Introduction: Guantánamo and Beyond

Exceptional Courts and Military Commissions in Comparative and Policy Perspective

Fionnuala Ní Aoláin and Oren Gross

THE MILITARY COMMISSIONS SCHEME ESTABLISHED BY President George W. Bush on November 13, 2001, has garnered considerable national and international controversy.[1] The commissions' creation has focused significant global attention on the use of military courts as a mechanism to process and try individuals suspected of involvement in terrorist acts or offenses committed during armed conflict. As this book goes to press, the military commissions are still operational with President Obama indicating recently that he had asked the Department of Defense to designate a site in the United States where further military commissions' proceedings would be held.[2] Upon taking office in 2008, President Obama signed an executive order requiring the closure of the detention center at the U.S. Naval Base in Guantánamo Bay, Cuba, within a year. In the intervening twelve months various alternatives were explored including freeing those prisoners whose petitions for habeas corpus were successful, placing other prisoners on trial before military commissions or civilian courts, and seeking an alternative holding location for those individuals likely to remain incarcerated without trial. Despite substantial hand wringing nationally

1 Military Order of Nov. 13, 2001, 66 Fed. Reg. 57, 833 (Nov. 13. 2001).

2 President Barack Obama, Speech delivered at the National Defense University, Washington D.C. (May 23, 2013), retrieved from www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university.

and internationally, a large group of individuals remains incarcerated at Guantánamo, and for some of them, operational progress to trial before a military tribunal continues.[3] The Obama administration relinquished its earlier position that indefinite detention without trial was not acceptable in a democratic society, and reinstated the full, if moderately amended, operation of the military commissions.

Framed by and against this political backdrop, this collection addresses the phenomena of what we broadly term "due process exceptionalism."[4] The essays included in this collection bring together the viewpoints of leading international, comparative, national security, and legal history experts from the United States and elsewhere. The collection also benefits from contributions by policy makers who offer policy-oriented analyses of the structural, legal, and political issues arising out of the use of exceptional courts and military commissions. These contributions include assessments of the relationship between exceptional courts and other intersecting and overlapping arenas in the context of U.S. domestic constitutional law, international law, international human rights law, and international humanitarian law; the patterns, similarities, and disjunctions that emerge as we view the process of resorting to such courts in comparative perspective; and the political and legal challenges that the creation or operation of such courts creates within states and for the international community.

The book focuses primarily on the role of exceptional courts and military tribunals in democratic polities, noting that courts are particularly relevant to the way in which democracies have responded to threats and crises, whether internal or external. Whereas the operation of such courts

3 When going to press six men face formal charges. In his May 23, 2013 speech on Terrorism, President Obama stated that the tension center at Guantánamo Bay "has become a symbol around the world for an America that flouts the rule of law," and opined that "there is no justification beyond politics for Congress to prevent us from closing a facility that should have never been opened." *Id*.

4 We note that some commentators use the term "national security exceptionalism." We view national security exceptionalism as being embraced by the concept of due process exceptionalism, but argue that the latter is a far wider term and has greater "catch."

in nondemocratic settings is noteworthy,[5] the precise challenges faced by democratic states are the ones that interest us the most as we draw out and explore the significance, patterns, and similarities that emerge in comparative assessment of due process exceptionalism. We use the term due process exceptionalism as an umbrella concept capturing a variety of state practices. It denotes the actions of executive and legislative branches in substantially modifying ordinary, well-accepted, and long-established due process practices and rules, particularly in the criminal justice area. The exceptionalism is derived from modifications to the requirement that the state must generally respect and uphold all of the legal rights that are owed to a person under its control. Justifications for due process exceptionalism are generally articulated as resulting from perceived challenge or threat, and they may be temporary or permanent. This is not a new phenomenon. With the fall of the monarchy in 509 BCE, the Roman republic moved to establish an executive branch of government that was headed by two chief magistrates, the consuls, who held immense power in their hands. In order to prevent reversion to a monarchical structure of government, the constitution of the republic based the executive offices of the republic on three fundamental principles: collegiality and equal power; limited, nonrenewable term of office; and the right of appeal (*provocatio*), which meant that any Roman citizen had the right to appeal any ruling by any other magistrate to a tribune.[6] This right of appeal – which assured Romans a core minimum of due process – was limited in several important ways. In addition to being limited to Roman citizens, the provocatio did not apply to matters pertaining to foreign affairs or decisions and actions taken by a dictator in times of extremely grave emergencies.

