HISTORY RHYMES—A COMPARATIVE ANALYSIS OF THE UNITED STATES' USE OF MILITARY COMMISSIONS AND THE UNITED KINGDOM'S USE OF DIPLOCK COURTS

BRETT BARNETT*

The use of noncivilian courts has received much criticism both in the United States and the United Kingdom for their abdication of rights and processes defendants are typically afforded in civilian courts. Since the Revolutionary War, military commissions have been utilized in the United States in various forms to meet the specific needs of the past and current administrations. While controversies over the precedential value of previous military commissions persist, the United States has continued to rely on them in convening military commissions to try Guantanamo detainees. The United Kingdom, on the other hand, has utilized Diplock Courts to try members of the Irish Republican Army and its various offshoots since 1973. In contrast to United States military commissions, Diplock Courts have been reformed and less utilized over the past decade. The result has been an increase in the institutional credibility of Diplock Courts.

This Note proposes that the United States look to the example set forth by the United Kingdom in shaping and reforming its military commissions. In support of this proposition, this Note compares the two noncivilian court systems in terms of their effectiveness in developing trial procedures and rules, as well as in anticipating social, cultural, and political consequences that follow. Through an analysis of landmark Supreme Court cases, the author examines the structure, process, and utilization of previous and current military commissions. In light of the reformations taken by the United Kingdom, the author then suggests steps to be taken by the United States in reforming its military commissions. The suggested approach will have a beneficial effect for all parties by increasing institutional credibility of military commissions among the international legal community.

* J.D. 2014, University of Illinois College of Law.

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I. INTRODUCTION

"[T]o wit, that no occurrence is sole and solitary, but is merely a repetition of a thing which has happened before, and perhaps often still."[1] Here, Twain is colloquializing about the phenomenon of historical recurrence. Historical recurrence is the belief that we look to the past to anticipate the future; "history repeats itself." Or probably more accurately, to borrow from Twain once more, "history does not repeat itself, but it rhymes."[2] In this vein, the United States has employed military

1. MARK TWAIN, THE JUMPING FROG AND OTHER SKETCHES 25 (Steelforth Press 2012) (1867).

2. *See* Lawrence P. Wilkins, *Then, Now and Into the Future: A Century of Legal Conflict and Development*, 28 IND. L. REV. 135, 137 n.4 (1995) (stating that the quote is most frequently attributed to Mark Twain, but Twain scholars cannot find the actual words in Twain's papers).

commissions in various forms since the Revolutionary War.[3] In that incarnation, the tribunal was employed most famously to try British Major John Andre who was tried before a Board of Officers to determine whether Andre had been spying.[4]

As will become evident in Part II of this Note, military commissions in the United States have not been susceptible to a uniform definition. Rather, military commissions have been molded throughout U.S. history to meet the specific needs of the current administration. For instance, during the Civil War, President Abraham Lincoln utilized military commissions to try both soldiers in the battlefield and civilians sympathetic to the Confederacy.[5] During World War II, President Franklin D. Roosevelt convened a military commission specifically for the purpose of trying eight German saboteurs.[6] Nevertheless, despite the shifting nature of what constitutes a military commission, and who can be tried before one, the author believes that a suitable definition for the purpose of this Note is: "Military commissions are a form of military tribunal convened to try individuals for unlawful conduct associated with war" operating outside the scope of criminal and civil courts.[7]

Recalling the import of the introductory quote by Twain, one could readily posit that despite the shifting nature of military commissions, the United States' elongated experience with them has enabled it to establish a court system consumed with precedence, trial procedures, rules, and allocations of burdens. In turn, the United States could utilize such precedence in convening commissions to try those detained at Guantanamo Bay without facing many unforeseen obstacles. As voluminous amounts of other legal commentary have set forth, however, this is not the case.[8] Since 2004, the legal community has looked to previous incarnations of military commissions and analogized and distinguished from current military commissions to a level approaching *ad nauseam*.[9] Commentators have addressed issues of constitutionality from every conceivable perspective as well as the social and political consequences of such military commissions.

As stated above, one ubiquitous source of fascination throughout the commentary has been how to equate Guantanamo detainees currently facing trial by military commission with previous military commission

3. Jennifer Trahan, *Trying a Bin Laden and Others: Evaluating the Options for Terrorist Trials*, 24 HOUS. J. INT'L L. 475, 482 (2002).

4. John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, TEX. TECH L. REV. 899, 908 (2003).

5. *See, e.g.*, *Ex Parte* Vallandigham, 68 U.S. 243 (1863).

6. *See Ex Parte* Quirin, 317 U.S. 1, 1–2 (1942).

7. *Military Commissions History*, OFF. MILITARY COMMISSIONS, http://www.mc.mil/ABOUTUS/MilitaryCommissionsHistory.aspx (last visited July 16, 2014).

8. *See, e.g.*, Muneer I. Ahmad, *Resisting Guantanamo: Rights at the Brink of Dehumanization*, 103 NW. U. L. REV. 1683 (2009).

9. *See, e.g.*, Hamdan v. Rumsfeld, 548 U.S. 557 (2006) (exceeding one hundred pages, this case is the home of six separate opinions (including four dissents), and cites to the Mexican-American War, the Civil War, World War II, and more secondary sources than could be reasonably expected of one man to count).

defendants. Some immediate and obvious places for analysis between current and past military commissions include: (1) the lack of a readily identifiable source nation of defendants;[10] (2) the inability to define the scope and time frame for which the War on Terror will last (which has the consequence of allowing military commissions to be conducted for an indeterminable time);[11] (3) the availability and opportunity to try defendants before an Article III court;[12] (4) the difference in type of defendants and intensity of crimes charged to the defendants and the subsequent sentences that can be handed down by a military commission;[13] and (5) the presence of ever-increasing scrutiny facing these military commissions from the media, the legal community, and international human rights organizations.[14]

The consequences of these dynamics are twofold: (1) the United States cannot fully rely on previous iterations of military commissions in developing trial procedures and rules and (2) the United States cannot accurately look to the consequences stemming from former military commissions to predict the social, cultural, and political ramifications of its contemporary actions.

Despite the fact that previous military commissions can, and do, serve as the appropriate *guideposts* from which to judge the consequences of current military commissions, this Note proposes that United States military commissions are not the most appropriate nor comprehensive touchstone for establishing how to utilize a court system to try terrorists and anticipate the political and social consequences for conducting military commissions against defendants that are members of a terrorist organization.

Rather, the author believes that we, as members of an ever-increasingly global society, should expand our analysis and commentary on military commissions to include the United Kingdom's utilization of Diplock Courts to try members of the Irish Republican Army and its various offshoots.[15] Throughout the latter half of the twentieth century, our common law brethren, the United Kingdom, has used Diplock Courts to try alleged members of the Irish Republican Army and its offshoot paramilitary organizations.[16] As will be explained below, Diplock Courts employed evidentiary and procedural components analogous to those currently employed by the United States' military commissions to try

10. William A. Zolla, *"Perilous Times" Again For America*, 19 CBA REC. 43, 66 (2005).

11. *Id.*

12. *See* Joshua L. Dratel, *How I Learned to Stop Worrying and Love the Military Commissions*, 41 SETON HALL L. REV 1339, 1346–48 (2011).

13. Ahmad, *supra* note 8, at 1695 (2009) (discussing the Bush Administration's description of Guantanamo detainees as "the worst of the worst" and the iconographic beliefs the public has had of those detainees).

14. *See, e.g.*, *Military Commissions*, AMNESTY INT'L, http://www.amnestyusa.org/our-work/issues/security-and-human-rights/fair-trials (lasted visited July 16, 2014).

15. Owen Bowcott, *Northern Ireland's Diplock Courts to be Abolished Soon*, GUARDIAN, Aug. 11, 2006, http://www.guardian.co.uk/politics/2006/aug/12/uk.northernireland.

16. John Jackson, *Many Years on in Northern Ireland: The Diplock Legacy*, 60 N. IRELAND LEGAL Q. 213, 215–20 (2009).

those suspected of engaging in terrorist activity.[17] Through comparison of the two court systems, we can study the effectiveness of trials conducted external to the traditional criminal justice system and anticipate the social and political fallout of conducting trials in this manner.

This Note proposes that the international condemnation of Diplock Courts throughout the twentieth century and their subsequent reforms and limited use over the past decades serves as a paramount example to the United States for shaping and reforming its use of military commissions. In support of this proposition, Part II will examine (1) the structure, process, and utilization of military commissions during the Civil War and World War II through analysis of landmark United States Supreme Court decisions and (2) the development and process of Diplock Courts from 1973 up to the end of the twentieth century. Part III will examine (1) the structure and process of military commissions currently used by the United States, (2) why these courts are dissimilar from previous military commissions and why previous military commissions serve as less than ideal precedence, and (3) the criticisms surrounding Diplock Courts. Part IV will look at the reformations taken by the United Kingdom in its reliance and utilization of Diplock Courts, and make a comparative analysis by examining what steps the United States could take to reform its military commissions. Part V will conclude that despite recent Congressional setbacks, the current Administration has and should continue to take steps increasing the transparency and process employed by military commissions and utilization of Article III courts to try Guantanamo detainees. Through comparison to the reforms made in Diplock Courts, we can foresee that changes to the process and structure of United States' military commissions will have a beneficial effect for all parties.

II. BACKGROUND

A. Civil War Military Commissions

1. General Background

During the Civil War, military commissions were frequently convened and utilized as a means of expeditious judicial process: there are 4271 documented trials by military commissions during the war and 1435 during reconstruction.[18] Unlike the military commissions of the twentieth and twenty-first centuries, however, these military commissions were convened of necessity and their jurisdiction was of a more limited na-

17. *See An RUC Interrogator Speaks: Northern Ireland's Forced Confessions Revealed (Video)*, GUARDIAN, Oct. 10, 2011, http://www.guardian.co.uk/uk/video/2010/oct/11/northern-ireland-police-torture.

18. United States v. Hamdan, 801 F. Supp. 2d 1247, 1295 (U.S.C.M.C.R. 2011); David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 40 (2005).

ture.[19] Military commissions were used primarily in the battlefield to maintain order in enemy territory, where civil courts were closed, and during the Reconstruction era in territories under military rule.[20] This view—that military commissions were of a limited jurisdiction and were simply common law courts developed "[o]ut of usage and necessity" during times of war—was resonated up to World War II by leading military law authorities General Enoch Crowder and Attorney General Thomas W. Gregory.[21]

Civil War military commissions typically combined General Scott's formulation of idealized military commission procedures and the procedures established in the Council of War.[22] Put another way, the procedure of military commissions during the Civil War mimicked, in many respects, the court-martial procedures.[23] The conformance to court-martial procedure stemmed from a desire to hold trials before reliable officers and to adhere to a procedural system designed to safeguard against abuses.[24] In short, holding trials that were substantively designed to adhere to traditional standards of fairness and process were of seminal importance.

During this era, military commissions were used to try persons that could not be "arraigned before [courts-martial] for any offense whatsoever, and many crimes committed even by military officers . . . cannot be tried under the 'Rules and Articles of War.'"[25] General Heny Halleck and Dr. Lieber, the lead author of the Army General Orders 100 (which were subsequently approved and adopted by President Lincoln), reasoned that although the trial procedure should mimic a courts-martial, those being tried by a military commission are not entitled to the benefits of a full trial in accordance with the laws of war because of their guerilla fighting technique.[26] This pertained to defendants who committed hostilities without commission or being part of an organized army, and did so "with intermitting returns to their homes and avocations, or with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character or appearance of soldiers."[27] Put another way, these persons were not entitled to the rank of soldier, and therefore,

19. Brief for the Brennan Center for Justice and Professor William N. Eskridge, Jr. as Amici Curiae Supporting Petitioner Presidential Authority Lacking at 14, Hamdan v. Rumsfeld, 2006 WL 42056 (2006) ("[M]ilitary commissions were tribunals used by commanders in the field to meet the necessities created by battlefield or the occupation of enemy territory.").

20. *Id.* at 14–15.

21. *Id.* (quoting *Revision of the Articles of War: Hearing on S. 3191 Before S. Subcomm. on Military Affairs*, 64th Cong. (1916) (statement of General Crowder)).

22. Alissa J. Kness, *The Military Commissions Act of 2006: An Unconstitutional Response to* Hamdan v. Rumsfeld, 52 S.D. L. REV. 382, 391 (2007).

23. *Id.*

24. Glazier, *supra* note 18, at 42.

25. Henry W. Halleck, Headquarters Department of the Missouri, Gen. Order No. 1 (Jan. 1, 1862), *in* 1 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES SER. II 247–49 (1894).

26. United States v. Hamdan, 801 F. Supp. 2d 1247, 1295–97 (U.S.C.M.C.R. 2011).

27. *Id*. at 1298.

Halleck and Lieber proposed that they should not be afforded the same judicial process.

Congress imposed several judicial safeguards and processes in an attempt to ensure that the government could not replace civilian jury trials with military commissions.[28] For instance, "Congress made it clear in the Suspension Act that the writ was suspended only for the purpose of allowing the military to arrest and temporarily detain citizens without showing cause in the civilian courts."[29] Additionally, citizens of loyal states that had been arrested were provided with appellate-like review by civilian court judges in states where the courts were still open.[30] Similarly, all military commissions received the same post-trial review as courts-martial[31] and were subject to federal judicial review.[32]

Despite the safeguards, however, there were instances in which military commissions were used to try civilians in non-Confederate states.[33] In these instances, it was the public and press that took action to stop the overstepping by government.[34] For instance, in *Ex Parte Vallandigham*, government overreaching was deterred, after the fact, largely because of public outcry.[35] In *Ex Parte Milligan*, it was the judiciary aided by public support that prevented government overreaching.[36]

2. Supreme Court Decisions

The Supreme Court became involved in military commissions on multiple occasions during the Civil War. In *Ex Parte Vallandigham*, the Supreme Court found that the Court was without jurisdiction to grant a writ of certiorari to hear the case.[37] *Ex Parte Vallandigham* was decided in the midst of the Civil War and the Court showed great deference to executive authority ruling that (1) military commissions have jurisdiction over rebellions[38] and (2) the Court's power to grant *certiorari* was expressly limited by the Constitution and acts of Congress.[39] *Ex Parte Milligan* reached the Court in 1866 after the conclusion of the Civil War.[40] Here the Court, in a turn of direction, found that military com-

28. Anthony F. Renzo, *Making a Burlesque of the Constitution: Military Trials of Civilians in the War Against Terrorism*, 31 VT. L. REV. 447, 475 (2007).
29. *Id.* at 474.
30. *Id.* at 474–75.
31. Glazier, *supra* note 18, at 43.
32. Kness, *supra* note 22, at 391–92.
33. Renzo, *supra* note 28, at 477.
34. *Id.*
35. *See infra* Subsection II.A.2
36. *Id.*
37. 68 U.S. 243, 243 (1863).
38. *Id.* at 249 ("These jurisdictions are applicable, not only to war with foreign nations, but to a rebellion, when a part of a country wages war against its legitimate government, seeking to throw off all allegiance to it, to set up a government of its own.").
39. *Id.* at 251 ("The appellate powers of the Supreme Court, as granted by the Constitution, are limited and regulated by the acts of Congress, and must be exercised subject to the exceptions and regulations made by Congress.").
40. *Ex Parte* Milligan, 71 U.S. 2 (1866).

missions were unconstitutional if convened when civilian courts are still operating.[41] The distinctions underlying the Court's change of heart regarding the vitality of military commissions, and the subsequent muted impact of *Ex Parte Milligan* by World War II era Supreme Court rulings on military commissions, strongly suggests the inapplicability of Civil War military commissions as stalwartly precedence for contemporary military commissions.

a. *Vallandigham*

In April 1863, General Burnside, Commanding General of the Department of Ohio, issued General Order No. 38.[42] Under General Order No. 38, persons "declaring sympathies for the enemy" were subject to arrest.[43] Burnside appointed a military commission to convene in Cincinnati, Ohio in April 1863.[44] Clement Vallandigham, a Democratic congressman in Ohio and persistent vocal critic of the Lincoln Administration, called for an end of the Civil War and opposed the abolition of slavery.[45] Vallandigham also specifically targeted General Order No. 38, believing it to be an unconstitutional usurpation by the executive.[46] Unsurprisingly, Vallandigham was targeted by the Union Army who monitored his speeches at political rallies.[47] On May 1, 1863, Vallandigham delivered a speech in which he was highly critical of the war and made protestations that (1) the Lincoln administration was depriving persons of their liberties and (2) the intended despotism of Lincoln was meant as to provide freedom to blacks, but enslavement for whites.[48] The extent to which Vallandigham's speaking contained antiwar or antigovernment rhetoric is contested.[49] His statements simply referred to war as cruel and that criminalizing antiwar speech was unconstitutional, while at the same time advising citizens to obey the law and seek redress through the political process by voting Lincoln out of office.[50]

Nevertheless, Vallandigham was arrested four days later on May 5th and tried before a military commission on May 6th.[51] Vallandigham was charged with uttering antiwar and antigovernment sentiments at a public meeting.[52] Vallandigham was quickly convicted and sentenced to impris-

41. *Id.* at 2–4.
42. Renzo, *supra* note 28, at 478.
43. *Ex parte* Vallandigham, 68 U.S. at 244.
44. *Id.* at 243.
45. Renzo, *supra* note 28, at 478.
46. Michael Kent Curtis, *The Fraying Fabric of Freedom: Crisis and Criminal Law in Struggles for Democracy and Freedom of Expression*, 44 TEX. TECH L. REV. 89, 108 (2011).
47. Renzo, *supra* note 28, at 478.
48. Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 455 (2002).
49. *See* Curtis, *supra* note 46, at 108.
50. *Id.*
51. Renzo, *supra* note 28, at 478.
52. *Ex parte* Vallandigham, 68 U.S. 243, 244 (1863).

onment.[53] Subsequently, he petitioned the Supreme Court to grant *certiorari*, arguing that the military commission was without jurisdiction to try him.[54]

The Supreme Court, in denying Vallandigham's petition, held the Court's "appellate powers . . . as granted by the Constitution, are limited and regulated by the acts of Congress . . . the petition before us we think not to be within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court."[55] The Court went on to state:

> Whatever may be the force of Vallandigham's protest, that he was not triable by a court of military commission, it is certain that his petition cannot be brought within the 14th section of the [Judiciary Act]; and further, that the court cannot, without disregarding its frequent decisions and interpretation of the Constitution in respect to its judicial power, originate a writ of certiorari to review or pronounce any opinion upon the proceedings of a military commission.[56]

Thus, when first presented with the opportunity to guide the government and the nation on the government's constitutional authority to use military commissions to try civilians, the Court took a pass.[57]

b. *Milligan*

Ex Parte Milligan, much like its contemporary *Ex Parte Vallandigham*, has seen a revitalization of interest resulting from the War on Terror[58] and the Supreme Court's decision to grant certiorari on numerous related cases.[59] Lambdin Milligan, an American citizen living in Indiana, was accused of engaging in rebellion against the United States.[60] Milligan, like Vallandigham, was put before a military commission for reasons that seem more political than treasonous.[61] Milligan was an Indiana Copperhead Democrat who, like Vallandigham, fervently called for the end of the Civil War and believed Lincoln had overstepped his constitutional boundary in perpetuating the Civil War.[62] Milligan voiced

53. Curtis, *supra* note 46, at 108.

54. *Ex parte* Vallandigham, 68 U.S. at 245.

