

Article III by Default: Constitutional Requirements for the Capital Prosecution of Unprivileged Enemy Belligerents

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Introduction

THUS FAR, NO PERSON DETAINED in America's War on Terror¹ has been sentenced to death by the U.S. government. This failure to capitally punish a single enemy combatant has not been due to a lack of effort on the part of the Bush Administration,² but rather the efforts of a few Americans³ and the legal impediments created by the U.S. Supreme Court.⁴

In 2009, the power of Commander in Chief passed to President Barack Obama, who has continued America's armed conflicts across

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1. "War on Terror" has been used to denote American and Allied conflicts in Iraq and Afghanistan, as well as American and Allied covert operations across the world. The term has "become ingrained in American national discourse," though it is notoriously hard to articulate and may actually mischaracterize several conflicts involving American and Allied forces currently occurring across the world. *See* Alen Weiner, *Hamdan, Terror, War*, 11 LEWIS & CLARK L. REV. 997, 998 (2007).

2. *See, e.g.*, Notice of Intent to Seek a Sentence of Death, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D.Va. Mar. 28, 2002) (No. Crim. 01-455-A).

3. *See, e.g.*, Special Verdict Form, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D.Va. Mar. 28, 2002) (No. Crim. 01-455-A). The *Moussaoui* trial resulted in a hung jury and a sentence of life in prison without parole.

4. In four landmark cases, the Supreme Court denied government arguments to curtail the jurisdiction of federal courts, as well as the constitutional power of the writ of habeas corpus. *See* *Boumediene v. Bush*, 128 S. Ct. 2229 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006); *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004); *Rasul v. Bush*, 542 U.S. 466 (2004).



the world. The Obama Administration has attempted to distance its campaigns from the Bush Administration's campaigns with the use of terminology—i.e., by substituting “unprivileged enemy belligerent” for “enemy combatant,”⁵ and “Overseas Contingency Operations” for “War on Terror.”⁶ Perhaps the Obama Administration's most provocative decision, however, has been to authorize the capital prosecutions for six unprivileged enemy belligerents suspected of orchestrating the terrorist attacks on September 11, 2001, rather than subject them to courts-martial proceedings or military commissions.⁷

In light of President Obama's and Attorney General Eric Holder Jr.'s monumental decision, this Comment explores the constitutional requirements for the capital prosecution of unprivileged enemy belligerents accused of committing or aiding hostilities against America. This Comment argues that, by default and largely thanks to false starts on behalf of the Bush Administration, courts-martial proceedings and military commissions cannot procure a constitutionally sound capital conviction of a detainee in the War on Terror. Instead, Article III federal courts have become the primary source of criminal justice in the War on Terror⁸ and the only venue that may procure a constitutional capital sentence against a person accused of committing crimes involving terrorism. This conclusion ultimately justifies President Obama's decision to authorize the New York City Terror Trials.⁹

Part I describes the world of combatants and the effects of the Bush Administration's creation of a new class of combatants. Part II provides historical background on the military's use of courts-martial and military commissions for capital proceedings. This Part focuses upon the constitutional and jurisdictional limitations the Supreme Court has placed on these tribunals. Part III evaluates Supreme Court case law relevant to capital prosecutions of unprivileged enemy belligerents through courts-martial proceedings or military commissions.

5. Military Commissions Act of 2009, Pub. L. 111-84, § 948a(7), 123 Stat. 2209, 2575.

6. See President's Letter to Congressional Leaders on the Global Deployments of United States Combat Equipped Armed Forces, DAILY COMP. PRES. DOC. 998 (Dec. 16, 2009) [hereinafter President's Letter]; see also DEPT. OF DEFENSE, FY 2010 BUDGET REQUEST SUMMARY JUSTIFICATION: OVERSEAS CONTINGENCY OPERATIONS, FISCAL YEAR 2010 (2009).

7. ERIC HOLDER, U.S. ATT'Y GEN., Attorney General Announces Forum Decisions for Guantanamo Detainee (Nov. 13, 2009), <http://www.justice.gov/ag/speeches/2009/ag-speech-091113.html>.

8. RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS (2009).

9. The author disagrees with the use of the death penalty as a constitutionally viable form of punishment. *Accord* *Furman v. Georgia*, 408 U.S. 314 (1972) (Marshall, J., concurring); *Trop v. Dulles*, 356 U.S. 86 (1956).

Under constitutional scrutiny, the vague and overbroad definition of “unprivileged enemy belligerent” poses basic problems of notice and due process. These problems are at the root of the legal impediments that have thus far prevented successful constitutional use of courts-martial and military commissions for convictions of detainees in the War on Terror. Part IV concludes by noting the Obama Administration has instituted the New York City Terror Trials in accordance with the federal courts’ proper role in the prosecution of those accused of terrorism.

I. Know Your Enemy

A. Who Is a Combatant?

Between the end of World War II in 1945 and the beginning of the War on Terror in 2001, persons engaged in war were generally divided into two classes: lawful and unlawful combatants.¹⁰ Lawful combatants, explicitly recognized by the Geneva Conventions, possess the right to legally kill and be killed¹¹ in armed conflicts between High Contracting Parties and are entitled to prisoner of war status.¹² Professor Peter Jan Honigsberg has recognized that “[t]he existence of unlawful combatants, those not recognized in the laws of war as combatants, is implicit in the definition of lawful combatants.”¹³ Typically, unlawful combatants are spies, saboteurs, civilians, militia members, or mercenaries.¹⁴ Unlawful combatants are not entitled to engage in armed conflicts between High Contracting Parties and do not qualify for prisoner of war status when captured.¹⁵ The terms lawful and unlawful combatant are internationally recognized terms covering the universe of parties who participate in armed conflicts or subversive hostilities.¹⁶ At least such was the case prior to September 11, 2001.¹⁷

10. See Peter Jan Honigsberg, *Chasing “Enemy Combatants” and Circumventing International Law: A License for Sanctioned Abuse*, 12 UCLA J. INT’L L. & FOREIGN AFF. 1, 8 (2007).

11. *Id.* at 9.

12. *Id.*

13. *Id.*

14. See *id.*

15. *Id.*

16. *Id.*

17. See *id.* at 8.

B. Who Is an Enemy Combatant?

The term enemy combatant was coined in 1942 by Justice Harlan Stone as a variant reference to Nazi saboteurs¹⁸—though at the time it lacked specific meaning.¹⁹ Following the September 11th terrorist attacks in 2001, the term was imbued with new meaning and has since been used to characterize persons detained in America’s War on Terror.²⁰ Two separate definitions for the term have been adopted by the Supreme Court, and Congress has issued a formal definition of enemy combatant in the Military Commissions Act of 2006.²¹ While the definition has undergone repeated changes since 2001,²² the definition for enemy combatant used in *Hamdan v. Rumsfeld*²³ is adopted here as: “an individual who was part of or supporting Taliban or Al Qaeda forces, or associated forces, that are engaged in hostilities against the United States or its coalition partners.”²⁴

C. Who Is an Unprivileged Enemy Belligerent?

Congress, as directed by the Obama Administration, issued new provisions and regulations for military commissions in the Defense Authorization Act for Fiscal Year 2010. The provisions are known as the Military Commissions Act (“MCA”) of 2009, amending in entirety Chapter 47 of the U.S. Code, Title 10. The MCA of 2009 shares many provisions with the MCA of 2006; the most notable departure is the Obama Administration’s new label, unprivileged enemy belligerents, for the class of people detained in the War on Terror. The scope of the term appears to apply more broadly than enemy combatant and is defined as a person who:

- (A) Has engaged in hostilities against the United States or its coalition partners; or

18. *Ex parte Quirin*, 317 U.S. 1, 8 (1942). The best definition offered by Justice Stone was a person “who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property . . . not to be entitled to the status of prisoners of war . . .” *Id.*

19. *See* Honigsberg, *supra* note 10, at 8.

20. *Id.* at 49 (noting that the first definition of the term “enemy combatant” was “an individual who, under the laws and customs of war, may be detained for the duration of the armed conflict”).

21. *Id.* at 4.

22. *Id.* at 5 n.9.

23. 548 U.S. 557 (2006).

