MEDIA INFLUENCE IN THE *GHAILANI* TRIAL: HAVE WE SEEN THIS BEFORE? THE EVER-GROWING IMPORTANCE OF AN INDEPENDENT JUDICIARY

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> *What I told the prosecutors and what I will tell you and what I spoke to them about is that failure is not an option. Failure is not an option. These are cases that have to be won. I don't expect that we will have a contrary result.*
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> —Attorney General Eric Holder, November 2009.[1]

On November 13th, 2009, the Obama Administration proceeded with the controversial decision to try suspected terrorists, previously detained at Guantanamo Bay, in Article III courts.[2] In these civilian courts, the alleged terrorists were guaranteed the same rights as other criminal defendants.[3] This decision started a national debate with different factions of the media either praising or condemning the Administration's new direction. The first alleged terrorist held at Guantanamo Bay tried under this new framework was Ahmed Khalfan Ghailani, whose trial was presided over by Judge Lewis Kaplan.[4] While other alleged terrorists had been tried in the civilian court system, Ghailani's trial marked a drastic change in the policy concerning the detainees held at Guantanamo Bay. This change led to intense media scrutiny of the trial's proceedings and the judge's decisions.

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1. *The Case of Ahmed Khalfan Ghailani: A Terrorist Let Off Easy*, G.O.P., Nov. 18, 2010, http://www.gop.gov/policy-news/10/11/18/the-case-of-ahmed-khalfan (last visited Feb. 12, 2012).

2. Eric Holder, Attorney General, Dep't of Justice, Announcing Decision to Try 9/11 Suspects in NY Civilian Court (Nov. 13, 2009), *available at* http://www.americanrhetoric.com/speeches/ericholder911suspectstrialnewyork.htm.

3. These civilian terrorist trials do have some special, requirements but they are largely similar to ordinary criminal cases. When compared to the Military Commissions, these trials, much stricter evidentiary rules. *Id.*

4. While the United States previously brought charges against other Guantanamo Bay detainees, Ghailani was the first alleged terrorist to have his case heard by a judge in an Article III court. The American government also allows these trials to be covered by the media, whereas the media coverage of the Military Commission set up in Guantanamo Bay is minimal. Military Commissions Act of 2009, Pub. L. No. 111-84, tit. XVIII, 123 Stat. 2190, 2574-2614, §§ 948a(7), 948b(a), 948c [hereinafter MCA of 2009].

The media has often questioned the decisions of the government regarding the most effective means of bringing war criminals and terrorists to justice. The earliest example of American skepticism towards these types of proceedings is the Nuremberg Tribunals. The media's reaction to the Second Nuremberg Military Tribunal ("NMT") was analogous to those of the *Ghailani* trial.[5] Similar to the terrorist trials, the prosecution of war criminals by the NMT was a nationally important issue. Newspaper journalists wrote extensively on the proceedings. Most importantly, the scrutiny these judges faced in the media during the NMT appears to have had an impact on the final verdicts in the trials, with the sentencing of the war criminals often varying upon the degree of media attention that particular defendant or trial received.

This Note will demonstrate that the extensive media coverage in the *Ghailaini* trial affected the final decision reached in the case. Using the attitudinal model of judicial decision making as a lens, I will demonstrate that the judge's decision was ultimately influenced by a variety of external factors. Specifically, this is because the media, rather than the courts, seemed to decide the ultimate outcome. The possibility that outside factors swayed the decisions of Judge Kaplan calls into question the independence of the judiciary, which ultimately affects the sense of justice created by Ghailani's prosecution. To look at the media's impact on the *Ghailani* proceedings, this paper will use the NMT proceedings and the media impact present in those tribunals to provide a baseline for determining how the media affected the *Ghailani* proceedings.

I. THE IMPORTANCE OF AN INDEPENDENT JUDICIARY IN THE UNITED STATES

A pillar of the American court system is the independence of the judiciary.[6] Before delving into the importance of judicial independence, it

5. The Secondary Nuremberg Tribunals were war crime trials that took place in the American Zone within Germany. Jonathan Friedman, *Law and Politics in the Subsequent Nuremberg Trials, 1946–1949*, *in* ATROCITIES ON TRIAL: HISTORICAL PERSPECTIVES ON THE POLITICS OF PROSECUTING WAR CRIMES 75–77 (Patricia Heberer & Jürgen Matthäus eds., 2008). These trials occurred after the initial International Military Tribunals and were set up under the same legal framework. *Id*. at 79. Furthermore, the American government was the only nation in charge of the Secondary Nuremberg Tribunals. *Id*. at 75–77. These trials received extensive media coverage while ongoing. *Id*. at 91–93.

6. Alexander Hamilton stressed the importance of an independent judiciary in the Federalist Papers. THE FEDERALIST No. 78 (Alexander Hamilton) ("Periodical appointments, however regulated, or by whomsoever made, would, in some way or other, be fatal to [the courts'] necessary independence. If the power of making them was committed either to the Executive or legislature, there would be danger of an improper complaisance to the branch which possessed it; if to both, there would be an unwillingness to hazard the displeasure of either; if to the people, or to persons chosen by them

is helpful to define what it entails. As a normative matter, judicial independence means that "judges should be autonomous moral agents, who can be relied on to carry out their public duties independent of venal or ideological considerations."[7] Basically, this means that judges should be free from external influences when making their decisions. This normative viewpoint is supplemented by an institutional viewpoint which stresses the judiciary's independence from the other branches of government. For the purposes of this Note, I will be focusing on the normative element of judicial independence, emphasizing how outside actors, such as the media, can influence judges and compromise this aspect of independence.

Before delving into the importance of the independent judiciary, it is necessary to establish a framework to understand the various ways that a judge may come to a decision. According to Judge Richard A. Posner, judges can decide cases based on nine different processes.[8] For the purposes of this Note, however, I will focus on the two main theories of judicial decision making: the legalist and attitudinal models.[9] In essence, the legalist model asserts that judges will only decide cases based on legal precedent, statutes, and the constitution and divorce their decision from outside influences, such as pressure from the media, peers, or politics: "Legalism, considered as a positive theory of judicial behavior . . . hypothesizes that judicial decisions are determined by 'the law,' conceived of as a body of preexisting rules found stated in canonical legal materials."[10] On the other hand, the attitudinal model of judicial decisionmaking posits that a judge bases her decisions on her personal politics rather than precedent. Essentially, the attitudinal model claims that "judges' decisions are best explained by the political preferences that they bring to their cases."[11] While the attitudinal judge will use precedent as a means to justify her decision, the basis of her ruling stems what she thinks is the best outcome of the case rather than what precedent indicates that the outcome should be.

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for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the Constitution and the laws.").

7. John Ferejohn, *Independent Judges, Dependent Judiciary: Explaining Judicial Independence* 72 S. CAL. L. REV. 353, 353 (1999).

8. RICHARD A. POSNER, HOW JUDGES THINK 19 (2008).

9. In Posner's book, he describes the nine different theories of judicial decisionmaking. But he places particular emphasis on the attitudinal and legalist models because these are the two most often forwarded by academics. *Id.*

10. *Id.* at 41.

11. *Id.* at 19–20.

From a normative stand-point, the concept of an independent judiciary is firmly rooted in the legalist theory of judicial decisionmaking. A legalist judge makes her decision based upon legal precedent divorced from outside influence such as pressure from the media, peers, or politics.[12] Support for this assertion can be seen by delving into the common understanding of what constitutes an independent judiciary. The history of the concept of judicial independence is particularly illustrative in this respect.

Protecting and ensuring we have an independent judiciary has been a consistent ideal in our nation's political system. Since the founding of the United States, political thinkers have argued for an independent judiciary in order to effectively enforce the laws of the land. In 1802, James Asheton Bayard, in his speech "Plea for An Independent Judiciary," urged the House of Representatives, when they were debating concerning the *Judiciary Bill*, about the need for an independent judiciary in the United States.[13] Here, Bayard focused on the normative aspects of judicial independence. He argued that an independent judiciary is essential to the well-being of society, stating that independent judges would rule according to the laws and not in accordance with their personal connections.[14]

Modern legal theorists have also identified the necessity of maintaining an independent judiciary. In the opening of *Justice as Fairness: A Restatement*,[15] Rawls points to the presence of an independent judiciary as one of the fundamental requirements for achieving justice in a democratic society.[16] Further, Associate Justice Breyer supports this viewpoint regarding the necessity of the independent judiciary.[17] In his work *Independence of the Judiciary*, Justice Breyer maintains that judicial independence is necessary so that judges decide cases based upon the laws of the land rather than their own whims.[18] Both judges and scholars have

12. *Id.* at 80.

13. James Asheton Bayard, *Plea for an Independent Judiciary*, *in* 4 A LIBRARY OF AMERICAN LITERATURE: FROM THE EARLIEST SETTLEMENT TO PRESENT TIME 246 (Edmund Clarence Stedman & Ellen Mackay Hutchinson eds., 1888).

14. Bayard contrasted his proposed American system with that of England, which he felt had far greater influence on judges. *Id.*

15. JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 10 (Erin Kelly ed., 2001)

16. *Id.*

17. Stephen G. Breyer, *Judicial Independence in the United States*, 40 ST. LOUIS U. L.J. 989, 989 (1995–96).

18. *Id.* ("[The] independent judiciary . . . [serves as] the basis for a society in which people and the government behave according to rules of law, rather than according to the will or whim of powerful rulers.").

recognized the importance of maintaining a judiciary free from outside influence.

