

AMERICAN BAR ASSOCIATION  
TASK FORCE ON TERRORISM AND THE LAW  
REPORT AND RECOMMENDATIONS  
ON  
MILITARY COMMISSIONS  
January 4, 2002

In response to the unprecedented attacks of September 11, on November 13, 2001, the President announced that certain non-citizens would be subject to detention and trial by military authorities. The order provides that non-citizens whom the President deems to be, or to have been, members of the al Qaida organization or to have engaged in, aided or abetted, or conspired to commit acts of international terrorism that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States or its citizens, or to have knowingly harbored such individuals, are subject to detention by military authorities and trial before a military commission.

The September 11 attacks caused over 3000 deaths and billions of dollars of economic losses. Beyond their immediate, horrible, impact, they demonstrated that a threat once thought hypothetical is all too real: there are groups of persons with the organization, resources, and will to cause mass death and destruction in the United States and elsewhere. It is the duty of the Government to bring those responsible to justice and to take all legal measures to prevent future attacks; it is also the duty of the Government to preserve and protect fundamental rights and liberties under the Constitution.

The President's order raises important issues of constitutional and international law and policy. The language in the order makes its potential reach quite broad and raises questions for which there is no clear, controlling precedent. Many of the issues will come into clearer focus only if and when more specific rules are drafted and a military commission is convened for the trial of a particular individual.

This paper addresses some of the major issues that can now be identified. It discusses the authority for and history of military commissions. It discusses the jurisdiction of military commissions, and judicial review of military commissions. It describes some of the issues relating to the procedures in a military commission. It discusses policy reasons for and against military commissions in the current circumstances. It concludes with a summary and recommendations.

The members of the task force are Harold S. Barron, chair-elect of the Business Law Section of the ABA, the former General Counsel of Unisys Corp., and a lawyer in private practice in Chicago, IL; Richard P. Campbell, chair of the Association's Section of Tort and Insurance Practice and a lawyer in private practice in Boston, MA; former Brigadier General John S. Cooke, chair of the ABA's Standing Committee on Armed Forces Law; John Garvey, Dean of the Boston College School of Law; Michael S. Greco, Immediate Past Chair of the Section of Individual Rights and Responsibilities and a practicing lawyer in Boston, MA; Prof. Barry Kellman of the DePaul Law School,

representing the Section of International Law and Practice; Esther Lardent, chair of the Coordinating Committee on Immigration Law, who is Director of the Pro Bono Institute, Washington, DC; Elizabeth Rindskopf Parker, the General Counsel of the University of Wisconsin and prior General Counsel of the Central Intelligence Agency, representing the Standing Committee on Law and National Security; Prof. Steven Allan Saltzburg of the George Washington University School of Law, representing the Section of Criminal Justice; Clint N. Smith, Vice President and General Counsel of WorldCom, Inc., representing the Section of Science and Technology Law; and Robert A. Clifford, a lawyer in private practice in Chicago and chair of the Section of Litigation, who chairs the Task Force.

Unless otherwise noted, the report and recommendations have not been adopted as the policy of the American Bar Association and should be considered solely as the views of the Task Force.

## I. AUTHORITY FOR MILITARY COMMISSIONS

Military commissions derive their authority from Articles I and II of the Constitution. Article I, Section 8, grants to Congress the powers: “To ... provide for the common Defence” (clause 1) and “To define and punish piracies on the high seas, and offenses against the Law of Nations; To declare War, grant letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water; To raise and support Armies...; To provide and maintain a Navy; To make Rules for the Government and Regulation of the land and naval Forces” (clauses 10-14). Article II confers on the President the “executive Power” (Section 1) and makes him the “Commander in Chief of the Army and Navy” (Section 2).

Congress has provided for military commissions in Article 21 of the Uniform Code of Military Justice (10 U.S.C. Sec. 821), which provides:

The 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 commission, provost court, or other military tribunals.

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<sup>1</sup> This language is designed to retain the common law jurisdiction of military commissions. In *Application of Yamashita*, 327 U.S. 1 (1946) the Court discussed Article of War 15, which contained substantially the same language as U.C.M.J. Article 21. It explained that Article 15 was adopted in 1916 in response to other amendments of the Articles of War which granted jurisdiction to courts-martial to try offenses and offenders under the law of war. Thus, the Court stated:

[I]t was feared by the proponents of the 1916 legislation that in the absence of a saving provision, the authority given by Articles [of War] 12, 13, and 14 to try such persons before courts-martial might be construed to deprive the non-statutory military commission of a portion of what was considered its traditional jurisdiction. To avoid this, and to preserve that jurisdiction intact, Article 15 was added to the Articles. ... By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war. *Id.*, at 19-20. (footnote omitted)

Military commissions have existed, albeit under different names, since before the beginning of the Republic. George Washington ordered the trial of John Andre for spying by a “Board of Officers,” which was, in all but title, a military commission.<sup>2</sup> The term “military commission” came into use during the Mexican War, and by the time of the Civil War was well embedded in usage.<sup>3</sup> Military commissions have had the authority to try persons not otherwise subject to military law for violations of the law of war and for offenses committed in territory under military occupation.<sup>4</sup>

Military commissions were used for both purposes in World War II, and were upheld by the U.S. Supreme Court.

