

January 2010

Prosecuting the Material Support of Terrorism: Federal Courts, Military Commissions, or Both?

P. Scott Rufener

Follow this and additional works at: <http://scholarship.law.umassd.edu/umlr>

 Part of the [Courts Commons](#), [Jurisdiction Commons](#), and the [Military, War and Peace Commons](#)

Recommended Citation

Rufener, P. Scott (2010) "Prosecuting the Material Support of Terrorism: Federal Courts, Military Commissions, or Both?," *University of Massachusetts Law Review*: Vol. 5: Iss. 1, Article 6.

Available at: <http://scholarship.law.umassd.edu/umlr/vol5/iss1/6>

This Note is brought to you for free and open access by Scholarship Repository @ University of Massachusetts School of Law. It has been accepted for inclusion in University of Massachusetts Law Review by an authorized administrator of Scholarship Repository @ University of Massachusetts School of Law.

PROSECUTING THE MATERIAL SUPPORT OF TERRORISM: FEDERAL COURTS, MILITARY COMMISSIONS, OR BOTH?

P. SCOTT RUFENER*

I. INTRODUCTION

Imagine you are the president of a newly founded country and your attorney general comes to you with recommendations for trial procedures in your budding democracy. She proposes that trials require the accused to have legal representation; that the judge and jury be independent from any outside influence; that the prosecution be required to turn over to the defense any exculpatory information it may have; that there be reasonable restrictions on the introduction of hearsay; that statements produced by torture or other forms of cruel treatment be disallowed; that the government not be allowed to force the defendant to incriminate herself; that the judge be allowed to dismiss the case if the government refuses to produce classified information; and that the accused be guaranteed two layers of review on the facts and the law by independent judges. Would you approve of this scheme? All of the foregoing requirements are now part of the military commissions system as amended by the Military Commissions Act of 2009 (hereinafter “2009 MCA”).¹

Congress has given jurisdiction over the crime of providing material aid to terrorists to both federal courts and military commissions.² Though military commissions have

* J.D. Candidate, 2011, Vanderbilt University Law School; B.S., Brigham Young University.

¹ Military Commissions Act of 2009, Pub. L. No. 111-84, § 1803, 123 Stat. 2190 (2009).

² 18 U.S.C. § 2339A-C (2006); 10 U.S.C. § 950t(25) (2006).

been heavily criticized since their reintroduction in 2001,³ current military commissions, as envisioned by the 2009 MCA, now include many of the features available in federal criminal trials and military courts-martial.⁴ One remaining criticism, however, is the issue of forum shopping by the Executive branch.⁵ The only technical jurisdictional restrictions on military commissions are that U.S. citizens and lawful combatants, as defined by the Geneva Conventions, may not be prosecuted in military commissions.⁶ All others accused of material support of terrorism may be prosecuted by military commission.⁷ Thus, some have called for the U.S. to articulate a principled, neutral standard for assigning accused offenders to military commissions or federal courts.⁸ Creating such a standard would help eliminate any undue discretion of the Executive and bolster our nation's credibility around the world.⁹

This note argues that given the recent changes in the 2009 MCA the overall scheme for prosecuting material support of terrorism offenses is satisfactory (i.e., material support crimes should remain under the jurisdiction of both forums), but that the jurisdiction of military commissions over material support offenses should be limited to those providing material support to further specific acts of terrorism (as opposed to generalized support) and to those giving aid to terrorists or foreign terrorist organizations (hereinafter "FTOs") in active theaters of war.

³ Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 Const. Comment 261, 271-73 (2002).

⁴ See Vijay M. Padmanabhan, *Norm Internalization Through Trials for Violations of International Law: Four Conditions for Success and Their Application to Trials of Detainees at Guantanamo Bay*, 31 U. PA. J. INT'L L. 427, 478 (2009) ("[The 2009 MCA] [adjusts] discovery, classified information and hearsay rules to approximate those used in the federal courts.").

⁵ *Id.* at 479.

⁶ 10 U.S.C. §§ 948a, 948c (2006).

⁷ *Id.*

⁸ See, e.g., Padmanabhan, *supra* note 4, at 479.

⁹ *Id.* at 478-79.

This approach allows for the use of military commissions, which may be needed in light of substantial security concerns,¹⁰ but provides clear guidance for the use of military commissions in the prosecution of material support crimes. U.S. citizens and lawful combatants are of course guaranteed to be prosecuted in federal court or military courts-martial, respectively, as the MCA excludes lawful combatants from military commission jurisdiction. But there remains a large middle ground because of the broad extraterritorial application of the federal material support statutes and the broad jurisdiction of military commissions. This note provides a solution for separating this middle ground in the context of material support offenses.

Part II explains the material support offenses in the context of federal criminal trials and military commissions. It provides information about the history and development of military commissions since 2001, and a brief overview of military commissions after the enactment of the Military Commissions Act of 2006 (“2006 MCA”). Part III outlines why the jurisdiction of military commissions over material support crimes should be circumscribed, even though the overall scheme of military commissions is generally satisfactory in light of the 2009 MCA. Part III also provides a detailed description of changes made to military commissions under the 2009 MCA as there has been little commentary about military commissions since its enactment. Part III helps remedy this lack of commentary. Some weaknesses of past commissions are noted for the sake of discussion and context, but this note is not intended to be a criticism or review of past practices as there is ample literature reviewing the pre-2009 MCA military commissions. Finally, Part IV touches on why the government should take action to further the legitimacy and perception of fairness of military commissions.

¹⁰ Scott L. Silliman, *Prosecuting Alleged Terrorists by Military Commission: A Prudent Option*, 42 CASE W. RES. J. INT’L L. 289, 294 (2009).

II. MATERIAL SUPPORT OF TERRORISM IN FEDERAL COURTS AND MILITARY COMMISSIONS

A. Article III Courts

The first material support statute was enacted in 1994 after the attempted bombing of the World Trade Center in New York in 1993.¹¹ Congress has since expanded the scope of terrorism-related crimes by prohibiting four different types of material support of terrorism, which are essentially crimes of facilitation, in 18 U.S.C. §§2339A-D.¹² Material support statutes are unique because they do not require proof of an individual's involvement in a specific terrorist offense.¹³ Section 2339B for example, only requires that an individual knowingly give assistance to a terrorist organization. She is not required to know the specific manner in which the assistance will be used or even that a specific act of terrorism will be carried out.¹⁴ The defendant must only know that the relevant organization has been designated as an FTO by the Secretary of State or that the organization engages in terrorism.¹⁵

The Department of Justice has had considerable success prosecuting violations of the material support statutes.¹⁶ A group accused of plotting to blow up the Sears Tower and several federal buildings in Miami, the "Liberty City Six" (originally known as the "Liberty City Seven"), was prosecuted under material support, seditious conspiracy, and

¹¹ Robert M. Chesney, *The Sleeper Scenario: Terrorism-Support Laws And The Demands Of Prevention*, 42 HARV. J. ON LEG. 1, 12 (2005) [hereinafter "Chesney Sleeper Scenario"].

¹² Benjamin J. Priester, *Who Is a "Terrorist"? Drawing the Line Between Criminal Defendants and Military Enemies*, 2008 UTAH L. REV. 1255, 1265 (2008).

¹³ *Id.*

¹⁴ *Id.* at 1266.

¹⁵ *Id.*

¹⁶ RICHARD B. ZABEL & JAMES J. BENJAMIN, JR., HUMAN RIGHTS FIRST, IN PURSUIT OF JUSTICE: PROSECUTING TERRORISM CASES IN THE FEDERAL COURTS—2009 UPDATE AND RECENT DEVELOPMENTS 14-16 (2009) [hereinafter *In Pursuit of Justice*].

felony explosives statutes.¹⁷ The prosecutors were able to obtain convictions against five of the six defendants under the material support statutes, §§ 2339A & 2339B.¹⁸ However, only one of the six defendants was convicted on a seditious conspiracy charge, and only two of the six were convicted on felony explosives charges.¹⁹

1. The Statutory Law

18 U.S.C. § 2339A, enacted in 1994, specifically prohibits “provid[ing] material support or resources [to others] . . . knowing or intending that they are to be used in preparation for, or in carrying out” terrorist acts such as the destruction of an airplane or the murder of government officers.²⁰ Material support or resources are defined broadly as any kind of financial assistance or services, property (tangible or intangible), lodging, weapons, lethal substances, explosives, personnel (which can include the offender), false identifications, communications equipment, safehouses or other facilities, transportation, and training or expert advice.²¹ Medicine and religious materials are specifically excluded.²² This definition applies broadly and would cover so-called “sleeper cells,” those running jihad training camps in the U.S., and “individuals providing broadcasting services for a terrorist organization’s television station.”²³ Section 2339A is similar to an aiding and abetting statute in that it prohibits giving any kind of assistance to those carrying out specific criminal acts (in this case terrorist acts).²⁴

In the wake of the 1995 bombing of the Alfred P. Murrah Federal Building in Oklahoma City, Congress enacted 18

¹⁷ *Id.* at 14-15. See *United States v. Batiste*, No. 06-20373 (S.D. Fla. 2009) (Dkt. Nos. 1291-96); *United States v. Batiste*, No. 06-20373, 2006 WL 5350692 (S.D. Fla. 2006).

