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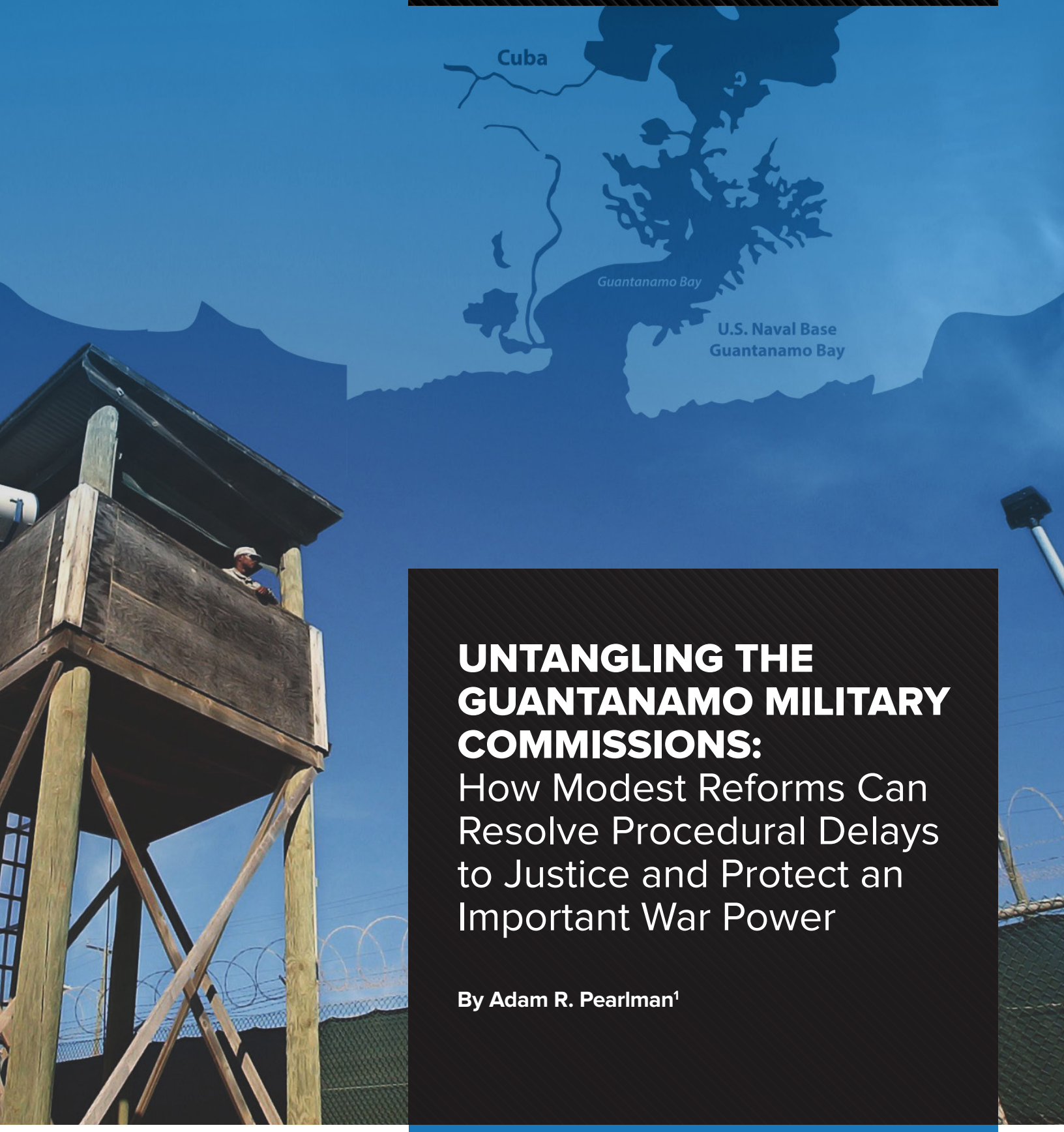

UNTANGLING THE GUANTANAMO MILITARY COMMISSIONS:

How Modest Reforms Can Resolve Procedural Delays to Justice and Protect an Important War Power

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NSI LAW AND POLICY PAPER

UNTANGLING THE GUANTANAMO MILITARY COMMISSIONS:
How Modest Reforms Can Resolve Procedural Delays to Justice and Protect an Important War Power

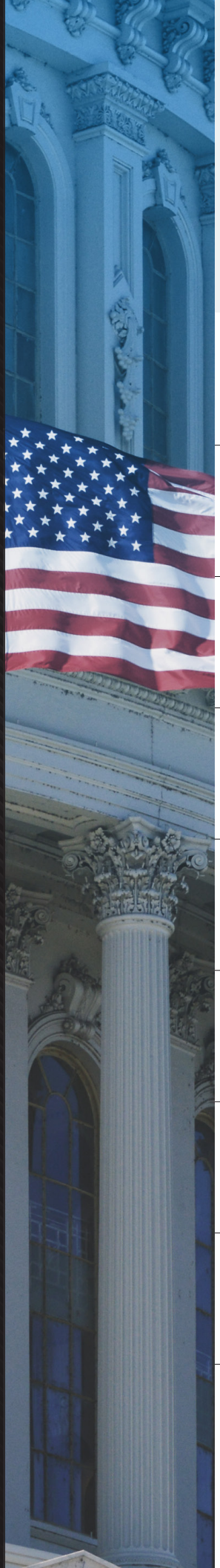
THIS NSI LAW AND POLICY PAPER:

1. **Describes** the history and purpose of the military commissions convened at Guantanamo Bay as well as the protracted delays plaguing several of the government's highest-priority commissions trials;

2. **Evaluates** the rationale behind military commissions "apparent unlawful influence" jurisprudence, the contempt powers of the military commissions trial judiciary, and detainee monitoring at Guantanamo Bay— issues that have contributed significantly to the unreasonably long pre-trial litigation phase of the commissions;

3. **Argues** that modest reforms would enable the commissions to accelerate the pace of pretrial litigation without undermining the rights of the Accused;

4. **Proposes** actionable recommendations that can help resolve these procedural delays to justice and protect an important war power for the United States.



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EXECUTIVE **SUMMARY**

Background on Military Commissions

BUSH COMMISSIONS ORDER & MILITARY COMMISSIONS ACTS

Soon after the attacks of September 11, 2001, President Bush signed an order authorizing military commissions to prosecute international terrorists for violations of the laws of war.

However, in its 2006 decision *Hamdan v. Rumsfeld*, the Supreme Court quashed those efforts and Congress was needed to re-establish the commissions, which was done through the Military Commissions Acts of 2006 and 2009.

LONG-PENDING TRIALS

There are currently three military commissions actively engaged in protracted pre-trial litigation concerning seven defendants, including Khalid Sheikh Mohammed and four others charged as co-conspirators related to the 9/11 plot.

KEY REFORMS NEEDED

Many factors have contributed to the lengthy proceedings and pre-trial litigation, but congressional attention to three key issues has the potential to eliminate significant impediments to reaching trial:

- **Curbing Misinterpretation and Abuse of the Unlawful Influence Statute**
- **Restoring the Contempt Power of Commissions Trial Judges**
- **Clarifying Permissible Detainee Monitoring**

The 'Apparent Unlawful Influence' Doctrine

BACKGROUND AND KEY CONCEPTS

- **'Unlawful Influence' In Military Commissions.** The military commissions' prohibition against "unlawful influence" is broader than its military justice counterpart prohibition on unlawful command influence in that it goes beyond a focus on superior officers to prohibit any person from improperly attempting to influence commissions proceedings.
  - The commissions judges have also adopted, from military justice common law jurisprudence, an "Apparent Unlawful Influence" doctrine guarding against even the appearance of unlawful influence.
- **Unlawful Influence Claims Proliferate.** Defense filings in the active military commissions raised the issue of unlawful influence at least 118 times between 2013-2018, including with respect to: amending regulation; amending statute; actions of individuals outside the chain of command; and an EEOC complaint.

THE DEBATE OVER UNLAWFUL INFLUENCE

Whether the military commissions' Unlawful Influence doctrine needs reform.

- ***Argument:* UI Litigation Has Been Reasonable.** The MCA's process is novel and untested, and robust litigation as to the rights of the Accused is therefore reasonable under the circumstances.
- ***Argument:* Reforms Are Needed.** The sheer number of allegations concerning unlawful influence and the unusually broad scope of these challenges demonstrate the need for reforms.

AUTHOR'S VIEWS

The 'Apparent Unlawful Influence' doctrine should not apply to military commissions:

- **Underlying Rationale Is Inapplicable.** Although UCMJ jurisprudence is a useful analogy, the military commissions' UI statute is significantly broader and applies to a system whose context, origins, and procedures differ materially from those of the military justice system.
- **Relying On The Prohibition Against *Actual* UI Is The Better Approach.** Requiring commissions judges to find actual unlawful influence would be better policy and recognize the broader scope of the unlawful influence statute, the different context in which the commissions are convened, and the different relationship between the Convening Authority and the Accused.

The Lack Of Judicial Contempt Powers

BACKGROUND AND KEY CONCEPTS

The "contempt power" refers generally to the inherent and unilateral power of a judge to enact punishments for acts that obstruct the court's orders or the administration of the justice system.

- **No Judicial Contempt Power In Military Commissions.** A federal court ruled last year that military commissions trial judges cannot unilaterally find someone in contempt.

THE DEBATE OVER JUDICIAL CONTEMPT AUTHORITY

Whether military commissions trial judges should have traditional contempt powers.

- ***Argument:* Judges' Powers Should Be Limited.** Judges' powers should be limited in military commissions because the system is inherently biased against defendants relative to the criminal and military justice systems, and the trial judiciary is not independent in the way that federal judges are.
- ***Argument:* Judges Should Have Contempt Power.** The contempt power is a basic and, in any other instance, uncontroversial tool that judges need to help them control their courtrooms and the proceedings therein.

AUTHOR'S VIEWS

- **Contempt Power Should Be Restored.** Military commissions have constantly been subject to conduct that would be unacceptable in any other forum, and the contempt power is a judge's principal tool for ensuring the proper functioning of the proceedings.
- **Legislative Amendment Should Be Pursued.** The federal court's decision will further hamstring military commissions trial judges and will only be overruled by legislative amendment.

Detainee Monitoring And The Rights Of The Accused

BACKGROUND AND KEY CONCEPTS

The military commissions defense bar has raised several allegations of government surveillance of attorney-client meetings at Guantanamo Bay.

- **Right To Counsel.** Federal courts have held that Guantanamo Bay detainees have a right to counsel associated with their habeas claims, and the MCA and DoD regulations guarantee defense counsel for the Accused in military commissions.
- **Precedent Of Lawful Surveillance.** There is precedent for conducting surveillance of detained or imprisoned terrorists during attorney-client meetings for intelligence and force protection purposes.

THE DEBATE OVER DETAINEE SURVEILLANCE

Whether surveillance of detainee-attorney communications is lawful, needed, and comports to relevant norms.

- ***Argument:*** **Prohibit Monitoring Of Attorney-Client Communications.** Government surveillance of attorney-client communications is generally prohibited both domestically and internationally, and has a chilling effect on counsels' ability to represent their clients.
- ***Argument:*** **Detainee Surveillance Is Necessary And Appropriate.** GTMO detainees remain national security threats and sources of intelligence while in detention, and Attorney-client privilege is not without recognized exceptions.

AUTHOR'S VIEWS

- **Restrictions With Oversight Is A Common Approach To Surveillance Programs.** As is the case with many national security programs, assurance and oversight measures are the proper approach rather than altogether forbidding the collection.
- **Walled-Off Teams Are Appropriate.** The courts have recognized the government's overriding investigative interest and quarantined surveillance is a well-established means to satisfy intelligence requirements without curtailing rights.
- **Detainee Monitoring Critical.** Previous prosecutions related to terrorists' communications with attorneys establish a case for carefully monitoring any detainee visit where sensitive information affecting national security might come to light.

