
January 2012

Ten Years On: Military Justice and Civil Liberties in the Post-9/11 Era

Eugene R. Fidell
Yale Law School

Follow this and additional works at: https://digitalcommons.nyls.edu/nyls_law_review



Part of the [Law and Politics Commons](#), [Law and Society Commons](#), [Military, War, and Peace Commons](#), [National Security Law Commons](#), and the [President/Executive Department Commons](#)

Recommended Citation

Eugene R. Fidell, *Ten Years On: Military Justice and Civil Liberties in the Post-9/11 Era*, 56 N.Y.L. SCH. L. REV. 104 (2011-2012).

This Article is brought to you for free and open access by DigitalCommons@NYLS. It has been accepted for inclusion in NYLS Law Review by an authorized editor of DigitalCommons@NYLS.

EUGENE R. FIDELL

Ten Years On: Military Justice and Civil Liberties in the Post-9/11 Era

ABOUT THE AUTHOR: Senior Research Scholar in Law and Florence Rogatz Lecturer in Law, Yale Law School; President, National Institute of Military Justice. The author served as a judge advocate in the U.S. Coast Guard from 1969 to 1972.

TEN YEARS ON: MILITARY JUSTICE AND CIVIL LIBERTIES IN THE POST-9/11 ERA

Within a day or two after 9/11, as the shock was wearing off, it occurred to me that the legal fallout of the attacks would be varied and profound. I cannot recall which areas of the law I thought at the time were most likely to be affected, but certainly they included criminal law. I also reckoned there would be litigation arising simply from the loss of the buildings and that these losses would present significant commercial insurance issues. With National Guard troops posted on the streets and in train stations, it also seemed likely that Posse Comitatus Act¹ issues would arise.

Based on these early observations, the attacks seemed to furnish the occasion for a new law review dedicated to examining the 9/11 fallout. My thought was that, unlike normal law reviews, this one would be designed to expire once things died down. I thought there might be a few lively years.

Nothing came of it, despite my effort to interest a law school in New York (not New York Law School) in the idea. On the other hand, existing law reviews have risen to the occasion, producing a rich post-9/11 literature over the last decade. Entirely new journals have sprung up, such as the Journal of National Security Law and Policy, on the editorial board of which I sit.² While more broadly cast than what I had in mind, many of the Journal's offerings fall under the post-9/11 rubric. The last decade has also witnessed the explosive growth of the blogosphere, where there is no shortage of excellent, rigorous, and pertinent sites.³

Given this background, I am especially pleased that New York Law School decided two years ago to co-sponsor this symposium on civil liberties ten years after 9/11 with the Federalist Society for Law and Public Policy Studies and the American Constitution Society for Law and Policy, and that the New York Law School Law Review is dedicating this issue to the program.

For many years, my main area of study and practice has been military law. In this article, I will assess how 9/11 has influenced the development of law and legal institutions in that field. In the process, I will at times get out of my lane to offer a few broader observations.

I. INTRODUCTION

The 9/11 attacks have influenced virtually every aspect of the world of military law. Part I of this article addresses its effects on military justice, which is the law

1. 18 U.S.C. § 1385 (2006).

2. The first issue of the *Journal* appeared in 2005. According to an introductory note from Dean Elizabeth Rindskopf Parker of the University of the Pacific, McGeorge School of Law, "it took the 9/11 attacks more than a decade [after the fall of the Berlin Wall] to begin the process of awakening a fuller understanding of the implications of [the end of the Cold War] for our new century." Elizabeth Rindskopf Parker, *Why a Journal of National Security Law & Policy?*, 1 J. NAT'L SEC. L. & POL'Y 1 (2005).

3. See, e.g., LAWFARE: HARD NAT'L SEC. CHOICES, <http://www.lawfareblog.com> (last visited Mar. 27, 2011); see also NAT'L SEC. ADVISORS, <http://www.natseclaw.com> (last visited Mar. 27, 2011); Am. Univ. Wash. Coll. of Law, NAT'L SEC. L. BRIEF, <http://www.nationalsecuritylawbrief.com> (last visited Mar. 27, 2011); Robert Chesney's [Nat'l Security L.] Listserv Archive, J. NAT'L SEC. L. & POL'Y, <http://chesney.jnslp.com> (last visited April 7, 2011).

governing the internal discipline of armed forces. Part II considers the Guantánamo detentions and the military commissions conducted there. Part III summarizes developments with respect to the rights of military personnel, while Part IV describes some impacts of 9/11 on the bar. Parts V and VI, respectively, identify instances in which the military was misused and the effects of 9/11 on the judiciary. This catalogue is not intended to be exhaustive, but it will give a sense of the pervasive effects of 9/11. Some are disturbing, such as the Supreme Court's seeming indifference to the stately pace of Guantánamo habeas corpus litigation, and a few are modestly encouraging, if not exactly a cause for celebration, such as the constructive role played by the Judge Advocates General. In Part VII, I provide some concluding remarks.

Just what were the effects of 9/11 on military justice? It depends on whether the question is limited to direct effects or includes indirect effects as well. If one includes the second Gulf War and the war in Afghanistan, the effects have been substantial. New challenges have faced the conventional military justice system, by which I mean the system of courts-martial used for ensuring good order and discipline among our military personnel.⁴ Despite the fact that a high tempo of military operations tends to reduce the disciplinary caseload, the wars in Iraq and Afghanistan have generated numerous high-profile incidents that have tested the military justice system. These include well-known cases, such as those that arose at the Abu Ghraib detention facility in Iraq,⁵ and others that arose under actual battlefield conditions in both countries.⁶ Many observers—myself included—have wondered whether military commanders were slower than they should have been in referring charges to courts-martial, and whether court-martial members (i.e., jurors) were too quick to permit “fog of war” claims to influence their thinking, thus making them slower to convict and, in the event of a conviction, less likely to impose a harsh sentence.⁷ Only now are we at a point where actual outcomes can be evaluated and judgments reached on these matters, as Marine judge advocate and now-professor Gary D. Solis brilliantly did after the dust settled in Vietnam.⁸

One byproduct of the military operations that followed 9/11 was a congressional attempt to revive the exercise of court-martial jurisdiction over civilians. Such jurisdiction was permitted by Congress until the 1950s, when a string of Supreme Court cases effectively confined military justice personal jurisdiction to individuals

4. Courts-martial are governed by the Uniform Code of Military Justice (UCMJ) and the Manual for Courts-Martial (MCM). *See generally* 10 U.S.C. §§ 801–950 (2006); *MANUAL FOR COURTS-MARTIAL, UNITED STATES* (2008), <http://www.army.mil/usapa/epubs/pdf/mcm.pdf>.