Courts have often emphasized their independence from the other branches of the government, demonstrating the importance that the judiciary places on its institutional independence. Frequently, courts assert independence by using the political question doctrine.[19] In a wide variety of cases, the judiciary has evoked the political question doctrine in order to ensure that the courts do not become involved in issues that are fundamentally political in nature.[20] Courts have also emphasized the importance of an independent judiciary when deciding questions that do not fall under the political question doctrine. For instance, in *United States v. Will,* the Court reaffirmed the necessity for independence, stating that "[a] [j]udiciary free from control by the Executive and Legislature is essential if there is a right to have claims decided by judges who are free from potential domination by [the] other branches of government."[21] As the aforementioned instances demonstrate, courts have been careful to assert their independence from the political branches to maintain their impartiality.

Various legal treaties and books designed to teach individuals about the legal system of the United States supports both the institutional and the normative aspect of judicial independence. For instance, books that are meant to teach non-lawyers about how the court functions do not mention that outside influences might impact the judges.[22] Rather, these books focus on legal precedent and the interpretation of statutes. They indicate that judges should be free from outside influence in order to render just decisions. Contrary to the theory of judicial decision making posited by the attitudinal model, there is no indication in these books that politics or personal opinions might influence a judge's decision. This viewpoint is also adopted by many introductory law text books where the focus is placed on precedent and statute interpretation and *not* about how judge's personal politics might influence the decision.[23] Nowhere in these sources do the authors mention that judges are influenced by the outside world. Instead, these books adopt the theory of judicial independence, supporting the legalist theory of judicial decision making.

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19. *See generally* Baker v. Carr, 369 U.S. 186 (1962).

20. For instance, in *Goldwater v. Carter*, the Supreme Court refused to determine whether the President had the authority to revoke treaties. Goldwater v. Carter, 444 U.S. 996, 999–1002 (1979).

21. United States v. Will, 449 U.S. 200, 217–18 (1980).

22. *See, e.g.*, BRENT E. ZEPKE, LAW FOR NON-LAYWERS (1983).

23. *See, e.g.*, GERALD PAUL MCALINN ET AL., AN INTRODUCTION TO AMERICAN LAW (2005).

In spite of all the rhetoric and academic arguments supporting the notion of an independent judiciary, judicial decisions are frequently influenced by the whims of the populace. Judges have indicated that they have looked at public opinion when making their final decisions on politically charged cases, lending support to the attitudinal model of judicial decision making.[24] For instance, in *Dennis v. United States*,[25] Justice Black noted that the Justices of the Court looked at public opinion before making their decision, stating that "[p]ublic opinion being what it now is, few will protest the conviction . . . ."[26] Academics have also agreed that the judiciary is susceptible to public pressure.[27] A modern day example can be seen in the opinions of Justices O'Connor, Kennedy, and Souter in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[28] In this case, Bruce Fein argued that the Justices "expressly justified their votes by the fear that overruling *Roe* would be portrayed in the media as a surrender to anti-abortion advocates."[29] These examples illustrate that judges, at times, allow outside factors, such as the media, to dictate their decisions as demonstrated by the media's ability to influence judicial opinions and affect the independence of the judiciary.

The increasing politicization of the judiciary has made it so that judges do not always base their decisions only on precedent for fear of public reprisal. This stands in direct contrast to the normative aspect of judicial independence, which aims to protect the judiciary from outside pressures and influence. In spite of the judiciary's institutional safeguards that

24. Justice Holmes warns of the difficulties of making good law with emotionally stirring cases. N. Sec. Co. v. United States, 193 U.S. 197, 400–01 (1904) (Holmes, J., dissenting) ("For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and *before which even well settled principles of law will bend*.") (emphasis added). Justice Jackson echoed this point of view, expressing the importance of an impartial judiciary. Bruce Fein & Rodney A. Smolla, *First Amendment-Does Media Coverage Influence the Outcome of Judicial Decisions?*, 78 ABA. J. 48, 48 (1992) ("To paraphrase Justice Robert Jackson, their [legal opinions'] vitality should not turn on the vicissitudes of political controversy or *journalistic passions*.") (emphasis added).

25. Dennis v. United States, 341 U.S. 494, 581 (1951) (Black, J., dissenting) (explaining that the public would not challenge Dennis's conviction though Justice Black believed Dennis's statements were protected under the First Amendment).

26. *Id.*

27. Christina E. Wells, *Fear and Loathing in Constitutional Decision-making*, 2005 WIS. L. REV. 115, 117 (2005) ("The normative argument that courts ought to protect civil liberties in times of crisis is an attractive one. . . . [But courts] remain subject to the same passions, fears, and prejudices that sweep the rest of the nation.").

28. 505 U.S. 833 (1992).

29. Fein & Smolla, *supra* note 24.

protect their independence, politicians and the media have openly condemned the actions of the judges instead of the underlying legal rules and regulations.[30] In effect, these condemnations can cause the judges to alter their position, leading them to vote a certain way even if that ruling is not legally correct.[31] This suggests that outside influence emmanating from the media or politicians can affect the independence of the judiciary. This occurs despite the fact that if Congress wishes to overturn a judicial decision, they can pass a new law or a constitutional amendment to indicate their opposition to the court's decision and not harm judicial independence.[32] Even though scholars, practitioners, and judges proclaim the importance of the independent judiciary, there are certain instances that demonstrate that the judicial branch is not truly independent and its final rulings can be affected by outside influences.

The theory of the independent judiciary is firmly rooted in the concept of legalism.[33] Judges who are members of an independent judiciary are not influenced by outside factors. Rather these judges are supposed to use legal cannons arrive at a decision in a case. As various academics, textbooks, jurists, and politicians have indicated in their writings, judges, if they adhere to the concept of an independent judiciary, should decide cases divorced from their own personal feelings of the case.[34] Judges that decide cases based upon this legalist framework are said to be upholding the "rule of law," implicitly giving credibility to the decisions made by the American judiciary. If a judge were to stray from this definition, the

30. A pertinent example of the polarization of judges occurred in Iowa, where the public removed several Iowa Supreme Court judges from office because of these judge's controversial decision to legalize same-sex marriage. A.G. Sulzberger, *Ouster of Iowa Judges Sends Signal to Bench*, N.Y. TIMES, Nov. 3, 2010, at A1, *available at* http://www.nytimes.com/2010/11/04/us/politics/04judges.html?_r=1. In this case, rather than changing the judicial decision by passing a new constitutional amendment, Iowans sought to punish the judges for their interpretation of the law. *Id.* A similar case can be made for the Supreme Court nomination process in which judges' decisions are scrutinized not for their understanding of the law but for their political viewpoints. For instance, the judicial confirmation hearing of Justice Sotomayor focused more on her politics than her judicial decisions. *See* Dahlia Lithwick, *The Rational Hysterics: Republicans Won't Beat Sonia Sotomayor by Attacking Her as Too Darn Human.*, THE DAILY BEAST, May 25, 2009, http://www.thedailybeast.com/newsweek/2009/05/25/the-rational-hysterics.html.

31. *See* Fein & Smolla, *supra* note 24; Gregory A. Caldeira, *Public Opinion and The U.S. Supreme Court: FDR's Court-Packing Plan*, 88 AM. POL. SCI. REV., 1139, 1139–40 (1987).

32. For instance, Article II of the Constitution provides for impeachment if judges abuse their positions or engage in illicit activity. U.S. Const. art. II, § 4, cl. 1. Similarly, Congress can pass laws which can overturn a judicial decision.

33. Harry T. Edwards & Michael Livermore, *Pitfalls of Empirical Studies that Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1913 n.37 (2008–2009).

34. *Id.* at 1897.

decisions that she made would be called into question by members of our society, since the judge would be using her own viewpoints (or outside factors that have influenced her decision) to decide a case rather than basing it on the foundational elements of the American legal system. Hence, a judge who decides a case based (at least partially) on the legalist model would be adhering to the concept of the independent judiciary and thus gives her decisions validity when judged against the backdrop of the "rule of law."

II. HISTORICAL BACKGROUND ON THE PROSECUTION OF WAR CRIMES IN THE UNITED STATES

Military commissions have been used to try enemy combatants[35] since the Revolutionary War.[36] During the Revolutionary War, the American government established its first military commissions to try, convict, and sentence enemy spies.[37] Subsequent armed conflicts used military commissions to try prisoners of war.[38] In fact, during the Civil War, the American government used these commissions extensively to try Confederate prisoners of war.[39] A commonality in these early cases was the presence of an ongoing military conflict with a recognized nation.[40]

A. A Brief History of the Use of Military Tribunals in the United States during World War II

One of the most influential cases about military commissions was *Ex Parte Quirin.*[41] The *Quirin* case contained a petition of habeas corpus by non-uniformed Nazi soldiers who were found on American soil.[42] Their intention was to destroy various transportation and industrial facilities to

35. The Fourth Circuit used *Ex parte Quirin,* 317 U.S. 1 (1942), to define an enemy combatant as "[o]ne who takes up arms against the United States in a foreign theater of war, regardless of his citizenship, may properly be designated an enemy combatant and treated as such." Hamdi v. Rumsfeld, 542 U.S. 507, 516 (2004) (internal citations omitted).

36. *Ex parte Quirin*, 317 U.S. at 42 n.14 (1942).

37. Christopher M. Evans, *Terrorism on Trial: The President's Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831, 1836–37 (2002).

38. INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 106-111 (Jordan J. Paust et al. eds., 3d ed. 2007).

39. *Id.* at 1837.

40. *Id.* ("Military commissions were also used extensively during the Civil War to try offenses against the laws of war.").

