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SHOULD LAWYERS PARTICIPATE IN RIGGED SYSTEMS: THE CASE OF THE MILITARY COMMISSIONS*

I. Introduction

Lawyers often represent clients when the odds are long or a catastrophe likely. The facts might be harmful, the evidence overwhelming, or the law clearly on the side of the opponent. Still, we do the best we can. But what if the *system* is rigged? What if the system has the trappings of a fair fight, but is, in fact, skewed to one side and, by design, the lawyer cannot fully defend the client? What if the lawyer can only lend legitimacy to a process that at its core is biased, slanted in favor of the other side, or fundamentally unfair? Indeed what if the system is arranged to prevent the lawyer from zealously representing the client or compromises the lawyer's undivided loyalty to the client? Should lawyers refuse to participate in such systems, or should they, should we, still do the best we can?

These questions were at the heart of a debate among civilian lawyers who considered whether to represent the "enemy combatants" facing trial by military commissions in Guantanamo Bay, Cuba.¹ Most prominently, the National Association of Criminal Defense

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¹ NAT'L ASSOC. OF CRIMINAL DEF. LAWYERS, ETHICS ADVISORY COMM., OPINION 03-04 (2003) ("NACDL"). NAT'L INST. OF MILITARY JUSTICE, STATEMENT ON CIVILIAN ATTORNEY PARTICIPATION AS DEFENSE COUNSEL IN MILITARY COMMISSIONS (2003) ("NIMJ"). John Mintz, *Lawyer Criticizes Rules for Tribunals; Won't Be Fair, Military Attorney Says*, WASH. POST, Jan. 22, 2004, at A3. Neil A. Lewis, *Lawyer Says Detainees Face Unfair System*, N.Y.

Lawyers (NACDL) advised its members that it would be unethical to represent an accused before the military commissions because the conditions imposed would make it impossible to provide adequate or ethical representation.² This paper will argue that the NACDL's position, at the time and under the circumstances, was the wise and preferred course of action. It was one of those unusual moments when, despite the instinct of every lawyer to participate, to get in there and fight, a call to boycott was better than a call to arms.

Soon after the 9/11 Al Qaeda terrorist attacks on the United States, the Bush administration surveyed the power available to the President to pursue the terrorists and the Taliban regime in Afghanistan which harbored them. As everyone knows, the government chose a multi-part strategy,³ but the principal response was military --an invasion of Afghanistan and a war on international terrorism. The President sought, and Congress by Joint Resolution authorized the President "to use all necessary means and appropriate force" against those who committed, authorized, planned, or aided the September 11 attacks.⁴

Pursuant to this resolution and claiming broad Executive and Commander in Chief authority, the administration invoked extraordinary powers to fight a war on terrorism. And, because wars inevitably produce both casualties and prisoners, the administration had to grapple

TIMES, Jan. 22, 2004, at A25.

² NACDL, *supra* note 1, at 1.

³ See, e.g., John Lancaster & Susan Schmidt, *U.S. Rethinks Strategy for Coping with Terrorists; Policy Shift Would Favor Military Action*, WASH. POST, Sept. 14, 2001, at A09. Michael R. Gordon, *After the Attacks: The Strategy; A New War and its Scale*, N.Y. TIMES, Sept. 17, 2001, at A1.

⁴ Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. §1541 note).

with how it would handle captured Taliban fighters, terrorists, or terrorist collaborators, whether seized in Afghanistan or elsewhere. A small circle of Administration officials, acting swiftly, secretly, and without consultation with Congress, decided it would use military tribunals to try terrorists.⁵ But these trials would not rely on systems based on civilian criminal law, international law, or even the Uniform Code of Military Justice.⁶ Instead the administration would create its own military commission system, based on a World War II model.⁷

On November 13, 2001, President Bush publicly issued an extraordinary military order providing that any non-citizen who was a member of al Qaeda or associated with international terrorism could be “tried for violations of the laws of war and other applicable laws by military tribunals.”⁸ The Military Order has breathtaking scope. Any non-citizen may be detained and tried by the military if the President has reason to believe that the person is or was a member of al Qaeda, or engaged in or conspired to engage in or prepared to engage in acts of international terrorism, or harbored persons who had done so—apparently at any time or in any place in the world.⁹

⁵ Tim Gordon, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1. See Editorial, *A Travesty of Justice*, N.Y. TIMES, Nov. 16, 2001, at A24.

⁶ Uniform Code of Military Justice, 10 U.S.C. §§ 801-946.

⁷ Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433 (2002). George Lardner Jr., *Nazi Saboteurs Captured! FDR Orders Secret Tribunal; 1942 precedent invoked by Bush against al Qaeda*, WASH. POST, Jan. 13, 2002, at W12. Richard Willing, *Legal battles of WWII underpin Bush strategy*, USA TODAY, Apr. 30, 2004, at 13A.

⁸ Military Order of November 13, 2001, “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” § 1(e), 66 Fed. Reg. 57,833 (Nov. 16, 2001). (“Military Order”).

⁹ *Id.* §§ 2(a)(1)(i)-(iii).

Lawyers for detainees report that persons currently in military custody at Guantanamo include “people who never took up arms against the United States or were arrested thousands of miles from Afghanistan or Iraq, Koran teachers who taught Taliban members, and professionals who say they unknowingly gave money to charitable organizations that funded al Qaeda.”¹⁰

The President’s Order determined that, given the grave danger presented by international terrorists, it would not be “practicable to apply in military commissions....the principles of law and the rules of evidence generally recognized in the trial of criminal cases.”¹¹ Rather, the Secretary of Defense was authorized to issue orders and regulations for the conduct of the military commission trials. At a minimum, these orders were to provide for a “full and fair trial” within the following parameters: military officers would decide questions of law and fact and impose penalties up to and including death. Any evidence having “probative value to a reasonable person” would be admissible, classified information would be protected, and conviction and sentence could rest on a two-thirds vote. Attorneys would conduct the prosecution and the defense. Convictions and sentences would be reviewed and finally decided by the President or the Secretary of Defense, and any individual subject to a military commission

¹⁰ Carol D. Leoning & Julie Tate, *Detainee Hearings Bring New Details and Disputes*, WASH. POST, Dec. 11, 2004, at A1. Details of who is being held as an enemy combatant in Guantanamo have come out of the Combatant Status Review Panels conducted by the military to determine whether the hundreds of persons held in prison facilities there are members of al Qaeda, the Taliban, or are persons supporting them. These panels are not legal proceedings, the detainee is not entitled to a lawyer, secret information is routinely used, and the government operates on a presumption that a person is an enemy combatant. *Id.* The panels are the military’s answer to the Supreme Court’s rulings that persons held at Guantanamo are within the jurisdiction of the United States and United States’ courts, *Rasul v. Bush*, _ U.S. __, 124 S. Ct. 2686 (2004), and that detainees are entitled to some measure of due process to establish the legality of their continued detention, *Hamdi v. Rumsfeld*, _ U.S. __, 124 S. Ct. 2633 (2004) (*Hamdi*, unlike the Guantanamo detainees, was an American citizen).

¹¹ Military Order, § 1(f).

proceeding would “not be privileged to seek any remedy or maintain any proceeding”¹² in any court of the United States or any state, any court of a foreign nation, or any international tribunal.

The President’s Order provoked furious criticism among those who saw it as unconstitutional concentration of power in the hands of the Executive and a plan to conduct kangaroo courts, operating in secret without judicial review.¹³ The debate among civilian lawyers over whether to participate in military commission proceedings did not arise, however, until after the contours of the commission’s operations were first spelled out in Military Commission Orders issued by the Secretary of Defense on March 21, 2002.¹⁴ Military Commission Order No. 1 specifically provided that an “Accused may also retain the services of a civilian attorney....”¹⁵ From that moment, the prospect that civilian counsel could become involved became real and open to argument.

This paper looks at the debate over civilian participation not only to argue that the NACDL’s position against participation was fully justified, but also to lay bare the complexity of the question and the factors that push in one direction or the other. Although the circumstances surrounding civilian participation in the military commission trials are quite unusual, this is not

¹² *Id.* § 7(b)(2).

¹³ *See, e.g.,* Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 *YALE L.J.* 1259 (2002); William Safire, *Kangaroo Courts*, *N.Y. TIMES*, Nov. 26, 2001, at A17.

¹⁴ Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374 (effective Mar. 21, 2002) (codified at 32 C.F.R. pt. 9) (“MCO-1”) (all of the Military Commission Orders and Instructions are available at <http://www.defenselink.mil/news/commissions.html>).

¹⁵ *Id.* § 4(C)(3)(c).

the first time that lawyers have had to face the dilemma of participation or non-participation,¹⁶ and it is useful to consider the dilemma in light of historical and even literary examples. Even in a particular case, the question of participation may be dynamic and require revisiting depending on whether the legal regime is static or evolving.

II The Military Commissions-A Full and Fair Trial or a Rigged System?

Are the military commissions rigged? Are they fixed or arranged in a way to produce a desired result, are they irregular courts in which accepted procedures are perverted and defense counsel's hands tied? In a word, yes.¹⁷

¹⁶ It should be noted, however, that the question of participation in a rigged system is not necessarily the same as questioning participation in an unjust system of laws. If a lawyer participates in a rigged system, he risks lending credibility to a predetermined outcome, but when a lawyer participates in enforcing an unjust system of laws, he risks lending credibility to the laws themselves. Thus, when French lawyers applied anti-Semitic laws of the Vichy regime during World War II, arguing over such questions as whether a person with one set of Jewish grandparents and one set of non-Jewish grandparents counted as a Jew, they were thereby endorsing the racially discriminatory laws themselves. The underlying laws applied in the military commission cases are not unjust, as a system of slavery or racial or religious discrimination is unjust. The laws applied in the military commission cases are instead applied in a *process* that is tilted to come out in favor of the government. For an insight into the problem of participating in a system of unjust laws, see ROBERT M. COVER, *JUSTICE ACCUSED* 226-56 (1975) (enforcement of slavery laws); RICHARD H. WEISBERG, *VICHY LAW AND THE HOLOCAUST IN FRANCE* (1996) (enforcement of anti-Semitic laws in Vichy France).

¹⁷ Although many decried the procedures as slanted and unfair, the tribunals were not universally or thoroughly condemned. Indeed, federal district Judge Robertson, who ordered that Salim Ahmed Hamdan may not lawfully be tried by a military commission until his Prisoner of War status is determined by a "competent tribunal" and until commission rules are amended to conform to the Uniform Code of Military Justice, observed that, "In most respects, the procedures established for the Military Commission at Guantanamo under the President's order define a trial forum that looks appropriate and even reassuring when seen through the lens of American jurisprudence." *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 166 (D.D.C. 2004). And, by U.S. military tribunal standards, the current commissions are far from the worst that we've seen. Consider, for example, the military commission that tried Confederate Cpt. Henry Wirz, the mid-level manager at the notorious confederate prison camp at Andersonville. The board of federal officers who tried him could admit any evidence it chose, it combined investigation, prosecution, and judgment, it made its own rules of procedure and evidence, all but one of the

There are essentially three parts to the procedures and instructions implementing the President's Military Order. The first, set out in Military Commission Order No.1 (MCO No.1) issued by Secretary of Defense Rumsfeld on March 21, 2002,¹⁸ establishes the *procedures* to be followed by the Commissions, including how the members will be appointed, what rules of evidence will apply, how the trial shall be conducted, and what rights shall be accorded the accused. The second, set out in Military Commission Instruction No.2 of a set of eight Instructions issued by the General Counsel of the Department of Defense, William Haynes, on April 30, 2003¹⁹ sets out the *crimes* and the elements of the crimes that may be tried by the military commissions. And the third, contained primarily in Military Instruction No.5²⁰ of the eight Instructions issued on April 30, 2003, identifies the *qualifications and restrictions* imposed on *civilian defense counsel* who participate in the commission proceedings.

