

Military Commission Law

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Introduction

Four years after President George W. Bush resurrected the “military commission” as a forum to try suspected terrorists,⁴ it is still surprisingly unclear what procedures will be followed when trials are finally conducted. At least two factors lead to this uncertainty. First, the commission system’s rules are subject to continuous change⁵ and, in fact, have been revised in sometimes internally-inconsistent ways.⁶ But perhaps more fundamentally, this procedural uncertainty exists because establishing a legal system from scratch is more difficult than its creators appear to have anticipated. Some method is needed to fill the procedural gaps that are inevitable in any legal system. In common law systems, these procedural gaps are filled by case law. How will they be filled in the military commission system? The answer to this question is important not only to those within the military legal establishment who are responsible for the conduct and review of commission trials, but also—perhaps especially—to civilian pro bono defense counsel struggling to negotiate their way through the Guantánamo maze.

Over the long history of military commissions, the norm has been that their procedures are tied closely to those prevailing in courts-martial. The rules under which courts-martial should refer to outside sources in filling procedural gaps were included. Actions taken by the Administration since the re-launching of commissions in November 2001 have made the question of what procedural rules apply much more complicated and confusing. Part I of this article surveys the pre-2001 legal situation and Part II examines the changes made by the new rules. Part III examines the developing case law in the field.

I. The Traditional Understanding

Article 36(a), Uniform Code of Military Justice (UCMJ) governs rule making for courts-martial and military commissions, as well as other military tribunals. Article 36 provides:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States District Courts, but which may not be contrary to or inconsistent with this chapter.⁷

The null hypothesis, therefore, is that district court practice, including the Federal Rules of Criminal Procedure and the Federal Rules of Evidence (FRE), apply to military commissions as well as courts-martial. Article 36(b) also requires that rules and regulations made under Article 36(a) “shall be uniform insofar as practicable.”⁸ One might argue that this uniformity clause implies that the rules and regulations must, “insofar as practicable,” be uniform as between courts-martial,

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⁴ Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 3 C.F.R. 918 (2001 comp.); 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter PMO].

⁵ See U.S. Dep’t of Defense, Military Commission Order No. 1 (Revised), Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism para. 11 (Aug. 31, 2005), available at <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf> (“The Secretary of Defense may amend this Order from time to time.”) [hereinafter MCO No. 1].

⁶ For example, compare *id.* ¶ 4A(5)(a) (“The Presiding Officer shall rule upon all questions of law, all challenges for cause, and all interlocutory questions arising during the proceedings.”), with PMO, *supra* note 4, § 4(a)(2) (providing that the military commission shall “sit[] as the triers of both fact and law”).

⁷ 10 U.S.C. § 836(a) (2000).

⁸ *Id.* § 836(b).

military commissions, and other military tribunals (such as provost courts),⁹ but the better reading is that the uniformity referred to is uniformity among the various armed forces.¹⁰ The rule making provision in Article 38 of the Articles of War (the Army's predecessor to Article 36 of the UCMJ) applied to courts-martial, courts of inquiry, military commissions, and other military tribunals, but included no uniformity clause. The uniformity clause first appeared when Congress enacted military justice legislation applicable to all of the services—the UCMJ—in 1950.

The President has, of course, issued rules of procedure and evidence for courts-martial. These rules are found in the *Manual for Courts-Martial (Manual)*, and depart in numerous respects from the rules applied in the district courts. The President's broad rule making power in this respect has been recognized by the Supreme Court.¹¹ One commentator has suggested that the President, as Commander-in-Chief, could promulgate military justice rules even if Congress had not enacted Article 36.¹²

Although the *Manual* is, as its title indicates, directed to courts-martial, its short preamble contains the following language regarding military commissions and provost courts: "Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedure[] and evidence prescribed for courts-martial."¹³

This language is, in a sense, parallel to that of Article 36(a): just as Article 36(a) sets district court practice as the baseline against which departures must be judged, this paragraph (para. 2(b)(2)) sets up the *Manual* as the baseline against which, in the case of military commissions, departures must be judged. The language of paragraph 2(b)(2) is spongier than Article 36(a) to the extent that it merely treats the court-martial practice baseline as a guide, rather than binding the court-martial and commission in lock-step fashion. In addition, while presidentially-made rules under Article 36(a) may not be contrary to or inconsistent with provisions of the UCMJ, the application of court-martial procedures and rules of evidence to military commissions may not, under paragraph 2(b)(2), be contrary to "any applicable rule of international law or to any regulations prescribed by the President or by other competent authority."¹⁴ Paragraph 2(b)(2) is itself an exercise of the President's Article 36(a) rule making power, and plainly reflects a decision to depart from district court practice in the case of military commissions.

