



Defending the Rule of Law: The Military Commissions Defense Organization

By Brigadier General John G. Baker, USMC

Brigadier General John G. Baker, USMC standing in front of the US Marine Corps War Memorial (Iwo Jima Memorial), Arlington, Va.

In a 2004 briefing, Air Force Colonel William Gunn, the first Chief Defense Counsel for Military Commissions, is reported to have written the letters V-U-C-A on a blackboard to describe the mission of the commissions defense function. In the ensuing years, despite a presidential pledge to “restore the Commissions as a legitimate forum for prosecution while bringing them in line with the rule of law,”¹ our mission remains Volatile, Uncertain, Complex, and Ambiguous. What follows is an introduction to the through-the-looking-glass V-U-C-A world of the Guantanamo military commissions from the perspective of the leader² of the Military Commissions Defense Organization (MCDO), the organization charged with providing defense services to accused facing charges before military commissions.

While military commissions are a traditional means for trying “unprivileged enemy belligerents,” in their current form they are a legal farce. Instead of being a beacon for the rule of law, uncertainty and delay have reigned supreme in the commissions since their inception. A military judge presiding over the first 9/11 prosecution described it, in a written opinion, as a system “in which uncertainty is the norm and where the rules appear random and indiscriminate.”³ The Military Commissions Act, which cobbles together parts of the court-martial and federal criminal systems, has several facially unconstitutional and fundamentally unfair provisions that have yet to be fully challenged in federal court.

Against the background of that legal uncertainty, the repeated delays in ongoing cases have captured presidential attention and caused the administration to attempt to change the rules of the game midstream. When announcing his half-hearted effort to close Guantanamo this past February, President Obama noted that military commissions have “resulted in years of litigation without a resolution.”⁴ That delay, however, has resulted from the government’s own conduct and — too often — misconduct, including repeatedly, deliberately and egregiously interfering with the defense function. Compounding these problems, the defense teams have suffered from a chronic shortage of resources, a particularly inexcusable situation given the capital nature and unprecedented scope of these cases — which are among the most important criminal cases in U.S. history. Meanwhile, the cloud of torture hangs over all the proceedings, directly or indirectly affecting virtually every issue that arises.

The prosecutor at the Nuremberg Tribunals, Justice Robert Jackson, recognized the danger of powerful nations unilaterally dispensing justice onto a purported enemy. “We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow,” Jackson said. “To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this trial will commend itself to posterity as fulfilling humanity’s aspirations to do justice.”⁵

In the Guantanamo military commissions, unfortunately, our nation has chosen Justice Jackson’s poisoned chalice over its commitment to justice. Despite and in the face of that choice, MCDO

defense teams have lived up to the highest standards of criminal defense and the legal profession by defending the rule of law at every turn of this demanding litigation. The defense bar, the legal community, and the nation as a whole can and should be proud of them — I know that I am.

A Brief History of the Military Commissions

On Nov. 13, 2001, anticipating the eventual capture of the individuals responsible for the 9/11 attacks and other enemy combatants in the Afghan war, President George W. Bush issued a military order authorizing noncitizens “to be tried for violations of the laws of war and other applicable laws by military tribunals.”⁶ Military commissions trace their modern origin in the United States to the Mexican-American War, when General Winfield Scott used them as a stopgap solution to prosecute his own soldiers to avoid trying them in civilian Mexican courts.⁷ Thereafter, military commissions were employed in the Civil War and the Philippine insurrection, and, most recently prior to President Bush’s order, during and immediately after World War II. The origin of the WWII commissions was *Ex parte Quirin*, the Supreme Court case that affirmed the convictions of seven Nazi saboteurs captured by the FBI after landing on the shores of Long Island and Florida in 1942. Until *Quirin*, military commissions adhered to court-martial practice, providing the same rights available to charged service members as practicable. *Quirin* broke with that tradition, allowing hearsay and other traditionally inadmissible evidence to be heard by the commission and otherwise dispensing with traditional constitutional protections.

Unfortunately, the Bush administration looked to *Quirin* when establishing the first iteration of the Guantanamo military commissions rather than the earlier tradition, and that choice has haunted the commissions ever since. The Supreme Court struck down the first commissions system in *Hamdan v. Rumsfeld*, holding that they were not “regularly constituted courts” within Common Article 3 of the Geneva Conventions and the Uniform Code of Military Justice in large part because of the system’s unjustifiable deviations from regular military practice.

Congress responded to *Hamdan* by enacting the Military Commissions Act of 2006 (2006 MCA). The 2006 MCA continued to include provisions of highly dubious constitutionality — such as hearsay provisions that put the burden on the defendant to show that the proffered hearsay was unreliable and limiting jurisdiction to aliens — that were significant departures from court-martial practice. The so-called “first round” of the 9/11 conspiracy and USS Cole bombing charges (along with charges related to the 1998 African Embassy Bombings that were subsequently removed to federal court⁸) were brought under the Act. The office was massively understaffed at the time — indeed, although these were all capital cases, for most of this period there was only one capitally-qualified attorney in the MCDO. To help, the American Civil Liberties Union and the National Association of Criminal Defense Lawyers formed the John Adams Project, a group of attorneys who partnered with MCDO military counsel to assist in the defense. The John Adams Project and other outside counsel who became involved during this period remain on the cases today.