Critics of the implementing rules focused primarily on the procedures to be followed by the commissions. The principal objections were the lack of any civilian review, the prospect of

members were veterans who had fought in the Civil War and all were awaiting promotions, prosecution witnesses were well paid, it overruled essentially all of the defendant's objections, and it arbitrarily limited Wirz's questioning and list of witnesses. At one point, even Wirz's civilian lawyers walked out on him, whereupon "Wirz cried as he begged them not to abandon him." Robert Scott Davis, *An Historical Note on "The Devil's Advocate": O.S. Baker and the Henry Wirz/Andersonville Military Tribunal*, 10 J. S. LEGAL HISTORY 25, 32 (2002). Eventually O.S. Baker stepped forward for the defense although it was obvious to all that Wirz was destined to hang, which he did.

¹⁸ MCO-1, *supra* note 14.

¹⁹ Military Commission Instruction No. 2, Crimes and Elements for Trial by Military Commission, 68 Fed. Reg. 39,381 (effective April 30, 2003) (codified at 32 C.F.R. pt. 11) ("MCI-2").

²⁰ Military Commission Instruction No. 5, Qualification of Civilian Defense Counsel, 68 Fed. Reg. 39,391 (effective April 30, 2003) (codified at 32 C.F.R. pt. 14) ("MCI-5").

using evidence kept secret from the accused and the public, and an evidentiary standard so minimal that hearsay and other forms of unreliable evidence, including coerced statements, would be admissible.²¹ These are dramatic departures from both civilian criminal law procedures and court martial practice, and they decidedly tilt the outcome to favor the government. Yet, in announcing the procedures the Secretary of Defense cautioned against looking at particular provisions and thereby missing the overall process which, he promised, would be a “full and fair trial”²² for the accused. He said:

...Observers may be inclined to examine each separate provision and compare it to what they know of the federal criminal court system or the court-martial system, and feel that they might prefer a system that they were more comfortable with. I suggest that no one provision should be evaluated in isolation from the others. If one steps back from examining the procedures provision by provision, and instead drops a plumb line down through the center of them all, we believe that most people will find that taken together, that they are fair and balanced and that justice will be served by their application.²³

Yet, in following the Secretary’s advice to view the procedures holistically, the tilt in the system becomes more apparent, not less. Here is an overview.

A. Commission Procedures

²¹ See, e.g., Rogers M. Smith, *With justice for some, not all?*, CHRISTIAN SCI. MONITOR, Nov. 20, 2001, at 9; Editorial, *Are Tribunal Rules Fair?*, WASH. POST, Mar. 25, 2002, at A18.

²² Secretary of Defense Donald Rumsfeld, News Briefing on Military Commissions (March 21, 2002), *reprinted in* NATIONAL INSTITUTE OF MILITARY JUSTICE, ANNOTATED GUIDE: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM 2 (2002) (“Annotated Guide”). Department of Defense General Counsel William J. Haynes said “full and fair trial” four times during the press conference, while Secretary Rumsfeld preferred the terms “forthright,” “impartial,” “balanced,” “honest,” or simply “fair.” Also, in response to a question asking whether the commission is a “kangaroo court,” Secretary Rumsfeld stated that he believed that the “characterization is so far from the mark that I am shocked -- sort of.” However, some have criticized the broad use of “full and fair” to describe the military tribunals as an “Orwellian twist.” William Safire, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A31.

²³ Rumsfeld, *supra* note 22.

The system is arranged to be military through and through. The military is the captor, the jailer, the prosecutor, the defender, the judge of the facts and the law, the sentencer, and there is no outside, impartial review.²⁴ Military commission members are named by the Appointing Authority, a military officer who oversees the process and who is named by, and acts for the Secretary of Defense and the President.²⁵ A military commission can have 3-7 members, and only the Presiding Officer must be a lawyer.²⁶ The other members need only be officers who are “competent to perform their duties.”²⁷ The members decide the facts and the law, creating the real possibility that the non-lawyer members will defer to the opinions of the Presiding Officer and, as non-lawyers, not have a full appreciation of the dangers of such things as hearsay evidence and an accused’s need to confront the evidence and witnesses against him.²⁸

²⁴ Lex Lasry, *United States v. David Matthew Hicks: First Report of the Independent Legal Observer For the Law Council of Australia*, 2004, ¶ 48. (available at http://www.nimj.org/documents/Lasry_Report_Final.pdf) (“the fundamental criticism of this procedure made by, among others, the American Bar Association is one of the process not being impartial and/or independent in that under these arrangements, the US Military is captor, jailer, prosecutor, defender, judge of fact, judge of law and sentencer with no appeal to an impartial and independent judicial body.”)

²⁵ MCO-1 § 4(A)(1).

²⁶ *Id.* §§ 4(A)(2)-(4). But, note that merely being a lawyer is a low threshold. As Lt. Cmdr. Swift noted, the “presiding officer would not even be qualified to be civilian defense counsel here.” John Hendren, *Military Trial Opens With a Challenge; A terrorism suspect's lawyer questions the qualifications of most of the officers presiding over proceedings at Guantanamo Bay*, L.A. TIMES, Aug. 24, 2004, at A11.

²⁷ MCO-1 § 4(A)(3). At the opening of Hamdan’s trial, none of the members of the panel, other than the Presiding officer, were lawyers. Hendren, *supra* note 26.

²⁸ There is a more fundamental problem as well. As Professor Ronald C. Smith, chair of the Criminal Justice Section of the ABA observed, military tribunals will inevitably be seen as slanted against an accused, “I think that there is the widespread view that a military tribunal, by its nature, cannot be impartial, that military careerists will be reluctant to acquit an alleged terrorist (too much explaining to do), and that the tribunal members will indulge in the

The accused is granted certain protections. Yet these, too, are qualified. The accused is entitled to notice of the charges against him and may only be convicted on a reasonable doubt standard. He is assigned a military defense lawyer²⁹ (whether he wants one or not)³⁰ and may retain civilian defense counsel, but the government will not pay for a civilian attorney. The accused enjoys a privilege against self incrimination, but this applies at the military trial and may not attach to prior statements of the accused even if obtained involuntarily or by means of torture.³¹ The commission proceedings will be open unless the Presiding Officer decides to close them in the interests of national security or the protection of participants. Discovery is available, and the prosecution must provide its trial evidence and exculpatory information to the defense, but access to witnesses and other evidence may be limited due to national security considerations and the protection of classified information. Finally, certain resources, such as interpreters and

presumption of administrative regularity while giving lip service to the presumption of innocence.” Ronald C. Smith, *The First Thing We Do, Let’s Kill All the Terrorists*, CRIM. JUSTICE 1 (Winter 2002).

²⁹ Apparently the Defense Department had to approve of any person selected to serve as military defense counsel (a practice contrary to the procedures of the Uniform Code of Military Justice). See Jonathan Mahler, *Commander Swift Objects*, N.Y. TIMES, June 13, 2004, § 6, at 42.

³⁰ MCO-1 § 6(D)(1). One of the four persons formally charged in the first military commission hearing, Ali Hamza Ahmed Sulayman al Bahlul, told the members of his tribunal that he wanted to represent himself. The Presiding Officer told him that this was not permitted under the rules. Bahlul declared that he will not participate in the trial unless he can represent himself or have a Yemeni attorney. Bahlul has two military-appointed attorneys, but it is unclear how his defense will proceed if he refuses to cooperate. Scott Higham, *Detainee Tells Hearing He Was Member of Al Qaeda*, WASH. POST, Aug. 27, 2004, at A3.

³¹ The Commission rules do not speak to this point as such. They do, however, permit the introduction of any evidence that has probative value to a reasonable person, *see infra* text accompanying note 32. In the pending, but temporarily suspended commission proceedings, defense counsel have filed motions to exclude involuntary defense statements and statements secured by torture. (The motions are available at http://www.defenselink.mil/news/Aug2004/commissions_motions.html).

working space, will be made available to the accused, but only as deemed necessary by the Presiding Officer and the Appointing Authority.

As for rules of evidence, the basic standard for admissibility remains as first framed by the President's Military Order, that is, "Evidence shall be admitted if, in the opinion of the Presiding Officer [or the Members, by majority vote] the evidence would have probative value to a reasonable person."³² While such a standard is similar to rules of evidence in administrative proceedings, commonly recognized bases for excluding probative evidence in civilian criminal courts are apparently not applicable. These would include grounds such as hearsay, privileged communications, evidence causing undue prejudice, or prior bad acts. And, apparently, statements obtained involuntarily from either the accused or other persons may also be admissible.

The most controversial evidentiary provisions are those dealing with "Protected Information" and the protection of witnesses. Protected Information covers a broad array of potential evidence including classified or classifiable information, information which might endanger the physical safety of the participants, information concerning intelligence and law enforcement sources, methods, or activities, and the dramatically broad catchall category, "information concerning other national security interests."³³ The Presiding Officer may hear and decide *ex parte*, and *in camera*, arguments that a witness' safety or the protection of information requires special arrangements such as testimony by electronic means or the closing of

³² Military Order § 4(c)(3).

³³ MCO-1 § 6(D)(5)(a).

proceedings.³⁴ The Presiding Officer can delete or substitute summaries for Protected Information, and can withhold Protected Information from the Accused, military defense counsel, and civilian defense counsel.³⁵ Protected Information may be used as evidence against the accused if disclosed to the military defense counsel, but counsel may not disclose the information to the accused or to civilian defense counsel.³⁶ In other words, a person may be convicted on evidence he has never seen, been informed about, or confronted in court.

An accused may be convicted on a two thirds vote of the members, except that a vote for death requires unanimity.³⁷ The Members are given wide latitude in sentencing, and no particular sentences are prescribed and no ranges provided. Commission Members are advised to keep in mind general sentencing goals such as punishment, incapacitation, and deterrence, and, in addition, are specifically told that: “All sentences should, however, be grounded in the recognition that military commissions are a function of the President’s war-fighting role as Commander-in-Chief of the Armed Forces of the United States and of the broad deterrent impact associated with a sentence’s effect on adherence to the laws and customs of war in general.”³⁸ No clarification is given, but the language sounds like an invitation to be severe.

Pretrial detention will not count toward an accused’s sentence, a period now running past three years for most detainees at Guantanamo. And, in any event, if an accused is found not

³⁴ *Id.* § 6(B)(3).

³⁵ *Id.* § 6(D)(5)(b).

³⁶ *Id.* § 6(D)(5)(d).

³⁷ *Id.* §§ 6(F), (G).

³⁸ Military Commission Instruction No. 7, Sentencing § 3(A), 68 Fed. Reg. 39,395 (effective Apr. 30, 2003) (codified at 32 C.F.R. pt. 16) (“MCI-7”).

guilty, he will not, on that account alone, be released from custody.³⁹ Any appeals, of conviction or sentence, are through the chain of military command, ending at the President's desk. There is no civilian judicial review.

B. Crimes Triable By Military Commissions

The specification of offenses and defenses triable in military commissions also reveals a system tilted toward findings of guilt. Military Commission Instruction No.2 sets out numerous crimes that are either "War Crimes,"⁴⁰ such as attacking civilians, or "Other Offenses triable by Military Commission,"⁴¹ such as hijacking or terrorism. Many of these crimes, such as aiding the enemy, aiding and abetting, command/superior responsibility for perpetrating or misprison, and accessory after the fact, as well as definitions of terms such as "enemy," are expansively drawn. Perhaps most controversial is the broadly defined crime of conspiracy together with the military's narrow interpretation of who is a lawful combatant. If one is engaged in combat, necessarily he has agreed to join with others to take lives, destroy property, or commit other acts of belligerency. If he is a lawful combatant, he will enjoy combatant immunity from charges inherently associated with being a member of an armed force. The United States has taken the position that all of the persons fighting with the Taliban, associated with al Qaeda or otherwise, either against the Northern Alliance or the United States after its invasion of Afghanistan, and all

³⁹ Defense Officials have said that if a detainee were judged to remain a danger, even after he had served a sentence, he might still not be released. Indeed, Attorney General Alberto Gonzales, then White House Counsel, stated that detainees could be held indefinitely, "and they need not be *guilty of anything*." Neil A. Lewis, *U.S. Charges Two at Guantanamo with Conspiracy*, N.Y. TIMES, Feb. 25, 2004, at A1 (emphasis added).