41. Evans, *supra* note 37, at 1842.

42. *Ex Parte Quirin,* 317 U.S. at 21 ("While landing they wore German Marine Infantry uniforms or parts of uniforms. Immediately after landing they buried their uniforms and the other articles mentioned and proceeded in civilian dress to New York City.").

hamper the American war effort.[43] These Nazi soldiers were found off the shores of Long Island and Florida with large quantities of explosives. The defendants argued it was unconstitutional to try them by a military commission when federal courts were available. The Court determined that "the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without . . . clear conviction."[44] The Court further emphasized that the Constitution does not require "that offenses against the law of war be tried before a jury."[45] Finally, the Court determined that "unlawful combatants" may be tried before military commissions if they intended to engage in hostile acts concerning the destruction of property or life,[46] setting forth the necessary requirements for trying an individual under a military commission when Article III courts were a viable option.[47]

The Nuremberg Trials marked the last time that the United States used military tribunals to prosecute enemy combatants on a large-scale. The Nuremberg trials came in two phases, the initial Nuremberg International Military Tribunals ("IMT"), followed by State-specific military trials.[48] One month after the formal opening of the IMT, the Allied Control Council overseeing Germany's occupation passed Control Council No. 10.[49] This established a uniform legal basis for trying Nazi war criminals following the conclusion of the IMT.[50] Control Council No. 10 authorized each State to try war crimes in its respective military zone.[51] It also

43. Evans, *supra* note 37, at 1842 ("They arrived armed with various explosive devices intending to disrupt America's war effort by destroying transportation and industrial facilities throughout the United States. The saboteurs were, however, apprehended and taken into custody by the FBI.").

44. *Ex Parte Quirin*, 317 U.S. at 25.

45. Evans, *supra* note 37, at 1843.

46. *Id.* at 1844 ("The eight German saboteurs had been apprehended wearing civilian clothes rather than their military uniforms 'during time of war,' with the intent to commit 'hostile acts involving destruction of life or property,' and were acting as agents of an enemy nation at war with the United States—the Third Reich.") (internal citations omitted).

47. *See Hamdi*, 542 U.S. at 516 (referencing *Ex parte Quirin* as the legal standard which the American government must meet to prove that Hamdi was an enemy combatant).

48. The United States and Allied governments used the International Military Tribunals to try the heads of the Nazi government for war crimes. Subsequently, each Allied government formed their own methodology for dealing with the less well-known war criminals. In the United States, this method was the Nuremberg Military Tribunal, which used American judges and prosecutors to try alleged Nazi war criminals. *See generally* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR (1992).

49. Control Council 10 was the main international instrument used to establish the various state-specific military tribunals. Friedman, *supra* note 5, at 76–77.

50. *Id.*

51. *Id.*

permitted German courts to engage in these proceedings by trying war criminals, with the stipulation that the Allies supervise these proceedings.[52] The crimes which Control Council No. 10 listed were crimes against peace,[53] war crimes,[54] crimes against humanity,[55] and membership in organizations proclaimed criminal by the IMT.[56]

Control Council No. 10 made it possible for the creation of the Secondary Nuremberg Military Tribunals ("NMT"), which were under the complete power of the American government.[57] The verdicts reached in each of these zones were international in nature. This obviated the need for subsequent rounds of international military tribunals to prosecute lesser Nazi war criminals because the guilty lesser Nazi war criminals could be brought to justice on the international stage.[58] Each power decided who they would indict based upon the individuals in their custody.[59] Control Council No. 10 also allowed for extradition between allies for specific war criminals who might have committed crimes in other territories or military zones.[60] This offered greater flexibility and efficiency, as defendants were transferred into areas where the strongest case could be made against

52. Control Council No. 10, art. III(1)(d), *available at* http://avalon.law.yale.edu/imt/imt10.asp ("Such tribunal may, in the case of crimes committed by persons of German citizenship or nationality against other persons of German citizenship or nationality, or stateless persons, be a German Court, if authorized by the occupying authorities.").

53. *Id.* art. II(1)(a) ("Crimes against Peace: Initiation of invasions of other countries and wars of aggression in violation of international laws and treaties, including but not limited to planning, preparation, initiation or waging a war of aggression, or a war of violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing").

54. *Id*. art. II(1)(b) ("War Crimes: Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or for any other purpose, of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity").

55. *Id*. art. II(1)(c) ("Crimes against Humanity: Atrocities and offenses, including but not limited to murder, extermination, enslavement, deportation, imprisonment, torture, rape, or other inhumane acts committed against any civilian population, or persecutions on political, racial or religious grounds whether or not in violation of the domestic laws of the country where perpetrated").

56. The Charter also defined membership in a criminal group or organization as a crime. *Id*. art. II(1)(d) ("Membership in categories of a criminal group or organization declared criminal by the International Military Tribunal").

57. *See generally* TAYLOR *supra* note 48.

58. Friedman, *supra* note 5, at 76–77.

59. Control Council 10, *supra* note 52, art. III(1)(a-d).

60. TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, 10–13 (U.S. Gov't Printing Office, 1949) [hereinafter *Final Report*].

them.[61] In the American zone, from 1946 to 1949[62] the NMT conduct twelve trials and prosecuted a variety of German war criminals from virtually all of the professions present in the Third Reich.[63] Despite the breadth of defendants, the IMT overshadowed the importance of the American-led NMT as a source of international legal precedent.[64] Nevertheless, the NMT constitutes the last instance of large-scale military trials conducted by an American military commission.[65]

B. Military Commissions in the Twenty-First Century

The military commissions established by the Bush Administration in the wake of September 11th are the latest large-scale application of military commissions to try enemy combatants. Initially, the Bush Administration attempted to authorize the formation of military commissions to try suspected terrorists without Congressional approval.[66] President Bush sought to justify these trials through his constitutional powers as Commander-in-Chief of the military.[67] However, in *Hamdan v. Rumsfeld*, the Supreme Court rejected this position, stating that the President must have Congressional authority in order to establish these non-Article III courts.[68] Consequently, Congress passed the Military Commissions Act of 2006 to set up the military commissions, establish the procedures for these commissions, and define who could be tried as an enemy in these courts.[69] However, the Court in *Boumediene v. Bush* declared unconstitutional the Military Commissions Act of 2006 because it did not offer an adequate and effective substitute for habeas corpus review of the alleged terrorists' cases.[70]

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61. Friedman, *supra* note 5.

62. *Final Report*, *supra* note 60.

63. In chronological order, the twelve cases of the Subsequent Nuremberg trials—included the Medical Case, Milch Case, Justice Case, Pohl Case, Flick Case, Farben Case, Hostage Case, RuSHA Case, *Einsatzgruppen* Case, Krupp Case, Ministries Case, and the High Command Case.TAYLOR, *supra* note 60, at 127, 162, 241; *see generally* Friedman, *supra* note 5. The first trial to open was the Medical Case which began on November 11, 1946, and the last case to close was the Ministries Case which came to a conclusion on April 14, 1949. TAYLOR, *supra* note 60; *Id.* at 127, 162, 241.

64. *Id.*

65. *Id.*

66. Michael Mukasey, *The Obama Administration and the War on Terror*, 31 HARV. J.L. & PUB. POL'Y, 953, 958 (2010).

67. Jeffery Addicott, *Efficacy of the Obama Policies to Combat Al-Qa'eda, the Taliban, and Associated Forces-The First Year*, 30 PACE L. REV. 340, 349–50 (2010).

68. *Id*.

69. *Id.*

70. Boumediene v. Bush, 128 S. Ct. 2229, 2240 (2008) ("We hold that those procedures are not an adequate and effective substitute for habeas corpus.").

The Supreme Court's decision in *Boumediene* corresponded with President Obama's election to the presidency, which resulted in a change in policy regarding the use of military commissions. When President Obama took office, he initially declared his intention to close the Guantanamo Bay detention facility within a year of assuming office and end the use of military commissions.[71] Obama's rationale for this decision appeared to be two-fold. Not only did he seek global support for the American-led war on terror, but he also stated his desire to reinstate the idea that the United States was a nation of laws.[72] But, as Obama's first year in office progressed the political realities and public concern over the fate of the terrorists detained at Guantanamo Bay made keeping these two promises nearly impossible.[73] Therefore, following the ruling in *Boumedeine*, President Obama urged Congress to pass the Military Commission Act of 2009 which set forth military commission procedures which were similar to those of a court martial hearing.[74] Additionally, this Act gave alleged enemy combatants the right of habeas corpus[75] and recourse to review the legality of their detentions.[76]

In conjunction with reinstating the military commissions, President Obama promised to use Article III courts to prosecute some of the defendants.[77] The Obama administration stated that these trials would be held in New York, just miles away from Ground Zero.[78] This decision created much debate in the media and political realm. Conservatives were uniformly opposed to giving the terrorists civilian trials.[79] These pundits and politicians thought that civilian trials were not the best forum for these cases due to the sensitivity of information that each side would enter into evidence.[80] Further, they thought that holding the terrorist trials in Article

71. Addicott, *supra* note 67, at 354.

72. Exec. Order 13,492, 3 C.F.R. 13492 (2010), *available at* http://www.white house.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities/.

73. Addicott, *supra* note 67, at 354.

74. *See generally* MCA of 2009, *supra* note 4.

75. Addicott, *supra* note 67, at 349; Mukasey, *supra* note 66.

76. Addicott, *supra* note 67, at 349.

77. *Id.*

78. The Obama Adminstration's decision to hold a civilian terrorist trial was not new. Under the Bush Administration, some terrorists were tried in the domestic sphere, notably Zacarias Moussaoi and Richard Reid. Mukasey, *supra* note 66, at 959. Further, prior to September 11, many terrorists were tried in civilian courts. *Id.* For instance, Osama Bin Laden was initially indicted in a civilian court. US v. Bin Laden, 126 F. Supp. 2d 264, 264 (S.D. NY 2000).

