

Trials of (Alleged) Terrorists by Military Tribunals: Effective or Not?

After al Qaeda's September 11, 2001 attacks, U.S. President George Bush decided that those responsible – and other terrorists – should be prosecuted at military tribunals rather than in civilian courts. This article examines the wisdom of this decision and concludes that the use of military tribunals to prosecute alleged terrorists has not been effective but rather been a failure.

Keywords: *military tribunals, military commission process, U-boat saboteur trial 1942, Guantanamo tribunals, 9/11 attacks, Uniform Code of Military Justice*

1. Introduction

After the *al Qaeda* attacks on the United States on September 11, 2001 (hereinafter: 9/11 attacks), the American government decided that those *al Qaeda* members who had planned, financed and otherwise were responsible for the attacks, should be tried at military tribunals. The legal theory was that as *al Qaeda's* attacks were acts of war, those responsible should be prosecuted at war-related tribunals.

In November 2001, President *George W. Bush* issued a military order creating these tribunals calling them 'military commissions'. Under the order, the U.S. Defense Department was tasked with prosecuting any *al Qaeda* member who had participated in the 9/11 attacks and any terrorists (*al Qaeda* or not) who were planning future attacks against the United States or its allies. Any person prosecuted at commissions was to be charged with war-related crime. President *Bush* declared in his military order that the trials were to be 'full and fair' and the accused had the right to be represented by defense counsel.¹

This article examines the use of military tribunals since their creation in 2001. Were they effective? Or not? Since these are war-related courts, this article uses the three 'levels of war' –

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1 Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 U.S. Federal Register, 57,833 (November 16, 2001).

relations disaster. At the operational level, they failed because there was too much emphasis on getting desired results rather than creating a process that would guarantee full and fair trials for each defendant. At the tactical level, the prosecutions were a failure because evidence gathered for use by the American government was tainted by the use of coercive interrogation techniques.²

2. The levels of war as the metric for evaluation

Modern military theory divides war into strategic, operational and tactical levels.³ The strategic level defines the desired outcome or end-state of an armed conflict – what ‘victory’ looks like.⁴ Its focus is on the ‘why’ and ‘with what’ of a conflict. The operational level focuses on using military force in a geographic area (or ‘theater of war’) to gain an advantage over the enemy. The focus is on planning and conducting large-scale military operations. Its focus is on the ‘how’ to achieve strategic goals. The tactical level involves planning and carrying out smaller battles and engagements that are won through direct contact with the enemy. Its focus is on the ‘what’ and ‘where’ of the fight. By way of example, the strategic goal of the Allies in World War II was the unconditional defeat of Germany, Italy and Japan. When the Allies decided on the liberation of France, Belgium and the Netherlands in 1944 – by invading Normandy – they employed military forces at the operational level of war. The invasion of northern France on June 6, 1944 brought the Allies into direct contact with the enemy at the tactical level of war.

These three levels are just as applicable to an examination of the military tribunals created after the 9/11 attacks. At the strategic level, the U.S. president defined the end-state for the military commissions. His November 13, 2001 Military Order had at least three goals: convicting all those terrorists who were prosecuted; appropriately punishing these wrongdoers; and demonstrating to the public that the trial proceedings were full and fair.

At the operational level, the White House and the U.S. Defense Department decided upon the processes to be used at trial – including rules of evidence and procedure. Also decided were the extent to which a defendant would be represented by a lawyer at his trial. The metric at this