In *Ex Parte Quirin*, 317 U.S. 1 (1942), the Court upheld the jurisdiction of a military commission ordered by President Roosevelt to try eight German saboteurs who had entered the United States surreptitiously. The Court stated:

By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases. (*Id.*, at 28)

(Article 21 of the U.C.M.J. is identical in material respects to its predecessor, Article of War 15.)

The Court expressly left open the question whether the President’s commander-in-chief power alone is authority to establish a military commission, since Article of War 15 recognized such authority. “It is 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. For here Congress has authorized trial of offenses against the law of war before such commissions.” (*Id.*, at 29)

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*See also* *Ex parte Quirin*, 317 U.S. 1 (1942); *Madsen v. Kinsella*, 343 U.S. 341 (1952) (“Since our nation’s earliest days, such [military] commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities relating to war. They have been called our common-law war courts.” *Id.*, at 346-7 (footnote omitted))

Article 18, U.C.M.J., provides that, in addition to jurisdiction over persons subject to military law, primarily members of the armed forces, “General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war.” Presumably, the President has chosen to use military commissions because the procedures can more easily be tailored to meet the exigencies of the circumstances.

<sup>2</sup> *See generally*, W. Winthrop, *Military Law and Precedents*, (2d Ed., 1920 reprint) at 832. Winthrop points to other trials in the Revolutionary War, as well as to the trials of individuals in the War against the Creek Indians in 1818, as early uses of military tribunals to try persons not otherwise subject to military jurisdiction. *See also*, *Madsen v. Kinsella*, 343 U.S. 341 (1952) at 346-47.

<sup>3</sup> Winthrop, *supra* n. 2 at 832.

<sup>4</sup> *See* *Madsen v. Kinsella*, 343 U.S. at 346-7; W. Winthrop, *Military Law and Precedents*, 2d ed. 1920 reprint, 831-846

In *Quirin* the defendants were captured, held, and tried in the United States. The Court rejected their claims that, because the civilian courts were open and functioning, they were entitled to be tried in such courts.<sup>5</sup>

Following the surrender and occupation of Germany and Japan in 1945, military commissions were used extensively. In Germany, over 1600 persons were tried for war crimes by U.S. Army military commissions.<sup>6</sup> In the Far East nearly 1000 persons were tried by such commissions.<sup>7</sup> Military commissions were also used to try individuals, including U.S. citizens, for ordinary criminal activity in the occupied territories. The Supreme Court upheld jurisdiction under both doctrines.

In *Application of Yamashita*, 327 U.S. 1 (1946), the Court upheld the jurisdiction of a military commission to try Japanese General Yamashita for war crimes.<sup>8</sup> In discussing Article of War 15, the Court stated, “By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war.” The Court also stated:

An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war. *Ex parte Quirin*, 217 U.S. 28, 63 S.Ct. 11. The trial and punishment of enemy combatants who have

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<sup>5</sup> The Court distinguished *Ex parte Milligan*, 71 U.S. 2 (1866). In *Milligan*, the Court held that a military commission in Indiana lacked authority to try Milligan, “not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service.” *Id.*, at 118. The *Milligan* Court stated that jurisdiction could not be applied under “the laws and usages of war” “to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed.” *Id.*, at 121. In *Quirin*, one of the defendants claimed U.S. citizenship. Assuming, without deciding, this to be the case, the *Quirin* Court stated, “Citizenship 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.” *Quirin* at 37. The *Quirin* Court opined that Milligan, as a non-belligerent, was not subject to the law of war, and therefore not amenable to trial by a military commission.

At least with respect to *citizens*, the *Quirin* Court seems to have drawn a distinction based on the status of the offender. The *Quirin* defendants were combatants, that is, members of the German armed forces, who sneaked behind enemy lines and shed their uniforms with the intent to commit sabotage against U.S. defense facilities. Lambden Milligan, on the other hand, was never a member of the enemy forces (although he was, allegedly, a member of a secret society in the north that intended to overthrow the government). His offenses were otherwise similar to those of the *Quirin* defendants: communicating with the enemy and conspiring to seize government munitions and to free confederate prisoners of war.

<sup>6</sup> As compared to some 200 tried by international military tribunals. See Telford Taylor, *Nuremberg and Viet Nam: An American Tragedy* (1970); H.W.Elliott, *The Trial and Punishment of War Criminals: Neglected Tools in the “New World Order”* (unpublished thesis at University of Virginia Law School 1996).

<sup>7</sup> *Id.* Conviction rates were about 85% in both theaters. *Id.*

<sup>8</sup> See also *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (holding habeas relief not available to enemy aliens to challenge military commissions where the crimes, apprehension, and trial all occurred outside the United States).

committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. *Id.*, at 11.