⁴⁰ MCI-2 § 6(A).

⁴¹ *Id.* § 6(B).

persons who aided or assisted al Qaeda or the Taliban are unlawful combatants. Moreover, according to the government's indictments, one can apparently be guilty of conspiracy to commit terrorism simply by having furnished any assistance to al Qaeda whether or not it was related to terrorist or military activities. Not surprisingly, all of the individuals currently charged under the military commission scheme have been charged with conspiracy.⁴²

C. Limitations Imposed on Civilian Defense Counsel

It is not only the military commission procedures or the broad definitions of criminal conduct that have raised questions about whether civilian defense counsel should participate in military commission cases. It is also, and perhaps more so, the specific limitations placed on counsel. One might be faced with a rigged system yet still have wide latitude to defend zealously. But what if the system was steered toward conviction *and* the rules applied to defense counsel seriously hampered her ability to defend? Such is the case with the military commissions. The question becomes, even apart from the way the commission procedures are

⁴² David Hicks has been charged with conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy (charge sheets at http://www.defenselink.mil/news/Nov2004/charge_sheets.htm). Hamdan, al Bahlul, and al Qosi have each been charged solely for conspiracy. Ali Hamza al Bahlul is a Yemeni who traveled to Afghanistan in 1999 to join al Qaeda. He worked in the al Qaeda media office making videos and recruiting materials and served as a bodyguard to Osama bin Laden. He was captured in Afghanistan in November, 2001. Sudanese national Ibrahim Ahmed Mahmoud al Qosi is alleged to have been al Qaeda's deputy chief financial officer in the early 1990's and a bodyguard of bin Laden. Australian David Hicks allegedly received training at al Qaeda camps and fought with the Taliban before being captured in Afghanistan in December, 2001. Yemeni Salim Ahmed Hamdan is alleged to have been a bodyguard and personal driver for bin Laden from 1996 until his capture in November, 2001. Hamdan's lawyer has decried the sweeping conspiracy net thrown around anyone the government claims aided the Taliban or al Qaeda, saying, "Had conspiracy been used this loosely in Nuremberg, you could have imprisoned all of Germany." Vanessa Blum, *Combatants To Go Before Military Panel*, LEGAL TIMES, Aug. 23, 2004, at 1.

constructed, and especially because they are constructed as they are, do the rules governing the qualifications and limitations on defense counsel insure that counsel will be ineffective?

The rules, as first issued on April 30, 2003,⁴³ provided that, in order to serve as a civilian defense counsel, a person must submit an application to the Chief Defense Counsel, the military officer in charge of overseeing the defense functions of the military commissions.⁴⁴ The applicant had to be a United States citizen, admitted in good standing to practice law, and in possession of a security clearance at the Secret level or higher, or the willingness to undergo a security check to obtain one.⁴⁵ The applicant also had to sign, without alteration of any kind, an “Affidavit and Agreement by Civilian Defense Counsel.”⁴⁶ This document binds the attorney to some fairly non-controversial obligations such as notifying the government of changes in one’s application information, being well-prepared, and representing one’s client zealously.⁴⁷ It also includes, however, some highly unusual obligations materially affecting counsel’s working conditions, ability to travel and communicate, and relationship with the client.⁴⁸

Altogether the undertakings envisioned civilian defense counsel effectively parachuting into a closely controlled military environment. Counsel, acknowledging that the government

⁴³ Military Commission Instruction No. 5, Qualifications of Civilian Defense Counsel was issued on April 30, 2003 and was the centerpiece of the debate around representation. It was subsequently modified to ease some of the restrictions, but the essential structure remains the same, *see infra* Part V.

⁴⁴ MCI-5 § 3(A)(1).

⁴⁵ *Id.* § 3(A)(2).

⁴⁶ *Id.* § 3(A)(2)(e).

⁴⁷ MCI-5, Annex B § II(B).

⁴⁸ *Id.* § II(E).

would not be responsible for any of his fees or costs, would agree that the commission case would be his “primary duty” and that no delays would be sought for personal or professional reasons.⁴⁹ He would work only with a Defense team consisting of the military defense counsel and other personnel provided by the military.⁵⁰ In other words, there would be no civilian law clerks, support staff, consulting attorneys, joint defense agreements, or any other outside help. In fact, with respect to joint defense agreements, Military Commission Instruction No. 4 specifically banned any agreements with other detainees, other counsel, or anyone “that might cause [civilian defense counsel] or the client he represents to incur an obligation of confidentiality”⁵¹ with others. In apparently eliminating joint defense agreements, the rules barred a common, strategically important, and legally recognized⁵² defense maneuver, and introduced a substantial element of unfairness. The defense would be unable to co-ordinate a common defense strategy with others facing charges while the military prosecutor would remain free to co-ordinate witnesses and information at will.

Under the mandated agreement,⁵³ the civilian lawyer would also agree not to travel from the site of the proceedings without permission from the Presiding Officer and not to transmit any

⁴⁹ *Id.* §§ II(B)-(C).

⁵⁰ *Id.* § II(C).

⁵¹ Military Commission Instruction No. 4, Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel § 5(A), 68 Fed. Reg. 39,389 (effective Apr. 30, 2003) (codified at 32 C.F.R. pt. 13) (“MCI-4”).

⁵² *See, e.g.,* United States v. Schwimmer, 892 F.2d 237, 243-44 (2d Cir. 1989), *cert. denied*, 502 U.S. 810 (1991). *See also* Michael J. Davidson, *The Joint Defense Doctrine: Getting Your Story Straight in the Mother of All Legal Minefields*, 1997 ARMY LAW. 17 (1997).

⁵³ MCI-5 Annex B.

documents from the site without prior approval. All pretrial and trial work, including any research, would be done only at the site. Counsel would agree to follow all rules related to the handling of classified information. In addition, and far more troubling, counsel would promise not to share any documents “about the case” with “anyone” except those on the defense team. And counsel would be further silenced by the agreement, applicable even after the proceedings ended, not to make any statement, “public or private,” “regarding” any closed sessions or classified information. Not only would counsel be forced to think about abandoning that best selling book down the road, but, more immediately, Military Commission Instruction No.4 actually imposed a standing gag order on statements to the media. It states, “Civilian Defense Counsel...may communicate with news media representatives regarding cases and other matters related to military commissions only when approved by the Appointing Authority or the General Counsel of the Defense Department.”⁵⁴ At the time this Instruction was released, the Department of Defense tried to assuage objections by suggesting that media contacts would be liberally authorized.⁵⁵

The most dramatic and condemned restrictions on civilian defense counsel, however, were the rules affecting counsel’s relationship with the client. Under the agreement, counsel would acknowledge that he would not have access to closed proceedings or Protected Information, which, it should be recalled, encompasses a potentially wide variety of information.⁵⁶ Counsel would acknowledge that reasonable restrictions could be placed on the

⁵⁴ MCI-4 § 5(C).

⁵⁵ NAT’L INST. OF MILITARY JUSTICE, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 121-22 (2003).

⁵⁶ *See supra* text accompanying notes 33-36.

time and duration of his contacts with the accused, with military authorities judging what is reasonable. Most controversially, counsel would agree that his communications with the client could be monitored for security and intelligence purposes.⁵⁷ The government agreed that it would not use any monitored information against the accused, but information that involved facilitation of a crime or was not related to legal advice would not be protected.⁵⁸ Moreover the attorney would agree to turn over any information, including client confidences, to prevent future crimes that the attorney believes are likely to lead to death, substantial bodily harm, or significant impairment of national security, an undefined term.⁵⁹

Obviously these undertakings can seriously intrude on the lawyer client relationship. Ethically, the attorney is bound to advise his client of the possibility of monitoring and the potential revelation of confidences.⁶⁰ It is reasonable to expect such advice would chill a full and free exchange between defense counsel and his client.⁶¹

If counsel signs the agreement, and remember the agreement is made a precondition for qualifying to serve, he places himself in considerable peril should there be a breach. He may face

⁵⁷ Military Commission Order No. 3, Special Administrative Measures for Certain Communications Subject to Monitoring § 4 (Feb. 5, 2004) (“MCO-3”).

⁵⁸ *Id.* § 4(F).

⁵⁹ MCI-5 Annex B § II(J).

⁶⁰ *See, e.g.*, A.B.A., STANDARDS FOR CRIMINAL JUSTICE, PROSECUTION FUNCTION AND DEFENSE FUNCTION Standard 4-3.1 (3d ed.) (Commentary).

⁶¹ Ellen S. Podgor & John Wesley Hall, *Government Surveillance of Attorney-Client Communications: Invoked in the Name of Fighting Terrorism*, 17 GEO. J. LEGAL ETHICS 145 (2003). Charlie Cassidy & Cassandra Porsch, *Government Monitoring of Attorney-Client Communications in Terrorism-Related Cases: Ethical Implications for Defense Attorneys*, 17 Geo. J. LEGAL ETHICS 681 (2004). Marjorie Cohn, *Looking Backward: The Evisceration of the Attorney-Client Privilege In the Wake of September 11, 2001*, 71 FORDHAM L. REV. 1233 (2003).

criminal prosecution for false statements or even fraud. In this, counsel may face a fate similar to that of lawyers who sign and violate agreements to comply with Special Administrative Measures⁶² (“SAMS”) which limit lawyer access to certain dangerous prisoners in the custody of the Federal Bureau of Prisons. For example, on February 10, 2005 a jury convicted long time criminal defense attorney Lynne Stewart of aiding a terrorist group, making false statements, and engaging in a conspiracy to defraud the United States.⁶³ Ms. Stewart was an attorney for Abdel Rahman convicted in the 1993 World Trade Center bombing plot. To continue to represent Mr. Rahman in prison, Ms. Stewart was required to sign affirmations that she would communicate with Mr. Rahman only about legal matters and not convey his messages to third parties.⁶⁴ Her conviction rested on the fact that she read a statement of Mr. Rahman’s to a reporter saying the “Sheik said he was withdrawing his support for – though not cancelling – a cease fire that the

⁶² Under 28 C.F.R. § 501.3(c), as modified in October 2001, the Attorney General has authority to implement Special Administrative Measures “for the monitoring or review of communications between that inmate and attorneys or attorneys’ agents who are traditionally covered by the attorney-client privilege, for the purpose of deterring future acts that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.” For a scholarly treatment, *see, e.g.*, Podgor, *supra* note 61, at 145-151.

⁶³ Michael Powell & Michelle Garcia, *Sheik’s U.S. Lawyer Convicted Of Aiding Terrorist Activity*, WASH. POST, Feb. 11, 2005, at A01. Although, at least one analyst has suggested that she was convicted of “speaking gibberish to her client and the truth to the press.” Andrew Napolitano, *No Defense*, N.Y. TIMES, Feb. 17, 2005, at A29.

⁶⁴ Stewart was required to sign an affirmation that she would not to “use [their] meetings, correspondence, or phone calls with Abdel Rahman to pass messages between third parties (including, but not limited to, the media) and Abdel Rahman.” However, the jury found that Ms. Stewart “frequently made gibberish comments in English to distract prison officials who were trying to record the conversation between the sheikh and his interpreter, and that she ‘smuggled’ messages from her jailed client to his followers.” Napolitano, *supra* note 63.