5. *See, e.g.*, *United States v. Graner*, 69 M.J. 104 (C.A.A.F. 2010); *United States v. Harman*, 68 M.J. 325 (C.A.A.F. 2010); *United States v. Smith*, 68 M.J. 316 (C.A.A.F. 2010).

6. *E.g.*, *United States v. Wuterich*, 67 M.J. 63 (C.A.A.F. 2008).

7. The full story remains to be told. *See generally* William C. Peters, *Adjudication Deferred: Command Responsibility for War Crimes and U.S. Military Justice from My Lai to Haditha and Beyond*, 37 *NATIONALITIES PAPERS* 925 (2009).

8. *See* Gary D. Solis, *Military Justice, Civilian Clemency: The Sentences of Marine Corps War Crimes in South Vietnam*, 10 *TRANSNAT'L L. & CONTEMP. PROBS.* 59 (2000); *see also* GARY D. SOLIS, *SON THANG: AN AMERICAN WAR CRIME* (1997) (focusing on a single incident that took place in 1970 in Vietnam).

who are in the military⁹ (and presumably certain military retirees).¹⁰ In 2006, Senator Lindsey O. Graham, Republican of South Carolina, led the revival effort, eventually leading to an amendment of the Uniform Code of Military Justice (UCMJ) to permit the exercise of court-martial jurisdiction over persons serving with or accompanying an armed force in the field in time of a declared war or a “contingency operation,”¹¹ a defined term under the UCMJ¹² that includes the wars in both Iraq and Afghanistan.

Given the precedents, this extension of court-martial jurisdiction raises serious civil liberties issues, and perhaps for this reason the armed forces have been loath to employ it. A mere handful of cases involving civilian contractor personnel has arisen in Iraq,¹³ but the sentences handed down in these proceedings have been so short that they do not even qualify for normal review in the military appellate courts.¹⁴ Other threatened prosecutions collapsed when injunctions were sought in federal district court in Washington, D.C.¹⁵ The Obama administration has trod very carefully in furthering the implementation of the new law. The 2010 amendments to the *Manual for Courts-Martial* cautioned that

-
9. See *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960); *Grisham v. Hagan*, 361 U.S. 278 (1960); *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960); *Reid v. Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth v. Quarles*, 350 U.S. 11 (1955).
 10. E.g., *Hooper v. United States*, 326 F.2d 982 (Ct. Cl. 1964) (upholding court-martial jurisdiction over a retired Navy Rear Admiral); *United States v. Hooper*, 9 U.S.C.M.A. 637 (1958). The Supreme Court referred to potential court-martial jurisdiction over retired regulars in *McCarty v. McCarty*, 453 U.S. 210, 221 (1981). See generally J. Mackey Ives & Michael J. Davidson, *Court-Martial Jurisdiction over Retirees under Articles 2(4) and 2(6): Time to Lighten Up and Tighten Up?*, 175 MIL. L. REV. 1 (2003).
 11. See 10 U.S.C. § 802(a)(10) (2006) (amended by the John Warner National Defense Authorization Act for Fiscal Year 2007, 120 Stat. 2083 (2006)). The 2006 legislation added the requirement for a declaration of war, in response to cases that had held the earlier statute could not be applied to Vietnam since Congress had never declared war there. *Id.*; *United States v. Averette*, 19 U.S.C.M.A. 363 (1970). The 2006 amendment also added the “contingency operations” provision. See 10 U.S.C. § 802(a)(10). For a discussion of the expansion of court-martial jurisdiction to contractors, see Eugene R. Fidell, *Criminal Prosecution of Civilian Contractors by Military Courts*, 50 S. TEX. L. REV. 845 (2009).
 12. 10 U.S.C. § 101(a)(13) (2006).
 13. See, e.g., Alexandra Zavis, *Army Interpreter Sentenced at Court-Martial*, L.A. TIMES, June 24, 2008, at A3, available at <http://articles.latimes.com/2008/jun/24/world/fg-interpreter24>.
 14. For example, in the case noted immediately above, the sentence was five months of confinement. *Id.* To be eligible for review by the service court of criminal appeals, a court-martial sentence must be at least a year of confinement or include a bad-conduct or dishonorable discharge or (in the case of a commissioned officer) a dismissal. 10 U.S.C. § 866(b)(1) (2006).
 15. E.g., Petitioner’s Petition for a Writ of Habeas Corpus, *Price v. Gates*, No. 1:09-cv-00106 (D.D.C. Jan. 16, 2009). This action for a writ of habeas corpus was dismissed on January 26, 2009 (ten days after it was filed), when military authorities advised the petitioner that then secretary of defense Robert M. Gates had decided to withhold authority for the Air Force to try him by court-martial. See Keith Rogers, *No court-martial for man suspected in spy plane fire*, LAS VEGAS REVIEW-JOURNAL (Jan. 23, 2009), <http://www.lvrj.com/news/38209139.html>; John O’Connor, Comment to *BIG news: U.S. not to proceed with charges against civilian contractor*, CAAFLOG (Jan. 26, 2009, 6:30 PM), <http://www.caaflg.com/2009/01/23/big-news-u-s-not-to-proceed-with-charges-against-civilian-contractor/>.