Then, as now, emergencies test the abilities of government to act vigorously and resolutely to overcome the crisis while not intruding

5 On the functioning of courts in nondemocratic settings, *see* LISA HILBINK, JUDGES BEYOND POLITICS IN DEMOCRACY AND DICTATORSHIP: LESSONS FROM CHILE (2007); TOM GINSBURG AND TAMIR MOUSTAFA (eds.), RULE BY LAW: THE POLITICS OF COURTS IN AUTHORITARIAN REGIMES (2008).

6 ANDREW LINTOTT, THE CONSTITUTION OF THE ROMAN REPUBLIC 152–57 (2003).

unnecessarily on established civil rights and liberties. The point was made by Attorney General Eric Holder in a speech delivered on March 5, 2012, in which he took pains to argue that, "both [federal civilian courts and the revised military commissions] incorporate fundamental due process and other protections that are essential to the effective administration of justice."[7] At the same time, discussing the targeted killing by the United States of an American citizen, the Attorney General argued:

> [T]he Due Process Clause does not impose one-size-fits-all requirements, but instead mandates procedural safeguards that depend on specific circumstances. . . . Where national security operations are at stake, due process takes into account the realities of combat. . . . "Due process" and "judicial process" are not one and the same, particularly when it comes to national security. The Constitution guarantees due process, not judicial process. . . . The Constitution's guarantee of due process is ironclad, and it is essential – but, as a recent court decision makes clear, it does not require judicial approval before the President may use force abroad against a senior operational leader of a foreign terrorist organization with which the United States is at war – even if that individual happens to be a U.S. citizen.[8]

The due process definition and its system management are uppermost in the minds of government decision-makers utilizing legal process to handle exigency. This book suggests that we should pay sustained and systematic attention to the sites and patterns of modification. By doing so we may more thoroughly understand the coping and adjustment patters of democratic states responding to violent challengers.

This collection is focused on modifications to courts, tribunals, and similar adjudicative bodies. In doing so, we explore how "normal" criminal justice responses may be deemed inadequate to the crisis or challenge at hand and, as a result, how states make adjustments to create new procedural mechanisms to prevent, contain, or punish the acts of those

7 Eric Holder, Speech delivered at Northwestern University School of Law (Mar. 5, 2012), retrieved from http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html.

8 *Id.*

challenging the state. The essays in this collection demonstrate, and critically assess, the phenomenon that when faced with acute violent challenges such as terrorism and armed conflict, democratic states make particular use of legal and judicial processes and institutions to manage such threats. This occurs in part because democratic states are constrained in their use of force to respond to such challenges, particularly when they manifest as internal armed conflicts or violence above a sporadic threshold.[9] Because democracies are particularly reluctant to cede the ground of combatant or armed conflict status to violent challengers, legal process becomes an important symbolic, expressive, communicative, and operational basis upon which to contain the effects and status of conflict.[10] Legal institutions and forms frame, and are framed by, the terms in which broader political responses to collective violence are shaped. Thus, the focus on democratic states and legal processes is significant, as it allows reflection on the restraints and limitations placed upon democratic states, and the extent to which there are consistent and comparative factors identifiable in such efforts. The reflection is particularly pertinent given

9 In a speech delivered on May 25, 2011, Harold Hongju Koh, the Legal Advisor to the U.S. Department of State, enumerated the "commitment to living our values by respecting the rule of law" as one of the four core commitments in what he called the emerging "Obama-Clinton Doctrine." Harold Hongju Koh, Legal Advisor to the Secretary of State, "The Obama Administration and International Law," speech before the American Society of International Law (May 25, 2011), retrieved from http://www.state.gov/s/l/releases/remarks/139119.htm. *See also* H.C. 5100/94, Pub. Comm. Against Torture in *Israel v. The State of Israel*, 53(4) P.D. 817, 845 (Barak, P.) (A democracy has "the upper hand" even though it "must sometimes fight with one hand behind its back." This is because "[t]he rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit and this strength allows it to overcome its difficulties."). For critical review of what has been called "Lawfare" – the use of law as a weapon of war – see, e.g., Jack L. Goldsmith, The Terror Presidency: Law and Judgment Inside the Bush Administration 53–64 (2009).