55. *Id.* at 251.

56. *Id.* at 251–52.

57. Stephen I. Vladeck, *The Laws of War as a Constitutional Limit on Military Jurisdiction*, 4 J. NAT'L SECURITY L. & POL'Y 295, 312 (2010).

58. John Yoo, *Lincoln and Habeas: Of Merryman and Milligan and McCardle*, 12 CHAP. L. REV. 505, 508 (2009).

59. Christina D. Elmore, *An Enemy Within Our Midst: Distinguishing Combatants from Civilians in the War Against Terrorism*, 57 U. KAN. L. REV. 213, 221–22 (2008) ("Indeed, the Supreme Court has recognized that *Ex parte Quirin* clarified the decision in *Ex Parte Milligan*, leading some to the conclusion that *Milligan* is applicable only once it is determined that the individual cannot qualify as an enemy combatant."). *But see* William D. Bader & Frank J. Williams, *David Davis: Lawyer, Judge, and Politician in the Age of Lincoln*, 14 ROGER WILLIAMS U. L. REV. 163, 210–11 (2009) ("*Ex Parte Milligan* did not play a particularly prominent role in the first trilogy of cases decided by the United States Supreme Court on this issue.").

60. Belknap, *supra* note 48, at 457–58.

61. *Id.* at 458.

62. Yoo, *supra* note 58, at 522.

his opposition both in the political arena, through a failed nomination for governor of Indiana,[63] and in less politically acceptable arenas through his organization of the Sons of Liberty.[64] It was through his affiliation with this organization that Milligan wound up before a military commission.[65]

In 1864, a fellow member of the Sons of Liberty, Harrison Horton Dodd, accepted money from Confederate agents to pay for a planned revolt and to store arms and ammo for this purpose.[66] Oliver Morton, the Republican Governor of Indiana, worrying about his upcoming reelection and looking to discredit the Democratic opposition, seized on the conspiracy.[67] Morton had Dodd, Milligan, and several other acquaintances arrested on the eve of the 1864 elections.[68]

Milligan's military commission was comprised of several army officers with strong personal and political connections to Oliver Morton.[69] Milligan was tried, convicted, and sentenced to death,[70] all of this in spite of the fact that there was no evidence that Milligan had done anything other than talk.[71]

Milligan filed a petition for habeas corpus to the U.S. Circuit Court for Indiana arguing that the military commission was without jurisdiction to try him.[72] The two judges hearing the case formally disagreed on the legality of trying civilians before a military commission, and the case wound up before the Supreme Court in 1866.[73] Arguing before the Supreme Court, the prosecution argued that the Bill of Rights did not apply in times of war.[74] Milligan's lawyers, conversely, argued that even in

63. *Id.*

64. Belknap, *supra* note 48, at 457. The Sons of Liberty consisted of a group of prominent Indiana Democrats. Although the group was alleged to have planned rebellious attacks on the Union, none of these plans ever came to fruition. Yoo, *supra* note 58, at 522.

65. Belknap, *supra* note 48, at 458.

66. Frank L. Klement, *The Indianapolis Treason Trial and* Ex Parte Milligan, *in* AMERICAN POLITICAL TRIALS 101, 106–08 (Michal R. Belknap ed., 1981).

67. Belknap, *supra* note 48, at 458. Governor "Morton was most anxious that [the] trial before a military commission begin in September, in time to grind grist for the October state elections." *Id.* (quoting Klement, *supra* note 66, at 103).

68. *Id.*

69. Klement, *supra* note 66, at 108.

70. *Ex Parte* Milligan, 71 U.S. 2, 118 (1866). John Yoo suggests "It had not helped that the ringleader, Dodd, escaped from his room above the post-office and made it to Canada, and that one of Milligan's comrades had turned informant." Yoo, *supra* note 58, at 523.

71. Belknap, *supra* note 48, at 458 n.169 (2002) (quoting WILLIAM H. REHNQUIST, ALL THE LIBERTIES BUT ONE: CIVIL LIBERTIES IN WARTIME 100–01 (1998)).

72. Belknap, *supra* note 48, at 460.

73. Nancy Murray & Sarah Wunsch, *Civil Liberties in Times of Crisis: Lessons From History*, 87 MASS. L. REV. 72, 75 (2002). A series of peculiar events and happenstance circumstances actually took place between the time Milligan was convicted and the Supreme Court granted certiorari. First, Governor Morton won his re-election and recommended commuting Milligan's sentence, but the military commission refused. Then, Morton's gubernatorial opponent, Joseph McDonald, traveled to Washington, D.C., and personally pled for Milligan's clemency to President Lincoln. Lincoln decided that Milligan would not die, but wanted to keep him jailed during the implementation of his second administration. Lincoln was killed before he could keep good on his promise, and President Johnson approved Milligan's death sentence. Yoo, *supra* note 58, at 523.

74. Murray & Wunsch, *supra* note 73, at 75.

times of war, civilians could not be tried by a military commission when civilian courts remained open.[75] The Court agreed with the petitioner stating:

> Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, in which the Federal courts were open . . . had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious State, nor a prisoner of war, nor a person in the military or naval service.[76]

This curtailment, which forbade the use of military commissions for civilians except when courts were closed,[77] helped establish guidelines for the appropriateness of when and where military commissions could be used for future governments.[78] Following *Milligan*, the right to a trial by jury reclaimed its paramount status for civilians. Here, the Supreme Court established that the judiciary would not, as they had in *Ex Parte Vallandigham*, watch from the sidelines as the President and Congress "overrode the constitutional protections in a criminal trial."[79] As Justice Davis so eloquently stated in his opinion for *Ex Parte Milligan*, "[w]icked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln; and if this right is conceded, and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate."[80]

It bears repeating that the Court found citizens could be tried before a military commission, but only (1) if the courts were closed, and (2) it was "impossible to administer criminal justice according to law."[81] In other words, the *Milligan* court narrowed the exception for civilians subject to military commission to instances necessary in areas where a civil court system was not functioning.[82] The Court agreed that the writ should be granted, and Milligan was released; thereafter he successfully sued the military for false imprisonment.[83]

75. *Id.*
76. *Ex Parte* Milligan, 71 U.S. 2, 3 (1866).
77. Brief Amicus Curiae of Louis Fisher in Support of Petitioner, Hamdan v. Rumsfeld, 548 U.S. 557 (2005) (No. 05-184) [hereinafter Brief of Louis Fisher].
78. *See* Elwood Earl Sanders, Jr., *The Essential Importance of* Ex Parte Milligan, 26 WHITTIER L. REV. 981, 985–90 (2005) (discussing the precedential status that *Ex Parte Milligan* has played in World War II era and War on Terror era military commission cases).
79. Yoo, *supra* note 58, at 526.
80. *Ex Parte* Milligan, 71 U.S. at 125.
81. Renzo, *supra* note 28, at 484 (quoting *Ex Parte* Milligan, 71 U.S. at 127).
82. *Id.* at 484–85.
83. Milligan v. Hovey, 17 F. Cas. 380, 380–83 (C.C.D. Ind. 1871).

B. World War II Military Commissions

1. General Background

President George W. Bush's order establishing the use of military commissions constituted the first time the United States had employed such a tribunal since World War II.[84] The World War II era cases are especially pertinent to the author's analysis as the Bush and Obama Administrations have relied heavily on military commission cases of this era in formulating and justifying their use of military commissions.[85] The leading World War II case, *Ex Parte Quirin*,[86] has been cited by both the Bush and Obama Administrations as providing great executive authority to conduct military commissions.[87] *Ex Parte Quirin* has been referred to as "[a]rguably the most important case" for the evolution of military commissions.[88] *Ex Parte Quirin* is particularly significant to the analysis at hand, as President Bush based his authority to convene military commissions on it.[89]

Such reliance is misplaced, however, for several reasons. First, the current Administration's "claim of executive detention power eclipses anything that has come before it and distorts these cases beyond recognition."[90] Put another way, the Bush and Obama Administrations' reliance on detaining individuals outside the traditional criminal system far surpasses that of previous administrations; thus, its reliance on cases in a previous era is little other than self-serving. Second, the status of the detainees in each situation is incompatible as the *Ex Parte Quirin* defendants were members of the German military whereas the Guantanamo detainees are members of a terrorist organization.

Furthermore, even if this latter point were disregarded, the behind-the-scenes facts underlying *Ex Parte Quirin* are, in the words of Justice

84. Josiah Ramsey Fricton, *The Balance of Power: The Supreme Court's Decision on Military Commissions and the Competing Interests in the War on Terror*, 33 WM. MITCHELL L. REV. 1693, 1695–96 (2007).

85. Jonathan Hafetz, *Stretching Precedent Beyond Recognition: The Misplaced Reliance on World War II Cases in the "War on Terror"*, 28 REV. LITIG. 365, 366 (2008).

86. 317 U.S. 1 (1942).

87. Hafetz, *supra* note 85, at 366.

88. Alberto R. Gonzales, *Waging War Within the Constitution*, 42 TEX. TECH L. REV. 843, 869 (2010) ("After studying this history and consulting with OLC, I concluded in the fall of 2001 that the President should be given the opportunity to consider whether he wanted the option of military commissions to bring terrorists to justice. I envisioned the United States using military commissions for special cases such as bin Laden and other top al Qaeda leaders. During the final weeks of October 2001, I first discussed the topic of military commissions with the President. I explained the Roosevelt precedent with the Nazi saboteurs and the Supreme Court decision in *Ex parte Quirin* upholding President Roosevelt's military commission. The President concluded it was a strong move. Shortly after that, the President and I spoke again about the possible use of commissions. He told me he wanted military commissions as a tool, but he was concerned about trying American citizens in a military commission. I returned to my desk and continued to work quietly with the lawyers to develop a military commissions option."); Brian Wolensky, *Discretionary Sentencing in Military Commissions: Why and How the Sentencing Guidelines in the Military Commissions Act Should Be Changed*, 12 CHAP. L. REV. 721, 726 (2009).

89. Fricton, *supra* note 84, at 1698.

90. Hafetz, *supra* note 85, at 366.

Felix Frankfurter, "not a happy precedent," and accordingly, is not something on which the current administration should place great weight.[91] Because the extreme facts underlying the case belie the Court's opinion, *Ex Parte Quirin*'s precedential status should be nominalized.[92]

2. Supreme Court Case

The facts giving rise to *Ex Parte Quirin* are extraordinary. In June 1942, eight German soldiers reached the United States by submarine with the intent to use explosives on strategic military targets.[93] The saboteurs traveled in two separate groups with one landing in Florida and the other in New York.[94] The saboteurs arrived in the United States in uniform, but quickly buried them and acquired civilian clothing.[95] One of the saboteurs turned himself into the FBI, became an informant, and helped the FBI arrest the other saboteurs before they could act.[96] All the saboteurs were born in Germany; however, one claimed to be a U.S. citizen.[97]

Initially the eight saboteurs were to be tried in civil court.[98] President Franklin D. Roosevelt issued an Executive Order on July 7, 1942,[99] however, denying the saboteurs access to the courts and establishing a military commission to try the saboteurs "for offenses against the law of war and the Articles of War."[100] To clarify, President Roosevelt created the military commission specifically to try the eight saboteurs.[101] President Roosevelt felt the need to make an example of the saboteurs and

91. LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 171 (2003).

92. Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT'L L.J. 15, 16 (2006) ("A close look at *Quirin* reveals a process and a decision with so many deficiencies that it should be remembered as a precedent not worth repeating. The same conclusion applies to the record of other U.S. military commissions over the past two centuries."); Vladeck, *supra* note 57, at 315 ("[P]opular and academic commentaries on the decision have been nearly uniform in their withering criticism of both the merits of the Court's analysis and the unusual means by which it disposed of the case.").

93. Fisher, *supra* note 92, at 34.

94. Brandon J. Pitcher, Note, Al-Marri v. Pucciarelli*: The Fourth Circuit Solidifies the President's Authority to Detain Al Qaeda Agents While Creating Additional Confusion Regarding the Habeas Corpus Privileges of Detainees*, 43 CREIGHTON L. REV. 1221, 1232 (2010).

95. *Ex Parte* Quirin, 317 U.S. 1, 21 (1942).

96. William Michael Jr. & Joseph Margulies, *Trying Terrorists Before Military Commissions: Precedents and Perspectives*, 59 BENCH & BAR MINN. 20, 21 (2002), *available at* http://www2.mnbar.org/benchandbar/2002/feb02/commissions-1.htm.

97. *Ex Parte* Quirin, 317 U.S. at 20.

98. Fisher, *supra* note 92, at 34.

99. Order of July 2, 1942, 7 Fed. Reg. 5103 (1942).

100. *Id.*

101. Brief of Louis Fisher, *supra* note 77, at 14. On the same day, President Roosevelt issued a proclamation that

> subjects, citizens or residents of any nation at war with the United States . . . who during time of war- enter or attempt to enter the United States . . . are charged with committing or attempting . . . to commit sabotage, espionage . . . or warlike acts . . . shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf.

Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942).

"made clear to his attorney general that he intended to brook no opposition, judicial or otherwise, to his desire to hold the saboteurs accountable for their crimes."[102] President Roosevelt also feared that a public trial in the criminal courts would be detrimental because: (1) it would reveal the saboteurs had been caught because of a snitch in the group;[103] (2) criminal law sentencing would be insufficient; and (3) it would allow the courts reviewing authority, when instead, the President wanted that authority reserved for himself.[104]

The military tribunal commenced on July 8, 1942, less than two weeks after the saboteurs were arrested.[105] As leading commentator Louis Fisher has said about the procedure and evidentiary rules of the military commission:

> There were no rules in place . . . [T]he tribunal adopted a three-and-a-half page double-spaced statement of rules, dealing primarily with the sessions being closed to the public, the taking of oaths of secrecy, the identification of counsel for the defendants and the prosecution, and the keeping of a record. Only eight lines referred to rules of procedure: disallowing peremptory challenges, [and] allowing one challenge for cause.[106]

The military commission's total disregard for establishing procedure and evidentiary rules that conformed with the Articles of War, or even prior U.S. military commissions, was highlighted by prosecuting attorney, Myron C. Cramer's statement to the commission, "[o]f course, if the Commission please, the Commission has discretion to do anything it pleases; there is no dispute about that."[107]

Before the commission could enter a verdict, the defendants sought a writ of habeas corpus from the civil courts.[108] On July 23, 1942, the Court agreed to hear the case with oral argument beginning a week later on July 29.[109] On July 31, after two days of oral argument, the Court issued a one page *per curiam* order upholding the President's authority to try the saboteurs by military commission rather than in civil court[110] and promising a full opinion after they had been given adequate time for its preparation.[111] The next day, on August 1, the military commission found

102. Hafetz, *supra* note 85, at 367.

103. FBI agents told George Dasch, the German saboteur turned informant, that after pleading guilty in civil court the FBI would begin the process of having the President pardon him as a reward for his assistance. The administration recanted on this offer because they feared compromising facts being aired in open court. Fisher, *supra* note 92, at 35.

104. Brief of Louis Fisher, *supra* note 101, at 15.

105. Louis Fisher, *Detention and Military Trial of Suspected Terrorists: Stretching Presidential Power*, 2 J. NAT'L SECURITY L. & POL'Y 1, 17 (2006).

