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“Bring[ing] Our Enemies to Justice”¹: Terrorism and the Court

Anna Elazan

On September 11, terrorists hijacked planes and crashed them in New York, Virginia, and Pennsylvania. In the wake of the largest terrorist attack on United States soil, the country rallied together, vowing that the individuals responsible would be found and brought to justice. One such individual is Khalid Sheikh Mohammad, the self-described mastermind behind the September 11 attacks and a senior member of al Qaeda. Mohammad faces the prospect of being held accountable for his actions in a court of law. However, controversy surrounds the two options of trying Mohammad: civilian criminal court and a military commission.

This article focuses on the venue of Mohammad’s trial and is broken into three sections. The first section reviews the historical use of military tribunals. This section begins by looking at the basis for Presidential authority to authorize the use of military commissions. This section then outlines the first use of military commissions since World War II. President George W. Bush’s authorization parallels the provisions in President Franklin Roosevelt’s authorization of the use of commissions in the 1940s. However, following authorization, the military commissions were subject to judicial challenges and significant revision by Congress. Finally, this section tracks recent developments since President Barack Obama took office.

The second section addresses the location of Mohammad’s trial. This section begins by discussing Attorney General Eric Holder’s announcement on November 13, 2009 to move the trial of Mohammad to the United States District Court of the Southern District of New York. This section addresses public opposition to the decision and concludes with a discussion of Holder’s January 30, 2010 decision to reconsider the location of the trial.

¹ George W. Bush, President of the United States, Address to the Joint Session of Congress and the American People (Sept. 20, 2001), *available at* <http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html>.

Because the Obama Administration has yet to decide which venue to pursue, the third section considers the strengths and weakness of both options. In addition to the civilian or military trials, this section explores a third “hybrid” option: a national security court with jurisdiction over international terrorism issues.

Historical Use of Military Tribunals

The use of military tribunals in the United States dates back to General George Washington.² Historically, military commissions have been used to try enemy combatants who violate the law of war.³ This section will begin by looking at the legal basis for the presidential authorization of military tribunals. The second part of this section will examine the use of military commissions under President Bush who was the first to implement military commission to try acts of terrorism.⁴ President Bush was the first president since President Roosevelt to use military commissions, and it was during his tenure that the trial of Khalid Sheikh Mohammad began in a military commission. While President Bush’s authorization includes similarities to President Roosevelt’s authorization fifty years earlier, the type of war being fought has changed. Since President Obama took office, there have been several developments in the use of military commissions, the first being an early moratorium on their use. However, five months later,

² Kenneth Jost, *Prosecuting Terrorists: Should Suspected Terrorists be Given Military or Civil Trials?*, 20 CQ RESEARCHER 217, 225 (Mar. 12, 2010). See generally Michael Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433 (2002); Louis Fisher, *Military Tribunals: Historical Patterns and Lessons*, RL32458 CRS REP. (2004).

³ Jennifer Elsea, *The Department of Defense Rules for Military Commissions: Analysis of Procedural Rules and Comparison with Proposed Legislation and the Uniform Code of Justice*, RL31600 CRS REP. 2 (2006). Military commissions are distinguishable from a military court martial. A military court martial is used by the United States to try its own service members for violations of the Uniform of Military Justice before a panel. See Uniform Code of Military Justice (UCMJ), 10 U.S.C. § 802 (2000).

⁴ Matthew Shapanka, *The Crime of Terrorism: Military and Civilian Approaches to Prosecuting Terrorists*, 56 FED. LAW. 32, 32 (2009). Acts of terrorism were tried in the traditional criminal justice system until September 11.

President Obama declared military commissions were lawful and effective due to updated rules and procedures.

Legal Basis for the Presidential Authorization of Military Tribunals

Under section two of Article II of the Constitution, the president is commander-in-chief.⁵ As commander-in-chief, the Constitution vests the President with the power to wage wars that have been declared by Congress and to execute all laws that define and punish offenses committed against the laws of nations, including the law of war which is comprised of treaties and general and customary international law.⁶ Furthermore, the Articles of War recognize that the commander-in-chief has the power to authorize the use of a military commission and dictate its procedure.⁷

The Supreme Court has affirmed the President's authority to authorize the use of military tribunals. In World War II, the Court upheld the use of military tribunals in *Johnson v. Eisentrager*, ruling that "[t]he jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long established."⁸ Notably, in *Ex parte Quirin*, the Supreme Court upheld the jurisdiction of a domestic military tribunal to try Nazi saboteurs for actions committed in the United States because the presidential order establishing the tribunal was promulgated during wartime pursuant to the Articles of War

⁵ U.S. CONST. art. II, § 2, cl. 1 ("The President shall be commander in chief of the Army and Navy of the United States, and of the militia of the several states, when called into the actual services of the United States")

⁶ *Ex Parte Quirin*, 317 U.S. 1, 26 (1942). See Alfred P. Rubin, Remarks at the Annual Meeting of the American Society of International Law (Apr. 25, 1985), in Antigoni Axenidou, *Should the Law of Wars Apply to Terrorists?*, 79 AM. SOC'Y INT'L L. PROC. 109, 111 (1985) (discussing the sources and principles of the law of war in the context of terrorism).

⁷ *Quirin*, 317 U.S. at 27.