In *Madsen v. Kinsella*, 342 U.S. 341 (1952), the Supreme Court upheld the jurisdiction of a military commission to try a civilian U.S. citizen for the murder of her husband, a U.S. serviceman, in occupied Germany in 1950. The Court's opinion discussed the history of military commissions.

The World War II military commissions were similar in composition and procedure to the international war crimes tribunals that tried the leaders of Germany and Japan for war crimes and other offenses against international law. The titles of the international tribunals – the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East – reflect that similarity.

It has been argued that it may be legally significant that there has not been a declaration of war with regard to the authority to create such tribunals as well as their jurisdiction.

*Quirin*, *Yamashita*, *Madsen* and the other World War II cases occurred following a declaration of war by Congress.<sup>9</sup> A state of declared war offers the clearest authority for the broadest use of war powers. A declaration of war draws clear lines. It defines (or at least has traditionally done so) who the enemy is: another state, and all the nationals of that state. It marks a clear beginning, and (again traditionally) an end, with some legal act or instrument marking its conclusion.

The Supreme Court and Congress have recognized that a state of war may exist without a formal declaration.<sup>10</sup> While such a declaration would provide the clearest authority in support of military commissions, military commissions, or similar military tribunals, have been used in hostilities in which there was no declaration of war, including the Civil War and the Indian Wars.<sup>11</sup> Nothing in Article 21 or elsewhere in the U.C.M.J. or other statutes explicitly limits or permits the use of military commissions when war has not been declared

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<sup>9</sup> Although in the latter two cases the hostilities had ended when the trials occurred.

<sup>10</sup> See *The Prize Cases*, 67 U.S. (1863); *Bas v. Tingy*, 4 U.S. 37 (1800). In *Talbot v. Seeman*, 5 U.S. 1 (1801), Chief Justice Marshall, for the Court, wrote, "It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they apply to our situation, must be noticed." *Id.*, at 28. Of course, this leaves open the question, how "far" do they apply? Marshall provided no clear answer, but the opinion did recognize that their application need not be explicit in Congress' authorizing act. See also Congress' declaration in the Mexican War, where Congress did not "declare war." Rather, it recognized that "by the act of the Republic of Mexico, a state of war exists between that government and the United States." Winthrop, *supra* note 2, at 668.

<sup>11</sup> See *Madsen v. Kinsella*, 343 U.S. 341, 346; Winthrop, *supra* note 2 at 831-835. However, in the Civil War, Congress specifically authorized the use of military commissions in several acts. See Winthrop, at 833.

On September 18, 2001, Congress enacted a Joint Resolution (Public Law 107-40, 115 Stat. 224) authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” The Preamble to the resolution states that the acts of September 11 were attacks against the United States that “render it both necessary and appropriate that the United States exercise its rights to self-defense.”

It can reasonably be argued that Congress’ authorization to use “all necessary and appropriate force” includes authority for the President’s order, at least with respect to offenses relating to the September 11 attacks. Presidents have asserted a constitutional authority to use military commissions arising from their executive duties as Commander in Chief of the Armed Forces. The scope of the President’s power to act alone with respect to military commissions has not been developed in case law, but it is clear that the President’s authority is least open to question when it is supported by an explicit act of Congress.

## II. JURISDICTION OF MILITARY COMMISSIONS

### A. Offenses against the law of war<sup>12</sup>

By its terms, Article 21 limits the jurisdiction of military commissions to “offenders or offenses that by statute or by the law of war may be tried by military commissions.” No other statute that would give jurisdiction to a military commission appears to apply in the current circumstances,<sup>13</sup> so the exercise of jurisdiction by a military commission must be under the law of war. That jurisdiction generally rests on either of two bases: military occupation or prosecution for law of war violations. Only the latter basis is in issue here. The Supreme Court, in *Ex Parte Quirin* and *Application of Yamashita*, has recognized that military commissions are proper fora for the trial of violations of the law of war.

What violations of the law of war may have been committed? A variety of theories may be applied to various activities of those responsible for the September 11

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<sup>12</sup> In modern usage, the term “law of armed conflict” is ordinarily used. Because the term “law of war” is used in the U.C.M.J., that term is used in this paper.

<sup>13</sup> Arguably Article 104, U.C.M.J., 10 U.S.C. sec. 904, might apply. Article 104 provides:

Any person who –

- (1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or
- (2) without proper authority, knowingly harbors or protects or gives intelligence to or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or military commission may direct.

By its terms, Article 104 applies to any person and is not limited to persons who are otherwise subject to the U.C.M.J. It seems likely that anyone who might have violated Article 104 with respect to the September 11 attacks would also be liable for a war crime.

attacks and those associated with them. Basically, two questions arise: were these acts of war, and, if so, did they violate the law of war? The second question is simple: assuming these were acts of war, these attacks on noncombatant civilians violated the law of war.<sup>14</sup>

The first question, were these acts of war, is a bit more complicated. Although there is room for argument on both sides, it can reasonably be concluded that these were acts of war.

