

Editorial Comment:

A Response to Why Military Commissions Are the Proper Forum and Why Terrorists Will Have “Full and Fair” Trials

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The Army Lawyer provided Captain Barry an opportunity to review and reply to Colonel Borch’s A Rebuttal to “Military Commissions: Trying American Justice.”¹ Captain Barry submitted the following response:

There is no question as to the commitment, caliber, or integrity, of the military personnel who will be engaged in the effort to ensure that any trials by military commission are “full and fair” as the President has directed.² My quarter-century in uniform, and well over a decade of involvement in this system since retirement,³ convince me that if by heroic effort they can make this process fair, they will do it. They are not the issue.

On the contrary, it is the process itself that is so troubling. It is one that Colonel Borch declares to be fair—as acting chief prosecutor that is his job. But the citations of authority he uses to support his view are almost exclusively the military commission regulations themselves, statements of those in the administration who have prepared those regulations, and views of a couple of commentators from the post-World War II era.⁴ Thus, the administration position he espouses actually stands alone, unsupported by any independent voice.

In a recent op-ed article, former deputy solicitor general Philip Lacovara expressed his deep concern for the fairness of

these procedures.⁵ He reiterated his early and strong support for military commissions as the appropriate venue for international terrorist war-criminals.⁶ Two years later, however, he has now concluded that the administration’s approach to military commissions confirms many of the critics’ worst fears—the rules governing military commissions depart substantially from standards of fair procedure.⁷ In particular, he is troubled by rules that undermine the basic right to effective counsel by imposing significant legal constraints on civilian defense counsel.⁸ He also challenged the administration’s constant reliance on World War II judicial cases such as *Quirin* and *Yamashita*.⁹

The administration needs to do more than simply defend its regulations and the deficient trial structure it has created. It needs to substantially modify the procedures. Otherwise, notwithstanding the best intentions and efforts of those involved, military commissions will not be perceived as fair, either here or internationally. We are a nation guided by the rule of law, and part of our goal in the war against terrorism is to win the hearts and minds of friend and foe alike—but on this issue we are losing even our friends. If we hope to use military commissions as an effective alternative to courts-martial or federal civilian prosecutions, we *must* substantially change the rules.

1. See Colonel Frederic L. Borch III, *A Rebuttal to “Military Commissions: Trying American Justice,”* ARMY LAWYER, Nov. 2003, at 10.

2. See Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 § 7(b)(2) (Nov. 16, 2001).

3. Captain Kevin J. Barry USCG (Ret.), served on active duty with the U.S. Coast Guard for twenty-five years, during which time he had assignments at sea and a variety of legal duties, including chief trial judge and appellate military judge. He is a founding member of the Board of Directors of the National Institute of Military Justice (NIMJ), a past president of the Judge Advocates’ Association and the Pentagon Chapter of the Federal Bar Association, and a past chair of the American Bar Association Standing Committee on Armed Forces Law. He has authored a number of works, including *A Face Lift (And Much More) for an Aging Beauty: the Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, [2002] L. REV. M.S.U.-D.C.L. 57.

4. See Borch, *supra* note 1, at 10-16.

5. Philip Allen Lacovara, *Trials and Error*, WASH. POST, Nov. 12, 2003, at A23.

6. *Id.*

7. *Id.*

8. *Id.*; see Procedures for Trials by Military Commissions of Certain Non-U.S. Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374-99 (1 July 2003) (to be codified at 32 C.F.R. pts. 10-17).

9. Lacovara, *supra* note 5, at A23 (citing *In re Yamashita*, 327 U.S. 1, 18 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942)).