

# Rites Without Rights: A Tale of Two Military Commissions

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This Essay, written as part of a symposium celebrating Judith Resnik's and Dennis Curtis's book *Representing Justice: Invention, Controversy, and Rights in City States and Democratic Courtrooms*,<sup>1</sup> explores the idea of justice being done and being seen to be done. Publicity and performance are central to the idea of modern courts. Courts in a democracy are supposed to perform their function publicly, openly, so that judges may be held accountable for their actions.<sup>2</sup> The adversarial process that characterizes American courts is likewise supposed to assist the courts in their search for truth and in their ability to do justice by "hearing the other side."<sup>3</sup> But in some proceedings justice only *seems* to be done. This Essay tells the stories of two military commissions and of the federal courts' reactions to them. Through these stories, it explores what happens when democratic institutions (in this case a democratically elected president) want rites—that is, justice being seen to be done—without rights. What ought a democratic society expect of courts and of the lawyers who argue before them in such moments of crisis?

In 1942 and 2001, two presidents created military commissions to convict the enemy. In 1942 the defendants were Nazi saboteurs; in 2001 the defendants were detainees held in Guantánamo Bay, Cuba. The

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1. JUDITH RESNIK & DENNIS CURTIS, *REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS* (2011). The title of this Essay is derived from Chapter 13 of the book, entitled "From 'Rites' to 'Rights.'" *Id.* at 288.

2. *Id.* at 301 ("[P]ublic processes of courts contribute to the functioning of democracies and give meaning to democratic aspirations that locate sovereignty in the people, constrain government actors, develop processes for norm elaboration, and insist on equality of treatment under law.").

3. *Id.* at 289-91.

purpose of both these commissions was to jettison traditional constitutional protections in favor of an easy governmental victory. The government asked lawyers on both sides (defense attorneys and prosecutors) to play the zealous advocate. It asked tribunal judges to oversee the proceedings to achieve the desired results. It asked federal judges to stay out of the fray or, if not, to play their part in legitimating these proceedings. The public performances of the military commissions and their representation in the press may be contrasted with the private conversations and unpublicized events that limited the federal courts' willingness to assert the importance of individual rights and to sit in judgment of their own state.

Part I of this Essay recounts the stories of these two commissions. Both were created by the government to harness legal procedures for political ends.<sup>4</sup> Yet in both cases, although the commissions were created in order to convict the defendants, they were structured as adversarial proceedings, permitting the defendant and his lawyer some modicum of participation in the trial. In both cases the press was harnessed to support the government's position that the tribunals were fair, and in both cases the federal courts ultimately sat in judgment of the legality of the commissions. But because it was an adversarial proceeding, the government was not always able to script the performance completely.<sup>5</sup>

Part II evaluates the promise of the federal courts and recounts the failure of the Supreme Court to realize the ideals of institutional independence and deliberation in each of these two military commissions.

Part III explores the constraints on the federal courts in responding to these military commissions. The formal requirements of law constrain the arguments that lawyers are able to make in court, and jurisprudential commitments constrain the arguments lawyers are willing to make. If the arguments the court hears are constrained by lawyers' craft, should judges be judged for not doing justice? This Part then turns to what the litigation over these military commissions achieved. Did the adjudications described here facilitate the recognition of rights, open a dialogue about what justice entails, or legitimate the government's actions? Does appeal to the courts within the constitutional order ultimately legitimate the

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4. OTTO KIRSCHHEIMER, *POLITICAL JUSTICE: THE USE OF LEGAL PROCEDURE FOR POLITICAL ENDS* (1961). Kirschheimer develops the concept of courts "beyond the constitutional pale" where the judicial apparatus is subordinated to the political command structure of society and the courts fail to adequately balance individual interests against those of the state. *Id.* at 95 n. 85.

5. Kirschheimer explains how the defendant "may sometimes win a point against the government, occasionally even fortified by the assistance of a lawyer worthy of his name. At any rate, he has a chance to hurl his defiance against the government and measure the abyss separating him from the official doctrine . . ." *Id.* at 97; see also RESNIK & CURTIS, *supra* note 1, at 302-03 (discussing the various uses and abuses of publicity of judicial proceedings from the perspective of the public).

military commissions, in that it leads society to put aside substantive injustice because formal procedural justice has been observed? On the other hand, to what extent have the courts incrementally transformed an unjust process for the good? These questions have been the subject of sociological study in other contexts and debated with respect to the civil rights movement.<sup>6</sup> In the context of the present military commissions, only history will provide the definitive answer.

### I. MILITARY COMMISSIONS AT MID-CENTURY AND TODAY

At the height of World War II, the Roosevelt Administration created a military commission to try eight Nazi soldiers who had made their way into the United States. The modern day military commissions in Guantánamo Bay were inspired by that precedent. Both commissions sought to mete out quick justice outside the normal constitutional order in makeshift tribunals with no preexisting rules. Most of the defendants in both the 1942 and 2001 military commissions originated from a legal regime very different from the liberal constitutional democracy of the United States and were in that sense foreigners to our legal system, in addition to being foreign citizens.<sup>7</sup> In both cases participants argued about whether the laws under which the defendants were being tried comported with traditional legal ideals, especially the prohibition on *ex post facto* laws.

There are important differences between the two commissions. The historical context is different. World War II was a conventional war, whereas the “War on Terror” is an unconventional war fought against non-state actors who do not respect international law. The 1942 commissions were held on United States soil, whereas the 2001 military commissions were held in Guantánamo Bay, Cuba, which is technically

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6. Some relevant sociological works include PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1998); JAMES C. SCOTT, *DOMINATION AND THE ARTS OF RESISTANCE: HIDDEN TRANSCRIPTS* (1992); and Michael W. McCann & Tracey March, *Law and Everyday Forms of Resistance: A Socio-Political Assessment*, 15 *STUD. IN L., POL'Y & SOC'Y* 207 (1995). On the question of the transformative capacity of Supreme Court opinions, see MARTHA L. MINOW, *IN BROWN'S WAKE: LEGACIES OF AMERICA'S EDUCATIONAL LANDMARK* (2010) (describing the lasting legacy of *Brown v. Board of Education*, 347 U.S. 483 (1954), outside the courts). For a critique of the power of the federal courts to effect civil rights reforms, see MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY* (2007) (arguing, among other things, that the Court's decision in *Brown* mobilized Southern whites).

7. Two of the Nazi saboteurs, Ernst Peter Burger and Herbert Hans Haupt, were naturalized American citizens. David Danelski, *The Saboteurs' Case*, 1 *J. SUP. CT. HIST.* 61, 62 (1996). Although none of the detainees held in Guantánamo Bay have been American citizens, several American citizens were held beyond the reach of the courts as part of the “War on Terror.” See Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Rumsfeld v. Padilla, 542 U.S. 426 (2004).

foreign territory, although it is fully controlled by the United States.<sup>8</sup> The two commissions have played out quite differently so far. As the stories below illustrate, the 1942 military commissions provided the speedy resolution they were meant to achieve and enabled the Roosevelt Administration to execute six of the eight Nazi saboteurs within a few weeks of their capture. By contrast, trials by military commission in Guantánamo Bay have moved at a glacial pace, with numerous detours to the federal courts. The way the federal courts treated these two military commissions is also quite different; the Supreme Court refused to exercise jurisdiction in 1942 and embraced it in 2006. Both these differences and the common threads that remain provide insights into the strengths and limitations of courts.

#### *A. Ex Parte Quirin*

Around midnight on June 12, 1942, a German submarine surfaced off the coast of Long Island.<sup>9</sup> Four men got into a rubber boat with four boxes of explosives, German military uniforms, and a great deal of money.<sup>10</sup> They headed to the beach. The men had been sent by the German government to sabotage strategic targets in the United States. The first person they met was a Coast Guard patrolman. They tried to bribe him with \$260.<sup>11</sup> He returned to his station, turned in the money, and alerted the authorities, but by the time the Coast Guard arrived on the scene the saboteurs were gone. They were already on their way to New York City. The Coast Guard recovered the explosives and uniforms that the men had buried in the sand. Little did the American authorities know that on June 16, another group of four would land on the coast near Jacksonville, Florida.<sup>12</sup>

Two days later, a man named George John Dasch called the FBI from New York City to inform them that just two days earlier he had arrived by submarine on the shore of Long Island from Germany with three other men.<sup>13</sup> Their purpose, he explained, was to sabotage strategic targets in the United States. Soon after his call, Dasch traveled to Washington, D.C.

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8. This became an issue in the litigation over the power of the federal courts to hear cases originating in the military commissions. See *Boumediene v. Bush*, 553 U.S. 723, 732 (2008) (holding that detainees held in Guantánamo Bay are constitutionally entitled to the writ of habeas corpus). The question of whether other United States constitutional protections apply in the Guantánamo military commissions remains open, but not because of its location.

9. Danelski, *supra* note 7; see LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 26 (2003). The facts described in this section can be found in these sources, unless otherwise noted.

10. FISHER, *supra* note 9, at 25-26.

11. *Id.* at 27; Danelski, *supra* note 7, at 63.

12. FISHER, *supra* note 9, at 35.

13. *Id.* at 32-33.

and submitted himself to protective custody. He provided information that enabled the FBI to apprehend all eight of the Nazi saboteurs by June 27.<sup>14</sup>

Dasch was a German who had lived in the United States, married an American, and served in the U.S. Army.<sup>15</sup> He claimed to have decided to turn himself and his co-conspirators in as soon as he reached the United States. A few of the other Nazi saboteurs also had American connections and upon landing appeared to be seeking to renew those ties rather than embark on any sabotage plan.<sup>16</sup> They were not a threatening group. A New York Times reporter, permitted to view the military commission courtroom a few weeks later, described the saboteurs as “ordinary looking individuals” who “were most inconspicuous physically and facially.”<sup>17</sup>

From the public’s perspective, the FBI successfully captured the saboteurs quickly and before they did any damage. But hidden from the public was the fact that the saboteurs had infiltrated the United States without being detected by the FBI. There was no reason to believe the FBI would have caught them had Dasch not turned in the two groups. This was an embarrassment for the FBI and the Roosevelt Administration.<sup>18</sup> The Administration risked exposing this embarrassment if Dasch was tried in civilian court. A trial would give Dasch the opportunity to tell his whole story.

