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*Terrorism and the Law of War: Trying Terrorists as War  
Criminals before Military Commissions*

Jennifer Elsea, American Law Division

Updated December 11, 2001

**Abstract.** This report identifies some of the legal and practical implications of treating the terrorist acts as crimes and of applying the law of war rather than criminal statutes to prosecute the alleged perpetrators. It presents an outline of the sources and principles of the law of war, including a discussion of whether and how it might apply to the current terrorist crisis. An explanation of the background issues and arguments surrounding the use of military commissions follows. It explores the legal bases and implications of applying the law of war under United States law, precedent for its application by military commissions, and provides an analysis of the President's Military Order of November 13, 2001.

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# CRS Report for Congress

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## **Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions**

**Updated December 11, 2001**

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# Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions

## Summary

On November 13, 2001, President Bush signed a Military Order pertaining to the detention, treatment, and trial of certain non-citizens as part of the war against terrorism. The order makes clear that the President views the crisis that began on the morning of September 11 as an attack “on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.” The order finds that the effective conduct of military operations and prevention of military attacks make it necessary to detain certain non-citizens and if necessary, to try them “for violations of the laws of war and other applicable laws by military tribunals.”

The unprecedented nature of the September attacks and the magnitude of damage and loss of life they caused have led a number of officials and commentators to assert that the acts are not just criminal acts, they are “acts of war.” The President’s Military Order makes it apparent that he plans to treat the attacks as acts of war rather than criminal acts. The distinction may have more than rhetorical significance. Treating the attacks as violations of the international law of war could allow the United States to prosecute those responsible as war criminals, trying them by special military commission rather than in federal court.

The purpose of this report is to identify some of the legal and practical implications of treating the terrorist acts as war crimes and of applying the law of war rather than criminal statutes to prosecute the alleged perpetrators. The report will first present an outline of the sources and principles of the law of war, including a discussion of whether and how it might apply to the current terrorist crisis. A brief explanation of the background issues and arguments surrounding the use of military commissions will follow. The report will then explore the legal bases and implications of applying the law of war under United States law, summarize precedent for its application by military commissions, and provide an analysis of the President’s Military Order of November 13, 2001. Finally, the report discusses considerations for establishing rules of procedure and evidence that comport with international standards.

# Contents

Introduction .....	1
Background .....	2
Ancillary Issues .....	4
Sources and Principles of the Law of War .....	5
Sources .....	6
Principles .....	7
Military Necessity .....	7
Humanity .....	7
Chivalry .....	7
Responsibility .....	8
Protection of Civilians and Prisoners of War .....	8
The Law of War Applied .....	10
Is There an “Armed Conflict”? .....	11
Are the September Attacks “Acts of War”? .....	13
Are Terrorists “Belligerents”? .....	14
Legal Bases for Establishing Military Commission .....	16
The Constitution .....	17
Precedent .....	18
War with Mexico .....	18
Civil War Cases .....	19
Other Conflicts .....	21
World War I .....	21
World War II .....	23
Other Rulings on Military Courts .....	25
Analysis of President’s Military Order .....	26
Wartime Basis .....	26
Jurisdiction .....	28
Offenses Triable by Military Commission .....	29
Authority to Detain .....	31
Jurisdiction of Other Courts .....	32
Review and Appeal .....	33
Rules Applicable to the Military Commission .....	34
Statutes .....	34
Procedural Rules .....	35
Due Process – Search for an International Standard .....	37
Appendix A .....	41
Military Order of November 13, 2001 .....	41
Appendix B .....	46
Proclamation No. 2561 .....	46
Military Order of July 2, 1942 .....	47
Military Order of January 11, 1945 .....	48

# Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions

## Introduction<sup>1</sup>

On November 13, 2001, President Bush signed a Military Order pertaining to the detention, treatment, and trial of certain non-citizens as part of the war against terrorism. The order makes clear that the President views the crisis that began on the morning of September 11 as an attack “on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.”<sup>2</sup> The order finds that the effective conduct of military operations and prevention of military attacks make it necessary to detain certain non-citizens and if necessary, to try them “for violations of the laws of war and other applicable laws by military tribunals.”<sup>3</sup>

The September 11 attacks clearly violated numerous laws<sup>4</sup> and may be prosecuted as criminal acts, as past terrorist acts have been prosecuted in the United States.<sup>5</sup> The unprecedented nature of the September attacks and the magnitude of damage and loss of life they caused have led a number of officials and commentators to assert that the acts are not just criminal acts, they are “acts of war.”<sup>6</sup> The President’s Order makes it apparent that he plans to treat the attacks as acts of war rather than criminal acts. The distinction may have more than rhetorical significance. Treating the attacks as violations of the international law of war could allow the

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<sup>1</sup> This report supersedes *Trying Terrorists as War Criminals*, RS21056 (Oct. 29, 2001), a summary treatment of the military tribunal issue prepared prior to the issuance of President Bush’s Order of November 13.

<sup>2</sup> Military Order, November 13, 2001, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, §1(a), 66 Fed. Reg. 57,833 (Nov. 16, 2001). See Appendix.

<sup>3</sup> *Id.* § 1(e).

<sup>4</sup> See *Terrorism at Home and Abroad: Applicable Federal and State Laws*, CRS Report 95-1050 (updated Sept. 24, 2001).

<sup>5</sup> Sheik Omar Abdel Rahman was convicted, along with several of his followers, for seditious conspiracy to levy war against the United States in connection with the 1993 World Trade Center bombing and other plans to commit urban terrorism. See *United States v. Rahman*, 189 F.3d 88 (2d Cir. 1999), *cert. denied* 528 U.S. 1094 (2000). The perpetrators of the embassy bombings in Africa were prosecuted for murder and other charges in federal court. See *United States v. Bin Laden*, 92 F.Supp.2d 189 (S.D.N.Y. 2000).

<sup>6</sup> See Philip Allen Lacovara, *Criminal or Military Justice for Captured Terrorists?*, 10 N.J. LAW. 7 (2001).

United States to prosecute those responsible as war criminals, trying them by special military commission rather than in federal court.

The purpose of this report is to identify some of the legal and practical implications of treating the terrorist acts as war crimes and of applying the law of war rather than criminal statutes to prosecute the alleged perpetrators. The report will first present an outline of the sources and principles of the law of war, including a discussion of whether and how it might apply to the current terrorist crisis. A brief explanation of the background issues and arguments surrounding the use of military commissions will follow. The report will then explore the legal bases and implications of applying the law of war under United States law and precedent for its application by military commissions. The report will conclude with an analysis of the President's Military Order of November 13, 2001.

## Background

Some observers have expressed concern that treating terrorist acts as acts of war may legitimize the acts as a lawful use of force and elevate the status of the perpetrators and terrorist networks to that of legitimate state actors and lawful combatants.<sup>7</sup> However, it may be argued that an application of the law of war to terrorism does not imply lawfulness of the conflict, nor does it imply that perpetrators are not criminals.<sup>8</sup> Terrorists are not members of armed forces for the purpose of the law of war<sup>9</sup> and do not, by definition, conduct themselves as lawful combatants.<sup>10</sup> Under this view, those who participate directly in unlawful acts of war, including those with command influence,<sup>11</sup> may be treated as war criminals and if captured, are not entitled to prisoner-of-war (POW) status under the Geneva Conventions.<sup>12</sup> As

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<sup>7</sup> See LT. COL. RICHARD J. ERICKSON, LEGITIMATE USE OF MILITARY FORCE AGAINST STATE-SPONSORED INTERNATIONAL TERRORISM 63-65 (1989).

