

THE INFLUENCE OF *EX PARTE QUIRIN* AND COURTS-MARTIAL ON MILITARY COMMISSIONS

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Professor Greg McNeal was an academic consultant to the prosecution during my tenure as the Chief Prosecutor for the military commissions at Guantánamo Bay, Cuba. We had similar perspectives on many issues, and we still confer on detainee matters. I concur with the views expressed in his essay.¹ I write to address two issues Professor McNeal identified and comment on how they affect the military commissions. First, I examine the case of the Nazi saboteurs—captured, tried, and executed in the span of seven weeks in 1942—and its influence on the decision in 2001 to resurrect military commissions. Second, I assess the conflicting statutory provisions in the Military Commissions Act and the impact on full, fair, and open trials.

I. ATTEMPTING TO REPEAT HISTORY

Professor McNeal argues that the administration chose military commissions to protect information collected for intelligence (intel) purposes from disclosure. Safeguarding intel, particularly the sources and methods used to acquire information, was a key factor, but I believe the decision had a broader basis heavily influenced by a precedent-setting trial in 1942 that became the template for the President's Military Order of November 13, 2001.²

Shortly after midnight the morning of June 13, 1942, four men left a German submarine and came ashore at Amagansett Beach, New York.³

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¹ Gregory S. McNeal, *Beyond Guantánamo, Obstacles and Options*, 103 NW. U. L. REV. COLLOQUY 29 (2008).

² See Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (authorizing the detention and prosecution of enemy combatants) (link).

³ Multiple accounts of the capture and trial of the Nazi saboteurs were used to construct this narrative description. They include: LOUIS FISHER, CONG. RESEARCH SERV., MILITARY TRIBUNALS: THE

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They wore military uniforms in hopes that if captured during the landing they would receive prisoner of war treatment. Four days later, at Ponte Vedra Beach near Jacksonville, Florida, another group of four men did the same. The eight men infiltrated the United States to execute a plan developed by the German High Command at the insistence of Adolph Hitler to attack factories, bridges, rail yards, and utilities to disrupt wartime production, intimidate the American public, and weaken the will to fight. The men were selected because they had lived in the United States before and were unlikely to attract attention as they moved about the country committing sabotage.

Mission success was in jeopardy from the start. The first team that landed in New York encountered a Coast Guardsman walking his nightly patrol along the beach. The leader of the four-man team, George Dasch, lived in the United States for nearly two decades, was married to an American, and served in the U.S. Army before returning to Germany. He spoke nearly flawless American English. Dasch told Seaman Second Class John Cullen that he did not want to kill him, and he offered Cullen \$260 to forget what he had seen. Cullen was unarmed and outnumbered, so he took the money, returned to the Coast Guard station, and reported the encounter. A group of armed Coast Guardsmen returned to the beach, too late to capture Dasch's team, but in time to smell diesel fuel, hear the rumble of an engine in the distance, and see the superstructure of a submarine heading out to sea. Similarly, within hours of the landing near Jacksonville fishermen discovered explosives and uniforms the saboteurs tried to hide in the sand on the beach. The effort to sneak the saboteurs ashore unnoticed was unsuccessful.

But the event that doomed the effort to failure was the decision by George Dasch, with the acquiescence of his travel partner Ernest Burger, to abandon the plan and report it to the FBI. Dasch encountered skepticism when he telephoned the FBI in New York City. He traveled to Washington a few days later expecting a hero's welcome and a face-to-face meeting with J. Edgar Hoover, but encountered more doubters. It was not until he dumped \$82,000 in cash onto a table at FBI headquarters the morning of June 19 that he was taken seriously. Dasch prepared a 254 page single-spaced typewritten statement outlining the plan. The eight saboteurs were all in custody and had confessed by June 27.