In response to President Obama’s request to fix some of the troubling aspects of the 2006 MCA, Congress passed the 2009 MCA. Crucially, along with other improvements, capital accused were for the first time in any military system given the same right to at least one counsel “learned in applicable law relating to capital cases” that federal capital defendants possess. Problematic

elements of the law and its implementing regulations remain, however. The 2006 MCA's unconstitutional hearsay provisions were made less unfair, but still not constitutional. The Convening Authority, a prosecutorial actor who determines which cases should go to trial and whether the government should seek the death penalty, still makes resourcing decisions for the MCDO as a whole and for individual defense teams. Commission jurisdiction continues to be limited to aliens. The classified evidence rules have been interpreted to allow the prosecution to secretly obtain permission from the military judge to secretly destroy critical *Brady* material. While these provisions have been upheld by the commissions' military judges, whether they hold up under eventual review by Article III courts remains to be seen.

It has not been the statute or its implementing regulations, however, but the government's conduct that has most undermined the commissions' credibility as a legitimate venue for dispensing criminal justice, much less providing justice in cases of this historical importance. Whether unilaterally destroying critical *Brady* material in the name of national security, seizing and reviewing attorney-client communications, turning defense team members into FBI informants, attempting to unlawfully influence the military judges, classifying the clients' memories and feelings about their torture on the theory that it had been a top secret "means and method of intelligence gathering," or simply botching judicial appointments to the commissions' appellate review court, the failure of the military commissions to date has been a self-inflicted wound.



Brigadier General John Baker Chief Defense Counsel

Brigadier General John G. Baker is the Chief Defense Counsel for Military Commissions. In this capacity, General Baker is responsible for overseeing the defense of all detainees located at Guantanamo Bay, Cuba (GTMO), accused of war crimes involving alleged terrorism against the United States under the Military Commissions Act (MCA) of 2009. He oversees a joint and total force staff of approximately 175 military and civilian lawyers, paralegals, investigators, intelligence analysts, defense security officers, translators, and administrative officers providing the full spectrum of trial defense services to GTMO detainees charged under the MCA, which includes six capital cases.

Prior to his appointment as the Chief Defense Counsel for the Military Commissions, General Baker served as the Deputy Director, Judge Advocate Division, for Military Justice and Community Development and was responsible for oversight of the Marine Corps military justice practice and the professional development of the Marine Corps legal community. General Baker also served as the Marine Corps representative to the Department of Defense's Joint Service Committee on Military Justice. Before serving as Deputy Director, General Baker served as the Chief Defense Counsel of the Marine Corps and was responsible for mentoring, training, and supervising all defense attorneys and defense support personnel across the Marine Corps in their litigation of hundreds of courts-martial each year. While serving as the Chief Defense Counsel of the Marine Corps, General Baker established the Marine Corps' Defense Services Organization, which transformed the delivery of defense counsel to Marines and sailors charged under the Uniform Code of Military Justice. Prior to this position General Baker served as the Regional Defense Counsel for the Eastern Region, where he mentored and trained Marine Corps defense attorneys at all Marine Corps installations east of the Mississippi and in theater when II Marine Expeditionary Force was forward. General Baker also carried a small caseload of complex cases, which included capital murder, serious sexual assaults, and other felonies, as well as allegations of misconduct by senior officers. Before serving as the Regional Defense Counsel-East, General Baker personally participated in several hundred courts-martial and served in a variety of leadership and litigation billets within the Marine Corps legal community, including Military Judge, Staff Judge Advocate and Law Center Director at Marine Corps Base Quantico, Senior Trial Counsel, Military Justice Officer, Chief Trial Counsel, Special Assistant U.S. Attorney, and Senior Defense Counsel. Prior to becoming a Judge Advocate, General Baker served as a supply officer until he was selected to attend law school under the Law Education Program.

Brigadier General Baker is a graduate of the University of Pittsburgh School of Law (J.D. 1997), Averett University (M.B.A. 1992), and Union College (B.S. 1989). He also holds an LL.M. from The Judge Advocate General's Legal Center and School (TJAGLCS), U.S. Army (2005). General Baker has been a faculty member for the National College of Capital Voir Dire and has lectured at Yale Law School, Pittsburgh School of Law, University of Colorado Law School, the Louisiana Capital Defenders Course, TJAGLCS, and the Naval Justice School. His personal decorations include the Legion of Merit with one gold star, Meritorious Service Medal with three gold stars, the Joint Service Commendation Medal, the Navy-Marine Corps Commendation Medal, the Navy-Marine Corps Achievement Medal, the Army Achievement Medal, and the Combat Action Ribbon. ■

Military Commission Defense Counsel and MCDO Leadership

This is a list of the lawyers who have served as defense counsel to those charged before various iterations of the Guantanamo military commissions from 2004 through the present day as well as the Deputy Chief Defense Counsel and Chief Defense Counsel. The list may not be complete. Some cases concluded in plea deals and convictions, some charges were dropped, and other cases have been in pretrial proceedings for years. As such, several of the cases have experienced multiple rounds of turnover in their representation. Finally, this list only represents those who have served in the defense role for the previous and ongoing cases. It does not list the legions of support staff, subject matter experts, researchers, paralegals, translators, mitigation specialists, and others who have been essential to the attorneys' ability to provide a zealous defense to their clients.