<sup>8</sup> See *id.* (describing arguments against invoking law of war against terrorists); Michael P. Scharf, *Defining Terrorism as the Peace Time Equivalent of War Crimes: A Case of Too Much Convergence Between International Humanitarian Law and International Criminal Law?*, 7 ILSA J. INT'L & COMP. L. 391 (2001) (arguing that treating terrorists according to the law of war would enable them to target government facilities, invoke the defense of obedience to orders, and claim prisoner-of-war status.).

<sup>9</sup> See THE HANDBOOK OF HUMANITARIAN LAW IN ARMED CONFLICTS 70 (Dieter Fleck, ed. 1995)(hereinafter "HANDBOOK")(noting that for groups to qualify as "armed forces," they must have a responsible command and an internal disciplinary system to ensure members' compliance with the law of war).

<sup>10</sup> See Spencer J. Crona and Niel A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U.L. REV. 349 (1996).

<sup>11</sup> See DOCUMENTS ON THE LAWS OF WAR 19 (Adam Roberts and Richard Guelff, eds. 2000)(hereinafter "DOCUMENTS")(explaining that the laws of war are applicable and binding upon individuals who bear direct responsibility for the commission of a crime, including those who order, induce, or facilitate it).

<sup>12</sup> See ERICKSON, *supra* note 7, at 79-80.

suspected war criminals, they may be tried by any nation in its national courts or by a military commission convened by one nation or many.<sup>13</sup>

Under the terms of the President's Military Order of November 13, the President has the option to order the trial of accused terrorists, whether captured overseas or on U.S. territory, by military commission. It is argued by some that it would be unworkable, for instance, to try Osama bin Laden in federal court under established rules of procedure and evidence. A public trial, some argue, could be used to the terrorists' advantage by allowing them to force the government to release sensitive information. A trial of suspected terrorists could also become an "international media circus," raising possible concerns for the safety of judge and jurors.<sup>14</sup> Such a trial could be lengthy and subject to multiple appeals, during which a conviction could be overturned on a technicality. It might be impossible to empanel an impartial jury anywhere within the United States, some observers have argued.

Observers have expressed concern that invoking the law of war against terrorists in this instance could lead to the use of a similar approach to combat other societal ills upon which rhetorical "wars" might be declared.<sup>15</sup> This tactic, they argue, could allow the government to establish military tribunals to try drug dealers, for example, without ordinary due process of law. Other opponents of using military commissions argue that secret trials could deny due process and that the resulting verdicts would lack legitimacy in the eyes of the international community.

A review of legal precedents indicates that the authority of the Commander in Chief to try war criminals in occupied territory is well settled. Similarly, there is substantial precedent for establishing military tribunals to try enemy belligerents who are charged with violating the law of war, especially individuals captured overseas.<sup>16</sup> Determining who qualifies as an "enemy belligerent" for acts committed on U.S. territory, however, would likely present greater constitutional difficulties.<sup>17</sup> The

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<sup>13</sup> See Adam Roberts, *Implementation of the Laws of War in Late-Twentieth-Century Conflicts*, in *THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM* 359, 365 (Schmitt and Green, eds. 1998) (noting that while international tribunals for enforcing the law of war have received more attention, the overwhelming number of trials have occurred at the national level).

<sup>14</sup> See Louis Jacobson and Gia Fenoglio, *How Would They Be Tried?* 33 NAT'L J. 3350 (Oct. 27, 2001).

<sup>15</sup> See Daniel M. Filler, *Values We can Afford – Protecting Constitutional Rights in an Age of Terrorism: An Answer to Crona and Richardson*, 21 OKLA. CITY U.L. REV. 409, 419-20 (1999).

<sup>16</sup> Military jurisdiction in occupied areas is well established, even for ordinary crimes, as a power necessary for military government. See *In re Yamashita*, 327 U.S. 1 (1946). The commander also has the option of detaining offenders until they can be delivered to civil authorities for trial. See *Gallagher v. United States*, 423 F.2d 1371 (Ct. Cl. 1970).

<sup>17</sup> See *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (granting writ of *habeas corpus* to civilian convicted by military commission for criminal offenses and violations of the law of war where federal courts were available and defendant was not affiliated with enemy (continued...))

President's order appears to be broader than the authority cited by previous Presidents, and may cover aliens in the United States legally who are citizens of countries with which the nation is at peace. It may also be seen as conflicting with certain acts of Congress.

### **Ancillary Issues.**

The President's order raises some possible related considerations. For example, section 1(d) of the order finds that the United States' ability to protect itself and its citizens depends upon using the United States Armed Forces to "identify terrorists and those who support them, to disrupt their activities and to eliminate their ability to conduct or support such attacks." Does this finding authorize the military police to investigate certain crimes, possibly implicating the *Posse Comitatus Act*, which restricts use of the military to enforce civilian law?<sup>18</sup> When civilian police are involved in terrorism investigations, must they follow the same standards that they apply to criminal cases? The use of military tribunals may also affect the United States' ability to extradite terrorist suspects captured abroad.

The order may also affect the rights and treatment of aliens. Because the current state of hostilities does not involve an enemy foreign state as such, the status of an alien as an "enemy alien" cannot be determined according to citizenship.<sup>19</sup> The question may arise as to whether aliens subject to the order may be treated as enemy aliens, in which case the law of war may permit their internment but would also entitle them to the protections of the 1949 Geneva Convention IV.<sup>20</sup> Under U.S. law, their detention may be authorizable only in accordance with the Enemy Alien Act.<sup>21</sup>

Such an approach could also have an impact on available remedies for victims. Will there be any effect on the possible civil liability of terrorists to compensate victims?<sup>22</sup> Would it matter if a particular victim was a government employee or

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<sup>17</sup>(...continued)  
armed forces).

<sup>18</sup> 18 U.S.C. § 1853. *See* The Posse Comitatus Act & Related Matters: The Use of the Military to Execute Civilian Law, CRS Report 95-964 S (updated June 1, 2000).

<sup>19</sup> *See* 50 U.S.C. § 21 (defining "enemy" as all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized").

<sup>20</sup> *See* HANDBOOK, *supra* note 9, at 41 (citing Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287)(GC IV). Enemy aliens in the territory of a party to the conflict who are charged with offenses must be treated in accordance with GC IV art. 76, which provides for conditions of detention at least equal to those of normal imprisonment, sanitary conditions and proper medical attention, and detainees have the right to maintain contact with the outside world. *See* HANDBOOK, *supra* note 9, at 278 and 284.

<sup>21</sup> 50 U.S.C. § 21.

<sup>22</sup> Civil actions brought under 18 U.S.C. §2333 (terrorism remedies) may not be maintained for acts of war. 18 U.S.C. §2335. Defendants convicted under criminal proceedings are  
(continued...)



someone located at a “military target” at the time of an attack? Will there be an effect on the liability of insurers?<sup>23</sup> A decision to adopt a law of war approach to the terrorist acts currently at issue, or to future acts of international terror, could also have significant foreign policy repercussions.

