



Articles

Military Commissions & Administrative Law

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THE MILITARY COMMISSIONS authorized by President Bush's November 13, 2001 Military Order¹ have sparked intense debate from a variety of perspectives, including constitutional, criminal, military and international law, and even professional responsibility. But an important dimension – administrative

law – has been largely overlooked.² The omission is critical because public confidence in governmental processes of all kinds – and the war on terrorism is no exception – is in large measure a function of maximizing public participation and transparency and minimizing departures from normal governmental

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- ¹ The November 13, 2001 directive was referred to by many as an Executive Order. E.g., Dahlia Lithwick, *Is President Bush's Executive Order Creating Military Tribunals Legal?*, Nov. 20, 2001, corrected, Nov. 26, 2001, available at <http://www.slate.msn.com/id/2058854>. In fact, it was a Military Order, following the style employed for the document establishing a military commission for the trial of German saboteurs in 1942. See 3 C.F.R. 1308 (1938-43 Comp.) (7 FED. REG. 5103 (July 7, 1942)); LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 52-53 (2003); see generally *Ex parte Quirin*, 317 U.S. 1 (1942). A January 11, 1945 military commissions order was also expressly labeled a "Military Order." 10 FED. REG. 549 (Jan. 16, 1945). President Bush's order was published, as was FDR's, in the *Federal Register*, 66 FED. REG. 57,833 (Nov. 16, 2001), and can be found at 3 C.F.R. 918 (2001 Comp.). "[I]t is the substance of a presidential determination or directive that is controlling and not whether the document is styled in a particular manner." Off. of Legal Counsel, *Legal Effectiveness of a Presidential Directive, as Compared to an Executive Order* (Jan. 29, 2000). The terminology used can, however, have a symbolic effect.
- ² Some preliminary observations on the rulemaking process appear in ANNOTATED GUIDE – PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM xii-xiii, 89-90 (2002) ("ANNOTATED GUIDE"), noted in *Commission Annotation*, 6 GREEN BAG 2d 122-23 (2003).

practice, each of which has suffered in the preparations for military commission trials. This essay will describe how military commission rulemaking has been conducted thus far. The process has been seriously flawed. Because other provisions of the Administrative Procedure Act provide the protections needed for current conditions, Congress should repeal the statutory exemptions for military commissions and military functions and subject military commissions to normal rule-making processes. Absent legislative action, the Department of Defense can nonetheless contribute to public confidence by taking comparable action voluntarily, in keeping with its own settled practice in the closely-related context of military justice.

THE MILITARY COMMISSION EXEMPTIONS

Congress has been generous in exempting

military commissions from the broad sweep of administrative and open-government legislation. This has taken two forms: by defining the term “agency” and by excluding agency action that represents a military “function.”

Perhaps most fundamentally, Congress included in the basic definitions sections of the Administrative Procedure Act an express exclusion of “courts martial and military commissions.”³ Because other statutes repeatedly piggyback on the § 551 definition of “agency,”⁴ the APA definition has the effect of immunizing military commissions from the normal constraints faced by federal agencies. There is a textual issue as to whether this exclusion simply applies to the commissions themselves, or whether it applies to things the Department of Defense does in respect of commissions.⁵ The authoritative Attorney General’s Manual sheds no light on the subject,⁶ but whatever

³ 5 U.S.C. §§ 551(i)(F), 701(b)(1)(F) (2000).

⁴ E.g., Freedom of Information Act, 5 U.S.C. § 552(f)(1) (2000); Privacy Act, 5 U.S.C. 552a(a)(1) (2000) (incorrectly cross-referencing § 552(e), vice § 552(f)(1)); Federal Advisory Committee Act, 5 U.S.C. App. 2, § 3(3) (2000); Agency Practice Act, 5 U.S.C. § 500(a)(1) (2000). The Agency Practice Act is not without interest in the context of military commissions since it permits “[a]n individual who is a member in good standing of the bar of the highest court of a State [to] represent a person before an agency on filing with the agency a written declaration that he is currently qualified as provided by this subsection and is authorized to represent the particular person in whose behalf he acts.” 5 U.S.C. § 500(6). If this provision were applicable to military commissions, would the requirement in Procedures for Trials by Military Commissions § 4(C)(3)(b)(i) and Military Commission Instruction No. 5 that civilian defense counsel be United States citizens survive?

