HARVARD LAW SCHOOL
NATIONAL SECURITY JOURNAL

ONLINE ARTICLE

A Foreign Organ: Courts-Martial as an Alternative to the 9/11 Military Commissions

Benjamin Sonnenberg*

* J.D., Harvard Law School, 2024. Benjamin Sonnenberg graduated from Harvard Law School in 2024 and is currently a litigation associate at Cravath, Swaine & Moore LLP.

Table of Contents

INTRODUCTION

Almost 3,000 Americans died on September 11, 2001.[1] In response to the disaster, and shortly following the U.S.-led invasion of Afghanistan, President Bush issued a Military Order pertaining to the "detention, treatment, and trial" of non-citizens in the War on Terror.[2] This Order established the modern system of military commissions at the Guantanamo Bay Naval Base (GTMO). The Order authorized trial by military tribunal for non-U.S. citizens who were members of Al-Qaeda or engaged in acts of international terrorism.[3] Almost immediately, the tribunals came under intense scrutiny because they provided defendants with few legal protections, especially in comparison to those provided by courts-martial.[4] Academics and politicians from across the spectrum raised moral and legal concerns.[5] The new system was not exposed to Congressional debate. A senior Justice Department official said, "People here are imbued with the idea that [9/11] shouldn't be allowed to happen again, and that has made us impatient."[6]

In 2006, the Supreme Court struck down the tribunals as unconstitutional in *Hamdan v. Rumsfeld*, finding that they were not expressly authorized by Congress, violated the Uniform Code of Military Justice (UCMJ), and did not satisfy the Geneva Conventions.[7] Rather than abandon the tribunals, Congress passed the 2006 Military Commission Act (MCA or "Act"), establishing the Court of Military Commission Review.[8] The 2006 Act, and the 2009 Act that superseded it, sought to cure the legal deficiencies the Supreme Court highlighted in *Hamdan* by enhancing an accused's right to counsel, prohibiting evidence obtained by torture, and restricting use of a defendant's incriminating statements.[9] The Supreme Court has not overturned the MCA and it remains in effect today.

Yet, the military commissions have largely failed. The tribunals have not succeeded in their most basic aim: bringing terrorists to justice. Of the roughly 780 men detained at GTMO since the prison opened in 2002, only about 30 have been charged. All in all, the commissions have procured a mere eight convictions, most of which were gained through plea agreements.[10] Human rights groups have never stopped criticizing the tribunals forfalling below due process standards, and continued controversy related to the use of torture- derived evidence has caused

---

[1] *See About the 9/11 Memorial & Museum,* 9/11 MEMORIAL & MUSEUM, https://www.911memorial.org/about (last visited Apr. 17, 2022).
[2] *See* Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 FED. REG. 222 (Nov. 16, 2001).
[3] *Id.*
[4] *See* Letter from Timothy H. Edgar, Legislative Counsel, ACLU, to Interested Persons (Nov. 29, 2001), https://www.aclu.org/other/memorandum-congress-president-bushs-order-establishing-military-tribunals.
[5] *See* Robin Toner and Neil Lewis, *A Nation Challenged: Civil Liberties; White House Push on Security Steps Bypasses Congress*, N.Y. TIMES, Nov. 15, 2001, at A1.
[6] *Id.*
[7] *See Hamdan v. Rumsfeld,* 548 U.S. 557, 567 (2006).
[8] *See* Military Commissions Act of 2006, 10 U.S.C. §§ 948-949 (2006).
[9] *See Military Commissions History*, OFFICE OF MILITARY COMMISSIONS, https://www.mc.mil/aboutus/militarycommissionshistory.aspx (last visited Apr. 17, 2022).
[10] *See* Steve Vladeck, *It's Time to Admit That the Military Commissions Have Failed*, LAWFARE (Apr. 16, 2019),https://www.lawfareblog.com/its-time-admit-military-commissions-have-failed; *The Guantánamo Docket*, N.Y. TIMES (Apr. 21, 2025), https://www.nytimes.com/interactive/2021/us/guantanamo-bay-detainees.html.

friction within the Executive Branch.[11] As discussed below, federal courts continue to splinter over complex legal issues related to non-citizen detainees and their rights, and the need for a reliable and legitimate system of adjudication has become increasingly apparent.

This article argues that the military justice system is the answer. Part I will introduce the current military commission process for enemy combatants and address its deficiencies. Specifically, the commissions routinely suffer from bureaucratic delays, are ineffective in securing convictions, are unfair and susceptible to improper political influence, and continue to offer comparatively weaker legal protections and due process rights to the accused.

Part II will compare these deficiencies to the advantages offered by the military justice system. It argues that the courts-martial are ideal for both addressing the legal issues left unresolved by *Hamdan*, as well as the human rights concerns that have plagued the military tribunals from their inception. Among other points, this section will argue that overlapping jurisdiction of the courts-martial and commissions renders the latter duplicative, that the military justice system enjoys a larger body of established case-law (as well as general legitimacy), that it is more efficient, and that the military system is a good middle-ground between the commissions and the fullest range of protections offered by federal trial courts. After discussing potential downsides, this section will analyze statutory and rule changes that are necessary for the military justice system to undertake this new task.

Finally, Part III will evaluate the proposal by applying the military justice approach to a hypothetical scenario: U.S. involvement in the Russo-Ukrainian War. The article will show the legal, logistical, and propaganda benefits of using the military justice system in lieu of the commissions. In short, courts-martial would provide the same procedural safeguards to Russian detainees as they would to American soldiers, satisfying Geneva Convention requirements. In line with Congressional commands, their use would enable prosecution of Russians without bringing them to U.S. soil. Finally, it would be a powerful moral victory to juxtapose Russian war crimes with American due process. Weighing the pros and cons, this article concludes that the military justice system should have primary responsibility for trying enemy combatants.

I. THE FAILURE OF THE MILITARY COMMISSIONS

Three major problems account for the failure of the military commissions: bureaucraticdelays and inefficiency, a lack of judicial independence, and a lack of due process protections.Each will be discussed in turn.

A. The Military Commissions Suffer from Bureaucratic Delays and Inefficiency.

According to the 2009 MCA, the goal of the military commissions is to "try alien unprivileged enemy belligerents for violations of the law of war and other offenses triable by military commission."[12] When the commissions were first established, legal commentators and

[11] *See* Carol Rosenberg, *Biden Administration Rejects Use of Testimony Obtained From Torture in Guantánamo Trial*, N.Y. TIMES (Feb. 1, 2022), https://www.nytimes.com/2022/02/01/us/politics/torture-guantanamo-terrorism-biden.html.

[12] *See* Military Commissions Act of 2009, 10 U.S.C. §§ 948-949 (2009).

