

THE STRATEGIC CONSEQUENCES OF USING MILITARY COMMISSIONS TO ADJUDICATE US PRISONERS IN THE GLOBAL WAR ON TERRORISM

BY

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USAWC PROGRAM RESEARCH PAPER

**THE STRATEGIC CONSEQUENCES OF USING MILITARY COMMISSIONS TO
ADJUDICATE US PRISONERS IN THE GLOBAL WAR ON TERRORISM**

by

Colonel John P. Fairgrieve
United States Marine Corps Reserve

Topic approved by
David Willmann

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U.S. Army War College
CARLISLE BARRACKS, PENNSYLVANIA 17013

ABSTRACT

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In the wake of the terrorist attacks of September 11, 2001 the US responded by initiating the Global War on Terrorism (GWOT). Subsequently the US took a significant number of prisoners, mainly as a result of the US-led invasion of Afghanistan. The Bush administration faced the problem of how to legally adjudicate the prisoners in US custody. The administration decided to use military commissions, a type of military tribunal that, as structured by the administration, offered fewer legal rights and protections to the prisoners than those afforded to criminal defendants in US courts. Several of the prisoners challenged the use of military commissions to adjudicate them, and in a series of decisions the US Supreme Court rejected their use, ruling in part that the President lacked the authority to use such commissions absent specific authorization from Congress. In response, Congress passed the Military Commissions Act of 2006, specifically authorizing the use of military commissions to adjudicate the prisoners.

The Bush administration's use of military commissions has been harshly criticized by commentators from within the US and abroad for failing to meet the minimum legal due process standards required by US and international law. Consequently, the use of such commissions detracts from the ability of the US to

achieve important strategic goals by undermining its moral authority and thus its ability to exert leadership within the international community.

THE STRATEGIC CONSEQUENCES OF USING MILITARY COMMISSIONS TO ADJUDICATE US PRISONERS IN THE GLOBAL WAR ON TERRORISM

He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.

—Thomas Paine, July 7, 1795

The United States (US) responded to the terrorist attacks of September 11, 2001 with a broad range of diplomatic, informational, military and economic actions. The administration of President George W. Bush labeled this response the Global War on Terrorism (GWOT). One component of the military aspect of the GWOT was the US-led invasion of Afghanistan. As a consequence of the invasion, the US quickly took a significant number of prisoners, the vast majority of which came from the battlefield in Afghanistan. The administration soon faced the dilemma of how to legally adjudicate the prisoners in US custody. It settled on military commissions, a type of legal tribunal that, as structured by the administration, did not provide the accused the same degree of legal rights and protections as those afforded to criminal defendants in US courts. Several of the prisoners held by US authorities challenged the use of military commissions. In a series of four decisions, the US Supreme Court rejected the administration's attempt to use military commissions to adjudicate the prisoners, ultimately holding in part that the proposed commissions failed to comply with international law and were established without Congressional authorization. In response, the administration proposed, and Congress passed the Military Commissions Act of 2006, authorizing the use of military commissions to adjudicate the prisoners, who by that point had been designated by the President "unlawful enemy combatants".

This paper will document the foregoing series of events and will argue that, regardless of whether the use of military commissions is ultimately found to be Constitutional, their use will hasten the erosion of the moral authority of the US within the international community that began with the invasion of Iraq and accelerated with the Abu Ghraib prison scandal, the use of “extraordinary renditions” to seize suspected terrorists in foreign countries, and the alleged torture of prisoners held by the US at a series of secret Central Intelligence Agency (CIA) prisons. This loss of moral authority in turn has undermined the ability of the US to achieve a number of strategic national security goals.

Adjudication of US Prisoners Taken in the GWOT: The Choice of Military Commissions

The US response to the terrorist attacks of September 21, 2001 took many forms, including significant actions by US armed forces. The first major military action by the US was the bombing of Kabul, the capitol of Afghanistan, which began on October 7, 2001.¹ This action was taken after the Taliban, the Islamic fundamentalist rulers of Afghanistan, refused to comply with a US ultimatum to hand over Osama Bin Laden and the members of his al Qaeda terrorist organization. A month after the beginning of the conflict a US-led coalition swept through most of Afghanistan, taking thousands of enemy prisoners in the process. Of these, close to 700 were flown to the US military facility at Guantanamo Bay, Cuba in January 2002. The prisoners were repeatedly interrogated and, according to US military sources, provided valuable information

concerning al Qaeda recruitment, training, funding and movement.² However, after the initial series of interrogations were completed questions soon arose regarding the process of adjudication and the prisoners' ultimate fate.