President Roosevelt debated what to do with the saboteurs. A trial in the civilian courts was rejected because the group had committed no acts of sabotage and likely faced charges of conspiracy to commit sabotage and a maximum sentence of confinement for three years. Roosevelt told Attorney

QUIRIN PRECEDENT, Order Code RL31340 (2002), available at <http://www.fas.org/irp/crs/RL31340.pdf> (link); George Lardner, Jr., *Nazi Saboteurs Captured! FDR Orders Secret Tribunal; 1942 Precedent Invoked by Bush Against al Qaeda*, WASH. POST, Jan. 13, 2002, at W12, available at http://www.law.uchicago.edu/tribunals/wp_011302.html (link); and FBI History: Famous Cases: George John Dasch and the Nazi Saboteurs, <http://www.fbi.gov/libref/historic/famcases/nazi/nazi.htm> (link).

General Francis Biddle that he was considering a court-martial where the death penalty was available, but like a civilian court, a court-martial required proof beyond a reasonable doubt and employed restrictive rules of evidence and procedure. Provost Marshall General Oscar Cox proposed a military commission, an idea that Secretary of War Henry Stimson supported despite the concerns of some in the Justice Department over holding a military commission when civilian courts were functioning.⁴ President Roosevelt concurred with Cox and Stimson, and he signed an order on July 2 naming the members of the military commission (in essence, the judge and jurors), the prosecutors, and the defense counsel. The order directed that evidence having probative value to a reasonable man would be admitted and the record of trial would be sent directly to the President when the trial ended.

Attorney General Biddle and The Judge Advocate General of the Army, Major General Myron Cramer, were the lead prosecutors.⁵ Colonel Kenneth Royall spearheaded the defense.⁶ The military commission assembled on July 8, 1942, in Room 5235 at the Justice Building in Washington, a few blocks from the White House, the Capitol, and the Supreme Court. Everyone except the accused was sworn to secrecy and no one else was allowed in the room. Despite the President's order prohibiting the federal courts from considering an action by anyone charged with a law of war violation before a military tribunal, Royall filed an application for a writ of habeas corpus with the Federal District Court for the District of Columbia challenging the constitutionality of the military commission. The application was denied the evening of July 28, citing the President's order.⁷

In the interim, Royall lobbied members of the Supreme Court, who were on summer break, to hear the case and they agreed to do so. Remark-

⁴ See Lardner, *supra* note 3. That concern almost certainly stemmed from the Supreme Court's decision in *Ex Parte Milligan*, 71 U.S. 2 (1866), holding that military tribunals could not be used to try citizens in states where Article III courts were operating and available. *Id.* at 121–22.

⁵ See Lloyd Cutler, *What I Saw at a Military Tribunal*, TIME.COM, Nov. 19, 2001, <http://www.time.com/time/nation/article/0,8599,185167,00.html> (link). The youngest member of the prosecution was Lloyd Cutler, who later served as White House Counsel to Presidents Carter and Clinton, and who co-founded Wilmer, Cutler & Hale, one of the largest law firms in the world and one of the first to represent Guantánamo Bay detainees. *Id.*; Frank Stockman, *Detainee Fight Gets Bigger, Costlier for Long-Battling Boston Law Firm*, BOST. GLOBE, Jun. 25, 2008, at A1.

⁶ See Jack Betts, *Sabotage and Secrecy: Lessons from a WWII Tribunal*, CHARLOTTE OBSERVER, Dec. 9, 2001, at 1D. Colonel Kenneth Royall went on to be the last person to hold the office of Secretary of War and later served as Secretary of the Army. He became a partner in a law firm that today, as the result of mergers, is Clifford Chance, the largest law firm in the world and one that represents Guantánamo Bay detainees. Biographical Note, Kenneth C. Royall Papers, University of North Carolina Library, Collection 4651, available at <http://www.lib.unc.edu/mss/inv/r/Royall,Kenneth%5FC.html#d0e263> (link).