Bush administration officials believed the tribunals would result in speedy convictions due to the lack of procedural safeguards.[13] Almost two decades later, these predictions have proven false. In the sixteen years after the MCA was first passed, the commissions have yielded only eight convictions. Of these, two have been overturned completely or partially.[14] The cases against the suspected perpetrators of 9/11, the very attack that led to the commissions, remain mired in endless pre-trial proceedings.[15] Issues over the admissibility of torture-derived evidence, CIA refusals to hand over information to the defense counsel, and logistical constraints (many personnel must commute from the Pentagon to GTMO) have stymied the commissions.[16] Worse yet, the extreme delays mean that a case may start and end with a completely different set of judges and attorneys. In 2020, veteran defense lawyer James Harrington, who started representing an alleged 9/11 plotter in 2012, retired for health reasons. Because his successor needed a security clearance and time to read through eight years of briefs and transcripts, the case remains in limbo.[17] In short, due to delays and general inefficiency, the military commissions have not succeeded in their basic goal of bringing terrorists to justice.

B. The Military Commissions Suffer from a Lack of Judicial Independence.

In the words of Dwight Sullivan, former military commissions Chief Defense Counsel, "the hallmark of law is to have a neutral system."[18] The commissions' founding documents are ostensibly committed to fairness. The 2009 MCA mentions "fair" or "fairness" ten times.[19] The 2019 Manual for Military Commissions directs the military judge to exclude evidence that may lead to "unfair prejudice," and entrusts the judge with the responsibility for ensuring that proceedings are conducted "in a fair. . . manner."[20] Fairness, independence, and impartiality are rooted in modern conceptions of the rule of law, as recognized by the Geneva Conventions. Article 75(4) requires that "[n]o sentence may be passed . . . except pursuant to a conviction pronounced by an impartial and regularly constituted court."[21]

Unfortunately, the military commissions are not independent for three reasons: (1) military commission trial judges have no fixed terms and can be reassigned by the military at will; (2) trial judges often have conflicts of interest that undermine their neutrality; and (3) the proceedings sufferfrom strong political influences that affect impartiality and fairness. First, military commission judges have no fixed terms under the 2009 MCA or Manual for Military Commissions.[22] As a result, unlike federal judges, military judges can be reassigned without cause by the chief judge, even before jurors have been assembled. This has occurred several

---

[13] Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*,38 CAL. W. L. REV. 433, 434 (2002).
[14] TOWARDS THE CLOSURE OF GUANTANAMO, INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 10 (2015).
[15] *See* Carol Rosenberg, *The 9/11 Defendants Were Captured Two Decades Ago. Why Hasn't a Trial Started?,* N. Y. TIMES (Oct. 21, 2024), https://www.nytimes.com/2024/10/21/us/politics/9-11-defendants-trial.html.
[16] *Id.*
[17] *See* Carol Rosenberg, *Judge Excuses 9/11 Defense Lawyer and Postpones Torture Testimony*, N.Y. TIMES (Feb.19, 2020), https://www.nytimes.com/2020/02/19/us/politics/sept11-defense-lawyer-guantanamo.html.
[18] Interview with Dwight Sullivan, former military commissions Chief Defense Counsel (Apr. 15, 2022).
[19] *See* Military Commissions Act of 2009, *supra* note 12.
[20] *See* U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS, at pt. 2, 40, 67 (2019).
[21] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 75(4), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].
[22] David J. R. Frakt, *Applying International Fair Trial Standards to the Military Commissions of Guantanamo*, 37 S. ILL. U. L.J. 551, 565 (2013).

times, leading to substantial delays.[23] If the chief does not choose to replace a military judge, it will be difficult toremove them because, as the Court of Appeals for the Armed Forces (CAAF) recognized, "there is a strong presumption that a [military] judge is impartial, and a party seeking to demonstrate bias must overcome a high hurdle."[24] While judges are required to recuse themselves whenever their impartiality may be in doubt, they alone have the right to make this decision and it is rarely exercised.[25]

Second, conflicts of interest continue to pose problems for military commission judges. Defense attorneys have argued that the judges have a financial incentive to avoid recusing themselves because they could suffer as much as a 20 percent reduction in pay by leaving the bench.[26] Additionally, commission judges may be conflicted by other positions they hold. In *In re Al-Nashiri*, the D.C. Circuit found that there was "an intolerable cloud of partiality" as a result of Judge Colonel Vance Spath's pursuit of employment as a DOJ immigration judge, even while the Attorney General was prosecuting a defendant in one of Spath's cases.[27] Spath did not disclose this crucial piece of information to the parties. As the court put it, "[t]he challenge Spath faced, then, was to treat the Justice Department with neutral disinterest in his courtroom while communicating significant personal interest in his job application."[28] All of Spath's orders were vacated, along with two years of pretrial proceedings.[29]

Finally, the military commissions have been affected by political influences that have undermined impartiality and fairness. Because many of the cases involve high-profile alleged terrorists like accused 9/11 mastermind Khalid Sheikh Mohammed, Executive Branch officials often made statements that threaten to compromise the trials or taint the jury.[30] For example, during her sworn testimony before the Senate Select Committee on Intelligence, CIA director Gina Haspel asserted that Khalid Sheikh Mohammad was the mastermind of the 9/11 attacks, which was later endorsed by President Trump through a series of tweets.[31] In recent years, unlawful influence claims have only increased. Between 2013 and 2018, the charge of unlawful influence was raised at least 118 times.[32] Considering the small number of individuals being tried at any given time, this is a concerning statistic.

Evidentiary issues and government monitoring have also revealed conflicts of interest and

---

[23] *Id.* at 564.
[24] *See United States v. Quintanilla*, 56 M.J. 37, 44 (C.A.A.F. 2001).
[25] *See* U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS, at pt. 2, 89 (2019).
[26] Warren Richey, *Guantánamo judge refuses to step aside*, THE CHRISTIAN SCIENCE MONITOR, July 17, 2012.
[27] *See In re Al-Nashiri*, 921 F.3d 224, 237 (D.C. Cir. 2019).
[28] *Id.* at 236.
[29] *See* Sarah Grant, *Summary: D.C. Circuit Vacates Military Judge's Rulings in Al-Nashiri*, LAWFARE (Apr. 16, 2019), https://www.lawfareblog.com/summary-dc-circuit-vacates-military-judges-rulings-al-nashiri.
[30] *See* Brenna Gautam, *Last Week at the Military Commissions: Undue Influence and Other Issues in the 9/11 Case*, LAWFARE (Aug. 2, 2018), https://www.lawfareblog.com/last-week-military-commissions-undue-influence-and-other-issues-911-case (referencing tweets by President Trump regarding CIA Director Gina Haspel's potential unlawful influence over Khalid Shaikh Mohammad's trial, which "amounted to endorsement of Haspel's comments by the Commander in Chief.").
[31] *See supra* note 30.
[32] ADAM. R. PEARLMAN, THE NATIONAL SECURITY INSTITUTE, UNTANGLING THE GUANTANAMO MILITARY COMMISSIONS: HOW MODEST REFORMS CAN RESOLVE PROCEDURAL DELAYS TO JUSTICE AND PROTECT AN IMPORTANT WAR POWER (Apr. 2019).

political interference. Defense attorneys have repeatedly complained of restrictions placedon them designed to prevent their access to evidence of defendants' torture, as well as of "government misconduct relating to . . . the lawyer-client relationship."[33] FBI investigations of defense teams and monitoring of attorney-client communications have further raised questions about agency meddling.[34] In sum, the military commissions suffer from a lack of judicial independence.