⁸ 339 U.S. 763, 786 (1950). In *Eisentrager*, the Court held that German soldiers convicted by a military commission for engaging in belligerent activity in China against the United States after Germany's surrender to the Allied forces had no right to a writ of habeas corpus. See *id.* at 777-81.

adopted by Congress.⁹ Although the Court did not define the, “boundaries of the jurisdiction of military tribunals to try persons according to the law of war,” it did find that as unlawful belligerents, the Nazi saboteurs “were plainly within” the military tribunal’s jurisdictional boundaries.¹⁰ Consistent with *Quirin*, the Bush Administration later justified the use of military tribunals to try al Qaeda members and affiliates by characterizing them as unlawful enemy combatants who violated the law of war.¹¹

Use of Military Commissions During President Bush’s Administration

After the September 11 attacks, the U.S. House of Representatives and the U.S. Senate adopted a joint resolution, the Authorization for Use of Military Force (AUMF), authorizing the President to “[u]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided” in the attacks or that “harbored such organizations or persons.”¹² On November 13, 2001, President Bush issued a military order authorizing the creation of military tribunals to try members of al Qaeda who were non-United States citizens who aided in terrorist acts or injury to the United States.¹³ The order

⁹ 317 U.S. at 11.

¹⁰ *Id.* at 45-46. In *Quirin*, the Court held, “Unlawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.” *Id.* at 31. Under the Geneva Convention, prisoners of war must (a) be “commanded by a person responsible for his subordinates,” (b) have a “fixed distinctive sign recognizable from a distance,” (c) carry arms openly, and (d) conduct “their operations in accordance with the laws and customs of war.” Geneva Convention Relative to the Treatment of Prisoners of War, art. 4(A)(2), Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 13. In *Quirin*, after landing their submarines in the United States, the Nazi saboteurs disposed of their military uniforms, forfeiting the right to be treated as a prisoner of war. 317 U.S. at 21. Therefore, the Court characterized the Nazi saboteurs as unlawful belligerents punishable by a military commission. *See id.* at 35-36.

¹¹ See Christina Elmore, *An Enemy within Our Midst: Distinguishing Combatants from Civilians in the War Against Terrorism*, 57 U. KAN. L. REV. 213, 223 (2006).

¹² Authorization for Use of Military Force (AUMF), Pub. L. No. 1070-40, § 2(a), 115 Stat. 224, 224 (2001).

¹³ Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 57833 (Nov. 13, 2001). The order stated that “[t]o protect the United States and its citizens and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order . . . to be tried for violations of the laws of war and other applicable law by military tribunals.” Additionally, the order said that because of the “danger to the safety of the United States and the nature of

demonstrated President Bush's belief that terrorist acts were acts of war and the actions of al Qaeda on September 11 were violations of the law of war.¹⁴ The procedures for trial by military commission were outlined in Military Commission Order No. 1, issued by the Secretary of Defense.¹⁵ In 2005, Congress passed the Detainee Treatment Act (DTA).¹⁶

President Bush's November 13, 2001 military order marked the first time military commissions had been used in over fifty years. The military order issued by President Bush was similar in structure to the military order issued by President Roosevelt on July 2, 1942 which was used to try the Nazi saboteurs in *Quirin*, and was supported by prior Supreme Court precedent.¹⁷ While President Roosevelt and President Bush's military orders were similar, the wars were considerably different.¹⁸

President Bush's order lacked Congressional authorization and the rules and procedures of the military commissions came under review. In *Rasul v. Bush*, the Court went to great lengths to distinguish its findings from that in *Eisentrager* fifty years earlier, holding that enemy combatants could have their habeas corpus claims heard in federal district court.¹⁹ In *Hamdi v.*

international terrorism," the military tribunals could not operate under the same "principles of law and the rules of evidence generally recognized in the United States district courts."

¹⁴ See *id.*

¹⁵ See Shapanka, *supra* note 4, at 20; Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002).

¹⁶ Detainee Treatment Act, 42 U.S.C.A. § 20000dd (2005). The DTA prohibited "cruel, inhuman, or degrading treatment or punishment" of detainees in the United States custody awaiting trial. The DTA also granted the U.S. Court of Appeals for the District of Columbia exclusive jurisdiction over the detainee's cases and said that no civil court would have jurisdiction to consider the application for a writ of habeas corpus.

¹⁷ Belknap, *supra* note 2, at 445.

¹⁸ Since World War II, the United States has "engaged in hostilities without official declarations of war and Congress has relied upon authorizations for the use of force to confer authority in every conflict." Elmore, *supra* note 11, at 234 (citing Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2058-59 (2005)). "Moreover, historical practice has confirmed that Congress may fully empower the President to engage in war within the bounds of the authorization." *Id.* at 233-24 (citing Bradley, 118 HARV. L. REV. at 2058-59). Congressional enactment of the Authorization for Use of Military Force (AUMF) shows that "Congress chose to treat the attacks on September 11 as acts of war." *Id.* at 233. See AUMF, *supra* note 12, § 1541. The AUMF said that it "intended to constitute authorization 'within the meaning of section 5(b) of the War Powers Resolution.'" *Id.* at 234 (citing AUMF, *supra* note 12, § 1541).