In sum, and reading Article 36(a) and paragraph 2(b)(2) of the *Manual* together, military commission rules should follow, broadly if not in every particular, the procedures and rules for courts-martial.¹⁵ The exceptions are those aspects that are governed by some "applicable rule of international law" or some regulation. Paragraph 2(b)(2) remains in force; it has not been amended, repealed, or suspended in any respect as the process of military commission rule making has proceeded.

Paragraph 2(b)(2) also has a long history. The Army's 1928 *Manual* included a similar clause providing that military commissions and provost courts "are summary in their nature, but so far as not otherwise provided have usually been guided

⁹ David W. Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2022 (2003).

¹⁰ *Hearings on H.R. 2498 Before a Subcomm. of the H. Comm. on Armed Services*, 81st Cong., 1st Sess. 1014-15 (1949), noted in David W. Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L., No. 1, at 77 & n.486 (2005), available at <http://ssrn.com/author=504660>. See generally Eugene R. Fidell, *Judicial Review of Presidential Rulemaking Under Article 36: The Sleeping Giant Stirs*, 4 MIL. L. REP. 6049, 6057 (Pub. L. Educ. Inst. 1976).

¹¹ *Loving v. United States*, 517 U.S. 748, 770-74 (1996) (sustaining presidentially-articulated standards for capital sentencing); see also *United States v. Scheffer*, 523 U.S. 303, 314 (1998) (sustaining presidential ban on use of polygraph evidence in courts-martial).

¹² Gregory E. Maggs, *Judicial Review of the Manual for Courts-Martial*, 160 MIL. L. REV. 96, 100 & n.29, 132-35 (1999).

¹³ MANUAL FOR COURTS-MARTIAL, UNITED STATES pmb1, para. 2(b)(2) (2005) [hereinafter MCM]. The language can be traced, in part, to chapter I, paragraph 2 of the 1928 *Manual*. MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. I, para. 2 (1928) [hereinafter 1928 MCM] ("Military Commissions and Provost Courts . . . are summary in their nature, but so far as not otherwise provided have usually been guided by the applicable rules of procedure and of evidence for courts-martial"), quoted in Glazier, *supra* note 10, at 64 & n.394. This paragraph's reference to international law first appeared in the 1951 *Manual*. See MANUAL FOR COURTS-MARTIAL, UNITED STATES ch. I, para. 2 (1951).

¹⁴ See MCM, *supra* note 13, at pmb1, para. 2(b)(2).

¹⁵ This assumes that the accused is not entitled to prisoner of war (POW) status. An accused who is entitled to POW status is entitled to be tried by a court-martial using the same procedures as the United States applies in the trial of its military personnel. Geneva Convention Relative to the Treatment of Prisoners of War art. 102, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; see Detlev F. Vagts, *Which Courts Should Try Persons Accused of Terrorism?*, 14 EUR. J. INT'L L. 313, 322 & n.51 (2003). A person whose status is in doubt must be treated as a POW until the matter is decided by a "competent tribunal" under Article 5 of the Third Geneva Convention. See *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152, 162 (D.D.C. 2004), *rev'd*, 415 F.3d 33, 43 (D.C. Cir. 2005) (military commission can serve as competent tribunal), *cert. granted*, 74 U.S.L.W. 3287 (U.S. Nov. 7, 2005) (No. 05-184).

by the applicable rules of procedure and of evidence prescribed for courts-martial.”¹⁶ Not surprisingly, unlike the current *Manual*, the 1928 *Manual* did not make commission practice subject to rules of international law.