C. The Military Commissions Offer Insufficient Due Process Protections.

The biggest and most intractable issue facing the military commissions is the lack of due process protections. While the 2009 MCA expanded the rights offered to detainees by the 2006 Act,[35] the military commissions continue to offer meager legal protections compared to the military or federal courts. This is partly the fault of the federal courts themselves. Two years after *Hamdan*, the Supreme Court in *Boumediene v. Bush* held that enemy combatants at GTMO were entitled to the privilege of habeas corpus to challenge their detentions.[36] Over a decade of subsequent case law has done little to clarify the remaining ambiguities surrounding the scope of due process afforded to enemy combatants. In *Kiyemba v. Obama*, the D.C. Circuit concluded that due process does not apply to aliens without property or presence in the U.S.[37] This ruling seemed to conflict with *Boumediene*'s expansion of due process protections, and in 2019, the D.C. Circuit narrowed *Kiyemba* in *Qassim v. Trump*, finding that the former only applied to a specific due process right but not others.[38] In *Al Hela v. Trump*, however, the court later revived *Kiyemba*, finding that it foreclosed the application of due process at GTMO.[39] Even assuming due process applies, courts have upheld practices limiting the scope of protections afforded to detainees. In *Ali v. Trump*, the court found that a detainee's detention formore than 17 years did not violate due process, and that continued detention was similarly constitutional.[40] Despite attempts to clarify the law, splits between district courts and courts of appeals remain common.[41] In short, the due process rights afforded to detainees are uncertain and rest on shaky ground.

Against this government-friendly legal background, the military commissions offer scant procedural and substantive protections, further undermining their legitimacy. The issues in this

---

[33] Kasey McCall-Smith*, How Torture and National Security Have Corrupted the Right to Fair Trial in the 9/11 Military Commissions*, 27 J. CONFLICTS & SECUR. L. 83, 114 (2022).
[34] Def.'s Mot. to Compel the Production of Information Related to the Monitoring and/or Collection of Attorney-Client Privileged Information at 1, *U.S. v. Khalid Shaikh Mohammad*, 280 F.Supp.3d 1305 (Military Commissions Trial Judiciary 2014).
[35] *See supra* note 9. Specifically, the 2009 MCA enhanced the accused's rights to counsel, including the right to request specific counsel and have counsel with expertise in capital cases. The Act also nominally prohibited the use of torture-derived evidence.
[36] *Boumediene v. Bush*, 553 U.S. 723, 728 (2008).
[37] *Kiyemba v. Obama*, 555 F.3d 1022, 1026 (D.C. Cir. 2009).
[38] *Qassim v. Trump*, 927 F.3d 522, 528 (D.C. Cir. 2019).
[39] *Al Hela v. Trump*, 972 F.3d 120, 141 (D.C. Cir. 2020).
[40] *Ali v. Trump*, 959 F.3d 364, 373 (D.C. Cir. 2020).
[41] *See, e.g.*, Jacob Pagano, *First Circuit Expands Due Process Rights of Noncitizens at Immigration Bond Hearings*, LAWFARE (Sept. 17, 2021), https://www.lawfareblog.com/first-circuit-expands-due-process-rights-noncitizens-immigration-bond-hearings; Steve Vladeck, *The Supreme Court Goes to War:* Hamdi*,* Padilla*, and* Rasul *at 10*, JUST SECURITY (June 27, 2014), https://www.justsecurity.org/12260/supreme-court-war/; Jennifer L. Milko, *Separation of Powers and Guantanamo Detainees: Defining the Proper Roles of the Executive and Judiciary in Habeas Cases and the Need for Supreme Guidance*, 50 DUQ. L. REV. 173, 176 (2012).

area can be summarized as follows: (i) the commissions' evidentiary rules do not require Miranda or Miranda-type warnings, (ii) hearsay (as well as hearsay within hearsay) is admissible, (iii) coerced statements are allowed and torture-derived evidence has continued to be accepted, (iv) and the commissions do not protect against unreasonable searches and seizures. Each of these will be discussed in turn.

i. No Miranda Warnings

First, military commission evidentiary rules do not require Miranda warnings. Instead, according to Military Commission Rule of Evidence No. 304, a statement may be admitted if the military judge finds that the "totality of the circumstances" renders the statement reliable and that it was made during "military operations at the point of capture."[42] Additionally, if the "interests of justice" would be served by the statement's admission into evidence, the judge can admit it.[43] While the Miranda warnings have been called a hallmark of American democracy, many have argued that the warnings could hamper intelligence-gathering if applied to the detainees. This fear has proven unfounded, however, as foreign terrorists have repeatedly waived rights even when given in order to incriminate other operatives or even themselves.[44] This raises concerns that not giving Miranda warnings serves to ensure that suspected terrorists do not seek counsel or avoid self-incrimination. Concerns about the lack of protection against this risk are deepened by 10 U.S.C. § 949a, which allows statements to be admitted evenif obtained through "alleged coercion or compulsory self-incrimination."[45] Rules such as these, combined with their impact on American credibility and the legality of the proceedings themselves,[46] suggests that the lack of Miranda warnings and protection against self-incrimination undermine the rule of law and administration of justice.

ii. Permissive Hearsay Rules

The commissions' rules on hearsay likewise disadvantage the accused, with the result that defendants are less able to confront adverse witnesses. Under 10 U.S.C. § 949a(b)(3)(D), military commissions may admit hearsay evidence that is inadmissible in a military or federal court.[47] Unlike in the federal system, hearsay evidence may generally be admitted if the prosecutor announces his intention to use the evidence and the judge finds that the statement is probative and serves the "interests of justice."[48] Further, experts on detainee law have argued that the Confrontation Clause of the Sixth Amendment, which bars hearsay statements of unavailable witnesses, does not apply to the military commissions.[49] This is especially problematic in cases involving "hearsay upon hearsay," or written statements drafted outside of court that summarize other out-of-court statements. These statements are admissible under the MCA, but with fewer

---

[42] *See* U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS, at pt. III, 8 (Rule 304).
[43] *Id.*
[44] *See* Mary B. McCord, *Federal Prosecution is a Viable Option for Enemy Combatants*, LAWFARE (July 24, 2017),https://www.lawfareblog.com/federal-prosecution-viable-option-enemy-combatants.
[45] 10 U.S.C. § 949a (2009).
[46] *See* Frakt, *supra* note 22, at 596-597.
[47] 10 U.S.C § 949a(b)(3)(D).
[48] U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS, at pt. 3, 57 (rule 803(b)).
[49] Christina Frohock, *Military Justice as Justice: Fitting Confrontation Clause Jurisprudence into Military Commissions*, 48 NEW ENGLAND L. REV. 255 (2014).

procedural safeguards than exist under the UCMJ, which governs the courts-martial.[50]