¹⁸ IN PURSUIT OF JUSTICE, *supra* note 16, at 14-15.

¹⁹ *Id.* *United States v. Batiste*, No. 06-20373, 2007 WL 5303053 (S.D. Fla. 2009).

²⁰ 18 U.S.C. § 2339A(a) (2006).

²¹ 18 U.S.C. § 2339A(b)(1) (2006).

²² *Id.*

²³ IN PURSUIT OF JUSTICE, *supra* note 16, at 13-14.

²⁴ *Id.* at 13; Chesney Sleeper Scenario, *supra* note 11, at 13.

U.S.C. § 2339B as part of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter “AEDPA”) to expand the tools of federal prosecutors against terrorism financing and other forms of assistance.²⁵ While § 2339A can be a powerful statute in some circumstances,²⁶ Congress may have seen the difficulties involved in proving whether an offender knew or intended that the aid was to be used in a specific terrorist act. Thus, section 2339B expands on § 2339A by prohibiting the same types of material support (financing, personnel, training, etc.).²⁷ Instead of prohibiting the provision of support to further specific acts of terrorism as § 2339A does, § 2339B prohibits providing such support to “foreign terrorist organization[s].”²⁸ An organization is designated as an FTO by the Secretary of State under the authority of 8 U.S.C. § 1189 when the Secretary finds that the organization has engaged in terrorist activity and is a threat to the United States.²⁹ The statute only requires that an offender know that the group for which the support is intended has been designated as an FTO or that the group has engaged in terrorism.³⁰

Section 2339B has been an important tool in prosecuting terrorists and those that support them.³¹ One highly visible case involved Ali Saleh Kahlah al-Marri. He was charged in federal court shortly after 9/11 with credit card fraud and

²⁵ James. J. Ward, *The Root of All Evil: Expanding Criminal Liability for Providing Material Support to Terror*, 84 NOTRE DAME L. REV. 471, 477 (2008).

²⁶ See, e.g., Robert M. Chesney, *Terrorism, Criminal Prosecution, and the Preventative Detention Debate*, 50 S. TEX. L. REV. 669, 690 (2009) [hereinafter Chesney Detention Debate] (describing the prosecution of Hamid Hayat under 18 U.S.C. § 2339A).

²⁷ 18 U.S.C. § 2339B(g)(4) (2006) (citing 18 U.S.C. § 2339A(b)).

²⁸ 18 U.S.C. § 2339B(a)(1) (2006). (Section 2339B also provides for civil penalties on top of the criminal penalties.); 18 U.S.C. § 2339B(b) (2006).

²⁹ 18 U.S.C. § 2339B(a)(1) (2006); 8 U.S.C. § 1189(a)(1) (2000).

³⁰ *Id.*

³¹ IN PURSUIT OF JUSTICE, *supra* note 16, at 13-15.

lying to a federal agent.³² In 2003, he was transferred to a naval brig in South Carolina and held as an “enemy combatant” without charges.³³ In February 2009 he was transferred back to the federal criminal system and charged with conspiracy to provide material support to an FTO, under § 2339B.³⁴ A few months later he pled guilty to conspiracy to violate § 2339B.³⁵ He “admitted having attended terrorist training camps from 1998 to 2001 and taking courses in the ‘use of various weapons and basic operational security tradecraft’” as well as to having met “with Khalid Shaikh Mohammed, who was at the time the external operations chief for the [al-]Qaeda organization, and ‘offer[ing] his services.’”³⁶

Although § 2339B was not used until 2002,³⁷ eighty-three defendants were charged under § 2339B between September 12, 2001 and June 6, 2009 for offenses involving al-Qaeda or other Islamist extremist groups and any associated activities.³⁸ Of these eighty-three cases, sixty-nine have been resolved, and forty defendants were convicted.³⁹ By comparison, sixty defendants were charged under § 2339A, with forty-seven charges resolved, and thirty-three convictions.⁴⁰

In 2002, 18 U.S.C. § 2339C was enacted to implement the United States’ obligations under the International Convention for the Suppression of the Financing of Terrorism.⁴¹ As the

³² *Id.* at 14; Human Rights First, *In The Courts, Ali Kahlal al-Marri, Qatari Student*, http://www.humanrightsfirst.org/us_law/inthecourts/supreme_court_al_marri.aspx.

³³ IN PURSUIT OF JUSTICE, *supra* note 16, at 14.

³⁴ *Id.* at 14.

³⁵ *Id.*

³⁶ John Schwartz, *Plea Deal Reached with Agent for Al Qaeda*, N.Y. TIMES, Apr. 30, 2009, available at <http://www.nytimes.com/2009/05/01/us/01marri.html>.

³⁷ Brian P. Comerford, *Preventing Terrorism by Prosecuting Material Support*, 80 NOTRE DAME L. REV. 723, 725 (2005).

³⁸ IN PURSUIT OF JUSTICE, *supra* note 16, preface, 12.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ See International Convention for the Suppression of the Financing of Terrorism, Dec. 9, 1999, 39 I.L.M. 270 (2000).

name suggests, the convention's purpose was for "signatory states to enact formidable and effective positive law prohibiting the direct or indirect financing of terrorism."⁴² Section 2339C punishes an individual who "directly or indirectly . . . provides or collects funds with the intention that such funds be used, or with the knowledge that such funds are to be used, in full or in part, in order to carry out [any terrorist acts]."⁴³ Like § 2339B, it is significant that under § 2339C "the knowing provision of funds intended to finance terrorists or FTOs is a federal crime regardless of whether the funds in question ever in fact finance a terrorist act."⁴⁴ Only the intent to support terrorist acts and the act of provision or collection of funds matters.

Lastly, Congress enacted 18 U.S.C. § 2339D in 2004 to punish an individual who receives "military-type training" from an FTO, but does not provide any assistance to terrorists.⁴⁵ The definition of "military-type training" includes training in means or methods that can cause death or serious bodily injury, destroy or damage property, or disrupt services to critical infrastructure, or training on the use, storage, production, or assembly of any explosive, firearm or other weapon, including any weapon of mass destruction.⁴⁶ Similar to § 2339B, this section only requires knowledge of the identity of the organization and its designation as an FTO or its involvement in terrorism.⁴⁷ No commission of terrorist acts is required.⁴⁸ Because § 2339C and § 2339D are

⁴² Alexander J. Urbelis, *Rethinking Extraterritorial Prosecution in the War on Terror: Examining the Unintentional yet Foreseeable Consequences of Extraterritorially Criminalizing the Provision of Material Support to Terrorists and Foreign Terrorist Organizations*, 22 CONN. J. INT'L L. 313, 316 (2007).

⁴³ 18 U.S.C. § 2339C(a)(1) (2006).

⁴⁴ Urbelis, *supra* note 42, at 317; 18 U.S.C. § 2339C(a)(3) (2006).

⁴⁵ 18 U.S.C. § 2339D(a) (2006).

⁴⁶ 18 U.S.C. § 2339D(c)(1) (2006).

⁴⁷ 18 U.S.C. § 2339D(a) (2006).

⁴⁸ *Id.*

relatively new, the Department of Justice has not used them extensively.⁴⁹

2. Extraterritorial Application

Section 2339A, which prohibits the provision of material support in furtherance of specific terrorist acts such as murder and destroying an airliner,⁵⁰ did not apply extraterritorially when first enacted. However, after 9/11 Congress amended § 2339A in the 2001 Patriot Act to apply extraterritorially by changing the language of the statute from “Whoever, within the United States provides” to “Whoever provides”⁵¹ As there are no other restrictions on this section’s extraterritorial application, § 2339A is the broadest of the four.

Section 2339B, which prohibits the provision of material support to FTOs, also did not apply extraterritorially when first enacted.⁵² But it was amended in 2004 and now clearly applies extraterritorially under specified circumstances.⁵³ The statute applies extraterritorially when the offender is a U.S. national or permanent resident, is a stateless person habitually residing in the U.S., or is later brought into or found within the U.S. (even if the offense occurs outside the U.S.).⁵⁴ Moreover, the statute applies to an offender that aids or abets or conspires to provide material support to an FTO with any person over whom jurisdiction exists under § 2339B(d)(1).⁵⁵

The prohibition on the collection or provision of funds (hereinafter “financing crime” or “financing offense”) to support terrorist acts in § 2339C also has broad extraterritorial application, which is provided for in considerable detail.⁵⁶ When the financing offense takes place

⁴⁹ Urbelis, *supra* note 42, at 318. See Chesney Detention Debate, *supra* note 26, at 689 (provides the description of a case involving 2339D).