Islamic Group had observed for three years in Egypt.”⁶⁵ Indeed Military Instruction No.5 specifically warns counsel that any false statement may render him liable to criminal prosecution and cites the false statements statute.⁶⁶

III. Should Civilian Lawyers Participate—The Debate

After the President issued his Military Order creating the commissions, followed by the Procedures and Instructions, there was vigorous criticism from many quarters— especially from the organized bar. Most criticism did not, however, specifically engage the question of whether civilian lawyers should participate in commission proceedings. Usually groups and individuals just stated their opposition to the commission procedures or presidential authority or both. In March 2003, the American College of Trial Lawyers penned a very lengthy critique of the

⁶⁵ Julia Preston, *Civil Rights Lawyer is Convicted of Aiding Terrorists*, N.Y. TIMES, Feb. 11, 2005, at A1.

⁶⁶ MCI-5 specifically references 18 U.S.C. § 1001 (Fraud and False Statements, Statements or entries generally).

One might argue that an analogy between the agreement counsel must sign to participate in the military commissions and the special restrictions placed on Lynne Stewart is inapt because Ms. Stewart’s was an exceptional case. She was representing someone already serving a life sentence for a terrorist bombing (Sheik Abdel Rahman), and the jury found she intentionally served as a conduit of messages aimed at facilitating future violence. *See* Peter Margulies, *The Virtues and Vices of Solidarity: Regulating the Roles of Lawyers For Clients Accused of Terrorist Activity*, 62 MD.L. REV. 173, 200-209 (2003) (seeing Stewart’s actions as beyond the lawyer’s legitimate role and appropriately subject to criminal sanction.) Yet the point of the Stewart case is not how bad, or not so bad her behavior was, but how broadly the government puts defense counsel at risk with its non-disclosure agreements. Writing about the Special Administrative Measures applied to pretrial detainees charged with terrorism offenses, Joshua Dratel notes the many ways these restrictions hamper the attorney client relationship and the ability of the lawyer to prepare a defense. And, as to the lawyer’s own legal vulnerability, he notes, “The S.A.M.’s also unquestionably exert a chilling effect upon counsel. Given the nature and scope of the proscriptions, it is doubtful that any lawyer could maintain a perfect record of compliance. Thus, the government has maximum discretion regarding *whom* to prosecute, for *what*, and *when*. The question is *wilfulness*, and the government has the power to decide to whom it wishes to afford the benefit of the doubt.” Joshua L. Dratel, *Ethical Issues In Defending A Terrorism Case: How Secrecy And Security Impair The Defense Of A Terrorism Case*, 2 CARD. PUB. L., POLICY, & ETHICS J. 81, 88 (2003) (emphasis in original).

commissions and made recommendations, but also concluded by saying that members should stand ready to assist in the commission trials.⁶⁷ In April 2003, however, after the Defense Department issued its instructions imposing severe limitations on civilian counsel's working circumstances, relationship to the client, and ability to participate fully in the proceedings, the objections by lawyers grew sharper. For example, the American Bar Association's Task Force on Treatment of Enemy Combatants called for changes in the restrictions placed on defense counsel saying, "...the rules, as now drafted, do not sufficiently guarantee that CDC [civilian defense counsel] will be able to render zealous, competent, and effective assistance of counsel to detainees."⁶⁸

The National Association of Criminal Defense Lawyers took the most provocative position. In a July 2003 column written for the Association's magazine, the President of NACDL, Lawrence S. Goldman, said, "In view of the extraordinary restrictions on counsel, however, with considerable regret, we cannot advise any of our members to act as civilian counsel at Guantanamo. The rules regulating counsel's behavior are just too restrictive to give us any confidence that counsel will be able to act zealously and professionally."⁶⁹ This was followed by a NACDL Ethics Advisory Committee Opinion, unanimously endorsed by the Board of Directors on August 2, 2003, that concluded that it would be unethical for a criminal

⁶⁷ AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON MILITARY COMMISSIONS FOR THE TRIAL OF TERRORISTS 32 (2003) (available at <http://www.actl.com/PDFs/MilitaryCommissions.pdf>).

⁶⁸ A.B.A., TASK FORCE ON TREATMENT OF ENEMY COMBATANTS, REPORT TO THE HOUSE OF DELEGATES 2 (2003) ("Task Force").

⁶⁹ Lawrence S. Goldman, *Guantanamo: Little hope for Zealous Advocacy*, CHAMPION (Nat'l Assoc. of Criminal Def. Lawyers, Wash., D.C.), July 2003, 4, at 9.

defense lawyer to represent an accused before the military commissions.⁷⁰ The NACDL Board said it would not condemn any defense lawyer who undertook such representation but that, in its view, “the conditions imposed on defense counsel before these commissions make it impossible for counsel to provide adequate or ethical representation” and that the severe disadvantages imposed on counsel “can only help insure unjust and unreliable convictions.”⁷¹

The NACDL Ethics Opinion repeated the association’s earlier view that the rules of the military commissions, particularly provisions allowing secret evidence, denied the accused due process of law. But the limits on counsel’s ability to defend were the principal target. The opinion cited defense counsel’s inability to share information with other witnesses or lawyers or to put on a common defense, the limitations on counsel’s ability to meet with the client, and the monitoring of lawyer-client communications. The opinion especially condemned the requirement that civilian lawyers sign an affidavit and agreement that they will abide by the severe restrictions placed upon them, including an acknowledgment that conversations will be monitored and that no appeals or challenges will be brought to civilian courts. NACDL believed that a lawyer could not ethically agree to these terms and, moreover, that it was personally and professionally dangerous for the lawyer to do so. As the NACDL rightly pointed out, a lawyer who agrees to the terms of the government’s restrictions and signs the affidavit and then refuses to abide by its terms is subject to indictment and prosecution for false statements under 18 U.S.C. §1001. The NACDL warned any lawyer who chose to participate, “It should be apparent to all that the purpose of forcing defense counsel to sign this agreement is so violations of the

⁷⁰ NACDL, *supra* note 1, at 1.

⁷¹ *Id.*

agreement may be prosecuted under 18 U.S.C. 1001, as happened in the [Lynne] Stewart case.”⁷²

The NACDL opinion advised any participating lawyer that he or she must, despite the serious risks, provide a zealous and independent defense. The NACDL added that participating lawyers must also be qualified to handle death penalty cases.⁷³

The main response to the NACDL’s position came from the National Institute of Military Justice (NIMJ).⁷⁴ On July 11, 2003, NIMJ issued a statement saying that each person has to decide on his or her own whether to participate in military commission trials.⁷⁵ Yet it left no mistake that it believed participation was the proper course. Non-participation, the NIMJ statement continued, would be “unfortunate”... “public confidence in the administration of justice would be ill-served by a boycott,” “[p]ublic esteem for the bar would also suffer,” and “we recommend that attorneys . . . give serious consideration to submitting their names. The highest service a lawyer can render in a free society is to provide quality independent representation for those most disfavored by the government.”⁷⁶

By participating, NIMJ argued, a lawyer can challenge commission procedures, suggest changes, and make a record. Indeed counsel might even convince the military authorities that

⁷² *Id.* at 15.

⁷³ *Id.* at 2. Under military commission rules, any charge can lead to a death sentence. In the first four cases, the government unilaterally announced that no death sentences would be imposed.

⁷⁴ NIMJ is a non-profit organization dedicated to the study of military justice issues. (<http://www.nimj.org>.) In the interests of full disclosure, the author serves on the Board of Directors of NIMJ and participated in the organization’s internal debate about what position to take.

⁷⁵ NIMJ, *supra* note 1, at 1.

⁷⁶ *Id.* at 3.

they need not actually apply all of the rules that permit restraints on counsel, such as attorney-client monitoring. The NIMJ statement took the position that only participation increases the chances that there will be justice or improvements in the system; abstention means you are sitting on the sidelines and “cannot increase the likelihood that they [the accused] will receive justice or at least as much justice as might be obtained with the help of civilian counsel.”⁷⁷

How should we evaluate these differing views? Who was right?

IV. Sorting It Out

---Is There a Professional Obligation to Participate or to Refuse to Participate?

The debate over participation must begin with question whether professional rules would *require or prohibit* a lawyer’s participation in the military commissions. Under the rules of professional responsibility, there would be no professional obligation to participate, and lawyers would be free to boycott the proceedings whether for financial reasons, opposition to the idea of trials by military commissions, or any other personal calculation.⁷⁸ Freedom to choose one’s clients is usually discussed in the context of lawyers having a moral aversion to the client or to his cause. Some see representation of the morally odious or odious causes as simply a business decision, as Abraham Lincoln did when he represented a slaveholder seeking recovery of run-away slaves.⁷⁹ Others have argued that lawyers must represent “any person who has any rights to be asserted or defended.”⁸⁰ Lawyers are admonished that one’s “personal preference...to avoid

⁷⁷ *Id.*

⁷⁸ MODEL RULES OF PROF’L CONDUCT R. 1.16 (2003).

⁷⁹ Anton-Hermann, *Abraham Lincoln Argues a Pro-Slavery Case*, 5 AM. J. LEG. HIST. 299 (1961).

⁸⁰ David Luban, *LAWYERS AND JUSTICE* 7 (1988) (quoting David Dudley Field).

adversary alignment against judges, other lawyers, public officials, or influential members of the community does not justify his rejection of tendered employment”⁸¹ and that, “to make legal services fully available, a lawyer should not lightly decline proffered employment.”⁸² But, the lawyer is free to judge the matter for herself, and professional standards have endorsed this view for a very long time.⁸³ As EC 2-26 states, “A lawyer is under no obligation to act as adviser or advocate for every person who may wish to become his client....”⁸⁴

The issue becomes more complicated when the bar collectively refuses representation and appointment of counsel is necessary. Of course, it is quite unrealistic to think that lawyers, each and every one, would refuse to represent a defendant, because, ordinarily, *someone* will step forward. But it could happen. Perhaps no lawyer would want to represent Osama bin Laden or perhaps lawyers, say public defenders, may, as a group, declare a work stoppage.⁸⁵ In such a

⁸¹ MODEL CODE OF PROF’L RESPONSIBILITY EC 2-28 (2004).

⁸² EC 2-26.

⁸³ Canon 31 of The ABA Canons of Professional Ethics (1908) was quite explicit: “No lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment. Every lawyer upon his own responsibility must decide what employment he will accept as counsel, what causes he will bring into Court for plaintiffs, [and] what cases he will contest in Court for defendants....”

⁸⁴ EC 2-26.

⁸⁵ In the early 1980s, nearly ninety percent of the public defenders in the District of Columbia refused to accept new work until they received pay increases (although the Supreme Court held that the strike violated the Sherman Antitrust Act, *FTC v. Superior Court Trial Lawyers Ass’n*, 493 U.S. 411 (1990)). In the past few years, public defenders have refused to take on new clients until they have received higher wages in Alabama, Stephanie Hoops, *Defense lawyers protest pay freeze*, TUSCALOOSA NEWS, February 17, 2002; Massachusetts, *Lawmakers OK back pay after lawyers refuse clients; Defenders of poor await bill signing*, BOSTON GLOBE, Aug. 19, 2003, at A1; New York, David Rohde, *In Pay Dispute, Some Lawyers For the Poor Refuse Cases*, N.Y. TIMES, Apr. 3, 2001, at B8; and Oregon, Michelle Roberts, *Public Defenders go on Strike*, OREGONIAN, June 27, 2000, at B01. Generally, these strikes have been unpopular, but relatively successful. *But see* Raphael Lewis & Jonathan Saltzman, *SJC*

case, or even in the more prosaic example of assigning lawyers to represent indigent defendants, a court may appoint a lawyer to represent a client. In that circumstance, professional rules require greater justification but still provide an exit strategy for the lawyer. EC 2-29 puts it this way: “When a lawyer is appointed by a court...to undertake representation of a person unable to obtain counsel...he should not seek to be excused ...except for compelling reasons.”⁸⁶

In the case of the military commissions, the prospect that the accused would not have any legal representation simply does not arise. The military commission rules assign each accused a military defense counsel. Indeed the accused has no choice; he must have such counsel.⁸⁷ And there is no reason to think that such representation will not be zealous and competent. Military defense lawyers are governed by essentially the same ethical rules as the civilian defense bar,⁸⁸ and the military defense lawyers who represent the four accused have, in fact, been vigorous and effective under the circumstances.⁸⁹ In encouraging civilian counsel to participate in the

Orders Lawyers Appointed, BOSTON GLOBE, Aug. 18, 2004, at A1 (“A justice of the state Supreme Judicial Court yesterday formally ordered judges in Hampden County to appoint private attorneys to represent indigent criminal defendants with or without the lawyers’ consent and to report them to the state Board of Bar Overseers if they refuse to take a case without a valid excuse.”)

