Detaining the Accused

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Introduction

For every American, the Fifth Amendment of the United States Constitution provides protection that "No person shall be held to answer for a capital . . . crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ." U.S. Const. amend. V. Additionally, the Fifth Amendment guarantees "… nor shall *any person* . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . . ." *Id.* (emphasis added). However, when it comes to noncitizens accused of engaging in hostilities toward the United States, in a time and place of war, "due process of law" has a different meaning.

Dating as far back as 1778, during the Revolutionary War, the United States created the Military Commissions, a "tribunal convened to try individuals for unlawful conduct associated with war."[1] Rooted in American and international laws of war, and shaped throughout centuries of legislation and U.S. Supreme Court precedents, each military commission convenes and adjourns under the authority of the Commander in Chief. After the September 11, 2001, terrorist attacks against the United States, President George W. Bush issued a Military Order to initiate the present-day Military Commissions. Since its reemergence in 2001, the Military Commissions has drastically changed from the President's Military Order of November 2001 to its current state.

By way of the Military Commissions Act (MCA) of 2006, and later, MCA of 2009, the Military Commissions continues to detain and try accused noncitizen combatants. *Id.* Prior to the MCA of 2009, however, there were many court rules of procedure, evidence, and criminal

[1] Military Commissions History, Office of Military Commissions, http://www.mc.mil/aboutus/militarycommissionshistory.aspx [hereinafter *OMC History*].

law, that infringed upon ordinary due process for the accused. In nearly two decades, approximately 780 individuals have been accused of war crimes and detained at Guantanamo Bay Detention Facility. Detention lasts well over a decade for many, while others have died in detention awaiting an opportunity for a fair trial that never came. Although, due process has significantly improved since Military Commissions stood up in 2001, today there are 40 detainees who remain in detention. Some have been held for over 18 years– held to answer for capital crimes without being charged and without trial.

Thesis

If every accused individual, whether an American or noncitizen, is presumed innocent until proven guilty in a court of law, and trial is promised without undue delay, how can the accused be lawfully detained at such lengths without being criminally charged? Under what legal authority and justification does the Military Commissions possess to extensively deprive the accused of life or liberty? And finally, what steps can be taken to ensure due process rights for the accused are upheld, while upholding military interests and defense against threats to national security?

Distinguishing Due Process

The Due Process clause in the Constitution protects "certain unalienable rights; that among these are life, liberty, and the pursuit of happiness." The Declaration of Independence para. 2 (U.S. 1776). Specifically, the Constitution protects people from being held (i.e., detained) without being charged, from self-incrimination, and from being deprived life or liberty without "due process of law," which includes the right to a speedy trial. U.S. Const. amend. V. For Military Commissions, many of the rules and procedures of the U.S. Federal Courts and U.S. military courts-martial tribunals apply, ensuring these rights of fair treatment and due process for those alleged of committing war crimes. Some fundamental procedural protections include: the accused is presumed innocent until proven guilty, prosecution bears the burden of proof, guilt must be proved beyond a reasonable doubt, trial must take place without undue delay, defense counsel is provided to the indigent at no cost, attorney-client privilege is upheld, cross-examination of witnesses is permitted, defendant is free from double jeopardy, right to an interpreter is provided at no cost, and pretrial legal review is required. Fed. R. Crim. P. 43-44; R.M.C. 804 (2019); UCMJ arts. 31, 38, 44, 62-63; 10 U.S.C. § 44, 62, 63, 831, 838[2].

Despite the shared due process rights received by the accused, there were (and still are) essential differences under Military Commissions that block the accused from equal protection. During military combat engagement with the Taliban on November 13, 2001, President George W. Bush "issued a comprehensive military order intended to govern the 'Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.'" *Hamdan v. Rumsfeld*, 548 U.S. 557, 568 (2006) (citing 66 Fed. Reg. 57833). The authority for this order came from a

[2] Comparison of Rules and Procedures in Tribunals that Try Individuals for Alleged War Crimes, Office of Military Commissions, http://www.mc.mil/aboutus/legalsystemcomparison.aspx [hereinafter *OMC Rules*].

variety of sources, originating chiefly from the U.S. Constitution designating the president as "Commander in Chief of the Army and Navy." U.S. Const. art. II § 2. Though the Constitution specifically grants Congress "the power to make all laws necessary and proper for carrying into execution," the War Powers Resolution codified limited constitutional powers of the Commander in Chief to engage the Armed Forces into hostilities pursuant to a declaration of war, statutory authorization, or national emergency generated by an attack upon the United States. U.S. Const. art. I § 8; 50 U.S.C.A. § 1541. Given this, the Authorization for Use of Military Force Joint Resolution emerged seven days after the September 11, 2001, attacks to the United States. This Congressional Joint Resolution authorized 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." 107 P.L. 40, 115 Stat. 224. In doing so, the President had at his disposal the ability to prescribe rules of the military court:

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for 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 . . . .