[c]ourt-martial jurisdiction over civilians under the [UCMJ] is limited by the Constitution and other applicable laws, including as construed in judicial decisions. The exercise of jurisdiction under Article 2(a)(11) in peace time has been held unconstitutional by the Supreme Court of the United States. Before initiating court-martial proceedings against a civilian, relevant statutes, decisions, service regulations, and policy memoranda should be carefully examined.¹⁶

No one should expect widespread use of this controversial authority to court-martial civilians.

II. THE MILITARY AND THE GUANTÁNAMO DETAINEES

The most significant 9/11 civil liberties issues have, of course, concerned not Americans in uniform or civilian contractors, but those whom we have detained and sought to prosecute before military commissions. Setting aside the question of detention, which has led to an astounding amount of litigation, the revival of the military commissions stands as one of the major civil liberties legacies of the 9/11 era. The tale is a grim one.

What to do about people captured in the course of operations against al-Qaeda (which conducted the 9/11 attacks) and the Taliban (which harbored al-Qaeda in Afghanistan)? The choices were few. One approach was to prosecute those we were able to capture before a federal district court, as was done with the perpetrators of the first World Trade Center bombing on February 26, 1993.¹⁷ Another alternative was to prosecute them before general courts-martial, which have authority to try offenses against the law of war by persons who are subject to the law of war.¹⁸ The Bush administration did not follow that route, even though it had been urged by experts.¹⁹ Instead, only two months after 9/11, President George W. Bush issued a Military

16. Exec. Order No. 13,552, 75 Fed. Reg. 54,263, 54,269 (Aug. 31, 2010), *amending* Rules for Court-Martial 202(a) (Discussion).

17. *See, e.g.*, United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) (affirming conviction); United States v. Salameh, 261 F.3d 271 (2d Cir. 2001) (affirming sentence with minor modifications as to fine and restitution).

18. 10 U.S.C. § 818 (2006).

19. *See generally* Jan E. Aldykiewicz & Geoffrey S. Corn, *Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74 (2001) (proposing that United States place war criminals before general courts-martial under control of a U.S. commander); Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509 (1994) (concluding that American courts-martial are viable alternatives to specially constituted international tribunals for trying crimes against the law of nations); Neal Katyal, *Invent This Wheel!!! Now can we try using courts-martial for enemy detainees?*, SLATE (July 11, 2006, 4:41 PM), <http://www.slate.com/id/2145512/> (arguing that following the Supreme Court's decision to strike down President Bush's military commission system at Guantánamo Bay, Congress should now seriously consider instituting a courts-martial system); Neal Katyal, *Sins of Commissions: Why aren't we using the courts-martial system at Guantanamo?*, SLATE (Sept. 8, 2004, 11:11 AM), <http://www.slate.com/id/2106406/> (laying out the benefits of a courts-martial system as compared to the Bush administration's use of military commissions).

TEN YEARS ON: MILITARY JUSTICE AND CIVIL LIBERTIES IN THE POST-9/11 ERA

Order authorizing the creation of military commissions,²⁰ a type of military court not used since the aftermath of World War II.²¹ These were contemplated by the UCMJ, but many of the details were not spelled out.²² The Bush commissions were slow to get off the ground, and eventually, after the Supreme Court found them flawed,²³ Congress stepped in and passed the Military Commissions Act of 2006 (MCA).²⁴ In 2009, another Military Commissions Act was passed,²⁵ but to date the government has prosecuted only a handful of cases under it and the predecessor arrangements.²⁶

Many concerns have been expressed about the use of military commissions. Should the strict rules of evidence apply, as they do in courts-martial?²⁷ Should evidence obtained by coercion short of torture be admissible? Should evidence obtained without *Miranda*²⁸ warnings be admitted? What restrictions should be imposed on the media in attempting to cover military commission trials?²⁹ But one

-
20. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001); Eugene R. Fidell, *Military Commissions and Administrative Law*, 6 GREEN BAG 2d 379, 379 n.1 (2003).
 21. See *Hamdan v. Rumsfeld*, 548 U.S. 557, 597 (2006). In *Hamdan*, Justice Stevens explained that military commissions have been used in three situations: (1) as substitutes for civilian courts when martial law has been declared; (2) as occupation courts to try civilians in the absence of civil government; and (3) “as an ‘incident to the conduct of war’ when there is a need ‘to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.’” *Id.* at 595–97 (quoting *Ex parte Quirin*, 317 U.S. 1, 28–29 (1942)). *Hamdan* involved the third type.
 22. See 10 U.S.C. §§ 818, 821, 836, 847–48, 850 (2006).
 23. *Hamdan*, 548 U.S. 557. The Supreme Court had earlier determined that foreign nationals held at Guantánamo Bay could seek writs of habeas corpus. *Rasul v. Bush*, 542 U.S. 466 (2004). In *Boumediene v. Bush*, the Court held that the part of the Military Commissions Act (MCA) that sought to preclude habeas corpus petitions by Guantánamo detainees was an unconstitutional suspension of the writ. 553 U.S. 723 (2008).
 24. Pub. L. No. 109-366, 120 Stat. 2600 (2006), amended by the Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190, 2574–614 (2009) (codified as amended in scattered sections of 10 U.S.C.).
 25. Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190, 2574–614 (2009) (codified as amended in scattered sections of 10 U.S.C.).
 26. 1 M.C. (Oct. 2006–June 2009), http://www.wcl.american.edu/nimj/documents/reporter_june19.pdf?rd=1; 2 M.C. (Jan. 2010), http://www.wcl.american.edu/nimj/documents/2MC_Issue2_January2010.pdf?rd=1. Military commission decisions are unofficially reported in the *Military Commission Reporter*, published by the National Institute of Military Justice.
 27. See 10 U.S.C. § 836(a) (Supp. II 2008); compare FED. R. EVID., with MIL. R. EVID.
 28. *Miranda v. Arizona*, 384 U.S. 436 (1966) (requiring that police officers advise civilians of their constitutional rights before questioning them).
 29. One notable controversy involved the expulsion of four journalists from the military commissions because they had written articles naming a witness who had previously identified himself in the news media. The matter was the subject of negotiations between the Department of Defense and the affected media. See Jeremy W. Peters, *Pentagon Eases Some Rules on Guantánamo Coverage*, N.Y. TIMES, Sept. 11, 2010, at A11, available at <http://www.nytimes.com/2010/09/11/us/11gitmo.html>. However, the resulting September 10, 2010 revised “Media Ground Rules” remain unduly onerous and problematic. See generally DEP’T OF DEF., MEDIA GROUND RULES FOR GUANTANAMO BAY, CUBA (GTMO) (2010), <http://www.defense.gov/news/d20100910groundrules.pdf>.