⁸⁶ EC 2-29.

⁸⁷ *See supra* note 30.

⁸⁸ Military prosecutors, too, must comply with ethical rules and, in the context of the military commission, they may face problems of their own. Consider Art. 31 of the U.C.M.J. which imposes limitations on the compulsion of self-incriminatory statements. If an overzealous prosecutor goes beyond the limitations imposed, he might be subject to disciplinary action by the military (however unlikely) or the state bars in jurisdictions where he is admitted.

⁸⁹ *See, e.g.*, Neil A. Lewis, *Military Defenders For Detainees Put Tribunals on Trial*, N.Y. TIMES, May 4, 2004, at A1; Blum, *supra* note 42, at 1. Apparently government officials expected that the military commissions would get off to a smooth start because they expected the first persons brought before the commission to plead guilty. But the five military lawyers assigned to defend the four have forcefully asserted their clients’ innocence and have denounced

commissions, NIMJ suggests that the special talents of the civilian bar are needed to add an additional reservoir of talent and experience to achieve justice for the accused. But NIMJ makes no claim, and there could be no claim, that justice can only be achieved if a civilian defense counsel participates. After all, most courts martial go forward without the participation of civilian defense counsel. Instead the NIMJ statement cites the preamble to the Model Rules of Professional Conduct saying that lawyers should, as public citizens, “seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”⁹⁰ But this is hardly obligatory and, in any event, does not answer the question of which action, participation or non-participation, serves to improve the law or the administration of justice.

If obligation were to lie anywhere under the rules, it would lie in requiring civilian lawyers to boycott the military commissions. But, even here, there is no clear mandate. The NACDL believed that the conditions imposed on defense counsel would make it impossible for them to provide adequate or ethical representation. Similarly, the ABA Task Force on Treatment of Enemy Combatants concluded that “the rules, as now drafted, do not sufficiently guarantee that Civilian Defense Counsel will be able to render zealous, competent, and effective assistance of counsel to detainees.”⁹¹ Professional rules do require that a lawyer represent a client competently and zealously and that he safeguard the client’s confidences. But these rules speak

the tribunals as unfair and rigged. Indeed Lt. Cmdr. Charles Swift, the military lawyer representing Salim Ahmed Hamdan, filed the first lawsuit directly challenging the legality of the commission system. Successful at the trial level, the matter is now on appeal to the U.S. Court of Appeals for the D.C.Circuit. Hamdan, *supra* note 17.

⁹⁰ NIMJ, *supra* note 1, at 3.

⁹¹ Task Force, *supra* note 68, at 2.

to counsel's preparation, diligence, and commitment, and the commission rules do not prevent the lawyer from being zealous, prepared, skilled, or effective within the bounds of the applicable law.

The problem is the applicable law. The rules of professional responsibility simply do not tell the advocate when a *system* so constrains the abilities of defense counsel that he may not be a part of it. The most direct guidance is a rule that encourages lawyers who find rules to be unjust or unfair to "endeavor by lawful means to obtain appropriate changes in the law."⁹² Not much help there.

Even with respect to one's professional obligation to keep client confidences, the model disciplinary rules provide that a lawyer may reveal "Confidences or secrets when...required by law..."⁹³ But, again, the rules do not say when a law requiring disclosure is so destructive of the lawyer-client relationship that an attorney's obedience to it is unethical. At the end of the day, the professional rules simply do not provide answers in situations where counsel is faced with a rigged system or where the system itself prevents counsel from providing effective representation. The professional rules assume away the problem because they assume that counsel will practice before tribunals that are impartial, fair, and fully respectful of a vigorous adversarial process.

Still there is an argument to be made, and, as the NACDL anticipated, it centers on the matter of competence. Although the lawyer's professional obligation to serve competently relates primarily to skill, proficiency, and preparation, one arguably acts incompetently by working within a system that disables him from doing a competent job. And there are several

⁹² EC 8-2.

⁹³ DR4-101(C)(2).

ways the military commission system disables the civilian lawyer from doing a competent job. First the rules as originally crafted forced the lawyer to work under adverse circumstances and without essential resources. The lawyer could do research only on site, had to prepare the defense only on site, could work only with military defense counsel or other assistants provided by the military, and could not share documents or information about the case with anyone except those on the defense team. As for resources, the attorney was entirely dependent on the military to provide translators and access to the defendant and other witnesses. And, as events unfolded, it was apparent that adequate resources were not always forthcoming.⁹⁴ Obviously such restrictions could unduly restrict counsel's ability to prepare an effective defense, a situation even the military authorities implicitly acknowledged as they subsequently modified some provisions.⁹⁵

Another way that the commission regime systematically undermined lawyer competence was to make it likely that only a few lawyers, and probably not the best, would be able to participate. Under the rules as originally written, not only would the civilian defense lawyer have little likelihood of getting paid for his efforts,⁹⁶ but he would also have to pay for the costs of obtaining a security clearance and other costs, such as travel. During the pendency of the commission proceedings, he would also have to put aside all other legal work and effectively

⁹⁴ Toni Locy, *Tribunal lawyers say defense short on resources*, USA TODAY, June 3, 2004, at 6A. ("Scott Silliman, a Duke University law professor, says the requests are routine and would be handled easily if the defendants faced trials by military courts-martial. But, he says, the tribunals are new to the government's bureaucracy, which must process many of the defense's requests. 'So, it's a . . . bureaucratic nightmare,' says Silliman, a former Air Force lawyer.") See Mahler, *supra* note 29.

⁹⁵ See *infra* Part V.

⁹⁶ Apparently most of the Guantanamo detainees lack personal resources sufficient to retain lawyers.

forsake other clients, including scheduled trial matters. Not surprisingly few lawyers have stepped forward. According to the Chief Defense Counsel William Gunn, about twenty five lawyers have submitted applications and none are from big firms. Little else has been disclosed about the qualifications or identities of these lawyers. And no generalizations can be drawn from the three civilian lawyers currently representing detainees since, in each case, the circumstances of their involvement are highly unusual.⁹⁷

A system structured so that only the least effective lawyers, or certainly not the best, can participate or, worse, where only the minimally competent or overly compliant are available, may be worse than having no lawyer at all. If the defendant has no lawyer at all, at least the whole world can see that the process is adversarial in name only.⁹⁸

⁹⁷ Only one civilian lawyer, Mr. Joshua Dratel, currently serves as a lead defense counsel. Mr. Dratel (who also happens to be on the Board of Directors of the NACDL) is a highly skilled and experienced trial attorney who has handled national security cases and possesses a security clearance. (See Dratel, *supra*, note 66 (recounting his experience in a terrorism case)). Mr. Dratel became involved at the urging of Major Michael Mori, the military defense counsel appointed to represent Australian David Hicks. Military authorities were apparently keen to move the case along (believing a guilty plea was likely) and encouraged Dratel's involvement. They even permitted Mr. Dratel to sign a modified agreement and affidavit. Mr. Hicks also has another civilian attorney, an Australian lawyer, Stephen Kenney, who serves only in a consulting capacity. The third civilian attorney is Professor Neal Katyal who also serves in essentially a consulting capacity. Professor Katyal assumed this role to facilitate the separate habeas challenge to the commission's proceedings.

⁹⁸ Consider this dilemma in the context of death penalty cases in the United States. Death penalty cases require highly qualified lawyers because the "responsibilities are . . . uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master." AMERICAN BAR ASS'N, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (2003), *reprinted in* 31 HOFSTRA L. REV. 913, 923 (2003). However, even though the stakes in a capital case are higher, the quality of the lawyers has not matched the need. See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994) and James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030 (2000).

Of course systems that impose personal costs on the lawyer, deprive him of needed resources, or seem to invite only the least among us to participate do not necessarily lead to ineffective or incompetent counsel. Sometimes, in the individual case, the lawyer can transcend the individual obstacles or give the government more than it bargained for. That was the case in the instance of Major J.F. Thomas, who represented Harry “Breaker” Morant in his rigged 1902 military trial during the Boer War in South Africa.⁹⁹ The resources available to the defense were Spartan, and the government thought it had a patsy in Major Thomas. But Thomas put up a fierce defense and, although Morant and two others were found guilty, the lawyer exposed the political calculations that insured the defendants would not have a fair trial.¹⁰⁰ So, too, with the lawyers who represented the hapless Nazi agents who landed on American soil during World War II, apparently to commit acts of sabotage. Their lawyers, Cols. Kenneth C. Royall and Cassius M. Dowell who were tasked with defending these men before specially constituted military tribunals, knew that the deck was stacked against them, but they fought doggedly to represent the defendants.¹⁰¹ Royall wrote to President Roosevelt, and twice filed for habeus corpus review, until, finally, he managed to bring the legality of the commission procedures before the Supreme Court. But, despite the persistent and skillful efforts of the defense, the

⁹⁹ Harry “Breaker” Morant, an Australian officer serving with the Bushveldt Carbineers, was court-martialed for the murder of civilian Boers and a German missionary during the Boer War. In the movie version of the incident, (which may take some poetic license) the court-martial outcome was predetermined to achieve political ends. The British High Command selected Maj. Thomas to act as a defense attorney because he had no trial experience (he handled mainly wills and land transactions).

¹⁰⁰ See Drew L. Kershen, *Breaker Morant*, 22 Okla. City U.L. Rev. 107 (1997).

¹⁰¹ See, e.g., David J. Danelski, *The Saboteurs’ Case*, 1 J. SUP. CT. HIST. 61 (1996); LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* (2003); Lardner, *supra* note 7.

government had already electrocuted the “saboteurs” by the time the Supreme Court published its opinion (which, in any event, rejected the defendants claims).¹⁰²

A similar demonstration of a lawyer putting up a good fight, even in the face of substantial government-created headwinds, is Lt. Cmdr. Charles Swift, who represents Salim Ahmed Hamdan in the military commission trials. Although he compared the commission proceedings to a Monty Python movie where “the Government had this wonderful suit of armor, lance and a sword, and I had been given a sharp stick,”¹⁰³ Swift has vigorously defended his client by filing amicus briefs (in which he compared President Bush to King George III), suing the United States, and challenging the proceedings at virtually every turn.¹⁰⁴

This idea, that the individual lawyer can overcome the obstacles of a procedurally rigged system, or at least must try to overcome the obstacles, rather than simply refuse to participate, lay behind the comment of former Chief Judge of the Court of Appeals of the Armed Forces, Walter T. Cox III. In responding to the internal NIMJ debate over whether lawyers should represent persons on trial before the military commissions, he said, “Civilian attorneys should be willing to step up and give the accused the best defense that they can and make the case ‘on the record’ of each case how that case may or may not have been properly defended under the

¹⁰² The Court released a per curiam opinion the day after oral arguments, July 31, 1942, which effectively rubber-stamped the proceedings. *Ex Parte Quirin*, 317 U.S. 1 (1942) (per curiam). The full opinion was released on October 29, 1942 after the saboteurs were executed. *Ex parte Quirin*, 317 U.S. 1 (1942).

¹⁰³ Mahler, *supra* note 29.