10 USCS § 836 (emphasis added).

And so it was ordered. Signed on November 13, 2001, the President's Military Order set forth "any noncitizen for whom the President determines 'there is reason to believe' that he or she (1) 'is or was' a member of al Qaeda or (2) has engaged or participated in terrorist activities aimed at or harmful to the United States," such individuals will be tried by military commission. *Hamdan*, 548 U.S. at 568 (citing 66 Fed. Reg. 57833). Further, the President found, "given the

danger to the safety of the United States and the nature of international terrorism, . . . it is *not* practicable to apply . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." 66 Fed. Reg. 57833 (emphasis added).

Essentially, this order did many things: (1) directed the Secretary of Defense to establish military commissions which would (2) have exclusive jurisdiction to (3) try noncitizens determined by the President to be members of al Qaeda or participants in terrorist activities aimed at the U.S. for which (4) a very different set of rules and procedures would apply. Unlike the rights commonly afforded in civilian courts and in courts-martial, these differences under the Military Order of November 2001 created significant advantages for the prosecution of the accused. First, the accused could have evidence used against them for which they may never obtain during discovery or see at all during their trial, making it difficult to contest. *OMC Rules*. Secondly, the rules permitted evidence to be gathered against the accused using "coercion." *Id.* Any testimonial hearsay or unsworn testimony could also be admitted as evidence against the accused. And among other differences, there were also very limited rights for the accused to appeal military commission convictions. *Id.*

On July 3, 2003, these significant departures from ordinary military tribunal due process were put to test after the President announced that Salim Hamdan and five others were triable under military commission. *Hamdan*, 548 U.S. at 569. By December, Hamdan was appointed military counsel to represent him and in February 2004, his counsel "filed demands for charges and for a speedy trial pursuant to Article 10 of the UCMJ, 10 U.S.C. § 810. *Id.* Because Military Commissions ruled that Hamdan was not entitled to any UCMJ protections, his demands were immediately denied. *Id.* Hamdan also filed his petitions in federal court from which he received

the basis for the Military Commission's jurisdiction and the General Allegations for which he was being held– four overt acts giving rise to the charge of conspiracy. *Id.* A military order was issued on July 7, 2004, to convene a Combatant Status Review Tribunal which determined Hamdan's status as an "enemy combatant" and thus, his detention at Guantanamo Bay was warranted. *Id.* at 570. Hamdan's Military Commission proceedings commenced. *Id.* at 571.

However, in November 2004, "the District Court granted Hamdan's petition for habeas corpus and stayed the commission's proceedings." *Id.* The District Court concluded that, (1) under Supreme Court opinions in *Reid v. Covert*, 354 U.S. 1 (1957)[3], *U.S. ex rel. Toth v. Quarles*, 350 U.S. 11 (1955)[4], and *McElroy v. U.S. ex rel. Guagliardo*, 361 U.S. 281 (1960)[5], a district court should determine whether a petitioner raised substantial arguments denying the right of the military to try him; (2) under Articles 21 and 36 of the UCMJ, the President may establish military commissions only for offenders or offenses triable by military tribunal within the law of war, which includes the Third Geneva Convention; and (3) the existing procedures of the Military Commission were "fatally contrary" or "inconsistent" with the Uniform Code of Military Justice (UCMJ). *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (2004). Hamdan was entitled to the full protections of the Third Geneva Convention until adjudged. And ultimately, the Court held that a military commission convened under the President's Military Order of November 2001 did not have the power to try him. *Hamdan*, 548 U.S. 557; *OMC History*.

[3] In *Reid*, a civilian dependent charged with murder of a service member overseas was not triable by court-martial.

[4] In *Quarles*, a civilian, discharged from previous military service, was not triable by court-martial for an offense committed while in service.

[5] Under *McElroy*, overseas civilians employed by the armed forces are not subject to court-martial jurisdiction for noncapital offenses.