⁵⁰ Urbelis, *supra* note 42, at 315.

⁵¹ *Id.*; 18 U.S.C. § 2339A (2006).

⁵² Urbelis, *supra* note 42, at 315-16.

⁵³ 18 U.S.C. § 2339B(d) (2006).

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ 18 U.S.C. § 2339C(b)(1) (2006).

within the United States, but the perpetrator is not found in the U.S. or is not a U.S. citizen, he or she may still be prosecuted.⁵⁷ Specifically, jurisdiction exists if an individual commits a financing offense within the United States and:

- (A) a perpetrator was a national of another state or a stateless person;
- (B) on board a vessel flying the flag of another state or an aircraft which is registered under the laws of another state at the time the offense is committed;
- (C) on board an aircraft which is operated by the government of another state;
- (D) a perpetrator is found outside the United States;
- (E) was directed toward or resulted in the carrying out of a predicate act against—
 - (i) a national of another state; or
 - (ii) another state or a government facility of such state, including its embassy or other diplomatic or consular premises of that state;
- (F) was directed toward or resulted in the carrying out of a predicate act committed in an attempt to compel another state or international organization to do or abstain from doing any act; or
- (G) was directed toward or resulted in the carrying out of a predicate act— (i) outside the United States; or (ii) within the United States, and either the offense or the predicate act was conducted in, or the results thereof affected, interstate or foreign commerce.⁵⁸

⁵⁷ *Id.*

⁵⁸ 18 U.S.C. § 2339C(b)(1) (2006).

That the United States may prosecute offenders when the financing offense occurs within its territory and the predicate terrorist occurs somewhere else is uncontroversial.⁵⁹

Moreover, jurisdiction exists when a financing offense takes place *outside* the United States and:

- (A) [the] perpetrator is a national of the United States or is a stateless person whose habitual residence is in the United States;
- (B) [the] perpetrator is found in the United States; or
- (C) [the financing] was directed toward or resulted in the carrying out of a predicate act against—
 - (i) any property that is owned, leased, or used by the United States or by any department or agency of the United States, including an embassy or other diplomatic or consular premises of the United States;
 - (ii) any person or property within the United States;
 - (iii) any national of the United States or the property of such national; or (iv) any property of any legal entity organized under the laws of the United States, including any of its States, districts, commonwealths, territories, or possessions.⁶⁰

Additionally, an offender may be prosecuted whenever the financing offense is committed on board a vessel or aircraft registered in the U.S., on board an aircraft operated by the U.S., or the offense was intended to support a terrorist act aiming “to compel the United States to do or abstain from

⁵⁹ Urbelis, *supra* note 42, at 318.

⁶⁰ 18 U.S.C. § 2339C(b)(2) (2006).

doing any act.”⁶¹ Again, jurisdiction exists under § 2339C whether the predicate terrorist act actually occurs or not.⁶²

Section 2339D, which prohibits the receipt of military-style training, applies extraterritorially when the offender is a U.S. national or permanent resident, is a stateless person habitually residing in the U.S., is later brought into or found within the U.S. (even if the offense occurs outside the U.S.), or aids or abets or conspires to receive military-style training with any person over whom jurisdiction exists under section 2339D(b).⁶³ There is also federal jurisdiction when the offense occurs in part within the U.S., or affects interstate or foreign commerce.⁶⁴

B. Military Commissions

In addition to federal criminal trials involving material support statutes, Congress has given jurisdiction over material support offenses to military commissions.⁶⁵ A brief history of military commissions and a detailed account of their use in World War II are included here to give context and background to the current military commission scheme. Also of note are the differences in public reaction to similar military commission schemes and the reasons behind these differing reactions.

1. Historical Use

The first known use of military commissions (previously known as military tribunals or war councils) by the U.S. government was in the U.S.-Mexico War between 1846 and 1848.⁶⁶ Later, the use of military commissions during the Civil War spurred a famous Supreme Court decision: *Ex*

⁶¹ 18 U.S.C. § 2339C(b)(3)-(5) (2006).

⁶² 18 U.S.C. § 2339C(a)(3) (2006).

⁶³ 18 U.S.C. § 2339D(b) (2006).

⁶⁴ *Id.*

⁶⁵ 10 U.S.C. §§ 948d, 950t(25) (2006).

⁶⁶ Jennifer K. Elsea, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military, Congressional Research Service*, Congressional Research Service at CRS-18 (Dec. 11, 2001), available at <http://www.fas.org/irp/crs/RL31191.pdf>.

Parte Milligan.⁶⁷ They were used again in World War I and World War II.⁶⁸ Perhaps the most famous use of military commissions was by President Roosevelt to prosecute the Nazi saboteurs in 1942.⁶⁹

Approximately six months after Hitler declared war on the U.S., a group of eight Nazi agents, all of which had previously lived in the U.S. and two of which were naturalized U.S. citizens, travelled to America by submarine and landed surreptitiously on the beaches of New York and Florida. Their objective was to “to blow up aluminum plants, railroad lines, canal locks, hydroelectric plants, and bridges.”⁷⁰ Soon after arriving, however, two of the agents turned themselves in and betrayed the remaining would-be saboteurs to the FBI.⁷¹

After J. Edgar Hoover announced their capture, there was a public outcry for their trial and execution.⁷² Despite some doubt in the Justice Department about the legality of the death penalty for non-U.S. citizens, the rest of the government, including many members of Congress, pressed for execution.⁷³ Soon thereafter, President Roosevelt announced that the Nazi saboteurs would be tried by military commission because of its “greater flexibility, its traditional use in cases of this character[,] its clear power to impose the death penalty,” and its speed and efficacy.⁷⁴ Less than one month after the Nazi agents had arrived on U.S. soil, their trial began.⁷⁵

⁶⁷ *Ex parte Milligan*, 71 U.S. 2 (1866); Elsea, *supra* note 66, at 19-21.

⁶⁸ Elsea, *supra* note 66, at 21-23.

⁶⁹ Goldsmith & Sunstein, *supra* note 3, at 270-71.

⁷⁰ *Id.* at 263.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 264.

⁷⁴ *Id.* at 264-65 (“Roosevelt’s announcement that a Military Commission would try the saboteurs ‘met with general satisfaction in Washington, as it will throughout the country,’ wrote Lewis Wood, the New York Times Washington correspondent. ‘The Presidential action calmed the fears of many who realized the delays and technicalities incident to civil trials.’”).

⁷⁵ *Id.* at 266.

The trial was closed to the public and press; and other than photographs and periodic communiqués that contained no meaningful information, it was conducted in complete secrecy.⁷⁶ The President's order establishing the commission only gave a very general outline of the commission's structure.⁷⁷ It simply gave the commission the power to make procedural rules consistent with the "Articles of War," to conduct a fair trial, to allow evidence of probative value to a reasonable man to be admitted, and to permit convictions upon a two-thirds vote (of the jury).⁷⁸ Despite some complaints about the secrecy of the commission, many did not object to it.⁷⁹

Three weeks into the trial, and despite some resulting opposition, the Supreme Court decided to hear "the saboteur's habeas corpus petitions challenging the legality of the military commissions."⁸⁰ A few days later, the Supreme Court approved of the military commissions, but said that it would provide an opinion with its reasons for doing so at a later date.⁸¹ After the fact, the Court's quick decision was praised: "But by the fact of their intercession the justices of America's highest court reaffirmed to innocent Americans that the law still stands as a shield over them, against malicious usurpation or the quick tempers and brash judgments of war time."⁸²

Three days after the Supreme Court's decision, the Nazi saboteurs were convicted and sentenced to death.⁸³ The result was not publicly announced until five days later, giving the president a chance to review and approve the commission's judgments.⁸⁴ President Roosevelt commuted the sentences of two defendants to life and thirty years, respectively, but "[b]y

⁷⁶ *Id.*

⁷⁷ *Id.* at 265 n.15.

⁷⁸ *Id.*

⁷⁹ *Id.* at 266.

⁸⁰ *Id.*

⁸¹ *Id.* at 267.

⁸² *Id.* at 268.

⁸³ *Id.* at 269.