The Administration was also driven by the likely outcome if Dasch and the others were tried in a civilian court. Because the men had not actually committed any acts of sabotage, it was not clear that the Government would prevail in a prosecution on that charge. In any event, the maximum sentence was only thirty years.<sup>19</sup> A lesser charge of conspiracy, which was the stronger case from the government’s perspective, would only result in a three-year sentence.<sup>20</sup> To avoid these results, the Roosevelt Administration decided to create a military commission to try Dasch and his erstwhile compatriots.<sup>21</sup> In a military commission, the government could try the saboteurs for violations of the laws of war and could impose the death penalty.

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14. LOUIS FISHER, CONG. RESEARCH SERV., RL 31340, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 3 (2002) [hereinafter FISHER, CRS].

15. *Id.* at 7; Danelski, *supra* note 7.

16. FISHER, CRS, *supra* note 14, at 28-29, 36-38. It seems that the plan was to wait at least two months before beginning the sabotage program. Danelski, *supra* note 7, at 63.

17. Lewis Wood, *Spy Court Session Viewed by Press: 11 Reporters Visit Shuttered, Closely Guarded Hall Where 8 Nazi Agents are on Trial*, N.Y. TIMES, July 11, 1942. The reporters were invited to view the defendants and the courtroom, but not to observe the proceedings. Pictures of the saboteurs can be found in Danelski, *supra* note 7, at 74-75, 77.

18. Danelski, *supra* note 7, at 65.

19. *Id.* at 66-67.

20. See FISHER, CRS, *supra* note 14, at 4.

21. See FISHER, *supra* note 9, at 46-49; Danelski, *supra* note 7, at 66-67.

The President issued a proclamation creating military commissions to try the German saboteurs only a week after the eight had been apprehended.<sup>22</sup> That same day the President issued a second order appointing the members of the military commission, the prosecutors, and the defense counsel.<sup>23</sup> The presidential order authorized the military commission to make its own rules, including rules of evidence. The rules governing the commission were promulgated on July 7 and consisted of a three and a half page, double spaced statement.<sup>24</sup> Only eight lines of this statement addressed the procedures that would be used in the trial. The document specifically addressed juror challenges (there were to be no peremptory challenges and only one challenge for cause), but all other rules were left to the discretion of the tribunal.<sup>25</sup> The rules gave only this guidance: "In general, wherever applicable to a trial by Military Commission, procedure of the Commission shall be governed by the Articles of War, but the Commission shall determine the application of such Articles to any particular question."<sup>26</sup>

The day after the rules were promulgated, the trial began. It was held in a makeshift courtroom, a former lecture and assembly hall, room 5235 of the Department of Justice building. The proceedings were closed to the public.<sup>27</sup> The glass doors at the end of the corridor were blacked over; the windows covered in dark curtains.<sup>28</sup> In sum, everything about the trial was irregular. It was a secret tribunal created out of whole cloth with the sole purpose of convicting the defendants and sentencing them to death.

The lawyers' initial strategy was to participate. They did not attempt to block the tribunal in the federal courts as the trial began. Yet from the beginning, an appeal to the federal courts was in the back of their minds. On July 6, Colonel Kenneth Royall, who had been appointed to represent seven of the eight defendants, had written to the President expressing his concern about the constitutionality of the military commissions and seeking the President's permission to appeal to the federal courts.<sup>29</sup> According to later historical accounts, Royall thought from the beginning that the defendants had a constitutional right to a civilian forum, but as a military officer he hesitated to challenge the Presidential Proclamation.<sup>30</sup>

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22. Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942); FISHER, CRS, *supra* note 14, at 5.

23. 7 Fed. Reg. 5103 (July 7, 1942); FISHER, CRS, *supra* note 14, at 6.

24. FISHER, CRS, *supra* note 14, at 7.

25. *Id.* at 8.

26. *Id.* (quoting Order of July 2, 1942, 7 Fed. Reg. 5103 (1942)).

27. *Id.* The rules promulgated by the military commissions required that they be closed to the public; select members of the press were allowed in on July 11 for a short period. *Id.*

28. *Id.* at 7.

29. *Id.* at 11.

30. Carlos M. Vázquez, "Not a Happy Precedent": *The Story of Ex Parte Quirin*, in FEDERAL

The military commission was entirely within the chain of command. For this reason, Royall sought the President's permission to bring a suit in the federal courts even before the trial began. Roosevelt's aide is reported to have told him to "use his own judgment."<sup>31</sup> Royall responded by writing the President a letter confirming his understanding that he would seek civilian counsel to bring an appeal in the federal courts or, if that were not possible, pursue an appeal on his own.<sup>32</sup> Today, the idea of a lawyer requiring the permission of the prosecuting entity to file a habeas petition seems like a blatant conflict of interest. It is to Royall's credit that he decided to go forward with the habeas proceeding. In contrast, Colonel Carl Restine, counsel for Dasch, did not believe he was authorized to appeal to the federal courts, although he did apparently think that civilian counsel could do so on the defendants' behalf.<sup>33</sup>

On July 21 Royall told the tribunal that he intended to file a writ of habeas corpus.<sup>34</sup> The trial had already been going on for twelve days. Before he filed anything with the lower courts, Royall began contacting Justices of the Supreme Court to see if they would hear a habeas petition over the summer when the Court was not in session.<sup>35</sup> Royall and the prosecution, including Attorney General Francis Biddle, met with Justices Hugo Black and Owen Roberts, and talked to Chief Justice Harlan Fisk Stone by phone over a period of days near the end of July to see whether the Justices would be willing to hear the case in a special term. As soon as the Justices agreed to hear the case in a special session—the Court set the argument for July 29—Royall filed for a writ with the United States District Court for the District of Columbia.<sup>36</sup> The case was entitled *Ex Parte Quirin*. On the evening of July 28, the district judge ruled that the federal courts lacked jurisdiction and Royall appealed directly to the Supreme Court.<sup>37</sup> The Supreme Court, as promised, heard oral argument on July 29 and 30. There was no time to review the briefs, which were submitted on July 29, so the Justices had to rely on oral argument.<sup>38</sup> The oral argument was long, lasting nine hours. Only after the oral argument was heard did the defense counsel file a notice of appeal and perfect their

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COURTS STORIES 219, 227 (Vicki C. Jackson & Judith Resnik eds., 2010).

31. *Id.*

32. FISHER, *supra* note 9, at 58-59; Danelski, *supra* note 7, at 68.

33. FISHER, CRS, *supra* note 14, at 12; Vázquez, *supra* note 30.

34. FISHER, CRS, *supra* note 14, at 12.

35. *Id.*

36. *Id.*

37. *Ex Parte Quirin*, 47 F. Supp. 431 (D.D.C. 1942), *aff'd per curiam*, 317 U.S. 1 (1942); FISHER, CRS, *supra* note 14, at 12.

38. FISHER, CRS, *supra* note 14, at 16.

appeal to the D.C. Circuit.<sup>39</sup> Like the military commissions themselves, everything about the appeal to the Supreme Court was irregular.

The Justices had various degrees of intimacy with the Roosevelt Administration. Eight of the Justices sitting on the Court in 1942 had been appointed by Roosevelt. Seven of them had been on the Court less than five years and three of those had come to the bench from high positions in the Roosevelt Administration only one year earlier.<sup>40</sup> Justice James F. Byrnes Jr. had been working as a de facto member of the Administration for the previous seven months, assisting with the war effort.<sup>41</sup> Justice Felix Frankfurter played an active role in the decision to try the saboteurs by military commission. At a dinner party on June 29, he had advised Secretary of War Stimson to choose a military commission.<sup>42</sup> Chief Justice Stone's son served as one of the military defense attorneys for the saboteurs.<sup>43</sup> Both sides agreed that the Chief Justice could hear the case because his son, Lauson Stone, was not involved in the habeas proceedings.<sup>44</sup> Justice Frank Murphy, who was a reserve army lieutenant colonel on active duty for the summer, reluctantly disqualified himself at Justice Frankfurter's urging.<sup>45</sup>

The pressure on the Court was enormous. The President had told the Attorney General, Francis Biddle: "I want one thing to be clearly understood, Francis. I won't give them up. . . . I won't hand them over to any United States marshal armed with a writ of *habeas corpus*. Understand!"<sup>46</sup> According to historical accounts, the statement was conveyed to the Justices through Justice Roberts, and Chief Justice Stone is said to have commented, "That would be a dreadful thing."<sup>47</sup> Justice Black reflected years later that Roosevelt had succeeded in "stamping" the Court.<sup>48</sup>

The Court moved quickly. Within a day of oral argument the Supreme Court returned a *per curiam* opinion denying the writ and upholding the jurisdiction of the military commission.<sup>49</sup> It was one of the fastest

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39. *Ex Parte Quirin*, 317 U.S. 1, 1 (1942) (per curiam).

40. Vázquez, *supra* note 30, at 229.

41. Danelski, *supra* note 7, at 69.

42. FISHER, CRS, *supra* note 14, at 20; Danelski, *supra* note 7, at 69-70; Vázquez, *supra* note 30, at 225.

43. FISHER, CRS, *supra* note 14, at 20.

44. *Id.* at 20.

45. Danelski, *supra* note 7, at 69.

46. Vázquez, *supra* note 30.

47. *Id.*

48. Vázquez, *supra* note 30, at 229 (quoting JOHN P. FRANK, *MARBLE PALACE: THE SUPREME COURT IN AMERICAN LIFE* 249 (1958)).

49. *Ex Parte Quirin*, 317 U.S. 1, 1 (1942) (per curiam); see Vázquez, *supra* note 30, at 97 (discussing procedural irregularity of direct appeal from D.C. District Court); *id.* at 108 (discussing



decisions ever reached by the Court, taking only eight days from the moment they were aware of the petition to issuing the *per curiam*. The saboteurs' appeal failed, but it is the way it failed that is interesting. The petitioners were executed long before the Court announced its reasoning for denying them review.<sup>50</sup>

It is unlikely that the Court had the time to consider fully all the information before it. There were three thousand pages of trial transcripts as well as seventy-page briefs. Furthermore, some of the information the Court received was misleading. For example, at the beginning of oral argument, Justice Jackson asked whether any of the defendants had attempted to turn themselves in. Royall answered that they had not. This was technically true because the defendants whom Royall represented had not turned themselves in. But the representation was misleading to the extent that it indicated that none of the saboteurs had turned themselves in. After all, they were caught because one of their number, Dasch, *had* turned himself in. Because Ristine had chosen not to bring an appeal, he was not there to correct the misimpression or present Dasch's perspective to the Court. Why Royall did not highlight Dasch's actions is unknown. It may be because one of the reasons driving the Roosevelt Administration to try the saboteurs by military commissions was to protect the FBI from embarrassment. But for Dasch's actions, the FBI would not have caught the saboteurs for some time. If the Court had had more time, this misleading statement might have been corrected. The information about Dasch's actions was in the record, which was largely made up of a three-thousand-page transcript of the military commission trial.<sup>51</sup> It is unlikely that the Court had the time to review it fully before the decision was rendered.