The next step in consideration of this landscape is to identify what “applicable rule[s] of international law” or paragraph 2(b)(2) regulations there may be to further “guide” military commissions. This is critical because the rules the President issued are considered

a departure from the presumptive rule and from long-standing military practice—and in failing to ‘be guided by’ the principles of law, and rules of evidence and procedure of *current* courts-martial, they fail to provide the degree of fairness and due process expected in criminal trials conducted by the United States in the 21st century.¹⁷

II. The New Rules on Gap-Filling

In the 13 November 2001 Presidential Military Order (PMO) establishing the new military commissions, the connection between commission practice and district court practice is broken:

Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.¹⁸

This language, however, suggests that the break is not complete. The President’s language does not appear to have made an across-the-board finding of federal procedural inapplicability. Rather, the impracticability finding expressly applies only “to the extent provided by and under this order.”¹⁹ This standard appears to preclude, for example, incorporation of the FRE, since the rules are inconsistent with the evidence standard prescribed in PMO section 4(c)(3). But as to the many procedural questions about which the PMO is silent, the President’s choice of words, read literally, indicates that he made no impracticability determination. This, in turn, suggests that officials entrusted with filling in the gaps should consider the congressional preference for aligning commission practice (like court-martial practice) with federal civilian criminal procedure.

It is certainly open to question whether the two factors cited in section 1(f) of the PMO—danger to the country’s safety and the nature of international terrorism—indicate the impracticability of following district court practice. Section 1(e) adds nothing to the equation.²⁰ It simply recites that “it is necessary for individuals subject to this order . . . when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals,”²¹ without attempting to explain *why* that is so. Curiously, PMO section 1(e) uses the term “military *tribunals*” whereas section 1(f) and section 4, which deals with trials, use the term “military *commissions*.” This discrepancy²² is presumably a result of hasty drafting, although it is possible to discern why it occurred.²³

¹⁶ 1928 MCM, *supra* note 13, ch. I, para. 2.

¹⁷ Kevin J. Barry, *Military Commissions: American Justice on Trial*, FED. LAW., July 2003, at 24, 26 (emphasis in original); *see also* Kevin J. Barry, *Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 1, 4. Discrepancies between contemporary court-martial practice and military commission practice under the current rules are also discussed in Glazier, *supra* note 9, at 2015-20.

¹⁸ PMO, *supra* note 4, sec. 1(f).

¹⁹ *Id.*

²⁰ Section 1(e) states:

To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

Id. sec. 1(e).

²¹ Glazier, *supra* note 9, at 2022 & n.71.

²² Military commissions are a subset of the larger category of military tribunals. *Id.* at 2006 n.1. Regrettably, media coverage early on picked the broader term, and efforts to correct this in favor of the more precise term have been an uphill battle. Further confusing the matter have been references to “competent tribunals” under article 5, ¶ 2, of the Third Geneva Convention and the Administration’s creation of Combatant Status Review Tribunals, which

Chief among the additional regulations issued by the Pentagon to implement the PMO are the Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism. These procedures were originally issued as Military Commission Order (MCO) No. 1 on 21 March 2002.²⁴ Section 1 of the Procedures set forth their purpose, and stated in pertinent part: “Unless otherwise directed by the Secretary of Defense, and except for supplemental procedures established pursuant to the President’s Military Order or this Order, the procedures prescribed herein *and no others* shall govern such trials.”²⁵ The “and no others” clause has received no attention, but it is important. Read literally, it would close the door on resort to either district court or court-martial practice as interstitial sources of law for military commissions.

The same impression is conveyed by Presiding Officers Memorandum (POM) No. 1-2, issued by Colonel Peter E. Brownback III on 12 September 2005. It provides:

[Presiding Officers Memoranda], communications with counsel, and courtroom proceedings may use the term “Commission Law.” Commission Law refers collectively to the President’s Military Order of November 13, 2001, DoD Directive 5105.70, Military Commission Orders, Military Commission Instructions, and Appointing Authority/Military Commission Regulations in their current form and as they may be later issued, amended, modified, or supplemented. POMs shall be interpreted to be consistent with Commission Law and should there be a conflict, Commission Law shall control.²⁶