ACTIONABLE RECOMMENDATIONS

1 REFORM THE UNLAWFUL INFLUENCE DOCTRINE

Congress should amend current law to clarify that the military justice common law doctrine of 'apparent unlawful command influence' does not apply to proceedings under the Military Commissions Act, and to provide for appeals of findings of actual unlawful influence.

2 RESTORE THE JUDICIAL CONTEMPT POWER

Congress should amend current law to provide military commissions judges with a unilateral contempt power consistent with those found in the criminal and military justice systems

3 AFFIRM THE LAWFULNESS OF DETAINEE MONITORING

Congress should consider a means to clarify that the statutory right to counsel in military commissions does not encompass a right to be free from monitoring for security, intelligence, and force protection purposes, and establish a framework to ensure any surveillance is walled-off from military commission proceedings.

BACKGROUND ON MILITARY COMMISSIONS

Bush Commissions Order

MILITARY ORDER OF NOVEMBER 13, 2001

- Soon after the terror attacks of September 11, 2001, President Bush signed the Military Order of November 13, 2001 that, among other things, provided for the Secretary of Defense to convene military commissions to prosecute international terrorists and those who harbor them.[2]
  - Military commissions are distinct proceedings from the detainees' habeas litigation;[3] they are one forum in which certain types of criminal proceedings (namely, adjudications of alleged war crimes) may be conducted.
- The Order employed the same paradigm President Roosevelt used for handling Nazi saboteurs, which the Supreme Court sanctioned in *Ex Parte Quirin* in 1942.[4]

THE SUPREME COURT INTERVENES

- In its 2006 decision *Hamdan v. Rumsfeld*,[5] the Supreme Court quashed the already-stalled efforts to prosecute alleged terrorists via military commissions convened by the President, in part under the President's inherent Constitutional authorities, including his powers as Commander-in-Chief.
- The decision reflected that international, military, and criminal law all had changed since the early 1940s.
  - There had been no military judges in the 1940s, for example, but judges became an integral part of the military justice system over the next half century.
  - The Geneva Conventions were adopted in 1949; the Uniform Code of Military Justice in 1951.
  - And the very different nature of the War on Terror also made it difficult to replicate World War II precedents directly.

Military Commissions Acts

MILITARY COMMISSIONS ACTS OF 2006 AND 2009

- In response to *Hamdan*, Congress passed the Military Commissions Act (MCA) of 2006[6] to enable the President and the Department of Defense to restart an effort that already had been underway for four years.
- Although President Obama suspended military commissions upon taking office in January 2009, soon afterward he signed into law the MCA of 2009[7] containing a set of amended provisions still in-force today.
- For the purposes of this Paper, military commission Accused are a subset of persons detained at Guantanamo Bay who also have been charged for violations of the law of war under the MCA.
    - Under the MCA, charges against a detainee are drafted and sworn to by prosecutors, and can only be "referred" to a military commission by an independent Convening Authority designated by the Secretary of Defense. As with a federal grand jury considering whether to issue a criminal indictment, the Convening Authority may only refer charges after determining probable cause exists that a crime has been committed over which a military commission would have jurisdiction.[8]
- Among other things, the MCA included a provision to shield the proceedings from "unauthorized influence," which had been alleged by uniformed military judge advocates involved in the standing-up of the tribunals.[9]
- Although its application is largely limited to aliens, the statute conveys personal jurisdiction on a few specific charges against U.S. persons, including contempt of court.
- The MCA provides only for limited interlocutory appeals (*i.e.*, appeals made during pre-trial and trial proceedings) to the United States Court of Military Commission Review, an Article I court-of-record.[10]

Pending Commissions Trials

- There are currently three military commissions actively engaged in pre-trial litigation concerning referred charges against seven Guantanamo Bay detainees (the Accused):
    - ***United States v. Mohammed, et al*** concerns Khalid Sheikh Mohammed, Walid bin'Attash, Ramzi Binalshibh, Ali Abdul Aziz Ali, and Mustafa Hawsawi, who are joint Accused charged as co-conspirators related to the 9/11 plot (the 9/11 commission). The current charges against these five detainees were referred in April 2012.[11]

- ***United States v. Abd al Rahim Hussayn Muhammad al Nashiri*** concerns Nashiri's alleged role in planning attacks on, *inter alia*, the USS COLE on October 12 2000. The current charges against Nashiri were referred in September 2011.[12]
- ***United States v. Abd Al Hadi Al-Iraqi*** relates to Hadi's alleged war crimes on the battlefield in Afghanistan. The current charges against Hadi were referred in June 2014.[13]

Protracted Delays

- Seventeen years after the first detainees arrived at Guantanamo Bay, and nearly thirteen years after the High Value Detainees entered military custody there and Congress passed the first Military Commissions Act, several of the government's highest-priority Accused remain in protracted pretrial litigation adjudicated via sporadically-held hearings at Guantanamo Bay.
- While the government is to blame for a fair share of the difficulties the military commissions have experienced since 2001, as both the Executive and Legislative branches have committed unforced errors in how commissions have been stood-up and implemented, that is not the only story.
- Many factors, including concerns related to classified information and discovery, have contributed to the lengthy proceedings and pre-trial litigation.
- Academics and practitioners have debated an array of solutions, from scrapping the process entirely and moving the proceedings to Article III courts, to complete overhauls of the underlying statutory regime.[14]

Modest Reforms Can Help Remedy Procedural Delays To Justice

- Congressional attention to three key issues has the potential to eliminate significant distractions having outsized influence on preventing the current commissions from reaching trials on the merits:
  - **Curbing Misinterpretation and Abuse of the Unlawful Influence Statute**
  - **Restoring the Contempt Power of Commissions Trial Judges**
  - **Clarifying Permissible Detainee Monitoring**

THE **'APPARENT UNLAWFUL INFLUENCE'** DOCTRINE

Background And Key Concepts

UCMJ 'UNLAWFUL COMMAND INFLUENCE'

- The Uniform Code of Military Justice has prohibited Unlawful Command Influence (UCI) in its current form since 1956,[15] which prevents superior officers from improperly intervening in court-martial proceedings against their subordinates.[16]
- The prohibition against UCI serves to counter-balance the lack of certain constitutional protections that servicemembers sacrifice upon enlistment, commissioning, or being drafted into the United States Armed Forces. These include the Fifth Amendment right to an indictment and the Sixth Amendment right to a randomly-selected jury.[17]
- Under a test developed by the U.S. Court of Appeals for the Armed Forces (CAAF), a UCI claim must be supported by "some evidence" (more than "mere allegation or speculation") of improper influence,[18] and the UCI must have a logical connection with a court-martial.[19] Meeting these threshold conditions raises a presumption of UCI that the government must either rebut beyond a reasonable doubt or prove that the UCI will not impact the proceedings.[20]

'APPARENT UCI'

- On the theory that even the appearance of UCI is toxic to our system of military justice, the military courts have developed a robust body of common law guarding against "apparent UCI."[21]
- This doctrine is based on, *inter alia*, maintaining troop morale and the public's faith in the military justice system.[22]
    - During hearings in 1949 as Congress considered enacting the UCMJ, Congress heard testimony that "it is necessary to the welfare of the armed services that their personnel believe that they are getting a fair trial as a help to the maintenance of morale . . . if you are to have a fighting army."[23]
- After the concept began to appear in dissenting opinions and dicta in the 1950s, military courts began developing a body of common law around apparent influence in 1964.[24]

- In determining whether apparent UCI exists, the presiding judge of a court-martial asks whether an "objective, disinterested observer fully informed of all the facts and circumstances would harbor a significant doubt about the fairness of the proceeding."[25]

'UNLAWFUL INFLUENCE' IN MILITARY COMMISSIONS

- **A Broader 'Unlawful Influence'.** The military commission analog to UCI is a prohibition against "unlawful influence" codified in 10 U.S.C. §949b.
  - Section 949b is broader than its military justice counterpart's focus on the influence of commanding officers, in that it prohibits *any person* from improperly attempting to influence commissions proceedings.[26]
    - Section 949b was included in the MCA to protect "the independent exercise of judgment by both prosecutors and defense counsel."[27]
  - Since 2008, the military commissions trial judiciary has applied CAAF's UCI test described above to military commissions proceedings, including the standard for alleging unlawful influence and the burden-shifting to the government to rebut the allegations.[28]
- **'Apparent Unlawful Influence'.** In addition to examining whether any allegedy improper conduct constitutes an attempt to (or does, in fact) unlawfully influence the commissions, the commissions trial judges have applied traditional military justice tests to assess whether that same conduct *appears* to be an attempt to influence the commissions judges or process.
  - Military common law standards for "apparent influence" have been applied to commissions proceedings without appreciable distinction, notwithstanding the broader protections §949b gives to military commissions over its UCI counterpart and not meaningfully accounting for the different context in which military commissions are convened.[29]
    - The judges have in part relied upon a provision of the Regulation for Trial by Military Commission (RTMC), promulgated by the Deputy Secretary of Defense, instructing that those involved in military commissions "must avoid the appearance . . . of unlawful influence."[30]
  - Importantly, if a military commissions trial judge decides an appearance of unlawful influence exists, neither that finding, nor the determined remedy (short of dismissal of a charge or exclusion of evidence) is immediately appealable.[31]

UNLAWFUL INFLUENCE CLAIMS PROLIFERATE

- Between 2013 and 2018, defense filings in the currently active military commissions raised the issue of Unlawful Influence at least 118 times,[32] including with respect to:
  - **Amending Regulation.** The defense in all three commissions challenged an order by the Deputy Secretary of Defense to amend his own Regulation for Trial by Military Commissions to empower the trial judiciary to better manage the pace of litigation by making military commissions the primary duty of the detailed judges, and by making their primary duty station the venue where the hearings and trials are to be held, *i.e.*, Guantanamo.[33]
    - Nashiri's defense team argued that the proposed regulatory change (known as "Change 1 to the RTMC") "attempted to coerce the independent judgment of the trial judiciary by marooning them on a remote penal colony,"[34] and would therefore prejudice the due process rights of the Accused.[35]
  - **Statutory Amendment.'** Acknowledging the "novel" theory, one defense team alleged "UI (or attempted UI) by statutory amendment" in response to proposed changes to the Military Commissions Act.[36]
    - A month later, another defense team argued that an enacted NDAA provision effectively overruling a judicial order by statute amounted to UI,[37] and argued commissions proceedings required abatement until that "taint . . . is cured, if possible."[38]
  - **Individuals Outside The Chain Of Command.** Defense counsel in the 9/11 commission alleged that an email[39] from the Legal Advisor to the Chairman of the Joint Chiefs of Staff to the civilian supervisors of commissions Chief Prosecutor and Chief Defense Counsel questioning the presence of military defense counsel appearing in-uniform and at government expense at a United Nations Human Rights Commission meeting in Geneva, Switzerland, constituted an unauthorized attempt "to influence the exercise of professional judgment by defense counsel."[40]
  - **An EEOC Complaint.** An Equal Employment Opportunity (EEO) complaint filed by enlisted female military police officers against military commissions trial judges relating to orders prohibiting them (the guards) from fully performing their assigned force protection duties as to certain High Value Detainees[41] was characterized by defense counsel as "Unlawful Influence Directed at the Military Judge," in that it would trigger an investigation "into the allegations and subject of the complaint," to wit, the judges' orders.[42]

The Debate Over Unlawful Influence

Whether the military commissions' Unlawful Influence doctrine needs reform.

