

2-2015

Comparing the Efficacy of the Law Enforcement Approach to the Military Approach for Prosecuting Terrorists

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School of Security and Global Studies

Intelligence Studies Program

This thesis for the master's degree submitted by

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Under the title

Comparing the Efficacy of the Law Enforcement Approach

to the Military Approach for Prosecuting Terrorists

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COMPARING THE EFFICACY OF
THE LAW ENFORCEMENT APPROACH TO THE MILITARY APPROACH
FOR PROSECUTING TERRORISTS

A Master Thesis

Submitted to the Faculty

of

American Public University

by

Paul Thomas Clark

In Partial Fulfillment of the

Requirements for the Degree

of

Master of Arts

November 2014

American Public University

Charles Town, WV

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ABSTRACT OF THE THESIS

COMPARING THE EFFICACY OF
THE LAW ENFORCEMENT APPROACH TO THE MILITARY APPROACH
FOR PROSECUTING TERRORISTS

by

Paul Thomas Clark

American Public University System, November 2014

Charles Town, WV

Professor Philip Fellman, Thesis Professor

This research paper will identify whether civilian criminal courts or military commissions are better suited to prosecute international terrorism suspects. Recent court cases from both legal systems will be compared and reviewed for trial length, conviction and appeal rates, and length of sentence, the more successful legal system for prosecuting terrorism suspects will be identified. Review of the court data demonstrates that civilian criminal courts are more effective in prosecuting international terrorism cases than military commissions because federal courts have trusted rules of evidence and a larger body of case law that can be used to establish precedent for convictions.

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CHAPTER 1

INTRODUCTION

For the past twenty years the primary foreign counter-terrorism threat has been the Sunni Islam-inspired Al Qaeda movement. Because of this, when someone mentions the word “terrorism”, Al Qaeda inevitably comes to mind. Prior to the rise of Al Qaeda, however, the main terrorism threat was Shia-based. The 1979 Islamic Revolution in Iran “intensified the Shia’s awareness of their economically deprived and politically impotent status in the Muslim community” (Directorate of Intelligence 1984) and gave rise to radical groups that used violence as a tool to fight oppression. Just as the 9/11 terrorist attacks brought Al Qaeda to the forefront of counter-terrorism awareness, Iran-backed Shia-based terrorist groups were given priority following the October 1983 attack on the Marine Corps barrack in Beirut, Lebanon by suicide bombers. This bombing is considered “a watershed in international terrorism” (Michaels 2013) being a terrorist attack that changed US foreign policy as President Reagan removed the US Multinational Force from Lebanon after earlier declaring that “the removal of all foreign forces from Lebanon is an essential United States foreign policy objective in the Middle East” (US Congress 1983, 1).

Since that pivotal terrorist attack in 1983, the United States (“US”) has changed its approach to combating terrorism, changes that have led to confusion over the best way to prosecute terrorism suspects. Prior to the terrorist attacks against the US on September 11, 2001, there was a single path to prosecute terrorism suspects: federal criminal courts. This path starts with law enforcement investigations and ends with trial in federal criminal courts. A second path that prosecutes terrorism as an act of war was created after 9/11, military commissions, starts

with military intelligence interrogations on the battlefield and ends with trial by military commission. The creation of the military commission option ignited a debate – a debate that has not yet been settled in a meaningful way – over the appropriate path to achieve meaningful terrorism convictions. The choice, in essence, is between the traditional law enforcement approach and the new military approach. With the debate unsettled, it has become a lingering obstacle to effectively combating terrorism as partisan bickering over the appropriate path to take interferes with efficiently interrogating and prosecuting terrorists. If the US is to successfully prosecute terrorism suspects for their actions, there should be a clear and proven path that leads to convictions for terrorist attacks.

Over the past thirty years, the United States has taken two main approaches to prosecuting international terrorism suspects. Prior to the 9/11 terrorist attacks, the FBI was the lead agency for “after-the-fact investigation of major terrorist attacks in order to develop criminal cases” (National Commission on Terrorist Attacks Upon the United States 2004, 1). The FBI would conduct a forensic investigation, identify the perpetrator(s), and eventually issue federal indictments. This approach continued under President Clinton in the early 1990’s as the threat from Al Qaeda grew. Despite President Clinton issuing multiple directives that “reiterated that terrorism was a national security problem, not just a law enforcement issue” (National Commission on Terrorist Attacks Upon the United States 2004, 108), US counterterrorism prosecution revolved around the FBI. This law enforcement centric policy is clear through the federal criminal indictments and convictions secured against suspects involved in the 1993 World Trade Center bombing, 1996 Khobar Towers bombing, 1998 East Africa Embassy bombings, and other high-profile terrorist attacks.

The US counterterrorism approach changed under President George W. Bush as he created a second path to where punishing the perpetrators of terrorist attacks became a military responsibility and fighting terrorism became a “war.” President Bush departed radically from the established law enforcement model of terrorism-as-a-crime and put the military in charge of the detention and interrogation of terrorist suspects. A new term – enemy combatant – was coined and “an ad hoc system of preventive detention whereby [suspects] ... are detained against their will without the filing of criminal charges for the purpose of incapacitation and interrogation” (Blum 2008) was created. In response to criticisms that the US was violating human rights by indefinitely detaining terrorism suspects without trial, an entire new court system – military commissions – was created through the Military Commissions Act of 2006 (“MCA 2006”) in order to put enemy combatants on trial for their crimes.

The military commissions system, while continuing to exist under President Obama, has not seen any new cases under the Obama Administration. After initially halting all military commissions, the administration ordered the resumption of commissions in early 2011 for Guantanamo detainees with the caveat that detainees will be prosecuted in civilian courts “when appropriate” (CNN Wire Staff 2011). In effect, commissions cases opened under President Bush have continued, but any terrorism suspects apprehended under President Obama have been turned over to federal courts for prosecution and in one case, that of Ahmed Ghailani, a Guantanamo detainee was transferred to US federal court for prosecution. The Obama Administration appears to have reverted US counterterrorism policy to favor the traditional law enforcement approach, but actually created a modified law enforcement approach that includes terrorism suspects being detained by the military – aboard US Navy vessels – where they are interrogated by a joint unit headed by the FBI, but made up of “the most effective and

experienced interrogators and support personnel from across the Intelligence Community, the Department of Defense and law enforcement” (US Department of Justice 2009), before being arraigned in civilian criminal courts for prosecution. This third approach starts differently, possibly to address criticism that counter-terrorism intelligence is lost through the law enforcement approach, but eventually merges with the traditional path that ends in federal criminal trials.

While the terrorism threat has moved from Shia-based to Sunni-based groups, the tactics utilized – bomb attacks meant to inflict mass-casualties – remain the same. The same thirty years of combating terrorism has resulted in three major US policy options that end in two distinct legal systems. The traditional law enforcement approach and modified law enforcement approach utilize civilian criminal courts and the military approach utilizes military commissions. No approach is without controversy and the changing US response raises a research question: what approach has been more effective in prosecuting international terrorists and securing justice for attack victims and their families?

The purpose of this research paper is to identify whether the law enforcement approach – i.e. civilian criminal courts – or the military approach – i.e. military commissions – is better suited to prosecute international terrorism suspects. Utilizing recent court cases from civilian courts and military commissions, this research paper will identify which course of action has been more successful in indicting terrorism suspects and securing convictions for terrorist attacks by comparing terrorism cases across both legal systems.

CHAPTER TWO

LITERATURE REVIEW

In November of 2001, when President George W. Bush signed the military order implementing trial “for violations of the laws of war ... by military tribunals” (Bush 2001) for terrorism suspects, it sparked “intense criticism from constitutional and international lawyers” (Koh 2002, 338). As a result, the debate began over the wisdom of this new paradigm that cast terrorism as an act of war rather than as a domestic crime. The early literature reviewing and debating the military commission process, as expected when debating legal systems, is dominated by legal scholars and academics. As a result, the legal arguments are detailed and include aspects of domestic and international legal precedent and international treaties, obligations, and standards as the Bush-ordered military commissions are compared to courts-martial, domestic criminal courts, and international criminal courts. However, because the military commission system had yet to be actually implemented, this research could not examine actual commission cases.

Koh (2002, 338) noted that the Bush order spawned a “legal process of narrowing the order [establishing military commissions]” and predicted that this legal wrangling would be “likely to continue until the first commission cases are brought” – a prediction that was proven over time. As researchers published criticisms of, and suggestions for revising, the military commission process – aided by legal challenges to the commissions brought in federal courts – the commission process was changed from what President Bush originally envisioned in 2001 to a much more robust legal system via the MCA 2006 and the Military Commissions Act of 2009 (“MCA 2009”). Each revision of the military commission system resulted in a new round of published research on the updated process, a trend that continues today. More recent published

research focuses less on the legal precedent that justifies (or fails to justify) the military commission system and focuses more on the legal challenges filed in response to cases prosecuted via commission and how these cases have changed the system – or at least the perception of it. These legal challenges – *Hamdan v. Rumsfeld* being the first and most well-known – focus on practical issues of security, legal representation and access, protection of classified information, and evidentiary procedure, issues that have been exposed as problematic in both commission and criminal courts and highlight that neither system is a perfect solution to prosecuting terrorists.

Based on the reviewed literature, the researchers can be broadly categorized into 1) those who conclude that military commissions are illegal or inappropriate for trying terrorism cases, 2) those who found that military commissions are legal and the appropriate venue for trials, and 3) those who believe that military commissions – regardless of their legality – are inappropriate for terrorism trials because they violate the spirit of the US commitment to the rule-of-law or contain some other moral flaw. The core disagreements between the above groups are those of presidential power and due process protections. Some examples of due process protections include whether non-citizen should be granted the same Constitutional protections as US citizens, how to handle evidentiary rules in battlefield conditions, and whether the President has exceeded his authority in creating military commissions through executive fiat.

Military Commissions are Illegal or Inappropriate for Terrorism Prosecutions

In its earliest form, military commissions were seen as illegal and an abuse of presidential power by critics, as President Bush attempted to justify the indefinite detention of terrorism suspects without access to legal counsel or due process, prohibit judicial review of detention and trial of terrorism suspects, all based on a military order that violated the separation of powers by

making the law, executing the law, and adjudicating the law, thus “allowing all three powers of government – legislative, executive, and judicial – to be concentrated in the presidency” (Fisher 2006, 2-3). Fisher’s basic argument is that since “the American constitutional system is founded upon the principle of the separation of powers” (Fisher 2006, 4), the Bush military order establishing military commissions is unconstitutional since it violates that separation. This consolidation of power in the executive raised concerns that it was the path to tyranny as the president could, without meaningful checks and balances from the other branches of government, simply dictate that a US citizen was an enemy combatant who would be held indefinitely without trial or access to legal counsel.