Certainly, had they been carried out under the sponsorship of a state, no one would question that the September 11 attacks were acts of war. Al Qaida and others who may be responsible for the attacks do not constitute a state. This does not mean that they cannot commit or are not liable for war crimes. The law of war applies to non-state actors, such as insurgents.<sup>15</sup> Given the degree of violence in these attacks and the nature and scope of the organization necessary to carry them out, it is much more difficult to

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<sup>14</sup> That a deliberate attack on noncombatant civilians violates the law of war is firmly embedded in customary law of war and also reflected in several conventions, such as Common Article 3 of the Geneva Conventions of 1949, *see, e.g.*, Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287.

Depending on the theory used, it may be that the attack on the Pentagon did not constitute a war crime, because the Pentagon may be a legitimate military target. Nevertheless, the kidnapping and murder of civilians aboard the four hijacked aircraft and the attacks on the World Trade Center seem, by any definition, to constitute war crimes.

Additional war crimes might include unlawful belligerency, that is, the commission of acts of war without complying with the laws of war for recognition as a belligerent. See Department of the Army Field Manual 27-10, *The Law of Land Warfare* (1956) paras. 80-82. See also Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1849 (T.I.A.S. 3364).

<sup>15</sup> See Common Article 3 of the 1949 Geneva Conventions, *e.g.*, Convention Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. 3365, 75 U.N.T.S. 287. See also *The 1977 Protocols Additional to the Geneva Conventions*, 16 I.L.M. 1391 (The U.S. has not ratified the 1977 Protocols, but recognizes that parts of them reflect customary law of war); David Bederman, *International Law Frameworks*, (New York, 2001) at 230-231.

Since World War II, there has been considerable debate about the application of the law of war to conflicts involving non-state actors. Many, if not most, of the conflicts since World War II have been “internal,” that is, between a rebel or insurgent group and the state itself. Typically, and understandably, states have resisted the application of the law of war to such conflicts, for to do so might imply legitimacy to acts of violence carried out by the non-state actors. After all, the law of war recognizes that lawful combatants may kill and engage in other acts of violence against legitimate targets. States have not wished to risk conceding such a privilege to rebels, preferring to treat them, and their acts, as criminal.

To address conflicts between a state and non-state, internal, forces, Protocol II of the Geneva Conventions provides for applying law of war protections to conflicts between a state’s “armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.”

Clearly, the persons responsible for the September 11 attacks were not a state or even a “dissident force” under Additional Protocol II; nor were they entitled to the privileges pertaining to lawful combatants. The United States would be fully justified in treating them as common criminals. The question, however, is: must it do so? And, must it do so when the non-state actors are not an internal dissident group, but an apparently well organized and resourced entity operating on a global scale.

The conventions and customary law of war are designed to protect innocent victims. They do so by establishing standards of treatment for various noncombatants, including civilians, as well as lawful combatants who have been captured. That does not mean that these protections should be turned into a shield against the jurisdiction of a court for the trial of war crimes of an unprecedented nature.

argue that they are not acts of war than to argue that they are.<sup>16</sup> The Joint Resolution of Congress, the action of the North Atlantic Treaty Organization recognizing the September 11 attack as an event triggering Article V of the Treaty, and the recognition by the United Nations Security Council that the attacks justify the right to self-defense strongly support the conclusion that the attacks were an act of war.<sup>17</sup> Finally, it is clear that individuals may be responsible for violations of the law of war.<sup>18</sup>

In sum, it would be anomalous to argue that, by operating so far outside the norms and principles of international law, the perpetrators of the attacks are beyond the application of the law of war.

As noted above, the jurisdiction of military commissions is limited to violations of the law of war.<sup>19</sup> Therefore, violations of U.S. criminal statutes are not, as such, subject to the jurisdiction of military commissions. This may restrict the number, and utility, of military commissions. It could complicate choice of forum questions in cases in which a person may be liable for violations of U.S. laws as well as for war crimes.<sup>20</sup> More importantly, it raises serious questions about the breadth of the President's order. Indeed, it is in this context that the reach of the President's order creates some concerns.

The President's order includes a much broader group of people than those who may have committed war crimes. The order applies to "members" of al Qaida, to people

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<sup>16</sup> It should also be noted that the September 11 attacks apparently marked the continued escalation of attacks attributed to al Qaida. Arguably, the United States was in a state of armed conflict with al Qaida long before September 11, 2001, as evidenced by attacks attributed to al Qaida on the World Trade Center in 1993, U.S. military barracks at Khobar, Saudi Arabia, in 1996, U.S. embassies in Kenya and Tanzania in 1998, and the USS Cole in 2000, and by U.S. retaliatory strikes against al Qaida targets in Sudan and Afghanistan in 1998. Whether or not that is the case, the earlier attacks on U.S. citizens and facilities add more weight to the case that the September 11 attacks were acts of war by an organized enemy. Moreover, it now appears that elements of al Qaida are engaged in the fighting in Afghanistan, lending further weight to their status as belligerents – albeit unlawful belligerents.