## Sources and Principles of the Law of War

As a subset of the law of nations, the law of war is a composite of many sources and is subject to varying interpretations constantly adjusting to address new technology and the changing nature of war.<sup>24</sup> It may also be referred to as *jus in bello*, or law in war, which refers to the conduct of combatants in armed conflict, as distinguished from *jus ad bellum* – law before war – which outlines acceptable reasons for nations to engage in armed conflict.<sup>25</sup> The rules overlap somewhat but remain conceptually separate due to the cardinal principle that *jus in bello* applies to both parties in a conflict, without regard to the lawfulness of the inception of the conflict.<sup>26</sup> In other words, the party “at fault” retains the rights and responsibilities of the law of war, even if the armed conflict itself is unjustifiable under international law.

The law of war is also sometimes known as the “law of armed conflict” or “international humanitarian law” (IHL).<sup>27</sup> The use of the terminology “armed conflict” reflects the applicability of the law to undeclared wars, in recognition of the reality that formal declarations of war may be largely a thing of the past. The term IHL is favored by some to emphasize the humanitarian purpose of the law, that is, to protect civilians to the extent possible in the event *jus ad bellum* fails to prevent an armed conflict.

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<sup>22</sup>(...continued)

estopped from denying responsibility in any subsequent civil suit. 18 U.S.C. §2333(b). Under current law, it is unclear whether a conviction by military commission could be invoked in this way.

<sup>23</sup> See Insurance Exclusion Clauses and Coverage of the Events of September 11, CRS Report RL31166 (Oct. 20, 2001).

<sup>24</sup> See DOCUMENTS, *supra* note 11, at 2; Georgios Petrochilos, *The Relevance of the Concepts of War and Armed Conflict to the Law of Neutrality*, 31 VAND. J. TRANSNAT’L L. 575, 577-78 (1998)(commenting on changes to law of war).

<sup>25</sup> See DOCUMENTS, *supra* note 11, at 1-2.

<sup>26</sup> See *id.* at 1; CIVILIANS IN WAR (Simon Chesterman ed., 2001) 15-16 (explaining that theories of “just war” were to be kept out of *jus in bello* in part to make it easier to maintain legal parity between parties, holding both sides to same rules of conduct).

<sup>27</sup> The reference to humanitarian responsibilities represents a change in focus from the rights and duties of combatants to an emphasis on belligerents’ responsibility to protect civilians. See G.I.A.D. Draper, *Humanitarianism in the Modern Law of Armed Conflicts*, in ARMED CONFLICT AND THE NEW LAW (Michael A. Meyer, ed. 1989).

## Sources.

Sources of the law of war include customary principles and rules of international law, international agreements, judicial decisions by both national and international tribunals, national manuals of military law, scholarly treatises, and resolutions of various international bodies.<sup>28</sup> Customary principles of international law apply universally.<sup>29</sup> Treaties bind only those parties to them, unless they are seen to codify *jus cogens* principles, that is, have attained the common acceptance of nations. The other sources are generally treated not as binding sources of law, but rather as evidence that rules and principles have attained the common acceptance of nations to qualify as *jus cogens* norms.

The first attempt to codify the law of war is generally accepted to be the first Geneva Convention of 1864.<sup>30</sup> The process continued with the Hague Conventions of 1899 and 1907 (also known as the “Law of The Hague”)<sup>31</sup> and when the Geneva Convention was revised and expanded into the four Geneva Conventions of 1949.<sup>32</sup> The process has continued through the adoption of the additional protocols in 1977, and augmented with related treaties such as the Genocide Convention.

The United States Army Field Manual (FM) 27-10, The Law of Land Warfare, codifies the Army’s interpretation of the law of war, incorporating reference to relevant conventions and rules of the customary law of war, as well as relevant statutes.<sup>33</sup>

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<sup>28</sup> See DOCUMENTS, *supra* note 11, at 4 (enumerating sources of international law of war).

<sup>29</sup> See *id.* at 7-8.

<sup>30</sup> See Bartram S. Brown, *Nationality and Internationality in International Humanitarian Law*, 34 STAN. J INT’L L. 347, 352 (1998) (citing Convention for the Amelioration of the Condition of the Wounded Armies in the Field, signed at Geneva, Aug. 22, 1864, 129 CONSOL. T.S. 361.).

<sup>31</sup> Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 (hereinafter “Hague Regulation” or “HR”).

<sup>32</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, August 12, 1949, 6 U.S.T. 3115; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of the Armed Forces at Sea, August 12, 1949, 6 U.S.T. 3219; The Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949, Int’l Comm. of the Red Cross, art. 118, 6 U.S.T. 3317 (hereinafter GC III); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, August 12, 1949, Int’l Comm. of the Red Cross, art. 6, 6 U.S.T. 3516 (hereinafter GC IV).

<sup>33</sup> See Department of the Army, FM 27-10, The Law of Land Warfare, chapter 1, § 1 (1956) (listing treaties pertinent to land warfare to which the United States is a party).

## Principles.

The main thrust of the law of war requires that a military objective be pursued in such a way as to avoid needless and disproportionate suffering and damages.<sup>34</sup> At the risk of oversimplifying the concept, three principles derived from the law of war may be applied to assess the legality of any use of force for political objectives.<sup>35</sup>

### Military Necessity.

The use of force must be proportional in relation to the anticipated military advantage or as a measure of self-defense. The principle applies to the choice of targets, weapons and methods. This principle, however, does not apply to unlawful acts of war.<sup>36</sup> There can be no excuse of necessity if the use of arms is not itself justified. In other words, military necessity can never be invoked to justify a breach of *jus ad bellum*, and it may not be invoked to justify a use of arms if there is no valid military advantage to be gained. However, responsibility for “collateral damage” to otherwise unlawful targets may sometimes be excused by military necessity.

### Humanity.

Lawful combatants are bound to use force discriminately. In other words, they must limit their targets to valid military objectives and must use means no harsher than necessary to achieve that objective. They may not use methods designed to inflict needless suffering, and they may not target civilians. It is also unlawful to target facilities such as nuclear power plants, whose destruction would unleash even more destructive forces likely to cause unjustifiable civilian casualties and lasting environmental damage.<sup>37</sup> However, there is an exception if the facilities are used to support “regular significant and direct military operations,”<sup>38</sup> especially if the facilities can be put out of production in such a way as to avoid unleashing disproportionately destructive forces.<sup>39</sup>

### Chivalry.

Combatants must adhere to the law of armed conflict in order to be treated as lawful combatants. They must respect the rights of prisoners of war and captured civilians, and avoid behavior such as looting and pillaging. They may not conceal their arms and disguise themselves as non-combatants during battle or preparation for an attack. While a “ruse” may be permissible to maintain operational secrecy or

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<sup>34</sup> See DOCUMENTS, *supra* note 11, at 9.

<sup>35</sup> See *id.* (summarizing principles found in military manuals of various nations).

<sup>36</sup> See *id.* at 10.

<sup>37</sup> Protocol I art. 56(1). See HILAIRE MCCOUBREY, 2 INTERNATIONAL HUMANITARIAN LAW 304 (1998).

<sup>38</sup> Protocol I art. 56(2).