⁵ A recent decision applying the “courts martial” clause of § 701(b)(1)(F) held that “Congress’ establishment, pursuant to Article I, Section 8 of the Constitution, of a separate judicial system for courts martial review is ... convincing evidence that Congress could not have intended Judge Advocate General review of courts martial to fall within APA review of agency decisions.” *McKinney v. White*, 291 F.3d 851, 853 (D.C. Cir. 2002); see also *id.* at 855. The same approach would be harder to apply to Department of Defense review of a military commission as Congress has not established a separate judicial system for review of military commissions. On the other hand, an accused who claimed prisoner of war status might claim a right of access to the statutory appellate apparatus applicable to trials of United States military personnel by court-martial, which can include review by the civilian United States Court of Appeals for the Armed Forces and Supreme Court of the United States. See Third Geneva Convention Relative to the Treatment of Prisoners of War art. 106. Of note, the Court of Appeals for the Armed Forces enjoys All Writs Act authority, 28 U.S.C. § 1651, including the power to issue writs of habeas corpus in aid of its jurisdiction. See U.S.C.A.A.F.R. 4(b)(1), 18(b). The UCMJ applies “in all places.” 10 U.S.C. § 805 (2000).

⁶ Dep’t of Justice, Attorney General’s Manual on the Administrative Procedure Act 10-11 (1947).

the correct answer, the APA rulemaking and adjudication provisions' even broader free pass "to the extent that there is involved (1) a military ... function of the United States"⁷ has probably made the reach of the "courts martial and military commissions clause" a moot point.⁸ In addition, it is worth recalling that the definitions section also exempts "military authority exercised in the field in time of war or in occupied territory,"⁹ which is broad enough to subsume within it many matters having to do with the operation of military commissions.

THE ADMINISTRATIVE PROCESS & THE MILITARY COMMISSIONS

The administrative process that has led the Administration to the current legal state of affairs for military commissions has been materially different from that to which administrative lawyers and even military lawyers have grown accustomed. A few illustrations will prove the point.

The process begins with President Bush's original Military Order of November 13, 2001. The idea to revive the use of military commissions was floated by two veterans of his father's Administration, William Barr and George Terwilliger, whose suggestions ultimately led to a White House Counsel's Office drafting effort.¹⁰ There was no public participation in that process, as far as is known. The Military Order was issued in final form, and published in the *Federal Register*.

The next step in the process was somewhat more open, but still nothing remotely like an APA rulemaking. On November 20, 2001, Secretary of Defense Donald H. Rumsfeld privately sought the views of nine private citizens – "the wise men," one of whom is a woman – with broad bipartisan experience in government.¹¹ Precisely how they developed their suggestions has not been disclosed, nor have any written communications to or from them been made public. Nonetheless, their efforts seem to have had a significant moderating effect on the document Secretary

7 5 U.S.C. §§ 553(a)(1), 554(a)4 (2000). The Ninth Circuit has said that "Congress intended the military function exception to have a narrow scope," *Independent Guard Ass'n of Nev., Local No. 1 v. O'Leary*, 57 F.3d 766, 769 (9th Cir. 1995), but did so in a case involving civilian guards at a Department of Energy facility that performed nuclear weapons testing for the military.