The Bush military order cited historical precedent for its authority to institute military commissions, but relied primarily on the *Ex parte Quirin* Supreme Court ruling for justification. The Department of Justice (“DOJ”) and some independent legal scholars agreed that *Quirin* and other cases, such as *Madsen v Kinsella*, support the finding that “absent congressional action to the contrary, the President has the authority as Commander in Chief to create military commissions” (MacDonnell 2002, 24). However, not all agreed with the *Quirin* argument noting that “the *Quirin* case was ‘not [the Supreme Court’s] finest hour’” (Fisher 2006, 2) and the legality of creating military commissions was not the only point of contention. Critics also believed that the 2001 military commissions system is illegal because it violates the constitutional rights of a US citizen to legal review because “subsequent judicial decisions [after *Quirin*] and congressional statutes have adopted important safeguards to protect US citizens from executive and military tribunals” (Fisher 2006, 13).

Not all critics believed the military commissions to be illegal, some simply felt that they were not the appropriate venue for trying terrorism cases, often because they find the system to

be unnecessary given the existence of the robust and long-established civilian criminal courts. One viewpoint holds military commissions to be redundant considering that “most of the conduct charged and tried ... in military commissions could be charged and tried in civilian criminal courts, under ordinary terrorism laws” (Cole 2013, 1). Another viewpoint is that civilian criminal courts are superior to the ad-hoc system of military commissions because criminal courts are well established and have clear rules for trials that “have been subjected to and survived repeated constitutional testing” (Cole 2013, 1) and are run by experienced trial judges that have a large body of legal precedent to rely on when making decisions. Military commissions, as a newly created system that is lacking the established trial processes of the civilian system, are seen as inferior and untrusted and the few trials that have been conducted were “rife with errors, misfires, and embarrassments” (Cole 2013, 2) and are presented as proof that the commissions system is flawed.

While Fischer’s fears that the violation of separation of powers would lead to tyranny were unfounded (federal courts have found that Habeas Corpus applies to both citizens and non-citizens regardless of where they are detained) his argument that military commissions are illegal was valid. Separately, Cole’s argument that military commissions lack legal precedent to rely on is somewhat spurious – there is no rule stopping commissions from utilizing civilian court precedents – it is true that military commissions suffer from a lack of constitutional testing. The original procedures for military commissions, in their first constitutional test via *Hamdan v. Rumsfeld*, were found to be illegal by the Supreme Court of the United States (“SCOTUS”). The military commissions system had failed its first test.

Congress responded to the SCOTUS ruling by approving the MCA 2006, an act that allowed “rules that depart from the strictures of the UCMJ [Uniform Code of Military Justice]

and possibly US international obligations” (Elsea 2014, 1). The changing procedures and procedural protections of the military commissions have put earlier convictions in jeopardy. Between 2007 and 2009 three terrorism suspects were convicted under the MCA 2006 guidelines – David Hicks, Salim Hamdan, and Ali Hamza Ahmad Suliman al Bahlul – and all three cases have either been overturned on appeal or are currently being appealed. The single conviction for Hamdan was overturned on appeal and al Bahlul successfully appealed two of three charges (with the remaining charge currently under appeal) after civilian courts found that their convictions were illegal under the MCA 2006 guidelines. The MCA 2006 was not the last round of legislative changes made to military commissions. After President Obama took office in early 2009, he stopped all military commissions in order to review commission procedures. The result was the MCA 2009, legislation passed by Congress that provided additional procedural protections for terrorism suspects being tried by military commission. It is possible that these revisions, like those that came before, may result in additional appeals and legal challenges to past prosecutions.

Military Commissions are Appropriate for Terrorism Prosecution

Supporters of military commissions, while fewer than supporters of the traditional law enforcement approach, have valid arguments for why military commissions are a legal and appropriate venue for prosecuting terrorism suspects. A core tenant of civilian criminal courts is freedom from unreasonable searches and seizures and civilian court procedures exclude evidence that was illegally obtained including information collected without a search warrant and statements made prior to the suspect being Mirandized. Another core tenant is chain-of-custody for evidence to prove that physical evidence presented at trial has not been tampered with or tainted by the prosecution. Commission supporters argue that when dealing with terrorism,

where suspects may be captured on a foreign battlefield, where waiting for search warrants is impractical, and where evidence cannot always be collected and cataloged in accordance with procedures mandated by civilian criminal courts, such evidence would be excluded from use in civilian courts. A lack of search warrants and chain-of-custody for evidence collected by soldiers on the front lines would preclude its use in a civilian trial because of strict evidentiary procedures. Military commissions take this concern into account and, as President Obama noted, allows “for the presentation of evidence gathered from the battlefield that cannot always be effectively presented in federal courts” (Cole 2013, 3). The MCA 2009 explicitly allows evidence to be used in military commissions even if “the evidence was not seized pursuant to a search warrant or other authorization” (Elsa 2014, 42).

A second argument supporting military commissions over civilian trials centers on protecting sensitive intelligence sources and methods and protecting classified information from exposure during trial. In its review of law enforcement and counter-terrorism prior to the 9/11 attacks, the 9/11 Commission found that because any information recorded and stored as part of building a case, including any analytical assessments, was “potentially discoverable in court ... there was a disincentive to share information” and FBI analysts “were discouraged from producing written assessments which could be discoverable and used to attack the prosecution's case at trial” (National Commission on Terrorist Attacks Upon the United States 2004, 3). While the 9/11 Commission was focused on information sharing, its findings make clear that the civilian court system could potentially expose sensitive information through the traditional discovery process. This concern was acknowledged by the Obama Administration and the MCA 2009 modified commissions procedures to “allow for the protection of sensitive sources and methods of intelligence-gathering” (Cole 2013, 3). Classified information is also protected by the

MCA 2009 to ensure that “the government cannot be compelled to disclose classified information to anyone not authorized to receive it” (Elsa 2014, 50) and, when necessary for the interests of justice, for an unclassified summary of the classified information to be substituted. Finally, understanding that it is possible for a suspect to be exposed to classified information either through the detention and interrogation process or through interaction with his attorney, the MCA 2009 allows for a military judge “to issue a protection order to prevent the disclosure of any classified information ... obtained by the accused” (Elsa 2014, 52).

It is these two core concerns – evidentiary rules and protection of classified intelligence and sources – that supporters argue proves that military commissions are the appropriate venue for terrorism prosecutions. A third, less commonly cited, argument is that criminal courts are too focused on success rates to effectively prevent terrorism. One study of the criminal justice system concluded that “police, prosecutors and forensic scientists often have an incentive to garner convictions” (Koppl and Sacks 2013, 1). While this study was focused on false convictions, rather than on comparing civilian courts to military commissions, it identified how there is an incentive to do anything necessary to secure convictions in civilian courts. The 9/11 Commission also noted an issue with incentivized prosecutions and reported that traditional law enforcement investigative and analytical processes were tailored in response to the FBI’s rewards system that measured success “based on statistics reflecting arrests, indictments, and prosecutions” (National Commission on Terrorist Attacks Upon the United States 2004, 3). The implication is that the traditional law enforcement approach was imperfect and failed to combat the threat of terrorism as alternative theories, analytical assessments, and investigative and prosecutorial resources were not fully exploited for fear of derailing a successful prosecution or that cases would only be pursued if they had a high likelihood of ending in success. In one

avored example of failure, the US declined to take custody of Usama bin Laden in 1996 because there was doubt that “we might not convict him in a federal court” (Wedgwood 2002, 329).

These same charges have not been leveled at the military commissions system, possibly because military assets are pulled from an existing pool of personnel and assigned to counter-terrorism investigations and prosecutions on a temporary basis by the Secretary of Defense, unlike the FBI where assets are permanently assigned to a specific unit such as counter-terrorism, a position considered a “backwater” assignment prior to 9/11 (National Commission on Terrorist Attacks Upon the United States 2004, 4). Since assignment to a military commission is temporary and not a permanent assignment that affects career advancement or other rewards, it is possible that there is less personal incentive to garner convictions. Additionally, the rules for military commissions specifically prohibit “external interference with the independence of military personnel working on any aspect of the proceedings” (Newton 2009, 157-158) in order to preserve due process.

Military Commissions are Unethical or Immoral

Outside of legal criticisms of military commissions is a subset of critics who find moral and ethical flaws in the military approach to prosecuting terrorists. In its earliest form, the military commissions procedures were so disliked that they were “denounced” by the National Association of Criminal Defense Lawyers and its members barred from participating in military commissions because it “would be a violation of its ethical rules” (McDavit 2005, 988). Criticisms ranged from disagreeing with the government policy of indefinite detention to concerns over a lack of meaningful judicial oversight. Some believed that MCA 2006 rules “permitted the introduction of coerced testimony” (Cole 2013, 2) and constituted de facto government acceptance of torture and inhumane treatment. Others believed that military

commissions are inherently inequitable because only foreign nationals are subject to trial by military commission – a US citizen will always be tried in a civilian criminal courts – and their lesser procedural protections and therefore “are discriminatory on their face” (Cole 2013, 2).

In most cases these criticisms are not legal arguments and are simply a political belief couched in ethical terms. Events have proven that there is meaningful judicial review with "federal courts ... active in overseeing, and on occasion overturning, the work of the military commissions" (Newton 2009, 170). Where specific legal arguments are made, such as the case of coerced evidence, they are often no longer valid. For example, under the MCA 2009, “statements obtained through cruel, inhuman or degrading methods [are] inadmissible regardless of when they were made” (Elsa 2014, 27). The US is still criticized for a paradigm of indefinite detention (a purely ethical complaint since there is Habeas Corpus relief and judicial review of a person’s detention status), but this does not affect the legitimacy of convictions in either the criminal court system or military commissions.

Conclusion

The literature extensively explored the legal issues surrounding military commissions and thoroughly compared commission procedures and protections to those of civilian criminal courts. However, the literature contained little or no research on the success of either system in prosecuting terrorism offenses and did not compare conviction and appeal rates or the appropriateness of the sentences handed down for either judicial system. This is not unexpected given the limited number of convictions secured by military commissions to date and the focus on legal theory by most researchers. This research paper will review the efficacy of the law enforcement approach to the military approach for prosecuting terrorists.

One aspect of this research will focus on the sentences handed down in cases that resulted in a conviction. The sentences will be reviewed and compared to the crimes to identify whether the sentences are meaningful. Meaningful is often subjective and it is necessary to understand how the two legal systems determine sentences – because they differ completely. Civilian courts use Federal Sentencing Guidelines when determine sentences while military commissions rely more on the discretion of the presiding judge and commission members during sentencing. There is a limited body of literature to assist in this research. One anonymous article published in the Harvard Law Review compared sentencing in civilian criminal courts – where sentences were “more tightly controlled by Congress and the President” (Harvard Law Review 2007, 1848) through federal sentencing guidelines – to military commissions where sentences are determined by a panel of five to twelve members. The anonymous author argues that the indeterminate sentencing used in military commissions is superior because “political involvement in sentencing would likely produce more harshness than justice” (Harvard Law Review 2007, 1848). This comparison of sentencing guidelines highlights that, while sentencing in terrorism cases is a useful variable in comparing the efficacy of the law enforcement and military approach to countering terrorism, it is not a one-to-one comparison and sentencing guidelines must be considered when comparing sentences between the two approaches.