<sup>39</sup> See McCoubrey, *supra* note 37, at 304.

obtain information about the enemy,<sup>40</sup> “perfidy”—lulling the adversary into believing there is a situation under which the law of war provides protection—is not allowed.<sup>41</sup> An example of perfidious conduct is the waving of a white flag to indicate surrender in order to ambush combatants. It is also forbidden to “kill or wound treacherously” enemy individuals.<sup>42</sup>

### **Responsibility.**

The law of war had its origins when states were considered the only subjects of international law. Its original purpose was to define the rights and duties of states in wartime to facilitate the determination of the legal responsibility of states for their breaches.<sup>43</sup> One of the more recent developments of the law of war is the notion of individual responsibility for conduct in war.<sup>44</sup> Each soldier is bound to obey the law of war even if it means disobeying the direct order of a superior.<sup>45</sup> Soldiers who obey unlawful orders are responsible for the violation along with whoever ordered it.<sup>46</sup> Conversely, responsibility for war crimes may not be imposed upon groups of individuals based on an unlawful act committed by a member of the group.<sup>47</sup> The notion of individual responsibility and justice through individual trials necessarily excludes the notion of collective guilt.<sup>48</sup>

### **Protection of Civilians and Prisoners of War.**

Since the 1949 Geneva Conventions, the focus of the law of war has turned from rules of engagement to the protection of individuals. An individual’s status as combatant or civilian is important for determining the forms of protection due under

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<sup>40</sup> See FM 27-10 § 51.

<sup>41</sup> See *id.* § 50.

<sup>42</sup> See *id.* § 31 (explaining that the rule prohibits assassination or outlawry of an enemy, but does not prohibit attack against an individual soldier or officer of the enemy by lawful means).

<sup>43</sup> See Brown, *supra* note 30, at 352-53.

<sup>44</sup> See *id.* at 353 (noting that war crimes are ultimately committed by people, making individual criminal responsibility important to deter individuals from committing war crimes).

<sup>45</sup> See BG Malham M. Wakin, *Applying Nuremberg Principles to Limited War*, 6 USAFA J. LEG. STUD. 169, 170 (1995 / 1996).

<sup>46</sup> See *id.* (explaining that the plea of following superior orders is not an adequate defense to war crimes when the orders are clearly unlawful).

<sup>47</sup> GC IV art. 33 provides:

No protected person may be punished for an offense he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.

<sup>48</sup> See Daniel J. Steinbock, *Interpreting the Refugee Definition*, 45 UCLA L. REV. 733 (1998) (interpreting various conventions to accord everyone “the right of life, liberty, and security of person, the right to recognition before the law, and the right to be free of arbitrary arrest, detention, or execution”).

international law. Combatants are allowed to wage war but may also be attacked by the enemy. Civilians may not wage war, but unless and for so long as they directly participate in hostilities, may not lawfully be attacked.<sup>49</sup>

### **POW.**

Members of the armed forces who fall into enemy hands during an armed conflict are protected by GC III and are treated as POWs. They may be interned under humane treatment as provided by the Convention, but they may not be punished unless convicted of a crime. If a POW is to be punished for a crime, he must first be convicted and sentenced by a court “according to the same procedure as in the case of members of the armed forces of the detaining Power.”<sup>50</sup> A POW may be confined awaiting trial for no longer than three months,<sup>51</sup> and no trial can begin until three weeks after the detaining Power has notified the prisoner’s representative and the protecting Power of the charges on which the prisoner is to be tried, where the prisoner is held, and where the trial will take place.<sup>52</sup>

### **Civilians.**

Civilians who are citizens of a party to an armed conflict and fall into enemy hands either by residing as aliens in the territory of an opposing party or through capture by invading or occupying forces, are entitled to treatment in accordance with GC IV. They, too, may be interned if necessary but may not be punished unless convicted of a crime by a regular tribunal practicing the generally recognized principles of regular judicial procedure.<sup>53</sup>

Civilians who take direct part in the hostilities and fall into the hands of the adversary are treated as POWs until a competent tribunal determines that they engaged in unlawful combat.<sup>54</sup> A captive may not be prosecuted for unlawful participation in hostilities unless such a determination has been made.<sup>55</sup> Therefore, even in the case of unlawful belligerents, it would seem the law of war no longer

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<sup>49</sup> See L. Doswald-Beck, *The Value of the 1977 Geneva Protocols for the Protection of Civilians*, in *ARMED CONFLICT AND THE NEW LAW* 137, 163 (Michael A. Meyer ed. 1989).

<sup>50</sup> See GC III art. 102; FM 27-10 § 178 (b) provides the following interpretation under the UCMJ:

Prisoners of war, including those accused of war crimes against whom judicial proceedings are instituted, are subject to the jurisdiction of United States courts-martial and military commissions. They are entitled to the same procedural safeguards accorded to military personnel of the United States who are tried by courts-martial under the Uniform Code of Military Justice or by other military tribunals under the laws of war.

<sup>51</sup> See GC III art. 103.

<sup>52</sup> See *id.* art. 104.

<sup>53</sup> See *id.* art. 84.

<sup>54</sup> See *id.* art. 5.

<sup>55</sup> See *id.*; HANDBOOK, *supra* note 9, at 92.

permits trial by military tribunal without ordinary due process merely on the accusation that a person has engaged in unlawful combat.

### ***Spies and Saboteurs.***

Spies and saboteurs do not receive the same protection. A spy is one who, in disguise or under false pretenses, penetrates into the zone of operations of a belligerent to obtain information with the intent of communicating that information to the hostile party.<sup>56</sup> If captured, a spy may be tried and executed.<sup>57</sup> However, if a spy rejoins the army of the hostile party as a lawful combatant, he is no longer a spy and is not subject to punishment for those acts if he later falls into the hands of the enemy.<sup>58</sup> Sending spies behind enemy lines is legal under the law of war.<sup>59</sup> Spies are not punished for criminal culpability so much as they are “deactivated” as a security measure. However, spies are entitled to a trial in accordance with the detaining power’s applicable laws before they can be punished.<sup>60</sup>

Saboteurs, or enemy agents who penetrate into the territory of an adversary without openly bearing arms in order to perpetrate hostile acts are subject to similar treatment.<sup>61</sup> However, such person is still a “protected person” for the purposes of the Geneva Conventions,<sup>62</sup> and is entitled to a fair and regular trial as prescribed.<sup>63</sup> It is unclear whether a saboteur retains the status of unlawful belligerent after rejoining the lawful forces or whether he becomes a lawful combatant, immune from punishment for the hostile acts. If sabotage is treated in a similar manner as spying during war, it may not be possible to characterize all “war criminals” as “unlawful belligerents” who are not entitled to treatment as POWs.

## **The Law of War Applied**

The purpose of this section is to discuss the issues relative to whether the attacks of September 11 may be considered “acts of war” under international law, and if so, how those responsible might be treated under the law of war. The law of war may be applied only to acts that are part of an “armed conflict.” A terrorist act is not seen to be an act of war unless it is part of a broader campaign of violence directed against the state. Where terrorist acts amount to no more than “situations of internal disturbances and tensions such as riots and isolated and sporadic acts of violence,”

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<sup>56</sup> See Hague Regulation art. 29. The U.S. codification of this rule is article 106 of the UCMJ, codified at 10 U.S.C. § 904. See FM 27-10 §§ 75-78.

