An Assessment of the Recommendations of the American Bar Association Regarding the Use of Military Commissions in the War on Terror

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At its 2002 annual meeting in Philadelphia, the American Bar Association ("ABA") adopted six specific recommendations regarding President Bush's November 13, 2001, Military Order. That order instructed the Secretary of Defense to prepare the rules and procedures necessary to establish military commissions to try al Qaeda and Taliban members, as well as other individuals who may be captured in the war against terrorism. The ABA's resolutions were as follows:

> RESOLVED, . . . the President and Congress should assure that the law and regulations governing any tribunal will:
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> 1. Not be applicable to United States citizens, lawful resident aliens, and other persons lawfully present in the United States;
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> 2. Not be applicable to persons apprehended or to be tried in the United States, except for persons subject to the settled and traditional law of war who engage in conduct alleged to be in violation of such law of war;
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> 3. Not be applicable to cases in which violations of Federal or state laws, as opposed to violations of such law of war, are alleged;
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> 4. Not permit indefinite detention of persons subject to the order;
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> 5. Require that its procedures for trials and appeals be governed by the Uniform Code of Military Justice and provide the rights afforded in courts-martial thereunder, including, but not limited to, provision for certiorari review by the Supreme Court of the United States (in addition to the right to petition for a writ of habeas corpus), the presumption of innocence, proof beyond a reasonable doubt, and unanimous verdicts in capital cases; and
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> 6. Require compliance with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights, including, but not limited to, provisions regarding prompt notice of charges, representation by counsel of choice, adequate time and facilities to prepare the defense, confrontation and examination of witnesses, assistance of an interpreter, the privilege against self-incrimination, the prohibition of ex post facto application of law, and an independent and impartial tribunal, with the proceedings open to the public and press or, when proceedings may be validly closed to the public and press, trial observers, if available, who have appropriate security clearances.

These recommendations were based upon two reports, one prepared by the Bar Association of the District of Columbia ("BADC"), and one prepared by the Association of the Bar of the City of New York ("ABCNY"), addressing the legal and policy issues surrounding the President's order. Although both of these reports assumed that, in certain circumstances, the President has the constitutional power to authorize the use of military

commissions for the trial of offenses against the laws of war,[1] they were also highly critical of the November 13 Military Order, which both organizations concluded was too broad -- particularly regarding the arrest and trial of individuals within the United States.[2] The recommendations adopted by the ABA were designed to address a number of these concerns.

A number of the ABA's recommendations have merit. Indeed, several merely restate the general limitations on the use of military commissions recognized by the Supreme Court, and which the Administration has evidenced no purpose or intent to challenge. In other cases, however, the ABA's recommendations represent aspirations that are not required by law and -- arguably -- improvident given the threats now faced by the United States. The following is a brief assessment of each ABA recommendation on its merits.

I. The Use of Military Commissions to Try United States Citizens or Aliens Lawfully Present in the United States.

In its first recommendation, the ABA suggested that military commissions should not be utilized to try individuals who are United States citizens or who are legally present in the United States, either as lawful resident aliens, or in some other appropriate visa status. Such a limitation would clearly be within the President authority (he, in fact, limited the November 13 Military Order's application to non-U.S. citizens), although it is not required by the Constitution.

This, at least, was the Supreme Court's view in *Ex parte Quirin*,[3] one of the leading precedents governing the use of military commissions in the United States. In that case, the Court upheld the trial, by military commission, of eight captured German agents. One of these men claimed to be an American citizen. Nevertheless, the Court reasoned that all of these individuals were "unlawful combatants," subject to "trial and punishment by military tribunals for acts which render their belligerency unlawful," and that "[c]itizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war."[4] Thus, the key to determining whether any particular individual is subject to trial by military commission is whether he qualifies as an "unlawful combatant," and not his nationality or current immigration status.

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[1] Report of the Bar Association of the District of Columbia 2 (Feb. 2002) [hereinafter BADC Report]; Report of the Association of the Bar of the City of New York 5-6 (Feb. 2002) [hereinafter ABCNY Report].

[2] The November 13 Military Order was modeled, in certain respects, on the order issued by Franklin Roosevelt in 1941, authorizing the trial of 8 Nazi saboteurs during World War II. This matter was the subject of the Supreme Court's decision in *Ex parte Quirin*, 317 U.S. 1 (1942).

[3] 317 U.S. 1 (1942).

[4] *Id.* at 31, 36.

The use of military commissions is an extraordinary measure, and should be kept to a minimum in all events. However, in view of the fact that some individuals associated with al Qaeda or the Taliban may be present in the United States lawfully, and may even be American citizens (as in the case of John Walker Lindh, the "American Taliban"), the ABA's resolution in this regard goes further than the law requires, and probably further than prudence would dictate at this time. Lawful entry into the United States, for short periods of time at least, is not difficult -- especially for individuals, like Briton Richard Reid (who has been indicted based on his attempt, during a flight from Paris to the United States, to ignite explosives concealed in his shoes), who are citizens of friendly states.

II. Limiting Application of Military Commissions to Offenses Against the Law of War.

The ABA's second and third recommendations, that military commissions should not be applicable to individuals captured in the territory of the United States "except for persons subject to the settled and traditional law of war who engage in conduct alleged to be in violation of the law of war," and that they should not be employed to try violations of federal or state law, appear merely to restate the limits imposed on the use of military commissions by the Supreme Court. In this regard, the use of military commissions to try individuals in the United States has been addressed by the Supreme Court in two principal cases, *Ex parte Milligan*,[5] and *Ex parte Quirin*.[6]

Ex parte Milligan was decided just after the Civil War's end, and is one of the Supreme Court's landmark civil liberties decisions. In that case, the Court ruled that civilians may not be tried by military commissions, even for offenses against the laws of war, so long as the regular civilian courts are open and operating. It reversed the conviction, by a military commission sitting in Indiana, of a southern sympathizer who had never taken part in hostilities, living in an area where the Article III Courts were always open and available.

Seventy-six years later, however, the *Quirin* Court made clear that individuals who undertake armed hostilities (*i.e.*, belligerents who thereby lose their status as civilians) against the United States, but who do not meet the recognized qualifications for the status of "lawful combatants,"[7] may be tried by military commissions in the United States.[8] As explained above, that case involved eight Nazi saboteurs who had been

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[5] 71 U.S. 2 (1866).

[6] 317 U.S. 1 (1942).

[7] To qualify as a "lawful combatant," an individual must be part of a military force that has a recognizable command structure, that wears a uniform or other insignia, carries arms openly, and conducts its operations in accordance with the laws and customs of war. *See* Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex art. 1, 36 Stat. 2277, T.S. No. 539 (Jan. 26, 1910).

[8] A number of commentators have suggested that the *Quirin* decision is limited to instances of declared war, and the ABCNY Report adopted this view. *See* ABCNY Report, *supra* note 1, at 7. Although the Supreme Court's decision in that case was not

landed by U-Boats along the East Coast, and who planned to carry out acts of sabotage and terror in the United States during World War II. At the same time, the Supreme Court took care to reaffirm its *Milligan* decision, distinguishing that case on the ground that the defendant there was a civilian, while the Nazi defendants were all "unlawful combatants," subject to the laws of war.