⁸⁴ *Id.*

the time of the public announcement, the executions [of the others] had been carried out.”⁸⁵

About three months later, the Court released its opinion in *Ex Parte Quirin*⁸⁶ with “little fanfare.”⁸⁷ The Court deemed the use of military commissions acceptable in this case because Congress had authorized the use of military commissions to try violations of the laws of war, “and that at least some of the acts allegedly committed by the defendants constituted such violations.”⁸⁸ It distinguished the most relevant precedent, *Ex Parte Milligan*,⁸⁹ which said that U.S. citizens cannot be tried by military commission when federal courts are operating, by noting that the defendant in *Milligan* was not an enemy belligerent, but that the Nazi saboteurs were.⁹⁰ Interestingly, there was little to no commentary about the opinion in the press.⁹¹

Military commissions were not used after World War II until 2001,⁹² when President George W. Bush reintroduced them by military order to prosecute acts of terrorism as violations of the law of war.⁹³ The military order did not specify many detailed procedures, but it had a few notable features. The standard for admitting evidence was simply that of having “probative value to a reasonable person.”⁹⁴ Conviction and sentencing for death sentences only required a two-thirds vote.⁹⁵ No courts, whether foreign, international,

⁸⁵ *Id.*

⁸⁶ *Ex parte Quirin*, 317 U.S. 1 (1942).

⁸⁷ Goldsmith & Sunstein, *supra* note 3, at 270-71.

⁸⁸ *Id.* at 270.

⁸⁹ *Ex parte Milligan*, 71 U.S. 2 (1866).

⁹⁰ Goldsmith & Sunstein, *supra* note 3, at 270.

⁹¹ *Id.* at 271.

⁹² Sarah Lorr, Note, *Reconciling Classified Evidence and a Petitioner's Right to a “Meaningful Review” at Guantánamo Bay: A Legislative Solution*, 77 *FORDHAM L. REV.* 2669, 2714 (2009).

⁹³ See Military Order, Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism, 66 *Fed. Reg.* 57,381, 57,384, § 4 (Nov. 16, 2001); Elsea, *supra* note 66, at 1.

⁹⁴ David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil Over the Guantánamo Military Commissions*, 12 *LEWIS & CLARK L. REV.* 131, 148 (2008).

⁹⁵ *Id.*

or U.S., could review the trials.⁹⁶ Only the President or Secretary of Defense was authorized to conduct a review.⁹⁷ This is especially interesting given that the Supreme Court decided to review the legality of the Nazi saboteur trial despite FDR's order to the contrary.⁹⁸ Notwithstanding the "seeming similarity" of President Bush's 2001 Military Order and that given by President Roosevelt, President Bush's order received widespread criticism from the press, Congress, legal academy, and foreign governments as an "ero[sion] of . . . the rule of law . . . a civil liberties calamity . . . [and a] constitutionally questionable endeavor [that] is misguided."⁹⁹

There are a number of potential reasons for the differing reactions to the use of military commissions by FDR and President Bush. Americans have grown distrustful of Executive and military authority over the past sixty years because of events like Watergate.¹⁰⁰ The country perceived a much greater threat to the nation's security during World War II than after 9/11.¹⁰¹ There has also been a remarkable expansion of federal constitutional rights in our legal system.¹⁰² Sixty years ago, criminal defendants did not have the right to court-provided counsel, the exclusionary rule for improperly obtained evidence had not yet come about, and habeas corpus review was much more limited.¹⁰³ Major reforms for military justice also did not come until the passage of the Uniform Military Code in 1968.¹⁰⁴ Given such differences, the rules contemplated by President Bush probably would not have drawn much attention in the late 1940s and 50s, but in 2001 they were met with a great deal of criticism.¹⁰⁵

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ *Id.*

⁹⁹ Goldsmith & Sunstein, *supra* note 3, at 271-74.

¹⁰⁰ *Id.* at 281-82.

¹⁰¹ *Id.* at 280-81.

¹⁰² *Id.* at 280-89.

¹⁰³ *Id.* at 283.

¹⁰⁴ *Id.* at 283-84.

¹⁰⁵ *Id.* at 280-89.

2. Modern Military Commissions

Since 2001, significant changes have been made to the military commissions system. This section will discuss the basics of military commissions and key aspects of the Military Commissions Act of 2006 (hereinafter “2006 MCA”).

The 2006 MCA authorized the prosecution of the provision of material support to terrorists by military commission.¹⁰⁶ 18 U.S.C §§ 2339A and 2339B were essentially merged into one in 10 U.S.C. § 950t(25), which prohibits the “provision of material support or resources to be used in carrying out an act of terrorism or the provision of material support or resources to an international terrorist organization engaged in hostilities against the United States, knowing that such organization has engaged or engages in terrorism.”¹⁰⁷ The 2006 MCA gave military commissions jurisdiction over “unlawful enemy combatants” (this label was changed to “unprivileged enemy belligerents” in the 2009 MCA).¹⁰⁸ An unlawful enemy combatant is defined in the 2006 MCA as an individual who “engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents who is not a lawful enemy combatant (including a person who is part of the Taliban, al Qaeda, or associated forces).”¹⁰⁹

¹⁰⁶ Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 948d, 950t(25) (2006) (President Bush’s second instruction order on military commissions authorized the prosecution of “aiding the enemy” and “aiding and abetting” crimes, both of which are similar to material support crimes.).

¹⁰⁷ Military Commissions Act of 2006, Pub. L. No. 109-366, § 950t(25), 120 Stat. 2630 (2006). The definition of material support is provided by 18 U.S.C. § 2339A (2006) (financial resources, personnel, weapons, etc.). *Id.*

¹⁰⁸ Military Commissions Act of 2006, Pub. L. No. 109-366, § 948d; 120 Stat. 2601-02; 10 U.S.C. § 948a (2006).

¹⁰⁹ Military Commissions Act of 2006, Pub. L. No. 109-366 § 948a, 120 Stat. 2601-02 (2006). Under the 2006 MCA, an unlawful enemy combatant could also be designated as such by a Combatant Status Review Tribunal or other executive branch tribunal. This aspect has been removed in the 2009 MCA. *See* 10 U.S.C. § 948a.

The 2006 MCA made some key changes in military commissions. First, it bifurcated the finding of facts and law by requiring that only the military judge presiding over the military commission rule on questions of law.¹¹⁰ Before the 2006 MCA, the entire commission, usually consisting of three or more officers, ruled cooperatively on questions of law, even though the other members of the commission were not required to have any legal training.¹¹¹ Furthermore, the presiding officer was only required to be a judge advocate, and did not necessarily have to be qualified as a military judge.¹¹² The 2006 MCA required that the presiding officer be qualified as a military judge.¹¹³ Before the 2006 MCA, the entire commission also ruled on findings of fact.¹¹⁴ Now, fact-finding is assigned to the members, the jury.¹¹⁵

Second, the 2006 MCA required that judges, trial and defense attorneys (the “prosecutor” in military commissions is called the trial attorney), and the members be independent from any unlawful influence.¹¹⁶ Essentially, these three groups are insulated from any kind of evaluation or reprimand by senior officers or Executive branch officials.¹¹⁷ This allows the judge to make truly impartial decisions without fear of retribution by superior officers, allows members to make impartial decisions, and allows for zealous representation by the defense attorneys.

Third, the required minimum number of members was raised to five for non-capital offenses, and twelve for capital offenses and the decision to convict in capital trials had to be

¹¹⁰ Eun Young Choi, *Veritas, Not Vengeance: An Examination of the Evidentiary Rules for Military Commissions in the War Against Terrorism*, 42 HARV. C.R.-C.L. L. REV. 139, 151-53 (2007).

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Military Commissions Act of 2006, Pub. L. No. 109-366, § 948j(b), 120 Stat. 2604 (2006).

¹¹⁴ Choi, *supra* note 110.

¹¹⁵ *Id.*

¹¹⁶ Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 948j(f), 949b, 120 Stat. 2604, 2609-10 (2006).

¹¹⁷ Military Commissions Act of 2006, Pub. L. No. 109-366, §§ 948j(f), 120 Stat. 2604 (2006).

unanimous.¹¹⁸ Previously, only three members were required for non-capital trials, and in all cases, capital or non-capital, only a two-thirds vote was required to convict.¹¹⁹

Fourth, the 2006 MCA provided for review by a panel of three judges from the U.S. Court of Military Commission Review (hereinafter “CMCR”).¹²⁰ The accused was given the automatic right to appeal to the U.S. Court of Appeals for the D.C. Circuit.¹²¹ Finally, the U.S. Supreme Court could make a final review by writ of certiorari.¹²² However, the scope of review for the CMCR and D.C. Circuit was limited. The CMCR was only permitted to review matters of law, not fact.¹²³ The D.C. Circuit was limited to “considering whether the result was consistent with the MCA and ‘to the extent applicable, the Constitution and the laws of the United States.’”¹²⁴

Fifth, Congress permitted the Secretary of Defense to create detailed rules of evidence and procedure.¹²⁵ With the promulgation of the Manual for Military Commissions,¹²⁶ the

¹¹⁸ Military Commissions Act of 2006, Pub. L. No. 109-366, § 949m, 120 Stat. 2616-17 (2006); Choi, *supra* note 110. Note in capital cases, the required number of members may be lowered to nine because of “physical conditions or military exigencies.”