One of the first issues was that of the legal status of the prisoners, in particular whether the prisoners were prisoners of war, and therefore entitled to certain rights and protections under the Geneva Conventions. In a decision issued on February 7, 2002, President Bush decided that the Geneva Conventions did not apply to members of al Qaeda. He further decided that the Geneva Conventions did not apply to the Taliban, deeming both groups "unlawful combatants" not qualifying as prisoners of war under Article 4 of the Geneva Conventions.³ The next step was to determine what kind of forum would be used to adjudicate the prisoners. There are at least four venues that can be used to adjudicate unlawful combatants held in US custody: (1) trial in US federal or state civilian courts; (2) trial before an international tribunal; (3) trial in another country under the principle of universal jurisdiction for acts of terrorism; or (4) trial by a military commission.⁴ While the use of any the first three of these potential venues would be viewed positively by many in the US and abroad, such use would also face significant difficulties.

US federal or state civilian courts would have jurisdiction to try war crimes under relevant criminal statutes. However, security for such trials would be a major challenge, for participants, jurors, and spectators. Further, it is questionable whether these venues could adequately safeguard classified information, including intelligence methods and sources. While procedures exist to protect disclosure of such classified information to

the public, they may not prove adequate to protect such information from the defendants, who could be expected to pass such information on to their comrades.⁵ Other burdens involving the use of these courts would be the lengthy trial process as well as difficulty meeting evidentiary requirements given the nature of the conspiracy and the location of the prisoners at the time of their capture. Finally, it has been argued that the nature of the crimes committed, terrorist acts resulting in the deaths of thousands of civilians, are crimes against the laws of war and arguably are unsuitable for trial in civilian courts.⁶

The use of international war crimes tribunals would likely be strongly supported by many non-governmental organizations and nations in the international community. However, this approach would lead to similar problems as the use of US civilian courts. Additionally, the risk of the disclosure of classified information relating to intelligence sources and methods would probably be greater than in US courts due to the use of international judges who may not be sensitive to US national security concerns. The time it would take to authorize and set up such a tribunal would probably be unacceptably long, and the choice of judges would be highly contentious, particularly concerning the possible participation of judges from Islamic countries. Further, there is a danger that international tribunals could devolve into propaganda circuses over which the US government would have little control.⁷ Finally, it is unlikely that such a tribunal would be authorized to impose the death penalty, given its growing international unpopularity.⁸

Trial in the domestic courts of another country is possible, and can be successful, as was proven by the prosecution of the terrorists responsible for the Pan Am 103 bombing over Lockerbie, Scotland.⁹ However, concerns remain regarding the disclosure of US classified information in such a setting. The laws of the relevant nation may also become an issue, particularly if they afford less due process protections than those of US criminal courts, or if they prohibit the death penalty. Finally, there is a question of which country or countries would be willing to host such events, and there would be significant logistic hurdles in moving prisoners, witnesses and evidence to another country.¹⁰

The focus of the administration soon settled on military commissions. Military commissions are a type of military tribunal, as are courts-martial, the authority and jurisdiction for both of which is found in the UCMJ.¹¹ The distinction between the two is that courts-martial are generally used to try military members for violations of criminal law while military commissions are primarily used to try civilians alleged to have violated the law of war.¹² The US Supreme Court previously upheld the use of a military commission ordered by President Roosevelt during World War II to try German saboteurs who had entered the US surreptitiously in the case of *Ex Parte Quirin*.¹³ However, the court did not resolve the question of whether the President has the constitutional power to create military commissions without the support of Congressional legislation.¹⁴ The Court extended its approval of the use of military commissions a few years later, holding that they had the jurisdiction to try Japanese

General Yamashita for war crimes committed during World War II in the case of *Application of Yamashita*.¹⁵ It is important to note, however, that both the *Quirin* and *Yamashita* cases occurred after a declaration of war by Congress, which offers the clearest authority for the broadest use of war powers by the President.¹⁶

On November 13, 2001 President Bush issued a Military Order entitled *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*.¹⁷ The Order was exceptionally broad, applying to anyone who was a member of al Qaeda, had engaged in, aided, or conspired to commit acts of international terrorism that caused or had as their aim to cause injury to the US or its interests, or had knowingly harbored individuals engaged in the above activities.¹⁸ The Order further directed the Secretary of Defense to issue orders and regulations necessary to appoint one or more military commissions. Those orders and regulations were required to include, but were not limited to, pre-trial, trial, and post-trial procedures with the military commission sitting as both the trier of fact and law. The standard for the admission of evidence was that which would “have probative value to a reasonable person”, and classified material was to be protected, if necessary, even by the closure of trial.