⁷ See FISHER, *supra* note 3, at 12. The district court judge, without explanation, “did not consider *Ex Parte Milligan* ‘controlling in the circumstances of this petitioner.’” *Id.* (quoting *Ex Parte Quirin*, 47 F. Supp. 431 (D.D.C. 1942).

ably, the Supreme Court held oral arguments sixteen hours after the District Court denied the application, beginning around noon on July 29 and continuing on July 30, for a total of nine hours of arguments.⁸ Chief Justice Harlan Fiske Stone announced the Court's unanimous decision orally at noon on July 31. The Court upheld the military commission. On August 3, the military commission found all eight men guilty and sentenced them to death. The President reviewed the 3,000 page trial transcript the next day and approved death sentences for six of the eight men. He commuted the death sentences for Dasch and Burger, and they were deported to Germany years later. The six condemned men died in the electric chair at the District of Columbia Jail on August 8, 1942 and were buried in unmarked graves on government property near the Anacostia River. The Court's opinion, *Ex Parte Quirin*,⁹ proved to be a challenge to write and was not released until October 29, twelve weeks after the executions. In total, it took only seven weeks for the President to create and convene a military commission, for prosecutors and defense counsel to prepare their cases, to litigate a joint trial for eight men, for an appeal to the district court to be filed and denied, for the Supreme Court to hear oral arguments and render a decision, and for six men to be executed and buried.¹⁰

I agree with Professor McNeal that protecting intel was a factor in the decision to revive the dormant military commission option, but it was not the sole factor. The history of the Nazi saboteurs was to some a precedent that proved that military commissions were swift, secret, and successful, and that the judicial branch would exhibit fawning obeisance to the President on matters of national security. The 1942 trial became the template for the plan to prosecute detainees in the global war on terrorism.¹¹ Combine that template with the view that detainees are unlawful enemy combatants exempt from Geneva Convention protections, the internationally accepted right to detain enemy combatants for the duration of an armed conflict, a

⁸ See *id.* at 20. Justice Frank Murphy declined to participate because he was on an active duty Army tour at the time. See *id.* Justice William O. Douglas missed the first day due to difficulties returning to Washington from his home in Oregon. See *id.* Chief Justice Harlan Fiske Stone considered disqualifying himself because his son, an Army Major, was a member of Royall's defense team, but chose to participate after Royall and Biddle waived objection. See *id.* Justice Felix Frankfurter did not publicly consider disqualifying himself even though he had dinner with Secretary of War Stimson on June 29, and suggested that the administration consider a military commission, the very issue before the Court a month later. See *id.*

⁹ 317 U.S. 1 (1942).

¹⁰ See FISHER, *supra* note 3, at 27–35; LARNER, *supra* note 3.

¹¹ See CHARLIE SAVAGE, TAKEOVER: THE RETURN OF THE IMPERIAL PRESIDENCY AND THE SUBVERSION OF AMERICAN DEMOCRACY 137–38 (2007) (“[T]he order [establishing military commissions] was modeled on a World War II military commission.”). In addition to providing a model for the basic operation of the commissions, government attorneys cited Roosevelt's handling of the saboteurs in 1942 and the Court's acquiescence in *Quirin* as the “primary precedent” for claiming that the President had the power to establish military commissions without prior approval from Congress. *Id.* at 136–37 (citing the handling of the saboteurs in 1942 to as the “primary precedent” government attorneys relied upon in choosing military commissions).

belief that Guantánamo Bay was a law-free zone beyond the reach of the courts, and a desire to maximize executive authority, and the roadmap leads to where we are today. In other words, it was assumed that we could detain and exploit enemy combatants at Guantánamo Bay for as long as we wanted. We could then prosecute them in military commissions that would be swift, secret, and successful. It would all be free of outside interference, and it would bolster executive power. Safeguarding intel was securely within that circle.