The first Supreme Court opinion in *Ex Parte Quirin*, was a *per curiam* decision dated July 31, 1942.<sup>52</sup> It was only a page long. The opinion stated that the Court had "fully considered the questions raised in these cases," but that since an opinion would "require a considerable period of time for its preparation," the Court was issuing its decision prior to writing that opinion.<sup>53</sup> The remainder was a bare-bones ruling that the President had the power to try the defendants before a military commission, that the military commission was lawfully constituted, and that the defendants were not entitled to habeas corpus because they were held in lawful

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*per curiam* opinion).

50. The defendants were executed on August 8, 1942, but the Court's reasoned opinion was not issued until October 29 of that year. *Quirin*, 317 U.S. at 1.

51. Vázquez, *supra* note 30, at 227 & n.26.

52. *Quirin*, 317 U.S. at 1.

53. *Id.*

custody.<sup>54</sup>

The Supreme Court having issued its decision, the trial continued. On August 3 the military panel issued its verdict, finding all eight of the saboteurs guilty and sentencing them to death.<sup>55</sup> President Roosevelt reviewed the trial transcript the next day and ordered six of the eight to be given the death penalty. They were executed on August 8. Dasch's sentence was commuted to thirty years. Ernst Peter Burger, who had arrived with Dasch that fateful night in June and turned himself in along with Dasch, had his sentence commuted to life in prison.<sup>56</sup>

Justice Stone began drafting the Court's full opinion in August. In mid-September he circulated a draft to the other Justices, and the process of trying to craft a final opinion began in earnest.<sup>57</sup> The Justices substantially disagreed over the basis for the decision.<sup>58</sup> Yet they had to justify the outcome because the decision had been announced and the defendants executed. Justice Douglas later reflected that although it was "easy to agree on the original *per curiam*, we almost fell apart when it came time to write out the views."<sup>59</sup> For example, could the Court consider whether the military commissions violated the laws of war given that its procedures were kept a secret? What if the surviving defendants appealed on the basis that the procedures were unlawful under the laws of war? The Court might be embarrassed if it turned out that it had held the commissions lawful prior to the execution only to learn its procedures rendered it unlawful. The Justices also disagreed on the source and extent of the President's power to convene military commissions. Justice Jackson was pressured into withdrawing a concurring opinion on this question.<sup>60</sup> Justice Frankfurter, who had encouraged the Secretary of War Stimson to try the saboteurs by military commission, wrote a very strange "soliloquy"—styled as a conversation between himself and an executed saboteur—with heartfelt arguments in favor of the military commissions.<sup>61</sup> Ultimately, the Justices agreed on an opinion that left many questions unanswered, holding that it was unnecessary to decide the

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54. *Id.*

55. FISHER, CRS, *supra* note 14, at 13.

56. *Id.* at 15.

57. *Id.* at 28.

58. For a detailed account of the nature and basis of the disagreement, see FISHER, *supra* note 9, at 113-21.

59. *Id.* at 117 (quoting WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939-1975*, at 138-39 (1981)).

60. FISHER, CRS, *supra* note 14, at 31; Danelski, *supra* note 7, at 76-77; see also Jack Landman Goldsmith, *Justice Jackson's Unpublished Opinion in Ex Parte Quirin*, 9 GREEN BAG 223 (2006) (setting Justice Jackson's unpublished concurrence in the context of his other decisions on presidential authority).

61. FISHER, CRS, *supra* note 14, at 20.

reach of the President's power to create military commissions or the parameters of those commissions.<sup>62</sup>

Justice Frankfurter changed his opinion over the years.<sup>63</sup> After the extended opinion was issued in October, Frankfurter consulted an expert on the laws of war who concluded that the procedure for creating the military commissions was flawed.<sup>64</sup> The Justices expressed regret for the way the *Quirin* case had been handled. In 1953, the Court discussed whether to hear an expedited review of the espionage and treason case of Ethel and Julius Rosenberg. Justices Frankfurter and Jackson both opposed the idea, having learned a lesson from *Quirin*.<sup>65</sup> Justice Frankfurter wrote, "We then discussed whether, as in *Ex parte Quirin*, 317 U.S. 1, we might not announce our judgment shortly after the argument, and file opinions later, in the fall. Jackson opposed this suggestion also, and I added that the *Quirin* experience was not a happy precedent."<sup>66</sup> Justice Douglas explained his own views in an interview twenty years later:

The experience with *Ex parte Quirin* indicated, 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.<sup>67</sup>

### *B. Hamdan v. Rumsfeld*

The military commissions that remain active in Guantánamo Bay, Cuba are a more familiar story.<sup>68</sup> In November 2001, President George W. Bush issued an order creating military commissions to try detainees held in the "War on Terror."<sup>69</sup> Those commissions were to be held in Guantánamo

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62. *Ex parte Quirin*, 317 U.S. 1, 29 (1942) (per curiam); FISHER, CRS, *supra* note 14, at 32-33.

63. FISHER, CRS, *supra* note 14, at 39.

64. *Id.* at 38-39.

65. *Id.* at 39. For a discussion of the Court's mishandling of the Rosenberg case and the role of the different Justices in that debacle, see Brad Snyder, *Taking Great Cases: Lessons from the Rosenberg Case*, 63 VAND. L. REV. 885 (2010).

66. FISHER, CRS, *supra* note 14, at 39.

67. *Id.*

68. Much has been written on the Guantánamo Bay military commissions. For critical analyses, see JOSEPH MARGULIES, *GUANTÁNAMO AND THE ABUSE OF PRESIDENTIAL POWER* (2007); MICHAEL RATNER & ELLEN RAY, *GUANTÁNAMO: WHAT THE WORLD SHOULD KNOW* (2004); CLIVE STAFFORD SMITH, *EIGHT O'CLOCK FERRY TO THE WINDWARD SIDE: FIGHTING THE LAWLESS WORLD OF GUANTÁNAMO BAY* (2007); and David W. Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantánamo Military Commissions*, 12 LEWIS & CLARK L. REV. 131 (2008). For a defense, see, for example, Frederic L. Borch III, *Why Military Commissions Are the Proper Forum and Why Terrorists Will Have "Full and Fair" Trials: A Rebuttal to Military Commissions: Trying American Justice*, ARMY L., Nov. 2003, at 10 (providing a defense of the system written by the Chief Prosecutor).

69. Military Order of November 13, 2001, 66 Fed. Reg. 57, 833 (Nov. 13, 2001).

Bay, Cuba, on a military base that is technically part of Cuba's sovereign territory but is under the complete control of the United States. The Guantánamo military commissions are beyond the constitutional pale in a literal sense, in that they have been set up outside of the United States, initially to avoid the reach of the federal courts and constitutional constraints which protect defendants, and more recently to protect the American citizenry.<sup>70</sup>

A conceptual separation accompanies that physical one. One of the greatest complaints about the military commissions is that they were initially conceived to be completely within the military chain of command. The judge or "presiding officer" was appointed by the prosecuting entity, the Department of Defense. The only route to an appeal was through the President, as Commander-in-Chief, who was also the head of the prosecuting entity.<sup>71</sup> As Judith Resnik and Dennis Curtis explain:

The distance between the work of those in a building marked by the words "Honor Bound to Defend Freedom" and the requirements imposed on those obliged to provide equal justice and hear both sides is echoed by the Guantánamo procedures, which lack the central normative obligations that define courts. As Bruce Ackerman has commented, the oath taken by officials at Guantánamo tribunals did not affirm commitments specifically to the United States Constitution. Nor were these officials asked to repeat what federal judges must say when they take office, that they "will administer justice without respect to persons, and do equal right to the poor and to the rich, and will faithfully and impartially discharge and perform all duties incumbent . . . under the Constitution of the United States." The military decisionmakers sat inside the chain of command, in no way independent from the Appointing Authority, the Secretary of Defense. Guantánamo's processes harked back to Renaissance Europe, where judges' charters depended on the ruling powers. . . .<sup>72</sup>

The first in the long series of habeas corpus appeals to the federal courts on behalf of Guantánamo detainees was *Rasul v. Bush*.<sup>73</sup> In that case, the Court was asked to decide whether the federal courts had habeas jurisdiction over non-citizen detainees held in Guantánamo. The lawsuit

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70. See RESNIK & CURTIS, *supra* note 1, at 327-28. A recent attempt to hold a civilian trial for detainees in New York City was met with fierce opposition. See Charlie Savage, *In Reversal, Military Trials for 9/11 Cases*, N.Y. TIMES, Apr. 5, 2011, at A1.

71. RESNIK & CURTIS, *supra* note 1, at 332. They share this quality with the military commission that tried the Nazi Saboteurs.

72. *Id.* at 332-33.

73. 542 U.S. 466 (2004).

was filed by civilian counsel on behalf of detainees.<sup>74</sup> The government had assigned JAG lawyers to defend the detainees in future military commission proceedings, but at that time had not yet assigned these defense lawyers actual clients. Neil Katyal, then a law professor at the Georgetown University Law Center, proposed to these lawyers—who were still waiting to be assigned clients—that they file a lawsuit on their own behalf. He suggested that they argue that they “shouldn’t be made to participate in an unconstitutional proceeding, that doing so contradicts [their] oath to uphold the Constitution.”<sup>75</sup> The lawyers refused, explaining that without clients they could not file any suits. As one of them explained, “My entire professional career I’ve worked with the understanding that a defense counsel has no stake in any case unless he represents a client with an interest, and I can’t see a way around that now.”<sup>76</sup> In the end, the military defense lawyers, with Katyal’s help, decided to file an amicus brief arguing that nobody was speaking for their future clients, who were the only detainees that both parties in the *Rasul* litigation agreed were not entitled to immediate access to habeas corpus.<sup>77</sup> That amicus brief marked the beginning of a long fight in the federal courts that culminated in the case of *Hamdan v. Rumsfeld*.<sup>78</sup>

The second person slated to be tried by military commission was Salim Hamdan, infamous in the United States for being Osama bin Laden’s driver.<sup>79</sup> One of the lawyers who had filed the amicus in *Rasul*, Lieutenant Commander Swift, was assigned Salim Hamdan as his client. Katyal remained involved in a habeas appeal on Hamdan’s behalf.