79. *See, e.g.*, *Boehner: 'No Way' Terrorist Trials Will Be Held in New York*, FOXNEWS.COM, Jan. 27, 2010, http://www.foxnews.com/politics/2010/01/27/boehner-way-terrorist-trials-held-new-york/ [hereinafter *Boehner*].

80. *Id.* ("'There is not going to be a trial in New York, I guarantee it. There is no appetite for the trials in Congress,' Boehner, R-Ohio, said.").

III courts was a national security risk because of the heightened possibility of terrorists attacking the courts that heard the trials.[81] On the other hand, liberal media outlets and politicians lauded the decision of the Obama Administration.[82] These individuals thought that the civilian trials would not affect the final decisions of the cases, would reinstate the rule of law in America, and would help to garner international favor for the "War on Terror."[83] This debate continues today, especially with the decision rendered in the *Ghailani* Trial.

Ahmed Ghailani was the first suspected terrorist and Guantanamo Bay detainee to be tried in an Article III court since Congress passed the Military Commissions Act of 2009.[84] The American government accused Ghailani of being an al-Qaida operative. To support this, the United States introduced evidence that pointed to his alleged role in the 1998 bombings of United States embassies in Kenya and Tanzania. These attacks took 224 lives and Ghailani allegedly had a large role in the operation and execution of these atrocities.[85] Out of the 285 counts against him, the jury convicted Ghailani for one count of conspiracy to damage or destroy U.S. property.[86] The media hotly debated the success of this verdict. Some factions thought that it restored the integrity of the American judicial system whereas others pointed to the verdict as a failure.[87]

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81. *Id.*

82. *See, e.g.*, Heather Horn, *One Year Later, Gitmo Still Open*, ATLANTIC WIRE, Jan. 22, 2010, http://www.theatlanticwire.com/opinions/view/opinion/One-Year-Later-Gitmo-Still-Open-2282.

83. *Id.*

84. The *Ghailani* trial was the first civilian terrorist trial. Holder, *supra* note 2. In this case, the jury convicted Ghailani on one of two-hundred-and-eighty-five counts. Nichols & Johnston, *infra* note 166. The ultimate sentence for Ghailani is twenty years-to-life. Weiser, *infra* note 175. The verdict in this trial reignited the national debate between holding the terrorist trials in military commissions or continuing with civilian trials for some terrorists. Phil Hirschkorn, *Ghailani Trial Reignites Terror Justice Debate*, CBS EVENING NEWS WITH KATIE COURIC, Nov. 20, 2010, http://www.cbsnews.com/8301-500803_162-20023492-500803.html.

85. Hirschkorn, *supra* note 84.

86. *Id.*

87. Many of the individuals who thought that the trial was a failure pointed to the strict procedural and evidentiary requirements needed in an Article III court. *See, e.*g., Warren Richey, *Terror Case: Is One Conviction and 284 Acquittals a Success*?, THE CHRISTIAN SCIENCE MONITOR, Nov. 18, 2010, http://www.csmonitor.com/USA/Justice/2010/1118/Terror-case-Is-one-conviction-and-284-acquittals-a-success. These individuals believe that due to the difficulty of obtaining evidence in terrorism cases, Courts should be more lenient in allowing contested evidence to be entered into the record. *See id.* Conversely, many judicial scholars and human rights advocates have pointed to the fact that these trials were a success because it shows that America is still a land of laws and not of mob justice. *See id*.

III. MEDIA INFLUENCING JUDGES: A COMPARATIVE STUDY BETWEEN THE SECONDARY NUREMBERG MILITARY TRIBUNALS AND THE CIVILIAN TERRORIST TRIALS

In order to view the possible extent of media influence on the judiciary, it is necessary to look at high-profile judicial decisions that elicited widespread media attention. It is also helpful to look at these high-profile trials over a long period of time to determine if media influence on the independent judiciary is a new or reoccurring phenomenon. Finally, it is useful to look at a high-profile case that did not take place on American soil to determine if the media was able to influence the judges' decisions in a more remote geographic setting. To this end, the final decisions rendered in the NMT and the first civilian terrorist trial, *Ghailani*, are case studies in high profile cases where judicial independence could be called into question because of media partiality. Both trials contained issues that deeply impacted the American public and received widespread media attention despite their differences in both time and place. Additionally, the NMT took place during the 1940s while the final verdict in the *Ghailani* trial was handed down on January 25, 2011. Finally, the NMT took place on German soil whereas the *Ghailani* trial took place just blocks away from the September 11th terrorist attacks. These factors combined demonstrate that the media has been influencing the judiciary in high-profile cases for an extended period of time, regardless of the geographic location.

The decisions rendered by the judges in the NMT aid in discerning the possible influence of the media on an Article III court. The comparison between the NMT and the *Ghailani* trial is not a perfect one. Regardless, the reaction of the American public to the atrocities that the Nazis and the terrorists acts committed were similar, and so was the media coverage that influenced the final decision of the judges in these highly contentious cases.

A. An Earlier Case Study: The Industrialist Trials of the NMT

Through newspaper articles, the American media managed to relay the opinion of the American public to the officials in charge of or involved with the Nuremberg proceedings, which likely affected the final verdicts of the NMT.[88] When the concern of the American government shifted

88. *See* TAYLOR, *supra* note 48 (discussing the presence of a large press corps, which had the sole purpose of reporting on the trials, and noting that even though this press corps diminished as the

away from the threat of German resurgence toward the Cold War, the media's perception of the NMT also changed. An excellent example of this change can be seen in the so-called Industrialist Trials, whose defendants consisted of the German industrialists who controlled Flick Combine, I.G. Farben, and Krupp Industries. The disinterest that the American media displayed toward the continuation of the industrialist proceedings seems to have validated the ideas proposed by American government officials who viewed the German industrialists as tools to combat the rise of communism.[89] Further, this disinterest in the Industrialist Trials could be seen in the opinions and verdicts delivered by the tribunal judges.

Prior to the start of the NMT, the American government attempted to indict Gustav Krupp, the head of Kurpp industries, for war crimes in the IMT, such as enslavement and deportation of Jews or German prisoners as well as plundering.[90] But, due to errors made by American prosecutors, the Nuremberg court deemed that Gustav was too sick for trial[91] and the court concluded that Gustav could not be tried *in absentia*.[92] In response to this, Justice Jackson, the lead American prosecutor in the IMT, tried to substitute Alfried Krupp for his father for using Krupp Industries to engage in the same crimes.[93] When Jackson presented the judges with his request, he was flatly and publicly denied.[94] This decision by the IMT judges created a large controversy in the media, which viewed the failure to indict Alfried Krupp with a sense of despair.[95] Headlines all across America reflected this disappointment. One such example is an Associated Press article in the *Atchison Daily Globe* of Atchison, Kansas, which titled its article "Krupp Family Not To Be Represented At Nuernberg."[96] This article outlined the reasoning behind the failure, and emphasized that the decision to reject the proposed substitution took the judges a mere twenty-

trials progressed, all of the final verdicts of the NMT still received some form of media coverage).

89. *See* WILLIAM MANCHESTER, THE ARMS OF KRUPP: 1587–1968, 618–21 (1968).

90. 1 INTERNATIONAL MILITARY TRIBUNAL: NUREMBERG 75 (U.S. Gov't Printing Office, 1947), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/NT_Vol-I.pdf.

91. AIERY NEAVE, NUREMBERG: A PERSONAL RECORD OF THE TRIAL OF THE MAJOR NAZI WAR CRIMINALS IN 1945–46, at 47 (1978).

92. In *absentia* refers to being tried while not being present in the court. TAYLOR, *supra* note 48, at 153–56.

93. *Id.*

94. *Id.*

95. Associated Press, *Krupp Family Not To Be Represented At Nuernberg*, ATCHISON DAILY GLOB., Nov. 17, 1945 at 1 [hereinafter *Krupp Family*].

96. *Id.* Notably, this wire article was reprinted across the United States. *See, e.g.*, George Tucker, *Nurenberg Trial to Start Tuesday: Tribunal Rules Out Younger Krupps as Defendant*, THE EVENING INDEPENDENT, No. 17, 1945, at 1.

one seconds.[97] Furthermore, the editor positioned the article on the front page directly beneath a picture of the Senate hearing regarding Pearl Harbor, only adding to the bleak tone of the article.[98] This article mirrored the tone of the nation in its dismay at the failure of the Krupp indictment.[99]

In addition to wire stories, editorials that began to surface were printed supporting the substitution of Alfried Krupp for his father, Gustav. An editorial published in the *Zanesville Signal* stated that both Krupps should be indicted for their crimes.[100] The author, however, argued that a substitution of Gustav for Alfried should not occur because the court should allow Gustav Krupp to be tried *in absentia* instead of court deciding to try Gustav.[101] On top of this point, the author referenced the initial desire of the American government to try Alfried Krupp separately in the proceedings for his own war crimes.[102] Ultimately the author concluded that "[i]t might be better to combine the British and American proposals. Let old Krupp [Gustav] be tried in absentia, not as a symbol but as what he is. And let his son also be tried on his own record."[103] This editorial supports the growing discontent among the American public over how the court handled the Krupp episode. Many Americans simply could not comprehend the reasoning behind not trying both Krupps in front of the IMT, for both, in the public's opinion, were clearly guilty of war crimes.