¹¹⁹ Glazier, *supra* note 94, at 148, 175; Silliman, *supra* note 10, at 295 n.28 (“[A] military commission may convict a detainee, except for death cases, upon a vote of only two-thirds of the panel. Sentencing requires only a two-thirds vote for imprisonment up to ten years and a three-fourths vote for sentences which are more than ten years up to life imprisonment, but a unanimous vote is required for a death sentence and the jury panel must be comprised of twelve members. This is identical to what is required in courts-martial under the Uniform Code of Military Justice.” (citations omitted)).

¹²⁰ 10 U.S.C. § 950f (2006).

¹²¹ Curtis A. Bradley, *The Military Commissions Act, Habeas Corpus, and the Geneva Conventions*, 101 AM. J. INT’L L. 322, 330 (2007).

¹²² 10 U.S.C. § 950g(e) (2006).

¹²³ Glazier, *supra* note 94, at 176; Military Commissions Act of 2006, Pub. L. No. 109-366, § 949a 120 Stat. 2601-02 (2006).

¹²⁴ Glazier, *supra* note 94, at 176.

¹²⁵ Military Commissions Act of 2006, Pub. L. No. 109-366 § 949a(a), 120 Stat. 2608-09 (2006).

¹²⁶ *See generally* Dept. of Def., Manual for Military Commissions, available at <http://www.defenselink.mil/news/M>

evidentiary rules for military commissions, for example, were made quite similar to the Military Rules of Evidence (the rules of evidence used in Military courts-martial, which are very similar to the Federal Rules of Evidence).¹²⁷ The 2009 MCA has further closed this gap.

Lastly, the 2006 MCA gave the accused the right to be present in all proceedings unless his own misconduct required his exclusion.¹²⁸ Congress also “[drew] the line on secret evidence, restricting trial panels to hearing only evidence that the accused also heard, and assuring his right to be present unless excluded due to his own misconduct.”¹²⁹ Of course, other problems remained because the 2006 MCA had some questionable provisions. Many of these were addressed in the 2009 MCA.

III. CIRCUMSCRIBING THE JURISDICTION OF MILITARY COMMISSIONS FOR MATERIAL SUPPORT CRIMES

The military commissions introduced by President Bush in 2001 were heavily criticized by many,¹³⁰ but today’s military commissions only share a name with those of the 2001-2005 period. The 2006 MCA significantly changed military commissions and provided many procedural protections for the accused.¹³¹ The 2009 MCA has made even more significant changes. In light of the 2009 MCA, this note

ANUAL%20FOR%20MILITARY%20COMMISSIONS%202007%20signed.pdf.

¹²⁷ Victor Hansen, *The Usefulness of a Negative Example: What We Can Learn About Evidence Rules from the Government's Most Recent Efforts to Construct a Military Commissions Process*, 35 WM. MITCHELL L. REV. 1480, 1497 (2009).

¹²⁸ Bradley, *supra* note 121, at 330.

¹²⁹ Glazier, *supra* note 94, at 175.

¹³⁰ See David Glazier, *Playing by The Rules: Combating Al Qaeda Within the Law of War*, 51 WM. & MARY L. REV. 957, 1032 (2009) (“The Guantanamo military commissions have generated tremendous controversy since President Bush first authorized their use in November 2001, largely because they were intended to take deliberate shortcuts from the procedural due process provided by civilian courts and courts-martial.”).

¹³¹ See *supra* Part II.B.2.

asserts that military commissions now constitute a fair and sensible forum for prosecuting unprivileged enemy belligerents. One remaining criticism of military commissions, however, is that there is no clear dividing line between military commissions and federal criminal court.¹³² At the very least the standards for choosing a forum are not public and appear to allow the executive to “forum shop” to avoid the rigors of a federal criminal trial whenever he chooses.¹³³ This criticism is a valid one, especially from the standpoint that the problem undermines the credibility of the U.S. in the rest of the world, which may substantially diminish the support we receive from other countries in fighting terrorism.¹³⁴

To address this problem, either Congress or the Executive branch should create a principled, neutral way of assigning accused criminals to military commissions or federal courts.¹³⁵ This note, being limited to a discussion of material support offenses, proposes limiting the jurisdiction of military commissions over material support crimes to individuals who intend to further specific acts of terrorism (and have actual knowledge, or should reasonably know of a specific (planned) act of terrorism) in any area of the world and to those giving generalized or specific aid to terrorists or FTOs in active theaters of war. Generalized aid being where a donor does not know of (or should not reasonably know of) or intend to further specific acts of terrorism, but only has knowledge that an organization or individual generally

¹³² Padmanabhan, *supra* note 4, at 479.

¹³³ See Michael A. Newton, *Some Observations on the Future of U.S. Military Commissions*, 42 CASE W. RES. J. INT’L L. 151, 162 (2008) (“Conversely, if the guidelines for allocating jurisdiction are opaque to the public and to defendants, the Administration will be criticized for its lack of transparency and the appearance of selective and self-serving justice.”).

¹³⁴ See *infra* Part IV.

¹³⁵ Newton, *supra* note 133 (“This puts the premium on the executive branch to promulgate clear guidance to military commanders and the Department of Justice as to the decision-making process for allocating jurisdiction among potential forums. This process must of necessity walk a very fine line in order to prevent trials from being tainted by executive interference or wholly improper command influence emanating from the White House or its designated proxies.”).

engages in acts of terrorism. Also note that the terms aid, support, and material support are used interchangeably.

This section outlines why a line should be drawn between generalized and specific material support, and between active theaters of war and the rest of the world. It also provides a detailed description of important military commission procedures because little has been written about the new—and significant—changes made by the 2009 MCA. Despite military commissions not being identical to Article III Courts, they provide a viable and fair forum to the Executive branch to prosecute terror-related offenses.¹³⁶

A. Drawing Lines

1. Specific vs. General Support

The first distinction made herein is between generalized material support given to terrorist organizations and material support intended to further specific acts of terrorism (e.g., section 2339A versus 2339B of Title 18). An example of specific aid is an individual who provides blasting caps to a terrorist knowing that the terrorist is planning to blow up a U.S. Embassy. Generalized assistance, on the other hand, would be an individual giving false passports without any knowledge of specific, planned acts of terrorism to an organization that purports to be a charitable organization, but has been designated as an FTO where the donor knows the FTO status of the organization. In the context of military commission jurisdiction, those providing generalized assistance should not be on the same level as those intending to support specific acts of terrorism; and thus they should not

¹³⁶ See Newton, *supra* note 133 (“[I]t is entirely permissible for military commissions to coexist with other courts and to share concurrent jurisdiction. Thus, despite potential friction with the President's political base, ending military commissions or further limiting their flexibility runs the risk of eroding their utility for future Commanders-in-Chief to the legal and logical vanishing point. President Obama's decisions in the near future will be made on policy grounds rather than on the basis of legal necessity.”).

be prosecuted in military commissions, but rather in federal courts.

There are two reasons for this distinction. First, those intending to aid and having knowledge of (or if they should reasonably know of) specific acts of terrorism seem to fit better in a category with other crimes of terrorism. The donor shares the intention of doing harm to others (or to property, etc.) on the same specific level as those planning and committing the acts of terrorism. In this way, there is much more of a direct link between the supporter and the terrorist. The second reason for the distinction is that there are greater immediate security concerns when an individual gives material support to further a specific act of terrorism. It seems more likely that the given support will actually be used to commit an act of terrorism, and will be used sooner. Conversely, generalized support crimes still present some dangers and certainly need to be prosecuted, but this can be done in federal court.

2. Active Theaters of War vs. Peace Zones

In active theaters of war (i.e., Iraq or Afghanistan), the use of military commissions seems more justifiable, even for prosecuting material support crimes, especially considering the changes made in the 2009 MCA. In an active theater of war, such immediate security concerns extend to generalized aid as well because it seems more likely that material support, whether generalized or specific, will actually end up supporting acts of terrorism within a war zone because of the chaotic and lawless nature of such an area. Certainly individuals in war zones may or may not be intending to support specific acts of terrorism (and thus may not be as culpable), but the risk that the aid will actually end up supporting terrorists seems sufficiently great to warrant prosecution by military commission. Military commanders in war zones should have this option to prosecute those supporting terrorist acts within their areas of responsibility.