<sup>17</sup> On September 12, 2001, NATO's North Atlantic Council stated that it regarded the attack as an action covered by Article V of the Washington Treaty, which states that "an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against all." Also on September 12, the United Nations Security Council recognized the United States' right to self-defense. U.N.S.C.Res. 1368.

<sup>18</sup> See *Kadic v. Karadzic*, 70 F.3d 232 (2<sup>nd</sup> Cir. 1995). See generally Jordan Paust, *International Law as Law of the United States* (Durham, NC, 1996), at 209-10. Also, Congress' September 18 Resolution authorized the use of armed force against "organizations and individuals," as well as states.

<sup>19</sup> Absent a grant of jurisdiction under some other statute. See note 13 and accompanying text, *supra*.

<sup>20</sup> U.S. district courts have jurisdiction to try persons for war crimes, if the perpetrator or the victim is a U.S. national or a member of the armed forces of the United States. 18 U.S.C. sec. 2441. This Act does not deprive military commissions of jurisdiction. H.R. Rep. No. 104-698 at 12, 1996 USCCAN 2166, 2177. ("The enactment of H.R. 3680 is not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under the law of war or the law of nations."). See also Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. sec. 3261(c): "Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal." Thus, Congress has recently recognized, and taken steps to preserve, the authority of military commissions to try offenses and offenders under the law of war.

complicit in “acts of international terrorism,” and to those who have “harbored” such persons. The offenses, and hence offenders, described in the order are not limited to the September 11 attacks, or to acts related to them. This raises several questions.

First, it is not clear that membership, alone, in al Qaida or harboring terrorists violates the law of war – the necessary predicate to the jurisdiction of a military commission under both common law and Article 21, U.C.M.J. Indeed, not all acts of international terrorism are necessarily violations of the law of war. Therefore, if the order is to be applied to these categories of acts and persons, specific authority from Congress appears necessary.

Second, the order’s application of military commissions to acts not associated with the September 11 attacks would uncouple the authority of such military commissions from Congress’ September 18 joint resolution, which authorized force against those who “planned, authorized, committed, or aided the terrorist attacks on September 11.” Using a military commission to address offenses unrelated to the September 11 attacks, particularly against persons in the United States, would raise additional serious questions of constitutional and statutory authority, at least in the absence of further authority from Congress.

Finally, the order applies a “reason to believe” standard to determining whether to subject someone in these categories to the jurisdiction of a military commission; thus, a resident alien could be compelled to forfeit substantial rights (see subsection II.B. below) without a clear demonstration that he or she is properly subject to the jurisdiction of a military commission.

#### B. Persons addressed in the President’s order

The President’s order applies to non-U.S. citizens who are or were members of al Qaida or who were principals or accomplices in the September 11 attacks or who knowingly harbored such persons. Potential prosecutions before military commissions could arise against non-citizens (aliens) under a variety of circumstances, but they would fall into two broad categories: aliens not within the United States (or its territories), and aliens within the U.S.<sup>21</sup>

Aliens not within the United States have few, if any, constitutional protections.<sup>22</sup>

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<sup>21</sup> Aliens in the United States can be divided into two broad groups – those present lawfully and those present unlawfully. The first group includes: lawful permanent residents; nonimmigrants (such as diplomats, and temporary visitors for work, study, or pleasure); and certain persons in humanitarian categories. Unlawful aliens includes: undocumented aliens, that is, persons who entered the United States without authorization or inspection and who have not acquired lawful status; and, status violators, that is, persons who entered the United States with authorization but who overstayed a visa or otherwise violated the terms of admission. See *A Judge’s Benchbook on Immigration Law and Related Matters*, American Bar Association Center for Immigration Law and Representation (2001), chapter 3.

<sup>22</sup> *Johnson v. Eisentrager*, 339 U.S. 763 (1950). See also *Zadvydas v. Davis*, 533 U.S. \_\_\_\_ (2001); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

Aliens present within the United States are entitled to due process protections. “But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all ‘persons’ within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent.” *Zadvydas v. Davis*, 533 U.S. \_\_\_, \_\_\_ (2001).

For more than a century, it has been recognized that aliens, whether or not lawfully in the United States, are entitled to the rights of the Fifth and Sixth Amendments before criminal penalties may be imposed. *Wong Wing v. United States*, 163 U.S. 228 (1896).<sup>23</sup> Of course, *Ex parte Quirin* suggests that an exception may exist for one who enters the country illegally in order to commit a war crime.<sup>24</sup>

Subjecting non-U.S. citizens outside the United States to the jurisdiction of military commissions raises the least likelihood of constitutional impediments, and also appears less objectionable on policy grounds. With respect to aliens already in the United States, such jurisdiction raises much more serious questions. It should be recalled, however, that in *Ex parte Quirin*, the Supreme Court upheld the trial during World War II – a declared war – by military commission for war crimes of a person presumed to be a U.S. citizen. The absence of a formal declaration of war in the current circumstances *could* have legal significance with respect to aliens within the U.S., particularly those lawfully present.

