Why Military Commissions Are the Proper Forum and Why Terrorists Will Have "Full and Fair" Trials:

A Rebuttal to *Military Commissions: Trying American Justice*[1]

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Captain (Capt.) Barry's article, *Military Commissions: Trying American Justice*, raises several issues regarding the upcoming military commission prosecutions of terrorists and their associates. The purpose of this article is to rebut some of his major points. The thesis of Capt. Barry's article appears to be that the military commissions do not satisfy "basic standards of American justice" because they "depart materially" from current practice and procedure in courts-martial.[2] He also asserts that military commissions are flawed in other ways. His major criticisms can be fairly summarized as follows: commissions "set aside normal rules of evidence in favor of a generic 'probative value to a reasonable person' standard;"[3] the role of defense counsel is unduly restricted;[4] and the Chief Defense Counsel is actually "another member of the government (prosecution) team."[5]

These criticisms, however, are unfounded. Military commissions are necessary in our continuing war on terrorism to best guarantee a "full and fair" trial protecting all personnel participating in the process, including the accused while also safeguarding classified and sensitive information used as evidence in the proceedings.[6] Despite the assertion to the contrary, the evidentiary standard adopted for use by the commission has been approved by the U.S. Supreme Court, meets international judicial standards and, because it is applicable to both the prosecution and defense, benefits both.[7] The claim that restrictions on defense counsel will preclude effective representation is unsupported. On the contrary, any limitations on the defense are both reasonable and necessary given that the commissions will be operating during wartime and, in any event, do not constitute a real obstacle to a zealous defense.[8] The assertion that the Chief Defense Counsel is just another prosecutor is unsubstantiated, for it ignores the plain language of Military Commission Order No. 1.[9] In sum, when the President established military commissions in November 2001, he directed that commission proceedings be "full and fair"—the legal framework developed to date guarantees that both the letter and the spirit of the President's command will be satisfied.[10]

1. *See* Kevin J. Barry, *Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 1. Mr. Barry's article is reprinted under a different name from a previous edition of *The Federal Lawyer*, albeit in a substantially expanded and more heavily footnoted version. *See* Kevin J. Barry, *Military Commissions: American Justice on Trial*, 50:6 FED. LAW. 24 (2003).

2. *See* Kevin J. Barry, *Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 1.

3. *Id.* at 1 (citing Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 § 7(b)(2) (Nov. 16, 2001) [hereinafter PMO].

4. *Id.* at 5, 8.

5. *Id.* at 8.

6. PMO, *supra* note 3, § 4(c)(2).

7. *See Dep't. of Defense's Implementation of the President's Military Order on Detention, Treatment, and Trial by Military Commission of Certain Non-citizens in the War on Terrorism*: *Hearing Before the Senate Armed Service Comm.*, 107th Cong. 68 (2001) (statements of Paul D. Wolfowitz, Deputy Secretary of Defense and William J. Haynes, General Counsel, Dep't. of Defense), *available at* http://www.senate.gov/~armed_services/hearings/2001/c011212.htm [hereinafter *President's Military Order Hearing*] ("[M]ilitary tribunals can permit more inclusive rules of evidence, a flexibility which could be critical in wartime. . . . Military commissions allow those judging the case to hear all probative evidence, including evidence obtained under conditions of war, evidence that could be critical to obtaining a conviction."); Senior Defense Official, U.S. Dep't of Def., Background Briefing on the Release of Military Commission Instructions, at the Pentagon (May 2, 2003), *available at* http://www.defenselink.mil/transcripts/2003/tr20030502-0144.html.

8. Procedures for Trials by Military Commissions of Certain Non-U.S. Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374-99 (1 July 2003) (to be codified at 32 C.F.R. pts. 10-17); U.S. DEP'T OF DEFENSE, MILITARY COMMISSION INSTRUCTIONS (30 Apr. 2003) [hereinafter MCI Nos. 1-8].

9. Military Commission Order No. 1, 68 Fed. Reg. 39,374-99 (21 Mar. 2002) [hereinafter MCO No. 1]; *see* discussion, *infra*, at text accompanying nn.56-68.