B. Military Commissions Are a Sensible Option

Military commissions have a controversial history, but they have changed significantly in the past few years.¹³⁷ In their current state, military commissions seem to be a sensible alternative to federal criminal trials to address situations where there are significant national security concerns.¹³⁸ This section details a number of important changes made by the 2009 MCA that make today's military commissions a fair forum. They are: limited jurisdiction (although as discussed this should be limited further for material support crimes),¹³⁹ allowance of pro se or self-selected civilian representation,¹⁴⁰ default application of the trial procedures and evidentiary rules of U.S. courts-martial,¹⁴¹ restricted use of hearsay evidence,¹⁴² imposition of a "Brady" type disclosure duty on the prosecution,¹⁴³ disallowance of statements produced by torture and cruel, inhuman, or degrading treatment,¹⁴⁴ inclusion of classified information procedures nearly identical to those used in federal courts,¹⁴⁵ and finally, full appellate review by both military and federal courts.¹⁴⁶

1. Circumscribed Jurisdiction

Military commissions only have jurisdiction over "unprivileged enemy belligerents".¹⁴⁷ Importantly, the 2009

¹³⁷ Padmanabhan, *supra* note 4, at 470-71.

¹³⁸ *Id.*

¹³⁹ 10 U.S.C. § 948d (2009).

¹⁴⁰ 10 U.S.C. § 949c(3) (2009).

¹⁴¹ 10 U.S.C. § 949a(a) (2009).

¹⁴² 10 U.S.C. § 949a (2009).

¹⁴³ 10 U.S.C. § 949j(b)(2) (2009).

¹⁴⁴ 10 U.S.C. § 949r(a) (2009).

¹⁴⁵ 10 U.S.C. §§ 949p-1 to 949p-7 (2009).

¹⁴⁶ 10 U.S.C. §§ 950a-950j (2009).

¹⁴⁷ 10 U.S.C. § 948c (2009). The 2009 MCA immunizes U.S. citizens from prosecution by military commission. 10 U.S.C. §§ 948a(1), 948c. It also invokes the definition of privileged enemy belligerents (i.e., lawful combatants) in Article 4 of the Geneva Convention Relative to the Treatment of Prisoners of War. Thus anyone falling under the relevant definitions will automatically be excluded from military commissions and

MCA specifies that military commissions have the power to determine whether the accused is an unprivileged enemy belligerent for the purposes of prosecution by military commission.¹⁴⁸ Previously, the 2006 MCA mandated that a determination of combatant status (a/k/a enemy belligerent status) by a Combatant Status Review Tribunal (hereinafter “CSRT”), which is tasked with deciding whether detainees at Guantanamo and other military installations are in fact enemy combatants, be dispositive for the purposes of military commission jurisdiction.¹⁴⁹ This clause has been removed from the 2009 MCA.¹⁵⁰ Although using CSRT determinations in military commissions is not explicitly banned by the 2009 MCA, it appears that the presiding military judge now has the final say on whether the military commission has jurisdiction over the accused, much like Article III courts.¹⁵¹ This provision, in combination with the independence given to military commission judges in the 2006 MCA, constitutes a powerful check on Executive power, especially the power of CSRTs.

2. Pro Se or Self-Selected Civilian Representation¹⁵²

The accused has the right to self-representation as long as he or she conforms to the applicable procedures and rules of the military commission.¹⁵³ The accused is also entitled to choose his or her own civilian counsel, but it must be at no cost to the government.¹⁵⁴ If the charge is capital, whether the accused is representing him or herself, has his or her own counsel, or is represented by a military lawyer, the accused

must be tried by court-martial. *See*, 10 U.S.C. § 948(a) (2009); Glazier, *supra* note 130, at 998-1000.

¹⁴⁸ 10 U.S.C. § 948d (2009).

¹⁴⁹ Military Commissions Act of 2006, Pub. L. No. 109-366 §§ 948d(c), 120 Stat. 2603 (2006).

¹⁵⁰ 10 U.S.C. § 948d (2009).

¹⁵¹ *Id.*

¹⁵² 10 U.S.C. § 949c (2009).

¹⁵³ 10 U.S.C. §§ 949a(b)(2)(D), 949a(b)(4) (2009).

¹⁵⁴ 10 U.S.C. § 949a(b)(2)(C)(i) (2009).

has the right to a lawyer that is experienced with capital cases (and this lawyer may be a civilian).¹⁵⁵

3. Court-Martial Trial and Evidence Rules are Default for Military Commissions

The 2009 MCA has changed the default application of the trial procedures and rules of evidence for Uniform Code of Military Justice (hereinafter “UCMJ”), which are used in United States courts-martial (which are where criminal trials for members of the armed forces are held).¹⁵⁶ Previously, the UCMJ only applied if it was specifically invoked in the MCA.¹⁵⁷ The 2006 MCA stated that [the] procedures [promulgated by the Secretary of Defense] shall, so far as the Secretary considers practicable or consistent with military or intelligence activities, apply the principles of law and the rules of evidence in trial by general courts-martial.”¹⁵⁸ Now, the UCMJ applies by default, unless a statute or Secretary of Defense specifies otherwise (of course the Secretary may not deviate from the limits set by law).¹⁵⁹ Thus, where the MCA or Secretary of Defense by way of the Manual for Military Commissions does not specify a rule, the rules of courts-martial will be controlling.

4. Further Restrictions on Hearsay

At a minimum, the 2009 MCA requires the suppression of evidence if its probative value is “substantially outweighed” by a risk of unfair prejudice, confusion of issues, misleading the members, undue delay, waste of time, or needless presentation of cumulative evidence.¹⁶⁰ Under the 2006 MCA, this was an optional provision that the Secretary of

¹⁵⁵ *Id.*

¹⁵⁶ 10 U.S.C. § 949a(a) (2009).

¹⁵⁷ Military Commissions Act of 2006, Pub. L. No. 109-366 §§ 948b(c)-948b(d), 949a(a), 120 Stat. 2602, 2608 (2006).

¹⁵⁸ Military Commissions Act of 2006, Pub. L. No. 109-366 § 949a(a), 120 Stat. 2608 (2006).

¹⁵⁹ 10 U.S.C. § 949a(a) (2009).

¹⁶⁰ 10 U.S.C. § 949a(b)(2)(F) (2009).

Defense could choose to adopt when formulating rules of evidence.¹⁶¹ Like the 2006 MCA, the 2009 MCA gives a list of provisions that the Secretary of Defense may choose to adopt in the rules of evidence.¹⁶² However, a new Manual for Military Commissions, which contains the rules of evidence for military commissions, has not been published yet.

Even the baseline statutory protection in the 2009 MCA is a significant improvement over the 2006 MCA. Under the 2006 MCA, hearsay evidence was not presumptively inadmissible as it is in the Military Rules of Evidence and Federal Rules of Evidence.¹⁶³ Rather, it was presumptively admissible.¹⁶⁴ Hearsay was allowed to be admitted under one of the traditional exceptions contained in the Military Rules of Evidence and Federal Rule of Evidence.¹⁶⁵ More significantly, however, hearsay could be admitted if adequate notice was provided to the opposing party and that party could not demonstrate the unreliability of the proffered evidence by a preponderance of the evidence.¹⁶⁶ In other words, if the prosecution provided timely notice to the defense that it was going to introduce hearsay evidence, the defense was given the burden to prove the unreliability of the evidence.¹⁶⁷ This was a rather significant loophole, and fortunately Congress did not include it in the 2009 MCA.

5. Disclosure Duties for Prosecutors Similar to the Brady Rule¹⁶⁸

The 2009 MCA enhances the right of the accused to discovery by requiring the prosecutor to disclose any evidence which “reasonably tends to negate the guilt of the accused . . . reduce the degree of guilt of the accused . . .

¹⁶¹ Military Commissions Act of 2006, Pub. L. No. 109-366 § 949a(b)(2), 120 Stat. 2608 (2006).

¹⁶² 10 U.S.C. § 949a(b)(3) (2009).

¹⁶³ Military Commission Rule of Evidence 803(a)-(b) (2006).

¹⁶⁴ *Id.*

¹⁶⁵ Military Commission Rule of Evidence 803(a) (2006).

¹⁶⁶ Military Commission Rule of Evidence 803(a)-(b).