Hamdan was scheduled to be tried by military commission in 2004. The trial proceeded even as Hamdan’s habeas appeal was pending. During voir dire before the military commission, Hamdan was excluded from the proceedings, although he had not been disruptive.<sup>80</sup> The military

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74. One of these was a not-for-profit organization, the Center for Constitutional Rights. The other was a prominent law firm that represented several Kuwaiti families who believed their relatives were being held in Guantánamo.

75. JONATHAN MAHLER, *THE CHALLENGE: HAMDAN V. RUMSFELD AND THE FIGHT OVER PRESIDENTIAL POWER* 67 (2008) (quoting E-mail from Neal Katyal, Professor, Georgetown Law School to Lt. Cmdr. Charles Swift and Lt. Cmdr. Philip Sundel, Department of Defense (around Mar. 2003)).

76. *Id.* at 69 (quoting E-mail from Philip Sundel, Lt. Cmdr., Department of Defense, to Neal Katyal, Professor, Georgetown Law School (Nov. 10, 2003)).

77. *Id.* at 69-70. See Brief of the Military Attorneys Assigned to the Defense in the Office of Military Commissions as Amicus Curiae in Support of Neither Party, *Rasul v. Bush*, 542 U.S. 466 (2004) (No. 03-343), 2004 WL 96765.

78. 548 U.S. 557 (2006).

79. The first person slated for trial was an Australian named David Hicks, who ultimately pled guilty and received nine months in prison and a seven-year suspended sentence. See Alexandra Lahav, *Portraits of Resistance: Lawyer Responses to Unjust Tribunals*, 57 UCLA L. REV. 725, 736-741 (2010) (describing the trial of David Hicks).

80. See MAHLER, *supra* note 75, at 133-37.

commission rules gave the presiding officer discretion in this, as in all other matters. In fact, the presiding officer could allow hearsay, coerced evidence, and, in the first iteration of the military commissions, evidence obtained through cruel and inhumane treatment or even torture.<sup>81</sup> Again and again, as they made their way up the federal court hierarchy, the lawyers successfully used the presiding officer's decision to exclude Hamdan to prove that the commissions were unfair.<sup>82</sup> The *fact* of his exclusion seemed more offensive to fundamental ideas of due process than the existence of an abstract discretionary rule permitting such exclusion. Because the lawyers participated in that first tribunal, they were armed with a concrete and powerful example of the military commission's overreaching.

First-person accounts can illuminate injustice better than abstract descriptions. One lawyer who participated in the military commissions described the courtroom in Guantánamo where Hamdan's trial took place:

Although there was no judge in these proceedings, the presiding officer was ordered to wear a robe (and ours carried a gavel); although this was a commission and not a court, the commission room, formerly a dental clinic, was swathed in blue velvet curtains and rich, dark wood furniture so as to look like a courtroom. The curtains only went two thirds of the way up the painted cinder block wall—just high enough to fill the frame of the closed circuit video cameras. For those of us appearing as defense lawyers in the commissions, we knew we were on a hastily constructed set, where costume and props and scenic design attempted to consecrate the once-barren space. In our very first commission session, we were handed a document listing speaking parts for the presiding officer, the lawyers, and our client, and ordered, with no apparent sense of irony, to follow “the script.”<sup>83</sup>

Hamdan's appeal reached the Supreme Court in 2005. Writing about the experience, Katyal explained his strategy. He specifically focused on the argument that the military commissions were an unconstitutional exercise of executive power in the absence of congressional authorization. Katyal explained that although some advocacy groups wanted him to argue that the military commissions were unconstitutional, a broader strategy would have been quite premature. One day the Court may need to reach them, but for purposes of Hamdan, it was appropriate to say that the Court could strike down the commissions and invite corrective action, if

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81. Glazier, *supra* note 68, at 185-94.

82. *Id.* at 159 (describing the oral argument before Judge Robertson in October 2005).

83. Munir Ahmad, *Resisting Guantánamo: Rights on the Brink of Dehumanization*, 103 NW. U. L. REV. 1683, 1763 (2009).

necessary.”<sup>84</sup>

Ultimately, Hamdan prevailed under Katyal’s theory. The Court ruled in *Hamdan v. Rumsfeld* that the military commissions, as presently constituted, violated separation of powers principles.<sup>85</sup> That was not the end of the story. Congress speedily ratified the military commissions with some minor changes.<sup>86</sup> The lawyers’ success was short lived. While there is an argument that the Military Commissions Act of 2006 ameliorated the worst injustices, there remained substantial criticisms of the military commission process that called its fairness into question.<sup>87</sup> But this was not the end of Hamdan’s battle in the federal courts.

In July 2008, days before he was set to be tried by military commission, Salim Hamdan appealed to the D.C. District Court to stay his trial and rule that the trial procedures violated due process.<sup>88</sup> The court declined to hear the case, pointing to Hamdan’s right to appeal after the military commission trial had been completed. The judge recognized that judges might differ on the requirements of procedural justice and left the determination up to the appellate process.<sup>89</sup> He took pains to recognize the legitimacy of the military commission, explaining that “Article III judges do not have a monopoly on justice.”<sup>90</sup> The judge then wrote about the importance of the *appearance* of fairness: “The eyes of the world are on Guantánamo Bay. Justice must be done there, and must be seen to be done there, fairly and impartially.”<sup>91</sup>

Sixty-six years after the trial of the Nazi saboteurs, Salim Hamdan was finally scheduled to go to trial before the new military commissions. He had been in Guantánamo for five years. At Hamdan’s trial, the presiding officer held that the Fifth Amendment did not apply to the commission proceedings, but he did exclude some evidence he found was obtained by coercion.<sup>92</sup> Hamdan was found guilty of providing material support to a terrorist organization and sentenced to five and a half years, but because

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84. Neal Kumar Katyal, *Hamdan v. Rumsfeld: The Legal Academy Goes To Practice*, 120 HARV. L. REV. 65, 95 (2006).

85. 548 U.S. 557 (2006).

86. Military Commissions Act of 2006, 10 U.S.C. §§ 948-50 (2008). See generally Glazier, *supra* note 68 (analyzing the Military Commissions Act).

87. Neither does the more recent decision in *Boumediene v. Bush*, 553 U.S. 723 (2008), address these questions. That decision permitted habeas petitions to proceed in the lower federal courts. See Judith Resnik, *Detention, the War on Terror and the Federal Courts*, 110 COLUM. L. REV. 579, 628-29 (2010) (analyzing *Boumediene* and describing scholarly reactions to the decision).

88. See *Hamdan v. Gates*, 565 F. Supp. 2d 130 (D.D.C. 2008).

89. See *id.* at 137.

90. *Id.*

91. *Id.* at 137.

92. Ruling on Motion to Suppress Statements Based on Coercive Interrogation Practices, *United States v. Hamdan*, CMCR 09-002 (July 20, 2008); Ruling on Motion to Suppress Statements Based on Fifth Amendment, *United States v. Hamdan*, CMCR 09-002.

he had already served five years in Guantánamo, his sentence amounted to four months.<sup>93</sup>

## II. THE IDEALS OF JUDICIAL INDEPENDENCE AND REASONED DELIBERATION

When Judge Robertson said that “Article III judges do not have a monopoly on justice,” his statement was correct. There are ordinarily different ways to achieve justice outside the federal courts—through litigation in state courts, political action and protest, and legislative action. But in the context of the military commissions, the statement takes on a different dimension. The lawyers did have special expectations of Article III judges. Their argument was that Article III courts have a monopoly on justice because they can assert that constitutional protections apply in Guantánamo over the objections of the other branches of government. Do the courts correspondingly have a special obligation to define procedural justice for the military commissions?

In concert with the judges’ role, the lawyers’ central role is to make legal arguments to the tribunal on behalf of their client.<sup>94</sup> The premise of the lawyer’s role in an adversarial system is the idea that justice is achieved by equal and opposite arguments being tested against one another before a neutral arbiter—the judge—who issues a ruling that presumably correctly applies the law to the facts at hand. This assumption is, in turn, based on the belief that reasoned argument can alter outcomes. That is not to say that this belief is not questioned. Nevertheless, the power of reasoned deliberation to achieve rectitude remains a foundation of lawyer self-understanding and of the adversarial system.

The belief that the judge will reach the correct result—with the assistance of the lawyer’s presentation of the arguments—rests on two principles: judicial independence and reasoned deliberation. When these two principles break down, as they did in various ways in *Ex Parte Quirin* and *Hamdan v. Rumsfeld*, this creates a crisis for the lawyers’ professional role, as well as for the judges. As Otto Kirchheimer explained:

[C]ourts are prone to put the disciplinary problem and the “lawyers as an officer of the court” theorem in the foreground, overlooking a special feature, absent in this form from other trials:

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93. See Robert F. Worth, *Bin Laden Driver To Be Sent to Yemen*, N.Y. TIMES, Nov. 25, 2008, <http://www.nytimes.com/2008/11/26/washington/26gitmo.html>.

94. KIRCHHEIMER, *supra* note 4, at 254-55 (discussing the relationship of the lawyer and client in political trials and the role of the courts in disciplining lawyers, especially lawyers representing “marginal political elements”); JUDITH SHKLAR, LEGALISM: LAW, MORALS, AND POLITICAL TRIALS 8-9 (1964) (defining legalism as an ethical attitude that morality consists of rule following, and noting that legalism is “the operative outlook of the legal profession”).



their own emotional and political involvement, the fact that the credibility of the trial, their own credibility, and that of the state organization they serve are for better or worse inseparably linked.<sup>95</sup>

The choices judges and lawyers made in these moments of crisis reveals the limits of the courts in a democracy.