10. PMO, *supra* note 3, § 4(c)(2).

Military Commissions Are the Proper Forum for Terrorists Accused of War Crimes and other War-related Offenses and Need Not Follow Courts-Martial Practice Because They Satisfy International Criminal Legal Standards

In 1950, when it enacted a uniform statute for courts-martial in the armed forces, Congress expressly recognized that military commissions would be utilized in the future.[11] As contemplated by Article 36, Uniform Code of Military Justice (UCMJ), "courts-martial, military commissions and other military tribunals" would all continue to exist, and be utilized when appropriate.[12] Moreover, as the Army and Navy had recently prosecuted more than 3000 German and Japanese defendants at military commissions,[13] Congress certainly understood that military commissions would be used in future prosecutions of enemy combatants for war crimes and war-related offenses. It follows that Congress foresaw orders similar to the President's Military Order of November 13, 2001, which provides for the trial by military commission of al Qaida members and other international terrorists who have committed war crimes and other war-related offenses.[14] Additionally, there is no doubt that establishing military commissions was a lawful exercise of the President's power under Article II:[15] after al Qaida's 11 September 2001 attacks, the President took action as Commander-in-Chief to defend the United States.[16] As Usama Bin Laden had previously declared war upon the United States,[17] and as al Qaida was waging its armed conflict against America by intentionally violating the law of war, the President properly exercised his authority as Commander-in-Chief to direct the prosecution by military commission of any captured enemy combatant who had committed a war crime or war-related offense.[18]

Unlike courts-martial—which today are essentially the U.S. Armed Forces' equivalent of Article III[19] courts—military commissions are special war courts; they exist only during war or in the aftermath of armed conflict.[20] Moreover, in contrast to the general criminal jurisdiction of courts-martial and U.S. District Courts, military commissions (whether created by Congress or by the President) are courts of extremely narrow focus, having subject-matter jurisdiction only over war crimes and war-related offenses.[21] Also note that the military commissions established by the President in November 2001 are even more restricted in scope, in that *in personam* jurisdiction is limited to non-U.S. citizens.[22] Additionally, by virtue of their military backgrounds, the panel members, prosecutors and defense counsel participating in those proceedings have a real-world expertise that makes them well-suited to handle war crimes and

11. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) [hereinafter 1950 UCMJ]; *see* MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 2 (1951) [hereinafter 1951 MCM]; *President's Military Order Hearing*, *supra* note 7 ("U.S. Congress also recognized the use of military commissions after World War II when it passed the Uniform Code of Military Justice in 1950, which included statutory language preserving the jurisdiction of military commissions.").

12. UCMJ art. 36 (2002). Also note that UCMJ, article 21, states that the jurisdiction of courts-martial are not exclusive; military commissions are not deprived of jurisdiction that "by the law of war" may be exercised over offenders or offenses. *Id.* art. 21.

13. NORMAN E. TUTOROW, WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS 5 (1986) ("The United States held in all approximately 900 war crimes trials, involving more than 3000 defendants. About half these cases were tried in Germany.").

14. PMO, *supra* note 3.

15. U.S. CONST. art. II, § 2.

16. *See* James Dao, *A Nation Challenged: The War Budget; U.S. is Expecting to Spend 1 Billion a Month on War*, N.Y. TIMES, Nov. 12, 2001, at B5.

17. Usama Bin Muhammed Bin In Laden, Declaration of Jihad Against the Americans Occupying the Land of the Two Holy Places (Aug. 23, 1996), *available at* http://www.terrorismfiles.org/individuals/declaration_of_jihad1.html. In August 1996, Usama bin Laden issued a "Declaration of Jihad Against the Americans," in which he vowed that al Qaida would take violent action against the United States unless American military forces withdrew from Saudi Arabia. Between the time of this declaration of war and the 9/11 attacks, al Qaida bombed U.S. targets in Kenya, Tanzania, and Yemen, with great loss of life and property. *Id.*; *see* Diana Elias, *Video Suggests Bin Laden Men Perpetrated Cole Bombing*, WASH. POST, June 20, 2001, at A24; Vernon Loeb and Christine Haughney, *Four Guilty in Embassy Bombings*, WASH. POST, May 30, 2001, at A1.

18. PMO, *supra* note 3.

19. U.S. CONST. art. III, § 2. Section 2 defines the power of Article III courts as follows:

> The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Id.

20. PMO, *supra* note 3.

21. *Id.*; MCO No. 1, *supra* note 9.

