

# Policy Comment

## Solving the Due Process Problem with Military Commissions

The terrorist attacks of September 11, 2001 prompted the creation of two new adjudicatory bodies within the Department of Defense. First, military commissions were established by presidential order just two months after the attacks in order to prosecute members of al Qaeda for war crimes.<sup>1</sup> The commissions are non-Article III courts (although they adhere to many aspects of conventional criminal procedure) and are empowered to try persons designated by the President as eligible for trial by commission for offenses against the laws of war. No trials have yet taken place, although commissions for four detainees have been convened, and fifteen detainees have been designated for trial.<sup>2</sup> Second, combatant status review tribunals (CSRTs) were created in the wake of *Hamdi v. Rumsfeld*<sup>3</sup> to determine if detainees at Guantánamo Bay are being properly held as enemy combatants.<sup>4</sup> A plurality of the Supreme Court held in *Hamdi* that “a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government’s factual assertions before a neutral decisionmaker.”<sup>5</sup> The CSRTs aim to provide that “fair opportunity”

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1. Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order].

2. See News Transcript, Department of Defense, Defense Department Briefing on Military Commission Hearings (Aug. 17, 2004), available at <http://www.defenselink.mil/transcripts/2004/tr20040817-1164.html>.

3. 124 S. Ct. 2633 (2004).

4. Memorandum from Paul Wolfowitz, Deputy Secretary of Defense, to Secretary of the Navy (July 7, 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf> (describing CSRTs).

5. *Hamdi*, 124 S. Ct. at 2648 (plurality opinion).

to individuals who the government alleges are enemy combatants and hence subject to detention until the end of hostilities.

This Comment's principal goal is to explore the interplay between the military commissions and the CSRTs. A plethora of law review articles have dealt with military commissions,<sup>6</sup> and the CSRTs have been covered at length in the press.<sup>7</sup> There has been almost no effort, however, to analyze how the two institutions fit together or how the lessons of one could be used to solve the potential constitutional problems of the other. This Comment seeks to fill that gap. In particular, it argues that there is a serious constitutional flaw in the military commissions' procedure for establishing personal jurisdiction and that, in an ironic twist, this flaw can be mended through a modest broadening of the scope of the CSRTs' fact-finding powers.

Part I describes the looming due process problem with the military commissions: that there is currently no mechanism by which individuals who dispute their eligibility to be tried by commission can resolve this jurisdictional issue. This Part argues that this aspect of the commissions' procedure is unconstitutional under case law on both Article III personal jurisdiction and unilateral executive designations. Part II contends that this due process problem can best be solved by expanding the decisionmaking range of the CSRTs. Rather than merely determining whether a detainee is an enemy combatant, the CSRTs should also decide whether a detainee found to be an enemy combatant is a *lawful* combatant, immune from trial by military commission, or an *unlawful* combatant, subject to such trial. Part II also argues that the CSRTs are better positioned to make this determination than either conventional courts or the military commissions themselves. Part III concludes.

## I

Critics have identified a host of potential legal problems with military commissions. Commissions may offend the principle of separation of powers because they were not explicitly authorized by Congress, they may violate the Equal Protection Clause because they are applicable only to

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6. See, e.g., Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003).

7. See, e.g., Zachary R. Dowdy, *Debate Drags on over U.S. Detainees*, NEWSDAY (N.Y.), Oct. 25, 2004, at A4; Neil A. Lewis, *Scrutiny of Review Tribunals as War Crimes Trials Open*, N.Y. TIMES, Aug. 24, 2004, at A12; Charlie Savage, *Freed Detainee Said To Train at Militant Camps*, BOSTON GLOBE, Oct. 2, 2004, at A7.

noncitizens, they may contravene provisions of the Uniform Code of Military Justice, and they may be illegal under the Geneva Conventions.<sup>8</sup> One problem with military commissions that has not been extensively analyzed, however, is the jurisdictional one: At present, a detainee has no opportunity to challenge the President's determination that he may be tried by commission.<sup>9</sup>