The Defense Department has prepared other instructions which ought to clarify these directives but which have not in fact shed much light on the situation or provided guidance for counsel appearing in these proceedings. To date, the Department has not released a *Manual for Military Commissions*, although one has been prepared.²⁷ The National Institute of Military Justice requested a copy under the Freedom of Information Act, but its request has languished at the Pentagon. The Defense Department has, however, released a variety of other military commission regulations, mostly without notice-and-comment rule making.²⁸ In addition, the Army has issued detailed benchbooks for courts-martial of enemy prisoners of war within the meaning of the Third Geneva Convention²⁹ and provost courts trying civilian internees within the meaning of the Fourth Geneva Convention.³⁰ It is difficult to understand why work would proceed to completion and public release of those two books, covering obscure processes that have not been brought into play since long before 11 September 2001, while a comparable publication for military commissions that actually *are* being used remains under wraps. This may simply be a function of different approval chains within the Pentagon, but it seems odd nonetheless.

are used to decide which of the Guantánamo detainees are “enemy combatants.” See Memorandum, Paul Wolfowitz, Deputy Secretary of Defense, to Secretary of the Navy, subject: Order Establishing Combatant Status Review Tribunal (7 July 2004), available at <http://www.defenselink.mil/news/Jul2004/d20040707review.pdf>.

²³ The PMO blends features of President Franklin D. Roosevelt’s Proclamation No. 2561, “Denying Certain Enemies Access to the Courts of the United States,” and his Military Order of 2 July 1942. The former used the term “military tribunal” while the latter used the term “military commission.”

²⁴ See U.S. Dep’t of Defense, Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism para. 11 (Mar. 21, 2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

²⁵ *Id.* para. 1.

²⁶ Office of the Presiding Officer, Military Commission, Presiding Officer Memorandum (POM) # 1-2 – Presiding Officers Memoranda (Sept. 12, 2005), available at <http://www.defenselink.mil/news/Sep2005/d20050914officers.pdf>.

²⁷ See Tim Golden, *U.S. Is Examining Plan to Bolster Detainee Rights*, N.Y. TIMES, Mar. 27, 2005, at 1, col. 6 (referring to 232-page draft manual).

²⁸ See generally Peter Raven-Hansen, *Detaining Combatants by Law or by Order? The Rule of Lawmaking in the War on Terrorists*, 64 LA. L. REV. 831 (2004); Eugene R. Fidell, *Military Commissions & Administrative Law*, 6 GREEN BAG 2d 379 (2003).

²⁹ U.S. DEP’T OF THE ARMY, PAM. 27-9-1, MILITARY JUDGES’ BENCHBOOK FOR TRIAL OF ENEMY PRISONERS OF WAR (4 Oct. 2004).

³⁰ U.S. DEP’T OF THE ARMY, PAM. 27-9-2, MILITARY JUDGES’ BENCHBOOK FOR PROVOST COURTS (4 Oct. 2004).

III. Commission Practice

This article will now examine practice under the new commission rules. Decisions of the Review Panel³¹ may ultimately serve the gap-filling function. Of course, as a result of a slow lift-off of the program, followed by extensive, continuing litigation in the federal courts, no trial on the merits has even begun in a commission case. But orders and instructions governing the military commission process do not provide for interlocutory appeals to the Review Panel. Before any case becomes complete, the Appointing Authority³² is entrusted with ruling on “all interlocutory questions, the disposition of which would effect a termination of proceedings with respect to a charge.”³³ Thus, the first opportunity to develop the military commission system’s “common law” rests with the Appointing Authority. The Appointing Authority has already begun this function of filling in procedural gaps by issuing rulings on challenges for cause and the right of an accused to self-representation.³⁴ Review of the preliminary proceedings conducted to date suggests that in fact there is persistent reference by all concerned to military justice statutes, regulations, and jurisprudence. Although the record is inconsistent, conventional military justice and civilian jurisprudence are the theme music playing in the background.

For example, in the *Hamdan*³⁵ and *Hicks*³⁶ cases, the defense challenged the Presiding Officer, three of the four commission members, and the sole alternate member. In due course, Major General (retired) John D. Altenburg, Jr., the former Assistant Judge Advocate General of the Army serving (as a civilian) as the Appointing Authority, issued a lengthy but little-noticed decision on the challenges for cause.³⁷ The decision nowhere cited the “and no other” clause but did cite, albeit as a “compare,” Article 25(a) of the UCMJ,³⁸ which defines who is eligible to serve on courts-martial. The decision also noted that the definition of “good cause” employed in *Military Commission Instruction No. 9*³⁹ “is the same definition of good cause that a convening authority or a military judge uses to excuse a court-martial member after assembly of the court.”⁴⁰ The decision recited that defense counsel relied on Rule for Courts-Martial 912 and the decision of the United States Court of Appeals for the Armed Forces in *United States v. Strand*.⁴¹ Remarkably (given the “and no other” clause), General Altenburg made the following observation:

The parties cite no controlling standard for deciding challenges for cause before military commissions. Nevertheless, it is helpful to examine the challenge standards in courts-martial, United States federal

³¹ See generally Dep’t of Defense, Military Commissions Factsheet, available at <http://www.defenselink.mil/news/Sep2005/d20050915factsheet.pdf>.