of the biggest issues concerning military commissions relates to the fundamental question of whether the so-called “high-value detainees”—those directly involved in the 9/11 attacks—should be prosecuted before a commission in Guantánamo or in the federal courts. The Obama administration has wrestled with this, offering in 2009 a set of guidelines for distinguishing the two categories of cases.³⁰ Attorney General Eric H. Holder, Jr. was widely criticized in 2009 when he announced that half of the high-value detainees would be tried in the U.S. District Court for the Southern District of New York.³¹ He seemed to recede from this position when local officials in lower Manhattan objected,³² and the proposal seemed doomed when New York City Mayor Michael Bloomberg joined in the objections, citing what seemed to be a wildly inflated cost estimate for courthouse and lower Manhattan security.³³ It is telling that when Ahmed Khalfan Ghailani was brought from Guantánamo to the Southern District for a civilian federal trial, the New York Police Department sought no financial assistance to bolster security around the Foley Square courthouse.³⁴ In the end, the high value detainees were slated for military commission trials.

What is the civil liberties interest? Since the Civil War, it had been widely understood that military courts could not be used to prosecute civilians when the local courts were open and transacting business.³⁵ The Supreme Court applied this doctrine to curtail—after the fact—the use of military courts in the then Territory of Hawaii in 1946 after the threat of Japanese invasion had passed.³⁶ Trial in federal district court affords a variety of constitutional protections not known to military commissions or courts-martial, such as indictment by grand jury and trial by a randomly drawn twelve-member jury of one’s peers. It also guarantees an independent judge protected by life tenure. In contrast, military commission jurors are handpicked and the presiding judges lack secure tenure required for judicial independence.³⁷

30. Memorandum from Brad Wiegmann & Colonel Mark Martins to the Att’y Gen. & the Sec’y of Def. (July 20, 2009), <http://www.scotusblog.com/wp-content/uploads/2009/07/law-of-war-prosecution-prelim-report-7-20-09.pdf>.

31. Charlie Savage, *Accused 9/11 Mastermind to Face Civilian Trial in N.Y.*, N.Y. TIMES, Nov. 14, 2009, at A1, available at <http://nytimes.com/2010/01/30/nyregion/30trial.html>.

32. Scott Shane & Benjamin Weiser, *U.S. Drops Plan for a 9/11 Trial in New York City*, N.Y. TIMES, Jan. 30, 2010, at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=9C0CE7DF113FF937A25752C1A96F9C8B63>.

33. Al Baker, *City Says 9/11 Trials Will Cost \$200 Million a Year*, N.Y. TIMES CITY ROOM BLOG (Jan. 6, 2010, 3:41 PM), <http://cityroom.blogs.nytimes.com/2010/01/06/city-says-911-trials-will-cost-200-million-per-year/>.

34. Devlin Barrett & Sean Gardiner, *Terrorism Trial Security Relatively Scaled Back*, WALL ST. J. (Sept. 21, 2010), <http://online.wsj.com/article/SB10001424052748703305004575504294061702442.html>.

35. *Ex parte Milligan*, 71 U.S. 2 (1866).

36. *Duncan v. Kahanamoku*, 327 U.S. 304, 318–19 (1946).

37. See Military Commissions Act of 2009, 10 U.S.C. § 948i(b) (Supp. III 2009); MANUAL FOR MILITARY COMM’NS R. 504, at II-30 (2010), http://www.defense.gov/news/2010_Manual_for_Military_Commissions.pdf; DEP’T OF DEF., REGULATION FOR TRIAL BY MILITARY COMM’NS ch. 5-2(a) (2007). In *Weiss v. United States*, the Court held that Fifth Amendment due process does not require fixed terms

III. RIGHTS OF MILITARY PERSONNEL

Another dimension of civil liberties in the post-9/11 era concerns the liberties of military personnel. Here a number of issues have emerged. For example, the wars in Iraq and Afghanistan are being fought in the Digital Age. This has generated a variety of issues. For example, although the military was—or at least seemed to be—content to have journalists embedded with combat units, it was less happy that soldiers were sending e-mails and digital photos from the battlespace.³⁸ There was definitely concern for a time about blogging by G.I.'s.³⁹ In one episode that created a firestorm of controversy, a commander in Iraq issued a general order that made it punishable for women soldiers to become pregnant and required them to be evacuated from the theater of operations.⁴⁰ Soon after the order was made public, it was revoked.⁴¹

Military free speech issues have reared their heads in the post-9/11 era as they have in other times. In 2010, General Stanley A. McChrystal was driven into retirement when a *Rolling Stone* article⁴² reported disparaging comments that members of his staff had made about Vice President Joseph R. Biden, among others.⁴³ Nothing in the circumstances indicated a violation of the UCMJ prohibition on

of office for military judges in courts-martial. 510 U.S. 163, 164 (1994). There is no doubt that the Court would rule the same way in the case of military judges assigned to preside over military commissions. Military commission trial judges have no fixed term under the MCA or the Manual for Military Commissions. See REGULATION FOR TRIAL BY MILITARY COMM'NS, *supra*, at ch. 6. They must be military judges under the UCMJ, but only Army and Coast Guard judges have terms of office by regulation and these are only for three years; judges from other branches have none. Judges of the Court of Military Commission Review (CMCR) have undefined terms of at least three years if they are civilians, but may be reassigned by the Secretary of Defense. *Id.* at ch. 25-11. Military judges sitting on that court have terms only to the extent their branch gives them a regulatory term of office, so once again, only Army and Coast Guard judges serving on the CMCR would have such terms, and then only short ones. Even those may be abbreviated in some circumstances.