Under the Military Order that created the military commissions, not everyone is subject to trial by commission for offenses against the laws of war. Rather, the Order applies only to noncitizens who the President determines (1) are current or past members of al Qaeda, (2) have been involved in acts of international terrorism directed at the United States, or (3) have knowingly harbored such persons.<sup>10</sup> The personal jurisdiction of military commissions is further limited by *Ex parte Quirin*, which held that only *unlawful* combatants "are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."<sup>11</sup> Under *Quirin*

8. For a comprehensive discussion of the potential problems with military commissions, see Katyal & Tribe, *supra* note 6. See also Petition for Writ of Mandamus Pursuant to 28 U.S.C. § 1361 or, in the Alternative, Writ of Habeas Corpus, Swift *ex rel.* Hamdan v. Rumsfeld, No. CV04-0777L (W.D. Wash. filed Aug. 9, 2004), *transferred sub nom.* Hamdan v. Rumsfeld, No. 04-1519 (JR), 2004 U.S. Dist. LEXIS 22724 (D.D.C. Nov. 8, 2004) (No. CV04-0777L) [hereinafter *Swift* Petition], available at [http://www.law.georgetown.edu/faculty/nkk/documents/Swift\\_000.pdf](http://www.law.georgetown.edu/faculty/nkk/documents/Swift_000.pdf) (making eight separate claims against the validity of military commissions).

9. I have not found any mention of this constitutional difficulty in the literature on military commissions. The petition in *Swift* (filed on behalf of Salim Hamdan, one of the four detainees for whom military commissions have been convened) argues that no commission has personal jurisdiction over Hamdan but does not contend that Hamdan's trial would violate the Due Process Clause if he did not have the ability to challenge the commission's personal jurisdiction. *Swift* Petition, *supra* note 8, at 22-23. The recent district court opinion halting Hamdan's trial also does not mention due process. It does, however, make the related argument that, under the Third Geneva Convention, Hamdan is entitled to POW protections (which include not being tried by a military commission for war crimes) until his combatant status "has been determined by a competent tribunal." Hamdan v. Rumsfeld, No. 04-1519 (JR), 2004 U.S. Dist. LEXIS 22724, at \*23-25 (D.D.C. Nov. 8, 2004) (quoting Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 5, 6 U.S.T. 3316, 3324, 75 U.N.T.S. 135, 142 [hereinafter *Third Geneva Convention*]). Because the Due Process Clause provides more robust procedural protections than the Third Geneva Convention's modest guarantee of a "competent tribunal," this Comment focuses on the constitutional difficulties with military commissions and how to resolve them. If the commissions' due process problem is solved, their Geneva Convention flaw will ipso facto be repaired as well.

10. Military Order, *supra* note 1, at 57,834.

11. 317 U.S. 1, 31 (1942). For other cases limiting the personal jurisdiction of military commissions, see *Reid v. Covert*, 354 U.S. 1, 22 (1957) (plurality opinion) ("[M]ilitary trial of civilians is inconsistent with both the letter and spirit of the constitution." (internal quotation marks omitted)); and *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121 (1866) ("[The President's war power cannot] sanction a military trial . . . for any offence whatever of a citizen in civil life . . ."). The reason for these limitations is that broader jurisdiction for military commissions raises serious executive/judicial separation-of-powers issues.

Article 4 of the Third Geneva Convention codifies the definitions of lawful and unlawful combatants. Third Geneva Convention, *supra* note 9, 6 U.S.T. at 3320, 75 U.N.T.S. at 138. Article 4 provides that members of organized resistance movements are lawful combatants entitled to POW status only if they have a commander, carry a "fixed distinctive sign," carry arms openly,

and the Military Order, therefore, military commissions, unlike conventional criminal courts, do not have personal jurisdiction over all alleged criminals in the territory they cover. Rather, to be subject to trial by military commission, an individual must both fit within one of the categories of persons identified in the Military Order and, as required by *Quirin*, be an unlawful combatant.