The use of military commissions essentially avoids or mitigates most of the problems identified in the possible alternative forums listed above. The proceedings could be controlled to prevent their becoming propaganda events; intelligence methods and sources could be kept secret; trials would proceed expeditiously; appeals would be dealt with quickly and efficiently; and punishment would be promptly imposed on the guilty.¹⁹ Further, military commissions are essentially portable. They are capable of

being held worldwide, on board ships, or at other remote, secure locations such as Guantanamo Bay. This characteristic of military commissions makes them a far more attractive forum than the others discussed above, improving the safety of the participants in the trial as well as the American public as a whole.²⁰

Despite the potential advantages to using military commissions over other potential forums, many commentators strongly criticized President Bush's decision. William Safire, a columnist with the New York Times, termed the proposed commissions "kangaroo courts".²¹ Others argued that, "it would curtail the civil rights of the defendants and open the United States to accusations of conducting the same type of tribunals it has protested – those in which Americans were tried in secret in foreign countries -- without lawyers or review."²² Finally, in an article in the Yale Law Journal, Professors Neal Katyal of the Georgetown Law Center and Laurence Tribe of Harvard Law School argued that "the President's Order establishing military tribunals for the trial of terrorists is flatly unconstitutional."²³

The Judicial Response to President Bush's Order

Despite the criticism of the proposed use of military commissions the Administration moved forward with their implementation. A number of the prisoners challenged their detention and the proposed use of military commissions in U.S. federal court. The administration opposed the detainees' use of the U.S. federal courts to challenge their detention, arguing that during a time of war, enemy combatants are not entitled to individual legal review of their detention and that the courts should be

restricted to investigating whether legal authorization exists for the broader detention scheme.²⁴ Some of the cases filed by the detainees advanced to the U.S. Supreme Court, and on June 28, 2004 the court filed decisions in three of the cases: *Rumsfeld v. Padilla*,²⁵ *Rasul v. Bush*,²⁶ and *Hamdi v. Rumsfeld*.²⁷ Broadly, in all three cases the US Supreme Court was asked the fundamental question of whether the petitioners were entitled to review in US federal court of their classification as enemy combatants and their consequent detention.²⁸

Rumsfeld v. Padilla

Jose Padilla is a U.S. citizen who was apprehended by federal agents executing a material witness warrant issued in connection with a grand jury investigation into the September 11th terrorist attacks. He was subsequently detained by the Department of Defense as a result of the President's determination that he was an enemy combatant who conspired with al Qaeda to carry out terrorist attacks in the U.S, and was transported to the Consolidated Naval Brig in Charleston, South Carolina for detention.²⁹ Padilla's attorney filed a habeas corpus petition, a Latin term for a legal challenge to his imprisonment, alleging that Padilla's military detention violated the Constitution. The Supreme Court framed the issues it needed to resolve in Padilla as follows: "First, did Padilla properly file his habeas petition in the Southern District of New York; and second, did the president possess authority to detain Padilla militarily." The court essentially decided the case on a technicality, determining that Padilla had improperly filed his habeas petition, and should have filed it in the District of South

Carolina where he was being detained. Consequently it never addressed the more contentious issue of whether the President possessed the authority to detain Padilla militarily.³⁰

Rasul v. Bush

Rasul v. Bush was actually two cases decided together because they addressed the same issue.³¹ The petitioners in these cases, two Australian citizens and twelve Kuwaiti citizens, were captured abroad during hostilities between the US and the Taliban. The US military had held them since early 2002, along with approximately 640 other foreign citizens captured abroad, at the US Naval Base at Guantanamo Bay, Cuba.³² The Australians each filed a writ of habeas corpus, seeking to be released from custody, access to attorneys, freedom from interrogations, and other relief. The Kuwaitis filed a complaint requesting to be informed of the charges against them, to be allowed to meet with their attorneys and their families, and to have access to the courts or some other impartial tribunal. They claimed that their detention violated the Constitution, international law, and treaties of the US.³³

The Supreme Court summarized the issue in this case as whether US courts lack jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay.³⁴ In a 6-3 decision authored by Justice Stevens, the court determined that federal courts did in fact have jurisdiction to determine the legality of the Executive Branch's "potentially indefinite detention of individuals who claim to be wholly innocent of

wrongdoing.”³⁵ In doing so, the court noted that the: “[a]pplication of the habeas corpus statute to persons detained at the base is consistent with the historical reach of the writ of habeas corpus.”³⁶ The court, however, did not specify the nature and extent of the habeas review to which the petitioners were entitled to.³⁷

Hamdi v. Rumsfeld

Yaser Esam Hamdi is a US citizen, born in Louisiana in 1980.³⁸ He later moved as a child to Saudi Arabia. In 2001 he was living in Afghanistan, where he was seized by members of the Northern Alliance, a coalition of groups opposed to the Taliban government, and was later turned over to US military forces. In April 2002, after the Government learned that Hamdi was a US citizen, he was transferred to the US Naval Brig at Charleston, South Carolina.³⁹ The Government contended that Hamdi was an enemy combatant and that this status justified holding him indefinitely without charges or proceedings until the Government determined whether access to counsel or further process was warranted.