ARGUMENT: UI LITIGATION HAS BEEN REASONABLE

- **A Novel Forum With Untested Rights.** In general, the military commissions defense bar has advanced arguments that the MCA's process is novel and untested, and the extensive pre-trial litigation as to the procedural and substantive rights of their clients is therefore reasonable under the circumstances.[43]
- **Improper Commentary By Senior Officials.** Further, they argue that senior government officials' comments suggesting that the process can be sped-up or streamlined, or disagreeing with actions taken or rulings made in the course of the proceedings,[44] reflect a determination to convict the Accused that constitutes, at minimum, the appearance of attempts to improperly influence the commissions. These appearances are harmful because they risk undermining the credibility of the commissions process with the American public, as well as the international community.
- **Appearances Matter.** CAAF has articulated a concern regarding "the confidence of the general public in the fairness of the court-martial proceedings."[45] It has opined that, even if there is no actual command influence, "there may be a question whether the influence of command placed an 'intolerable strain on public perception of the military justice system."[46]
    - Given that level of concern about maintaining public confidence in the well-established court-martial system, at least as much attention should be paid to the controversial military commissions system, which is being closely watched by both the American public and worldwide.

ARGUMENT: EXTENT AND SCOPE OF UI LITIGATION DEMONSTRATES PROBLEMS

- **Excessive Litigation.** The sheer number of allegations concerning unlawful influence could be argued to indicate a pervasive problem with either the underlying statute or the way the military commissions trial judiciary has been applying UCI precedents without properly accounting for the differences between courts-martial and military commissions.
    - Litigating every comment made or action taken by a government official referencing the military commissions process eats up an extraordinary amount of docket time and resources, because the threshold for alleging UI is so low and automatically triggers an appearance doctrine that is treated on equal footing, and the trial judges' rulings are practically unreviewable.

- **Unreasonable Scope.** Additionally, the broader scope of these unlawful influence challenges relative to those typically seen in the military justice context, including some based on the consideration or enactment of changes to statutes and regulations governing military commissions, demonstrates the need for reforms.
  - Indeed, at least one defense filing has argued that a judge ruling against a defense motion can itself be evidence of unlawful influence.[47]
  - The nature of several of the unlawful influence motions establish that UI allegations are capable of being used as a sword to delay, stall, and effectively prosecute the military commissions system, rather than a shield by which its independence is ensured.
    - Without reform, it can be expected that UI litigation will remain a central feature of defense teams' strategies once the commissions' members, none of whom will be seasoned military jurists used to operating independently, are seated.[48]

Author's Views

'APPARENT UCI' DOCTRINE SHOULD NOT APPLY TO MILITARY COMMISSIONS

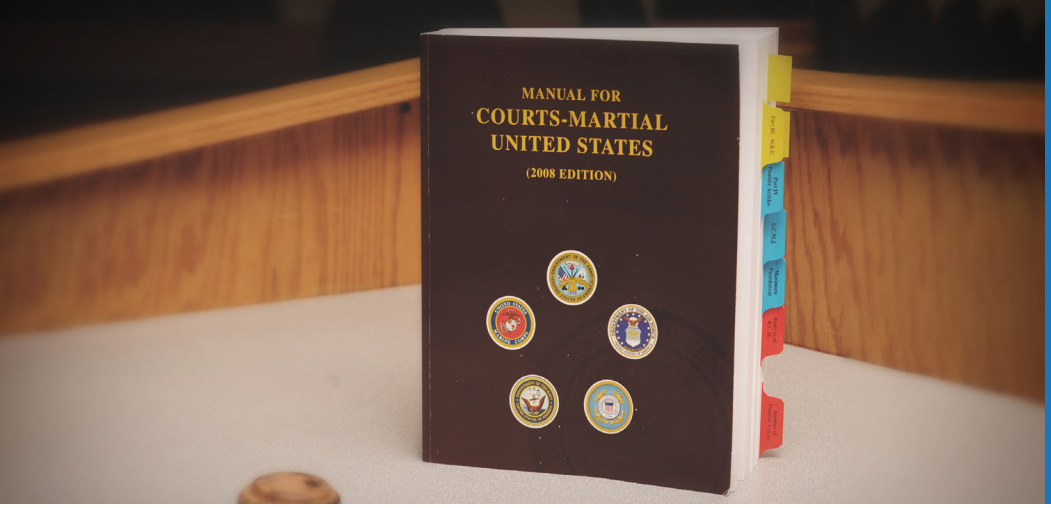
- **Underlying Rationale Is Inapplicable.** Although UCI jurisprudence is a useful analogy for determining unlawful influence under the MCA to a certain extent, because the UI statute is broader and because it applies to a system whose context, origins, and procedures for convening and trying cases differ materially from those of the military justice system governed by the UCMJ, CAAF's "apparent UCI" doctrine has no place in military commissions.
  - The apparent UCI doctrine recognizes that maintaining good order and discipline and, therefore, the effectiveness of the military, can be significantly affected by circumstances that appear as though commanders are improperly directing criminal proceedings against their subordinates. The lack of any command relationship to the Accused makes this rationale inapplicable to military commissions convened under the MCA.
    - The Accused in these military commissions are not members of the U.S. military, and neither the military commissions trial judges nor the commission members empaneled in future trials are, or will be, direct subordinates of the Convening Authority.
  - Further, the UCI doctrine developed to counter-balance the lack of certain constitutional protections that U.S. citizens sacrifice when serving in the military,[49] and the Accused in military commissions never possessed the antecedent constitutional rights in the first place.

- Finally, the apparent UCI doctrine was developed during the draft years, when any member of the public could be pressed into service and subjected to the military justice system. In that context, public perceptions of the fairness of its proceedings had an immediate and direct impact on military morale and effectiveness[50] in a fundamentally different way than is the case with military commissions convened to try the alleged war crimes of alien unprivileged enemy belligerents.[51]

- **RTMC Provision Concerning Appearances Creates No Enforceable Rights.** The RTMC's treatment of §949b[52] does not make "apparent U.I." a justiciable question in military commissions.
  - This provision of the Regulation, which appears in the Introduction section, does not create substantive rights,[53] is properly read to be cautionary, and is, in any event, for the Deputy Secretary to enforce, not the military judges.
- **Relying On The Prohibition Against *Actual* UI Is The Better Approach.** The "apparent UI" doctrine is bad law and inappropriate policy, and the current jurisprudence and lack of meaningful appellate procedure allows the parties to military commissions (not merely the defense) to wield unreasonable allegations of unlawful influence.
  - Requiring commissions judges to rely only on the power to find actual unlawful influence would recognize the broader scope of the unlawful influence provision, the different context in which the commissions are convened, and the different relationship between the convening authority and the Accused, and would result in better policy.
  - The unavailability of the "apparent UI" theory would require military trial judges to engage in additional rigor to support a UI finding, rather than falling back on conjecture concerning how official actions might appear.
    - Removing the chill of the over-reaching "apparent UI" jurisprudence would also serve as a stronger deterrent to any officials who might actually seek to improperly influence the commissions for fear now of being found to have committed the more direct and significant offense.
  - Making a finding of attempted or actual unlawful influence immediately appealable would further provide the necessary check on the trial judiciary's findings. As with any appeal, findings of fact would be reviewed with deference, but the ultimate legal conclusion would be reviewed *de novo*.
  - Further, amending the statute establishing who may convene military commissions[54] to more clearly provide for the Convening Authority's role in overseeing and supervising the system as a whole will remove uncertainty as to the authority to engage in effective management practices, such as studies of the frequency of court sessions (which precipitated the litigation over "Change 1")[55] and delinquency of rulings on motions (as the federal judiciary reports under the Civil Justice Reform Act).[56]

THE "APPARENT UI" DOCTRINE IS BAD LAW AND INAPPROPRIATE POLICY...

THE LACK OF **JUDICIAL CONTEMPT POWERS**



Background And Key Concepts

THE CONTEMPT POWER

- The "contempt power" refers to the inherent power of a court "to punish one for contempt of its judgments or decrees and for conduct within or proximate to the court which is contemptuous."[57]
  - "Contempt of court" is defined as "Any act which is calculated to embarrass, hinder, or obstruct court in administration of justice, or which is calculated to lessen its authority or its dignity."[58]
- Although the contempt power is not *inherent* in military courts, courts-martial have always had limited contempt powers,[59] and in 2011 were granted general contempt powers by statute.[60] The UCMJ provision allows judges to act unilaterally.

NO JUDICIAL CONTEMPT POWER IN MILITARY COMMISSIONS

As a result of *Baker v. Spath*,[61] a successful challenge to a contempt finding against defense counsel in the *Nashiri* commission, a military commissions trial judge cannot unilaterally find someone in contempt, as can be done in the criminal or military justice systems.

- ***Nashiri* Contempt Finding.** On November 1, 2017, the judge presiding over the *Nashiri* commission found Brigadier General John G. Baker, Chief Defense Counsel of the Military Commissions Defense Organization (MCDO), in contempt of court and sentenced him to 21 days' confinement and a $1,000 fine.[62]
  - Baker had excused all but one of Nashiri's defense counsel in light of ethics concerns they (counsel) raised directly to Baker, rather than to the court.
  - The commissions trial judge directed Baker to rescind his order, but Baker refused. After being found in contempt and being taken into custody, Baker filed a habeas petition in U.S. District Court the following day.

- **District Court Limits Contempt Power.** On June 18, 2018, in *Baker v. Spath*, the U.S. District Court for the District of Columbia determined that the MCA does not provide military commissions trial judges with unilateral contempt powers because the statute requires that contempt be tried "by a military commission," and distinguishes between "commissions" fully constituted with their "members" (*i.e.*, jurors), and military judges sitting alone.
  - Military commissions trial judges are "detailed to" and "preside over" military commissions, and are "forbidden from taking part in the procedures that a military commission is required to go through . . . to convict a person."[63]
  - Therefore, notwithstanding DoD regulations allowing for the military trial judge to act unilaterally in the absence of the seating of commission "members,"[64] the court decided that the MCA does not permit military commissions trial judges themselves to convict anyone for contempt of court.
  - Ultimately then, absent a statutory amendment, a separate trial would need to occur before anyone in the commissions system may be convicted and sentenced for contempt of court.

The Debate Over Judicial Contempt Authority

Whether military commissions trial judges should have traditional contempt powers.

ARGUMENT: JUDGES' POWERS SHOULD BE LIMITED IN A SYSTEM OF LIMITED RIGHTS FOR THE ACCUSED

- Military commission Accused lack certain rights common to criminal defendants in other fora. Critics of the commission sometimes characterize this as being a system biased against defendants. Allowing for summary proceedings in such a system further taints this already controversial system.
- The military commissions trial judiciary is not independent in the way that federal judges are; there is therefore a potential for the contempt power to be misused to speed up proceedings in a way that impacts due process for the Accused.

ARGUMENT: JUDGES SHOULD HAVE UNILATERAL CONTEMPT POWER

- The contempt power is a basic and, in any other instance, uncontroversial tool that judges have to help them control their courtrooms and the proceedings therein.

- The contempt power allows judges to punish misconduct occurring before them or in the context of proceedings over which they preside. The judges themselves, who benefit from presumptions of impartiality, are in the best position to determine when their orders have been violated in such a way as to merit a summary contempt proceeding, and the appropriate sentence to punish the misconduct.
- Sanctionable misconduct includes disruptive acts in the courtroom, failure to adhere to a judicial order (as was the case in *Baker*), and disrespectful behavior.
- Contempt convictions and sentences can then be reviewed by the Convening Authority, and are subject to further appeals.

- Military commissions trial judges, who are fully trained and qualified military trial judges with experience in the military justice system, know and understand the standards for punishing contemptuous conduct.