8 Thus, in publishing the Military Commission Instructions in the *Federal Register*, the Department of Defense made no reference to the "courts martial and military commissions" clause, but rather recited that "[i]t has been certified that 32 CFR part 9 is a military function of the United States and exempt from administrative procedures for rulemaking." 68 FED. REG. 39,374, col. 1 (July 1, 2003). The same formula was used for all of the Instructions. President Bush's Military Order also invoked the "military function" terminology. Military Order §§ 4(b), 6. See Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Powers*, 4 U. PA. J. CONST. L. 648, 709 & nn.328-330 (2002) ("an appropriate premise, considering how the individuals covered by The Order were detained and other circumstances surrounding the issuance of this directive").

9 5 U.S.C. § 551(1)(G) (2000).

10 See STEVEN BRILL, *AFTER: HOW AMERICA CONFRONTED THE SEPTEMBER 12 ERA* 125-26 (2003).

11 *Id.* at 266, 393; Ruth Wedgwood, *Justice, and Security Too*, LOS ANGELES TIMES, July 10, 2003. These were former FCC chairman Newton Minow, former White House Counsel Lloyd N. Cutler, former Attorney General Griffin B. Bell, *id.* at 240-41, former Secretary of Transportation William T. Coleman, former Defense Department General Counsels Martin R. Hoffman and Terrence O'Donnell, law professors Bernard Meltzer and Ruth Wedgwood, and former federal judge and FBI and CIA director William Webster. Dep't of Defense, News Briefing on Military Commissions (Mar. 21, 2002) (remarks of Sec'y of Defense Donald H. Rumsfeld), available at www.defenselink.mil/news/Mar2002/to3212002_to321sd.html; ANNOTATED GUIDE xi.

Rumsfeld later issued.¹² Perhaps if they had been formally constituted as an advisory committee they would have made even further headway, despite having to comply with the transparency and record-keeping requirements of the Federal Advisory Committee Act.¹³ Doing so would have increased public confidence in the end-product.

In any event, on March 21, 2002, Secretary Rumsfeld issued Military Commission Order No. 1, promulgating “Procedures for Trials by Military Commissions.” Despite suggestions that rules implementing President Bush’s Military Order be made the subject of public notice and a brief opportunity to comment,¹⁴ these were issued in final form. They were not published in the *Federal Register*, however, until July 1, 2003, when they accompanied the eight Military Commission Instructions that thus far implement them.¹⁵

COSTS & BENEFITS

There are costs associated with compliance with the rulemaking requirements of the APA and other requirements of the open government laws. Involving the public in the administrative process can retard the prompt development of government policy and in theory may expose to public view matters that

involve national security. On the other hand, the benefits of transparency are substantial: allowing notice-and-comment rulemaking not only contributes to public confidence in government decision making but can and often does lead to improved decisions. Indeed, as explained below, these benefits are demonstrated by the limited experience to date in connection with one of the eight Military Commission Instructions.

Experience with establishing the ground rules for the current military commissions also suggests that the competing interests are easily reconciled, and that normal federal administrative law standards could be applied without harm to any governmental interest. Thus, in 2002, when it appeared that rulemaking to implement President Bush’s Military Order might be imminent, the Department of Defense resisted affording a notice-and-comment opportunity for implementing rules, despite requests from the American Bar Association and the National Institute of Military Justice. The Department advised ABA President Robert E. Hirshon that it had “decided against the idea of [employing notice-and-comment rulemaking procedures] based on a variety of factors including the need to move decisively and expeditiously in the ongoing war against terrorism.”¹⁶

12 For example, the provisions regarding the presumption of innocence, proof beyond a reasonable doubt, unanimous vote for a death sentence, discovery, compulsory process, right to counsel, and “allowing civilians to serve as the judges” (presumably referring to the Review Panel, see ANNOTATED GUIDE 73), were reportedly suggested by these advisors. BRILL, *supra* note 10, at 393.

13 5 U.S.C. App. 2, §§ 10-11 (2000); see Dep’t of Defense Directive No. 5105.4 (Feb. 10, 2003) (Federal Advisory Committee Act Management Program).