### *A. Judicial Independence*

One basis for the legitimacy of the federal courts in the American system of government stems from separation of powers principles. The federal courts are understood as separate and independent from both the executive and the legislature. Curtis and Resnik point out that lack of judicial independence was a key complaint of the colonists against George III and establishing an independent judiciary was a central component of both the state and federal constitutions they drafted.<sup>96</sup>

Alexander Hamilton wrote that the power of the judicial branch is largely a function of public trust, having “no influence over either the sword or the purse.”<sup>97</sup> Justice Frankfurter similarly opined in his dissent in *Baker v. Carr* that “[t]he Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction.”<sup>98</sup> One of the problems with the perception of court independence as its source of authority is that the courts are not in fact separate from the other political branches.<sup>99</sup> Courts are more interdependent than independent, relying on the executive “not only to enforce court orders but also for their budgets, staff, facilities, and often, their jurisdiction to hear certain categories of cases.”<sup>100</sup> Courts do not choose their own membership; federal judges are appointed by the executive with the advice and consent of Congress.<sup>101</sup> Finally, the minority or the dissenter who comes before the federal courts seeking redress faces another problem. To the extent that the courts’ legitimacy rests on public perception and the public is hostile to the marginalized individual or group, they may be concerned that the courts are not, in fact, independent and outside the political fray, but instead deeply imbedded in it.

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95. KIRCHHEIMER, *supra* note 4, at 255-56.

96. RESNIK & CURTIS, *supra* note 1, at 292.

97. THE FEDERALIST No. 78, at 523 (Alexander Hamilton).

98. *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting).

99. See Alexandra D. Lahav, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993, 999-1000 (2011) (citing sources for the proposition that checks and balances, rather than separation of powers, is the better metaphor).

100. RESNIK & CURTIS, *supra* note 1, at 292.

101. U.S. CONST. art. II, § 2.

Reasonable people differ on what will sustain public confidence in the courts. For example, Justice Frankfurter wanted the federal courts to stay out of the political fray and to police the lines between judicial and so-called political questions vigorously.<sup>102</sup> These lines are very difficult to draw, but they are also central to a liberal democracy.<sup>103</sup> Furthermore, the decision not to act is also a form of action. Some members of the public will inevitably criticize the judiciary's refusal to intervene, and for others staying out of the fray will diminish the judiciary's standing.

The *Quirin* case illustrates some of the problems that can arise as a result of the unavoidable interrelationship between the branches in the extreme case. Having no power itself, the judicial branch is dependent not only on public will but also on the other branches respecting its rulings and following its injunctions. This mutual respect is the foundation on which the courts act. When the President threatens to ignore court injunctions, as Roosevelt did in *Quirin*, or when Supreme Court Justices advise the executive on actions that later come before the Court, as Justice Frankfurter did, that interrelationship strains the Court's ability to make independent judgments.

In *Hamdan v. Rumsfeld*, by contrast, the Court stood up to the executive branch, holding that the President lacked the power to create military commissions absent Congressional action. Yet the Court avoided making determinations regarding the minimum procedural protections that ought to be available to detainees being tried by military commission, essentially giving Congress a free hand to shape the commissions to its liking. Judith Shklar's explanation is as apt today as it was fifty years ago:

When the Court leaves Congress free to act, it in effect gives its stamp of approval to those actions . . . . In acquiescing to Congress one may preserve the fiction of a nonpolitical Court by making its decisions uncontroversial. It is a political calculation that any judge faced with a political trial must make.<sup>104</sup>

Deferring to the legislative branch allowed the Court to assert its power and police the line between law and politics without a direct confrontation. By deferring to Congress, the Court gave the impression of deference to the political branches even as it limited executive power. Yet in so doing, the Court did not assert the power of law over expedience and refused to define the elements of procedural justice required for a trial to be fair. The Court left open to the Government the ability, whether

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102. See Rachel E. Barkow, *More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy*, 102 COLUM. L. REV. 237, 265-66 (2002) (discussing Frankfurter's dissent in *Baker v. Carr*).

103. See SHKLAR, *supra* note 94, at 217.

104. *Id.* at 217.

through the legislative or executive branches, to try outsiders without traditional procedural protections. In *Quirin*, the decision was more limited in some ways but more protective in others—there the Court did not distinguish between citizens and foreigners.<sup>105</sup> The limited approach of the *Hamdan* Court was encouraged by the lawyers, who adopted a theory that the Court should be asked to rule on narrower separation of powers grounds rather than delve into what constitutional protections, if any, apply in Guantánamo.<sup>106</sup>

### *B. Reasoned Deliberation*

The second basis for court legitimacy is that courts operate within preexisting legal structures and issue reasoned opinions based on the application of the law to the facts of the case. By applying regular procedures that are determined in advance, the courts are supposed to administer the law impartially and fairly and law remains relatively autonomous. Reasoned deliberation and independence are interrelated. The courts are able to engage in reasoned deliberation because they are independent; professional mores allow them to maintain that independence. Reasoned opinions, the public embodiment of judicial deliberation, allow the public to check that the courts are in fact engaged in the process of legal reasoning. For some, the underlying faith is that through the process of reasoned deliberation made public, the courts will reach just decisions.

The story of *Ex parte Quirin* illustrates a failure of this theory to be realized in practice in two ways. First, the judges did not engage in reasoned deliberation because they did not have time. To the extent that the petitioner's lawyers were trying to appeal to the logic of the law to save their clients, the futility of the endeavor is evidenced by the fact that the court was unable to work out the legal reasoning prior to its decision. There was no opportunity for justice to work its way into the discussion through reasoned deliberation.<sup>107</sup> The failure of principle in *Quirin* is not only in the substance of the decision, which has been largely rejected, but also in the failure of the fundamental requirement that a court provide reasons for its decision. An opinion issued after the result is a *fait accompli* cannot rid itself of the impression (and the reality) of

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105. See Resnik, *supra* note 87, at 593.

106. This point is elaborated in the discussion of Katyal's strategy. See Katyal, *supra* note 84; *infra* notes 129-132 and accompanying text.

107. The process of reasoning to reach just outcomes is the bulwark of Lon Fuller's theory that law will not work its way towards iniquity: "When men are compelled to explain and justify their decisions, the effect will generally be to pull those decisions toward goodness, by whatever standards of ultimate goodness there are." Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 636 (1958).

rationalization rather than reason. This hard truth plagued the Justices, who as we have seen expressed regret over the procedures in that case. The Justices put themselves in the unpleasant position of trying to justify their decision after the fact. Was this a failure of process and timing in that particular case or an assault on the methodology of reasoning itself?

Second, even if the Justices had had time, it is unclear that the process of reasoned deliberation would have resulted in a just outcome. The story of *Quirin* leaves open the question of what would have happened had the Justices engaged in a process of reasoned deliberation instead of a rush to judgment. On the one hand, after looking more carefully at the laws of war and reading through the trial transcript, the Justices might have reached a different result. For example, the Justices might have picked up on the fact that Dasch had turned himself in to the authorities and intended to do so from the beginning. On the other hand, the political pressures of the moment would have remained intense into the fall of 1942 and beyond, even if the Court had taken its time. First, the President's threat that he would disregard any writ issued by the Court put that institution in a shaky position. Second, the Justices were intimately involved with the Administration. Justice Frankfurter had, after all, advised members of the Administration to pursue a military commission strategy. Third, the alternatives—particularly trial in a civilian court—were unpalatable, not least because the maximum sentence was quite short. Finally, and perhaps most importantly, the country remained at war for several more years.

Sixty years later, when deciding *Hamdan v. Rumsfeld*,<sup>108</sup> the Justices of the Supreme Court had a substantial amount of time to consider the legality of the military commissions in Guantánamo. Hamdan's case made its way through the federal system at a pace that gave the Justices years to contemplate the issues raised by trying detainees in the "War on Terror" by military commission in Guantánamo. Yet the Justices could not agree on substantive issues in the case when it came time for them to decide it. For example, the Justices could not agree on whether the offenses with which Hamdan was charged were triable by military commission at all.<sup>109</sup> Only a plurality was prepared to hold that basic rights "recognized as indispensable by civilized peoples" included the right to be present at his trial and be privy to the evidence against him.<sup>110</sup> Justice Kennedy declined to rule on the question of what minimal

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108. 548 U.S. 557 (2006).

109. A plurality of Justices (Justices Stevens, Souter, Ginsburg, and Breyer) signed on to Part V of the opinion of the Court, concluding that military commissions could only try offenses against the laws of war. *Id.* at 595-613 (2006).

110. That plurality included Justices Stevens, Souter, Ginsburg, and Breyer. *See id.* at 633-35.

procedures ought to be available under the Geneva Convention. He wrote that the procedures used against Hamdan deviated from those available in court martial without demonstrating “evident practical need,” leaving open the argument that pressing governmental needs could allow the government to dispense with the traditional procedural protections that many consider fundamental to a fair trial.<sup>111</sup>

The Supreme Court’s response in both 1942 and 2006 was wanting. In both cases the result was that the military commissions remained outside of the constitutional order because of failures in deliberation and independence, although the failures were very different in each case. In 1942 the Court failed in its obligation to deliberate at all until it was too late. In 2006 the Court failed in its obligation to produce the product of deliberation, that is, to assert a normative vision of the requirements for a fair trial. If the courts are to participate in a normative dialogue with the other branches of government, more work needs to be done to develop a normative vision that will constitute that dialogue.<sup>112</sup>

Despite these limitations and the Court’s refusal to stand as a bulwark in defense of individual rights, in both cases court involvement resulted in greater publicity for the military commissions. In the *Hamdan* case in particular, the adjudication spurred the development of a lawyer movement against the military commissions that is discussed at greater length below. In that case, the Court’s opinion was at least as important in spurring lawyer mobilization as the legal propositions for which it stands.

### III. BETWEEN THE KING AND THE ANGEL GABRIEL: THE CONSTRAINTS ON COURTS AND THE LIMITS OF ADJUDICATION

The narratives of both military commissions are reminiscent of a story from the Talmud, recounted by Robert Cover.<sup>113</sup> The Talmud explains the prohibition on judging the King in the following way. A slave of the King had killed a man and the head of the Sanhedrin (judges), Simeon b. Shetah, advocated that the King ought to be called before them to be judged. The judges sent for the King, who sent the slave to them. But this did not satisfy them, and they sent again for the King to appear in person. Simeon called for the King to stand before the court so that the witnesses could testify against him. “The King replied ‘I will not act by your word

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111. *Id.* at 646.

