § 9, cl. 2 of the Constitution, "has full effect at Guantánamo Bay," and that detainees at Guantánamo Bay, Cuba "are entitled to the privilege of habeas corpus to challenge the legality of their detention.").
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In the wake of the murder of nearly 3,000 people on September 11, 2001, it would seem unimaginable that a judicial process conceived to punish alleged terrorists would receive heightened criticism. Nonetheless, the negative reputation of the military commissions held by domestic and international commentators is well known. The process is described as “rigged,” and the procedures are contested as inconsistent with international legal obligations. These perceptions resonate beyond public opinion, and must be viewed in light of a larger discourse among domestic and international actors of the legal framework applicable to military commissions. As a prescriptive contribution, this Article argues for policy-makers to engage in the interpretive, discursive process of normative compliance theory when formalizing national security strategy. Applying this process

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10 See, e.g., Katherine Newell Bierman, Counterterrorism Counsel--U.S. Program, Human Rights Watch, To Continue to Receive Testimony on Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld: Hearing Before the Senate Comm. on Armed Services, 109th Cong. 06-59 (2006) (Prepared Statement to the Senate Committee on Armed Services, July 19, 2006) (“[I]t is only a matter of time before governments who might otherwise avoid the appearance of illegality will exploit America’s efforts to carve out exceptions to the Geneva Conventions to justify poor treatment of captured Americans.”); Beard, supra note 7 (describing the MCA’s deficiencies with regard to the laws of war, and analyzing the potential negative effects these will have on U.S. counterterror policies); Lord Goldsmith, Justice and the Rule of Law, 43 INT’L LAWYER 27, 30 (2009) (criticizing the military commissions as not following fair trial procedures recognized under international law); Kevin E. Lunday & Harvey Rishikof, Due Process Is A Strategic Choice: Legitimacy and the Establishment of An Article III National Security Court, 39 CAL. W. INT’L L. 87, 90 (2008); Nanda, supra note 7, at 525-26;
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will minimize the need to engage in post hoc reputation shaping and, more importantly, will facilitate internalization of applicable legal norms in counter-terrorism operations.

In this context compliance theory seeks to describe why States comply with the rule of law. This Article focuses on reputation, a common element to several competing theories of compliance, and its impact on a nation-state’s compliance with legal norms. Under the process-based strand of compliance theory, there are three stages of compliance. 11 First, there is an action taken by a State, such as implementing the military commission system to prosecute suspected terrorists. This is followed by an interpretive discourse of the legal norms governing this action among multiple domestic and international actors, including governments, international organizations, non-governmental organizations, and legal scholars. Finally, the articulated norm becomes a part of a State’s domestic law through internalization processes such as judicial decisions, legislative enactments, or executive statements. Each of these steps in the transnational legal process is evident in the evolution of the military commissions, and, I argue, that it was the reputation of the tribunal system that generated the strongest pull toward compliance in the interpretive and internalization phases.

A critical analysis of the legal basis underlying substantive and procedural aspects of the military commissions reveals that, in spite of the reputation for non-compliance, the process under the Military Commissions Act of 2006 were generally aligned with domestic and international legal requirements. 12 One reason explaining the disparity between perceived compliance and actual practice is that the interpretive discourse of the applicable norms was given insufficient attention during the conception phase of the tribunal system. As such, the process developed a skewed reputation that had a pull toward norms articulated by commission critics, rather than their proponents. Ultimately, these norms were internalized through the revised Military Commissions Act of 2009.

This discussion begins in Section II with a review of compliance theory generally, the significance of the reputational pull within competing theories, and strategies that have shaped the current reputation of the military commissions. The military commissions are then critically assessed in Section III in terms of the historical significance of military tribunals and their relevance in modern armed conflict. This Section also assesses substantive and procedural aspects of the Military Commissions Act of 2006 in terms of compliance with relevant legal

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standards, highlighting issues such as retroactive application of offenses, hearsay evidence, so-called secret evidence, and statements of the accused. Section IV focuses on recent amendments to the military commission system, the internalization of legal norms through the MCA of 2009, and the debate over the use of federal courts or military tribunals to prosecute terror suspects.

The Article concludes with recommendations for policy makers when engaging in the transnational discourse that shapes a State’s reputational pull toward compliance with accepted legal norms. As the military commissions debate reflects, overcoming a negative reputation directly impacts the efficacy of policy decisions.

II. Compliance Theory, Reputational Pull, & Reputation Shaping

In November 2001, President George W. Bush issued Military Orders, which established the first U.S. military commissions since the Second World War. This system has undergone significant change, due largely to adverse Supreme Court decisions, including Hamdan v. Rumsfeld, which required the President to work with Congress to maintain a constitutionally viable terrorist tribunal system. Recent actions taken to update the military tribunals, including the Military Commissions Act of 2009, reflect change outside of the judicial framework. Rather than an adverse ruling, the latest changes seem to be motivated by the negative reputation held by many commentators of the Guantánamo courts. In essence, the rationale for updating the military commissions was to bring the commissions in compliance with the rule of law. This Section reviews compliance theory in historical context, analyzes the common thread of reputational pull among the compliance theories, and illustrates the methods used to shape the reputation of the military commissions.

A. An Historical Analysis of Compliance Theory

Compliance theory belongs to a distinct psychological and sociological group of study into stated norms and observed conduct in relation to those norms. The underlying question – Why do various actors obey legal norms? – is the heart of this theory. The pull toward compliance takes several forms, and is the basis of legal studies of individual, corporate and political behavior. The discussion of the military commissions focuses on the political actor in terms of compliance with domestic constitutional as well as international legal obligations.

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15 For a detailed history of the compliance debate, see Michael P. Scharf, International Law in Crisis: A Qualitative Empirical Contribution to the Compliance Debate, 31 Cardozo L. Rev. 45, 49-62 (2009). The subject of this article has since been extended into a book titled: Michael P. Scharf & Paul Williams, Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Adviser (2010).

16 Koh, supra note 11, at 2603, n. 13 (citing compliance studies by criminologists, corporate compliance scholars, advocates of regulatory reform, social psychologists, anthropologists, and sociologists and law-and-society scholars). Relevant to this discussion, Koh cites works by legal and moral philosophers, see, e.g., Frederick Schauer, Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life (1991); Paul Harris, The Moral Obligation to Obey the Law, in On Political Obligation (Paul Harris ed., 1990); Roscoe E. Hill, Legal Validity and Legal Obligation, 80 Yale L.J. 47 (1970); M.B.E. Smith, Is There a Prima Facie Obligation to Obey the Law?, 82 Yale L.J. 950 (1973).
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Prior to the Second World War, compliance theory in international law could be divided into four strands. The first strand, the “Austrian positivistic realist strand,” held that nations do not actually “obey” international law because “it is not really law.” The second strand, following a “Hobbesian utilitarian, rationalistic” approach, argued that “nations sometimes follow international law, but only when it serves their self-interest to do so.” The third approach maintained that “nations generally obey international law out of a sense of moral and ethical obligation derived from considerations of natural law and justice,” and is recognized as the “Kantian liberal, fairness strand.” Finally, the “Bentham process-based strand” held that nations are induced to obey the law from the “encouragement and prodding of other nations” through a discursive legal process. These four distinct strands provide the foundational bases for discussing compliance even today.

During the interwar years, two leading international lawyers began to focus on “solidarity” and a commonality of values among States as leading causes of compliance. Later, Louis Henkin’s seminal work, How Nations Behave, followed a utilitarian, rationalistic premise in defending international law. The height of the Cold War saw the dominance of the positivistic, realist strand, led by prominent scholars such as George F. Kennan. Nonetheless, international legal theorists, as opposed to international relations experts, maintained the significance of the “Bentham process-based strand.” Noteworthy among these theorists were Harvard Law professors, Abram Chayes, Thomas Ehrlich, and Andreas Lowenfeld, and Yale Law professors Myres McDougal and Harold Lasswell.

17 Scharf, supra note 15, at 51; see also Koh, supra note 11, at 2613.
18 See Koh, supra note 11, at 2609, 2611, citing JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 201 (Weidenfeld & Nicholson 1954) (1832) (“The duties which [international law] imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.”). See also Scharf, supra note 15, at 51.
19 Koh, supra note 11, at 2611; and see Scharf, supra note 15, at 51.
20 Koh, supra note 11, at 2611. Koh describes Kant’s “vision of international law as a purposive system dedicated toward securing peace, and built on the cornerstones of justice, democracy, and a liberalism focused on the centrality of human rights.” Id. at 2610, referencing Immanuel Kant, To Perpetual Peace: A Philosophical Sketch (1795), in PERPETUAL PEACE AND OTHER ESSAYS 107 (Ted Humphrey trans., 1983).
21 Koh at 2611.
22 Nathanial Berman, The Paradoxes of Legitimacy: Case Studies in International Legal Modernism, 32 HARV. INT’L L.J. 583, 585, quoting Alfred Verdross’s 1927 Hague Lectures, 16 Recueil des Cours 244 (1927). See also Koh, supra note 11, at 2613. Koh also references the works of James Brierly, 23 RECUEIL DES COURS 458 (1928), who focused on “solidarity” rather than natural law or positivist consent as the underlying reason for compliance.
23 Louis Henkin, HOW NATIONS BEHAVE 49-87 (1968); See also Koh, supra note 11, at 2621.
24 See Scharf, supra note 15, at 52, citing GEORGE F. KENNAN, AMERICAN DIPLOMACY 1900-1950 (1951). Scharf quotes Kennan’s attack of the Kantian approach, saying: “[T]he belief that it should be possible to suppress the chaotic and dangerous aspirations of governments in the international field by the acceptance of some system of legal rules and restraints [is an approach that] runs like a red skein through our foreign policy of the last fifty years.” Id. at 95.
26 See Scharf, supra note 15, at 52-53, discussing Harold Koh’s distinction between the Harvard and Yale methods, “observing that the Harvard approach focused on process as policy constraint while the New Haven approach was more value-oriented, focusing on process as policy justification.” Id. at 53, n.26.
The process based theory was later refined and relabeled the “transnational legal process.” Gaining significant traction among the process strand due to the changed legal landscape of the 1970’s and 80’s, “transnational legal process” encompassed “the theory and practice of how public and private actors including nation-states, international organizations, multinational enterprises, nongovernmental organizations, and private individuals, interact in a variety of public and private, domestic and international fora to make, interpret, internalize, and enforce rules of transnational law.”

Harold Hongju Koh, currently the State Department Legal Adviser, explains, while “rationalists dominated international relations theory in the 1980s,” it was “legal process” which “continued to dominate the study of international law.”

Following the collapse of the Soviet Union, the 1990’s saw international law’s metamorphosis into a blend of customary, positive, declarative, and “soft” law. The end of the Cold War accelerated what has been described as “sovereignty decline,” marked by the continued rise of the transnational legal process involving States, intergovernmental organizations, NGOs, and informal networks.

Michael P. Scharf, Professor at Case Western Reserve University School of Law, discusses the four prevailing compliance theories of the 1990’s in his Article “International Law in Crisis.” First, he describes the “instrumentalist” strand, which is an extension of the rational choice model, arguing that States only comply when it is in their self interest to do so. Second is the “liberal internationalist” strand, explaining that liberal democracies are more likely to comply with international law. The third strand, “constructivist,” describes that national interests are influenced by “norms of international law, the values of the international community, and the structure of international society.” Finally, the “management model,” utilized by Abram and Antonia Chayes in their work, The New Sovereignty, and refined by Koh,

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27 See Koh, supra note 11, at 2626, citing HENRY STEINER AND DETLEV VAGTS, TRANSNATIONAL LEGAL PROBLEMS (1968) (as updated HENRY STEINER, DETLEV VAGTS, & HAROLD HONGJU KOH, TRANSNATIONAL LEGAL PROBLEMS (4th ed. 1994).
28 Koh, supra note 11, at 2625-26.
30 Koh, supra note 11, at 2631 (reference omitted).
31 Id.
33 Id. at 54; See also Koh, supra note 11, at 2632, citing Robert O. Keohane, Jr., International Relations and International Law: Two Optics, Sherrill Lecture at Yale Law School (Feb. 22, 1996); See also Andrew T. Guzman, A Compliance-Based Theory of International Law, 90 Cal. L. Rev. 1823 (2002) (discussing compliance with international law from the perspective of self-interested States).
argues that compliance is induced “through interactive processes of justification, discourse, and persuasion.” 36

The transnational legal process describes three stages of compliance. Initially, there is an interaction (or series of interactions) between transnational actors. 37 In the current analysis, the interaction was triggered when the United States decided to prosecute alleged terrorists by military commission. This is followed by interpretation of the norm(s) governing the underlying interaction. For example, numerous domestic and transnational actors engaged in an interpretive discourse of the applicable legal standards governing trials by military tribunal. Finally, the moving party seeks not to “coerce” the other party, but to encourage the other party to internalize the international norm at issue. In our example, commentators and officials encouraged the United States to internalize certain norms. In short, “The aim is to “bind” the other party to obey the interpretation as part of its internal value set.” 38

Legitimacy theorists, including New York University Law Professor Thomas M. Franck, argue that rules incentivize compliance out of perception that they have been promulgated through a legitimate, or “right process.” 39 Within domestic institutions, there is evidence that legitimacy can be measured in terms of a “compliance pull” toward existing norms. In this field of study, not unlike the reputational pull of compliance theory. 40 Professor Gregory S. McNeal of Pepperdine University School of Law states that institutional legitimacy is “a specific form of legitimacy derived from the pressure for conformity placed on institutions by external observers. That conformity pressure may force institutional innovations such as military commissions and national security courts to comply with formal and informal external mandates (in this case imposed by law or prompted by public opinion)…” 41

Contemporary compliance scholarship was shaped by the terrorist attacks of September 11, 2001 and the invasion of Iraq in 2003. 42 During this time, a forceful counter-argument to liberal internationalists, constructivists, and Koh’s transnational legal process emerged. 43 Professor Jack Goldsmith of Harvard Law School, and Professor Eric Posner of the University of Chicago Law School published The Limits of International Law, 44 arguing that international law

36 Scharf, supra note 15, at 55, citing ABRAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY 109-11. For further discussion of the Chayes’s work, and further developments in the process-based strand, see Koh, supra note 11, at 2636.
37 Id. at 2646.
38 Id. at 2646.
39 Id. at 2601-02, citing THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS (1995); See also THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990); And see, Koh, supra note 11, at 2622, n. 113, citing Oscar Schachter, Towards a Theory of International Obligation, 8 VA. J. INT’L L. 300, 307 (1968).
40 See discussion infra Part II.C.
41 Gregory S. McNeal, Institutional Legitimacy and Counterterrorism Trials, 43 U. RICH. L. REV. 967, 968 (2009) (“Organizations generally, and counterterrorism organizations specifically, evolve to conform with their institutional environment under pressures which are felt as force, such as the formal requirements of law; as persuasion, such as dicta; and through expectations established by the culture and society in which the counterterrorism organization operates.”) Id. 979.
42 Scharf, supra note 15, at 56.
43 Hathaway & Lavinbuk, supra note 25, at 1413 (“In recent years, this vulnerability [in internationalist scholarship] has been the subject of unrelenting attack by a revisionist movement of smart young scholars not afraid to question the assumptions and claims of their predecessors.”).
is not so much a binding legal regime, as it is a series of political choices by nation-states. Following previous rational choice theorists, who have argued that “[i]nternational law is not law but politics,” this particular theory views international law as a threat to the constitutional democratic decision making process.

Numerous scholars rallied to contest the theories put forth by Goldsmith and Posner. Additionally, through a session of interviews with ten former State Department Legal Advisers, Michael Scharf concluded that this theory was widely rejected in practice. Specifically, “[The Legal Advisers] all perceived international law as real law that is binding on the United States and operates as a constraint on policy-makers, even where there are important national security interests at stake.” Nonetheless, common ground among competing compliance theories can be found in the reputation of State action, discussed in the following Section.