Military Commissions Defense Counsel (alphabetic)				Chief Defense Counsel (chronological)	Deputy Chief Defense Counsel (chronological)
Michael L. Acuff	Patrick J. Flor	Matt MacLean	Walter Ruiz	William Gunn	Michael Berrigan
Muneer Ahmad	Kobie Flowers	Edward MacMahon	Brent Rushforth	Dwight Sullivan	Bryan Broyles
Tracy K. Alsup	Lee D. Foreman	Joseph Margulies	Sean A. Safdi	Steven David	Billy Little
Sarah Altschuller	David Frakt	Lawrence Martin	Sergio F. Sarkany	Peter Masciola	Brent Filbert
Kristine Autorino	Amy Freyermuth	Mary McCormick	James M. Sawyers	Jeffrey Colwell	
Robert G. Ayres	Josh M. Fryday	Edward J. McDonough	Harry Schneider	Karen Mayberry	
Mark V. Balfantz	David Furry	Scott McKay	Matthew Schwartz	John G. Baker	
Donna L. Barlett	Robert Gensburg	Matthew McLean	Michael A. Schwartz		
Brydie Bethell	Nina Ginsberg	David McLeod	Matthew Seeger		
Thomas Boğar	Sean M. Gleason	Joseph McMillian	Preston Selleck		
Kevin Boğucki	Michael Griffin	Scott Medlyn	Sharon Shaffer		
Cheryl T. Bormann	Wendell Hall	John J. Merriam	Jonathan Shapiro		
Brandon E. Boutelle	James Harrington	Jason Miller	Shawn D. Shugert		
Yvonne R. Bradley	Daniel Harvey	Brian L. Mizer	Charles Sipos		
Brian Brady	Daniel P. Harvey	Eric S. Montalvo	David Sleight		
Mark Bridges	James E. Hatcher	Catherine Moore	Clive Stafford Smith		
Deirdre G. Brou	William T. Hennessy	Michael Mori	Robert M. Sneed		
Bryan T. Broyles	Chanelle Heth	Samuel Morison	Rebecca S. Snyder		
Howard Cabot	Chantelle Higgins	Darren E. Myers	Gretchen Sosbee		
Chris F. Callen	Karen D. Hill	David Nevin	Gary Sowards		
Christopher D. Cazares	Martin J. Hindel	Tri H. Nhan	Mary Spears		
Theresa J. Champ	Megan E. Hoffman-Loğsdon	Brian P. Nicholson	Alexis Stackhouse		
John Chandler	Nancy Hollander	James Nickovich	Robert B. Stirk		
Anne Chapman	Brian R. Hurey	John Norris	Philip Sundel		
Erwin Chemerinski	Thomas F. Hurley	James A. O'Brien	Tia R. Suplizio		
Timothy Chism	Aliya Hussain	Terry O'Brien	Todd M. Swensen		
Barry Coburn	Brian L. Jackson	Jahn C. Olson	Justin J. Swick		
James Cohen	Jon S. Jackson	Natalie Orpelt	Charles Swift		
Jeffrey P. Colwell	Thomas F. Jasper, Jr.	Travis J. Owens	James Szymanski		
James G. Connell	Katya Jestin	Robert Palmer	Michael G. Thieme		
Aimee Cooper	Christina M. Jimenez	Michel Paradis	Sterling R. Thomas		
Kit C. Crane	Amy M. Jordan	Melanie Partow	Brian M. Thompson		
David Cynamon	Richard Kammen	Charles Patterson	Paul H. Threatt		
Allison C. Danels	Christopher Kannady	Edwin Perry	Adam Thurschwell		
Veronica de la Vega	Ramzi Kassem	Todd Pierce	James Valentine		
Mark Denbeaux	Neal Katyal	Julie L. Pitvorec	Colby C. Vokey		
Premal Dharia	Jason F. Keen	Jennifer L. Pollio	Jason Wareham		
Wells Dixon	Robert T. Kincaid, III	Derek A. Poteet	Clay M. West		
Katherine Doxakis	William C. Kirby	Alka Pradan	Sandra K. Whittington		
Joshua L. Dratel	Jared Kneitel	Andrea Prasow	Alaina M. Wichner		
Teresa Duncan	Thomas Krzyminski	Prescott Prince	Joseph D. Wilkinson II		
Thomas Durkin	William C. Kuebler	Thomas G. Pyle II	Jennifer Williams		
Dennis Edney	Suzanne M. Lachelier	Rita Radostitz	Raashid S. Williams		
Rosa Eliades	Christopher Lanks	Martha Rayner	Richard J. Wilson		
Barry D. Emmert	Daphne M. LaSalle	Paul Reichler	Barry D. Wingard		
Wade N. Faulkner	Philip Leahy	Richard B. Reiter	Eric P. Winkofsky		
Richard E. N. Federico	Denise LeBoeuf	Stephen Reyes	Jason D. Wright		
Scott Fenstermaker	Amanda Lee	Ned W. Roberts	Brian Young		
Brent G. Filbert	Jeffrey D. Lippert	Jeffery Robinson			
Amy S. Fitzgibbons	Keith Lofland	Thomas M. Roughneen			
Thomas A. Fleener		David Ruhnke			