While proponents of the military commissions say it is necessary to have lax hearsay rules (as one official put it, "[w]e can't issue a subpoena to a goat herder in Pakistan"), they haveled to prosecutorial abuses.[51] For example, in the trial of accused USS *Cole* bomber Al-Nashiri, prosecutors successfully admitted sixty-six pieces of hearsay evidence from almost 100 absent witnesses, a figure unheard of in federal or state courts.[52] While the use of hearsay is not inherently problematic,[53] it is concerning that the most permissive hearsay rules are being applied to individuals facing the most serious and permanent of punishments. The permissive hearsay rules undermine the military commissions as impartial and fair courts of law.

iii. Issues over Torture-Derived Evidence

The use of coerced and torture-derived evidence also continues to be an issue. As mentioned, military commission rules permit statements to be admitted even if they were potentially coerced, and statements made "at the point of capture," when the military'spower over an individual is arguably greatest, are acceptable.[54] Beyond this, torture-derived evidence, which is nominally disallowed, has continued to find its way into the military commissions, causing embarrassment and friction within the Executive Branch. On May 18, 2021, a military judge ruled in Al-Nashiri's case that, even though there was credible evidence that many of the defendant's statements had been made under torture, a judge could consider such statements in interlocutory motions.[55] This decision came after chief prosecutor Brigadier General Mark Martins argued that torture-derived evidence could be used in pre-trial proceedings, despite the U.S. being a signatory to the United Nations Convention Against Torture.[56] While the Biden administration later reversed course and stated that none of Al- Nashiri's statements made while in CIA custody were admissible, some observers have criticized the government for not foreclosing the possibility that future administrations may permit evidence garnered through torture. Instead, the DOJ left the decision to the military judges, a concerning outcome

---

[50] *See, e.g.,* Jennifer Trahan, *Military Commission Trials at Guantanamo Bay, Cuba: Do They Satisfy International and Constitutional Law*, 30 FORDHAM INT'L L.J. 780 (2007); AMNESTY INT'L, *Justice delayed and justice denied? Trials under the Military Commissions Act*, AI Index AMR 51/044/2007 (Mar. 22, 2007).

[51] Paul H. Hennessy, *Prosecution by Military Commission versus Federal Criminal Court: A Comparative Analysis*, 75 FED. PROBATION 27, 29 (2011).

[52] *See* Lauren Bateman, *8/5 Motions Hearing #3: Cole Photographs and the Yemen Friendship Agreement*, LAWFARE (Aug. 6,2014), https://www.lawfareblog.com/85-motions-hearing-3-cole-photographs-and-yemen-friendship-agreement; Carol Rosenberg, *USS Cole lawyers spar over hearsay evidence at Guantánamo war court*, MIAMI HERALD (Feb. 21, 2014), https://www.miamiherald.com/news/nation-world/world/americas/article1960648.html; Carol Rosenberg, Gu*antánamo Judge Weighing Hearsay Statements in U.S.S. Cole Bombing Case*, N.Y. TIMES (Oct. 29, 2022), https://www.nytimes.com/2022/10/29/us/politics/uss-cole-bombing-case.html.

[53] Common law and the Federal Rules of Evidence recognize that "under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available." *See, e.g.*, Fed. R. Evid. 803.

[54] M.C.R.E. 304 (a)(3).

[55] Ruling on Def.'s Mot. to Strike AE 353V for Inclusion of Statements and Derivative Evidence Obtained by Torture or Cruel, Inhuman, or Degrading Treatment at 6, *U.S. v. Al Nashiri* (Military Commissions Trial Judiciary 2021).

[56] *See* Carol Rosenberg, *Chief Guantánamo Prosecutor Retiring Before Sept. 11 Trial Begins*, N.Y. TIMES (July 9, 2021), https://www.nytimes.com/2021/07/09/us/politics/chief-guantanamo-prosecutor-retiring.html.

considering their past willingness to consider torture-derived evidence.[57]

iv. No Protection Against Unreasonable Searches and Seizures

Finally, unlike in the federal court system (where the protections of the Fourth Amendment apply), the military commissions do not protect against unreasonable searches and seizures. Under 10 U.S.C. § 949(b)(3)(A), "[e]vidence seized outside the United States shall not be excluded from trial by military commission on the grounds that the evidence was not seized pursuant to a search warrant or authorization."[58] Supporters of the commissions argue that prosecutors must rely on evidence collected during military or intelligence-gathering missions. Under these conditions, search authorizations are not feasible. While this may be understandable for covert overseas operations requiring split-second decision-making, it does not excuse actions taking place at GTMO itself. For example, guards seized documents belonging to detainee Mustafa al Hawsawi without authorization, even though they were labelled "attorney-client privilege."[59]

This lack of protection against searches and seizures has further undermined the accused's ability to defend himself in court. According to Air Force Captain Michael Schwartz, a 9/11 defense attorney, the intrusion into supposedly privileged documents causes defendants to doubt the confidentiality of their attorney-client relationships and is "negatively affecting our ability to do our job."[60] In sum, the lack of due process protections at Guantanamo further undermines the commissions' legitimacy as fair tribunals. By creating so many due process concerns and delaying the proceedings, the rules also delay justice. These issues underscore the need for an alternative system of justice.

II. THE MILITARY JUSTICE SYSTEM AS AN ALTERNATIVE

In 1957, Justice Hugo Black, writing for the majority in *Reid v. Covert*, summed up the traditional view of courts-martial: "Military law is, in many respects, harsh law which is frequently cast in very sweeping and vague terms. It emphasizes the iron hand of discipline more than it does the even scales of justice."[61] With the advent of the UCMJ, however, and the creation of the Court of Appeals for the Armed Forces (CAAF), the rights given to servicemembers dramatically expanded. A little more than 60 years after *Reid* was decided, the Supreme Court in *Ortiz v. U.S.* extolled the military justice system's "judicial character."[62] It declared that the CAAF "stands at the acme of a firmly entrenched judicial system that exercises broad jurisdiction in accordance with established rules and procedures."[63] Indeed, for a system of justice that must often choose between "good order and discipline" and personal liberties, the

---

[57] *See* Carol Rosenberg*, Biden Administration Rejects Use of Testimony Obtained From Torture in Guantánamo Trial*, N.Y. TIMES (Feb. 1, 2022), https://www.nytimes.com/2022/02/01/us/politics/torture-guantanamo-terrorism-biden.html.
[58] 10 U.S.C § 949(b)(3)(A) (2009).
[59] Tom Ramstack, *Guantanamo guards accused of improper document seizures*, REUTERS (Oct. 24, 2013), https://www.reuters.com/article/us-usa-guantanamo/guantanamo-guards-accused-of-improper-document-seizures-idUSBRE99N11D20131024.
[60] *Id*.
[61] *Reid v. Covert*, 354 U.S. 1, 38 (1957).
[62] *Ortiz v. United States*, 138 S. Ct. 2165, 2180 (2018).
[63] *Id.*

military courts have repeatedly achieved that balance by protecting both national security and the individual soldier.[64]

A leading trial lawyer has argued that the military justice system should try enemy war criminals.[65] So far, these recommendations have not been followed. But the passage of time has only continued to show the wisdom of using the military justice system in lieu of tribunals. Because the military courts render the commission duplicative, have greater legitimacy, are more efficient, are less prone to political interference, and offer greater protections for the accused, the military justice system should replace the military commissions of Guantanamo Bay.