B. The Reputational Pull of Compliance Theory

The “reputational pull” of compliance theory was first articulated prior to the Second World War in theories focusing on compliance resulting from “solidarity” and commonality of values among States. Reputation is significant if one agrees that States must engage one another with a modicum of good faith, and that failure to adhere to treaty obligations and accepted legal norms will result in future transactional costs. This represents the “process-based strand of thinking about the compliance question by mixing process with reputation: the “solidaristic” strand that emerged derived a nation’s incentive to obey from the encouragement and prodding of other nations with whom it is engaged in a managerial, discursive legal process.” Louis Henkin similarly based at least part of his analysis of “foreign policy factors” on orderly and friendly relations among states, and a desire for a reputation for principled behavior, for propriety and respectability. Others have noted that once a legal standard is

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47 Hathaway & Lavinbuk, supra note 25, at 1414.
48 See, e.g., Allen Buchanan, Democracy and the Commitment to International Law, 34 GA. J. INT’L COMP. L. 305 (2006); Hathaway & Lavinbuk, supra note 25; Margaret E. McGuiness, Exploring the Limits of International Human Rights Law, 34 GA. J. INT’L & COMP. L. 393 (2006); see Scharf, supra note 15, at 56-62; and see Gray, supra note 45.
49 Scharf, supra note 15, at 63 (reference omitted). It must be noted, however, that even though Goldsmith and Posner’s work received extensive criticism from process-oriented compliance theorists, at least one aspect of rational choice theory was revealed in Scharf’s empirical study. When it comes to issues of armed conflict, legal advisers and, ultimately, policy-makers feel less constrained by issues of “compliance” and reputation. See Scharf at 70. See also Guzman, supra note 33, at 1825 (arguing that international law is less effective in areas such as the law of war and arms agreements).
50 See Berman, supra note 22, at 585 (quoting Alfred Verdross’s 1927 Hague Lectures, 16 RECUEIL DES COURS 244 (1927)). See also Koh, supra note 11, at 2613. Koh also references the works of James Brierly, 23 RECUEIL DES COURS 458 (1928), who focused on “solidarity” rather than natural law or positivist consent as the underlying reason for compliance.
51 Koh, supra note 11, at 2613 (emphasis added).
53 Id. at 48-50.
recognized as belonging to customary international law, or is codified in a treaty, violation of that standard will have serious reputational costs.\footnote{Paul Schiff Berman, \textit{Seeing Beyond the Limits of International Law}, 84 \textit{Tex. L. Rev.} 1265, 1292-95(2006) (reviewing Goldsmith and Posner’s \textit{The Limits of International Law}).}

The “new” sovereignty described by the Chayes’ managerial model is also comprised in part of “status – the vindication of the state’s existence as a member of the international system.”\footnote{See Koh, \textit{supra} note 11, at 2656, \textit{citing CHAYES} at 27 (arguing that only a few self-isolated nations still act independently in “their perceived self-interest……”).} This theory of compliance sees “the impetus for compliance [as] not so much a nation’s fear of sanction, as it is a fear of diminution of status through loss of reputation.”\footnote{Koh, \textit{supra} note 11, at 2637, \textit{citing CHAYES} at 119 (stating that “there are too many audiences, foreign and domestic, too many relationships present and potential, too many linkages to other issues to be ignored” for a State to choose to ignore the rule of law.)} Koh notes that the loss of reputation comes, particularly in a field such as international human rights, when the interpretive community determines that a norm has been violated. This community is comprised not only of nation-states who are parties to relevant treaties, but possibly also “domestic, regional, and international courts; ad hoc tribunals; domestic and regional legislatures; executive entities; international publicists; and nongovernmental organizations.”\footnote{Koh, \textit{supra} note 11, at 2640 (observing that the global norm against genocide is interpreted by a far larger group than merely the parties that comprise the treaty regime of the Genocide Convention).} As discussed in more detail below, these actors significantly impact reputation shaping.\footnote{See discussion \textit{infra} Section II.C.}

Goldsmith and Posner argue that reputational considerations have little impact on State behavior. Assuming that reputation does not weigh as the dominant factor in policy decisions, it must be recognized that the “CNN factor” (ie. How a certain action will be received by a variety of actors if aired publicly) of modern politics is at least one – albeit significant – consideration in nearly every decision.\footnote{See Scharf, \textit{supra} note 15, at 68 (discussing how the ten State Department Legal Advisers he interviewed recognized “that the ability to claim that an act is not in violation of international law is limited by the credulity of both the domestic and international legal communities, as reflected in public statements of governments, NGOs, international organizations, and scholars.”)} Nonetheless, rational choice theorists seek to limit the effect, if any, that reputation has by compartmentalizing various issues in foreign relations.\footnote{Id. at 61.} For example, the international response to U.S. actions to assist with Haiti’s disaster relief in January 2010 will have little impact on the U.S. reputation for complying with international trade agreements.\footnote{Id. at 61, \textit{citing GOLDSMITH AND POSNER}, at 102 (arguing that a negative reputation in complying with environmental standards will not affect the State’s ability to effectively carry out trade agreements).} While seeking to minimize its effect, Goldsmith and Posner concede that in at least some circumstances reputation matters.\footnote{Guzman, \textit{supra} note 33, at 1875, n. 189.} The commonality of reputation as an element in each theory of compliance must be given consideration. Upon observing the interactions of nation-States, it is necessary that “significantly more value be placed on reputation than Goldsmith and Posner are willing to acknowledge.”\footnote{Scharf, \textit{supra} note 15, at 60, discussing the “super game” theory analysis of David M. Golove’s, \textit{Leaving Customary International Law Where It Is: Goldsmith and Posner’s The Limits of International Law}, 34 Ga. J. Int’l L. 102 (2009).} Even within the rationalist approach, maintaining a good reputation can be in a
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State’s self-interest. Therefore, under this strand, when a State “chooses” to comply with international norms, the self-interest at issue is the maintenance of good relations in order to facilitate future negotiations and interactions that are similarly in the self-interest of a State.\textsuperscript{64} Professor Kenneth Anderson of American University Washington College of Law points out that in seeking to circumvent the possibility that reputation as a law-abiding State is in the long-term self-interest, Goldsmith and Posner never explain what constitutes a State’s self-interest.\textsuperscript{65} In the process-based strand it is far less controversial that reputation among multiple international players – States, organizations, public and private sectors – plays a strong role in shaping State behavior as part of the discursive process. As Scharf points out based on his empirical study, “The Legal Advisers all recognized (and advised policy-makers) that violations can engender international condemnation, strain relations with allies, and interfere with the ability of the United States” to achieve important domestic and foreign policy objectives.\textsuperscript{66} Moreover, each of the Legal Advisers saw “reputation as a law-abiding State” as a component “of the compliance pull of international law.”\textsuperscript{67}

The reputational pull also places restraints on policy-making, which ultimately results in norm internalization. As noted by Professor Stephen Saltzburg of George Washington University School of Law, “The President must also be concerned with the reaction of the international community to the choices made in fighting the war on terror. This is not because the President owes any formal duty to any nation other than the United States. It is because no nation, not even the world’s “superpower,” can fight a global war alone, and because every nation, superpower or not, wants to be as sure as it can that its actions do not create new enemies and provoke new attacks upon it.”\textsuperscript{68}

Several years after the initial policy decisions relating to the war on terror had been given effect, it was readily apparent that “[m]any countries in Europe and around the world [had] an unfavorable impression of the United States’ handling of detainees.”\textsuperscript{69} This negative reaction to the U.S. approach to detention policy was anticipated by then Secretary of State Colin Powell and his legal adviser William H. Taft IV as early as 2002, shortly after President Bush decided not to apply the Geneva Conventions to al Qaeda and Taliban detainees.\textsuperscript{70} They argued that “applying the conventions would demonstrate that the U.S. bases its conduct on its legal obligations, not just its policy preferences.”\textsuperscript{71}

\begin{footnotesize}
\begin{itemize}
    \item[64] Guzman, \emph{supra} note 33, at 1825 (“International law can affect state behavior because states are concerned about the reputational and direct sanctions that follow its violation.”)
    \item[66] Scharf, \emph{supra} note 15, at 63.
    \item[67] Id. at 97. The other factors include multilateral reciprocity and the desire to maintain order and promote the rule of law. \emph{Id.}
    \item[68] See generally Saltzburg, \emph{supra} note 7.
    \item[69] Colonel Michael W. Meier, \emph{A Treaty We Can Live With: The Overlooked Strategic Value of Protocol II}, 2007 ARMY LAW. 28, 41 (SEP 2007).
    \item[70] Memorandum from President George W. Bush (Feb. 7, 2002).
    \item[71] Meier, \emph{supra} note 69, at 30, \emph{citing} Memorandum, William H. Taft IV, Legal Advisor, Department of State, to Alberto R. Gonzales, Counsel to the President, subject: Comments on Your Paper on the Geneva Convention (2 Feb. 2002); Memorandum, Colin L. Powell, Secretary of State, to Counsel to the President and Assistant to the President
\end{itemize}
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In spite of numerous adjustments to “war on terror” policies in the years following Powell and Taft’s memos, the negative reputation would stick. Efforts to internalize norms and bring U.S. policy into at least perceived compliance were continually rejected as insufficient, including Congress’s enactment of the Military Commissions Act of 2006 (MCA). As one commentator notes, the MCA “risks harming the perception of the United States as a country willing to adhere to its international legal obligations.” The next section discusses some of the strategies used to interpret the lawfulness, constitutionally and internationally, of the trial of enemy belligerents by military commission.

C. Reputation Shaping, Political Discourse, & Advocacy Strategies

A State’s reputation for compliance is shaped by various domestic and international actors engaged in the discursive process. As discussed above, as soon as State action begins, the interpretive process works to articulate the applicable legal standard. It is during this phase that a State’s reputation is formed “through public opinion, the news media, and other mechanisms of public accountability [including domestic and international organizations, political debate, and other States] faced daily” by policy-makers. This section focuses on methods utilized to shape reputation, as applied to the military commissions debate and counter-terrorism policies broadly.

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72 See articles cited supra note 7.

73 Trahan, supra note 7, at 835. Trahan continues by adding that:

The United States will be able to firmly stand behind the rule of law and its Geneva Convention obligations if it: (1) adopts military commission trial procedures identical to those in the Uniform Code of Military Justice and limits military commission trials to trying individuals apprehended in conjunction with traditional armed conflict and/or on the battlefield during a period of armed conflict; (2) tries any other Guantanamo detainees whose charges can be satisfactorily substantiated in federal court under federal anti-terrorism laws; (3) desists from redefining the United States' Geneva Convention obligations in any way (which there would be less need for if trials were held pursuant to the UCMJ and/or in federal court); (4) desists from attempting to immunize war crimes resulting from “collateral damage”; (5) reinstates habeas corpus review for Guantanamo detainees; and (6) ceases attempting to undermine judicial review as to matters of international law. Then, the United States could hold its head high on the international stage, as it should, regarding military commission trials, and start reclaiming its moral authority in its continued response to the attacks of September 11, 2001.

See discussion infra Sections III.B. and IV.A. and the comparative analysis of the military commissions procedural and evidentiary provisions to determine whether the United States can “hold its head high” once again.

74 Koh, supra note 11, at 2652. Here, Koh, writing in 1997, is describing Israel’s engagement with the Oslo peace process in the 1990’s, and how transnational processes as well as domestic reputational influences shaped future adherence to interpreted legal norms. Although that process was ultimately overcome by events, the reputational shaping mechanisms at play, both domestically and internationally, in the military commission discourse are remarkably similar. See also Scharf, supra note 15, at 70 (discussing ways that the State Department Legal Adviser has exerted influence “in shaping the modalities and articulating the rationale” for certain actions so “that it would be accepted by the international community.”).
Initially, it is the government that promotes policy choices and makes efforts to garner public support. For example, in describing the need for the Guantánamo Bay detention facility in 2002, Secretary of Defense Donald Rumsfeld described the detainees as the “worst of the worst.” Framing the issue in this way, using “tactical words and phrases to fundamentally alter popular attitudes and perceptions,” also known as semiotics, is a tactic used by virtually all political actors. Secretary of State Hillary Clinton demonstrated the current administration’s use of semiotics when she remarked that “the administration has stopped using the phrase [‘war on terror’] and I think that speaks for itself…” Besides external discourse, internal government actors engage in reputation shaping every time they provide advice, thereby contributing to the interpretive discourse of legal issues surrounding foreign policy and national security decisions. Sometimes the government solicits outside interpretation, such as when President Bush and Congress established the 9-11 Commission. Regarding the treatment of detainees following the attacks of September 11, 2001, the bipartisan Commission concluded that “[a]llegations that the United States abused prisoners in its custody make it harder to build the diplomatic, political, and military alliances the government will need” in a successful counterterrorism strategy.

The allies of the United States and other transnational actors shape the reputation of U.S. foreign policy decisions by engaging in the discursive process. Numerous investigations, fact finding inquiries, and legal studies have been conducted by foreign governments and multinational organizations regarding the treatment of detainees at Guantánamo Bay, and, to a lesser

76 For an in depth analysis of the use of tactical language in the global war on terror, or “semiotics,” see Scharf, supra note 15, at 77-81. Although Professor Scharf focuses on the use of semiotics by officials in the Bush administration, he concludes that Democrats and Republicans alike engage in the use of “word games” or semiotics to influence public opinion. Id. at 78.
78 9-11 COMMISSIONS REPORT 379. See also U.S. SENATE ARMED SERVS. COMM., Senate Armed Services Committee Inquiry Into the Treatment of Detainees in U.S. Custody, at xxv (Dec. 11, 2008), available at http://levin.senate.gov/newsroom/supporting/2008/Detainees.121108.pdf. (“The fact that America is seen in a negative light by so many complicates our ability to attract allies to our side, strengthens the hand of our enemies, and reduces our ability to collect intelligence that can save lives.”)
79 See Scharf, supra note 15, at 95, n. 216 (discussing opinions by the U.N. Secretary-General, the U.N. Special Rapporteur on Torture and Arbitrary Detention, the United Kingdom House of Commons, the International Committee of the Red Cross, and the Inter-American Commission on Human Rights relevant to the U.S. treatment of “war on terror” detainees).
extent, the military commission process. In fact, President Obama’s administration has gone to
great lengths to reassure European allies that the United States is taking appropriate steps to
close the detention facility in Guantánamo Bay, a clear example of proactive steps to shape the
U.S. reputation for compliance.

Academic scholarship and civil law suits have contributed significantly to the military
 commissions compliance discourse. The debate within the academy ranges from those who
argue that the military commissions are in full compliance, to those who maintain that the
commissions fail to comply with international law, constitutional law, and military law.

Today, the reputation of the military commissions for non-compliance is all but assumed by
many, with one article even comparing the tribunals to the infamous Dred Scot decision.

Non-governmental organizations play a significant role in the process of reputation
shaping through the interpretive discourse. This influence can be traced to the rise of
international institutions and non-government organizations in the 1970’s and 80’s, which had a
profound impact on international relations. This development continued well into the 1990’s,

http://www.photius.com/rogue_nations/guantanamo.html; Neil Lewis, Red Cross Finds Detainee Abuse in

See Deborah Pearlstein, We’re All Experts Now: A Security Case Against Security Detention, 40 CASE W. RES. J.
Int’l L. 577, n.32 (2009), citing Brief for 422 Current and Former Members of the United Kingdom and European
Union Parliaments as Amici Curiae in Support of Petitioner, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (No. 05-
184) (arguing that the military commission process fails to satisfy international legal standards); see also Goldsmith, supra note 7, at 30 (criticizing the military commissions as not following fair trial procedures recognized under
international law); and see Stephanie Nebehay, 9/11 Suspects should face civilian court, U.N. envoy says, REUTERS,
Scheinin, U.N. special rapporteur on the protection of human rights and fundamental freedoms while countering
terrorism, arguing against a military commission trial for the 9/11 suspects).


Professor McGuinness argues that Goldsmith and Posner’s book, The Limits of International Law, “is not really a
descriptive account of how international law actually works, but an effort to alter public perceptions about the
importance of international law in order to expand presidential power in foreign relations.” McGuinness, supra note 48, at 421; Peter Margulies, The Detainees’ Dilemma: The Virtues and Vices of Advocacy Strategies in the War on
Terror, 57 BUFF. L. REV. 347, 347 (2009). For a discussion of civil law suits against former U.S. officials in the
“war on terror,” see Keith A. Petty, Who Watches the Watchmen? ‘Vigilant Doorkeeping,’ the Alien Tort Statute,

See cited articles supra note 12.

See cited articles supra note 7.

Balkin & Levinson, supra note 7 (comparing the constitutional principles espoused in the Dred Scott decision to
modern legal issues, including the military commissions);

For a thorough discussion of the “rise” of international NGOs, and the current debate regarding NGO
accountability, see Kenneth Anderson, What NGO Accountability Means – And Does Not Mean, 103 AM. J. INT’L L.
170 (2009).

Koh, supra note 11, at 2624, citing HAROLD JACOBSON, NETWORKS OF INTERDEPENDENCE (1979); RICHARD W.
MANSBACH ET AL., THE WEB OF WORLD POLITICS, NON-STATE ACTORS AND THE TRANSFORMATION OF
INTERNATIONAL RELATIONS (1976); PRESSURE GROUPS IN THE GLOBAL SYSTEM: THE TRANSNATIONAL RELATIONS
OF ISSUE-ORIENTED NON-GOVERNMENTAL ORGANIZATIONS (Peter Willets ed., 1982).

Koh, supra note 11, at 2631, n. 162, citing THE ROLE OF NON-GOVERNMENTAL ORGANIZATION IN THE
PROMOTION AND PROTECTION OF HUMAN RIGHTS (G. Castermans et al. eds., 1990); NGOs, THE UN, AND GLOBAL
GOVERNANCE (Thomas G. Weiss & Leon Gordenker eds., 1996); Steve Charnovitz, Participation of
Nongovernmental Organizations in the World Trade Organization, 17 U. PA. J. INT’L BUS. L. 331 (1996); Jessica
and holds true today in international treaty making and enforcement regimes, 91 as well as Congressional hearings discussing the Military Commissions Act of 2006 and its revisions in 2009. 92

In the military commission debate, it has been the detainees’ lawyers that have led the way in shaping a reputation of non-compliance. Professor Peter Margulies of Roger Williams University School of Law writes a candid assessment of the strategies used by Guantánamo habeas and defense attorneys to shape public opinion. 93 For these attorneys, “[A]dvocacy outside of court is often the main event.” 94 Employing a strategy Margulies refers to as “crossover advocacy,” attorneys mobilize non-judicial actors with the intent of influencing outcomes through judicial or political influence. Such actors include the media, foreign governments, international organizations and non-governmental organizations, 95 all of which are active participants in reputation shaping as noted above.

Margulies describes how, in an effort to “bypass” the law, 96 “lawyers expanded their strategy to include not only the fact-finder in a military commission but also officials in a detainee’s country of origin, who could pressure the United States for the detainee’s release.” 97 As such, the range of tactics utilized by crossover advocates include “bargaining with [foreign] public officials” in order to influence U.S. foreign policy, 98 formal advocacy in the form of civil lawsuits against government officials domestically and in foreign jurisdictions, 99 and media relations to claim – legitimately and otherwise – that detainees are innocent 100 and were tortured.