The MCDO's Unique and Challenging Mission

The MCDO is an extremely diverse organization, employing approximately 200 personnel drawn from all four military branches, civilian government employees, and civilian contractors. Trial teams are made up of judge advocates, government service civilian attorneys, civilian counsel providing pro bono representation, learned counsel, paralegals, intelligence analysts, security information officers, investigators, interpreters, mitigation specialists, expert consultants, and administrative staff. Our mission statement explains that the MCDO “provides ethical, zealous,

independent client-based defense services under the Military Commission Act in order to defend the Rule of Law and maintain public confidence in the nation's commitment to equal justice under law." Our work challenging the current Commission process, which is flawed in both design and execution, is vital to ensuring the current and any future law of war prosecutions are credible.

While it is accurate to think of the MCDO as the "public defender" for the military commissions, the analogy only goes so far. Unlike any civilian defender office in the country, MCDO defense teams represent a clientele with a dizzying array of actual and potential conflicts of interest: a small number of individuals, all of whom are charged with the same limited group of substantive crimes on the basis of conspiratorial liability (eight of the nine active trial-level cases are based on the 9/11 attacks or the bombing of the USS Cole); all of whom are alleged to have belonged to only two organizations (al Qaeda and the Taliban); many of whom knew and had dealings with other clients prior to the alleged commission of the charged crimes; and all of whom are detained in conditions that permit contact, communication, and admissions to other, potentially cooperating accused clients. This is because the "office conflict" rule that prevents defender offices from representing conflicted clients does not apply in military justice systems, including the military commissions. As a result of the office structure, I am the professional responsibility supervisor of each office attorney (as in other defender offices) even though I am not permitted to be a member of their defense team (since I would otherwise face irreconcilable conflicts of interest). Defense counsel have handled the complexities of this situation remarkably well, but it is a constant challenge.

The MCDO's structure is the least of the challenges facing the defense in the military commission cases, however. Their legal and factual complexity, the geographic scope of investigation and numbers of witnesses, the quantity of discovery (an enormous amount of which is classified), the remote location of hearings and clients, the number of victims, and the circumstances of accused who were subjected to brutal torture by the U.S. government are all unprecedented. The charge sheet in the 9/11 case alleges almost 3,000 victims and overt acts in 14 different countries. One measure of its scope is the government's investigation: According to the FBI's website, at least 30 of its foreign offices were involved, with over 4,000 special agents and 3,000 professional employees responding to more than 500,000 investigative leads, conducting more than 167,000 interviews, and collecting more than 150,000 pieces of evidence. Defense investigation has required travel over multiple continents in numerous non-English-speaking countries, some with governments that are actively hostile to the defense. The other pending capital case, of alleged USS Cole bomber Abd al-Nashiri, is almost as wide-ranging.

The noncapital cases have comparable scope. Nashwan al-Tamir (known as Abd Hadi al-Iraqi in the pleadings), alleged to have been a senior leader of al Qaeda, is charged with multiple war crimes against United States personnel in Afghanistan over a five-year period, and Majid Kahn and Ahmed al Darbi, both of whom have pleaded guilty and are awaiting sentencing, are charged as part of the 9/11 and USS Cole bombing conspiracies, respectively.

In the 9/11 and USS Cole cases, over 2,500 pleadings have been filed. Over 65,000 documents comprising more than 550,000 pages have been produced in discovery, along with 14 terabytes of electronic discovery in the 9/11 case alone. The most important discovery, virtually all of

which has not yet been produced, is classified at the highest levels, including the still-classified 6,700-page Senate Select Committee on Intelligence (SSCI) Report on the Central Intelligence Agency's Detention and Interrogation Program (the so-called "Torture Report") and the 6,000,000 underlying government documents on which the Report is based. The clients' torture is at the center of virtually all of the most critical issues facing the defense, yet it is the information that the government has fought hardest to keep from disclosing. That fight has only just begun in earnest.

Given the magnitude of its mission, the MCDO has been horrendously underresourced, as the Convening Authority and military services have failed to live up to their obligation to provide sufficient personnel and funding for a constitutionally adequate defense. This has remained the case even though Congress specifically recognized the problem and emphasized the need for adequate defense resourcing in the 2009 Act. Predictably, burnout has been a significant problem as defense teams have done more with less as their requests for critical resources often are ignored for months or receive "interim responses" saying nothing more than that the requests remain under consideration. At the moment, at least, there are glimmers of hope that the systematic underresourcing may be changing, as the Convening Authority, who recently approved my request for additional paralegals, is considering my requests for funding for a second learned counsel for each capital case and additional government attorneys, intelligence analysts, and investigators for all our active cases. If the defense teams continue to be underresourced, the result will be more delays and, down the line, more challenges to the fundamental fairness of the proceedings.

