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Constitutional and Policy Implications of Military Tribunals for Terrorism Detainees

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Clemenceau said that military justice is to justice as military music is to music, so I'd like to talk about military music. What do we mean by military music? Music *written* by soldiers? By civilians but *played* by soldiers? Must it be 4/4 timing? Can it be a waltz or bossa nova? Must it be for brass and percussion instruments but not strings?

Without consensus on these questions, how can we say if military music is good or bad? You get the point.

Likewise with military tribunals. There's quite a difference depending on whether you're talking about UCMJ courts martial - the international gold standard of military justice – or the “makin'-it-up-on-the-fly-and-after-four-years-still-can't-get-off-the-ground” affront to fundamental international and domestic standards of due process known as the Guantanamo military commissions.

One must look at the 1) structure and 2) execution of a particular process or example in order to judge, so I won't be stating any general opinions about military tribunals for terrorism detainees or for anyone else. And I'll leave most of the policy arguments to others – not because I don't have an opinion – of which you are already quite clear – but because my experience lies in the legal realm.

The first sign of trouble is in the word “terrorist.” Of course, we're all thinking about the likes of Gitmo detainee Mr. Hamdan, alleged to be Osama's driver. But what about Timothy McVeigh? Was he not a terrorist? What about violent anti-abortion or anti-logging activists? Actually, we still do not have an international or even national consensus on the meaning of the word. Before we can seriously address the questions raised by choosing military over civilian trials, we would have to do a better job of defining that class of persons affected than is done by merely saying “terrorism detainees.”

Perhaps we mean people who are a part of trans-national organizations that conspire to commit crimes from abroad. This might make some sense, because the major problems cited with Article III courts are things like Miranda and voluntariness, chain of evidence, right to call and confront witnesses - all things that create headaches for the prosecution of trans-national crime. But aren't some of these problems of our own making - like torture and trying to shift people from armed conflict to criminal justice paradigms when we might just as well have begun with those of criminal justice? Are these problems so real as to justify the moral and political costs of lowering the bar for all the despots of the world to follow? Seems to me we had some pretty successful terrorism prosecutions in the US - from the first WTC bombing to upstate NY terror cells - both before and since we declared that it was “war.” Is it not possible that we can tweak our Article III court

procedures a bit to accommodate the real problems without resort to the legal and policy disasters that military commissions have wrought?

Assuming we have done all that, there is still a class of detainees for whom military tribunals would be appropriate - detainees charged with violations of the laws of war. Indeed, our history and jurisprudence recognizes the propriety of military justice for war crime prosecutions against detainees. The corollary, most salient in this discussion, is that we do not use military tribunals to prosecute crimes against foreign criminal suspects whom we detain outside the context of armed conflict.

We have an entire international legal paradigm devoted to war, or armed conflict as it is more contemporaneously known: international humanitarian law (IHL). The Geneva Conventions are among the most widely ratified international treaties and the US is a party to all four of them. They set out the standards for due process in criminal trials but they apply only in and to the context of "armed conflict."

Therefore, international and domestic law both require, that in order to determine the legality of using military tribunals, you will first need to determine that the factual context is armed conflict and rules of armed conflict are, in fact, applicable. Why is that important?

In armed conflict, things that would otherwise be criminal, like killing, destruction, detention without trial and trial with a reduced menu of judicial guarantees are, to a limited degree, lawful. Thus, while humanitarian interests are best served by respect for humanitarian law where it applies, they are not well served by invoking humanitarian law where it does not belong, namely beyond the bounds of armed conflict.

In connection with military justice, this means taking care not to call something a war crime if it is not a crime committed in the context of armed conflict. And since war crimes are crimes committed in war, which is synonymous with "armed conflict," it means taking care not to call "war" that which is not "armed conflict." These points are critical to avoiding improper assertion of both subject matter and personal jurisdiction.

President Bush's Military Order of November 2001, which provides for trials of terrorism detainees by military commission (MC), and the subsequent MC Instruction #2 which details the crimes that are subject to trial by MC, are consistent with the oft stated US position that the term "global war on terror" is not merely a rhetorical device: it suggests the view that all alleged terrorist criminality undertaken by non-US nationals may be subject to MC jurisdiction as being within the bounds of, or having a "nexus to" armed conflict. Under this scheme, it does not matter whether your crime occurred anywhere near a battlefield, or even whether you actually took up, or sought to take up arms. According to our government, a person can be detained as an enemy combatant if they unwittingly contribute to a charity that supports terrorism, or if they teach English to the son of a terrorist. And the crimes with which they can be charged are equally overbroad.

In this respect, the US MC scheme, like the entire "global war on terror" concept of which it is a part, misapplies international humanitarian law, the law of armed conflict (IHL). How so?