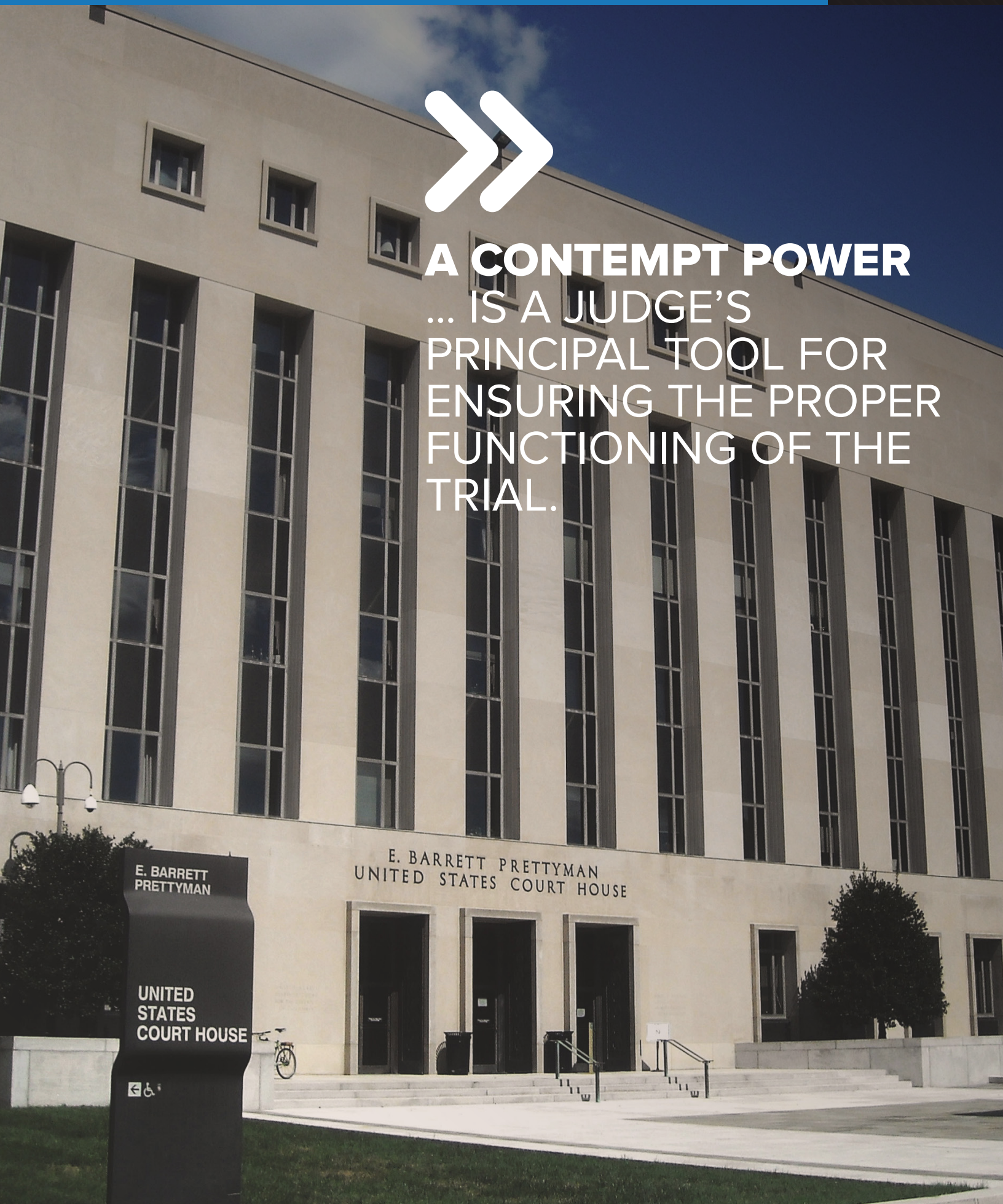
Author's Views

CONTEMPT POWER SHOULD BE RESTORED

- Military commissions have constantly been subjected to conduct that squarely fits the definition of contempt, and would be unacceptable in any other forum. This includes:
  - A government official (the Chief Defense Counsel) excusing a criminal defendant's counsel without consulting the presiding judge (as was the case in *Baker*);
  - A defense counsel's wearing a kangaroo lapel pin during several years of oral argument sessions as a political statement against the court;[65] and
  - Another defense counsel's impugning the objectivity and integrity of both the presiding commissions trial judge and a federal judge[66] without evidence and likely in violation ABA Model Rule of Professional Conduct 8.2(a).[67]
- A contempt power available to a trial judge is customary to U.S. criminal and military justice systems and is a judge's principal tool for ensuring the proper function of the trial and enforcing his or her orders.
- Removing this authority from the trial judge and injecting the prospect of significant delay to adjudicate findings of contempt is likely to unreasonably raise the bar before a judge is willing to so derail the trial—making courtroom disruptions and the disobeying of judicial orders more common.
- Under *Baker*, trial judges are unable to prevent the Chief Defense Counsel's dismissing or excusing a defense counsel even on the eve of trial, or during one.

LEGISLATIVE AMENDMENT SHOULD BE PURSUED

- The D.C. District Court's decision will only be overruled by legislative amendment to the MCA. Failing to overrule the court with legislation will further hamstring military commissions trial judges already overly-concerned about the perception of the proceedings.
- Although the *Baker* opinion addresses at-length that the contempt power is cabined by how military commissions are structured (*i.e.*, defining a "commission" as a body composed of its members rather than the presiding judge), its ultimate reasoning is primarily a function of how the crime of contempt appears in the MCA.
- An effective amendment therefore need not redefine any terms in the statute, but merely reconstitute the contempt provision itself.



A CONTEMPT POWER ... IS A JUDGE'S PRINCIPAL TOOL FOR ENSURING THE PROPER FUNCTIONING OF THE TRIAL.

DETAINEE MONITORING **AND THE RIGHTS OF THE ACCUSED**

Background And Key Concepts

The military commissions defense bar has, over the years, raised several allegations of government surveillance of attorney-client meetings at Guantanamo Bay.[68]

RIGHT TO COUNSEL

- **Habeas Petitions.** In *Boumedienne v. Bush*,[69] the Supreme Court held that the Constitution's Suspension Clause[70] applies to Guantanamo Bay detainees, affording each detainee the right to challenge both the scope of the President's detention authority and the merits of their individual detentions in federal district court.
    - Though not explicitly found in the Supreme Court's decision, district courts have held that detainees have a concomitant right to counsel associated with their habeas claims.[71]
- **Commissions Trials.** The representational rights of the military commission Accused are outlined and granted by provisions of the MCA and DoD regulations (the Rules for Military Commissions[72] and RTMC).

QUALIFIED PROTECTION OF COMMUNICATIONS

- Detainees nevertheless are not entitled to unrestricted and completely private communications with their attorneys.
- The courts have long recognized the regulatory authority of the Department of Defense to include the power to establish "privilege teams" or "filter teams" walled-off from the habeas litigation proceedings, which are authorized to read all mail between detainees and their counsel.[73]

FURTHER RIGHTS UNSETTLED

- The Supreme Court in *Hamdan v. Rumsfeld*[74] ruled, *inter alia*, that Common Article III of the Geneva Conventions applies to military commissions.
- No court has determined that military commission Accused have rights under the United States Constitution beyond Guantanamo detainees' *habeas corpus* rights as found in *Boumedienne*.
    - This includes rights of civilian criminal defendants in the United States under, *e.g.*, the Fourth, Fifth, and Sixth Amendments.[75]

PRECEDENT FOR LAWFUL SURVEILLANCE

- There is precedent for conducting audio and visual surveillance of visits with detained or imprisoned terrorists, even during attorney-client meetings, for intelligence and force protection purposes.
- Perhaps the most famous case is *United States v. Stewart*,[76] in which Lynne Stewart, a criminal defense attorney representing "the blind sheikh," Omar Ahmad Ali Abdel Rahman, was convicted of multiple felonies, including material support of terrorism, for conduct related to her supposedly representational visits with Rahman.
    - Rahman was the target of surveillance under the Foreign Intelligence Surveillance Act (FISA)[77] while serving his sentence as a high-security federal prisoner subject to Special Administrative Measures.
    - The FISA collection persisted throughout Stewart's visits with Rahman, and, among other things, recorded her helping Rahman communicate with a designated Foreign Terrorist Organization.

The Debate Over Detainee Surveillance

Whether monitoring of detainee-attorney communications is lawful, needed, and comports with relevant norms.

ARGUMENT: SURVEILLANCE OF ATTORNEY-CLIENT COMMUNICATIONS IS ANATHEMA TO U.S. LAW AND PRACTICE

- **General Disapproval.** Government surveillance of attorney-client communications is generally frowned upon, both domestically as creating ethical concerns within the legal profession, and internationally in terms of best-practices in protecting the rule of law.

- ABA Model Rule of Professional Conduct 1.6 reflects the importance of maintaining confidentiality of client information as part of the attorney-client relationship.
- The United Nations' prison intelligence handbook instructs, "Audio-visual surveillance should not be used to infringe the confidentiality and professional secrecy of a prisoner's meetings with lawyers . . . ."[78]

- **A Chilling Effect.** Knowledge or suspicion of surveillance of attorney-client meetings will have a chilling effect on counsels' ability to represent their clients effectively.
  - The Accused would be less likely to be open and candid with their attorneys, impacting their ability to participate in their defense, which amounts to a denial of due process.
  - Counsel may find themselves in an ethical conundrum whereby their inability to ensure confidentiality of their communications with their clients provides grounds for their withdrawal from the case entirely, as occurred in the Nashiri commission in the situation that led to the litigation in *Baker v. Spath*. The rule of law requires that criminal defendants be represented by independent and competent counsel.
- ***Stewart* Precedent Is Distinguishable.** *U.S. v. Stewart* is a distinguishable situation in which the FISA surveillance of Rahman occurred after he was already convicted; that case does not address monitoring a detainee actively defending against criminal charges in pre-trial litigation.

ARGUMENT: PERSISTENT DETAINEE SURVEILLANCE IS NECESSARY AND APPROPRIATE

- **Sacrosanct Communications; With Exceptions.** Attorney-client privilege and confidentiality, although often considered sacrosanct aspects of the legal profession and rule of law, are not without several recognized exceptions.[79]
  - Security environments such as a prison or military detention facility housing law-of-war detainees raise imminent concerns over guard force safety, external security threats, and control of classified information.
  - GTMO detainees are, by definition, national security threats.[80]
- **National Security Central To Military Commissions.** Attorney General William Barr described the distinct nature of the military commissions process in the following context:
  - "When the United States is engaged in an armed conflict and exercising its powers of national defense against a foreign enemy, it is acting in an entirely different realm than the domestic law enforcement context. The Nation, and all those who owe her allegiance, are at war with those foreign enemies. That is not an analogy or a figure of speech – it describes a real legal relationship and one that is fundamentally different from the government's posture when it seeks to enforce domestic law against an errant member of society."[81]

- **Attorney-Client Communications Not Immune From National Security Concerns.** The Stewart precedent demonstrates the most acute concern, that of a detainee directing communications to other terrorists through conversations with counsel.
  - Separately, the prosecution of former CIA officer John Kiriakou demonstrated that classified and sensitive information has been surreptitiously shared with military commissions Accused during attorney-client meetings.
    - Kiriakou pled guilty to charges related to his leaking the personally identifying information of CIA officers to a journalist, who subsequently passed the information to the defense teams of High Value Detainees as part of the "John Adams Project" of the American Civil Liberties Union's and National Association of Criminal Defense Lawyers. The pictures of the officers were ultimately shown to the detainees themselves.[82]

Author's Views

RESTRICTIONS WITH OVERSIGHT A COMMON APPROACH TO SURVEILLANCE PROGRAMS

- Any monitoring of attorney-client communications in military commissions context is best thought of as an activity that has the potential for abuse.
- As is the case with many national security programs, assurance and oversight measures, including imposing strict need-to-know requirements and use restrictions on collected intelligence, is the proper approach, rather than altogether forbidding the collection.
  - The Foreign Intelligence Surveillance Act, for example, requires the development of "minimization procedures" for intelligence collected under the authorities provided for in that law, to protect the collected information from improper uses. This includes its use in criminal prosecutions absent stringent safeguards.[83]

WALLED-OFF SURVEILLANCE TEAMS ARE APPROPRIATE

- The courts have recognized the "likely" chilling effect of a "privilege team" or "filter team" arrangement on attorney-client communications. However, the D.C. District Court determined in the habeas context that the chill "cannot be allowed . . . to trump the government's investigative requirements in this sensitive situation."[84]

- Although concerns for detainees' rights are arguably higher when they are subject to criminal proceedings than with respect to civil habeas proceedings, the national security interests at stake are unaffected, and such quarantined surveillance is a well-established means to satisfy intelligence requirements without curtailing rights in a criminal context.