Inability to form an effective attorney-client relationship: The biggest challenge my defense teams face is forming and maintaining an effective attorney-client relationship. With few exceptions, MCDO clients have a history of being subjected to brutal torture at the hands of the U.S. government. The patent unfairness of the system only compounds the difficulties of forming a relationship, a situation summed up by one accused who, when asked in 2006 if he would be willing to accept a different judge advocate as his counsel, responded, "Same circus, different clown."

The impact of past torture continues to permeate every aspect of the attorney-client relationship. Many detainees continue to lack the necessary medical care appropriate for lengthy periods of abuse. While defense team attorneys should be devoting their efforts to case building and research, they unfortunately spend a disproportionate amount of time on "care and feeding" of the client. Under these difficult conditions — not to mention the obvious inherent cultural and language barriers — MCDO defense teams have done a remarkable job building rapport and gaining clients' trust.

In the meantime, despite the best efforts of our attorneys to win the trust of their clients, the U.S. government has repeatedly taken steps that frustrate meaningful attorney-client communications, both inside and outside of the courtroom.

Government interference with the defense function: In the space of three months beginning in January 2013, the 9/11 defense teams discovered that an intelligence agency could shut down live courtroom proceedings without the knowledge or assent of the judge; that the same agency

had the ability to listen to courtroom conversations through the microphones placed on defense tables; and what had previously been believed to be smoke detectors on the ceiling of attorney-client meeting rooms were in reality listening devices. During a hearing addressing these issues, the cells of all of the accused were searched and privileged attorney-client mail was seized. In 2014, it was learned that the FBI had convinced a 9/11 defense team member to become a confidential informant as part of a criminal investigation of one of the other team members. During a February 2015 hearing, one of the 9/11 accused announced that he recognized the court interpreter sitting at his defense table from one of the black sites where he was interrogated and tortured. These events led to well over a year's delay in the proceedings while hearings were cancelled and court-ordered investigations were conducted. Most recently, the government appears to be baiting one of the accused to either attempt to "waive" his entire defense team less a single military counsel or to go pro se. To say the very least, military commissions will have no legitimacy as a system of criminal justice until this kind of government interference ends.

Interminable proceedings: The sheer length of the pretrial process takes its toll on the defense. The accused in the 9/11 and USS Cole bombing cases were captured over 12 years ago. They were originally charged and referred for trial in 2008. Eight years later, because the MCA did away with speedy trial rights for commissions accused, trial in both cases remains years away. Attorneys, clients, and victims are not getting any younger. Given the pace of proceedings, it has become entirely conceivable that a case will lose key players to illness, retirement, or other reasons before the end of trial.

Meanwhile, the bulk of the legal professionals assigned to military commissions are active duty officers and enlisted personnel whose career progressions require them to rotate, even over client objection, to other jobs within their career field to remain competitive for promotion. As a result, our organization continually loses talented attorneys, paralegals, and investigators, not to mention valuable institutional knowledge. Turnover not only hurts case preparation, it jeopardizes client relationships, which take years of painstaking work to establish.

In the face of pressure to leave the MCDO to remain competitive for promotion, some attorneys have shown remarkable commitment to their cases and clients by seeking extensions to remain in this office. Essentially, these attorneys are choosing their commitment to their clients over career, making a sacrifice that deserves recognition from the leaders of the Army, Navy, Marines, and Air Force. Put simply, military members should not be forced to make this choice. Serving in the military commissions while displaying commitment to see the process through should be a qualification for promotion to the next rank. Unfortunately, we know from the significant number of MCDO officers who have been "passed over" for promotion that the military promotion boards do not appreciate this commitment to defending the rule of law.

Classified evidence: Classification and security clearance issues have consistently impeded the abilities of the defense teams to do their jobs. Most of the evidence in military commissions cases relating to the clients' torture is classified at the high levels. This poses hurdles and impediments to the defense presented in no other case. New hires without security clearances cannot meet the client or participate in important case preparation until they have undergone a lengthy background investigation process that literally takes a year or more to complete. In the 9/11 case alone, the government has produced 55,000 pages of classified documents, and the

bulk of the discovery related to the clients' torture and CIA's torture program remains unproduced. Worse yet, the clients do not have clearances and thus are barred from seeing classified discovery or discussing it with their counsel in any detail. This substantially complicates counsel's ability to develop their case, as well as impedes the attorney-client relationship.

Even after obtaining necessary clearances, defense counsel operate in the dark due to a lack of adequate classification guidance. Defense counsel are legally bound to handle classified information appropriately, yet, for seven years — since charges were originally brought in the 9/11 case — the government has refused to provide the formal classification guidance required by Executive Order. The limited guidance that has been received has been inadequate, resulting in “spills” of classified information by members of the prosecution and the defense that cause logistical problems, including the temporary seizure of computers, while security personnel conduct investigations. Lack of classification guidance also has a chilling effect on defense teams, who cannot afford to put their security clearances at risk.