### III. Judicial Review of Military Commissions

The President’s order provides:

With respect to any individual subject to this order –

- (1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and
- (2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding brought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

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<sup>23</sup> The Court has upheld, in some limited contexts, treating aliens differently from citizens, and treating some types of aliens different from other types, but these distinctions have been narrowly drawn. *See, e.g.*, *Cabell v. Chavez-Salido*, 454 U.S. 432 (1982)(upholding ban on alien probation officers); *Mathews v. Diaz*, 426 U.S. 67 (1976)(permitting distinction on rational basis grounds between permanent resident aliens based on length of time in the U.S. for purposes of Medicare eligibility).

<sup>24</sup> As discussed in note 6 and accompanying text, *supra*, in *Ex parte Quirin*, the Supreme Court upheld jurisdiction of a military commission to try a U.S. citizen for offenses committed in the United States because the citizen was a “belligerent” in a declared war. It distinguished *Ex parte Milligan*, which held a military commission lacked jurisdiction to try a citizen who was not a belligerent for offenses committed in the United States. The President’s order excludes citizens from the jurisdiction of military commissions, but arguably the belligerent – non-belligerent distinction *Quirin* drew with *Milligan* may have some relevance to the application of the President’s order to aliens in the United States. Of course, the issue is further blurred by the fact that defining who is a “belligerent” is problematic in the current situation.

Notwithstanding the broad nature of this language, it does not expressly suspend the writ of habeas corpus, and it is most unlikely that it could. Although the Supreme Court has held that military commissions are outside the normal process of judicial review (*Ex parte Vallandigham*, 68 U.S. 243 (1863)), it has reviewed applications for writ of habeas corpus by persons being tried by military commission. See, e.g., *Madsen v. Kinsella*, *Application of Yamashita*, *Ex Parte Quirin*, all discussed above. (But see *Johnson v. Eisentrager*, 339 U.S. 763 (1950) wherein the Court denied habeas review of the jurisdiction of a military commission outside the United States to try an enemy alien who was never in the United States for war crimes alleged to have been committed outside the United States. The Court distinguished its review of jurisdiction in *Yamashita*, pointing out that Yamashita’s offenses and trial occurred in the Philippines, which were, at that time, possessions of the United States.) The Court has carried out these reviews even in the face of language in the implementing Presidential order that purported to foreclose judicial review, much as in the current order.<sup>25</sup> In conducting such reviews, the Court has examined whether the legal predicates for a military commission were established. Consequently, if the President’s order leads to trial of one or more individuals, it can be assumed that the validity of the order and the jurisdiction of such commissions will be reviewed in federal courts – at least with respect to any persons or trials within the United States, if the defendant has legal counsel who seeks review notwithstanding the prohibitory language of the President’s order.

#### IV. PROCEDURES FOR MILITARY COMMISSIONS

The President’s order of November 13 provides only the sketchiest outline of procedures, leaving the details to the Secretary of Defense.<sup>26</sup> The order directs “a full and fair trial,” “admission of such evidence as would ... have probative value to a reasonable person,” safeguarding classified information, conviction and, if necessary, sentencing “only upon the concurrence of two-thirds of the members of the commission,” and review by the President or the Secretary of Defense. It also recognizes a right to counsel for the defendant.<sup>27</sup>

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<sup>25</sup> “The Proclamation also stated in terms that all such persons were denied access to the courts.” *Ex parte Quirin*, 317 U.S. at 23.

<sup>26</sup> Article 36(a), U.C.M.J., 10 U.S.C. sec. 836(a), provides:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

The President’s order refers to this provision; it also states that “I find consistent with section 836 of title 10 United States Code, that it is not practicable to apply in military commissions under this order the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”

<sup>27</sup> Under section 4(c)(5) of the order, the Secretary of Defense is authorized to prescribe regulations for “the conduct of the defense by attorneys for the individual subject to this order. Presumably, these would concern the qualifications of counsel and perhaps access to classified information. Extensive or unusual regulation could be cause for concern.

It remains to be seen what procedures will be developed and promulgated, but there is no reason these should not provide due process, even considering the exigencies that motivated the President's order.