DETAINEE SURVEILLANCE AND MONITORING IS CRITICAL

- The *Stewart and Kiriakou* prosecutions establish a case for carefully monitoring any detainee visit where sensitive information, such as matters affecting force protection and security, or foreign intelligence, might come to light.
- The fact that no criminal charges were brought against the defense attorneys in relation to the Kiriakou leaks of classified information does not imply that the government does not have legitimate intelligence and force protection equities in learning of and taking lawful and appropriate action to counter such conduct.

ACTIONABLE RECOMMENDATIONS

1 REFORM THE UNLAWFUL INFLUENCE DOCTRINE

AMEND THE MCA TO ELIMINATE THE 'APPARENT UI' DOCTRINE & PROVIDE FOR APPEALS

- 10 U.S.C. §949b should be amended to make clear that the military common law doctrine of 'apparent unlawful command influence' does not apply to proceedings under the Military Commissions Act.[85]
- Additionally, §950d should be amended to allow for appeals of trial court findings of actual unlawful influence.
- Further, amending §948h to clarify that it is within the Convening Authority's responsibilities to administer and supervise the military commissions process to ensure it proceeds in an efficient manner, will insulate that official from UI allegations associated with otherwise reasonable management studies conducted, and resourcing decisions made, with the purpose of improving the efficiency of commissions proceedings.
- A sample of these amendments could read as appears in Appendix 1.

2 RESTORE THE JUDICIAL CONTEMPT POWER

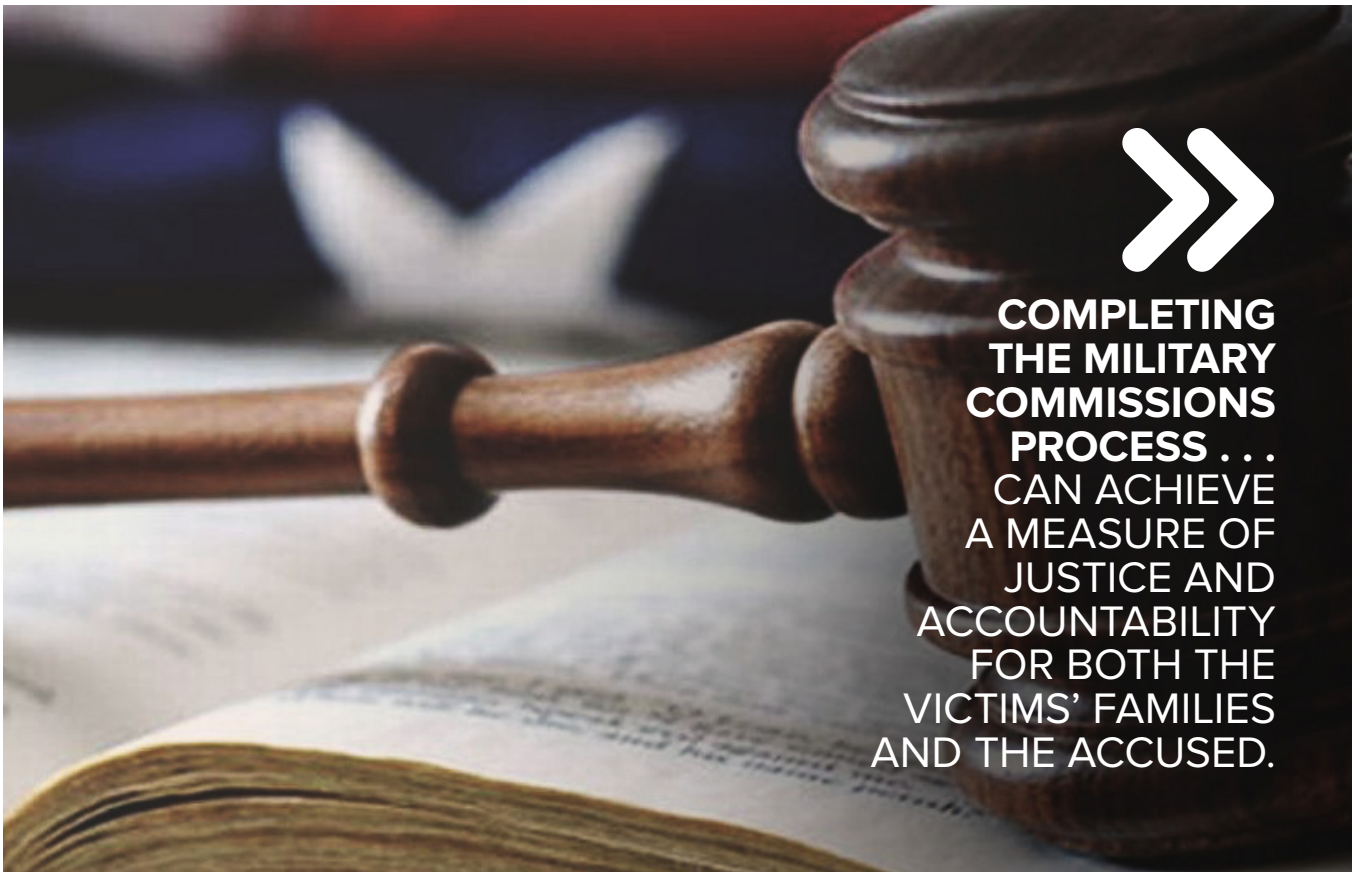
AMEND THE MCA TO PROVIDE JUDICIAL AUTHORITY TO HOLD SUMMARY CONTEMPT PROCEEDINGS

- Congress should amend Subchapter VIII of the MCA (and DoD should amend associated regulations) to explicitly provide for the military commissions trial judiciary's unilateral contempt power.
- These amendments should provide for a judicial authority consistent with those found in the criminal and military justice systems.[86]
- A sample amendment could read as appears in the redlined text appearing in Appendix 2.[87]

3 AFFIRM THE LAWFULNESS OF DETAINEE MONITORING

ESTABLISH A BALANCED DETAINEE SURVEILLANCE FRAMEWORK

- Congress should consider a means to clarify that the statutory right to counsel of an Accused in a military commission convened under the MCA does not encompass a right to be free from monitoring for security, intelligence, and force protection purposes separate and apart from the legal proceedings.
- Like with other national security programs, an oversight framework could be designed to ensure any surveillance of attorney-client communications is walled-off from military commission proceedings.
- Lawmakers considering this recommendation, however, should do so aware of the litigation risk associated with such a clarification, which could carry with it the possibility that a court may find that the accused in military commissions have certain as-yet unannounced constitutional rights.[88]



CONCLUSION

An Efficient Military Commissions Process That Advances National Security While Protecting Detainee Rights Is In The U.S. National Interest

At first, military commissions were envisioned to be a critical component of processing detainees at Guantanamo. Early procedural difficulties and bureaucratic in-fighting, however, and especially the shifting of focus to Operation Iraqi Freedom, took attention and the sense of urgency away from the developing difficulties at GTMO.

NEITHER ARTICLE III COURTS NOR THE MILITARY JUSTICE SYSTEM IS THE ANSWER

Many critics of military commissions argue that using Article III courts or even the military justice system would be more effective, efficient, and achieve more just results.

- **Article III Courts Not Designed For Battlefield Reality.** The statistics often cited to support the argument that Article III courts are effective and efficient in trying terrorist offenses include counterterrorism charges primarily against defendants arrested domestically after standard law enforcement investigations, rather than battlefield or intelligence-led captures of individuals against whom war crimes charges may be brought.
    - Prosecutions of battlefield captures in the criminal justice system have in fact been rare, and often convictions have been precarious for those that were pursued.[89]
    - The two most high-profile, non-law-enforcement-driven captures to be tried in federal court, Ahmed Ghailani and Ahmed Abu Khattala, were both narrowly convicted, and importantly were acquitted of all murder charges in spite of their actions related to the Africa embassy bombings in 1998 and the Benghazi attack in 2012, respectively.
- **Military Justice System Designed For U.S. Personnel, Not Terrorists.** With respect to the military justice system, many who tout court-martial rules and procedures as a tried-and-true system of justice and therefore a preferred substitute to commissions, fail to account for the different nature of the crimes and status of the military commission Accused, as well as the wholly different incentives of commissions defense counsel.

- With few exceptions,[90] the Accused in courts martial are U.S. personnel charged with the UCMJ's version of common crimes using evidence that rarely implicates classified programs, sources, or methods.
- To date, an underappreciated feature of the commissions in this regard is the small number of Accused, and the fact that there are no new potential entrants into the system in the foreseeable future. Whereas defense counsel in the military justice system usually have more than one client at a time and operate always with the knowledge that they will have future servicemember clients to defend, the military commissions defense bar has no new incoming cases giving them a backlog of clients with speedy trial rights, and therefore has no incentive to dispose of the current ones on the merits so that future clients might benefit from their skilled representation.

EFFECTIVE MILITARY COMMISSIONS ARE AN IMPORTANT WAR POWER

Despite the difficulties of the GTMO commissions, maintaining the Defense Department's centuries-old authority to convene military commissions[91] as a means to pursue its warfighting objectives is critical.

- **This Paper's Recommendations Can Help.** Of the three proposals contained in this Law & Policy Paper, each has potential to promote reaching adjudication of the merits of these cases.
  - The proposed amendment to the unlawful influence statute would hold judges accountable for rigorous fact-finding, rather than conjecture concerning appearances in this highly public process, about which passions run high from all sides of the bar and political spectrum.
  - Amending the contempt provision will restore to the military commissions trial judiciary a basic power all other judges have – the power to control proceedings in their courtrooms.
  - And clarifying that there is no inherent due process concern with legitimate collection against national security targets likely to have foreign intelligence and information related to force protection concerns will remove a critical distraction from the system.
- **Additional Reforms Should Be Considered.** Beyond the measures recommended in this Paper, there are many additional ways Congress might consider amending the MCA to promote resolution to commissions cases consistent with the interests of justice, including:
  - Establishing military commissions as the trial judges' primary duty, with the location of the proceedings as their primary duty station;
  - Clarify that the authority to dismiss defense counsel from their representational duties after an attorney-client relationship has been established, lies with commissions trial judges, not the Chief Defense Counsel;
  - Streamlining the arduous discovery process;

- Examining the practice of having the Accused present at the beginning of every court session to inquire as to whether he waives his presence;
- Affirming the proper extent of the subpoena power able to be exercised in relation to the commissions;
- Revisiting the structure and role of the U.S. Court of Military Commission Review; and
- Vesting jurisdiction for litigation over conditions of confinement with the U.S. District Court for the District of Columbia as an issue properly lying in habeas rather than continuing the current practice of commissions litigating detention commissions at nearly every session as it arguably relates to the ability of the Accused to participate in his defense.

The current institutional incentive heavily favors prosecuting the military commissions system through protracted litigation based on worst-case hypotheticals. As this continues, it raises the political costs of sending any further detainees into the commissions system, incentivizes a range of other potentially less preferable (and, generally speaking, less humane) alternatives to disposing of alleged terrorists,[92] and allows the defense to delay reaching the merits trial and keep admissible evidence out of public view for as long as possible while the commissions continue to be perceived as a dysfunctional system and a drain on critical resources.

Completing the military commissions process for the current GTMO detainees slated to be tried can achieve a measure of justice and accountability for both the victims' families and the Accused.