106. Fisher, *supra* note 92, at 36.

107. *Id.* (quoting Transcript of Trial at 991, 1942 German Saboteur Case, Court Martial Case Files, CM 334178 (unpublished transcript, on file with the National Archives, College Park, Maryland)).

108. *Id.* at 34.

109. Fisher, *supra* note 105, at 21.

110. *Id.* at 22.

111. *Ex Parte* Quirin, 317 U.S. 1, 2 (1942).

the eight saboteurs guilty and recommended the death penalty.[112] A week later, on August 8, six of the defendants were electrocuted, while the two others received prison sentences.[113]

On October 29, nearly three months after the six defendants were executed, the Court issued its full opinion.[114] The Court found the President had statutory authority under Article 15 of the Articles of War to convene a military commission to try the German soldiers.[115] According to the Court, Congress had incorporated the Articles of War by reference.[116] As a means of bolstering executive authority, the Court additionally reasoned that the President acted pursuant to the "authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war."[117] The Court justified the military commission's jurisdiction in stating "it was not the purpose or effect of § 2 of Article III . . . to enlarge the then existing right to a jury trial. The object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law."[118]

C. Diplock Courts

1. General Background

The United Kingdom has had a well-chronicled but troublesome history with terrorism.[119] The contentious arena that is Irish politics has elicited responsive action from the United Kingdom for nearly 150 years.[120] For the purposes of this Section, however, we will focus our analysis on the judicial and political processes afforded to detainees from the late 1960s to the end of the twentieth century (a time aptly referred to as "The Troubles").[121]

In response to the growing political violence in Northern Ireland, the United Kingdom enacted counterterrorism legislation and created a

112. Fisher, *supra* note 105, at 22.
113. Fisher, *supra* note 92, at 48.
114. 317 U.S. at 18–48.
115. *Id.* at 30.
116. *Id.* ("Congress had the choice of crystallizing in permanent form and in minute detail every offense against the law of war, or of adopting the system of common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts. It chose the latter course.").
117. *Id.* at 28.
118. *Id.* at 39.
119. Geoffrey Bennett, *Legislative Response to Terrorism: A View From Britain*, 109 PENN ST. L. REV. 947, 947 (2005).
120. *Id.* at 947–48 (2005) ("Particular legal measures relating to Ireland go back some two hundred years but the modern law of legal measures against terrorism undoubtedly begins with Fenian agitation on the mainland of Britain from the 1860s.").
121. *The Troubles—An Interactive History,* GUARDIAN, http://www.theguardian.com/Northern_Ireland/flash/0,6189,344683,00.html (last visited July 20, 2014.).

court system to try crimes connected to terrorist activity.[122] In 1972, the United Kingdom abolished jury trials for crimes related to terrorist activity and created Diplock Courts.[123] Diplock Courts were created as a result of a report by Lord Diplock, in which he concluded that jury trials could not be used to effectively deal with terrorist crime, due to well-founded concerns of juror intimidation or, conversely, loyalty.[124] The Northern Ireland Emergency Provisions Act 1973 to 1998 and the Prevention of Terrorism Acts 1974 implemented the recommendations and conclusions of the Diplock Report and established the procedure, process, and rules to be afforded to detainees charged with crimes under the Acts.[125]

2. Procedure and Evidence in Diplock Courts

A brief note about the existence of Diplock Courts: trials in these courts commenced in early 1973, were limited by the Good Friday agreement, and were abolished in 2007; although the courts were reestablished in 2012, their jurisdiction and authority has been circumscribed.[126]

A recurring criticism of the Diplock Courts was that they abbreviated several procedures and evidentiary rules that had typically been afforded to defendants in civil courts.[127] Several noteworthy differences are: (1) the trials are conducted before a single judge sitting without a jury, (2) Diplock Courts have a substantially lower standard of admissibility of confessions, (3) Diplock Courts allow "supergrass" witnesses to testify against multiple defendants in a single trial, and (4) negative inferences can be drawn both during interrogations and at trial from a defendant who wished to remain silent. Each deviation will be discussed below.

Turning to the first point, trials in Diplock Courts are before a single judge sitting without a jury.[128] As stated above, there were two con-

122. Christie A. Leary, Note, *The Political Offense Exception, the Irish Republican Army, and the Supplemental Treaty-The Inadequacy of Anglo-American Extradition Policy Demonstrated by* In Re Requested Extradition of Artt, Brennan, and Kirby, 5 J. INT'L LEGAL STUD. 293, 305–06 (1999).

123. *See generally* LORD DIPLOCK, REPORT OF THE COMMISSION TO CONSIDER LEGAL PROCEDURES TO DEAL WITH TERRORIST ACTIVITIES IN NORTHERN IRELAND (1972), *available at* http://cain.ulst.ac.uk/hmso/diplock.htm.

124. *Id.* at ¶ 7(a)–(c).

125. James T. Kelly, *The Empire Strikes Back: The Taking of Joe Doherty*, 61 FORDHAM L. REV. 317, 325 n.23 (1992).

126. Lisa Miriam Jacobs, Note, *It's Time to Leave the Troubles Behind: Northern Ireland Must Try Paramilitary Suspects by Jury Rather than in Diplock-type Courts*, 45 TEX. INT'L L.J. 655, 655–56 (2010). Though Diplock Courts were abolished by Parliament in July 2007, certain cases are still tried before a juryless trial. The reforms that were made to these courts and the cases that come before them will be discussed in Part III, *infra.*

127. Brian P. Lenihan, *Unsound Method: Judicial Inquiry and Extradition to Northern Ireland*, 34 B.C. L. REV. 591, 611–12 (1993).

128. *Id.* at 613.

trasting and seemingly paradoxical purported reasons for this.[129] On the one hand, the United Kingdom wanted to caution against jury pools comprised of members of dialectic sectarian interests with Protestant jurors acquitting Loyalist defendants and Catholic jurors acquitting Republican defendants.[130] On the other hand, however, the United Kingdom feared that defendants would intimidate or seek retribution against jurors that convicted the defendant.[131]

Second, Diplock Courts apply a lower standard of admissibility of evidence than the civil courts.[132] As a result, confessions that would not be admissible under common law are admissible in Diplock Courts.[133] Under Diplock Courts, confessions are presumed admissible in the absence of overt evidence of an interrogator's attempt to coerce a confession.[134] One commentator has concluded that "[a]t one point, 90 percent of Diplock cases relied on confessions obtained through 'intensive interrogations' as primary evidence," which constituted evidence "that would have been inadmissible in a jury trial."[135] In fact, the interrogators are permitted to engage in a "moderate degree of physical maltreatment" as long as it did not constitute the amorphously defined "violence."[136] Moreover, these uncorroborated confessions can be used as the sole basis for conviction,[137] and in fact, provided nearly conclusive proof of guilt in all cases in which they were obtained.[138]

Third, Diplock Courts allow for "supergrass" testimony to be used as the sole basis for conviction.[139] "Supergrass" signified the government's exchange of blanket immunity for a person involved in a terrorist attack to testify against his confederates.[140] This testimony was highly criticized as it was often uncorroborated, self-serving, did not force the testifying parties to cease their illegal activities, and there was an extraordinarily high percentage of recantations.[141]

Fourth, a 1988 Northern Ireland Criminal Evidence Order enabled interrogators, prosecutors, and the court to use a defendant's silence

129. Laura K. Donohue, *Terrorism and Trial by Jury: The Vices and Virtues of British and American Criminal Law*, 59 STAN. L. REV. 1321, 1326 (2007) ("Although [Lord Diplock] offered no evidence in support of his claim, he recommended the suspension of jury trial."); *see* Lenihan, *supra* note 127, at 613–14.

130. *See* Lenihan, *supra* note 127, at 614.

131. U.S. DEP'T OF STATE, *United Kingdom Country Reports on Human Rights Practices – Europe and Canada*, 22a ANN. HUMAN RIGHTS REP. SUBMITTED TO CONG. 1374, 1382 (1997); Lenihan, *supra* note 127, at 613–14.

132. Leary, *supra* note 122, at 306–07.

133. Carol Daugherty Rasmic, *Northern Ireland's Criminal Trials Without Jury: The Diplock Experiment*, 5 ANN. SURV. INT'L & COMP. L. 239, 248 (1999).

134. *Id.*

135. Jacobs, *supra* note 126, at 657.

136. Rasnic, *supra* note 133, at 249.

137. Jacobs, *supra* note 126, at 657.

138. Rasnic, *supra* note 133, at 252.

139. Jacobs, *supra* note 126, at 658.

140. Rasnic, *supra* note 133, at 249–50.

141. *Id.* at 250.

against him.[142] Subsequent legislation, such as the Terrorist Act 2000 and the Antiterrorism Crime and Security Act 2001, criminalized withholding information.[143] Prior to enactment of the Order, suspects had been trained by their paramilitary organizations to withstand interrogation techniques and remain silent throughout the process.[144] As a result, "over half of those questioned in connection with serious crimes, including scheduled offenses, refused to answer any questions while in police custody."[145] The Order was enacted in response to this refusal.[146] Article 3 of the 1988 Order allows for a Diplock Court to draw adverse inferences from the accused's failure to mention a fact during an interrogation, but later used in his defense.[147] Article 4 of this Order allowed the court to draw adverse inferences from a defendant's refusal to testify at trial, as long as the court had first warned the defendant of the consequences of his refusal.[148]

While the 1988 Order prevented a defendant from being convicted of an offense solely on the basis of an allowable adverse inference,[149] recent legislation indicates this is no longer true.[150] For instance, "Under Section 38B(2) of the . . . Terrorist Act 2000, a person commits an offense if he does not disclose information, as soon as reasonably practicable, which he knows or believes might be of material assistance in preventing an act of terrorism."[151]

III. ANALYSIS

A. Grounds For Making a Comparative Analysis

In order to make a comparative analysis between the United States' current military commissions, the United States' previous military commissions, and the United Kingdom's Diplock Courts, we must first explain for why such analysis is appropriate. In doing so, this Note recognizes that there are distinctions between United States' military commissions—which have traditionally been tried before military officers, at times have had juries, and have at least attempted to adhere to

142. Criminal Evidence (Northern Ireland) Order, 1988, SI 1988/1987 (N. Ir. 20) [hereinafter 1988 Order]. It must be noted, however, that there has never been a recognized right to silence under the common law of the United Kingdom. Rather "[t]he common law recognizes that adverse inferences drawn from a defendant's silence in the face of an accusation are only the result of ordinary common sense." Lenihan, *supra* note 127, at 631.

143. Bennett, *supra* note 119, at 954.

144. Lenihan, *supra* note 127, at 628.

145. *Id.*

146. *Id.*

147. 1988 Order art. 3, *supra* note 142; Bennett, *supra* note 119, at 953.

148. 1988 Order art. 4, *supra* note 142; Lenihan, *supra* note 127, at 629.

149. Lenihan, *supra* note 127, at 630.

150. Bennett, *supra* note 119, at 954.

151. *Id.* It is not apparent, however, that 38B(2) has been used in a Diplock Court as the basis for a conviction. As will be explained in Part III, *infra* after 1998 the use of Diplock Courts has been greatly reduced, and terrorist suspects are more frequently tried in common law courts.

procedures and evidentiary rules resembling the articles of war[152]—and the United Kingdom's Diplock Courts—which are nonmilitary in nature, are juryless, and have rules and procedures that are legislatively derived.[153] This Note also recognizes that it is reducing distinctions between the various systems and their defendants to a certain level of generality. This Note, however, proposes that by engaging in such reduction we can arrive at an appropriate level from which we can engage in meaningful discourse between the two states' uses of nontraditional criminal courts to try terrorist suspects.

To begin with, this Note recognizes there are distinctions between the defendants tried in each court system. While Diplock Courts, for the most part, have been concerned with paramilitary terrorist organizations associated with the Irish Republican Army ("IRA") and its progeny,[154] U.S. military commissions have been concerned with terrorists and terrorist organizations associated with al-Qaeda.[155] There is an inherent tension with analogizing the IRA, an organization that employed terrorism as a means of fighting for political and territorial freedom from the United Kingdom, with al-Qaeda,[156] which for all intents and purposes has the much less-focused goal of eradicating the world of all those not adhering to its ideologies.[157] Both the IRA and al-Qaeda, however, are recognized as terrorist organizations in both the United Kingdom and the United States.[158] Moreover, this Note is focused on the judicial actions taken by the victims of the acts of terrorism, as opposed to the groups performing such acts.

Second, as indicated above, there are structural differences between military courts used in the United States and the nonmilitary Diplock Courts of the United Kingdom. Nevertheless, both courts were created specifically to try those suspected of engaging in terrorist activity. Both courts employ procedural and evidentiary rules rooted in common law

152. *See supra* Section II.A–B.

153. *See supra* Section II.C.

154. Michael P. Scharf, *The Jury Is Still Out on the Need for an International Criminal Court*, 1 DUKE J. COMP. & INT'L L. 135, 153 (1991).

155. *See* Military Commissions Act of 2009, 10 U.S.C. § 948(a)(7)(c) (2009) (The term "unprivileged enemy belligerent" means an individual (other than a privileged belligerent) who was a part of al-Qaeda at the time of the alleged offense under this chapter).

156. It bears noting that the IRA and al-Qaeda have both employed religion and religious mysticism as a means of fostering support and advocating. For instance, it is well established that the Irish Republican Army infamously identified themselves as Catholics and used such rhetoric to bolster their attack of the Protestant government in Belfast. *See Irish Republican Army*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/organizations/i/irish_republican_army/index.html (last visited July 20, 2014). And al-Qaeda identifies its members as Sunni and uses this identification to carry out its global jihad. *Al-Qaeda's Global Jihad: How to Win the War Within Islam*, ECONOMIST, July 17, 2008, http://www.economist.com/node/11750386. For the point of my analysis, however, the inception and driving force behind these organizations is not important.

157. *See* Jason Burke, *After Bin Laden: What Next for al-Qaida and Global Jihad*, GUARDIAN, May 4, 2011, http://www.theguardian.com/world/2011/may/04/bin-laden-what-next-alqaida.

158. *Foreign Terrorist Organizations*, U.S. DEP'T OF STATE (Sept. 28, 2012), http://www.state.gov/j/ct/rls/other/des/123085.htm; *Proscribed Terrorist Organisations*, HOME OFFICE (June 20, 2014), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/281224/ListProscribedOrganisations.pdf.

(albeit different common law), and both have received international scrutiny for the processes they employ.[159] As such, the author believes a comparative analysis is appropriate.

This Part proceeds by (1) examining current military commissions in the United States through an overview of the Bush-era military commissions and a more focused analysis of the developments during the Obama Administration; (2) discussing the contemporary and historical criticisms of military commissions during the Civil War and World War II, and, as result, why reliance on such precedence is misguided; (3) looking at the historic criticisms of the Diplock Courts; (4) reviewing the reforms they have undertaken over the past fifteen or so years, and their current use and process; and (5) analyzing the benefits the United States could receive if it transitioned its military commissions to a system resembling the Diplock Courts.

B. Contemporary Military Commissions

1. Bush-Era Military Commissions

On July 7, 2004, by order of the Deputy Secretary of Defense, the United States established the Combatant Status Review Tribunal as means of classifying Guantanamo detainees.[160] Soon thereafter, the first military commissions were established.[161] President Bush, in the November 13 Order, proclaimed military courts were necessitated in response to the "grave acts of terrorism . . . , including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania."[162] Bush enacted these military commissions despite their historically limited jurisdiction, relying heavily on the precedent established by *Ex Parte Quirin*.[163] Initially, the Bush-era military commissions deviated from the traditional procedural standards of military commissions of the Uniform Code of Justice[164] and the evidentiary standards of the Federal or Military Rules of Evidence.[165]

Commentators on the Bush-era military commissions have by and large analyzed their constitutionality and compliance with international

159. *See supra* Section II.C; *infra* Section III.B.

160. Arthur S. Gold & William R. Coulson, *The War on Terror-Point Counterpoint: Civil Courts for Enemy Combatants?*, 24 CBA REC., Nov. 2010, at 40, 41.

161. *Id.*

162. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

163. Eun Young Choi, Note, *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, 139–40, 180–81 (2007).

164. *Id.* at 147–49.

165. *Id.* at 154–55.

human rights obligations.[166] They have sought to validate or condemn the United States' actions through analysis of statutory authorizations, relevant domestic case law, and categorizing times in which military commissions are and are not appropriate.[167]

For instance, Joseph Marguiles, an attorney for the detainees in the watershed case *Rasul v. Bush*, has asserted that the Bush administration was focused on preventing further acts of terrorism more than they were with adhering to the rule of law.[168] Put another way, "Bush claimed constitutional authority as commander in chief to build an ad hoc legal system unilaterally, in which neither criminal, military nor international law applied."[169] Although it borders on the horrific to think that the United States deliberately created a court system that works on a "make it up as we go" basis, it has made for fascinating analysis by the leading commentators in the field.[170]

During the Bush-era, the goal in pushing the detainees through this specifically created court system was not to ensure that they received adequate process or even an impartial trial.[171] Rather, the goal was to keep the defendant detained until the United States had extracted whatever information they could from the individual and assured themselves through their investigations existing outside the judicial process that the individual posed no terroristic threat. Evidence of this intent can be found in the fact that detainees, even if acquitted, were not guaranteed release.[172]

Take for instance the detainment of Abd al-Rahim al-Nashiri, the alleged mastermind behind the 2000 bombing of the U.S.S. Cole.[173] Al-Nashiri was captured sometime during the middle of 2002.[174] Since then he has been detained at various locations and has spent the last seven

166. *See, e.g.*, Tung Yin, *"Anything But Bush?": The Obama Administration and Guantanamo Bay*, 34 HARV. J.L. & PUB. POL'Y 453 (2011) (criticizing the Bush-era policies of detention without charges, abusive and coercive interrogation techniques, lack of formal process, and taking aggressive legal positions).