After the Supreme Court ruling in *Hamdan*, the Military Commissions established by the President's Military Order was invalidated and Congress enacted the Military Commissions Act (MCA) of 2006. *Id.* The MCA of 2006 specified and authorized who would be subjected to a trial by military commission, how status would be determined, and reestablished the comprehensive rules and procedures governing such commission. Specifically, the MCA of 2006 granted the accused many of the lost rights under the Military Order of November 2001. The accused were provided (1) the right to see any and all evidence admitted against them, (2) to be present during all proceedings, (3) a trial before a qualified military judge and panel members,[6] (4) to obtain defense witnesses and gather evidence, and (5) a robust appellate review. *OMC History.* Although a vast change closer to that of courts-martial and Article III Federal Court, the MCA of 2006 still withheld significant rights from the accused. Under the MCA of 2006, the accused were limited on their right to seek writs of habeas corpus (such as in *Hamden*), limited to counsel, carried the burden to contest the government's hearsay evidence, and still had evidence gathered against them using "coercion." *Id.*

With the MCA of 2006, Salim Hamdan was tried by military commission in August of 2008. *Id.* He was acquitted of the conspiracy charge but convicted of providing material support for terrorism and sentenced to 66 months of confinement. *Id.* After being captured in Afghanistan in December 2001, Hamdan was transferred to the Guantanamo Bay detention facility on May 6, 2002.[7] This meant, of his five-and-a-half-year sentence conviction, Hamdan had already been detained for over 6 years. He was given credit for most of the time he served

[6] A "panel" in military court is akin to a jury, but comprised of servicemembers.

[7] Andrei Scheinkman et al., *The Guantánamo Docket,* N.Y. Times, May 2, 2018.

and was transferred to his home country, Yemen, on November 25, 2008, to serve the final month of his sentence. *Id.*

Two months prior to Hamdan's conviction, the landmark U.S. Supreme Court case *Boumediene v. Bush* held that the MCA of 2006 "denied federal courts of jurisdiction to hear habeas corpus actions that were pending at the time of its enactment." *Boumediene v. Bush*, 553 U.S. 723 (2008). This confirmed the exclusive jurisdiction of Military Commissions as per 28 U.S.C. § 2241 which states "No court, justice, or judge shall have jurisdiction to hear or consider . . . a writ of habeas corpus filed by or on behalf of an alien . . . properly detained as an enemy combatant or is awaiting such determination." 28 U.S.C. § 2241(e)(1). In *Boumediene* the Court also addressed separation of powers concerns with Guantanamo Bay. Despite the government's view that the Constitution had no effect to noncitizens in Cuba, the Court disagreed stating "The Nation's basic charter cannot be contracted away . . . . The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply." *Boumediene*, 553 U.S. at 727. Therefore, the accused being detained as enemy combatants at Guantanamo Bay were entitled to the habeas corpus privilege of challenging the legality of their detention. *Id.* Additionally, such habeas corpus hearings were required to be prompt and could not be delayed for lengthy review procedures. *Id.* at 793.

A few months later, in January 2009, President Barack Obama ordered a stay in all military commission proceedings to review the commissions and detention operations. *OMC History*. In October 2009, Congress passed the MCA of 2009 and the stay was lifted in November. Still in effect today, the MCA of 2009 advanced the due process privileges for the accused subject to military commission proceedings. *Id.* Specifically, the MCA of 2009 did the following:

> It enhances an accused's rights to counsel, including the right to request a specific counsel from the defense pool and, in capital cases, to have counsel with expertise in capital cases. The MCA of 2009 also prohibits the use in evidence of statements that were obtained by torture or cruel, inhuman, and degrading treatment. It prohibits the use of statements of the accused unless the military judge finds the statement reliable, probative and given either (1) "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 best be served by admission of the statement" or (2) voluntarily. The Act also places the burden for the use of hearsay evidence on the party intending to use it.

Id.

Not until 2011 did the United States Court of Military Commission Review (CMCR)[8] affirm the findings and sentence in *U.S. v. Hamdan*, 801 F. Supp. 2d 1247 (2011). *OMC History*. However, in 2012, the U.S. Court of Appeals for the D.C. Circuit determined "material support for terrorism was not a pre-existing war crime under international law" and the MCA was "not intended to retroactively punish new crimes." *Hamdan v. U.S.*, 696 F. 3d 1238 (2012). The Court of Appeals reversed CMCR and ordered Hamdan's conviction for material support for terrorism be vacated." *Id.*; *OMC History*.

Although Hamdan's conviction was ultimately vacated almost four years after he finished serving his entire sentence in pretrial detention, he is a rare exception whose case set precedent for others. *Hamdan v. U.S.* became a landmark case which the U.S. Court of Appeals for the D.C. Circuit reversed and vacated other convictions such as *U.S. v. Al Bahlul* 820 F. Supp. 2d 1141 (2011), for crimes not pre-existing under international law at the time charged. *OMC History*.

[8] Court of Military Commissions Review is the court of appeals equivalent for trial courts convening under Military Commissions.