It is obvious that both legal systems attempt to punish crimes and deter future crimes, however, the system better suited for terrorism prosecutions must be determined. Proponents of both systems have valid points and, while military commissions is the only system solely dedicated to ensuring national security, it is not clear that the criminal court system isn't robust enough to handle terrorism prosecutions even in cases involving classified and sensitive information and intelligence sources. This research paper proposes to qualitatively identify

which legal system is most capable of securing successful convictions of terrorism suspects, a significant indicator that will help policymakers choose the appropriate venue for the detention, interrogation, and trial of international terrorism suspects.

CHAPTER III

RESEARCH METHODOLOGY

Theoretical Framework

Although the legitimacy of military commissions has been thoroughly researched and the commission process legislatively revised in response to identified shortfalls and legal challenges, there is no research comparing the efficacy of securing prosecutions in criminal courts versus military commissions. This paper is proposed as a way to partially fill the research gap and provide insight into which legal system is best suited to effectively prosecuting terrorism cases.

As of March 2014, only eight military commissions have been completed (Elsa 2014) – a very limited sample size – while hundreds of cases have been prosecuted in the longer established criminal courts. This disparity in sample size precludes the use of a purely quantitative research method that looks at conviction rates. Additionally, simply relying on conviction rates is not a viable quantitative approach to measuring efficacy because of a possible conviction bias. As a measure of job performance, “prosecutors are often measured by their conviction rates” (Koppl and Sacks 2013, 33) a condition that, arguably, leads prosecutors to only pursue cases that have a higher likelihood of resulting in a conviction. If prosecutions are only pursued when a conviction is highly probable, the conviction rate for trials will be skewed upwards.

Given these limitations, a qualitative descriptive approach was chosen to study the efficacy of the two legal systems. While conviction rates will be an important factor, they will not be the only one because they do not tell the whole story. As an example, military commissions have a 100% conviction rate, but 50% of those convictions are currently under appeal and one – the conviction of Salim Hamdan of *Hamdan v. Rumsfeld* fame – has already

been overturned by the US Court of Appeals for the DC Circuit (Elsea 2014, 5). Hamdan's successful appeal highlights one issue with relying on a newly formed legal system: a lack of legal precedent. Hamdan successfully argued that the Military Commissions Act of 2006 did not authorize ex post facto prosecution, an unclear position in military commissions that is perfectly clear in federal courts where the Constitution prohibits ex post facto prosecution based on two previous cases (*Collins v. Youngblood* and *California Department of Corrections v. Morales*). Although the ex post facto rules were changed by the Military Commissions Act of 2009, a change that allowed the successful prosecution and overturned appeal of another Guantanamo detainee in *United States v. Al Bahlul*, a suspected terrorist was allowed to go free because of unclear legal precedent and rules in the newly established military commissions system.

This research will demonstrate that civilian criminal courts are more effective in prosecuting international terrorism cases than military commissions because federal courts have trusted rules of evidence and a larger body of case law that can be used to establish precedent for convictions.

This study is significant because it serves to qualitatively identify which legal system is most capable of securing successful convictions of terrorism suspects, a significant indicator that will help policymakers choose the appropriate venue for the detention, interrogation, and trial of international terrorism suspects.

Research Design

Using existing records from modern terrorism criminal cases that have been prosecuted in federal courts or military commissions as its primary data source, the research paper will be a qualitative descriptive study. Where appropriate, third-party legal analysis of the cases will be used to clarify complex legal issues or expound upon especially controversial areas of terrorism

prosecution. The data reviewed for this research paper will include international terrorism-related prosecutions in federal criminal courts or military commissions between 1983 and present.

Choosing which federal court cases will be included for study is somewhat subjective, especially given the difficulty in defining terrorism. The definition of terrorism “has changed ... frequently over the past 200 years” and has become so over-used that “virtually any especially abhorrent act of violence that is perceived as directed against society ... is often labelled ‘terrorism’” resulting in “no one widely accepted or agreed definition for terrorism” (Hoffman 1998, 13-37). Without a concrete definition, the decision to include certain cases for study is subjective. This can be seen in the controversial case of Nidal Malik Hasan, the former US Army officer who shot 13 people at Fort Hood in 2009. Many consider the Fort Hood shooting to be a clear act of terrorism because of Hasan’s links to Anwar al-Awlaki – and the Center on Law and Security at New York University School of Law includes it as a significant terrorist attack in its Terrorism Trial Report Card (2011) – yet the Department of Defense (“DOD”) and the White House have labelled the shooting as workplace violence. Officially, the charges against Hasan were not terrorism or national security related, rather he was charged with thirteen counts of premeditated murder and thirty-two counts of attempted premeditated murder (Fort Hood Press Center n.d.).

What constitutes a terrorism-related case became a national debate in late 2009 as part of the larger military commissions vs. federal courts conflict. The Obama Administration elected to transfer the trial of Khalid Sheik Mohammed from military commissions at Guantanamo to the federal court system and argued that federal courts were the proper trial venue given their proven successes in convicting terrorists. The DOJ claimed success in 300 terrorism-related trials, a claim that was criticized by supporters of military commissions as being inflated and overly-

optimistic. In response to critics – primarily the very vocal Senator Jeff Sessions – of the DOJ’s claimed success against terrorists, a list of 403 terrorism-related cases and included categories of offenses and sentences levied was provided to Congress. After reviewing the case list, Sessions noted that “most of the convictions [for terrorism listed by the DOJ] are for far lesser offenses, such as document fraud and immigration violations” (Ramonas 2010) and are not nearly as severe as the charges levied against terrorism suspects in military commissions. It is clear that the DOJ was counting the simplest of charges, such as making false statements, as terrorism convictions and this acknowledged disparity between charges levied in federal courts and charges in military commissions played a role in which federal court cases were selected for this study.

The limited number of commission cases also played a role in federal court case selection. Currently, only twelve cases are active or have been completed under the Military Commissions Act (US Office of Military Commissions n.d.) as compared to the 403 federal court cases listed by the DOJ (Ramonas 2010). Given the limited number of commission cases, charges levied in the commissions were used as a template to identify similar cases prosecuted via the federal courts. Only major terrorism-related charges have been levied in active and completed commission cases – primarily material support to terrorism, conspiracy, murder and attempted murder – and are comparable to charges listed by the DOJ as “Category I” terrorism offenses (US Department of Justice 2010).

As a result of the above conditions, in an effort to ensure a valid comparison between the two legal systems, only major federal court cases with charges that fall under Category I offenses are included in this study. Additionally, in order to keep research focused on the core problem statement of non-state-sponsored international terrorism, any cases where the perpetrator was not

acting on the behalf of, or in support of, a known international terrorist organization – for example cases related to state-sponsored terrorist groups such as HAMAS or related to domestic terrorist groups — will be excluded from this research study. Finally, given the make-up of persons charged in military commissions, all selected federal court cases will include only non-US persons who were captured outside of the US.

With criteria established for selecting terrorism cases, online databases and websites operated by the federal government – such as the DC Circuit Court and the Office of Military Commissions – and established research institutions will be queried for matching cases. Each matching case will be reviewed for indicators such as the length of the trial, whether the trial resulted in a conviction or an acquittal, whether an appeal was filed, the length of the appeal process, and the result of the appeal. For cases that resulted in a conviction, the sentence handed down will be reviewed and compared to the crime to identify whether the sentence was meaningful. Although meaningful is often subjective, the US publishes federal guidelines for sentencing that can be used as a measure to compare criminal court sentences to military commission sentences. The court rulings and opinions gathered from the sources noted above will be reviewed for data identifying why the prosecution or appeal was a success or failure and cross-checked against documented procedures in both legal systems to determine which system had a greater possibility of securing the desired conviction.

CHAPTER IV

FINDINGS AND ANALYSIS

The Choice of Lead Investigating Agency Determines Trial Path

Before an indictment is issued in federal courts, and before charges are levied in military commissions, there is a period of investigation and detention. The two primary systems for gathering information about a terrorism suspect – law enforcement interviews and military interrogations – are a major factor in determining which legal system will prosecute a suspected terrorist. In cases where the FBI (or other non-military law enforcement organization) is the primary investigative agency, prosecution is inevitably held in the federal court system. Where the military (or other intelligence agency) is the primary detention and investigation organization, military commissions are the resulting venue for prosecution. All twelve active or completed military commissions at Guantanamo involve terrorism suspects captured by either the US military or the CIA with primary interrogation/investigation duties falling to the US military. All of the dozens of terrorism-related federal court cases reviewed were led by the FBI following the traditional law enforcement approach to prosecuting terrorists. This trend is maintained even with the introduction of the third – modified law enforcement – approach; all terrorism suspects prosecuted under the modified law enforcement approach have also been indicted in federal courts rather than charged in military commissions.

The Obama Model

First tested in 2009 with the prosecution of terrorist suspect Ahmed Khalfan Ghailani, the modified law enforcement approach – sometimes dubbed “the Obama model” (Johnson 2013) – combines initial military capture, detention, and interrogation of terrorism suspects with secondary detention, interrogation, and criminal prosecution by the FBI and federal courts. In

some cases, the capture, detention and interrogation of terrorism suspects by the US military is conducted under the coordination of, or cooperation with, federal law enforcement agencies. The traditional military and law enforcement approaches are well documented and the subject of thorough research. The Obama model is less well known and not thoroughly tested.

The traditional law enforcement approach did not involve military or intelligence agencies in the investigative phase of prosecuting terrorists. This changed in 2009 when the White House's Special Task Force on Interrogations and Transfer Policies recommended the creation of a joint law enforcement/military/intelligence agency interrogation group, the High-Value Detainee Interrogation Group ("HIG"). The Task Force believed that "the United States could improve its ability to interrogate the most dangerous terrorists by forming a specialized interrogation group ... that would bring together the most effective and experienced interrogators and support personnel from across the Intelligence Community, the Department of Defense and law enforcement" (US Department of Justice 2009).

When Omar Faruk Abdulmutallab was arrested in Detroit, Michigan for attempting to set off explosives on an airliner in December of 2009, his arrest and questioning by law enforcement ignited debate over why the Obama model – and the HIG – wasn't used in his interrogations (Ackerman, Intel Chief Says New Interrogation Unit Ought To Have Questioned Abdulmutallab 2010). It wasn't clearly understood by those calling for using the HIG that Abdulmutallab fell under the traditional law enforcement model – and, amusingly, that the HIG was not yet operational (Associated Press 2010) – and not the Obama model. Abdulmutallab was not a fugitive captured by the military in a failed state halfway around the world and held for months of interrogations, he was arrested on US soil and immediately turned over to the FBI. Despite his falling easily into the law enforcement model, the debate raged over how the administration

handled the interrogations. Specifically, the debate was over whether Abdulmutallab should be handled as a criminal or an enemy combatant (Isikoff 2010), i.e. whether suspects should be prosecuted via the law enforcement or military approach. Which approach has the best chance of stopping follow-up attacks while still allowing for Abdulmutallab's successful prosecution? Should he be given Miranda rights? Does the law enforcement approach, with its Miranda protections, hinder the ability to extract national security information from the suspect?