112. RESNIK & CURTIS, *supra* note 1, at 304 (“[A]djudication does not always yield wise or just results. Our argument is that it offers opportunities for democratic norms to be implemented through the millions of exchanges in courts among judges, the audience, and the litigants.”); Resnik, *supra* note 87, at 670 (noting that public courts achieve “acknowledgement of the existence of conflicts” and “opportunities to develop or revisit governing precepts”).

113. Robert M. Cover, *Folktales of Justice: Tales of Jurisdiction*, 14 CAP. U. L. REV. 179, 184 (1984).

but by the words of the court as a whole.' He turned to the left and to the right, but all looked to the ground."<sup>114</sup> The judges feared calling the King to account because of the obvious worldly consequences. Simeon then said to the judges, "Let the Master of Thoughts call you to account."<sup>115</sup> The Angel Gabriel then smote all the judges, except Simeon, and the rule was established that the King would not be judged.

When a court faces down the President, under threat that he will not obey its orders or that the public will lose faith in the court based on its decisions, the court finds itself between the proverbial King and the Angel Gabriel. Either the decision to hold the executive branch to account or the refusal to do so may result in a fatal blow to the legitimacy of the court. Since the court lacks the means of enforcing its orders, such a loss of legitimacy is grave indeed. In both *Quirin* and *Hamdan*, the Supreme Court produced a performance of adjudication that did not, in fact, engage with the deeper issues of injustice raised by those cases. In *Quirin*, the Court chose the King. The court's performance in *Hamdan* was arguably designed to walk a safe path between the King and the Angel Gabriel. Are these types of performances inherent in the nature of courts and the process of adjudication in times of crisis?

When lawyers appealed to the federal courts so that their clients might not be tried by military commission they must have believed, at some level, that the process of reasoned deliberation would lead the court to a just outcome even with respect to a regime beyond the constitutional pale. The lawyers' goal may have been transformative court-ordered changes, but even in *Hamdan*, widely understood as a victory for detainees, the changes revealed themselves to be incremental.<sup>116</sup> At least in part, the result was constrained by the way courts operate and the role of lawyers within courts.

The decision to seek justice from the courts requires that advocates argue on the court's terms and narrow the issues that the court will decide. This is part of the performance of adjudication. By contrast, the political process allows more open ended arguments. Narrow arguments may be institutionally driven. Narrowing may also be self-imposed, a product of the lawyer's jurisprudential philosophy or his sense of the requirements of advocacy. This narrowing process pushes in an incrementalist or even conservative direction and discourages transformational change.

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114. *Id.* at 187 (quoting BABYLONIAN TALMUD, Sanhedrin, 19a-19b).

115. *Id.*

116. Many think that this is also the story of the landmark decision of *Brown v. Board of Education*, 347 U.S. 483 (1954). The federal courts became the forum of choice for the cause of desegregation when Southern state courts offered little possibility of a fair outcome. Although *Brown* was a transformative decision in many ways, it has also been demonstrated to have been one part of a much larger political strategy. See *supra* note 6 (citing sources on the significance of *Brown*).

*A. The Constraints of Legal Argument: Real and Perceived*

Lawyering entails a particular craft because the process of adjudication is a performance with its own set of rules. These rules constrain the advocate. Sometimes formal legal constraints limit the availability of particular avenues of argument.<sup>117</sup> Constraints can also be practical, formed (at least in part) by the lawyer's perception of what will "work." These constraints of craft raise important questions. What is the relationship between the power granted to the courts in a democratic system and the process constraints on courts? Is this power legitimate because of these constraints or despite them? If the constraints come from lawyers' craft, does it matter for judging judges that the lawyers did not ask the court to "do justice"?

Lawyers may feel more justified internalizing constraints that they understand to be imposed by legal requirements or the institutional structure of the court. Self-imposed constraints, by contrast, put the lawyer in a potential conflict with his client, because he must pit his own sense of what is appropriate to argue before a court against what may be in the best interest of his client or what the client may wish to do.<sup>118</sup> The first cases filed on behalf of Guantánamo detainees illustrate how lawyers understand the constraints of appeals. These appeals were filed before the military commissions were convened. They were requests to find out whether and why a client was held on the military base in Guantánamo Bay, Cuba, in the immediate aftermath of 9/11.<sup>119</sup>

In 2002, the names of persons detained at Guantánamo were not made public. A Kuwaiti family hired a prominent law firm to assist them in determining where their son was being held. After making some inquiries with the State Department and other agencies and being rebuffed, the lawyers decided to go to the federal courts.<sup>120</sup> The period was an intense one in American politics and society. The tragedy of 9/11 loomed large. Anthrax scares rocked the capital. The lawyers were worried about the public perception of seeking to free terrorists. So they sought to work on behalf of their clients in light of these political constraints. They

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117. For example, the collateral bar rule forbids a litigant to dispute the validity of an injunction in a contempt proceeding for violating that injunction. *See Walker v. City of Birmingham*, 38 U.S. 307 (1967).

118. This has been the theme of much of the scholarship on "cause lawyering." *See generally* CAUSE LAWYERING: POLITICAL COMMITMENTS AND PROFESSIONAL RESPONSIBILITIES (Austin Sarat ed., 1998) (describing concept of cause lawyering and including essays on cause lawyering in a variety of contexts); STUART A. SCHEINGOLD & AUSTIN SARAT, SOMETHING TO BELIEVE IN: POLITICS, PROFESSIONALISM AND CAUSE LAWYERING (2004) (same).

119. *See Rasul v. Bush*, 215 F. Supp. 2d 55 (D.D.C. 2002), *rev'd*, *Al Odah v. United States*, 103 F. Appx. 676 (D.C. Cir. 2004).

120. David Luban, *Legal Ethics in Guantánamo*, 60 STAN. L. REV. 1981, 1989 (2008).

developed a strategy of keeping the complaint “very narrow.”<sup>121</sup> As one participating lawyer recalled, “So I said ‘let’s play it cute—we won’t file habeas corpus . . . we’ll invoke federal question jurisdiction, we’ll file under the [Administrative Procedure Act] and we’ll say we had reason to believe these nine or ten . . . people are in the custody of the United States.’”<sup>122</sup> The claims were based on Department of Defense regulations and what the lawyers asked for was very limited, as this lawyer characterized the strategy: “[N]umber one, do you have these guys? Number two, if you do have they been charged with anything and if so, what charges? And number three, we want to contact them. That’s it. Nothing about release, nothing about habeas corpus, that’s it.”<sup>123</sup>

At the beginning, given the political atmosphere in 2002, the lawyer explained, “we made plain in our opening complaint . . . that we were not alleging innocence. All we were seeking were the three little things I said: are you holding them? Have they been charged? And we want contact. Later, as it developed, we expanded that somewhat to ask for due process.”<sup>124</sup> Despite these narrow arguments, the lawyer believed that the clients were in fact innocent.<sup>125</sup> The lawyer and his colleagues had to convince the prestigious firm for which they worked that it was acceptable to represent detainees alleged to be terrorists. The lawyer explained:

[T]he pitch to the firm . . . was we’re not representing defendants who are terrorists—we’re not in this for representing terrorists. We’re seeking minimum due process of fairness, that’s it, that’s as far as we’ll go. And should the day come that they will be charged by military commissions, we will be out.<sup>126</sup>

The lawyers who brought the first set of detainee cases took a narrow approach to appeal both to the public and the courts. So did Hamdan’s lawyers a few years later.

Law and politics are linked in the lawyers’ decisions about how to litigate a case. Judges were well aware of the nearness of 9/11, the threat of anthrax in Washington, D.C., the atrocities at Abu Ghraib, and myriad other political events. For these reasons some Justices wanted to defer to

121. Interview with Lawyer No. 4 (June 24, 2008), at 3.

122. *Id.* at 4.

123. *Id.*

124. *Id.* at 7.

125. He explained, “I don’t think I would have taken on the case, myself, if I thought they were indeed guilty.” *Id.* at 8.

126. *Id.* at 8. The lawyer noted, “Everyone assumed that anyone who was in Guantánamo was a terrorist . . . Plus, many members of the firm in New York had relatives or friends who died in the Twin Towers. And so there was personal anguish, there was political-social anguish, and there was economic anguish to the extent that any public link between the firm and terrorists might cause loss of clients.” *Id.* at 7.



the executive. These Justices were satisfied to leave the litigation beyond the constitutional pale. In the 1960s, political philosopher Otto Kirchheimer described a court subordinated to the governmental command structure with a minimal role in balancing the interests of the state against individual interests.<sup>127</sup> Kirchheimer might have been describing Justice Thomas's and Justice Scalia's dissents in *Hamdan*. Justice Thomas wrote, "The plurality's evident belief that *it* is qualified to pass judgment on the 'military necessity' of the Commander in Chief's decision to employ a particular form of force against our enemies is so antithetical to our constitutional structure that it simply cannot go unanswered."<sup>128</sup> Justice Scalia similarly argued that "military necessities relating to the disabling, deterrence, and punishment of the mass-murdering terrorists of September 11 require" that the Court abstain from the case.<sup>129</sup>

The decision to adopt a narrow litigation strategy was critical to the unfolding of the *Hamdan* litigation. In his reflections on the experience, the architect of the lawyers' strategy, Neil Katyal, explained that he was deeply influenced by Alexander Bickel's idea of the "passive virtues" of the Court. That is, the manner in which "the Court employed procedural and jurisdictional doctrines to produce a useful 'time lag between legislation and adjudication, as well as shifting the line of vision.'"<sup>130</sup> In reconstructing his appellate strategy, Katyal appeared to use Bickel's theory as only a description of what the Supreme Court does, rather than a normative theory of what the Court ought to do. For example, Katyal explained:

[W]e sought to use the facts and the law to diminish the motivating principles that might otherwise have led the Court to adopt Professor Bickel's passive virtues. Whereas Bickel feared a Court that would rule on an issue of first impression, we sought to educate the Court about the issue repeatedly to ensure that it was not an issue of first impression. Whereas Bickel feared a Court that would rule on a matter without a developed factual record, we sought to develop that factual record in a few key moves that did not compromise Mr. Hamdan's interests in a subsequent trial. And whereas Bickel feared a Court that would lose its legitimacy by undermining the political branches, we sought to show that the Court's action would only invalidate a trial system that had never

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127. KIRCHHEIMER, *supra* note 4, at 95.

