

## NO THIRD CLASS PROCESSES FOR FOREIGNERS

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Professor McNeal's analysis begins by looking at two conflicting statutory provisions regarding military commissions: one provision allowing a political appointee as Convening Authority, and another providing trial counsel with enhanced protection from undue influence.<sup>1</sup> He sees this interaction as permitting politicization of the trial procedures. Professor McNeal urges the exclusion of political influence from the Convening Authority, by either placing a military officer with existing courts-martial responsibilities in this role or, alternatively, creating a joint Convening Authority. He also urges Congress to bolster the independence of the trial counsel so that they are not subject to the evaluation of higher-ups who have an interest in the outcome of trials. He urges transparent rulemaking, according to procedures that are at least as protective as those required for promulgating rules in courts-martial.

In the second part of his essay, Professor McNeal describes a series of obstacles impeding a transition to a National Security Court. He highlights the nonprosecution paradox as well as intelligence problems, and posits three transitional obstacles to a National Security Court: (1) challenges posed by accommodating speedy trial rights in light of security clearances and secured facilities, (2) authorities governing the methods by which intelligence is gathered and used, and (3) the phenomenon of executive forum-discretion.<sup>2</sup> Professor McNeal is admirable in avoiding "a clean slate view" by steering away from the tendency to be prospective, and instead focusing our attention on what kind of process should be in place for the eighty tria-

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\* Associate Professor of Law, University of Toledo College of Law. I dedicate this reply to Mr. Charles Sadler, former United States Foreign Service Officer whose optimistic spirit and brilliance are a light to me. He formed part of my team in 2006 at the Executive Council of the American Society of International Law when we successfully adopted the Centennial Resolution on Laws of War and Detainee Treatment, and he taught me about the language of diplomacy. Always supportive since childhood, always a friend. I greatly appreciate the research assistance of Elijah Santiago, Robert Jacoby, and Diane S. Bitter-Gay and the helpful comments of Professors Lee Strang and Rebecca Zietlow. I am deeply indebted to Professor Pedro Malavet for his wise guidance on the *Insular Cases*—a fascinating part of U.S. constitutional and international law history. All errors are my own.

<sup>1</sup> The next three paragraphs summarize Professor McNeal's article, *Beyond Guantanamo, Military Commissions and National Security Courts: Options and Obstacles*, 103 NW. U. L. REV. COLLOQUY 29 (2008), available at <http://www.law.northwestern.edu/lawreview/colloquy/2008/28/LRColl2008n28McNeal.pdf> (link).

<sup>2</sup> See *id.* at 43–44.

ble detainees currently in custody.<sup>3</sup> He urges that reformers must recognize the corrections identified, which he considers to be necessary for the continued use of military commissions. Today, post-*Hamdan*<sup>4</sup> and post-*Boumediene*,<sup>5</sup> Professor McNeal suggests how to improve the military commissions. Part I of this Essay asserts that the flaws in the structure of the military commissions are intentional and explains why such a flawed structure was established. Part II discusses the military commissions' third class processes. Part III explores the troubling example of the Hamdan military commission, and Part IV asserts that attempts to reform the military commissions will be fruitless. Part V suggests using a different perspective for establishing procedures for trying terror suspects.

### I. POST 9/11 PANIC AND IMPROVIZATION

Professor McNeal's paper brought me back to 2005 when the operative Military Commissions were those established pursuant to a Presidential Military Order from 2001.<sup>6</sup> I had the opportunity to meet Major General John D. Altenburg (Ret.) (who was then the Appointing Authority under the scheme that was struck down in *Hamdan*) at a conference held at Duke. I felt that I was dealing with a person who reflected the finest traditions of our military, of patriotism in time of war, and of the legal profession. His willingness to take on that difficult task remains admirable. I have felt those same feelings of admiration for Professor McNeal and his work as an academic consultant to Colonel Morris Davis—the former Chief Prosecutor, Department of Defense Office of Military Commissions—and for Colonel Davis himself. Each of these persons has appeared to me to be “a good man in a bad spot,” the words I used to describe General Altenburg when I spoke to him in 2005.

It is because of this deep respect for Professor McNeal and others like him that I feel compelled to suggest a different path in this reply. I believe that Professor McNeal's analysis aptly highlights some structural problems and concerns with a movement toward a national security court. However, I suggest that the military commissions are intentionally structured in this manner in order to render separate and unequal third class justice (as compared with Article III courts (first class justice) or courts-martial (second class justice)) and forestall or prevent criminal liability for key Executive and Legislative perpetrators of a “policy of cruelty.”<sup>7</sup> Thus, the problems

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<sup>3</sup> See *id.* at 43.

<sup>4</sup> *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006).

<sup>5</sup> *Boumediene v. Bush*, No. 06-1195 (U.S. June 12, 2008) (link).

<sup>6</sup> See Presidential Military Order on Detention, Treatment and Trial of Certain Non-citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (link).

<sup>7</sup> See Hearing on the Treatment of Detainees in U.S. Custody Before the S. Comm. on Armed Services, 110th Cong. (2008) (statement of Alberto J. Mora, Former General Counsel of the Navy), available at <http://armed-services.senate.gov/statemnt/2008/June/Mora%2006-17-08.pdf> (“This interrogation

that Professor McNeal identifies are actually features specifically adopted to ensure that third class justice can be rendered to the eighty triable detainees so that they can be sentenced to long terms in prison or death. Rather than think of the eighty triable detainees as obstacles to the arrival at a national security court, it might be better to see them as the guinea pigs for a military commission system designed as a transparent attempt to rid them of existence.

One must understand that these commissions are departures from those used historically, where the local courts were not open to hear cases or justice needed to be rendered in a war zone or occupied zone.<sup>8</sup> The imperfections of military commissions in those settings were balanced by the lack of viable alternative processes. The present military commissions are different post hoc creatures. Since 9/11, through its efforts to isolate from any law the persons concerned, the Executive has attempted to place detainees in a legal no man's land. When courts have asserted a legal framework, the Executive and the Legislature have attempted to circumvent the spirit, if not the letter, of relevant Supreme Court decisions. With *Boumediene*, the Supreme Court pried open the cover and forced in the requirement of habeas corpus review, but the "hydraulic pressure"<sup>9</sup> to keep these persons in this separate and unequal process is significant and bipartisan. Even with *Boumediene*, the Executive and Legislature exert pressure to ensure that habeas corpus does not disturb the progress and the results of the third class process for these eighty triable detainees.

## II. SEPARATE AND UNEQUAL THIRD CLASS PROCESSES

The Executive, and later the Legislature, attempted to establish a hermetically sealed system in which detainees are unable to avail themselves of any other law or process as they are moved along to conviction and indefinite confinement or execution. The drafters of the Military Commission Act of 2006 (MCA) appear to be separating these types of military commissions from international law, domestic courts-martial, domestic courts, from other types of traditional military commissions, and, essentially, any other law. Ultimately, these alien unlawful enemy combatants are human beings, who are being stripped of the protection of all the laws but one—the MCA. It becomes readily apparent that this group of people, consistent with a policy of cruelty, is considered worthy of only "special" processes—separate and unequal third class procedures.