<sup>57</sup> See *id.* art. 30.

<sup>58</sup> See *id.* art. 31.

<sup>59</sup> See FM 27-10 § 77.

<sup>60</sup> See HANDBOOK, *supra* note 9, at 99 (citing HR art. 30).

<sup>61</sup> See FM 27-10 § 81 (citing GC III art. 4).

<sup>62</sup> See *id.* at § 73.

<sup>63</sup> See GC IV art. 5; FM 27-10 § 248.

the Hague and Geneva Conventions do not apply.<sup>64</sup> Instead, peacetime domestic criminal laws and international conventions aimed at the repression of terrorism would come into play, obligating states parties to the agreements to try or extradite those believed responsible.<sup>65</sup>

### Is There an “Armed Conflict”?

Because the terrorist organization allegedly behind the September attacks is not a state under international law and its members are not uniformed soldiers of any recognized army, there are conceptual difficulties in fitting their activities into the rubric of the international law of war.<sup>66</sup> There are two recognized types of armed conflicts – international and internal. An international armed conflict involves two or more states,<sup>67</sup> whereas an internal conflict involves a legitimate state engaged in conflict with an armed group that has attained international personality.<sup>68</sup>

The nature of “internal conflicts” remains a matter of some controversy. While Additional Protocol I to the 1949 Geneva Conventions on the Protection of War Victims (“Protocol I”)<sup>69</sup> sought to extend coverage to non-international conflicts “in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination,” it is not clear whether groups fighting for other causes were meant to be covered.<sup>70</sup> At any rate, the United States did not ratify Protocol I, arguing that to recognize as combatants irregular groups – terrorists – would allow them to “enjoy many of the benefits of the law of war without fulfilling its duties, and with the confidence that

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<sup>64</sup> See Scharf, *supra* note 8, at 392 (citing quotation of Protocol II art. 1(2)).

<sup>65</sup> *See id.*

<sup>66</sup> See Ruth Wedgwood, *Responding to Terrorism: The Strikes Against bin Laden*, 24 YALE J. INT’L L. 559 (1999) (suggesting “new paradigm” may be necessary to incorporate terrorism into the legal structure of warfare).

<sup>67</sup> They need not recognize each other. See DOCUMENTS, *supra* note 11, at 45 (citing Geneva Conventions).

<sup>68</sup> See, Gregory M. Travalio, *Terrorism, International Law, and the Use of Military Force*, 18 WIS. INT’L L.J. 145, 183 (2000) (explaining that a group like the Palestinian Liberation Organization (PLO) is probably sufficiently organized and in sufficient control over territory and population to be a “quasi-state,” for the purposes of applying the Geneva Conventions).

<sup>69</sup> Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

<sup>70</sup> HANDBOOK, *supra* note 9, at 42.

the belligerent state has no real remedy under the Protocol to deal with this matter.”<sup>71</sup>

The use of force by private persons rather than organs of a state has not traditionally constituted “armed conflict.”<sup>72</sup> It has been suggested that the possible involvement of the governments of foreign states may make international terrorism an armed conflict for the purposes of the law of war.<sup>73</sup> Some have maintained that state support of terrorism is a violation of international law.<sup>74</sup> On the other hand, some jurists argue that states supporting the acts of third parties are not necessarily responsible for those acts merely by providing financial, political, or intelligence support.<sup>75</sup> Only direct military support would qualify as an act of war under this view.<sup>76</sup>

Viewing the situation pragmatically, it may not matter whether the initial attacks were perpetrated by state actors or a criminal enterprise. The existence of an armed conflict is effectively determined by the behavior of sovereign states.<sup>77</sup> One international legal writer has concluded that a “state of generalized hostilities” accurately characterizes state practice regarding application of the law of war, raising the issue of the status of non-parties to the conflict as neutrals.<sup>78</sup> Under this view, a factual determination of whether the fighting is persistent enough or of a sufficient

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<sup>71</sup> See Abraham Sofaer, *The U.S. Decision not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims*, 82 A.J.I.L. 784, 786 (1988). See George Aldrich, *Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions*, 85 A.J.I.L. 1, 6-7 (1991) (arguing that U.S. position mistakenly presumed that the Protocol would allow terrorists to enjoy POW status); Hans-Peter Gasser, *Some Legal Issues Concerning Ratification of the 1977 Geneva Protocols*, in ARMED CONFLICT AND THE NEW LAW 81, 96 (1989)(arguing that recognizing members of non-state armed forces would not advance the cause of terrorism).

<sup>72</sup> HANDBOOK, *supra* note 9, at 42.

<sup>73</sup> See ERICKSON, *supra* note 7, at 66-67 (arguing that state sponsored or state supported terrorist organizations may have status under international law, while terrorist organizations not recognized as international entities might best be dealt with as criminal matters).

<sup>74</sup> See Travalio, *supra* note 68, at 148 (citing General Assembly Resolutions 2131 that states have a “duty to refrain from organizing, instigating, assisting, or participating in acts of civil strife or terrorist acts in another state or acquiescing in organized activities within its territory...”).

<sup>75</sup> See HANDBOOK, *supra* note 9, at 50.

<sup>76</sup> See *id.*; *cf* Travalio, *supra* note 68, at 152 (citing *Nicaragua v. United States*, in which the International Court of Justice held the activities of the Nicaraguan “contras” could be attributed to the United States government only if it could be proved that the United States exercised effective control over the contras “in all fields.” 1986 ICJ Rep. 14 (1986)).

<sup>77</sup> See HANDBOOK, *supra* note 9, at 41 (noting that states have treated the Geneva Conventions as applicable even where neither party to the conflict has acknowledged the existence of a state of war).

<sup>78</sup> See Petrochilos, *supra* note 24, at 605 (arguing that case-by-case analysis may be necessary to determine whether “armed conflict” exists).



magnitude to rise to the level of “armed conflict” in the view of the international community would suffice to settle the issue.<sup>79</sup>

The present conflict does not fit squarely within the definitions of internal or international armed conflicts. The attacks on New York, Pennsylvania, and the Pentagon do not appear to have been part of an effort to take control of territory or install a new government, nor is it certain that they were carried out under the direction of another state. However, the sophisticated planning and execution believed necessary to have accomplished the attacks suggest that they were carried out by organized members of a quasi-military force.<sup>80</sup> The political and ideological purpose ostensibly motivating the terrorist attacks arguably distinguishes them from “ordinary” criminal acts of violence. The magnitude of harm combined with the threat of more attacks appear to be considered sufficient to give rise to a right of self-defense, not only in the viewpoint of the United States, but by many other states and the United Nations.<sup>81</sup> If the attacks are viewed as the opening volley to the United States’ military response in Afghanistan, and the reactions of other nations are taken into account, an armed conflict in the “factual sense” could be said to exist.