There are only two categories of armed conflict in IHL. International armed conflict is armed intervention by one state against another state – regardless of how much or how little violence there may be. Occupation even without resistance triggers the IHL of international armed conflict.

Non-international armed conflict is state vs. rebels or rebels vs. rebels. Here, thresholds of violence, including considerations of intensity and protracted nature count, so as to distinguish from convenience store hold-ups, riots, and in the words of the International Criminal tribunal for the former Yugoslavia, even from acts of terrorism. Which is not to say that terrorism or the efforts to combat it (however they may be defined) cannot amount to armed conflict. Of course they can. They simply must first meet the threshold criteria.

And another thing you need for it to be armed conflict is parties. In armed conflict, there are rights and responsibilities. They are effectuated through the parties. Terror or terrorism cannot be a party to an armed conflict. Grammarians with a politically

mischievous streak have had a field day with terrorism. One says it's an adverb masquerading as a noun, or, if I may paraphrase, a method rather than an entity. Another suggests that going to war against a common noun is a losing proposition. Proper nouns like Germany and Japan can surrender and promise not to do it again. You'll never get that out of drugs or corruption or terrorism.

Coming back from the edge of glibness, this means that when the "war on terror" amounts to armed conflict, you apply the law of armed conflict, including that aspect of it governing the trial of detainees. In addition to applying the judicial guarantees mandated in the law of armed conflict, which by the way are conspicuously absent from military commissions, this means taking care to distinguish between two categories of belligerents: combatants and civilians, as required by Geneva Convention III for the protection of prisoners of war and Geneva Convention IV for civilians. Why is this important? Two reasons:

- One, because a lawful combatant, normally but not necessarily someone entitled to prisoner of war status, may not be tried for the mere fact of having taken part in hostilities, while a civilian can be so tried under domestic law.
- Two, because a lawful combatant, if tried for, say, war crimes, may only be tried by the same courts using the same procedures as are applied against members of the detaining powers' own military, according Geneva Convention III. In the case of the US, this means courts martial pursuant to the Uniform Code of Military Justice. And I suggest that if US Supreme Court precedent is construed otherwise (namely, the Quirin case), it is moot since that decision precedes the ratification of Geneva Convention III by the US.

And by the way, there is no third category known as "unlawful" or "enemy combatant." A civilian who unlawfully takes part in hostilities is still a civilian and does not thereby lose whatever protected status he may have had under Geneva Convention IV for the protection of civilians. He may be prosecuted for his mere participation and for war crimes, but he is still a civilian.

But when the war on terror does NOT amount to armed conflict, you may not apply the law of armed conflict. In such cases, you must stick with the provisions of domestic and international criminal and human rights law.

The great danger of the US military commissions that purport to apply only to crimes committed in the context of armed conflict, but in fact go well beyond, is threefold:

- First, unlike UCMJ courts martial, in which ultimate civilian review is available, the MCs mock the requirement of both domestic and international law that courts be independent of the prosecuting authority. In MCs, all the rules, procedures, prosecutors, judges, review mechanisms and even assigned defense lawyers are within the president's military chain of command.
- Second, MCs seek to legitimise trials for crimes not cognisable as war crimes. Detainees are charged with conspiracy or unlawful belligerency. Those are not a war crime. Charging someone with crimes for acts alleged to have occurred before the law was defined is as old a prohibition in criminal justice as I know. Even in domestic prosecutions we've seen how conspiracy is used to nail people against whom there is insufficient evidence of a direct crime. In armed conflict, it's a recipe for abuse. Even at Nuremberg, it was rejected and no one was convicted of the crime of membership in an unlawful organization – the SS – unless there was evidence of direct complicity in its crimes. Another MC crime: aiding the enemy. It's not a crime if you ARE the enemy and owe no allegiance to the US.
- Third, using wartime procedures for prosecution of non-wartime acts feeds a dangerous, ultimately self-defeating vision of all war, everywhere, all the time, in total contradiction to what the laws of war say about the limited scope of their own application.

There's nothing wrong with military tribunals for terrorist crimes, so long as they are limited to the field of armed conflict and they respect the fundamental judicial guarantees recognized in domestic and international law. Otherwise, let's be patriotic and have some faith in the judicial process that our founders gave us and that has served us well, even in

times of past crisis at least as grave as the one we face today. And if there are nuances to transnational terrorism prosecutions that pose special challenges to our traditional concepts of due process, such as voluntariness, Miranda, chain of evidence, right to call and confront witnesses, then lets first see if they can be resolved by tweaking procedures within our traditional institutions – our Article III courts - before we undertake radical solutions that wreak havoc with our time-honored system of checks and balances.