167. *See, e.g.*, Emanuel Margolis, *National Security and the Constitution: A Titanic Collision*, 81 CONN. B.J. 271 (2007) (comparing various military commission cases during the Civil War and World War II era with *Hamdan, Hamdi,* and *Rasul* and forecasting the issues before the Court in *Boumediene*).

168. Jonathan Mahler, *Terms of Imprisonment*, N.Y. TIMES, July 30, 2006, http://www.nytimes.com/2006/07/30/books/review/30mahler.html.

169. *Id.*

170. *See, e.g.*, Jan Pudlow, *Koh: America Must Repair its Reputation*, FLA. B. NEWS July 15, 2008, at 5 (quoting Harold Hongju Koh, "Our obsessive focus on the War on Terror has taken an extraordinary toll upon our global human rights policy. Seven years of defining our human rights policy through the lens of the War on Terror have clouded our human rights reputation, given cover to abuses committed by our allies in that war, and blunted our ability to criticize and deter gross violators elsewhere in the world.").

171. Margolis, *supra* note 167, at 283–91 (discussing the facts underlying *Hamdi* and *Hamdan*).

172. *See The Risks of Releasing Detainees*, N.Y. TIMES (Jan. 23, 2009, 11:41 AM), http://roomfordebate.blogs.nytimes.com/2009/01/23/the-risks-of-releasing-detainees/.

173. Josh Gerstein, *Military Won't Promise to Release Cole Suspect if Acquitted*, POLITICO (Nov. 2, 2001, 11:58 AM), http://www.politico.com/blogs/joshgerstein/1111/Military_wont_promise_to_release_Cole_suspect_if_acquitted.html.

174. *U.S.: Top al Qaeda Operative Arrested*, CNN (Nov. 22, 2002, 6:41 AM), http://www.edition.cnn.com/2002/US/11/21/alqaeda.capture/index.html.

and a half years detained at Guantanamo Bay as a high value detainee.[175] During this time he has been subjected to "enhanced interrogation techniques"[176] on multiple occasions.[177] At a 2006 combatant status review tribunal ("CRST") al-Nashiri told the tribunal that his confessions were the product of torture.[178] At the CSRT al-Nashiri stated, "[f]rom the time I was arrested five years ago, they have been torturing me . . . . It happened during interviews. One time they tortured me one way, and another time they tortured me in a different way."[179]

In 2009, the Justice Department filed papers in connection with a motion to dismiss filed by al-Nashiri stating that "no charges are either pending or contemplated with respect to al-Nashiri in the near future."[180] In April 2011, new capital charges were filed against al-Nashiri.[181] These charges were referred to the military commission at Guantanamo Bay.[182] Eight months later, in November 2011, al-Nashiri's defense team received notification from military prosecutors that even if al-Nashiri were to be acquitted by a military commission, the commission is not authorized to release al-Nashiri.[183] Put another way, al-Nashiri could remain detained regardless of whether he was acquitted or found guilty.[184] The legal justification provided by military prosecutors is that law-of-war detention and criminal prosecution are distinct, and because of this distinction al-Nashiri can be detained under the law of war for the duration of the hostilities.[185] Critics have condemned this position stating that the al-Nashiri trial promises to, at best, be nothing more than a show trial.[186]

The al-Nashiri case serves as an extreme anecdotal example of the judicial process afforded to Guantanamo detainees. The case is beneficial for the author's analysis because it serves as a nice segue from the

175. *The Guantanamo Docket: Abd al Rahim al Nashiri,* N.Y. TIMES, http://projects.nytimes.com/guantanamo/detainees/10015-abd-al-rahim-al-nashiri (last visited July 20, 2014).

176. Carol Rosenberg, *Mental-Health Experts Get Access to Detainee's CIA File*, MIAMI HERALD, Feb. 8, 2013, http://www.miamiherald.com/2013/02/08/3223749/mental-health-experts-get-access.html.

177. It should also be noted, in connection with al-Nashiri's prosecution, that he was admittedly subjected to enhanced interrogation techniques such as waterboarding by the CIA. Symposium, *Contemporary Practice of the United States Relating to International Law*, 102 AM. J. INT'L L. 860, 877 (John R. Crook ed. 2008). These interrogations were video recorded, however they were destroyed pursuant to a destruction order by CIA Service Director Jose A. Rodriguez. The United States decided not to file any charges in relation to the destruction of these tapes. Scott Shane & Mark Mazzetti, *Tapes by C.I.A. Lived and Died to Save Image*, N.Y. TIMES, Dec. 30, 2007, http://www.nytimes.com/2007/12/30/washington/30intel.html?pagewanted=3.

178. Adam Liptak, *A Guantanamo Detainee Says Torture Led to Confessions*, N.Y. TIMES, Mar. 31, 2007, http://www.nytimes.com/2007/03/31/world/americas/31iht-web0331-gitmo.5095549.html.

179. *Id.*

180. Peter Finn, *Administration Halts Prosecution of Alleged USS Cole Bomber*, WASH. POST, Aug. 26, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/08/26/AR2010082606353.html.

181. *New Charges Filed Against Suspect in U.S.S. Cole Bombing*, N.Y. TIMES, Apr. 20, 2011, http://www.nytimes.com/2011/04/21/us/21gitmo.html.

182. *Id.*

183. Gerstein, *supra* note 173.

184. *Id.*

185. Jane Sutton, *Guantanamo Court Can't Free Bomb Suspect, U.S. Says*, REUTERS (Nov. 3, 2011, 2:33 AM), http://in.reuters.com/article/2011/11/02/idINIndia-60283020111102.

186. *Id.*

Bush Administration to the Obama Administration, as both have been involved in the al-Nashiri case. Before proceeding, however, the author believes it would be a negligent oversight not to acknowledge the four landmark Supreme Court decisions that shaped the United States' current military commissions and treatment of enemy combatants.

In *Hamdi v. Rumsfeld*, the Court held that that "a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[187] The Court also recognized that "enemy-combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict."[188]

In *Rasul v. Bush*, the Court became actively involved in the military commissions at Guantanamo holding the "federal habeas statute conferred on [the] district court jurisdiction to hear challenges of aliens held at Guantanamo Bay, and [the] district court was not barred from exercising jurisdiction over claims asserted under federal question statute and Alien Tort Statute."[189]

In *Hamdan v. Rumsfeld*, the Court continued its stand against unchecked executive authority finding: (1) the Detainee Treatment Act did not deprive the Supreme Court of jurisdiction over habeas appeals;[190] (2) "[t]he military commission at issue is not expressly authorized by any congressional Act";[191] and (3) "[t]he military commission at issue lacks the power to proceed because its structure and procedures violate both the [Uniform Code of Military Justice] and the four Geneva Conventions."[192]

Finally, in *Boumediene v. Bush*, the Court found (1) the Suspension Clause applies to alien detainees being held in Guantanamo; (2) these detainees were entitled to file a petition of habeas corpus to challenge the legality of their detention; (3) the habeas corpus hearing must be prompt, and detainees are not required to first exhaust Guantanamo review procedures; and (4) the provision of the Military Commissions Act denying federal courts jurisdiction to hear the habeas corpus actions pending at the time of its enactment in 2006 was unconstitutional.[193] In summation, each of these cases has greatly influenced the United States' current relationship with military commissions and enemy combatants. In response to the Court's decision in *Boumediene*, the Obama Administration enacted the Military Commissions Act of 2009 ("MCA 2009").[194]

187. 542 U.S. 507, 533 (2004).
188. *Id.*
189. 542 U.S. 466, 466 (2004).
190. 548 U.S. 557, 557 (2006).
191. *Id.* at 559.
192. *Id.* at 560.
193. *See generally* 553 U.S. 723 (2008).
194. Military Commissions Act of 2009, 10 U.S.C. § 47A (2009).

2. Obama Era Military Commissions

On January 22, 2009, President Obama signed three executive orders pertaining to the United States' treatment of detainees at Guantanamo Bay.[195] The first order required Guantanamo Bay to be closed within a year,[196] the second order formally banned torture/enhanced interrogation methods against detainees, and the third order established an interagency task force to review the detainment policies and procedures employed at Guantanamo.[197] Five days later, President Obama suspended military commission proceedings.[198] As has been well-documented, the Obama Administration encountered some slight setbacks with implementation of the executive orders closing Guantanamo[199] and keeping the military commissions suspended.[200]

On May 21, 2009, prior to any reports from the task force, President Obama stated that it would not be possible to close Guantanamo.[201] Horowitz and Rishikof posit that President Obama's main hindrance preventing the closure of Guantanamo was "[d]etainees who could not be prosecuted yet also posed a clear danger to the United States."[202] To that effect, in President Obama's 2009 remarks on national security, the President stated: "We're going to exhaust every avenue that we have to prosecute those at Guantanamo. . . . even when this process is complete, there may be a number of people who cannot be prosecuted . . . who nonetheless pose a threat to the security of the United States."[203] During

195. Mark Mazzetti & William Glaberson, *Obama Issues Directive to Shut Down Guantanamo*, N.Y. TIMES, Jan. 21, 2009, http://www.nytimes.com/2009/01/22/us/politics/22gitmo.html.

196. Barack Obama, Exec. Order No. 13,492, *Closure of Guantanamo Detention Facilities: Executive Order- Review and Disposition of Individuals Detained at Guantanamo Bay Naval Base and Closure of Detention Facilities*, WHITE HOUSE (Jan. 22, 2009), *available at* http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities.

197. *Obama Signs Order to Close Guantanamo Bay Facility*, CNN POLITICS (Jan. 22, 2009), http://www.cnn.com/2009/POLITICS/01/22/guantanamo.order/index.html.

198. Exec. Order No. 13,492, 74 Fed. Reg. 4897 (Jan. 27, 2009).

199. Peter Finn & Anne E. Kornblut, *Guantanamo Bay: Why Obama Hasn't Fulfilled His Promise to Close the Facility*, WASH. POST, Apr. 23, 2011, http://www.washingtonpost.com/world/guantanamo-bay-how-the-white-house-lost-the-fight-to-close-it/2011/04/14/AFtxR5XE_story.html (stating that Eric Holder's decision to return the attempted federal prosecution against Khalid Sheik Mohammed back to the Defense Department as the "fittingly quiet coda to the effort to close the detention center").

200. Bernard Horowitz & Harvey Rishikof, *Enemy Combatant Detainees*, *in* CONGRESS AND THE POLITICS OF NATIONAL SECURITY 167, 168 & n.1 (David P. Auerswald & Colton C. Campbell eds., 2011) ("[O]n March 7, 2011, Obama issued Executive Order 13567 restarting military commission trials and detainee case review proceedings at Guantanamo Bay. . . . As of March 16, 2011, the Department of Defense website lists 25 total terrorist defendants in military commission proceedings. By the count of the authors, nine of this group have had their charges dropped (but remain in custody), seven face ongoing commission proceedings (though one of this group has won a federal habeas case), four have been charged and pleaded guilty, three have been convicted (two by commission and another in federal court), and two have been transferred to their country of citizenship.").

201. *Id.* at 183.

202. *Id.*

203. Barack Obama, President of the United States, Remarks by the President on National Security, The White House: Office of the Press Secretary (May 21, 2009), *available at* http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09.

this same speech President Obama also spoke to why he was, in a respect, retreating from his position on military commissions:

> Military commissions have a history in the United States dating back to George Washington and the Revolutionary War. They are an appropriate venue for trying detainees for violations of the laws of war. They allow for the protection of sensitive sources and methods of intelligence-gathering; they allow for the safety and security of participants; and for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts.[204]

To that effect, President Obama promised to reform military commissions stating:

> We will no longer permit the use of evidence . . . obtained using cruel, inhuman, or degrading interrogation methods. We will no longer place the burden to prove that hearsay is unreliable on the opponent of the hearsay. And we will give detainees greater latitude in selecting their own counsel, and more protections if they refuse to testify.[205]

Several months later, on October 28, 2009, Congress passed the MCA 2009.[206] The MCA 2009 was enacted in response to and in the wake of (1) the Supreme Court's ruling in *Boumediene* where the Court struck down the Military Commission Act of 2006's elimination of habeas corpus[207] and (2) President Obama's expressed desire to reform military commissions in the United States.[208]

Whether the MCA 2009 accomplished Obama's goals of reform or expanded the process and procedure afforded to detainees has been the subject of great scrutiny. Joanne Mariner, the Terrorism and Counterterrorism Program Director at Human Rights, has criticized the MCA 2009, stating, "Tinkering with the discredited military commissions system is not enough. Although the pending military commissions [sic] legislation makes important improvements on the Bush administration's

204. *Id.* President Obama went on to state, in an attempt to reconcile his January 27, 2009 Executive Order closing military commissions with his then current views,

> Now, some have suggested that this represents a reversal on my part. . . . In 2006, I did strongly oppose legislation proposed by the Bush administration . . . because it failed to establish a legitimate legal framework, with the kind of meaningful due process rights for the accused that could stand up on appeal. I said at that time, however, that I supported the use of military commissions to try detainees, provided there were several reforms . . . . Those are the reforms that we are now making.

Id.

205. *Id.*

206. Military Commissions Act of 2009, 10 U.S.C. § 47A (2009).

207. Boumediene v. Bush, 553 U.S. 723, 795 (2008) ("Our decision today holds only that petitioners before us are entitled to seek the writ; that the DTA review procedures are an inadequate substitute for habeas corpus; and that petitioners in these cases need not exhaust the review procedures in the Court of Appeals before proceeding with their habeas actions in the District Court. The only law we identify as unconstitutional is MCA § 7, 28 U.S.C. § 2241(e). Accordingly, both the DTA and the CSRT process remain intact.").

208. Obama, *supra* note 203. "I said [in 2006] that I supported the use of military commissions to try detainees, provided there were several reforms . . . . Those are the reforms that we are now making." *Id.*

system, the commissions remain a substandard system of justice."[209] Similarly, Horowitz and Rishikof argue that the MCA 2009 "neglected to significantly address the substantive scope of detainment authority."[210]

For the purposes of the author's analysis, two overlying questions arise. First, were changes proposed by the Obama Administration sufficient to distinguish the United States not only from the Bush Administration, but all previous administrations' use of military commissions? Second, how do military commissions differ from the Diplock Courts in the process provided to the defendants? It is from the analysis of these two questions that we can foresee the international community's receptiveness.

The answer to the first question, unfortunately, appears to be something approaching no change at all. Military commissions have continued to operate in a system in which the public is presented with a story divorced from the actual facts.[211] Similarly, as expected, contemporary military commissions highly resemble the procedures previously employed by the Diplock Courts, and accordingly have received condemnation from the domestic and international legal community.[212]

Ibrahim Ahmed Mahmoud al Qosi, a former driver and chef for Osama bin Laden, was the first detainee to be convicted by military commission under the Obama administration.[213] Commentators have marked the al Qosi trial as the inauguration of a reformed set of military commissions with new rules, ensuring greater process to defendants.[214] Al Qosi's military commission serves a paradoxical role in United States' military commission jurisprudence. Some commentators call it a beacon of the reformation of the United States' military commissions,[215] yet others call upon it as a reminder of the United States' continued deprivation of fair judicial process in this arena.[216]

The cause of this division amongst commentators is likely attributable to the two concurrent al Qosi trials: the public trial and the secret trial.[217] On July 7, 2010, al Qosi, after extensive pretrial detainment and

209. *US: New Legislation on Military Commissions Doesn't Fix Fundamental Flaws*, HUMAN RIGHTS WATCH (Oct. 8, 2009), http://www.hrw.org/news/2009/10/08/us-new-legislation-military-commissions-doesn-t-fix-fundamental-flaws.

210. Horowitz & Rishikof, *supra* note 200, at 183.

211. Gold & Coulson, *supra* note 160, at 41.

212. *See, e.g.*, Andrea Prasow, *A Trial Within a Trial: Justice, Guantanamo-Style*, JURIST, Aug. 19, 2010, http://jurist.org/forum/2010/08/a-trial-within-a-trial-justice-guantanamo-style.php. ("Prasow, senior counter-terrorism counsel at Human Rights Watch, says that the players constituting the military commission that tried Ibrahim al Qosi in Guantanamo last week created their own 'mini-justice system' to replace the broken system they had originally been handed . . . .").

213. *Ibrahim Ahmed Mahmoud al Qosi*, HUMAN RIGHTS FIRST, http://www.humanrightsfirst.org/our-work/law-and-security/military-commissions/cases/ibrahim-ahmed-mahmoud-al-qosi/ [hereinafter HUMAN RIGHTS FIRST].

214. *See* Yin, *supra* note 166, at 471, 482–91 (describing reformed procedure and process afforded to defendants in military commissions).

215. *See id.* at 471.