Hamdi’s father filed a petition for a writ of habeas corpus naming his son and himself as next friend. He contended that he had not had contact with his son since the Government took custody of him in 2001 and that the Government was holding him without access to counsel or notice of any charges pending against him.⁴⁰ The petition argued that Hamdi’s detention was not legally authorized, that as a US citizen he was entitled to the full protections guaranteed by the Constitution, and that his detention in the US without charges, access to an impartial tribunal, or assistance of counsel violated the Fifth and Fourteenth Amendments to the Constitution. The petition asked

the Supreme Court, among other things, to appoint him an attorney, to order the Government to stop interrogating him, to declare that he was being held in violation of the Fifth and Fourteenth Amendments, and to order his release. Hamdi's father claimed his son was innocent and was in Afghanistan to do "relief work" and could not have received military training.⁴¹

The Supreme Court indicated that in this case it had to determine the legality of the Government's detention of a US citizen on US soil as an enemy combatant and to address the process that is constitutionally owed to one who seeks to challenge such a classification.⁴² In a narrow decision Justice O'Connor, writing for the court, indicated that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a US citizen held in the US as an enemy combatant must be afforded a meaningful opportunity to contest the factual basis for the detention before a neutral decision maker.⁴³ However, the court also concluded that the current situation requires that "enemy combatant hearings may be tailored to alleviate their uncommon potential to burden the Executive at a time of ongoing military conflict." The court indicated that this "tailoring" could extend to the admissibility of hearsay evidence on the part of the Government and a presumption in favor of the Government's evidence so long as the presumption remained rebuttable and that a fair opportunity for rebuttal was provided.⁴⁴ In summarizing the court's decision, Justice O'Connor observed, "the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator."⁴⁵

Hamdan v. Rumsfeld

The *Padilla*, *Rasul* and *Hamdi* decisions were not the Supreme Court's final word on the Administration's initial attempt to use military commissions to adjudicate the detainees in US custody. Just over two years later, the court rendered a far more sweeping decision in a subsequent case, *Hamdan v. Rumsfeld*.⁴⁶ Salim Ahmed Hamdan, a Yemeni national, was at the time of the court's decision being detained at a US prison at Guantanamo Bay. In November 2001, during hostilities between the US and the Taliban in Afghanistan, Hamdan was captured by militia forces and turned over to the US military.⁴⁷ In June 2002 Hamdan was transported to Guantanamo Bay. The President subsequently determined that Hamdan was eligible for trial by a military commission, and over two years after his arrival at Guantanamo Bay Hamdan was charged with one count of conspiracy "to commit ... offenses triable by military commission."⁴⁸

Hamdan filed petitions for writs of habeas corpus and mandamus, the latter a request that the court issue a specific order of relief, challenging the Executive Branch's intent to use a military commission to prosecute him. Hamdan claimed that the military commission lacked authority to prosecute him for two basic reasons. First, he claimed that neither a Congressional Act nor the common law supported trial by this commission for the crime of conspiracy, which Hamdan claimed was not a violation of the law of war. Second, he claimed that the procedures the President adopted violate the basic tenets of military and international law, in particular the principle that a defendant must be able to see and hear the evidence against him.⁴⁹

In an opinion authored by Justice Stevens, the Supreme Court determined that the military commission convened to try Hamdan lacked the power to proceed because its structure and procedures violated both the UCMJ and the Geneva Conventions. In doing so, the court noted that Common Article 3 of the Geneva Conventions applied to Hamdan's prosecution, and required that he be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."⁵⁰ While recognizing that Hamdan may be "a dangerous individual whose beliefs, if acted upon, would cause great harm and even death to innocent civilians, and who would act upon those beliefs if given the opportunity", the court nonetheless stated that "in undertaking to try Hamdan and subject him to criminal punishment the Executive is bound to comply with the Rule of Law that prevails in this jurisdiction."⁵¹ In his concurring opinion, Justice Breyer identified another key component of the court's ruling, that Congress had denied the President the legislative authority to create military commissions of the type at issue in this case. However, he noted that "[n]othing prevents the President from returning to Congress to seek the authority he believes is necessary."⁵²