Miranda Protections

The Miranda protections are a key point of debate between the different approaches to combating terrorism. The Miranda Warning is the practice of notifying criminal suspects of their legal right to not answer law enforcement questions – created in the landmark *Miranda v. Arizona* Supreme Court decision 1966. The Miranda notification is currently used by law enforcement agencies in the United States and was created in an attempt to reduce the stress of interrogations in detention by giving the suspect some control in the form of legal protections and the right to remain silent. The use of Miranda with terrorism suspects is controversial because critics feel that it negatively affects the ability to extract national security information from terrorism suspects (Tapper 2010). Critics of Miranda protections imply that a suspect will immediately stop cooperating with interrogators once informed of his rights. This view also implies that the suspect was cooperating at all and further implies that interrogators will simply stop trying to get information post-Miranda. These views are parochial.

It is unclear how Miranda affects national security intelligence collection given the sensitive nature of the information although supporters of Miranda contend that “the giving of Miranda warnings has not deterred people from talking [to the US government]” (Branigin and Kornblut 2010). On the prosecution side, studies on the effects of Miranda on extracting

confessions from suspects are contradictory and have found both “an inhibiting effect” resulting in lower confession rates and that “*Miranda* has made no statistically significant difference in the confession rate” (Cassell and Hayman 1996). Confession rates aside, information gathering does not simply stop under *Miranda* and interrogators continue to use “psychological strategies to get suspects to voluntarily waive their *Miranda* rights” (Gudjonsson 2003) and are able to secure guilty pleas from many terrorism suspects. Of primary importance, *Miranda*, regardless of its effect on intelligence collection or confessions, has no negative effect on securing convictions. *Miranda* protections were given to Abdulmutallab, Faisal Shazad, and dozens of other terrorists that have been successfully convicted through the traditional law enforcement approach.

Intelligence Gathering

The second major accusation made by critics of the Obama model is that law enforcement activities and intelligence collection are incompatible and that prosecution should never take precedence over extracting intelligence to prevent future attacks. With each major terrorist arrest, the balance of security versus suspect rights is questioned: “when we detain terrorism suspects, our top priority should be finding out what intelligence they have that could prevent future attacks and save American lives ... our priority should not be telling them they have a right to remain silent” (Baker 2010).

After the arrest of Abdulmutallab, members of Congress and the Obama Administration traded blows over the decision to offer *Miranda* rights. Congress believed that the White House was less-than-forthcoming about *Mirandizing* Abdulmutallab (Tapper 2010) while White House advisor John Brennan chastised Congress for not understanding that Abdulmutallab had been immediately given *Miranda* protections by the FBI (Reddy 2010). It should have been clearly

understood that Miranda rights are mandatory under the law enforcement model. It is not so clear when Miranda rights apply under the Obama model.

Since the creation of the HIG, the Obama model has been used for terrorism suspects that are operating outside of the United States. Suspects are captured and detained by the US military before being interrogated by the HIG in an effort to extract national security information from terrorism suspects while “reserving the right to prosecute them later in [federal] courts” (Johnson 2013). Like the law enforcement model, suspects under the Obama model are offered Miranda rights – eventually. The initial interrogations by the HIG may not offer the terrorism suspect Miranda protections, but, at some point interrogations transition to a more traditional law enforcement model where the suspect is offered Miranda protections prior to additional law enforcement questioning and possible federal indictments. What the Obama model allows for, that the traditional law enforcement model does not, is a period of non-Miranda protected intelligence collection. This intelligence collection activity will be further discussed in the case of Ahmed Khalfan Ghailani.

Four Court Cases

There are only four cases utilizing the Obama model to date – including its Miranda protections – those of Ahmed Ghailani, Ahmed Warsame, Abu Anas al Liby, and Ahmed Abu Khattalah. Although all were prosecuted under the Obama model, the cases are all slightly different. In one case the US military acted alone to detain a terrorism suspect rather than acting jointly with law enforcement, in another the CIA detained a suspect for years prior to his being transferred to federal court, and in two cases the military acted under the authority of federal law enforcement to capture suspects and transfer them to the US for trial.

Case 1: Ahmed Khalfan Ghailani

US v. Ahmed Khalfan Ghailani appears to be one of the earliest federal court cases prosecuted under the Obama model. An extremist who was originally detained and interrogated by the Central Intelligence Agency (“CIA”) before being turned over to military detention at Guantanamo, Ghailani was originally charged in military commissions with multiple charges including “murder of protected persons, attacking civilians, attacking civilian objects, intentionally causing serious bodily injury, murder in violation of the law of war, destruction of property in violation of the law of war, terrorism, providing material support for terrorism, and conspiracy” (US Office of Military Commissions n.d.). In the only known case of its kind, the military commission charges were dismissed in 2009 and Ghailani was transferred to the US for trial in the US District Court for the Southern District of New York after a “change in policy” (United States v. Ahmed Khalfan Ghailani 2010). Ghailani is a unique case because of the age of the indictment, having first been indicted in 1998, and the number of years between his capture in 2004 and his federal court arraignment in 2009. The only similar case is that of Abu Anas al Liby, a terrorism suspect who was also indicted in 1998. Al Liby, however, had minimal time – less than one month – between his capture and arraignment in 2013. Ghailani is included as an example of an Obama model case because of his detention by intelligence agencies followed by prosecution in federal courts. It can be argued that Ghailani falls under the traditional law enforcement approach because he was indicted in federal court in December of 1998, had an active arrest warrant at the time of his capture, and was tried under the 1998 indictment and not for terrorist actions post-9/11. Also, despite his capture, detention and interrogation by military and intelligence agencies, the court records make clear that only statements from FBI

investigators and FBI-interviewed witnesses that were part of the original 1998 law enforcement investigation made up the bulk of the trial evidence.

For this study, Ghailani is included because of the case's importance to the validity of the Obama model. Because of the involvement of intelligence agencies and their controversial interrogation tactics, a major question in the Ghailani trial was related to the admissibility of allegedly coerced testimony, specifically "whether the government may use ... the testimony of a witness whom the government obtained only through information it allegedly extracted by physical and psychological abuse" and the court answered with a resounding rejection of coerced testimony and concluded that the government "may not use that evidence—or fruits of that evidence that are tied as closely related to the coerced statements" (United States v. Ahmed Khalfan Ghailani 2010). This ruling has ensured that any intelligence gathered by the joint law enforcement/intelligence HIG prior to transfer to the Miranda-protected law enforcement stage of the Obama model cannot be used in federal court prosecutions. It also delineates a clear break between information gathered pre- and post-Miranda to ensure that pre-Miranda classified intelligence, where a suspect may claim the information was extracted via torture or coercion, will not be used in federal court.

Two other major court decisions favor including Ghailani in this study because of their validation of the Obama model as being capable of gathering national security intelligence from a terrorism suspect prior to trial in federal courts. The first court decision is related to controversial interrogation tactics and whether subjecting Ghailani to enhanced interrogation techniques was grounds to dismiss the charges against him. Defense attorneys moved "to dismiss the indictment on the ground that [Ghailani] was tortured by the CIA in violation of his rights under the Due Process Clause of the Constitution" (United States v. Ahmed Khalfan Ghailani

2010). The courts sidestepped the issue of whether Ghailani was tortured, but did find that any alleged abuse or government misconduct did not warrant dismissal of the indictment. Thus, any allegedly pre-Miranda coercive interrogation of the suspect would not negatively impact the ability to indict in federal courts.

The second decision from *US v Ghailani*, addresses the balance of priorities between extracting national security information and prosecuting the suspect. After his capture in 2004, it was decided that prosecuting Ghailani would be delayed in favor of interrogating him for national security information. As a result of this decision he was held in CIA custody until 2006 and in military custody at Guantanamo until 2009. In a legal motion, Ghailani argued that his arrest in 2004 gave the government two mutually exclusive options: detain him for questioning or prosecute him under the 1998 indictment. He claimed that the decision to delay prosecution violated his right to a speedy trial. If true, the decision to delay prosecution to gather intelligence could derail future prosecutions of terrorism suspects and give credence to the critical view that intelligence and law enforcement were incompatible. The motion failed and the federal court rejected Ghailani's arguments and found that the delay in prosecuting him did not violate his right to a speedy trial. The delay did not present an advantage to the Government's case and also "served compelling interests of national security" (*United States v. Ahmed Khalfan Ghailani* 2010) – the charges were not dismissed. This ruling by the District Court provides the government legal precedent to detain and interrogate terrorism suspects for national security purposes without fear of forfeiting future prosecution.

Those critics who argue that law enforcement and intelligence are incompatible and that prosecution should never take precedence over extracting intelligence to prevent future attacks are incorrect. The Court's rulings on non-law enforcement interrogation tactics and on delaying

prosecution to gather intelligence in support of national security – with or without Miranda protections – eviscerate the argument that the Obama model limits the ability to gather information or favors prosecution over national security.

This case, as the first of its kind under the Obama model, was not without legal controversy and a conviction was not guaranteed. Indeed, Ghailani’s conviction was a mixed verdict with the court finding him guilty of a single count of conspiracy to destroy government buildings and property and acquitting him on nearly 300 counts of murder. Because it resulted in acquittal on the majority of the charges, despite the conspiracy conviction resulting in a life sentence in prison, the case did not settle the debate over whether federal courts or military commissions were the appropriate venue for terrorism prosecutions despite court rulings supporting the Obama model.

Case 2: Ahmed Abdulkadir Warsame

Ahmed Abdulkadir Warsame, a young Somali man, was captured by the US military in mid-April of 2011 while he was aboard a small boat in the Gulf of Aden between Yemen and Somalia. Warsame was “questioned for intelligence purposes for more than two months” (US Attorney’s Office 2011) while under military detention on board a Navy ship (Savage 2011). Warsame’s interrogations appear to follow the template authorized by the *US v. Ghailani* rulings: delayed prosecution in order to extract intelligence without endangering future indictments. After two months of interrogations, there was “a four-day break between his interrogation for intelligence purposes and separate questioning for law-enforcement purposes” with the law enforcement interviews being done after giving Warsame a Miranda warning to allow prosecutors to “have a better chance of being allowed to use his statements as evidence” (Savage 2011). The US Attorney’s Office released a statement that Warsame had waived his Miranda

rights and continued to speak “to law enforcement agents for several days” (US Attorney’s Office 2011) before being indicted on nine terrorism-related charges in federal court. To make clear that the handling of Warsame met the needs of both national security and criminal prosecution, the National Security Council released a statement that the decision to transition to law enforcement questioning for prosecution was only made after intelligence agencies had decided that they were satisfied with his “comprehensive” interrogations (Savage 2011) and the information gathered during interrogations “was not used against him in the criminal case” (Dilanian, Terrorism suspect secretly held for two months 2011) and completely avoided the concern of exposing classified information during trial.