APPENDICES

APPENDIX 1

10 U.S. CODE § 948h - WHO MAY CONVENE MILITARY COMMISSIONS

Military commissions under this chapter may be convened by the Secretary of Defense or by any officer or official of the United States designated by the Secretary for that purpose. **Notwithstanding section 948j(f) of this Title, such officer also shall administer and is responsible for the supervision of the military commissions process to ensure fair, just, and efficient outcomes.**

10 U.S. CODE § 949b - UNLAWFULLY INFLUENCING ACTION OF MILITARY COMMISSION AND UNITED STATES COURT OF MILITARY COMMISSION REVIEW

(a) Military Commissions.—

(1) No authority convening a military commission under this chapter may censure, reprimand, or admonish the military commission, or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the military commission, or with respect to any other exercises of its or their functions in the conduct of the proceedings.

(2) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a military commission under this chapter, or any member thereof, in reaching the findings or sentence in any case;

(B) the action of any convening, approving, or reviewing authority with respect to their judicial acts; or

(C) the exercise of professional judgment by trial counsel or defense counsel.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions;~~or~~

(B) statements and instructions given in open proceedings by a military judge or counsel~~.~~**;**

(C) formal administrative rulemakings or regulatory actions by authorized officials; or

(D) official testimony, written or oral, or reports prepared in relation to the legislative and oversight functions of Congress.

(b) United States Court of Military Commission Review.—

(1) No person may attempt to coerce or, by any unauthorized means, influence—

(A) the action of a judge on the United States Court of Military Commissions Review in reaching a decision on the findings or sentence on appeal in any case; or

(B) the exercise of professional judgment by trial counsel or defense counsel appearing before the United States Court of Military Commission Review.

(2) No person may censure, reprimand, or admonish a judge on the United States Court of Military Commission Review, or counsel thereof, with respect to any exercise of their functions in the conduct of proceedings under this chapter.

(3) The provisions of this subsection shall not apply with respect to—

(A) general instructional or informational courses in military justice if such courses are designed solely for the purpose of instructing members of a command in the substantive and procedural aspects of military commissions;~~or~~

(B) statements and instructions given in open proceedings by a judge on the United States Court of Military Commission Review, or counsel.~~;~~

(C) formal administrative rulemakings or regulatory actions by authorized officials; or

(D) official testimony, written or oral, or reports prepared in relation to the legislative and oversight functions of Congress.

(4) No appellate military judge on the United States Court of Military Commission Review may be reassigned to other duties, except under circumstances as follows:

(A) The appellate military judge voluntarily requests to be reassigned to other duties and the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, approves such reassignment.

(B) The appellate military judge retires or otherwise separates from the armed forces.

(C) The appellate military judge is reassigned to other duties by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, based on military necessity and such reassignment is consistent with service rotation regulations (to the extent such regulations are applicable).

(D) The appellate military judge is withdrawn by the Secretary of Defense, or the designee of the Secretary, in consultation with the Judge Advocate General of the armed force of which the appellate military judge is a member, for good cause consistent with applicable procedures under chapter 47 of this title (the Uniform Code of Military Justice).

(c) Prohibition on Consideration of Actions on Commission in Evaluation of Fitness.—In the preparation of an effectiveness, fitness, or efficiency report or any other report or document used in whole or in part for the purpose of determining whether a commissioned officer of the armed forces is qualified to be advanced in grade, or in determining the assignment or transfer of any such officer or whether any such officer should be retained on active duty, no person may—

(1) consider or evaluate the performance of duty of any member of a military commission under this chapter; or

(2) give a less favorable rating or evaluation to any commissioned officer because of the zeal with which such officer, in acting as counsel, represented any accused before a military commission under this chapter.

(d) Jurisdiction of the Military Commission System.–

(1) Notwithstanding subsection (2), military commissions trial judges possess jurisdiction to determine whether unlawful influence has been attempted or affected upon a military commission or a judge of the United States Court of Military Commission Review.

(2) Military commissions trial judges are prohibited from engaging in assessments of alleged unlawful influence beyond that which are authorized by this section.

10 U.S. CODE § 950d - INTERLOCUTORY APPEALS BY THE UNITED STATES

(a) Interlocutory Appeal.—Except as provided in subsection (b), in a trial by military commission under this chapter, the United States may take an interlocutory appeal to the United States Court of Military Commission Review of any order or ruling of the military judge—

(1) that terminates proceedings of the military commission with respect to a charge or specification;

(2) that excludes evidence that is substantial proof of a fact material in the proceeding;

(3) that finds unlawful influence on the proceedings in violation of section 949b of this title;

(~~3~~4) that relates to a matter under subsection (c) or (d) of section 949d of this title; or

(~~4~~5) that, with respect to classified information—

(A) authorizes the disclosure of such information;

(B) imposes sanctions for nondisclosure of such information; or

(C) refuses a protective order sought by the United States to prevent the disclosure of such information.

(b) Limitation.—

The United States may not appeal under subsection (a) an order or ruling that is, or amounts to, a finding of not guilty by the military commission with respect to a charge or specification.

(c) Scope of Appeal Right With Respect to Classified Information.—

The United States has the right to appeal under paragraph **(~~4~~5)** of subsection (a) whenever the military judge enters an order or ruling that would require the disclosure of classified information, without regard to whether the order or ruling appealed from was entered under this chapter, another provision of law, a rule, or otherwise. Any such appeal may embrace any preceding order, ruling, or reasoning constituting the basis of the order or ruling that would authorize such disclosure.

(d) Timing and Action on Interlocutory Appeals Relating to Classified Information.—

(1)Appeal to be expedited.—

An appeal taken pursuant to paragraph **(~~4~~5)** of subsection (a) shall be expedited by the United States Court of Military Commission Review.

(2)Appeals before trial.—

If such an appeal is taken before trial, the appeal shall be taken within 10 days after the order or ruling from which the appeal is made and the trial shall not commence until the appeal is decided.

(3)Appeals during trial.—If such an appeal is taken during trial, the military judge shall adjourn the trial until the appeal is decided, and the court of appeals—

(A) shall hear argument on such appeal within 4 days of the adjournment of the trial (excluding weekends and holidays);

(B) may dispense with written briefs other than the supporting materials previously submitted to the military judge;

(C) shall render its decision within four days of argument on appeal (excluding weekends and holidays); and

(D) may dispense with the issuance of a written opinion in rendering its decision.

(e) Notice and Timing of Other Appeals.—

The United States shall take an appeal of an order or ruling under subsection (a), other than an appeal under paragraph **(~~4~~5)** of that subsection, by filing a notice of appeal with the military judge within 5 days after the date of the order or ruling.

(f) Method of Appeal.—

An appeal under this section shall be forwarded, by means specified in regulations prescribed by the Secretary of Defense, directly to the United States Court of Military Commission Review.

(g) Appeals To Act Only With Respect to Matter of Law.—

In ruling on an appeal under paragraph (1), (2), ~~**or**~~ (3)**, or (4)** of subsection (a), the appeals court may act only with respect to matters of law.

(h) Subsequent Appeal Rights of Accused Not Affected.—

An appeal under paragraph **(45)** of subsection (a), and a decision on such appeal, shall not affect the right of the accused, in a subsequent appeal from a judgment of conviction, to claim as error reversal by the military judge on remand of a ruling appealed from during trial.

APPENDIX 2

10 U.S. CODE § 950t - CRIMES TRIABLE BY MILITARY COMMISSION

The following offenses shall be triable by military commission under this chapter at any time without limitation:

(1) . . . .

. . . . .

(31) ~~**Contempt.—**~~

~~**A military commission under this chapter may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder.**~~

~~**(32)**~~ Perjury and obstruction of justice.—

A military commission under this chapter may try offenses and impose such punishment as the military commission may direct for perjury, false testimony, or obstruction of justice related to the[*] military commission.

10 U.S. Code § 950u - Crimes triable by military commission trial judge

A military commission trial judge may try and punish under this chapter at any time and without limitation, contempt by any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. Nothing in this section limits otherwise existing charging, referral, or contempt powers of reviewing and appellate bodies of military commission proceedings or convictions.

***Though outside the scope of this Policy Paper, Congress might also consider amending the perjury statute by changing the asterisked instance of "the" to the indefinite article "a," to avoid the possibility of a *Baker*-like reading of the text that might require a convening a separate trial composed of the same "commission," i.e., same jury, in front of which the alleged perjury or obstruction occurred, which would likely raise both logistical and due process issues.**

RULES FOR MILITARY COMMISSIONS

RULE 809. CONTEMPT PROCEEDINGS

(a) In general. The military commission **trial judge** may exercise contempt power granted under 10 U.S.C. § ~~**950t**~~ **950u**.

(b) Method of disposition.

(1) Summary disposition. When conduct constituting contempt is directly witnessed by the commission **trial judge**, the conduct may be punished summarily.

(2) Disposition upon notice and hearing. When the conduct apparently constituting contempt is not directly witnessed by the commission **trial judge**, the alleged offender shall be brought before the ~~**commission**~~ **judge** and informed orally or in writing of the alleged contempt. The alleged offender shall be given a reasonable opportunity to present evidence, including calling witnesses. The alleged offender shall have the right to be represented by counsel and shall be so advised. The contempt must be proved beyond a reasonable doubt before it may be punished.

(c) Procedure. The military judge shall in all cases determine whether to punish for contempt and, if so, what the punishment shall be. The military judge shall also determine when during the trial the contempt proceedings shall be conducted; however, the military judge shall conduct the contempt proceedings outside the members' presence. The military judge may punish summarily under subsection (b)(1) only if the military judge recites the facts for the record and states that they were directly witnessed by the military judge in the actual presence of the commission. Otherwise, the provisions of subsection (b)(2) shall apply.

(d) Record; review. A record of the contempt proceedings shall be part of the record of the trial of the military commission during which it occurred. If the person was held in contempt, then a separate record of the contempt proceedings shall be prepared and forwarded to the convening authority for review **consistent with the convening authority's jurisdiction to independently review all findings of guilt by the military commissions trial chamber**. The convening authority may approve or disapprove all or part of the sentence. ~~**The**~~ **No** action of the convening authority**, on the merits or as to any sentence imposed,** is ~~**not**~~ subject to further review or appeal.

(e) Sentence. The punishment may not exceed confinement for 30 days or a fine of $1,000, or both. A sentence of confinement pursuant to a finding of contempt shall begin to run when it is adjudged unless deferred, suspended, or disapproved by the convening authority. The place of confinement for a civilian or military person who is held in contempt and is to be punished by confinement shall be designated by the convening authority. A fine does not become effective until ordered executed by the convening authority. The military judge may delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the proceedings.

ENDNOTES

1 Adam Pearlman is a Visiting Fellow at the George Mason University Antonin Scalia Law School National Security Institute. The views expressed in this Policy Paper are those of the author alone, and do not necessarily reflect the official position of any U.S. Government department or agency. Work on the substance of this paper was completed prior to the author's entry on duty to his current full-time position. The author would like to thank Jennie O'Hara for her research assistance.

2 Military Order of November 13, 2001, 66 Fed. Reg. 222, 57833 (Nov. 16, 2001).

3 For a detailed discussion of the history and case law of GTMO detainee habeas actions, *see* Adam R. Pearlman, Meaningful *Review and Process Due: How Guantanamo Detention is Changing the Battlefield*, 6 HARV. NAT. SEC. J. 255 (2015).

4 317 U.S. 1 (1942).

5 548 U.S. 557 (2006).

6 Pub. L. No. 109-366, 120 Stat. 2600 (2006).

7 Pub. L. No. 111-84, 123 Stat. 2574 (2009) (codified at 10 U.S.C. §§948a, et. seq.).

8 *See* Manual for Military Commissions, Part II, Rules for Military Commissions (RMC) §§ 601(d) and 406(b) (Discussion), available at https://www.mc.mil/Portals/0/pdfs/2016_Manual_for_Military_Commissions.pdf.