2 The principal reason that the military commissions established by President *Bush* have been a failure is that a ‘full and fair’ trial was impossible with evidence derived from the use of coercive interrogation techniques. Yet, despite their illegality under both international law and US domestic law, and whether using such techniques really results in obtaining reliable evidence, some high-ranking U.S. officials continue to defend their use. Long after he left U.S. government service, Vice President *Richard Cheney* continued to insist that waterboarding was both legal and moral. Central Intelligence Agency counter-terrorism expert *Jose Rodriguez* likewise defends to this day the use of ‘hard measures’ (torture) in the interrogation of detainees at Guantanamo (see: DAVIDSON SORKIN, I Really Resent You Using the Word Torture). Some scholars also defend the use of torture. *Fritz Allhof*, an associate professor of philosophy at Western Michigan University, insists that it can be morally permissible to use torture in an interrogation if it saves innocent lives (see: ALLHOF, Terrorism, Ticking Time-Bombs and Torture). They are wrong. For a lengthy rebuttal of *Allhof*’s claim that torturing human beings can achieve some good, and why torture is immoral and illegal under all circumstances, see: BORCH, Review: Terrorism, Ticking Time-Bombs and Torture 255–263. For a discussion of why alleged terrorists have legal rights and must be afforded appropriate treatment, see also: BORCH, International Law and the War on Terror 441–454.

3 NEWELL, The Levels of War 26–29.

4 Modern wars are won or lost at this level rather than at the operational or tactical levels of war. The U.S. experience in Vietnam is a good illustration of how the Americans almost always won on the battlefield but lost the war in southeast Asia because the U.S. did not have a coherent strategy for achieving victory. The North Vietnamese and Viet Cong simply refused to capitulate and the Americans ultimately gave up and left.

level was whether the agreed upon procedures furthered success at the strategic level, chiefly the stated strategic goal that the trials be full and fair.

At the tactical level, the Chief Prosecutor (and assistant prosecutors) selected cases for prosecution and proceeded to trial. The measurement for success at this level was whether the evidence used at trial was reliable and if it resulted in convictions of the defendants (and an appropriate punishment).

3. Military commissions

Military commissions are war-time military tribunals. They are used for the prosecution of enemies accused of violating the laws and customs of war. A state of armed conflict – a war – is required for military commission jurisdiction to exist, but the tribunals may be used beyond the conclusion of any conflict. In keeping with their practical nature, military commissions historically have used fewer stringent rules of procedure and evidence than do domestic civilian courts or courts-martial. In general, military commissions are composed of military officers, but there is no fixed number; a single member military commission would be lawful under U.S. law.⁵

Almost all nation-states have some type of military commission process. During and after World War II, all the Allies used military commissions of some type to prosecute war criminals. In U.S. legal history, the most well-known World War II trial is the military commission that tried the German U-boat saboteurs in Washington, D.C. On June 12, 1942, eight Nazis travelling in two separate submarines landed on U.S. soil – four on a beach in New York and four on a beach in Florida. Their mission: sabotage U.S. war-related industries and infrastructure, including aluminum plants, hydroelectric stations and railroad lines. Unfortunately for these Nazis, they were all captured within a week of their arrival.

On July 2, President *Franklin Roosevelt*, acting in his capacity as the Commander-in-Chief of the U.S. Army and Navy, created a military commission to prosecute the eight enemy combatants for their war-related crimes. The trial was held in secret from July 8 to August 1 before seven Army generals. All eight saboteurs were found guilty; all were sentenced to death. Six of the eight were executed by electrocution on August 8; the two remaining spies had their sentences commuted to terms of imprisonment.⁶

The speed of the U-boat saboteur trial in the early years of World War II demonstrated that a military commission could be appropriate as “*a tribunal of necessity*” and, as such a court of necessity, it might consider “*any evidence having probative value to a reasonable person.*”⁷ This relaxed evidentiary standard remains in place to this day – and is the evidentiary standard used at the Guantanamo Bay military commissions.

During and after World War II, the United States held about 900 war crimes trials in all, involving more than 3,000 defendants. Half of these cases were prosecuted in occupied Germany.⁸ Similarly, the Belgians, British, Chinese, Dutch, French, Poles and Russians also prosecuted thousands of war criminals at military tribunals between 1945 and 1950.⁹

5 SOLIS, *The Law of Armed Conflict* 640–641.

6 BORCH, *The Historical Role of Military Lawyers in National Security Trials* 728–731.

7 Ex parte Quirin, 317 United States [Supreme Court] 1 (1942).

8 TUTOROW, *War Crimes, War Criminals and War Crimes Trials* 5.

9 For a comprehensive look at war crimes prosecuted by the Dutch in the Netherlands East Indies, see: BORCH, *Military Trials of War Criminals in the Netherlands East Indies, 1946–1949*.