216. Gold & Coulson, *supra* note 160, at 41.

217. *Id.*

muddled judicial process,[218] pled guilty to conspiracy and providing material support for terrorism.[219] In the month prior to his guilty plea, al Qosi had been provided access to his legal advisor, Sudanese attorney Ahmed Elmufti.[220] It should be noted, however, that Elmufti, as a Sudanese national, was not granted security clearance at Guantanamo, and therefore, could only speak with al Qosi in the presence of U.S. military personnel.[221]

During the trial the jury was questioned by the judge and both parties, challenges were raised, and al Qosi's counsel "urged the jury to sentence al Qosi to the minimum sentence the judge said they could issue—12 years . . . . The prosecution in turn argued that al Qosi deserved the maximum 15-year sentence."[222] The jury deliberated for eighty minutes and issued a sentence of fourteen years in prison[223] (in addition to the eight and a half years he had already spent in custody in Kandahar, Afghanistan and Guantanamo Bay).[224]

Commentators, however, believe that the jury sentence was merely symbolic and that the judge, counsel, and Department of Defense had already agreed on what sentence al Qosi would serve.[225] The terms of the plea agreement were kept secret, however; it was reported as early as 2010 by the news outlet Al Arabiya that al Qosi would only serve two more years in jail.[226] These reports turned out to be true as it was reported in July 2012 that al Qosi had been repatriated to Sudan.[227] Andrea Prasow, senior-counter terrorism counsel at Human Rights Watch and self-professed "seasoned observer and former military commission's defense lawyer," stated that in the immediate aftermath of the sentencing:

> I found myself having dinner a few feet away from a curious gathering. Judge Paul was scheduled to retire the following day (technically, to begin "terminal leave" on her way to military retirement). The judge, defense counsel, prosecution counsel, members of the clerk's office, court reporters, and others all enjoyed dinner, replete with wine and gifts for the judge. They had a lot to celebrate. To-

218. *See* OFFICE OF MILITARY COMMISSIONS, UNITED STATES V. IHRAM AHMED MOHMOUD AL QOSI, P-002 (July 16, 2009) (Ruling on Government Motion for Appropriate Relief (120 Day Continuance) and attached exhibits), *available at* http://www.mc.mil/Portals/0/pdfs/alQosi/Al%20Qosi%20(AE039)%20MJ%20Ruling.pdf.

219. Charlie Savage, *Guantanamo Prisoner is Repatriated to Sudan*, N.Y. TIMES, July 12, 2012, http://www.nytimes.com/2012/07/12/world/africa/convicted-al-qaeda-member-is-transferred-from-guantanamo-to-sudan.html. (Specifically, al Qosi "had followed the Qaeda leader, Osama bin Laden, to Afghanistan in 1996 after his expulsion from Sudan, and that he performed a variety of menial tasks at his compound, including running its kitchen and sometimes serving as a driver. . . . Mr. Qosi also said he fired a mortar for a militia helping the Taliban fight the Northern Alliance, but said he had no involvement in, or advanced knowledge of, terrorist attacks like the 1998 embassy bombings in Africa or the Sept. 11 attacks").

220. HUMAN RIGHTS FIRST, *supra* note 213.

221. *Id.*

222. Prasow, *supra* note 212.

223. *Id.*

224. Human Rights First, *supra* note 213.

225. Prasow, *supra* note 212.

226. *Id.*

227. Savage, *supra* note 223.

> gether, they had created their own mini-justice system. The one they were given was so broken that they simply couldn't operate within its parameters. The prosecution walked away with a political success—a 14-year sentence for a man who cooked for al Qaeda; the defense likely negotiated a dream deal for their client; and the judge walked into retirement knowing that she had closed the chapter on another military commission case.[228]

International Human Rights organizations such as Human Rights First celebrated al-Qosi's repatriation believing that it was marked development in military commissions.[229] The author, however, shares the view of many others in the legal community—the Obama Administration was pulling the wool over the world's eyes. Everything of substance and importance in the al Qosi trial was decided behind closed doors; it was a derogation below even the basest standards of what constitutes a military commission or tribunal. The fact that al-Qosi's sentence was commuted to two years is not an improvement on the United States' international standing. Rather it shows that the United States will continue to speak out of both sides of its mouth when it comes to affording the detainees process.

This criticism must be tempered. Although the preceding sections have painted a negative light on the Obama Administration's utilization of military commissions and highlighted the similarities between this Administration and its predecessors, there have been some fundamental improvements to the procedural and evidentiary rules employed by military commissions.[230] Moreover, the Obama Administration has attempted to try detainees in civil courts and made calls for reformation of the judicial processes with which these detainees are provided. These developments will be discussed below.

C. Criticism of Former Military Commissions

1. Vallandigham

Before engaging in a comparative analysis of the current Diplock Court structure and use, and how its improvements serve as guidance for the United States, we must first examine why reliance on precedence from United States military commissions is misplaced. As discussed in Subsection II.A.2.a, in *Ex Parte Vallandigham*, the Supreme Court found that the Court was without jurisdiction to grant a writ of certiorari over a military commission.[231] To be more specific, the *Ex Parte Vallandigham* Court found (1) military commissions have jurisdiction over rebellions[232] and (2) the Court's power to grant certiorari was expressly limited by the

228. Prasow, *supra* note 212.
229. HUMAN RIGHTS FIRST, *supra* note 213.
230. *See infra* Section III.D.
231. *See supra* Subsection II.A.2.a.
232. *Ex parte* Vallandigham, 68 U.S. 243, 249 (1863).

Constitution and acts of Congress.[233] The Court's decision was criticized over the ensuing years by a variety of commentators and possibly played a role in Lincoln's decision to commute Vallandigham's sentence.

During the Civil War, military commissions were typically confined to the battlefield or where the military government was controlling occupied Confederate territory.[234] Instances in which military commissions were convened in non-Confederate states, outside the battlefield, "were widely viewed by the public and press as unconstitutional elements of tyranny."[235] Such was the case with Vallandigham. Although Ohio had been declared a military district, martial law had not been imposed, Vallandigham was a citizen in a loyal state, and his arrest and detention were in direct response to a speech made at a political rally outside the field of battle in Ohio.[236]

Vallandigham's "arrest triggered a substantial outcry from Lincoln's opponents and supporters alike."[237] In the immediate aftermath of Vallandigham's arrest, there was rioting in his hometown, the local Republican newspaper's building was burned down, and telegraph lines were cut.[238] Critics of the conviction insisted upon the unwavering need for free speech to prevail in order to sustain the democracy.[239] Even members of Lincoln's own cabinet criticized the use of a military commission here.[240] For instance, Gideon Wells, Lincoln's Secretary of the Navy, referred to "the assertion of military power over Vallandigham as 'arbitrary and injudicious' and wrote that 'the constitutional rights of the parties injured are undoubtedly infringed upon.'"[241]

In the face of criticism from both Republicans and Democrats, Lincoln initially supported Burnside's actions[242] and defended Vallandigham's arrest.[243] The President asserted that the Congressman's speech had the intent of preventing the raising of troops, and because of this interference, trial by military commission was procedurally proper and judicially sound.[244] Over the ensuing months, commentators believe that as a result of the political and public outcry stemming from the arrest, Lin-

233. *Id.* at 251.

234. Renzo, *supra* note 28, at 476–77.

235. *Id.* at 477.

236. Andrew Kent, *The Constitution and the Laws of War During the Civil War*, 85 NOTRE DAME L. REV. 1839, 1907–08 (2010).

237. Joseph A. Ranney, *Abraham Lincoln's Legacy to Wisconsin Law, Part 2: Inter Arma Silent Leges: Wisconsin Law in Wartime*, 82 WIS. LAW. 14, 16 (2009), *available at* http://www.wisbar.org/newspublications/wisconsinlawyer/pages/article.aspx?Volume=82&Issue=2&ArticleID=1670.

238. Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 108 (1998).

239. Curtis, *supra* note 46, at 109.

240. Renzo, *supra* note 28, at 480.

241. *Id.*

242. Curtis, *supra* note 46, at 108.

243. Lincoln posited, "Must I shoot a simpleminded soldier boy who deserts while I must not touch a hair of a wily agitator who induced him to desert?" Ranney, *supra* note 237, at 16 (quoting from Liberty of America, *Lincoln: Speeches and Writings 1859–1865,* at 460 (1989) (letter to Erastus Corning, June 12, 1863)).

244. *Id.*

coln became wary of arresting private citizens for speech primarily political in nature and which only posed a threat to military recruitment on an indirect ancillary basis.[245] Lincoln attempted to justify the actions of his general in what has come to be called the Corning Letter.[246] In his letter Lincoln attempted to justify the actions taken against Vallandigham protesting that the Union had not acted simply to suppress political speech, but instead that such restrictions were necessary to prevent unlawful conduct likely to interfere with the war effort.[247] Ultimately, in response to the critical outcry, and most likely in accordance with his own intentions, Lincoln freed Vallandigham on the condition that Vallandigham exile himself "beyond the lines."[248] In sum, the public backlash, division within the Lincoln Administration, Lincoln's own recognition that the military commission had acted unlawfully, criticism from the legal community, and the Supreme Court's holding just two years later in *Ex Parte Milligan* worked collectively to limit, if not extinguish, the precedential value of *Ex Parte Vallandigham*.

Additionally, *Ex Parte Vallandigham*'s application can be limited on another ground entirely: the factual circumstances underlying the use of military commissions during the Civil War are so divorced from the current climate that any analogy is untenable. In *Ex Parte Vallandigham*, as was the case with other highly political military commissions, the issue at hand was the suppression of speech in war.[249] Critics of Lincoln's Administration bolstered charges that suppression of speech that had only a tangential correlation to fostering disloyalty undermined the foundations upon which democracy is built.[250] Lincoln Administration defenders argued that during times of war, executive powers were immense, and that free speech could, and should, be suppressed when the situation necessitates it.[251] As indicated from the preceding paragraphs, despite Lincoln's belief in his vast executive powers during times of war, he eventually took action in accordance with the desires of his critics.

In most cases, however, military commissions were convened out of necessity and in the battlefield. For instance, military commissions had jurisdiction to try cases in which civilian rebels were charged with "furnish[ing] the enemy with arms, provisions, clothing, horses and means of transportation" and under the "*laws of war* . . . liable to capital punishment."[252] Convictions for aiding the enemy became a catch-all category

245. MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE": STRUGGLES FOR FREEDOM OF EXPRESSION IN AMERICAN HISTORY 315–16 (2000); Ranney, *supra* note 237, at 16.

246. Dennis J. Hutchinson, *Lincoln the "Dictator"*, 55 S.D. L. REV. 284, 294 (2010).

247. *Id.* at 294–95.

248. *Id.* at 293 (quoting Frank L. Klement, The Limits of Dissent: Clement L. Vallandigham & The Civil War 154, 177 (1970) [hereinafter Klement, Vallandigham]); Ranney, *supra* note 237, at 16.

249. Curtis, *supra* note 46, at 109.

250. *Id.*

251. *Id.*

252. United States v. Hamdan, 801 F. Supp. 2d 1247, 1296 (U.S.C.M.C.R. 2011) (quoting from H.R. Doc. No. 65, 55th Cong., 3d Sess., *reprinted in The War of the Rebellion: A Compilation of the Official Records of the Union and Confederate Armies,* Ser. II, vol. I, (Civil War, Ser. II, vol. I), pp. 233–36, G.O. 13 (1861)).

from which the United States could try and convict nonenlisted persons before a military commission.[253] Aiding could be considered with self-describing offenses such as providing advice, counsel, or comfort to a party of armed men or joining a party of armed men, who damaged or destroyed railroad or telegraph property, but also could entail encumbering activities in which the aiding component of the charge is less intuitive: "unlawfully plundering an oxen, wagon, horse, or other property" or "committing various acts of outlawry."[254]

Military commissions were most frequently convened in "Union-occupied Confederate territory and 'strife-torn border states.'"[255] As the prevalence of military commissions expanded—4271 during the Civil War and Reconstruction—so did the abuses of power and hastily convened military commissions.[256] For example, the authority of the military commission convened to try the remaining Lincoln assassinators was criticized by members of the Lincoln Administration.[257] The jurisdiction of the military commission was grounded on the fact that the assassination took place in a war zone that was under a constant threat of invasion and was subject to martial law at the time of the assassination.[258] Secretary of the Navy, Gideon Wells, however, believed a civil court was the proper venue, and Lincoln's former Attorney General, Edward Bates, believed that a military commission was improper as the accused were civilians with no known ties to the Confederate Army.[259] Bates stated, "[s]uch a trial is not only unlawful, but it is a gross blunder in policy: It denies the great, fundamental principle, that ours is a government of law, and that the law is strong enough to rule the people wisely and well."[260]

2. Milligan

As one might expect, the Court's decision in *Milligan* sparked criticism from Republicans and praise from Democrats.[261] Republicans saw the act as overreaching judicial activism, especially in light of the fact that just two years earlier the Court believed that they lacked authority to grant certiorari over the proceedings of a military commission.[262] Republican congressmen such as Thaddeus Stevens believed the decision had "rendered immediate action by Congress upon the question of the estab-

253. *Id.* at 1301–03.

254. *Id.* at 1302 (citing to and describing numerous Civil War military commissions).

255. Fisher, *supra* note 92, at 29.

256. Brief of Louis Fisher, *supra* note 77, at 13 (quoting Darrett B. Rutman, *The War Crimes and Trial of Henry Wirz*, 6 CIVIL WAR HIST. 117, 118 (1960) ("[T]he superintendent of the notorious Andersonville prison, was unfairly blamed by a military commission for the conditions there and was 'hurried to his death by vindictive politicians, an unbridled press, and a nation thirsty for revenge.'").

257. Renzo, *supra* note 28, at 480.

258. *Id.*

259. *Id.*

260. ANTHONY S. PITCH, "THEY HAVE KILLED PAPA DEAD!": THE ROAD TO FORD'S THEATRE, ABRAHAM LINCOLN'S MURDER, AND THE RAGE FOR VENGEANCE 312 (2008) (quoting Edward Bates diary, May 25, 1865).

261. Yoo, *supra* note 58, at 526–28.

262. *See id.* at 527.

lishment of governments in the rebel States absolutely indispensable."[263] The media cast the decision as impugning the work the Union had done to uphold the Constitution,[264] a political act rather than a judicial opinion,[265] and some even went as far as calling for a reconstruction of the Supreme Court.[266]

On the other side, Democrats heralded the decision as paving the way for readmission of the Southern states.[267] The media praised the decision, referring to the Court as "monopolists of patriotism" who "denounced those who upheld the sacred liberties of the citizen as guaranteed by the Constitution, so now, in the midst of peace, they assail those who maintain the rights of the States as guaranteed by that same instrument."[268]

The precedential value of *Ex Parte Milligan* has been extensively debated recently by the Court and legal commentators. For instance, the *Ex Parte Milligan* Court's statement, "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances,"[269] has been cited by numerous legal commentators to show the "almost self-evident unconstitutionality of post-9/11 national security policies of the Executive and Congress."[270]

At the same time, however, commentators warn of the dangers from overreliance on *Ex Parte Milligan*.[271] For instance, one commentator highlights the contrasted views between the Civil War Court's and the current Court's views on the reach and enforcement of the Constitution and applicability of the war powers doctrine.[272] One commentator categorizes the misconception as one in which "[c]ontemporary courts and commentators generally have at best incomplete, and at worst fundamentally misconceived, views about war powers doctrines of the Civil War era."[273] To begin with, the Civil War Court decided over 300 cases arising from the war, and the legality and legitimacy of military commissions had been debated by Congress, the Lincoln Administration, and the media for over five years by the time *Ex Parte Milligan* was decided.[274] The

263. *Id.* (quoting CONG. GLOBE, 39th Cong., 2d Sess. 251 (1865)).
264. *Id.* (quoting 3 CHARLES WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 151 (1922) [hereinafter WARREN]).
265. *Id.* (quoting WARREN, *supra* note 264, at 154).
266. *Id.* (quoting WARREN, *supra* note 264, at 154).
267. *Id.*
268. *Id.* (quoting WARREN, *supra* note 264, at 157).
269. *Ex Parte* Milligan, 71 U.S. (4 Wall.)1, 120–21 (1867).
270. Kent, *supra* note 236, at 1842.
271. *Id.* at 1845.
272. *Id.* at 1843.
273. *Id.*
274. *Id.*

War-On-Terror Court, by contrast, has had a much smaller output,[275] and has been criticized for their misapplication of *Ex Parte Milligan*.[276]

Additionally, the Civil War Court's view on the Constitution's reach is more limited than the current Court's view. One commentator argues that although a judicially enforced Constitution is seen as a "universal providence,"[277] the Civil War Court's view was that "the Constitution . . . did not provide protections to or create obligations for most noncitizens . . . . Only U.S. citizens and resident or sojourning noncitizens who owed 'allegiance' or 'obedience' to the government and its laws were within the 'protection' of the Constitution . . . ."[278] Viewing the Civil War Court from this perspective, *Ex Parte Milligan* seems as aberration from the Court's views on the interaction between the laws of war, the Constitution, and military commissions. In summation, although *Ex Parte Milligan* has been cited as a triumph for increased judicial scrutiny over the military court system, a check on unrestrained executive power, and a call for increased usage of civilian courts—all of which the author believes are both beneficial and necessary to increase the current legitimacy of U.S. military commissions—reliance on this case's precedential value should be tempered and cautioned for the aforementioned reasons.