24. *Id.* at 570 n.1 (2006) (citing Memorandum from Deputy Sec’y Def., Paul Wolfowitz, to Sec’y Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>).

- (B) Has purposefully and materially supported hostilities against the United States or its coalition partners; or
- (C) Was a part of al Qaeda at the time of the alleged offense under this chapter.²⁵

D. Circumventing the Rules of War²⁶

Both the definition of enemy combatant and unprivileged enemy belligerent subsume the definitions for lawful and unlawful combatants under the Geneva Conventions. Honigsberg describes the definitions as a “confusion of terms. If enemy combatant subsumes the two sub-categories of lawful and unlawful combatants . . . then again all we have here is a generic term for all combatants, not a new category of combatants.”²⁷ The broad definitions do more than confuse terms and conflict with international norms. They defeat the procedures governing the Uniform Code of Military Justice and undermine the pillars of notice, due process, and individualization guaranteed by the Fifth and Eighth Amendments to the Constitution.

II. Combatants, the U.S. Military, and Capital Punishment Under Articles I and II of the Constitution

A. Articles at War: “Unprivileged Enemy Belligerents” and Super Concurrent Jurisdiction

A Commander-in-Chief has three options to capitally prosecute a person detained as an unprivileged enemy belligerent.²⁸ First, the trial

25. See Military Commissions Act of 2009, Pub. L. 111-84, § 948a(7), 123 Stat. 2209, 2575. The breadth of the definition of unprivileged enemy belligerent actually makes it more akin to the definition for enemy combatant adopted by the Supreme Court in *Hamdi v. Rumsfeld*, 542 U.S. 507, 516 (2004).

26. See Honigsberg, *supra* note 10, at 9 (“By creating a new, unauthorized class of enemy combatants outside of international recognition and protection, the administration was attempting to circumvent the application of the Geneva Conventions.”).

27. See *id.* at 54.

28. This charging determination is subject to the jurisdiction of each court and the substantive offenses that may be brought against the unprivileged enemy belligerent by the U.S. Military or U.S. Department of Justice. However, as will be explained below, the U.S. Code, Uniform Code of Military Justice (“UCMJ”), and Military Commissions Act of 2009 proscribe crimes based on common elements and facts tending to constitute premeditated murder, attacks on U.S. property, or aiding hostilities against America. This is true whether or not the crime occurs abroad or domestically. Thus, under the current expansion of the law, courts representing Articles I, II, and III of the Constitution may each have separate jurisdiction over the same “war crime.” The Supreme Court has recognized that failure to hold an unprivileged enemy belligerent responsible through military commissions “does not mean that that the Government may not, for example, prosecute by court-martial or in federal court those caught ‘plotting terrorist atrocities like the bombing of the Khobar Towers.’” *Hamdan*, 548 U.S. at 612 n.41.

could be held through capital courts-martial proceedings,²⁹ authorized under Article I of the Constitution, for crimes cognizable under the Uniform Code for Military Justice (“UCMJ”).³⁰ Second, the official could create or seek congressional approval for military commissions and administer capital prosecutions through military tribunals,³¹ under Article II of the Constitution,³² for crimes cognizable under the MCA or Executive Order. Finally, the U.S. Department of Justice (“DOJ”) could institute capital charges through an Article III forum.³³ At any time, any person detained in the War on Terror could be prosecuted in any given forum, with little guidance or rationale explaining the selection of one forum over another.³⁴

29. Taliban, Al Qaeda, and other detainees in the War on Terror held by the United States, could be capitally tried through general courts-martial proceedings. See Uniform Code of Military Justice, 10 U.S.C. §§ 802(a)(9)–(10), 802(a)(12), 818 (2006) [hereinafter UCMJ]. This includes any detainee held at Guantanamo Bay. *Hamdan*, 548 U.S. at 620 n.47 (citing *Rasul v. Bush*, 542 U.S. 466 (2004)).

30. General courts-martial proceedings are authorized by the UCMJ, which was promulgated by Congress pursuant to its Article I powers. U.S. CONST. art. I, § 8. See also *Dynes v. Hoover*, 61 U.S. (20 How.) 65, 79 (1857) (“These provisions show that Congress has the power to provide for the trial and punishment of military and naval offences . . . without any connection between it and the 3d article of the Constitution defining the judicial power of the United States; indeed, . . . the two powers are entirely independent of each other.”).

31. See UCMJ, 10 U.S.C. §§ 821, 836 (2006); *id.* §§ 948b(a)–(d).

32. See U.S. CONST. art. II, § 2 (granting executive power to form tribunals and military commissions).

33. Taliban and Al Qaeda detainees could be capitally prosecuted through civilian courts if their crimes are proscribed by the U.S. Code. See U.S. CONST. art. III, § 2. (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States . . .”).

34. Tung Yin, *Enemies of the States: Rational Classification in the War on Terrorism*, 11 LEWIS & CLARK L. REV. 903, 904 (2007) (“In practice, the government’s decisions of whether to treat a given suspected terrorist as a criminal defendant or as an enemy combatant has not followed any discernable algorithm.”). In fact, a given defendant may appear in more than one forum. See ZABEL & BENJAMIN, *supra* note 8, at 14. Al-Marri underwent an eight-year journey through the federal courts and military commissions before ultimately pleading guilty in a federal court. Originally, he was charged with financial fraud, false identity, and false statements in a federal court. After being adjudicated an enemy combatant by a Combatant Status Review Tribunal (“CSRT”), he was then detained for over five years in a naval brig in South Carolina where he awaited trial by military commission. In 2009, his charges in federal court were reinstated and he has since pled guilty to materially aiding hostilities against America in violation of 18 U.S.C. § 2339 (2006). *Id.*

B. Rules and Procedures for Capital Courts-Martial Proceedings

1. Jurisdiction

The UCMJ defines the substantive law governing military courts and courts-martial proceedings.³⁵ There are three types of courts-martial proceedings: summary, special, and general.³⁶ General courts-martial proceedings are reserved for felonies including capital prosecutions.³⁷ Eligibility for trial through courts-martial is most commonly based on a person's status and not necessarily his/her crimes or geographical location.³⁸ Hypothetically, an unprivileged enemy belligerent could be tried through courts-martial proceedings as a prisoner of war or person detained by the American government outside the United States.³⁹

2. Rules for Capital Courts-Martial Proceedings

The UCMJ and the Rules of Courts Martial govern the procedures, substantive offenses, and terms of appellate review in capital courts-martial proceedings. Capital courts-martial cases are also governed by the Eighth Amendment's prohibition on cruel and unusual punishment as interpreted by the U.S. Supreme Court.⁴⁰ Accordingly, the military's capital sentencing scheme must rationally narrow the class of death eligible offenders and meet heightened standards of reliability, as imposed by the Eighth Amendment, in all capital cases.⁴¹

The court in *United States v. Matthews*⁴² recognized that capital courts-martial proceedings must conform to the Supreme Court's decisions in *Furman v. Georgia*,⁴³ *Gregg v. Georgia*,⁴⁴ and *Woodson v. North*

35. See UCMJ, 10 U.S.C. §§ 881, 906, 918–19 (2006) (defining: conspiracy, spy, espionage, premeditated murder, and manslaughter, respectively).

36. *Id.* § 816 (Courts-Martial Classified).

37. *Id.* § 818 (Jurisdiction of General Courts-Martial); see also David J. R. Frakt, *An Indelicate Balance: A Critical Comparison of the Rules and Procedures for Military Commissions and Courts-Martial*, 34 AM. J. CRIM. L. 315 (2007).

38. See UCMJ, 10 U.S.C. § 802 (2006).

39. See *id.* §§ 802(9)–(12).

40. *Id.* § 855; see also *United States v. Matthews*, 16 M.J. 354, 368 (C.M.A. 1983) (quoting *United States v. Wappler*, 2 U.S.C.M.A. 393, 396 (1953) (“In enacting Article 55, Congress ‘intended to grant protection covering even wider limits than that afforded by the Eighth Amendment’”).

41. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972); *Matthews*, 16 M.J. 354.

42. 16 M.J. 354 (C.M.A. 1983).

43. 408 U.S. 238 (1972).

44. 428 U.S. 153 (1976).