91 Anna Spain, Who’s Going to Copenhagen?: The Rise of Civil Society in International Treaty-Making, ASIL INSIGHT, Vol. 13, Issue 25, December 11, 2009 (discussing the extensive participation in climate change talks at the Copenhagen summit in 2009). See also NGO participation in the Rome Statute negotiations and Assembly of State Party meetings at http://www.iccnow.org/?mod=accreditation, stating that “NGOs have attended meetings of the ICC’s Preparatory Committees, Commissions and Assembly of States Parties since 1996. Since 1998, the Coalition for the International Criminal Court has facilitated NGO access to these negotiations in order to increase global NGO participation and input in the ICC process.”
92 Katherine Newell Bierman, Counterterrorism Counsel--U.S. Program, Human Rights Watch, To Continue to Receive Testimony on Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld: Hearing Before the Senate Comm. on Armed Services, 109th Cong. 06-59 (2006) (Prepared Statement to the Senate Committee on Armed Services, July 19, 2006) (“[I]t is only a matter of time before governments who might otherwise avoid the appearance of illegality will exploit America's efforts to carve out exceptions to the Geneva Conventions to justify poor treatment of captured Americans.”)
93 Margulies, supra note 84.
94 Id. at 347 (describing the advocacy outside of the courtroom as part of a human rights mobilization strategy he calls “crossover advocacy”).
95 Id. at 348.
96 Id. at 364.
97 Margulies, supra note 84, at 364.
98 Id. at 364-365.
99 Id. at 365-67.
100 Margulies describes two approaches to claims of innocence for GTMO detainees. Id. at 368. One is the strategy of arguing that all detainees are innocent, the “You’ve got the wrong guys” misadventure narrative. Id. at 368, citing Carol D. Leonnig, Judges Question Lack of Prisoner Rights: Detainees in Cuba Want Ability to Fight “Enemy Combatant” Claims in Court, WASH. POST, Sept. 9, 2005, at A5. But see, ‘Guilty’ puts end to the Hicks myth, March 29, 2007, available at the guilty plea of David Hicks http://www.smh.com.au/news/opinion/guilty-puts-end-to-the-hicks-myth/2007/03/28/1174761563330.html.
Garnering media attention to assist in reputation shaping is often effective for crossover advocates. As Margulies demonstrates, there are institutional factors in media coverage which encourage reporting “novelty” that “attracts eyeballs and advertising.”\footnote{Margulies, \textit{supra} note 84, at 383.} Reporters are naturally drawn to counsel with fewer constraints on their interaction with outside actors. Margulies continues, “All things being equal, journalists give more play to the perspective of players who talk to them, as opposed to players [e.g. Government attorneys] whose media interaction is constrained by rules limiting disclosure.”\footnote{\textit{Id.} at 384.} It follows that in the effort to shape the reputation of the military commissions, it was the more vocal, dramatic pleas of detainee counsel that dominated the interpretive discourse.

It is important to note that the benefits to defense counsel utilizing these tactics are real and significant.\footnote{\textit{Id.} at 372-76. \textit{See also} David Luban, \textit{Lawfare and Legal Ethics in Guantanamo}, 60 STAN. L. REV. 1981 (2008) (arguing about the difficulties habeas and defense counsel have when representing GTMO clients); \textit{But see} Major General Charles J. Dunlap, Jr. & Major Linell A. Letendre, \textit{Military Lawyering and Professional Independence in the War on Terror: A Response to David Luban}, 61 STAN. L. REV. 417 (2008) (providing a strong rebuttal to Luban’s lopsided arguments).} Moreover, it is essential to point out that this discussion is not intended to imply that defense and habeas counsel should not be afforded every opportunity to zealously represent their clients within legal and ethical parameters.\footnote{See Model Rules of Professional Conduct r. 3.6 (2009) (avoiding prejudicial public statements about matters at issue in litigation. \textit{See also} Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991); \textit{and see} Judith L. Maute, “\textit{In Pursuit of Justice}” in \textit{High Profile Criminal Matters}, 79 FORDHAM L. REV. 1745, 1756-57 (2002). Efforts to vilainize defense and habeas counsel in this process is both unproductive and unfair. \textit{See, e.g.}, Dwight Sullivan, CAAFLog.com, \textit{Pro bono Gitmo lawyers – bad; Military Gitmo defense counsel – not morally reprehensible.} March 6, 2010, available at http://www.caafllog.com/2010/03/06/pro-bono-gitmo-lawyers-bad-military-gitmo-defense-counsel-not-morally-reprehensible/. \textit{See also} \textit{Are You or Have You Ever Been a Lawyer?}, N.Y. TIMES, Opinion, March 7, 2010, http://www.nytimes.com/2010/03/08/opinion/08mon1.html?partner=rssnyt&emc=rss (describing recent efforts to discredit lawyers who represented Guantanamo detainees and recalling the embarrassing incident when Cully Stimson, then deputy assistant secretary of defense for detainee affairs under George W. Bush, “urged corporations not to do business with leading law firms that were defending Guantánamo detainees. He resigned soon after that.”).} Recently, significant controversy followed statements made by a political group advocating against former detainees’ lawyers who have now taken positions in government.\footnote{John Schwartz, \textit{Attacks on Detainee Lawyers Split Conservatives}, NYTIMES.com, March 9, 2010. A statement issued by numerous influential attorneys, including former Bush administration officials states that “We consider these attacks both unjust to the individuals in question and destructive of any attempt to build lasting mechanisms for counterterrorism adjudications.” Available at http://www.politico.com/news/stories/0310/34050.html.} Without dignifying such remarks, it is worth noting that in the military context, Judge Advocates have a proud history of zealously representing unpopular defendants, to include alleged Nazi war criminals in the post-War military commissions.\footnote{\textit{Peter Judson Richards, EXTRAORDINARY JUSTICE: MILITARY TRIBUNALS IN HISTORICAL AND INTERNATIONAL Context} 120 (2007).} Rather than critique zealous representation, this discussion is intended to demonstrate the advocacy tactics used, as well as their practical effect in shaping the reputation of policy decisions.

In spite of possible benefits to defense and habeas counsel, extra-judicial advocacy can be harmful due to its tendency to be “self-serving,” it requires “lower levels of accountability for
advocates,” and it can ultimately “undermine the credibility of the advocate” if, for example, a client’s alleged abuse is exaggerated.\(^\text{107}\) Significantly, the use of this strategy “tempts the lawyer to omit material facts that undermine” their version of events, since legal ethics in public are less stringent than rules governing candor to the court.\(^\text{108}\)

Facing relaxed accountability, crossover advocates in the military commission process have demonstrated lack of candor in two specific forms: the “misadventure narrative,” describing detainees who were in the wrong place at the wrong time, and narratives that exaggerate specific claims of abuse and innocence.\(^\text{109}\) A striking example is the case of Candace Gorman, who claimed that doctors at the Guantánamo Bay detention facility gave her client AIDS, only to be rebuked by the court.\(^\text{110}\) This rebuke, however, did not prevent her from subsequently making the same claim to a columnist, who printed the story without mentioning the court’s adverse findings.\(^\text{111}\) Similarly, Clive Stafford Smith, founder of the international human rights organization Reprieve and attorney for some Guantánamo detainees, omits from his book, in which he claims that his client, Binyam Mohamed, was innocent of charges, any detail of Mohamed’s training in weapons use and document forgery at an al Qaeda training camp.\(^\text{112}\)

Assuming that extra-judicial advocates overstep ethical boundaries on rare occasions, factual misperceptions play a role in reputation shaping even at the margins. The example of Clive Stafford Smith’s “omission” regarding Binyam Mohamed’s terrorist training will not be seized upon by unaccountable actors in the interpretive debate. Instead, advocacy groups will report as fact that Binyam Mohamed was an innocent, maligned by the military commission process. Additionally, there is evidence that some authors “manipulate sources” to produce studies of dubious value,\(^\text{113}\) which Margulies refers to as “Agenda-Driven Empiricism.” The distortive effect this sort of research can have on reputation shaping, and the compliance process generally, must not be overlooked.

Delay is another strategy effectively utilized to allow time to further engage in shaping a negative reputation, as well as to allow that reputation to sink in. One commentator argues that delays in the current military commissions were “induced in part by the sustained criticism of the process, on multiple judicial and political fronts, from its very inception, [and] undermine the purported need for expediency.”\(^\text{114}\) The effectiveness of this tactic was articulated by Peter Judson Richards in his book, Extraordinary Justice: Military Tribunals in Historical and International Context. He states, “When the punishment of a war crime lags indefinitely behind

\(^{108}\) Margulies, supra note 84, at 390.
\(^{109}\) Id. at 391.
\(^{110}\) Id. at n.155-56.
\(^{112}\) Margulies, supra note 84, at 392-93.
\(^{113}\) Id. at 403-08, citing the study by Mark Denbeaux & Joshua Denbeaux, Report on Guantanamo Detainees: A Profile of 517 Detainees Through Analysis of Department of Defense Data (2006), available at http://law.shu.edu/news/guantanamo_report_final_2_08_06.pdf.
\(^{114}\) Richards, supra note 106, at 139.
the triggering event, the actual crime itself, the potential for a curious inversion of categories increases profoundly. The perpetrator of atrocities slowly and steadily metamorphoses into a kind of victim.”\textsuperscript{115} He continues, adding an Orwellian twist, that “the trial of war criminals, with all the slow cruel pageantry of the law,… after a lapse of time has so strange a way of focusing a romantic light on the accused and turning a scoundrel into a hero.”\textsuperscript{116}

As we have seen, the methods used to shape reputation range from government actions, discourse with international allies and partners, interpretations of lawfulness by international and non-government organizations, scholarship and litigation from a professional community of academics and advocates, as well as caressing public opinion through media outlets. While these methods are not unique to the military commissions debate, they have had a profound impact in shaping the reputation of the process, and, as we shall see, in interpreting the norms that are ultimately internalized as policy. Unfortunately, however, this debate has taken on an urgent, often polarizing tone, causing some actors engaged in the discursive process to manipulate facts and rely on lower levels of accountability. In this context, the next section is a critical analysis of the military commissions, in light of the negative reputation the process has developed in the interpretive, discursive phase of the compliance process.

III. A Critical Analysis of the Popular Perception

The reputation of the military commissions, the gravamen of the reputational pull, has been framed largely in polemic terms. The public debate regarding the lawfulness of commissions has elucidated little as to the historical, legal, and policy underpinnings of the tribunal system. In short, the perception of military commissions is often at odds with reality, generating policy based on (still) debatable legal issues. This section discusses the criticisms of and justifications for the military commissions, focusing on the historical use of military commissions, the use of these tribunals in the context of modern conflict, and the legal framework of the Military Commissions Act of 2006.

A. Historical Background: From Conflict to the Courts

i. Military Commissions from 1776-1952

Military Commissions have played an important role throughout U.S. history. Soon after the terrorist attacks of September 11, 2001, when President Bush announced that the United States would prosecute terrorist suspects by military commission,\textsuperscript{117} commentators debated the legal significance of their previous use.\textsuperscript{118} The debate quickly deteriorated into characterization

\textsuperscript{115} Id. at 170.
\textsuperscript{116} Id. at 172.
\textsuperscript{117} Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §§3(a), 4(b), 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Military Order].
of military tribunals as horrific abuses of power by means of “star chambers,” “juntas,” “rubber truncheons” and “kangaroo courts.”119 At least one commentator writes that “precedent [for military commissions] is weak at best.”120 These clichés belie the historical record. The Supreme Court recognized that military commissions have often been relied upon in times of crisis, including: in place of civilian courts during martial law,121 as occupational tribunals to try civilians when a military government is in place,122 and as law of war tribunals “to seize and subject to disciplinary measures those enemies who…have violated the law of war.”123

President Obama acknowledged the historic significance of these war crimes tribunals at a speech given at the National Archives on May 21, 2009.124 He stated, “Military commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war.”125 In fact, during the Revolutionary War military courts were used by both Colonial and British forces to prosecute and punish spies.126 General Andrew Jackson later utilized military tribunals during the War of 1812127 and the Seminole War in Florida in 1818.128

Terrorism]; Trahan, supra note 7, at 785; But see Richards, supra note 106, ix; Bradley & Goldsmith, supra note 12, at 2129-32 (discussing historic precedent as support for the pre-Hamdan military commissions); and see Bickers, supra note 12, at 908.

119 Richards, supra note 106, ix.


121 Hamdan, 126 S. Ct. at 2775, citing Ex parte Milligan, 4 Wall. 2, 127 (1866) (indicating that military commissions are well recognized as substitutes for civilian courts during times of martial law). But see Duncan v. Kahanamoku, 66 S. Ct. 606 (1946) (holding that Congress did not authorize trying civilians by military commission instead of in civilian courts during a period of martial law in Hawaii); and Milligan, 4 Wall., at 121-22, 127 (discussing the constitutional issues raised by trying civilians by military commission and holding that trial by military commission of civilians is impermissible when the courts are open).

122 Hamdan, 126 S. Ct. at 2776 (discussing the use of military commissions in occupied Germany to apply the German Criminal Code). See also Yoo, supra note 12, at 91, citing Eli E. Nobleman, Military Government Courts: Law and Justice in the American Zone of Germany, 33 A.B.A. J. 777, 777-80 (1947); Pitman B. Potter, Legal Bases and Character of Military Occupation in Germany and Japan, 43 AM. J. INT'L L. 323 (1949) (noting that hundreds of thousands of cases were tried by military commissions in occupied Germany).

123 Hamdan, 126 S. Ct. at 2776 (quoting Ex parte Quirin, 317 U.S. 1, 28-29 (1942)). See also Trahan, supra note 7, at 785; and see Major Michael A. Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals who Commit International Crimes, 153 MIL. L. REV. 1, 13-21 (1996).

124 President’s Archives Speech, supra note 4. Military tribunals have also played an important role outside of the U.S. See Richards, supra note 106, at 6-7. In fact, evidence of military tribunals to prosecute enemy war criminals dates back to 405 B.C. when the Spartans prosecuted Athenian prisoners. Id. at 7, citing Mccormack & Simpson, eds., Law of War Crimes, 33-34. The British utilized military commissions as early as 1688 to punish violations of international law. See Newton, supra note 123, at 13, n. 47, citing Articles of James II, art. LXIV, reprinted in COL. WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS, 919-28 (2d. ed. 1920). Newton further states that “[s]ubsequent military codes restated the legality of using military commissions to punish violations of the laws and customs of war.” Newton, supra note 123, at 13, n. 47, citing British Articles of War of 1765, art. II, § XX, reprinted in WINTHROP, supra, at 931.

125 President’s Archives Speech, supra note 4.

126 See Richards, supra note 106, at 11-16; and see Fisher Tribunals, supra note 118, at 2. In 1776, Captain Nathan Hale of the Continental Army was caught behind British lines and was tried and sentenced to death by a military court. Id. at 2, citing Brief for the Respondent, United States ex rel. Ernest Peter Burger [Ex parte Quirin],
Over time the procedures of military commissions evolved, reflecting the legal standards of the day as well as the nature of the underlying conflict. Arising out of “usage and necessity,” military tribunals were used once again during the U.S. War with Mexico of 1846-1848 under the authority of General Winfield Scott’s General Order 20. For the first time, these tribunals went by the title “military commission,” distinguishing them from courts-martial used to prosecute soldiers.

The military commissions came of age during the Civil War. That President Lincoln’s suspension of the writ of habeas corpus went hand in hand with the use of military tribunals is significant to those who argue modern commissions are a result of significant Executive overreach. However, during this same period, Union Army General Order 100 was promulgated in order to alleviate the cruelty and unnecessary suffering inflicted upon the sick and wounded during combat. General Order 100, also known as the “Lieber Code” for its author Dr. Francis Lieber, is widely regarded as a significant milestone in the evolution of...
international humanitarian law.\textsuperscript{135} It provides the legal basis for the Civil War military commissions, and modern day commissions can trace their lineage directly to the Lieber Code.\textsuperscript{136}

The Lieber Code commissions were authorized to prosecute “cases which do not come within the “Rules and Articles of War,” or the jurisdiction conferred by statute on courts-martial.”\textsuperscript{137} Rather, they relied on the common laws of war. At the time it was understood that offenses within the jurisdiction of domestic courts “whenever such loyal court exists will not be tried by a military commission.”\textsuperscript{138} These principles illustrated an emerging distinction between Articles of War commissions utilized in situations of martial law,\textsuperscript{139} commissions occurring in occupied territory,\textsuperscript{140} and so-called “law of war” military commissions. Solidifying these jurisdictional distinctions, the Supreme Court held in \textit{Ex parte Milligan} that the use of military trials to prosecute civilians was unlawful where the civilian courts were “open, and in the proper and unobstructed exercise of their jurisdiction.”\textsuperscript{141} Nonetheless, following this decision, there were more than 1, 435 military commission trials between April 1865 and January 1869.\textsuperscript{142}

In apparent contrast to the decision in \textit{Milligan}, a military commission was convened to try John Wilkes Boothe’s eight alleged co-conspirators in the Lincoln assassination even though the civilian courts in Washington, DC were fully operational.\textsuperscript{143} Attorney General James Speed issued a legal opinion in 1865 detailing the legal justifications for utilizing a military commission in this instance.\textsuperscript{144} Rather than consider the Lincoln co-conspirators as civilian criminals as in

\textsuperscript{135}See G.I.A.D. Draper, \textit{The Status of Combatants and the Question of Guerilla Warfare}, 45 BRT. Y.B. INT’L L. 173, 179 (1971) (“[T]he writings of Lieber were the first major attempt to give written form to the customary rules of land warfare prevailing at the end of the first half of the nineteenth century.”).


\textsuperscript{137}General Order No. 100, Instructions for the Government of the Armies of the United States in the Field, Apr. 24, 1863, 13, reprinted in \textit{The Laws of Armed Conflict} 3 (Dietrich Schindler & Jiri Toman eds. 1988). \textit{See also} Newton, supra note 123, at 17 (noting that the commissions tried more than 2,000 cases during the war and reconstruction); also see, Elsea, Terrorism and the Law of War at 19.

\textsuperscript{138}FISHER TRIBUNALS, supra note 118, at 19, \textit{citing 2:1 The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies} 248 (1894).

\textsuperscript{139}RICHARDS, supra note 106, at 25.

\textsuperscript{140}Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

\textsuperscript{141}Ex Parte Milligan, 71 U.S. (4 Wall.) 2 (1866).

\textsuperscript{142}RICHARDS, supra note 106, at 40, \textit{citing Neely, The Fate of Liberty} 176-77. For two significant cases prior to 1865, \textit{see} Ex Parte Merryman, 17 Fed. Cas. 144 (No. 9,487) (D.C. Md. 1861) (where Chief Justice Roger Taney expressed concern regarding the scope of Lincoln’s order suspending the writ of habeas corpus); \textit{and see} Ex parte Vallandigham, 1 Wall. (68 U.S.) 243 (1864) (denying certiorari review due to lack of authority as an Article III court to oversee the military commissions). A notable post-\textit{Milligan} case is the trial of Captain Henry Wirz for conspiracy and murder, primarily for his role as administrator of the inhumane Confederate prison at Andersonville, Georgia where approximately one-third of the 48,000 Union prisoners died. \textit{See} FISHER TRIBUNALS, supra note 118, at 26, \textit{citing} Lewis L. Laska and James M. Smith, \textit{‘Hell and the Devil’: Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865,” 68 MIL. L. REV. 77, 78 (1975); and see} RICHARDS, supra note 106, at 41 (describing the Wirz trial as a “quasi-judicial referendum on the South’s treatment of Union prisoners”).