¹⁹ See 542 U.S. 466, 475-79, 485 (2004). In *Rasul*, the Court said:

Petitioners in these cases differ from the *Eisentrager* detainees in important respects: They are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of

Rumsfeld, the Court ruled that the President had authority to detain enemy combatants under the AUMF but that an individual being held as an “enemy combatant” must be given the opportunity to dispute that status.²⁰ In *Hamdan v. Rumsfeld*, the Court held that the military commissions could not proceed because they were not Congressionally authorized, stating further that even if the military commission was a properly authorized court, “its structure and procedures violate[d] the Uniform Code of Military Justice.”²¹

In the aftermath of *Hamdan*, Congress passed the Military Commission Act of 2006 (MCA) to remedy the defects of military commissions found in *Hamdan*. The MCA provided a statutory authorization for the use of commissions, thereby rectifying one of the reasons that commissions were invalidated in *Hamdan*.²² The MCA authorized the President to create military commissions “to try alien unlawful enemy combatants that engaged in the hostilities

aggression against the United States; they have never been afforded access to any tribunal, much less charged with and convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.

Not only are the petitioners differently situated from the *Eisentrager* detainees, but the Court in *Eisentrager* made quite clear that all six of the facts critical to its disposition were relevant only to the question of the of the prisoners’ constitutional entitlement to habeas corpus. The Court had far less to say on the question of the petitioners’ statutory entitlement to habeas review. *Id.* at 467 (citations omitted).

Four years after *Rasul*, in *Boumediene v. Bush*, the Court held that the Suspension Clause of the Constitution applies to detainees held as enemy combatants at Guantanamo Bay, that the detainees were entitled to have their habeas corpus claims heard in a federal district court, and that the provision of the Military Commission Act of 2006 denying federal courts jurisdiction over the detainees’ federal habeas corpus claims was unconstitutional. 553 U.S. 723 (2008).

²⁰ 542 U.S. 507, 518, 524-25 (2004). The holding that the President had the authority to detain enemy combatants under the AUMF was consistent with the Court’s holding fifty years earlier in *Quirin*. *See id.* at 518 (“The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice, are ‘important incident[s] of war.’” (citing *Quirin*, 317 U.S. at 28, 30)).

²¹ 548 U.S. 557, 560 (2006). The Court asserted that “[t]ogether the Uniform Code of Military Justice, the Authorization for Use of Military Force, and the Detainee Treatment Act at most acknowledge a general Presidential authority to convene military commissions in circumstances justified under the Constitution and laws, including the law of war.” *Id.* at 559-60. The Court held that, under the UCMJ, courts martial procedures should be applied in the military commissions. *Id.* at 561. The Court said that “[n]othing in the record demonstrates that it would be impracticable to apply court martial rules here.” *Id.* The Court said that generally “the procedures governing tribunals by military commission historically have been the same as those governing courts martial.” *Id.* at 617 (citations omitted). However, the Court acknowledged that “there is a glaring exception to this general rule. The procedures and evidentiary rules used to try General Yamashita near the end of World War II deviated in significant respects from those then governing courts-martial.” *Id.* (citing *Yamashita v. Styer*, 327 U.S. 1, 1 (1946)).

²² *See* Scott Sillman, *Prosecuting Alleged Terrorists by Military Commission: A Prudent Option*, 42 CASE W. RES. L. REV. 289, 290 (2009).

against the United States for violations of the law of war and other offenses triable by military commissions.”²³ The MCA stated that generally the rules and procedures of the courts martial would apply in military commissions.²⁴

One of the unlawful enemy combatants that the Bush administration decided to prosecute in a military commission was Khalid Sheikh Mohammad. Eighteen months after the September 11 attacks, Mohammad was captured by the United States.²⁵ In 2006, Mohammad was transferred to Guantanamo Bay where charges of war crimes and murder, among others, were brought against him before a military commission.²⁶ On December 8, 2008, Mohammad sent a letter to the military commission’s judge expressing his desire to confess and plead guilty.²⁷

Use of Military Commissions During President Obama’s Administration

In his first executive order as President, Obama ordered all pending cases before military commissions be halted.²⁸ In May 2009, President Obama made a speech calling for the reform of military commissions to ensure that the commissions are a lawful, fair, and effective prosecutorial forum.²⁹ He argued that federal courts should be used when an individual violates American criminal law and military courts when law of war is violated:

²³ Military Commission Act of 2006, Pub. L. No. 109-366, § 948b(a), 120 Stat. 2600 (2006). Courts martial were given jurisdiction over lawful enemy combatants.

²⁴ § 949a(a).

²⁵ Jost, *supra* note 2, at 219.

²⁶ *See id.*; Charge Sheet for Khalid Sheikh Mohammad at 1-20, *United States v. Mohammad*, No. [no docket number in the original] (U.S. Military Comm’n filed April 15, 2008), *available at* <http://www.defense.gov/news/d20080509Mohammed.pdf>. Mohammad was charged with (i) conspiracy, (ii) attacking civilians, (iii) attacking civilian objects, (iv) intentionally causing serious bodily harm, (v) murder in violation of the law of war, (vi) destruction of property in violation of the law of war, (vii) hijacking or hazarding a vessel or aircraft, (viii) terrorism, and (xi) providing material support for terrorism.

²⁷ William Glaberson, *5 Charged in 9/11 Attacks Seek to Plead Guilty*, N.Y. TIMES, Dec. 8, 2008, *available at* http://www.nytimes.com/2008/12/09/us/09gitmo.html?_r=1.

²⁸ Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 22, 2009). Despite the President’s order, the military judge held hearings in July and September. Michael Price, *Guantanamo Update*, 33 CHAMPION 55, 55 (2009).

²⁹ Barack Obama, President of the United States, Remarks by the President on National Security (May 21, 2009), *available at* http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-On-National-Security-5-21-09/.