Although the *Quirin* Court did not directly address the question whether individuals properly before a military commission could be charged with offenses under federal or state law, in addition to violations of the laws of war, the strong implication of the decision is that they cannot. In this regard, the *Quirin* Court noted as follows:

> We are concerned only with the question whether it is within the constitutional power of the national government to place petitioners upon trial before a military commission for the offenses with which they are charged. We must therefore first inquire whether any of the acts charged is an offense against the law of war cognizable before a military tribunal, and if so whether the Constitution prohibits the trial. We may assume that there are acts regarded in other countries, or by some writers on international law, as offenses against the law of war which would not be triable by military tribunal here, either because they are not recognized by our courts as violations of the law of war or because they are of that class of offenses constitutionally triable only by a jury.[9]

This assumption is, in fact, fully supported by the traditional practice of military commissions, where "civilian" offenses are triable only in instances where "martial law" has been declared. In this regard, military commissions have, in the past, exercised three types of subject-matter jurisdiction or "competence." These included (1) violations of the laws and usages of war not otherwise triable by courts martial under the Articles of War (now the Uniform Code of Military Justice); (2) breaches of military orders or regulations by individuals not subject to trial by court-martial; and (3) "[c]rimes and statutory offenses congnizable by State or U.S. courts, and which would properly be tried by such courts if open and acting."[10]

The first type of authority, violations of the laws and usages of war by individuals -- such as unlawful combatants who are not subject to trial by court-martial (a process generally reserved for individuals enrolled in the armed forces of the United States) --

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specifically based on the fact that Congress had declared war against Germany, the Court did note this fact in its decision. 317 U.S. at 26. At the same time, some of the earliest decisions of the Supreme Court, rendered during the active political careers of the Constitution's Framers, suggest that a state of war, to which the "laws of war" would apply, could be created regardless of whether or not Congress had formally declared war. *See Bas v. Tingy*, 4 U.S. 37, 43 (1800); *Talbot v. Seeman*, 5 U.S. 1, 28 (1801); *see also The Pedro*, 175 U.S. 354, 363 (1899).

[9] 317 U.S. at 29.

[10] William Winthrop, *Military Law and Precedents* 839 (2d ed. 1920).

was upheld by the *Quirin* Court. To the extent that the second type of jurisdiction has survived *Milligan* and *Quirin*, it is applicable only in areas where martial law has been properly declared.[11] The third type of jurisdiction, over statutory and common law offenses otherwise triable in the civilian courts, is applicable only -- as the *Milligan* Court made clear -- if those institutions are not operating.

At this time, none of these circumstances is currently obtaining any place on the territory of the United States. Consequently, the ABA's recommendation that the subject-matter jurisdiction of the military commissions established pursuant to the President's November 13 Military Order be limited to offenses against the law of war appears merely to restate the requirements of the law.[12] And, it should be noted, the Administration has not suggested that its Order was intended to reach further, or that it will attempt to apply the Order in a manner inconsistent with the Supreme Court's decisions in this area.[13] This point was fully confirmed by the Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002) ("Military Commission Order No. 1"), which established the procedures and rules for the conduct of military commissions under the November 13

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[11] Here, it should be noted that the Supreme Court invalidated the military trials of two civilians, four years after *Quirin* was decided, in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). In that case, two citizens of Hawaii were tried before military commissions established shortly after Japan's 1941 attack on Pearl Harbor. One defendant was convicted of embezzlement, and the other with assaulting (as the result of a bar brawl) military personnel. The Supreme Court ordered both men released. It reasoned that both defendants were civilians, and that the charges against them could have been tried in the civilian courts. It rejected the government's argument that the state of "martial law," proclaimed in accordance with Hawaii's Organic Act after the December 7 attack, was sufficient authority to try civilian offenders before the military courts. The Court concluded that, although the statute permitted the imposition of "martial law," it did not by that term alone permit the replacement of civilian with military justice.

[12] It should be noted, of course, that Congress has codified certain "offenses against the law of war," 18 U.S.C. § 2441 (war crimes); and has specifically provided that certain offenses be triable by military commission. *See e.g.*, 10 U.S.C. § 904 (aiding the enemy); 10 U.S.C. § 906 (spying). These federal statutory offenses would also be properly triable before military commissions under the Supreme Court's precedents.

[13] Moreover, the President's November 13 Military Order was based, at least in part, on UCMJ section 821. Section 821 provides that "[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821. This provision is the successor to Article 15 of the Articles of War, which the Supreme Court concluded in *In re Yamashita*, 327 U.S. 1, 7-8 (1946), "incorporated, by reference, as within the preexisting jurisdiction of military commissions created by appropriate military command, all offenses which are defined as such by the law of war, and which may constitutionally be included within that jurisdiction." In that case, the Court also noted that "[n]either Congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war." *Id.* at 13.

Military Order. That order provided, in relevant part, that "[c]ommissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission."[14]

III. The Question of Indefinite Detention.

The ABA's fourth recommendation is that the rules and regulations governing military commissions should not permit indefinite detention of persons subject to the November 13 Military Order. This recommendation raises the difficult question whether individuals captured during the United States' war on terror may be held, without trial, for protracted periods of time.[15] Secretary of Defense Donald Rumsfeld has, in fact, suggested that at least some of the al Qaeda and Taliban members, now housed at Guantanomo Bay, may be held indefinitely. The answer to this question is far from clear. It is impossible to identify a rule of international law that would conclusively prohibit the detention of captured al Qaeda and Taliban members on an indefinite basis. Moreover, it can be argued -- with some force -- that the unique circumstances involved in the conflict between the United States and al Qaeda would justify indefinite detention for certain individuals, even if this required derogation from an established international law norm.

At the same time, even if the indefinite detention of certain al Qaeda and Taliban members is legally supportable, to hold such individuals for protracted periods beyond the close of hostilities without some form of judicial process would represent a dramatic departure from ancient Anglo-American legal traditions. The decision whether to hold individual detainees on an indefinite basis will be one of the most difficult to face a President in the past sixty years. Before a determination is made to hold any detainee "indefinitely," all other options should be fully explored, and the issue should be the subject of a vigorous public debate.

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[14] Military Commission Order No. 1, § 3(B).

[15] To date, no member of either organization, captured in the United States, has been subjected to the November 13 Military Order. Therefore, we limit our analysis to those individuals captured and held overseas to whom, under the Supreme Court's precedents, the Constitution's protections do not apply. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950) (Constitutional guarantees do not extend to non-U.S. citizens who are not present on U.S. territory).