This section will argue that the military courts are well-equipped to handle both the intricate legal issues and human rights concerns explored in the preceding part of this article. In short, the existence of the courts-martial renders the commissions unnecessary: the military justice system enjoys a larger body of established case-law (as well as general legitimacy), is better equipped to thwart political interference, and is a good middle-groundbetween the commissions and the fullest range of protections offered by federal trial courts.

Requiring the federal courts to adjudicate these cases would be unwise because of public policyand logistical concerns. Effectuating this new approach requires only minor Congressional tweaks to the UCMJ or the United States Code, making the military justice system a natural and plausible alternative to the commissions.

A. The Military Justice System Renders the Military Commissions Duplicative.

The military justice system renders the commissions duplicative because the courts already have jurisdiction over many of the same persons subject to trial by a military tribunal. Under 10 U.S.C § 818(a), "[g]eneral courts-martial also have jurisdiction to try any person whoby the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[66] In other words, the same individuals subject to the commissions under the laws of war are subject to the courts-martial. Further, while the military commissions offer fewer procedural and substantive due process protections for the accused, the commissions are in many ways modeled after the military courts. The Manual for Military Commissions is "adapted from the Manual for Courts-Martial" and applies the "procedure and rules of evidence applicable in trials by general courts-martial" except where required by the "unique circumstances" of military andintelligence operations, or by other practical needs.[67] The two systems are also comparable in a number of respects: similar types of punishment are authorized; military officers serve as judges and attorneys; a majority of jurors must agree on conviction; and a death sentence

[64] *See, e.g., United States v. Barry*, 78 M.J. 70, (C.A.A.F. 2018) (concluding that the appellant had met his burden to show senior Navy JAG officials committed unlawful influence in his criminal case); *United States v. Campbell*, 41 M.J. 177 (C.M.A.1994) (finding a urinalysis to not be a valid inspection because its purpose was to obtain a criminal conviction rather than ensure good order and discipline); *United States v. Matthews*, 16 M.J. 354 (C.M.A. 1983) (finding that the death penalty was not available for a murder and rape conviction because "[t]here is no military necessity" to distinguish between sentencing procedures in courts martial and those in capital cases in civilian courts).

[65] Tara Lee, *American Courts-Martial for Enemy War Crimes*, 33 U. BALT. L. REV. 49, 67 (2003).

[66] 10 U.S.C § 818(a).

[67] *See* U.S. DEP'T OF DEFENSE, *Foreword* to MANUAL FOR MILITARY COMMISSIONS (2019).

requires a unanimous vote.[68] Because numerous procedures and rules are common to both systems, and because the military courts already have jurisdiction over many of the individuals tried by the tribunals, the courts-martial can replace the military commissions without undue disruption.

B. The Courts-Martial Have a Larger Body of Practice and Greater Legitimacy.

The lack of precedent for commissions makes them inefficient and error prone. "It was a lot harder to set up a justice system than anyone would think," according to Dwight Sullivan. "As a common law lawyer, I was used to certain ways of doing things. But everything in the commissions was a question of first impression."[69] Indeed, because of the relative newness of the military commissions, there is not an established body of practice or traditions to draw on. This contributes to the commissions' overall inefficiency because legal issues must constantly be resolved for the first time, leading to a greater chance of error and reversal by the federal courts.[70] By contrast, the courts-martial have a larger body of practice that has evolved over seventy years of post-UCMJ case law. In comparison to the small number of extended trials conducted by the military commissions, the courts-martial have heard thousands of cases; CAAF in particular has held hundreds of trials over the past decade alone, ontopics ranging from freedom of speech and capital punishment to unlawful command influence and religious liberty.[71] This rich body of practice ensures greater efficiency, a higher degree of competence, and a system better able to react to novel questions of law.

This, in turn, lends greater legitimacy to the military courts. As mentioned, the SupremeCourt in *Ortiz* praised the military justice system's "judicial character" and "established rules and procedures," authorizing Supreme Court appellate review even though the CAAF is not an Article III court.[72] This was not the first time the Court praised the military justice system. Following a string of reforms in the 1970s and 80s, judges pushed for CAAF to develop doctrines that would make the system fairer. It worked. In 1994, the Court upheld the system of non-tenured military judges.[73] Justice Ginsburg in a concurring opinion wrote that the decision "upholds a system of military justice notably more sensitive to due process concerns than the one prevailing through most of our country's history."[74] Transferring authority over enemy belligerents to the military justice system would mean choosing a system with a more robust body of practice and greater legitimacy—two things sorely lacking today.

C. The Military Justice System Is More Efficient Than the Military Commissions.

Compared to the slow pace of the military commissions, the military justice system is

---

[68] *Comparison of Rules and Procedures in Tribunals that Try Individuals for Alleged War Crimes*, OFFICE OF MILITARY COMMISSIONS, https://www.mc.mil/aboutus/legalsystemcomparison.aspx (last visited Apr. 26, 2022).
[69] *See* Interview with Dwight Sullivan, *supra* note 18.
[70] James E. Baker and Laura Dickinson, *The Future of the US Military Commissions: Legal and Policy Issues*, JUST SECURITY (May 8, 2018), https://www.justsecurity.org/55865/future-u-s-military-commissions-legal-policy-issues/.
[71] UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES, REPORT OF THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES—OCTOBER 1, 2020, TO SEPTEMBER 30, 2021 (2021).
[72] *See Ortiz*, 138 S. Ct. at 2170.
[73] Note, *Prosecutorial Power and the Legitimacy of the Military Justice System*, 123 HARV. L. REV. 937, 941 (2010).
[74] *See Weiss v. United States*, 510 U.S. 163, 194 (1994) (Ginsburg, J., concurring).

speedier and more efficient.[75] One reason for this difference is that Rule 707(a) ("Speedy trial") requires that the "accused shall be brought to trial" within 120 days after being charged.[76] The Rule is strictly enforced and failure to comply results in dismissal of affected charges. Additionally, CAAF employs the four-factor *Barker* test to determine if the prosecution has been reasonably diligent in bringing charges to trial. These factors are the length of the delay, the reasons for the delay, whether appellant made a demand for a speedy trial, and prejudice to the appellant.[77] CAAF has also repeatedly held that a deliberate attempt to delay trial in order to hamper the defense "should be weighted heavily against the government."[78] Though some criticize the military justice system for providing exceptions to the 120-day rule, pretrial confinement generally does not go beyond 350 days—a fraction of the time commission defendants spend in their cells awaiting trial.[79] The speed of the military justice system is a major advantage over the expensive lethargy of the tribunals.