In the United States today, one legal basis for the creation (and use) of a military commission is the Uniform Code of Military Justice (Ucmj). Enacted by the U.S. Congress in 1950,¹⁰ it permits the use of such military tribunals for war-related offenses. Article 36, Ucmj states that “*courts-martial, military commissions and other military tribunals*” may be used when appropriate.

Given the legal precedent established by the U-boat saboteur case in 1942, the authority of the American president as Commander-in-Chief of the U.S. armed forces, was an alternate legal basis for establishing a military commission. As *Osama bin Laden*, the *al Qaeda* leader, had declared war on the United States in 1996, and as *al Qaeda* was waging its armed conflict against America by intentionally violating the Law of Armed Conflict with its 9/11 attacks, President *George Bush* exercised his authority as Commander-in-Chief – just as *Roosevelt* had done in 1942 – to create a military commission to try *al Qaeda* members and other similar bad actors. *Bush’s* Military Order of November 13, 2001, directed the prosecution by military commission of any captured enemy combatant who had committed a war crime or war-related offense against the United States or its allies. U.S. citizens were excluded from the jurisdiction of the military commission; they would be prosecuted in U.S. courts.¹¹

4. Strategic level failure: public relations

Success at trial – convictions and severe punishments – were the desired end-state for the *Bush* military tribunals. But success at the strategic level had an important public relations component: acceptance by the American people – and men and women living in other countries – that prosecuting terrorists at military tribunals was fair and that justice was done.

If there was no victory in the ‘court of public opinion’ – if American public opinion (and world opinion) did not accept that it was proper to use military commissions – then this negative opinion would undercut the value of having used military tribunals. Adverse public opinion would be tantamount to strategic failure.¹²

From the outset, the decision to hold the military tribunals outside the United States – and away from the jurisdiction of U.S. civilian courts – made it difficult to convince outside observers that the tribunals would be fair. When Secretary of Defense *Donald Rumsfeld* was quoted as saying that he wanted “*the legal equivalent of outer space*” for the trials, it was difficult to overcome the perception that the trials were going to be nothing more than legal bad faith on the part of the U.S. government.¹³

Unfortunately, as journalist *Jane Mayer* demonstrated in a widely read article published in 2005, detainees at Guantanamo were being abused during the course of their interrogations.¹⁴ The news media reports that followed were unremittingly negative. An editorial in the *Washington Post*

10 Uniform Code of Military Justice, Public Law No. 81-506, 64 U.S. Statutes 107 (1950).

11 President *Bush’s* legal authority derives from the powers of the president created by Article II, section 2 of the U.S. Constitution. See also: Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 U.S. Federal Register, 57,833 (November 16, 2001).

12 For a discussion of how the Guantanamo Bay military commissions are strategic-level public relations theatre see: BORCH, Guantanamo as Theatre: Military Commissions as a Performance in the Court of Public Opinion 345–370.

13 SOLIS, The Law of Armed Conflict 651.

14 MAYER, The Experiment 60.

newspaper in January 2006 criticized Major General *Geoffrey D. Miller*, who was the senior Army officer at Guantanamo from 2002 to 2004, for permitting improper questioning techniques. These techniques included the use of snarling dogs, painful shackling, sleep deprivation and nudity.¹⁵

Ultimately, the U.S. Supreme Court, the highest judicial court in the country, ruled in 2006 that the military commissions created by President *Bush* were unconstitutional – illegal because they failed to comply with the Geneva Conventions of 1949.¹⁶ Although the U.S. Congress subsequently created a new military commission process – and the Guantanamo tribunals continue to this day – the U.S. government has never been able to overcome the public perception that the legal basis for the military tribunals is weak, and that the use of harsh questioning techniques was unfair.