As the trials continued, American interest in prosecuting German industrialists for war crimes lessened. The Flick trial aptly demonstrates the waning public interest in the actual atrocities committed by the industrial magnates.[104] Freidrich Flick and his cohorts were charged with war crimes, crimes against humanity, enslavement and deportation of individuals under Nazi control, membership in the SS, and being a Nazi party member.[105] The media tended to marginalize the Industrialist Trials

97. *Krupp Family*, *supra* note 95 ("The request of Justice Robert H. Jackson chief prosecutor that 30-year-old Alfried Krupp tried in the place of his father, Gustav Krupp Von Bohlen Und Halbach, was disposed of in a session which lasted exactly 21 seconds.").

98. *Id*.

99. Felix Morley, Editorial Comment, *Travesty of Justice*, CHESTER TIMES, Nov. 27, 1945, at 1.

100. C.C. Stebbins, *Crime and Punishment*, THE ZANESVILLE SIGNAL, Nov. 11, 1945, at 1.

101. *Id.*

102. *Id*.

103. *Id.*

104. *Compare* Walter Winchell, *Nemesis at Nuremberg*, THE CHARLESTON DAILY MAIL, Dec. 4, 1946, at 9, *with* Associated Press, *Fancy Bathtub Craving of Hitler Made Public*, WALLA WALLA UNION-BULL., June 9, 1947 at 4 [hereinafter *Bathtub*] (describing a letter about Hilter's bathtubs as potential evidence in the "Flick concern").

105. 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS: "THE FLICK CASE" (U.S. Gov't Printing Office, 1952) [hereinafter THE FLICK CASE], *available at* http://www.loc

as exemplified in "Fancy Bathtub Craving of Hitler Made Public" published in the *Walla Walla Union-Bulletin* of Washington.[106] The author only briefly mentions Freidrich Flick, head of the Flick combine, in passing, stating that "[t]hey are charged with helping to form the German war plan."[107] While the article mentioned some aspects of the indictment, it ignored the remainder of the indictment, such as Flick's membership in the SS.[108] The article omitted some of the most inflammatory charges, such as the slave labor and plunder allegations.[109] Newspapers across America imitated the tone set by this article.[110] Many articles only briefly mentioned the slavery and plunder charges and either failed to report on the issue or offered only a short statement about the verdict.[111] In neglecting these elements, authors marginalized the proceedings by focusing on a mundane aspect of the trials and failing to elaborate on the crimes of the Flick Combine.

Similar to the declining public interest in the Flick Trial, reporting on the I.G. Farben Trial faced a decline in popular interest. The executives of I.G. Farben were charged with planning and engaging in an aggressive war, enslavement and deportation of individuals under Nazi control, war crimes, crimes against humanity, and membership in the SS.[112] In contrast to the outrage that stemmed from the failure to try Alfried Krupp, the newspaper articles written about I.G. Farben moved away from the previously condemnatory tones as exemplified by a front page article printed in the *Daily Capital News* of Jefferson City, Missouri[113] Considering the article was printed during the initial phases of the I.G. Farben trial, this article demonstrates the shift between stories printed before the start of the trial and those published afterward.[114] Whereas prior articles belittled the industrialists, this exposé praised some of the

.gov/rr/frd/Military_Law/pdf/ NT_war-criminals_Vol-VI.pdf.

106. *Bathtub*, *supra* note 104.

107. *Id*.

108. *Id*.

109. *Id.*; THE FLICK CASE, *supra* note 105, at 10–11.

110. *See, e.g.*, Associated Press, *Flick, Associates*, DIXON EVENING TELEGRAPH, Dec. 22, 1947, at 6; Robert Young, *Ask U.S. Court to Free German at Nuernberg*, THE CHICAGO DAILY TRIB., Mar. 17, 1948, at 15.

111. Young, *supra* note 110 (citing with approval statements of Flick's defense counsel accusing the prosecution of being communists).

112. 7 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS: "THE FARBEN CASE" 10–11 (U.S. Gov't Printing Office, 1952) [hereinafter THE FARBEN CASE], *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/ NT_war-criminals_Vol-VI.pdf.

113. Associated Press, Donald Doane, *Farben Directors Charged With Fostering Wars*, DAILY CAPITAL NEWS, Aug. 27, 1947, at 1.

114. *Id*.

accomplishments of the Farben executives prior to the Second World War.[115] The shift in tone strongly supports the idea that the public's interest in the outcome of the trials was declining.

As the trials progressed toward their final verdicts newspaper articles' tone and placement changed, reflecting a growing public apathy about the trials grew. An example of this decline is the media's attention over the course of the Krupp trials, which initially started with much fervor and ended in indifference.[116] In a front-page story regarding the Krupp verdict in the *Chillicothe Constitution Tribune*, the author stated the Krupp verdict in a matter of fact tone, in marked contrast to the hyperbolic phrases used earlier on in Krupp's proceedings.[117] A large portion of the article summarized the crimes that Alfried Krupp and his associates committed.[118] Despite this summation, the article failed to give in-depth details regarding the severity of these crimes by embedding pertinent details in large, long-winded paragraphs.[119] This placement enabled apathetic readers to easily pass over the list of crimes committed by Krupp's company, which further evidences the public's growing disinterest in Nazi war crimes.

Following the Berlin Blockade, publications regarding the Industrialists Trials declined notably. The Berlin Blockade marked a turning point in relations between the United States and the Soviet Union, leading to the escalation of Cold War tensions and impacting the volume, content, and tone of the articles printed in the ensuing months.[120] Pieces printed concerning Alfried Krupp appear to indicate this shift.[121] Furthermore, the infrequency with which the *New York Times* published articles about the Krupp Trial reflects waning public interest in the outcome of the trials. Between the late winter of 1947 and the summer of 1948, the *New York Times* printed just four articles concerning the Krupp Case, as compared to the numerous stories printed prior.[122] A parallel shift in article content tracks this same decrease in public attention. For instance, the editor of the *Moberly Monitor-Index* surrounded an article entitled "Krupp Officials

115. *Id.* (stating that all the defendants were "outstanding men in business or science in pre-war Germany.").

116. *Krupp Family*, *supra* note 95.

117. *Compare* Associated Press, *Krupp Munition Works Officials are Convicted*, CHILLICOTHE CONSTI.TRIB., July 31, 1948, at 1 [hereinafter *Krupp Munition Works*], *with* Stebbins, *supra* note 100.

118. *Krupp Munition Works*, *supra* note 117.

119. *Id.*

120. *See generally* JOHN MAN, BERLIN BLOCKADE (1973).

121. Alfried Krupp was the most famous of the industrialist defendants. *See generally* MANCHESTER, *supra* note 89.

122. *Id.* at 613.

Acquitted on Two War Crimes Counts" with stories about communism.[123] Additionally, the author wrote in a very detached tone and decided to only briefly cite facts.[124]

As time progressed, the American public seemed to not want to read about the atrocities of the Third Reich. Whereas initially newspaper articles were long and full of detailed analysis, later journalists and newspaper editors opted for succinct articles about the continuing trials. Rather than focusing on the continuing trials, the American media turned to more pressing international issues. The reporters accomplished this task by vilifying communists while lauding the accomplishments of capitalism. This shift in media coverage of the Industrialist Trials appears to have affected the final punishments delivered by the judges in the NMT proceedings. The judges of the industrialist trials appeared attuned to the feelings of the American public as well as the American government. As the judges handed down the verdicts of the NMT, each sentence seemed to correlate with the amount of public attention a particular trial received, indicating that they may have been influenced by the media.[125] Both the length of the verdicts and the final sentencing suggests the judges' reluctance to harshly punish the industrialists in light of the international events of the period.

The sentences of those convicted in the Industrialist Trials only decreased with the passage of time. This can best be seen by looking at the relevant sentences of the lead defendants for each company. In the Flick Trial, Friedrich Flick was sentenced to seven years in prison. In the trial of I.G. Farben leaders, many of the heads of the combine were acquitted. Only two heads received larger sentences than Friedrich Flick, Walter Durrfeld who oversaw the construction of Auchwitz and Otto Ambros who oversaw the production of Auchwitz.[126] Therefore, it is significant that the two heads of I.G. Farben who were intimately involved in the construction and operation of Auchwitz received a sentence that was one year longer than that of Flick, who did not run such a brutal camp. Next, Alfried Krupp received a minimal sentence. While he initially received twelve years in prison, he was released shortly after his imprisonment. Moreover, this sentence was significantly smaller than the sentence he

123. Associated Press, *Krupp Officials Acquitted on Two War Crimes Counts*, MOBERLY MONITOR-INDEX, Apr. 5, 1948, at 2.

124. *Id.*

125. *See infra* text accompanying notes 126–27.

126. Auchwitz was the worst of the camps created by the Industrialists. YISRAEL GUTMAN & MICHAEL BERENBAUM, THE ANATOMY OF AUSCHWITZ, at i (1994).

would have received if he was tried in front of the IMT where most of the defendants were sentenced to death.[127] Considering there was popular American support for trying Alfred in front of the IMT, the comparison is important because it seems to indicate that over time the American public became less interested in the outcome of the trials. So, while Krupp's sentence did not decrease in relation to the *other defendants*, it certainly decreased from the amount of jail time Krupp likely would have received if he was actually tried in front of the IMT. This seems to indicate that over time the lack of media furor surrounding the case allowed for the judges to operate in a more legalist framework, rather than succumbing to the pressures of the American media.