The due process problem with the post-September 11 military commissions, then, is that they provide no mechanism for a defendant who contests his commission's personal jurisdiction over him to effectuate that protest.<sup>12</sup> The President alone determines that an individual is subject to the Military Order, and upon that determination the individual may be tried for war crimes even though he denies that he is an unlawful combatant or that he meets the Order's three criteria for eligibility.<sup>13</sup>

Two distinct lines of doctrine indicate that this aspect of the military commissions' procedure is unconstitutional. First, cases in the Article III setting have long held that a defendant is always entitled to challenge a court's personal jurisdiction over him. Because the "requirement that a court have personal jurisdiction flows . . . from the Due Process Clause" and "recognizes and protects an individual liberty interest,"<sup>14</sup> it would subvert the defendant's constitutional rights to try him without first affording him an opportunity to contest the court's personal jurisdiction. So important is the individual's interest in being certain of the court's personal jurisdiction over him that the alleged "deprivation of a right not to be tried is . . . immediately appealable."<sup>15</sup> Analogizing to the military commission context, it is a violation of due process for a detainee to face trial by

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and act "in accordance with the laws and customs of war." *Id.* It is likely that an individual who meets the Military Order's criteria for trial by commission would also be an unlawful combatant under Article 4. To the extent that the Military Order and Article 4 produce divergent outcomes, however, the requirement of unlawful combatant status must be met before trial by commission becomes lawful. As *Quirin* held, unlawful combatant status, not the Military Order's criteria, is the sine qua non of eligibility for trial by commission.

12. I am assuming here that defendants before military commissions are entitled to invoke due process rights. This is a debatable assumption, *cf.* *Johnson v. Eisentrager*, 339 U.S. 763, 783-84 (1950), but recent cases suggest that it is a correct one, *cf.* *Rasul v. Bush*, 124 S. Ct. 2686, 2698 n.15 (2004).

13. Military Order, *supra* note 1, at 57,834.

14. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982).

15. *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 499 (1989) (emphasis omitted). A court's ruling on personal jurisdiction is usually not subject to interlocutory appeal, but that is because another court that would have personal jurisdiction typically exists. In the case of military commissions, however, personal jurisdiction is based on status rather than geographic ties, so there is no other commission that can try a person over whom the original commission lacks personal jurisdiction. At present, an Article III court's ruling on personal jurisdiction cannot deprive an individual of a "right not to be tried," while the President's designation of eligibility for trial by military commission can.

commission without first having had the chance to argue that he is ineligible for such a trial.

Second, case law outside the Article III setting has established that designations by the Executive almost never suffice to justify government actions that severely harm an individual. Such designations carry a great risk of error because the person affected is unable to present her side of the story. They also undermine the individual's dignity interest by preventing her from having her voice heard.<sup>16</sup> As a result, the Executive may not unilaterally determine that an individual is ineligible for welfare benefits;<sup>17</sup> subject to confinement in a mental hospital;<sup>18</sup> subject to internment or deportation as an enemy alien;<sup>19</sup> or, as *Hamdi* recently established, detainable until the end of hostilities as an enemy combatant.<sup>20</sup> The situation of the military commission defendant is no different. Under the Military Order, a unilateral presidential determination made with no input from or consultation with the detainee allows him to be tried by military commission, where he may be sentenced to life imprisonment or death.<sup>21</sup> The detainee therefore risks being deprived by the Executive of a significant liberty interest—the right not to stand trial—without ever having had his objections heard.<sup>22</sup>

## II

There are several ways in which the due process problem with military commissions could be solved. An Article III court could evaluate the detainee's claim that he is ineligible for trial by military commission if he files a petition for a writ of habeas corpus.<sup>23</sup> Or the procedures of the military commissions could be changed so that the President's determination that an individual is subject to the Military Order is no longer

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16. See *Grannis v. Ordean*, 234 U.S. 385, 394 (1914) (“The fundamental requisite of due process of law is the opportunity to be heard.”).

17. *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).

18. *Vitek v. Jones*, 445 U.S. 480, 495 (1980).

19. *United States ex rel. Schwarzkopf v. Uhl*, 137 F.2d 898, 900 (2d Cir. 1943).

20. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (plurality opinion).