3. Quirin

The Roosevelt Administration, the *Ex Parte Quirin* Court, the current Supreme Court,[279] and commentators have all been highly critical of *Ex Parte Quirin*.[280] The criticism stems, at least in part, from President Roosevelt's blatant violations of the Articles of War and the procedures and rules traditionally afforded defendants in military tribunals, and the Court's admittedly post hoc justification of such actions.[281] Chief Justice Stone, aware of the unenviable position of having to justify both Opinions and the President's actions, wrote to Justice Frankfurter that it was "very difficult to support the Government's construction of the articles

275. *Id.*

276. Ryan Goodman, *The Second Annual Solf-Warren Lecture in International and Operational Law*, 201 MIL. L. REV. 237, 253–54 (2009) (criticizing the *Hamdi* plurality and Justice Scalia for transposing the rules of military trials and detention). Both the plurality and Justice Scalia cited to *Ex Parte Milligan* to argue that if states have the power to try defendants by military court then they also have the power to detain; if the state has the greater power it also has the lesser power. Professor Goodman argues that the inverse, however, is present in *Hamdi*, and the Court's "reasoning doesn't work, because it would mean that the lesser power includes the greater power, in a certain sense. It is also important to note that even if this reasoning were sustainable, it would only deny military detention. It wouldn't deny detention by civilian authorities." *Id.* at 254.

277. Kent, *supra* note 236, at 1843.

278. *Id.* at 1847.

279. Justice Scalia referred to *Ex Parte Quirin* as "not this Court's finest hour." Hamdi v. Rumsfeld, 542 U.S. 507, 569 (2004) (Scalia, J., dissenting).

280. Chad DeVeaux, *Rationalizing the Constitution: The Military Commissions Act and the Dubious Legacy of* Ex Parte Quirin, 42 AKRON L. REV 13 (2009). This article provides a great comparison of the Court's decisions in *Ex Parte Milligan* and *Ex Parte Quirin*. The author provides critical analysis on the inherent tensions between the two decisions and how the *Ex Parte Quirin* Court failed to reconcile the two. *See id.* at 17–18.

281. Fisher, *supra* note 105, at 22.

[of war], . . . [it] seems almost brutal to announce this ground of decision for the first time after six of the petitioners have been executed . . . ."[282] A similar sentiment was echoed by Justice Douglas who stated in regard to the Court's handling of the case, "I think, to all of us that it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds, the examination of the grounds that had been advanced is made, sometimes those grounds crumble."[283]

Likewise, members of the Roosevelt Administration found the procedure employed to be one not worth repeating.[284] Secretary of War, Henry Stimson, prevented a similar military commission from being convened two years later when two more German agents were captured after entering the United States.[285] Stimson convinced Roosevelt to try these German agents consistent with the Articles of War.[286]

Scholars have criticized the decision on a plethora of grounds.[287] Louis Fisher, for instance, has criticized the decision on grounds that (1) the Court granted cert and heard the case before they were prepared to analyze the issues;[288] (2) the Court issued two separate opinions, each attempting to justify President Roosevelt's actions;[289] (3) the Justices were aware President Roosevelt was violating the Articles of War, but took no action to stop him;[290] and (4) there were grounds for multiple Justices to recuse themselves, but they did not.[291] Notably, one scholar has professed "[i]n deciding the saboteur case the Court had fallen into step with the drums of war. For so long as its members marched to their beat, the Court remained an unreliable guardian of the Bill of Rights."[292]

Despite the criticism, *Ex Parte Quirin* remains the "seminal case on the use of military commissions."[293] Scholars, prosecutors, government agents, and the courts have used *Ex Parte Quirin* for classification of members of the Taliban, al-Qaeda, and other groups as enemy combatants.[294] This reliance is based, at least in part, on language from that

282. *Id.* (quoting Letter from Chief Justice Harlan Fiske Stone to Justice Felix Frankfurter, Sept. 10, 1942).

283. *Id.* at 24 (quoting conversation between Justice William O. Douglas and Professor Walter Murphy, June 9, 1962).

284. Fisher, *supra* note 92, at 40.

285. *Id.*

286. *Id.*

287. DeVeaux, *supra* note 280, at 101–02.

288. Fisher, *supra* note 105, at 21–22.

289. *Id.* at 22.

290. *Id.*

291. Fisher, *supra* note 92, at 37–38.

292. Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 94 (1980).

293. DeVeaux, *supra* note 280, at 17.

294. Wolensky, *supra* note 88, at 721 n.2 (quoting *Ex parte* Quirin, 317 U.S. 1, 37–38 (1942) ("Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."). Wolensky continues,

> The definition of enemy combatants, as described in *Ex parte Quirin*, was reaffirmed by the Supreme Court in 2004. Hamdi v. Rumsfeld, 542 U.S. 507, 519 (2004). This classification is im-

opinion stating "[f]irst, the saboteurs were not wearing uniforms and were thus unidentifiable as combatants. Second, the attacks were planned in the United States."[295]

The author recognizes that *Ex Parte Quirin* provides powerful precedential value. In fact, the *Hamdi* plurality referred to *Ex Parte Quirin* as "the most apposite precedent" on the detainment on U.S. citizens.[296] Moreover, the author recognizes that the underlying factual similarities between the enemy combatants in *Ex Parte Quirin* and the United States' current detainees lend itself to ready analogy. Such reliance, however, divorces itself, at least in part, from the facts surrounding the Court's decision in *Ex Parte Quirin*. Justice Scalia has said about *Ex Parte Quirin*: it was "not this Court's finest hour."[297] The Court's opinion was an *ex post facto* justification for actions that had already been taken and several members of the Court have explicitly addressed it as such. Taken as such, one can readily recognize that the language employed by the *Ex Parte Quirin* Court should not be given full accord; the decision should be relegated to the rank of other World War II era cases in which the Court stepped out of the way of an overbearing executive.[298] As Justice Jackson warned in his *Korematsu* dissent, providing posterity with unconstitutional yet judicially validated military orders enables "[t]he principle [to] lie about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. Every repetition imbeds that principle more deeply in our law and thinking and expands it to new purposes."[299] As has been shown, Jackson's warning found validity with the current military commissions. Alberto Gonzales, while serving as U.S. Attorney General, looked to *Ex Parte Quirin* to support the Bush Administration's use of military commissions. Gonzales stated,

> I concluded in the fall of 2001 that the President should be given the opportunity to consider whether he wanted the option of military commissions to bring terrorists to justice. I envisioned the United States using military commissions for special cases such as bin Laden and other top al Qaeda leaders. During the final weeks of October 2001, I first discussed the topic of military commissions with the President. I explained the Roosevelt precedent with the Nazi saboteurs and the Supreme Court decision in *Ex parte Quirin* upholding

portant because an enemy combatant can be detained until the end of a current conflict, and is subject to trial by military commission. *Id.* at 521. Further, the United States has classified members of the Taliban, al Qaeda, and associated forces as unlawful enemy combatants, and defines an unlawful enemy combatant as 'a person who has engaged in hostilities or who has purposefully and materially supported hostilities against the United States or its co-belligerents. 10 U.S.C. § 948a (Supp. 2008).

Id.

295. *Id.* at 726 n.33.

296. Hamdi v. Rumsfeld, 542 U.S. 507, 523 (2004).

297. *Id.* at 569 (Scalia, J., dissenting).

298. *See* Korematsu v. United States, 323 U.S. 214, 223–24 (1944).

299. *Id.* at 246 (Jackson, J., dissenting).

> President Roosevelt's military commission. The President concluded it was a strong move.[300]

As the preceding quote indicates, the language employed by the Court in *Ex Parte Quirin* has served as readily applicable executive authority to convene military commissions. The Bush Administration, by focusing on the language of *Ex Parte Quirin* and disconnecting it from the context and factual circumstances surrounding the case, was able to find solid judicial endorsement for convening military commissions as how the Bush Administration best saw fit. In summation of the views espoused above, the amicus curiae brief of Historians and Scholars of *Ex Parte Quirin* refer to the case as "an institutional defeat for the Court, a flawed decision that emerged out of a judicial process that is all but unthinkable today."[301] The Court's decisions in *Hamdi*, *Rasul*, *Hamdan*, and *Boumediene* each evidence the Court's dwindling deference to executive authority to convene military commissions on an ad hoc one-off basis. This demonstration of judicial strength highlights *Ex Parte Quirin*'s diminished status, and the author believes it should be either excluded from reliance by the government, or used as an example of the consequences of an overreaching executive by defendants moving forward.

D. Criticism of Diplock Courts

"Diplock trials were used for about one-third of all serious cases in Northern Ireland until the end of the 1990s."[302] A recurring criticism from the legal community was that despite the advocacy and judicial efforts of the attorneys and judges, the structure of the courts promoted unfairness and violated human rights.[303] For instance, the Diplock Courts purported to have installed several procedural safeguards; however, in practice the safeguards were inadequate or not followed.[304] First, judges were required to file a written opinion in support of their verdicts on findings of fact and law.[305] These guidelines, however, were vague and susceptible to judicial manipulation.[306] Judges could render a verdict and then provide any reasoning, regardless of its legal soundness or conformity with the guidelines, in support of the verdict.[307] Second, defendants were guaranteed the right to appeal their decision.[308] Although this safeguard was highly valuable to defendants as Diplock Courts had higher reversal rates than traditional trials, it highlights the Courts' flaws.[309]

300. Gonzales, *supra* note 88, at 869.
301. Brief of Historians and Scholars of *Ex Parte Quirin* as *Amicus Curiae* in Support of Petitioner at 1, Al-Marri v. Spagone, 2009 WL 230946 (2009) (No. 08-368).
302. Jacobs, *supra* note 126, at 657.
303. Leary, *supra* note 122, at 306.
304. Jacobs, *supra* note 126, at 658.
305. Leary, *supra* note 122, at 307.
306. Jacobs, *supra* note 126, at 658.
307. *Id.*
308. *Id.*
309. *Id.*

Third, trials were held in public courts.[310] Yet commentators have argued that this does not adequately compensate for the elimination of the jury trial.[311] This is primarily because Diplock Courts "eliminated one of the only ways the minority Catholic community could participate in the administration of justice."[312]

Commentators have argued that Diplock Courts were an abrogation from "the procedural safeguards that guarantee a 'fair trial' in most common law jurisdictions and thus derogate from the minimum standards established under the European Convention for the Protection of Human Rights and Fundamental Freedom . . . ."[313] In 1978, the European Court of Human Rights found that the interrogation techniques[314] used in conjunction with the Diplock Courts did not constitute torture, but did constitute "inhumane and degrading treatment."[315] Human rights organizations like the Committee on the Administration of Justice have argued that Diplock Courts are insufficient, and called for their immediate cessation.[316]

Similarly, as mentioned in Part II, the use of supergrass witnesses often enabled perverse miscarriages of judicial safeguards. As mentioned above, supergrass witnesses were members of paramilitary organizations forced to provide uncorroborated testimony against co-conspirators in exchange for prosecutorial immunity.[317] These witnesses were often used to obtain the convictions of dozens of suspects in one trial.[318] For instance, from 1981 to 1983, approximately six hundred suspects were arrested on the information of seven Loyalist and eighteen Republican supergrass witnesses.[319] Unsurprisingly, out of the twenty-five supergrass witnesses used to obtain these six hundred arrests, fifteen of the witnesses later retracted their testimony.[320]

310. Lenihan, *supra* note 127, at 643.

311. Donohue, *supra* note 129, at 1334.

312. *Id.* at 1334. "The elimination of the defendant's peers from the courtroom—done without evidence of the need to do so—also carried with it important weaknesses. Perhaps most dramatically, the system clashed with Britain's traditional embrace of jury trial, which legend—if not history—rooted in one of the state's foundation documents: the Magna Carta." *Id.* at 1337.

313. Matter of Requested Extradition of Smyth, 61 F.3d 711, 714 (9th Cir. 1995).

314. The United Kingdom had an interrogation practice known as "the five techniques."

> The five techniques consisted of: (a) *wall standing*: forcing the detainees to remain for periods of some hours in a 'stress position' . . . ; (b) *hooding*: putting a black or navy coloured bag over the detainees' heads and, at least initially, keeping it there all the time except during interrogation; (c) *subjection to noise*: pending their interrogations, holding the detainees in a room where there was a continuous loud and hissing noise; (d) *deprivation of sleep*: pending their interrogations, depriving the detainees of sleep; (e) *deprivation of food and drink*: subjecting the detainees to a reduced diet during their stay at the centre and pending interrogations.

Louis-Philippe F. Rouillard, *Misinterpreting the Prohibition of Torture Under International Law: The Office of Legal Counsel Memorandum*, 21 AM. U. INT'L L. REV. 9, 24 n.45 (2005).

315. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 94 (1978).

316. *Institutional Reform in Northern Ireland: Ending the Diplock Courts*, TRANSITIONAL JUSTICE, http://www.facinghistory.org/reading/institutional-reform-northern-ireland-endi (last visited July 20, 2014).

317. Jacobs, *supra* note 126, at 658.

318. Rasnic, *supra* note 133, at 250.

319. *Id.*

320. *Id.*

Another recurring complaint from human rights organizations, such as the Northern Ireland Human Rights Commission and the Independent Commission on Policing in Northern Ireland, was the routine and regular admissibility of confessions obtained through abusive treatment of the detainees; treatment which often constituted torture.[321] The severity of this allowance is brought into greater light as United Kingdom police forces were authorized, in certain circumstances, to prevent suspects from contacting legal counsel for up to forty-eight hours after arrest.[322]

Human Rights in Ireland, another human rights organization, believes there was a correlation between the facilitation of police brutality and the Diplock system.[323] They suggest that police were incentivized to secure confessions by whatever means necessary, as they were cognizant of the fact that the testimony would be admitted.[324] Moreover, the behavior "results in unsound evidence, . . . and it arises where there is both a top-down culture that information must be attained at any costs and a culture within the police that fears whistle-blowing and the repercussions of failing to stop 'preventable' attacks."[325]

Commentators have also suggested that Diplock Courts, by denying defendants many of the procedural and due process rights they would have been afforded in traditional courts, perpetuated civil unrest and mistrust of the judicial system.[326] Moreover, the lack of participation in the judicial process resonated with both politicians and voters, and catalyzed feelings of a "lack of accountability" and a "sense of powerlessness."[327] In the same vein, the use of Diplock Courts diminished respect for the judicial process; "the damage to the legal system inflicted by nonjury trials may weigh almost as heavily as the gains of an increased conviction rate and speedier process. Consequently, the reinstatement of ju-

321. U.S. DEP'T OF STATE, ANNUAL HUMAN RIGHTS REPORTS SUBMITTED TO CONGRESS: UNITED KINGDOM 1970 (1999).

322. *See* John Patrick Groarke, *Revolutionaries Beware: The Erosion of the Political Offense Exception Under the 1986 United States-United Kingdom Supplementary Extradition Treaty*, 136 U. PA. L. REV. 1515, 1534 (1988) ("The PTA allows the police to exercise broad powers of arrest anywhere in the United Kingdom. It allows the police to arrest anyone they have 'reasonable grounds' to suspect of being 'concerned in the commission, preparation or instigation of acts of terrorism' connected with Northern Ireland, and to hold that person for up to forty-eight hours.").

323. Fiona de Londras, *Police Brutality, Torture and the Diplock Courts in Northern Ireland: The Guardian Investigates*, HUMAN RIGHTS IRELAND, Oct. 11, 2010, http://www.humanrights.ie/index.php/2010/10/11/police-brutality-torture-and-the-diplock-courts-in-northern-ireland-the-guardian-investigates/.

324. *Id.*

325 *Id.*

326. *See* Kathleen P. Lundy, *Lasting Peace in Northern Ireland: An Economic Resolution to a Political and Religious Conflict*, 15 NOTRE DAME J.L. ETHICS & PUB. POL'Y 699, 709 (2001).

327. "[T]he lack of genuine access, responsibility, and ownership in the political process is dangerous because 'powerlessness is the seedbed of violence.'" *Id.* at 710 (quoting John Paul Lederach, *Beyond Violence: Building Sustainable Peace*, *in* BEYOND VIOLENCE: THE ROLE OF VOLUNTARY COMMUNITY ACTION IN BUILDING A SUSTAINABLE PEACE IN NORTHERN IRELAND 11, 18 (Arthur Williamson ed., 1995)).

ries has been advocated as not only desirable (which is officially undisputed) but also as 'entirely practicable.'"[328]

Commentators have also brought into question the impartiality and integrity of the Diplock Court judges. Critics have argued that the juryless trials enabled severe consequences such as: (1) the resignation of the traditional safeguard role that jurors play from nonimpartial judges as many judges throughout the 1970s were members of the Protestant Unionists majority,[329] (2) Diplock judges were less concerned with striking inadmissible evidence, and were therefore inadvertently tainted in their decision making process,[330] and (3) judges became "case-hardened" by hearing so many cases on Irish political violence that they were no longer impartial to the accused.[331] The case-hardening phenomenon is "the process through which judges become more cynical of defense claims of innocence and more prosecution prone in their decisions."[332]

Evidence of case hardening is demonstrated through the fact that acquittals in Diplock cases decreased by fourteen percent in less than a decade as they went from a fifty-three percent acquittal rate in 1984 to only a twenty-nine percent acquittal rate in 1993.[333] Two interesting, yet diverging points can be made of this fact. On the one hand, the procedural safeguard of having Diplock judges articulate the reason behind their judgment provides appellate courts with a better record from which they can reverse a Diplock Court. This is because appellate courts have the power to reverse an erroneous verdict on the basis of law or fact, as opposed to in a jury trial where it is more difficult for an appellate court to make a reversal on factual findings and are, instead, for the most part, limited to reversals on applications of law.[334] On the other hand, the higher conviction rate in Diplock courts, and subsequent need to reverse a larger amount of Diplock cases, lends credence to the belief that judges are case-hardened and biased.[335]

328. GERARD HOGAN & CLIVE WALKER, POLITICAL VIOLENCE AND THE LAW IN IRELAND 105 (1989).

329. Rasnic, *supra* note 133, at 252 (noting that although many judges were members of the Protestant Unionist majority, "there has not been any conclusive proof that the courts have dealt more leniently with Protestants than with Catholics, although doubt of judicial nonbias is widespread"); Lenihan, *supra* note 127, at 615.