Pretrial Detention

On January 11, 2002, the first known detainees arrived at Guantanamo Bay.[9] In the first month, the population doubled from 156 detainees to over 300 detainees by February. *Id.* The number doubled again to over 600 detainees by August 2002, and an estimated total of 780 people have been sent to the Guantanamo Bay Detention Facility since January 2002. *Id.* Of these, 731 have been transferred, 9 died in detainment, and 40 detainees remain in the detention facility today. *Id.* Of the 40 still held, 5 have been recommended for transfer pending security conditions, 7 have been charged in military commissions, 2 have been convicted[10], 3 are pending referral of charges, and the remaining 23 detainees are being held in an indefinite Law-of-War detention status and are not recommended for transfer. *Id.* Of the 23 indefinite detainees, some such as Mohammed al Qahtani and Ghassan al Sharbi, have been detained for over 18 years and their charges for war crimes have been dismissed; others such as Abu Zubaydah have been detained for nearly 14 years and confirmed by Central Intelligence Agency (CIA) director, Gen. Hayden, to have been waterboarded, among other forms of intensive interrogation and questionable torture. *Id.*

If neither al Qahtani or al Sharbi pose a high risk to national security, nor have any charges filed against them, how can they be lawfully detained for over 18 years, or at all? Additionally, if Zubaydah was subjected to torture during his detainment, and the government still has no credible charges against him, how long can the government still hold him? Do the accused not have defensive recourse?

[9] Andrei Scheinkman et al., *The Guantánamo Docket,* N.Y. Times, May 2, 2018

[10] Ali Hamza al Bahlul was sentenced to life in prison on 2008 and Majid Khan pleaded guilty and awaits sentencing.

Perhaps more problematic could be Khalid Mohammed who has been detained for nearly 14 years and charged with war crimes, despite having also been confirmed by the CIA to be the subject of torturous interrogation. *Id.*; *See U.S. v. Khalid Shaikh Mohammad*, et al., 280 F. Supp. 3d 1305 (2017). Abd al Nashiri, as a high-value detainee, was held for 6 months by the CIA in a secret site and was also waterboarded for information. *Id.* Both Mohammed and al Nashiri are of the 7 charged in the military commissions system and under the MCA of 2009; which means any "coerced" information they may have given will be inadmissible. Additionally, it is only because they have been charged and began proceedings that they are able to challenge and defend themselves within the military court. For the 23 others without official charges, particularly those who have had their charges dropped, they may never see their day in court, yet can be lawfully detained… indefinitely. How is this consistent with the Constitutional right of due process?

The Law of War

The traditional purposes for incarceration are well-known to criminal law scholars: deterrence, retribution, incapacitation, and rehabilitation. Nora V. Demleitner et al., *Sentencing Law* (4th ed. 2018). The American Bar Association (ABA) has published consequential and retributive approaches to sentencing:

> (a) The legislature should consider at least five different societal purposes in designing a sentencing system: (i) To foster respect for the law and to deter criminal conduct. (ii) To incapacitate offenders. (iii) To punish offenders. (iv) To provide restitution or reparation to victims of crimes. (v) To rehabilitate offenders. (b) Determination of the societal purposes for sentencing is a primary element of the legislative function. . . .

Id. at 3 (citing *ABA Standards for Criminal Justice, Sentencing* 18-2.1 (3d ed. 1994)).

The U.S. has also codified sentencing factors to include: the nature and circumstances of the offense, history and characteristics of defendant(s), need for the sentence imposed, types of sentences available, avoidance of unwarranted sentence disparities among defendants of similar records and conduct, and need to provide restitution to victims. *Id.* at 6 (citing 18 U.S.C. § 3553).

However, these are purposes and guidelines with regards to convicted criminals. When it comes to pretrial detention, even for accused terrorists, what grounds does the government have for such extensive (and sometimes indefinite) "detention sentences"? The answers to the aforementioned questions begin with the Law of War. The Department of Defense Law of War Manual sets forth the duties, rights, and rules for the detainment and prosecution of war criminals. Justice Robert Jackson is quoted in the Forward, describing U.S. military lawyers trying thousands of defendants post World War II before military commissions, "stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of law." Department of Defense, *Law of War Manual* ii (June 2015) (citation omitted). And in the Law of War Manual, Chapter 8 captures the duties, expectations, and promises to those detained by U.S. forces. "[R]eflected in international law, domestic law, national policy, and DoD policies," the Law of War requires that "detainees shall *in all circumstances* be treated humanely and protected against any cruel, inhuman, or degrading treatment." *Id.* at VIII § 8.2 (emphasis added). Because of the gravity of detainee treatment, section 8.2 also includes a warning that "[v]iolations of the requirement to treat detainees humanely may be violations of criminal law." *Id.*

Those who may be detained are (1) "persons who have participated in hostilities or who belong to armed groups, but who are not entitled to [Prisoner of War] POW status or protected person status in international armed conflict;" (2) "persons held for reasons related to a non-

international armed conflict; and (3) "any other detentions." *Id.* at VIII § 8.1.1.[11] It is explained in Chapter IX that "Persons who are alleged to have committed war crimes" are a category of persons who are not necessarily excluded from POW status. IX § 9.3.2.2. However, the third category of "any other detentions" is an apparent catch-all where perhaps even a POW cannot escape detention.