Rather than relying on *Quirin*, the decisionmakers should have considered how Roosevelt responded when a chance to repeat the process arose a few years later. In late November 1944, a German submarine dropped two would-be saboteurs off along the coast of Maine, and by the end of the year both men were in FBI custody. One would assume that if the prosecution of the saboteurs in 1942 was a precedent-setting success President Roosevelt would simply repeat the process, and the Attorney General and Army Judge Advocate General advocated for exactly that.¹² Secretary of War Stimson, however, persuaded the President that repeating the process might have adverse consequences. Stimson believed an extraordinary trial process under the direction and control of very senior government officials like Biddle and Cramer would cause excessive publicity and set a precedent that might encourage the Germans to use extraordinary measures against American prisoners of war.¹³

Roosevelt sided with Stimson and authorized a military commission that differed in material respects from the 1942 trial. The military commission was convened, and rather than the President, Major General Thomas Terry—an active duty military officer and Commander of the Second Services Command—selected the members and counsel.¹⁴ The trial was held on a military post, Fort Jay, on Governors Island, New York, rather than in the Justice Building in Washington. Biddle and Cramer were not allowed to prosecute, despite their desire to do so.¹⁵ And when the trial ended, the record of trial went through the normal post-trial review process set out in the Articles of War, the same as a court-martial, rather than directly to the President. There were, however, some similarities to 1942: the military commission proceedings were closed to the public, and the accused were found guilty and sentenced to death.¹⁶ Roosevelt died in April 1945 not long before the death sentences were to be carried out and while the case was in the post-trial review phase. President Truman commuted the death

¹² See FISHER, *supra* note 3, at 42.

¹³ See *id.*

¹⁴ See *id.* at 44.

¹⁵ See *id.* at 42–43.

¹⁶ See *id.* at 44; Richard Willing, *An American Was the Nazi Spy Next Door*, USA TODAY, Feb. 28, 2002, at A1, available at <http://www.usatoday.com/news/nation/2002/02/28/usatcov-traitor.htm> (link).

sentences to confinement for life and later reduced them to set periods of confinement.¹⁷

Whether it was because World War II ended shortly after the trial or because more ordinary processes that Stimson advocated were used, the second trial generated far less attention than the first, and today it is virtually forgotten. Regardless, Stimson's concerns merit consideration today. If we employ and condone extraordinary measures, we weaken our moral authority to condemn others when they do the same. Lloyd Cutler, the youngest of the prosecutors in the 1942 trial, published an article in December 2001, citing lessons learned six decades earlier. Cutler suggested the administration allow the accused access to the federal courts, minimize secret proceedings as much as possible, and ensure that each accused has competent and conflict-free representation by his counsel of choice. Cutler concluded, "In a very real sense, it is the American legal system, not just al Qaeda's leaders, that [will] be on trial."¹⁸

Some senior officials portray the current military commissions as ordinary processes, but the claim rings hollow. Brigadier General Thomas Hartmann, the Legal Advisor to the Convening Authority, at a Pentagon press conference in February 2008 announcing charges against the 9/11 detainees, said: "These processes that we have before the military commissions in many ways parallel the military justice system which, I think, is very well regarded by the defense community as giving tremendous rights to [defendants]."¹⁹ He told *Newsweek*:

[T]he protections provided to these people, to these accused, are very, very similar to the protections that would be provided to me in connection with a military court-martial. That's a fundamentally important thing, to say that you're giving essentially the same kinds of protections to people accused in these cases to the kinds of people that we are.²⁰

¹⁷ FISHER, *supra* note 3, at 44. Both men were eventually released from prison. Erich Gimpel settled in Brazil and wrote an autobiography entitled *Agent 146: The True Story of a Spy in America*, published in the U.S. in 2003 (available from Thorndike Press). See Gregory Kesich, *When Spies Came to Maine*, PORTLAND PRESS HERALD (Maine), Apr. 13, 2003, at A1; Richard Sassaman, *Nazi Spies Come Ashore*, AMERICA IN WWII, Oct. 2005, available at <http://www.americainwwii.com/stories/nazispiescomeashore.html> (link). William Colepaugh, an American citizen who attended MIT, served in the U.S. Navy, and later defected while serving as a merchant seaman, became a successful businessman in King of Prussia, Pennsylvania, where he was an active member of the Rotary Club. See Willing, *supra* note 16.