Carolina^{45,46} These cases prohibit capital sentencing schemes that function arbitrarily or capriciously by requiring the adaptation of procedures in capital cases that narrow the class of offenders eligible for the death penalty and meet heightened standards of reliability.⁴⁷ The Court of Appeals for the Armed Forces has also recognized that all capital courts-martial proceedings must adopt sentencing procedures that “individualize [the] determination on the basis of the character of the individual and the circumstances of the crime . . . in an objective, evenhanded and substantively rational way”⁴⁸

The UCMJ authorizes the death penalty for fourteen crimes.⁴⁹ These include several crimes applicable to the hypothetical capital courts-martial case involving an unprivileged enemy belligerent, such as premeditated murder, war crimes, various crimes of espionage, and destruction of military property.⁵⁰

The Rules of Courts Martial (“RCM”) govern the procedures for capital courts-martial proceedings.⁵¹ The procedures are tailored to satisfy the Eighth Amendment’s heightened reliability requirements in capital cases.⁵² The RCM requires, along with other safeguards, unanimity in the penalty determination and automatic appellate review by the Court of Appeals for the Armed Forces.⁵³ Prior to the imposition of a death sentence, the jury must convict the defendant of a capital offense, find the existence of a statutory aggravating factor, and find that the “mitigating factors⁵⁴ are substantially outweighed by

45. 428 U.S. 280 (1976).

46. *Matthews*, 16 M.J. at 368.

47. *See id.* at 370–74.

48. *Id.* at 379 (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)).

49. *See* UCMJ, 10 U.S.C. § 802 (2006) (assaulting or willfully disobeying superior commissioned officer); *id.* § 885 (desertion); *id.* § 894 (mutiny); *id.* § 899 (misbehavior before the enemy); *id.* §§ 900–02 (subordinate compelling surrender); *id.* § 904 (improper use of countersign); *id.* § 906 (forcing a safeguard); *id.* § 910 (aiding the enemy, spying, espionage); *id.* § 913 (improperly hazarding a vehicle); *id.* § 918 (misbehavior of sentinel); *id.* § 920 (premeditated murder, felony-murder, and rape).

50. UCMJ, 10 U.S.C. §§ 904, 908, 910, 918 (2006).

51. *See* *Loving v. United States*, 517 U.S. 748, 753–54 (1995).

52. *Id.*

53. *Id.* at 750–54.

54. *See* Lt. Michael Montgomery, *Death Is Different: Kreutzer and the Right to a Mitigation Specialist in Military Capital Offense Cases*, ARMY LAWYER 13, 16 (February 2007) (Mitigation investigation searches for evidence that: “(1) portrays any positive qualities the defendant possesses, (2) makes the defendant’s violent acts ‘humanely understandable in light of his past history and the unique circumstances affecting his formative development,’ (3) tends to show that his life in prison would likely be productive, or at least not be threatening to others, (4) rebuts the prosecutor’s evidence of aggravating circumstances, (5) provides evidence of extenuating circumstances surrounding the capital crime itself.”).

the aggravating factors.”⁵⁵ In *Loving v. United States*,⁵⁶ the Supreme Court upheld the constitutionality of these procedures under the Eighth Amendment.⁵⁷

In a number of other cases, military courts have sought, in line with Supreme Court precedents, to ensure the reliability of capital courts-martial proceedings. The Court of Appeals for the Armed Forces has adopted and enforced added procedural and substantive rights for capital defendants.⁵⁸ For example, in all capital cases the court has required effective assistance of counsel at trial and on direct appellate review, while also finding that ineffective assistance of counsel may constitute prejudice and reversible error.⁵⁹ Likewise, the military courts have held that defendants in capital courts-martial proceedings have the right to present a wide-range of evidence in mitigation and that the erroneous denial of a request for the appointment of a mitigation specialist⁶⁰ constitutes reversible error.⁶¹ In sum, the Court of Appeals for the Armed Forces has made clear that all capital courts-martial proceedings require, “competent counsel; [a] full and fair opportunity to present exculpatory evidence; individualized sentencing procedures; fair opportunity to obtain the services of experts; and fair and impartial judges and juries.”⁶²

C. Rules and Procedures for Capital Military Commissions

1. Jurisdiction

Military commissions are born of military necessity in times of war, and are not themselves constitutionally suspect. Military commissions may be administered by Executive Order pursuant to congressional approval, the UCMJ, and the Executive’s plenary powers in war

55. *Id.*; Rules for Courts-Martial §§ 1004–1006, Exec. Order No. 13468, 73 Fed. Reg. 43, 827 (July 24, 2008).

56. 517 U.S. 748 (1995).

57. *Id.* at 750.

58. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (“This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long.”).

59. *United States v. Curtis*, 44 M.J. 106 (C.A.A.F. 1996).

60. *See Montgomery*, *supra* note 54, at 16.

61. *See United States v. Kreutzer*, 59 M.J. 773, 778–80 (A. Ct. Crim. App. 2004); *United States v. Allen*, 31 M.J. 572, 623 (C.M.R. 1990) (“Military due process entitles a servicemember to the assistance of an expert when necessary to the preparation of an adequate defense.”).

62. *United States v. Murphy*, 50 M.J. 4, 15 (C.A.A.F. 1998).

time under Article II.⁶³ The Executive's authority stems from the powers jointly granted to the President and Congress in times of war.⁶⁴ Of particular importance here are the congressional Authorization for Use of Military Forces Against Terrorists,⁶⁵ the congressional Authorization for Use of Military Forces Against Iraq Resolution of 2002,⁶⁶ and Article 21 of the UCMJ⁶⁷ that all authorize the use of military commissions. Pursuant to these congressional declarations and the Executive's plenary powers under Article II, on November 13, 2001, the Bush Administration promulgated military commissions intended to govern the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."⁶⁸ After the U.S. Supreme Court struck the Bush Administration's military commissions, Congress and the Executive first responded by passing the MCA of 2006 (later amended by the MCA of 2009).⁶⁹

Historically, military commissions have been used in three situations: (1) as a substitute for civilian courts during martial law, (2) as a substitute for civilian courts in occupied countries, and (3) as "incidents to the conduct of war" for enemies who have violated the laws of war.⁷⁰ The military commissions formed to prosecute unprivileged enemy belligerents under the MCA of 2009 operate in the second and third historical situations.

2. Historical Precedents

There is ample precedent for the imposition of capital punishment through military commissions. Military commissions have historically utilized several procedural safeguards, including particularized notice, lengthy adversarial proceedings, and qualified counsel. The

63. See *supra* text accompanying notes 33–34. The Supreme Court has noted that "[t]rial by military commission raises separation-of-powers concerns of the highest order." *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Breyer, J., concurring).

64. U.S. CONST. art. II, § 2, cl. 1; U.S. CONST. art. I, § 8, cls. 10, 11, 12, 14; *Hamdan*, 548 U.S. 557; *In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1, 10–11 (1942).

65. Pub. L. No. 107-40, 115 Stat. 224 (2001).

66. Pub. L. No. 107-243, 116 Stat. 1498.

67. UCMJ, 10 U.S.C. § 821 (2006).

68. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001); see *Hamdan*, 548 U.S. at 568.

69. See Military Commissions Act of 2009, Pub. L. 111-84, § 949(a), 123 Stat. 2209, 2575.

70. *Hamdan*, 548 U.S. at 595–96.

use of commissions to prosecute alleged terrorists is not necessarily a novel idea.⁷¹

In *In re Application of Yamashita*,⁷² the Commanding General of the Japanese Army was tried for violating the Articles of War after he failed to prevent his troops from committing atrocities in the Philippines.⁷³ He was informed of his charges through a bill of particulars,⁷⁴ 286 witnesses testified during the course of the proceedings,⁷⁵ and ultimately he was sentenced to death. This was despite the efforts of six appointed defense attorneys.⁷⁶ General Yamashita was given full appellate review of his case on direct appeal and an opportunity to challenge the commission's creation and jurisdiction on post-conviction appeals.⁷⁷ Moreover, the proceedings conformed to international law.⁷⁸

In *Ex Parte Quirin*,⁷⁹ Nazi saboteurs were sentenced to death after being tried for charges listed in the Articles of War.⁸⁰ The five spies were tried in front of military tribunals commissioned by President Roosevelt's Executive Order.⁸¹ The military commissions were held in front of secret tribunals on American soil, but afforded the five saboteurs procedures acceptable under international law.⁸² Five days before trial, the spies received a five-count indictment that specifically described their charges and the basis for those charges.⁸³

Finally, in *Johnson v. Eisentrager*,⁸⁴ twenty-one German nationals, in service in China during World War II, were arrested for violating the laws of war by continuing to engage in hostilities following the

71. See Brian J. Foley, *Guantanamo and Beyond: Dangers of Rigging the Rules*, 97 J. CRIM. L. & CRIMINOLOGY 1009, 1036 (2007).