After the panel has delivered its verdict and imposed a sentence. . . [a] three-member Review Panel of Military Officers, one of whom must have prior experience as a judge, will review all cases for material errors of law, and may consider matters submitted by the Prosecution and Defense. Review Panel members may be civilians who were specifically commissioned to serve on the panel. If a majority of the Review Panel members believe a material error of law has occurred, they may return the case to the Military Commission for further proceedings.

Id.

³² The Appointing Authority exercises some, but not all, of the powers that a convening authority wields in a court-martial. “The Appointing Authority approves and refers appropriate charges to a Military Commission and appoints Military Commission members.” *Id.* The Appointing Authority, however, does not have an initial review function in contrast to a convening authority’s role under Article 60 of the UCMJ. 10 U.S.C. § 860 (2000).

³³ MCO No. 1, *supra* note 5, para. 4.A(5)(e).

³⁴ See Appointing Authority, Appointing Authority Decision on Challenges for Cause (Oct. 19, 2004), available at <http://www.defenselink.mil/news/Oct2004/d20041021panel.pdf> [hereinafter Challenges for Cause Decision]; Appointing Authority, Request of Detailed Defense Counsel to Modify Military Commission Rules to Recognize Right of Self-Representation (June 14, 2005), available at <http://www.defenselink.mil/news/Aug2005/d20050811bahul.pdf>.

³⁵ *United States v. Hamdan*, No. 04-0004. See generally U.S. Dep’t of Defense, Commission Transcripts, Exhibits, and Allied Papers, available at http://www.defenselink.mil/news/commissions_exhibits_hamdan.html (last visited Dec. 6, 2005).

³⁶ *United States v. Hicks*, No. 04-0001. See generally U.S. Dep’t of Defense, Commission Transcripts, Exhibits, and Allied Papers, available at http://www.defenselink.mil/news/Oct2005/commissions_exhibits_hicks.html (last visited Dec. 6, 2005).

³⁷ Challenges for Cause Decision, *supra* note 34.

³⁸ 10 U.S.C. § 825(a) (2000).

³⁹ U.S. Dep’t of Defense, Military Commission Instruction No. 9 (Dec. 26, 2003), available at <http://www.defenselink.mil/news/Jan2004/d20040108milcominstno9.pdf> [hereinafter MCI No. 9].

⁴⁰ Challenges for Cause Decision, *supra* note 34, at 3 (citing MANUAL FOR COURTS-MARTIAL, UNITED STATES, RULE FOR COURTS-MARTIAL 505 (2002)).

⁴¹ 59 M.J. 455 (2004).

practice, and under international practice when deciding the appropriate challenge standard for military commissions.⁴²

The decision goes on to explain the legal framework for military commission procedures, citing Articles 21 and 36 of the UCMJ and the President's impracticability determination.⁴³ After noting that several provisions of the UCMJ expressly apply to military commissions as well as courts-martial, General Altenburg noted that Article 41, which discusses challenges for cause, "is expressly applicable only to trials by court-martial and does not prescribe the standard to use when deciding a challenge for 'cause.'"⁴⁴ He proceeded to discuss historical military jurisprudence concerning challenges,⁴⁵ challenges for cause in the federal courts,⁴⁶ military justice case law,⁴⁷ a proposed American Bar Association standard,⁴⁸ and international standards.⁴⁹ In the end, "[c]onsidering all of the above," including the PMO's requirement for a "full and fair trial, with the military commission sitting as the triers of both fact and law,"⁵⁰ General Altenburg announced a standard for deciding challenges for cause against commission members.