A. The Status of "Unlawful Combatant" in International Law.

The detainees now in custody at Guantanomo Bay are not ordinary criminal suspects, such as the individuals responsible for the original World Trade Center bombing in 1993 or the Oklahoma City bombing in 1995, who must be charged and brought to trial, or released, in accordance with rigorous constitutional and statutory requirements guaranteeing a speedy trial. These individuals were captured in the context of an international armed conflict, and fall into the category of "unlawful belligerents" or "unlawful combatants." Their legal rights and liabilities must be determined with reference to that status, in accordance with the Laws of War.[16]

In this regard, despite the assertions of "human rights" activists, such as South African Judge Richard Goldstone, that international law does not recognize the category of unlawful combatant (which he claims was "invented" by the United States Supreme Court in *Ex parte Quirin*), this classification has a hoary pedigree.[17] It is firmly rooted in both international law and the Law of War. As early as 1582, the Judge Advocate General of the Spanish Army in the Netherlands wrote with respect to those with no lawful right to engage in warfare:

> The laws of war, therefore, and of captivity and of postliminy [the restoration of rights or status after release], which only apply in the case of enemies, can not apply in the case of brigands . . . . Since then those alone who are "just" enemies [*i.e.*, those enjoying the sanction of a state under the laws of war] can invoke to their profit the law of war, those who are not reckoned as "hostes," and who therefore have no part or lot in the law of war are not qualified to bargain about matters that only inure to the benefit of "just" enemies.[18]

Similarly, the 18th Century international law publicist Emmerich de Vattel recognized the category of unlawful combatant, and described it thus:

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[16] *See generally* Lee A. Casey, David B. Rivkin, Jr., Darin R. Bartram, *Detention and Treatment of Combatants in the War on Terrorism* (The Federalist Society for Law & Public Policy Studies 2002) [hereinafter *Detention and Treatment of Combatants*].

[17] Judge Goldstone's remarks were reported, among other places, in Clare Dyer, "POWs or criminals, they're entitled to protection," Manchester Guardian Weekly, p. 24 (Feb. 13, 2002). The category of unlawful combatant has, of course, been called by other names over the years, including "unlawful belligerent," "unprivileged belligerent," and "franc-tireur." Judge Goldstone's argument that this status of belligerent does not exist because the Supreme Court may have been the first to use the term "unlawful combatant" is similar to claiming that "trucks" do not exist because in other English-speaking countries large, heavy-duty motorized vehicles are called "lorries."

[18] Balthazar Ayala, *Three Books on the Law of War and on the Duties Connected with War and on Military Discipline* 60 (John Pawley Bate, Trans. 1912).

> When a nation or a sovereign has declared war against another sovereign by reason of a difference arising between them, their war is what among nations is called a lawful war, and in form; and as we shall more particularly shew the effects by the voluntary law of nations, are the same on both sides, independently of the justice of the cause. Nothing of all this takes place in a war void of form, and unlawful, more properly called robbery, being undertaken without right, without so much as an apparent cause. It can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules of wars in form. It may treat them as robbers.[19]

In the mid-19th Century, the Instructions for the Government of Armies of the United States in the Field, provided that "[m]en, or squads of men, who commit hostilities . . . without being part and portion of the organized hostile army, and without sharing continuously in the war, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates."[20]

Thus, the classification of unlawful combatant was well established by the beginning of the 20th Century, when the minimum requirements necessary for recognition as a lawful belligerent (membership in a group with a recognized command structure, uniform or other distinguishing insignia, that carried arms openly and that conducted its operation in accordance with the laws of war), were incorporated into Article I of the 1907 Annex to the Hague Convention (IV) Respecting the Laws and Customs of War on Land.[21] The 1914 Manual of Military Law published by the British War Office explained both the distinction, and its purpose, as follows:

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[19] Emmerich de Vattel, *The Law of Nations* 481 (Luke White ed. Dublin 1792).

[20] *See* Instructions for the Government of Armies of the United States in the Field General Orders, No. 100, April 24, 1863, *reprinted in* 7 John Moore, *A Digest of International Law* §174 (1906).

[21] Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex art. 1, 36 Stat. 2277, T.S. No. 539 (Jan. 26, 1910) [hereinafter "Hague Convention" or "Hague Regulations"]. The conditions that must be satisfied before lawful belligerency is established are as follows:

> Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:--
>
> > (1) To be commanded by a person responsible for his subordinates;
> > (2) To have a fixed distinctive emblem recognizable at a distance;
> > (3) To carry arms openly; and

> The division of the enemy population into two classes, the armed forces and the peaceful population, has already been mentioned. Both these classes have distinct privileges duties, and disabilities. *It is one of the purposes of the laws of war to ensure that an individual must definitely choose to belong to one class or the other, and shall not be permitted to enjoy the privileges of both. In particular, that an individual shall not be allowed to kill or wound members of the army of the opposed nation and subsequently, if captured or in danger of life, to pretend to be a peaceful citizen. . . .*
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> Peaceful inhabitants . . . may not be killed or wounded, nor as a rule taken prisoners . . . . *If, however, they make an attempt to commit hostile acts, they are not entitled to the rights of armed forces, and are liable to execution as war criminals.*[22]

The classification of unlawful combatant remains fully applicable today, and was not eliminated by the various agreements entered after World War II, in particular the Geneva Conventions of 1949, as some have claimed.[23] In 1977, during the negotiations that resulted in Protocol I and Protocol II to the Geneva Conventions of 1949, a number of developing countries *attempted* to achieve a rule that would have been more protective of unlawful combatants, entitling them to protection "equivalent" to those of POWs.[24]

> (4) To conduct their operations in accordance with the laws and customs of war.

[22] War Office, *Manual of Military Law* 238 (1914). Although it was fully recognized that "irregular" combatants could achieve the status of lawful belligerents, this was *only* if they complied with the basic requirements of the Hague Regulations. Anyone not complying with those requirements, constituted an unlawful belligerent who was not entitled to prisoner of war status, and would could be punished for his unlawful belligerency. A point confirmed in the current U.S. Field Manual on The Law of Land Warfare: "[p]ersons, such as guerrillas and partisans, who take up arms and commit hostile acts without having complied with the conditions prescribed by the laws of war for recognition as belligerents . . . are, when captured by the injured party, not entitled to be treated as prisoners of war and may be tried and sentenced to execution or imprisonment." *See* Department of the Army, *Field Manual on The Law of Land Warfare* 34 (July 1956).

Significantly, this included the regular forces of a state if they also failed to meet the minimum requirements: "[i]t is taken for granted that all members of the army as a matter of course will comply with the four conditions; should they, however, fail in this respect they are liable to lose their special privileges of armed forces. *See Manual of Military Law,* at 240.

[23] *See Detention and Treatment of Combatants, supra* note 16, at 2-7.