22. PMO, *supra* note 3.

related offenses. Finally, unlike Article I courts-martial, which may be tied to a command's location,[23] or Article III courts, which must be held in the United States, military commissions may be held at any geographic location.[24] As the Department of Defense (DOD) intends to begin prosecutions while the armed conflict with al Qaida continues,[25] the ability to hold commission proceedings at any location allows classified and sensitive information to be better protected and also ensures the safety of all personnel involved in the process—panel members, defense counsel, prosecutors and the accused. In sum, Congress and the UCMJ contemplated the use of military commissions; military commissions are specialized war courts whose limited jurisdiction and military participants makes them best able to deal with criminal offenses arising out of armed conflict; and the commissions are best able to protect classified information critical to national security and safeguard all personnel participating in the process.

Captain Barry also asserts that unless the rules and procedures used at military commissions "closely reflect" the courts-martial model, they will fall short of American standards of justice.[26] This assertion, however, is contrary to the President's mandate and the language of the Commission Order. First, the President mandated in his military order that all commissions be "full and fair;"[27] this certainly comports with the American ideal that every accused is entitled to a fair trial. Second, Military Commission Order No. 1 provides the following safeguards for an accused—all of which are similar to those protections enjoyed by an accused at courts-martial: (1) the presumption of innocence; (2) proof of guilt beyond a reasonable doubt; (3) the right to call and cross-examine witnesses (subject to rules regarding production of witnesses and protection of information); (4) access to all evidence the prosecution intends to introduce at trial and any exculpatory evidence known to the prosecution; (5) no statements made by an accused to his attorney, or anything derived from those statements, may be used against him at trial; (6) the right to remain silent at trial, with no adverse inference from such silence; (7) the right to military defense counsel at no cost to the accused; (8) the right to civilian defense counsel at no cost to government (provided counsel is a U.S. citizen and obtains a security clearance); and (9) the right to have any findings and sentence reviewed by an appellate panel.[28] Finally, American courts-martial should not be the measure of fairness. Instead, the public should use international legal standards to evaluate the fairness of military commissions. By way of example, the rules governing prosecutions before the new International Criminal Court (ICC) provide for the following: (1) a presumption of innocence; (2) proof beyond a reasonable doubt; (3) choice of counsel at no cost; (4) right to cross-examine witnesses against him; (5) right against self-incrimination; and (6) a right to appeal any findings or sentence to an "Appeal Chamber."[29] While the United States is not a party to the Treaty of Rome, and while the ICC does not apply to our armed conflict with al Qaida and the Taliban, a comparison of its rules with the regulations governing military commissions shows that there is no difference between the rights enjoyed by an accused at either proceeding.[30] Assuming *arguendo* that the ICC's rules satisfy international jurisprudential norms, it follows that military commissions also do—and that there is every reason to conclude that they will be fair.

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23. Note, however, that "[c]ourts-martial have power to try any offense under the code except when prohibited by the Constitution." MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. II-15 (2002) [hereinafter MCM]. Additionally, "the authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions." *Id.* pt. II-48.

24. *See* U.S. CONST. art. III; MCO No. 1, *supra* note 9.

25. This is an unusual situation given that almost all war crimes and war-related offenses are prosecuted *after* the end of hostilities, when the need to protect national security information and safeguard participants in the trial is greatly reduced. *President's Military Order Hearing*, *supra* note 7. Deputy Secretary of Defense, Paul Wolfowitz, explained the unusual situation created by terrorist hostilities as follows:

> Because of the ongoing threat from terrorists, the risks to jurors are of a kind that military officers are trained and prepared to confront but that are not normally imposed on jurors in civilian trials. Indeed, the judge who handled the trial for the first World Trade Center attack is still under 24 hour protection by federal marshals—and probably will be for the rest of his life.
>
> It is also important to avoid the risk of terrorist incidents, reprisals or hostage takings during an extended civilian trial. Moreover, appeals or petitions for habeas corpus could extend the process for years. Military commissions would permit speedy, secure, fair and flexible proceedings, in a variety of locations, that would make it possible to minimize these risks.

Id.

26. Barry, *supra* note 2, at 1.

27. PMO, *supra* note 3.

28. MCO No. 1, *supra* note 9, para. 5.

29. Rome Stat. of the Int'l Crim. Court, U.N. Doc. A/CONF. 183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998), *reprinted in* 37 I.L.M. 998 (1998), *available at* www.un.org/law/icc/statute/romefra.htm [hereinafter Rome Statute].