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policy—which may aptly be labeled a 'policy of cruelty'—violated our founding values, our constitutional system and the fabric of our laws, our over-arching foreign policy interests, and our national security.") (link).

<sup>8</sup> See *Hamdan*, 126 S. Ct. at 2772–73 ("The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity.").

<sup>9</sup> *INS v. Chadha*, 462 U.S. 919, 951 (1983). ("The hydraulic pressure inherent within each of the separate Branches to exceed the outer limits of its power, even to accomplish desirable objectives, must be resisted.") (link).

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Nothing indicates a waning of the bipartisan support in the current executive and legislative branches for continuing to shuffle these people into such a conviction container. On the contrary, the continuing revelations of the extensive efforts to further the central characteristic of the post-9/11 policy towards detainees—a policy of cruelty<sup>10</sup>—make the conviction container increasingly necessary for members of the executive and legislative branches involved in designing, planning, and implementing this policy. I recognize that the *Boumediene* majority has to some extent loosened the seal by permitting more judicial scrutiny of these detainee cases through habeas corpus proceedings. However, because of their need to hide their actions allowing and even ordering torture, I am not sanguine about the willingness of the Executive and the Legislature to adopt meaningful improvements either to the Military Commissions or to the judicial forms of any proposed National Security Courts.

We must understand the nature of what is at stake in these Military Commissions, for they are not merely an exercise in United States National Security Law. The Commissions represent an authorization of torture from the President, down through the National Security Principals, through the War Council, and through the back and forth of the lawyers in the Department of Justice, the White House, the Department of Defense, the Department of State, and the intelligence agencies. Entrenched both domestically and in our relations with other states, such authorization permeates the whole issue of the Military Commissions and any future National Security Courts. To speak of “intelligence” and “criminal liability,” but then refrain from speaking openly about that elephant in the room for both the Executive and the Legislature, is to engage in a level of denial that is especially inappropriate for matters as serious as defending the United States against its enemies.

I will go further and state that everything I have read leads me to the conclusion that the persons in these branches departed from long established United States practice and policy by succumbing to post-9/11 panic. They improvised a detainee policy that steered away from the Geneva Conventions and our other international obligations by avoiding traditional courts or courts-martial and purposely put people in legal black holes outside the United States. As the law of the lone superpower, the MCA does no less than push out to the world a state practice to bring us back to pre-Geneva Convention standards. In the end, it is simply a means to carve out a new space for a certain group of people who are considered worthy of only a third class process. If permitted to go forward, one can expect a fostering of these processes, conceivably leaching from the United States national security law to the international law arena. The problem with this third

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<sup>10</sup> See, e.g., JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008); PHILIPPE SANDS, *THE TORTURE TEAM: RUMSFELD'S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008); JORDAN PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION'S UNLAWFUL RESPONSES IN THE "WAR" ON TERROR* (2007).

class process is that unlike courts or courts-martial, these commissions demonstrate judicial forms (or “legalness” in the sense of “truthiness” coined on the *Colbert Report*<sup>11</sup>), not judicial norms of a kind required by these kinds of significant processes.

Judicial forms are the kinds of features and acts that we expect to be part of judicial processes: for example, a hearing room, adversaries, a judge, a fact finder, motions being made, motions being responded to, decisions on motions being made, evidence introduced and the rest of the aspects of a process to render a judicial decision. Judicial norms are more focused on the substance of what has gone on in that process to see if a meaningful judicial process has occurred. For example, a show trial can have all of the judicial forms of being in a courtroom—a judge, a prosecutor, a defense counsel, etc.—but so depart from judicial norms that we understand them as sham processes. The MCA processes are such sham processes.

### III. JUDICIAL FORMS “LEGALNESS” AS OPPOSED TO JUDICIAL NORMS

The Salim Ahmed Hamdan military commission recently concluded at Guantánamo. This is the second military commission, the first having been the subject of a plea agreement made by the Australian detainee David Hicks.<sup>12</sup> I opposed these military commissions as being fundamentally unfair when they were being considered by Congress back in 2006. The MCA appeared to disconnect these detainees from domestic and international law, subjecting them to a hermetically sealed process under the MCA alone. Since then, in *Boumediene*, the Supreme Court has pried open this process by finding constitutional habeas corpus to be available.<sup>13</sup> The contours of such habeas relief are now being worked out in the lower courts.<sup>14</sup> In light of the torture found to have been conducted by the United States and its allies on detainees, one of the major questions for these military commissions has been the manner in which coerced evidence and hearsay evidence will be treated. The Hamdan military commission provided the first glimpse at how the Military Commissions will handle evidentiary matters in an actual trial. While the MCA represents a great deal of understanding of the interstices of U.S. law, because of the departures in the act from what would occur in courts or courts-martial, I have been worried that the

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<sup>11</sup> See *The Colbert Report: The Word—Truthiness* (Comedy Central television broadcast Oct. 18, 2005), available at <http://www.comedycentral.com/videos/index.jhtml?videoId=24039> (link).

<sup>12</sup> See Agence France-Presse, *Terror Detainee Back in Australia*, N.Y. TIMES, May, 2007, § 1, at 8, available at <http://www.nytimes.com/2007/05/20/world/asia/20hicks.html> (link).

<sup>13</sup> But see Enemy Combatant Detention Review Act of 2008, S. 3401, 110th Cong. (2008) (introduced on July 31, 2008, the bill attempts to severely restrict the ambit of any habeas corpus review in response to *Boumediene*). For a discussion of the bill, see Deirdre Jurand, *Guantanamo Habeas Petition Procedures Bill Introduced in Senate*, JURIST, Aug. 4, 2008, <http://jurist.law.pitt.edu/paperchase/2008/08/guantanamo-habeas-petition-procedures.php> (link).

<sup>14</sup> But see Enemy Combatant Detention Review Act of 2008, *supra* note 13 (attempting to severely restrict judicial review of military commissions in response to *Boumediene*).

process would be unfair “as applied.”

The Hamdan military commission confirmed that this process is not consistent with fundamental norms of American justice. I came to this conclusion early in the proceedings, through an examination of the Memorandum Order of Judge James Robertson of July 18, 2008 and the Ruling on Motions to Suppress of Military Judge Keith Allred two days later on July 20, 2008. This Essay walks through these two orders because they appear to be foundational for the Hamdan military commission and likely will also be foundational for subsequent proceedings with “bigger fish.” My conclusion is that in contrast to courts that provide first class process, or courts-martial that provide second class justice, these separate and unequal military commissions are a third class process for foreigners in an almost hermetically sealed container. They are procedures aimed at hiding and turning a blind eye to the policy of cruelty towards detainees, not about providing meaningful due process.

