

By William Fisher

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Critics of President Obama's changes to the regulations governing military commissions are characterizing these changes as "cosmetic improvements," amid a growing consensus among human rights organizations that these tribunals are designed to produce convictions, while trials in civilian courts are far more likely to produce justice.

This is the emerging view, not only from outside advocates opposed to the Bush-era tribunals, but also of many of the military judges, prosecutors and defense attorneys who have seen from the inside how the commissions have worked - or failed to work - over the past eight years.

One of these is Air Force Reserve Lt. Col. David Frakt, who resigned his post as a defense lawyer for a Guantanamo prisoner, and enjoys a high degree of credibility because of the unique experience he has had.

We spoke extensively with Frakt via email. He told us, "Clearly, the new military commissions are a significant improvement, at least on paper, over the previous incarnations. The revisions to the hearsay rules and the establishment of a voluntariness standard for the admissibility of statements are the two most significant improvements."

However, he added, "The military commissions are still fundamentally flawed in a number of respects. First, there is no requirement of any pretrial investigation, such as a preliminary hearing or grand jury. Second, there is no derivative evidence rule, or 'fruit of the poisonous tree' doctrine, so even if coerced statements themselves may be inadmissible, evidence derived from those coerced statements may still be admitted into evidence. Third, the MCA still authorizes the trial of detainees for a variety of offenses that are not traditional war crimes, including material support to terrorism, terrorism, conspiracy, and the invented offense of murder in violation of the law of war. Fourth, juveniles may still be subject to trial by military

commission."

Frakt concludes, "Military commissions are wholly unnecessary. There are virtually no examples of true war crimes committed by detainees during the armed conflict that started after 9/11. Almost all the offenses relate either to pre 9/11 activity and involve material support to terrorism, conspiracy and terrorism. These offenses can be effectively tried in federal courts."

Colonel Frakt continues: "Now that that the evidentiary rules in military commissions have been tightened to more closely resemble the rules in federal courts, the real reason for the creation of military commissions - the ability to gain easy convictions on tainted evidence - has largely been removed. But the taint of the original process still lingers. The perception that the military commissions are a second-class option remains."

Frakt referenced an amendment South Carolina Republican Sen. Lindsey Graham sought to insert into the bill. Graham commented that people who are terrorists don't deserve full constitutional rights. Colonel Frakt responded by charging that Graham "is clearly prejudging the cases and affording a presumption of guilt, not innocence. The Constitution sets forth the minimum due process that we believe is necessary to ensure a fair trial. Why would we ever want to go below that?"

Frakt concludes that "the criteria for determining which cases go to commissions and which to federal courts make no sense. Basically, the cases will go to federal court if the Justice Department wants the case and thinks they can prove it, and the rest of the cases will go to the military commissions. This is further proof that the commissions are a second-class option."

Frakt speaks from first-hand experience. He served as an Air Force officer and military defense counsel with the Office of Military Commissions. During that time, he called the original military commissions "a catastrophic failure." He was defense counsel for a young Guantanamo prisoner, Mohammed Jawad, who was released this summer to his home in Afghanistan after years in confinement when a military judge ruled his confession was coerced. Frakt has returned to his work as a professor at Western State University College of Law in Fullerton, California.

And he is not alone in condemning the military commissions. Frakt's former adversary in the

military commissions, the prosecutor, Lt. Col. Darrel Vandeveld, resigned in September 2008. He told a Congressional committee that the commissions were "broken beyond repair" and "cannot be fixed, because their very creation - and the only reason to prefer military commissions over federal criminal courts for the Guantánamo detainees - can now be clearly seen as an artifice, a contrivance, to try to obtain prosecutions based on evidence that would not be admissible in any civilian or military prosecution anywhere in our nation."

Lt. Col. Darrel Vandeveld declared the commission system unable to deliver justice, and explained how he had gone from being a true believer to someone who felt truly deceived.

In October and November 2008, his military judge, Army Col. Stephen Henley, refused to accept the confessions made by Jawad shortly after his capture (both in Afghan and US custody), because they had been extracted through threats of torture.

This dramatic assertion was made in a statement by Lieutenant Colonel Vandeveld in January of this year in connection with Jawad's habeas claim. His lawyers had discovered that Jawad may have been as young as 12 when he was first seized.