72. *In re Yamashita*, 327 U.S. 1, 14 (1946).

73. *Id.* It should be noted here that the Supreme Court has recognized its troubles with *Yamashita* and that "the force of that precedent, however, has been seriously undermined by post-World War II developments." *Hamdan*, 548 U.S. at 618. The Court has cited with approval the opinions by the dissenting justices, stressing the lack of procedural safeguards in General Yamashita's trial. *Id.* (citing *Yamashita*, 327 U.S. at 41–81 (Rutledge, J., dissenting)).

74. *Yamashita*, 327 U.S. at 14.

75. *Id.* at 5.

76. *Id.*

77. *Id.* at 25–26.

78. *Id.* at 22–25 (discussing Yamashita's status under the Geneva Convention of 1929).

79. 317 U.S. 1 (1942).

80. *Id.* at 8.

81. Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 7, 1942); see *Quirin*, 317 U.S. at 22.

82. *Quirin*, 317 U.S. at 34 n.12 (discussing international law).

83. *Id.* at 23.

84. 339 U.S. 763 (1950).



German surrender in 1945. They were tried by military tribunals commissioned by the Joints Chief of Staff and charged in particularity for conduct in violation of the Laws of War.⁸⁵ Prior to trial they were given representation by counsel and permitted the opportunity to rebut the accusations in a preliminary hearing. At trial, they were allowed to introduce evidence on their own behalf and were permitted to fully cross-examine the prosecution's witnesses.⁸⁶ Ultimately, their convictions were upheld and the German nationals took the opportunity to challenge the jurisdiction of the commissions through post-conviction appeals.⁸⁷ More importantly, their trials conformed to the Geneva Convention's requirements for trials involving war crimes.⁸⁸

3. Modern Precedents

The Court has yet to comment on the constitutional validity of the military commissions created by the MCA of 2006 or 2009. The Court has, however, indicated what jurisdictional requirements, pre-trial procedures, trial procedures, and substantive offenses may be constitutionally required for the prosecution of unprivileged enemy belligerents by military commissions. These principles must be deduced from the Court's consideration of the military commissions created by Executive Order in 2001, the Combatant Status Review Tribunals ("CSRTs"), the Detainee Treatment Act of 2005, and section 7 of the MCA of 2006.⁸⁹

In *Hamdi v. Rumsfeld*,⁹⁰ the Court found that a detainee must receive "notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."⁹¹ The Court also recognized the President's power to detain individuals who fought against the United States in Afghanistan for the duration of the conflict as a fundamental incident of the war.⁹² Through a balancing determination, the Court held that de-

85. *Id.* at 766.

86. *See* *Boumediene v. Bush*, 128 S. Ct. 2229, 2259–60 (2008).

87. *Eisentrager*, 339 U.S. 763.

88. *Id.* at 789.

89. 28 U.S.C. § 2241(e) (Supp. 2007). Thus, this Comment draws its argument that the MCA of 2009 is unconstitutional in case of a capital prosecution of "unprivileged enemy belligerents" by analogy to particulars of the Court's response in *Hamdi v. Rumsfeld*, 547 U.S. 510 (2005), *Rasul v. Bush*, 542 U.S. 466, 484–85 (2004), *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006), and *Boumediene v. Bush*, 128 S. Ct. 2229, to the procedures utilized by the Bush Administration to detain and prosecute "enemy combatants."

90. 547 U.S. 510 (2005).

91. *Id.* at 533.

92. *Id.* at 518.

tainees had the right to some procedural system by which to challenge their detention.⁹³ In accordance, “the Deputy Secretary of Defense established [CSRTs] to determine whether individuals detained at Guantanamo were ‘enemy combatants.’”⁹⁴

In *Hamdan v. Rumsfeld*,⁹⁵ the Court struck the military commissions created by Executive Order in 2001 because their “structure and procedures violated both the UCMJ and the Geneva Conventions.”⁹⁶ Moreover, a plurality of the Court has also found that the charge of “one count of conspiracy ‘to commit . . . offenses triable by military commission’”⁹⁷ as an enemy combatant does not constitute “an offense . . . [that] by the law of war may be tried by military commissions.”⁹⁸ The Court found that the jurisdiction stripping provisions of the Detainee Treatment Act were unconstitutional in that the statute failed to properly suspend the writ of habeas corpus.⁹⁹

In *Boumediene v. Bush*,¹⁰⁰ the Court found that section 7 of the MCA of 2006, which stripped federal courts of the ability to hear enemy combatants claims of writ of habeas corpus, violated the constitutional right to habeas corpus implied by the Suspension Clause and granted to all persons detained by the U.S. government.¹⁰¹ The Court held that enemy combatants possess the constitutional right to challenge their detention through petition for writ of habeas corpus.¹⁰² The Court did indicate that the reach of the writ may be diminished based upon the status of the detainee and the sufficiency of process used to determine that status.¹⁰³

In issuing these holdings, the Court has struck the military commissions created by Executive Order in 2001, finding the entire scheme suffered from procedural deficiencies.¹⁰⁴ It also struck section 7 of the MCA of 2006 and found that the section “effects an unconsti-

93. *Id.* at 537.

94. *Boumediene*, 128 S. Ct. at 2241.

95. 548 U.S. 557 (2006).

96. *Id.* at 567.

97. *Id.* at 566.

98. *Id.* at 567.

99. *Id.* at 558.

100. 128 S. Ct. 2229 (2008).

101. *Id.*; *Rasul v. Bush*, 542 U.S. 466, 484–85 (2004). In *Rasul*, the Court found that the federal courts had jurisdiction to hear writ of habeas corpus suits of persons detained at Guantanamo Bay. *Id.* at 483. The novelty of the case is the extension of federal court jurisdiction to a military installation because the United States government has *de jure* sovereignty over Guantanamo Bay. *Id.* at 484.

102. *Boumediene*, 128 S. Ct. 2229.

103. *Id.* at 2259.

104. *Id.* at 2269.

tutional suspension of the writ.”¹⁰⁵ As a remedy, Congress and the Obama Administration issued the MCA of 2009.

4. The Military Commissions Act of 2009

The MCA of 2009, Manual for Military Commissions, and the Regulations for Trial by Military Commissions prescribe the procedural and substantive elements of modern military commissions.¹⁰⁶ Though the MCA of 2009 substituted several new provisions,¹⁰⁷ in sum the structure of the MCA of 2006 and 2009 are similar. Whether the MCA of 2009 has cured constitutional deficiencies noted in the prior scheme is an open question.¹⁰⁸

Procedurally, the MCA of 2009 claims to utilize “the procedures for trial by general courts-martial”¹⁰⁹ Any commissioned and active officer of the Armed Forces is eligible to serve on a commission,¹¹⁰ so long as at least five members serve in an ordinary commission and twelve in a capital commission.¹¹¹ A guilty verdict may be reached by two-thirds of the members of the commission and a capital sentence meted if all the members concur in the penalty of death.¹¹² Each military commission is presided over by a military judge who is a commissioned officer of the armed forces,¹¹³ and is protected from punishment by the convening authorities based on their findings or sentences.¹¹⁴ The prosecution and defense counsel must be judge advocates generals selected by the Secretary of Defense.¹¹⁵

Substantively, the MCA of 2009 guarantees unprivileged enemy belligerents several rights including the right to cross examination,

105. *Id.* at 2238.