Warsame’s case is unique because it is the first alleged use of the HIG in the interrogations of a terrorism suspect captured overseas (Dilanian, Terrorism suspect secretly held for two months 2011) and processed under the Obama model. It is also the first case that didn’t involve detention at Guantanamo or CIA prison facilities; it proposed a solution to the question of where to detain terrorism suspects outside of Guantanamo during pre-law enforcement interrogations. This “significant new step” (Dilanian, Terrorism suspect secretly held for two months 2011) in where to detain terrorism suspects was to simply hold the suspect on a Navy ship at sea during interrogations. The practice is not new – human rights groups had accused the US of holding suspects aboard ships as early as 2008 and at least one former Guantanamo detainee, David Hicks, claimed to have been interrogated aboard a Navy ship in 2001 – and, to the consternation of human rights groups, is still one of extrajudicial detention. It does however, provides a viable solution to incarceration at Guantanamo, CIA-run prison sites, or the outsourcing of detention to third-party countries.

It is not clear whether detention aboard a Navy vessel would cause issues with prosecution should a terrorist suspect make it an issue during trial; within a few months Warsame pleaded guilty to all charges against him. He faces a mandatory minimum sentence of life in prison, but has yet to be sentenced and has been so cooperative post-plea that “he will not be sentenced until the [US] government has decided it no longer requires his assistance” (Ackerman 2013).

Case 3: Abu Anas al Liby

The third case prosecuted under the Obama model is that of Abu Anas al Liby aka Nazih Abdul Hamed al Ruqai. The case bears some similarity to *US v. Ghailani* – both were indicted in 1998 for crimes related to the US Embassy bombings in Kenya and Tanzania – and also to *US v. Warsame* – both were captured by US military forces in international territory and were interrogated by the HIG team aboard US navy vessels. It is not clear if al Liby was given Miranda protections or questioned for law enforcement purposes prior to being transferred to law enforcement custody. Where *US v. al Liby* is different comes from the circumstances surrounding his capture. Unlike Warsame, who was believed to be in international waters between Yemen and Somalia when captured, al Liby was “forcibly removed” (United States v. Anas al Liby 2013) by the US military from within the sovereign territorial boundaries of Libya. Al Liby’s capture was an immediate focal point for defense attorneys as the chief federal public defender argued in US District Court that al Liby should be arraigned immediately because he was “not aware of any lawful basis for the delay in [al Liby’s] appearance and the appointment of counsel” (Dilanian 2013).

The trial of al Liby has not yet begun, but it will be the first test of the Obama model for a suspect taken – allegedly without the compliance of the foreign government who called the

operation a “kidnapping” (Karadsheh, Cruickshank and Shoichet 2013) – from within the borders of a sovereign nation. What effect the possible violation of territorial boundaries will have on the prosecution of al Liby has to play out in court but initial signs are promising. In an early motion filed for al Liby, defense attorneys sought to have the charges dismissed “for lack of jurisdiction on the grounds that his apprehension [in Libya] and treatment prior to being presented to this Court violated (1) the *Ker-Frisbie* doctrine, (2) the Posse Comitatus Act, and (3) international treaties” (United States v. Anas al Liby 2013). Al Liby alleges that he was not provided Miranda rights, was subjected to inhumane treatment during interrogations, and was illegally detained by US forces in violation of international treaties and agreements. The court found for the government and “denied in all respects” the motion to dismiss the indictment ensuring that a terrorism suspect could stand trial in federal courts “regardless of the method used to bring him to this Court” (United States v. Anas al Liby 2013).

Case 4: Ahmed Abu Khattalah

The fourth, and final, case being prosecuted under the Obama model is that of Ahmed Abu Khattalah, the Libyan militant leader believed to be behind the attacks against the US mission in Benghazi, Libya on the 11th anniversary of the 9/11 attacks. Like al Liby, Khattalah was allegedly captured by US military commandos from within the territorial boundaries of Libya before being taken to a Navy ship in the Mediterranean Sea where he was interrogated (Martinez, Perez and Starr 2014). He was read the Miranda warning before leaving the Navy warship (Schmidt and Schmitt 2014) and being transferred to law enforcement detention in Washington, DC. The capture operation was conducted without the knowledge of the Libyan government and was described by US officials as a “unilateral US action” (Schmidt, Baker and Schmitt 2014). In the case of al Liby, it is not clear whether the capture was a military or law

enforcement action but the capture of Khattalah was allegedly a law enforcement operation carried out as a joint mission between the US military and FBI agents under law enforcement authority. Despite the law enforcement role in Khattalah's capture, the case is being included in the study as representing the Obama model because of the inclusion of the US military in his capture, the multi-week period of interrogation aboard a Navy warship, and the assertion that FBI involvement "does not mean that ... Khattala[h] was read a Miranda warning" (Schmidt, Baker and Schmitt, U.S. Seizure of Suspect in 2012 Benghazi Assault Ends Long Manhunt 2014). A second media report clarified that Khattalah wasn't given a Miranda warning until just before leaving the Navy ship as he was being flown to Washington, DC (Schmidt and Schmitt 2014). Presently, only the initial and superseding indictments against Khattalah have been unsealed by the courts and there are no additional court documents available in any online legal databases. Khattalah pled not guilty to both the original indictment and additional charges, but the disposition of this case remains to be finalized.

US v. Khattalah may be another watershed moment for the Obama model. Unlike previous cases where there was a distinct separation between intelligence-gathering interrogations and law enforcement interviews, and therefore a distinct separation between classified and unclassified information to be used during the trial, the Khattalah case involves prosecutors and defenders reviewing "thousands of thousands of pages" of documents and "hundreds of hours of video" (Courson 2014) that contained unclassified and classified information. The case also shows the difficulty in using traditional law enforcement methods in a dangerous and hostile country. Security conditions in Libya did not allow FBI investigators to quickly reach the scene and it was many weeks before they could gather evidence and the hostile environment makes finding and interviewing Libyan witnesses difficult (Schmidt and Schmitt

2014). No trial date has been set by the federal judge overseeing the case as the court addresses issues with the handling of classified materials related to the trial.

Beyond the concerns with classified data, there may be other legal issues to address in *US v. Khattalah*. At least one legal scholar has raised issues related to how Khattalah was captured in Libya because, unlike *US v al Liby*, the operation was not conducted under military authorization – Khattalah’s capture was a law enforcement operation. Legally there are questions over whether a law enforcement agency can violate the territory of another country without that country’s consent, consent that is missing from the capture of Khattalah in Libya, or as a defense against future attack (Lederman 2014). The only available documentation related to this question is in the form of a letter from the US Ambassador to the United Nations, Samantha Power, to the United Nations claiming that the capture of Khattalah was “necessary to prevent ... armed attacks” and an “inherent right of self-defense” (Power 2014), but the letter offers no evidence to support those statements.

A second potential legal issue is whether the time on board the Navy warship constitutes a violation of Khattalah’s right to a speedy trial by “[serving] to delay presentment and facilitate interrogation without counsel” (Hafetz 2014). The legal precedent set in *US v. Ghailani* found that a delay in prosecution did not provide the Government’s case an advantage and “served compelling interests of national security” (*United States v. Ahmed Khalfan Ghailani* 2010). This precedent may not apply to *US v. Khattalah* if the Government gained an advantage through the delay or if the delay was unnecessary or did not serve the interests of national security.

Excluded Cases

In reviewing terrorism-related federal court cases, two cases appeared to fall under the Obama model but did not meet the criteria necessary for inclusion in this category. Both cases

involved a suspected terrorist being captured in foreign countries by US operatives before being transferred to law enforcement custody for federal prosecution.

Case 1: Sulaiman Abu Ghayth

Sulaiman Abu Gayth is an Al Qaeda member and the son-in-law of Usama bin Laden. Abu Gayth was indicted under the existing criminal conspiracy case against the perpetrators of the 1998 US Embassy bombings in East Africa. According to media reports, Abu Gayth was initially detained in Turkey after leaving Iran and was detained there for over 30 days. The Turkish government refused to transfer him to US custody and instead deported him to Kuwait via Jordan. In Jordan he was captured, allegedly by “US operatives” (Barrett, Gorman and El-Ghobashy 2013), before being flown to New York by the FBI. Media reports are unclear on the circumstances of capture with some reporters claiming CIA involvement in his capture and others the more generic US operatives. Without further documentation, this case could easily be a traditional law enforcement action with the US Department of State (“DOS”) coordinating the capture and extradition of a terrorist suspect from Jordan, a country with a long history of cooperating with US counter-terrorism efforts.

The case of *US v. Sulaiman Abu Gayth* is excluded from the Obama model because, based on the available limited data, there was no distinct period of pre-Miranda intelligence questioning followed by post-Miranda questioning by a new law enforcement team. It is clear that the government did not transfer the suspect to the US via Navy warship – to allow additional time for interrogations – but instead flew the Abu Gayth directly to the US for prosecution in federal courts.

Case 2: John Walker Lindh

US v. John Walker Lindh is one of the earliest federal prosecutions post-9/11 attacks. Lindh was captured by the Northern Alliance in operations conducted in northern Afghanistan in late-2001. According to defense motions, Lindh was first interrogated by two Americans who were later identified as CIA operatives before being moved to the Northern Alliance detention facility at Sheberghan. Lindh was again interrogated, this time by US Special Forces members as part of an “ODA” (*United States v. John Phillip Walker Lindh* 2002) – an acronym for Operational Detachment-Alpha – on at least two occasions while detained at Sheberghan prison. During these interrogations he was not given Miranda warnings. After being transferred from Sheberghan to a facility at Mazar-e-Sharif, Afghanistan, Lindh was again interrogated multiple times by members of the US military. His detention and interrogation by the US military continued after being transferred to Camp Rhino south of Kandahar, Afghanistan. After a few days of military interrogations, Lindh was questioned by an FBI agent at Camp Rhino and notified of his – allegedly waived under duress – constitutional rights. Additional FBI interviews followed before his eventual transfer to a US Navy warship. After a relatively short, messy trial, Lindh pleaded guilty in July of 2002 and was sentenced to 20 years in prison.

The Lindh case has some elements similar to an Obama model prosecution including capture and initial detention and interrogation by military forces and intelligence agencies without Miranda protections before transfer to law enforcement control for prosecution in federal courts. This case is not included in this study as an example of a modified law enforcement model prosecution because its path from military to law enforcement control was completely ad hoc and not part of a pre-determined prosecution model. Additionally, as a US citizen, Lindh should have been immediately moved into the existing law enforcement prosecution model with

all of its legal and procedural protections guaranteed to citizens because the military order guiding the detention, treatment, and treatment of terrorism detainees applied only to non-citizens at the time of his detention.

Summary of Findings

The Obama model, a modified law enforcement approach to prosecuting terrorism suspects, was created to satisfy the needs of national security and due process and as a valid path for prosecution of foreign nationals without utilizing detention at Guantanamo or trial by military commission. Despite only four identified cases prosecuted under the Obama model, it is the preferred method for prosecution under the Obama Administration. Legal challenges still await this model, but initial legal testing is positive with successful prosecutions of Ghailani and Warsame – a 50% conviction rate – that have resulted in one life sentence and one pending sentence that has a statutory minimum sentence of life imprisonment. Two cases are pending trial and may present unique legal challenges that, if overcome, will confirm the Obama model as a valid prosecution option and one superior to military commissions for terrorism suspects captured outside of the US. Some aspects of the model are still controversial including rendition of suspects in possible violation of international law and extrajudicial detention without Miranda protections, but human rights opposition to the Obama model is much less than opposition to the military prosecution model if, for no other reason, because they result in trials in federal courts and “prohibit evidence obtained by torture” (Center for Constitutional Rights 2010) as affirmed in *US v. Ghailani*.