This disclosure produced yet another crisis for the commission system when an exasperated federal judge condemned the Justice Department for its persistent obstruction, and repeatedly stressed that the government did not have a single reliable witness and that the case was "lousy," "in trouble," "unbelievable" and "riddled with holes," according to statements Vandeveld and Frakt made in July to two Congressional committees.

The positions taken by both men dropped like an A-bomb on the uniformed military, the civilian leadership at the Pentagon, the Congress and the White House.

But these positions should have come as no surprise. Perhaps the element that was unique was agreement involving both the prosecutor and the defense counsel in the same single case.

Lieutenant Colonel Frakt testified before a Congressional committee as an expert witness, being an experienced lawyer who studied the Military Commissions Act of 2006 in depth and

served on the commissions from April 2008 as a military defense attorney for two prisoners, Mohamed Jawad and Ali Hamza al-Bahlul.

The view he expressed was that the MCA should be repealed and trials held in federal courts, which have a proven track record of dealing with cases related to terrorism. However, as he is pragmatic enough to realize that this may not happen, he provided the committee with 11 detailed revisions to the MCA, which should be followed if, as anticipated, everyone involved in the decision-making process continues to believe that the tainted commissions will be able to deliver justice.

Lieutenant Colonel Frakt told Congress, "As we ponder the questions before us, I think it is important to review where we are now and how we got to this point.

"One point on which all sides should be able to agree is that the military commissions of the Bush administration were a catastrophic failure. The military commissions clearly failed to achieve their intended purpose. After more than seven years and hundreds of millions of dollars wasted, the military commissions yielded only three convictions, all of relatively minor figures. Not a single terrorist responsible for the planning or execution of a terrorist attack against the United States was convicted. Two of the convicted, David Hicks and Salim Hamdan, received sentences of less than one year and were subsequently released. The third trial, of my client Mr. al-Bahlul [Ali Hamza al-Bahlul], though yielding a life sentence, was far from a triumph for the military commissions.

"There were several problematic aspects of this trial, not the least of which was the fact that several members of Mr. Hicks' jury were actually recycled for this military commission. More disturbing was the denial of Mr. al-Bahlul's statutory right of self-representation. Mr. Al-Bahlul, a low-level al-Qaeda media specialist, wanted to represent himself before the military commissions and this request was granted by the military judge at the arraignment, Army Colonel Peter Brownback. Soon thereafter, Col. Brownback was involuntarily retired from Army and replaced. The new judge revoked Mr. al-Bahlul's pro se status, although he knew that Mr. al-Bahlul had refused to authorize me, his appointed military defense counsel, to represent him. As a result, there was no defense presented; Mr. al-Bahlul was convicted of all charges and received the maximum life sentence.

"Why, with the entire resources of the Department of Defense, the Justice Department and the national intelligence apparatus at their disposal, were the military commissions such an abysmal

failure? The answer is simple: the military commissions were built on a foundation of legal distortions and outright illegality.

"The rules, procedures and substantive law created for the commissions were the product of, or were necessitated by, the wholesale abandonment of the rule of law by the Bush administration in the months after 9/11. In the United States of America, any such legal scheme is ultimately doomed to fail," Frakt said.

Frakt and Vandeveld were not the first the first - nor are they likely to be the last - to speak out in opposition to the use of military commissions. Earlier in the Guantanamo, kabuki-theater spectacle, a young Naval officer named Charles D. Swift gained national notoriety by pushing back against the Pentagon powers that be.

Swift was a lieutenant commander in the Judge Advocate General's Corps and a visiting associate professor of law at Emory University School of Law. He served as defense counsel for Salim Ahmed Hamdan, a former driver for Osama bin Laden captured during the invasion of Afghanistan. Hamdan was charged in July 2004 with conspiracy to commit terrorism.

As Hamdan's legal counsel, Swift, together with the Seattle law firm of Perkins Coie and Georgetown Law Professor Neal Katyal, appealed Hamdan's writ of habeas corpus petition to the US Supreme Court.

In Hamdan v. Rumsfeld, the justices ultimately held that the military commission to try Salim Hamdan was illegal and violated the Geneva Conventions as well as the United States Uniform Code of Military Justice (UCMJ).

Ultimately, Swift was passed over (the second time) for promotion because the Navy said he failed to have the diversity of experience required of Navy judge advocates and had to retire under the military's "up or out" promotion system, which mandates retirement for officers passed over twice. But other informed sources contend Swift was released because of his Hamdan defense. Swift has said he learned of being passed over two weeks after the Supreme Court decided in Hamdan's favor.