30. *Compare id.*, *with* MCO No. 1, *supra* note 9, and PMO, *supra* note 3.

"Probative to a Reasonable Person" is the Correct Evidentiary Standard

Under the ICC rules, and at the International Criminal Tribunal for the Former Yugoslavia, hearsay evidence is admissible if deemed to have probative value.[31] It stands to reason that there is nothing fundamentally unfair about admitting hearsay at a criminal proceeding even though such evidence is generally excluded at courts-martial by virtue of the Military Rules of Evidence.[32] Similarly, given that Article 36, UCMJ, permits the President to direct the use of different modes of proof at military commissions, there is nothing improper about deciding that all evidence "probative to a reasonable person" is admissible.[33] This standard not only takes into account the unique battlefield environment in which much evidence will be obtained, but explicitly recognizes that what happens in a war setting is markedly different from traditional peacetime law enforcement practices in the United States. Soldiers cannot be expected to complete a chain-of-custody document when under fire from an enemy combatant in a cave.

Additionally, those who complain about the "probative to a reasonable person standard" forget that the accused and his counsel benefit from this provision at least as much as the prosecutor; defense counsel are also able to introduce written and oral hearsay, documents of uncertain or unknown origin—anything that is "probative."[34] As one lawyer, writing about his experiences in war crimes trials held in Yokohama (Japan) from 1945 to 1947, observed about the "probative to a reasonable person" standard:

> The relaxation of certain rules of evidence and presumption, which are basic in American Federal jurisprudence, *proved a blessing in disguise to some of the American defense counsel*. They turned the interpretation of the evidence in their favor by continued protestations of "adherence to fundamental Anglo-Saxon principles," "fair-play," "civilized law systems" . . .[35]

Defense counsel would continually protest against the reception of hearsay evidence in spite of the repeated admonitions of the court that such evidence was admissible in accordance with the prevailing rules of procedure.[36] Then, when counsel with a show of great resignation would reluctantly concede the court was correct in its ruling, they were permitted to all the more strongly argue the lack of probative value of such evidence.[37] This gave them a strong talking point to attack the admittedly weak evidence, oftentimes carrying down with them other strong evidence.[38] There is every reason to believe that defense counsel in the instant military commissions, in providing the accused with a zealous defense, will take a similar approach to evidence offered by the prosecution at trial.

Finally, while the presiding officer and panel members may give the government (and the defense) wide latitude in admitting evidence, all members will have taken an oath prior to the commencement of the trial.[39] Having sworn to give the accused a full and fair trial, and hold the prosecution to its burden of proving the case beyond a reasonable doubt, the members may well disregard or give less weight to admissible evidence that they conclude is unreliable or of low probative value.[40]

Captain Barry also claims that the "probative to a reasonable person" standard comes from *In re Yamashita*,[41] that this was a drastic departure from the rules of evidence in the then-applicable 1928 *Manual for Courts-Martial*, and that the "probative to a reasonable person" standard has never received judicial review.[42] These claims are incorrect. In fact, the standard comes from the 1942 Nazi U-boat saboteur case, *Ex parte Quirin*.[43] President Roosevelt directed that the military commission use this method of proof in his 2 July 1942 Executive Order[44] and the Supreme Court, *in reviewing and then affirming*

31. *See* Rome Statute, *supra* note 29.

32. *See* MCM, *supra* note 23, MIL. R. EVID.; President's Military Order Hearing, *supra* note 7.

33. PMO, *supra* note 3; UCMJ art. 36 (2002).

34. PMO, *supra* note 3.

35. Albert Lyman, *A Reviewer Reviews the Yokohama War Crimes Trials*, J. OF BAR ASS'N OF D.C. 267, 274 (1950) (emphasis added).

36. *Id.* at 275.

37. *Id.*

38. *Id.*

39. MCO No. 1, *supra* note 9, sec. 5C.

40. *See id.*

41. *In re* Yamashita, 327 U.S. 1 (1946).