### **Are the September Attacks “Acts of War”?**

The term “act of war” may be defined as “a measure of force which one party, using military instruments of power, implements against another party in an international armed conflict.”<sup>82</sup> Another definition is a “use of force or other action by one state against another” which “[t]he state acted against recognizes ... as an act of war, either by use of retaliatory force or a declaration of war.”<sup>83</sup> The September attacks were not “acts of war” in the traditional sense, because the perpetrators were not overtly acting on behalf of a state and because they did not employ conventional military weapons.<sup>84</sup> However, the United States’ reaction to the attacks is likely to

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<sup>79</sup> *See id.*

<sup>80</sup> *See, e.g.,* Katherine M. Skiba, *Quick Action Against Bin Laden Called Difficult*, MILWAUKEE JOURNAL SENTINEL, Sept. 26, 2001, at 6A (quoting former CIA Director Stansfield Turner); Holger Jensen, *Attacks Beyond Bin Laden’s Power?*, ROCKY MOUNTAIN NEWS (Denver), Sept. 18, 2001, at 4A (quoting Armed Forces Intelligence, a British think tank that the sophistication and planning of this operation “simply could not have been directed from a cave in Afghanistan”); Richard Sisk, *The Prime Suspect Is Bin Laden*, DAILY NEWS (New York) Sept. 12, 2001, at 18 (“Intelligence officials and terrorism experts were stunned at the sophistication and coordination involved in the series of airline hijackings and suicide crashes in downtown Manhattan and the Pentagon.”).

<sup>81</sup> *See* S.C. Res. 1373, U.N. SCOR, U.N. Doc. S/Res1373 (2001) (reaffirming the right of countries to self-defense contained in Article 51 of the U.N. Charter).

<sup>82</sup> *See* HANDBOOK, *supra* note 9, at 49.

<sup>83</sup> *See* JAMES R. FOX, DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW 6 (1992) (cited in *U.S. v. Shell Oil Co.*, 841 F.Supp. 962, 972 (C.D.Cal.1993)).

<sup>84</sup> *See, e.g.* *Pan Am. World Airways, Inc. v. Aetna Cas. & Sur. Co.*, 505 F.2d 989 (2d Cir. 1974)(finding that the hijacking of an airliner by non-state actor was not an act of war for the purpose of invoking exclusionary clause in insurance policy).

be of greater significance than the technicalities for the purposes of applying the law of war.<sup>85</sup>

Assuming the existence of an armed conflict, it is beyond question that the September attacks were part of it. Preparation for the attacks would also be covered, notwithstanding the fact that the hostilities had not yet technically begun.<sup>86</sup> Recent cases of mail containing anthrax spores delivered to government representatives as well as civilians may also be “acts of war” if they were carried out as part of the same terrorist campaign.

To label the attacks as “acts of war” does not imply that they are lawful.<sup>87</sup> Although the principles of the law of war leave a great deal of room for interpretation, there can be little doubt, assuming such acts can be viewed as acts of war, that the attacks of September 11 were not conducted in accordance with the law of war. Even if one considers the Pentagon to be a valid military target, the hijacking of a commercial airliner is not a lawful means for attacking it.<sup>88</sup> Acts of bioterrorism, too, violate the law of war, regardless of the nature of the target.<sup>89</sup>

### Are Terrorists “Belligerents”?

Assuming that the attacks may be considered acts of war, and that there is indeed an ongoing armed conflict, the Hague and Geneva Conventions come into play to determine the rights and responsibilities of participants, or “belligerents.” Members of armed forces of a party to the conflict are classified as *combatants* unless they belong to a small class of members excluded from participation in combat, such as medical and religious personnel, who are designated as *non-combatants*.<sup>90</sup> Other officials may under some circumstances attain combatant status if so designated by their state.<sup>91</sup> All others are considered *civilians*, who are not ordinarily authorized to

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<sup>85</sup> The exact definition is probably more relevant in cases dealing with claims for liability. *See supra* notes 22-23.

<sup>86</sup> *See* Maj. Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals who Commit International Crimes*, 153 MIL. L. REV. 1, 20 (1996) (citing *Johnson v. Eisentrager*, 339 U.S. 763, 786 (1950)).

<sup>87</sup> *See* HANDBOOK, *supra* note 9, at 50 (noting that the term does not have the “same precision or legal significance which it possessed in the days when states more commonly declared themselves to be in a formal state of war”).

<sup>88</sup> Hijacking of civilian aircraft is by itself a criminal act under international law. Hague Convention for the Suppression of Unlawful Seizure of Aircraft, December 16, 1950, 22 UST 1641.

<sup>89</sup> *See* Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, 94 L.N.T.S. 65; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, 1015 U.N.T.S. 163.

<sup>90</sup> *See* HANDBOOK, *supra* note 9, at 65.

<sup>91</sup> *See id.* at 66.

take part in hostilities.<sup>92</sup> If captured, combatants are entitled to POW status and may not be criminally punished for acts of violence carried out lawfully in their role as combatants. Civilians who fall into enemy hands, however, may be punished as criminals for participating in military hostilities, even if that conduct would have been legal for a combatant.<sup>93</sup>

A member of an irregular or voluntary military is covered only if he is commanded by a person responsible for subordinates, he wears a fixed distinctive emblem recognizable at a distance, he carries arms openly, and he conducts operations in accordance with the laws and customs of war.<sup>94</sup> Because terrorists do not follow these rules, they are not covered under the Geneva Convention as POWs.<sup>95</sup> It should be noted that Protocol I art. 96 requires non-state belligerents, in order for their members to be entitled to protected treatment under the Protocol, to file a declaration with the Swiss Government accepting the obligations of the Protocol.

If al Qaida can be viewed as an irregular army, then, no member of al Qaida would be entitled to POW treatment. On the other hand, if al Qaida is a political organization, only members who engage in warlike activities are unlawful combatants. Other members, as well as civilians who give them aid that doesn't amount to direct participation in hostilities, do not lose their status as civilians. Members of al Qaida captured in Afghanistan may be entitled to POW or civilian status, depending upon the circumstances of their capture. If they are members of the armed forces, they must be treated as POWs, even if they are accused of previously violating the law of war or carrying out a terrorist act.<sup>96</sup> GC III requires that a POW who is not accused individually of committing a crime be detained in accordance with appropriate guarantees of rights and humane treatment. POWs accused of a crime may be tried and imprisoned in the same manner that a member of the armed forces of the detaining power would be treated.<sup>97</sup>

A civilian member of al Qaida captured in Afghanistan without having participated in the hostilities may be detained only in accordance with GC IV. If that individual is suspected of having committed a crime, he or she is entitled to a regular trial.<sup>98</sup> A civilian who has engaged in hostile or belligerent conduct is still a protected person, although one not entitled to POW treatment.<sup>99</sup> A civilian captured within the United States who is "definitely suspected" of activities hostile to the

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<sup>92</sup> There is disagreement as to whether civilians may participate only in the case of a *levée en masse*, or spontaneous uprising of a population to defend itself against occupying forces, or whether civilians have an absolute duty to abstain from hostilities. See CIVILIANS IN WAR *supra* note 26, at 16-17.

<sup>93</sup> See HANDBOOK, *supra* note 9, at 68.

<sup>94</sup> See Travalio, *supra* note 68, at 185.

<sup>95</sup> See *id.*

<sup>96</sup> See GC III art. 85.

<sup>97</sup> *Id.* Art. III

<sup>98</sup> GC IV art. 71.