106. *See* Frakt, *supra* note 37, at 330–31. Frakt mentions the MCA of 2006 since the article predated October 2009. As discussed, however, the MCA of 2006 and 2009 are similar and many of the provisions of the MCA of 2006 at issue in the Frakt article are also present in the MCA of 2009.

107. *See id.* at 332.

108. *See id.*

109. 10 U.S.C. § 948b(c) (2006).

110. *Id.* § 948i(a) (explaining eligible officer must be specifically selected by the convening authority based upon several qualifications).

111. *Id.* § 948m.

112. *Id.* § 949m.

113. *Id.* § 948j(a).

114. *Id.* § 949b(a).

115. *Id.* §§ 948k(4)(b)–(c).



the right to be present at trial,¹¹⁶ the right to counsel, the right to self-representation,¹¹⁷ and protections against double jeopardy.¹¹⁸ The MCA of 2009 also grants unprivileged enemy belligerents the same protections against cruel and unusual punishment defined in the UCMJ.¹¹⁹ However, the MCA of 2009 explicitly withholds from unprivileged enemy belligerents rights against unreasonable search and seizure, protections against compulsory self-incrimination, protections against testimonial hearsay,¹²⁰ the right to speedy trial,¹²¹ and the right to pretrial discovery of exculpatory evidence if deemed confidential.¹²² More troublesome is the fact that it allows the government to use confidential information against the accused without disclosure so long as it is described by generic categories.¹²³

The MCA of 2009 outlines thirty-two potential criminal charges applicable to principals,¹²⁴ conspirators, and accessories after the fact.¹²⁵ Convictions resulting from sixteen of the listed crimes may potentially result in a capital sentence.¹²⁶ However, the Act does not require notification of the accused prior to the swearing of charges.¹²⁷

If any charges are sustained, the convening authority first reviews the conviction and sentence, then modifies it, orders a rehearing, or issues a conviction based on a lesser included offense.¹²⁸ Thereafter, any conviction is automatically referred to the U.S. Court of Military Commission Review,¹²⁹ then the U.S. Court of Appeals for the District

116. *Id.* § 949a(b)(2). The right to be present has limitations, as the accused may, after prior notice, be excluded from the proceedings to ensure the physical safety of individuals and to prevent disruption of the proceedings. *Id.* § 949d(d)(1)(2).

117. *Id.* § 949a(b)(2).

118. *Id.* § 949h.

119. *Id.* § 949s.

120. *Id.* § 949a(b)(3)(A)(B)(D).

121. *Id.* § 948b(d)(1)(A). The section also includes a “catch-all” exemption from other provisions in the UCMJ. *Id.* § 948b(d)(2).

122. *Id.* §§ 949p-1, 949p-4, 949p-6.

123. *Id.* § 949p-6(b).

124. *Id.* §§ 950t(1)–(32).

125. *Id.* §§ 950q, 950r.

126. Capital charges could potentially include: murder of protected persons, attacking civilians, taking hostages, employing poison, using protected persons as shields, torture, cruel and inhuman treatment, intentionally causing serious bodily injury, mutilating or maiming, murder in violation of the law of war, using treachery or perfidy, hijacking or hazarding a vessel or aircraft, terrorism, spying, conspiracy, and solicitation. *See id.* §§ 950t(1)–(2), 950t(7)–(9), 950t(11)–(15), 950t(17), 950t(23)–(24), 950t(27), 950t(29)–(30).

127. *Id.* § 948q(b).

128. *Id.* §§ 950b, 950e–950f.

129. *Id.* §§ 950c, 950f.



of Columbia Circuit¹³⁰ and, ultimately on petition for certiorari, to the U.S. Supreme Court.¹³¹ However, the MCA limits review by federal courts to “questions of law” based on the record.¹³²

It is telling that the Obama Administration has not placed its faith in military commissions to secure a constitutional conviction against unprivileged enemy belligerents for capital crimes. By electing to prosecute the six suspected September 11th masterminds in an Article III court, the Obama Administration has implicitly revealed its doubts surrounding the constitutional legitimacy of tribunals created by the MCA of 2009. The decision is not shocking, however, given the constitutional impediments to securing a death sentence against an unprivileged enemy belligerent through a military tribunal.

III. Capital Prosecution Through Courts-Martial Proceedings and Military Commissions Violates the Uniform Code for Military Justice and the Fifth and Eighth Amendments

Since 2002, the term enemy combatant has been used by the American government to detain combatants in Afghanistan, Iraq, and across the globe. In three cases, the Supreme Court has acquiesced to the government’s terminology and definition of enemy combatant.¹³³ The Court has thereby constitutionalized the vague and overbroad term. The Court’s acceptance of enemy combatant has been argued as an “error in judgment” and judicial “permission to deprive people of their internationally recognized rights and protections.”¹³⁴ This Part explores the constitutionality of the term unprivileged enemy belligerent if and when it is used by the American government to deprive people of their lives through capital courts-martial proceedings or capital tribunals under Articles I and II of the Constitution.

A. Capital Prosecution Through Courts-Martial Proceedings Violates the Fifth and Eighth Amendments

Courts-martial proceedings may be used to capitally prosecute unprivileged enemy belligerents.¹³⁵ The proceedings must conform to

130. *Id.* § 950g.

131. *Id.* § 950g(e).

132. *Id.* § 950g(d).

133. *Boumediene v. Bush*, 128 S. Ct. 2229, 2240 (2008); *Hamdan v. Rumsfeld*, 548 U.S. 557, 570 n. 1 (2006); *Hamdi v. Rumsfeld*, 547 U.S. 510, 517 (2005).

134. *See Honigsberg, supra* note 10, at 4.

135. *See HOLDER, supra* note 7.

the Supreme Court's Eighth Amendment jurisprudence.¹³⁶ In the hypothetical capital prosecution of an unprivileged enemy belligerent, these requirements pose significant procedural barriers to the Executive's ability to uphold a capital conviction reached through courts-martial proceedings.

First and foremost, the jurisdiction of the Court of Appeals for the Armed Forces and the jurisdiction of all capital courts-martial proceedings rest upon the detainee's wartime status. Here, the court's jurisdiction turns upon the government's allegations that the detainee is an unprivileged enemy belligerent.¹³⁷ These terms conflict with the language used by the UCMJ, as well as international norms, because they fail to identify whether an individual detainee is in fact a lawful or unlawful combatant entitled to prisoner of war status or war criminal status. The allegation that a detainee is an unprivileged enemy belligerent thus fails to provide any specific or cognizable grounds by which to establish the jurisdictional purview of the courts-martial power as required by the UCMJ.¹³⁸ This is especially true in the context of a capital courts-martial case, where the military's unilateral designation of a person as an unprivileged enemy belligerent poses serious questions of due process and risks to the reliability of the proceedings.¹³⁹

Second, the Court of Appeals for the Armed Forces has repeatedly recognized that the Eighth Amendment requires application of *United States v. Matthews*'¹⁴⁰ narrowing and sentencing principles to capital courts-martial proceedings. Thus, to reach a death verdict, the jury's sentence must be based upon an "*individualized* determination on the basis of the character of the individual and the circumstances of the crime."¹⁴¹ In cases involving unprivileged enemy belligerents, individualization between detainees is impossible since the term fails to meaningfully distinguish between lawful combatants and unlawful combatants. Detainees would thus be unable to defend against a sentence of death on the basis they were a prisoner of war who could

136. *Loving v. United States*, 517 U.S. 748, 754–55 (1996).

137. See ZABEL & BENJAMIN, *supra* note 8, at 21.

138. 10 U.S.C. §§ 802(9)–(10) (2006).

139. See Frakt, *supra* note 37, at 338 ("The designation of a detainee as an 'enemy combatant' subjects the detainee to the jurisdiction of military commissions and potentially to the death penalty. Such a critical designation should not be left to military officers with no legal training and no judge to guide them."). *Id.*

140. 16 M.J. 354 (C.M.A. 1983).