*A. Judge Robertson and the Structures of American Law Used to Permit the Separate and Unequal Third Class Process for Foreigners*

The essence of the perverse nature of the Military Commissions can be seen first in the United States District Court’s examination of Hamdan’s request for a preliminary injunction to block the start of the military commission. While denying the injunction, Judge James Robertson made several important comments in his memorandum order.<sup>15</sup> Two significant examples of such markers merit attention. First, he cites the “fairly permissive standards for allowing the use of hearsay” as one of the ways that the MCA commissions depart from the standards generally applied in either typical American criminal trials or courts-martial.<sup>16</sup> Second, he also notes, in what he calls a “startling” departure, that under 10 U.S.C. § 948r(c), evidence obtained by “coercion” may be used against the defendant so long as the military judge decides that its admission is in the interest of justice and that it has “sufficient” probative value.<sup>17</sup>

Judge Robertson specifically contrasts 10 U.S.C § 948r(c) with the Supreme Court’s decision in *Chambers v. Florida*,<sup>18</sup> in which the Court reversed a conviction and excluded evidence obtained through five days of coercive interrogations. I find it striking that Judge Robertson asks us to compare the Military Commission process put in place in 2006 with the process struck down in a 1940 Supreme Court decision. In *Chambers*, Jus-

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<sup>15</sup> Hamdan v. Gates, No. 04-CV-1519-JR, 2008 WL 2780911 (D.D.C. July 18, 2008), available at [https://ecf.dcd.uscourts.gov/cgi-bin/show\\_public\\_doc?2004cv1519-108](https://ecf.dcd.uscourts.gov/cgi-bin/show_public_doc?2004cv1519-108) (memorandum order denying Hamdan’s motion for a preliminary injunction) (link). The next paragraphs summarize key provisions of that analysis.

<sup>16</sup> *Id.* at \*2.

<sup>17</sup> *Id.*

<sup>18</sup> 309 U.S. 227 (1940) (link).

tice Black delivered the opinion of the Court by starting with a phrase painful to read today:

The grave question presented by the petition for certiorari, granted in forma pauperis, is whether proceedings in which confessions were utilized, and which culminated in sentences of death upon four young negro men in the State of Florida, failed to afford the safeguard of that due process of law guaranteed by the Fourteenth Amendment.<sup>19</sup>

In harkening back to the Jim Crow era, to a case in which African-Americans in the South during segregation were abused in an interrogation, I believe that Judge Robertson is carefully reminding the United States of a time when hysteria led to profoundly unfair processes. Judge Robertson's marker should haunt us as we examine this separate and unequal third class process for foreigners—a process without the safeguards of Article III courts or courts-martial.

In the MCA's structure for review of convictions, Judge Robertson does recognize an improvement from the President's Military Order. However, he notes the tendentious question of whether the two charges against Hamdan—conspiracy in violation of 10 U.S.C. § 950v(b) (28) and for providing material support for terrorism in violation of 10 U.S.C. § 950 v(b)(25)—are actually war crimes traditionally addressed by Military Commissions or, implicitly, new constructs inserted by Congress.<sup>20</sup> The concern of course is whether these charges violate the Constitution's Ex Post Facto, Bill of Attainder, or Define and Punish Clauses,<sup>21</sup> or, more broadly, the question of the principal of legality. He also discusses other claims of Hamdan's: that the MCA violates the equal protection component of Fifth Amendment due process, and that hearsay evidence and evidence obtained through coercion violates his Geneva Convention and due process rights.

The government's purpose is to ensure that all these matters are dealt with inside the Military Commission structure, which contains the court-stripping language of 10 U.S.C. § 950j(b). Consistent with canons of avoiding of questions of constitutionality, Judge Robertson ultimately resists addressing Hamdan's constitutional challenge to the court-stripping language. His analysis distinguishes the posture of this case (a challenge to MCA jurisdiction) from that in *Boumediene* (a challenge to detention).<sup>22</sup> He finds significant the Combat Status Review Tribunal (CSRT) and jurisdic-

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<sup>19</sup> 309 U.S. at 227 (citations omitted).

<sup>20</sup> Justice Stevens raised the point when questioning the law of war nature of the conspiracy charge in the President's Military Order in 2006 in *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2779–80 (2006). From the perspective of international law, Congress stating that such a crime is part of the laws of war in the MCA is mere domestic national security law and does not of itself change the laws of war on the international plane.

<sup>21</sup> U.S. CONST. art I, § 9, cl. 3, § 8, cl. 10.

<sup>22</sup> *Hamdan*, No. 04-CV-1519-JR, 2008 WL 2780911, at \*4–6.

tional hearing Hamdan had before the commission, and further, he cites Hamdan's opportunity to avail himself of the procedural processes of notice of charges, of discovery, prospective ability to call and cross-examine witnesses, and the opportunities to challenge hearsay and to introduce exculpatory evidence.<sup>23</sup> Judge Robertson notes that Hamdan's Suspension Clause arguments are not completely covered by *Boumediene* and are complex in their potential deviation from traditional habeas corpus review.

Most importantly, Judge Robertson relies on the comity-based abstention doctrine of *Schlesinger v. Councilman*<sup>24</sup> in this military commission setting where a foreigner is being charged. Recognizing that *Councilman* concerned a court-martial proceeding against a U.S. service member and not a military commission (the military commissions having been promulgated by the Legislature) he concludes that considerations of comity militate for abstention by the courts. Judge Robertson found inapplicable the *Councilman* exception, according to which defendants may raise "substantial arguments that a military tribunal lacks personal jurisdiction over them," and denied the motion for preliminary injunction.<sup>25</sup> Hamdan is not appealing this decision, so the scene now shifts us to the Military Commission.

In sum, Judge Robertson in dicta raises significant warnings about the Military Commission process. He notes that the "eyes of the world are on Guantánamo Bay" in denying the preliminary injunction.<sup>26</sup> Since that decision it is understood that Hamdan's lawyers are not intending to appeal this decision so the military commission has moved forward and the scene now shifts us to Guantánamo.

### B. Two Days Later—Military Commission "Legality"

Two days after Judge Robertson's opinion, the Military Judge Keith Allred ruled on a motion to suppress statements based on coercive interrogation practices and a motion to suppress statements based on the Fifth Amendment.<sup>27</sup> The military judge addressed the question of whether Fifth Amendment rights are available to detainees in Guantánamo. The analysis reveals his view that *Boumediene* was a narrow opinion concerning habeas corpus and that he sees the question as being whether the Fifth Amendment

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<sup>23</sup> *Id.* at \*5–6.

<sup>24</sup> 420 U.S. 738 (1975) (abstention for comity reasons by federal courts when court-martial engaged against U.S. serviceman).

<sup>25</sup> *Hamdan*, No. 04-CV-1519-JR, 2008 WL 2780911, at \*7.

<sup>26</sup> *Id.*

<sup>27</sup> Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices and Motion to Suppress Statements Based on Fifth Amendment, *United States v. Hamdan*, D-029 and D-044 (Military Comm'n, July 20, 2008) [hereinafter *Hamdan*, Ruling on Motions to Suppress Statements], available at [http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%20and%20D-044%20Ruling%201%20\(2\).pdf](http://www.defenselink.mil/news/Ruling%20on%20Motion%20to%20Suppress%20and%20D-044%20Ruling%201%20(2).pdf) (link). The next paragraphs summarize the analysis of that ruling.



should, like habeas corpus, apply in Guantánamo. At that point, one cannot help but sense a tightening of the MCA's hermetic seals around Hamdan.