¹⁰⁴ Hendren, *supra* note 26. Scott Higham, *Hearing open with Challenge to Tribunals: Defense Attorneys say Military Commissions deny Due Process to Detainees*, WASH. POST, Aug. 29, 2004, at A12.

circumstances.” He added, “This reminds me of a doctor who would say, ‘We have inadequate medical facilities, so just let the patients die.’”¹⁰⁵

These comments, however, fail to take account of the third way that the commission rules set up lawyers to give ineffective or incompetent assistance. The rules substantially intrude into the attorney client relationship by enlisting the lawyer’s agreement that conversations with the client could be monitored. Because clients must be told of this possibility, they would naturally be unwilling to share full information that would then be available to their jailers (and possibly their tormentors).¹⁰⁶ And the rules of the proceeding further undermine a true defense by insuring that civilian counsel cannot see or evaluate all of the evidence used against the client or have access to all exculpatory information. In such circumstances, the situation is more like the doctor who says, “The government has fixed it so the patient dies, and I’m asked to be present so it looks like he is getting full and adequate care.” When all of the rules of the

¹⁰⁵ Email from William T. Cox III (July 7, 2003) (on file with author) (reprinted with the permission of Mr. Cox).

¹⁰⁶ The detention centers at Guantanamo Bay have been the subject of intense scrutiny related to the treatment of prisoners. Although officials claim that detainees at Guantanamo are treated in “a humane manner at all times,” Kathleen T. Rhem, *Detainees Living in Varied Conditions at Guantanamo*, American Forces Information Service, Feb. 16, 2005 (available at http://www.defenselink.mil/news/Feb2005/n02162005_2005021604.html), there have been serious allegations of torture made by the International Committee of the Red Cross, Neil A. Lewis, *Red Cross Finds Detainee Abuse In Guantanamo*, N.Y. TIMES, Nov. 30, 2004, at A1; by FBI agents, Dan Eggen & R. Jeffrey Smith, *FBI Agents Allege Abuse of Detainees at Guantanamo Bay*, WASH. POST, Dec. 21, 2004, at A1; and by released detainees, Carol D. Leonnig & Dana Priest, *Detainees Accuse Female Interrogators; Pentagon Inquiry Is said to Confirm Muslims’ Accounts of Sexual Tactics at Guantanamo*, WASH. POST, Feb. 10, 2005, at A1. See also Jane Lampman, *US Stand Against Torture: Firm Enough?* CHRISTIAN SCI. MONITOR, Jan. 19, 2005, at 11. One of the accused in the military commission cases, David Hicks, has filed a detailed affidavit setting out the abuse he has suffered at the hands of military officials, both in Afghanistan and at Guantanamo Bay. Affidavit of David Hicks, *Rasul v. Bush*, No. 02-299 (D.D.C. Aug. 5, 2004), *proceedings on remand*, _ U.S. _, 124 S. Ct. 2686 (2004).

commission are considered, it appears that even the most ferocious and committed defender will be disabled from providing fully effective and competent representation.

--- A Utilitarian Calculus

The position of NIMJ was that civilian counsel should participate in the commission proceedings because counsel would be in a position to soften or change objectionable rules and because counsel could do *some* good for the accused. Analysis of both claims requires a bit of deconstruction. First, the claim that counsel's participation will facilitate positive changes in the system highlights a hallmark of the commission process: it is being made up on the fly. The President's Military Order set out the general rules, but then left the creation of a system to the Secretary of Defense, the General Counsel of the Defense Department, and the Appointing Authority who oversees the operation of a particular commission. Procedures for the actual proceedings had to be made up, crimes described, and the role of counsel spelled out. As the commission proceedings began, there were no rules for disqualification of commission members, no clear motion practice, no clear idea of how far defense counsel could go in discovery, no developed rules of evidence.¹⁰⁷ This make-it-up-as-you-go-along state of affairs both cuts in favor and against counsel's participation. It cuts in favor because there appears to be room for good lawyering and arguing for rules that will soften the unfairness to the accused. It argues against because the lawyers ought to be sure the client's rights will be protected before the process begins, not hope for the best as matters unfold.¹⁰⁸

¹⁰⁷ At the time of this writing, the military commission authorities have issued a series of memoranda to fill in some, but certainly not all, of these gaps, *see* www.defenselink.mil/news/commissions.html.

¹⁰⁸ This same make-it-up-as-you-go-along feature characterized the military commission that tried the Nazi saboteurs. Professor Louis Fisher criticized this approach as follows, "It was error for Roosevelt to authorize the tribunal to 'make such rules for the conduct of the

Second, the claim that counsel's participation will result in positive changes in the commission proceedings depends on at least three subsidiary propositions: 1) that, strategically speaking, working within the system is more likely to effect change than making a political statement by boycotting, 2) that changes that can or will be made are likely to be material and significant, and 3) that any changes that are made, if short of completely eliminating the slanted features of the system, will outweigh the legitimizing effect of counsel's participation. The first proposition is difficult to evaluate. At the time the NACDL discouraged its members from participating in the commissions, the restrictions on counsel's working environment and private and adequate access to the accused were severe. But the military later modified some of its restrictions and conditions.¹⁰⁹ It is impossible to say whether the NACDL's position caused these changes or whether the more general criticism and condemnation did so. But the NACDL's action surely was a part of the impetus for change.

At the same time, it also appears that counsel participating in the proceedings have produced changes or, at least, clarifications in commission operations. For example, counsel for David Hicks, Joshua Dratel, reports that he was able to negotiate changes in the affidavit civilian defense counsel must sign.¹¹⁰ These changes, he reports, effectively put him in a position no worse than he would be in if he were representing a criminal defendant in an ordinary case

proceedings, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it.' Procedural rules need to be agreed to before a trial begins, not after. No confidence can be placed in rules created on the spot, particularly when done in secret. It would have been better for the military tribunal to operate under the procedures set forth in the Articles of War and the *Manual for Courts-Martial*." Fisher, *supra* 101, at 173.

¹⁰⁹ See *infra* Part V .

¹¹⁰ Telephone interview with Joshua Dratel, Attorney for David Hicks (Dec. 12, 2004).

involving classified documents. And, since the operating rules are being made up as matters proceed, participating lawyers have pressed for and were successful at removing two members of the first commission panel.¹¹¹ They are also filing or planning to file various discovery motions and motions for the exclusion of statements, all of which may make “new law” in this start-from-scratch system. Moreover, as the NIMJ Statement noted, not all rules crafted to favor to the government will necessarily be invoked, and presumably counsel can try to minimize harm to the accused. For example, even though all evidence probative to a reasonable person would permit admission of coerced statements, counsel may be able to convince the commission not to allow such evidence.

It appears, however, that there are features of the commission system that are irremediably tilted and not open to significant alteration by those operating within the system. These are the basic rules of operation prescribed by the President. Whether the rules will be invoked to their full extent, it is still the case, and remains the case, that the accused can be convicted on secret evidence, unreliable evidence may be admitted, access to witnesses and other evidence is under the control of the military, military officers are the judge and jury of the proceedings, members of the panel other than the presiding officer need not be trained in the law, and there is no civilian review of the proceedings. It will take a political decision to alter these rules, not good lawyering.

So, even if counsel is able to change some rules, the core unfairness and tilt in the system will remain. The net result may be that counsel, by trying to do some good, by taking all lawyer-

¹¹¹ John Hendren, *Guantanamo Tribunal Loses 3 Members Due to Possible Conflicts*, L.A. TIMES, Oct. 22, 2004, at A29. But, Commander Swift has stated that he believes that the removal of the members was a “Pyrrhic victory” because the commission simply reduced the number of panelists (from five to three) instead of replacing them (which would have required the prosecution to convince three of five, rather than two of three). *Id.*

like steps, filing motions, putting together some kind of defense, utilizing one's full resources, such as they are, will have lent legitimacy to a rigged system. The government will continue to trumpet that it has provided a "full and fair" trial, and, in part because of counsel's participation, the outcome may appear genuine and valid.

But, still, isn't it better to do something? Can't the lawyer do some good for the accused? These, too, are hard questions to answer. Although the deck is stacked against the accused by virtue of the procedures, the limits on counsel, and the broad-based crimes and limited defenses, it is possible that a particular accused could achieve some success in defending himself. Moreover, success may be defined differently for each person, with politics affecting the outcome. Take the case of David Hicks, the Australian accused of training in al Qaeda camps and fighting with the Taliban in Afghanistan in 2001. It is lucky for Mr. Hicks that he hails from Australia, a staunch ally of the U.S. and a non Arab country that has supported the U.S. in the war in Iraq. As a result, the U.S. has signaled that, should Mr. Hicks be convicted, he will be returned to Australia to serve any sentence.¹¹² The U.S. has also been co-operative in permitting an Australian lawyer to participate as consulting counsel and in easing the restraints on Mr. Hicks' U.S. civilian counsel, Mr. Dratel. According to Mr. Dratel, Mr. Hicks wants to put up a defense, does not want to be seen as obstreperous or obstructionist, and is aware of the importance of public opinion in his own country. In other words, for some clients, success may be more than just winning or losing in the courtroom.¹¹³

¹¹² Press Release, U.S. Dep't. Of Defense, Guantanamo Detainee Charged (June 10, 2004) (available at <http://www.defenselink.mil/releases/2004/nr20040610-0893.html>).

¹¹³ But, of course, one cannot know the client's larger interests until there is a client. The decision whether to participate, or to make yourself available for participation, may come before you know who your client is or what his larger goals may be.

Indeed, sometimes clients may regard a ‘win’ as simply putting up a good fight against a powerful or corrupt foe.¹¹⁴ Or, perhaps the client has public relations goals or political goals, and, if the lawyer can assist him in showing that the system is unfair and the public perceives the system as unfair, that is a victory in itself. Or, the client may be looking beyond the here and now and may want to make a record for history, a record to let those who come after judge whether justice was done. Of course if the lawyer is to assist the client in this dimension of his case, there has to be a public record, and there has to be free access to the court of public opinion. There has to be free access to the media. When the NACDL issued its call for non-participation, one of the severe restrictions on counsel included a gag order prohibiting counsel from communicating with the media about any commission matters without permission from a military official. These limitations still exist although, following the public stance of the NACDL and sharp criticism of the rules by others, the military authorities have, in practice, allowed substantial press-counsel contact. It remains to be seen if secret evidence is used and whether the public will ever know anything about it.

--Chance For Correction from Above

One factor that may strongly influence a decision to participate in an unfair proceeding is whether there is the possibility of correction from above. If independent civilian courts have review authority and can provide relief, then defending someone, even in a thoroughly corrupted process, is fully justified. Under that circumstance, participation in the proceeding is like driving

¹¹⁴ In his book recounting years of serving as a “people’s lawyer” representing labor unions, civil rights activists, and others, the late professor Arthur Kinoy repeatedly emphasized that “the test of success for a people’s lawyer is not always the technical winning or losing of the formal proceeding. Again and again, the real test was the impact of the legal activities on the morale and understanding of the people involved in the struggle. To the degree that the legal work helped to develop a sense of strength, an ability to fight back, it was successful.” ARTHUR KINOY, RIGHTS ON TRIAL 57 (1983).

a dirty car to the car wash. You can't get there without getting in. Consider the case of *Brown v. Mississippi*¹¹⁵ decided in 1936. It would be hard to imagine a case more corruptly arranged to insure a guilty verdict.

One Raymond Stewart was murdered on March 30, 1934. That night and the next day sheriff's deputies brutally beat and tortured three black men until they signed confessions admitting to the murder. The next day, April 2nd, two county sheriffs and others were invited to the jail to hear the defendants' "free and voluntary confessions." On April 4th a grand jury returned indictments against the defendants for murder, and they were arraigned the same day. There was certainly no speedy trial issue as the court appointed counsel at arraignment, and the trial began the next morning. The trial ended the following day with convictions and death sentences. The sole evidence against the defendants was the testimony of the sheriffs and another person who heard the "free and voluntary" confessions of the accused. On appeal, the state courts, fully aware of what had transpired, affirmed the convictions. At that time, at that place, and under those circumstances, the defendants could not get and did not get a fair trial. But they did have the United States Supreme Court, which reversed. The so-called trial, the Court said, was a "mere pretense" where "state authorities...contrived a conviction resting solely upon confessions obtained by violence."¹¹⁶ In *Brown*, it made sense for the lawyers to participate and to fight all of the way because they had an independent court to appeal to, a court unafflicted by prejudgment and alert to denials of fundamental fairness.¹¹⁷

¹¹⁵ 297 U.S. 278 (1936).