Once the American public's attention to the Industrialist Trials and the horrific crimes these industrialists perpetrated diminished, the American High Commissioner commuted the sentences of many of the convicted industrialists.[128] This decision allowed the sentenced industrialist Nazis to retain all their previously held property and reintegrate into German society.[129] The media did not write any articles about the commutations of the convicted industrialists' sentences. The lack of articles published on this point seems to indicate that the American public no longer cared about punishing the industrialists. The once impassioned rhetoric present at the onset of the trials gave way to the publication of more factual stories. The papers that opted to report on the release of the industrialist prisoners did so in purely factual tone, not belying any underlying anger that once existed.[130] When looking at the amount of media coverage that the release of the industrialists received, it seems that the American public had lost interest in their fate.

From the failure of the Krupp indictment to the final verdicts of the Industrialist Trials, the American media seems to have influenced the formation and execution of the NMT proceedings. Once the NMT began, waning public support for the trials, seemed to have helped with the decision of the U.S. government to rapidly conclude the trials.[131] The

127. Quincy Right, *The Law of the Nuremberg Trial*, 41 AM. J. INT'L L. 38, 38 (1947).

128. John J. McCloy, *Approach to Clemency Decisions*, WKLY. INFO. BULL., May 1951, at 11.

129. *Id.*

130. In this article, John McCloy published his response to a letter that Eleanor Roosevelt wrote to him concerning his decision to free Nazis from jail. *Id.*

131. Various newspaper articles printed as the trials went on turned from a very aggressive stance regarding the Nazi industrialists toward presenting articles concerning the industrialists in a more factual nature. This transition can most easily be seen in the descriptions of the defendants. *Compare Nazi Rivalry on Loot Shown in Flick Trial*, N.Y. TIMES, Apr. 22, 1947, at 23, *with Bathtub*, *supra* note 104.

increasing Cold War tensions and extreme length of the trials led to this decline in popular support among the American public.[132] With the American media focusing its reporting on the amplification of Cold War tensions, a correlation appears between the importance of a given defendant and the length of his sentence, seeming to indicate that the American judges noticed this shift and acted accordingly. The American public no longer desired to punish Nazi industrialists who were capable of effectively halting the spread of communism into Germany.

From this, I believe we can draw a reasonable inference that the judges in the industrialist trials attempted to balance the legal rules of the case with the pressure put on them by the media to hand down a harsh sentence. This was not an easy task given the politically and emotionally charged nature of the NMT trials. When analyzing the cases in light of the newspaper articles published during the time, it becomes clear that judges might not be able to maintain a legalist attitude when the subject is hotly contested. The Krupp case provides the best example of this approach. Initially, the American public and, presumably, the judges were angry when the court excluded Gustav and Alfried Krupp from being tried in front of the IMT. Having not been able to try Krupp *in abstentia* in the initial Nuremberg proceedings, the American public seemed eager to hand Krupp and his fellow industrialists a harsh sentence. Flick, the first industrialist, received such a harsh sentence. When it came time for Krupp's trial, the American public had begun to emphasize the danger posed by communism and looked to industry to combat it.[133] In response, the initial cries for a harsh punishment for Krupp were tapered and he ultimately received a negligible punishment, first calling for the death penalty and then receiving a twelve year sentence that was commuted without any public protest. This abatement in public opinion allowed for the judges to strike a balance between the public and the laws demands. This same balancing effort can be seen in the later case of *Ghailani*.

B. Civilian Terrorism Trials: Ghailani *Case Study*

During President Obama's first term in office, he indicated that his administration would try alleged terrorists in Article III courts rather than the special military commissions used by the Bush Administration.[134] This

132. MANCHESTER, *supra* note 89 (stating that the Cold War impacted the final outcome of the Krupp trials because of public fear concerning communism).

133. *Id.*

134. Holder, *supra* note 2.

drastic change in policy elicited great media attention. Ghailani was the first individual fully prosecuted by the federal government in this new framework.[135] Given the unprecedented nature of the *Ghailani* trial, the media paid close attention to the proceedings. Further, they criticized the various decisions rendered by the court. Both the great attention placed on Ghailani's trial and the political pressure to convict Ghailani for being a terrorist seem to have affected the decisions that Judge Kaplan made throughout the case.

Many pundits were unsure of the possible effectiveness of the civilian trials and the likelihood that these alleged terrorists held at Guantanamo Bay would be ultimately convicted for their alleged crimes.[136] However, neither the media nor the Obama Administration emphasized the possible problems of outside influence in the civilian terrorist trials. Rather, both groups pointed to the fact that the civilian terrorist trials would reinstate the rule of law in America because the alleged terrorists would be tried in Article III courts like normal criminals rather than in a military commission.[137] They thought that condemnation by civilian courts would do more to protect the integrity of the American judicial system.[138] However, when the court failed to convict the accused both sides viewed this as a failure of the judicial system, rather than evidence that an innocent man was spared from an unjust punishment.[139]

Throughout the *Ghailani* trial, the media also debated the relevance of the enhanced interrogation techniques used on the alleged terrorists held at Guantanamo Bay, including Ghailani.[140] Prior to the trial, the media used an indifferent tone when discussing the use of enhanced interrogation

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135. Jason Leopold, *A Campaign Promise Dies: Obama and Military Commissions*, TRUTHOUT, Apr. 4, 2011 (originally published on Mar. 8, 2010), http://www.truth-out.org/the-unmaking-a-campaign-promise-obama-and-military-tribunals57493.

136. Brian Montopoli, *Republicans Outraged Over Terrorist Trial*, CBS NEWS (Nov. 13, 2009), http://www.cbsnews.com/8301-503544_162-5635009-503544.html.

137. Holder, *supra* note 2. While civilian terrorist trials would help to reinstate the rule of law, it would only help in so far as these trials maintained their independence and did not allow outside sources to influence the final decision.

138. *Ghailani Trial Underscores Federal Courts' Ability To Prosecute Terrorism Suspects, Says ACLU*, AM. CIV. LIBERTIES UNION (Jan. 25, 2011), http://www.aclu.org/national-security/ghailani-trial-underscores-federal-courts-ability-prosecute-terrorism-suspects-say.

139. Andy Worthington, *The Rule of Law and the Ghailani Case*, THE FUTURE OF FREEDOM FOUNDATION (Nov. 23, 2010), *available at* http://www.fff.org/comment/com1011m.asp.

140. Michael J. Lebowitz, *The Value of Claiming Torture: An Analysis of al-Qaeda's Tactical Lawfare Strategy and Efforts to Fight Back*, 43 CASE W. RES. J. INT'L L. 357, 362 (2010). From an international law standpoint, enhanced interrogation is torture. *See generally* Jordan J. Paust, *Executive Plans and Authorizations to ViolateInternational Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811 (2004–2005). Therefore, throughout this Note, I will be using the terms enhanced interrogation and torture interchangeable.

techniques on Ghailani. The first articles published about this topic related to whether Ghailani's case should be dismissed if he was tortured while in CIA custody.[141] These articles did not editorialize on whether the case should be dismissed or not. Rather, the journalists used a very matter of fact tone when reporting on the proceedings, frequently giving the government the benefit of the doubt.[142]

Judge Kaplan's opinion of the dismissal claim mirrored the media's tone and language. When the defendants moved for dismissal on the grounds that Ghailani was subject to enhanced interrogation techniques, Judge Kaplan did not delve into whether the alleged techniques were used or the possible ramifications of torture to Ghailani's human or legal rights.[143] He rejected the defense's argument that the case should be dismissed because American government officials allegedly tortured Ghailani. Rather, Judge Kaplan indicated that it did not matter to the integrity of the legal proceedings if Ghailani was tortured or not while in CIA custody, stating that "[c]ertainly the government should not be deprived here 'of the opportunity to prove his guilt through the introduction of evidence wholly untainted by [any government] misconduct.'"[144] Additionally, Judge Kaplan emphasized the retributive nature of Ghailani's claims[145] as well as the fact that the government would not be relying on any information they obtained during Ghailani's

141. Ghailani's defensive team was trying to dismiss the case because CIA interrogators allegedly used these "enhanced interrogation techniques" on him before the CIA detained Ghailani at Guantanamo Bay. *See, e.g.*, Benjamin Weiser, *Terror Suspect's Lawyer Asks for Dismissal of Case*, N.Y. TIMES, Jan. 12, 2010, at A19, *available at* http://www.nytimes.com/2010/01/12/nyregion/12ghailani.html; Alison Gendar, *Time to Drop Charges Against Accused Al Qaeda Embassy Bomber Ahmed Khalfan Ghailani, Attorney Says*, DAILY NEWS, Jan. 12, 2010, http://www.nydailynews.com/news/world/2010/01/12/2010-01-12_time_to_drop_charges_free_terror_suspect_atty_sez.html; *Lawyer Cites Torture for Wanting Charges Dropped Against Gitmo Detainee*, FOXNEWS.COM, Jan. 11, 2010, http://www.foxnews.com/us/2010/01/11/lawyer-cites-torture-wanting-charges-dropped-gitmo-detainee/ [hereinafter FOXNEWS.COM, *Wanting Charges Dropped*].

142. For instance, the Fox News article stated: "Quijano [the defense counsel] says Ghailani was subject to so-called 'enhanced interrogation methods' for 14 hours over five days and was denied trial for four years." FOXNEWS.COM, *Wanting Charges Dropped*, *supra* note 141. However, nowhere in this article does the author condemn the government's actions. *Id.* In fact, the journalist framed the statements in such a manner that gives the government the benefit of the doubt; some readers might think that the government did not employ "enhanced interrogation techniques" when questioning Ghailani, even though the opposite was true.

143. United States v. Ghailani, 751 F. Supp. 2d 502, 508 (S.D.N.Y. May 10, 2010).

144. *Id.* at 506 (alteration in original).