[L]et me be clear: We are indeed at war with al Qaeda and its affiliates. . . . [D]etainees who violate the laws of war and are therefore best tried through military commissions They are an appropriate venue for trying detainees for violations of the laws of war. They allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.³⁰

President Obama based his support of military commissions on condition of their reform.³¹

In October 2009, President Obama signed the Military Commission Act of 2009 (Revised MCA), which incorporated recommendations made in his May speech.³²

According to the Senate Armed Services Committee, the fixes include “(1) precluding the use of coerced testimony; (2) limiting the use of hearsay testimony; (3) establishing new procedures for handling classified information, similar to procedures applicable in the civilian courts; (4) providing defendants with fairer access to witnesses and documentary evidence; and (5) requiring that defendants be provided with appropriate representation and adequate resources.”³³

Additionally, the Act authorized the president to establish military commissions to try the crimes of conspiracy and providing material support for terrorism.³⁴ The Act applies the procedures and rules of evidence applicable to courts martial in the United States to military commissions.³⁵ The law permits appeals from military commissions to the U.S. Court of Military Commission Review, with further appeals to the United States Courts of Appeals of the District of Columbia and ultimately to the U.S. Supreme Court.³⁶

³⁰ *Id.*

³¹ *Id.* President Obama noted that the reforms to the commissions include disallowing evidentiary statements “obtained using cruel, inhuman, or degrading interrogation methods,” placing the burden to prove that hearsay is unreliable on the opponent of hearsay, and giving detainees greater opportunity to choose their own counsel and more protections if they refused to testify.

³² Josh Gerstein, *Obama Signs Military Commissions Reform*, POLITICO, Oct. 28, 2009, available at http://www.politico.com/blogs/joshgerstein/1009/Obama_signs_Military_commissions_reforms.html.

³³ *Id.*

³⁴ Military Commission Act of 2009 (Revised MCA), 10 U.S.C.A. § 948b(b) (2009). The Act granted military commission’s jurisdiction over such standard war crimes as pillaging, denying quarter, taking hostages, torture, mutilation, and rape.

³⁵ § 949a(a).

³⁶ § 950f, g.

Decision to Move the Trial of Mohammad to Civilian Court

On November 13, 2009, United States Attorney General Eric Holder announced the move of the trial of Khalid Sheikh Mohammad and four other detainees from a military commission to the U.S. District Court of the Southern District of New York.³⁷ In contrast, on that very same day, Attorney General Holder decided to resume the trial of five other detainees in a military commission.³⁸ Professor Jeffrey Addicott criticized the disparity between the two decisions.³⁹ Professor Addicott argued that trying al Qaeda terrorists in both civilian courts and military commission sends a confused message of “whether the United States is at war.”⁴⁰

Initially, the decision to move the trial to lower Manhattan was largely supported by Democrats and criticized by Republicans. Democrats extended their support because, they said, the decision would send the message that the United States is confident in its judicial system.⁴¹ Republicans, such as Senator Lindsey Graham, criticized the prosecution in civilian court because it was “criminalizing the war.”⁴² While most reactions to the move of the trial remained

³⁷ U.S. Dep’t of Justice, Attorney General Announces Forum Decisions for Guantanamo Detainees, Nov. 13, 2009, available at <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>. The four other detainees were also involved in the September 11 attack. The detainees are Walid Muhmmaed Salih Mubarak Bin Attash, Ramzi Bin Al Shibh, Ali Abdul-Aziz, and Mustafa Ahmed Al Hawsawi.

³⁸ U.S. Dep’t of Justice, Departments of Justice and Defense Announcement Forum Decisions for Ten Guantanamo Bay Detainees, Nov. 13, 2009, available at <http://www.justice.gov/opa/pr/2009/November/09-ag-1224.html>. The five detainees Holder found should be tried in a military commission “include the detainee accused of orchestrating the October 2000 attack on the USS Cole, which killed 17 U.S. sailors and injured dozens of others, and a detainee who is accused of participating in an al-Qaeda plot to blow up oil tankers in the Straits of Hormuz.”

³⁹ Telephone Interview with Jeffrey F. Addicott, Professor and Director of Center for Terrorism Law, St. Mary’s Univ. Sch. of Law (Mar. 4, 2010). Professor Jeffrey Addicott is a Distinguished Professor of Law and the Director of the Center for Terrorism Law at St. Mary’s University School of Law. An active duty Army officer in the Judge Advocate General’s Corps for twenty years, Professor Addicott spent a quarter of his career as a senior legal advisor to the United States Army’s Special Forces. As an internationally recognized authority on national security law, terrorism law and human rights law, Professor Addicott not only lectures and participates in professional and academic organizations both in the United States and abroad, but he is also a frequent contributor to national and international news shows, including FOX News Channel and MSNBC. Jeffrey F. Addicott, http://www.stmarytx.edu/law/content/faculty/addicott_j.html?height=400&width=500.

⁴⁰ *Id.*

⁴¹ See *New York 9/11 Trial Ignites Row*, BBC NEWS, Nov. 13, 2009, available at <http://news.bbc.co.uk/go/pr/fr/-/2/hi/americans/8360018.stm>.