It is the United States armed forces' practice to go beyond baseline compliance with the rules of Common Article 3 of the 1949 Geneva Conventions, and ensure detainee treatment exceeds the standards of humane treatment under international law.[12] *Id.* at VIII § 8.1.2; Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. "In addition to international law, the requirements . . . are also based on . . . U.S. statutes, such as the Detainee Treatment Act of 2005, or national policy, such as . . . applicable Executive Orders." *Id.* at § 8.1.4.3. The humane treatment of detainees include (1) protection against violence, torture, and cruel treatment; (2) protection against humiliating or degrading treatment;[13] (3) prohibition against biological or medical experiments; (4) prohibition against threats to commit inhumane treatment; (5) duty to protect; and (6) no adverse distinction.[14] *Id.* at § 8.2. Interrogation is also specified and "must be carried out in a manner consistent with the requirements for humane treatment, including the prohibitions against torture, cruelty, degrading treatment, and acts of threats of violence." *Id.* at § 8.4.1. Additionally, the treatment and/or techniques of interrogation of any person in the custody of, effective control of,

[11] Though outside the scope of this work, it is noted that one who is considered having POW status may be exempt from these forms of detention practices and procedures.

[12] Detainee treatment is also relative to overall safety and national security concerns.

[13] Examples include, but not limited to photographs, public display, rape and other indecent assault.

[14] Distinctions founded on race, color, religion, faith, sex, wealth, national or social origin, political opinion, or any other similar criteria are prohibited.

or under detention by the Department of Defense, must be authorized by and listed in the U.S. Army Field Manual on Intelligence Interrogation. *Id.*

The Rules for Military Commissions state that "upon the swearing of charges and specifications, the accused shall be informed . . . as soon as practicable." R.M.C. 308 (2019). This conditional rule guarantees the accused will be informed soon, but only once charges have been brought. The Manual does not give any indication as to the existence of time requirements that an accused person shall be charged. Contrarily, In the Preamble, the Manual divorces military commissions from maintaining certain rights existing in courts-martial under the Uniform Code of Military Justice (UCMJ). It expresses, per chapter 47A of Title 10, U.S. Code, the Secretary of Defense may dictate pretrial, trial, and post-trial procedures. *Id.* at I-1(d); 10 U.S.C. § 948b(d)(2). And as such, the R.M.C. states that sections of Title 10 that relate to pretrial investigations, compulsory self-incrimination, and a speedy trial; do not apply to the current military commissions. *Id.* at I-1(b); 10 U.S.C. §§ 810, 831, 832, and 948b(d)(1). However, this is at odds with the Law of War. Specifically, Chapter VIII prohibits compulsory self-incrimination. "No one shall be compelled to testify against himself or herself or to confess guilt." *Law of War* VIII § 8.16.3.3. And regarding a speedy trial, the Law of War guarantees "the procedure shall provide for an accused to be informed *without delay* of the particulars of the notice alleged against him or her. . . ." *Id.* at § 8.16.3. (emphasis added).

In the Procedures for Detention, detainees are to be informed promptly of their reasons for detainment in a language they understand generally within 10 days of detention. *Id.* at § 8.14.1. And for those not afforded POW status or treatment, a review of continued detention is conducted by "an impartial and objective authority," often by a military commander. No time requirements exist as to how often a review must take place, nor how long a person may be

detained. However, "when the circumstances justifying detention have ceased to exist . . . such persons shall be released within the minimum delay possible . . . ." *Id.* at § 8.14.3. For this to take place, though, the circumstances for which the person was detained must cease to exist. *Id.* This small caveat is powerful. It will not matter if formal charges have been dropped against the accused, as is the case for some detainees; so long as the circumstances justifying detention still exists, the person can still be lawfully held.

Particularly for those accused of participating in hostilities or belonging to armed groups, as most, if not all, of the recent and current detainees have been; "the circumstance that justifies their continued detention is the continuation of hostilities. Thus, release of such persons is generally only required after the conflict has ceased.[15]" *Id.* at § 8.14.3.1. Though, given many of the allegations of membership to armed groups in continuous active engagement against U.S. armed forces, it explains the legality of continuous detention as well as the probable threat to national security. This is especially true for the 15 accused as being "high-value detainees."