14 Letter from Eugene R. Fidell, Pres., NIMJ, to William J. Haynes II, General Counsel, Dep’t of Defense, Feb. 19, 2002 (analogizing to Dep’t of Defense rule for proposed changes to *Manual for Courts-Martial*, 32 C.F.R. § 152.4(c)(1); “abbreviated two-week comment period would appropriately reconcile the competing interests in public participation and prompt action”); Letter from Robert E. Hirshon, Pres., ABA, to William J. Haynes II, General Counsel, Dep’t of Defense, Mar. 15, 2002.

15 68 FED. REG. 39,374 (July 1, 2003) (to be codified at 32 C.F.R. Pt. 9).

16 Letter from William J. Haynes II, General Counsel, Dep’t of Defense, to Robert E. Hirshon, Pres., ABA, Mar. 19, 2002. NIMJ had been advised only a few days earlier that the Department had made no decision on NIMJ’s similar suggestion. Letter from William J. Haynes II, General Counsel, Dep’t of Defense, to Eugene R. Fidell, Pres., NIMJ, Mar. 7, 2002.

Events proved that that rationale was wide of the mark as the months ticked by without further action.¹⁷ As time passed, the newspapers began to suggest that additional rules were in the offing, leading to the renewal of suggestions for notice-and-comment rule-making.¹⁸ Eventually, on February 28, 2003, the Department changed its position, at least in part, and circulated for comment (without publication in the *Federal Register*) a draft of what was to become Military Commission Instruction No. 2, on crimes and elements. The Department's press release supplied a telephone number to which comments could be faxed, and indicated that it intended to finalize and publish the final instruction early in March 2003,¹⁹ although it gave no fixed deadline for the submission of comments. The absence of a firm deadline was of course a far cry from the usual process for notice-and-comment rulemaking.²⁰

The draft prompted comments from a variety of organizations and individuals. Some of these commenters are known; others

are not. Several of the organizations and individuals that commented posted their submissions on internet websites or otherwise made them available to the public.²¹ Others, however, have not done so. Moreover, the Department of Defense has ignored requests for copies of all comments that were filed on the draft crimes and elements instruction.²²

It was a different story for the other seven instructions. Although they were the subject of private consultations with an unknown number of persons outside the government,²³ they were never made available to the general public in draft. Instead, they were simply issued in final form (along with the final version of the crimes and elements instruction, which became Military Commission Instruction No. 2). Although signed by Department of Defense General Counsel William J. Haynes II on April 30, 2003, the text was not made public until two days later, when they were uploaded to the Department of Defense's website and a background press

17 The delay in bringing Guantánamo Bay detainees to trial was noted with frustration by Judge Howard Matz, even as he dismissed a habeas corpus petition. *Gherebi v. Bush*, 2003 WL 21180433, at *7 (C.D. Cal. May 13, 2003), *appeal docketed*, No. 03-55785 (9th Cir. May 15, 2003) (“[p]utting aside whether these captives have a right to be heard in a federal civilian court – indeed, especially because it appears they have no such right – this lengthy delay is not consistent with some of the most basic values our legal system has long embodied”), *quoted in* NIMJ, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK V (2003) (“SOURCEBOOK”). There certainly is a tension between the initially-claimed need for urgent action and the length of time it took to issue the Military Commission Instructions. The delay had the effect of permitting interrogations to proceed without the immediate prospect of legal proceedings that might chill or end detainee cooperation.

18 *E.g.*, Letter from William E. Lawler III, Pres., Bar Ass'n of Dist. of Columbia, to Donald H. Rumsfeld, Sec'y of Defense, Dec. 30, 2002 (citing WALL ST. J.); Letter from Eugene R. Fidell, Pres., NIMJ, to William J. Haynes II, General Counsel, Dep't of Defense, Nov. 26, 2002.

19 Dep't of Defense News Release No. 092-03, DOD Releases Draft Military Commission Instruction (Feb. 28, 2003), available at http://www.defenselink.mil/releases/Feb2003/bo2282003_bt092-03.html.