141. *Id.* at 377.

legally kill on the battlefield, or an unlawful combatant who was perhaps a citizen and intruding on the battlefield.¹⁴²

Third, the term unprivileged enemy belligerent covers conduct committed by both lawful and unlawful combatants working for the Taliban, Al Qaeda, their own behalf, or on the behalf of any number of other groups and states hostile to America. In this respect, no evidence could successfully individualize the wartime status of detainees held as unprivileged enemy belligerents.¹⁴³ The term is applicable to every foreign citizen, American citizen, financier, politician, terrorist, provincial warlord, armed forces member, spy, prisoner of war, or criminal detained and accused of hostilities towards the U.S. government.¹⁴⁴ Thus, persons detained under the overbroad and vague term could have been lawful or unlawful combatants, and their conduct may have been legal or illegal within the context of war. The term unprivileged enemy belligerent thus fails to narrow the class of death-eligible offenders “in an objective, evenhanded, and substantively rational way”¹⁴⁵ In sum, these impediments would substantially deter the Obama Administration from pursuing capital charges against an unprivileged enemy belligerent through courts-martial.

B. Capital Prosecution Through Military Commissions Violates the Fifth and Eighth Amendments

In the alternative to capital courts-martial proceedings, the Executive could administer capital prosecutions of unprivileged enemy belligerents through military commissions.¹⁴⁶ In fact, under the Bush Administration, ten cases were referred to commissions, including the five suspected September 11th co-conspirators.¹⁴⁷ Under the Obama Administration, five individuals have been referred to commissions.¹⁴⁸

142. See Honigsberg, *supra* note 10.

143. *Matthews*, 16 M.J. at 379.

144. See *supra* Part I.C–D.

145. *Matthews*, 16 M.J. at 379. Likewise, the term *unprivileged enemy belligerent* renders all enemies as an “undifferentiated mass,” subject to indefinite detention by the American government. See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (“A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”).

146. See ZABEL & BENJAMIN, *supra* note 8.

147. See Frakt, *supra* note 37, at 324.

148. Charlie Savage, *Trial for 9/11 Suspects Set To Be in N.Y.*, S.F. CHRON., Nov. 14, 2009.

The Supreme Court has already held a provision of the MCA of 2006 unconstitutional and, despite the MCA of 2009's changes to Chapter 47 of the U.S. Code, Title 10, the constitutionality of the scheme is an open question.¹⁴⁹ It is not surprising then that the Obama Administration has repudiated the term enemy combatant and promulgated new military commissions as part of continuing military operations in Afghanistan.¹⁵⁰ The term unprivileged enemy belligerent has both expanded the class of detainees and the accompanying constitutional problems.

The Court has held that military commissions by Executive Order failed to satisfy "the most basic precondition" of military commissions; that is, military necessity.¹⁵¹ Likewise, members of the Court have held that the MCA's overbroad charge of conspiracy to commit crimes triable by military commission conflicts with the laws of war.¹⁵² Current military commissions authorized by the MCA of 2009 and held in either Guantanamo Bay, Fort Bragg, or other forums removed from Afghanistan and Iraq, would appear to fail this test. Likewise, by utilizing conspiracy charges, military commissions have intruded into the detention models historically retained by the criminal justice system¹⁵³ and have violated Winthrop's historical precondition that commissions only address violations of the laws of war.

Second, military commissions have historically based their jurisdiction on the detainee's wartime status as lawful or unlawful combatants and their status as a prisoner of war or war criminal. Never before has a military commission been formed to try unprivileged enemy belligerents. Here, the vagueness that permeates the definition of the term would infect the constitutionality of a capital conviction secured through military commission. While the Supreme Court has accepted the government's terminology in the past, a conviction, especially a capital conviction, of an unprivileged enemy belligerent might pro-

149. See *Montgomery*, *supra* note 54.

150. See President's Letter, *supra* note 6.

151. *Hamdan v. Rumsfeld*, 548 U.S. 557, 612 (2006) (citing *Rasul v. Bush*, 542 U.S. 466, 487 (2004)).

152. *Id.* at 610. However, the plurality was quick to note that this error could be cured by Congress. *Id.* at 601–02. Congress has subsequently taken the opportunity to define the crime of conspiracy in the Military Commissions Act of 2009, 10 U.S.C. § 950(t) (29). Thus, it is an open question whether codification of "conspiracy to commit crimes . . . cognizable through military commissions" is in accordance with the laws of war.

153. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079, 1118 (2008) (noting the convergence of the criminal justice system and military commission particularly in cases involving conspiracy).

vide the fodder necessary to examine the constitutionality of the term and challenge the President's power to detain.¹⁵⁴

Third, the Court has recognized that to determine the scope of habeas review requires an analysis of the "sum total of procedural protections afforded to the detainee at all stages, direct and collateral."¹⁵⁵ While this requirement is relevant to the determination of the Court's jurisdiction, its discussion provides insight into the procedures for military commissions. The Court has indicated procedures related to the exclusion of the defendant from his trial, the disclosure of classified information, evidentiary strictures for the admission of testimonial evidence, the unanimity of the jury panel, the appellate process, powers of the convening and appointing authorities, the assignment of judges, and the power of direct and collateral review of any convictions by federal courts are a concern.¹⁵⁶ Perhaps most importantly, the Court has recognized the significance of "risk of error in the tribunal's findings of fact" as an important factor when considering the constitutionality of the tribunal.¹⁵⁷

In contrast to the procedures historically utilized by military commissions, the MCA of 2009 fails to provide minimal requirements of notice, compulsory process and independent appellate review that typically accompany charges and convictions under the Articles of War and international law.¹⁵⁸ Discretionary sentencing systems under the convening authority's review pose additional constitutional issues of notice, due process, and fundamental fairness.¹⁵⁹ Similarly, restrictions on the defendant's access to confidential information, including confidential information submitted at trial against him,¹⁶⁰ pose issues of compulsory process and the right to confrontation. Additional issues are also raised by the explicit withholding of protections against unreasonable search and seizure, protections against compulsory self-

154. See *Boumediene v. Bush*, 128 S. Ct. 2229, 2272 (2008) ("Thus a challenge to the President's authority to detain is, in essence, a challenge to the Department's definition of enemy combatant . . .").

155. *Id.* at 2269.

156. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 614–15, 647–51 (2006); see also *Boumediene*, 128 S. Ct. at 2269–70.

157. *Boumediene*, 128 S. Ct. at 2270. Here, scholarship has documented that the CSRT proceedings create a significant risk of error. See *Foley*, *supra* note 71, at 1009.

158. *Hamdan*, 548 U.S. at 603–08 (distinguishing the procedures used in *Quirin* and *Yamashita* from the procedures given to Hamdan).

159. See Brian Wolensky, *Discretionary Sentencing in Military Commissions: Why and How the Sentencing Guidelines in the Military Commission Act Should Be Changed*, 12 CHAP. L. REV. 721, 742 (2009).

160. See 10 U.S.C. §§ 949p-6(b)–(d), 949p-7 (2009).

incrimination, protections against testimonial hearsay,¹⁶¹ and the right to a speedy trial.¹⁶²

Fourth, the Court has indicated that a factor in determining the constitutionality of military commissions is any procedural deviation between the commissions and courts-martial proceedings under the UCMJ and RCM.¹⁶³ In order to justify procedural deviations by military commissions, the Court has required a showing of impracticability in applying the rules of courts-martial.¹⁶⁴ Here, recent scholarship by those directly involved in the commissions indicates that many of the deviations between military commissions and courts-martial proceedings are not pragmatically justified.¹⁶⁵ Similarly, other scholarship has indicated that selectively choosing and excluding provisions from the UCMJ may subject military commissions to constitutional challenges.¹⁶⁶ In both instances, the circumstances of a capital case and the MCA of 2009's failure to adopt the provisions listed in the RCM, including bifurcated proceedings and sentencing determinations in line with Supreme Court Authority, establish irreconcilable deviations between modern military commissions and capital courts-martial.¹⁶⁷

In an evaluation of the MCA of 2009, the Court will compare the procedures historically used by military commissions to the procedures utilized by the MCA of 2009. They will determine if the MCA

161. *Id.* §§ 949a(3) (A)–(B), 949a(3) (D).

162. *Id.* § 948b(d) (1) (A).

163. *Hamdan*, 548 U.S. at 624–25.