¹⁸ Lloyd Cutler, *Lessons on Tribunal—From 1942*, WALL ST. J., Dec. 31, 2001, at A9, available at <http://www.opinionjournal.com/forms/printThis.html?id=95001664> (link). Mr. Cutler died in May 2005 at the age of 87. Adam Bernstein, *Lloyd Cutler, 1917-2005: Consummate Lawyer Played an Array of Roles*, WASH. POST, May 9, 2005, at A1.

¹⁹ Brig. Gen. Thomas Hartmann, Legal Advisor to the Convening Auth. for the Office of Military Comm'ns, Dept. of Def. News Briefing with Brig. Gen. Hartmann from the Pentagon (Feb. 11, 2008) available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=414> (link).

²⁰ Dan Ephron, "Fair, Open, Just, Honest": A Chat with the Adviser to the Gitmo Military Commissions, NEWSWEEK.COM, Jun. 2, 2008, <http://www.newsweek.com/id/139664/output> (link). Hartmann

But saying it is essentially the same as the widely respected court-martial system does not make it so.²¹ On July 11, 2008, for example, 375 European officials filed a friend-of-the-court brief with the U.S. District Court for the District of Columbia in the Hamdan case arguing the procedures for the military commissions “are clearly at odds with the most basic norms of fair trial and due process.”²² These deficiencies set military commissions apart from the American military justice system.

If a military commission is, as Brigadier General Hartmann claims, essentially an ordinary court-martial, why is an extraordinary process even necessary? The Roosevelt administration learned from its experience with the saboteurs in 1942 and chose not to follow the same course again in 1945. It has been nearly seven years since the President authorized military commissions and the results, or lack thereof, speak for themselves. Lloyd Cutler’s prediction in December 2001 that military commissions would be as much a trial of the American legal system as a trial of al Qaeda proved accurate. I doubt he would like the verdict.

II. MILITARY COMMISSIONS AND COURTS-MARTIAL ARE NOT TWO SIDES OF THE SAME COIN

Professor McNeal accurately describes the tension created by portions of the Military Commissions Act (MCA)²³ that allow the Secretary of Defense, or any officer or official of the United States that he designates, to send a case to a military commission,²⁴ and prohibit any person from attempting to coerce or by any unauthorized means influence a prosecutor’s exercise of professional judgment.²⁵ These provisions are similar to ones in the Uniform Code of Military Justice (UCMJ) that allow the President, the Secretary of Defense, the Secretary of the service to which the accused belongs, and a number of different commanding officers to send a case to a general court-martial.²⁶ The UCMJ also contains a prohibition on exerting

repeated the claim in an ABC World News interview on the eve of the Hamdan trial. *ABC News: The Trial of Salim Hamdan* (ABC television broadcast Jul. 20, 2008), available at <http://abcnews.go.com/Video/playerIndex?id=5413350> (link).

²¹ One commentator made the point more colorfully: “Clearly, Hartmann attended the George Costanza school of public relations, where they abide by the principle that ‘it’s not a lie if you believe it.’ And the corollary that if you repeat something enough, it will be true.” Posting of Phillip Carter to Intel Dump, http://voices.washingtonpost.com/inteldump/2008/06/general_sings_the_gitmo_blues.html (Jun. 5, 2008, 13:26 EST) (link).

²² The Associated Press, *European Officials Ask to Delay Guantánamo Trial*, Jul. 14, 2008, available at <http://www.newser.com/article/d91u09ig0/european-officials-ask-judge-to-delay-guantanamotrial-for-osama-bin-ladens-former-driver.html> (link).

²³ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (codified in scattered sections of 10, 18, 28, 42 U.S.C.) (link).

²⁴ Military Commissions Act, 10 U.S.C. § 948h.

²⁵ *Id.* § 949b(a)(2)(C).