¹⁶⁷ *Id.*

¹⁶⁸ Padmanabhan, *supra* note 4, at 471.

impeach the credibility of [government witnesses, or] . . . mitigat[e] evidence at sentencing.”¹⁶⁹ The key aspect of this provision is that it requires the prosecutor to turn over any evidence that “is known or reasonably should be known to any government officials who participated in the investigation and prosecution of the case against the defendant.”¹⁷⁰ This rule is very similar to the *Brady* rule applicable in federal courts, which also requires prosecutors to turn over any exculpatory evidence of which the prosecutor knows or reasonably should know.¹⁷¹ On the topic of obtaining evidence, this same section in the 2009 MCA also specifies that the right of the accused in a military commission to obtain witnesses and evidence in his defense is equal to the right that a defendant in an Article III court has to obtain witnesses and evidence for his defense.¹⁷²

6. Prohibition on Statements Obtained by Torture or Cruel, Inhuman, or Degrading Treatment

The scope of the ban on statements obtained by torture has been expanded in the 2009 MCA to include statements produced by cruel, inhuman, or degrading treatment (as defined in the Detainee Treatment Act of 2005 (DTA)).¹⁷³ The Army Field Manual, the only source which military personnel may rely on for standards of conduct in interrogations,¹⁷⁴ prohibits a multitude of actions such as: “[f]orcing the detainee to be naked, perform sexual acts, or pose in a sexual manner, [p]lacing hoods or sacks over the head of a detainee; using duct tape over the eyes, [a]pplying

¹⁶⁹ 10 U.S.C. § 949j (2009).

¹⁷⁰ 10 U.S.C. § 949j(b)(4) (2009).

¹⁷¹ *Brady v. Maryland*, 373 U.S. 83, 87 (1963); Bennett L. Gershman, *Reflections on Brady v. Maryland*, 47 S. TEX. L. REV. 685, 699-700 (2006).

¹⁷² 10 U.S.C. § 949j(a)(1) (2009).

¹⁷³ 10 U.S.C. § 948r(a) (2006).

¹⁷⁴ Executive Order, Ensuring Lawful Interrogations, § 3(c) (Jan. 22, 2009), available at http://www.whitehouse.gov/the_press_office/EnsuringLawfulInterrogations/; See also John R. Cook, *President Issues Executive Order Banning Torture and CIA Prisons*, 103 AM. J. INT'L L. 331 (2009).

beatings, electric shock, burns, or other forms of physical pain, “[w]aterboarding,” [u]sing military working dogs, [i]nducing hypothermia or heat injury, [c]onducting mock executions, [and] [d]epriving the detainee of necessary food, water, or medical care.”¹⁷⁵

The 2006 MCA banned statements produced by torture, but allowed statements obtained by other means before the enactment of the DTA if they met a two-part standard: “(1) the totality of the circumstances render[ed] the statement reliable and possessing sufficient probative value; and (2) the interests of justice would [have] best [been] served by admission of the statement into evidence.”¹⁷⁶ However, statements obtained after the enactment of the DTA were also not allowed if they were obtained by cruel, inhuman, or degrading treatment.¹⁷⁷ This is significant because a great deal of inappropriate detainee treatment by the CIA occurred between 2002 and 2004.¹⁷⁸ The 2009 MCA amendment forecloses the use of any statements obtained by improper methods during that time period.¹⁷⁹

The 2009 MCA also imposes additional standards on other statements introduced into evidence. Like the 2006 MCA, such statements must be found reliable as judged by the totality of the circumstances and must have sufficient probative value.¹⁸⁰ Second, either the statement (1) must be made incident to lawful conduct during military operations and (2) its introduction would best serve the interests of justice; *or* the statement must be voluntarily made.¹⁸¹ The voluntariness of the statement is to be judged by “the totality of the circumstances, including, as appropriate:” (1) the

¹⁷⁵ U.S. Army Field Manual 2-22.3, §5-75.

¹⁷⁶ Military Commissions Act of 2006, Pub. L. No. 109-366 § 948r(c), 120 Stat. 2607 (2006).

¹⁷⁷ Military Commissions Act of 2006, Pub. L. No. 109-366 § 948r(d), 120 Stat. 2607 (2006).

¹⁷⁸ Joanne Mariner, *A First Look at the Military Commissions Act of 2009, Part Two*, FINDLAW, Nov. 30, 2009, <http://writ.news.findlaw.com/mariner/20091130.html>.

¹⁷⁹ 10 U.S.C. § 948r(a) (2009).

¹⁸⁰ 10 U.S.C. § 948r(c) (2009).

¹⁸¹ 10 U.S.C. § 948r(c) (2009).

details and circumstances of military and intelligence conduct surrounding the taking of the statement, “(2) the characteristics of the accused, such as military training, age, and education level,” and (3) other circumstances surrounding the taking of the statement such as “lapse of time, change of place, or change in identity” of the interrogator between the time the statement was taken and any prior questioning.¹⁸² This provision allows, but does not require, the judge to consider all the surrounding circumstances of the taking of a statement to make sure the defendant is not being unjustly deceived or coerced into making any admissions.¹⁸³

7. Classified Information Procedures Are Nearly Identical to CIPA

A significant change in the 2009 MCA is the near-complete incorporation of the Classified Information Procedures Act (hereinafter “CIPA”), the federal law mandating certain procedures to handle classified information in federal criminal trials.¹⁸⁴ By “establish[ing] a procedural framework for ruling on questions of admissibility involving classified information before introduction of the evidence in open court,” CIPA helps ease the tension between a defendant’s Sixth Amendment right to a public trial and the government’s interest in protecting classified information.¹⁸⁵ The 2009 MCA essentially incorporates CIPA in its entirety (hereinafter “MCIPA”);¹⁸⁶ however Congress made a few modifications, likely because of the increased sensitivity of information and security concerns in military commissions.

¹⁸² 10 U.S.C. § 948r(d) (2009).

¹⁸³ *Id.*

¹⁸⁴ Jonathan M. Lamb, Comment, *The Muted Rise of the Silent Witness Rule in National Security Litigation: The Eastern District of Virginia’s Answer to the Fight Over Classified Information at Trial*, 36 PEPP. L. REV. 213, 235, 238 (2008); 10 U.S.C. §§ 949p-1 to 949p-7 (2009).

¹⁸⁵ Lamb, *supra* note 184, at 238.

¹⁸⁶ Compare 18A U.S.C. §§ 2-6, 8 and 10 U.S.C. §§ 949p-2 to 949p-7 (2009).

CIPA has four main provisions.¹⁸⁷ First, either party may move for, and the court is required to hold, a pretrial conference to consider and encourage resolution of questions about the use of classified information.¹⁸⁸ In the conference, no decisions are made about the proposed use of classified information at trial, but the court may issue a protective order prohibiting the defense from disclosing any classified information it may receive.¹⁸⁹ The language in MCIPA on pretrial conferences and protective orders is identical to that of CIPA, except that MCIPA has been expanded to allow for *ex parte* pretrial conferences.¹⁹⁰

The second aspect concerns discovery. When the defense requests discovery of or access to classified information in a federal criminal trial, CIPA allows the U.S. to make a motion to the judge to obtain authorization to redact information from, substitute a summary for, or stipulate to facts contained in the classified information.¹⁹¹ MCIPA, on the other hand, disallows the disclosure of classified information by default unless the judge determines that disclosure “would be noncumulative, relevant, and helpful to a legally cognizable defense, rebuttal of the prosecution’s case, or to sentencing, in accordance with standards generally applicable to discovery of or access to classified information in Federal criminal cases.”¹⁹² The difference, while material, seems unlikely to substantially impact fairness because while MCIPA does provide for a default rule against disclosure of classified information, it also gives the military judge significant discretion. It also provides concrete standards for judges to work with, standards that are based on federal criminal standards and procedure.¹⁹³ Additionally, however, MCIPA does not allow the defense to move for reconsideration if the military judge prevents access or authorizes a substitution, summarization, or redaction request

¹⁸⁷ Lamb, *supra* note 184, at 238-45.

¹⁸⁸ *Id.* at 239-40.

¹⁸⁹ *Id.*

¹⁹⁰ 10 U.S.C. § 949p-2(b) (2009); 18A U.S.C. § 2.

¹⁹¹ Lamb, *supra* note 184, at 240-41; 18a U.S.C. § 4.

¹⁹² 10 U.S.C. § 949p-4 (a)(2) (2009).

¹⁹³ *Id.*

by the prosecution.¹⁹⁴ The remainder of this MCIPA provision provides more specific wording, but appears to operate in the same manner as CIPA.¹⁹⁵

The third provision of CIPA concerning the defendant's pre-existing knowledge of classified information is identical to the corresponding provision of MCIPA. In both statutes, where the accused already has knowledge of classified information, or gains access to such knowledge during the pre-trial or trial stage, the accused is required to notify the court if it intends to disclose the information.¹⁹⁶ The United States must then be given a "reasonable opportunity" to seek a hearing to consider a substitution of the classified information, as explained in the next paragraph.¹⁹⁷

Section 6 of CIPA is the principal provision of the classified information procedures regime.¹⁹⁸ It lays out the procedures to be followed when a judge determines the proper use of classified information at trial.¹⁹⁹ At a section 6 hearing, the judge first determines whether the proffered information is relevant and admissible at trial (as would be done for any other evidence).²⁰⁰ This hearing can be held in camera if the Attorney General (or a "knowledgeable U.S. official" in the case of military commissions) certifies that a public hearing might result in disclosure of the information.²⁰¹ To assure that classified information is not unnecessarily disclosed in military commissions, Congress inserted the following into MCIPA: "Classified information is not subject to disclosure under this section unless the information is relevant and necessary to an element of the offense or a legally cognizable defense and is otherwise admissible in evidence."²⁰²

¹⁹⁴ 10 U.S.C. § 949p-4 (2009).