The Military Prosecution Approach

Just as the handling of John Walker Lindh was an ad-hoc affair, so too was the creation of the military approach to prosecuting terrorism. The destruction wrought by the 9/11 attacks was unprecedented in US history, never before had a terrorist organization succeeded in conducting a mass casualty attack on US soil. In response to these attacks, Congress passed a Joint Resolution – the Authorization for the Use of Military Force (“AUMF”) – on September 18 of 2001 that gave the Executive branch broad powers to fight terrorism. On November 16, President George W. Bush issued a Military Order that defined how non-citizens were to be detained and tried when fighting terrorism. The order, citing the AUMF, explicitly declared that it was necessary for suspected terrorists “to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals” under rules that were not “generally recognized [as appropriate] in the trial of criminal cases in the United States district courts” (Bush 2001). Bush believed that federal courts were inadequate to handle the current threat of international terrorists operating as part of irregular forces on remote battlefields.

The military order creating commissions contained only very vague guidelines for how trials were to proceed. Procedures for trial were provided in more detail by the DOD Military Commission Order (“MCO”) Number 1 issued March 21 of 2002, an order that was revised in August of 2005 to allow for more thorough oversight after critics argued that the original MCO did not provide for significant judicial review of commission cases. The commission process came under legal attack before a single trial could be concluded as the case of *Hamdan v. Rumsfeld* was filed. Through this suit, Hamdan petitioned for a writ of habeas corpus and argued that the commission process was illegal because it did not fully follow guidelines detailed in the

Uniform Code of Military Justice (“UCMJ”) and that its evidentiary rules were too broad by allowing for any “evidence would have probative value to a reasonable person” (Rumsfeld 2002) to be admitted. As a result of this legal challenge, commissions were stopped, started, and then stopped again as the District Court sided with *Hamdan*, was overturned on appeal, and then the appeal overturned by the SCOTUS in 2006. This legal loss – including finding that “the usual principles of relevance and admissibility” (Salim Hamdan v. Donald Rumsfeld 2006) should apply to commissions – resulted in the passing of additional procedures and definitions for military commissions (the previously mentioned MCA 2006) but did not end the legal challenges as *Boumediene v. Bush* found portions of the MCA to be unconstitutional. These court losses resulted in the military commission process being amended by the MCA 2009, revisions that provided additional due process and evidentiary procedure protections to military commissions. It wasn’t until mid- to late-2011 – nearly 10 years after commissions were first created by military order – that the major legal challenges were settled and commissions were found to be constitutional.

The legal procedures were not the only ad-hoc element to the military approach to prosecuting terrorism; detention, interrogation, and investigative procedures were also created in seemingly reactive fashion. The early years at Guantanamo were beset by confusion and conflict as a new paradigm of terrorism-as-war replaced the existing paradigm of terrorism-as-crime. At least three organizations at Guantanamo were active in interrogations – uniformed military and civilian interrogators, the FBI, and the little known Criminal Investigative Task Force (“CITF”) – and all had different purposes and approaches to gathering information. The FBI, as the primary counter-terrorism law enforcement organization, is well known and has documented experience with conducting terrorism investigations. CITF, however, is less well known and did

not exist prior to its establishment in 2002. Tasked with the investigation of suspected terrorists, CITF appears to be the military law enforcement embodiment of the FBI mission including evidence collection, crime-scene processing, and witness and detainee interviews with the goal of prosecuting terrorists in military commissions.

The military introduced controversial interrogation methods without evidence of their efficacy and law enforcement opposition to these methods resulted in multiple investigations into allegations of abuse and torture at Guantanamo. Cooperation suffered as a result of these differences in interrogation methods as the FBI refused to “participate in joint interrogations of detainees with other agencies in which techniques not allowed by the FBI were used” (Office of the Inspector General 2009) and CITF agents were told to distance themselves from “increasingly coercive interrogations” (Mallow 2007) at Guantanamo. It wasn’t until 2006 that a study into the effectiveness of interrogation tactics was published – the Study on Educating Information: Foundations for the Future – and it was more of a “primer on the ‘science and art’ of both interrogation and intelligence gathering” (Intelligence Science Board 2006) than a report on which interrogation methods produced the best results. A follow-up paper was published in 2009 – Intelligence Interviewing: Teaching Papers and Case Studies – years after the use of controversial interrogation methods had been banned at Guantanamo.

In balancing the needs of gathering national security intelligence and pursuing criminal prosecution of terrorism suspects, the balance at Guantanamo shifted heavily in favor of national security. Interviews and investigations into FBI and CITF agent conduct at Guantanamo clearly show that the FBI and CITF requirements took a back seat to military intelligence needs. Regardless of the national security priority, law enforcement agencies at Guantanamo still had a responsibility to conduct investigations and pursue convictions and were responsible for

collection of evidence that was admissible in commissions. Reviewing case documents from military commissions at Guantanamo clearly shows that the majority of evidence submitted to the courts was produced by the FBI and CITF. Where available, evidence document lists cite multiple Form 302 and Form 40 entries, the official form number for the written record of law enforcement interviews conducted by the FBI and CITF respectively.

Only eight trials in the military commission system have been successfully completed, a relatively small number that critics cite as proving that military commissions are a failure. Out of the eight convictions, five have been appealed. The results are mixed with one conviction overturned on appeal (*US v. Salim Hamdan*), one conviction supported (*US v. Omar Khadr*), and three pending (*US v. Ibrahim al Qosi*, *US v. Ali al Bahlul*, and *US v. David Hicks*). Three convictions have been secured through plea bargains (*US v. Noor Uthman Mohammad*, *US v. Ahmed al Darbi*, and *US v. Majid Khan*) and are unlikely to be appealed.

In addition to the above completed commissions, there are four active cases ongoing at Guantanamo that have, potentially, years before they are decided: *US v. Khalid Sheikh Mohammed, et al.*, *US v. Abd al Rashim al Nashiri*, *US v. Abd al Hadi al Iraqi*, and *US v. Ramzi bin al Shibh*. Twelve cases in total with seven convictions. Of those convictions, four are secured, three are under appeal, and one conviction was overturned on appeal – a 33% conviction rate that may go as high as 58% when the appeals are decided in favor of the government or a maximum of 92% if all four active cases result in convictions.

The conviction percentage is low by federal court standards and fails to reflect the inactive and abandoned cases. The military commission case database lists fifteen cases where the charges were withdrawn and, in some cases are highly unlikely to be reinstated. In five of those cases (*US v. Mohammad Hashim*, *US v. Abdul Ghani*, *US v. Binyam Mohammad*, *US v.*

Fouad al Rabia, and *US v. Mohammad Jawad*) it is very unlikely that charges will ever be re-filed because the detainees have been released from Guantanamo and transferred out of US custody. In one case (*US v. Ahmed Khalfan Ghailani*) charges will not be re-filed because the detainee was transferred to federal custody where he was tried and convicted in civilian criminal courts. The status of the remaining nine inactive cases is unknown. If the five dismissed cases count towards the total of completed cases, the possible 92% conviction rate (assuming 11 of 12 convictions) drops to a possible maximum of 65% (11 out of 17 cases).

Although a theoretical 65% conviction rate is not inconsequential, especially given the difficulties in prosecuting battlefield cases and the hurdles created by the ad-hoc system of interrogation and prosecution at Guantanamo, it is not the entire picture. Convictions have been applauded by supporters of military commissions but there has been limited discussion of the sentencing resulting from those convictions. The sentences handed down have been extraordinarily lenient and it is obvious that federal courts have succeeded in securing more severe penalties for terrorists. Only Omar Khadr (8 years) and Ali al Bahlul (life imprisonment) have received sentences over 48 months – and those sentences are less than meaningful. An eight year sentence for murder is not as severe as what is commonly handed down in federal court and the al Bahlul conviction is in jeopardy pending the disposition of his current appeal. The minimal sentences for Hamdan, Hicks, al Qosi, and Uthman Mohammad means they have already been released from detention and are free men. In the remaining cases, those of Majid Khan and Ahmed al Darbi, sentencing has been delayed as they cooperate with the prosecution of other commissions cases. These sentences are extremely lenient compared to the life imprisonment handed down in federal courts for Abu Gayth and Ghailani and the 20 year sentence for John Lindh.

Summary of Findings

It is clear that Guantanamo served as a laboratory for terrorism prosecution and, as controversial as it is, both the legal and investigative failures and successes served to shape the Obama model of terrorism prosecution. The military commission model and the Obama model include many similar components including separate organizations dedicated to intelligence gathering, law enforcement activities, and legal processes, but the similarities end there. Where the components work together successfully in the Obama model, they fail in the military model and are in conflict with each other as law enforcement and military intelligence attempted to work in parallel rather than in sequence. Rather than use the parallel structure that caused so much conflict at Guantanamo, the Obama model learned from those earlier failures and created a period of initial intelligence gathering and a subsequent, but clearly separate, period for law enforcement questioning.

Prosecutions were hindered by a decade of legal challenges to the newly created military commissions system and the number of terrorism suspects charged suffered as the process was halted, started, and halted again in response to federal court rulings. Putting aside the low number of cases, the military commissions do a reasonably good job of securing convictions for terrorism offenses when assessing conviction rates. Unfortunately, however, commissions fail to produce lengthy sentences especially when compared to sentences handed down by federal courts.

With the promising start to the Obama model, and as a less controversial path to securing terrorism convictions, it must be concluded that the military approach to terrorism is less desirable and inferior to the modified law enforcement approach.

The Law Enforcement Approach

The legal battle at Guantanamo also clearly affected how federal courts would prosecute terrorism in the post-9/11 world in both the traditional law enforcement and Obama models. Court decisions issued as part of Guantanamo-related lawsuits, such as the SCOTUS ruling that even non-citizen detainees are to be granted habeas rights, have effects beyond military commissions. These rulings were not the only changes made to the federal courts that affected terrorism prosecution. Early supporters of the traditional law enforcement approach to prosecuting terrorism believed that the federal courts, as they existed prior to 9/11, were robust enough to handle any future terrorism cases as evidenced by the courts' established track record in anti-terrorism prosecution that resulted in convictions related to major terrorist attacks against the US. Nearly all of these cases, however, represent reactive law enforcement. Investigations were not started until a criminal act triggered them and future attacks were only identified if exposed as part of an existing criminal investigation. Until a bomb exploded at the World Trade Center or at an Embassy in Kenya, or until explosives were found either by accident or plain dumb luck in the shoe of a would-be bomber or the car of a man crossing the Canadian border, there wasn't a reason for the FBI to act.

After the unprecedented destruction of the 9/11 attacks, the US law enforcement community began transitioning to a proactive counter-terrorism model one where investigations were "proactive, agile, flexible and intelligence-driven ... [to] prevent acts of terrorism" (Bjelopera 2013). Despite claims from legal traditionalists who believed in the status quo of terrorism legislation and the capabilities of federal courts, current laws and regulations were not capable of successful proactive counter-terrorism operations.