The Administration's Response

The decision in *Hamdan* was viewed as a "sweeping and categorical defeat for the administration"; causing human rights attorneys who represented many of the detainees at Guantanamo to describe it using words such as "fantastic," "amazing" and "remarkable".⁵³ However, the Bush administration, perhaps encouraged by Justice Breyer's comments, quickly responded, proposing legislation to Congress to address

the faults identified by the Supreme Court. Congress did act, and in late September 2006 both houses passed the Military Commissions Act of 2006 (MCA).⁵⁴ President Bush signed the MCA on October 17, 2006, stating as he did so: "It is a rare occasion when a president can sign a bill he knows will save American lives. I have that privilege this morning."⁵⁵ He went on to state that the MCA "complies with both the spirit and the letter of our international obligations," and that it "will allow the Central Intelligence Agency to continue its program for questioning key terrorist leaders and operatives".⁵⁶

According to the administration, the MCA "authorizes the President to establish military commissions to try unlawful enemy combatants suspected of engaging in or planning hostile acts against the United States." The administration further asserts that the MCA "includes such legal protections as the presumption of innocence, the right to call and cross-examine witnesses, the right to legal defense and the right not to be forced to testify."⁵⁷ On January 18, 2007 the Department of Defense (DOD) released its new courtroom procedures for implementing the guidelines set down in the MCA.⁵⁸ In addition to the protections outlined by the administration above, the new manual explicitly forbids prosecutors from using evidence obtained through torture.⁵⁹

While the MCA appears to address many of the shortcomings identified by the Supreme Court, it remains to be seen if it will pass constitutional muster. While forbidding the admission of evidence obtained as a result of torture, the MCA make a distinction between torture and coercion, allowing the admission of evidence that was obtained as a result of coercion by military and intelligence officials prior to late 2005, when Congress passed legislation banning cruel and inhumane treatment of

prisoners.⁶⁰ Coerced testimony could be used if a military judge determines that the evidence is both reliable and relevant. This is important in light of the administration's plan to try certain "high value" detainees who were moved to Guantanamo Bay in September 2006 after being kept at other locations in secret prisons run by the CIA. The MCA may also face significant legal challenges because it prevents detainees from challenging their imprisonment in US federal courts by using a writ of habeas corpus.⁶¹ The rationale, explains John Bellinger, legal advisor to Secretary of State Condoleezza Rice, is that habeas corpus applies to criminal law, not wartime situations. He argues that the Geneva Conventions do not address habeas corpus, and that international law has recognized the right to hold enemies in detention. "As in any military conflict," stated Bellinger, "there is no right to habeas corpus."⁶²

Not surprisingly, human rights groups have criticized the new procedures, saying they stray too far from the military's traditional rules for courts-martial. One key argument is that the rules allow government attorneys too much leeway to keep defendants from viewing classified evidence. Jennifer Daskal, a lawyer at Human Rights Watch, states that pursuant to the rules published by the DOD to implement the MCA: "Classified sources and methods are protected. This creates the possibility that the defense will not learn the ways in which the evidence was obtained, which could have been through coercive techniques like water boarding and sleep deprivation."⁶³

The Use of Military Commissions to Adjudicate the Detainees in US Custody Undermines US National Security Goals

The most recent edition of the country's cornerstone document concerning national security, the National Security Strategy of the United States (NSS), was signed

by President Bush on March 16, 2006.⁶⁴ A review of the NSS reveals a number of US policy goals and supporting strategies relating to the promotion of democracy, a major component of which is respect for individual rights and the rule of law. Key statements in the NSS relating to the promotion of democracy include: “The United States must defend liberty and justice because these principles are right and true for all people everywhere. These nonnegotiable demands of human dignity are protected most securely in democracies. . . . To protect our Nation and honor our values, the United State seeks to extend freedom across the globe by leading an international effort to end tyranny and to promote effective democracy.”⁶⁵ The NSS goes on to state that effective democracies “protect independent and impartial systems of justice, punish crime, [and] embrace the rule of law”.⁶⁶ Later, in a chapter concerning cooperative action with other countries, the NSS states that the US “will encourage all our partners to expand liberty, and to respect the rule of law and the dignity of the individual, as the surest way to advance the welfare of their people and to cement close relations with the United States.” While stating that the US must be prepared to act alone if necessary, the section concludes that “there is little of lasting consequence that we can accomplish in the world without the sustained cooperation of our allies and partners.”⁶⁷ Finally, and most importantly, the NSS concludes that: “America must lead by deed as well as by example.”⁶⁸