D. The Military Justice System Is More Responsive to Issues of Political Interference.

Compared to the military commissions, the courts-martial are more responsive to unlawful command influence (UCI).[80] In *United States v. Boyce*, the mere appearance of UCI resulted in reversal in a sexual assault case. In that case, which concerned UCI by the Secretary of the Air Force over referral of the appellant's criminal case to a court-martial, the court concluded that knowledge or intent to unlawfully influence was not relevant. Rather, the key to the analysis was merely effect.[81] In *United States v. Salyer*, the court found that the Government's successful attempt to disqualify a military judge after he made an unfavorable ruling created an appearance of UCI requiring dismissal.[82] Similarly, in 2013, Navy Judge Commander Marcus Fulton ruled during two pretrial hearings that comments by made President Obama regarding the need for harsher sentences in sexual assault cases constituted UCI. Fulton held that if found guilty, the defendants would receive lesser sentences.[83] As these examples show, the courts-martial more effectively maintain judicial independence than do the military commissions.

Additionally, it is important to recognize that, unlike tribunal judges, who can be reassigned by the Secretary of Defense at will and have no fixed term limit, CAAF judges are civilians who serve for fifteen years.[84] Finally, as noted by Justice Thomas in his *Ortiz* concurrence, CAAF has

---

[75] For example, in FY23, the U.S. Army Court of Criminal Appeals rendered an initial decision in 298 cases with an average processing time of 245 days from receipt of the record of trial to decision. 287 of those cases were issued within 18 months. OFF. OF THE JUDGE ADVOCATE GEN., U.S. ARMY REP. ON MILITARY JUSTICE FOR FISCAL YEAR 2023 1-2 (2023).
[76] *See* U.S. DEP'T OF DEFENSE, MANUAL FOR MILITARY COMMISSIONS, at pt. 2, 64 (Rule 707(a)).
[77] *Barker v. Wingo*, 407 U.S. 514, 530-33 (1972).
[78] *United States v. Reyes*, 80 M.J. 218, 226 (C.A.A.F. 2020).
[79] *United States v. Danylo*, 73 M.J. 183, 185 (C.A.A.F. 2014).
[80] *See* MARINE CORPS JUDGE ADVOCATE DIVISION, COMMAND INFLUENCE 1 (2020) (dividing UCI into two definitions: actual and apparent UCI. Actual UCI is where a commander manipulates the court-martial process toachieve a certain result. Apparent UCI is where the commander's actions cause an "objective, fully informed observer" to have significant doubts about the fairness of the process.).
[81] *See United States v. Boyce*, 76 M.J. 242, 253, 257 (C.A.A.F 2017).
[82] *See United States v. Salyer*, 72 M.J. 415, 417 (C.A.A.F. 2013).
[83] *See* Jennifer Steinhauer, *Remark by Obama Complicates Military Sexual Assault Trials*, N.Y. TIMES (July 13, 2013), https://www.nytimes.com/2013/07/14/us/obama-remark-is-complicating-military-trials.html.
[84] *See* 10 U.S.C. § 942, Art. 142; Eugene R. Fidell, *Ten Years On: Military Justice and Civil Liberties in thePost-9/11 Era*, 56 N.Y.L. SCH. L. REV. 103, 109.

broad "independent authority" to prescribe rules for itself, while the Executive Branch lacks authority to review or modify its decisions.[85] This dynamic, combined with the fact that CAAF judges maybe removed only for neglect of duty, misconduct, or mental or physical disability, makes the military justice system much more independent than the commissions.[86]

E. The Courts-Martial Offer Substantially More Due Process Protections.

Perhaps the single most important advantage the courts-martial have over the military commissions is a wider array of due process protections for the accused. As discussed in the previous section, the commissions do not require Miranda warnings, admit coerced statements, have adopted rules extremely permissive of hearsay, and do not protect against unreasonable searches and seizures. In each of these areas, the military justice system provides a wider array of protections while still preserving good order, discipline, and the nation's security.

The military justice system has more robust protections against self-incrimination, a bedrock precept of criminal procedure intended to preserve the integrity of the judicial system. Article 31 of the UCMJ states that "[n]o person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him."[87] The section further provides that "[n]o statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial."[88] As addressed, the lack of *Miranda* warnings, as well as the admission of coerced statements, are not necessary to garner valuable intelligence from detainees. They also result in procedural delays and potential reversal. The military justice system provides sufficient lawful means for gaining information to be used at trial such as through pre-trial interrogations, depositions, cross-examination, and even plea deals. Maintaining prohibitions against self-incrimination while providing investigators and prosecutors with the tools necessary to do their jobs is yet another reason to prefer the military courts.

The military justice system also includes superior protections against admitting hearsay and the fruits of unreasonable searches and seizures. Under Rule 802, hearsay is admissible only according to the rules of military or federal law.[89] Additionally, unlike the commissions, courts-martial admit hearsay within hearsay only if every part of the statement meets an exception to the rule against hearsay.[90] Because many detainees are facing the death penalty, the most permanent of all punishments, a more restrictive approach to hearsay would be a welcome change.

Furthermore, pursuant to Rules 311, 315, and 317, physical evidence gathered by law enforcement must be obtained through a search authorization, and searches conducted without a warrant are presumptively unreasonable.[91] There is a lessened expectation of privacy in the military justice system which has been traditionally accepted considering that the military is

[85] *See Ortiz*, 138 S.Ct. at 2187 (Thomas, J., concurring).
[86] *See* 10 U.S.C. § 942(c).
[87] 10 U.S.C § 831.
[88] *Id.*
[89] *See* MIL. R. EVID. 802.
[90] *SEE* MIL. R. EVID. 805.
[91] *See* MIL. R. EVID. 311, 315, 317.

necessarily separate from civilian society.[92] Even so, the military courts have worked to maintain a line between what can be seized and what is off-limits to investigators that revolves around notions of nexus and privacy which would be familiar to civilian courts. For example, in *United States v. Nieto*, CAAF concluded that a military magistrate did not have probable causeto seize the accused's laptop because there was insufficient nexus between the alleged crime and the item in question.[93] In *United States v. Maxwell*, CAAF found the accused had a reasonable expectation of privacy in emails he sent and received on a computer subscription service. The court also found that the good-faith exception for unlawful searches did not apply and that the fruits of the unlawful seizure were inadmissible.[94] Compared to the military commissions, the military justice system has a workable standard and documented track record of distinguishing between what is private and privileged and what is subject to seizure.

F. The Federal Courts Are Not a Better Alternative to the Military Justice System.

While many[95] have argued that the federal courts should replace the tribunals, the military justice system is the better alternative for several reasons. The military justice system offers logistical advantages and relatively fewer circuit splits, and it constitutes a middle-ground between the military commissions and the fullest range of protections offered by the federal courts.

First, if the courts-martial took the place of military commissions, no change in venue would be required. Because GTMO is a military base, it would remain the location of the trials. This approach would also satisfy the many members of Congress who have opposed bringing suspected terrorists onto U.S. soil for trial.[96] If federal courts were given authority to try the detainees in the U.S., it would require a major about-face from Congress—the measure banning the prisoner transfer passed in a 91-to-3 vote.[97] According to Dwight Sullivan, it is possible for federal district judges to oversee trials at Guantanamo, but this would require extensive travel and would likely result in the same delays that plague the military commissions now.[98] It would also carry the potential for conflict if the federal judge tires of the commute. By contrast, military judges, lawyers, and juries are either on-site or have experience traveling to GTMO.