The crux of the analysis is the truncated evaluation of the *Insular Cases*<sup>28</sup> and the inapposite discussion of *United States v. Verdugo-Urquidez*.<sup>29</sup> On the *Insular Cases*, one phrase sums up the essence of the analysis: "While the Court has since decided that some of these rights are indeed fundamental, these cases illustrate that the Court has not traditionally found the Constitution applicable abroad."<sup>30</sup>

Essentially, Judge Allred considers Hamdan's rights to be akin to those of persons in the Philippines at the turn of the 19th to 20th century. He does so, effectively disregarding all of the significant developments in Fifth Amendment jurisprudence since that time. Omitted is any analysis of the history through which Fifth Amendment rights became fundamental rights. First, the ruling does recognize that the language in the *Insular Cases* stating that the Fifth Amendment applied only in federal courts has been superseded by decisions in which it was made applicable to the states through the Fourteenth Amendment.<sup>31</sup> Second, the analysis does not emphasize the fundamental nature of those rights as demonstrated by their application in an unincorporated territory, such as Puerto Rico.<sup>32</sup> By casting aside these developments in the fundamental nature of the Fifth Amendment, both in the states and in an unincorporated territory, the judge essentially ratifies the political branches' efforts to create a less noble process at Guantánamo where coerced testimony can be admitted more easily.

Rather than halting his analysis in the Philippines at the turn of the 19th to 20th century, Judge Allred might have taken either of two paths: (1) Taking an "outward-in approach," he could have discussed how the Fifth Amendment has been applied offshore, starting with the *Insular Cases* in the Philippines, moving to Hawaii—before and after statehood, then to Puerto Rico, then to the application to the states of the Fifth Amendment through the Fourteenth Amendment, and then examined Guantánamo in

<sup>28</sup> See *id.*, slip op. at 9–10 (discussing the *Insular Cases*—cases from the turn of the 19th to 20th century concerning the applicability as of right of constitutional protections such as the Fifth and Sixth Amendments to unincorporated U.S. territories such as the Philippines).

<sup>29</sup> See *id.* at 10 (discussing *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990)).

<sup>30</sup> *Id.*

<sup>31</sup> See, e.g., *Malloy v. Hogan*, 378 U.S. 1 (1964) (self-incrimination). See generally, JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 11.6 (7th ed. 2004).

<sup>32</sup> Other authorities provide a broader vision of the question of the experience with unincorporated territories. See generally EDIBERTO ROMÁN, THE OTHER AMERICAN COLONIES: AN INTERNATIONAL AND CONSTITUTIONAL LAW EXAMINATION OF THE UNITED STATES' NINETEENTH AND TWENTIETH CENTURY ISLAND CONQUESTS (2006); PEDRO A. MALAVET, AMERICA'S COLONY: THE POLITICAL AND CULTURAL CONFLICT BETWEEN THE UNITED STATES AND PUERTO RICO (2004). For a general introduction to the law of United States Territories and Affiliated Jurisdictions see STANLEY K. LAUGHLIN, JR., THE LAW OF UNITED STATES TERRITORIES AND AFFILIATED JURISDICTIONS (1995). I am indebted to Professor Pedro A. Malavet for drawing my attention to the rich work on the *Insular Cases* and their consequences.

that context. (2) Alternatively, taking an “inward-out approach,” Judge Alford could have started from the Fifth Amendment in the Federal courts, moved to the application to the states of the Fifth Amendment through the Fourteenth Amendment, then to application of the Fifth Amendment in an unincorporated territory such as Puerto Rico, and finally arrived at Guantánamo. What seems inexcusable is not examining at greater length the changed nature of the Fifth Amendment right since the early 20th century in the *Insular Cases*.<sup>33</sup>

As to *Verdugo-Urquidez*, the discussion is also problematic as the Fourth Amendment analysis with regard to Mexico is inapposite in a situation of armed conflict, and the Fifth Amendment analysis, largely based on *Johnson v. Eisenstrager*,<sup>34</sup> focuses on extraterritorial application in China and Germany after convictions of war crimes.<sup>35</sup> Unlike the situation of a sovereign state like Mexico in *Verdugo-Urquidez* and the occupied zones of China and Germany in *Eisenstrager*, as recognized in *Boumediene*, the complete treaty and de facto control of the United States in a peaceful Guantánamo is on a different footing.

Moreover, this was a hearing for the war crimes trial and not in the habeas corpus proceeding after a conviction. Thus, the Fifth Amendment stakes could not be higher. At a minimum, one would expect that the Military Judge would tread more carefully on the fundamental nature of the Fifth Amendment right in this context rather than treat such rights in such a dismissive manner. While Guantánamo is not America, it is abundantly clear that Guantánamo is enough of a de facto America for purposes of United States effective control for the Supreme Court that fundamental Constitutional rights should not be denied without more substantial bases.<sup>36</sup>

It is regretful that the military judge does not analogize for the Fifth Amendment from the majority’s analysis of the factors for the extension of the writ to Guantánamo in *Boumediene*.<sup>37</sup> While he cites to *Boumediene*, it is only done to focus on words like “practicalities” rather than on the Court’s concerns with fundamental rights being provided to noncitizens in unincorporated territories.<sup>38</sup> For example, contrary to the analysis of *Ross*<sup>39</sup>

<sup>33</sup> See *Boumediene v. Bush*, No. 06-1195, slip op. at 25–34 (U.S. June 12, 2008) (discussing the development of the extraterritorial application of constitutional provisions, including the Fifth Amendment, since the *Insular Cases*).

<sup>34</sup> 339 U.S. 763 (1950).

<sup>35</sup> See *Hamdan*, Ruling on Motions to Suppress Statements, D-029 and D-044, slip op. at 9–10.

<sup>36</sup> See *Rasul v. Bush*, 542 U.S. 466, 484 (2004) (holding that federal courts have statutory jurisdiction to hear habeas petitions filed by detainees at Guantánamo); *Boumediene*, No. 06-1195, slip op. at 25–34 (“[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism.”).

<sup>37</sup> See *Boumediene*, No. 06-1195, slip op. at 25–34 (“[Q]uestions of extraterritoriality turn on objective factors and practical concerns, not formalism.”).

<sup>38</sup> See *Hamdan*, Ruling on Motions to Suppress Statements, D-029 and D-044, slip op. at 11–14.

<sup>39</sup> *In re Ross*, 140 U.S. 453, 463–65 (1891) (holding that trials of citizens or noncitizens before a consular tribunal in accordance with a treaty covering offenses committed in a foreign country are con-

in *Boumediene*, military tribunals are not necessary on Guantánamo and Americans are not subject to the tribunals.<sup>40</sup> This difference might raise concerns about the fairness of the process. In addition, with regard to the *Insular Cases*, that the Philippines were soon destined for independence while there is no similar path foreseen for Guantánamo also militates for a stronger version of Constitutional protections. Finally, that there are significant allegations of ill treatment that come from credible sources<sup>41</sup> should have tempered greatly the Military Judge's willingness to not interpret the Fifth Amendment to apply in this setting. Things like the introduction of "clean teams"—interrogators who had no knowledge or participation in torture coming after other interrogators had tortured—should have been examined more openly to get at the substance of the balancing of national security concerns with fundamental rights. Maybe he was hesitant as a military judge to exercise the full breadth of power that the Supreme Court's *Boumediene* decision permitted. It is precisely that lack of judicial toughness with regard to the Fifth Amendment and coercion in the military judge's exercise of discretion that seals the fate of Hamdan. And in that manner, the military judge acquiesces to coercion—as have, in my opinion, too many Americans.