A central pillar of US foreign policy is the promotion of effective democracy, the foundation for which is the rule of law. The US State Department defines the rule of law as “the principle that all members of society - - both citizens and rulers - - are bound by

a set of clearly defined and universally accepted laws.”⁶⁹ As the NSS states, the US recognizes that in order to accomplish its goal of promoting democracy, it must lead by example. US actions must establish and maintain credibility and moral authority within the international community. However, the decision to use military commissions to adjudicate the detainees in US custody undermines the rule of law because the commissions afford defendants significantly fewer legal rights and protections than those provided to criminal defendants in US civilian courts, and arguably as required by international law. Moreover, the decision to use military commissions, and its impact on the perception of the US in the international community, cannot be viewed in a vacuum. It is only the most recent of a series of events that have seriously damaged the image of the US in world.

In the wake of the September 11, 2001 terrorist attacks, the international community expressed great sympathy for the US and was strongly supportive of a forceful US response. For the first time in its history NATO invoked Article 5 of the Washington Treaty, stating that “an attack against one is an attack against all,” and many NATO members provided support to the US for operations in Afghanistan and the GWOT.⁷⁰ However, by March of 2003 as the invasion of Iraq drew near much of the support for US international actions had dissolved. While certain key allies such as Britain, Spain and Australia supported the US position, the US faced “an overwhelming opposition to war in many nations and a growing resignation as it approached.”⁷¹ Emblematic of this opposition was the following statement made by French President Jacques Chirac: “Whether it involves the necessary disarmament of Iraq or the

desirable change of the regime in this country, there is no justification for a unilateral decision to resort to force. Iraq today does not represent an immediate threat that justifies an immediate war.”⁷² A poll of adults in nine countries reflected that the Bush administration had “squandered an outpouring of goodwill and sympathy among allies and partners in the aftermath of the September 11, 2001, terrorist attacks”, with the percentage of respondents who had a favorable opinion of the US dropping precipitously in Germany, France and Italy.⁷³

The invasion of Iraq was not the only incident that damaged US credibility in the international community after September 11, 2001. In late April, 2004 photographs began to circulate around the globe “showing American soldiers smiling, laughing and holding their thumbs up as naked Iraqi detainees were forced into sexually abusive and humiliating positions.”⁷⁴ The photographs “drew particular anger in the Arab world just as the American military in Iraq was seeking to pacify a rising insurgency,”⁷⁵ undermining US efforts to stabilize the country. The Abu Ghraib scandal, in conjunction with the war in Iraq, unquestionably contributed to the continued decline of the global image of the US. In the spring of 2006, a survey revealed that the percentage of people who favorably viewed the US had dropped significantly in Spain, India, Russia, Indonesia and Turkey.⁷⁶

Finally, in the wake of the attacks of September 11, 2001 the Bush administration decided to take action against suspected terrorists located in foreign countries. These individuals were seized by US agents and were transported to secret facilities in third countries for interrogation. When this policy, termed “extraordinary rendition” was made

public, it caused great outrage. Indeed, a German court issued an arrest warrant for 13 people suspected of involvement in the kidnapping in Macedonia of a German citizen of Lebanese descent, and an Italian judge indicted 26 Americans, most of them CIA officers, in connection with the case of a radical Egyptian cleric who disappeared near his mosque in Milan in February 2003.⁷⁷ International concern over this issue has been further exacerbated by allegations that the prisoners held at these secret US facilities have been tortured by US agents.⁷⁸

Conclusion

The decision to use military commissions to adjudicate the prisoners in US custody has exacerbated the erosion of US moral authority in the international community, which began in earnest with the US invasion of Iraq and accelerated with the Abu Ghraib prisoner abuse scandal, the use of extraordinary renditions by the CIA to seize suspected terrorists abroad and the alleged torture of some of these same prisoners by US agents at secret overseas prisons. As a result of this series of decisions and actions, the US is now viewed negatively in many countries, with the influential human rights group Amnesty International declaring that the latter two events are evidence that the US “thumbs its nose at the rule of law and human rights.”⁷⁹ In order to accomplish the policy goals identified by President Bush in the NSS, the US must be able to effectively exert moral leadership in the international community. To do so US actions must be consistent with its stated policies. Although there are advantages to using military commissions to adjudicate prisoners in US custody, doing so undermines American authority and the ability of the US to achieve certain central

strategic goals identified in the NSS. The plan to use military commissions should be abandoned and an alternative forum adopted, one which provides, as Justice Stevens noted, “all the judicial guarantees which are recognized as indispensable by civilized peoples.”⁸⁰

Endnotes

¹ Erik Schechter, “The Other Guantanamo Bay,” Worldpress.org, November 22, 2004; available from http://www.worldpress.org/print_article.cfm?article_id=2101&dont=yes; Internet; accessed 22 January 2007.