[24] *See* Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflict (Protocol I), Art. 44(2) [hereinafter Protocol I]. Thus, under the language of Protocol I, the status of unlawful

The United States, however, rejected this effort to undermine the traditional laws of war, and repudiated Protocol I for this very reason. In his note transmitting Protocol II (dealing with armed conflicts within a single country) to the Senate for its advice and consent, President Reagan explained the American rejection of Protocol I as follows:

> Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war. . . . It would give special status to "wars of national liberation," an ill-defined concept expressed in vague, subjective, politicized terminology. Another provision would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war. This would endanger civilians among whom terrorists and other irregulars attempt to conceal themselves. These problems are so fundamental in character that they cannot be remedied through reservations, and I therefore have decided not to submit the Protocol to the Senate in any form . . .
>
> It is unfortunate that Protocol I must be rejected. We would have preferred to ratify such a convention, which as I said contains certain sound elements. But we cannot allow other nations of the world, however numerous, to impose upon us and our allies and friends an unacceptable and thoroughly distasteful price for joining a convention drawn to advance the laws of war. In fact, we must not, and need not, give recognition and protection to terrorist groups as a price for progress in humanitarian law.[25]

Thus, overall, the status of unlawful combatant is firmly grounded in international law, and the rules applicable to such individuals may be applied by the United States to members of al Qaeda and the Taliban fully in accordance with recognized and accepted international norms.[26]

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combatant would not have been eliminated (and such individuals could still have been punished as having violated the laws and customs of war), but groups operating in violation of the Hague Regulations would have been given more protection than hitherto required. Accordingly, the United States took a very strong position rejecting even these changes, which it feared would undermine the traditional Hague Regulations in any case.

[25] Message from the President of the United States Transmitting the Protocol II Additional to the Geneva Conventions of August 12, 1949, and Relating to the Protection of Victims of Noninternational Armed Conflicts, Concluded at Geneva on June 10, 1977 (Jan. 29, 1987), 1977 U.S.T. LEXIS 465.

[26] For an analysis of the failure of either al Qaeda or the Taliban to qualify as "lawful" belligerents, *see Detention and Treatment of Combatants, supra* note 16, at 9-13.

B. The Detention of Captured Unlawful Combatants.

As the ABCNY correctly noted in its report, the legal regime applicable to unlawful combatants is very harsh.[27] Traditionally, unlawful combatancy was punishable by death, often with little or no formal "process" beforehand. By the beginning of the 20th Century, it was recognized, by at least some states, that unlawful combatants could not be killed out of hand by officers in the field, but that some process was required before such individuals could be executed.[28] This rule was applied by the military tribunals established by the Allies after World War II to try Axis nationals accused of war crimes and crimes against humanity, and is now firmly established as a requirement of customary international law.[29]

However, the precedents in this area are largely limited to cases where the defendants (German or Japanese officers) had, indeed, put individuals accused of being "unlawful combatants" (either resistance fighters, downed Allied airmen, or civilians) *to death* without trial or process of any kind.[30] As a result, they are not obviously controlling (even by analogy) with respect to the question whether unlawful combatants may be held in "detention" (even for protracted periods) without trial.[31] Moreover, although unlawful combatants may not be punished without some form of judicial process, albeit a military one, detention does not necessarily constitute "punishment."

1. Detention of Unlawful Combatants During the Conflict.

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[27] ABCNY Report, *supra* note 1, at 13.

[28] *See e.g., Manual of Military Law*, *supra* note 22, at 242 ("It is not . . . for officers or soldiers in determining their conduct towards a disarmed enemy to occupy themselves with his qualifications as a belligerent. Whether he belongs to the regular army or to an irregular corps, is an inhabitant or a deserter, their duty is the same: they are responsible for his person and must leave the decision of his fate to competent authority. No law authorizes them to have him shot without trial, and international law forbids summary execution absolutely.").

[29] *See Detention and Treatment of Combatants*, *supra* note 16, at 7-9.

[30] *See, e.g., The German High Command Trial: Trial of Wilhelm von Leeb and Thirteen Others*, (Case No.72), 12 L.Rpts. of Trials of War Criminals 1, 85 (U.N. War Crimes Comm. 1949); *The Hostages Trial: Trial of Wilhelm List and Others (Case No. 47)*, 8 L.Rpts. of Trials of War Criminals 34, 57 (U.N. War Crimes Comm. 1948); *Trial of General Tanaka Hisakasu and Five Others (Case No. 33)*, 5 L.Rpts. of Trials of War Criminals 66 (U.N. War Crimes Comm. 1948); *Trial of Carl Bruner, Ernst Schrameck and Herbert Falten (Case No. 45)*, 8 L.Rpts. of Trials of War Criminals 15, 16-19 (U.N. War Crimes Comm. 1948); *Trial of Josef Altstotter and Others (Case No. 35)*, 6 L.Rpts. of Trials of War Criminals 1 (U.N. War Crimes Comm. 1948).

[31] Although, it should be noted, international practice permits the detention for lengthy periods even of ordinary criminal suspects. *See e.g., W. v. Switzerland*, No. 14379/88 (ECHR 1993) (period of pre-trial detention lasting four years found not to be unreasonable.).

There seems to be little doubt that unlawful combatants, although they are not entitled to the status and privileges of legitimate prisoners of war ("POWs") under the Geneva Conventions,[32] can nevertheless, like POWs, be detained until the conclusion of hostilities. In this regard, although unlawful combatants *may* be punished for their unlawful belligerency, there is no rule of international law *requiring* that they be punished, with death or otherwise, and their detention at least until the close of hostilities would be fully supported by the same rationale that underpins the rule permitting POWs to be held -- to prevent their return to the fight.[33]

This, of course, may well involve a very significant length of time. Even hostilities between states may last for protracted periods. For example, taking just the wars in which the United States was involved (at least for some portion of the conflict) over the past century, the First World War lasted four years (1914-1918), the Second World War lasted six years (1939-1945),[34] the Korean War lasted three years (1950-1953), and the Vietnam War lasted sixteen years (1959-1975), with significant U.S. involvement lasting from 1963-1973. Some U.S. POWs were held by North Vietnam for nearly a decade. Only the 1991 Gulf War was concluded in less than one year. In the case of an undeclared war, particularly one where at least some of the parties are not state actors, the precise point at which the conflict ends must be determined based on all of the facts and circumstances at the time. As Secretary of State William Seward explained in 1868:

> It is certain that a condition of war can be raised without an authoritative declaration of war, and, on the other hand, the situation of peace may be restored by the long suspension of hostilities without a treaty of peace being made. History is full of such occurrences. What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled, and must in every case be determined with reference to collateral facts and circumstances.[35]

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[32] *See Detention and Treatment of Combatants, supra* note 16, at 7-9.

[33] Under the Geneva Conventions, the recognized purpose and justification of confinement during the conflict is the "legitimate concern -- to prevent military personnel from taking up arms once more against the captor State." International Committee of the Red Cross, *Commentary on the Geneva Conventions of 12 August 1949, Geneva Convention III Relative to the Treatment of Prisoners of War* 546-47 (1960) [hereinafter *ICRC Commentary on Geneva Convention III*].

[34] In fact, the Second World War can be dated from 1931-1945 if Japan's invasion of China, rather than Hitler's attack on Poland in 1939, is considered as the conflict's actual beginning.

[35] Letter of Secretary of State Seward to Mr. Goni, Spanish Minister, July 22, 1868, *reprinted in* 7 John Moore, *A Digest of International Law* §1163 (1906). Indeed, even in the case of a declared war, the Supreme Court has ruled that the state of war does not "cease with a cease-fire order." *Ludecke v. Watkins*, 335 U.S. 160, 167 (1948).

Therefore, the United States can lawfully hold captured al Qaeda and Taliban members during the conflict, even though this may involve a considerable period of detention.