Hamdan was but one of many judicial rebukes to President George W. Bush's detention plans. In Hamdan, the high court held that the military commissions set up by the Bush administration to try detainees at Guantanamo Bay lacked "the power to proceed because its structures and procedures violate both the Uniform Code of Military Justice and the four Geneva Conventions signed in 1949." Specifically, the ruling says that Common Article 3 of the Geneva Conventions was violated.

In another case, Hamdi v. Rumsfeld, the Supreme Court reversed the dismissal of a habeas corpus petition brought on behalf of Yaser Esam Hamdi, a US citizen being detained indefinitely as an "illegal enemy combatant." The court recognized the power of the government to detain unlawful combatants, but ruled that detainees who are US citizens must have the ability to challenge their detention before an impartial judge.

Earlier, in 2004, the Supreme Court held in Rasul v. Bush that the nearly 600 men imprisoned by the US government in Guantanamo Bay, Cuba, had a right of access to the federal courts, via habeas corpus and otherwise, to challenge their detention and conditions of confinement.

Subsequent to this decision, the habeas petitions were remanded to the district court for further proceedings. Immediately after the Supreme Court's decision in Rasul, 11 new habeas petitions were filed in the United States District Court for the District of Columbia on behalf of over 70 detainees. These cases eventually became the consolidated cases of Al Odah v. United States and Boumediene v. Bush, the leading cases determining the significance of the Supreme Court's decision in Rasul, the rights of noncitizens to challenge the legality of their detention in an offshore US military base, and the constitutionality of the Military Commissions Act of 2006.

Moreover, the list continues to grow under President Barack Obama. The high court has accepted a request to hear a case from 13 ethnic Uighur (Chinese Muslim) Guantanamo inmates who are petitioning for release to the United States, contrary to a measure voted last week by the House of Representatives permitting the transfer of prisoners to the US for trial, but explicitly forbidding their release to the US.

The legislation requires an assessment of potential security risks, including what dangers are involved, how the threat can be diminished, legal arguments and assurances about the detainee's level of risk to the relevant state governor, to be provided 45 days prior to prosecution in the US. Under these measures, the president must provide Congress with the detainee's name, destination, a risk assessment and transfer terms in order to release them to

another country.

Some of the Uighurs are still being detained while the government has found countries prepared to relocate others. A federal judge ruled in February that they be released to the US. However, an appeals court overturned the decision in February saying that only the executive branch, not federal judges, had jurisdiction on immigration matters.

In addition to the cases on their way to the Supreme Court, dozens of habeas corpus petitions have been filed, but not yet heard, in Federal Court in Washington, DC.

Observers of the military tribunals process are predicting that the new amendments may do little to insulate the commissions from multiple legal challenges. In the past, these challenges have virtually stopped the proceedings at Guantanamo and have, in large part, been responsible for only three trials being held there in eight years.

One of the more persistent Guantanamo-watchers since the first prisoners arrived there is Chip Pitts, president of the Bill of Rights Defense Committee and a lecturer at the Stanford University law school.

Here's his take-away from this week's developments.

He told us, "Without gainsaying the undoubted improvements contained in Obama's military commissions created by the National Defense Authorization Act (NDAA), including an overdue prohibition on use of most (but not all) evidence obtained by coercion, the problem with continuing the unnecessary and suspect Bush-era military commissions in any form is that they perpetuate an overbroad, second-tier system of justice.

"Especially when taken together with continued recourse to novel definitions of 'war crimes', indefinite detention, and refusal to prosecute higher-ups who authorized torture, such derogations from the rule of law blatantly violate international human rights and constitutional due process and equal protection: they'll be used only in a discriminatory fashion, for non-citizens (even some who were children at the time) against whom the evidence is

insufficient to try them in the regular US courts that, unlike the military commissions, have a good record of successfully trying terrorists.

"Such a discriminatory, second-tier system of justice not only calls into question the outcomes reached, but will inevitably spill over to taint the US justice system as a whole and continue to tarnish the country's reputation and soft power - and the nation's ability to achieve both its human rights goals and its other vital interests in the world.

"It is way past time to reject the discriminatory, disproven, xenophobic, demagogic, and counterproductive notions driving such policy mistakes, including above all the now indisputably wrong idea that the hopelessly overbroad 'endless global war on terror' framework can somehow yield better decisions and results than the proven legal approaches that carefully and pragmatically evolved over the last 1000 years as the best ways to produce truth with justice."