² Ibid.

³ President George Bush, “Humane Treatment of al Qaeda and Taliban Detainees,” memorandum for The Vice President, The Secretary of State, The Attorney General, Chief of Staff to the President, Director of Central Intelligence, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff, Washington D.C., 7 February 2002. See generally, Gary J. Brockington, United States Policy on Detainees Captured During the Global War on Terror in Light of the United States Supreme Court Decisions in *Rasul V. Bush*, *Rumsfeld v. Padilla*, and *Hamdi V. Rumsfeld*, Strategy Research Project (Carlisle Barracks: U.S. Army War College, 18 March 2005), 3.

⁴ American Bar Association Task Force on Terrorism and the Law, “Report and Recommendations on Military Commissions,” 4 January 2002; available from <http://www.abanet.org/leadership/military.pdf>; Internet; accessed 4 April 2007 [Hereinafter “ABA Task Force Report”]. See also, Michelle McAninch Miller, The Authority and Suitability of Military Commissions to Try the September 11th Terrorists, Strategy Research Project (Carlisle Barracks; U.S. Army War College, 9 April 2002), 4.

⁵ ABA Task Force Report, 14.

⁶ Miller, 20.

⁷ Robert H. Bork, “Having Their Day in (a Military) Court,” January 2002; available from <http://www.ciaonet.org/pbei-2/aei/oti/bor01/bor01/.html>; Internet, accessed 6 July 2006.

⁸ ABA Task Force Report, 14.

⁹ Miller, 20.

¹⁰ Ibid. See also, ABA Task Force Report, 14.

¹¹ Uniform Code of Military Justice, U.S. Code, Title 10, Article 21, sec. 821.

¹² Ibid. See also, Miller, 5.

¹³ 317 U.S. 1 (1942).

¹⁴ *Ibid.*, 28. Congress had specifically authorized the trial of offenses against the law of war prior to the trials of the German saboteurs.

¹⁵ 327 U.S. 1 (1946).

¹⁶ ABA Task Force Report, 5.

¹⁷ President George W. Bush, Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," Federal Register 66 (16 November 2001): 57831.

¹⁸ *Ibid.*, sec. 2; Miller, 3.

¹⁹ Bork, 2.

²⁰ Miller, 19.

²¹ William Safire, "Essay; Kangaroo Courts," New York Times, 26 November 2001; available from <<https://select.nytimes.com/search/restricted/article?res=F708IEFF3A5EOC758EDDA80994D9404482>>; Internet; accessed 10 April 2007.

²² Katherine Q. Seelye, "A NATION CHALLENGED: CIVIL LIBERTIES; Draft Rules for Tribunals Ease Worries, but Not All," New York Times, 29 December 2001; available from <http://select.nytimes.com/search/restricted/article?res=F30B10F834550C7A8EDDAB0994D9404482>; Internet; accessed 10 April 2007.

²³ Neal K. Katyal and Laurence H. Tribe, "Waging War, Deciding Guilt; Trying the Military Tribunals," Yale Law Journal, 111 (2002): 1259.

²⁴ *Hamdi v. Rumsfeld*, 542 U.S. 507, 527 (2004).

²⁵ 542 U.S. 426 (2004).

²⁶ 542 U.S. 466 (2004).

²⁷ 542 U.S. 507 (2004).

²⁸ *Padilla*, 542 U.S. 426, 430; *Rasul*, 542 U.S. at 430; *Hamdi*, 542 U.S. at 509. See generally, Brockington, 4.

²⁹ *Padilla*, 542 U.S. at 430-432.

³⁰ *Ibid.* See generally, Brockington, 6.

³¹ *Rasul*, 542 U.S. 466 (2004).

³² *Ibid.*, 470-471.

³³ *Ibid.*, 472.

³⁴ *Ibid.*, 470.

³⁵ *Ibid.*, 469, 485.

³⁶ Ibid., 481.

³⁷ Brockington, 5.

³⁸ *Hamdi*, 542 U.S. at 510.

³⁹ Ibid.

⁴⁰ Ibid., 511.

⁴¹ Ibid.

⁴² Ibid., 509.

⁴³ Ibid.

⁴⁴ Ibid., 533-534.

⁴⁵ Ibid., 535.

⁴⁶ 126 S. Ct. 2749 (2006).

⁴⁷ Ibid., 2759.

⁴⁸ Ibid.

⁴⁹ Ibid.

⁵⁰ Ibid., 2796.

⁵¹ Ibid., 2798.

⁵² Ibid., 2799.