38. See *Army Monitors Soldiers' Blogs*, MILITARY.COM (Oct. 30, 2006), <http://www.military.com/NewsContent/0,13319,117978,00.html>; see *Information Security/Website Alert*, U.S. DEP'T OF DEF. (Aug. 6, 2006), <http://www.defense.gov/webmasters/policy/infosec20060806.aspx>.
39. See James Dao, *Pentagon Keeps Wary Watch as Troops and Their Superiors Blog*, N.Y. TIMES, Sept. 9, 2009, at A1, available at <http://www.nytimes.com/2009/09/09/us/09milblogs.html>.
40. *Pregnant G.I.s Could Be Punished*, N.Y. TIMES (Dec. 20, 2009), <http://www.nytimes.com/2009/12/20/us/20general.html>; DEP'T OF THE ARMY, 3D INFANTRY DIV. MULTI-NAT'L DIV.-NORTH, GENERAL ORDER No. 1 (GO #1), ¶ 3(s) (Nov. 4, 2009), <http://bobmccarty.com/wp-content/uploads/2009/12/MND-N-GO1-4NOV09.pdf> (forbidding “[b]ecoming pregnant, or impregnating a Soldier, while assigned to the Task Force Marne [Area of Responsibility], resulting in the redeployment of the pregnant Soldier”).
41. *Commander to Rescind a Provision on Pregnancy*, N.Y. TIMES, Dec. 26, 2009, at A8, available at <http://www.nytimes.com/2009/12/26/us/26military.html>.
42. Michael Hastings, *The Runaway General*, ROLLING STONE (July 22, 2010, 10:00 AM), <http://www.rollingstone.com/politics/news/17390/119236>.
43. Helene Cooper & David E. Sanger, *Obama Says Afghan Policy Won't Change After Dismissal*, N.Y. TIMES, June 24, 2010, at A1, available at <http://www.nytimes.com/2010/06/24/us/politics/24mcchrystal.html>.

speaking contemptuously of the President,⁴⁴ but the case was a useful reminder that military personnel—especially commissioned officers—are not as free as civilians are to speak their minds.⁴⁵

Other issues regarding expressions of personal beliefs have also arisen. Some military personnel have objected to the wars in Iraq and Afghanistan, leading to a trickle of requests for conscientious objection discharges and related litigation under a body of case law largely developed during the Vietnam War.⁴⁶ In a few cases, soldiers who could not qualify under the standards for conscientious objector status nonetheless sought to avoid deployment. A leading example of this is First Lieutenant Ehren K. Watada, who fought the Army to a draw after protracted litigation in the military and civilian federal courts.⁴⁷

The military has striven to accommodate Muslim soldiers and sailors with respect to their worship and ritual foods.⁴⁸ There is no reason to assume that Dr. Nidal Malik Hasan, an Army major who has been charged in connection with the multiple shootings that occurred at Fort Hood, Texas, on November 5, 2009,⁴⁹ is in any way typical of the Muslim military population, but coupled with the kind of surprising, mindless hostility that emerged over plans to build a Muslim cultural center near the site of the World Trade Center, there is reason to fear that Muslim soldiers may find themselves under special, and unconstitutional, scrutiny.

Until the delayed effective date of its repeal,⁵⁰ the military continued to be bound by the “Don’t Ask, Don’t Tell” policy Congress enacted in 1993⁵¹ to prevent President Clinton from lifting the prohibition on military service by homosexuals. To be sure, the policy that homosexuality is incompatible with military service was an issue long before 9/11, but ironically, it may be that military operations in the wake of 9/11

44. 10 U.S.C. § 888 (2006).

45. *E.g.*, *Parker v. Levy*, 417 U.S. 733, 758–59 (1974); *United States v. Howe*, 17 U.S.C.M.A. 165 (1967) (rejecting a First Amendment challenge to the UCMJ Article 88 conviction of a junior officer who carried a sign denouncing President Lyndon Johnson as a “facist” [*sic*]); *see also* *United States v. Brown*, 45 M.J. 389 (C.A.A.F. 1996) (affirming the conviction of a soldier who sought to organize a strike); *United States v. Wilson*, 33 M.J. 797 (A.C.M.R. 1991) (affirming the conviction of a soldier who blew his nose on the American flag).

46. *E.g.*, *Hanna v. Sec’y of the U.S. Army*, No. 06-11434-NG, 2006 U.S. Dist. LEXIS 74326 (D. Mass. Oct. 6, 2006), *aff’d*, 513 F.3d 4 (1st Cir. 2008); *Rogowskyj v. Conway*, No. 06-1930(ESH), 2007 U.S. Dist. LEXIS 17162 (D.D.C. Mar. 13, 2007).

47. *Watada v. Head*, 530 F. Supp. 2d 1136 (W.D. Wash. 2007) (granting in part and denying in part Lt. Ehren K. Watada’s petition for a writ of habeas corpus).

48. The military chaplaincy now includes imams. *See* David Turner, *Muslim Chaplain Covers Lots of Ground to Serve Soldiers*, AM. FORCES PRESS SERV. (Sept. 8, 2008), <http://www.defense.gov/news/newsarticle.aspx?id=51077>. For an example of accommodation, *see* Rob Bellin, *Ramadan begins for Muslim Soldiers, SOUND OFF!* (Sept. 29, 2006), <http://www.ftmeadesoundoff.com/news/3619/ramadan-begins-muslim-soldiers>.

49. Robert D. McFadden, *Army Doctor Held in Ft. Hood Rampage*, N.Y. TIMES, Nov. 6, 2009, at A1, *available at* <http://www.nytimes.com/2009/11/06/us/06forthood.html>.