42. PMO, *supra* note 3; MANUAL FOR COURTS-MARTIAL, UNITED STATES (1928); Barry, *supra* note 2, at 1, 4.

the *Quirin* proceedings on 31 July 1942, concluded that the defendants had been lawfully tried.[45] This identical evidentiary standard was used in military commissions held in Germany and the Far East after World War II—all of which, in the view of many historians and commentators, conducted fair trials of war criminals.[46]

Restrictions on Defense Counsel are Both Necessary and Reasonable

Since commissions will be held while the armed conflict with al Qaida and international terrorists continues, the government must ensure that information critical to the protection of the United States is not disclosed to the enemy, while also ensuring that all individuals participating in the commission, including the accused, are protected from harm. Reasonable restrictions on defense counsel are necessary to safeguard information and people—Military Commission Instruction No. 5 is a reasonable balance of these two requirements and the right of the accused to effective representation.[47]

First, the accused's detailed defense counsel—a highly experienced Army, Navy, Air Force or Marine judge advocate—*always* has access to evidence the prosecution intends to introduce at trial and will *never* be excluded from any trial proceeding.[48] But, given the need to preclude the enemy from obtaining classified evidence that might aid him in his war against the United States, all those participating in the proceedings—including both military counsel and any civilian attorney hired by the accused at his own expense—must have security clearances.[49] This explains why Instruction No. 5 requires U.S. citizenship and at least a SECRET clearance for civilian attorneys who desire to represent a detainee.[50] As to the claim that civilian defense counsel will be denied access to highly classified or sensitive information—and may be excluded from the proceedings if such information is introduced at commission proceedings—this is possible. The requirement, however, that commission proceedings be both "full and fair"[51] and "open"[52] mandates the use by the prosecution of unclassified evidence to the greatest extent possible. If classified information is introduced at trial, it is logical that the prosecution will utilize the evidence with the lowest classification level.

Regarding the monitoring of conversations between the accused and his counsel, the policy decision to permit monitoring is based on three factors—the government's intent to start commissions while the war continues, the requirement to protect national security information, and the need to safeguard the lives of those participating in the proceedings. It is similar to the need to put reasonable restrictions on defense counsel. Four important points should be considered. First, monitoring will not occur as a routine matter; rather, monitoring is expected to occur infrequently, with at least a general notice of intent to monitor provided to defense counsel prior to its occurrence.[53] Second, monitoring is an intelligence and security function and not a law enforcement function.[54] Third, no prosecutors associated with the proceedings against the monitored accused are

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43. *Ex parte* Quirin, 317 U.S. 1 (1942).

44. Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 2, 1942). As an aside, Roosevelt's order appointing a commission to try the eight U-boat saboteurs also directed that the proceedings be "full and fair"—the phrase used almost sixty years later by President Bush in his Military Order of November 13, 2001. *Id.*; PMO, *supra* note 3.

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

46. *See, e.g.*, Maximilian Koessler, *American War Crimes Trials in Europe*, 39 GEO. L.J. 18-112 (1950). The following statement is representative of the views of many historians that the trials were fair:

> Those responsible for the war crimes trials by American military commissions or military government courts in Germany were inspired by the honest desire to give the defendants the full benefit of a fair trial . . . The result of this philosophy . . . was a procedure which, in all external aspects, represented an American trial, but was conducted under rules which were neither purely American, nor purely European ones but a kind in themselves.

Id. at 54-55; *see also* Paul E. Spurlock, *The Yokohama War Crimes Trials*, 36 ABA J. 387-89, 436-37 (1950) ("Trials were examples of democratic ideals . . . It was considered that, under the system employed, an accused received outstandingly fair and honest justice.").

47. *See* MCI No 5, *supra* note 7.

48. *Id.* para. 6.B.(3).

49. *Id.* para. 3.A.(2)d.

50. *Id.*

51. *Id.* para. 6.B.(2).

52. *Id.* paras. 5.O. & 6.B.(3).