¹¹⁶ *Id.* at 286.

¹¹⁷ Death penalty cases in Texas present a similar scenario. The Texas courts routinely uphold death sentences and in some cases appeared to defy or ignore U.S. Supreme Court rulings. Fortunately, the Supreme Court has exercised its power of review to keep the Texas

One of the major criticisms of the military commissions is the absence of independent civilian review authority. Under the President's Order, an accused's fate will be decided exclusively by military officers, and final review of any conviction lies with the President or the Secretary of Defense acting at his discretion. Commission panels must consist of military officers. Review Panels that examine the trial record and forward the matter to the Secretary of Defense or remand to correct errors of law must also consist of military officers. And final determinations go to the Commander-in-Chief who, as the Prosecutor-in-Chief, began the entire process by designating who should be tried by a military commission. And, to remove any doubt that this is a closed system, the President's Order provides that an accused is "not privileged to seek any remedy" in any federal or state court or any international court. The President has attempted to soften this insulated, all-military scheme by granting temporary military ranks to three distinguished civilian lawyers and appointing them to the Review Panel. But, if the process is rigged, it is unlikely that appeals to higher authority *within the military commission system itself* will correct the system. There can be no confidence that the appeals process, including the Review Panel, will entertain questions about the legitimacy of the very system within which they are operating.

With the military commissions, the best way, (and, according to the commission rules, the only way), to raise a fundamental challenge is outside of the commission system. Such a

Courts in check. In the past decade, the Supreme Court has had to reverse decisions in six Texas death penalty cases, including three in 2004 alone. Adam Liptak & Ralph Blumenthal, *Death Sentences in Texas Cases Try Supreme Court's Patience*, N.Y. Times, Dec. 5, 2004, at A1. See also Stephen B. Bright, *Elected Judges and the Death Penalty in Texas: Why Full Habeas Corpus Review by Independent Federal Judges Is Indispensable to Protecting Constitutional Rights*, 78 TEX. L. REV. 1805, 1805 (2000); TEXAS DEFENDER, A STATE OF DENIAL: TEXAS JUSTICE AND THE DEATH PENALTY (2000) (available at <http://www.texasdefender.org/publications.htm>).

fundamental challenge is underway now. Professor Neal Katyal filed a habeas corpus petition on behalf of Salim Ahmed Hamdan, one of the four military commission defendants. On November 8, 2004, Hamdan's petition challenging the lawfulness of trying him for war crimes before the military commissions was granted by Judge Robertson of the federal district court in Washington, D.C.¹¹⁸ So it is simply not the case that the only way to challenge the legality of the commission proceedings is to participate in them. To the contrary, the best way to challenge the commission proceedings was to act outside of them.

Both of the U.S. civilian lawyers, Mr. Dratel and Professor Katyal, pressed the point that they viewed their representation in the commission proceedings as just one venue, just one avenue of seeking to represent their clients' interests. Indeed Professor Katyal's involvement in the commission case grew out of his entirely separate representation of Mr. Hamdan in the habeas corpus proceeding. District Judge Robertson asked Professor Katyal to assist in Mr. Hamdan's case in Guantanamo and thus provide him with more complete representation (and to make lawyer-client interactions easier).¹¹⁹ Viewing representation of a client as a battle with many fronts can make the decision whether to participate in commission proceedings more palatable, but it does not enhance the argument that civilian counsel should participate in the first instance.

--Personal Risks to Defense Counsel

Deciding whether to participate in rigged systems may also turn on the professional or personal risks the lawyer faces. In law school classes, we tend to think of this in terms of the

¹¹⁸ Hamdan, *supra* note 17.

¹¹⁹ Telephone Interview with Neal Katyal, Professor, Georgetown University Law School (Dec. 14, 2004).

risks associated with representing unpopular or reviled clients. We tell stories, good and true stories, of lawyers who have taken up hated causes or wicked men. A classic is the story of John Adams in his defense of British troops. On March 5, 1770, British soldiers opened fire on a mob in the streets of Boston.¹²⁰ When British captain Thomas Preston and his soldiers were put on trial, John Adams and Josiah Quincy rose to defend them. Although Adams was defending unpopular British soldiers who killed Boston civilians, his dogged defense secured acquittals for the troops.¹²¹ Adams' defense made him a model for lawyers and a hero in American history.

But this is not a John Adams story. This is not a situation where the lawyer is taking on an unpopular client and risks public censure or criticism. This is a case where the danger comes from the government and its ability to punish lawyers who don't hew the line, represent clients the government doesn't like, or, perhaps, defend too vigorously.

We would all like to think that we will rise to the occasion and stare down danger in defense of clients, but the reality of confronting government power can be sobering. In other countries, crusading lawyers have been killed, jailed, stripped of citizenship, ostracized, and booted out of jobs. Even recently, for example, threats of criminal prosecution for "evidence fabrication" and harassment have created new lows in the morale of Chinese defense attorneys

¹²⁰ For accounts of the Boston Massacre, see HILLER B. ZOBEL, *THE BOSTON MASSACRE* (1970); FREDERIC KIDDER, *HISTORY OF THE BOSTON MASSACRE, MARCH 5, 1770* (2001).

¹²¹ See 3 *LEGAL PAPERS OF JOHN ADAMS* (L. Kinvin Wroth & Hiller Zobel, eds. 1965); see also John Phillip Reid, *A Lawyer Acquitted: John Adams and the Boston Massacre Trials*, 18 *AM. J. LEGAL HIST.* 189 (1974).

who “are forced simply to go through the motions of serving as a trial prop.”¹²² In Tunisia, human rights lawyers are subject to threats of imprisonment, harassment, and physical assault.¹²³

But one might think that lawyers in the United States may face nothing more drastic than social ostracism. Think again. For example, during the 1950s, the American Bar Association encouraged local disciplinary action against lawyers who represented Communists. In the famous “Foley square” case,¹²⁴ the five defense lawyers for the Communists were held in contempt for engaging in a conspiracy to obstruct the trial and were imprisoned for their efforts. Although the Supreme Court upheld the contempt charge, Justices Black and Frankfurter vigorously dissented. In the dissenting opinions, the Justices recognized that the lawyers were essentially condemned for guilt by representation.¹²⁵ Professor Arthur Kinoy similarly was convicted on criminal charges for using “loud and boisterous language” during his defense of anti-war activists before the House Un-American Activities Committee (although his conviction was later reversed on appeal).¹²⁶

¹²² CONGRESSIONAL-EXECUTIVE COMMISSION ON CHINA, DEFENSE LAWYERS TURNED DEFENDANTS: ZHANG JIANZHONG AND THE CRIMINAL PROSECUTION OF DEFENSE LAWYERS IN CHINA (2003).

¹²³ HUMAN RIGHTS WATCH, HUMAN RIGHTS LAWYERS AND ASSOCIATIONS UNDER SIEGE IN TUNISIA (2003) (available at <http://www.hrw.org/backgrounder/mena/tunisia031703.htm>)

¹²⁴ *Dennis v. United States*, 341 U.S. 494 (1951).

¹²⁵ “Unless we are to depart from high traditions of the bar, evil purposes of their clients could not be imputed to these lawyers whose duty it was to represent them with fidelity and zeal. Yet from the very parts of the record which Judge Medina specified, it is difficult to escape the impression that his inferences against the lawyers were colored, however unconsciously, by his natural abhorrence for the unpatriotic and treasonable designs attributed to their Communist leader clients.” *Sacher v. United States*, 343 U.S. 1, 19 (1952) (Black, J., dissenting).

¹²⁶ Kinoy, *supra* note 114, at 307.

The recent conviction of Lynne Stewart also serves as a chilling reminder that advocacy for unpopular defendants can have serious consequences. Indeed, Lt. Cmdr. Philip Sundel, who represents al-Bahlul as a military defense lawyer was recently denied a promotion, effectively ending his military career under the Navy's "up or out" system. His lost promotion might well have come from his zealous advocacy against the commission system.¹²⁷

A lawyer's decision to participate in a system threatening personal or professional harm depends on two factors. First the lawyer must fully inform himself and be clear eyed about the risks he faces. Second, he must, at the outset and throughout the proceedings, search his conscience and be sure that every strategic decision he makes is made in the best interests of the client and not influenced by self protection. He must pursue a vigorous defense and not trim the sails, even a little, for his own interests. But a lawyer might be well advised not to participate at all.

---The Lawyer's Own Moral Imperative

Lawyers can obviously view participation in commission proceedings from sharply different moral perspectives. On one side, some might find the interference with the attorney client relationship is too harmful to countenance under any circumstances. A lawyer's privilege and duty to press a full and zealous defense on behalf of a client and protection of attorney-client

¹²⁷ See Neil A Lewis, *U.S. Terrorism Tribunals Set to Begin Work*, N.Y. TIMES, Aug. 22, 2004, at 22. ("One of those lawyers, Lt. Cmdr. Philip Sundel, said he accepted the job after the Navy's top lawyer said it would be a historic opportunity. 'Not historic enough, I guess,' Commander Sundel said in an interview. 'I found out in June I was not selected for promotion for the second year in a row,' said Commander Sundel, who has a strong reputation as a trial lawyer. Under the military's system that emphasizes promotion or resignation, he will leave the service. Asked if he believed the promotion denial was related to his representation of Ali Hamza Ahmed Sulayman al-Buhlal of Yemen and his strong criticism of the tribunal system, he said: 'I have no way of knowing if it adversely impacted my situation. It didn't positively impact, it seems.'")

confidences are integral to the independence of the bar and, hence, to our system of justice. One may see any encroachment on these prerogatives as reason enough to refuse to participate in commission proceedings. In other words, the government must not be allowed the slightest advantage lest, little by little, the lawyer's role is compromised. Others may also view the entire executive branch war on terror as vast and dangerous overreaching, not to be assisted in any way. They want to oppose the President's action and only feel comfortable doing so outside of the apparatus set up to fight the war.

On the other side, some lawyers may choose to participate and may do so for many different reasons. Some may choose to fight from within, either for the sake of the accused or to defend one's own sense of fairness and justice. An extreme example of a lawyer participating in a rigged system in order to be part of fighting the good fight is Soviet lawyer Dina Kaminskaya. She represented various defendants in Soviet political trials where outcomes were dictated by the Communist Party. These trials included coercive interrogations, perjury, and subservience of the judiciary to political authority. Yet Kaminskaya felt a moral obligation to stand with the dissidents. She said, "the Soviet dissidents whom I defended were neither terrorists nor extremists. They were people struggling, within the law, to induce the state to observe legitimate human rights.... In defending them I felt that I too was in some degree taking part in that struggle."¹²⁸

¹²⁸ Dina Kaminskaya, FINAL JUDGMENT 49 (1982). As one reviewer of her book put it, "Ms. Kaminskaya suggests at one point that she represented dissidents out of a sense of professional responsibility. Undoubtedly more was involved, *because a sense of professional responsibility might also compel one to refuse to participate in a case in which the outcome was predetermined*. Despite her protestations to the contrary, I suspect that Ms. Kaminskaya possessed a bit of the dissident spirit herself." Mark H. Loewenstein, *Book Review* 55 U. COLO. L. REV. 337, 339 (1984) (emphasis supplied).