Second, as discussed above, the federal courts have split frequently over the issue of detainee and non-citizen rights. Part of this is due to the size of the federal system, which is comprised of ninety-four trial courts and thirteen intermediate appellate courts. Coupled with the Supreme Court's reticence to hearing more than a limited number of cases in any given term, circuit splits proliferate. By comparison, the military justice system is smaller and has only four trial and four

---

[92] *See United States v. Middleton*, 10 M.J. 123, 126-27 (CMA 1981).
[93] *See United States v. Nieto*, 76 M.J. 101, 107 (C.A.A.F. 2017).
[94] *See United States v. Maxwell*, 45 M.J. 406, 421 (C.A.A.F. 1996).
[95] *See, e.g.*, David Glazier, *Destined for an Epic Fail: The Problematic Guantánamo Military Commissions*, 75 OHIO STATE L.J. 903, 906; NEW YORK CITY BAR ASSOCIATION, CONVERTING GUANTÁNAMO BAY MILITARY COMMISSIONS INTO AN ARTICLE III COURT 1 (2020).
[96] *See* David M. Herszenhorn, *Senate Passes Military Bill That Bans Transfers of Guantánamo Detainees*, N.Y. TIMES (Nov. 10, 2015), https://www.nytimes.com/2015/11/11/us/politics/senate-passes-military-bill-that-bars-transfers-of-guantanamo-detainees.html.
[97] *Id.*
[98] *See* Interview with Dwight Sullivan, *supra* note 18.

intermediate appellate courts (Army, Air Force, Coast Guard, and Navy-Marine Corps). While the military courts would be deciding the same difficult issues as the federal courts are now, the military system may be more likely to achieve legal uniformity. In the event a split among the intermediate appellate courts does occur, CAAF or the Supreme Court can always grant cert and clarify the law.

Finally, while many Americans are opposed to the GTMO military commissions, providing accused 9/11 terrorists with the same procedural protections guaranteed to U.S. citizens is likely to generate enormous controversy in a way applying military law will not.[99] The military courts are a viable middle-ground approach that supplies needed procedural safeguards while balancing public reaction to the same.

This is not to say, of course, that transferring proceedings from the military commissions to the military courts will have no drawbacks. For example, for all their faults, the GTMO tribunals guarantee review by the federal courts. Since the 2006 MCA, the Court of Military Commission Review has been under the authority of the D.C. Circuit, and defendants have the right to apply for writs of certiorari to the Supreme Court(although the Court has not heard a case this way since *Boumediene* in 2008).[100] In the military justice system, most of CAAF's cases are based on discretionary review and CAAF has veto power over access to the Supreme Court.[101] Additionally, many have argued that federal courts have tried individuals for terrorism-related offenses in the past and have an unmatched level of legitimacy.[102] Finally, it bears noting that courts-martial have a relative lack of experience trying terrorists.

Ultimately, however, these issues do not outweigh the aforementioned benefits. The marginal benefit afforded by the vanishingly small possibility of Supreme Court review does not justify continued use of commissions. True, federal courts enjoy a strong sense of legitimacy among the accused, the public, and other stakeholders, but so too do the military courts. As for the relative inexperience in trying terrorists, considering all the other benefits—logistical, legal, and political—offered by the military system, this should not be dispositive. The military courts have an established body of practice regarding criminal and international law upon which they can draw when trying foreign terrorists or war criminals.[103]

---

[99] *Senators Lieberman, Collins Introduce Bill to Requirement Intelligence Officials Be Consulted About Arrested Foreign Terrorists,* U.S. SENATE COMMITTEE ON HOMELAND SECURITY & GOVERNMENTAL AFFAIRS, https://www.hsgac.senate.gov/media/christmas-day-threat-prompts-legislation (last visited Apr. 29, 2022) (House Judiciary Committee Chairman Lamar Smith: "Giving terrorists the same rights as American citizens ignores the seriousness of the threat from al Qaeda and other foreign terrorist groups.").

[100] *See* Military Commissions Act of 2009, 10 U.S.C. § 950g (2009).

[101] *See* Eugene R. Fidell, Brenner M. Fissell & Philip D. Cave, *Equal Supreme Court Access for Military Personnel: An Overdue Reform*, 131 YALE L.J. F. 1, 4-5 (2021).

[102] *See, e.g.*, Detlev F. Vagts, *Which Courts Should Try Persons Accused of Terrorism?*, 14 EUR. J. INT'L L. 313,314 (2003); Kevin E. Lunday & Harvey Rishikof, *Due Process Is a Strategic Choice: Legitimacy and the Establishment of an Article III National Security Court*, 39 CAL. W. INT'L L.J. 87, 134 (2008).

[103] Between 2018 and 2024, there have been thousands of court-martial trials across all military branches. *See* JOINT SERV. COMM. ON MILITARY JUSTICE, ANNUAL REPORTS, https://jsc.defense.gov/Annual-Reports/ (last visited May 4, 2025).

G. Necessary Statutory Changes

In order to implement this approach, only a few statutory changes are necessary. As shown, 10 U.S.C. § 818(a) gives the military courts the same jurisdiction to try anyone subject tomilitary tribunals *under the laws of war*. This likely applies only to privileged enemy belligerents. Under 10 U.S.C. § 948a(6), a privileged belligerent belongs to any category enumerated by Article 4 of the Geneva Convention Relative to the Treatment of POWs (in short, the laws of war).[104] According to 10 U.S.C. § 948c, however, the military commissions have jurisdiction over unprivileged enemy belligerents—defined as anyone who is not privileged under Article 4 and who engages in hostilities against the United States.[105] In other words, the military commissions can try individuals *not* subject to the laws of war. As a result, if the military courts are to gain jurisdiction over not only war criminals but unprivileged enemy belligerents (such as 9/11 detainees) as well, Congress need only amend 818(a) to include unprivileged enemy belligerents. Congress may also add unprivileged enemy belligerents to the list of persons subject to the UCMJ under Article 2. If this becomes the case, enemy belligerents could then be tried at military bases, including the existing military base at Guantanamo where most are currently held or can easily be brought.

III. APPLICATION TO HYPOTHETICAL U.S. INVOLVEMENT IN THE RUSSO-UKRAINIAN WAR

This last section will apply what has been discussed to a hypothetical: U.S. involvement in the ongoing war in Ukraine. After resolving the jurisdictional questions, this exercise will reveal the advantages of using the military courts in lieu of commissions to try detainees. Amongother benefits, courts-martial as currently constructed provide the same procedural safeguards to Russian detainees as they would to American soldiers, thus satisfying the relevant Geneva Convention requirements, which are discussed below. In line with Congressional commands, using courts martial would enable prosecution of Russians without bringing them to the U.S. Finally, using military courts in this context would be a powerful moral and propaganda victory that would juxtapose Russian war crimes with American due process in the broader theater of war.