9 *See* United States v. Hamdan, AE191 (Military Comm'n, May 9, 2008) (Ruling on Defense Motion to Dismiss the Charges and Specifications for Unlawful Influence, D-026). For the purposes of this Policy Paper only, the author assumes the findings of the military commissions trial judge to be correct and accurate.

10 10 U.S.C. §950d.

11 The referred charging sheet relating to the 9/11 commission is available at https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(Referred%20Charges).pdf. Relevant to the material accompanying this citation as well as the following two, the author notes that the date of referral of the charges currently being pursued by the government is only one of several dates to consider. Depending on the circumstances, it may also be useful to consider an Accused's capture date, the date he entered into military custody at GTMO, the date prosecutors swore charges against him, and, if applicable, the date of any previously sworn and referred charges that are not currently before a military commission.

12 The referred charging sheet relating to Mr. Nashiri is available at https://www.mc.mil/Portals/0/pdfs/alNashiri2/Al%20Nashiri%20II%20(Referred%20Charges).pdf.

13 The referred charging sheet relating to Mr. Hadi is available at https://www.mc.mil/Portals/0/pdfs/alIraqi/Hadi%20Al%20Iraqi%20Referred%20Charge%20Sheet.pdf.

14 *See*, e.g., American Bar Association Standing Committee on Law & Nat. Sec., and G.W.U. Law School, "The U.S. Military Commissions: Looking Forward," May 2018. The cited "Law and Policy Workshop" report is referred to here as an example. This author does not necessarily endorse the specific recommendations contained therein.

15 10 U.S.C. §837.

16 The prohibition prohibits commanders from "control[ling] the actions of subordinate[s] in the exercise of their duties under the U.C.M.J." United States v. Gore, 60 M.J. 178, 185 (C.A.A.F. 2004).

17 *Cf.* In re Tarble, 80 U.S. 397, 408 (1871). The underlying legal basis for the different analysis of servicemembers' constitutional rights stems from military personnel being subject to Congress' Article I power to regulate "the land and naval forces," U.S. CONST. art. I, § 8.

18 United States v. Biagase, 50 M.J. 143, 150 (C.A.A.F., 1999).

19 *See* United States v. Ayala, 43 M.J., 296, 300 (C.A.A.F. 1995).

20 United States v. Gerlich, 45 M.J. 309, 310 (1996).
21 *See* U.S. v. Lewis, 63 M.J. 405 (C.A.A.F. 2006).
22 *See*, e.g., United States v. Weasler, 43 M.J. 15, 21 (C.A.A.F. 1995) (Sullivan, CJ, dissenting); United States v. Cruz, 20 M.J. 873, 880 (A.C.M.R. 1985), rev'd on other grounds, 25 M.J. 326 (C.M.A. 1987); United States v. Treakle, 18 M.J. 646, 667–68 (A.C.M.R. 1984) (Yawn, J., concurring in part and dissenting in part), aff'd, (C.M.A. Sept. 22, 1986).
23 Major Martha Huntley Bower, USAF, *Student Report: Unlawful Command Influence: Preserving the Delicate Balance*, Air Command and Staff College Rep. No. 87-0295 at *15, available at https://apps.dtic.mil/dtic/tr/fulltext/u2/a179919.pdf (quoting Hearings on H.R. 4080 and S. 857 Before a Subcomm. of the Comm. on Armed Serv., 81st Cong., 1st Sess. 87 (1949)).
24 *Id.*
25 *Lewis*, 63 M.J. at 416.
26 *See, e.g., Hamdan*, AE191 at 10-11; see also United States v. Mohammad et at., AE 031BBB, (Military Comm'n, Apr. 5, 2016) (Order on Joint Defense Motion to Dismiss for Unlawful Influence).
27 *See Hamdan*, No. AE191 at 3.
28 *See id.*
29 *See id.*
30 Regulation for Trial by Military Commission (2011) (RTMC) § 1-4, available at https://www.mc.mil/Portals/0/2011%20Regulation.pdf.
31 *See* 10 U.S.C. §950d.
32 The number of filings is calculated based on mc.mil docket searches for defense filings containing the search term "unlawful influence" in the commissions concerning the alleged 9/11 co-conspirators, Nashiri, and Hadi. The author acknowledges this is a rather simplistic accounting of the prevalence of unlawful influence litigation in the currently active commissions, but notes also that it represents only a floor in terms of how many times the defense teams have raised the matter in their filings, and does not at all account for the time spent litigating related allegations in oral argument sessions.
33 *See Mohammad*, AE343/344, (Military Comm'n, Jan. 30, 2015) (Joint Motion to Dismiss for Unlawful Influence); *see also* United States v. al-Nashiri, AE332, (Military Comm'n., Jan. 13, 2015) (Defense Motion to Dismiss for Unlawful Influence); *see also* United States v. Hadi, AE032, (Military Comm'n., Jan. 22, 2015) (Defense Motion to Dismiss for Unlawful Influence).
34 *See al-Nashiri* AE332 at 2.
35 *See, e.g., Mohammed.*, AE 343M/AE 344C, (Military Comm'n, Mar. 31, 2017) (Joint Defense Motion to Disqualify the Convening Authority Due to Unlawful Influence).
36 *See Hadi*, AE055E at 13-14, (Military Comm'n, May 6, 2016) (Defense Motion for Abatement/Continuance).
37 *See* Pub. L. 114-328, §1056.
38 *Mohammad*, 254MMMMM (Military Comm'n., Jun. 17, 2016) (Mr. al Baluchi's Response to Government Motion to Rescind Interim Order Limiting Use of JTF-GTMO Female Guards).
39 Email is available at https://www.mc.mil/Portals/0/pdfs/KSM2/KSM%20II%20(AE363)%20Part%204.pdf (attachment F to AE363).
40 *See Mohammad*, AE363 at 2 (Military Comm'n., Jun. 30, 2015) (Joint Defense Motion to Compel Discovery). The Legal Advisor to the Chairman, a one-star general officer, does not fall anywhere in the chain of command of any party to the commissions; the supervisors of the parties to the commissions both held a rank-equivalence of a Deputy Assistant Secretary at the time of the incident that gave rise to the motion.
41 *Hadi*, AE021 (Military Comm'n., Oct. 16, 2014) (Emergency Defense Motion For Appropriate Relief To Cease Physical Contact with Female Guards); *Mohammad.*, AE254WW.
42 *Mohammad*, AE254WW; *see also Mohammed*, AE254JJ (Military Comm'n., Jan. 7, 2015) (Interim Order on Emergency Defense Motion to Bar Regulations Substantially Burdening Free Exercise of Religion and Access to Counsel)..
43 *See generally, e.g., Mohammad*, AE343/344; *see also al-Nashiri*, AE332; see also al Hadi, AE032.
44 *See, e.g., Mohammed, et al.*, AE 254WW; *Mohammad et al.*, AE031BBB.
45 United States v. Stoneman, 57 M.J. 35,42 (C.A.A.F. 2002).
46 *Id.* at 42-43 (quotations omitted).
47 *See Hadi*, AE055E (May 6, 2016) at 16, n.25.

48 Further, the parade of hypothetical horribles the defense often posits, including and especially with respect to how the Department considers the zealous advocacy of those associated with the defense, have not borne out. As a prime example relating directly to the events associated with the UI allegations against the Legal Advisor to the Chairman, *see* n. 40, *supra*, and associated text, the defense often focuses on the relative ranks of personnel in the normally hierarchical Department of Defense, as if it were a trump-card on all things commissions-related. Rank inequality was also a matter about which the defense vociferously complained after BG Mark Martins' appointment as Chief Prosecutor at a time when the Chief Defense Counsel was a colonel. But the civilian superior of the Military Commissions Defense Organization (MCDO), the DoD Deputy General Counsel (DGC) for Personnel & Health Policy, has since been promoted to become the Senior DGC, *i.e.*, he now out-ranks the DGC for Legal Counsel, the civilian supervisor of the Chief Prosecutor. This shows that DoD leadership did not hold against the DGC (PH&P)'s supervision of MCDO against him, and even took an affirmative step that threw the rank-equality and reporting structure of commissions supervision out-of-balance in favor of the defense. *See also, e.g.*, Justice Steven H. David, *Dear Mom and Dad*, 24 Ind. Int'l & Comp. L. Rev. 419, 427 (2014) (quoting performance evaluations received by a former Chief Defense Counsel for Military Commissions).

49 *Cf.* Reid v. Covert, 354 U.S. 1 (1957); In re Tarble, 80 U.S. 397 (1871).

50 Whether and to what extent the all-volunteer force might be argued to constitute a material change in the military's relationship with the public in a way that might have merited a change in how the courts approach apparent UCI is outside the scope of this Paper.

51 10 U.S.C. §948c. One exception, contempt of court, is examined below

52 *See* RTMC § 1-4

53 *See* RTMC § 1-1(b).

54 10 U.S.C. §948h.

55 *See* text accompanying nn. 33-35, *supra*.

56 22 U.S.C. §476. The CJRA is cited merely as illustrative of a mechanism by which federal judges are held accountable for the performance of their duties in a timely manner. It is a legislatively-mandated transparency mechanism only, with no possibility of impacting the lifetime tenures of federal judges. Further, it applies only to certain civil matters, not criminal prosecutions, the timelines of which are guided by the Speedy Trial Act, 18 U.S.C. §3161, et seq, which provides the benchmarks that comply with the Sixth Amendment's right to a speedy trial for criminal defendants in the United States. Nevertheless, it stands as an example of how collecting and reporting statistical information about judicial actions can have positive impacts on the workflow of jurists who must evaluate the merits of the motions made before them, without calling into question their impartiality.

57 *Contempt power*, Black's Law Dictionary(6th ed. 1990).

58 *Contempt of court*, Black's Law Dictionary((6th ed. 1990).

59 *See* David Glazier, *Contempt at the Military Commissions: A Legal History*, Lawfare, Nov. 8, 2017, available at https://www.lawfareblog.com/contempt-military-commissions-legal-history.

60 10 U.S.C. §848.

61 No. 17-cv-02311-RCL, 2018 U.S. Dist. WL 3029140 (D.D.C. June 18, 2018).

62 All facts in this section are taken from the court's opinion in *Baker*.

63 *Baker*, 2018 U.S. Dist. WL 3029140, at *11-12.

64 Military Commissions Act of 2009, 948i(b), Pub. L. No. 111-84, 123 Stat. 2574, codified at 10 U.S.C. §§948a, et. seq.

65 *See, e.g.*, Laurence Douglas & Steve Mumford, "A Kangaroo in Obama's Court" Harpers Mag. (Oct. 2013) (available at https://harpers.org/archive/2013/10/a-kangaroo-in-obamas-court/) (quoting defense counsel Richard Kamen on his decision to wear a gold kangaroo lapel pin to commissions proceedings as "not meant to express [his] love of Australian wildlife."); Rishabh Bhandari, "This Week at the Military Commissions, 9/8 Session: The 'Kangaroo Lapel Pin' Edition," Lawfare (Sept. 10, 2016) (available at https://www.lawfareblog.com/week-military-commissions-98-session-kangaroo-lapel-pin-edition); Carol Rosenberg, *Guantanamo's USS Cole Death-Penalty Case in Limbo After Key Defense Lawyer Quits*, McClatchy D.C. Bureau (Oct. 13, 2017) (available at https://www.mcclatchydc.com/news/crime/article178712951.html) (Describing how "Kammen came to the [Nashiri] case in 2008 [and] alienated the parents of sailors killed in the attack, as well as Cole survivors, by sporting a kangaroo pin on his lapel, a demonstration of his disdain for the hybrid court of military and federal law, which was created in response to the 9/11 attacks.").

66 *See Hadi*, AE055B, Attachment B, n. 8; Hadi AE055E at 5 & 16, nn. 10 & 25.