164. *Id.*

165. See Frakt, *supra* note 37, at 330. Frakt explains the significant differences between courts-martial proceedings and military commissions of 2006. The pretrial procedures in military commissions differ from courts-martial proceedings in that they base jurisdiction on a person's status as an "enemy combatant," fail to impose a minimum age limitation, fail to impose a statute of limitations, fail to impose limits on the length of pre-trial detention, failing to grant detainees the right to a speedy trial, not requiring referral of charges, restricting discovery, and restricting access to witness and evidence. *Id.* The trial process used in military commissions differs from the process used in courts-martial proceedings in matters concerning the production of witnesses and evidence, the defendant's right to counsel, the composition of military commissions, and restrictions on plea bargaining. *Id.* Finally, evidentiary matters in military commissions differ from evidentiary standards in courts-martial proceedings because they do not place any restrictions on self-incrimination, lower the standards for relevance, fail to grant defendants search and seizure rights, utilize lenient restrictions on hearsay, and limit disclosure of exculpatory evidence that is confidential. *Id.*

166. Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967, 1007 (2009).

167. In determining the constitutionality of military commissions, members of the Court have compared the procedures utilized by the MCA of 2009 to the procedures of a regularly constituted court prescribed by Common Article 3 of the Geneva Convention. *Hamdan*, 548 U.S. at 631–32.

fulfills preconditions historically used to justify military commission. The MCA of 2009's actual procedures will be evaluated, and any deviations between the UCMJ and the MCA will have to be justified by the Executive. Finally, the Court will look to international law for guidance. Here, this comment has argued that the MCA of 2009 fails to fulfill each of these factors and their use is constitutionally unjustifiable in the context of a capital case. It appears the Obama Administration has reached the same conclusion and has recognized the risk of utilizing military commissions for capital proceedings.¹⁶⁸

IV. Why the Obama Administration Has Authorized the New York City Terror Trials

A. Federal Courts and Criminal Justice in the War on Terror

At first blush, one might think that Article III courts present the greatest obstacles for successful capital conviction of an unprivileged enemy belligerent. The federal courts are not typically associated with wars and provide greater procedural safeguards than courts-martial and military commissions. This, however, is not a typical war and military commissions have already failed. Moreover, for those who have witnessed the recent proliferation of terrorism related cases and convictions in the federal courts, the Obama Administration's decision to institute the New York City Terror Trials comes with little surprise.¹⁶⁹

The reality is that, to date, Article III federal courts have secured almost every conviction against a person detained in the War on Terror.¹⁷⁰ The federal courts have also served as the forum for the only capital trial of an enemy combatant.¹⁷¹ In an interview recently aired

168. See President's Statement on Military Commissions, DAILY COMP. PRES. DOC. 364 (May 15, 2009).

169. See Kelly Moore, *The Role of Federal Criminal Prosecutions in the War on Terrorism*, 11 LEWIS & CLARK L. REV. 837 (2007).

170. One scholastic effort has identified 289 defendants in 119 cases involving terrorism charges in the federal courts. See ZABEL & BENJAMIN, *supra* note 8, at 6. Based on information alleged in indictments, the study defined terrorism cases as "encompass[ing] prosecutions that are related to Islamist extremist terrorist organizations such as al Qaeda or individuals and organizations that are ideologically or organizationally linked to such groups. *Id.* at 5.

171. Special Verdict Form, *United States v. Moussaoui*, 282 F. Supp. 2d 480 (E.D.Va. Mar. 28, 2002) (No. Crim. 01-455-A). The Moussaoui trial resulted in a hung jury and resulted, as the default, in a sentence of life in prison without parole. *Id.* at 13. The trial will likely be the model for the defense in the New York City Terror Trials if the suspects are not allowed to represent themselves. Thus, a review of the jury's findings in *Moussaoui* is important. There, the jury found, unanimously and beyond a reasonable doubt, eight of ten aggravating factors for Count I (Conspiracy to Commit Acts of Terrorism Tran-

before Super Bowl XLIV, President Obama tallied 190 convictions of terrorists in the federal courts.¹⁷² This number is substantiated by the DOJ's website, which lauds the federal criminal justice system for convicting 145 of 160 defendants accused of crimes associated with terrorism.¹⁷³ Since 2007, this total has grown to 195 convictions with 74 pending cases.¹⁷⁴ An even more recent study, sent to members of the Senate Judiciary Committee, counts 403 such convictions.¹⁷⁵

Terror-related prosecutions appear to be increasing on a daily basis. The particular venues of choice have been within the Southern District of New York and the Eastern District of Virginia.¹⁷⁶ To assist in the U.S. DOJ's efforts, "Congress has given . . . a formidable arsenal of criminal statutes to deploy in terrorism prosecutions."¹⁷⁷ This includes both general charges, like murder of a protected person, and alternative charges, like false statements. Through these provisions, the DOJ has convicted suspected terrorists including American citizens, foreign aliens, and suspects who targeted military personnel, as well as convicted for conduct that occurred internationally and domestically.¹⁷⁸ The most common charge has been based on the material support statute, under 18 U.S.C. § 2339 (2006), which encompasses forty-eight conceivable offenses and has resulted in seventy-three con-

scending National Boundaries). *Id.* at 1–5. Of the twenty-three mitigating factors offered by the defense, at least one juror found the existence of eleven factors plus one additional mitigating factor. *Id.* at 6–9. Nine agreed that Moussaoui's "unstable early childhood . . . resulting in orphanages and having a home life without structure . . .," and that his "father had a violent temper and physically and emotionally abused his family" constituted mitigating factors. *Id.* at 7. Many accredit the one juror who found twelve mitigating factors as Mr. Moussaoui's savior. Though, it should be noted, that there were three jurors who each found the existence of one factor not offered by the defense and handwrote onto the verdict sheet: "That Zacarias Moussaoui had limited knowledge of the 9/11 attack plans." *Id.* at 9.

172. Lyn Sweet, Transcript of Katie Couric Super Bowl Interview with President Obama, *available at* http://blogs.suntimes.com/sweet/2010/02/katie_couric_super_bowl_obama.html (Feb. 7, 2010).

173. See DEPT. OF JUSTICE, FACT SHEET: PROSECUTING AND DETAINING TERROR SUSPECTS IN THE U.S. CRIMINAL JUSTICE SYSTEM (2009).

174. Interestingly, "of the 214 defendants whose cases were resolved as of June 2, 2009 (charges against 75 defendants were still pending), 195 were convicted either by verdict or by guilty pleas. This is a conviction rate of 91.121%." See ZABEL & BENJAMIN, *supra* note 8, at 5–7.

175. Leah Nysten, *DOJ Counts 400 Terrorist Convictions in Civilian Courts*, MAINJUSTICE.COM, Mar. 26, 2010, <http://www.mainjustice.com/2010/03/26/doj-400-terrorist-convictions-in-civilian-courts>.

176. ZABEL & BENJAMIN, *supra* note 8, at 7.

177. *Id.* at 13.

178. See *id.* at 1.



victions.¹⁷⁹ Though no capital sentences have resulted, six defendants have been convicted of potentially capital charges under 18 U.S.C. § 2332 (2006) related to the killing of a U.S. National.¹⁸⁰

B. The New York City Terror Trials

The decision to authorize the New York City Terror Trials, perhaps more than any other decision instituted by the Obama Administration short of health care, has drawn popular discussion and revolt. On both sides of the aisle, political and social commentators have drawn upon a common set of themes to condemn or praise the Administration's decision. While polls reveal general uncertainty by the American public towards the trial,¹⁸¹ and many years still separate their commencement, one thing is certain—the decision represents a bold step in the War on Terror.

The DOJ has yet to unseal an indictment or specify the charges against the suspects, though the crimes will assuredly be based upon the 2973 murders of American civilians that occurred on September 11, 2001.¹⁸² The accused are: Khalid Sheik Mohammed, Walid Muhammad Salih Maubarek Bin Attash, Ramzi Binalshib, Ali Abudal Aziz Ali, Mustafah Ahmed Adam Al Hawsawi, and Mohammed Al Kahtani.¹⁸³ Before military commissions under the MCA of 2006, they had all been charged with conspiracy, murder in violation of the laws of war, attacking civilians, attacking civilian objects, intentionally caus-

179. See *id.* at 11. The “material support” statute criminalizes the following: [Providing] money, property, or services, lodging, training, false identification, communications equipment, personnel (including oneself), weapons or lethal substances, explosives, transportation, safe houses, facilities, or expert advice or assistance, knowing that the support is to be used by someone else in connection with a range of offenses including murder, kidnapping and the violation of terrorism statutes.