Others may choose to participate because they believe they can assist the accused, achieve a sound result, and, in any event, think that the government is doing the best it can to find ways to balance current dangers and protections of those put on trial. There is a hint of this view in the NIMJ statement, which refers to the fact that “Military commissions have been used in wartime in the past. But we now face a new use of these tribunals as part of the war on terrorism—a struggle that pits the country against individuals and groups rather than other nations, and does so without the prospect of a clearly defined end-date.”¹²⁹ Maybe lawyers should just stay in the game, acknowledging that the government does have special national security concerns in a time of terror, and do one’s part to strike a new balance.

Recognizing the legitimacy of these different moral positions, both the NACDL and NIMJ say that, in the end, each lawyer has to decide the question of participation him or herself and that the lawyer should not face condemnation either way.

V. What has happened

The case against the first four defendants to be tried by the military commissions has stalled. The successful habeas petition to declare the commissions unlawful suspended the cases just as they were about to get underway. Nevertheless there has been pretrial maneuvering and thus some glimpse of whether the absence or presence of civilian defense counsel has mattered. First, it is quite clear that the military defense counsel have waged a vigorous and competent defense both in the courtroom and, so far as has been possible, in the press. The one lead civilian defense counsel, Joshua Dratel, has also performed energetically and skillfully, but it is unlikely that his service led to outcomes not otherwise attainable.

¹²⁹ NIMJ, *supra* note 1, at 2.

Second, as NIMJ predicted, the military has changed some rules, particularly those affecting the lawyers. But these changes cannot be attributed to the fact that civilian lawyers became involved in the proceedings. Most of the changes came before the civilians were even active in commission cases. Rather the government appears to have been reacting to the barrage of criticism from bar groups, law professors, the media, and others, including the NACDL and its position that participation would be unethical. So the impetus for changes in the rules was not civilians working on the inside but lawyers criticizing the commissions from outside. The changes were, in any event, modest.¹³⁰

In early 2004, the Defense Department relaxed various rules related to civilian defense counsel's preparations, working conditions, monitoring of conversations with the accused, and travel from the site.¹³¹ Most importantly, defense counsel may now seek approval to expand somewhat the defense team and contacts with persons who may assist the defense. And counsel no longer has to acknowledge that lawyer-client conversations, even if traditionally covered by the attorney client privilege, may be subject to monitoring. The lawyer must still acknowledge that monitoring may occur if conversations "would facilitate criminal acts . . . or if those communications are not related to the seeking or providing of legal advice."¹³² Since the

¹³⁰ Apparently the changes have not been significant enough for NACDL to withdraw its recommendation against participation, which, to date, remains on the organization's website. See <http://www.nacdl.org>.

¹³¹ Dep't of Defense News Release, Feb. 6, 2004 (available at www.defenselink.mil/releases/2004/nr2004026-0331.html). The Pentagon also announced that it would pay the costs associated with counsel obtaining a "top secret" clearance, about \$2500. (But not a "Secret" clearance, about \$200).

¹³² *Id.*

relaxation still seemed to anticipate monitoring, Pentagon officials then went further and announced that counsel will be notified if conversations are monitored.¹³³

Third, the lawyers in the commission proceedings have had an effect in shaping the *application* of the rules as would be inevitable since the commissions are a make-it-up-as-you-go-along system. For example, the commission rules provide that the “appointing authority may remove members [of a commission panel] ...for good cause.”¹³⁴ There is no definition of cause and, initially, there was no reference to a challenge process by the lawyers involved. Military Commission Instruction No.8 simply leaves the matter to the discretion of the presiding officer.¹³⁵ Nevertheless, defense lawyers mounted a vigorous challenge to panel members and even succeeded in having two of the five members removed (though they were unsuccessful in having the Presiding Officer disqualified).¹³⁶ Civilian attorney Dratel played an active part in the disqualification effort, but it is not known whether the defense lawyers’ aggressiveness was led by civilian attorney Dratel or whether the military lawyers would have struck the same posture on their own.

¹³³ John Mintz, *Pentagon to Alter Military Tribunal Rules*, N.Y. TIMES, Feb. 6, 2004, at A11. Chief Defense Counsel William Gunn reports that, to date, there have been no notices of monitoring. Telephone Interview with William Gunn, Chief Defense Counsel, Guantanamo Military Commission (Dec. 14, 2004).

¹³⁴ MCO-1 § 4(A)(3).

¹³⁵ Military Commission Instruction No. 8, Administrative Procedures § 3(A)(2), 68 Fed. Reg. 39,397 (effective Apr. 30, 2003) (codified at 32 C.F.R. pt. 17) (“MCI-8”), provides: “The Presiding Officer shall determine if it is necessary to conduct or permit questioning of members (including the Presiding Officer) on issues of whether there is good cause for their removal. The Presiding Officer may permit questioning in any manner he deems appropriate.”

¹³⁶ Hendren, *supra* note 111.

Fourth, NIMJ was also correct to suggest that commission rules might not be applied in all of their stringency. The gag order on contact with the media is an example. Considerable lawyer-media contacts have occurred, although it is not known what kinds of contacts have been discouraged or prohibited. But this leniency has only been a matter of forbearance, and it was promised by military authorities before civilian counsel were active. The timing shows, again, that relaxation of rules resulted from outside criticism and not the fact that civilian lawyers became participants.

Fifth, events have also shown that lawyers participating in the commission proceedings, civilian and military, may really have something to fear from the government. Lynne Stewart now stands convicted of violating an agreement analogous to the one civilian defense counsel must sign. And one of the most outspoken military defense lawyers, Lt. Cmdr. Phillip Sundel, was denied a promotion effectively ending his military career.

Finally, the most important legal victory against the commission proceedings has been the habeas action to declare them unlawful—an action taken outside of the commission proceedings themselves.

VI. Conclusion

In some respects, the NACDL's non-participation stance was easy. Civilian lawyers were not faced with an accused pleading not to be abandoned as was the case when civilian lawyers walked out on Cmdr. Wirz during the Andersonville military trial.¹³⁷ All military commission accused will have, indeed must have, military counsel. It was easy, too, in that the commission system was arranged so that the opportunity to represent an accused was, in any event, economically unattractive. Few lawyers, sympathetic with NACDL's position or not, would have

¹³⁷ Davis, *supra* note 17.

been prepared to give up all other professional responsibilities and take on what would almost inevitably be a pro bono case. In other respects, the NACDL position was difficult and controversial. It forced the NACDL to go against its mission of defending those accused of crimes and to resist the lawyer's natural instinct to enter the fray. Yet the NACDL's action was a strategic and principled stance taken at the precise moment when it was likely to have the most impact.

The President's Military Order set out only the general framework for the operation of the military commissions. When the NACDL acted, the Defense Department was creating the implementing rules, but no proceedings had yet begun. Thus, there was the possibility that fierce resistance and something as dramatic as a lawyer boycott could force the government to abandon, or at least to amend, its approach. Moreover, the rules as they then stood, particularly those related to the role of the civilian defense lawyer, were an unprecedented interference with the lawyer-client relationship and a lawyer's duty to defend competently and zealously. A reasonable lawyer could conclude, as the NACDL did conclude, that it would be unethical to participate under such rules.

The NACDL may have also known a bit of history. Over many centuries, history's painful lesson is that lawyers who participate in rigged systems, even those doing the very best they can, fighting skillfully and energetically, rarely, if ever, save the client. It is the flawed and one-sided system, not the lawyer's verve, that dictates the outcome. Indeed some of the world's most notoriously rigged systems had procedural safeguards, including lawyers.¹³⁸ For example, recent historical accounts of the Inquisition recognize that inquisitors were often "honest men

¹³⁸ Even in literature, defendants in rigged systems are almost always afforded lawyers, *see, e.g.*, HARPER LEE, *TO KILL A MOCKINGBIRD* (1960) (Atticus Finch), although not all are especially zealous, *e.g.*, FRANZ KAFKA, *THE TRIAL* (1937).

working painstakingly for their faith” and, in many cases, “in a scrupulously legal manner.”¹³⁹ Defendants in the infamous “star chamber” in England were represented by an “energetic and extensive group” of barristers and sergeants-at-law.¹⁴⁰ In political “show trials” in the Soviet Union, defendants were afforded defense counsel.¹⁴¹

Even in American history, there are numerous examples of rigged trials where the defendants were provided with certain procedural protections, sometimes including zealous lawyers, but their convictions were nonetheless predetermined. Examples include the Salem Witch trials which resulted in 160 tried and 19 executed in a special “witchcraft court.”¹⁴² The World War II cases of the Nazi saboteurs¹⁴³ and Japanese General Yamashita¹⁴⁴ had prearranged

¹³⁹ Michael Baigent, *THE INQUISITION* 52-55 (1999).

¹⁴⁰ MICHAEL STUCKEY, *THE HIGH COURT OF STAR CHAMBER* 37 (1998). For a description of the procedures of the Star Chamber, see Charles G. Barnes, *Star Chamber Mythology*, 5 *AM. J. LEGAL HIST.* 1 (1961).

¹⁴¹ See Dina Kaminskaya, *supra* note 128. See also Robert Conquest, *THE GREAT TERROR: A REASSESSMENT* (1990).

¹⁴² FRANCES HILL, *A DELUSION OF SATAN: THE FULL STORY OF THE SALEM WITCH TRIALS* (1997). PETER CHARLES HOFFER, *THE SALEM WITCHCRAFT TRIALS: A LEGAL HISTORY* (1997).

¹⁴³ *Ex Parte Quirin*, 317 U.S. 1 (1942). Commentators have been generally critical of the Supreme Court’s role in the *Quirin* case. See Fisher, *supra* note 101, at 173 (arguing that the Court was “practically compelled . . . to take the case and pretend to exercise an independent review”); Danelski, *supra* note 101, at 61 (calling the Court’s opinion an “agonizing effort to justify a *fait accompli*”).

¹⁴⁴ *In re Yamashita*, 327 U.S. 1 (1946). Yamashita was the commanding General of the Japanese Fourteenth Army Group in the Phillipine Islands during World War II. He was tried before a military commission, which the Supreme Court sanctioned, made up of five American generals, none of whom were lawyers. He was hanged, despite his being “rushed to trial under an improper charge, given insufficient time to prepare an adequate defense, deprived of the benefits of some of the most elementary rules of evidence and summarily sentenced.” *Id.* at 27-28 (Murphy, J., dissenting). For an account of the trial, see J. Gordon Feldhaus, *The Trial of Yamashita*, 15 *SOUTH DAKOTA BAR JOURNAL* 181 (1946).

outcomes; this, despite what are generally regarded as aggressive and heroic efforts of their defense counsel.¹⁴⁵ Indeed, while some think of the term “kangaroo court” as an Australian invention, it actually originated during the mid-nineteenth century in the American West to describe rigged courts that quickly bounced defendants from the gavel to the gallows.¹⁴⁶ If defendants are doomed in any event, maybe the best way to fight a rigged system is to call it a charade and refuse to be a part of it.

Critics of the military commissions have equated them to the Star Chamber, kangaroo courts, and show trials. These labels go too far. Yet despite some changes in the circumstances of how civilian counsel may participate in the commissions, the system retains features that are fundamentally unfair and apparently not open to alteration. It remains the case that the accused can be convicted on secret evidence, hearsay statements even those secured by coercion or torture may be admitted into evidence, the accused’s own statements, even if secured by coercion or torture, may be admitted into evidence, access to witnesses and other evidence is under the control of the government, military officers are the judge and jury, members of a panel other than the presiding officer need not be lawyers, and there is no civilian judicial review of the proceedings. Civilian counsel is still hampered in gaining access to the accused and to other witnesses and evidence. Counsel remains restricted in speaking to the media and still faces the prospect that lawyer-client conversations will be monitored. Under such circumstances, NACDL’s non-participation stance was and remains a fully defensible, ethical, and even wise choice.

¹⁴⁵ Fisher, *supra* note 101.

¹⁴⁶ BLACK’S LAW DICTIONARY 382 (8th ed. 2004).

