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JUST THREE MISTAKES!

*Major General John D. Altenburg, Jr.**

The author asserts that three major Executive branch mistakes in 2001 and 2002 created the conditions for misunderstanding of international humanitarian law and the authority of the military to capture and detain unprivileged belligerents and conduct military commissions. His experience as a career Army Judge Advocate and as the Convening Authority for Military Commissions provides him with a unique perspective. He discusses early Presidential decisions that undermined the good will of the international community, generating critical reaction that forced the administration to respond constantly to debates regarding domestic criminal law standards. Rather, the administration should have engaged in meaningful discussions of appropriate responses to non-state actors waging war and the appropriate application of international humanitarian law standards. The author concludes that the administration's arrogance and naïveté led to these mistakes.

Three mistakes by the previous administration in the last quarter of 2001 laid the foundation for criticism that has persisted since that time. Some of the criticism is well-founded; some has been disingenuous. A significant result of these mistakes has been inaccurate information communicated to the public.

The first mistake was the failure to pursue active public diplomacy and education regarding international humanitarian law. The second mistake was failure to conduct Third Geneva Convention Article 5 tribunals in Afghanistan and the concomitant decision to send large numbers of hastily-screened detainees out of theater; and the third mistake was the failure to design and implement, at an appropriate juncture, twenty-first century military commissions.

The current administration is at precisely the same crossroad in 2009. Decisions regarding combat operations, detention policy, detention location, and the nature of twenty-first century war crimes trial venues, including military commissions, face the administration in September 2009. It

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is important to analyze the events of 2001 in order to inform critical decisions and policies in 2009.

Criticism of the President's 2001 Military Order¹ and later the 2006 Military Commission Act² (MCA) as a forum for trying alleged war crimes by members and supporters of al-Qaeda has focused precisely on the feature that makes military commissions useful: the rules and procedures that differ from U.S. domestic criminal trial practice procedures. These differences are lawful and consistent with international legal standards, even though some may consider them ill-advised for policy reasons. While it is true that military commissions have, historically and as a matter of custom, substantially employed the procedural and evidentiary rules applicable at the time to courts-martial, there always have been modifications. The best and most recent example is the military commission as employed in the 1940s, when the courts-martial rules were modified for commissions to allow hearsay, closed sessions, and to provide finality through prompt review, but no appeal.³ That exception to pre-existing custom, in the wake of the MCA, retains vitality as manifest in the statutory mandate⁴ to employ other procedures and rules of evidence.

The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as the Commander-in-chief in war. In some instances . . . Congress has specifically recognized the commission as the proper war-court, and in terms provided for the trial thereby of certain offenses. In general, however, it has left to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of the laws of war and other offences not cognizable by court-martial.⁵

While opinions vary on the vitality of the trials being conducted at Guantánamo Bay, most would likely agree that the limited public acceptance by some sectors of the press, public, and academy in the U.S. and

¹ Military Order No. 222, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

² Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

³ See COMM. OF ARMED SERVICES, AMENDING THE ARTICLES OF WAR TO IMPROVE THE ADMINISTRATION OF MILITARY JUSTICE, H.R. REP. NO. 80-1034, at 17-22 (1947), available at http://www.loc.gov/tr/frd/Military_Law/pdf/amend_articles.pdf. See also Military Order of July 2, 1942, 3 C.F.R. 1308 (1938-1943); Proclamation No. 2561, 3 C.F.R. 309 (1938-1943); Jack Goldsmith & Cass R. Sustein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT 261, 274-76 (2002) (discussing the similarities between President Franklin Delano Roosevelt's military commissions in the 1940s to President Bush's military commissions).

⁴ See Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

⁵ WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 831 (1920).

abroad of military commissions as a forum for trial of al-Qaeda and associated non-state actors is the result of a series of complex policy decisions and attitudes. Policies change with the stroke of a pen, but attitudes and public opinion frequently harden; the adage that “there’s no second chance to make a first impression” applies with devastating force.