Detainment Exceptions

With national security risk justification and the law of war permissibility, the U.S. government maintains a compelling legal rationale for continuous detention. There are, however, exceptions to continuous detention. In addition to habeas corpus pleadings and potential infractions and violations of the law of war, some of the most compelling claims for release exist under Article 110 of the Third Geneva Convention, repatriation due to illness. Not only can military engagement have severe and lifelong effects to one's mental health, the

[15] Generally, as a matter of U.S. policy, detainees are often released before the conclusion of hostilities. *Law of War* VIII § 8.14.3.1. This could possibly explain many, if not most, of the known 731 detainees that were transferred.

additional mental anguish of torture can cause dilapidating effects to the mind and body.[16] Long-term psychological problems of torture survivors include physical health problems, trauma, anxiety, depression, and even psychosis. *Id*. And many studies demonstrate the detrimental and permanent effects of imprisonment, particularly isolated confinement.[17] So now, imagine the combination of all three circumstances.

In his 2004 habeas corpus petition in *Hamdan*, petitioner stated the details of his mistreatment, which exacerbated his mental condition and made it increasingly difficult for him to defend himself during trial as his detention continued. The U.S. government did not refute Hamdan's claims and the District Court felt compelled to detail it as follows:

> Until a few days before the oral argument on Hamdan's petition, his most urgent and striking claim was that he had been unlawfully and inhumanely held in isolation since December 2003 and that such treatment was affecting his mental and psychological health as well as his ability to assist in the preparation of his defense. Late on the Friday afternoon before the oral argument held on Monday, October 25, 2004, the government filed its "notice of a change in circumstances," advising the court that Hamdan had been moved back to Camp Delta -- a separate wing of Camp Delta, to be sure, but nevertheless an open-air part of Camp Delta where pre-commission detainees can communicate with each other, exercise, and practice their religion.

Hamdan, 344 F. Supp. 2d 152, 172 (D.D.C. 2004) .

[16] Amanda C. Williams & Jannie Van der Merwe, *The Psychological Impact of Torture*, National Institutes of Health, May 2013.

[17] See Sadie Dingfelder, *Psychologist Testifies on the Risks of Solitary Confinement*, American Psychological Association (Oct. 2012), https://www.apa.org/monitor/2012/10/solitary; See also Craig Haney, Senate Judiciary Subcommittee on the Constitution, Civil Rights, and Human Rights Hearing on Solitary Confinement (2012) https://www.judiciary.senate.gov/imo/media/doc/12-6-19HaneyTestimony.pdf; Kirsten Weir, *Alone, in 'the Hole': Psychologists Probe the Mental Health Effects of Solitary Confinement*, American Psychological Association (May 2012), https://www.apa.org/monitor/2012/05/solitary; and Lorna Collier, *Incarceration Nation: The United States Leads the World in Incarceration*, American Psychological Association (Oct. 2014), https://www.apa.org/monitor/2014/10/incarceration.

For al-Qahtani, he was transferred to Guantanamo Bay in February 2002, and claimed to have been "tortured", "repeatedly hospitalized", and "placed in a life-threatening condition." *Al-Qahtani v. Trump*, No. CV 05-1971 (RMC), 2020 WL 1079176, at *1 (D.D.C. Mar. 6, 2020). His claims were supported by the Military Commissions Convening Authority who admitted that "al-Qahtani would not be subjected to a capital trial because of the torture he had endured at the hands of the U.S. military." *Id.* (citing Bob Woodward, *Detainee Tortured, Says U.S. Official*, The Washington Post (Jan. 14, 2009)). Before he was detained, it was later confirmed by an independent medical expert that al-Qahtani had a history of mental illness preceding his alleged participation in terrorist activities. *Id.* "Prior to entering U.S. custody, Mr. al-Qahtani was diagnosed with schizophrenia, major depression, and a possible neurocognitive disorder due to a traumatic brain injury." *Id.* At the time al-Qahtani was initially detained, U.S. government officials witnessed him "talking to nonexistent people." *Id.*

> While at Guantanamo Bay, Mr. al-Qahtani was subjected to solitary confinement, sleep deprivation, extreme temperature and noise exposure, stress positions, forced nudity, body cavity searches, sexual assault and humiliation, beatings, strangling, threats of rendition, and water-boarding. Dr. Keram concluded that these conditions were "severely cruel, degrading, humiliating, and inhumane" and "would have profoundly disrupted and left long-lasting effects on a person's sense of self and cognitive functioning 'even in the absence of pre-existing psychiatric illness.'" Dr. Keram opines that Mr. al-Qahtani's treatment at Guantanamo Bay exacerbated his psychological ailments, to which he was particularly vulnerable due to his pre-existing disorders.

Al-Qahtani v. Trump, No. CV 05-1971 (RMC), 2020 WL 1079176, at *2 (D.D.C. Mar. 6, 2020) (citing Suspected Mistreatment of Detainees, from FBI Deputy Assistance Director, Counterterrorism Division, T.J. Harrington (July 14, 2006)).