10 The heated debate about the status of the individuals detained at Guantánamo Bay is a point in hand. *See, e.g.*, Benjamin Wittes, Detention and Denial: The Case for Candor after Guantánamo (2011). Another notable example pertains to the British government classification of captured IRA members as "criminals" and the insistence of the Republicans that they be accorded a political, or "special category," status. *See, e.g.*, Kieran McEvoy, Paramilitary Imprisonment in Northern Ireland: Resistance, Management, and Release (2001).

the heated political and legal debates surrounding the system of military commissions established by President Bush, and ongoing challenges concerning how best to process those detained in the aftermath of the terrorist attacks of 9/11 and the wars in Iraq and Afghanistan.

As noted previously, exceptional courts are not a new phenomenon. States have long used the legal process and courts as a means to manage and address exceptional threats and challenges. To achieve this, existing courts have been modified, new courts have been established, and jurisdiction for certain offenses moved from civilian criminal courts to military courts and commissions or were added to the roster of offenses with which the latter could deal. Arguably, the typifying of such military courts and commissions as exceptional is itself controversial, given that states have long established prerogatives to create various kinds of courts with variable jurisdictional and subject reach. A starting point in this introduction is to explore the meanings of due process exceptionalism, offering a spectrum of views that pertain to the uniqueness of court form, as well as the engagement of particular powers to establish or modify their operation.

A number of essays pay particular attention to the distinctions between civilian and military courts, including the operational and jurisdictional patterns that have historically framed their respective spheres of influence, probing the extent to which the rigidity of differences among such courts holds up to scrutiny. Military courts and commissions play a central role in any analysis of due process exceptionalism. However, as Gary Solis observes in Chapter 3, in many democracies, military courts in the form of courts-martial also have ongoing ordinary functions in implementing military codes of justice and regulating and enforcing military discipline. Equally, the resort by states to ad hoc military commissions has comparative and domestic pedigrees. Such commissions, in various forms, have been utilized by states as a means to process crimes and defendants deemed unsuitable for the ordinary courts. A number of the essays in this collection investigate the interplay between ordinary criminal courts, exceptional modified courts, military courts, and military

commissions. Exploring the layered relationships between these institutions and providing an overview and analysis of how they complement, hinder, or reinforce one another gives a sense of the interplay between differing legal institutions as they respond to perceived political or military challenges. A number of contributions (Conte, Greer, Weissbrodt, and Hansen) also explore the relationship between exceptional courts and international oversight, particularly in the context of the United Nations Human Rights Committee, the Inter-American Court, the ad hoc international criminal tribunals, and the European Court of Human Rights. International judicial and quasi-judicial organs' standard setting on the meaning and forms of fair trial constrains the ways in which democratic states can utilize exceptional courts to try violent actors, and shapes broader rule-of-law understandings about the limits of legal exceptionalism for democracies.

1. Due Process Exceptionalism and Exceptional Discourses

What makes a court exceptional? Any definition of exceptionality must be sensitive to its own domestic system bias with its attendant and ever-present risk of identifying procedures and processes that appear different from those with which one is most familiar as procedurally or substantively deficient just because of that difference from the recognizable. We suggest that a number of factors and attributes must be considered when ascribing an exceptional or "extraordinary" character to a court:

- The authorization basis and context of a court's making;
- The limits articulated to such courts in their operation (time limits, geographical and jurisdictional limits);
- The range of offenses over which the courts have jurisdiction;
- Evidentiary and procedural rules used by and in the courts and the extent of their deviation from the rules applied in the ordinary courts' system;
- The judicial appointment mechanisms and processes to such courts;

- The perceived neutrality, impartiality, and independence of such courts from the other branches of government, with special focus on the executive branch;
- The limitations on due process rights ascribed to those subject to the courts' authority.

There are courts that satisfy some of these criteria even within the ordinary jurisdiction of the state, such as juvenile courts, immigration and asylum tribunals, and social security tribunals. Evidently, some courts meeting the criteria of exceptionalism encounter fewer criticisms than others. To pinpoint challenges to exceptional courts requires a nuanced and careful exploration of the various factors in the particular political, social, and legal contexts in which the courts are established and operate. However, based on the analyses presented across the contributions to this collection, we suggest that three characteristics have a particularly significant weight in assessing the legitimacy of exceptional courts. These are the areas that provoke the most resistance and challenge to exceptional courts: First, the range of offenses or regulatory terrain of the court; second, the procedural rules related to the introduction or exclusion of evidence; and finally, the perceived neutrality of the court and its distance from the other branches of government, including the mode of judicial appointment. The analyses provided by Conte, Weissbrodt and Hansen, and Greer strongly suggest that it is across these dimensions that democratic states are most likely to be found in breach of international treaty obligations when they opt to use exceptional courts.