128. *Hamdan v. Rumsfeld*, 548 U.S. 557, 678 (2006) (Thomas, J., dissenting).

129. *Id.* at 674 (2006) (Scalia, J., dissenting).

130. Katyal, *supra* note 84, at 84 (quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 112, 116 (2d ed. 1986)).

actually been used.<sup>131</sup>

At first blush this description of the legal team's strategy looks like it is merely a response to the realities of how courts proceed. In fact this description accepts a normative theory about what the Supreme Court can be expected to do. By assuming that the passive virtues describe the Court's approach, the lawyers' strategy impliedly signed on to them. Katyal's approach extended beyond the strategy involved in timing and fact development. It extended to the legal team's substantive decision to argue that the military commissions were unconstitutional on separation of powers grounds.

The more lawyers accept the description of what courts do in the most controversial cases as deciding on the narrowest possible grounds, the greater the risk that lawyers will avoid arguments that question the "passive virtues." But it is not clear that the passive virtues are normatively desirable—at a minimum this is a substantial point of contention.<sup>132</sup> For Bickel the passive virtues were indeed virtuous, and Katyal seemed to adopt this view as well. The truth is it was a successful strategy. Nevertheless, this strategy allowed the Court to leave open critical questions such as whether fundamental rights and particular constitutional protections apply in the Guantánamo Bay military commissions. The passive virtues would dictate that the Court should avoid making such decisions or delay them until the political branches can find their feet. But this approach has a cost to individuals and to the lawyers representing them.

The point here is not that the approach that Hamdan's legal team adopted was misguided, but rather that it reflected a legal philosophy, as all representation reflects the legal philosophy of the advocate to some degree. By choosing a philosophy of adjudication, the lawyer limits himself and his client and excludes other normative visions. While the Court is theoretically able to follow those other excluded lines of reasoning *sua sponte*, it is a hallmark of the system that courts decide the issues that the litigants present.<sup>133</sup> Constraints of craft and performance that legitimate court proceedings also limit them. Expectations that the judge "hear the other side" are based on an understanding of adversarialism embedded in the system—it is the performance of *both*

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131. *Id.* at 94.

132. See Steven Vladeck, *The Passive-Aggressive Virtues*, 111 COLUM. L. REV. SIDEBAR 122, 125 (2011) (arguing that "[a]lthough the Justices have repeatedly acted to assert and preserve the institutional role of the federal courts more generally, they have been decidedly unwilling to engage the substance of counterterrorism policies, especially in cases in which those policies relate to alleged abuses of individual civil liberties").

133. See generally Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447 (2009) (discussing the power of courts to consider issues without litigants raising them).

sides that allows the judge to hear the *other* side.<sup>134</sup> How harshly should we judge the judges in not embracing a rights-protective approach in *Hamdan* when the lawyers did not demand it of them? Or is the obligation of life tenure that judges not avert their eyes; are they obligated to “take advantage of [life tenure] to seriously discomfit the wielders of power?”<sup>135</sup> In not doing more, are judges and lawyers part of an “apparatus of complicity?”<sup>136</sup>

The lawyers in *Ex parte Quirin* experienced a different set of limitations. Whereas Katyal assumed he would bring the *Hamdan* case to the federal courts from the start, the defense lawyers in the Nazi saboteurs case struggled with the question of whether they could go to the federal courts at all. Royall’s decision to seek habeas review took some courage, as it required a military officer to seek from the Court specifically what the Commander-in-Chief wanted to avoid: a public, civil trial. Moreover, the Administration’s position that military commissions provided sufficient procedural protections had public support. Many news outlets saw the 1942 military commissions as a paragon of fairness. Opening up the courtroom to journalists was likely intended to achieve this effect. After the trial, the *New York Times* editorialized: “We had to try them because a fair trial for any person accused of crime, however apparent his guilt, is one of the things we defend in this war.”<sup>137</sup> Similarly, *The New Republic* lectured: “It is good to know that even in wartime and even toward the enemy we do not abandon our basic protection of individual rights.”<sup>138</sup> Royall was criticized for his efforts by some who perceived his representation of the saboteurs as disloyal.<sup>139</sup>

Neither the military commissions convened in 1942 nor those convened after 2001 were entirely secret, as this would not have achieved the governmental objective. Instead the government allowed for carefully crafted public moments, where journalists were allowed in to witness a scripted spectacle. Resnik and Curtis point out that the problem with government sponsored spectacle, from the government’s point of view, is that “those who produce spectacles do not control their meaning or effects.”<sup>140</sup> One of the lawyers representing Guantánamo detainees before the military commissions explained about the government’s approach:

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134. RESNIK & CURTIS, *supra* note 1, at 291.

135. Cover, *supra* note 113, at 200.

136. *Id.* at 200, n. 73; see also Lahav, *supra* note 79, at 730 (discussing lawyer complicity in military commissions).

137. FISHER, CRS, *supra* note 14, at 35 (quoting *They That Take the Sword*, N.Y. TIMES, Aug. 9, 1942, at 8).

138. *Id.* at 35 (quoting *The Saboteurs and the Court*, NEW REPUBLIC, Aug. 10, 1942, at 159).

139. Vázquez, *supra* note 30, at 228.

140. RESNIK & CURTIS, *supra* note 1, at 295 (attributing this insight to Michel Foucault).

Once the media sort of embraced us as heroes, guardians of law...they were put in a position where they just sort of had to . . . continue letting us do what it is we thought we should do. So I think they sort of opened a Pandora's box . . . by not shutting people up at the very beginning.<sup>141</sup>

At the same time, the parsimonious release of information can have a lulling effect. Similarly, the provision of some protection to the defendant facing a tribunal beyond the constitutional pale may produce the illusion of fairness when in fact, the ultimate conviction is already promised. Did cases like *Quirin* and *Hamdan* contribute to the *appearance* of justice when it was in fact absent? Or did these adjudications publicize and promote the plight of the accused?

### *B. Transforming the Law, Subverting or Legitimizing Injustice*

Lawyers may bring a suit in the hope that a legal decision can be transformative, but the courts are often willing only to impose incremental changes. Decisions such as *Hamdan v. Rumsfeld* are useful for establishing certain important principles. Setting forth the limits of executive power, as the Court did in *Hamdan*, was a necessary condition for adjudication within a constitutional system. The lawyers' work played a significant role in establishing those principles. Nevertheless, *Hamdan* and subsequent decisions left open which, if any, constitutional protections apply to the detainees who were the subjects of these petitions.

The federal courts did not live up to the hopes of defense counsel and, importantly, the defendant in the *Hamdan* decision.<sup>142</sup> Salim Hamdan himself was detained in Guantánamo until his 2008 trial. That trial occurred under a slightly improved regime, but one still believed by many to be procedurally unjust and still outside of the constitutional order. It is impossible to know whether Hamdan would have been released earlier from Guantánamo—arguably his ultimate goal—had his lawyers completed the trial in 2006 rather than delaying with a series of federal appeals. Things may have been better for Hamdan in 2008. The political situation in 2008 was different than in 2006, influencing the commission jurors in Hamdan's trial in his favor. David Hick's light sentence of only nine months of a seven-year suspended sentence as a result of his 2007 plea deal may have influenced the military commission's sentencing

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141. Telephone interview with Lawyer No. 7 (Apr. 6, 2009), at 43.

142. While the opinion represented a win for the defense, in the immediate aftermath of that case Congress ratified the military commissions with the Military Commissions Act of 2006, 10 U.S.C. §§ 948-50 (2008).

decision.<sup>143</sup> Nevertheless, a “win” that only achieved delay is a very limited victory from the point of view of the client indefinitely detained in the Guantánamo Bay prison.

Many of the detainees held in Guantánamo did not put any stock in the courts. As one lawyer who participated in these cases explained, his clients “began to see it as a political process. That their only hope was a change in the administration.”<sup>144</sup> He came to agree with them:

I think in the end, they were probably right . . . I overestimated the judiciary’s role and it confirmed a lesson I had learned long ago—which is, if you really need justice, swift justice, you’re not going to get it in court. It’s just not geared up for that. The judges are too timid, especially in an area like this—where they think they are intruding on the military, it’s terrorism, it’s all this stuff . . . [A]n unelected, life tenured judge is not going to stand up and say “Follow me.” He’s just not going to do it. And it was unending delay, every time the government filed a motion, it would take weeks and weeks and months before the court would hear it. And you want to scream. And my feeling was, initially—that’s why we recommended we followed the laws to begin with—I thought the courts are the answer. But I learned after bitter experience, that the courts were not the answer, the political process was the answer.<sup>145</sup>

Along similar lines, Jenny Martinez powerfully paraphrased her client Jose Padilla’s question: “Why is it that litigation concerning the alleged enemy combatants detained at Guantánamo and elsewhere has been going on for more than six years and almost nothing seems to have actually been decided?”<sup>146</sup>

The lawyers’ narrow strategy in litigating *Hamdan* reveals their trust in adjudication and their vision of the courts’ role in a democracy. In other words, *Hamdan* is a testament to the power and the limits of legalism. The *Hamdan* case is an important precedent for curbing executive authority, but with respect to the military commissions it merely gave Congress another bite at the apple with little guidance as to what constitutes justice for the accused. The focus on governmental structure—which branch of

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143. Sarah Wood, *Judge Accepts Australian Detainee’s Guilty Plea*, AM. FORCES PRESS SERV., Mar. 30, 2007, <http://www.defenselink.mil/news/newsarticle.aspx?id=32642>.

144. Interview with Lawyer No. 4, *supra* note 122, at 31.

145. *Id.*

146. Jenny S. Martinez, *Process and Substance in the “War on Terror,”* 108 COLUM. L. REV. 1013, 1014-15 (2008) (analyzing the focus on procedures rather than substantive rights in detainee litigation). *But see* Joseph Landau, *Muscular Procedure: Conditional Deference in the Executive Detention Cases*, 84 WASH. L. REV. 661 (2009) (arguing that the courts’ use of procedure strengthens important values such as transparency while not dictating the terms of the substantive law to the coequal branches).

government had the power to authorize a military commissions system—overshadowed other critical issues and took off the table important values that require serious attention, such as how much process is a person detained in the “War on Terror” entitled to and why? Ultimately, the question of what process rights protect detainees remains unanswered.