⁵³ Linda Greenhouse, "Justices, 5-3, Broadly Reject Bush Plan to Try Detainees," *New York Times*, 30 June 2006, pg. A.1 (2879 words) [database on-line]; available from UMI ProQuest, Bell & Howell; accessed 30 June 2006.

⁵⁴ Michelle Austein, "Congress Passes Legislation on Questioning, Trying Detainees," 29 September 2006; available from <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&x=20060929133523hmnietsua0.7587854>; Internet; accessed 1 April 2007.

⁵⁵ Vince Crawley, "Bush Signs Military Commission Act To Try Terrorist Suspects," 17 October 2006; available from <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2006&m=October&x=20061017163242MVyelwarC0.8755457>; Internet; accessed 1 April 2007.

⁵⁶ Ibid.

⁵⁷ Ibid.

⁵⁸ Mark Mazzetti, "Pentagon Revises its Rules on Prosecution of Terrorists," New York Times, 19 January 2007; available from <<http://select.nytimes.com/search/restricted/article?res=F20C12FC35540C7A8DDDA80894DF40482>>; Internet; accessed 19 April 2007.

⁵⁹ Ibid.

⁶⁰ Ibid.

⁶¹ Austein.

⁶² Vince Crawley, "U.S. Official Explains New Military Commission Law," 23 October 2006; available from <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=20067m=October&x=20061023163258MVyelwarC0.1970331>; Internet; accessed 1 April 2007.

⁶³ Mazzetti.

⁶⁴ George W. Bush, The National Security Strategy of the United States of America (Washington D.C.: The White House, March 2006), preface.

⁶⁵ Ibid., 2-3.

⁶⁶ Ibid., 4.

⁶⁷ Ibid., 36-37.

⁶⁸ Ibid., 49.

⁶⁹ Alexandra Abboud, "The Rule of Law Provides Foundation for Democracy; Judicial independence, equal protection and civil liberties are key components," 1 February 2006; available from <http://usinfo.state.gov/dhr/Archive/2006/Jan/19-995963.html>; Internet; accessed 1 April 2007.

⁷⁰ U.S. Department of State, "NATO Coalition Contributes to Global War on Terrorism; Contributions made by 19 NATO members, Nine Aspirants; 24 October 2002; available from <http://usinfo.state.gov/xarchives/display.html?p=washfile-english&y=2002&m=October&x=20021025151835mkellerh@pd.state.gov0.1174127>; Internet; accessed 21 April 2007.

⁷¹ Alan Cowell, "THREATS AND RESPONSES: WORLD REACTION; A Worried World Shows Discord," New York Times, 19 March 2003; available from <http://select.nytimes.com/search/restricted/article?res=FA0E10F839550C7A8DDDA0894DB404482>; Internet; accessed 22 April 2007.

⁷² Ibid.

⁷³ Ibid.

⁷⁴ Thom Shanker and Jacques Steinberg, "THE STRUGGLE FOR IRAQ: Captives; Bush Voices 'Disgust' at Abuse of Iraqi Prisoners," New York Times, 1 May 2004; available from <http://select.nytimes.com/search/restricted/articles?res=FA0811FA3E590C728CDDAC0894DC404482>; Internet; accessed 22 April 2007.

⁷⁵ Ibid.

⁷⁶ Brian Knowlton, "Global Image of the U.S. Is Worsening, Survey Finds," New York Times, 14 June 2006; available from <http://select.nytimes.com/search/restricted/article?res=F10B14F638550C778DDDAF0894DE404482>; Internet; accessed 22 April 2007.

⁷⁷ Ian Fisher and Mark Mazzetti, "ITALIANS INDICT C.I.A. OPERATIVES IN '03 ABDUCTION," New York Times, 17 February 2007, available at <http://select.nytimes.com/search/restricted/article?res=F40B16F63F5A0C748DDDAB0894DF404482>; Internet; accessed 1 April 2007.

⁷⁸ Adam Liptak, "SUSPECTED LEADER OF ATTACKS ON 9/11 IS SAID TO CONFESS," New York Times, 15 March 2007; available from <http://select.nytimes.com/search/restricted/article?res=F40D14FA35550C768DDDAA0894DF40482>; Internet; accessed 25 April 2007.

⁷⁹ Alan Cowell, "U.S. 'Thumbs Its Nose' At Rights, Amnesty Says," New York Times, 26 May 2005; available from <http://select.nytimes.com/search/restricted/article?res=FB0B16F7385D0C758EDDAC0894DD40482>; Internet; accessed 22 April 2007.

⁸⁰ *Hamdan v. Rumsfeld*, 126 S. Ct. 2796.