50. Don’t Ask, Don’t Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515.

51. 10 U.S.C. § 654 (2006).

contributed to the growing sentiment in favor of repeal. For instance, the loss of many Arabic translators as a result of the policy received media attention⁵² and was cited in *Log Cabin Republicans v. United States*.⁵³ Another consideration is the simple fact that a country that demands repeated deployments of its military personnel, calls up reservists and National Guard troops, and exercises the “stop loss” power to keep on active duty those who would otherwise have been discharged, is under special pressure not to reject or separate those who are willing to serve and are otherwise qualified. This may be one of the few positive civil liberties developments in the military world traceable, albeit indirectly, to 9/11.

IV. THE BAR

To look only at the specific kinds of civil liberties issues that have emerged in the military setting since 9/11 is to tell only half the story. The other half has to do with lawyers and institutional relationships. The post-9/11 military chronicle includes both proud chapters and also some for which there is less reason to be proud.

Members of the legal profession have played central roles in many of the salient post-9/11 events in the military arena. The Bush administration had very few lawyers in its inner national security circle: neither the President, the Vice President, the secretary of defense, the secretary of state, nor, for a time, the national security advisor were attorneys, and former attorney general Alberto R. Gonzales was not one of our strongest.⁵⁴ But lawyers played key roles in the events that generated a civil liberties crisis after 9/11, including former vice president Dick Cheney’s aide David S. Addington; John C. Yoo and Jay S. Bybee at the Department of Justice; and William J. Haynes II at the Pentagon.⁵⁵ Considering the wreckage for which these attorneys are responsible, it is interesting that none of them has suffered any real penalty. In fact, it is rather a mixed bag. Mr. Bybee now serves as a U.S. Circuit Judge, while Mr. Haynes’s nomination to the Fourth Circuit failed.⁵⁶ Professor Yoo has returned to the legal academy, and joins this symposium, despite calls to ostracize

52. E.g., Elisabeth Bumiller, *Varied Forces Pushing Obama to Drop on ‘Don’t Ask, Don’t Tell,’* N.Y. TIMES, Feb. 1, 2010, at A1, available at <http://www.nytimes.com/2010/02/01/us/politics/01military.html>.

53. No. CV 04-08425-VAP, 2010 U.S. Dist. LEXIS 93612 (C.D. Cal. Sept. 9, 2010) (holding that the Don’t Ask, Don’t Tell Act Policy violates the First and Fifth Amendments and issuing a permanent injunction barring its enforcement), *injunction stayed*, *Log Cabin Republicans v. United States*, No. 10-56634, 2010 U.S. App. LEXIS 22655 (9th Cir. 2010), *application to vacate stay denied*, *Log Cabin Republicans v. United States*, 131 S. Ct. 589 (2010).

54. See *President Bush’s Cabinet*, THE WHITE HOUSE, <http://georgewbush-whitehouse.archives.gov/government/cabinet.html> (last visited Mar. 14, 2011). The website includes a list of President Bush’s cabinet members and hyperlinks to biographies of each member.

55. See generally JANE MAYER, *THE DARK SIDE: THE INSIDE STORY OF HOW THE WAR ON TERROR TURNED INTO A WAR ON AMERICAN IDEALS* (2008); JACK L. GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* (2007).

56. Neil A. Lewis, *Bush Drops Plans to Resubmit 3 Judicial Nominees*, N.Y. TIMES, Jan. 10, 2007, at A18, available at <http://query.nytimes.com/gst/fullpage.html?res=980DEEDF1230F933A25752C0A9619C8B63>.

him or revoke his academic tenure.⁵⁷ The Justice Department found no intentional wrongdoing in his work on the so-called “Torture Memos,”⁵⁸ and so far as is known, neither he nor any of the others noted here have been subjected to bar discipline. And, calls for Judge Bybee’s impeachment—a highly doubtful proposition, in my view, for pre–confirmation acts that do not go to the integrity of the confirmation process itself—have gone unheeded.⁵⁹

Have our bar institutions failed? This is not the place to pass judgment on any of these individuals, but rather to suggest that it is asking too much to expect the professional disciplinary system to stand as a serious bulwark against intrusions on civil liberties by public officials.

The post-9/11 civil liberties issues have changed the military legal community, but perhaps less than one might have thought. For example, it is a fact that the Judge Advocates General (JAG) pushed back against some of the more appalling positions of the Bush administration.⁶⁰ Their willingness to do so reflected both their moral and legal judgments, but also their concern that the Bush administration’s policies with respect to the treatment of detainees would come back to haunt American military personnel were the tables ever turned.⁶¹ For the sake of the profession, it would have been preferable for them to have been more open about this, including submitting their resignations on this basis.⁶² This is not asking too much, as all of them would have been able to retire with substantial lifetime benefits. And it would have been preferable for their opposition to become known directly from them as opposed to being leaked, as it was, to the New York City Bar Association.⁶³ But