As a practical matter, the appeal appears to have done little for Hamdan except delay the inevitable, perhaps making his sentence a bit lighter than it would have been otherwise. One JAG lawyer said about the appellate strategy in *Hamdan*:

I thought they wrote their petition in a way that was bad for the system but was good for their guy—which I suppose is a good thing. They wanted to win, they wanted the win so they filed the petition—and their petition essentially invited the court to invite Congress into the party. And I think that they certainly knew that if they did win and Congress was invited to the party, that the system would be much harder to win . . . later down the road . . . But you know [some of us] went around thinking is that just because they thought it would be cool to win [in] the Supreme Court? Or does that actually benefit Hamdan? . . . But I can't say that it was the wrong thing to do to win a case . . . I probably would have done the same thing. I would have wanted to win.<sup>147</sup>

The strategy in *Hamdan* illustrates the tension between the thrill of the appellate strategy for the lawyer and its effectiveness in achieving the client's goals. This lawyer explained:

I mean, if I'm in federal court . . . and I do really, really well—my client wins, he's very happy—and I get all sorts of accolades from everybody else and I get more work and I'm a hero. . . . In Gitmo, everything is on its head. It's completely opposite, where . . . you could make yourself a hero and it's exactly what your guy doesn't want and he gains nothing from it.<sup>148</sup>

Hamdan's lawyers returned to the federal courts one last time to obtain an answer to the question of what rights protected the accused in military commissions. In *Hamdan v. Gates*, the United States District Court for the District of Columbia declined to rule.<sup>149</sup> Instead, that court left the answer to be determined first by the military commission and ultimately by the appeals process. This meant that as Hamdan's case went to trial, the procedural rules for conducting that trial had yet to be firmly established. The fairness of those rules had not been determined. This was a fundamental violation of the rule of law principle requiring that the

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147. Interview with Lawyer No. 7 (Nov. 2008), at 45.

148. *Id.* at 46-47.

149. 565 F. Supp. 2d 130 (D.D.C. 2008).

procedural rules be set in advance.

In denying Hamdan's request, the judge evoked a cliché about justice that is worth considering in light of the military commissions process. He wrote: "The eyes of the world are on Guantánamo Bay. Justice must be done there, and must be seen to be done there, fairly and impartially."<sup>150</sup> One reading of this statement is that the judge equates the importance of justice *being* done and justice *seen* to be done. He could have meant only that a public trial, rather than a secret one, was critical to procedural justice. It is important that justice "not be done in a corner nor in any covert manner."<sup>151</sup> But the judge also could mean that the appearance of procedural justice is just as important as the just outcome. What is the significance of justice being *seen* to be done if it is not *in fact* done? This is the conundrum of publicity in the military commissions context, where the government's efforts were geared towards the appearance of justice, a performance of court proceedings without the rights that are traditionally understood to be the predicate of justice.

Adversarial adjudication is one of the signposts of our collective conception of procedural justice. Social psychological studies show that Americans perceive adversarial proceedings as fairer than other types of processes.<sup>152</sup> Even if an adversarial hearing is perceived only as a necessary but not a sufficient condition, it is still a central component of our collective understanding of how justice is done and often serves as a stand-in for other components that we all agree are necessary for procedural justice, such as a neutral decision maker. The use of adversarial representation as a heuristic for justice increases the responsibility of lawyers, whose participation in the adversarial proceeding is part of the presentation of justice being *seen* to be done. Habeas petitions such as those that gave rise to *Quirin* and *Hamdan* give lawyers the opportunity to expose the fact that justice is not being done. But such petitions can justify injustice by creating the false perception that objections have been fully heard and ruled upon by an independent and deliberative judiciary. That is the mixed legacy of *Quirin* and *Hamdan*.

Although the spectacle of military tribunals cannot be entirely controlled by the government, secrecy in the name of national defense allows the government to exercise a great deal of control over how that spectacle plays out. Moreover, secret discussions behind the scenes, such as the threat that the executive will disobey court orders that influenced

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150. *Id.* at 137.

151. RESNIK & CURTIS, *supra* note 1, at 293 (quoting Fundamental Laws of West New Jersey, 1676).

152. See TOM R. TYLER ET AL., SOCIAL JUSTICE IN A DIVERSE SOCIETY 79-80 (1997).

the Supreme Court in *Quirin*, will also affect the performance of the courts' role and tempt judges to avert their eyes from injustice.

Here we return to the role that the ideology of legalism plays in particular with respect to these habeas appeals to the federal courts. On the one hand, people might attach too much importance to procedures that will distract them from unjust substantive outcomes.<sup>153</sup> But there is also the risk that the performance of certain types of procedures (rites) such as an adversarial adjudication, may serve to signal procedural justice (rights) when it is in fact absent. Our legalistic culture often relies on legal frameworks and language, such as due process, to understand justice.<sup>154</sup> Both arguments inside and outside the courts are susceptible to the accusation that they cabin the terms of the discussion and the possibility of reform. While it is true that the legalistic focus on rule-following and process can eclipse other values, such as human dignity, the legal arsenal also offers the possibility of making arguments that enhance these values. That is especially the case in situations where the courts are asked to balance the interests of the state with those of individuals, such as the cases discussed here.

Much has been written, both critical and laudatory, on the concerns of the federal courts in getting ahead of the populace on social and political issues.<sup>155</sup> This is largely because of that classic problem in constitutional law, the counter-majoritarian difficulty.<sup>156</sup> The risk for lawyers participating in this system is that in the process of trying to achieve incremental change they may instead legitimate injustice. In *Hamdan*, for example, the Court encouraged Congress to weigh in and in so doing reproduced the military commissions in a more unassailable form. Did this empower members of the populace to call out injustice, or did it lull them into the belief that the courts, watching over the matter, would set the right balance? Similarly, in *Quirin*, did the Court's consideration of the case, although it declined jurisdiction to hear the merits, in fact create the impression that the 1942 military commission had been vetted and was therefore fair? These habeas appeals ran the risk of creating just enough process to create the empty appearance of justice: an adversarial argument, an apparently neutral arbiter, and published opinions. On the

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153. See Martinez, *supra* note 146, at 1027.

154. See Susan Silbey, *After Legal Consciousness*, 1 ANN. REV. L. & SOC. SCI. 323 (2005) (discussing the concept of legal consciousness and the sociological approaches to the question of why people obey the law when it fails to live up to its promises).

155. See, e.g., LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004); Reva Siegel & Robert Post, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CALIF. L. REV. 1027 (2004).

156. See generally Barry Friedman, *The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy*, 73 N.Y.U. L. REV. 333 (1998) (describing the conditions for the development of the concept of a countermajoritarian difficulty).



other hand, the Court's decision to decline jurisdiction or defer to Congress may be a sufficiently transparent refusal to address the heart of the matter that it spurs and maybe even strengthens a continued struggle.

Sociologists have argued that individuals, through seemingly small actions, “‘identify the cracks and vulnerabilities of organized power’ in the acts of resistance.”<sup>157</sup> Adjudication is one form of such resistance, although it is done through established pathways. One risk is that a legal challenge may sufficiently ameliorate conditions for a brief time to make insufferable situations tolerable, and, in doing so, “‘actually inoculate power from sustained and collective challenge.’”<sup>158</sup> The Supreme Court's decision to permit the tribunal that is beyond the constitutional pale to continue, as in *Quirin*, can still inoculate against resistance because it gives the appearance of reasoned deliberation and review by an independent branch of government. To the extent that the courts lend legitimacy to a process by hearing arguments even as they are already prepared to reject them, then the lawyers assist in legitimating the court's decision by making their arguments within the constraints of adjudication. Consider, in this light, the decision of the Dasch's lawyer, Colonel Ristine, not to appeal to the federal courts. Ristine's decision did no more for his client or for the principles of legality than did the decision of Royall to appeal. In the end, Ristine's client, Dasch, received the lightest sentence of all.<sup>159</sup> At the same time, the decision not to appeal prevents the court from entertaining more far reaching arguments.

Finally, a successful suit, even on narrow grounds, can have repercussions far beyond the law being made. Success in the Supreme Court can change the tide of public opinion and may spur more lawyers to become involved in resisting injustice. For example, a lawyer who participated in an appeal on behalf of detainees held in Guantánamo as early as 2002 explained the significance of the Supreme Court victory in that case: “When we won in the Supreme Court in 2004, then all of a sudden, the floodgates opened and everybody—Johnny-come-lately—came aboard . . . all of a sudden, these firms were interested, they wanted to sign up; it became sexy . . .”<sup>160</sup> Even when adjudication does not achieve the lawyers' goals directly, it can be part of a larger democratic dialogue.

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157. EWICK & SILBEY, *supra* note 6, at 187 (quoting Joel F. Handler, *A Reply*, 26 LAW & SOC'Y REV. 819-24 (1992)).

158. *Id.*

159. Dasch was sentenced to thirty years imprisonment. John Peter Burger was sentenced to life. The rest of the saboteurs were executed. Danelski, *supra* note 7, at 72.

160. Interview with Lawyer No. 4, *supra* note 121, at 14.

## CONCLUSION

In the two stories told here—of the 1942 military commission created to try Nazi saboteurs and of the 2001 military commission created to try Guantánamo detainees—defense lawyers believed that through reasoned argument to the federal courts, governmental decisions to place certain trials outside the constitutional order could be reversed. These lawyers, separated by sixty years, expressed through their actions faith in the capacity of the federal courts to be deliberative, sophisticated and independent. Their decisions and tactics framed the courts' responses to military commissions. Their stories illuminate the continuing hold that adjudication has on the legal imagination, even as the ultimate results in the two narratives demonstrate the limits of the courts' ability (or willingness) to defend unpopular individual rights in wartime. They also raise a host of ethical questions that will continue to be debated. If it is politically impossible to have a trial with constitutional protections for a set of defendants, what then? What does more damage to democracy, the existence of persons held beyond the rule of law or the pretense of legality?<sup>161</sup> These are serious questions for a democracy in crisis, and as Resnik points out, "if American law is to cherish human dignity, it will be because more than life-tenured judges make it do so."<sup>162</sup>

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161. The Supreme Court struggled with this question in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004), ultimately holding that something less than a full trial with the attendant constitutional protections is acceptable for American citizens held as enemy combatants.

162. Resnik, *supra* note 87, at 685.

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