5. Operational level failure: procedures focused on results rather than fairness

An evaluation of the operational level of the military commission measures the fairness of the procedures used at the military tribunal. What law should be applied? How should it be applied? What rules of evidence should be followed? What rights does the accused have to defend himself?

President *Bush's* Military Order No. 1 provided that the trials were to be ‘full and fair’; but it did not define the words. Presumably this meant that the defendant should enjoy robust due process in the proceedings. At a minimum, due process means (1) notice of the charges against an accused; (2) an opportunity to present a defense; and (3) an impartial tribunal.¹⁷

The Military Order of November 13, 2001 also provided that all evidence was admissible if “*probative to a reasonable person.*” As a practical matter, this meant that any relevant evidence was admissible; the military tribunal was permitted to consider any documents or statements connected to the charges that it thought should be considered. Perhaps most important, in regards to admissions made by the accused, any statements obtained through the use of coercive interrogation techniques were admissible if the tribunal considered them relevant to the case – regardless of the techniques used.

Probably the most glaring shortcoming in the procedural framework was that the restrictions placed on criminal defense attorneys prevented effective representation of the accused – or at least the perception was that the restrictions harmed the defense function. This is because, while the accused was permitted to have a civilian defense counsel, that lawyer had to be approved by the government and, if that civilian attorney could not qualify for a security clearance, he would not be able to see the evidence against his client.

15 A General’s Dishonor, Washington Post, Jan. 15, 2006, B6.

16 Hamdan versus Rumsfeld, 548 United States 557, June 29, 2006. For an analysis of Geneva Convention common article 3, which the Supreme Court concluded was not satisfied by the military commission process created by President *Bush*, see: BORCH, Geneva Conventions 26–33.

17 For an examination of the legal meaning of ‘full and fair,’ see: BORCH, Why Military Commissions are the Proper Forum and Why Terrorists Will Have ‘Full and Fair’ Trials 1.

6. Tactical level failure: evidence collected for use by prosecution tainted by use of coercive interrogation techniques

Given the absence of documentary and similar forensic evidence, the prosecutors at Guantanamo were almost entirely dependent on oral and written statements from individual defendants to build a criminal case. Unfortunately, many of these statements were the result of using coercive interrogation techniques. These techniques not only violated international and domestic law but, because they involved the application of physical and mental duress, were likely to be unreliable.

When being questioned, almost every detainee either declined to answer questions about his alleged terrorist activities, or else insisted that he knew nothing. Unwilling to accept a refusal to answer or believing that the detained person in fact had knowledge about terrorist activities, the interrogators began using coercive interrogation techniques.

The U.S. Central Intelligence Agency (CIA) employed waterboarding as an interrogation technique at various locations against three *al Qaeda* members. *Khalid Sheikh Mohammed* was waterboarded 183 times. *Abu Zubaydah* was waterboarded 83 times. *Abd al-Rahim al-Nashiri* was waterboarded at least three times. While American military personnel were not involved in this CIA waterboarding, and no waterboarding was conducted at any U.S. military facility, the use of this torture seriously damaged the prosecution's case against these men. Perhaps more importantly, the use of waterboarding on *Khalid Sheikh Mohammed*, *Abu Zubaydah* and *Rahim al-Nashiri* had a spill-over effect on all other prosecution efforts because it gave credence to the defense claim that 'my client was tortured into giving incriminating statements.'

Proof of coercive interrogation techniques being used at Guantanamo certainly provided support for this claim that statements were unreliable. *Khalid Sheikh Mohammed*, for example, admitted under interrogation that he was the mastermind behind the 9/11 attacks. But given that these statements resulted from waterboarding and other harsh interrogation techniques, can we trust them as reliable evidence? How could a military commission conclude that *Khalid Sheikh Mohammed* really is the mastermind behind the attacks given that coerced statements are the proof of his involvement?¹⁸

In any event, starting in late 2002, American interrogators used the following questioning techniques:¹⁹ sound and light deprivation, 20-hour questioning sessions, forced nudity, stress positions, sensory overloading, walling, convincing 'the detainee that death or severely painful consequences are imminent', use of a wet towel to induce the misperception of suffocation.