Discussions of the utility of military commissions as an appropriate trial forum frequently find participants already polarized. Without suggesting that any specific policy, practice, or event created this polarization, it seems fair to conclude that a combination of secrecy and exertion of unitary executive power did much not only to prevent the education of the public regarding wartime legal procedures available to the government, but also to reduce proponents of military commissions to sporadic and ineffectual counter punching. In hindsight, the (perhaps) well-intended secrecy that surrounded the formulation and piecemeal implementation of military commissions also served, whether intended or not, to encourage ignorance, both in the public and the press, regarding the history and diversity of military tribunals generally, and the role of wartime military commissions specifically. This secrecy fostered skepticism and ill will; it produced a public perception of the military commissions’ legitimacy as being defined by those who opposed them, evaluated not as a flexible, historically based, and evolving UCMJ⁶ authorized war crimes trial forum, but rather as an untested shortcut to convictions, hopelessly intermeshed with detainee policy.

The U.S. is at war with al-Qaeda and Taliban members who support it. When the war began is a point worth discussing. Some argue that it began in 1993 when al-Qaeda operatives bombed the World Trade Center in New York City. This event is now characterized as World Trade Center I. Others argue that it began in 1996 when Osama bin Laden declared war on the U.S. or in 1998 when he repeated the declaration and specified that his operatives should target and kill American civilians worldwide. Nearly all would agree that bombing two U.S. embassies in western Africa in 1998 or attacking a U.S. warship in 2000 qualify as wartime actions. There should be no doubt that the 2001 attacks on the World Trade Center in New York City and the Pentagon in Washington, D.C. ensured a state of war between al-Qaeda and the U.S. But there are some who claim that because al-Qaeda is a non-state actor all the events discussed above amount to mere criminal activity that should be prosecuted with the domestic criminal law system.⁷

⁶ Uniform Code of Military Justice, 10 U.S.C. §§ 801–946 (2006).

⁷ See, e.g., Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648, 725–27 (2001) (cautioning against removing the Afghanistan detainees from the mainstream criminal law system because of prior precedent treating both foreign and domestic terrorists like common criminals).

The problem of determining when the war will end or how we will be able to tell when the war ends is worthy of a different discussion and debate, but it does not alter the fact that we are currently at war. For the first time in history, organizations of non-state actors are capable of mounting offensive military operations worldwide, have more military capability than half the nations of the world community, and possess economic clout which matches or exceeds that of more than half the countries of the world. They are “state-like” in only these three aspects, but these aspects are critical to the national security of all nations. This is a thorny issue, but we should not conclude that the U.S. cannot be at war because we cannot articulate how or when we will be able to tell the war is concluded. It is important to note that all security organizations to which the U.S. belongs invoked their self-defense clauses in the fall of 2001 after the 9/11 attacks; such unprecedented action was not taken for law enforcement purposes.

What is worthy of discussion and debate is how to conduct the war, how to detain combatants, what interrogation methods to employ, and if, how, and when to prosecute those who are believed to have committed violations of the law of armed conflict. The terms of the discussion should be within the framework of war principles, not law enforcement principles. A nation may choose to prosecute certain offenders as criminals and employ our domestic criminal justice system. But combatants captured by allied forces may—and should—be detained and interrogated, if capturing powers choose to question them within the principles of the law of armed conflict. Decisions regarding whether, when, and where to prosecute those who violated the law of armed conflict should be made within the same principles.

There are many issues to discuss in connection with the ongoing conflict, but we are at least eight years into the war and have little consensus on several important questions. The main reason for the current confusion is the singular inability of the U.S. administration in 2001 to communicate to its citizens and to the rest of the world the nature of the conflict—other than sweeping blandishments about the “global war on terror.” The failure to engage in public education and public diplomacy regarding unique aspects of the law of armed conflict, like the right to detain until the war ends, allowed critics to frame the terms of debate. Such efforts by organizations and individuals are legitimate, but left unchallenged they may confuse the public.