²⁶ The Uniform Code of Military Justice, 10 U.S.C. § 822 (2008).

unlawful influence, although it lacks the MCA's extra protection for a prosecutor's exercise of professional judgment.²⁷

The reason for the MCA's special protection for the exercise of professional judgment is as Professor McNeal describes.²⁸ Some from outside the prosecution took great interest in our efforts, to put it charitably, after the high value detainees were transferred to the Department of Defense from the Central Intelligence Agency in September 2006. A short time later, I asked Senators Lindsey Graham and John McCain to add some extra protection to the MCA to insulate the prosecution from external interference. The importance of this protection was tested in the first contested trial. Salim Hamdan's counsel moved to dismiss the charges because of undue influence over the prosecution by Brigadier General Hartmann.²⁹ The Military Judge, Navy Captain Keith Allred, found that Hartmann tread too far into the prosecution function and violated the ban on unlawful influence, but instead of dismissing charges he disqualified Hartmann from further involvement in the case.³⁰ In his ruling, Judge Allred said:

The Commission finds that Congress had the intent to protect military commission participants from unlawful influence, and specifically from political influence, and that its purpose in doing so was to protect the integrity of the proceedings and enhance their reputation in the public view. The Commission generally accepts the military law of command influence as an appropriate model for decisions under the comparable provisions of the MCA. But because Congress took special steps in the MCA to protect the prosecutors from unlawful influence, the general military model, in which the SJA [an organization's senior attorney] properly supervises and directs the prosecution, military law's general acceptance of SJA supervision of trial counsel must be moderated somewhat to prevent that supervision from becoming not merely intrusive, but coercive or unauthorized.³¹

²⁷ *Id.* § 837.

²⁸ See McNeal, *supra* note 1, at 36–37.

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

³⁰ See Ruling on Motion to Dismiss (Unlawful Influence) at 10–12, United States v. Hamdan, D-026 (Military Comm'n, May 9, 2008), available at <http://www.defenselink.mil/news/May2008/D026.pdf> (link).

³¹ *Id.* at 9–10. On August 14, 2008, a different military judge presiding over the case of Mohammed Jawad disqualified Brigadier General Hartmann for similar reasons. See Mike Melia, *Pentagon Official Removed from 2nd Gitmo Trial*, ASSOCIATED PRESS, Aug. 14, 2008; Carol Rosenberg, *Judge Bans General from Guantánamo Trial Role*, MIAMIHERALD.COM, Aug. 14, 2008, <http://www.miamiherald.com/news/americas/guantanamo/story/642000.html> (link). On September 4, 2008, a third judge disqualified him from involvement in another case. Despite being disqualified three times for having compromised his objectivity by becoming too involved with the prosecution, as of September, Brigadier General Hartmann was still Legal Advisor to the Convening Authority and actively engaged in moving military commission cases to trial. Carol Rosenberg, *Replace Guantánamo Lawyer, ex-Bush Official Urges*, CHI. TRIB., Sep. 8, 2008, at C8, available at <http://www.chicagotribune.com/news/nationworld/chi-guantanamosep07.0,1735370.story> (link). A De-

I did not anticipate a problem from within the Office of Military Commissions when I asked for added protection from undue influence. At that time, in September 2006, the Convening Authority was Major General (retired) John Altenburg³² and his Legal Advisor was Brigadier General Thomas Hemingway.³³ These two career military officers had over sixty years of active duty military service between them, including service at the most senior levels of the Army and Air Force JAG Corps. They maintained their detachment from both the prosecution and defense and went to great lengths to avoid even the appearance of partiality. For example, when I arrived in late 2005, the prosecution occupied a suite of offices adjacent to the Convening Authority in a building near the Pentagon. A common doorway, normally propped open, connected our offices, allowing prosecutors and members of the Convening Authority's staff to mingle freely. To avoid any perception that we were too close, Altenburg and Hemingway had a door with a Pentagon monitored alarm installed, physically separating the prosecutors and the Convening Authority's staff.