Sound and light deprivation involved using headphones and masks to keep the detainee from seeing or hearing anything. Over time, such sensory deprivation can result in acute anxiety and hallucinations.

Twenty-hour questioning sessions necessarily includes sleep deprivation. The effects of a lack of sleep include taking longer to respond to stimuli, decreases in short-term memory, speech impairments, and inflexible thinking. Physical effects may include hypertension and other cardiovascular disease.

18 For an in-depth look at *Khalid Sheikh Mohammed*, see: MEYER – MCDERMOTT, *The Hunt for KSM*.

19 Coercive Interrogation Techniques: Do They Work, Are They Reliable, and What Did the FBI Know About It, Senate Judiciary Report 110–941, www.congress.gov/event/110th-congress/senate-event/lc9312/text.

Forced nudity induces shame and creates an environment where the person fears sexual or physical assault, or both. The shame, grief and fear may result in post-traumatic stress disorder and major depression. Depending on the culture in which the person was raised, if the forced nudity is in the presence of the opposite gender, this can induce even greater shame and sexual humiliation. This was particularly true in the interrogation of Afghan males who were raised in a sexually conservative culture.

Stress positions include force standing, awkward sitting positions or suspension of the body for prolonged periods of time. Stress positions can lead to long term or even permanent damage, including nerve, joint and circulatory damage.

Bombarding the senses with powerful lights (strobe, flashing lights) and loud noises (loud music, screams and constant noise) will inflict extreme physical and mental pain. At minimum, this sensory overload causes physiological distress. Loud music or noises can cause hearing loss or chronic ringing in the ears. One of the stress-inducing noise used at Guantanamo was a recording of babies crying inconsolably. Another recording was of cats meowing.²⁰

Walling was used in the questioning of some detainees. The interrogator pulls the person being questioned forward, and then quickly throws the person into a wall. The idea is for the individual's shoulder blades to hit the wall, but often the person's head would strike the wall.

Threats of death to individual or his family. The interrogator informed the person being questioned that he will be killed if he does not cooperate. Alternatively, he is told that one or more family members will be killed.

Waterboarding is a form of slow, controlled drowning. The person is strapped down and water is poured over the face to create the sensation of asphyxiation or drowning. Vice President Dick Cheney referred to it as just a 'dunk in the water' – but nothing could be less accurate.

Other examples of interrogation techniques included a case in which a female interrogator, attempting to unsettle a Muslim detainee, smeared fake menstrual blood on him.²¹ Another interrogation technique involved a Muslim detainee *"Sitting on the floor . . . with an Israeli flag draped around him, loud music being played and a strobe light flashing."*²²

7. Conclusion

Ultimately, the military trials of alleged terrorists have not been effective – because they have been strategic, operational, and tactical failures. At the strategic level, the tribunals have failed to convince the public – both in the United States and in other countries – that the proceedings are fair and just. At the operational level, the commissions have failed to adopt procedures that guarantee that the accused terrorists will have a fair trial, chiefly because of restrictions placed on civilian defense counsel. Finally, the use of coercive interrogation techniques has damaged the entire process. Statements derived from the use of techniques tantamount to torture are by their very nature involuntary and consequently unreliable. The fact that some of these questioning techniques also are both immoral and illegal has damaged the entire tribunal process.

Given that the military tribunals have been ineffective, why does the U.S. government continue the trials? There are at least three reasons. First, some of those held at Guantanamo have committed heinous offenses and there must be some accountability for them. Second, resistance

20 MAYER, The Experiment 64.

21 MAYER, The Experiment 60.

22 MAYER, The Experiment 65.

to prosecuting alleged terrorist in American civilian courts means that military tribunals are the only meaningful alternative. Last of all – and perhaps most importantly – it is easier to let the military commission process continue rather than bring it to an end.

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