The military judge then turns to a practicalities analysis and essentially

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stitutional).

<sup>40</sup> The discussion of *Ross* in *Boumediene* highlights the practical considerations that justified the use of consular tribunals in *Ross*:

The petitioner in *Ross* was a sailor serving on an American merchant vessel in Japanese waters who was tried before an American consular tribunal for the murder of a fellow crewman. 140 U.S. at 459, 479. The *Ross* court held that the petitioner, who was a British subject, had no rights under the Fifth and Sixth Amendments. *Id.* at 464. The petitioner's citizenship played no role in the disposition of the case, however. The Court assumed (consistent with the maritime custom of the time) that *Ross* had all the rights of a similarly situated American citizen. *Id.* at 479 (noting that *Ross* was "under the protection and subject to the laws of the United States equally with the seaman who was native born").

*Boumediene*, No. 06-1195, slip op. at 30–31.

Unlike the consular tribunals in *Ross*, the military commissions apply only to noncitizens and do not apply US law equally to Americans and non-Americans, are not the result of long established custom, and are hard to justify as the best possible means to achieve justice for these cases in a situation where the American or foreigner is not in the United States but is in a territory over which the United States has effective control and de facto sovereignty. Moreover, the practical reasons in custom for consular tribunals in 1891 related to time and travel simply do not exist for the Guantanamo detainees. U.S. courts are just a couple of hours away and U.S. courts-martial could be held at Guantanamo without any significant practical difficulty.

<sup>41</sup> See GLENN FINE, INSPECTOR GENERAL OF THE DEPARTMENT OF JUSTICE, A REVIEW OF THE FBI'S INVOLVEMENT IN AND OBSERVATIONS OF DETAINEE INTERROGATIONS IN GUANTANAMO BAY, AFGHANISTAN, AND IRAQ 15 (2008), available at <http://www.usdoj.gov/oig/special/s0805/final.pdf> (discussing reports by FBI agents of "aggressive interrogation techniques" being used at Guantánamo) (link); Jennifer Schuessler, *A History of Abuse in the War on Terror*, N.Y. TIMES, July 22, 2008, at E1, available at <http://www.nytimes.com/2008/07/22/books/22schuessler.html> (reviewing JANE MAYER, THE DARK SIDE (2008)) ("A secret Red Cross report given to the C.I.A. last year and described to Ms. Mayer said some of these techniques were categorically torture. (An internal C.I.A. review, she writes, was on its way to reaching the same conclusion in 2004 before Mr. Cheney derailed it.)") (link).

defers to the Congressional approach, which expressly and consciously denies unlawful enemy combatants the right to be warned that their statements may be used against them and the right to have an unwarned statement suppressed.<sup>42</sup> The military judge supports this Congressional position by referencing procedures from two civil law-based international criminal tribunals and the Common Article 3 of the Geneva Conventions and concludes that the MCA provides enough process.<sup>43</sup> This would seem to be the wrong answer.

First, when adhering to the language of Article 5 of the Geneva Convention on the Treatment of Prisoners of War (GC III), the questions are (1) whether Hamdan should have been entitled to Prisoner of War (POW) Status and (2) whether the tighter interrogation rules associated with that status should have applied, as opposed to those based on Common Article 3 grounds. We should remember that Hamdan was captured on the battlefield of Afghanistan and, in case of doubt, he should have been provided GCIII POW protections.<sup>44</sup> The ruling makes brief reference to Hamdan's having had process in the CSRT (Combatant Status Review Tribunal), and that this is otherwise adequate for GC III Article 5 hearing purposes.<sup>45</sup> However, the fact that prior to that hearing the higher POW protections should have protected Hamdan's statements belies that interpretation.

Second, in the event we remain in Common Article 3, Judge Allred's analysis still falls short in its evaluation of whether the MCA is a regularly constituted court affording all the judicial guarantees recognized as indispensable by civilized peoples. Judge Allred defers to the Congressional pronouncement in the MCA, thereby accepting its conformity with the Common Article 3 standard. He does not examine any other parts of the Geneva Conventions, presumably because the MCA actually prohibits assertions of the Geneva Conventions.<sup>46</sup> Yet, it would seem advisable that the peculiar qualities of the MCA process would merit some evaluation of its compliance with Common Article 3. In a context where a policy of cruelty has been in place, one might expect greater attention. Possibly, like District

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<sup>42</sup> *Hamdan*, Ruling on Motions to Suppress Statements, Summary and Decision, D-029 and D-044, slip op. at 12, 13, 15–16.

<sup>43</sup> *Id.* at 12–13.

<sup>44</sup> See Geneva Convention Relative to the Treatment of Prisoners of War art. 5, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, available at <http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68> (stating that all prisoners of war should be afforded protections under the Geneva Conventions and that whenever there is doubt about a detainees proper status, he should “enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”) (link).

<sup>45</sup> See *Hamdan*, Ruling on Motions to Suppress Statements, D-029 and D-044, slip op. at 11 (Military Comm'n, July 20, 2008).

<sup>46</sup> Military Commissions Act of 2006, 10 U.S.C. § 948b(g) (2006) (“No alien unlawful enemy combatant subject to trial by military commission under this chapter may invoke the Geneva Conventions as a source of rights.”).

Judge Robertson, Judge Allred felt his hands tied by precedent.<sup>47</sup>

On the other hand, given how the Fifth Amendment has become part and parcel of every regularly constituted court in the United States, its absence in these proceedings seems curious. To the extent that Common Article 3 calls for normal domestic law processes, the absence on practical grounds of Fifth Amendment rights is shocking. However, Judge Allred does not discuss the difference between this type of proceeding and the court or court-martial proceedings in which the Fifth Amendment right is sacrosanct. In his willingness to defer to Congress—which calculated in collaboration with the Executive to further this policy of cruelty<sup>48</sup>—the military judge reminds me of the judge in the state court deferring to a local policy of cruelty with the African-American defendant in *Chambers v. Florida*. In this case, it is a foreigner relegated to a third class process. The tribunal should reflect the fundamental qualities of American law, and in

<sup>47</sup> See *Hamdan v. Gates*, No. 04-CV-1519-JR, 2008 WL 2780911, at \*7 (D.D.C. July 18, 2008) (“Where both Congress and the President have expressly decided when Article III review is to occur, the courts should be wary of disturbing their judgment.”).

<sup>48</sup> It is to be remembered that the Military Commission Act of 2006 was developed in response to the 2006 *Hamdan* decision which, among other things, stated that at a minimum Common Article 3 of the Geneva Conventions applied to the Al Qaeda persons held by the United States. *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2793–98 (2006). As the four top Judge Advocate Generals of the uniformed services testified in the summer of 2006, violations of Common Article 3 had occurred in detainee treatment:

Senator Graham: Would you agree that some of the techniques we have authorized clearly violate Common Article 3?

General Rives: Some of the techniques that have been authorized and used in the past have violated Common Article 3.

Senator Graham: Does every one agree with that statement? Affirmative response of all concerned.” SEN. GRAHAM: Would you agree that some of the techniques we have authorized clearly violate Common Article 3?