330. Where judges abdicate their role as gatekeepers of evidence, and instead hear all evidence, regardless of its admissibility, it becomes unlikely that a judge could "truly disregard an accused's confession in his decision-making just because the confession was held inadmissible." Jacobs, *supra* note 126, at 659 (quoting Andrew J. Wistrich et. al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1323 (2005)).

331. Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 CARDOZO L. REV. 1657, 1697 (2003).

332. *Id.*

333. Rasnic, *supra* note 133, at 252.

334. *Id.* at 253 n.58 (citing to and quoting from the Lord Chief Justice's opinion in *R v. Donnelly*, 4 NIJB 70 (1986)) ("[E]xperience in Northern Ireland has shown how much greater in a Diplock trial are the appellant's opportunities of persuading the Court to interfere than when the appeal is from sphinx-like verdict of a properly directed jury, which does not have to give reasons for its verdict.")).

335. *See* O'Connor & Runmann, *supra* note 331, at 1698.

The preceding paragraphs should be tempered, however, as commentators, the international legal community, and human rights organizations have all recognized that despite the various procedural and evidentiary differences between common law courts and Diplock Courts, the legal process complied with international standards of a fair trial.[336] For instance, the Committee on International Human Rights of the Association of the Bar of the City of New York conducted a study and found Diplock Courts to comply with international standards.[337] Similarly, although the European Court of Human Rights found the interrogation techniques amounted to "inhuman and degrading treatment,"[338] they have not found Diplock Courts to contravene the United Kingdom's obligations under the European Convention on Human Rights.[339]

In the same vein, Kevin Boyle, a leading human rights activist and member of the Northern Ireland Civil Rights Association, has stated, "[T]he effects of intimidation, or popular support for violence, or both, may result in witnesses refusing to come forward and juries in the clearest cases refusing to convict."[340] Human Rights in Ireland, the same human rights organization that found a correlation between the Diplock Courts and the use of violence and brutality against defendants, acknowledges that there was "excellent legal work done within those courts."[341] This report acknowledges that there was "excellent lawyering" and "fair minded judges."[342] These two factors were thought to add legitimacy to the Diplock Courts.[343]

John Jackson, a leading commentator in the area, suggests first, "[t]he barristers who appeared in Diplock courts were well wedded to the traditionalist norms of the Bar . . . whereby barristers are expected to take the first brief . . . irrespective of where it comes from. . . . [This] prevented the courts becoming merely a tool in the hands of the prosecution."[344] Second, "judges also displayed a strong sense of independence in judging the hundreds of cases that came before them in the Diplock courts. . . . [F]or the most part, judges appear to have scrutinised cases as best they could . . . ."[345] Jackson's praise of the Diplock Court's judicial integrity and impartiality serves as a well-countenanced balance to the afore-mentioned criticisms of these same judges. These contrasting perspectives serve as a synecdoche of the legal community's complex, and sometimes paradoxical, understanding and views of Diplock Courts.

336. Lenihan, *supra* note 127 at 640–41.
337. *Id.* at 641.
338. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 94 (1978).
339. Lenihan, *supra* note 127, at 641.
340. Carol Coulter, *Tributes to Human Rights Lawyer Kevin Boyle*, IRISH TIMES, Dec. 29, 2010, at 7 (noting that Boyle "served on the executive of the Northern Ireland Civil Rights Association"); Kevin Boyle, *Human Rights and the Northern Ireland Emergency*, *in* HUMAN RIGHTS IN CRIMINAL PROCEDURE: A COMPARATIVE STUDY 153 (John Albert Andrews ed., 1982).
341. de Londras, *supra* note 323.
342. *Id.*
343. *See* Jackson, *supra* note 16, at 220–21.
344. *Id.*
345. *Id.* at 221.

Regardless of the competing theories on interpretation, statistical data demonstrates that conviction rates dropped drastically during the time between the Good Friday Agreement and 2002.[346] In 1997, the year prior to the Good Friday Agreement, Diplock Courts had a conviction rate of ninety-five percent (eighty-four of eight-eight).[347] During the next two years, the Diplock Courts were relied on much less but still carried a high conviction rate: ninety-seven percent (thirty-three of thirty-four) in 1998,[348] and ninety-two percent (twenty-three of twenty-five) in 1999.[349] Starting in the year 2000, however, the conviction rates dropped significantly despite the fact the usage rates returned to pre-Good Friday Agreement rates: forty-three percent (thirty-nine of eight-nine) in 2000;[350] thirty-seven percent (twenty-three of sixty-two) in 2001;[351] and forty-two percent (thirty-two of seventy-five) in 2002.[352] These statistics are anomalous. The lower conviction rates, one could posit, are the by-product of the elimination or decrease in use of coercive tactics to obtain confessions. The most probable reason for the increased use from 2000 to 2002 is that the use of Diplock Courts was reaffirmed by the Terrorism Act 2000.[353] The increased use was short-lived, however, as on average the courts were used to trying sixty defendants a year from 2000 to 2007.[354] Finally, in December 2006, Parliament passed legislation that abolished Diplock Courts in July 2007, with an exception for allowing juryless trials in "exceptional cases where juries could be intimidated."[355] Since then, the United Kingdom has placed much greater reliance on their traditional court system to try terrorist suspects, and, as will be dis-

346. The Good Friday Agreement, which was signed on April 10, 1998, proposed the early release of political prisoners, the decommissioning of paramilitary weapons, and an exclusive reliance on "democratic and peaceful means" to solve political difference. *The Good Friday Agreement in Full*, BBC NEWS (Dec. 9, 2004, 1:47 PM), http://news.bbc.co.uk/2/hi/uk_news/northern_ireland/4079267.stm.

347. U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 1997: UNITED KINGDOM (Jan. 30, 1998), *available at* http://www.state.gov/www/global/human_rights/1997_hrp_report/unitedki.html (seventy-four persons pled guilty, ten were convicted at trial, and four were acquitted).

348. U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 1998: UNITED KINGDOM (Feb. 26, 1999), *available at* http://www.state.gov/www/global/human_rights/1998_hrp_report/unitedki.html.

349. U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 1999: UNITED KINGDOM (Feb. 23, 2000), *available at* http://www.state.gov/j/drl/rls/hrrpt/1999/368.htm.

350. U.S. DEP'T BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 2000: UNITED KINGDOM (Feb. 23, 2001), *available at* http://www.state.gov/j/drl/rls/hrrpt/2000/eur/856.htm.

351. U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 2001: UNITED KINGDOM (Mar. 4, 2002), *available at* http://www.state.gov/j/drl/rls/hrrpt/2001/eur/8364.htm.

352. U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 2002: UNITED KINGDOM (Mar. 31, 2003), *available at* http://www.state.gov/j/drl/rls/hrrpt/2002/18399.htm

353. Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 ME. L. REV. 131, 154 (2010).

354. *Id.* at 155.

355. U.S. DEP'T OF STATE BUREAU OF DEMOCRACY, HUMAN RIGHTS AND LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – 2006: UNITED KINGDOM (Mar. 6, 2007), *available at* http://www.state.gov/j/drl/rls/hrrpt/2006/78847.htm.

cussed in the next Part, the author believes such reliance has led to greater government transparency and accountability.

IV. RESOLUTION AND RECOMMENDATIONS

A. Current Diplock Courts

In 2007, the United Kingdom enacted the Justice and Security Act (Northern Ireland).[356] This legislation created a presumption of trial by jury but allowed for the Director of Public Prosecutions ("DPP") to shift it to a bench trial if there was a believed "risk to the administration of justice."[357] Significantly, under this Act the decision to use a bench trial rather than a jury trial was predicated on the individual facts of the case, not on a list of scheduled offenses, as was the case under the Diplock Court system.[358] By structuring the current trial system with a presumption towards trial by jury, the United Kingdom has significantly increased the institutional legitimacy and judicial authority of its court system. As was discussed in Section III.D, one recurring criticism of Diplock Courts was the elimination of civilian juries.[359] Critics propounded that elimination of civilian involvement perpetuated a sentiment of aggression toward the government. This presumption of trial by jury responds to and answers the qualms of these critics.[360]

Under the new system, the DPP can certify a trial to be conducted without a jury only if he makes a finding that one of four conditions is met, and, as indicated above, he finds that "there is a risk that the administration of justice might be impaired if the trial were to be conducted with a jury."[361] Additionally, the Director is required to consider alternatives to a nonjury trial, such as screening the jury from the public, before certifying the case for a Diplock Court.[362] These new Diplock Courts also eliminated the use of supergrass witnesses and prevented extended detention without trial.[363]

356. Justice and Security Act, 2007, c. 6 (N. Ir.).

357. Setty, *supra* note 353, at 155 n.155.

358. *Id.*

359. *See supra* Section III.D.

360. It should be noted, however, that the decision to try a defendant by bench trial is still made by an involved party, the Director of Public Prosecutions. *See* Justice and Security Act, 2007, c. 6, § 5 (N. Ir.). The author believes even greater legitimacy and authority in the United Kingdom's court system would be realized if Parliament provided an independent judiciary with this decision making power. *See* Jacobs, *supra* note 126, at 661; *see also* Roger Masterman, THE SEPARATION OF POWERS IN THE CONTEMPORARY CONSTITUTION: JUDICIAL COMPETENCE AND INDEPENDENCE IN THE UNITED KINGDOM 31 (2011) (explaining that the Constitutional Reform Act (2003) "may be come to be seen as having cemented the status of judicial independence as a constitutional fundamental in the UK constitution").

361. Justice and Security Act , 2007, c. 6, § 1 (N. Ir.).

362. Jacobs, *supra* note 126, at 662–63.

363. *Id.* at 662. Jacobs, however, argues that these procedural and evidentiary changes are not enough and the "Diplock-type court procedures are simply too analogous to the old Diplock courts to be considered a successful change." *Id.* at 663.

A recent Diplock Court case, *R v. Abbas Boutrab*, highlights the distinction between old and new Diplock Courts.[364] In the former, in 2005, Abbas Boutrab became the first non-republican or loyalist to be tried before a Diplock Court.[365] Boutrab was found guilty of possession of articles for a purpose connected to terrorism, guilty of control of a false instrument, and guilty of collecting information likely to be useful to terrorists, but was found not guilty of handling stolen goods and not guilty of using a false instrument.[366] Importantly, the defendant was allowed to challenge the legality of the seizure of the goods at issue and the prosecution was forced to establish the continuity and integrity of these goods.[367] Moreover, the police were required to affirmatively establish that in regard to the interrogations "there was no unfairness or disadvantage to the defendant in the manner in which the contents of the police interviews were compiled or presented to the Court."[368] Finally, the court made a detailed record of the facts, analysis, and application of law for each count.[369] Although judges under the old Diplock Court system were required to make findings of facts and conclusions of law, as discussed above, judges were able to manipulate the record and provide self-affirming conclusions.[370]

Although these occurred before the Justice and Security Act, the 2004 decision *A v. Secretary of State for the Home Department* (also known as the Belmarsh Case)[371] and the 2005 decision *A v. Secretary of State for the Home Department (No. 2)*[372] illustrate the judiciary's active protection of civil rights and "stand against national security policies crafted by Parliament . . . ."[373] Because these cases pertain to defendants suspected of engaging in terrorism-related activities and demonstrate a pushback by the judiciary against the other branches of government, their inclusion is highly relevant to this analysis.

In the Belmarsh Case, sixteen persons suspected of engaging in terrorism-related activity were certified by the Home Secretary and detained at Belmarsh Prison in accordance with Section 23 of the Anti-Terrorism, Crime and Security Act 2001 ("ATCSA").[374] "Several defendants challenged the lawfulness of their detention."[375] A majority of the House of Lords found the indefinite detention, authorized under Sec-

364. [2005] NICC 36.

365. Mark Hughes, *No Angry Men: First Trial Without Jury Begins*, INDEPENDENT, Jan. 13, 2010, http://www.independent.co.uk/news/uk/home-news/no-angry-men-first-trial-without-jury-begins-1866124.html.

366. R. v. Boutrab, [2005] NICC 36.

367. *Id.*

368. *Id.*

369. *Id.*

370. *See supra* Section II.C.

371. [2004] UKHL 56, [2005] 2 A.C. 68 (H.L.) [7].

372. [2005] UKHL 71, [2006] 2 A.C. 221.

373. Setty, *supra* note 353, at 151.

374. John Ip, *The Supreme Court and House of Lords in the War on Terror: Inter Arma Silent Leges?*, 19 MICH. ST. J. INT'L L. 1, 23–24 (2010).

375. *Id.* at 23.

tion 23 of the ATCSA, incompatible with Articles 5 and 14 of the European Covenant on Human Rights.[376] The decision forced the Blair Government to repeal this section of the ATCSA,[377] which has been seen as "an extremely rare example of a British court overturning the government's view of what was necessary in the interests of national security[,]"[378] and was referred to as "the finest assertion of civil liberties that has emerged from a British court since at least Entick v Carrington."[379]

It is worth noting the comparison between the House of Lords ruling in *A v. Secretary of State for the Home Department* with the U.S. Supreme Court's ruling in *Boumediene v. Bush*.[380] In both instances: (1) the detainees challenged the legality of their detainment; (2) the court found the detainment to be illegal; and (3) in response, the respective governments enacted new legislation (the Obama Administration enacted the MCA 2009 and the Blair Government enacted the Prevention of Terrorism Act 2005).[381] This is significant as it highlights each judiciary's defense of civil rights and reaction against overreaching by other arms of their respective governments. Despite this similarity, there remains a fundamental procedural difference between the two nations. In the United Kingdom, because of the nominalized utilization of nontraditional courts, such as the Diplock Court, the judiciary has immediate jurisdiction over these cases and can act as a relatively quick check against other branches of the government. In the United States, conversely, because of the continued reliance on nontraditional courts, such as military commissions and the limited scope of appellate jurisdiction, Article III courts, which the author believes have more authority to act as an effective check against the legislative and executive branches than military commissions,[382] have less immediate access to these issues of law, and are prevented from acting as a quick check against other branches of the government.

"In *A v. Secretary of State for the Home Department (No. 2)*, the House of Lords unanimously ruled that no British court could rely on evidence that might have been procured through torture."[383] Although addressing an allegation of evidence obtained through torture before a Special Immigration Appeals Commission, the case has direct relevance to the author's analysis of Diplock Courts. The most recurring criticism of Diplock Courts was the admissibility of evidence obtained through

376. *Id.* at 24.

377. *Id.*

378. *Id.* at 32 (quoting Adam Tomkins, Readings of A v. Secretary of State for the Home Department, P.L. 259, 259 (2005)).

379. *Id.* at 33 n.250 (quoting Conor Gearty, *Human Rights in an Age of Counter-Terrorism: Injurious, Irrelevant or Indispensable?*, 58 C.L.P. 25, 37 (2005)).

380. *See supra* Subsection III.B.1.

381. *See* Ip, *supra* note 374, at 24.

382. *See, e.g.*, *supra* Subsection II.B.2 for discussion on the composition of the military commission used to try the defendants in *Ex Parte Quirin*. *But see supra* Subsection III.C.3 for discussion on the Supreme Court's deference to the Roosevelt Administration in *Ex Parte Quirin*.

383. *See* Ip, *supra* note 374, at 27.

"inhuman and degrading treatment."[384] Although the European Court of Human Rights found that the interrogation techniques used to obtain evidence before a Diplock Court fell short of torture, that court and multiple international human rights organizations were highly critical of the interrogation methods utilized.[385] In light of this, the House of Lord's ruling in *A v. Secretary of State for the Home Department (No. 2)* served as a reaffirmation by the judiciary that the courts of the United Kingdom would not facilitate illicit executive action.[386]

B. Looking Forward in the United States

The author believes that the United States should look to the example set forth by the United Kingdom in implementing an effective court system to try defendants suspected of engaging in terrorist activities. Moreover, the author believes that although the Obama Administration has taken significant strides towards implementing such a system, the Administration has unfortunately backslid over the past four years.[387] Additionally, although the U.S. Supreme Court and the involved federal courts have taken a resolute stance with military commission cases and have protected individuals while preventing government overreaching, their effectiveness is diluted under the current structure. As a result of our current structure, commentators have argued that the United States has sacrificed institutional legitimacy for effectiveness.[388] By relying on structure and precedent of former military commissions, the United States "copied a potentially illegitimate trial system, shielded themselves from normative pressures, and disregarded the value which an institution can derive from conformity."[389] In the same vein, critics believe that a consequence of the current military commission system is that "[t]he United States has lost its moral authority to seek the death penalty . . . ."[390]

This Note proposes that the United States: (1) minimalize reliance on military commissions except for situations in which there is a finding by an independent judiciary that the administration of justice would be impeded were the defendant to be tried before a civilian court and (2) amend the Military Commissions Act so that in cases that still rely on trial by military commission the procedure and substantive rules resemble those employed in civilian courts. This Section proceeds by examining

384. Ireland v. United Kingdom, 25 Eur. Ct. H.R. (ser. A) at 59 (1978).

385. *See supra* Section III.D.