\textsuperscript{143}RICHARDS, supra note 106, at 42. According to Louis Fisher, the Lincoln co-conspirator military commission remains the most controversial of the Civil War era. FISHER TRIBUNALS, supra note 118, at 28. One of the Lincoln co-conspirators, Dr. Samuel Mudd was pardoned by Johnson, and later had an heir who challenged the legitimacy of the tribunals. \textit{See} Mudd v. Caldera 134 F. Supp. 2d 138, 140 (2001) (holding that the military tribunal had jurisdiction to try Mudd for violations of the law of war).

\textsuperscript{144}Military Commissions, 11 OP. ATTY GEN. 297; 1865 U.S. AG LEXIS 36 (July, 1865).
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_Milligan_, Attorney General Speed reasoned that the President’s assassination was a law of war offense, and as such the accused should be tried as “secret, but active participants” in violation of the law of war. The personal jurisdiction distinction between _Milligan_ and the Lincoln co-conspirator trial is overlooked by many. _Milligan_ prohibited the trial of _civilians_ by military commission when the courts were operational; the Court did not prohibit the trial of _belligerents_. Attorney General Speed’s opinion, legally binding for the Executive, resonates with the law of war military commissions of the 21st century.

Prior to World War I, military tribunals and Army provost courts were used to discipline a local uprising during the U.S. occupation of the Philippines. Military commissions, however, had never been formally recognized by statute at this time. In 1912, during Congressional hearings to amend the Articles of War, the Judge Advocate General, E.H. Crowder, emphasized that military commissions should be included in the revised Articles, as they are an institution “of the greatest importance in a period of war and should be preserved.” In spite of the institutional significance, the United States declined to use military commissions during World War I.

Modern authority for the use of military commissions relies heavily on World War II precedent. _Ex parte Quirin_ is undoubtedly the most influential, albeit controversial, of these cases. The case began when eight Nazi saboteurs landed on U.S. shores by submarine at Long Island and Florida. Within fourteen days of their arrival they were apprehended by FBI agents. President Roosevelt convened a military commission in Washington, DC to prosecute the saboteurs on July 8, 1942. Five days after the commission adjourned on August 3, 1942, six

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145. The majority of the civil war era military commissions tried civilians in violation of the laws of war, but combatant soldiers were also tried by military commission. RICHARDS, supra note 106, at 29. Richards goes on to explain that “further hard choices attended the task of discerning between “legitimate popular resistance forces and illegitimate guerrilla bands,” which remained a vexing problem throughout the war.” Id. at 29 (citing Gunther Rothenberg, _The Age of Napoleon_, in HOWARD, ANDREOPoulos, AND SHULMAN, EDs., _The Laws of War_, 86-97.)

146. See, e.g., Colby Goodman, _Historical Use of Military Commissions Fails to Provide Support for Trying 9/11 Suspects_, Human Rights First Blog, posted 10 December 2009, available at http://www.humanrightsfirst.org/blog/hrfblog/2009/12/historical-use-of-military-commissions.html (arguing that Attorney General James Speed ignored the Supreme Court’s ruling in _Milligan_, without recognizing the pivotal legal distinction between the status of the accused in _Milligan_ – a civilian – and the Lincoln co-conspirators, participants in the armed conflict). See also _Quirin_, 317 U.S. at 45 (“Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war.”)

147 11 OP. ATTY GEN. 297, 312 (“[T]o unite with banditti, jayhawkers, guerillas, or any other unauthorized marauders is a high offense against the laws of war; the offense is complete when the band is organized or joined.”).

148 FISHER TRIBUNALS, supra note 118, at 32.

149 FISHER TRIBUNALS, supra note 118, at 33, citing “Revisions of the Articles of War,” Hearing before the House Committee on Military Affairs, 62nd Cong., 2d Sess. 3 (1912).

150 See ELSEA TERRORISM, supra note 118, at 21-22 (stating that the Attorney General relied heavily on _Milligan_ and concluded that the civilian courts were in operation, martial law had not been declared, and the offenses were committed outside the field of military operations). But see RICHARDS, supra note 106, at 99 discussing the use of military tribunals following the armistice, resembling the occupation-style tribunals in the post-bellum South or General Scott’s tribunals in Mexico.

151 Ex Parte Quirin, 317 U.S. 1 (1942). For another military commission occurring during hostilities, see FISHER TRIBUNALS, supra note 118, at 47, citing Duncan v. Kahanamoku, 327 U.S. 304, 315 (1946) (holding that the martial law order in place in Hawaii following the Pearl Harbor attack of 7 December 1941 could not mean that all civil courts could be closed and replaced with military tribunals for civilians).

of the eight accused were executed. The Court held that the President has the authority, pursuant to congressional authorization, “to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.” The Quirin case remains controversial because of what some have considered the “pre-determined logic” of the Court. This is particularly true when compared to the case of two subsequent Nazi saboteurs and the different treatment they received than the saboteurs in the Quirin case. It is this precedent, not the original decision, which commentators argue the PMO commissions should have been modeled after.

The vast majority of WWII military commissions occurred after the conclusion of hostilities. War crimes were adjudicated by international military tribunals, such as the Nuremberg Tribunal and the International Military Tribunal for the Far East, as well as national military tribunals. While the Nuremberg Tribunal adjudicated nearly 200 cases, United States Judge Advocates prosecuted some 1,600 German war crimes defendants, and another 1,409 accused in the Pacific theater.

Among the national military commissions was the trial of Japanese General Tomoyuki Yamashita. This case involved the slaughter of Filipinos in the tens of thousands by Japanese forces under General Yamashita’s command. When the case reached the Supreme Court, the majority confirmed the legitimacy of military commission jurisdiction as well as the principle of command responsibility. This precedent was followed by other post-war American military tribunals.

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153 RICHARDS, supra note 106, at 106. In addition to the eight Quirin saboteurs, fourteen people were arrested in Chicago and New York and tried in civil court for providing assistance to the saboteurs. See FISHER QUIRIN, supra note 118, at 15, n. 62.
154 Quirin, 317 U.S. at 28-29.
155 For highly critical analysis of the Quirin decision, see FISHER TRIBUNALS, supra note 118, at 43-45; and see FISHER QUIRIN, supra note 118.
157 RICHARDS, supra note 106, at 110.
158 Id. at 104 (discussing U.S. Secretary of War, Henry Stimson, and his plan to use military commissions to prosecute Axis war criminals). Additionally, Richards discusses the popular misconception that Nuremberg and the IMTFE were the leading models of justice following the Second World War, where “the criticisms lodged against the international tribunals also spread over to impugn the war crimes programs of the Allies more generally.” Id. at 104.
159 Maj. Jan E. Aldykiewicz, Authority to Court Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts, 167 MIL. L. REV. 74, at 75-76 (2001). See also RICHARDS, supra note 118, at 114, citing HOWARD LEVIE, TERRORISM IN WAR, 135-39 (1993) (accounting 1,672 individuals tried by U.S. military commission in the European theater). See also JOHN ALAN APPLEMAN, MILITARY TRIBUNALS AND INTERNATIONAL CRIMES 267 (noting that although the US conducted the majority of military commissions, Great Britain, Australia, France, the Netherlands, Poland, Norway, Canada, China, and Greece each conducted their own).
161 In re Yamashita, 327 U.S. 1 (1946). The Court stated that General Tomoyuki Yamashita had been properly charged. The Court noted that he had breached his duty as commander and that “Obviously charges of violations of
In the European theater, the *Eisentrager* case involved twenty-one German nationals convicted of violating the law of war, who were detained in Landsberg, Germany. When the case came before the Supreme Court, the petitioner’s habeas claims were rejected. The Court argued that alien enemy combatants with no connection to the United States other than their confinement may not avail themselves of the rights under the Fifth Amendment or congressional statute. The Court noted that “[n]o decision of this Court supports” such an “extraterritorial application of organic law.” Justice Jackson added that if the Fifth Amendment “invests enemy aliens in unlawful hostile action against us with immunity from military trial, it puts them in a more protected position than our own soldiers….It would be a paradox indeed if what the Amendment denied to Americans it guaranteed to enemies.”

The negative reputation of the 2009 Military Commissions is relevant in light of these historic precedents. For example, there were a significant number of commentators who criticized the post-war International Military Tribunals, while offering praise to the conduct of the military commissions “for their fairness and justness.” Not unlike today, as the war crimes program in post-war Germany dragged on into the 1950’s, it “ceased to be a priority, and became instead a political burden.” One commentator recognized that “as the immediacy of events faded into memory, military and political objectives shifted and diverged.” The lessons of the

the law of war triable before a military tribunal need not be stated with the precision of a common law indictment.”

Id. at 17. For more detailed, critical analysis, see FISHER TRIBUNALS, supra note 118, at 52. Refuting critical historical analysis of the *Yamashita* majority, see RICHARDS, supra note 106, at 127-28.

RICHARDS, supra note 106, at 127. After surveying the completed cases in the Pacific theater, Richards cites Piccigallo’s assessment:

Minor trials featured, with admirable consistency in the various theaters, excellent and devoted defense counsel; sufficient procedural safeguards, subject, of course to military law: fair-minded judges; extraordinarily thorough and impartial review procedures in all theaters (save perhaps the Russian); adequate translation facilities; generally (with some exceptions) public hearings; and accessible, complete records of the proceedings. A considerable percentage of the accused, too, were acquitted; perhaps not as many as might have been expected received death sentences. Commutation of sentences was not uncommon.

Id. at 130, citing PICCIGALLO, THE JAPANESE ON TRIAL, 214.

Johnson v. Eisentrager, 339 U.S. 763 (1950). For another prominent European military commission case, see See Madsen v. Kinsella, 343 U.S. 341, (1952) (where the Supreme Court upheld the trial of a civilian dependent of a military member by military commission, reasoning that the “absence of attempts by Congress to limit the President’s power,” may authorize the President in time of war to “establish and prescribe the jurisdiction and procedure of military commissions.”) Id. at 348.

Eisentrager, 339 U.S. at 784-85 (citation omitted). In holding the Fifth Amendment inapplicable, the court considered several key factors: (1) The detainee was an enemy alien, (2) had never been or resided in the United States, (3) was captured outside of the United States and there held in military custody as a prisoner of war, (4) was tried and convicted by a military commission sitting outside the United States, (5) was tried for offenses against the law of war committed outside the United States, and (6) was at all times imprisoned outside the United States. But see Boumediene v. Bush, 128, S. Ct. 2229 (rejecting the Government’s formalistic interpretation of Eisentrager, and resting its analysis of the applicability of the Fifth Amendment extraterritorially on (1) the detainees’ citizenship and status and the process by which that is determined, (2) nature of detention sites, and (3) practical considerations in resolving the prisoner’s entitlement to the writ.) Id. at 2259.

Eisentrager, 339 U.S. at 783.

RICHARDS, supra note 106, at 130, citing PICCAGALLO, at 214; DOWER, EMBRACING DEFEAT, 443-84; and MAGUIRE, LAW AND WAR, 169.

RICHARDS, supra note 106, at 132.

Id. at 132.
post-war military commissions instruct that as the conflict fades so too does the political capital to expend on punishment of war crimes. This lesson is particularly relevant to the military commissions of the 21st Century as the attacks of September 11, 2001 drift further from the collective consciousness.

**ii. Military Commissions in the Context of Modern Armed Conflict**

The military commissions in Guantánamo Bay are the third category of military tribunal identified in *Quirin* as “law of war” courts. This necessarily requires that the alleged crimes took place in the context of an armed conflict. Since the attacks of September 11, 2001, commentators have struggled to remove *war* from the “war on terror,” arguing that, beyond the initial invasion and occupation of Afghanistan by the U.S.-led coalition, an armed conflict does not exist. In fact, the very term “war on terror” has fallen out of favor due to sustained criticism.

Arguing that there is no underlying armed conflict is an effective interpretive mechanism that results in shaping the reputation of the military commissions as extra-legal. The federal courts are functioning, there is no state of martial law, and the hearings are held far away from conflict or occupation zones, so why then is there a need for a “war court?”

It is recognized that “there is no settled definition of the term ‘armed conflict.’” This term is frequently used, but not defined, in the 1949 Geneva Conventions and the 1977 Additional Protocols, the primary treaties governing the use of armed force. Nonetheless, a generally accepted functional definition of armed conflict states:

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169 Id. at 138.


171 *See, e.g.*, International Commission of Jurists, Report of the Eminent Jurists Panel on Terrorism, Counter-terrorism, and Human Rights, Assessing Damage, Urging Action: Executive Summary, at 9 (Feb. 16, 2009) available at http://ejp.icj.org/IMG/ExecSumm.pdf [hereinafter Jurists Report]; *See also* Nanda, *supra* note 7, at 514 n. 6 (providing an overview of Bush administrations practices during the “war on terror” and whether they complied with international law); Natasha Belandra, *Defining Armed Conflict*, 29 CARDOZO L. REV. 2461, 2472, n. 31 (2008) (concluding that the “war” on terror is not an armed conflict and that it must be controlled by international human rights law). Professor Belandra notes that most commentators recognize the conflict in Afghanistan immediately following 9-11 as well as the subsequent occupation were, in fact, part of an armed conflict. *Id.* at 2472, citing HELEN DUFFY, THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 250-55 (2005) (arguing that the conflict with al Qaeda cannot be characterized as an international or non-international armed conflict); Silvia Borelli, *Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the “War on Terror,”* 857 INT’L REV. RED CROSS 39, 46 (2005) (arguing that outside of Afghanistan and Iraq, the “war on terror” should not be considered an armed conflict but as law enforcement on an international scale); Mary Ellen O’Connell, *The Legal Case Against the Global War on Terror*, 36 CASE W. RES. J. INT’L L. 349 (2004) (arguing that there is virtually no support among independent scholars for a case of “global war”); Mark A. Drumbl, *Judging the 11 September Terrorist Attack*, 24 HUM. RTS. Q. 323 (2002) (arguing that the September 11th attack should be treated as a criminal attack and be addressed by international criminal law and process). *See also* ELSEA TERRORISM. *supra* note 118, CR-11-14 (discussing whether an armed conflict exists between the United States and al Qaeda); Michael P. Scharf, *Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?*, 9 ILSA J. INT’L & COMP. L. 391 (2001).

172 Pleming, *supra* note 77.

173 *See* Belandra, *supra* note 170, at 2468-69.

174 *Id.*
[A]n armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between states or protracted armed violence between governmental authorities and organized armed groups, or between such groups within the states….International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved.175

Another interpretive statement, issued by a Panel on Terrorism held by the International Commission of Jurists states:

[W]hen terrorist acts are committed outside of [armed conflict], they are not governed by international humanitarian law, but by domestic criminal law and international human rights law and, perhaps, international criminal law. Accordingly, individuals who are suspected of terrorist offences committed outside of situations of armed conflict cannot legally be labeled, tried, and/or targeted as combatants. Where terrorist acts trigger or occur during an armed conflict, such acts may well constitute war crimes, and they are governed by international humanitarian law, together with international human rights law.176

Additionally, a report prepared by the Congressional Research Service states, “A terrorist act is not seen to be an act of war unless it is part of a broader campaign of violence directed against the state.”177 Examining al Qaeda’s activity prior to September 11, 2001, it is clear that the organization’s sustained use of force both “triggered” the armed conflict with the United States, and was part of a “broader campaign of violence.”

Since al Qaeda’s inception in Afghanistan in 1988,178 the group has articulated its offensive strategy against the Western world, specifically targeting the United States and Israel. In 1992, the al Qaeda leadership issued a fatwa calling for jihad against U.S. forces.179 In its first effort to engage the United States, al Qaeda’s military committee trained and equipped Somali warlords, who were later responsible for the deadly 1993 attack on two U.S. Blackhawk helicopters.180 In 1996, bin Laden issued a public fatwa calling for the forcible removal of U.S. personnel from military installations in Saudi Arabia.181 Declaring war on the United States, bin Laden issued yet another fatwa in 1998, which called for all Muslims to kill any American, anywhere in the world.182 That same year al Qaeda operatives carried out this deadly directive

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175 Prosecutor v. Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 67, ICTY, 2 October 1995 (Cassese, J.). This is the generally accepted definition of armed conflict under international law. See, e.g., Rome Statute of the International Criminal Court, Article 8(2)(f); See also Prosecutor v. Kunarac, Judgment, para. 56, ICTY, 12 June 2002.
176 Jurists Report, supra note 170; see also Nanda, supra note 7, 514 (emphasis added).
177 ELSEA TERRORISM, supra note 118, at CRS-10 (emphasis added).
178 9-11 COMMISSION REPORT at 56.
179 Id. at 59.
180 Id. at 60.
181 Id. at 48.
182 9-11 COMMISSION REPORT, at 47.

The attacks and declarations of war by al Qaeda illustrate that this discussion takes place in the context of an armed conflict, as opposed to isolated events traditionally handled by law enforcement measures. In fact, shortly after the attacks in 2001, the U.N. Security Council condemned the attacks as “threats to international peace and security” and reaffirmed the right of States to defend themselves against such attacks. Years later the Supreme Court would also recognize the existence of an armed conflict between the United States and al Qaeda. Numerous commentators, including prominent former government attorneys, support this analysis.

It is in this context, on November 13, 2001, that President George W. Bush issued a Military Order authorizing the establishment of military commissions (PMO Commissions).
These orders and a series of Military Commission Instructions issued by the Secretary of Defense created the system by which terrorist suspects would be detained and tried as “unlawful combatants.” The primary legal authority cited for the first version of military commissions was the President’s constitutional authority as Commander in Chief. Congressional action under the Authorization for the Use of Military Force (AUMF) passed in response to the September 11, 2001 attacks, as well as relevant sections of the Uniform Code of Military Justice. By November 2005, ten cases had been charged and prepared for trial under the PMO military commissions.