20 See 1 C.F.R. § 18.17 (2002).

21 SOURCEBOOK 29-71.

22 *Id.* at vi, 44.

23 On professional ethics aspects, for example, the Department of Defense consulted Prof. Geoffrey C. Hazard, Jr. Vanessa Blum, *Tribunals Put Defense Bar in a Bind*, LEGAL TIMES, July 14, 2003, at 1, 14, cols. 2-3; see also Neil A. Lewis, *Rules for Terror Tribunals May Deter Some Defense Lawyers*, N.Y. TIMES, July 13, 2003, at 1, col. 1, 14, col. 4.

briefing was conducted at the Pentagon.²⁴ All eight were eventually published in the *Federal Register*,²⁵ only two days before the Administration announced that President Bush had designated six Guantánamo Bay detainees for possible trial by military commission. Contrary to the usual practice in federal agency rulemaking (and notwithstanding a suggestion by NIMJ),²⁶ the final rules did not include a “statement of basis and purpose” reflecting, even in summary fashion, the comments that had been received and what, if any, changes had been made in response.

That issuance, however, was far from the end of the rulemaking process. For one thing, one of the most controversial parts of the instructions, dealing with the constraints to be imposed on civilian defense counsel, was modified in several respects from the version published as a Final Rule in the *Federal Register*. Specifically, the changes enlarge the universe of persons with whom defense counsel may communicate regarding a case and permit case-related work, such as research, investiga-

tion and witness interviews, to be performed away from the trial site.²⁷

These changes – which address concerns raised by leading human rights organizations²⁸ – were simply made in the version posted on the Department of Defense’s website, and made known informally to a handful of journalists covering the Pentagon. The website version in no way disclosed the fact that changes had been made, although standard military practice is to clearly indicate such changes as “Change 1.” The date shown on the affected Military Commission Instruction was also not changed.

This informal manner of proceeding had the effect of undermining confidence in the rulemaking process by casting doubt on the reliability of the *Federal Register* text.²⁹ Few will agree with the Pentagon’s military commission spokesman’s attempt to characterize the changes as mere “clarification,”³⁰ but even if that description were apt, it is no excuse for e-tampering with the text of a published regulation. Many an APA rule

24 Dep’t of Defense News Release No. 297-03, DoD Issues Military Commission Instructions (May 2, 2003), available at http://www.defenselink.mil/news/May2003/bo5022003_bt297-03.html; Dep’t of Defense, Background Briefing on the Release of Military Commission Instructions (May 2, 2003), available at www.defenselink.mil/transcripts/2003/tr20030502-0144.html.

25 68 FED. REG. 39,374 (July 1, 2003). The Department also established in 32 C.F.R. chapter I a new subchapter B – Military Commissions (and redesignated existing subchapters B-K), 68 FED. REG. 38,609 (June 30, 2003), thereby paving the way for publication of the eight Military Commission Instructions.

26 Letter from Eugene R. Fidell, Pres., NIMJ, to William J. Haynes II, General Counsel, Dep’t of Defense, Mar. 12, 2003, at 2, SOURCEBOOK 43, 44, citing, *inter alia*, *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 35 @ n.58 (D.C. Cir. 1977) (“opportunity to comment is meaningless unless the agency responds to significant points raised by the public”).

27 See Matthew S. Freedus, Kevin J. Barry @ Grant Lattin, Supplemental Discussion of Military Commission Instruction No. 5 (Qualification of Civilian Defense Counsel) (July 11, 2003), available at <http://www.nimj.org>.

28 See Letter from Jamie Fellner, Dir., U.S. Program, Human Rights Watch, to William J. Haynes II, General Counsel, Dep’t of Defense (June 10, 2003), available at <http://www.hrw.org/press/2003/06/haynes061003-ltr.htm>; Lawyers Comm. for Human Rights, *Trials Under Military Order: A Guide to the Final Rules for Military Commissions 18-19* (June 2003), available at http://www.lchr.org/us_law/a_guide_to_the_final_rules.pdf.