Consequently, al-Qahtani was diagnosed with severe Post-Traumatic Stress Disorder (PTSD) as a result of his interrogations and maltreatment during detainment. *Id.*

The treatment of these men and others like them go against the Third Geneva Conventions. Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135. And particularly in al-Qahtani's case, he could be repatriated if found to fall within Article 110, which dictates repatriation if "(1) incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished. (2) Wounded and sick who, according to medical opinion, are not likely to recover within one year . . . (3) Wounded and sick . . . whose mental or physical fitness seems to have been gravely and permanently diminished." 6 U.S.T. 3316. In al-Qahtani's Motion to Compel Examination by a Mixed Medical Commission, the government argued against granting the commission due to the extreme cost and burden, because such commission had never been done. However, al-Qahtani contested that medical evaluations and treatments have been done in the past. *Al-Qahtani*, No. CV 05-1971 (RMC), 2020 WL 1079176; *See Al-Oshan v. Obama*, 753 F. Supp. 2d 1, 2 (D.D.C. 2010)[18]; *Zuhair v. Bush*, 592 F. Supp. 2d 16, 17 (D.D.C. 2008)[19]. On March 6, 2020, the District Court granted al-Qahtani's motion.

Alternative Approaches

Given the national security and Law of War needs and justifications to detain the accused, coupled with the legal right–and violation of–"trial without undue delay," it is apparent that something must be done. In a joint report by the Military & Veteran Affairs Committee, Federal Courts Committee, International Human Rights Committee, and Task Force on the Rule

[18] In *Al-Oshan v. Obama*, the government was required to collaborate with an independent medical expert to create a treatment plan for detainee.

[19] *Zuhair v. Bush* required the government to find an independent medical examiner for a detainee's evaluation.

of Law; the problematic and frustrating history of Military Commissions was addressed. They note within the 14 years of Military Commissions at Guantanamo Bay it has "garnered a mere 8 convictions–half of which have already been overturned and the remainder of which remain on post-trial appeal . . . ." Erik L. Wilson et al., *White Paper on Converting Guantánamo Bay Military Commissions into an Article III Court* I (2020). The high-profile 9/11 case, *U.S. v. Khalid Shaikh Mohammad,* has consisted of nearly 10 years of pretrial proceedings and still "years away from a trial expected to last 3-5 years and be followed by another 10-15 years of appeals." *Id.* The U.S.S. Cole bombing is another high-profile case[20] where "the D.C. Circuit recently vacated nearly 4 years of decisions." *Id.* And if continued, an estimated $400 million per year will be added to Military Commissions' $6 billion cost to date. *Id.*

In vast comparison, traditional federal (Article III) courts have convicted over 660 terrorists since 9/11 at a conviction rate over 90%. *Id.* The Committees argue that if the accused terrorists were tried in traditional federal court, they would have been prosecuted, sentenced for capital crimes, and completed their appeals process years ago. *Id.* The question then becomes, why not move the accused to federal court? Simply put, "it's complicated." Chiefly, there is an inherent need to protect highly sensitive, classified information in the interest of national security. Unlike military commissions that are heavily equipped with military judges and attorneys, support personnel, and other resources with the qualified experience in handling classified material; an Article III court would leave a federal judge to make national security decisions as to the disclosure of sensitive information to personnel, to include defendants.[21] There are also concerns of the Classified Information Procedures Act (CIPA) being invoked in

[20] *U.S. v. Abd al Rahim Hussayn Muhammad al Nashiri*, 191 F. Supp. 3d 1308 (2016), better known as "*Nashiri*" or "U.S.S. Cole" case.

[21] Liz Halloran, *Terrorism Justice: Courts vs. Commissions*, NPR, Nov. 27, 2009.

Article III court, and as a result, a substantial leak of sensitive information could result.[22] However, these national security issues have been addressed and no recent significant leaks have arisen due to terrorism prosecution in federal court. *Id.*

Despite these challenges, there are benefits to both sides. First, the prosecution has legal precedent, public policy, and above a 90% conviction rate on its side. Also, in Article III courts, the prosecution can bring significant (but not all) violations of the laws of war in addition to conspiracy charges not pursuable by military commission. Wilson, *supra* I(c). And third, the prosecution only has 2 levels of appellate review to potentially contest as oppose to the 3 levels afforded in military commissions. *Id.* And given the current, decade-long military commissions appeals process, which is already subject to review (and vehemently criticized) by federal courts, the appeals process is reason alone for prosecution to move to an Article III court solution.