The overclassification of evidence relating to detainee treatment while in U.S. custody has often led to absurd consequences. Because the government long considered client statements about their torture to be classified information on “means and methods of intelligence gathering,” all words spoken or written were presumed to be top secret unless first reviewed and cleared by officials. At one time, if a client told his attorney he wanted a tuna sandwich for lunch, the attorney could not share this information with the cashier at Subway without committing a severe breach of national security.

Written communications from clients, too, have historically undergone a lengthy review process by government agents to prevent the “spilling” of classified information. Routine, even light-hearted, conversational communications between attorney and client were treated as top secret. In 2012, a letter from MCDO client Muhammad Rahim was held up for two months while undergoing security review. After the letter was finally cleared and delivered, the attorney discovered that it consisted of two sentences: “LeBron James is a very bad man. He should apologize to the city of Cleveland.”

Counsel now have somewhat more latitude to determine what client statements may actually contain classified information. But shifting the burden to attorneys in the face of ambiguous government guidance still forces them to operate in a sea of uncertainty. Statements about LeBron James and tuna sandwiches are obvious, but borderline cases continue to require counsel to make difficult decisions without a safety net.

Remote location of clients and courtroom: It is imperative to maintain close communications with clients in capital cases. The logistics of the commissions make establishing effective and meaningful attorney-client communications far more difficult than it should be. Even the most routine client visits require travel to Cuba because telephone and electronic communication is not allowed, taking attorneys out of the office for a full week at a time due to limited flights to and from the island. There are workspaces for attorneys to use in Guantanamo, but that workspace, quickly constructed on an abandoned airfield, is too small and not designed for large

defense teams. Further, the living conditions at Guantanamo, with no potable water, cooking area or privacy, are not conducive for the long-term stay that will be required to try these cases.

Convening Authority interference with MCDO independence: As part of the 2006 MCA, Congress established a “Convening Authority” to officially decide who would be charged in military commission and which charges they would face, a structure that remains in place under the current 2009 Act as well. The concept of a Convening Authority is carried over from modern military justice. When a military member is accused of an offense under the UCMJ, a Convening Authority, almost always the commander of the accused, may convene a court-martial via a special military order, which expires at the conclusion of the court-martial. The Convening Authority controls the entirety of the process: what offenses to charge, whether to accept an accused’s offer for a plea bargain, which military members to assign to the jury, and finally whether to approve the verdict and sentence. At the same time, the Convening Authority acts on resourcing requests, including defense funding requests for experts, witnesses, and travel. Observers have long criticized the dual role — both prosecutorial and judicial — of the Convening Authority. In another context, this inherent conflict of interest would be unconstitutional. In the military, however, courts have held it is necessary as a tool of the commander to preserve good order and discipline in his unit. The court-martial is a mechanism for commanders to maintain a combat-ready fighting unit, and he or she needs to retain control over the entirety of the process. It was because of that unique military need that appellate courts have held that the dual role of the Convening Authority in the military justice system is consistent with due process.⁹

The problem is that the justification for a Convening Authority in the court-martial process does not apply to military commissions. The Convening Authority in military commissions is a civilian within the Department of Defense, not a military commander, and Guantanamo detainees are not a military unit in which good order, discipline, and combat readiness must be maintained. Nevertheless, the Convening Authority structure, with its conflicting prosecutorial, judicial and defense funding roles, remains in place in the commissions today. An example of the problem is highlighted by the Supreme Court’s recent decision that it was a Due Process violation for a District Attorney who had authorized his office to seek the death penalty to later sit as a judge in a subsequent appeal of the case.¹⁰ Yet in the commissions, the Convening Authority not only makes the decision whether or not to pursue death, he rules on defense requests to fund mitigation experts and other sentencing-related experts, and ultimately has review authority over any resulting sentence, including death.

Currently, the Convening Authority’s Office retains far too much control of the function of the military commissions defense counsel even apart from these structural problems. Under the governing regulation, it is the Chief Defense Counsel’s responsibility to “supervise all defense activities and the efforts of detailed defense counsel and other office personnel [and] ensure proper supervision and management of all personnel and resources assigned to the Military Commissions Defense Organization,”¹¹ while the Convening Authority’s role is limited to providing resources for individual defense teams. Nevertheless, the Convening Authority has asserted control over the defense well beyond this limited authority. The MCDO, along with the Office of the Chief Prosecutor and the Trial Judiciary, is nested within Office of Military Commissions for administrative purposes. As a result, the Convening Authority and his staff

exercise administrative oversight of the military and government employees assigned to the MCDO. Worse yet, this administrative model pits prosecution and defense personnel against each other for awards, meritorious promotions and other administrative matters. Further, the Convening Authority and his staff remain in the approval chain for the MCDO security clearance requests, which encroaches on my independence and adds an unnecessary layer of bureaucracy that contributes to the delays in obtaining clearances for defense personnel. Similarly, the Convening Authority controls the MCDO training and travel budget, and assumes administrative roles that are inappropriate given its quasi-adversarial position with respect to the office. These functions need to be assigned to the MCDO itself in order to maintain its necessary independence.