29 Cf. *Nolan v. United States*, 44 Fed. Cl. 49 (1999) (C.F.R. governs over later non-C.F.R. delegation).

30 Blum, *supra* note 23, at 14, col. 2 (quoting Major John Smith). The Department’s informal methods set off a scramble by the contributors to NIMJ’s SOURCEBOOK to determine whether other

change has sought to clarify an existing rule; such a change remains a new act of rulemaking. On the other hand, the tinkering – which tended to ease, at least to a degree, some of the constraints on civilian defense counsel to which journalists and civilian attorneys had called attention – again demonstrates the Department's willingness to listen. This so-called "clarification," however irregular, thus indirectly confirms the value of conventional notice-and-comment procedures.

The fact that the Department of Defense not only went to the trouble of publishing the Military Commission Instructions in the *Federal Register* but designated them for inclusion in the *Code of Federal Regulations* is itself not without significance. It suggests that the Department believes that these rules should be available permanently, instead of having to be dusted off and reissued only at extended intervals.³¹

During this process the Department of Defense conducted another commissions-related rulemaking, employing normal APA notice-and-comment procedures. Coincidentally, that rulemaking concerned another aspect of the same Military Commission Instruction as the one at issue in the phantom change just described. Instruction No. 5 governs civilian defense counsel, and

establishes a civilian defense counsel pool for which individuals may apply.³² Because the result is a "system of records" for Privacy Act purposes,³³ the Department could not sidestep notice-and-comment,³⁴ and notice of the addition of the proposed additional system to its inventory was issued on June 4, 2003, and published in the *Federal Register* on June 12, 2003, with a July 14, 2003 effective date.³⁵ The only 5 U.S.C. § 552a(b)(3) "routine use" identified in the notice (other than the Department's normal "blanket routine uses") is disclosure "[t]o accused for purposes of furnishing information on individuals who are qualified to appear before a Military Commission as a civilian defense counsel." The Department has not released the names of the few individual attorneys who have applied for the civilian defense counsel pool thus far, although at least one has publicly identified himself.³⁶

Yet more rulemaking is likely. Critical aspects of the military commission process, such as the operation of the review panel, remain uncharted. Presumably this and other matters will be the subject of the further instructions for which the Department of Defense quietly reserved room when it established subchapter B.³⁷

In addition, in due course the prosecution is required to prepare, "as directed by the

Instructions had been changed; none seem to have been. NIMJ immediately posted notice of the change on its own website, www.nimj.org, and followed it with a Supplemental Discussion. See Freedus, Barry & Lattin, *supra* note 27.

31 John Mintz, *6 Could be Facing Military Tribunals*, WASH. POST, July 4, 2003, at A1.

32 Whether to apply has become an issue of some moment, as civilian lawyers have been concerned that participation may validate a system they believe to be profoundly flawed. See Blum, *supra* note 23; Lewis, *supra* note 23; Seth Stern, *Who'll Defend the Detainees?*, CHRISTIAN SCIENCE MONITOR, June 19, 2003; Lawrence S. Goldman, *Guantánamo: Little Hope for Zealous Advocacy*, 27 THE CHAMPION, No. 6, at 4 (July 2003) (Nat'l Ass'n of Criminal Defense Lawyers); NIMJ, Statement on Civilian Attorney Participation as Defense Counsel in Military Commissions (July 11, 2003).

33 5 U.S.C. § 552a(a)(5) (2000).

34 *Id.* § 552a(e)(11).

35 68 FED. REG. 35,203 (June 12, 2003).

36 Blum, *supra* note 23; Lewis, *supra* note 23; Stern, *supra* note 32.

37 68 FED. REG. 38,609 (June 30, 2003) (reserving parts 18-20).