⁴² Charlie Savage, *Holder Defends Decision to Use U.S. Court for 9/11 Trial*, N.Y. TIMES, Nov. 19, 2009, available at <http://www.nytimes.com/2009/11/19/us/19detain.html>.

consistent with party members, Democratic New York Governor David Paterson criticized the decision because, he said, New York City is still recovering from the September 11 attacks.⁴³

After mounting public criticism of the economic costs and potential disruptions in a city still rebuilding from the September 11, 2001 attacks, New York City Mayor Michael Bloomberg announced on January 27, 2010 that he was withdrawing his support for holding Mohammad's trial in lower Manhattan.⁴⁴ Three days later, the Obama Administration announced that it would begin reconsidering the location of the trial.⁴⁵

The Obama Administration was criticized for allowing political pressure to change its decision. Professor Stephen Vladeck explained that "once you cave into political pressure on something like this, you lose any ability to have moral leadership on the subject."⁴⁶

Additionally, the Director of the Center for National Security Studies, Kate Martin, said, "We can't have a situation where political pressure forces the federal government to forgo criminal prosecution. That would mean the system is fundamentally broken."⁴⁷

⁴³ Danny Hakim, *Paterson Calls Obama Wrong on 9/11 Trial*, N.Y. TIMES, Nov. 19, 2009, available at <http://www.nytimes.com/2009/11/17/nyregion/17paterson.html>. Governor Paterson said, "We still have been unable to rebuild that site, and having terrorists tried so close to the attack is going to be an encumbrance on all New Yorkers."

⁴⁴ Michael Barbaro & Al Baker, *Bloomberg Balks at 9/11 Trial, Dealing Blow to White House*, N.Y. TIMES, Jan. 28, 2010, available at <http://www.nytimes.com/2010/01/28/nyregion/28bloomberg.html>.

⁴⁵ Scott Shane & Benjamin Weiser, *U.S. Drops Plan for a 9/11 Trial in New York City*, N.Y. TIMES, Jan. 10, 2010, available at <http://www.nytimes.com/2010/01/30/nyregion/30trial.html>.

⁴⁶ Interview with Stephen Vladeck, Professor, Am. Univ. Wash. Coll. of Law, in Wash., D.C. (Mar. 3, 2010). Stephen Vladeck is a Professor of Law at American University Washington College of Law, where his teaching and research focus on federal jurisdiction, national security law, constitutional law, and international criminal law. A nationally recognized expert on the role of the federal courts in the war on terrorism, he was part of the legal team that successfully challenged the Bush Administration's use of military tribunals at Guantánamo Bay, Cuba, in *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and has co-authored amicus briefs in a host of other lawsuits. Stephen I. Vladeck, <http://www.wcl.american.edu/faculty/vladeck/>.

⁴⁷ Jane Mayer, *The Trial: Eric Holder and the Battle Over Khalid Sheikh Mohammad*, THE NEW YORKER, Feb. 15, 2010, available at http://www.newyorker.com/reporting/2010/02/15/100215fa_fact_mayer.

The Question of Where

Since its January 30 announcement, the Obama Administration has still not decided which venue it will use to try Mohammad. Initially, the Administration indicated that a final decision would be made by the end of February 2010, but on March 12, the Administration postponed the announcement and indicated that no recommendation had been sent to the President.⁴⁸

The section below will look at the strengths and weaknesses associated with trying suspected terrorists in a civilian court or a military commission. However, since September 11, a third option has been suggested: the creation of a national security court. The last part of this section provides a short overview of the proposals for this new court. At this time, there is no indication that the Administration is considering the creation of a national security court.

Even though this section will explore some of the strengths and weaknesses of civilian courts and military commissions, it is important to note that there is a current presumption that both options are legally sound. The choice between them boils down to a policy decision.

Federal District Court

Supporters of civilian courts argue that there is a lack of demonstrated need for military commissions.⁴⁹ In regard to efficiency, civilian courts have disposed of far more terrorism cases

⁴⁸ Jodi Kantor & Charlie Savage, *After 9/11 Trial Plan, Holder Hones Political Ear*, N.Y. TIMES, Feb. 14, 2010, available at <http://www.nytimes.com/2010/02/15/us/politics/15holder.html>; Charlie Savage, *White House Postpones Picking Site of 9/11 Trial*, N.Y. TIMES, March 5, 2010, available at <http://www.nytimes.com/2010/03/06/us/06trial.html>.

⁴⁹ Shapanka, *supra* note 4, at 35.

than the three cases decided by military commission.⁵⁰ Additionally, only a small percentage of the Guantanamo Detainees are eligible to be tried by a military commission.⁵¹

Balance of Defendant's Due Process Rights Against the Disclosure of Confidential and Sensitive Information: Classified Information Procedures Act

One of the critiques of civilian courts rests on the need to protect classified and sensitive information.⁵² However, the Classified Information Procedures Act (CIPA) has been successful in balancing a defendant's due process rights against the protection of classified and sensitive information.⁵³ CIPA does not change the parties' discovery or evidentiary obligations.⁵⁴ Rather, the presiding judge is notified when classified information is likely to arise in trial and meets with the appropriate party in a pretrial conference to deem whether the classified information is relevant.⁵⁵ If the judge decides that the information is relevant, then the judge may authorize the deletion of "specified items of classified information from documents", the substitution of "a summary of the information for such classified documents," or the substitution of "a statement admitting relevant facts that the classified information would tend to prove."⁵⁶

Since its enactment, CIPA has been successfully adapted in situations it was not originally envisioned for, such as terrorism cases, and has proven effective in keeping classified

⁵⁰ See Human Rights Watch, *Fighting Terrorism Fairly and Effectively: Recommendations for President-Elect Barack Obama* at 5 (Nov. 2008), available at <http://www.hrw.org/en/reports/2008/11/16/fighting-terrorism-fairly-and-effectively-0>. "[T]he federal courts have tried more than 107 terrorism cases, obtaining 145 convictions." Since the implementation of a military commission by President Bush, military commissions tried and convicted three terrorists: Ali Hamza Abmad Suliman al Bahlul, Salim Ahmed Hamdan, and David Hicks. See Jost, *supra* note 2, at 220.