<sup>99</sup> See FM 27-10 § 247(b) (interpreting GC IV art. 4).

national security, such as sabotage and espionage, is not entitled to claim such rights and privileges under GC IV that would be “prejudicial to the security of the state.”<sup>100</sup> However, such persons must nevertheless be treated with humanity and if subject to trial, “shall be granted the full rights and privileges of a protected person” under GC IV.<sup>101</sup>

## Legal Bases for Establishing Military Commission

United States law incorporates the international law of war.<sup>102</sup> The United States adheres to the law of war through incorporation of the customary rules and treaty provisions into regulations of the armed forces. The Law of Land Warfare, FM 27-10 may be viewed as an embodiment of the United States Army’s interpretation of the law of war on land. Although the manual is not considered binding upon courts and tribunals interpreting the law of war, those provisions of the manual that are neither statutes nor the text of treaties to which the United States is a party may be considered as evidence of the custom and practice of the law of war.<sup>103</sup>

Military jurisdiction is recognized from two sources: “that branch of a country’s municipal law which recognizes its military establishment” and “that which is derived from international law, including the law of war.”<sup>104</sup> The U.S. military exercises its jurisdiction through the use of courts-martial, military commissions, provost courts, and other military tribunals.<sup>105</sup>

A military commission consists of a panel of military officers convened by military authority to try enemy belligerents on charges of a violation of the law of war.<sup>106</sup> It is distinct from a military court martial, which is a panel set up to try U.S. servicemembers (and sometimes civilians accompanying the armed forces) for violations of the Uniform Code of Military Justice. U.S. servicemembers charged with a war crime may be tried before court martial or in federal court.<sup>107</sup>

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<sup>100</sup> See FM 27-10 § 248 (citing GC IV art. 5).

<sup>101</sup> See *id.*

<sup>102</sup> *The Paquete Habana*, 175 U.S. 677, 700 (1900).

<sup>103</sup> See FM 27-10, *supra* note 33, at § 1.

<sup>104</sup> See *id.* § 13.

<sup>105</sup> See *id.*

<sup>106</sup> See *Crona and Richards*, *supra* note 10, at 368.

<sup>107</sup> The War Crimes Act of 1996, codified at 18 U.S.C. §2441, subjects persons suspected of perpetrating a violation of the Geneva Conventions and other international conventions to criminal punishment if the perpetrator or victim is either a U.S. servicemember or a U.S. national. Article 18 of the UCMJ, 10 U.S.C. § 818, provides general court martial jurisdiction over “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.” Arguably, this language may be used to subject any alleged violator of the law of war – regardless of citizenship or military status – to court martial, but Congress, in enacting the War Crimes Act of 1996, presumed article 18 could only be applied to military personnel. See Maj. Jan E.

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President Bush's order authorizing the use of military commissions for the trial of terrorists cites the President's authority under the Constitution as well as the laws of the United States, including the congressional authorization to use military force in response to the September 11 attacks,<sup>108</sup> as well as 10 U.S.C. §§ 821 and 836. There is no express language in the Constitution and very little mention in the legislative authorities cited that clearly authorizes military tribunals; however, there is historical precedent that may form a basis for an interpretation of the authorities to support the order.

### The Constitution.

The Constitution empowers the Congress to declare war and “make rules concerning captures on land and water,”<sup>109</sup> to define and punish violations of the “Law of Nations,”<sup>110</sup> and to make regulations to govern the armed forces.<sup>111</sup> The Constitution further empowers the Congress to make all laws “necessary and proper” for the execution of all powers under the Constitution.<sup>112</sup> The Congress also has the power to regulate the jurisdiction of the courts<sup>113</sup> and to establish such inferior tribunal as it deems necessary.<sup>114</sup>

Generally, the power of the President to convene military commissions flows from his authority as Commander in Chief of the Armed Forces and his responsibility to execute the laws of the nation.<sup>115</sup> Under the Articles of War and subsequent statute,<sup>116</sup> the President has at least implicit authority to convene military commissions to try offenses against the law of war.<sup>117</sup> Articles 18 and 21 of the UCMJ recognize the concurrent jurisdiction of military commissions to deal with

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<sup>107</sup>(...continued)

Aldykiewicz, *Authority to Court Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts*, 167 MIL. L. REV. 74, 145-48 (2001).

<sup>108</sup> Pub. Law 107-40, 115 Stat. 224.

<sup>109</sup> U.S. CONST. art. I, § 8, cl. 11.

<sup>110</sup> *Id.* art. I, § 8, cl. 10.

<sup>111</sup> *Id.* art. I, § 8, cl. 14.

<sup>112</sup> *Id.* art. I § 8 cl. 18.

<sup>113</sup> *Id.*; *id.* art. III § 2.

<sup>114</sup> *Id.* art. I § 9.

<sup>115</sup> U.S. CONST. art. II.

<sup>116</sup> The Articles of War were codified at 10 U.S.C. § 801 *et seq.* as part of the Uniform Code of Military Justice (UCMJ). Although the cases cited in this report interpret the Articles of War, the relevant sections of the UCMJ would likely be interpreted to be essentially identical. See Robinson O. Everett & Scott L. Silliman, *Forums for Punishing Offenses Against the Law of Nations*, 29 WAKE FOREST L. REV. 509, 515 (1994).

<sup>117</sup> *Ex Parte Quirin*, 317 U.S. 1 (1942).

“offenders or offenses designated by statute or the law of war.”<sup>118</sup> Statutory offenses for which a military commission may be convened include only aiding the enemy, 10 U.S.C. § 904, and spying, 10 U.S.C. § 906. Caselaw suggests that military commissions could try as enemy belligerents those accused of committing war crimes even if they hold U.S. citizenship.<sup>119</sup> Recognized hostilities with foreign enemies may qualify to invoke the law of war even where no declared state of war exists.<sup>120</sup>

Congress has thus recognized the authority to convene military commissions,<sup>121</sup> and has delegated to the President the authority to set their rules of procedure, both trial and post-trial.<sup>122</sup> Congress has not, however, provided a definition of the offenses under the law of war over which a military commission might exercise its jurisdiction, nor has it explicitly identified many statutory offenses for which the accused might be tried by military commission.

### **Precedent .**

Most of the United States’ experience with military commissions relates to occupied territory or conditions of martial law. Although the current crisis does not fit the typical circumstances associated with war crimes committed by otherwise lawful combatants in obvious theaters of war, there is some precedent for convening military commissions to try enemy belligerents for conspiring to commit violations of the law of war outside of any recognized war zone.

### **War with Mexico.**

The use of military commissions by the United States dates back at least until the war with Mexico in the 1840’s. During the occupation of Mexico in 1847, General Winfield Scott convened “councils of war” to try Mexican citizens accused of violations of the law of war, such as committing guerrilla warfare or enticing American soldiers to desert.<sup>123</sup> Despite the lack of statutory authority, General Scott

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<sup>118</sup> 10 U.S.C. § 821.

<sup>119</sup> *See id*; Johnson v. Eisentrager, 339 U.S. 763, 786 (1950); *cf* Madsen v. Kinsella, 343 U.S. 341 (1952) (upholding jurisdiction of military commission to try civilians in occupied foreign territory).

<sup>120</sup> Johnson v. Eisentrager, 339 U.S. at 786 (citing Duncan v. Kahanamoku, 327 U.S. 304 (1945)). *See* Crona and Richardson, *supra* note 10, at 360-61.