67 A.B.A. Model R. for Prof. Conduct, Rule 8.2, Maintaining the Integrity of the Profession: Judicial & Legal Officials.
68 *See, e.g.*, Lorelei Laird, *Legal ethics questions and accusations of spying on the defense have stymied a Guantanamo terrorism trial*, ABA JOURNAL (November 2018), http://www.abajournal.com/magazine/article/legal_ethics_guantanamo_terrorism_trial.
69 553 U.S. 723 (2008).
70 U.S. CONST. art. I, § 9, cl. 2.
71 See In re Guantanamo Bay Detainee Continued Access to Counsel, 892 F.Supp.2d 8 (D.D.C. 2012) (finding that detainees must have access to counsel even when not actively litigating their habeas cases). Given that each of these cases has classified national security equities, one of the implications of this ruling was that counsel would maintain their security clearances and access to classified information concerning detainees even while their clients' case was held in abeyance and, possibly, even after dismissal. This is contrary to standard practice, in which one must be performing work requiring access to and need to know classified information.
72 Manual for Military Commissions, Part II. Rules for Military Commissions, available at https://www.mc.mil/Portals/0/pdfs/2016_Manual_for_Military_Commissions.pdf.
73 See, e.g., Hicks v. Bush, 452 F. Supp. 2d 88 at 94 (D.D.C. 2006); In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174 (D.D.C. 2004)).
74 548 U.S. 557 (2006).
75 As noted above with respect to the Fifth and Sixth Amendments in the UCI context, even U.S. servicemembers give up certain legal protections upon entering service. Likewise, the applicability of the Fourth Amendment and the balancing of associated privacy interests change, as well. See, e.g., Fredric I. Lederer & Frederic L. Borch, *Does the Fourth Amendment Apply to the Armed Forces?*, 3 Wm. & Mary Bill of Rights J. 219 (1994). *See also* H. Brendan Burke, *Comment: A "Special Need" for Change: Fourth Amendment Problems and Solutions Regarding DNA Databanking*, 34 STETSON L. REV. 161, 162 (2005) (suggesting that "members of the armed forces may receive less protection from warrantless or suspicionless searches than federal parolees and probationers do."). Indeed, civilians, too, may have less protection under the Fourth Amendment while present on military installations. *See* Ryan Leary, *Searching for the Fourth Amendment: In a Post-September 11th World, Does the Rationale of the Fourth Circuit* in United States v. Jenkins *Reduce the Fourth Amendment Protections of Individuals on Military Installations?*, 29 CAMPBELL L. REV. 111 (2006).
76 590 F.3d 93 (2d Cir. 2009). Descriptions of the underlying facts of the case have been taken from the Second Circuit's published opinion.
77 Foreign Intelligence Surveillance Act of 1978, Pub. L. No. 95-511, 92 Stat. 1783.
78 United Nations Office on Drugs and Crime, Handbook on Dynamic Security and Prison Intelligence at 54. Available at https://www.unodc.org/documents/justice-and-prison-reform/UNODC_Handbook_on_Dynamic_Security_and_Prison_Intelligence.pdf.
79 MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(1)-(3) (AM. BAR ASS'N 2018).
80 *See also* In re Guantanamo Detainee Cases, 344 F. Supp. 2d 174 (D.D.C. 2004).
81 William P. Barr, Former Att'y Gen. of the U.S., Testimony Before the Committee on the Judiciary of the U.S. Senate: Department of Justice Oversight: Preserving Our Freedoms While Defending Against Terrorism (Nov. 28, 2001), available at http://avalon.law.yale.edu/sept11/barr_001.asp.
82 *See, e.g.*, Press Release, FBI, Former CIA Officer John Kirakou Pleads Guilty to Disclosing Classified Information About CIA Officer, (Oct. 23, 2012) (on file at https://archives.fbi.gov/archives/washingtondc/press-releases/2012/former-cia-officer-john-kirakou-pleads-guilty-to-disclosing-classified-information-about-cia-officer); Press Release, U.S. Dep't of Justice, Former CIA Officer John Kiriakou Indicted for Allegedly Disclosing Classified Information, Including Covert Officer's Identity, to Journalists and Lying to CIA's Publications Board, (Apr. 5, 2012) (on file at https://www.justice.gov/opa/pr/former-cia-officer-john-kiriakou-indicted-allegedly-disclosing-classified-information); Kim Zetter, "Guantanamo Defense Lawyers Being Investigated Over CIA Photos," Wired (Aug. 21, 2009) (available at https://www.wired.com/2009/08/aclu-photos/).
83 FISA here is mentioned merely as an example inspired by the facts of the Stewart case, and is used only to highlight analogous precedent with respect to one of the numerous authorities the government has to collect foreign intelligence. The author has no personal knowledge as to whether FISA authorities have ever been invoked at Guantanamo, and takes no position in this Law and Policy Paper as to whether FISA is relevant to Guantanamo detainees in the first instance.
84 *Hicks*, 452 F. Supp. 2d at 103.

85 It should also be clear that Article 37 of the UCMJ cannot be read to apply in lieu of § 949b. Article 37's prohibition against unlawful command influence, which carries with it the associated "apparent unlawful command influence" jurisprudence, so far (and correctly) has not been read to apply to military commissions convened under the MCA. Nothing in the text of either statute expressly prevents such a reading, however; what prevents it from happening is merely the canon of statutory construction that the more specific statute (in this case, the MCA) should apply.

86 *See also* Military Justice Act of 2016 Section-by-Section Analysis at *14 (explaining the Act's amendments to clarify the contempt power authorities enacted in 2011) (available at http://jpp.whs.mil/public/docs/03_Topic-Areas/01-General_Information/13_MJRG_MilitaryJusticeAct_2016_SecAnalysis.pdf).

87 There is another issue addressed by the district court that deserves attention, though not via legislative amendment. The court declined to read the Rule concerning the Convening Authority's role with respect to contempt provisions, RMC 809(d), in light of the that official's mandate to review independently all convictions, not merely sentences, adjudicated by the military commissions trial chamber. In the view of the court, Rule 809(d) failure to vest the Convening Authority with the power to review Baker's underlying contempt provision amounted to an exhaustion of Baker's remedies in the military system, triggered the collateral effects doctrine with respect to the underlying conviction, and therefore called for the federal court to exercise its habeas jurisdiction without awaiting further potential action by the Convening Authority. Although arguably correct in a strictly textualist sense, the court's reading fails to credit the traditional roles and responsibilities of convening authorities, and DoD should clarify the Rules as necessary and appropriate. A sample amendment to Rule 809(d) is included in Appendix 2.

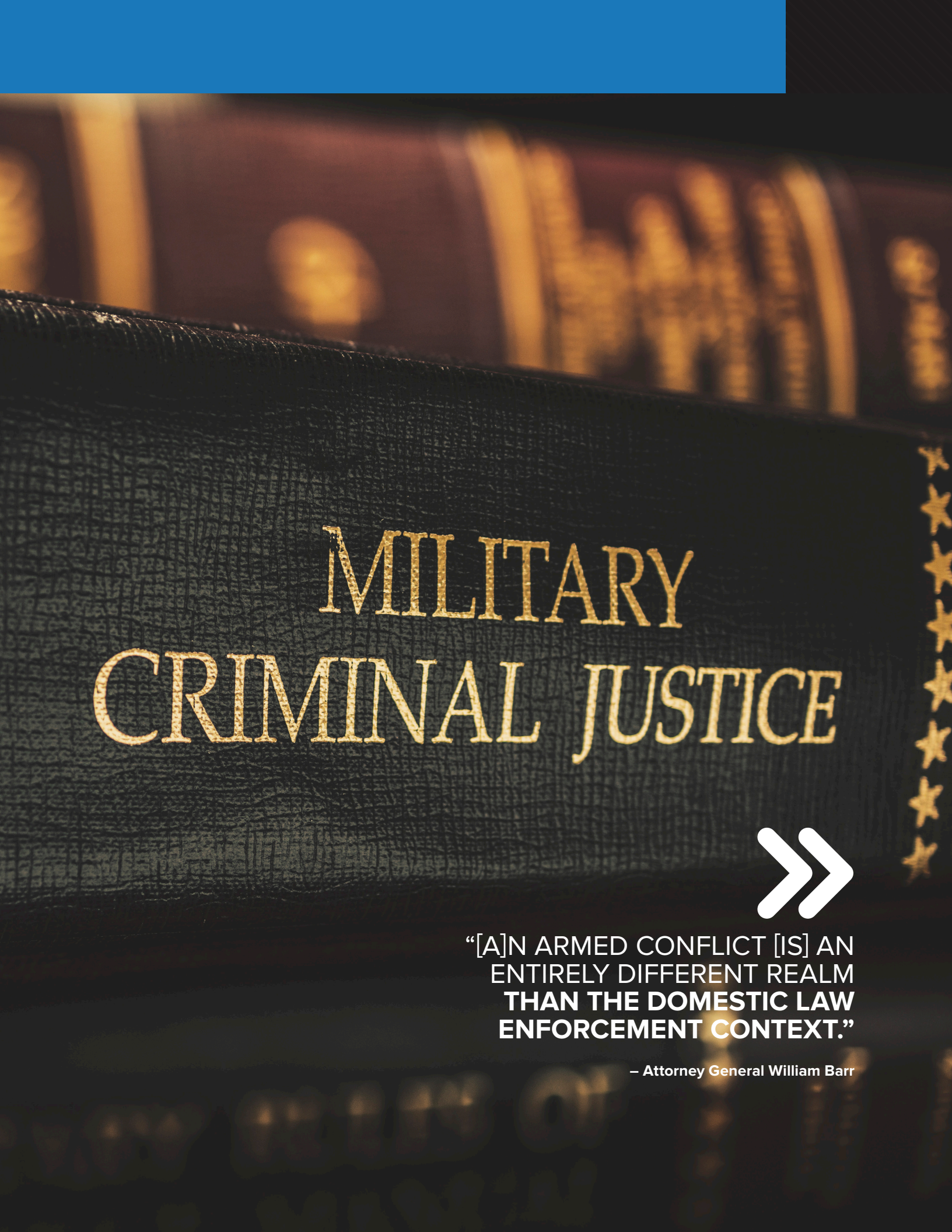
88 For a more fulsome discussion of historical blowback against U.S. policy and operations at GTMO, *see* Adam R. Pearlman, *GQ: The Guantanamo Quagmire*, 27 STAN. L. & POL'Y REV. 101 (2016).

89 The U.S. Departments of State, Justice, and Defense are developing recommendations "to improve the ability of both U.S. and partner nations to more effectively use battlefield evidence in criminal justice prosecutions." Press Release, U.S. Special Operations Command, US Senior Leaders Explore Battlefield Evidence Processes at USSOCOM, (Dec. 10, 2018) (available at https://www.socom.mil/pages/battlefield-evidence.aspx).

90 For example, for charges brought under the Military Extraterritorial Jurisdiction Act of 2000, Pub. L. 106-523, 114 Stat. 2488 (2000) (codified as amended at 18 U.S.C. §§ 3261-3267).

91 *See, e.g.*, Haridimos V. Thravalos, *History, Hamdan, and Happenstance: 'Conspiracy by Two or More to Violate the Laws of War by Destroying Life or Property in Aid of the Enemy,* 3 HARV. NAT. SEC. J. 223 (2012); Haridimos V. Thravalos, *The Military Commission in the War on Terrorism*, 51 VILL. L. REV. 737 (2006).

92 One example is an expanded use of lethal measures. *See, e.g.*, Adam R. Pearlman, *Meaningful Review and Process Due: How Guantanamo Detention is Changing the Battlefield*, 6 HARV. NAT. SEC. J. 255, 282-83 (2015).



"[A]N ARMED CONFLICT [IS] AN ENTIRELY DIFFERENT REALM **THAN THE DOMESTIC LAW ENFORCEMENT CONTEXT."**

– Attorney General William Barr

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