In World War II and previously, the procedures in military commissions generally mirrored those used in courts-martial. Procedures in courts-martial have changed significantly over the last fifty years and, in many respects, parallel those used in civilian criminal trials. In paragraph 2(b)(2) of the Preamble of the Manual for Courts-Martial, the President has prescribed that, "Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules and procedures and evidence prescribed for courts-martial." Therefore, except to the extent that his November 13 order provides otherwise, it appears that procedures for courts-martial should be the basis for those in military commissions.<sup>28</sup>

The United States is a party to the International Convention on Civil and Political Rights.<sup>29</sup> Article 14 of the ICCPR describes certain standards and procedures that should be used in all courts and tribunals.<sup>30</sup> It is fair to note that there is nothing in the

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<sup>28</sup> Some confusion may exist concerning whether Article 36 U.C.M.J. requires military commissions to follow the procedures the UCMJ prescribes for courts-martial, because Article 36 says the procedures in courts-martial and military commissions "may not be contrary to or inconsistent with this chapter." This language must be read in light of the other articles in the UCMJ, however. Most of those articles apply expressly to courts-martial, e.g., article 51 says, "Voting by members of a general or special court-martial ... shall be by secret written ballot." (Emphasis added) By their express terms, these articles and the procedures they prescribe do not include military commissions. Any suggestion that they apply by inference to military commissions is negated by the fact that in a few articles (e.g. Article 37) Congress expressly mentions military commissions along with courts-martial. Thus, when Congress wanted to make a specific provision applicable to military commissions as well as courts-martial, it did so. The fact that it did not apply most of the court-martial procedures to courts-martial, but left it to the President to decide (subject to the guidance, "so far as he considers it practicable" to apply rules and principles used in U.S. District Courts), reflects the common law nature of military commissions, and the flexibility of their procedures.

<sup>29</sup> G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171. The United States, when it entered the Covenant, declared that in its view, Articles 1 through 27 of the treaty are not self-executing. The United States' position is that these protections are, generally, in the United States Constitution and require no further implementation, and that the Covenant does not provide a basis for individuals to claim relief in United States Courts. Since the United States joined the Covenant, it has not departed from its provisions.

<sup>30</sup> Article 14 provides:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

Convention that suggests that either the United States or other nations contemplated at the time they adopted the Convention that it would apply to war crimes and military commissions, but it is also true that the basic rights set forth in the Convention have been respected in “war crimes” prosecutions conducted by the United Nations’ special tribunals.<sup>31</sup>

## V. OTHER CONSIDERATIONS

Trying individuals by military commission would be a controversial step. Military commissions probably will not afford the same procedural protections as civilian courts.<sup>32</sup> The United States has protested the use of military tribunals to try its citizens in

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3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
    - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
    - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
    - (c) To be tried without undue delay;
    - (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
    - (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
    - (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
    - (g) Not to be compelled to testify against himself or to confess guilt.
  4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
  5. Everyone convicted of a crime shall have the right to have his conviction and sentence being reviewed by a higher tribunal according to law.
  6. When a person has by final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
  7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

<sup>31</sup> The Human Rights Committee, established under Part IV, Articles 28-45, of the ICCPR has stated, in General Comment Number 13, that it “notes the existence, in many countries, of military or special courts which try civilians,” and that “[w]hile the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees of Article 14.” The ICCPR also includes, in Article 4, a provision permitting parties to derogate from their obligations, “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”

<sup>32</sup> This view could complicate requests for extradition, or some other form of delivery, of suspected terrorists to control of the United States. For example, it has been reported that Spanish officials will refuse

other countries. If conducted under reasonable procedures, however, military commissions can deliver justice with due process. Nevertheless, regardless of their actual fairness, many will view the verdict of a military commission with skepticism.

The alternatives are not without difficulties. Killing surrendering individuals with no process whatever is hardly an option. This leaves several possible fora besides military commissions: U.S. domestic courts; an international tribunal; or the domestic courts of another country.

U.S. civilian courts, federal or state, would have jurisdiction to try war crimes and other offenses under various criminal statutes. Major concerns with the exercise of such jurisdiction center on security. This includes the physical security of the courthouse and the participants (including jurors) in the trial. It also includes the ability to safeguard classified information, including intelligence sources and methods whose compromise could facilitate future terrorist acts. While mechanisms exist to protect evidence of a classified nature from public exposure, these may not suffice to protect the information from the defendants and, through them, others who may use such information to the harm of the U.S. and its citizens.<sup>33</sup>

Trial before an international tribunal would have many of the same problems as trial in a U.S. court. The risk to intelligence sources would probably be substantially greater. Also, it is unlikely that the death penalty would be available in such a forum. Finally, given experience with international tribunals in Yugoslavia and Rwanda, it could take an unacceptably long time to authorize and set up an international tribunal to address these cases.<sup>34</sup>

Concerns with trial in the court of another country would depend on the circumstances. To the extent that evidence from U.S. intelligence sources was necessary, the concerns about compromise would be serious. Of course, with respect to trial in some foreign countries, due process concerns about military commissions could pale by comparison. Finally, even in the unlikely event that another country were willing to assert jurisdiction, it may be questioned whether the U.S. government or public would view such as an appropriate and adequate forum in which to bring to justice those responsible for the attacks.

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to extradite persons suspected of complicity in the September 11 attacks unless they receive assurances that such persons would be tried in civilian courts. *New York Times*, November 25, 2001, p. A1, col. 1.

<sup>33</sup> The Classified Information Protection Act, 18 U.S.C. Appendix secs. 1-16, provides procedures for notice to the government and judicial screening when the defendant wishes to reveal classified information. It is designed to limit the defense's ability to leverage its possession of classified information in plea negotiations. CIPA provides no protection for information that the prosecution might need to introduce or for information that the defense is permitted to introduce.