Altenburg and Hemingway were replaced by Susan Crawford and Hartmann, respectively.³⁴ Susan Crawford never served a day in a military uniform, yet as the Convening Authority she sits atop the military commission hierarchy.³⁵ Brigadier General Hartmann served as an active duty judge advocate for less than eight years before leaving in 1991 to enter the Air Force Reserve and pursue a private sector career.³⁶ Until July 2007 when he became the Legal Advisor to Crawford, Hartmann was the general counsel of MXenergy, a Stamford, Connecticut company with some Defense Department contracts.³⁷

fense Department spokesperson said Hartmann "remains focused on doing his job as the Legal Adviser to the Convening Authority and he will continue to do it." *Id.*

³² See Biography of John D. Altenburg, Jr., Greenberg Traurig, <http://www.gtlaw.com/People/JohnDALtenburgJr> (link).

³³ See Biography of Brigadier General Hemingway, United States Air Force, <http://www.af.mil/bios/bio.asp?bioID=7760> (link).

³⁴ See Press Release, Dept. of Def., *Seasoned Judge Tapped Head Detainee Trials* (Feb. 7, 2007), available at <http://www.defenselink.mil/Releases/Release.aspx?ReleaseID=10493> (discussing Susan Crawford's appointment as Convening Authority) (link); Brigadier General Hartman, United States Air Force, <http://www.defenselink.mil/news/d20070207crawford.pdf> (link).

³⁵ Ms. Crawford's biography is available at <http://www.defenselink.mil/news/d20070207crawford.pdf> (link). She was General Counsel of the Department of the Army from 1983 to 1989 in the Reagan-Bush administration. In November 1989, President George H.W. Bush nominated her to be DoD Inspector General under Secretary of Defense (now Vice President) Richard Cheney. John T. Woolley & Gerhard Peters, The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=17781> (link).

³⁶ See United States Air Force Biography of Brigadier General Thomas W. Hartmann, <http://www.af.mil/bios/bio.asp?bioID=10078> (link).

³⁷ Hartmann became MXenergy's general counsel in January 2005. See MXenergy Services, Inc., Registration Statement for Securities to Be Issued in Business Combination Transactions (Form S-4/A), at 90 (Jan. 17, 2007), available at <http://sec.edgar-online.com/2007/01/17/0001047469-07-000232/Section22.asp> (link). The "Active Parties List" in New York State Department of Public Ser-

Military justice is unique, with some features that are analogous and others totally foreign to the civilian justice system. It is designed to help military commanders maintain mission readiness and unit discipline. As some experienced military justice commentators said:

By its very nature, the military criminal legal system operates in an awkward fashion. Commanders are given extensive responsibilities and powers in order to make it work. Yet, commanders who stray from the system's clear constraints run the risk of affecting the fairness of individual trials and subverting the legitimacy of the entire system.³⁸

It is the military justice system's focus on readiness rather than civilian system's focus on retribution that justifies military justice operating in such "an awkward fashion."

From 2001 through 2007, the Army, Navy, Air Force, and Marine Corps convened more than 50,000 courts-martial.³⁹ Despite the fact that the UCMJ, like the MCA, allows designated civilian officials to be convening authorities, to the best of my knowledge not one court-martial was convened by a civilian, which raises the question: if military commissions are based on courts-martial, why are they alone convened by a civilian political appointee rather than a military commanding officer?