Non-government agencies naturally seek opportunities to advocate for their beliefs, whether it is to modify the law of armed conflict itself, to define anew which weapons systems and ammunition types are legitimate, or to define terms and concepts; for example, the appropriate designation of “child soldier.” When government representatives abdicate their responsibility to counter such claims, the public is left to conclude that the law *is* what critics describe. In fact, frequently what critics persuade the public *is* the law is what critics would like for the law to become. A simple example

is that of defining “child soldier.” No doubt numerous organizations and individuals would like for persons less than eighteen years old or less than sixteen years old to be considered “child soldiers.” Perhaps someday international law will change to make it so. But the law is that “child soldier” is someone less than the age of fifteen.⁸ Wishing it to be otherwise or advocating it to be otherwise may be a laudable goal, but the lack of comment by others has led many to believe that a fifteen year-old *is* a child soldier. It is true that *conscripting* such young people is prohibited, but even then there is no bar to holding them accountable for their actions.

The terms of debate regarding detention issues at Guantánamo Bay in 2002 quickly became defined in the context of domestic criminal law. The U.S. government failed to discuss publicly the universal and time-honored basis for detaining al-Qaeda and Taliban supporters captured in Afghanistan and transferred to Guantánamo. Not one administration official compared al-Qaeda detention to the more than 400,000 German and Italian detainees who were in prison camps located in all forty-eight of the U.S. states in 1944. None of those World War II detainees demanded lawyers or trials; they understood the law of armed conflict and that the detaining power (the U.S.) was justified in detaining them until the war ended. In fact, many detainees in 1944 could have argued that they were merely vehicle drivers, cooks, or typists; they had not taken up arms against the allies. Most were conscripted by their respective governments; they had not voluntarily become part of the military force. But the law of armed conflict was clear; all could be detained until the war ended, no matter how long that might be. Yet no U.S. official in 2001 or 2002 drew this obvious comparison to help the public understand the basis for detaining al-Qaeda operatives and supporters. Even allowing for the difference between Prisoner of War status for most World War II detainees and the unlawful combatant status of today’s detainees, the public would have been served well by a better effort from the administration to inform them of the wartime principles supporting detention.

More significantly, not one administration official in 2002 spoke publicly to compare the U.S. government’s position during the 1960s and 70s, when several hundred U.S. military personnel were detained by North Vietnam. North Vietnam was not a signatory to the Geneva Conventions and claimed that the detainees were war criminals, but took no steps to adjudicate these claims and did not follow the rudiments of international law in its humanitarian or legal treatment of captured U.S. personnel. Still, the U.S. never demanded their return, did not demand lawyers to represent

⁸ See, e.g., Rome Statute of the International Criminal Court art. 8.2(b)(xxvi), July 17, 1998, 2187 U.N.T.S. 90 (“[W]ar crimes’ means . . . conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities.”).

them, and did not demand that they be prosecuted or released. Rather, the U.S. government, through both Democratic and Republican administrations, stated that it expected North Vietnam to treat the detainees with respect and to return them to the U.S. when the war ended. In 1968 and 1969 few imagined that the war would end in 1973 for U.S. detainees. The nature of war is that its end is difficult to predict. Those who claim we are not at war because we cannot articulate how we will define its end ignore the reality and history of war to make their point.

Had the U.S. administration articulated forcefully in 2001 or 2002 that the law of armed conflict gives us the legal right to detain until the war ends those captured on the battlefield, then we might sooner have had a more focused debate regarding detention policy, whether to prosecute alleged war criminals sooner or later, and what forum to use once the decision to prosecute was made. The arrogance of the administration, evidenced by ignoring its obligation to educate and inform the public, combined with critics who advocated not the existing law but the law as they would wish it to be, created confusion that continues to this day. This failure of public discourse by the government, combined with two other errors in judgment mentioned above, led to mounting criticism of U.S. government policy once the public adjusted to the shock of September 2001.