For the accused, Article III court is choice. The accused would benefit from all Fifth Amendment due process rights in which they do not currently receive: grand jury indictment, jury trial, restricted hearsay admissibility, unanimous jury vote for conviction, and an imposed sentence guided by U.S. Federal Sentencing Guidelines. *Id.*; See generally U.S. Const. amend. V. Though military commissions now excludes "statements obtained by torture or cruel, inhuman, or degrading treatment," as in Article III courts, only the latter provides one of the most vital benefits to the accused– Miranda warnings and search warrants are required. *Id.* If the prosecution's crux of evidence against the accused derived from violations of Constitutional Fourth, Fifth, and Sixth Amendment rights (as fully bestowed in Article III courts), the statements would be inadmissible and the accused could potentially be acquitted. U.S. Const. amend. IV–VI.

[22] *In Pursuit of Justice*, Human Rights First, Sep. 20, 2010.

But, if in the interest of justice, and favorable to both the prosecution and defendants, what is preventing the accused from being tried in federal courts? The law. Since 2010, the use of government funds to transfer or release the accused at Guantánamo to the U.S. and its territories has been prohibited under the National Defense Authorization Act. Wilson, *supra* I(d). Additionally, between the law of war, MCA of 2009, Supreme Court holdings, federal statutes, and legal precedent, the Military Commissions is here to stay. Regardless of how lengthy the proceedings or contestable the rulings of Military Commissions, only a change in law can move the accused trials to an Article III court. And given all these reasons, "Congress, however, has prohibited the Guantánamo detainees from being transferred to the U.S. for trial, and appears to have no appetite for changing this policy." Id. at I. In addition to both political parties having strong opposition to transferring the accused to the U.S. for trial, public opinion significantly sides with Congress in keeping the accused at Guantánamo Bay. *Id.*

Given the dismal status quo of Military Commissions, and Congress having no public support nor interest in transferring the accused to the U.S., there lies a hybrid solution– bring the Article III court to Guantánamo Bay. In the Committees' White Paper to Majority Leader McConnell and Speaker Pelosi, an outline for the legislative action, logistical orchestration, and litigious management was proposed:

> 1. Congress would amend 28 U.S.C. § 112 to temporarily expand the jurisdiction of the Southern District of New York[23] to encompass the U.S. Naval Base at Guantánamo and designate Guantánamo as a place for holding court for limited purposes.
>
> 2. The cases presently pending before the military commissions would be assigned to judges sitting within the Southern District of New York or, by designation, to judges who sit outside the District

[23] Though the Committees specifically proposed jurisdictional expansion of the Southern District of New York, they recognized it as one of many potential district courts that could temporarily expand.

> 3. The judges would hold case management hearings and set paths forward for proceeding to trial and final judgment

Id. This proposal is not without significant cost and time to convert and renovate Camp Justice[24] to support this proposed change in court. However, at a current $400 million spent per year without an end in sight, how can we afford not to? Whether or not Congress takes action, only time will tell.[25] For the accused, however, time is running out.

Conclusion

All too often in American society we say the accused are innocent until proven guilty in a court of law. And yet, we allow the *allegations* of heinous crimes to cast a cloud of prejudgment over the accused, in which we imbrue their fundamental rights of due process. Regardless of the charges to which one faces, all Americans and noncitizens are entitled to a fair trial without undue delay. It cannot be said that in 13 to 18 years of detainment the accused have received this fundamental human right. Given the long history of the present Military Commissions and its little justiciable effect, it raises many questions in its infringement upon the rights of the accused.

Whether Military Commissions becomes an Article III court, or Congress permits the accused to be transported and tried in U.S. federal court, or Military Commissions continues as-is for another decade (or indefinitely); holding the accused without charges and without trial is a violation of habeas corpus and strips away rights we deem so unalienable. "Our federal courts

[24] Located on the southeast coast of Cuba, "Camp Justice" comprises the court facilities and supporting infrastructure of Military Commissions held on Naval Station Guantanamo Bay. Facilities, Office of Military Commissions, https://www.mc.mil/facilitiesservices/facilities.aspx.

[25] As of the date of this paper, Aug 7, 2020, Military Commissions' Public Affairs office was not aware of the Committees' White Paper proposal to Congress.

are well equipped to prosecute terror suspects and handle sensitive national security evidence while protecting fundamental rights.[26]" If sufficient evidence exists to prosecute the accused, then under the U.S. Constitution, this must be conducted without undue delay. U.S. Const. amend. VI. If, however, there is insufficient evidence to charge–let alone prosecute–the accused, then certainly there is not enough evidence to justify detaining the accused indefinitely. *Id.* As Alexander Hamilton wrote in Federalist Paper No. 84, "The establishment of the writ of habeas corpus . . . [is] perhaps greater securit[y] to liberty and republicanism than any [the Constitution] contains." Alexander Hamilton, *The Federalist Papers, No. 84* (1788).

[26] ACLU, *Detention*, (2020), http://www.aclu.org/issues/national-security/detention.