In the remainder of the Challenges for Cause Decision, General Altenburg cited Supreme Court authority arising in a civilian context,⁵¹ a decision of the Virginia State Bar,⁵² UCMJ provisions on, among other things, certification of military judges,⁵³ and further military case law.⁵⁴ Rejecting the defense's claim that Colonel Brownback and he had a friendly relationship that gave rise to an appearance of unfairness, General Altenburg observed that his finding "is consistent with federal cases [of which he cited six] reflecting that the mere fact that a judge is a friend, or even a close friend, of a lawyer involved in the litigation does not, by that fact alone, require disqualification of the judge."⁵⁵ Four more civilian federal cases were cited in the course of rejecting the defense's claim that Colonel Brownback was predisposed to deny a speedy trial motion.⁵⁶

Additional evidence of the contemplated breadth of the sources of law that may properly be invoked in the military commissions is found in POM No. 14-1, which deals with the Commissions Library and was issued by the Presiding Officer and the Chief Clerk for Military Commissions.⁵⁷ According to this POM, "[t]he Commissions Library is an electronic collection of cases, resources, and other writings of benefit to counsel, the Presiding Officers, the Review Panel (should that body become involved), and others."⁵⁸ It will contain "[p]otentially, anything useful as a reference or resource to the practice before a Military Commission."⁵⁹

⁴² Challenges for Cause Decision, *supra* note 34, at 3.

⁴³ *Id.* at 4-5.

⁴⁴ *Id.* at 5.

⁴⁵ *Id.* at 5-6.

⁴⁶ *Id.* at 6-7.

⁴⁷ *Id.* at 7.

⁴⁸ *Id.* at 7 (quoting American Bar Association, Standards Relating to Jury Trials (2004) (draft)).

⁴⁹ *Id.* at 8-9.

⁵⁰ *Id.* at 10 (quoting PMO, *supra* note 4, sec. 4(c)(2) (Nov. 16, 2001)). The 31 August 2005 revision of MCO No. 1 seems to be inconsistent with this provision of the PMO since it removes the members' power to overrule decisions of the presiding officer on legal issues other than the admissibility of evidence. See *supra* note 6. See generally Neil A. Lewis, *U.S. Alters Rules for War Crime Trials*, N.Y. TIMES, Sept. 1, 2005, at A14, col. 4.

⁵¹ Challenges for Cause Decision, *supra* note 34, at 10, 14 (citing and quoting *Irvin v. Dowd*, 366 U.S. 717 (1961)).

⁵² *Id.* at 17.

⁵³ *Id.*

⁵⁴ *Id.* at 20 (quoting *United States v. Hagen*, 25 M.J. 78, 86-87 (1987) (Sullivan, J., concurring); *United States v. Davis*, 58 M.J. 100, 101, 103 (2003)).

⁵⁵ *Id.* at 24.

⁵⁶ *Id.* at 25.

⁵⁷ Office of the Presiding Officer Military Commission, Presiding Officer Memorandum (POM) # 14-1: Commissions Library (Sept. 8, 2005), available at <http://www.defenselink.mil/news/Sep2005/d20050911POM14-1.pdf>.

⁵⁸ *Id.* para. 1.

⁵⁹ *Id.* para. 4c.

Ordinarily the Commissions Library contains: cases other than those readily available as a published opinion on Lexis-Nexis or similar services; large references to alleviate users from having to have the book with them (MCM or the Military Judges Benchbook, for example); items that appear on the Internet so the correct document is preserved before the document is changed or removed from the Internet; “hard-to-find” items (such as decisions of international tribunals and similar writings); treaties and treatises; law review articles; and like items.⁶⁰

What emerges from the Challenges for Cause Decision and POM 14-1 is that, notwithstanding the ostensible rejection of both civilian federal practice and court-martial practice, those two bodies of law remain central to the administration of justice in military commissions. Moreover, General Altenburg’s reference to international legal developments and POM 14-1’s inclusion of such materials in the Commissions Library not only fly in the face of the “and no other” clause, but put the military commission apparatus squarely on one side in the current debate over the propriety of reference to international jurisprudence in United States courts.⁶¹ Whether this expansive approach will be followed by the Review Panel, which is the closest thing to a court of appeals for the military commissions,⁶² remains to be seen. However, given that none of the four members of the Review Panel have had recent military justice experience, and all have had distinguished careers in the civilian legal world,⁶³ it is highly doubtful that they will apply the blinders implicit in the “and no others” clause when the time comes for them to review cases.