Deputy General Counsel (Legal Counsel),” a “trial guide” for use in the commissions’ proceedings.³⁸ It remains unknown whether this will take the form of a Military Commission Instruction or something else. Trial guides are a familiar part of court-martial practice, and have long been found in the *Manual for Courts-Martial*, although they are not mandatory.³⁹ Given the influential role a trial guide can play in the process, it is certainly to be hoped that the military commissions trial guide will at least be circulated informally before it is made final.

Similarly, the armed forces widely rely on a voluminous “benchbook” that includes standard jury instructions.⁴⁰ It would be surprising if no such document was being generated for use in military commissions. Once again, a benchbook is not authoritative and may not be a likely candidate for notice-and-comment rulemaking, but it would be surprising if – assuming one were issued – its contents were not highly significant for the conduct of trials.

Martial (“MCM”), while far from perfect,⁴¹ has become increasingly open and, above all, procedurally predictable. Reference to that evolution is entirely appropriate given the fact that courts-martial and military commissions are exempted by the same APA clauses. The Department’s current regulations on this subject were only recently updated, and include *Federal Register* publication of proposed changes unless the Secretary of Defense “in his sole and unreviewable discretion proposes that the President issue the change without such notice on the basis that public notice procedures ... are unnecessary or contrary to the sound administration of justice, or an MCM change corresponding to legislation is expeditiously required to keep the MCM current and consistent with changes in applicable law.”⁴² Similarly, the General Counsel can abbreviate the Department’s normal 60-day comment period if that period “is unnecessary or is contrary to the sound administration of military justice.”⁴³

THE COURT-MARTIAL ANALOGY

CONGRESSIONAL INTEREST

In sharp contrast to the process the Department of Defense has employed in connection with military commission rulemaking, for a generation the rulemaking process for changes to the *Manual for Courts-*

Congress has taken little notice of any of these issues, or, for that matter, military commissions in general, after perfunctory hearings in 2001. In the 108th Congress, a few bills have been introduced by Democrats, but

38 Mil. Comm’n Inst. No. 3, § 4(B); see SOURCEBOOK III-12.

39 Manual for Courts-Martial, United States, App. 8, at A8-1 n.1 (2002).

40 Dep’t of the Army Pamphlet 27-9, *Military Justice: Military Judges’ Benchbook* (Sept. 15, 2002).

41 The evolution of this process has been chronicled by Kevin J. Barry, a retired captain in the U.S. Coast Guard, who served as a military trial and appellate judge. E.g., Kevin J. Barry, *Modernizing the Manual for Courts-Martial Rule-Making Process: A Work in Progress*, 165 MIL. L. REV. 237 (2000); see also ANNOTATED GUIDE 81.

42 68 FED. REG. 36,915, 36,917 (June 20, 2003) (to be codified at 32 C.F.R. Pt. 152, App. A, § (d)(2)).

43 *Id.* § (d)(5). Nor is this the only area in which the Department of Defense has shown itself able to accommodate the requirements of federal administrative law. In response to a recommendation of the now-defunct Administrative Conference of the United States, Admin. Conf. of U.S., *Elimination of the “Military or Foreign Affairs Function” Exemption from APA Rulemaking Requirements*, 39 FED. REG. 4847 (Feb. 7, 1974); see also Arthur E. Bonfield, *Military and Foreign Affairs Function Rulemaking Under the APA*, 71 MICH. L. REV. 221 (1972), the Department established a “general policy favoring notice

they would benefit from further work on the administrative law issues. For example, § 3(c) of H.R. 1290 ("Military Tribunals Act of 2003"), introduced on March 13, 2003, by Representative Adam Schiff of California, would authorize the Secretary of Defense, in consultation with the Secretary of State and the Attorney General, to prescribe and publish in the *Federal Register* (and report to the Judiciary Committees) the rules of evidence and procedure for military commissions, but fails to mandate notice-and-comment rulemaking.⁴⁴ Judging by the experience under a now-repealed reporting requirement for court-martial rules, moreover, submission to congressional communities is likely to be of little consequence.⁴⁵ A more recent proposal, H.R. 2428 ("Military Tribunal Regulations Review Act"), introduced by Representative Joseph M. Hoeffel of Pennsylvania, establishes an elaborate machinery for congressional review, but makes no reference to *Federal Register* publication or conventional notice-and-comment rulemaking. This proposal is interesting because it raises the fundamental question of whether rules for military commissions should be analogized, procedurally, to rulemaking for the federal