The reputation of the post-9/11 military commissions was assailed almost as soon as the President issued the Military Orders. As discussed in more detail below, this early negative reputation would stick, thereby constraining policy options and efforts to amend the poorly regarded military commissions. Professor Gregory McNeal attributes the lack of legitimacy of

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191 Dep’t of Def. Military Commission Order No. 1, Mar. 21, 2002.

192 See U.S. CONSTITUTION, art. II, § 2, cl. 1; See also Quirin, 317 U.S. at 26 (1942):

The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.

193 Authorization for the Use of Military Force, P.L. 107-40, 115 Stat. 224 (2001), authorizing the President to: use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

194 10 U.S.C. §§ 821, 836 (2000). Section 821 (Article 21 of the UCMJ) provides:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

Section 836 (Article 36 of the UCMJ) provides that procedures [Procedures] for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures of courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

See also Bradley, Military Commissions at 323.


196 McNeal, supra note 41, at 989-90, n. 2, citing Jack Goldsmith & Cass R. Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes, 19 CONST. COMMENT. 261, 261 (2002). See also Katyal & Tribe, supra note 7; But see Bradley & Goldsmith, supra note 12 (discussing the authorizations and limitations on the President’s actions in the war on terror based on Congress’s Authorization for the Use of Military Force of 2001).
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the PMO Commissions on the preclusion of outside input, known in process-based compliance theory as the “interpretive discourse,” which could have assisted in bringing perceptions in line with historic norms governing military commission procedure. Once the negative reputation for non-compliance with the rule of law had taken hold, however, the constitutional, international and military legal norms at issue would be internalized through judicial incorporation.

In *Hamdan v. Rumsfeld*, the Supreme Court held that the PMO military commissions system “lacks power to proceed because its structure and procedures violate both the UCMJ and the Geneva Conventions.” Specifically, the court stated that the President’s power to convene military commissions, based on Congressional authorization in Article 21 of the Uniform Code of Military Justice, must comply with the law of war. As such, article 3 common to all four of the 1949 Geneva Conventions (CA3) is applicable, and its procedural protections must be applied. Because the PMO Commissions were not patterned after the UCMJ, they were not a “regularly constituted court” and did not comport with CA 3.

This landmark decision, as well as other decisions relating to the detention of enemy detainees, required the administration to internalize legal standards it had heretofore rejected. Following the *Hamdan* decision, Congress enacted the Military Commissions Act of 2006, discussed in detail in the following section. As this discussion highlights, many of the negative criticisms of the PMO Commissions carried over to the revised military commissions, which would negatively impact the reputation of that process as well.

**B. Military Commissions Act of 2006**

The Military Commissions Act of 2006 (MCA) was passed by Congress in response to the Supreme Court’s decision in *Hamdan*. The Supreme Court invited the President to revive the military commission process when four justices noted that “[n]othing prevents the President from returning to Congress to seek the authority he believes necessary.” The passage of the

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197 McNeal, supra note 41, at 990. Additionally, McNeal suggests that had the administration taken note of the State Department’s argument to apply the minimal protections of Common Article 3 of the 1949 Geneva Conventions to the GTMO detainees, then the nearly universal criticism from our international allies may have been diminished. *Id.* at 992, citing *Jack Goldsmith, The Terror Presidency* 120 (2007).

198 Koh, supra note 11, at 2640 (reference omitted).

199 *Hamdan* 126 S.Ct. at 2759.

200 *Id.* at 2774.

201 *Id.* at 2794-96. For a detailed discussion of the applicable protections of CA3 to the military commissions, see discussion infra Section III.B.

202 *Hamdan*, 126 S.Ct. at 2792 (“Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case.”) Underlying the discussion to the PMO Commission’s compliance with the UCMJ and CA3 is the underlying tension of the President’s Article II powers as Commander in Chief and Congress’s war powers under Article I. The dual role for the political branches in establishing military commission procedures was clearly articulated in Justice Kennedy’s concurring opinion. *Hamdan* at 2799.


204 10 U.S.C. §§ 948a-950w. The House of Representatives passed the MCA with a vote of 250-170 and the Senate had 65-34 votes in favor. *See Bradley, supra* note 12, at 322 n.5.

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MCA was the second iteration of the compliance process for the military commissions, starting with the initial post-*Hamdan* decision to seek legislative approval for the tribunal system. Shortly following this decision, the interpretive, reputation shaping phase began, and for many it was perceived as illegitimate from the outset.\(^{206}\)

Nonetheless, the MCA of 2006 and the accompanying rules of procedure and evidence demonstrate a significant step toward internalization of the domestic constitutional legal requirements set forth in *Hamdan*, as well as international legal norms.\(^{207}\) In fact, the MCA marks the first time that the United States has expressed, in its domestic law, the law of war offenses triable by military commissions.\(^{208}\) This section critically analyzes the reputation of the MCA’s jurisdictional, procedural, and evidentiary provisions in terms of compliance with the rule of law.

i. Regularly Constituted Court

The MCA’s compliance with international and domestic law will be judged by whether the tribunals are “regularly constituted” under common article 3 of the Geneva Conventions.\(^{209}\) According to the Supreme Court in *Hamdan*, this requires that the commissions resemble the courts-martial system.\(^{210}\) As the Court explained:

Common Article 3, then, is applicable here and, . . . requires that Hamdan be tried by a “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people.” 6 U.S.T., at 3320 (Art. 3, ¶ 1(d)). While the term “regularly constituted court” is not specifically defined in either Common Article 3 or its accompanying commentary, other sources have disclosed its core meaning. The commentary accompanying [Article 66 of the Fourth Geneva Convention] defines “‘regularly constituted’” tribunals to include “ordinary military courts” and “definitely exclude[e] all special tribunals.” GCIV Commentary 340 (defining the term “properly constituted” in Article 66, which the commentary treats as “regularly constituted”); see also *Yamashita*, 327 U.S., 206 McNeal, *supra* note 41, at 1008. For a summary of scholarly articles criticizing the post-*Hamdan* commissions, *see* articles, *supra* note 7. *See also* ELSEA MCA PROCEDURES, *supra* note 194, at CRS-1 (noting that critics argue that the MCA deviates from the UCMJ in “significant ways”).

207 For a list of scholarship that supports military commissions, at least in part, *see* cited articles, *supra* note 12.


209 *Hamdan*, 126 S.Ct. at 2792 (“Nothing in the record before us demonstrates that it would be impracticable to apply court-martial rules in this case.”). The Supreme Court found that Article 21 of the UCMJ brought the Geneva Conventions into the legal framework of the military commissions. *Id.* at 2774, 2802.

210 Compare the *Hamdan* standard and the MCA provisions to the rules of the *Quirin* commissions, which provide: “In general, wherever applicable to a trial by Military Commission, the procedure of the Commission shall be governed by the Articles of War, but the Commission shall determine the application of such Articles to any particular question.” *See* FISHER QUIRIN, *supra* note 118, at 24, *citing* Rules Established by the Military Commission Appointed by Order of the President of July 2, 1942 at 3-4; McCoy Papers; *See also* FISHER QUIRIN, *supra* note 118, at 36, *citing* “Observations on Ex Parte Quirin,” signed “F.B.W.,” [Frederick Bernays Wiener] at 4; Frankfurter Papers. Wiener criticized the 1942 military commissions as having impermissibly deviated from the standards of general court-martial. When the second group of Nazi saboteurs came in November 1944, they were tried in a manner consistent with Wiener’s criticisms of the 1942 tribunals. *See* FISHER QUIRIN, *supra* note 118, at 37; *see also* RICHARDS, *supra* note 106, at 152-53.
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at 44, 66 S. Ct. 340, 90 L. Ed. 499 (Rutledge, J., dissenting)(describing military commission as a court “specially constituted for a particular trial”). And one of the Red Cross’ own treatises defines “regularly constituted court” as used in Common Article 3 to mean “established and organized in accordance with the laws and procedures already in force in a country.” Int’l Comm. of Red Cross, 1 Customary International Humanitarian Law 355 (2005); see also GCIV Commentary 340 (observing that “ordinary military courts” will “be set up in accordance with the recognized principles governing the administration of justice”).

Internalizing these norms, the Secretary of Defense promulgated the Manual for Military Commissions (MMC), “establishing detailed, public rules of evidence and procedure governing the conduct of military commissions that were closely aligned with the accepted norms governing U.S. courts-martial under the UCMJ.”

A comparative analysis of procedural and evidentiary norms is discussed in more detail in the following section.

Trial by a regularly constituted court includes offenses that were recognized as offenses previously triable by military commission. A fundamental principle of law, nullum crimen sine lege, states that persons may not be prosecuted for conduct that was not an offense under international or domestic law when that conduct occurred. In the constitutional context, this standard is expressed in the ex post facto clause. While an in depth analysis of the subject matter jurisdiction of the military commissions is beyond the scope of this article, the contours of the interpretive discourse and the MCA’s reputation for compliance is personified in the discussion of the crime “material support for terrorism,” which many argue does not belong to recognized law of war violations.

Examining the domestic jurisdictional standards, Article 21 of the UCMJ provides that military commissions will have jurisdiction only over “offenses that by statute or by the law of

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211 Hamdan, 126 S.Ct. at 2797-98.
213 See Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR), providing: “No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.” And see Protocol I Additional to the 1949 Geneva Conventions, art. 75(4)(c), providing: “[N]o one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed.” See also HELEN DUFFY, THE ‘WAR ON TERROR’ AND THE FRAMEWORK OF INTERNATIONAL LAW 95 (2005).
214 U.S. Constitution, art. I, § 9, cl. 3.
215 See, e.g., DUFFY, supra note 212, at 350-51 (“To the extent that laws enshrining vague and imprecise definitions of terrorism or related offenses purport to criminalize conduct, concerns clearly arise regarding compatibility with Article 15 of the ICCPR. Numerous criticisms have been leveled at states by human rights bodies in this respect since 9/11.”) (internal reference omitted); And see generally Elsea MCA Procedures, supra note 194; David Glazier, Precedents Lost: The Neglected History of the Military Commission, 46 VA. J. INT’L L. 5 (2005); Michael O. Lacey, Military Commissions: A Historical Survey, 2002 ARMY LAW. 41 (Mar. 2002); but see Statement of David Kris, Assistant Attorney General Before the Committee on Armed Services of the United States Senate, “Military Commissions,” July 7, 2009 (“[I]dentifying traditional law of war offenses can be a difficult legal and historical exercise….“).
war may be tried by military commissions, provost courts, or other military tribunals.\textsuperscript{216} Providing statutory support, the MCA states “A military commission under this chapter shall have jurisdiction to try any offense made punishable by this chapter or the law of war when committed...before, on, or after September 11, 2001.”\textsuperscript{217} Therefore, Congress clearly intended the MCA to apply retroactively to crimes such as material support.

The interpretive debate regarding this offense, however, has continued through extensive litigation in military commissions\textsuperscript{218} and on appeal before the Court of Military Commission Review (CMCR). Specifically, at the CMCR, Hamdan’s appellate counsel argue that the charge “material support for terrorism” is not a violation of the law of war, and by defining material support as a crime “traditionally...triable” by a law of war commission, “Congress not only ignored historical reality, it overstepped the limited grant of power conferred on it by the Offenses Clause [of the Constitution].”\textsuperscript{219} Additionally, because Hamdan’s charged misconduct occurred years prior to the enactment of the MCA of 2006, it violates the prohibition of \textit{ex post facto} prosecution in the Constitution and international law.\textsuperscript{220}

On the other hand the government argues, based on the U.S. common law of war,\textsuperscript{221} that the conduct undertaken by suspected terrorists has traditionally been punishable by military commission, and that by enacting the MCA, “Congress has unambiguously exercised the authority to “define and punish” material support for terrorism as an “Offense[] against the Law of Nations.”\textsuperscript{222} Trial judges in several military commission cases, including \textit{U.S. v. Khadr} and \textit{U.S. v Hamdan}, held that “conspiracy and material support for terrorism have traditionally been considered violations of the law of war.”\textsuperscript{223} In the \textit{Hamdan} trial, military judge Captain Keith Allred concluded that participating in armed conflict while belonging to an irregular force that commits war crimes against civilians was treated as a war crime in the past, particularly in Civil War military commissions. Congress, in this case, was simply renaming conduct that was already a crime.

\textsuperscript{216} 10 U.S.C. § 821. \textit{See also} ELSEA TERRORISM, \textit{supra} note 118, at CRS-32; \textit{and see} Newton, \textit{supra} note 123 at 21 (“[T]he entire scope of history and American jurisprudence compel the conclusion that Article 21 grants jurisdiction only over violations of the international laws of war.”)

\textsuperscript{217} MCA § 948d(a).

\textsuperscript{218} \textit{See, e.g.}, \textit{U.S. v. Hamdan}, Ruling on Defense Motion to Dismiss, July 16, 2008 (ruling that the conspiracy and material support charges did not violate the prohibition against \textit{ex post facto} punishment).


\textsuperscript{220} \textit{See id.} Hamdan’s brief also argues that his equal protection rights were violated, since the MCA of 2006 only permits personal jurisdiction over aliens.

\textsuperscript{221} Madsen v. Kinsella, 343 U.S. 341, 346-47 (1952) (noting that military commissions are “our common law war courts.”).

\textsuperscript{222} \textit{See, e.g.}, \textit{U.S. v. Hamdan}, Court of Military Commissions Review, Appellee Brief, CMCR Case No. 09-002, at 4 (on file with author).

\textsuperscript{223} \textit{See, e.g.,} U.S. v. Hamdan, Ruling on Defense Motion to Dismiss, July 16, 2008 (ruling that the conspiracy and material support charges did not violate the prohibition against \textit{ex post facto} punishment). \textit{See also} U.S. v. Khadr, Ruling on Defense Motion to Dismiss for lack of Subject Matter Jurisdiction, D-008 and D-009 (on file with author).
This particular compliance debate, however, is far from over. During Congressional testimony prior to the enactment of the MCA of 2009, General Counsel for the Department of Defense, Jeh Johnson, and Assistant Attorney General of the Department of Justice’s National Security Division, David Kris, questioned whether a conviction based on the offense material support for terrorism would be upheld on appeal.\textsuperscript{224} With a recent Supreme Court decision on the federal material support statute,\textsuperscript{225} and the Court of Military Commission Review decision forthcoming, the extent to which this crime satisfies domestic and international legal norms is being determined by the courts.\textsuperscript{226} Even if these issues are resolved in favor of the Government, the reputation that this crime is not valid, and that the process is illegitimate will likely remain.

ii. Military Commission Procedural Protections

In any criminal justice system, justice cannot be done without a fair process. As such, the scope of procedural protections afforded suspects before military commissions is at the pinnacle of the reputational pull of the compliance debate.\textsuperscript{227} While misperception and rhetoric often overshadow this issue, determining which procedural protections are due to the accused is no simple task. Even critics of the MCA concede that the precise legal framework governing the detention and prosecution of enemy combatants is unclear. As stated by Professor David Martin of the University of Virginia School of Law, “When the overarching constitutional and statutory rules are uncertain, nearly every practice is fair game, and a detainee’s lawyer owes it to his client not to neglect claims or theories that just might prove productive.”\textsuperscript{228}

The Hamdan decision recognized certain limits on presidential discretion when promulgating rules of procedure for Military Commissions. Relying on article 36 of the UCMJ,\textsuperscript{229} the Court detailed a uniformity requirement applicable to such tribunals. Under this standard, as demonstrated by the Court, Military Commissions rules of procedure must be uniform with courts-martial practice unless demonstrably impracticable.\textsuperscript{230}

\textsuperscript{224}Testimony of Jeh Charles Johnson, General Counsel, Department of Defense, Hearing Before the Senate Armed Services Committee, “Military Commissions,” July 7, 2009; and see Statement of David Kris, supra note 214.
\textsuperscript{226}For further discussion of U.S. internalization of international legal standards, see Knoops, supra note 7, at 609-618 (arguing that international jurisprudence impacted Supreme Court’s interpretation of applicability of conspiracy at military commissions); and see Mark A. Drumb, The Expressive Value of Prosecuting and Punishing Terrorists: Hamdan, The Geneva Conventions, and International Law, 75 GEO. WASH. L. REV. 1165, 1174-77 (2007) (questioning whether Congress can lawfully grant jurisdiction to a military commission for the crime of conspiracy, which was not historically a law of war offense triable by military commission).
\textsuperscript{227}Noting the importance of procedural protections, Justice Jackson wrote, “Only the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied.” Shaughnessy v. United States ex rel. Mezei, 345 U.S. 206, 224 (1953) (Jackson, J., dissenting).
\textsuperscript{228}See Martin, supra note 7, at 359; See also Eric Posner, Boumediene and the Uncertain March of Judicial Cosmopolitanism, 2008 CATO SUP. CT. REV. 23 (2007-1008) (arguing that Boumediene is less about separation of powers and more about granting constitutional protections to citizens overseas – i.e. Judicial cosmopolitanism).
\textsuperscript{229}10 U.S.C. § 836.
\textsuperscript{230}See Hamdan, 126 S.Ct. at 2792; but see Frakt, supra note 7 (arguing that the MCA of 2006 and its implementing regulations fail to adequately adopt courts-martial procedures and, as a result, the MCs cannot be considered a “regularly constituted court”); and see Elsea MCA Procedures, supra note 194; and see Jennifer Elsea, Hamdan v.
In spite of the guidance from *Hamdan*, and the protections afforded the accused under the MCA, the origin of rights afforded unprivileged belligerents remains unresolved. Affording constitutional due process rights to military commission defendants is clearly not appropriate.\(^{231}\) As a “non-Article III court, a military commission would not be subject to the same constitutional requirements that apply to Article III courts.”\(^{232}\) The Supreme Court has upheld the idea that aliens held overseas, even if in territories under U.S. authority, are not due the full panoply of constitutional rights.\(^{233}\) This form of “global due process,”\(^{234}\) taking into account practical considerations of extra-territorial application of constitutional rights, was most fully realized in *U.S. v. Verdugo-Urquidez*.\(^{235}\) In that case, the Court held that the Fourth Amendment did not prohibit the admission of evidence obtained by U.S. agents during a warrantless search and seizure of the defendant’s home in Mexico.\(^{236}\) Even the Supreme Court’s decision in *Boumediene*, while granting detainees the privilege of habeas corpus review, declined to grant further constitutional protections to Guantánamo detainees.\(^{237}\) Therefore, arguments furthering the reputation that the military commissions do not comply with constitutional due process requirements must be carefully scrutinized.