It is generally conceded by proponents and defenders alike that exceptional and military courts make it easier to try a defendant than would be the case in an ordinary civilian court – no matter what state or legal system one operates within. Martin Scheinin, the former United Nations Special Rapporteur on Human Rights and Counterterrorism, has found that lower fair trial guarantees often characterize military and special courts due to prolonged periods of pre-charge and pretrial detention, with inadequate access to counsel, intrusion into attorney-client

confidentiality, and strict limitations on the right to appeal and bail.[11] The consistency of modified rules about evidence, secrecy, legal access, and public access separately or in tandem lessen the burdens on those prosecuting and make the task for the defense more arduous. In particular, the procedural and evidentiary shifts deployed by exceptional courts and tribunals with a view to facilitating conviction, although much less discernible to the average observer than the gravity of the crimes charged or the status of the judicial officer presiding (military officer or civilian), may be far more distorting of the hitherto accepted "rules of the game" for criminal trials. Such rule changes, for example, may permit reliance on confessions in circumstances where reliance would normally be impermissible; burdens of proof may be reversed and rules pertaining to admissibility of evidence relaxed; abrogated pretrial procedures may substantially disadvantage the defendant during trial; definitions of the charged offenses may be "open textured" and "catchall," smoothing easier conviction; and the trial itself may be conducted in ways that adversely affect accountability and transparency.

Arguably, military commissions may fall into a singular category of perceived exceptionalism: when they are deployed by democratic states, and when they try civilians. A range of views on the permissibility, acceptability, and legitimacy of the commissions are reflected in this collection. Despite the general principle that military courts and commissions do not inherently violate the fair trial provisions of international law, Conte, Weissbrodt and Hansen all underscore the resistance by international courts as well as other mechanisms to accepting the legitimacy of trying civilians before military commissions. There are narrow formal exceptions to this bar: accepting that in extreme exigencies where regular trials before civilian courts are impossible, limited military jurisdiction might be undertaken. This reveals that civilian interface with judicial military oversight exposes core resistance to the seepage of military justice beyond

11 Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, UN Doc. A/63/223, ¶¶ 27, 45(b) (2008). *See also*, UN General Assembly Res. 66/171 (Mar. 30, 2012), UN Doc. A/Res/66/171.

a narrowly defined remit, a position that allies democratic practice with express forms of judicial remit and demarcation. For some scholars the exceptionalism of military commissions cannot be detached from the continuum of modified arrest and detention practices that precedes trial before military officers. In this vein, Fiona de Londras argues in Chapter 5 that there is a continuum of exceptionalism pervading the preventive detention paradigm hazardously infected with a sweeping view of the scale of terrorist threat, in which military commissions play an auxiliary role. She charges that the preventive detention of suspected terrorists creates the conditions in which extraordinary courts and prosecutions are almost inevitable and whereby the detention process may itself constitute a type of extraordinary quasi-criminal procedure.

However, comparative analysis discloses that resort by states to ad hoc military commissions has comparative and long-standing domestic pedigree. Such commissions (in various forms) have been utilized by numerous democratic states as a means to process crimes and defendants deemed unsuitable for the ordinary courts. Ireland and Turkey offer two prominent European examples of such deployment.[12] The rich historical accounts provided by David Glazier and Gary Solis in Chapters 1 and 3, respectively, illuminate a narrative that captures elements of the routine use of U.S. military commissions and courts-martial in relatively straightforward and uncontentious ways, implementing military codes of justice and regulating military discipline, but also identifying stress points when military commissions operate as jurisdictional "gap fillers" for states looking to short circuit the usage of the ordinary courts.

One of the most trenchant critiques of exceptional courts in general and military courts in particular is their deviation from the ordinary processes of detention, pretrial process, and the conduct of the trial. The combined effects of prolonged (and, where courts are not involved, even indefinite) detention, coercive interrogation techniques, the particular

12 On the Irish Special Criminal Court *see, e.g.*, FERGAL F. DAVIS, THE HISTORY AND DEVELOPMENT OF THE SPECIAL CRIMINAL COURT – 1922–2005 (2007). On Turkey *see, e.g.*, Alastair Mowbray, *Military Judges and the Right to a Fair Trial*, 6 HUM. RTS. L. REV. 176 (2006).