⁵¹ Shapanka, *supra* note 4, at 36. As of November 2007, only 14 of almost 300 Guantanamo detainees were eligible to be tried in a military commission.

⁵² Shapanka, *supra* note 4, at 37.

⁵³ See JAMES BENJAMIN & RICHARD ZABEL, HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURT 82 (May 2008). Enacted in 1980, CIPA was passed by Congress "against the backdrop of difficulties encountered in the criminal prosecution of Cold War spies." *Id.* While originally used when a defendant had classified information that he or she might disclose at trial, CIPA has been used in terrorist cases where "classified information is known only by the government." See *id.* at 82, 89.

⁵⁴ *Id.* at 92.

⁵⁵ *Id.* at 82.

⁵⁶ 18 U.S.C. app. 3 § 4. A district court's order of disclosure of classified information is immediately appealable. See also *id.* § 7.

information from being leaked.⁵⁷ Richard Zabel and James Benjamin Jr., partners in the New York office of Akin Gump Strauss Hauer & Feld LLP, argue that “[a]s a result of CIPA’s effectiveness, the government has been able to use information obtained from foreign law enforcement and intelligence sources without compromising the integrity of the source.”⁵⁸

Despite its success, CIPA is not without flaws. First, a judge makes the pretrial decision on the whether classified information is discoverable “without the benefit of the adversarial process and without knowing the defendant’s theory of the case.”⁵⁹ Second, when opposing counsel is able to argue in support of the disclosure of the classified information in a pretrial hearing, the counsel does so without seeing the information.⁶⁰ Third, CIPA does not address issues that arise when a defendant represents himself or the possible need for the availability of additional classified information when a defendant may be sentenced to death.⁶¹ Critics disagree about whether the CIPA’s shortcoming should be rectified via a statutory amendment to CIPA or a change in court procedures of Article III courts.⁶²

Federal Districts that Qualify for Civilian Terrorism Trials

If the Obama Administration decides to try Mohammad in a civilian criminal court, there are a variety of venue possibilities under federal law. In federal murder cases, for example, the trial can be held “where the injury was inflicted, or the poison administered or other means

⁵⁷ See generally Benjamin, *supra* note 53, at 87-89. CIPA has been used in a large number of terrorism cases. *Id.* at 85 (citations omitted). “[W]e are not aware of any instances in which CIPA’s procedures failed and there was a substantial leak of sensitive information as a result of terrorism prosecution in federal court.” JAMES BENJAMIN & RICHARD ZABEL, HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN FEDERAL COURT, 2009 UPDATE AND RECENT DEVELOPMENT 25 (July 2009).

⁵⁸ Benjamin, *supra* note 53, at 87.

⁵⁹ ASHLEY Inderfurth & WAYNE MASSEY, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAW AND NATIONAL SECURITY, TRYING TERRORISTS IN ARTICLE III COURTS: CHALLENGES AND LESSONS LEARNED 13 (July 2009).

⁶⁰ *Id.* at 14. Permitting a security cleared defense attorney to see the evidence in a pre-trial conference has been suggested as a solution to this issue, but the defense attorney would still be foreclosed from disclosing the information to his or her client.

⁶¹ Benjamin, *supra* note 53, at 89-90.

⁶² Inderfurth, *supra* note 59, at 15.

employed which caused the death, without regard for the place where the death occurs.”⁶³

Professor Vladeck argued that federal statutes suggest venue preferences “but are seldom categorical.”⁶⁴ He stated that the trial of Mohammad and his co-conspirators could not only be held in a district where the hijacked planes crashed, but also in a district where the planes took off or where a substantial part of planning or preparation for the crime took place.⁶⁵ While it may be more appropriate as a venue matter to hold the trial where the aircraft crashed, “federal law allows for the argument that other federal venues are appropriate.”⁶⁶

Once the trial is held within a proper federal district, there are no limitations to the trial’s specific location. Professor Vladeck stated that there is nothing in the venue rules that require a trial be held within a courthouse; a trial could be held anywhere within the district.⁶⁷ Within the Southern District of New York, the trial of Mohammad could be held within the courthouse; outside the courthouse, such as Governors Island; or on a military base.⁶⁸ Nevertheless, holding a trial outside of a courthouse may raise concerns of practicality, especially when the Southern District of New York already hosts one of the best equipped courthouses in the country for high profile, high security, and classified related cases.⁶⁹ Moreover, Professor Vladeck asserts that holding the trial on a military base may raise separate Constitutional implications, under the First

⁶³ 28 U.S.C.A. § 3236 (2010).

⁶⁴ Vladeck, *supra* note 46.

⁶⁵ *Id.* Federal trials have been held in cities where a substantial part of the planning or preparing of crimes took place in cases where there have been long originating conspiracies.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Governors Island is a 172-acre island located in the East River off Lower Manhattan. Julie Menin, Op-Ed, *Trial by Ferry*, N.Y. TIMES, Jan. 17, 2010, available at <http://www.nytimes.com/2010/01/17/opinion/17menin.html>.