386. *See* Ip, *supra* note 374, at 27.

387. *See supra* Subsection III.B.2.

388. Gregory S. McNeal, *Institutional Legitimacy and Counterterrorism Trials*, 43 U. RICH. L. REV. 967, 968–69 (2009).

389. *Id.*

390. Charley Keyes, *Guantanamo Detainee Lawyers Ask That Death Penalty Case Be Dropped*, CNN (July 19, 2011, 7:39 PM), http://edition.cnn.com/2011/CRIME/07/19/guantanamo.detainee/ (internal quotation marks omitted).

the Obama Administration's attempts at reformation and the consequences of such reformation.

The Obama Administration and Congress have implemented and attempted to implement several significant reformations to the Bush Administration's military court system. First, Obama issued Executive Order 13491 which rescinded President Bush's executive order of July 20, 2007 and categorically banned enhanced interrogation techniques.[391] The significance of such action cannot be understated as the expected correlated benefits can be foreseen through the increased legitimacy of Diplock Courts after they stopped admitting confessions obtained through coercion.[392] The curtailment of suspect maltreatment, an appellate court ruling preventing physical violence of suspects, and increasing a Diplock Courts' discretion to exclude confessions obtained through inhuman treatment, each worked to increase the institutional authority of Diplock Courts and prevented suspects from being seen as martyrs.[393] Similarly, the Obama Administration's explicit ban on enhanced interrogation techniques works to enhance the legitimacy of military commissions and detention centers such as Guantanamo Bay.[394]

Second, Congress enacted the MCA 2009 in response to the Court's ruling in *Boumediene*.[395] The MCA 2009 made several significant changes to the evidentiary and procedural rules used in military commission cases.[396] First, the MCA 2009 more closely tracks the Uniform Code of Military Justice ("UCMJ") than the MCA 2006.[397] This is significant as the UCMJ has a storied body of institutional legitimacy and adheres to international legal standards.[398]

Additionally, the MCA 2009 shifts the initial burden of admitting hearsay evidence onto the prosecution so that such evidence will not be admitted "unless the proponent of the evidence demonstrates by a preponderance of the evidence that the evidence is reliable under the totality of the circumstances."[399] Previously, evidence was admissible so long

391. Horowitz & Rishikof, *supra* note 200, at 182.

392. Jackson, *supra* note 16, at 226.

393. *See id.* at 217.

394. Critics of enhanced interrogation techniques believed that such techniques enabled the detainees to be seen as martyrs. "What is clear is that if their goal was indeed to martyr themselves, mission accomplished. Not only have they possibly encouraged scores of aspiring jihadists, they have provided another occasion for more politicians and editorialists around the world to join the chorus calling for the closure of Guantánamo." Mahler, *supra* note 168.

395. Military Commissions Act of 2009, 10 U.S.C. §§ 948a–950t (2012).

396. Daniel H. Benson & Calvin Lewis, *Repeal of the Military Commissions Act*, 19 S. CAL. REV. L. & SOC. JUST. 265, 284 (2010).

397. *Id.* at 277–90 (comparing and contrasting various provisions of the MCA 2009 and the UCMJ. Although the authors conclude that the MCA 2009 should be repealed and the UCMJ should be used to try Guantanamo detainees, the authors do acknowledge similarities between the two acts in terms of evidentiary standards, closed proceedings, and appeals).

398. *Id.* at 271–72.

399. *Id.* at 285 (quoting Memorandum from Jeh C. Johnson, General Counsel of the Dep't of Defense to the Sec'y of Defense, at 6–7 (May 13, 2009) (interpreting MCA 2009's provision on hearsay evidence)) (internal quotation marks and emphasis omitted).

as it had a probative value to a reasonable person.[400] Although the MCA 2009 differs entirely in substance from the Justice and Security Act (Northern Ireland) 2007, both signify to the legal community, the courts, and the world at large that the respective governments are amending and creating legal regimes in which terrorist suspects are provided with more protection and executive overreaching is curtailed. Although there are shortcomings to each Act and commentators have argued that neither Act goes far enough,[401] it is seemingly undisputed that both Acts are improvements over the previous legislative regimes.

Third, the Obama Administration has used and has attempted to use Article III courts to try Guantanamo detainees.[402] Attorney General Eric Holder believes that Article III courts are the proper venue to prosecute terrorists stating, "[w]e know that we can prosecute terrorists in our federal courts safely and securely because we have been doing so for years. There are more than 300 convicted international and domestic terrorists currently in Bureau of Prisons custody . . . ."[403] Proponents of Article III courts cite to the fact that since the 2007 conviction of David Hicks—the first person to be convicted by military commission—only seven other defendants have been convicted.[404] Federal courts, proponents argue, would be both faster and more efficient.[405] While critics argue that federal courts are poorly equipped to handle sensitive information on issues of national security,[406] the American Bar Association Standing Committee on Law and National Security found that "Article III courts have remained flexible in handling these issues."[407] It should be noted, however, the Standing Committee recognized that there could be difficulties reconciling *Brady v. Maryland* and the Classified Information Procedure Act with terrorism cases, and agreed that the "use of classified evidence in a terrorism trial poses special problems in prosecuting, defending, and adjudicating terrorism cases in the Article III courts."[408]

400 *Id.* at 284.

401. For criticism on the Justice and Security Act (Northern Ireland) 2007, see Setty, *supra* note 353, at 155. For criticism on the MCA 2009, see Benson & Lewis, *supra* note 396.

402. Aziz Z. Huq, *Forum Choice for Terrorism Suspects*, 61 DUKE L.J. 1415, 1418 (2012).

403. *Obama Claims Bush Administration Got 190 Terrorism Convictions in Federal Court*, POLITIFACT, http://www.politifact.com/truth-o-meter/statements/2010/feb/12/barack-obama/obama-claims-bush-administration-got-190-terrorism/ (last updated July 27, 2011).

404. *The Guantanamo Trials*, HUMAN RIGHTS WATCH, http://www.hrw.org/features/guantanamo (last visited July 20, 2014).

405. Hanna F. Madbak, *Trial by Military Commission or Article III Court? The Debate Rages On*, GUANTANAMO AND BEYOND: A BLOG ON EXECUTIVE DETENTION, NATIONAL SECURITY, AND DUE PROCESS (July 27, 2010, 10:19 PM), http://nysbar.com/blogs/ExecutiveDetention/2010/07/trial_by_military_commission_o.html.

406. *See* Huq, *supra* note 402, at 1506.

407. ASHLEY INDERFURTH & WAYNE MASSEY, AMERICAN BAR ASSOCIATION STANDING COMMITTEE ON LAW AND NATIONAL SECURITY, TRYING TERRORISTS IN ARTICLE III COURTS: CHALLENGES AND LESSONS LEARNED 12 (2009).

408. *Id.* at 13.

Skeptics of the use of Article III courts to try Guantanamo detainees point to the 2010 trial of Ahmed Ghailani.[409] Ghailiani was charged for the 1998 African embassy bombings and was tried before a civilian jury in the Southern District of New York.[410] On November 17, 2010, Ghailani was convicted on one count of conspiracy and acquitted on 284 charges (most of which were for murder).[411] Proponents of the use of Article III courts to try Guantanamo detainees posit that the Ghaliani trial demonstrates "even without evidence obtained from questionable interrogation techniques used on terrorism suspects, the government can make and prove its case" citing to the conspiracy conviction for which Ghaliani was sentenced to life imprisonment.[412]

Most, including Congress, however, have not taken this position.[413] Proponents of the continued use of military commissions believe "Ghailani's acquittal on 99 percent of the counts emboldens the belief held by some that military commissions in Guantanamo . . . may be a better option to secure tough justice, although the track record of military commissions is thin and punctuated by light sentences."[414] The Ghailani conviction is also significant because it came just four days after Holder announced a plan to transfer five high profile detainees, including Khalid-Sheikh Mohammed ("KSM") to the United States so they could be prosecuted in the Southern District of New York.[415] In response, at least in part, to the Ghaliani trial, Congress "added a mandate to the 2011 National Defense Authorization Act, effectively withdrawing all funding for transferring Guantanamo detainees and constraining the executive."[416] In effect, the spending blockade prevented Guantanamo detainees from being tried in Article III courts, and as discussed above, encouraged the 2011 resumption of military commissions.[417] Although critics of the Obama Administration charge that the "administration has also been complicit in the preservation of military commissions[, and i]ts lawyers have continued to defend aggressively the military detention of enemy combatants in terms only slightly at odds with those offered by the Bush administration."[418] Holder has "stated bluntly that military commission prosecutions were not his first choice and had been forced upon the executive branch."[419]

409. Horowitz & Rishikof, *supra* note 200, at 185.

410. Phil Hirschkorn, *Ghailani Trial Reignites Terror Justice Debate*, CBS NEWS (Nov. 27, 2010, 1:58 PM), http://www.cbsnews.com/news/ghailani-trial-reignites-terror-justice-debate/.

411. Horowitz & Rishikof, *supra* note 200, at 185.

412. Lawrence Friedman & Victor Hansen, *The Ghailani Trial: Justice Served*, JURIST (Nov. 24, 2010, 1:14 AM), http://jurist.org/forum/2010/11/the-ghailani-trial-justice-served.php; *see also* Horowitz & Rishikof, *supra* note 200, at 185.

413. Horowitz & Rishikof, *supra* note 200, at 185.

414. Hirschkorn, *supra* note 410.

415. Horowitz & Rishikof, *supra* note 200, at 184–85.

416. *Id.* at 185.

417. *Id.* at 186.

418. Huq, *supra* note 402, at 1506.

419. Horowitz & Rishikof, *supra* note 200, at 186.

KSM was formally arraigned on May 5, 2012, on war crime charges before a military tribunal at Guantanamo Bay.[420] The Obama Administration and advocates of the continued use of military commissions believe that the KSM trial will serve to "show the world that the tribunal system is now legitimate" and will demonstrate the evidentiary changes on hearsay and the inadmissibility of evidence procured through torture.[421] Additionally, the United States has increased media access to the tribunal as a hearing on pretrial motions was "shown to reporters at the base and those watching a closed-circuit feed at Fort Meade . . . [on] a [forty] second delay . . . ."[422]

This increased media access has not been without criticism, however. First, the American Civil Liberties Union and others objected to the use of a forty second delay.[423] Second, even with the forty second delay, the military judge and court security officer still have access to a censor button, which kills the audio feed to the media.[424] And although the censor is supposed to be controlled either by the judge or court security officer, during a January 28, 2013 hearing, "some external body" activated the censor button.[425] In response to the censor being activated, the presiding military judge, Colonel James Pohl stated,

> Note for the record, that the 40-second delay was initiated, not by me. If some external body is turning things off, if someone is turning the commissions off under their own view of what things ought to be, with no reason or explanation, then we are going to have a little meeting about who turns that light on or off.[426]

The preceding example demonstrates one of the core concerns with continued reliance on military commissions: despite claims that reforms have enhanced the process provided to individual defendants, the United States' perpetual abdication of judicial safeguards and continued ability to provide ammunition for criticism from human rights organizations and the legal community make military commissions an inferior and reluctant choice.

Despite Congress' spending blockade in 2011, effectively preventing the transfer of detainees from Guantanamo, in March 2013, the Obama

420. Charles Savage, *U.S. to Restart Tribunal, Aiming to Show It's Fair*, N.Y. TIMES, May 4, 2012, http://www.nytimes.com/2012/05/05/us/us-to-restart-tribunal-aiming-to-show-its-fair.html.

421. *Id.*

422. Charlie Savage, *Defendants in Sept. 11 Case Cooperate as Proceedings Resume at Guantanamo*, N.Y. TIMES, Oct. 15, 2012, www.nytimes.com/2012/10/16/us/sept-11-terrorism-case-resumes-smoothly-at-guantanamo.html.

423. *Id.*

424. Jason Leopold, *Secret Censor Revealed at Guantanamo Military Commissions*, TRUTHOUT (Jan. 29, 2013, 2:59 PM), http://www.truth-out.org/news/item/14223-secret-censor-revealed-at-guantanamo-military-commissions.

425. Carol Rosenberg, *Guantanamo Judge Says 'External Body' Was Wrong to Censor War Court*, MIAMI HERALD, Jan. 29, 2013, http://www.miamiherald.com/2013/01/29/3206764/guantanamo-judge-says-external.html.

426. *Colbert Report* (Comedy Central television broadcast Feb. 27, 2013) (quoting Col. James Pohl), *available at* http://www.colbertnation.com/the-colbert-report-videos/424240/february-27-2013/khalid-sheikh-mohammed-s-trial-at-gitmo.

Administration began using Article III courts to try terrorist suspects.[427] On March 8, 2013, Sulaiman Abu Ghaith, Osama Bin Laden's son-in-law, pled not guilty to conspiring to kill Americans in a Southern District of New York courthouse.[428] Because Abu Ghaith was not detained at Guantanamo, he was not subject to the prohibition against using government funds to transfer enemy combatants from Guantanamo to the United States.[429] Principal Deputy White House Press Secretary, Josh Earnest stated, "[t]he intelligence community agrees that the best way to protect our national security interests is to prosecute Abu Ghaith in an Article III court."[430] Earnest noted that the Administration plans on adopting a flexible approach in the detainment and judicial process stating, "[w]e're able to question him as a part of the regular process in detaining individuals like this, but we're also able to put him through Article III courts to ensure that he's held accountable for his crimes."[431]

Unsurprisingly, Republican members of Congress have been critical of the decision to try Abu Ghaith in an Article III court and have resonated the same concerns Congress had with trying KSM in an Article III court.[432] For instance, Senator Mitch McConnell believes that Abu Ghaith should be detained at Guantanamo where he can be "fulsomely and continuously interrogated without having to overcome the objections of his civilian lawyers."[433]

It is obviously premature to determine whether trying Abu Ghaith in a civilian court marks a "bold presidential decision to undermine military commissions and to proclaim that the civilian courts are the government's venue of choice for *all* terrorism cases—even those against wartime enemy combatants"[434] or is simply an isolated example of the utilization of a civilian court to try a terrorist suspect. It is, the author believes, a step in the right direction. The United Kingdom has gained institutional credibility amongst the international legal community since nominalizing the use of Diplock Courts over the past half-decade.[435] The author believes the United States will garner that same institutional credibility if the Abu Ghaith trial serves as an accurate indication of what is to come.

427. John Parkinson & Mary Bruce, *Republicans Decry Obama's Decision to Try Al Qaeda Suspect in Civilian Court*, ABC NEWS (Mar. 8, 2013, 4:12 PM), http://abcnews.go.com/blogs/politics/2013/03/republicans-decry-obamas-decision-to-try-al-qaeda-suspects-in-civilian-court/.

428. *Id.*

429. Andrew C. McCarthy, *While You Weren't Looking, Obama Kills Military Commissions*, NAT'L REV. OUTLINE (Mar. 8, 2013, 11:22 AM), http://www.nationalreview.com/corner/342522/while-you-werent-looking-obama-kills-military-commissions-andrew-c-mccarthy.

430. Parkinson & Bruce, *supra* note 427.

431. *Id.*

432. *Id.*

433. Marc Santora & William K. Rashbum, *Bin Laden Relative Pleads Not Guilty in Terrorism Case*, N.Y. Times, Mar. 8, 2013, http://www.nytimes.com/2013/03/09/nyregion/sulaiman-abu-ghaith-bin-ladens-son-in-law-charged-in-new-york.html.

434. McCarthy, *supra* note 429.

435. *See supra* Section IV.A.

V. CONCLUSION

The United States has used various incarnations of military commissions since the Revolutionary War. During the Civil War, the military commissions of Vallandigham and Milligan garnered the attention of the Supreme Court. In the former, the Court declined jurisdiction, but in the latter the Court struck down the military commission as unlawful. During World War II, the Roosevelt Administration used a military commission to try eight saboteurs and in the process obtained the *ad hoc* sanctioning of the Court. Likewise, the United Kingdom utilized Diplock Courts to try members affiliated with the Irish Republican Army and its progeny. In each of these instances, these noncivilian courts were widely criticized for their abdication of rights and processes defendants had been afforded in their respective civilian courts. The Diplock Courts, however, have been reformed and less utilized over the past decade with the result being an increase in the institutional credibility of the United Kingdom. Conversely, the United States has continued to rely on its military commission precedent in convening military commissions to try Guantanamo detainees. Recently, however, the Obama Administration has made several statutory changes and indicated that Article III courts will take a more prevalent role in prosecuting future terrorist suspects. This Note proposes that the United States should look to the benefits reaped by the United Kingdom when it changed its court system to accurately foresee the benefits to institutional credibility that they can expect if they continue to implement such changes.