¹⁹⁵ *Id.*

¹⁹⁶ 10 U.S.C. § 949p-5(a)(1-2) (2009); 18A U.S.C. § 5.

¹⁹⁷ 10 U.S.C. § 949p-5(a)(1-2) (2009); 18A U.S.C. § 5.

¹⁹⁸ Lamb, *supra* note 184, at 242.

¹⁹⁹ *Id.*

²⁰⁰ 18A U.S.C. § 6(a).

²⁰¹ *Id.*; 10 U.S.C. § 949p-6(a)(3) (2009).

²⁰² 10 U.S.C. § 949p-6(a)(3) (2009).

In the case that the judge authorizes disclosure of classified information, the government may seek permission to submit a summary of the classified information or a statement admitting relevant facts that the classified information tends to prove in lieu of the classified information.²⁰³ In this “substitution hearing” authorized by section 6(c) the judge has a responsibility to the defendant to ensure that any substitutions or statements provided by the government “will provide the defendant with substantially the same ability to make his defense as would disclosure of the specific classified information.”²⁰⁴

If the judge orders disclosure after a substitution hearing, then the Attorney General may object to the order by filing an affidavit certifying that the disclosure of the information would damage national security.²⁰⁵ The government may ultimately choose not to disclose the information, but the judge is then authorized to dismiss specific counts, the entire case, or strike the testimony of a government witness.²⁰⁶

Most of section 6 of MCIPA mirrors CIPA, but some language is carried over from the 2006 MCA. First, § 949p-6(c) mandates an in camera pretrial hearing to assess the admissibility of classified information. It also helps protect unnecessary disclosure of classified information by requiring that the judge permit the trial counsel to

Includ[e] a substituted evidentiary foundation pursuant to the procedures described in subsection (d) [MCIPA subsection (d) is the counterpart of CIPA section 6(c), which allows for substitution, etc.], while protecting from disclosure information identifying those sources, methods, or activities, if (A) the evidence is otherwise admissible; and (B) the military judge finds that (i) the evidence is

²⁰³ 18A U.S.C. § 6(c).

²⁰⁴ Lamb, *supra* note 184, at 243; 18A U.S.C. § 6(c).

²⁰⁵ 18A U.S.C. § 6(c)(2).

²⁰⁶ 18A U.S.C. § 6(e).

reliable; and (ii) the redaction is consistent with affording the accused a fair trial.²⁰⁷

8. Full Appellate Review via Military and Federal Courts

The 2009 MCA has changed appellate review of military commissions in two very important ways. First, the scope of review for the CMCR and D.C. Circuit has been expanded.²⁰⁸ Both courts may now review findings of both law and fact.²⁰⁹ Thus, the CMCR may find that the evidence against the accused was insufficient to support the jury verdict.²¹⁰ Second, the 2009 MCA has given CMCR judges full independence from improper influence by the executive branch and chain of command.²¹¹ This structure follows the court-martial scheme, which provides for trial and review by independent military judges, then the review continues on into the Article III courts.²¹²

This system is advantageous in two respects. First, by allowing independent military judges to conduct trials and the first layer of appellate review, it allows them to tailor

²⁰⁷ 10 U.S.C. § 949p-6(c) (2009).

²⁰⁸ 10 U.S.C. §§ 950f(d), 950g(d) (2009).

²⁰⁹ *Id.*

²¹⁰ Silliman, *supra* note 10, at 295-96. This author also notes the similarity between military commission reviews and military criminal reviews: “The model for this expanded scope of appellate review is the service courts of criminal appeal, the highest appellate courts in each of the armed services for review of courts-martial.” *Id.*

²¹¹ 10 U.S.C. § 949b(b) (2009); Newton, *supra* note 133, at 157 (“The Supreme Court has upheld this sui generis system of Article I courts authorized by the UCMJ, thereby discounting arguments that military judges are inevitably held hostage to the demands of the executive branch or the hierarchical whims of military superiors.”).

²¹² Newton, *supra* note 133, at 157 (“The UCMJ structure preserves the long history of self-regulation by a parallel system of law under the authority of the executive branch rather than the existing federal court system authorized in Article III of the Constitution. In fact, the entire military judiciary is composed of Article I judges who serve in a stovepiped organization designed to be insulated from the control of any commander at any level.”); Glazier, *supra* note 94, at 176-177 (“Overall the MCA brings the commission process much closer to the judicial form of a court-martial.”).

constitutional and statutory interpretation to the unique demands of military circumstances.²¹³ Second, this system more fully tests the procedural, substantive, and constitutional validity of the trials and statutes by providing for at least two layers of detailed review to expose the weaknesses and unfair aspects of a particular statute or trial.

In addition, military commission judges and CMCR judges should be able to incorporate findings of federal courts on federal material support statutes and trials and similar findings of military courts-martial into military commissions of material support crimes to the extent they feel it is necessary.²¹⁴

Overall, this system places a great deal of faith in military judges and lawyers, but rightly so. We cannot assume that these judges and lawyers will give in to executive demands or ignore their ethical and professional obligations in order to secure unfair or unwarranted convictions.²¹⁵ As one commentator said:

The practice of military commissions during the past seven years demonstrates that military attorneys and judges have done their duty in seeking justice according to law. Many human rights groups and lay observers unfamiliar with the discipline and dedication of military attorneys assumed that they would simply cave in to executive pressures to unfairly convict defendants with little due process. The record emphatically demonstrates otherwise.²¹⁶

²¹³ Newton, *supra* note 133, at 157 (“Because military courts are convened and created under Article I authority, the interpretation and application of constitutional protections often varies slightly, and judges need not be appointed for life as they are in the federal system.”).

²¹⁴ 10 U.S.C. § 948b(c) (2009). (The 2009 MCA does not include a ban on consideration of federal judicial rulings and procedures.).

²¹⁵ Newton, *supra* note 133, at 158.

²¹⁶ *Id.*

IV. IMPROVING THE PERCEPTION OF MILITARY COMMISSIONS
TO GAIN SUPPORT

In addition to guiding the Executive and limiting unneeded discretion, a clear standard for the separation between federal courts and military commissions will help give the U.S. credibility abroad. Such credibility is badly needed to obtain support from other countries in fighting terrorism. These countries need to know about the changes that have been made to military commissions, and that we are using them in a judicious manner. If we can get that message across, it seems more likely that other countries will cooperate because they know we value fairness, due process, and other similar values.

The U.S. can and should act in other ways such as using multilateral treaties and law enforcement agreements to encourage the enforcement of anti-terrorism (and material support) laws by other countries. The U.S. should also come up with ways to educate our own population and the populations of other countries on extremism and terrorism and combat such ideologies. By engaging Arab and Muslim communities at home and abroad diplomatically and respectfully, we can also obtain the intelligence and information we need to ferret out terrorist threats.²¹⁷ By increasing emphasis on multilateral political and diplomatic engagement with other countries, we can more effectively obtain global cooperation.²¹⁸

V. CONCLUSION

The military commissions introduced by President Bush in 2001 were heavily criticized by many, but they have come a long way since then. The 2006 MCA and 2009 MCA have made significantly changed military commissions and provided many fundamental procedural protections for the accused.

²¹⁷ DAVID COLE & JULES LOBEL, *LESS SAFE, LESS FREE: WHY AMERICA IS LOSING THE WAR ON TERROR* 214-15 (2007).

²¹⁸ COLE & LOBEL, *supra* note 196, at 217.

In light of the 2009 MCA, this note asserts that military commissions now constitute a fair and sensible forum for prosecuting terrorists. To address the criticism that there is no clear dividing line between the jurisdiction of military commissions and federal courts, this note proposes limiting the jurisdiction of military commissions over material support crimes to individuals who intend to further specific acts of terrorism (and have actual knowledge, or should reasonably know of a specific act of terrorism) in any area of the world and to those giving generalized or specific aid to terrorists or FTOs in active theaters of war. This approach, while not perfect, provides a relatively clear dividing line. In addition, having a clear jurisdictional separation between military commissions and federal courts will bolster the credibility of the U.S. abroad, and substantially increase the support we receive from other countries in fighting terrorism.