Active Military Commission Cases — 22 June 2016

The following is a list of active cases that are currently in pretrial proceedings, awaiting sentencing, or under appeal. It does not represent cases that have been resolved or charges that were brought then later dropped.

ACCUSED	STATUS	ALLEGATIONS
The 9/11 Case Khalid Sheikh Walid Bin 'Attash Ali Abdul Aziz Ali Mustafa al Hawsawi Ramzi Binalshibh	Pretrial hearings.	Alleged to have conspired to commit the 9/11 attacks on the World Trade Center and Pentagon.
The USS Cole Case Abd al Rahim al Nashiri	Pretrial hearings currently stayed while government pursues interlocutory appeal in the Court of Military Commission Review.	Alleged to have conspired to commit suicide bomb boat attacks in the Gulf of Aden on the USS Cole, resulting in the deaths of 17 United States sailors, and on the French ship MV Limburg.
Nashwan al-Tamir (a/k/a Abd al Hadi al Iraqi)	Pretrial hearings.	Alleged to have been a senior al Qaeda leader responsible for war crimes against United States personnel in Afghanistan.
Majid Khan	Pled guilty; awaiting sentencing.	Alleged to have conspired with Khalid Sheikh Mohammad and others to commit terrorist acts in United States, Pakistan and Indonesia.
Ahmed al Darbi	Pled guilty; awaiting sentencing.	Alleged to have conspired with Abd al Nashiri in bombings of USS Cole and MV Limburg.
Ali al Bahlul	Awaiting decision by the D.C. Circuit on question of whether the government can try the crime of conspiracy by military commission.	Alleged to have been responsible for al Qaeda propaganda and recruiting. Convicted of all counts; sentenced to life imprisonment. Convictions vacated by <i>United States v. Bahlul</i> (D.C. Cir. 2014) (en banc) and <i>United States v. Bahlul</i> (D.C. Cir. 2015). Argument on government en banc rehearing petition held on 1 December 2015.
Omar Khadr	Appeal stayed pending D.C. Circuit's decision in <i>United States v. Bahlul</i> . Appeal pending in the Court of Military Commission Review.	Alleged to have murdered United States soldier in Afghanistan. Pled guilty to all counts; repatriated to Canada to serve out sentence.

The Future

If our government wants the most important criminal cases in American history to be tried by military commission, it is essential that the proceedings live up to the highest standards of American justice. They have not. Instead, V-U-C-A remains their hallmark. This is a gross injustice being done to the individuals charged in the system, but it is also more than that — it is, as Justice Jackson recognized, a matter of national security and integrity as well.

All military service members swear an oath to “support and defend the Constitution of the United States against all enemies, foreign and domestic.” That is exactly what MCDO attorneys, military and civilian, are doing every day. If our leaders decide to again use military commissions in some future armed conflict, the current efforts of our defense teams to change the “poisoned chalice” of the Guantanamo military commissions into legitimate and credible proceedings are laying the groundwork for a military commission system that fully comports with the rule of law and has the respect of the international community. In defending the rule of law by fighting for their clients, MCDO personnel are defending the rule of law on behalf of us all. I could not be more grateful and proud to lead this organization.

Notes

1. <https://www.whitehouse.gov/the-press-office/statement-president-barack-obama-military-commissions>.
2. The views expressed in this article are mine alone and do not represent the views of any individual defense team or the Department of Defense or any of its entities.
3. *United States v. Mohammad, et al.*, Ruling D-126 (2009), at 3.
4. <https://www.whitehouse.gov/the-press-office/2016/02/23/remarks-president-plan-close-prison-guantanamo-bay>.
5. “Second Day, Wednesday, 11/21/1945, Part 04,” in Trial of the Major War Criminals before the International Military Tribunal. Volume II. Proceedings: 11/14/1945-11/30/1945. [Official text in the English language.] Nuremberg: IMT, 1947. pp. 98-102.
6. 66 Fed. Reg. 57833.
7. See W. Winthrop, *Military Law and Precedents* 831 (rev. 2d ed. 1920).
8. See *United States v. Ghailani*, 733 F.3d 29 (2d Cir. 2013).
9. *Curry v. Secretary of the Army*, 595 F.2d 873 (D.C. Cir. 1979).
10. *Williams v. Pennsylvania*, No. 15–5040 (S. Ct., June 9. 2016).
11. (RTMC 9-1(a)(2)).