⁶⁹ Vladeck, *supra* note 46. Professor Vladeck argued that “the Southern District of New York, the Eastern District of Virginia, and the DC District Court are all specially set up to handle the kinds of unique circumstances that make” the trial of terrorist suspects “logistically trying.” The United States District Court for the Eastern District of Virginia convicted Zacarias Moussaoui of criminal conspiracy arising from the September 11 attacks. See *United States v. Moussaoui*, 591 F.3d 263 (4th Cir. 2010).

Amendment and Sixth Amendment, if the trial is moved to a military base “as a way to shield them from the public.”⁷⁰

Military Commission

While military commissions can provide more flexibility in location and procedure than civilian courts, the Military Commissions Act of 2009 helped alleviate some of the concerns that the commissions’ procedures varied too greatly from those in civilian courts.

Location Flexibility

While a civilian trial of Mohammad could take place in only a limited number of federal districts, a military commission could be located virtually anywhere in the world.⁷¹ With a wide selection of American military bases at its disposal, military commissions could be held at installations such as Guantanamo Bay, Cuba, or Bagram, Afghanistan.⁷² This flexibility of location can mitigate the monetary and safety concerns associated with hosting Mohammad’s trial in a more densely populated American city.

Procedures

The Military Commission Act of 2009 revised the procedures of military commissions, so the procedures are more consistent with the procedures used by the United States to try its own military.⁷³ Under the Act, a typical military commission includes a jury of five members of the armed forces.⁷⁴ However, in cases where the death penalty is sought, the jury must consist of at least twelve members and the decision to sentence the defendant to death must be

⁷⁰ Vladeck, *supra* note 46.

⁷¹ Sillman, *supra* note 22, at 294 (citing 10 U.S.C. § 805 (2006) (“[The Uniform Code of Military Justice] applies in all places.”)).

⁷² *See id.* In Bagram, Afghanistan, there is a United States military base with a detention center. *See* Michael Evans, *Bagram Prison in Afghanistan May Become the New Guantanamo*, THE TIMES, Mar. 22, 2010 available at http://www.timesonline.co.uk/tol/news/world/us_and_americas/article7070460.ece.

⁷³ *Id.* at 296-97.

⁷⁴ Revised MCA, *supra* note 12, §§ 948i, m.

unanimous.⁷⁵ The Act permits for appellate review of a military commission’s determination of law and fact by a Court of Military Commission Review, to the Court of Appeals for the District of Columbia, and eventually to the United States Supreme Court.⁷⁶

Congressional Support

Despite the ability to try Mohammad and his co-conspirators in federal district courts, there have been Congressional attempts to force the trial into military commissions. Days after the Obama Administration’s January 30 announcement that it would consider other venue options for the trial of Mohammad, Senator Lindsey Graham and Representative Frank Wolf introduced identical bills that would prohibit the use of Department of Justice funds to prosecute individuals for the September 11 attacks in Article III courts.⁷⁷ Because these bills would only limit one department’s funding, Professor Vladeck believed that the bill will be ineffective because there is “flexibility and fluidity” that would allow the Department of Justice to recover funding from other agencies.⁷⁸ However, Professor Vladeck said that “if the bill was more categorical, stating that no money appropriated to the government” could be used for trying individuals involved in the September 11 attacks in Article III courts, then a separation of powers issue may arise that would need to be decided through litigation.⁷⁹ Under the Constitution, Congress has the power of the purse,⁸⁰ but the President has prosecutorial discretion.⁸¹

⁷⁵ §§ 949m(b)(2)(C), 949m(b)(3)(C).

⁷⁶ §§ 950f, 950g.

⁷⁷ H.R. 4556, S. 2977, 111th Cong. (2010).

⁷⁸ Vladeck, *supra* note 46.

⁷⁹ *Id.*

⁸⁰ U.S. CONST. art. I, § 8.

⁸¹ *See* U.S. CONST. art. II.

A Possible Third Option: The Creation of a National Security Court

Amidst the debate over whether enemy combatants should be tried in a civilian court or a military commission, some have called for the creation of a national security court.⁸² There are a number of proposed plans, but the common underlying factor is that a national security court would be specialized, with subject matter jurisdiction over *international* terrorism issues and personal jurisdiction over enemy combatants.⁸³ Proposals call for judges similar to Article III judges.⁸⁴ Advocates for the national security court argue that the court be used both in reviewing decisions to detain terrorist suspects preventatively and in prosecuting them.⁸⁵

The idea of a national security court has come under criticism.⁸⁶ Professor Vladeck argues that the proposals are based on four assumptions:

(1) that preventative detention of terrorism suspects is not unlawful; (2) that CIPA and other evidentiary rules render traditional criminal prosecutions of terrorism suspects unworkable; (3) that, in general, the Article III courts are inappropriate forums for terrorism cases; and (4) that there are no analogous tribunals and/or procedures already available under the extant laws.⁸⁷

⁸² See Andrea Logaman & Glenn Sulmasy, *A Hybrid Court for a Hybrid War*, 42 CASE W. RES. J. INT'L L. 299 (2009); Michael B. Mukasey, Op-Ed, *Jose Padilla Makes Bad Law*, WALL ST. J., Aug. 22, 2007 at A15. Sulmasy was one of the first to advocate for a NSC. John Radsan, *Change Versus Continuity at Obama's CIA*, 21 REGENT U. L. REV. 299, 300-01 (2009) (citing Glenn Sulmasy, Op-Ed, *The National Court: A National Evolution*, JURIST, May 10, 2006, available at <http://jurist.law.pitt.edu/forumy/2006/05/national-security-court-natural.php>).