-
57. See generally Marty Lederman, *Yoo, Boalt and Academic Freedom: Dean Edley Speaks Out*, BALKINIZATION (Apr. 11, 2008, 12:43 PM), <http://balkin.blogspot.com/2008/04/post-no-6-yoo-boalt-and-academic-freedom.html>; Spencer Michels, *Yoo’s Tenure Questioned Over Bush Torture Policy*, PBS NEWSHOUR (Oct. 20, 2009), http://www.pbs.org/newshour/bb/education/july-dec09/tenure_10-20.html.
58. See Eric Lichtblau & Scott Shane, *Report Faults 2 Authors of Bush Terror Memos*, N.Y. TIMES, Feb. 20, 2010, at A1, available at <http://query.nytimes.com/gst/fullpage.html?res=9E02E0DA1239F933A15751C0A9669D8B63&pagewanted=2>.
59. See Neil A. Lewis, *Official Defends Signing Interrogation Memos*, N.Y. TIMES, Apr. 29, 2009, at A12, available at <http://www.nytimes.com/2009/04/29/us/politics/29bybee.html>.
60. Mark Mazzetti & Neil A. Lewis, *Military Lawyers Caught in Middle on Tribunals*, N.Y. TIMES, Sept. 16, 2006 at A1, available at <http://www.nytimes.com/2006/09/16/washington/16jags.html>.
61. See, e.g., Josh White, *Military Lawyers Fought Policy on Interrogations*, WASH. POST, July 15, 2005, at A01; Memorandum from Brig. Gen. Kevin M. Sandkuhler, Staff Judge Advocate to the Commandant of the U.S. Marine Corps, to Gen. Counsel of the Air Force ¶ 3a (Feb. 27, 2003), <http://balkin.blogspot.com/jag.memos.pdf>; Memorandum from Maj. Gen. Jack L. Rives, Dep. Judge Advocate Gen. of the Air Force, to Gen. Counsel of the Air Force ¶ 1d (Feb. 6, 2003), <http://balkin.blogspot.com/jag.memos.pdf>; Memorandum from Rear Adm. Michael F. Lohr, Judge Advocate Gen. of the Navy, to Gen. Counsel of the Air Force ¶ 3 (Feb. 6, 2003), <http://balkin.blogspot.com/jag.memos.pdf>.
62. See Eugene R. Fidell, *Where is the Courage to Walk Away?*, NAVY TIMES, Aug. 22, 2005, at 46, available at <http://www.navytimes.com/legacy/new/0-NAVYPAPER-1002042.php>.
63. See Joe Conason, *Lack of Protection*, SALON (May 7, 2004, 13:46 ET), http://www.salon.com/news/opinion/joe_conason/2004/05/07/rights/index.html; see generally ASS’N OF THE BAR OF THE CITY OF N. Y., COMM. ON INT’L HUMAN RIGHTS & COMM. ON MILITARY AFFAIRS AND JUSTICE, HUMAN RIGHTS STANDARDS APPLICABLE TO UNITED STATES’ INTERROGATION OF DETAINEES 2 (2004), <http://www>.

these are quibbles. The JAGs who pushed back or stood their ground deserve recognition and the Nation's thanks.

The post-9/11 era saw a substantial improvement in the institutional power of the Judge Advocates General (TJAGs). After the unpleasantness over the Torture Memos had died down, Congress authorized the TJAGs a third star, making them Lieutenant Generals and Vice Admirals.⁶⁴ This will in theory give them greater clout in Pentagon decisionmaking in the future,⁶⁵ even though there are plenty of other officers in those pay grades. Efforts were also made to iron out relationships between the civilian general counsels of the military departments and the TJAGs.

Will the TJAGs become a bulwark for civil liberties? I am certain those who were personally involved in the struggle with Mr. Haynes over the treatment of detainees believe they already are. I will only add a small *dubitante*: when it comes to reform of the American military justice system, they have not been at the forefront.⁶⁶

What of the less senior judge advocates who have been drawn into the defense of Guantánamo detainees? Many of them displayed moral courage as well as high professionalism in providing zealous representation to detainees. Some were passed over for promotion to higher ranks, whether for this or other reasons.⁶⁷ Equally impressive has been the commitment of uniformed prosecutors, a number of whom showed courage in objecting to the pursuit of pointless cases and insisting on ethical

abcny.org/pdf/HUMANRIGHTS.pdf (noting that information about alleged details of interrogation techniques used at U.S. detention facilities "have come from government officials speaking on the condition that they would not be identified").

64. Nat'l Def. Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 543, 122 Stat. 3, 114 (2008) (amending 10 U.S.C. §§ 3037(a), 5148(b), 8037(a)). The incumbents were neither automatically promoted nor entitled to promotion. *See* Memorandum Opinion from Steven G. Bradbury, Principal Deputy Assistant Att'y Gen., Office of Legal Counsel, to the Acting Gen. Counsel, Dep't of Def., on Promotions of the Judge Advocates Gen. Under Section 543 of the Nat'l Def. Authorization Act for Fiscal Year 2008, at 6 (Apr. 14, 2008). Mr. Haynes attempted to block the three-star legislation. *See generally* Scott Horton, *Jim Haynes's Long Twilight Struggle*, HARPER'S MAG., Feb. 2008, <http://harpers.org/archive/2008/02/hbc-90002336>.
65. "An extra star means the legal officers would be allowed in high-level Pentagon meetings now closed to two-star generals. Supporters say that staff at the Pentagon often set up meetings where only personnel at the three-star level and above are invited. The TJAGs are automatically left out." Roxana Tiron, *Graham Focuses on Glimmer of TJAGs' 3rd Star*, THE HILL, Oct. 3, 2006, at 14, *available at* <http://thehill.com/business-a-lobbying/2371-graham-focuses-on-glimmer-of-tjags-3rd-star>.
66. At the same time they were resisting the so-called enhanced interrogation techniques, the JAGs were also resisting efforts to persuade the military services to post court-martial dockets online. They later did so, but their initial joint refusal was inexplicable. *See* Eugene R. Fidell, Marvin Anderson Lecture: Transparency, 2009, Address Before the University of California, Hastings College of the Law (Mar. 23, 2009), *in* 61 HASTINGS L.J. 457, 466-67 (2009).
67. *See, e.g.*, *Mori v. Dep't of the Navy*, 731 F. Supp. 2d (D.D.C. 2010); *Paper: Detainee Lawyer Must Leave Navy*, WASH. POST (Oct. 8, 2006, 9:20 PM), <http://www.washingtonpost.com/wp-dyn/content/article/2006/10/08/AR2006100800603.html>.

conduct and preserving their own prosecutorial independence.⁶⁸ On the whole, the post-9/11 era will be—and deserves to be—looked back on as a high point in the history of American military law.

The civil liberties picture is also a good deal brighter in the military field as a result of the influence of civilians outside the government. Hundreds of civilian attorneys volunteered to take up the challenge of representing Guantánamo detainees.⁶⁹ They paid a price in terms of the value of their time and considerable out-of-pocket expenses and were supported by their partners and regular clients. Efforts to punish them by suggesting that their fee-paying clients find other counsel failed.⁷⁰ This is a bright chapter in the story. Would it happen again if comparable issues arose in a time of serious retrenchment within the profession? I hope we never have to find out.