21. See 32 C.F.R. § 16.3(a) (2004) (“Any lawful punishment or condition of punishment is authorized, including death.”).

22. Despite being based on international law rather than due process, the district court's analysis in *Hamdan*, see *supra* note 9, is similar. “The government must convene a competent tribunal . . . and seek a specific determination as to Hamdan's status under the Geneva Conventions. Until or unless such a tribunal decides otherwise, Hamdan has, and must be accorded, the full protections of a prisoner-of-war.” *Hamdan v. Rumsfeld*, No. 04-1519 (JR), 2004 U.S. Dist. LEXIS 22724, at \*25 (D.D.C. Nov. 8, 2004).

23. See, e.g., *Swift* Petition, *supra* note 8, at 22-23 (seeking habeas and mandamus relief from federal district court in part on the ground that Hamdan's military commission lacks personal jurisdiction over him).

final and the individual can challenge that determination before the commission. But the most practical and accurate way to ensure that an individual is properly brought before a military commission is neither to deposit the problem in the lap of an Article III court nor to fiddle with the commissions' own procedures. Rather, the best way is to entrust the CSRTs with determining not only *whether* a detainee is an enemy combatant but also *what kind* of enemy combatant he is. In the language of the Military Order and *Quirin*, the CSRTs should rule on (1) whether an enemy combatant is a current or past member of al Qaeda, has been involved in acts of international terrorism directed at the United States, or has knowingly harbored such persons (thus fulfilling the three criteria listed in the Military Order) and (2) whether an enemy combatant is lawful or unlawful. Only if a detainee's CSRT finds that he both meets the Military Order's criteria and is an unlawful combatant should he be subject to trial by military commission.

A determination of this sort by the CSRTs would resolve in one blow the due process problem with the commissions. The commissions' personal jurisdiction would no longer simply be asserted by the Executive without any opportunity for the detainee to object to the determination. Rather, the detainee would be able to introduce evidence and present arguments about why he is ineligible for trial by commission, and a quasi-judicial body, the CSRT, would then adjudicate the challenge.

It is true that the CSRTs' procedural protections are less robust than those of an Article III court, meaning that a CSRT's determination that a detainee is eligible for trial by commission would not be quite as rigorous as a court's finding that it has personal jurisdiction over a defendant. This contrast between CSRTs and Article III courts is not especially worrisome, though. The core of the due process right at stake is that the detainee have a hearing before his eligibility for trial by commission is determined—not that he have a full-blown Article III proceeding on that issue.<sup>24</sup> In addition, what the CSRTs lack in process they make up for in expertise; with three military officers composing each tribunal, the CSRTs are more qualified than civilian courts to answer questions about combatant status on the battlefield.<sup>25</sup> Finally, the individual interest implicated in a determination of eligibility for trial by military commission is of roughly the same weight as

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24. See, e.g., *Hamdi*, 124 S. Ct. at 2648-50 (plurality opinion) (requiring hearing, but not Article III proceeding, on enemy combatant status); *Goldberg*, 397 U.S. at 266-68 (same for eligibility for welfare).

25. See *Solorio v. United States*, 483 U.S. 435, 448 (1987) (“[C]ivil courts are ill equipped to establish policies regarding matters of military concern.” (internal quotation marks omitted)). If Article III courts are ill equipped to try servicemembers for offenses against civilians—the issue at stake in *Solorio*—they are far less capable of determining an enemy fighter's precise status on the battlefield.

the interest implicated in a finding of combatant status.<sup>26</sup> If the CSRTs can constitutionally adjudicate the latter,<sup>27</sup> they should also be able to legitimately evaluate the former.

Assuming that broadening the scope of the CSRTs solves the due process problem with the military commissions, the questions then become whether the CSRTs are well positioned to assess what kind of enemy combatant a detainee is, and whether they are better suited to this task than Article III courts or military commissions themselves. The CSRTs are ideally situated to determine whether an enemy combatant is lawful or unlawful because the questions of whether a detainee is an enemy combatant and what kind of enemy combatant he is are so tightly intertwined. The same evidence that informs the CSRTs on the first question would also enable them to answer the second. For example, witnesses who observed the detainee fighting—thereby establishing that he is a combatant—could also testify about whether he carried arms openly; bore a fixed, distinctive sign; or otherwise qualified for POW protection as a lawful combatant. Having found that a given detainee was an enemy combatant, the CSRTs should have relatively little trouble also determining the lawfulness of his combatant status.