If these truly are military commissions intended to dispense military justice then this is a military mission that ought to be performed by the military. President Roosevelt chose to appoint a military commanding officer as the convening authority when he had a second chance, and he allowed the case to proceed through the normal military appellate review process afterwards. His handling of the saboteurs in 1945 is a better model for a military commission than the more famous 1942 case. Courts-martial convening authorities—career military officers—understand that unlawful

vice case number 07-E-1507, Long-Range Electric Resource Plan and Infrastructure Planning Process, lists Thomas W. Hartmann as the party of record for MXenergy as of July 7, 2008. See Active Parties List as of July 7, 2008 at 6, Proceeding on Motion of the Commission to Establish a Long-Range Electric Resource Plan and Infrastructure Planning Process, 2008 WL 2809944 (N.Y.P.S.C. 2008), available at [http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/0/AFA48CBE6994DE7D852573CC00595F94/\\$File/APLJuly708.pdf?OpenElement](http://www3.dps.state.ny.us/pscweb/WebFileRoom.nsf/0/AFA48CBE6994DE7D852573CC00595F94/$File/APLJuly708.pdf?OpenElement) (link). MXenergy secured its first Department of Defense contract in May 2007. See Contracts to MXenergy, Inc. (FY 2000–2008), USASpending.gov, http://www.usaspending.gov/fpds/fpds.php?company_name=MXenergy&sortby=r&detail=0&datatype=T&reptype=r&database=fpds&fiscal_year=&submit=GO (link). The Department of Defense awarded MXenergy another contract valued at \$28 million in June 2008. Press Release, Dept. of Def., *Contracts* (June 26, 2008), available at <http://www.defenselink.mil/contracts/contract.aspx?contractid=3806> (link).

³⁸ Frederic I. Lederer and Barbara Hundley Zelif, *Needed, an Independent Military Judiciary: A Proposal to Amend the Uniform Code of Military Justice*, in *EVOLVING MILITARY JUSTICE* 27, 38 (Fidell & Sullivan ed., Naval Institute Press, 2002).

³⁹ The total comes from data reported annually by each service and published in the Annual Reports of the Court of Appeals for the Armed Forces. The appendices of those reports detail the total numbers of courts-martial tried by each branch of the military. Each of those reports is available at <http://www.armfor.uscourts.gov/Annual.htm> (link).

influence is, as Chief Judge Robinson O. Everett said years ago, “the mortal enemy of military justice.”⁴⁰ Generals Altenburg and Hemingway understood that and ensured that prosecution and convening authority functions remained separate to avoid too close a relationship casting doubt on the legitimacy of the process. Replacing their sixty-plus years of active duty military legal experience with a career political appointee having no prior military service and a Reserve attorney from a company doing business with the Defense Department, in my view, indicates military commissions are not as military as the wording of the title suggests.⁴¹

CONCLUSION

My comments are limited to two aspects of military commissions, but there are other aspects to consider.⁴² Additionally, important questions about the appropriate standard of review for detainees held as unlawful combatants who will not face war crimes charges, and proper techniques for obtaining intelligence and evidence exceed the scope of this Essay. With an election on the horizon and a new administration soon to take responsibility for Guantánamo Bay and the war on terrorism, debate on these questions will lead to a new course of action and perhaps begin to restore our reputation. I remain hopeful.

⁴⁰ *United States v. Thomas*, 22 M.J. 383, 393 (C.M.A. 1986).

⁴¹ For example, the prosecution’s closing argument in the Hamdan case, the first fully litigated military commission trial in over sixty years, was delivered by a civilian attorney from the Justice Department rather than a military Defense Department prosecutor. See Jerry Markon, *Hamdan Case Heads to Jury*, WASH. POST, Aug. 4, 2008, available at <http://www.washingtonpost.com/wp-dyn/content/article/2008/08/04/AR2008080401269.html> (link); Jerry Markon, *Detainee’s Trial in Military System Begins Today*, WASH. POST, Jul. 21, 2008, at A3, available at http://www.washingtonpost.com/wp-dyn/content/article/2008/07/20/AR2008072001604_pf.html (link).

⁴² For instance, Judge Allred determined the Fifth Amendment right against self-incrimination did not apply in the Hamdan trial despite the Supreme Court’s decision in *Boumediene v. Bush*, No. 06-1195 (U.S. June 12, 2008), available at <http://www.supremecourtus.gov/opinions/07pdf/06-1195.pdf> (extending the constitutional right of habeas corpus to detainees at Guantánamo Bay) (link).