General Rives: Some of the techniques that have been authorized and used in the past have violated Common Article 3.

Senator Graham: Does every one agree with that statement? Affirmative response of all concerned.

*Military Commissions in Light of the Supreme Court Decision in Hamdan v. Rumsfeld: Hearing Before the S. Comm. on Armed Services*, 109th Cong. 67 (2006) (testimony of all of the Military Judge Advocate Generals). Furthermore, congressional leaders had been informed of the techniques. See Benjamin G. Davis, *Congress, Torture and Romain Gary’s “Chien Blanc”*, JURIST, Dec. 10, 2007, <http://jurist.law.pitt.edu/forumy/2007/12/congress-torture-and-romain-garys-chien.php> (referring to press reports that week and to earlier dissimulation by a member of Congress to me) (link). A timeline shows the intimate relationship between the admission of coerced interrogation and the introduction of the Military Commission Act to Congress on the same day. For an intricate discussion of some of the interstices of the collaboration see Gregory S. McNeal, *An Abbreviated Legislative History and Timeline Regarding the Development of Section 949(b) of the Military Commissions Act of 2006* (Aug. 8, 2008) (unpublished manuscript), available at <http://works.bepress.com/gregorymneal/17> (link). The watered down provisions concerning the Geneva Conventions, the War Crimes Act, and the retroactive application of the MCA are evidence of the collaboration by the Executive and Congress to change the rules to hopefully avoid any difficulties as a result of the policy of cruelty. The Enemy Combatant Detention Review Act recently proposed in light of *Boumediene* is a further example of this collaborative effort by the Executive and some members of Congress.

failing to do that, it fails to meet fundamental American judicial norms. The Court should have been less deferential because this policy of cruelty departed from the foundational norms of our country. With the policy of cruelty, as the Supreme Court did by not deferring in *Boumediene*, it would be more consistent with the full powers of the Judiciary (let alone the full power of the jurisdiction of a state to adjudicate as a matter of international law) to include more *grandeur d'esprit* in the analysis and less deference to the complicit Congress. Otherwise, the Judge appears to be limiting the unfavorable consequences for the prosecution of the official policy of cruelty. As Judge Robertson wrote in his memorandum opinion, "[t]he eyes of the world are on Guantánamo Bay."<sup>49</sup> Letting Congressional acquiescence to torture denature an American judicial procedure should be anathema to the military judge.

The military judge selects two international criminal tribunals (Yugoslavia and Rwanda) that derive their processes to a great extent from the civil law tradition.<sup>50</sup> With all due respect to Judge Allred, his approach appears to cherry-pick sections from a couple of processes that operate on the international plane and support his inclination to deny to Hamdan a fundamental norm of American law. Yet he is aware that the civil law systems share with American law the fundamental concern with the procurement of testimony through coercion. The result is to provide a process to foreigners in the MCA different than that afforded persons in the courts or courts-martial processes, and, in particular, with regard to an aspect that touches on fundamental American rights and fundamental international norms against torture. Read as an exclusive process for foreigners, the MCA raises concerns by not providing national treatment—treatment of foreigners and Americans alike before the law—to these foreigners, and by potentially falling short of meeting the international minimum standard of justice by treating these foreigners in a manner that subverts the *jus cogens* peremptory norm against torture. The possibility of coerced testimony being admissible makes these concerns especially grave.

I am also concerned that this exclusive process for foreigners is a *tribunal d'exception* in which Americans cannot be tried. This different treatment of Americans and foreigners is not inevitable; the United States courts and courts-martial could in fact address these cases.

We have seen the resilience of courts most recently in a major terrorism trial here in Toledo, Ohio.<sup>51</sup> While there are issues on appeal, it did appear that the court process was capable of balancing the key interests while providing and appearing to provide justice. The major attraction of placing the federal judiciary in the central role for these cases is that there is little

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<sup>49</sup> *Hamdan*, No. 04-CV-1519-JR, 2008 WL 2780911, \*7.

<sup>50</sup> See *Hamdan*, Ruling on Motions to Suppress Statements, D-029 and D-044, slip op. at 13 (Military Comm'n, July 20, 2008).

<sup>51</sup> *United States v. Amawi*, 552 F. Supp. 2d 669 (N.D. Ohio 2008).

question as to their independence and neutrality in a process that has many traditions—it is not a process of remaking the wheel like the MCA. As to the courts-martial, these are the courts that deal with the military, and the jurisprudence developed will draw from the more stable form of military judicial process rather than being made up on the fly. To use Professor McNeal's terms, the executive forum-discretion would be reduced to two traditional forums that are both available and substantial creatures of judicial norms. Those presiding over these forums have experience in dealing with all the concerns addressed by Professor McNeal. I do not want to minimize the significance of the difficulties that the torture has caused us and will cause such tribunals, but I respect their ability to see clearly.

This exclusive forum for foreigners does not provide foreigners with national treatment. Also, because of the link between these protections from the consequences of coerced testimony and torture, I believe that Judge Allred failed to apply an international minimum standard of justice.

Under the lower standard, the military judge goes on to accept and exclude various statements.<sup>52</sup> His analysis gives the impression that he carefully weighed the information provided. But, we must understand that this careful weighing takes place only after excluding Fifth Amendment applicability, after giving great deference to a Congressional approach that masks the policy of cruelty, and after emphasizing the practicality of the circumstances.<sup>53</sup> To the untrained reader, this will all appear to be a reasonable process. But, one who has some sense of what the opinion excludes begins to understand the brilliant perversity of these Potemkin trials for foreigners. But, while brilliant, these procedures fail to meet U.S. and International judicial standards.

It is beyond the scope of this Reply to highlight all of the flaws of the MCA processes—they are legion. Nevertheless, I hope that this short Reply removes any mask of respectability that may cover these procedures. The MCA processes are ingenious and represent a great deal of understanding of the interstices of U.S. law, but they are inconsistent with fundamental judicial norms of the United States. Changing the prosecutor or convening authority will not correct these fundamental flaws because such flaws are inherent to this system. Of course, when the convictions roll in, the message will be that these foreigners got more process than they gave their victims. That is the language of a small town in the south in 1940 with an African-American on trial for murder, and not the language of process consistent with fundamental American values and international standards. We are not duped.

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<sup>52</sup> See *Hamdan*, Ruling on Motions to Suppress Statements, D-029 and D-044, slip op. at 15–16.

<sup>53</sup> See *id.* at 8–14.

## IV. REFORM IS MEANINGLESS

I wish I could be hopeful that some new Executive and Legislature will correct these compounded legal and policy flaws. But absent meaningful accountability on the part of the executive and legislative leaders who worked together to institute the torture and who seek to hide behind these military commissions or a future national security court,<sup>54</sup> I think such hope is unwarranted.<sup>55</sup> These actors are human and we should understand these acts for what they are—attempts at self-preservation and avoidance of accountability for the crimes they permitted. Whether operating in the domestic or international field, and whether operating in the public or private sphere, the interest of these actors is to make sure that the legal regime for those people subject to the Military Commissions is third class.