Legislative Changes

The DOJ realized that its operational guidelines were not structured to support proactive investigations and as a result, the number of Joint Terrorism Task Forces expanded, organizational changes were made to remove barriers between law enforcement and intelligence agencies, and the *Attorney General's Guidelines for Domestic FBI Operations* and the *FBI Domestic Investigations and Operations Guidelines* were updated to “give the FBI more leeway to engage in proactive investigative work that does not depend on criminal predication” (Bjelopera 2013, 1). Major changes were also made to terrorism legislation in the years after 9/11.

The first and “one of the most sweeping and controversial acts in United States history” (Abdolian and Takooshian 2002, 1429) came in late October of 2001 as the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT) Act of 2001* was passed “by overwhelmingly, bipartisan margins” (US Department of Justice n.d.). The PATRIOT Act expanded surveillance for a broader range of crimes, allowed the use of roving wiretaps against terrorism suspects, delayed notification of search warrants, and granted access to business records that would otherwise be out of reach. The Act also changed how law enforcement obtains search warrants, created a new federal crime – domestic terrorism – and changed the scope of existing charges to include terrorism-related crimes including allowing for broader use of conspiracy charges – a frequently used charge in post-9/11 indictments – and harsher penalties for committing crimes. Critics immediately argued that the PATRIOT Act “resembled portions of the earlier Antiterrorism Act of 1996 which had already been ruled unconstitutional by federal courts” (Abdolian and Takooshian 2002, 1430). Just as the new military commissions legislation spawned legal challenges, so too did the new

PATRIOT Act legislation. For example, the Act expanded the use of National Security Letters (“NSL”) by the FBI, an extremely controversial practice that was banned by a federal judge in March of 2013 (Bjelopera 2013, 7).

The USA PATRIOT Act of 2001 was one of dozens of legislative changes made post-9/11 to strengthen national security and combat terrorism. The 2001 Act was improved through the *USA PATRIOT Act Improvement and Reauthorization Act of 2005*. As new terrorist threats to specific economic sectors or targets emerged, legislation was crafted to address the threat. Facets of bioterrorism and chemical weapon security were strengthened through the *Agricultural Bioterrorism Prevention Act of 2002* and the *Stop Terrorist and Military Hoaxes Act of 2004*. The threat to commercial ports was addressed by the *Reducing Crime and Terrorism at America's Seaports Act of 2005* and terrorist financing via the *Combating Terrorism Financing Act of 2005*. Broad counter-terrorism legislative changes were made via the *Intelligence Reform and Terrorist Prevention Act (IRTPA) of 2004*, especially through its subtitles *Weapons of Mass Destruction Prohibition Improvement Act of 2004*, *Prevention of Terrorist Access to Destructive Weapons Act of 2004*, and *Material Support to Terrorism Prohibition Enhancement Act of 2004*.

Material support to terrorism is a commonly cited charge in federal terrorism case and its definition was changed both before and after 9/11, changes that have been legally challenged. The crime of material support for terrorism is defined in United States Code, Title 18, Sections 2339A and 2339B (“18 USC § 2339A” and “18 USC § 2339B”) and was first created by the *Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996*. As initially defined, material support for terrorism was limited and only applicable to persons under the jurisdiction of the US (i.e. citizens and resident aliens) and to terrorist groups that were formally designated as Foreign Terrorist Organizations (“FTO”) by the DOS. The material support laws were redefined under

the USA PATRIOT Act of 2001 to include adding attempting or conspiring to provide material support as indictable crimes. The expanded definitions have allowed for proactive prosecution of persons who were only planning to provide material support to terrorist organizations. A second revision occurred with the passing of the IRTPA of 2004 and the crime of material support was expanded to any organization that “has engaged or engages in terrorism” (US Congress 2004, 126) as opposed to only applying to a designated FTO. In one high profile legal challenge to the revised material support for terrorism laws that advanced all the way to the Supreme Court, the Humanitarian Law Project argued that the statute was too broad and “infringes their rights to freedom of speech and association” (*Eric Holder v. Humanitarian Law Project* 2010). The legislation survived the challenge; the court found that the statute was constitutional but future challenges await as the court explicitly limited the scope of their ruling and noted that they do not “address the resolution of more difficult cases that may arise under the statute in the future” (*Eric Holder v. Humanitarian Law Project* 2010).

Case Statistics

Indictments for terrorism-related offenses were limited in number prior to 9/11 compared to the number of cases tried after the attacks. Dozens of terrorism cases were prosecuted in federal courts, but the charges were quite similar to traditional criminal cases – murder, attempted murder, conspiracy to provide false information, even sedition – rather than the often-used terrorism-specific charges that are more common following legislative revisions to terrorism criminal statutes. Using these more traditional criminal charges, federal courts were able to successful convict persons involved in high-profile terrorist attacks including the Millennium Bomb Plot (*US v. Ressam, et al. and US v. Mokhtar Haouari, et al.*), the 1993 World Trade Center Bombing (*US v. Omar Abdel Rahman, et al.*), and the Philippines Airline Bomb

Plot (*US v. Ramzi Ahmed Yousef, et al.*). In certain complex cases, indictments and convictions have spanned decades of trials. This is most famously shown in trials related to the 1998 bombings of two US Embassies in Kenya and Tanzania. A case that started as single indictment in *US v. Usama bin Laden, et al.* – case number 98 CR 1023 – has been amended over the years as superseded indictments are issued. This long-lived case has been used as recently as October of 2013 when Anas al Liby (*US v. Anas al Liby*) was arraigned in federal court after his capture in Libya.

As the legislative changes made to terrorism statutes after 9/11 show, federal courts were not fully ready for proactive terrorism prosecutions and even some reactive cases tried after 9/11 proved to be more difficult than proponents suggested. The first major post-9/11 case, *US v. John Walker Lindh*, involved nearly a year of legal wrangling over the handling of classified information, the lack of Miranda protections, concern over government destruction of evidence, allegations of mistreatment, and other issues. These legal issues were never addressed as a last-minute agreement allowed Lindh to plead guilty and allowed prosecutors to avoid debating these critical and controversial legal issues. It was, however, the first successful post-9/11 terrorism conviction in federal courts. Two other high-profile cases soon followed – *US v. Zacarias Moussaoui* and *US v. Richard Reid* – and proved to be just as difficult as Lindh. Legal challenges to Reid’s self-incriminating statements were mounted amid claims that Reid was “improperly interrogated” and had “sedatives administered” prior to questioning (Serrano 2002). These challenges were minor compared to the abomination that was the Moussaoui trial. It was nearly four years after the filing of charges before the Moussaoui trial finally started. Moussaoui tried to represent himself in court and wanted to interview Al Qaeda detainees as potential witnesses. The case was “fraught with procedural problems, delays, appeals, risks to classified evidence ...

due to gaps in federal law” and it was argued that “many of the problems prosecutors encountered in the Moussaoui trial will be experienced in future terrorism trials” (Ramonas 2010).

In response to issues identified through early terrorism trials in federal courts and as the law enforcement approach to prosecuting terrorism moved from a reactive model to a proactive model, the criminal statutes supporting proactive prosecution matured and expanded. Trials became easier and conviction rates increased as the now-familiar charges of providing material support to terrorists – conspiracy to provide material support to terrorists, attempted use of a weapon of mass destruction – replaced the more traditional criminal charges seen in terrorism indictments. It is impossible to provide universally agreed-upon conviction rates for terrorism trials because of the somewhat vague definition of terrorism and the subjectivity with which cases are included in counts and how conviction rates are calculated.

The DOJ claims more 403 terrorism defendants were convicted in federal courts (US Department of Justice 2010) in the decade since 9/11, but their count includes a number of cases that are unrelated to Islamic-inspired terrorism. These cases are linked to support for terrorist organizations – FARC in Columbia and the Tamil Tigers – but are not linked to Al Qaeda or its associated groups. Many cases are also for lesser offenses such as attempted bribery, passport or immigration violations, and perjury or providing false information and, due to the lower severity of these crimes, may not be included in all terrorism conviction studies. The DOJ did not provide a conviction rate among all terrorism defendants.

Other reports on terrorism convictions provide statistics based on the number of cases and not only based on the number of defendants as the DOJ does. Human Rights First lists 123 terrorism cases in federal courts as of 2008 (Zabel and Benjamin, Jr., *In Pursuit of Justice*:

Prosecuting Terrorism Cases in Federal Courts 2008, 133-135) with a resulting 90% conviction rate and 135 cases as of 2009 with a 91% conviction rate for 214 defendants (Zabel and Benjamin, Jr. 2009, 51-54). The Terrorist Trial Report Card identifies “approximately 300 prosecutions, from 2001 to 2011” with an 87% conviction rate “roughly the same conviction rate ... for all federal criminal indictments” (The Center on Law and Security 2011, 2). I reviewed forty-two federal cases for this research study and concur with the percentages reported in the above independent studies. It is interesting to note that the average number of indictments per year has increased as terrorism statutes and the proactive law enforcement model mature. Between 2003 and 2007 terrorism indictments averaged 27 per year, a number that doubled for 2009 and 2010. This significant increase has been attributed to larger numbers of FBI proactive “sting operations” and greater use of the revised material support to terrorism charges (The Center on Law and Security 2011, 3).

Federal courts have had success in procuring significant and lengthy sentences in terrorism convictions. Methods for calculating averages differ, but available studies place the average term of imprisonment between eight and fourteen years – a number that trends downward with the inclusion of lesser-severity terrorism charges – with the more serious charges resulting in life imprisonment.

Summary of Findings

The traditional law enforcement approach to prosecuting terrorism has been successful in both pre- and post-9/11 trials. Convictions have been secured in both major and minor terrorism-related charges and the calculated 87-91% conviction rate proves the success of this approach. As terrorism statutes matured and more legal precedents are set in federal courts, the number of terrorism indictments has increased. These statistics show that the traditional law enforcement

approach to terrorism is a legitimate and effective tool for combating terrorism. It is important to note that the majority of suspects tried in federal courts were captured within the boundaries of the US and the traditional law enforcement approach meets the needs of these cases well.

However, there are cases where suspects have consumed years fighting extradition or have successfully defended against extradition to the US as happened with two defendants in *US v. Mustafa Kamel Mustafa, et al.* In cases where extradition is problematic, the Obama model and its use of extraordinary rendition may be the more appropriate path.

CHAPTER V

CONCLUSION

Summary

The United States uses three main approaches to prosecuting international terrorism suspects across two legal systems. The military approach to prosecuting terrorists utilizes military detention and interrogation combined with trial by military commission under the *Military Commission Act of 2009*. The law enforcement approach has two branches, the traditional approach utilizing only law enforcement agencies and the modified law enforcement approach (the “Obama model”) that utilizes both law enforcement and military and intelligence agencies for capture, detention and interrogations before transitioning to a Miranda-protected questioning by a law enforcement agency. Regardless of which branch is initially used, the law enforcement approach results in trial in federal criminal courts.