V. MISUSE OF THE MILITARY

Issues of improper use of the military have, happily, been few in the post-9/11 years. One matter that has lingered, however, is a claim that “force protection” personnel at Fort Lewis, Washington, spied on a local anti-war group.⁷¹ In addition, if the cross-border flow of undocumented immigrants continues, it is likely that military forces will increasingly be looked to for securing the border, under the rubric of national security in the post-9/11 era.⁷² Surging drug-war violence on the Mexican side of the border may have a similar effect.

VI. EFFECTS ON THE JUDICIARY

Finally, and perhaps most elusive, is the effect of the post-9/11 military related activity on the federal courts. There are three aspects to this effect. First, a generation of Supreme Court Justices has now had to grapple repeatedly with these issues, and there is every reason to believe that they will continue to do so as Justices Sotomayor and Kagan settle in to their new responsibilities. The Court was far too slow to act as the first post-9/11 cases reached it. Specifically, it should have been more aggressive in holding special terms of court. As the years of detention at Guantánamo have mounted, the pace of the judicial process has become ever more disappointing and indefensible, even allowing for judicial restraint.

The second aspect has to do with the global nature of the fallout of post-9/11 military legal activity. Although it has not been widely recognized in the United

68. *E.g.*, *United States v. Hamdan*, 1 M.C. 78 (May 9, 2008), http://www.wcl.american.edu/nimj/documents/reporter_june19.pdf?rd=111 (ruling on unlawful command influence claim).

69. *See* Neil A. Lewis, *Official Attacks Top Law Firms over Detainees*, N.Y. TIMES, Jan. 13, 2007, at A1, [available at http://www.nytimes.com/2007/01/13/washington/13gitmo.html](http://www.nytimes.com/2007/01/13/washington/13gitmo.html).

70. *Id.*

71. *See* Jeremy Pawloski, *Group Says Man Was Spy*, THE OLYMPIAN, July 28, 2009, at 1A, [available at http://www.theolympian.com/2009/07/28/922995/group-says-man-was-spy.html](http://www.theolympian.com/2009/07/28/922995/group-says-man-was-spy.html).

72. *See* Randal C. Archibold, *Obama to Send up to 1,200 Troops to Border*, N.Y. TIMES, May 26, 2010, at A1, [available at http://www.nytimes.com/2010/05/26/us/26border.html?_r=1&th&emc=th](http://www.nytimes.com/2010/05/26/us/26border.html?_r=1&th&emc=th).

States, litigation flowing one way or another from our military activities has kept courts busy in a number of other countries. A notable example is the litigation in Canada seeking to compel the Canadian government to make diplomatic representations on behalf of a military commission defendant, Omar Khadr, because he was a minor at the time of the offenses with which he had been charged.⁷³ Guantánamo-related issues have also come up in British and other foreign courts.⁷⁴ Indeed, it was a Law Lord who first prominently described Guantánamo as a “legal black hole.”⁷⁵ This is not to say that foreign developments will play any specific role in the administration of justice here, but they demonstrate yet again that our legal system does not function in a vacuum. The administration of justice is as likely to attract foreign interest as are policy pronouncements from the executive branch or congressional enactments. Mindful that the significance of foreign legal developments is a matter on which the Justices have widely varying orientations,⁷⁶ some at least will find foreign developments in this area worthy of consideration even if they never actually alter an outcome. We are not alone, and have much to learn from foreign judges as well as other international actors such as the International Committee of the Red Cross, which plays a central role in administration of the Geneva Conventions.⁷⁷

Third, many federal district judges have found themselves drawn into post-9/11 matters related to the military, as the responsibility has fallen to them to hear and decide the numerous habeas corpus cases arising from the Combatant Status Review Tribunals and, more recently, the detentions at Bagram Air Base in Afghanistan.⁷⁸ As trial judges, they have had a unique opportunity to evaluate “up close and personal” the government’s evidence and decisionmaking. Given the government’s uneven track record in these cases,⁷⁹ one is tempted to assume that the effect would be an erosion of the confidence these judges would otherwise be inclined to place in government decisionmaking and litigation claims. This too is impossible to measure, but it seems a not-unlikely outcome, with potentially significant implications for other areas of judicial review of agency action involving the military and claims of national security.

73. *Khadr v. Canada (Prime Minister)*, [2010] 1 S.C.R. 44 (Can.).

74. *See R (Binyam Mohamed) v. Sec’y of State for Foreign & Commw. Affairs*, [2010] EWCA (Civ) 158 (appeal taken from Eng.).

75. Johan Steyn, *Guantanamo Bay: The Legal Black Hole*, 53 INT’L & COMP. L.Q. 1 (2004).

76. *E.g.*, *Lawrence v. Texas*, 539 U.S. 558, 573 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002).

77. *Building respect for the Law*, INT’L COMMITTEE OF THE RED CROSS (Oct. 29, 2010), <http://www.icrc.org/eng/what-we-do/building-respect-ihl/overview-building-respect-ihl.htm>.

78. *See Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

79. The numbers have shifted over time, but as of this writing Guantánamo habeas petitioners have prevailed more often than not. Andy Worthington, *Guantánamo and Habeas Corpus: Wins and Losses, Part 1*, THE FUTURE OF FREEDOM FOUND. (July 19, 2010), <http://www.fff.org/comment/com1007f.asp>.

VII. CONCLUSION

Some bullets do their worst damage not at the point of entry but when they encounter tissue and bone within the body. So it may be with the aftermath of 9/11. Certainly in the part of the legal forest with which I have chiefly been concerned, the 9/11 shell has tumbled in ways that have caused serious internal injuries. But our legal institutions—tempered by the experience of the last decade—are robust enough to survive those injuries, and will continue to evolve and, I hope, gain strength as the legal fallout of 9/11 continues and as new aspects of the post-9/11 era come under examination. It is incumbent on all of us to ensure that outcome. With wisdom, effort, and luck, we may not even need another such symposium in 2021, even if experience suggests otherwise.