53. *Id.* sec. II-I.

involved in the process.[55] Finally, and most importantly, information obtained as a result of monitoring will not be used against the accused that made the statement; it is inadmissible in any commission proceeding against him.[56]

The Chief Defense Counsel's Mission: "Proper Representation of All Accused"

One basis of Capt. Barry's criticism is that the Chief Defense Counsel is, like the Chief Prosecutor, part of the DOD General Counsel's office.[57] Although the General Counsel has overall responsibility for legal operations in the DOD, he is not the decision-maker for pre-trial, trial, or post-trial issues at military commissions.[58] It is the appointing authority that controls what cases are tried and how military commissions are conducted.[59] The General Counsel's ultimate supervision of the Chief Defense Counsel is an administrative function and not an attempt to affect the independence of that defense counsel or the defense function.[60]

In fact, defense counsel practicing within the military justice system may see analogies to the current relationship between the General Counsel and the Chief Defense Counsel. For example, The Judge Advocate General of the Air Force ultimately "supervises" the Chief Circuit Defense Counsel responsible for overseeing the delivery of all defense services at courts-martial in a particular geographical region.[61] That supervisory relationship, however, in no way adversely affects the independence of the Chief Circuit Defense Counsel, or his freedom of action in supervising defense counsel at Air Force courts-martial—just as it will not at trials by military commissions.[62]

Captain Barry also takes issue with whether the Chief Defense Counsel actually is a defense counsel since he may not perform the duties of a detailed defense counsel or enter into an attorney-client relationship with any accused.[63] This criticism may seem unusual to those attorney-supervisors who have experience detailing subordinates generally, and specifically in potential conflict scenarios. The Chief Defense Counsel is required to ensure "proper representation of all accused,"[64] to detail one or more judge advocates who will "defend the accused zealously within the bounds of the law without regard to personal opinion" as to his guilt,[65] and otherwise ensure that the accused is represented at all stages of the proceedings.[66] To carry out his duties—and to ensure that he does not have a conflict of interest with any accused—the Chief Defense Counsel necessarily is precluded from entering into an attorney-client relationship with any accused. Of course, were he to represent an accused, there is a very high likelihood that the Chief Defense Counsel would be unable to ensure proper management of defense personnel and resources, to include precluding conflicts of interest among military defense counsel under his direct supervision.

There is nothing, however, to prohibit defense counsel from seeking the advice of the Chief Defense Counsel on matters that would not reveal client confidences. Once again, this supervisory function is not uncommon to military defense counsel that regularly supervise subordinate defense counsel and provide general advice and guidance without forming attorney-client relationships with individual accuseds.[67] Additionally, these supervisors regularly detail different defense counsel to represent different clients in conflict cases, and this function in no way aligns the supervisor with the prosecution or prevents the detailed defense counsel from communicating or seeking general advice in a given case.[68]

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54. *Id.*

55. *Id.*

56. *Id.*

57. Barry, *supra* note 2, at 9.

58. *See* MCO No. 1, *supra* note 9.

59. *Id.* para. 3A.

60. MCI No 5, *supra* note 8.

61. U.S. Dep't of Air Force Manual 51-204, U.S. Air Force Judiciary para 1.1 (1 July 1995).

62. *See generally President's Military Order Hearing*, *supra* note 7.

63. Barry, *supra* note 2, at 8.

64. MCI No. 5, *supra* note 8, para. 4.C.(1).

65. *Id.* para. 4.C.(2).

66. *Id.*

67. *See* U.S. Dept' of Army, Reg. 27-1, Judge Advocate Legal Services para. 3-2 (30 Sept. 1996).

Conclusion: Trials at Military Commissions Will Be "Full and Fair"

For the foregoing reasons—starting with the President's command that military commissions be "full and fair," there is every reason to expect that this is exactly what will occur when the first trials get underway.[69] The military commissions established by the President in 2001 are war courts of extremely narrow jurisdiction. Because they exist only to prosecute terrorists for war crimes (and other related offenses) committed in the ongoing war on terrorism, the rules and procedures used in previous wars to prosecute war crimes are the proper model for the current military commission process.

In his criticism of military commissions, Capt. Barry does not consider the people who will be a part of the commission process. In my view, people—who they are, what they will do, how they will do it—are a critical component in any evaluation of the fairness of military commissions. This is because no criminal legal system—U.S., foreign, civilian or military—can be judged without examining the men and women who take part in it. Ultimately, it is people—in this case commissioned officers, many of whom will be experienced judge advocates—who will ensure that the President's command for "full and fair" trials is carried out, both in letter and in spirit. It would be much more fair if Capt. Barry and others, who are critical of military commissions, would wait to see how the first trials are conducted—especially if, as I believe, they will both be "full and fair" and something of which Americans will be proud.

68. *See id.* para. 2-5.

69. *See* PMO, *supra* note 3, § 4(c)(2).