2. Detention After Hostilities Have Concluded.

Whether unlawful combatants may be held after hostilities have concluded, *i.e.*, after both the Taliban in Afghanistan, and al Qaeda globally can no longer undertake hostile action against the United States, is a more difficult question. Unlike POWs, who are specifically entitled to repatriation at the close of hostilities under the Geneva Convention III Relative to the Treatment of Prisoners of War, there is no clearly applicable rule requiring the release of captured unlawful belligerents.[36] The provisions of Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (12 Aug. 1949), which require the repatriation of civilian "internees" at the close of a conflict,[37] also are inapplicable since that convention benefits civilians, and not combatants.[38] Moreover, the proper application of internationally recognized rules

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[36] *See* Geneva Convention III Relative to the Treatment of Prisoners of War (1949), Art. 118. Circumstances permitting, very seriously injured or sick POWs, those not likely to survive for instance, must be repatriated immediately. Art. 109, 110. At the same time, POWs who have been convicted of criminal (as opposed to mere disciplinary) offenses may be held in custody until the completion of these proceedings and any criminal sentence. Art. 119.

[37] Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War (1949), Arts.

[38] According to the ICRC commentary, the treaty does contemplate some protected status for individuals, principally civilian in character, who undertake acts of unlawful belligerency – such as sabotage, espionage, or membership in a "partisan" movement or the *levee en masse*. Such individuals, in the ICRC's view, cannot be treated as "outside the law." *See ICRC Commentary on Geneva Convention IV, supra* note 33, at 50-51 (notably, this point was expressed as a "satisfactory solution" for the ICRC, rather than the clear requirements of the treaty).

At the same time, a treaty must be interpreted in accordance with its historical context, *see e.g.*, Ian Brownlie, *Principles of Public International Law* 628-29 (4th ed. 1990), and the Geneva Conventions were negotiated and agreed with reference to traditional armed conflicts between nation-states like World War II. An individual's status under the treaties is inextricably linked to his or her status as a national of either a belligerent state (one engaged in the conflict), or of a neutral state. For example, in defining the status of "protected person," Article 4 of the treaty provides that:

> [n]ationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

against arbitrary imprisonment (*e.g.*, Article 9 of the International Covenant on Civil and Political Rights), are unclear.

As noted above, it has long been recognized that "detention" does not necessarily constitute punishment. As the ICRC explained in discussing the internment of civilians during wartime, a practice still permitted under the Geneva Conventions, "[i]nternment is simply a precautionary measure and should not be confused with the penalty of imprisonment."[39] The indefinite detention of suspected terrorists has been approved by at least one "international" court, the European Court of Human Rights, in the form of "internment" in *Ireland v. United Kingdom* (1978).[40] Similarly, the United States Supreme Court has noted:

> [T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment.
>
> * * *
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> We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government

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Geneva Convention IV, Art. 4. No provision is made for individuals who, as in the case of al Qaeda, are neither the nationals of a belligerent state (one actively engaged in the conflict), but who have themselves (without reference to their own countries of origin) made war. This same is true of the Taliban, which has been ousted from power in Afghanistan, but which continues the conflict on its own account. (Of course, to the extent that the treaty were considered to be applicable, nationals of states maintaining diplomatic relations with the United States -- such as Saudi Arabia and Afghanistan -- also would not be considered "protected persons.")

Indeed, again and again the ICRC commentary notes the importance of the specific experiences of World War II to the treaty's provisions. *See e.g., ICRC Commentary on Geneva Convention IV, supra* note 33, at 21, 38, 83, 118, 249, 273, 278, 345, 380, 423, 491, 499. The circumstances now faced by the United States, which is confronted with groups that are entirely belligerent in character, are comparable to the armed forces of a state, but that fail to meet (indeed, have rejected) the requirements of lawful belligerency. Neither the Geneva Convention, nor the ICRC commentary, contemplated this situation. It was, however, recognized that "[t]here could be no question of obliging a State to observe the Convention in its dealings with an adverse Party which deliberately refused to accept its provisions." *Id.* at 19.

[39] *ICRC Commentary on Geneva Convention IV, supra* note 33, at 384.

[40] The United States Supreme Court's opinion in *Ex parte Quirin*, the only case in which it dealt specifically with unlawful belligerents, such as al Qaeda and the Taliban, did not address this question. However, the Court has made clear that the Constitution's guarantees do not extend to non-U.S. citizens who, like the detainees held in Cuba, are not present on U.S. territory. *See Johnson v. Eisentrager*, 339 U.S. 763 (1950).

> may detain individuals whom the Government believes to be dangerous.[41]

In determining whether any particular form of detention is punitive, requiring due process before its imposition, the key question is the purpose of the incarceration. The Supreme Court, for example, has looked to whether the detention in question has a punitive purpose, either in the form of retribution or deterrence -- the "primary objectives of criminal punishment."[42] In *Kansas v. Hendricks*, 521 U.S. 346 (1997), the Court upheld the Kansas Sexually Violent Predator Act, which permitted the civil commitment of individuals, previously convicted of sexually violent offenses, who were likely to engage in "predatory acts of sexual violence." It rejected the petitioner's argument that the act involved a "criminal" proceeding, and concluded that the statute involved a form of administrative detention. The Court reasoned that the statute was not "retributive because it does not affix culpability for prior criminal conduct," 521 U.S. at 361-62, and that it was not intended as a deterrent because the individuals involved, because of a mental or personality disorder, were "unlikely to be deterred by the threat of confinement." *Id.* at 362-63.

In the case of al Qaeda and Taliban members, it may be argued that the purpose of their detention is not to "affix culpability" for criminal acts (although they could be criminally prosecuted), but to ensure that they do not rejoin the battle against the United States. This would be merely an extension of the rationale for holding such individuals, like legitimate POWs, for the duration of the armed conflict. Detention beyond the close hostilities would be required because, unlike in the case of POWs, there is no recognized authority, in the form of a state, with which the United States can conclude a peace agreement, and that can guarantee the "demobilization" of these individuals once they are repatriated.

Similarly, there is little doubt that the individuals involved would not be deterred by the threat of detention. It is clear that they do not believe that they have, in any sense, been engaged in criminal conduct, and even the prospect of certain death has not deterred the actions of some in their efforts to attack the United States. Indeed, most significantly, their determination to continue the war against the United States is not obviously subject to the sort of cost/benefit reasoning that ordinary criminals (including other terrorists like the Provisional Irish Republican Army), can be expected to perform. The evidence strongly suggests that many al Qaedas and Talibs believe that they are engaged in a "holy war," sanctioned by God, and that they will be rewarded in heaven for acts which carry the severest penalties on earth. Because of these beliefs, the ordinary calculation necessary for imprisonment to have a deterrent effect are not present, and they can fairly be described as simply being beyond deterrence.