Reform is meaningless. The pressures on the political convening authority are hydraulic. If the Convening Authority were to be a military convening authority in the chain of command, the pressure would focus on that military convening authority (the old Kiss Up, Kick Down scenario). Military generals are unable, or unwilling, to put their “stars on the table.” An example of this is the action by then Chair of the Joint Chiefs of Staff General Richard Myers, who blocked a legal review of detention policies requested by all four services. As detailed in the testimony of Jane G. Dalton, Retired Rear Admiral in the U.S. Navy, to the Senate Committee on the Armed Services of June 17, 2008,<sup>56</sup> this episode suggests that having a military convening authority may not be enough to protect judicial norms for alien unlawful enemy combatants. At least, this is the case in the face of those exercising pressure to deviate from fundamental rules of law, to enable and hide torture, and to seek self-preservation for their acts.

In addition, even the transparent regulation process can be subject to direct and indirect pressure to co-opt or capture the regulation drafting process. Congressional oversight of the process is indeed unlikely. Con-

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<sup>54</sup> See generally JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008); PHILIPPE SANDS, *THE TORTURE TEAM: RUMSFELD’S MEMO AND THE BETRAYAL OF AMERICAN VALUES* (2008); JORDAN PAUST, *BEYOND THE LAW: THE BUSH ADMINISTRATION’S UNLAWFUL RESPONSES IN THE “WAR” ON TERROR* (2007); Davis, *Congress, Torture and Romain Gary’s “Chien Blanc”*, *supra* note 48.

<sup>55</sup> To understand the extent of this impropriety, we should keep in mind that even the flawed *Quirin* military commission in World War II appears better than these Military Commissions, because in the *Quirin* commission there was no torture in the processes. For a detailed examination of the *Quirin* commission, see LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER* (2005) in which no hint of torture is made in the highly critical analysis of the impoverished *Quirin* military commission set up under President Roosevelt.

<sup>56</sup> Origins of Aggressive Interrogation Techniques: Hearing Before the S. Comm. on the Armed Services, 110th Cong. (2008) (Testimony of Admiral Jane G. Dalton, USN (Ret.)). Senator Reed questioned Admiral Dalton: “[Y]ou were essentially told by General Myers to stop any formal legal analysis to reach a formal conclusion. Is that correct?” Admiral Dalton responded: “I was told to stop the broad-based legal review that would—and policy review that would have involved the services and the other agencies like Fort Huachuca and DIA. I was told to stop the broad-based analysis.” *Id.*



gress's manifest inability to understand the relation between our treatment of these foreigners and the treatment of Americans accused in foreign countries is significant. Additionally, there is simply no perceived interest for a Congressperson to do anything that risks being considered "soft on terrorism." Finally, the obstacles noted for a national security court appear to be not so much obstacles, but rather consequences of the policy of cruelty.

To state those consequences more specifically: the nonprosecution paradox is clearly a result of the difficulty of introducing evidence from coerced interrogations in normal courts and courts-martial. "Intelligence problems" is a euphemism at least in part for information procured through coerced interrogations. "Challenges posed by accommodating speedy trial rights in light of security clearances and secured facilities" is really more about the secret, incommunicado detention and torture of detainees to get information that compromises their underlying rights and the high secrecy sought to protect these acts from being brought to light. "Authorities governing the methods by which intelligence is gathered and used" is again a subtle reference to evidence gathered through the policy of cruelty. "The phenomenon of executive forum-discretion" is really about the effort of the executive to put cases in a forum where the policy of cruelty will not be brought to light in a way that risks accountability. All these obstacles are derived from the policy of cruelty.

By removing the policy of cruelty and returning to traditional baselines on human rights, the result is to make such a court an anachronism in search of a problem. Ultimately, the problem is not in the vagaries of courts or courts-martial, but rather in the willingness to put in place a policy of cruelty that violates both U.S. and international law.

There is another aspect of the MCA that disturbs me. In addition to inadequate judicial processes, the MCA serves as a further form of hydraulic pressure on the detainees. One senses the pressure that would lead detainees—ostensibly in free will—to plead guilty to horrendous things once they realize there is no hope for them in this process. To pick one, Khalid Sheikh Mohammed has confessed to many things. It is widely known that these confessions were made in a context after torture and one in which his two children were being held incommunicado by the United States.<sup>57</sup> Can those sorts of pressures be analyzed meaningfully in this process? I doubt it. Take even the process of torture and then peace. Do the statements in the peaceful periods bear the mark of the earlier torture?<sup>58</sup> I find it hard to feel comfortable with the idea that Hamdan felt the need to walk out of the

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<sup>57</sup> Olga Craig, *CIA Holds Young Sons of Captured Al-Qaeda Chief*, SUNDAY TELEGRAPH, Mar. 9, 2003, at 2, available at <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/1424123/CIA-holds-young-sons-of-captured-al-Qaeda-chief.html> (link).

<sup>58</sup> See *Hamdan*, Ruling on Motions to Suppress Statements, D-029 and D-044, slip op. at 15 (answering this question in the negative, at least as a procedural matter for the military commissions: "Command influence 'in the air' is not enough. Impact on a particular trial must be shown.")

room when the video of one of his ostensibly peaceful Afghanistan interrogations was played.<sup>59</sup> What is missing from the tape? I also worry that decisions made in light of Hamdan's circumstances are actually efforts to use the military commission proceedings involving the low-level driver/bodyguard to create and solidify new standards that leave space open for evidence that is still to come in other cases with "bigger fish." For the eighty triable detainees, I suspect that the MCA is part and parcel of bringing them to a level of despair significant enough to coerce guilty pleas. The opaque process around each confession—what is off stage, so to speak—is disturbing. Judicial forms may be followed, but what will have taken place is judicial noise—not an application of judicial norms.

#### V. A CITIZEN'S PERSPECTIVE—LESSONS DURING 9/11

This lack of confidence in the ability of those acting from the Executive or Legislature to meaningfully provide further improvised legislation leads me to suggest that reform is not the right approach. Rather than think of reform as further improvisation, I suggest that we step back to a third approach. It is frequently bandied about that persons have a pre-9/11 mindset or that everything changed after 9/11. I have written in other places on the inappropriate nature of that split.<sup>60</sup> However, in preparing this paper, I came across a reminder of a third place for this debate: a citizen's perspective during 9/11. It is in that moment that I may have found the suggestions for the proper course of action. The citizen's perspective that I describe will necessarily be only a microcosm. However, in rereading an e-mail I wrote on September 12, 2001 describing my Dispute Resolution class on 9/11, I am struck again by what that discussion revealed about how we might proceed today.

The Dispute Resolution class was at Texas Wesleyan University School of Law and consisted of about forty students. It started at about 10:15 New York time, so the television was reporting the hijackings live, the pictures of the bombed World Trade Center buildings were on the air, and we were deep into the period before the towers came crashing down. We started the class in a somber mood as you would imagine.

We had a moment of silence for all the people who were lost. We then went on with looking at questions from our textbook. One of the questions was about negotiating with Terrorists in the Middle East who held hostages, and we had a long discussion on this one.

I felt it was hard on them but I asked them to imagine that President Bush was coming back to Washington and they were going to meet with him. I asked what advice they would give about the strategy to be taken.