The most troubling and obvious error was the decision not to conduct Third Geneva Convention Article 5 tribunals in Afghanistan. It was not necessary to conduct such tribunals for all detainees, but for the administration to conclude that there was “no doubt” as to the status of not only al-Qaeda operatives, but also all Taliban members and others captured was to ignore the purpose and importance of Article 5 tribunals while also failing to appreciate the advantage of conducting such tribunals.⁹ The decision not to conduct Article 5 tribunals was made in the face of unanimous opposition from all uniformed attorneys (judge advocates) at every level of command. Judge advocates are inclined to conduct Article 5 tribunals even when not strictly required because they serve as an institutional safeguard for detention operations. Three commissioned officers, at least one of whom is a judge advocate officer, objectively reviewing the facts and circumstances of the detainee’s capture and detention, provide a significant internal control measure for detention operations. At such hearings, the detainee is able to describe personally his perspective on capture and detention and to provide

⁹ See generally Memorandum from Jay S. Bybee, Assistant Att’y Gen., Office of Legal Counsel, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel of the Dep’t of Def. (Jan. 22, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf>.

information supporting his release or a detention category other than “unlawful combatant.”¹⁰ If necessary, interpreters are provided.¹¹

Conducting Article 5 tribunals in Afghanistan would have produced two significant benefits and no countervailing disadvantages. First, the mechanism itself would have revealed early not only possible intelligence failures but also any mistakes in point of capture operations and subsequent detention operations. Second, Article 5 tribunals would have reinforced the legitimacy of the detention regime in the eyes of the American public, world opinion, and most importantly, the Supreme Court. Recall that Justice O’Connor’s opinion in the *Hamdi*¹² decision, while acknowledging that the U.S. was at war, strongly “advised” the government that tribunals to determine the appropriate status of the detainees would be important. Her thinly veiled reference to Geneva Convention Article 5 tribunals led directly to the establishment of the Combat Status Review Tribunal (CSRT). Unfortunately, by 2004 critics, because of the described failure of public education, were already in full domestic criminal law mode and commenced to criticize the CSRT process because of perceived inadequacies when compared to domestic criminal process. Ironically, the Guantánamo detainees have been afforded the most extensive review procedures in the history of armed conflict. The CSRT process went far beyond that mandated by the Geneva Conventions. The U.S. went even further in establishing annual Administrative Review Boards, an absolutely unprecedented mechanism not required by international law. Yet because the terms of the debate remain domestic criminal law, much of the public believes that the detainees must be released and that Guantánamo must be closed.

The other major error was the decision to pattern the November 13, 2001 Presidential Military Order (PMO)¹³ so literally after the 1942 Presi-

¹⁰ 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; Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees, Army Regulation 190–8, ch. 1, § 1–6 (1997), available at http://www.army.mil/usapa/epubs/pdf/r190_8.pdf (stating that “if any doubt arises” as to a person’s classification, “such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal” and a tribunal should determine the status of any person “not appearing to be entitled to prisoner of war status” who “asserts that he or she is entitled to treatment as a prisoner of war”) [hereinafter Enemy Prisoners of War].

¹¹ Enemy Prisoners of War, *supra* note 10, § 1–6 e(5) (“Persons whose status is to be determined shall be allowed to attend all open sessions and will be provided with an interpreter if necessary.”).

¹² *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (“Indeed, it is notable that military regulations already provide for such process in related instances, dictating that tribunals be made available to determine the status of enemy detainees who assert prisoner-of-war status under the Geneva Convention.”).

¹³ Military Order No. 222, *supra* note 1.

dential Military Order establishing a military commission to prosecute alleged Nazi saboteurs.¹⁴ The 1942 Presidential Military Order and subsequent trial had been affirmed 8-0 by the Supreme Court,¹⁵ but the 1942 order was based on the 1920 Articles of War, which were amended by the 1948 Articles of War and then superseded by the 1950 Uniform Code of Military Justice (UCMJ).¹⁶ The UCMJ was subsequently amended significantly in 1968 and 1983.¹⁷ The PMO drafters simply failed to consider the effect of the preceding sixty years of jurisprudential developments in military law.