145. *Id.* at 505 ("In seeking dismissal of the indictment, however, he does not deny that he is being afforded every protection guaranteed to all in the defense of criminal prosecutions. Rather, Ghailani in effect argues that the case should be dismissed *to punish the government for its mistreatment of him* before he was presented in this Court to face the pending indictment.") (emphasis added).

time in CIA custody.[146] On top of these statements, Judge Kaplan summarily dismissed Ghailani's speedy trial defense that related to a delay in his trial because of his alleged torture, citing that there was no compelling reason to go forward with it.[147] Like those writing in the media, Judge Kaplan appeared indifferent toward alleged torture of Ghailani.

From late May 2010 till early October 2010, the stance of the media and the views evident in Judge Kaplan's opinions changed once the government attempted to use information acquired through enhanced interrogation techniques.[148] Initially, when Judge Kaplan decided to allow the case to proceed to trial, the journalists' tone did not change, again reporting the facts and refraining from personal judgment or the use of the charged words present in the defendant's brief—like the defendant's lawyer's assertion that Ghailani's alleged torture amount to an outstanding due process violation.[149] However, this tone changed when the government attempted to introduce evidence obtained through enhanced interrogations. Journalists, with the exception of some commentators from conservative-leaning news sources, such as Fox News, universally panned the use of torture to extract information.[150] Articles published in various news outlets condemned the use of torture, with some authors calling for the Obama Administration to investigate the alleged use of torture by government officials during the Bush Era.[151] Additionally, journalists started to publish articles concerning the possible use of medical officials in aiding the CIA's enhanced interrogations.[152] These types of stories were written with

146. *Id.* at 506.

147. *Id.* at 505 ("In this case, Ghailani has not identified explicitly the component of his due process rights that allegedly was violated.").

148. *See, e.g.*, James Risen, *Medical Ethics Lapses Cited in Interrogations*, N.Y. TIMES, June 7, 2010 at A6, *available at* http://www.nytimes.com/2010/06/07/world/07doctors.html.

149. A Business Week article buried the argument of the defense in the case, placing it towards the end of the article where the readers are less likely to read. Furthermore, while Hurtado made sure to quote all of the inflammatory language used by the defense, she placed the judge's responses directly after the quotations. *See, e.g.*, Patricia Hurtado, *U.S. Judge Refuses to Dismiss Indictment of Guantanamo Detainee Ghailani*, BUSINESS WEEK, May 10, 2010, *available at* http://www.bloomberg.com/news/2010-05-10/u-s-judge-refuses-to-dismiss-indictment-of-guantanamo-detainee-ghailani.html.

150. *See, e.g.*, *Boehner*, *supra* note 79; David Alexander, *CIA Briefed 68 Lawmakers on Interrogation Program*, REUTERS, Feb. 23, 2010, http://www.reuters.com/article/2010/02/24/us-usa-security-interrogation-idUSTRE61N0WE20100224; Jason Ryan, *Torture Investigation: Bush-DOJ Attorneys 'Exercised Poor Judgment,'* ABC NEWS, Feb. 19, 2010, http://abcnews.go.com/Politics/torture-investigation-president-george-bush-era-doj-attorneys/story?id=9892348.

151. Jim Nintzel, *Torture: The GOP's Default Position?*, TUCSON WEEKLY, Feb. 15, 2010, http://www.tucsonweekly.com/TheRange/archives/2010/02/15/torture-the-gops-default-position.

152. Leonard S. Rubenstein & Stephen N. Xenakis, *Doctors without Morals*, N.Y. TIMES, Mar. 1, 2010

very harsh tones and condemned the use of these techniques by the CIA.[153] Furthermore, some newspaper articles stressed the importance of the *Ghailani* trial, thinking that it would help to determine whether information gathered through these enhanced interrogation techniques would be allowed in civilian terrorist trials.[154]

Judge Kaplan directly addressed the media's stance in his decision on the admissibility of evidence procured through enhanced interrogation. His decision reflected the negative public sentiment concerning government use of enhanced interrogation to obtain information from alleged terrorists.[155] In his July 2010 opinion, Judge Kaplan took note of the popular opinion surrounding the trials and was sympathetic to the public outrage that stemmed from the terrorist attacks.[156] He nevertheless stated that public anger over terrorism attacks could not influence his decision as this would be "unacceptable in a country that adheres to the rule of law."[157] Therefore, Judge Kaplan seemed to be in touch with the viewpoints expressed in the media and in the populace at large. But, instead of ignoring these viewpoints, he directly addressed them to justify the proceedings.[158]

As both his August and October 2010 opinions demonstrate, Judge Kaplan took notice of public opinion surrounding the trial, he still strove to adhere to the rule of law. In these opinions, Judge Kaplan ruled on whether information obtained through enhanced interrogation would be

153. For instance, Larry Neumeister of the Associate Press stated that: "After the Sept. 11, 2001, attacks, the CIA used 10 harsh methods, including waterboarding, a form of simulated drowning." Larry Neumeister, *Tanzanian Who Supplied Explosives Testifies in U.S.*, MIAMI HERALD (Sept. 16, 2010), http://www.miamiherald.com/2010/09/16/1828454/tanzanian-who-supplied-explosives.html.

154. *See, e.g.*, Carrie Johnson, *Guantanamo Detainee's Trial May Set Tone For Others*, NAT'L PUB. RADIO (Sept. 27, 2010), http://www.npr.org/templates/story/story.php?storyId=130103644 (noting that the *Ghailani* trial could create an important precedent regarding whether information obtained through enhanced interrogation will be allowed at trial).

155. *See generally* United States v. Ghailani, No. S10 98 Crim. 1023(LAK), slip op., 2010 WL 4006381 (S.D.N.Y., Oct. 6, 2010).

156. United States v. Ghailani, 751 F. Supp. 2d 515, 519 (S.D.N.Y., July 12, 2010) ("It [the Government] could not lawfully give vent to the outrage felt both here and in Africa at these murderous attacks on innocent civilians. It would be obliged to release him if hostilities with Al Qaeda were to end. This prosecution therefore serves at least two purposes that our government could not lawfully achieve without an appropriate conviction—to pass a moral judgment on and to punish Ghailani if in fact he committed the alleged crimes.").

157. *Id.* at 520.

158. In a New York Times article, Weiser noted the close connection present between parts of Judge Kaplan's opinion and the on-going debate in the media surrounding the legitimacy of the trials. Benjamin Weiser, *Judge Refuses to Dismiss Terror Suspect's Case*, N.Y. TIMES, July 13, 2010, at A19, *available at* http://www.nytimes.com/2010/07/14/nyregion/14ghailani.html (noting that Judge Kaplan made this statement in reference to the "political debate about trying terrorists in civilian courts . . .").

allowed at trial. In particular, Ghailani's defensive team wanted to exclude the testimony of Hussein Abebe, a man whose whereabouts became known through Ghailani's enhanced interrogation.[159] In his August opinion, Judge Kaplan balanced public outrage over terrorism with the fundamental principles of the American judiciary system. Although many of the facts surrounding the opinion are redacted, the legal defense of Ghailani remained almost entirely intact.[160] Ghailani's defense centered on the "Fruit of a Poison Tree" doctrine which states that no evidence or witnesses can be entered into at trial if either party obtained this evidence or witness by illicit means.[161] Rather than showing deference to the government's arguments, Judge Kaplan dismissed the government's argument for allowing Abebe as a witness stating he was skeptical about the government's ability to obtain this information without torture.[162] He ruled that "the Court does not have *the requisite high level of confidence that the government would have obtained Abebe's testimony about Ghailani's statements* [without the use of "enhanced interrogation techniques" on Ghailani]."[163] Here, he demonstrated that he was skeptical about the government's ability to obtain this information without torture.

In October 2010, Judge Kaplan ultimately decided that Abebe could not testify in Ghailani's trial. Nevertheless, Judge Kaplan made certain to address the public outrage concerning the terrorist attacks. In a brief two-page opinion, he stated that:

> The Court has not reached this conclusion lightly. It is acutely aware of the perilous nature of the world in which we live. But the Constitution is the rock upon which our nation rests. We must follow it not only when it is convenient, but when fear and danger beckon in a different direction. To do less would diminish us and undermine the foundation upon which we stand. Moreover, it is appropriate to emphasize that Ghailani remains subject to trial on the pending indictment, that he faces the possibility of life imprisonment if convicted, and that his status as an "enemy combatant" probably would permit his detention as something akin to a prisoner of war until hostilities between the United States and

159. United States v. Ghailani, 743 F. Supp. 2d 242, 242 (S.D.N.Y., Aug. 17, 2010).
160. *See generally id.*
161. *Id.* at 249–54.
162. *Id.*
163. *Id.* at 254 (emphasis added).

> Al Qaeda and the Taliban end even if he were found not guilty in this case.[164]

Not only does Judge Kaplan express regret at his decision to not allow Abebe as a witness, but he even mentions that regardless of the verdict, Ghailani will likely remain imprisoned indefinitely due to his status as an enemy combatant. This statement demonstrates that Judge Kaplan was acutely aware of the public reaction his opinion was going to receive. Therefore, he decided to preemptively justify his opinion, noting that, regardless of the outcome of the case, Ghailani would likely be imprisoned for the remainder of his life as an "enemy combatant."