Adding responsibilities to the CSRTs, moreover, should not substantially hamper their adjudicatory efficiency. The new question that the CSRTs would be required to answer follows logically from the original one and pertains to the same set of underlying facts. The CSRTs would also only need to consider the issue of eligibility for trial by military commission in the small subset of cases where (1) the detainee has been determined to be an enemy combatant and (2) the government has indicated that it wishes to try the detainee in front of a military commission. In all other cases, the CSRTs' inquiry would be identical to the status quo, ceasing once the binary determination of enemy combatant status was made.

Not only should the CSRTs prove adept at adjudicating eligibility for trial by commission, but there are good reasons to prefer that they do so

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26. An adverse decision regarding combatant status empowers the government to confine an individual until the end of hostilities—which, in the ongoing War on Terror, could be decades away. An adverse decision regarding eligibility for trial by military commission allows the government to try an individual for offenses against the laws of war (but of course does not guarantee his conviction). These consequences are similar in their severity.

27. This, of course, is a contestable proposition. No court has yet ruled on the constitutionality of the CSRTs, though their validity has been challenged on due process grounds by Guantánamo detainees. *See, e.g.*, Second Amended Petition for Writ of Habeas Corpus and Complaint for Injunctive, Declaratory, and Other Relief at 13, 25-26, *Hicks v. Bush* (D.C. Cir. filed Aug. 31, 2004) (No. 1:02-cv-00299-CKK), available at [http://www.jenner.com/files/tbl\\_s69NewsDocumentOrder/FileUpload500/393/Hicks\\_amendedpetition\\_complaint.pdf](http://www.jenner.com/files/tbl_s69NewsDocumentOrder/FileUpload500/393/Hicks_amendedpetition_complaint.pdf). My view is that the CSRTs are probably constitutional under *Hamdi* but that further procedural protections for detainees should be implemented even if they are not constitutionally mandated.

rather than Article III courts or military commissions. First, conventional courts are currently only able to address the personal jurisdiction issue if it is raised before them in a petition for a writ of habeas corpus. It is obviously preferable for the detainee to have an automatically available forum for contesting his eligibility for trial by commission than to need to file a habeas petition in order to challenge his commission's personal jurisdiction over him.<sup>28</sup> Courts considering habeas petitions would also be one-time (or, at best, infrequent) players at distinguishing between types of enemy combatants, lacking both the expertise that the CSRTs will develop through practice and the CSRT military officers' understanding of the battlefield and the status of persons on it. Second, military commissions would waste limited resources by conducting their own duplicative inquiry into the factual circumstances of the detainee's apprehension. Once a CSRT has already investigated the detainee's status, there is no reason for a commission to reinvent the wheel. Requiring commissions to assess eligibility would also increase the likelihood that extensive government preparations for a prosecution would come to naught if it was found that personal jurisdiction is absent. The CSRTs are therefore well suited to classifying enemy combatants and are a better institutional choice for this task than either conventional courts or military commissions.

### III

This Comment has sought to explore the interplay between the two types of adjudicatory bodies created within the Department of Defense since September 11, 2001—in particular, the ways in which one, the CSRTs, could be modified so as to avert a constitutional due process problem with the other, the military commissions. This Comment in no way addresses the many other legal questions that currently surround the military commissions.<sup>29</sup> But its proposal to broaden the scope of the CSRTs' fact-finding powers does offer a pragmatic solution to one conspicuous flaw with the commissions. If adopted, trials by military commissions would be more likely to survive legal challenge—and more likely to be fair when they do take place.

—*Nicholas Stephanopoulos*

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28. One could imagine a requirement that an Article III court resolve the question of personal jurisdiction before the detainee could appear before a military commission. Such a requirement, however, would needlessly divide proceedings over a detainee among three separate institutions: CSRTs, Article III courts, and military commissions. It would also erode the principal appeal of military commissions: namely, that they are flexible adjudicatory bodies tailored to the unique needs of the military.

29. *See supra* note 8 and accompanying text.