Inside NACDL: More Than a Few Good Men and Women: America's Heroes at Guantanamo Bay

By Norman L. Reimer

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Eight years ago this month, this column celebrated the Supreme Court's important decision in *Boumediene v. Bush*,¹ which struck down the provisions of the 2006 Military Commissions Act that deprived detainees at Guantanamo of the right to bring habeas corpus petitions.² While noting that the decision offered some hope that the United States would turn the page on its post-9/11 extra-constitutional excursion, the thrust of the column was to highlight the array of travesties that were unfolding in the military commission prosecutions. Based upon what was publicly disclosed about those wholly unprecedented and bizarre processes, and undaunted by the prospect that outrage might give rise to hyperbole, I offered this observation: "[M]ake no mistake about it: the military commission process that is unfolding at Guantanamo is a farce."³

Sadly, history has confirmed that this assessment was no exaggeration. It is more than a little sad to note that eight long years later, Brigadier General John G. Baker, Chief Defense Counsel for the Military Commission Defense Organization (MCDO), also describes the military commissions as "a legal farce."⁴ In this month's cover story, General Baker catalogues the litany of abuses that more than justify that harsh characterization. Persistent denigration of the defense function, pervasive government misconduct, and the perverse obsession with trying to keep secret the details of the torture that was inflicted upon the accused — notwithstanding that it is the worst-kept secret in the history of the republic — have irreversibly earned the branding as a farce.

Rather than employing the prosecution of alleged enemy combatants as a means to showcase America's commitment to the rule of law, these proceedings are a stain on the nation. The upshot of this folly is that America's enemies are vindicated in their harshest critiques and in the assertion that the nation is hypocritical in its purported dedication to human rights and constitutional principles.

There is, however, one aspect of the sorry spectacle at Guantanamo Bay that should be a source of pride for every American, as well as for all those who love liberty and who recognize that the true greatness of a nation and a people is revealed when times are toughest. The women and men who have served the MCDO are heroes for the ages. They are true "champions of liberty."

Every lawyer who has worked on the defense against these prosecutions has had to endure hardship and indignity that should never be seen in an American legal proceeding. Restricted access to clients, inadequate physical facilities and housing arrangements, government intrusion on the defense function, and secret intrusion by other governmental agencies are just some of the challenges. Additionally, these are also among the most complex and expansive prosecutions ever undertaken, with unprecedented volumes of discovery and massive witness lists resulting from investigations conducted in dozens of countries. And, of course, by seeking death, these prosecutions are geometrically more complex because the ultimate sentence is on the table, necessitating a broad mitigation investigation. General Baker's article provides some of the jaw-dropping data that puts the challenge into context.⁵ But the military commission proceedings at

Guantanamo have also extracted a heavy toll on the civilian attorneys and service personnel who have been detailed to this defense. General Baker compellingly describes the many sacrifices endured by the defense teams.⁶ Notwithstanding the considerable sacrifice, many have chosen commitment to their clients over career considerations. And many have indeed lost opportunities for promotion because their work in defending the rule of law has not been recognized.

Political leaders of all stripes are quick to praise the bravery of the nation's uniformed men and women who place themselves in harm's way to protect national security. And that praise is well-earned. At the same time, however, we must never lose sight of the fact that bravery can be demonstrated in many ways. Those who recognize that the same values for which service men and women are prepared to shed blood in the field of combat must also be upheld in a legal proceeding display an equally worthy manifestation of bravery. Though largely unrecognized, the lawyers who have been fighting for constitutional principles for a decade through the representation of some of the most reviled accused persons in U.S. history are role models for democracy.

And, as is patently evident in General Baker's article, they are led by a fiercely dedicated patriot who wears his uniform and the principles for which it stands with dignity and determination. For much of the pendency of the military commission proceedings at Guantanamo, there was a disparity in the rank of the head of the MCDO and the chief prosecutor. But a little known provision of the National Defense Authorization Act of 2014 changed that by requiring equivalency in rank.⁷ This change in law paved the way for the appointment of General John Baker.

While fully recognizing the skill and dedication of General Baker's predecessors,⁸ many of whom served during the darkest days of these proceedings, in John Baker the MCDO has a powerful and persuasive advocate. General Baker's record of service to the United States of America and the defense function is extraordinary. (See the profile of General Baker on page 19.) His willingness to speak out with pride and determination on behalf of the women and men who have upheld the noblest aspirations of the Sixth Amendment under the most difficult of circumstances should be an inspiration to all Americans. I can say conclusively that it is an inspiration to the defense bar.

NACDL is honored to publish General Baker's observations, and proudly dedicates this issue of *The Champion* to each and every defense lawyer, and the support staff of the MCDO, who soldier on, day in and day out, year in and year out, fighting every inch of the way in these woefully misguided military commission prosecutions to uphold the dignity of our nation. They will set an example for the ages of just exactly what it requires to fight for the principles of democracy. Their legacy will be the one shining light that endures from this dark chapter in American history.

Notes

1. *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).
2. Norman L. Reimer, *Guantanamo: Peering Through the Keyhole at America's Soul*, *The Champion*, July 2008 at 7.

3. *Id.*
4. John G. Baker, *Defending the Rule of Law: The Military Commissions Defense Organization*, *The Champion*, July 2016 at 18.
5. *Id.*
6. *Id.*
7. P.L. 113-66, sec. 1037. Grade of Chief Prosecutor and Chief Defense Counsel in Military Commissions Established to Try Individuals Detained at Guantanamo (providing that the Chief Defense Counsel and the Chief Prosecutor in the military commissions must be of equal grade).
8. Previous Chief Defense Counsel for MCDO listed in the order that they served: William Gunn, Dwight Sullivan, Steven David, Peter Masciola, Jeffrey Colwell, and Karen Mayberry.

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