Id. at 13.

180. *Id.* at 11–12.

181. A Rasmussen Poll indicated that fifty-one percent of Americans oppose the Obama Administration's decision. However, more locally, the same poll indicated that a small plurality of New Yorkers—forty-five percent—believed that the trial is a good idea. Dan McLaughlin, *Nine Reasons Why the New York City Terror Trials Are a Bad Idea*, NEW LEDGER, Nov. 18, 2009, available at <http://newledger.com/2009/11/nine-reasons-why-the-new-york-city-terror-trials-are-a-bad-idea>.

182. For an interesting review of the suspects' journey through military commissions and CSRT hearings, see Adine S. Momoh, *Gaming the System, “Are You Saying If We Plead Guilty We Will Not Be Able to Be Sentenced to Death?”*, 35 WM. MITCHELL L. REV. (SPECIAL ISSUE) 5119 (2009) (describing the five suspects' efforts to plead guilty to capital charges in order to receive the death penalty and obtain martyrdom or end their nightmarish detention).

183. See John Crook, *Contemporary Practice of the United States Relating to International Law*, 102 AM. J. INT'L L. 346, 361–62 (2008).

ing serious bodily injury, destruction of property in violation of the law of war, terrorism, and providing material support for terrorism.¹⁸⁴

Khalid Sheikh Mohammed has been portrayed as the lynchpin and is accused of masterminding the September 11th terrorist attacks. As early as 1996, Mohammed is alleged to have proposed the operational concept to Osama Bin Laden. He is also alleged to have “obtained approval and funding from [O]sama Bin Laden for the attacks, overseeing the entire operation, and training the hijackers in all aspects of the operation in Afghanistan and Pakistan.”¹⁸⁵ The charges alleged against the other five suspects are less noteworthy, but tangentially connected to the September 11th terrorist attacks.¹⁸⁶

This conduct, if connected to the operation of Al Qaeda and September 11th, is capitally cognizable under 18 U.S.C. § 2332 (2006) and other U.S. Codes. Since no indictment has been filed, however, DOJ has yet to capitally authorize the case. This has not stopped President Obama and Attorney General Holder from indicating they will seek the death penalty against the five suspects.¹⁸⁷

The DOJ has taken several steps in preparation for trial. Many believe that Judge Lewis Kaplan, who is currently presiding over Ahmed Ghailani’s case involving the bombings of American Embassies in Africa and whose court holds the capital indictment against Osama Bin Laden, has been tapped for assignment of the case.¹⁸⁸ David Raskin, “one of the last remaining members of a cadre of seasoned terrorism prosecutors in the Manhattan office,” has also been tabbed as the frontrunner for lead prosecutor and has taken time off his other duties in the office to focus on the September 11th case.¹⁸⁹ Likewise, local defense counsel have clamored for the position of lead counsel and a “‘death list’—a cadre of about 20 veteran defense lawyers in New York who have broad experience in death penalty and other

184. *Id.* at 362.

185. *Id.*

186. *See id.* (describing more fully the circumstances and charges against the other conspirators).

187. In an interview in Tokyo, Japan shortly after the announcement of the trials, President Obama stated. “I’m absolutely convinced that Khalid Sheik Mohammad will be subject to the most exacting demands of justice. The American people insist on it. My administration will insist on it.” Catherine Herridge, Michael Levine & Assoc’d Press, *U.S. Likely to Seek Death Penalty for Sept. 11 Terror Suspects*, FOXNEWS.COM, Nov. 13, 2009, <http://www.foxnews.com/politics/2009/11/13/self-proclaimed-sept-mastermind-face-trial-ny/>.

188. Benjamin Weiser, *Judge Who Gets Terror Case May Be Decided by the Spin of a Wheel*, N.Y. TIMES, Nov. 28, 2009, at A15.

189. Benjamin Weiser, *A Prosecutor of a 9/11 Case Who Is Likely to Try Another*, N.Y. TIMES, Jan. 13, 2010, at A23.

complex criminal cases” involving terrorism, has been prepared by the Federal District Court in Manhattan.¹⁹⁰

But as quickly as the Obama Administration announced the capital trials would occur in the Federal Court for the Southern District of New York—located blocks from Ground Zero in Manhattan—the Administration has appeared to reverse course.¹⁹¹ The trials now appear headed to the Southern District of New York, the Eastern District of Virginia, the Western District of Pennsylvania, or worse, a military commission at Guantanamo Bay.¹⁹² The decision is a response to political and popular upheaval¹⁹³ and logistical concerns, including an estimated security cost of over \$200 million.¹⁹⁴ The Obama Administration has recognized that all of these factors were perhaps inadvertently diminished prior to the initial announcement in November 2009.¹⁹⁵

Whether or not the New York City Terror Trials result in America’s first capital conviction in the War on Terror, this Comment argues that the federal courts have become the only legitimate source for criminal justice and capital punishment in the War on Terror. In the last ten years, the Bush and Obama Administrations have secured hundreds of federal convictions against those once labeled enemy combatants and now held as unprivileged enemy belligerents. The reality of criminal justice in the War on Terror proves that trials through Article III courts are the most advantageous and realistic means of securing a capital conviction against an unprivileged enemy belligerent. This fact, if realized, should quiet the popular shock and dismay surrounding the Obama Administration’s decision to institute the New York Terror Trials.

190. Benjamin Weiser, *For 9/11 Cases, Calling on a Short List of Veteran Lawyers*, N.Y. TIMES, Dec. 8, 2009, at A29.

191. Mike Allen & Kasie Hunt, *White House Drops Plan for New York City Terror Trials*, POLITICO.COM, <http://www.politico.com/news/stories/0110/32243.html>. It should be noted that in an interview with Katie Couric, President Obama stated he had not yet decided if the New York Terror Trials would be moved. Sweet, *supra* note 172.

192. See Scott Shane & Benjamin Weiser, *U.S. Drops Plan for a 9/11 Trial in New York City*, N.Y. TIMES, Jan. 30, 2010, at A1.

193. *Id.*

194. Al Baker, *Security for Terrorism Trial Estimated at \$200 Million a Year*, N.Y. TIMES, Jan. 7, 2010, at A25.

195. See Jodi Kantor & Charlie Savage, *After 9/11 Trial Plan, Holder Hones Political Ear*, N.Y. TIMES.COM, Feb. 15, 2010, <http://www.nytimes.com/2010/02/15/us/politics/15holder.html?pagewanted=all>.

Conclusion

Thus far, no one detained by the United States in its War on Terror has been successfully prosecuted for capital crimes. While in the future this could change, given the institution of capital charges against the five suspected September 11th masterminds, this Comment predicts that no successful or constitutional capital prosecution of an unprivileged enemy belligerent will ever take place through courts-martial proceedings or military commissions. The constitutional infirmities arising from the term unprivileged enemy belligerent and lack of procedures utilized by current military commissions fail to meet the standards for due process and reliable sentencing as mandated by the Fifth and Eighth Amendments.

Instead, and as recent developments prove, the capital prosecution of detainees held in the War on Terror must take place in front of federal courts. By default, the Executive has been forced to reach this conclusion as a result of the Bush and Obama Administrations' failure to create constitutionally adequate military commissions or comply with the terminology of the Rules of War.¹⁹⁶

This problem, however, is obviated by the Obama Administration's decision to seek capital charges against the six detainees through an Article III court. In front of a federal court, the six September 11th co-conspirators no longer stand as unprivileged enemy belligerents. Instead, the defendants have been bestowed the full panoply of rights afforded by the Constitution to all persons accused of a criminal charge in an Article III forum. The Obama Administration has thus realized the ironic reality that the label unprivileged enemy belligerent must be repudiated to secure America's first capital conviction in the War on Terror. In fact, the Constitution requires nothing less when the government seeks to extinguish an individual's life—no matter how they are labeled or their crimes defined.

196. See Honigsberg, *supra* note 10, at 9.