A. The Jurisdictional Basis for Using Courts-Martial to Try Russians

Russia launched a full-scale invasion of Ukraine on February 24, 2022. The war has dominated headlines around the world and debates are raging over how active the United States should be in fighting Putin's military adventurism. As terrifying a prospect as it may be, American military intervention in Ukraine is not far-fetched. President Biden has recently asked Congress for an additional $33 billion of military aid to Ukraine, while Putin continues to warn of "lightning fast" retaliation against any country that dares to interfere.[106] Considering Russia's desperate military and economic situation, Putin may take increasingly risky measures to win the war—even if it means armed confrontation with the United States.[107]

---

[104] *See* 10 U.S.C. §948a(6).
[105] *See* 10 U.S.C. §948c.
[106] The Guardian, *Putin warns of 'lightning fast' retaliation against interference in Ukraine*, YOUTUBE (Apr. 27, 2022), https://www.youtube.com/watch?v=GW8meWAQg6A.
[107] Hal Brands*, A losing and desperate Putin could be terrifying*, AEI (Mar. 18, 2022), https://www.aei.org/op-eds/a-losing-and-desperate-putin-could-be-terrifying/.

Since the start of the war, the Russian Armed Forces have been accused of numerous war crimes, summary executions, rape, and looting.[108] There have been reports of Russian special forces dressed in civilian clothes or in Ukrainian uniforms.[109] According to West Point legal scholar Michael Schmitt, this behavior, as well as other crimes perpetrated by occupying Russian forces, means that some captured Russians are not subject to the laws of war.[110] A scholar has also argued that Russian spies engaged in sabotage can similarly be denied POW status.[111] If so, and assuming they engaged in hostilities against the United States, they would be considered unprivileged enemy belligerents subject to military courts-martial under the changes proposed by this article.[112] Even if they were not deemed unprivileged belligerents, they could be subject to military courts as regular prisoners of war under the UCMJ. It is worth noting that a formal declaration of war is probably unnecessary for captured soldiers to be considered POWs. The Court of Military Appeals (CAAF's predecessor) in *U.S. v. Anderson* expanded "time of war" to include undeclared conflicts like Vietnam.[113] The court later held that "time of war" referred only to formally declared wars for the purposes of certain UCMJ provisions. But this was nullified when Congress passed the 2007 National Defense Authorization Act, which amended sections of the Code to read "[i]n time of declared war or contingency operation."[114] A large-scale undeclared war in Ukraine would likely count as the latter. Thus, viewed as either enemy belligerents or prisoners of war, the military justice system could have jurisdiction to try Russian war criminals-turned detainees.

B. Military Courts and the Russo-Ukrainian War

The Ukraine hypothetical spotlights many of the advantages of this article's proposal. All of the benefits identified in the preceding sections—procedural safeguards and efficient trials—would be present; this means faster, less expensive, fairer, and more impartial trials. Russian detainees accused of serious war crimes or behavior that violates the laws of war could be tried at Guantanamo Bay Naval Station. This would avoid the need to coordinate transfer of detainees to military bases within NATO partner states, while also avoiding the logistical issues of relying on federal judges to commute to and from Guantanamo, which may otherwise be a significant burden.

If the detainee is a prisoner of war, trying them through court-martial satisfies the Geneva Convention in a way military commissions cannot. The Geneva Convention's "principle of assimilation" reflects the understanding that "prisoners of war will be treated on the same terms

---

[108] *See* Brett Forrest, *Human Rights Watch's Evidence of Alleged War Crimes in Ukraine*, WALL ST. J., Apr. 4, 2022.
[109] *See* Chris Koschnitzky and Michael N. Schmitt, *Russian Troops Out of Uniform and Prisoner of War Status*, LIEBER INSTITUTE FOR LAW & LAND WARFARE AT WEST POINT (Mar. 4, 2022), https://lieber.westpoint.edu/russian-troops-out-of-uniform-pow-status/.
[110] *Id.*
[111] *See* Ken Watkin, *Special Forces, Unprivileged Belligerency, and the War in the Shadows*, LIEBER INSTITUTE FOR LAW & LAND WARFARE AT WEST POINT (Mar. 8, 2022), https://lieber.westpoint.edu/special-forces-unprivileged-belligerency-war-shadows/.
[112] *See* 10 U.S.C. § 948a(7).
[113] *U.S. v. Anderson*, 38 C.M.R. 386, 387 (C.M.A. 1968).
[114] *U.S. v. Ali*, 71 M.J. 256, 262 (C.A.A.F. 2012).

as members of the armed forces of the Detaining Power."[115] Applying the same set of laws to the detainees and those guarding them is therefore consistent with both principles of international law as well as ideals of American due process.

This due process would also serve as a powerful propaganda tool in the fight against Russian aggression. Contrasting Russian war crimes and disregard for international law with American due process would be a powerful way to quickly and fairly bring individuals to justice while winning international hearts and minds. Breaking with our traditional reliance on military tribunals for aprocess that better protects individual rights would also powerfully undercut Russian claims that their war is against "Nazism."[116] It would help encourage and bolster pro-peace elements in Russia and its allied states. Finally, it may also encourage neutral countries that so far have been reluctant to take a strong position on the war. In serving these interests, our military courts would be a powerful tool in the fight for peace, while rehabilitating the United States's global image.

CONCLUSION

In Dwight Sullivan's words, the military commissions are a "foreign organ transplantedinto the body of American law."[117] If so, it is clear the body has rejected the transplants. More than two decades since the modern tribunals were established, they have become an anachronism. To Sullivan, the tribunals were created to ensure that otherwise unlawful procedures could survive in the "legal black hole" that was supposedly Guantanamo Bay. After the Supreme Court rejected that vision, the tribunals lost their purpose, but "the system continues on."[118] As the costs of Guantanamo rise ($13 million per prisoner annually), and as issues of legality, legitimacy, and efficiency continue to haunt the trials, efforts to seek a replacement have stalled.[119]

This article has sought to do three things: illustrate and explain the failure of the military commissions, provide an alternative in the form of the military justice system, and apply that alternative to an emerging legal issue of international significance. In a country where due process and the rule of law undergird our identity, and in a time of increasing national security threats, we need a system of adjudication that balances these competing interests. The preamble to the Manual for Courts-Martial embodies this vision: "The purpose of military law is to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States."[120] If the 9/11 commissions are indeed a foreign organ, then the military justice system is exactly what the doctor ordered.

---

[115] INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARY ON THE THIRD GENEVA CONVENTION (2021).
[116] Anton Troianovski, *Why Vladimir Putin Invokes Nazis to Justify His Invasion of Ukraine*, N.Y. TIMES (Mar. 17, 2022), https://www.nytimes.com/2019/09/16/us/politics/guantanamo-bay-cost-prison.html#:~:text=11%2C%202001%2C%20attacks%20—%20paying,years%20after%20the%20George%20W.
[117] Interview with Dwight Sullivan, *supra* note 18.
[118] *Id*.
[119] *See* Carol Rosenberg, *The Cost of Running Guantánamo Bay: $13 Million Per Prisoner*, N.Y. TIMES, Sept. 16, 2019.
[120] *See* JOINT SERVICES COMM. ON MIL. JUST., *Preamble* to MANUAL FOR COURTS-MARTIAL (2019).