courts, where congressional oversight is settled practice and *Federal Register* notice plays no role in the process, or to administrative rulemaking. The Rules Enabling Act⁴⁶ model may make more sense in light of the fact that, under it, rules only come to Congress after they have been vetted in the quite open process of the Judicial Conference of the United States committee system⁴⁷ and review by the Justices of the Supreme Court. In the military justice area, on the other hand, rulemaking has not relied on a broad-based public committee, but rather on an internal Joint-Service Committee on Military Justice⁴⁸ that conducts its essential business in private, holding what can best be described as a pro forma public meeting once a year. While the military system has improved over time, it has been justly criticized.⁴⁹



Continuing to insulate everything about military commissions from core federal administrative legislation is unnecessary and needlessly maintains a mystique that is out of date and counterproductive. The APA and the Department of Defense's own rulemaking regulation are flexible enough to

and comment in the development of regulations having a substantial and direct impact on the public, unless a 'significant and legitimate interest' of the Department or the public requires not following that procedure." JEFFREY S. LUBBERS, A GUIDE TO FEDERAL AGENCY RULEMAKING 52 @ n.70 (3d ed. 1998); see 32 C.F.R. Pt. 336 (2002).

44 See also S. 22, 108th Cong., 1st Sess. (2003) (§ 1303(c)).

45 See Eugene R. Fidell @ Jay M. Fidell, *Loss of Numbers*, 48 NAVAL L. REV. 194, 195 @ n.7 (2001); Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1216 n.2 (1997) ("power to repudiate a [Manual for Courts-Martial] provision has never been exercised, and indeed, it appears that the responsible committees of Congress have never played a significant role with respect to oversight of the President's power under UCMJ art. 36(b)"). Query whether the Judiciary Committees would be more aggressive in exercising oversight of military commission rules than the Armed Services Committees were with respect to court-martial rules.

46 28 U.S.C. § 2072 (2000).

47 28 U.S.C. § 2073 (2000). See generally Peter G. McCabe, *Renewal of the Federal Rulemaking Process*, 44 AM. U. L. REV. 1655 (1995).

48 68 FED. REG. 36,915 (June 20, 2003) (to be codified at 32 C.F.R. Pt. 152).

49 E.g., Barry, *supra* note 41.

accommodate any operational or security requirements that may arise,⁵⁰ and carving military commissions entirely out of their sweep only serves to erode public confidence both here and abroad in the soundness and regularity of commission-related decision making. Whatever else – if anything – Congress chooses to do regarding military commissions, it should repeal the exceptions. In any event, the Department of Defense should apply the same approach it has wisely adopted for other contexts. ~~GB~~

⁵⁰ The APA's rulemaking section has exceptions for cases in which "notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest" and permits an agency to dispense with the normal 30-day comment period "for good cause found and published with the rule." 5 U.S.C. §§ 553(b)(3)(B), (d)(3) (2000); see generally Attorney General's Manual, *supra* note 6, at 30-31; LUBBERS, *supra* note 43, at 75-83. The Department's regulations dispense with prior opportunity for public comment for "[a]ny matter pertaining to a military or foreign affairs function of the United States which has been determined under the criteria of an Executive Order or statute to require a security classification in the interests of national defense or foreign policy," or where "inviting public comment on a proposed regulation is (i) impracticable, (ii) unnecessary, or (iii) contrary to the public interest, and incorporates in the adopted regulation that determination and its basis." 32 C.F.R. §§ 336.2(d)(1), (4) (2002).