Although his viewpoints mirrored those expressed in the media, Judge Kaplan's legal conclusions were firmly based in the law of the United States and not his own viewpoints. Therefore, even though language of this opinion demonstrates that he did take into account the viewpoints of the media, he did not let the media control the admissibility of evidence gained from enhanced interrogation. Instead, Judge Kaplan re-asserted the idea that the United States was a nation of laws.[165]

Ultimately, the jury only convicted Ghailani on one of 285 counts, conspiracy to destroy a federal building. This caused uproar in the media despite the fact that Ghailani could still receive a life sentence for his crime.[166] Newspaper articles denounced the acquittal of Ghailani on 284 counts.[167] Following the decision, journalists and political commentators turned skeptical about the effectiveness of the civilian terrorist trials.[168] The media's major issue with these trials was the possibility that the alleged terrorists would go free if not convicted of a crime. The media felt this way in spite of Judge Kaplan's attempts to assuage their fears by indicating that Ghailani's status as an enemy combatant would likely keep

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164. *Ghailani*, 2010 WL 4006381 at *1–*2.

165. *Id.*

166. Ghailani was convicted of one count of conspiracy to destroy U.S. buildings and property. Hans Nichols & Nicholas Johnston, *Ghailani Verdict Won't Close Trial Options, Gibbs Says*, BUSINESS WEEK, Nov. 18, 2010, http://www.businessweek.com/news/2010-11-18/ghailani-verdict-won-t-close-trial-options-gibbs-says.html. This conviction carried a sentence of 20 years to life in prison. *Id.*

167. *See, e.g.*, James Gordon Meek, *Ahmed Ghailani's Acquittal on Nearly All Counts in Embassy Bombings Case Has Big Repercussions*, DAILY NEWS, Nov. 18, 2010, http://www.nydaily news.com/news/ny_crime/2010/11/18/2010-11-18_ahmed_ghailanis_acquittal_on_nearly_all_counts_in_embassy_bombings_case_his_big_.html?r=news.

168. Charlie Savage, *Ghailani Verdict Reignites Debate Over the Proper Court for Terrorism Trials*, N.Y. TIMES, Nov. 18, 2010, at A18, *available at* http://www.nytimes.com/2010/11/19/us/19gitmo.html.

him imprisoned for life, regardless of this trial's verdict.[169] Notably, none of these newspaper articles discussed the possibility that any of the alleged terrorists held at Guantanamo Bay might actually be innocent, as if the trials function was only to determine the level of guilt of the defendant, not their guilt or innocence.

Judge Kaplan's final sentencing in the *Ghailani* case demonstrates his personal anger at Ghailani and similar terrorists, which mirrors the outrage present in the media over the verdict. For instance, in Ghailani's sentencing hearing, Judge Kaplan stated that he believed that Ghailani was an al-Qaeda operative despite the vigorous protests of Ghailani's defense counsel to the contrary.[170] While he did not overturn the jury's decision during the sentencing proceedings, he all but rendered their decision moot. He noted that, regardless of the jury's decision, he believed Ghailani to be a member of the terrorist organization and should be punished accordingly.[171] This led to Judge Kaplan sentencing Ghailani to life in prison, the maximum possible sentence for his conviction.[172] Considering this was the maximum sentence even if the jury convicted Ghailani on all counts, Judge Kaplan managed to make the singular conviction of the jury have the same weight as if Ghailani was a full member of al-Qaeda and actively sought to destroy American embassies.

In support of his ruling, Judge Kaplan stated that, "[a] sentence must be imposed that, in addition to other things, makes it crystal clear that others who engage or contemplate engaging in deadly acts of terrorism risk enormously serious consequences . . . ."[173] Some media outlets reported that Judge Kaplan gave this maximum sentence to silence "critics of the jury's verdict by rendering the defendant's acquittal on 284 out of 285 counts all but meaningless."[174] Judge Kaplan even went as far as to say that regardless of how Ghailani was treated while in detention at American facilities, "the impact on him pales in comparison to the suffering and the horror that he and his confederates caused."[175] He further emphasized his

169. *Id*.

170. Phil Hirschkorn, *Ghailani Judge: Civilian Trials Work*, CBS NEWS, Jan. 30, 2010, http://www.cbsnews.com/stories/2011/01/30/national/main7299759.shtml.

171. *Id*. ("In determining his sentence, Kaplan went beyond trial evidence, which proponents of military commissions had worried would be limited by the strict rules of admissibility in federal court.").

172. Nichols & Johnston, s*upra* note 166.

173. Hirschkorn, *supra* note 170.

174. *Id.*

175. Benjamin Weiser, *Ex-Detainee Gets Life Sentence in Embassy Blasts*, N.Y. TIMES, Jan. 26, 2010 at A19, http://www.nytimes.com/2011/01/26/nyregion/26ghailani.html?_r=1 (internal citations omitted).

disdain for Ghailani throughout the trials, condemning Ghailani for actions he was not convicted for but nonetheless caused as sustained by evidence that was not admitted at trial.[176] Judge Kaplan concluded by indicating that even though the jury only convicted Ghailani on one count of 285, he nevertheless "knew and intended that people would be killed as a result of his own actions and of the conspiracy that he joined . . . ."[177] Finally, Judge Kaplan emphasized that Ghailani's conviction was supported by the trial record and that he received the same sentence as he would have been given if Ghailani would have been convicted of all 285 counts.

Judge Kaplan's decisions throughout the *Ghailani* trial seem to indicate that he took into account the media when entering in his final judgments. In certain instances, such as his October opinion, Judge Kaplan explicitly acknowledged the media while entering his judgments. He even went as far as to justify his decision by indicating that, regardless of the decision he reached, Ghailani would still be imprisoned for life. Finally, the excerpts taken from Judge Kaplan's statements during the sentencing hearing seem to indicate that Judge Kaplan's final sentencing decision was influenced by public opinion. Not only does he use evidence not admitted at trial, but he indicated that he used the sentence to send a message to other would-be terrorists.

The opinions rendered in Judge Kaplan's opinions in the *Ghailani* cases demonstrate that a judge is more apt to utilize her personal beliefs in high profile cases, thus conforming to the attitudinal model of judicial decisionmaking. While Judge Kaplan did base his decisions on legal precedent, the outcomes of his decisions seem to match-up to the various stories printed in newspapers across the United States and, in that sense, mirror the viewpoints of the public. After the public demonstrated growing discontent about the use of enhanced interrogation techniques, Judge Kaplan wrote an opinion that strongly rebuked the practice. But Judge Kaplan's comments surrounding Ghailani's sentence best indicate that he allowed outside factors to influence his decision. It should be noted that Judge Kaplan attempted to balance his personal beliefs with legal precedent. None of his decisions were contrary to legal precedent and all were well within his power as a judge. Therefore, even though Judge Kaplan might have allowed outside factors to influence his decision, he

176. *Id.* ("'It was a cold-blooded killing and maiming of innocent people on an enormous scale,' Judge Kaplan said. 'The very purpose of the crime was to create terror by causing death and destruction.'").

177. *Id.*

still used legal precedent as a framing device, which serves to uphold the integrity of his decision.

C. An Independent Judiciary?: Comparing the Verdicts of the NMT and Ghailani

The decisions rendered in both the NMT and the *Ghailani* trial indicate that the media affects the ultimate outcomes of high-profile trials. The Industrialist Trials of the NMT support this conclusion. As public support for the trials began to wane so did the severity of sentences. Similarly, the *Ghailani* trial illustrates how public anger over the proceedings and verdict led to the harsh sentence handed down by Judge Kaplan on January 25, 2011. Interestingly, these case studies demonstrate that the media had the potential to impact high profile trials regardless of the time period, type of crime, or geographic location.

Judges are human; they are not robots who render decisions devoid of emotion. It is understandable that high profile cases might cause a judge to succumb to outside influences. But, this should all be viewed against the backdrop that one of the most important elements of the American legal system is the independent judiciary. Without one, judges would be able to decide cases based upon personal whims rather than legal precedents and decisions. Furthermore, given the American case law system, the precedents set in high profile cases could have negatively affected future cases until they are either explicitly overruled or made invalid by a legislative act. Therefore, the idea that the media seems to affect the final decisions of the judiciary is a troubling one. While it is understandable that these high profile cases are hotly constested, it does not change the need of the courts to act independent of outside influence.

IV. CONCLUSION

As a society, it is important to understand that our actions can influence how judges decide cases, especially in these extremely important and high-profile decisions. We need to realize that judges are human beings that cannot be expected to completely divorce themselves from news topics or popular opinion polls. In these types of cases, judges do the best they can to maintain independence. In some cases, the public's pressure for a retributive decision is too hard to resist. It is important for judges to act in this manner because it serves to uphold the integrity of their decisions and to reaffirm the idea that the rule of law still is supreme in United States. But, as members of this society, we need to be cognizant of

the fact that the media can influence the final decisions of judges and act accordingly. It is understandable and, indeed, expected that we will have an opinion about a high profile case, but we must be aware of the fact that our hyperbolic statements or unfounded accusations written in news articles can influence the decision of a judge. I hasten to add that I am not advocating for a system of self-censorship or government censorship. Rather, I am urging that as a society we should encourage thoughtful reporting because of the impact it can have on the final decision in a high-profile case.

The independent judiciary is one of cornerstones of the American political system. In contentious cases, the independence of the judiciary is even more important to ensure that legal conclusions, rather than emotions, determine final verdicts and sentences. The NMT and *Ghailani* trial demonstrate the potential for judges to be influenced by the media. This finding calls into question whether the judicial system of the United States is truly independent from outside influence when outside opinions can have an effect on decisions reached at trial. Given the high profile nature of these cases as well as their ultimate precedential value, America should support the independent nature of its judiciary so that history will not have reason to condemn these decisions as retributive in nature and from a time where passions, rather than the law, ruled the judiciary.