Common article 3 of the Geneva Conventions requires that a regularly constituted court provide the “judicial guarantees which are recognized as indispensable by civilized peoples.”\(^{238}\) Although these guarantees are undefined, the official commentary to the Geneva Conventions, analogous to its legislative history, states that common Article 3 was intended merely to preclude

\(^{231}\) The *Quirin* Court concluded that the Fifth and Sixth Amendments do not require that the subject of a military commission be indicted by a grand jury. *Quirin*, 317 U.S. at 39-40; see also Martin, *supra* note 7, at 361 (“[I]n many instances some kind of rights discount may be applied in light of the foreign circumstances or the exact setting of apprehension and confinement.”) The Court’s decision in *Boumediene*, which secured the privilege of habeas corpus to Guantánamo detainees, did not extend additional constitutional protections.


\(^{236}\) *Id.* at 275-78. The Court specifically stated that “lawful but involuntary” presence “is not the sort to indicate any substantial connection” with the United States for the purposes of constitutional protections. *Id.* at 271.

Additionally, as Justice Kennedy noted, the question of what process is “due” takes into account the “particular context.” *Id.* at 278 (Kennedy, J., concurring).

\(^{237}\) *Boumediene*, 128 S. Ct. at 2262.

\(^{238}\) Common Article 3 to the 1949 Geneva Conventions.
Military Commissions and the Reputational Pull of Compliance Theory

“summary justice.” Revealingly, the commentary also provides that CA3 does not prevent “a person presumed to be guilty from being arrested and so placed in a position where he can do no further harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law.”

Comparing the procedures of the MCA to the requirements found in article 75 of Protocol I Additional to the 1949 Geneva Conventions (API) is also instructive. Even though the United States has not ratified API, many consider the procedural protections for defendants tried during armed conflict articulated in article 75 to be customary international law, filling in the ambiguity of CA3’s undefined “judicial guarantees.”

In addition to API, many consider the framework of international human rights law to be the interpretive benchmark for war crimes tribunals. Articles 14 and 15 of the International Covenant on Civil and Political Rights (ICCPR) are directly on point. Widely recognized as binding treaty obligations as well as customary international law, there is nonetheless some concern regarding the extra-territorial application of the ICCPR’s protections. In any event,

239 International Committee of the Red Cross, Commentary on the Geneva Conventions of 12 August 1949: III Geneva Convention Relative to the Treatment of Prisoners of War 28, at 39-40 (“We must be very clear about one point; it is only ‘summary’ justice which it is intended to prohibit.”). See also Bradley, supra note 12.


241 Protocol I Additional to the 1949 Geneva Conventions, art. 75 (1977). In the plurality opinion of Hamdan (Stevens joined by Ginsburg, Breyer, and Souter), the justices concluded that MCO No. 1 did not comply with art. 75 of API, which is regarded by many as customary international law, even though the U.S. has not ratified API. See Hamdan, at 548 U.S. at 633. For further discussion of applicability of Article 75 of API, see Lunday & Rishikof, supra note 10, at 105-10. Furthermore, the applicability of Article 75 at best provides guidance as customary international law, even if the United States has not signed or ratified the Additional Protocols. See id. at 110.

242 See Jinks, supra note 185, at, 404-410, 431, 432, n. 360 (2004); see also Taft, supra note 188, at 321-22.

243 See, e.g., Kenneth Watkin, Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict, 98 Am. J. Int’l L. 1, 2-8 (2004) (arguing that human rights law ought to be used to fill in any humanitarian gaps in IHL); and see Belandra, supra note 170 (discussing whether the “war” on terror is an armed conflict and concluding that it is not, and must be controlled by international human rights law).

244 International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171, arts. 14, 15. Article 15 is discussed in more detail above, supra Section III(B)(i).

245 Lunday & Rishikof, supra note 10, at 110, citing Hain v. Gibson, 287 F.3d 1224, 1243 (10th Cir. 2002).

246 See John Bellinger, former State Department Legal Adviser, stated that the ICCPR does not apply extraterritorially – rather only to “…..all individuals within its territory and subject to its jurisdiction…” John Bellinger Opinio Juris posts, Wrap Up I, available at http://www.state.gov/s/l/2007/116111.htm Additionally, Eleanor Roosevelt, the U.S. representative at the ICCPR treaty negotiations, was “particularly anxious” about any extra-territorial obligations. Id. Furthermore, in 2006 the United States objected to a UNHCR report on Guantanamo Bay, arguing that the ICCPR does not apply extra-territorially, and that the appropriate legal framework in the context of armed conflict is international humanitarian law, not international human rights law. See Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba 4 (2006), available at http://www.asil.org/pdfs/ilib0603212.pdf. See also Major Michelle A. Hansen, Preventing the Emasculation of Warfare: Halting the Expansion of Human Rights Law Into Armed Conflict, 194 Mil. L. Rev. 66 (2007) (arguing that human rights law should not be interpreted to supplant international humanitarian law during armed conflict).
the ICCPR is at a minimum instructive as to the “judicial guarantees” that are required by Common Article 3.

(a) Procedural Protections in the MCA of 2006

A historical reference point for comparing the procedural protections of the 21st century military commissions is the Nuremburg Tribunal, which based its rules of procedure and evidence largely on U.S. military commissions of the time.247 As the laws of war and human rights law developed over the next several decades, so did the rights afforded the accused at war crimes tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and now the International Criminal Court (ICC).248 The United States internalized many of these protections in the Military Commissions Act of 2006.

The following protections, specified in article 14 of the ICCPR, are incorporated into military commission procedures:249 public hearing,250 independent and impartial tribunal,251 presumption of innocence,252 informed promptly of the charges,253 adequate resources to prepare a defense,254 defense counsel of his choosing,255 tried without undue delay,256 trial in the

249 To demonstrate military commission compliance, references are also made to article 75 of API, the UCMJ, the statutes and rules of the ICTY, ICTR and the ICC. Two protections of ICCPR Article 14 are not provided for in the military commission process. First, paragraph 4 states, “In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.” The age of the accused, and other relevant mitigation evidence, is admissible and may be given due consideration during sentencing. See Rule for Military Commission 1001 (2007). Second, compensation in the event of a wrongful conviction is not provided for in the MCA. See ICCPR article 14(6).
250 ICCPR art. 14(1); API art. 75(4)(i); Commission sessions are subject to closure by the military judge after finding that closure is necessary to protect information the disclosure of which could be reasonably expected to damage national security or to ensure physical safety. MCA §949d, RMC 806. See also Rule for Courts-Martial (RCM) 806 (allowing closure in order to protect classified information); U.S. v. Groden, 2 MJ 116; The ICTY, ICTR allow public exclusion for reasons of public order or morality, safety or non-disclosure of a victim or witness identity, or for protection of the interests of justice. ICTY Articles 20(4), 21(2) and 22, Rules 78 and 79; ICTR Articles 19(4), 20(2), and 21, Rule 78 and 79. See also Rome Statute articles 64(7) and 67(1) (allowing closure to protect victims, witnesses and confidential or sensitive information).
251 ICCPR art. 14(1); API art. 75(3); Rule for Military Commission 912; UCMJ article 41; ICTY and ICTR Rule 15; Rome Statute article 41.
252 ICCPR article 14(2); API art. 75(4)(d); MCA § 949l(c)(1) and R.M.C. 920(e)(5)(A); UCMJ, Article 51, RCM 920e; ICTY Article 21(3); ICTR Article 20(3); and Rome Statute Article 66(1).
253 ICCPR article 14(3)(a); API Article 75(4)(a); MCA § 948q(b); RMC 308; Rule for Courts-Martial 308; ICTY, article 21(4)(a) and (b); ICTR, article 20(4)(a) and (b); Rome Statute, article 67(1)(a) and (b).
254 ICCPR art. 14(3)(b); API article 4(a), (g). This is a general “equality of arms” requirement. Besides providing for access to documents and compulsory production of witnesses, the accused in at least one military commission case has received an army of competent attorneys, spokespersons, and lobbyists. [The defense team] has filed [over 100] separate legal pleadings, made numerous public speeches and press releases to various media outlets, conducted worldwide lobbying of various government officials and associations, and enlisted the assistance of other lawyers, non-governmental organizations, a law clinic, law professors, law students, and even members of the Canadian Parliament.
presence of the accused, cross-examine witnesses, obtaining witnesses, assistance of interpreter, right against self-incrimination, appellate review, and protection against double jeopardy. Additionally, in the military commissions system the prosecution must prove the guilt of the accused beyond a reasonable doubt. The procedural protections at a military commission fit well within internationally accepted standards, whether the lex specialis is human rights law (ICCPR) or the law of armed conflict (CA3 and API art. 75). 

While many critics have not fully distinguished between pre-MCA military commissions, and post-MCA military commissions, Professor Margulies takes a significant step in this direction by acknowledging that “courts have permitted proceedings [in the post-MCA military

See also Rule for Military Commissions 701.

255 ICCPR article 14(3)(b); API article 75 (4)(a); Although this rule was recently expanded in the Military Commissions Act of 2009, the previous provisions were, MCA § 949c(b)(1)(2), RMC 506(a) (detailed military counsel), 949c(b)(3), RMC 506(a) (choice of civilian counsel at no cost to the government), RMC 506(d) (foreign consultants), 949a(d), RMC 506(c) (self representation authorized). See also UCMJ articles 27 and 38. The ICTY, ICTR and ICC allow choice of counsel from the Court at no cost. See ICTY article 21(4)(b) and (d), ICTR Article 20(4)(b) and (d); and see Rome Statute article 55(2)(c).

256 ICCPR article 14(3)(c); Rule for Military Commission 707 requires arraignment within 30 days of service of charges to the accused and assembly of the commission no later than 120 days after service of charges, not to include excludable delays. Rule for Courts-Martial 707(a) requires trial within 120 days after the earlier of preferral of charges, pre-trial confinement, or entry on active duty. The ICTY, ICTR, and ICC require that trials begin without “undue delay.” ICTY Rules, article 21(4)(c), ICTR Rules, article 20(4)(c), and Rome Statute article 67(1)(c).

257 ICCPR article 14(3)(d); API art. 75(4)(e); MCA § 949d(b), (e) and RMC 804 (providing that the accused has a right to be present at hearings unless he is removed for persisting in disruptive or dangerous conduct. See also, Rule for Courts-Martial 804. And see ICTY Statute, article 21(4)(d); ICTR Statute, article 20(4)(d) and Rule 80(2) (allowing removal if the accused is disruptive); Rome Statute, article 63 and 67(1)(d) (allowing video-teleconference of proceedings to the accused’s cell if the accused is disruptive).

258 ICCPR Article 14(3)(e); API article 75(4)(g); MCA §949a(b), RMC 702(g)(1)(A) and 910(c)(3); UCMJ Article 32; RCM 910(c)(3); MRE 611(b); ICTY Statute, article 21(4)(e), Rule 85(B); ICTR Statute, article 20(4)(e) and Rule 85(B); Rome Statute, article 67(1)(e).

259 ICCPR article 14(3)(e); API article 75(4)(g); MCA § 949j(a), RMC 703 (reasonable opportunity to obtain witnesses and other evidence); MCA §949j(b), RMC 703(e) (availability of limited subpoena and warrant of attachment); UCMJ article 46, RCM 703; ICTY and ICTR Rule 54 (general rule of summons and Trial Chamber may summon witnesses and order attendance), Rule 85(A) (no rule of production specified); Rome Statute article 64(6)(b) (the Pre-Trial Chamber will request help from the States in obtaining witnesses).

260 ICCPR article 14(3)(f); MCA § 948l(b), RMC 502(e)(3)(A); UCMJ article 28; ICTY article 21(4)(f), Rule 42(A)(ii); ICTR article 20(4)(f), Rule 42(A)(ii); Rome Statute article 67(f).

261 ICCPR, article 14(3)(g); API article 75(4)(f); MCA § 948r(a), but see non-applicability of Miranda warnings, MCRE 301(a); UCMJ article 31(a) and (c), RCM 910(c)(3), MRE 301, 18 USC 6002; ICTY article 21(4)(g), Rule 42(A)(iii); ICTR article 20(4)(g), Rule 42(A)(iii); Rome Statute, articles 55(2)(b) and 67(1)(g).

262 ICCPR article 14(5); API article 75(4)(j); MCA § 950b (Review by Convening Authority), §950c &f (review by Court of Military Commissions Review), §950g (review by D.C. Circuit Court of Appeals and U.S. Supreme Court), RMC 1201-05; UCMJ articles 66, 67, 28 USC 1259; ICTY and ICTR, Article 25, Rule 108 108 bis, also Article 26 and Rule 115 (allowing Appeals Chamber to hear additional evidence); Rome Statute article 81.

263 ICCPR article 14(7); API art. 75(4)(h); UCMJ article 44 (and see U.S. v. Stokes, 12 MJ 229); ICTY Statute article 10, Rule 13; ICTR Statute article 9, Rule 13. Rome Statute article 20.

264 See MCA § 949l(c)(4), (c)(1); UCMJ articles 51, and RCM 920e; Rome Statute articles 66(2), (3); the ICTY and ICTR Statutes do not specify the burden, but it is on the Prosecutor.

commission[s] to proceed subject to judicial review, in part because these proceedings possess indicia of fundamental fairness." The scope of the rights of the accused at military commissions must be recognized even by the greatest of commission skeptics, easily overcoming Guantánamo Bay’s reputation as a “legal black hole.”

(b) Evidentiary Issues in the MCA of 2006

Beyond the comparative criminal procedure of the military commissions, several evidentiary issues must be revisited, as each played a role in the reputation of the process, leading to the revisions of the MCA in 2009. These issues are the use of hearsay evidence, so-called secret evidence, and coerced statements of the accused.

The admissibility of hearsay evidence at military commissions is a significant departure from court-martial and federal court practice, where hearsay is not admissible unless a specific exception exists to the hearsay rule. A closer look reveals that the introduction of hearsay evidence in military commissions is restricted in several important ways. Initially, hearsay evidence is excluded if it violates other rules of evidence, including privileges, character, or MCRE 403 (relevancy). Second, the proponent of the hearsay evidence is required to give the opposing party sufficient notice (twenty days) of the intent to introduce the evidence and the particulars of the evidence. Finally, the opponent of the hearsay in the MCA of 2006 had the opportunity to preclude the admissibility of the evidence if successful in demonstrating that it lacked probative value and was unreliable.

The permissive use of hearsay at military commissions is consistent with other war crimes tribunals. Each of the post-war international tribunals allowed hearsay evidence so long

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267 Initially, the military commissions evidentiary rules state that all evidence having probative value to a reasonable person is admissible, except as otherwise provided by these rules, this Manual, or any Act of Congress applicable to trials by military commissions. Evidence that does not have probative value to a reasonable person is not admissible.

MCRE 402. Evidence is “probative to a reasonable person when”:

[A] reasonable person would regard the evidence as making the existence of any fact that is of consequence to a determination of the commission action more probable or less probable than it would be without the evidence.

MCRE 401. Additionally, the military commissions exclude:

[A]ny evidence the probative value of which is substantially outweighed: (1) by the danger of unfair prejudice, confusion of the issues, or misleading the commission; or (2) by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

MCRE 403.

268 MRE 801-807; Federal Rules of Evidence, Article VIII, Rule 802.

269 RICHARDS, supra note 106, at 156 (“[T]he law imposes special advance notice requirements on the government [using hearsay], requires that it pass threshold tests of reliability, relevance, probative value, and fairness, and subjects such evidence to the criteria of admissibility applicable in cases of classified information.”).

270 MCA § 949a(b)(2)(E); MCRE 801-807. But see MCA 2009 § 949a(b)(3)(D), where the burden is on the proponent of the hearsay to demonstrate its probative value and reliability.
as it was deemed to have probative value. \(^{271}\) Furthermore, at the ICTY hearsay evidence may be admitted after the Trial Chamber assesses its “indicia of reliability.” \(^{272}\) At the ICC as well as the ad hoc tribunals, the rules mirror those of the Military Commissions. For example, hearsay evidence is admissible if it has probative value and was not obtained in violation of other procedures or laws. \(^{273}\)

In practice, the risk of prosecutors attempting to push through inordinate amounts of hearsay evidence never came to fruition. In *U.S. v. Hamdan*, the government introduced evidence “that Hamdan knowingly transported and guarded bin Laden before, during, and after the 9/11 terror attacks; transported weapons and ammunition for al Qaeda including two surface-to-air missiles; and received weapons training.” \(^{274}\) None of this evidence was hearsay.

Another issue of concern is the use of so-called secret proceedings and evidence. Proceedings of military commissions are presumptively open, except in circumstances when the judge makes a specific finding that closure is necessary to protect information the disclosure of which would cause damage to the national security, including intelligence or law enforcement sources, methods, or activities, or to ensure the physical safety of individuals. \(^{275}\) This is similar to courts-martial practice, where proceedings may be closed when the military judge determines it is necessary to protect classified information. \(^{276}\)

The protection of witnesses is also of concern at military commission proceedings, as it is at the international tribunals. Explaining the protective measures in place before the ad hoc tribunals, one commentator notes, “In the Yugoslavia and Rwanda tribunals, combatants could testify as ‘Witness X’ from a separate room, using a voice modulator. The right for the defendant to confront his or her accuser does not require that they be face to face, but means that they can hear clearly what the witness says.” \(^{277}\) Similarly, in limited circumstances military

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271 Nuremberg Charter, Section V, article 19; IMTFE Charter IV, article 13(a); Control Council Law 10, Ordinance No. 7, article VII. See, e.g., In re Yamashita, 327 U.S. 1, 19-23 (1946) (noting that even though hearsay is prohibited in federal courts, these procedural safeguards in the Articles of War were meant to be applied to U.S. soldiers and personnel that accompany the military, not to enemy combatants and as such did not violate any statute, treaty or military command).