Obviously, this analysis has some highly troubling aspects. For some, it may bring to mind the Soviet practice of using a mental health "diagnosis" as a means of justifying the imprisonment or commitment of dissidents. The situations are, however,

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[41] *United States v. Salerno*, 481 U.S. 739, 746 & 748 (1987).
[42] *Kansas v. Hendricks*, 521 U.S. 346, 361-62 (1997).

fundamentally different. The key question would not be whether the members of al Qaeda or the Taliban can be said to suffer from some form of mental illness or disorder. Such disorders are certainly one reason, as the Supreme Court held in *Hendricks*, why an individual may not be subject to deterrence, suggesting that incarceration is not imposed for purposes of punishment. It is the individual's susceptibility to deterrence, however, that is the critical inquiry.

A sincerely held religious belief can undermine the assumptions on which the principle of deterrence, or the normal instinct for self-preservation, is based just as effectively as any psychological disorder, real or imagined. Historic examples of this phenomenon include the American Indian "Ghost Dancers" in the 1880s and 1890s, who believed that wearing magical articles of clothing would protect them from bullets, and the Chinese Boxers, who held similar beliefs a few years later. Here, the justification for holding certain members of al Qaeda and the Taliban in preventative detention would be that, because they are not subject to the normal calculations that make deterrence effective -- regardless of the reason why that is the case -- the purpose of their detention is not punitive.

As a second alternative, the United States could take the position that the emergence of widespread terrorism by groups who are not tied to any one nation-state -- a state that could be held accountable for their actions and expected to control them -- presents circumstances that have not been confronted by the community of nations for several centuries. The fact that many of these individuals are suicidal, as well as homicidal, also suggests that the case is *sui generis*. Consequently, the current international norms -- both customary and treaty-based -- would simply be inapplicable because they were developed to address fundamentally different circumstances.

Indeed, perhaps the most comparable precedents to al Qaeda, and similar international terrorist groups, date from the 17th and early 18th centuries, when international law was in its infancy, in the form of the pirate companies operating on the high seas. The international legal status of such individuals was described as follows by one 18th Century judge:

> As to the heinousness or wickedness of the offence, it needs no aggravation, it being evident to the reason of all men. Therefore a pirate is called "hostis humani generis," with whom neither faith nor oath is to be kept. And in our law they are termed "brutes," and "beasts of prey" and that it is lawful for any one that takes them, if they cannot with safety to themselves bring them under some government to be tried, to put them to death.[43]

[43] *See The Trials of Major Stede Bonnet, and Thirty-three others, at the Court of Vice-Admiralty, at Charles-Town, in South Carolina, for Piracy, 5 George I A.D. 1718*, 15 How. St. Tr. 1231, 1235 (1816); *see also* Sir Leoline Jenkins, Charge given to an Admiralty Session within the Cinque Ports (Sept. 2, 1668), quoted in Alfred Rubin, *The Law of Piracy* 87 (1988) ("[t[hey are outlawed, as I may say by the Laws of all Nations; that is, out of the Protection of all Princes and of all Laws whatsoever. Every body is

Whether today's international terrorist organizations could be treated as "outlaws" is debatable.[44] However, the very severe treatment formerly accorded to individuals engaged in analogous activity suggests that the United States would be justified in exploring a new framework for dealing with groups having the characteristics of outlaw bands. A form of indefinite detention may well constitute a supportable part of this framework. And, as a means of addressing concerns that this form of incarceration not approximate some later day Bastille, a series of procedures could be adopted to ensure that the detention would last only so long as the circumstances which originally justified it continue to obtain. A model for such a system can, in fact, we found in the internment provisions of the Geneva Convention IV.

As noted above, this treaty applies only to civilians, and does not benefit either al Qaeda or Taliban members as unlawful combatants. However, it may serve as an appropriate source of reasonable (indeed, highly protective) procedures governing internment. Under Geneva Convention IV, internment (or assigned residences) may be ordered "only if the security of the Detaining Power makes it absolutely necessary."[45] In addition, interned individuals are entitled to have their internment periodically reconsidered "by an appropriate court or administrative board."[46] This review process must take place at least twice yearly, "with a view to the favourable amendment of the initial decision, if circumstances permit."[47] A similar, if not identical, system (which would involve administrative proceedings rather than a criminal trial before a military commission or civilian court) could be adopted by the United States to review the cases of individual al Qaeda or Taliban members. These proceedings would ensure that their detention does not last longer than "absolutely necessary."

Finally, there is a third approach open to the United States in dealing with individual al Qaedas and Talibs who cannot safely be released once their organizations are crushed. Each of these individuals remains an unlawful combatant and, as such, each has violated the laws and customs of war, and is subject to criminal prosecution and punishment. As the Supreme Court explained in *Ex parte Quirin*, "[u]nlawful combatants . . . are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[48] The President's November 13, 2002 Military Order, and Secretary Rumsfeld's Department of Defense Military Commission Order No. 1 (Mar. 21, 2002), established a process for such prosecutions which, as discussed below, fully

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commissioned and is to be armed agaisnt them, as against Rebels and Traytors, to subdue and to root them out.").

[44] As noted above, even in 1914 the British Manual of Military Law categorically stated that "international law forbids summary execution absolutely." *See supra* note 22. Moreover, even in the years when piratical depredations where at their height in the late 17th and early 18th centuries, captured pirates were almost invariably (at least in the Anglo-American experience) brought to trial before punishment was inflicted.

[45] Geneva Convention IV, Art. 42.

[46] Geneva Convention IV, Art. 43.

[47] *Id.*

[48] 317 U.S. at 30.

complies with relevant due process requirements. Military commissions can impose lengthy sentences of imprisonment, which would give the United States the legal right to hold convicted al Qaeda and Taliban members after the close of hostilities. Indeed, this would be the case even if they were entitled to the rights and privileges of POWs.[49]

There is no doubt that simply prosecuting the Guantanomo Bay detainees for having violated the laws and customs of war, by being unlawful combatants, would be the surest means of vindicating the requirements of due process. This approach is firmly grounded in both international, and domestic U.S. law, and would neither involve the development of new international norms, nor derogation from existing norms. Ironically, this would also be the harshest of the options available to the United States for dealing with these individuals. It would involve criminal prosecution and the imposition of a term of imprisonment, perhaps life, or even the death penalty in appropriate cases. By contrast, a form of preventative detention would not involve criminal prosecution, and *might* ultimately result in a shorter period of incarceration for the affected individuals.

IV. The Procedures to Be Applied by Military Tribunals

The ABA's fifth recommendation suggests that the procedures for use in military commissions should "be governed by the Uniform Code of Military Justice and provide the rights afforded in courts-martial thereunder," including an opportunity for judicial review in the form of a writ of certiorari (and by writ of habeas corpus), the presumption of innocence, the requirement of proof beyond a reasonable doubt, and unanimous verdicts in capital cases. Although the rules and procedures applicable in courts-martial would certainly be a permissible model for the Secretary of Defense to follow in establishing the procedural rules for military commissions under the November 13 Military Order, this is not required by law. The UCMJ is, however, generally applicable.

There are two constitutional sources of authority under which the President might establish military commissions. The first is his own authority as Commander-in-Chief of the armed forces of the United States.[50] The Supreme Court, in *Quirin*, specifically declined to consider the extent of this power, since it found sufficient authority for President Roosevelt's establishment of a military commission under the Articles of War.[51]

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[49] *See* Geneva Convention III, Art. 119.