<sup>34</sup> It should also be noted that the procedures in such tribunals do not necessarily comport with those in U.S. civilian trials. See Note, *Due Process in International Criminal Courts: Why Due Process Matters*, 87 *Virginia Law Review* 1381 (November 2001).

## VI. SUMMARY

1. The unprecedented and horrible attacks of September 11 demonstrated that the United States faces an organized enemy with the resources and the will to cause mass death and destruction in the United States and elsewhere.
2. It is the duty of our Government to bring those responsible to justice and to take all legal measures to minimize the possibility of future terrorist attacks, consistent with its duty to preserve fundamental rights and liberties.
3. There is historical authority supporting the President's establishment of military commissions in wartime, under the Constitution and laws of the United States.
4. Military commissions have been used in periods other than declared war.
5. Congress has authorized the President to use armed force against those persons, organizations, and states responsible for the September 11 attacks.
6. The scope of the President's power to act alone with respect to military commissions has not been developed in case law. The President's constitutional authority to use military commissions is least open to question when the President consults with and has the support of Congress.
7. Military commissions have authority to try persons for violations of the law of war. It can reasonably be argued that the September 11 attacks were violations of the law of war.
8. Absent additional congressional authority, military commissions do not have authority to try persons for crimes other than law of war violations.
9. The President's order of November 13, on its face, appears to apply to offenses that may not have been war crimes, and that may not be connected to the September 11 attacks.
10. The President's order applies to all non-citizens, including aliens lawfully present in the United States. The breadth of the President's order raises serious constitutional questions under existing precedent.
11. Military commissions are subject to habeas corpus proceedings in federal court, at least as to persons present in the United States and to U.S. citizens.
12. The President's order states that any military commission must provide a "full and fair" trial. It leaves to the Secretary of Defense to prescribe most of the procedures. Paragraph 2(b)(2) of the Preamble of the Manual for Courts-Martial suggests those procedures should generally follow those used in courts-martial.

13. The United States is a party to the International Convention on Civil and Political Rights. Article 14 of the ICCPR describes certain standards and procedures that should be used in all courts and tribunals. Although war crimes trials may not have been contemplated by the parties, the basic rights and procedures in Article 14 have been respected in United Nations special tribunals for war crimes.

14. Alternatives to military commissions include trial in U.S. district courts, international tribunals, and the courts of other countries. Each forum has advantages and disadvantages. The advantages of military commissions include providing greater security to participants and protecting sensitive intelligence that might be used to facilitate future terrorist acts. The major disadvantage is the perception (at least), at home and abroad, that military commissions lack adequate safeguards to ensure a fair trial. This perception will depend significantly on the application of the order and the procedures used in any military commission.

## VII. RECOMMENDATIONS

The Task Force makes the following recommendation which is consistent with existing American Bar Association policy:

All branches of the federal government should adhere to applicable U. S. Constitutional and international Rule of Law principles in all activities relating to the apprehension, detention, prosecution, sentencing, and appeals of persons suspected of or charged with committing terrorist acts or terrorism-related activities against the United States.

In addition, although the American Bar Association has no specific existing applicable policies, the Task Force makes the following recommendations:

1. Any use of military commissions should be limited to narrow circumstances in which compelling security interests justify their use.
2. Unless there is additional specific authority from Congress, the following persons should not be tried by military commission: persons lawfully present in the United States; persons in the United States suspected or accused of offenses unconnected with the September 11 attacks; and persons not suspected or accused of violations of the law of war.
3. The procedures for any military commission should fulfill the President's direction that they afford a "full and fair trial." They should "be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial," Manual for Courts-Martial, Preamble, paragraph 2(b)(2), and should conform to Article 14 of the International Covenant on Civil and Political Rights. The procedures in Article 14 include: an independent and impartial tribunal, with the proceedings open to the press and public, except for specific and compelling reasons, and the following rights for the defendant: presumption of innocence; prompt notice of charges, and adequate time and facilities to prepare a defense; trial without undue delay; to be present, and to be

represented by counsel of choice; to examine, or have examined, the witnesses against him and to obtain the attendance of witnesses in his behalf under the same conditions as the witnesses against him; to the free assistance of an interpreter; not to be compelled to testify against himself or to confess guilt; and to review of any conviction and sentence by a higher tribunal. In addition, any person tried by a military commission in the United States should be permitted to seek habeas corpus relief in United States courts; trial observers, if available, who have appropriate security clearance, should be permitted to observe the proceedings of military commissions; and no sentence of death should be permitted on less than a unanimous vote of all the members of a military commission.

4. In establishing and implementing procedures and selecting trial venues for handling persons charged with terrorist acts or terrorism-related activity against the United States, the federal government should consider the impact of its choices as precedents in (a) the prosecution of U. S. citizens in other nations and (b) the use of international rule of law norms in shaping other nations' responses to future acts of terrorism.