Had government attorneys considered the development of military law, they would not have insisted upon “creating” an ad hoc military commission process. Article 21 of the UCMJ provides ample legislative authority for the executive to conduct military commissions.¹⁸ Article 36 of the UCMJ provides additional authority to modify commission procedures, if necessary.¹⁹ Using the UCMJ and the current Manual for Courts-martial (MCM)²⁰ as a starting point, attorneys could have analyzed MCM provisions to determine if they were practicable in twenty-first century military commission trials of non-state actor unlawful combatants who had allegedly violated the law of armed conflict. Where the court-martial provision was adequate, it could be adopted by the commission process. Where the court-martial provision was considered impracticable, the commission process could be modified and an analysis provided in the developing “Manual for Military Commissions.” Many believe that had such a methodology been followed, then the critics of military commissions would have had much less to discuss—even if they continued to be preoccupied with domestic criminal law procedures for non-citizen alien unlawful combatants.

Actually, such a methodology was adopted by the Office of Military Commissions (OMC) in late 2004 as individuals within the executive branch debated differences among administration officials about detention policy and military commission procedures. OMC attorneys worked from

¹⁴ Military Order of July 2, 1942, 3 C.F.R. 1308 (1938–1943).

¹⁵ *Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁶ Military Legal Resources History of the Uniform Code of Military Justice, http://www.loc.gov/rr/frd/Military_Law/UCMJ_LHP.html; H.R. REP. NO. 80-1034, at 1 (1947); 95 CONG. REC. 4120, at 1–2 (1949).

¹⁷ Military Justice Act of 1968, Pub. L. No. 90-632, 82 Stat. 1335 (1968); *The Military Justice Act of 1983: Hearing on S. 974 Before the Military Personnel and Compensation Subcommittee of the Committee on Armed Services, United States House of Representatives*, 98th Cong. 9 (1983).

¹⁸ Uniform Code of Military Justice, 10 U.S.C. § 821 (2006).

¹⁹ *Id.* § 836(a).

²⁰ MANUAL FOR COURTS-MARTIAL (2008 ed.), http://www.loc.gov/rr/frd/Military_Law/pdf/MCM-2008.pdf.

October 2004 throughout 2005 and well into 2006 to develop a Manual for Military Commissions (MMC) and a proposed UCMJ amendment (Article 135(a)). If adopted, these documents would have concisely updated UCMJ military commission procedures to account for legislative and jurisprudential changes since 1948. Unfortunately, decision makers did not share the enthusiasm of a group of Defense Department, National Security Council, State Department, and Justice Department officials who urged the adoption of proposed Article 135a and the proposed Manual for Military Commissions.²¹ Once the Supreme Court decided *Hamdan*,²² then Congress seized the initiative and subsequently passed the Military Commission Act of 2006,²³ which is fraught with its own inconsistencies and inadequacies.

Three mistakes in the early twenty-first century spread misinformation, created critics, and strengthened existing critics. We live now with the effects of those missteps. But the war continues; national security remains at risk. Our reputation is damaged and the balancing must continue. How do we achieve what has always been a challenging wartime balance? We must protect our national security while upholding the rule of law. We did not do that very well from 2001 to 2006. Perhaps in 2009, with a different administration in Washington, D.C., there can be the discussion and constructive debates that should have occurred seven years ago. Discussion and debate today should focus on the issues as they relate to the war paradigm in the twenty-first century in the wake of several Supreme Court decisions. These decisions acknowledge the fact that the U.S. is at war. Given that, how do we reconcile national security interests and the rule of law? What is the way forward?

²¹ See Statement by Major General John D. Altenburg, Jr. Before the Committee of Armed Forces, at 3–4 (July 7, 2009), available at http://law.case.edu/lectures/files/2009-2010/20090911_1-AltenburgTestimonySASC-09.7.7.pdf.

²² *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²³ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.