Researching the Obama model has identified a limited number of cases. Only four indictments have been issued under the Obama model. Of those, two have been completed and two are currently active. This model has had a very promising start that has seen fewer challenges to the legitimacy of the model and those few challenges have been successfully overcome. As a result the model presently has a 50% conviction rate, but there is a strong possibility that that percentage will increase based on the strength of the two pending cases. The two convictions have resulted in meaningful sentences: life imprisonment for both defendants.

The traditional law enforcement approach – as expected – has the most cases of all the researched models. Forty-two cases were reviewed out of the hundreds of terrorism cases prosecuted in federal courts under this model. Meaningful sentences were handed down for the

more severe charges and ranged from 25 years to life imprisonment for both pre- and post-9/11 trials.

The military approach to terrorism has more active cases than the Obama model but less than the law enforcement model. Seventeen cases in total were identified with five cases completed, three active appeals, four active trials, and five dismissals without trial. Including cases where charges were dismissed results in a 40% conviction rate for completed cases with five convictions, one of which was overturned on appeal. The sentences issued by military commission are inconsistent. Ali al Bahlul was sentenced to life imprisonment but is appealing. Other sentences ranged from less than three years to forty years, but in many cases the sentences were shortened as detainees served nine months of a seven year sentence (David Hicks), two out of fourteen years (Ibrahim al Qosi), and eight years out of forty (Omar Khadr). Many of those convicted by military commission have already been released.

The Obama approach and the military approach will continue to see fewer cases than the traditional law enforcement approach for a variety of reasons. Traditional law enforcement cases often involve domestic arrests and do not face the complexities of international apprehension of a terrorism suspect. Extradition treaties and extraordinary rendition in violation of territorial boundaries are not a feature of domestic arrests. Hostile governments and unsafe conditions in failed and failing states are not barriers to arresting US persons within our borders. Drone strikes and Tomahawk missiles are not an option in prosecuting terrorists inside US territory. All of these conditions factor into a lower number of indictments outside of the traditional law enforcement process and a smaller number of cases should not preclude the use of the Obama model or military approach to combating terrorism.

Major terrorism attacks often bring about legislative changes to prevent another, similar, future attack. Following the 1993 World Trade Center bombing and the 1995 Oklahoma City bombing, the *Antiterrorism and Effective Death Penalty Act of 1996* was enacted to “deter terrorism” and “provide justice for victims [of crime]” (Orye III 2002, 441). Legislators reacted similarly to the 9/11 attacks by passing legislation meant to strengthen law enforcement tools and protect the nation from terrorist attack. Early proponents of the traditional law enforcement approach believed that the federal court systems were already ready and able to successfully prosecute any possible terrorist act, yet the dozens of legislative changes after 9/11 show that the courts were not ready for the desired proactive terrorism prosecution model. Changes in criminal statutes to allow proactive terrorism prosecutions resulted in legal challenges and laws just as the military commission system changed in response to legal challenges. To use a decade of challenges and changes to the legal procedures in military commissions as evidence that the military approach to terrorism is inappropriate, faulty, or a failure ignores the changes made to the federal court systems over the past decade. Additionally, it is likely that, had the cases tried via military commission been tried in federal courts, many of the same legal challenges would also have been brought forward in the federal venue. Habeas Corpus for Guantanamo detainees would have been an issue in federal trials and transferring detainees to the continental US would have raised a host of legal issues – for example immigration issues related to stateless persons held at Guantanamo – not addressed in military commissions.

Conclusion

There will always be differences of opinion in how terrorism statistics are calculated. There is inherent subjectivity when selecting cases based on differences in the definition of terrorism. Additionally, researching terrorism cases to identify successful convictions and

conviction rates is made difficult by poorly organized data. The federal court system has an official records archive that would presumably serve as a central repository for case data, however, court documents are only available through the PACER web application, a system that is both antiquated and costly with charges of up to \$3 per case document retrieved. Freely available alternatives such as the Google Scholar, Leagle, FindLaw, and eCases websites often contain incomplete data and display results poorly. Conducting free-text searches is complicated by the various ways that a court's case number is written – S10.98 CRIM.1023, 10 98 CRIM 1023, 98 CR 1023, 98-CR-1023, 98-CR-001023, 98-001023 – and variations in spelling of suspect names. Where lists of terrorism cases are maintained, they are incomplete and lack crucial information such as case numbers and the status of appeals. Despite these difficulties, the statistics show that the law enforcement approach to prosecuting terrorism has significantly better results than the military approach. With the evolution of the Obama model to handle the difficult terrorism cases that cross national boundaries and involve international fugitives – cases originally meant to be tried in military commissions – the law enforcement approach has matured and is now a viable replacement for military commissions.

APPENDICES

Appendix I

Cases Included Under the Obama Model

Case	Case Number	Miranda Protections	Convicted
US v. Ahmed Khalfan Ghailani	98 CR 1023	N	Y
US v. Ahmed Abdulkadir Warsame	11 CR 559	Y	Y
US v. Anas al Liby	98 CR 1023	Unknown.	Trial Pending.
US v. Ahmed Abu Khattalah	14 CR 141; 14 CR 212	Y	Trial Pending.

Appendix II

Cases Excluded From the Obama Model

Case	Case Number	Miranda Protections	Convicted
US v. Sulaiman Abu Ghayth	98 CR 1023	N	Y
US v. John Phillip Walker Lindh	02 CR 037	N	Y

Appendix III

Military Commissions (Charges Inactive/Dismissed)

Case	Charge Status	Detention Status	Further Prosecution Likely
US v. Abd al Rahim al Nashiri	Charges Withdrawn Without Prejudice	Detained	Yes
US v. Ahmed Khalfan Ghailani	Charges Withdrawn Without Prejudice	Transferred to Federal Custody	N/A
US v. Almed Mohammed al Darbi	Charges To Be Reinstated	Detained	Yes
US v. Faiz al Kandari	Charges Withdrawn Without Prejudice	Detained	Unknown
US v. Ghassan al Sharbi	Charges Withdrawn Without Prejudice	Detained	Unknown
US v. Mohammad Hashim	Charges Withdrawn Without Prejudice	Released from Guantanamo	No
US v. Mohammed Karmin	Charges Withdrawn Without Prejudice	Detained	Unknown
US v. Sufyian Barhoumi	Charges Withdrawn Without Prejudice	Detained	Unknown
US v. Abdul Ghani	Charges Withdrawn Without Prejudice	Released from Guantanamo	No
US v. Jabran al Qahtani	Charges Withdrawn Without Prejudice	Detained	Unknown
US v. Binyam Mohammad	Charges Withdrawn Without Prejudice	Released from Guantanamo	No
US v. Fouad al Rabia	Charges Withdrawn Without Prejudice	Released from Guantanamo	No
US v. Mohammad Jawad	Charges Withdrawn Without Prejudice	Released from Guantanamo	No
US v. Obaidullah	Charges Withdrawn Without Prejudice	Detained	Unknown
US v. Tarek el Sawah	Charges Withdrawn Without Prejudice	Detained	Unknown

Appendix IV

Military Commissions (Active Cases)

Case	Status
US v. Khalid Sheikh Mohammed, et al.	Active
US v. Abd al Rashim al Nashiri	Active
US v. Abd al Hadi al Iraqi	Active
US v. Ramzi bin al Shibh	Active

Appendix V

Military Commissions (Completed Cases)

Case	Convicted	Sentence	Status	Appealed	Conviction Overturned
US v. Salim Hamdan	Yes	66 months	Released.	Yes	Yes
US v. David Hicks	Yes	9 months	Released.	Yes	Pending
US v. Ibrahim al Qosi	Yes	2 years	Released.	Yes	Pending
US v. Noor Uthman Mohammad	Yes	34 months	Released.	No	N/A
US v. Omar Ahmed Khadr	Yes	8 years	Detained.	Yes	No
US v. Ali al Bahlul	Yes	Life imprisonment.	Detained.	Yes	Pending
US v. Majid Khan	Yes	Sentencing delayed.	Detained.	No	N/A
US v. Ahmed al Darbi	Yes	Sentencing delayed.	Detained.	No	N/A

Appendix VI

Reviewed Federal Court Cases

Case	Case Number	Post-9/11 Case
US v. Omar Abdel Rahman, et al.	93 CR 181	N
US v Ramzi Ahmed Yousef, et al.	93 CR 180	N
US v Usama bin Laden, et al.	98 CR 1023	N/A (Spans pre- and post-9/11)
US v. Ressam, et al.	99 CR 666	N
US v. Mokhtar Haouari, et al.	00 CR 015	N
US v. John Phillip Walker Lindh	02 CR 037A	Y
US v. Zacarias Moussaoui	01 CR 455	Y
US v. Richard Reid	02 CR 10013	Y
US v. Abdul Faruk Abdulmutallab	10 CR 20005	Y
US v. Jose Padilla	04 CR 60001	Y
US v. Yayha Goba, et al.	02 CR 214S	Y
US v. Zubair Ahmed, et al.	07 CR 647	Y
US v. Ali Yasin Ahmed, et al.	12 CR 661	Y
US v. Iyman Faris	03 CR 189	Y
US v. Nuradin M. Abdi	04 CR 088	Y
US v. Shahawar Matin Siraj	05 CR 104	Y
US v. Kevin James, et al.	05 CR 214	Y
US v. Mohammad Zaki Amawi, et al.	06 CR 0719	Y
US v. Syed Haris Ahmed, et al.	06 CR 147	Y
US v. Burson Augustin, et al.	09 CR 15985	Y
US v. Ferid Imam, et al.	10 CR 019	Y
US v. Mohammed Wali Zazi	10 CR 060	Y
US v. Najibullah Zazi	09 CR 663	Y
US v. Ahmad Wais Afzali	09 CR 716	Y
US v. Faisal Shahzad	10 CR 541	Y
US v. Farooque Ahmed	10 CR 413	Y
US v. Rezwana Ferdous	11 CR 10331	Y
US v. Sami Osmakac	12 CR 045	Y
US v. Amine Mohamed El-Khalifi	12 CR 037	Y
US v. Quazi Mohammad Rezwanaul Ahsan Nafis	12 CR 720	Y
US v. Naser Jason Abdo	11 CR 182	Y
US v. Dzhokar A. Tsarnaev	13 CR 10200	Y
US v. Aafia Siddiqui	08 CR 826	Y
US v. Sulaiman Abu Ghayth	98 CR 1023	Y
US v. Ilyas Kashmiri, et al.	09 CR 830	Y
US v. Abdul Tawala Ibn Ali Alishtari	07 CR 115	Y
US v. Mohammed Ali Hassan Al-Moayad, et al.	03 CR 1322	Y
US v. Mustafa Kamel Mustafa, et al.	04 CR 356	Y
US v. Ali Saleh Kahlah Al-Marri	09 CR 10030	Y
US v. Omer Abdi Mohamed	09 CR 352	Y
US v. Abdifatah Yusuf Isse, et al.	09 CR 050	Y
US v. Ahmed Hussein Mahamud	11 CR 191	Y
US v. Rahmat Abd Hir	07 CR 501	Y

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