[50] U.S. Const. Art. II, § 2. Here, it should be noted that the title and authority of "Commander in Chief" was granted by Congress to George Washington during the War for Independence and he, at least, understood this grant to include the authority to establish military commissions to try violations of the laws of war. The most famous instance in which this authority was utilized involved the trial and execution of Major John Andre, a British officer who was captured behind American lines, out of uniform, after having negotiated with Benedict Arnold, who proposed to betray West Point to British forces.

[51] *See* 317 U.S. at 29 (because Congress had authorized the use of military commissions under the Articles of War, it was "unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.").

The Articles of War, now the UCMJ, were enacted pursuant to the second source of constitutional power to create military commissions -- Congress' authority under Article I, § 8, to "make Rules for the Government and Regulation of the land and naval Forces," "constitute Tribunals inferior to the Supreme Court," and "[t]o define and punish . . . Offenses against the Law of Nations."[52] This authority remains extant in sections 818, 821, and 836 of the UCMJ.[53]

The President's November 13 Military Order invoked both sources of authority, and specifically cited UCMJ section 836. Under this provision, the President is specifically authorized to prescribe, by regulation, the "[p]re-trial, trial, and post-trial procedures, including modes of proof, for cases arising under [the UCMJ] triable in courts-martial, military commissions and other military tribunals."[54] These procedures, to the extent the President considers "practicable," must "apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts."[55] Moreover, they may not be "inconsistent" with other provisions of the UCMJ.[56] Finally, "[a]ll rules and regulations made under this article shall be uniform insofar as practicable."[57]

Under this language, the rules and procedures followed in military commissions may clearly depart from those ordinarily applied in courts-martial, to the extent the President has concluded the use of identical rules and procedures would be impracticable, so long as they are otherwise consistent with the UCMJ.[58] Thus, the rules governing

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[52] U.S. Const. art. I, § 8, cls. 14, 9 & 10.
[53] 10 U.S.C. §§ 818, 821, 836.
[54] 10 U.S.C. § 836(a).
[55] *Id.*
[56] *Id.*
[57] 10 U.S.C. § 836.
[58] The rules governing the operation of military commissions have, generally, been comparable -- although not identical -- to those governing courts martial. As noted in one leading treatise on the subject:

> As a general rule, and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will -- like a court-martial -- permit and pass upon objections interposed to members . . . will formally arraign the prisoner, allow the attendance of counsel, entertain special pleas if any are offered, receive all the material evidence desired to be introduced, hear argument, find and sentence after adequate deliberation, render to the convening authority a full authenticated record of its proceedings, and, while in general even less technical than a court-martial, will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence.

Winthrop, *supra* note 10, at 841.

courts-martial under the UCMJ would be an appropriate, although not required, model for military commissions.

In any event, Procedures for Trials by Military Commissions adopted by Secretary of Defense Donald Rumsfeld in Department of Defense Military Commission Order No. 1 (Mar. 21, 2002), do depart from the rules and practices governing ordinary courts- martial in a number of important respects, but are nevertheless fully consistent with the requirements of the UCMJ and fundamental fairness in the context of a military trial. Indeed, in some respects, these rules appear more protective of the accused than the rules governing courts-martial. For example, all of the members of a military commission are required to be commissioned officers of the United States, whereas warrant officers and enlisted personnel are permitted, in certain circumstances, to serve in regular courts-martial.[59] In addition, under Military Commission Order No. 1, as in regular courts-martial, the accused must be proven guilty beyond a reasonable doubt, is entitled to military defense counsel without charge, and may retain civilian defense counsel at his own cost, is not required to testify during trial, and (unlike in European Civil Law legal systems) the Common Law rule is retained so that no adverse inference can be drawn from the accused's refusal to take the stand.[60] As in courts-martial, a two-thirds vote is necessary to convict, although a unanimous vote is required for the imposition of the death penalty, and the accused may not be tried twice for the same offense.[61]

Perhaps the most significant, substantive departure from ordinary practice under the UCMJ is in the area of appeals. Under Military Commission Order No. 1, an accused is entitled to have his case considered by a Review Panel of three military officers (although civilians may also be appointed to this panel), one member of which must have experience as a judge. The Review Panel's recommendations, and the record of the trial, are then to be reviewed by the Secretary of Defense, who will transmit the case to the President for final disposition (unless the President chooses to vested this final authority in the Secretary.)[62] Although the Review Panel process is similar to the review provided in regular courts-martial, whereby a conviction can be reviewed by a panel of three military judges (who may be commissioned officers or civilians) in the Court of Criminal Appeals,[63] the UCMJ also provides for potential review by the Court of Appeals for the Armed Forces, and by the Supreme Court through a writ of certiorari, in courts-martial.[64] These additional levels of review would not be available under Military Commission Order No. 1.

The ABA's recommendation, that individuals tried by military commission should be permitted to obtain a merits review of their convictions by writ of certiorari, is a point

[59] Military Commission Order No. 1, § 4(3); 10 U.S.C. § 825.
[60] Military Commission Order No. 1, §§ 4(C)(3), 5(B), (F).
[61] Military Commission Order No. 1, §§ 5(P), 6(F); 10 U.S.C. §§ 844, 852.
[62] Military Commission Order No. 1, § 6 (H)(4)(5).
[63] 10 U.S.C. § 866.
[64] 10 U.S.C. § 867, 867a.

upon which there may be reasonable disagreement.[65] However, under current law -- quite apart from the President's November 13 Military Order -- individuals tried by military commission are not entitled to a "merits" review of a conviction. As the Supreme Court noted in *In re Yamashita*,[66] military commissions:

> are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations. . . . Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.

The President's November 13 Military Order is fully consistent with this rule.

The single exception to this rule recognized by the Supreme Court is, of course, review by a petition for writ of Habeas Corpus. In such a proceeding, the federal courts "may inquire whether the detention complained of is within the authority of those detaining the petitioner."[67] In such a proceeding, the constitutionality of the November 13 Military Order may be tested. Under the Supreme Court's decisions in both *Yamashita* and *Quirin*, the scope of this review will cover "the lawful power of the commission to try the petitioner for the offense charged," although not the "guilt or innocence" of the accused.[68]

Here it is important to recognize that, despite the loud claims of many Administration critics, including the ABCNY Report, the President's November 13 Military Order did not suspend the right to seek review through a writ of Habeas Corpus, nor can the order fairly be interpreted as seeking that result. In this regard, the November 13 Military Order tracks language originally adopted by President Roosevelt in his Order of July 2, 1942, which provided that persons subject to the order "shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such

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[65] The current statutory authority, providing for certiorari review of certain decisions of the United States Court of Appeals for the Armed Forces in the case of courts martial, 10 U.S.C. § 867a, 28 U.S.C. § 1259, appears, in any case, to be insufficient to support such review where a military commission is concerned. Additional action by Congress would be required before such review could be permitted.

[66] 327 U.S. 1, 8 (1946).