Conclusion

In the earliest years of the modern military justice system, it was suggested by Judge Paul W. Brosman, one of the first three members of what was then known as the Court of Military Appeals (now the United States Court of Appeals for the Armed Forces), that the court was “freer than most” to select the best rule of decision and “find its law where it will, to seek, newfledged and sole, for *principle*, unhampered by the limiting crop of the years.”⁶⁴ That approach was problematic. But in time the significance of the Brosman Doctrine decreased as presidentially promulgated rules reduced the court’s opportunity to make law.⁶⁵ One wonders—regardless of one’s views as to the wisdom of reviving military commissions in the first place—if the early evidence suggests that those responsible for the administration of justice by military commissions may chafe against the implications of the “and no others” clause, and if we are witnessing an Altenburg Doctrine that may take the place of the Brosman Doctrine in the annals of military law.

⁶⁰ See *id.* para. 4c.

⁶¹ Compare *Roper v. Simmons*, 543 U.S. 551, 125 S. Ct. 1183, 1198-1200 (2005) (defending reference “to the laws of other countries and to international authorities as instructive” for interpreting the Eighth Amendment), with *id.* at 1227-29 (Scalia, J., dissenting) (criticizing judicial invocation of “alien law”). Reference to international materials is unavoidable because the substantive law of offenses is plainly inspired by international doctrines on war crimes. See generally *Crimes and Elements of Trials by Military Commission*, 32 C.F.R. Pt. 11 (2005); Eugene R. Fidell & Michael F. Noone, Jr., *Discussion in NAT’L INST. OF MIL. JUST., MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK 99-100* (2003) (discussing Military Commission Instruction No. 2); Melissa J. Epstein & Richard Butler, *The Customary Origins and Elements of Select Conduct of Hostilities Charges Before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions*, 179 MIL. L. REV. 68 (2004). The official statement of crimes and elements for trials by military commissions includes the following provision on “effect of other laws:” “No conclusion regarding the applicability or persuasive authority of other bodies of law should be drawn solely from the presence, absence, or similarity of particular language in this part as compared to other articulations of law.” 32 C.F.R. § 11.3(b). This certainly suggests that the drafters were aware that reference to “other bodies of law” was, notwithstanding the “and no others” clause (which refers to procedure), inevitable. Indeed, any other outcome is inconceivable on matters of substantive law, given the Constitution’s recognition of the “Law of Nations.” U.S. CONST. art. I, § 8, cl. 10.

⁶² As of this article’s publication, Congress was considering legislation to vest direct appellate jurisdiction over commission cases (mandatory in some cases, discretionary in others) in the United States Court of Appeals for the District of Columbia Circuit. See National Defense Authorization Act for Fiscal Year 2006, S. 1042, 109th Cong. § 1092(d) (2005). See generally Deborah Funk, *Senate Votes to Restrict Detainees’ Access to Courts*, ARMY TIMES, Nov. 28, 2005, at 20. Congress’s failure, years after the PMO, to confer appellate jurisdiction over military commissions on the United States Court of Appeals for the Armed Forces, the highest court of the military justice system, is inexplicable, but that is another article.

⁶³ The Review Panel includes former Secretary of Transportation William T. Coleman, Jr., former Circuit Judge and Attorney General Griffin B. Bell, Rhode Island Chief Justice Frank J. Williams, and Pennsylvania Court of Common Pleas Judge and former Congressman Edward G. Biester, Jr. Review Panel members are appointed for unrenovable terms, the length of which is prescribed by the Secretary of Defense but “normally shall not exceed two years.” MCI No. 9, *supra* note 39, para. 4.B(2).

⁶⁴ Paul W. Brosman, *The Court: Freer Than Most*, 6 VAND. L. REV. 166, 167-68 (1953).

⁶⁵ See generally Eugene R. Fidell, *Going on Fifty: Evolution and Devolution in Military Justice*, 32 WAKE FOREST L. REV. 1213, 1214-19 (1997); Eugene R. Fidell, “If a Tree Falls in the Forest . . .”: *Publication and Digesting Policies and the Potential Contribution of Military Courts to American Law*, 32 JAG J. 1, 9 n.55 (1982).