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<sup>59</sup> Carol Rosenberg, *Bin Laden's Driver Evasive in Interrogation Video*, MIAMI HERALD, July 24, 2008, at A3, available at <http://www.mcclatchydc.com/100/story/45343.html> (link).

<sup>60</sup> See, e.g., Benjamin G. Davis, *A Citizen Observer's View of the U.S. Approach to the "War on Terrorism"*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 465, 465–79 (2008).

Many students felt that there was no place for alternative dispute resolution and negotiation and the approach should be to find and kill the people who did this. I talked with them about the Clausewitz notion that war is diplomacy by other means.<sup>61</sup> I told them that we, like President Bush, were all under the emotions of the horrible events, but that even with emotion at that level, one still has to think rationally about the appropriate next steps. I asked them to tell me what they would say to President Bush. Student responses varied greatly.

One student said that he would look at how to make these types of attacks cease and start to think about options. I asked him what he would do if the terrorists asked for \$1 million and whether he would pay it. The student was not sure but said that he would try to find ways to create options. Another student pointed out that we were not in a hostage setting, but were in a situation after the bombings, where there is no place to negotiate. Another student—one who had previously served in the Navy—said that rather than striking out we would have to go back to our principles and determine from there the best way to proceed. Another student's view was that when people have nothing to lose they will do these terrible things, so we must find a way for the people to have a stake in what is going on in order to stop these types of things from happening. Another student said that this was a situation where people acted on principles and there was no way to change their beliefs. Another student started to give a history of Middle East relations. I asked him for his recommendation and he did not say. Another student referred to the movie *Thirteen Days* and the Cuban missile crisis and said each cabinet member would have their own agenda. I then asked her, knowing that each person would have an agenda, how she would proceed if she were the National Security Advisor. She said she would recommend striking at someone. There were other points, but this is generally how the discussion went. As class ended, I was told that both of the World Trade Center towers had fallen down.

As I have looked back on that class and gotten past the parts where persons urged us to strike out (we have had wars and the policy of cruelty for that), I remain struck by the comments of the former Navy member. He suggested, that rather than striking out, we should return to our principles, and from these principles determine the best way to proceed. Surely the Fifth Amendment protections form part of our principles, and govern our treatment of persons hailed in front of an American military commission. Surely that commission must comport with standards developed in our courts and courts-martial. Surely we must provide real and not ersatz process. Surely, we can provide an international standard of process consistent with American values for these foreigners. Our legal system should not

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<sup>61</sup> See CARL VON CLAUSEWITZ, ON WAR 87 (Micheal Howard & Peter Faret, eds. & trans., Princeton Univ. Press 1976) (1832) ("It is clear, consequently, that war is not a mere act of policy but a true political instrument, a continuation of political activity by other means.").

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have a steerage class to hide our policy of cruelty. Instead, our legal system should assure us that, whatever course we take, we are adhering to judicial norms whereby a defendant has the possibility to be acquitted.<sup>62</sup> We Americans surely can respond to the call of Hersch Lauterpacht in a lecture given at the Royal Institute of International Affairs, Chatham House, London, on May 27, 1941 during some of the darkest days of World War II:

Constructive thought in the field of international organization must continue to be based on the view that while the protection of true sovereignty, conceived as independence of the power of other States, is the main purpose of international law, its reality has been thwarted by certain manifestations of State sovereignty and that a surrender or limitation of some aspects of that sovereignty are still the essential condition of the effectiveness of the Law of Nations. *The fulfillment of that condition depends not only on the acquiescence but on the determination of the individual citizen.*<sup>63</sup>

### CONCLUSION—BACK TO FIRST AND SECOND CLASS PROCESS

The structural response by Professor McNeal strikes at important symptoms, but, still, these are only symptoms of what is wrong with the MCA. The MCA seems to be a post-hoc structure to wrap up the drastic consequences of the policy of cruelty—it seems tailor-made for that task and not for the purpose of rendering justice.

The inability of the Executive and the Legislature to establish a procedure that meets judicial norms leaves us with only two places in which to deal with these cases: traditional Article III courts or courts-martial. Over the past seven years, as noted above, the Article III courts have demonstrated a resiliency and an adaptability to the problems associated with terrorism cases.<sup>64</sup> Over and over, with regard to military commissions, we have seen the Supreme Court willing to step in and point out that it has not been duped. We should not let ourselves be duped by the MCA.

Since I first began writing this piece in late July 2008, the Hamdan military commission has rendered its verdict and sentenced Mr. Hamdan to sixty-six months of imprisonment with credit given for sixty-one months already served.<sup>65</sup> Like a tree falling in the proverbial woods, one does not

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<sup>62</sup> See Justice Robert H. Jackson, *The Rule of Law Among Nations*, Address to the American Society of International Law, Washington, D.C., (April 13, 1945), available at <http://www.roberthjackson.org/documents/Rule%20of%20Law%20Among%20Nations.pdf> (“The ultimate principle is that you must put no man on trial under the forms of judicial proceedings if you are not willing to see him freed if not proven guilty. If you are determined to execute a man in any case, there is no occasion for a trial; the world yields no respect to courts that are organized merely to convict.”) (link).

<sup>63</sup> Hersch Lauterpacht, *The Reality of the Law of Nations*, in 2 *INTERNATIONAL LAW BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT* 35–36 (E. Lauterpacht ed., 1975) (emphasis added).

<sup>64</sup> See *supra* note 51 and accompanying text.

<sup>65</sup> William Glaberson, *Panel Sentences Bin Laden Driver to a Short Term*, N.Y. TIMES, Aug. 8, 2008, at A1, available at

have a sense of any members of the American political class having any concern about the quality of the process Mr. Hamdan received. Persons have spoken in praise of the fairmindedness of the military jurors and the judge in the case.<sup>66</sup>

I have no doubt that the *Hamdan* jurors are fine persons of high caliber, but having good people acting as judges does not make a judicial process consistent with core American values. Rather, it adds the United States to a long list of countries that use ersatz mechanisms to try their perceived enemies. This brief Essay is my modest way to speak to my fellow citizens and ask them to ponder what America is losing in terms of reputation and stature by these third class processes that dissimulate crimes of torture rather than condemn them. For this American citizen, this third class process is not good enough, for it renews with the worst of prior American judicial process, not the best. Would that this plea be heard.

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<http://www.nytimes.com/2008/08/08/washington/08gitmo.html?scp=1&sq=Hamdan&st=cse> (link).

<sup>66</sup> See, e.g., Posting of Bill West to Counterterrorism Blog, [http://counterterrorismblog.org/2008/08/the\\_hamdan\\_jury.php](http://counterterrorismblog.org/2008/08/the_hamdan_jury.php) (Aug. 7, 2008, 10:58 EST) (link); Posting of Andy McCarthy to the Corner, <http://corner.nationalreview.com/post/?q=YWFiZTRiN2FiZGZGEyZDUxNzMxMDY3OWU3NzEwZWFKNTU=> (Aug. 7, 2008, 9:55 EST) (link); see also Jess Bravin, *Hamdan Jury Felt Evidence Didn't Back U.S. Claim*, WALL ST. J., Aug. 11, 2008, at A3, available at <http://online.wsj.com/public/article/SB121832872967027369.html> (discussing claims by a *Hamdan* juror to have decided the case based solely on the evidence presented) (link).