⁸³ See Andrew McCarthy & Alykhan Velshi, *We Need a National Security Court* at 33 (Jul. 2006), available at <http://www.defenddemocracy.org/images/stories/national%20security%20court.pdf>; 42 CASE W. RES. J. INT'L L. at 303. McCarthy and Velshi suggest that a national security court should have jurisdiction over only alien combatants. *We Need a National Security Court* at 36. Yet, Sulmasy and Logman propose that the court should have jurisdiction over aliens and United States citizens alike. 42 CASE W. RES. J. INT'L L. at 305.

⁸⁴ "The judges would be selected by the Chief Justice of the United States and renewable for four-year terms. Renewal would be in the discretion of the Chief Justice, and judges could be removed from their assignment to [national security court] for bad behavior or poor performance." *We Need a National Security Court* at 34. Sulmasy and Logman suggest that the judges should be life tenured and appointed by the president, with the advice and consent of the Senate. 42 CASE W. RES. J. INT'L L. at 305.

⁸⁵ Stephen Vladeck, *The Case Against National Security Courts*, 45 WILLAMETTE L. REV. 505, 512-13 (2009). Proposals for both uses of a national security court vary. See generally *id.* at 508-16.

⁸⁶ See Mark Shulman, *National Security Courts: Star Chamber or Specialized Justice?*, 15 J. INT'L & COMP. L. 533, 445-46 (2009) (saying an op-ed written by Judge John C. Coughenour against a national security court has met and canceled out Mukasey's op-ed).

⁸⁷ Vladeck, *supra* note 85, at 516.

Because this article's focus is on trials and jurisdiction, rather than the power of detention, the first assumption is beyond the scope of this discussion. The second and third assumptions involve the use of a civilian court, which was previously evaluated in this article.

Regarding the fourth assumption, Professor Vladeck argues that there are already at least three notable procedures in place that mirror the requests for a national security court.⁸⁸ First, the USA Patriot Act “authorizes the Attorney General to detain any non-citizen ‘engaged in any . . . activity that endangers the national security of the United States.’”⁸⁹ Second, habeas corpus claims are already heard before military officers in a forum known as Combatant Status Tribunals.⁹⁰ Furthermore, since a detainee's right to have the habeas corpus claim heard in federal court was upheld in *Boumediene*,⁹¹ any proposed national security court's determination would also need to be appealable to a federal district court. Third, the Military Commission Act of 2009 provides for a military commission with jurisdiction over a wide range of offenses, including those proposed within a national security court's jurisdiction.⁹²

Currently, the calls for the creation of a national security court have yet to congeal into a widely supported alternative. A national security court would need to be created by Congress, but there is no indication that the creation of the court has been proposed in Congress. In this regard, Professor Addicott noted that the Military Commission Act of 2009 likely demonstrates Congress's decision to support military commissions rather than any proposed third option.⁹³

⁸⁸ *See id.*

⁸⁹ *Id.* at 521 (citing Uniting and Strengthening America By Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, 8 U.S.C. § 1226(a) (2001)). The decision to detain the individual is reviewable by the Attorney General and a petition for a writ of mandamus in Federal District Court of the District of Columbia.

⁹⁰ *Id.* at 522 (citing 8 U.S.C. § 1226(a)).

⁹¹ *See* Vladeck, *supra* text accompanying note 19.

⁹² Vladeck, *supra* note 85, at 522. The Military Commission Act of 2009 authorizes the President to try “alien unprivileged enemy belligerents” who “has engaged in hostilities against the United States,” “has purposefully and materially supported hostilities against the United States,” or “was part of al Qaeda.” Revised MCA, *supra* note 12, §§ 948a(7), 948b(b).

⁹³ Addicott, *supra* note 39.

Conclusion

The decision of whether to try Khalid Sheikh Mohammad in a civilian court or military commission is a policy decision that must be made by the executive branch. The Military Commissions Act of 2009 eradicated many of the procedural concerns first associated with the military commissions after September 11. With regard to the concern that confidential and classified information concerning national security, the Classified Information Procedures Act has shown effective in keeping the information confidential in civilian courts. The security, cost of security, and disruption to life were some of the critiques of hosting the trial of Mohammad in lower Manhattan. These concerns may have been exacerbated by the emotional impact of hosting the trial where the physical and emotional wounds of September 11 are still healing. As discussed above, these concerns may be minimized by moving the trial to a civilian court in a less populated area.

Thus, I find the determinative factor in choosing the venue of the Mohammad's trial is the composition of the jury. A military commission's jury consists of members of the armed forces whose job is to serve the country. Furthermore, members of the military are able to bring their experiences as professional warriors and understanding of the standards of conduct in war to their role as jurors. These are valuable characteristics for jurors trying the self proclaimed mastermind of the September 11 attacks. The findings of a civilian jury may be influenced by just hearing Mohammad is suspected of orchestrating the September 11 attacks; by a desire not to be the jury member that did not find him guilty; or by a hope to make their participation on the jury a publicity opportunity. Furthermore, there may be a concern for the safety of civilian jury members. The job of members of the military is to accept risk for the United States, and there is

no way to know the effect of being a member of the jury that does or does not convict Mohammad. Moreover, the Military Commissions Act of 2009 imposes minimal standards on the number of jury members used to convict an individual of death. Therefore, the President should try Mohammad in a military commission because it has the potential to provide one aspect that civilian courts may inherently be unable to provide, an impartial jury.