[67] *Id.* Here, it should be noted, that the Supreme Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), precludes petitions for Habeas Corpus by captured enemy belligerents who are not held on the sovereign territory of the United States. Therefore, the individuals held at the Guantanomo Bay Naval Base, which is leased to the United States indefinitely but which remains Cuban territory, cannot (absent the enactment of new legislation by Congress) seek Habeas relief in the federal courts. *See Coalition of Clergy v. Bush,* 2002 U.S. Dist. LEXIS 2748, *29-*40 (C.D. Cal. Feb. 21, 2002.

[68] *In re Yamashita*, 327 U.S. at 8.

remedy or proceeding sought on their behalf, in the courts of the United States." In like manner, the November 13 Military Order provides that individuals subject to the order "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individuals behalf, in (i) any court of the United States." Critics charge that this language represents an unconstitutional attempt by President Bush to eliminate Habeas Corpus review by persons subject to the order. This claim is simply wrong.

In fact, this language was considered by the Supreme Court in *Quirin*, where the Court ruled -- in 1942, some sixty years before the November 13 Military Order was issued -- that it *did not* prevent judicial review "for determining [the Roosevelt order's] applicability to the particular case," or of "petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."[69] Suggestions that the President intended to eliminate review by writ of Habeas Corpus, under the November 13 Military Order must, therefore, assume that he, his White House Counsel, and his Attorney General, all were unaware of the *Quirin* Case at the time the order was drafted and issued. A far more likely explanation is that, understanding fully the implications of the Supreme Court's jurisprudence in this area, they never intended to foreclose Habeas review, and that the Administration's critics -- out of ignorance, or malice, or both -- have simply seized upon the relevant language as a convenient means of attacking the order, without regard to the legal background against which it was adopted.

V. Application of the International Covenant on Civil and Political Rights.

Finally, the ABA's sixth recommendation is that the rules governing military commissions comply with Articles 14 and 15(1) of the International Covenant on Civil and Political Rights ("ICCPR"). The United States acceded to this convention on June 8, 1992, and is subject to its requirements to the extent that they may be applicable in these circumstances.[70] Assuming that the convention does apply to individuals falling within the category of "unlawful belligerent," the United States must comply with Article 15(1) (which embodies the universally accepted rule that individuals cannot be punished for conduct that did not constituted a crime when it occurred) and Article 14 (which incorporates various due process guarantees).[71]

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[69] 317 U.S. at 24-25.

[70] The CCPR's applicability during wartime to individuals subject to the laws of war is unclear. That document does not purport to displace, or even address, the issues covered by other international instruments, such as the 1907 Hague Convention (No. IV) Respecting the Laws and Customs of War on Land, or the 1949 Geneva Conventions, and by the customary law of armed conflict. In this regard, the closest the Covenant comes to addressing such issues is a provision in Article 8 that "service of a military character" does not constitute forbidden "forced or compulsory labour."

[71] These include, among others:

* the presumption of innocence;
* the right to be informed of the charge;

The procedural rules drafted pursuant to the November 13 Military Order provide a level of due process fully consistent with the CCPR's requirements.[72] Defendants are specifically entitled to the presumption of innocence (and cannot be convicted unless guilt is proven beyond a reasonable doubt, a standard not required by the CCPR),[73] to be informed of the charges in a language they understand with adequate time to prepare a defense,[74] to be tried in their presence, and to have counsel of their own choosing, and to have assigned counsel at no charge.[75] The rights to a public hearing, to examine witnesses, to obtain witnesses and documents for the defense, are fully preserved, and the accused is entitled to refuse to testify and not to have an adverse inference drawn from his decision.[76] (Again, a provision more protective than required by the CCPR, and routinely disregarded by Civil Law legal systems.) The accused cannot be tried twice on the same charge, and is entitled to the appointment of one or more interpreters to assist in his defense, and the proceedings must be conducted "expeditiously," so as to avoid unnecessary delay.[77] Moreover, an appeal process is provided in the form of a Review Panel consisting, at a minimum, of three military officers and which may also include civilian members.[78]

It should be noted, however, that, in any case, the United States would be entitled to derogate from the requirements of Article 14, in accordance with Article 4, if any aspect of the rules and procedures for military commissions were found not to be in compliance with that provision.[79] Under Article 4, CCPR parties may derogate from the requirements of Article 14 "[i]n time of public emergency which threatens the life of the

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* the right to adequate time and facilities for preparing a defense;
* the right to counsel of the accused's own choosing;
* the right to be tried without undue delay and in his presence;
* the right to examine, and to have examined, witnesses against him and to obtain the attendance and examination of witnesses on his behalf; and
* the right to have his conviction and sentence reviewed by a higher tribunal according to law.

[72] Here, it should be noted that, while the CCPR requires that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law," there is no requirement that appeals be permitted to the civilian court system. The provision of a military appellate board is, in fact, very similar to the system now followed in the *ad hoc* United Nations International Criminal Tribunals for the Former Yugoslavia and Rwanda, where appeals are permitted to Tribunal judges sitting as an "appeals panel." This arrangement would, therefore, clearly meet international standards.

[73] Military Commission Order No. 1, § 5(B).

[74] Military Commission Order No. 1, § 5(A).

[75] Military Commission Order No. 1, § 5(D), (K), § 4(C).

[76] Military Commission Order No. 1, § 5(F), (H), (I), § 6(A)(5).

[77] Military Commission Order No. 1, § 5(J), (P), § 6(B)(2).

[78] Military Commission Order No. 1, § 6(H)(4). The CCPR, it should be noted, does not require that appeals be permitted to the civilian court system.

[79] Derogations from Article 15 are not permitted.

nation and the existence of which is officially proclaimed." Whether and when a threat to the "life of the nation" exists, is a matter left by the CCPR to individual state parties to determine. This authority, however, has been used by U.S. allies in the past. Great Britain, for example, notified the CCPR states parties, on 17 May 1976, that it intended "to take and continue measures derogating from [its] obligations under the Covenant," with respect to the situation in Northern Ireland. Article 14 was among those provisions listed as having been derogated from.[80] Significantly, a similar derogation from the requirements of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which, like the CCPR, also permits derogation, "[i]n time of war or other public emergency threatening the life of the nation," was upheld by the European Court of Human Rights in 1993.[81]

[80] On September 14, 2001, President Bush proclaimed a state of national emergency. Although this proclamation (7463) did not recite that the "life of the nation" was at stake, the President's Military Order of November 13 reaffirmed this state of emergency, and further noted that:

> (c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.[80]

To the extent that a more specific statement regarding the invocation of Article 4 is deemed necessary, an additional proclamation to this effect can be made by the President. In addition, a notification that the United States intends to derogate from Article 14 would have to be transmitted to the U.N. Secretary-General.

[81] *See Brannigan & McBride v. United Kingdom*, No. 14553/89 (ECHR 1993).

Our Purpose

The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order. It is founded on the principles that the state exists to preserve freedom, that the separation of governmental powers is central to our Constitution, and that it is emphatically the province and duty of the judiciary to say what the law is, not what it should be. The Society seeks both to promote an awareness of these principles and to further their application through its activities.

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The Courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequences would be the substitution of their pleasure for that of the legislative body."

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