273 Rome Statute, article 69(4) and (7) (hearsay admissible if deemed to have probative value, so long as not gathered in violation of Rome Statute or internationally recognized human rights); ICTY and ICTR Rule 89(c) (The Chamber may admit relevant evidence which it deems to have probative value (unless excluded by Rule 95, which mandates exclusion of evidence obtained by methods which cast doubt on its reliability or would jeopardize the integrity of the proceedings); Sierra Leone Rule 89(c)(May admit relevant evidence).


275 MCA §949d, RMC 806.

276 See also Rule for Courts-Martial (RCM) 806 (allowing closure in order to protect classified information); U.S. v. Groden, 2 MJ 116.

commissions have approved the use of protective orders for some witnesses, which did not limit the accused’s right to confront witnesses, but ensured the individual’s safety. 278

Finally, the protection of classified information under Military Commission Rule of Evidence 505 has been assailed as permitting the use of so-called secret evidence by the Government, permitting convictions based on information that the accused will not see. This is a misleading interpretation of the rule, and fails to acknowledge similar measures used in courts-martial, 279 federal court, 280 and the International Criminal Court 281 to protect classified information.

MCRE 505 provides, “Classified information shall be protected and is privileged from disclosure if disclosure would be detrimental to the national security.” 282 There are significant limitations to this rule. First, the head of the government agency with equity in the information must first determine that the information is properly classified, and that its disclosure would be detrimental to national security. Only then may the prosecutor, on the agency’s behalf, invoke the national security privilege. 283 Following this determination, the military judge may agree, but is not required to do so, to the nature and scope of the protections sought by the government. The military judge may take several steps, to include: issuing protective orders as necessary to protect national security information, 284 permitting the deletion of “specified items of classified information from materials” provided to the defense, 285 allowing disclosure to the defense of substitutes or summaries of information contained in classified materials, and providing “the substitution of a statement admitting relevant facts that the classified information would tend to prove.” 286

At no point in this process is the government permitted to withhold exculpatory or relevant information. Moreover, if the government persists in objecting to disclosure of certain information, the judge has broad discretion to take any necessary measures to protect the fairness of the proceedings. Specifically:

If the military judge determines that the government’s proposed alternative to full disclosure…would be inadequate or impracticable…the military judge, upon a finding that the information in question is evidence that the Government seeks to use at trial, exculpatory evidence, or evidence necessary to enable the defense to prepare for trial, shall issue any order that the interests of justice require. 287

278 MCRE 505(e).
279 See MRE 505.
281 Article 72, Rome Statute
282 MCRE 505(a).
283 MCRE 505(c).
284 MCRE 505(e)(1), (2).
285 MCRE 505(e)(3).
286 MCRE 505(e)(3).
287 MCRE 505(e)(4).
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The military judge may then order preclusion of all or part of a witness’s testimony, declare a mistrial, find against the Government on any evidentiary issue, and dismiss all charges or specific charges to which the classified information in question relates. Furthermore, the lawfulness of non-disclosure of classified information is reviewable in full on appeal.\(^{288}\) When the defense objects to withholding the evidence, and the accused is found guilty, the entire unaltered text of the contested materials is sealed and appended to the record for appellate review.

Discussions relating to the military commissions, or detention issues more broadly, inevitably revert back to the permissive use of “coerced” evidence in the MCA 2006.\(^{289}\) The MCA could not be clearer that a “statement derived by the use of torture shall not be admissible in a military commission under this chapter.”\(^{290}\) The subject of controversy, however, is the possibility of admitting statements obtained by cruel, inhuman, and degrading treatment—prohibited by the U.N. Torture Convention.\(^{291}\) This stems from a provision, now obsolete, allowing the use of statements of the accused “in which the degree of coercion is disputed” and was obtained prior to the enactment of the Detainee Treatment Act of 2005.\(^{292}\) In this context, the non-application of Miranda warnings has drawn the ire of critics, particularly those who wish to apply the constitutional standards of federal courts\(^{293}\) and Article 31 warnings of the UCMJ.\(^{294}\)

Two significant restrictions, however, limited the use of statements of the accused where the level of coercion was in dispute. The military judge had to find both that “the totality of the circumstances render[ed] the statement reliable and possessing sufficient probative value,”\(^{295}\) and that “the interests of justice would best be served by admission of the statement into evidence.”\(^{296}\) Additionally, the general exclusionary rule of the military commissions provides, that the military judge shall exclude any evidence the probative value of which is substantially outweighed: (1) by the danger of unfair prejudice, confusion of the issues, or misleading the commission; or (2) by considerations of undue delay, waste of time, or needless presentation of

\(^{288}\) MCRE 505(e)(7).
\(^{289}\) Although only partly relevant to the trial of suspected terrorists before military commissions, the conditions of detention and interrogation have been the subject of extensive debate. See, e.g., Scharf, supra note 15, at 81-96, citing Barbara Slavin, Abuse of Detainees Undercuts U.S. Authority, 9/11 Panel Says, USA TODAY, Nov. 15, 2005 at 8A (“[T]he U.S. policy on treating detainees is undermining the war on terrorism by tarnishing America’s reputation as a moral leader.”). See also Goldsmith, supra note 196; Philippe Sands, Torture Team: Rumsfeld’s Memo and the Betrayal of American Values (2008); Paust, Jordan J., Beyond the Law: The Bush Administration’s Unlawful Responses in the “War” on Terror (2007); Tara McKelvey, Monstering: Inside America’s Policy of Secret Interrogations and Torture in the Terror War (2008); Eric A. Posner & Adrian Vermeule, Terror in the Balance: Security, Liberty, and the Courts (2006); Karen Greenberg, The Torture Debate in America (2005).
\(^{290}\) MCA § 948r(b).
\(^{291}\) UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.
\(^{292}\) MCA § 948r(c).
\(^{293}\) 5th Amendment, U.S. Constitution; Miranda v. Arizona, 384 U.S. 436 (1966); see also Chavez v. Martinez, 123 S. Ct. 1994, 2000-01 (2003) (Fifth Amendment violation occurs when coerced statements are admitted as testimony in criminal case).
\(^{294}\) UCMJ article 31(a) and (c); RCM 910(c)(3); MRE 301; 18 USC 6002. See, e.g., Frakt, supra note 7, at 357-59.
\(^{295}\) MCA § 948r(c)(1).
\(^{296}\) MCA § 948r(c)(2).
cumulative evidence.” In spite of these restrictions, it was easy for critics to target the possibility of a military commission judge admitting “coerced” statements into evidence, solidifying the reputation of unfairness.

The MCA of 2009 eliminates the possibility of admitting coerced statements into evidence. Even under the previous rule, military judges were likely to suppress statements taken under questionable circumstances. For example, prior to his trial, Salim Hamdan won a motion to suppress statements taken while he was in custody at the Bagram detention facility. This was not a result of a factual finding of actual mistreatment of Hamdan, but stemmed from the generally coercive environment at the detention facility. Practically speaking, the previous rule permitting coerced evidence was less threatening than reported, but certainly did not raise the reputation of the military commissions process.

iii. Domestic and International Compliance

The procedural and evidentiary provisions of the 2006 MCA discussed above indicate that the reputation for non-compliance with international and domestic legal standards may have been overstated. That the discussion takes place in terms of the Geneva Conventions and CA3 demonstrates the extent to which the United States has internalized international legal norms. The Hamdan decision itself can be seen in terms of the “increasing interpenetration of domestic and international systems.”

In the Hamdan decision, the Court stated that “Congress, through Article 21 of the UCMJ, has ‘incorporated by reference’ the common law of war….” At this point the Geneva Conventions were officially internalized through judicial decision into the domestic legal framework of the military commissions. Nonetheless, in § 948b(g) of the 2006 MCA, Congress provided that no one “subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.” At first glance, this would appear to be at odds with both international and domestic law.

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297 MCRE 403. Compare these restrictions to the ICTY’s exclusionary rule, stating that evidence is inadmissible if it was obtained by methods which cause substantial doubt on its reliability or would jeopardize the integrity of the proceeding. ICTY Rule 95.
299 Koh, supra note 11, at 2603-04; See also Knoops, supra note 7, at 626, 632-33 (stating that the Hamdan decision reflects international interpretation of the applicability of common article 3, and that future, non-U.S., terrorism trials must provide the minimum safeguards of CA3 as found by Supreme Court). But see Posner, supra note 227.
300 Hamdan, U.S. at 602.
301 Hamdan, U.S. at 628 (“Compliance with the law of war is the condition upon which the authority set forth in Article 21 is granted.”).
303 Martin, supra note 7, at 353 (“Though ostensibly quite restrictive, the wording could be found to leave room for a court to enforce the Geneva-sourced rights sua sponte.”).
The “Geneva stripping” provision of the 2006 MCA, however, did not prevent litigants from making Geneva-based arguments before military commissions. For example, Salim Hamdan argued in pretrial motions that he was entitled to, among other things, a Prisoner of War status determination under article 5 of the Third Geneva Convention. The military judge ruled in Hamdan’s favor, but after considering the evidence presented at the article 5 hearing, Hamdan did not meet the requirements of a Prisoner of War. Following this determination, Hamdan argued that he should be classified as a civilian subject to the protections of the Fourth Geneva Convention (GCIV). Applying the provisions of article 4 of GCIV to the facts in Hamdan’s case, the military judge ruled that he did not qualify as a civilian under the convention.

The ability of military commission accused to argue for, and receive, certain protections of the Geneva Conventions does not sit well with some commentators. It is argued, for example, that proscribing the invocation of Geneva as a source of rights follows “a basic long-standing international law principle of treaty construction recognizing that the primary parties to an international treaty are signatory states, and not private individuals. Thus, unless they contain express language to the contrary, international treaties do not vest individual persons with claims of right or causes of action against governments.”

Additionally, U.S. internalization of international law must be viewed in terms of domestic interpretive mechanisms. Even if the MCA of 2006 conflicted with U.S. treaty obligations, the MCA prevails as later in time. As one expert recognized, “[I]t is well settled that Congress has the authority to override treaties for the purposes of U.S. law.” Because the MCA of 2006 was clear as to what rights applied, which offenses could be charged, and what rights did not apply, the MCA was binding on the Courts since it is last in time.

Such an approach, however effective domestically, does not contribute to the interpretive discourse of the applicable international norms, nor does it enhance the U.S. reputation as a nation that adheres to the rule of law. The United States has a long tradition of internalizing

304 Bradley, supra note 12, at 327-28, citing 152 Cong. Rec. S10, 401-02 (daily ed. Sept. 28, 2006) (Senators McCain, Warner and Graham stating that “it is not the intent of Congress to dictate what can or cannot be said by litigants in any case.”)).


306 Id.


308 RICHARDS, supra note 106, at 158.

309 Bradley, supra note 12, at 339, citing Breard v. Greene, 523 U.S. 371, 376 (1998); The Chinese Exclusion Case, 130 U.S. 580, 600 (1889) (“If the treaty operates by its own force (self-executing), and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.”); Whitney v. Robertson, 124 U.S. 190, 194 (1888) (explaining that, if legislation and self-executing treaty provision cannot be reconciled, the one later in time prevails); Head Money Cases, 112 U.S. 580, 597–99 (1884) (if a conflict with a treaty exists, the act of Congress must prevail in a judicial forum).

310 Saltzburg, supra note 7, at 1032.
international legal standards. For example, the Supreme Court in the *Paquete Habana* decision reaffirmed that “[i]nternational law is our law,” but clarified that this holds true “where there is no treaty and no controlling executive or legislative act or judicial decision.”\(^{311}\) Although the MCA controls the field in terms of legal standards applicable to trial by military commission, it should not be interpreted to conflict with international law.\(^{312}\) This interpretation, while constitutionally sound, “does not relieve the United States of its international obligation or of the consequences of a violation of that obligation.”\(^{313}\)

This discussion need not reach such extremes. As the previous sections demonstrate, the military commissions are in compliance with applicable legal standards. In the spirit of a Second World War military commission, Colonel Leon Jaworski stated, “the Commission [had] accorded to the accused every right that they could possibly have expected or wanted, rights and privileges that were unknown to them under the government that was theirs for so long.”\(^{314}\) Similarly, the significant protections afforded the accused in the 2006 MCA prompted one expert to comment that

[H]e regards to the Guantanamo Bay military commissions and the Military Commissions Act (MCA), virtually all civilian court protections are now provided for under current U.S. law and regulation governing the military commissions, including Supreme Court review. The process that has developed for the conduct of the military commissions has gone beyond that required by the law of war, and whether one would conclude that [Human Rights Law] is supplanted under the doctrine of [International Humanitarian Law] as lex specialis or not, HRL principles have played a role as well. Nonetheless, the United States understands that there is still a lot more to do. U.S. officials are trying to learn lessons from the difficult experiences occasioned since September 11, 2001, including by looking ahead and thoughtfully considering the views of others, including coalition partners and the ICRC.\(^{315}\)

These sentiments indicate a more engaged approach to the interpretive discourse of compliance. Through this process, legal norms are articulated and later internalized, reinforcing the gravity of the reputational pull. As the next section discusses, recent policy on the military commissions demonstrates the efforts to proactively shape the reputation of the United States as a law abiding nation, and internalize internationally recognized legal norms.

\(^{311}\) The *Paquete Habana*, 175 U.S. 677, 700 (1900).

\(^{312}\) Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) (holding that an ambiguous statute should be construed, to the extent possible, not to conflict with international law). *But see* Olivia v. U.S. Dep’t of Justice, 433 F.3d 229, 235 (2d Cir. 2005) (stating that the Charming Betsy “canon of statutory interpretation…does not apply where the statute at issue admits no relevant ambiguity.”).


\(^{314}\) RICHARDS, supra note 106, at 119, citing UNWCC Law Reports, I: 200 (1948).

IV. Proactive Reputation Shaping and Internalization of Norms

The policy to reform the military commissions, beginning on January 20, 2009, the evening of President Obama’s inauguration, can be analyzed as part of a “reputational pull” toward compliance with international and domestic law. Recall that in the transnational legal process, compliance with legal norms occurs in three phases: interaction, interpretation, and internalization. Through public statements, Executive Orders, and Congressional statutes, each of these phases is represented in the new approach. The internalization of norms through proactive reputation shaping is the focus of this Section.

A. The Renewed Relevance of the Military Commissions

The accepted interpretation of a legal norm becomes part of the domestic legal framework through “judicial incorporation, legislative embodiment, or executive acceptance.” In the case of military commissions, internalization occurred after a negative reputation had developed for perceived non-compliance. Under these circumstances, the Obama administration has engaged in proactive reputation shaping in several ways.

First, the President has on numerous occasions affirmed that we are engaged in an ongoing war. At the National Archives speech on May 21, 2009, he asserted, “Now let me be clear. We are indeed at war with al Qaeda and its affiliates.” Serving in part as a rebuttal to contrary assertions, this pronouncement contextualizes the issue in terms of an armed conflict and allows the administration the flexibility to continue to utilize the military commission system. Additionally, the law of war paradigm avoids implications that the government has been operating in violation of accepted international legal standards.

Second, the President issued three Executive Orders on January 22, 2009, which, in part, permitted additional time for interpretive discourse, both with domestic actors and internationally, in an effort to determine how to proceed with detainees’ cases. These orders ensure that interrogations are lawful, require examination of each detainee’s case with the intent of closing the Guantánamo Bay detention facility by January 22, 2010, and initiated a review of detention policy options. In Executive Order 13,492, the President found, “It is in
the interests of the United States that the executive branch conduct a prompt and thorough review of the circumstances of the individuals detained at Guantanamo who have been charged with offenses before military commissions pursuant to the [MCA of 2006]...as well as the military commission process more generally.”

The intent of this order to internalize legal norms clearly demonstrates that the reputational pull extends beyond the process-based strand of compliance theory, but also applies to the rational choice, self-interests of States.

Finally, the President’s National Archives speech on May 21, 2009 breathed new life into the military commissions and signaled an effort to internalize legal standards by seeking Congressional action. Administration officials engaged in the interpretive discourse through Congressional testimony. Jeh Johnson, General Counsel of the Department of Defense and David Kris, Assistant Attorney General, Department of Justice, each expressed the need for reform in terms of fairness and credibility. Specifically, Mr. Kris stated, “Properly constructed, [military commissions] take into account the reality of battlefield situations and military exigencies, while affording the accused due process.” On June 17, 2009, Attorney General Eric Holder explained to the Senate Judiciary Committee, “Adherence to the rule of law strengthens security by depriving terrorist organizations of their prime recruiting tools. America must be a beacon to the world. We can lead and are leading by strength, by wisdom, and by example.” The effort to enhance the reputation of the United States by internalizing legal standards is immediately clear from these statements.

In October 2009, Congress passed the Military Commissions Act of 2009, adopting many of the President’s recommendations. Several changes to the previous military commission system are worth discussing. For example, military commissions may now exercise jurisdiction over “unprivileged enemy belligerents” rather than “unlawful enemy combatants” signifying implementation of the language used in the Geneva Conventions. Additionally, unprivileged belligerents are defined as persons who: are not privileged belligerents, have engaged in hostilities against the U.S. and its coalition partners, have purposefully and materially supported hostilities, or were part of al Qaeda at the time of the alleged offense. Notable in this revision is the exclusion of members of the Taliban as a potential class of defendant. Also, membership in al Qaeda is now sufficient, without a connection to the underlying hostilities, for jurisdictional purposes.

More significantly, the MCA of 2009 explicitly prohibits the admission of statements obtained by cruel, inhuman, or degrading treatment, bringing the statute into compliance with the

327 Id.
328 Statement of Attorney General Holder Before the United States Senate Committee on the Judiciary, June 17, 2009. Compare these statements to those of former State Department Legal Advisers who exerted influence “in shaping the modalities articulating the rationale” for certain actions so “that it would be accepted by the international community.” See also Scharf, supra note 15, at 70.
329 10 U.S.C. § 948c (“MCA 2009”) (“Any alien unprivileged enemy belligerent is subject to trial by military commission as set forth in this chapter.”) Compare to MCA 2006 § 948c.
330 MCA 2009 § 948a(7).
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UN Torture Convention. Of interest, this section amends the previous exclusionary rule, by requiring that statements of the accused be made either “voluntarily” or when “the statement was made incident to lawful conduct during military operations at the point of capture or during closely related active combat engagement, and the interests of justice would be best served by admission of the statement into evidence.”

Other changes include: the ability of the accused to be represented by military counsel of his choosing, and heightened qualifications for defense counsel in the event of a capital case; the burden is now on the proponent of hearsay evidence to demonstrate that it is sufficiently reliable; and the Classified Information Procedures Act—the same statute applied in federal court—is now the standard for protecting classified materials used in military commission proceedings.

The MCA of 2009 is an example of concrete internalization of legal norms, and a reflection of the gravity of the reputational pull toward compliance. Unlike previous changes, the amendments in 2009 were proactive, resulting from nearly eight years of interpretive discourse of the applicable legal regime. During that time, the U.S. policy on the military commissions, and all things related to Guantánamo Bay, generated a reputation for perceived non-compliance.

This reputation was due in part to the greater “Guantánamo issue.” As discussed above, the MCA of 2006 appeared to have provided significantly greater protections than any unprivileged belligerent has ever known. Nonetheless, the process “still suffered from a perceived lack of legitimacy, in part because of the legacy of the prior system [PMO Commissions].” This is evident in the other policies of 2009, namely to close the Guantánamo detention facility by 2010, to move all detainees to a federal prison in Thomson, Illinois, to

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331 MCA 2009 § 948r(a).
332 MCA 2009 § 948r(c)(2)(B). Voluntariness is determined by the military judge considering the totality of the circumstances, including: “The details of the taking of the statement, accounting for the circumstances of the conduct of military and intelligence operations during hostilities”; “The characteristics of the accused, such as military training, age, and education level”; and “The lapse of time, change of place, or change in identity of the questioners between the statement sought to be admitted and any prior questioning of the accused.” § 948r(d).
333 MCA 2009 § 948r(c)(2)(A). Additionally, the previous standard that statements of the accused are admissible if the “totality of the circumstances renders the statement reliable and possessing sufficient probative value” remains intact. MCA 2009 § 948r(c)(1).
334 MCA 2009 § 949a(b)(2)(C).
335 MCA 2009 § 949a(b)(3)(D).
336 See discussion supra Section III.B(ii)(b).
337 Detention Policy Task Force Memorandum, July 20, 2009, at 2. See also Drumble, supra note 225, at 1190 (commenting on the enhanced due process protections in the 2006 MCA, and the impact these would have on the perception of the system, states, “What lawyers well versed in the peculiarities of international humanitarian or military law might perceive as palpable changes from the prior commissions to the present commissions may well appear technical to general audiences and, accordingly, not convey much meaning to such audiences.”).
move as many cases to federal court as possible, and to conduct an overarching review of all prosecutable cases and detainee files. In fact, the Executive Orders of January 22, 2009 each mention the reputational factors at stake, with only one involving the issue of military tribunals. The scope of Guantánamo’s reputation is evident in Executive Order 13, 493, which provides, “In view of the significant concerns raised by these detentions, both within the United States and internationally, prompt and appropriate disposition of the individuals currently detained at Guantánamo and closure of the facilities in which they are detained would further the national security and foreign policy interests of the United States and the interests of justice.”

As these pronouncements reflect, the military commissions were wrapped up into a larger package, the entire reputation of which was inescapable. During the Executive ordered review of 2009, the commissions process suffered more than an additional year of delay. This provided fuel to critics, who habitually discount externally mandated delays in the system when discussing the effectiveness of the process in bringing terrorists to justice. In fact, there are many who will not be satisfied with anything short of trying these cases in federal court. As stated by a representative of a respected domestic NGO, “The Obama administration has committed to closing the prison at Guantánamo, but closing the prison will have little meaning if the administration leaves in place the policies that the prison has come to represent.” He added, “The commissions remain not only illegal but unnecessary.” The following section discusses the debate between trying terrorists in federal court versus military commissions.

B. The Current Interpretive Phase: Military Commissions v. Federal Court

The current compliance debate has focused too much on the false dichotomy of the exclusive use of military commissions or the exclusive use of federal courts to prosecute terrorist suspects. This has reached a critical juncture in light of recent suggestions that the administration may change course and prosecute the suspected 9/11 masterminds by military commission. It is all too easy to discuss Article III courts in reputational terms of “real justice” or the “embodiment of American values.” Similarly, arguing that the civilian judicial system is ill-suited for trying terrorist suspects is belied by the Department of Justice’s strong record of prosecuting and convicting terror suspects. As in most aspects of this debate, there is

341 See discussion infra note 365.
342 Lara Jakes, Obama revives military trials at Guantánamo, ASSOCIATED PRESS, October 29, 2009.
much greater nuance underlying decisions relating to choice of forum. During this interpretive debate over the legality of procedures provided by the military commissions and whether they live up to recognized legal standards, it is important to take into account the nature of the conflict with al Qaeda, the status of the participants, and the need for a historical record.

The military commissions are well suited to prosecute alleged terrorists in the ongoing armed conflict. As one commentator notes, “It may be that the events of September 11 herald a new hybrid type of conflict – between organized groups and foreign states – that [the law of war] will evolve to encompass.” This argument was utilized during the Second World War when President Roosevelt created the Quirin commissions in an effort to protect the nation. The Court considered that “the conditions of modern warfare – where systems of supply, production, and transportation operated as potential legitimate targets – had put the concept of front battle lines in a state of permanent flux.” So, arguably, the changed face of battle experienced in WWII is similar to the “different” kind of war we fight today against adversaries that may target anyone, anywhere, and at any time. Moreover, as explained in Madsen v. Kinsella, the military commissions serve as a flexible tool, “adapted in each instance to the need that called it forth.”

As noted by the Hamdan Court, the war with al Qaeda is best characterized as a non-international armed conflict. The legal framework governing this type of conflict, which is much less developed than the norms underlying international armed conflicts, has required courts to adopt a “purposive rather than a formalistic interpretation of law.” This approach was utilized by the ICTY so as “not to leave unpunished any person guilty of any such serious violation, whatever the context within which it may have been committed.” The military commissions, similarly, are an appropriate venue to prosecute suspected terrorists, because they rely on a purposive formulation of the common laws of war, but still provide substantial procedural protections to the accused which comply with internationally recognized standards.

The status of the participants in this conflict also warrants utilizing every lawful method available in prosecuting the war effort. The principle of reciprocity underlies virtually every aspect of international legal theory. Some compliance theorists argue that it is among the strongest factors of a State’s obedience to international law, because of expected reciprocal


347 See, e.g., Detention Policy Task Force Memorandum, July 20, 2009, at 4, and Tab A (citing relevant factors for prosecution forum decisions, including: “nature of the offense to be charged; the identity of the victims of the offense; the location in which the offense occurred and the context in which the defendant was apprehended; evidentiary issues; and the extent to which the forum would permit a full presentation of the accused’s wrongful conduct.”). See also Elsea Terrorism, supra note 118, at 3.


349 Fisher Quirin, supra note 118, at 18, citing Brief for Respondant at 409.

350 Richards, supra note 106, at 108, citing Quirin at 37.


352 Hamdan at U.S. 628-29.

353 Duffy, supra note 212, at 85 n.69.

354 Tadic Jurisdiction Appeal Decision at para. 92.
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behavior from other nations.\footnote{Scharf, supra note 15, at 64-65 ("If the United States ignores or interprets away a rule of international law, the precedent will be used by other States in the international community, both with respect to their relations with the United States and with each other, thereby weakening the general rule of law and rendering the international system less stable.")} Take an example from the First World War. The French stopped using military tribunals, which lacked the procedural protections of military commissions today, due to German retaliation. Knowing that they shared a long history of common tradition and culture, the French hoped that they might “communicate” with their adversary through fair play.\footnote{RICHARDS, supra note 106, at 162.} Today, however, “[t]he same cannot be said with regard to opponents who routinely violate fundamental law of war principles for the ostensible purpose of wearing down their enemies’ will to resist, as al-Qaeda have done in the current war on terror.”\footnote{Id., citing the effect an al-Qaeda attack in Spain had on its presidential election that year, and on Spain’s decision to withdraw its troops from Iraq in 2004.} Therefore, the tradition of reciprocity breaks down when dealing with an actor that is decidedly less determined to follow any applicable legal standards.\footnote{Id. at 163, citing Guidelines for beating and killing hostages, in the AL QA’EDA MANUAL, excerpted in LAQUEUR, ED., VOICES OF TERROR, 403, 406. See also Drumbl, supra note 225, at 1185-86 (arguing that the deterrence value in punishing terrorist suspects is low).}

The United States, on the other hand, can be proud of its adherence to traditional notions of fair play and justice in the procedures of the military commissions. The military officers sitting in judgment as panel members are trained specifically in the laws of armed conflict, are experienced (particularly in this age) with the nature and scope of combat operations, and are familiar with military custom.\footnote{See generally Richard V. Meyer, Following Historical Precedent: An Argument for the Continued Use of Military Professionals as Triers of Fact in Some Humanitarian Law Tribunals, 7 JOURNAL OF INTERNATIONAL CRIMINAL JUSTICE 43 (2009).} Some argue that it would be more difficult for civilians untrained in these matters to exercise sound judgment in assessing violations of the law of war. “The presumption that civilian tribunals, simply by virtue of their non-military character, would operate at a higher level of equity and fairness lacks warrant.”\footnote{RICHARDS, supra note 106, at 175. See also Meyer, supra note 359.}

The importance of the military commissions in establishing a historical record of the crimes of al Qaeda is another argument in favor of utilizing this system.\footnote{See, e.g., id. at 119. See also Drumbl, supra note 225, at 1195-97 (2007)} Commenting on the Dakota Trials of 1862, Peter Richards states, “It is because the trials were held and records were kept that later generations could learn from and critique the military process.”\footnote{RICHARDS, supra note 106, at 32.} He adds that the passion for vengeance on all sides of the conflict on the Western frontier had reached a point where “it is difficult to see how even full-scale civil trials” could have significantly improved [the fairness of the trials].\footnote{Id.} The records maintained by the military tribunals following the Second World War have proven invaluable.\footnote{Henry T. King, Jr., Benjamin B. Ferencz, & Whitney R. Harris, Origins of the Genocide Convention: Remarks by Benjamin B. Ferencz, 40 CASE W. RES. J. INT’L L. 13, 26 (2008) (“[P]unishment is important because it tells the victims we care. We know what happened and we set a historical record that is indisputable.”); see also Drumbl, supra note 225, at 1195, n.125, citing LAWRENCE DOUGLAS, THE MEMORY OF JUDGMENT: MAKING LAW AND HISTORY IN THE TRIALS OF THE HOLOCAUST 3 (2001).} Even so, the war crimes tribunals in Germany,
“did little to change German attitudes. Cries of foul play and “victor’s justice” accompanied the proceedings of the Trial of the Major War Criminals and the subsequent tribunals….German legal scholars questioned the legality of the Nuremberg trial under international law….Ironically, the War Department, not wanting the occupation to result in anti-Allied sentiment, achieved exactly the opposite on the problem of war criminals.”

In the context of historical reputation, the Guantánamo Bay commissions are on par with post-war precedent and should therefore be evaluated not in terms public perception, but on the ability to generate an accurate historical record of a transnational criminal enterprise.

The arguments in favor of military commissions must not be interpreted to preclude prosecution of terrorist suspects in Article III courts. There is considerable evidence that federal court prosecutions have been successful in bringing terrorists to justice. There is no reason then why the discourse should dissolve into an “us versus them” contest between the military and civilian judicial systems. Cutting between these arguments, some would rely primarily on a new national security court. The feasibility of this option, however, seems unlikely given the difficulty two successive administrations have had getting the first national security court—military commissions—up and running.

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366 The ability to “permit a full presentation of the accused’s wrongful conduct” was a consideration during the Detention Policy Task Force’s forum determinations. See Detention Policy Task Force Memorandum, July 20, 2009, at 4.
368 See Trahan, supra note 7, at 783 (“[I]ndividuals apprehended far from any field of battle and/or not during traditional armed conflict [should be tried] in federal court, pursuant to federal anti-terrorism laws, as were terrorism cases in the United States throughout the 1990s.”).
370 Among the least valuable arguments against the military commissions is the length of time it has taken to try cases. See, e.g., Gabor Rona, Andy McCarthy’s Analysis Doesn’t Add Up, HUFFINGTON POST, http://www.huffingtonpost.com/human-rights-first/andy-mccarthy’s-analysis-d_b_444913.html (last visited 3 March 2010); and see Deborah Pearlstein, The Politics of Gitmo, Balkinization, February 15, 2010, at http://balkin.blogspot.com/2010/02/politics-of-gitmo.html (“[A]fter 8 years, the commissions have convicted 3 defendants, 2 of whom are already back on the streets.”). The full story is slightly more complex. Initially, the PMO Commissions ceased to exist following the Supreme Court’s decision in Hamdan v. Rumsfeld in June 2006.
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Ultimately, the military commissions must remain an option since there is no “one-size-fits-all approach that works for all counterterrorism efforts.”\textsuperscript{371} The President’s policy to try suspected terrorists in federal court where feasible while utilizing the military commissions for law of war offenses just makes sense.\textsuperscript{372} According to John Bellinger, former State Department Legal Adviser, “I think it is neither appropriate nor necessary to limit terrorism cases to either military commissions alone or federal trials alone.”\textsuperscript{373} This is consistent with a recent letter from Secretary of Defense Robert Gates and Attorney General Eric Holder, which states, “In order to protect the American people as effectively as possible, we must be in a position to use every lawful instrument of national power – including both courts and military commissions – to ensure that terrorists are brought to justice and can no longer threaten American lives.”\textsuperscript{374} Utilizing both options is not only an effective national security strategy, but also enhances the reputation of the United States for compliance with its international obligations.

V. Conclusions & Recommendations

The reputational pull of compliance theory was best summarized by Professor Michael P. Scharf. He writes, “[T]he ability to claim that an act is not in violation of international law is limited by the credulity of both the domestic and international legal communities, as reflected in the public statements of governments, NGOs, international organizations, and scholars.”\textsuperscript{375} It is in the course of the repeated legal process—interaction, interpretation, and internalization—that a State’s reputation among transnational and domestic actors plays a role, and how “international law acquires its “stickiness,” that nation-states acquire their identity, and that nations come to “obey” international law out of perceived self-interest.”\textsuperscript{376} It is within this process that the military commissions will be judged in terms of compliance with the rule of law.

Later, following the enactment of the MCA of 2006, the initial hearings did not take place until June 2007. Then, in January 2009, the military commissions were delayed so that the detention and trial procedures could be reviewed. \textit{See} Peter Finn, \textit{Judge Suspends Guantanamo Case at Obama’s Request}, WASH. POST, January 21, 2009. \textit{And see} Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, Exec. Order No. 13, 492, 74 Fed. Reg. 4897 (January 22, 2009). It was only in November 2009 that the Attorney General announced that certain cases would remain in the military commissions. \textit{See} Attorney General Announces Forum Decisions for GTMO Detainees, November 13, 2009, \textit{available at} http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html. This amounts to less than three years of possible litigation time. Compared to other high profile prosecutions, this is less time than it took to try Moussaoui in federal court, \textit{see} Charles Krauthammer, \textit{Sparing Moussaoui for the Wrong Reasons}, WASH. POST, May 12, 2006, \textit{available at} http://www.washingtonpost.com/wp-dyn/content/article/2006/05/11/AR2006051101949.html; and less time than the trial of Milosevic which ended without a verdict due to his death. Moreover, the International Criminal Court has been in existence since July 2002 and has yet to complete its first case.\textsuperscript{371} \textit{See} John Bellinger, \textit{Opinio Juris} at 6. \textit{See also} statements of David Kris and Jeh Johnson at Senate Armed Forces Committee.

\textsuperscript{372} President’s Archives Speech, \textit{supra} note 4.


\textsuperscript{375} Scharf, \textit{supra} note 15, at 68.

\textsuperscript{376} Koh, \textit{supra} note 11, at 2655.
The reputation of an interaction can be shaped in the interpretation phase of compliance. Extra-judicial advocates, freed by “lower levels of accountability,” reinforce the popular opinion among commentators that the military commissions, particularly as an extension of Guantánamo Bay, are unlawful and unjust. While it is unrealistic to expect each transnational actor in the compliance process to agree on the interpretation of an underlying legal standard, these advocacy strategies have a direct impact on policy.\textsuperscript{377} This illustrates the gravity of reputation and how it pulls a State toward internalization and compliance.

Based on the military commission experience, it is clear that the government must be proactive in reputation shaping. The Obama administration demonstrated this in its immediate efforts to reform the trial process, as well as the President’s May 21, 2009 speech at the National Archives, justifying the continued use of the commissions in terms of historic precedent and law of war practice.

Providing a clearly articulated legal basis for a proposed action is merely the starting point. States must give due consideration to other transnational actors who have something to say in the interpretive phase. Willingness to engage signals an effort to comply, and enhances the reputation for the underlying policy. Failure to engage in the interpretive, reputation shaping phase could result in norm interpretation contrary to the government position, or forced internalization through adverse judicial decisions, such as the Supreme Court’s decision in \textit{Hamdan v. Rumsfeld}. As witnessed in the military commissions debate, opting out of the transnational and domestic discourse results in diminished interpretive influence when future efforts are made to shape a reputation for compliance.

It is appropriate to conclude with a quote from Justice Robert Jackson, Chief Prosecutor of the International Military Tribunal at Nuremburg: "We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well."\textsuperscript{378} Contrary to the developed reputation, there is no poisoned chalice at the military commissions. If the commissions are judged on the merits of proceedings and the high standard of procedural protections, then the legacy will be reflected in terms of fairness and compliance with the rule of law.

\textsuperscript{377} Margulies, \textit{supra} note 84, at 373.
\textsuperscript{378} Opening Statement, Nuremburg Trial.