<sup>121</sup> 10 U.S.C. § 821.

<sup>122</sup> 10 U.S.C. § 836.

<sup>123</sup> *See* Newton, *supra* note 86, at 15 (noting the councils employed procedures “not materially differing” from the military commissions conducted at the same time for civilian offenses). Among the offenses tried by military commission were “assassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault or battery, robbery, theft, the wanton desecration of churches, cemeteries, and the destruction, except by order of a superior officer, of public or private property, whether committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces, or by such individuals against such individuals, or against Mexicans or civilians; as  
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relied on his own power under the law of war as the occupier of territory to issue the order.<sup>124</sup>

### Civil War Cases.

In April 1863, Union Army General Order Number 100 declared that military commissions could prosecute “cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial” by using the common law of war.<sup>125</sup> Military commissions tried more than 2,000 cases during the war and reconstruction period.<sup>126</sup> However, after the war, the courts limited the jurisdiction to areas occupied by United States forces and governed by martial law<sup>127</sup> and limited the jurisdiction to genuine violations of the law of war.<sup>128</sup>

After the outbreak of the Civil War, Congress enacted the Act of March 3, 1863, relating to habeas corpus, and regulating judicial proceedings in certain cases authorizing the suspension of habeas corpus during the Rebellion.<sup>129</sup> The President issued the following proclamation:

That during the existing insurrection, and as a necessary means for suppressing the same, all rebels and insurgents, their aiders and abettors, within the United States, and all persons discouraging volunteer enlistments resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to rebels, against the authority of the United States, shall be subject to martial law, and liable to trial and punishment by courts martial or military commission.

Second. That the writ of habeas corpus is suspended in respect to all persons arrested, or who now, or hereafter during the Rebellion shall be, imprisoned in any fort, camp, arsenal, military prison, or other place of confinement, by any

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<sup>123</sup>(...continued)

well as the purchase by Mexicans or civilians in Mexico, from soldiers, of horses, arms, ammunition, equipments or clothing.” *See id.* (citing General Order 20, Army Headquarters at Tampico, Mexico, Feb. 19, 1847, reprinted in *Military Orders-Mexican War*, NARG (entry 134) (as amended by General Orders 190 and 287).

<sup>124</sup> *See id.* at 15.

<sup>125</sup> *See* Newton, *supra* note 86, at 17 (citing General Order No. 100, Instructions for the Government of the Armies of the United States in the Field, Apr. 24, 1863, 13, reprinted in *THE LAWS OF ARMED CONFLICT* 3 (Dietrich Schindler & Jiri Toman eds. 1988)).

<sup>126</sup> *See id.*

<sup>127</sup> *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1866). The Reconstruction Act of March 2, 1867, established military commissions in the occupied lands of the South. Act of Mar. 2, 1867, ch. 153, 14 Stat. 428.

<sup>128</sup> *See* Newton, *supra* note 86, at 18 n.69 (citing 1 *THE LAW OF WAR: A DOCUMENTARY HISTORY* 783-98 (Leon Friedman ed., 1971); Lewis L. Laska & James M. Smith, *Hell and the Devil: Andersonville and the Trial of Captain Henry M. Wirtz*, CSA, 1865, 68 *MIL. L. REV.* 77 (1975). Captain Henry Wirtz, the commandant of a notorious prisoner of war camp in Georgia was convicted in 1865 by a military commission and sentenced to die for murder and conspiring to maltreat federal prisoners of war. *See id.*

<sup>129</sup> 12 Stat. 755.

military authority, or by the sentence of any court martial or military commission.<sup>130</sup>

The government sought to prosecute members of a group called the Sons of Liberty, an organized group of conspirators operating in Indiana who had allegedly been hired by Confederate officials to destroy the North.<sup>131</sup> The “Supreme Grand Commander of the Sons of Liberty” was convicted by a military commission and sought review by the Supreme Court, which held it had no constitutional or statutory authority to review military commissions.<sup>132</sup> However, his co-conspirator Lamdin P. Milligan, who was convicted and sentenced to death on charges of conspiracy against the government, giving aid and comfort to the enemy, inciting insurrection, disloyal practices, and violation of the law of war, was granted his petition to the Court for *habeas corpus*. The Supreme Court recognized military commission jurisdiction over violations of “laws and usages of war,” but stated those laws and usages “...can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed”<sup>133</sup> The Supreme Court explained its reasoning:

It will be borne in mind that this is not a question of the power to proclaim martial law, when war exists in a community and the courts and civil authorities are overthrown. Nor is it a question what rule a military commander, at the head of his army, can impose on states in rebellion to cripple their resources and quell the insurrection...Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectively closes the courts and deposes the civil administration.<sup>134</sup>

However, in 1865 the Attorney General found that co-conspirators charged in the assassination of President Lincoln could be tried by military commission, despite the fact that the courts were operating in Washington, D.C.<sup>135</sup> His opinion emphasized the difference between “open and active participants” in war and “secret, but active participants” in violation of the law of war.<sup>136</sup>

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<sup>130</sup> See *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2, 15 -16 (1866) (citing Presidential Proclamation of September 24<sup>th</sup>, 1862).

<sup>131</sup> See Newton, *supra* note 86, at 18.

<sup>132</sup> *Ex parte* Vallandigham, 28 F. Cas. 874 (C.C.S.D. Ohio 1863) (No. 16,816), cert. denied, 68 U.S. (1 Wall.) 243 (1863).

<sup>133</sup> *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121 (1866).

<sup>134</sup> *Ex Parte* Milligan, 71 U.S. at 127.

<sup>135</sup> Military Commissions, 11 Op. Atty Gen. 297; 1865 U.S. AG LEXIS 36 (July, 1865)

<sup>136</sup> 11 Op. Atty Gen. 297; 1865 U.S. AG LEXIS 36, \*13-14. The Attorney General opined:

The law and usage of war contemplate that soldiers have a high sense of personal honor. The true soldier is proud to feel and to know that his enemy possesses personal honor, and will conform and be obedient to the laws of war. In a spirit of justice, and with a wise appreciation of such feelings, the laws of war protect the character and honor of an open enemy. When by the fortunes of war one open enemy is thrown into  
(continued...)



One of the men tried was Dr. Samuel Mudd, sentenced to life in prison for aiding and abetting after the fact the conspiracy by providing medical assistance, lodging, and horses to John Wilkes Booth and a co-conspirator.<sup>137</sup> Dr. Mudd later received a full pardon for his work in battling yellow fever in the prison. His great-grandson filed an application with the Army Board for Correction of Military Records asserting his great-grandfather was innocent of the charges and that the military commission lacked jurisdiction to try a citizen of Maryland when the courts were fully functional. The Board recommended the conviction be set aside, but the Secretary of Defense denied the application. The United States District Court for the District of Columbia dismissed the appeal, finding that “if Dr. Samuel Mudd was charged with a law of war violation, it was permissible for him to be tried before a military commission even though he was a United States and Maryland citizen and the civilian courts were open at the time of the trial.”<sup>138</sup>

### Other Conflicts.

In 1864 the United States made a treaty with the Modoc Indians in which the tribe agreed to remain on a reservation in the State of Oregon. United States troops were subsequently sent out to cause them to return to the reservation after they had left it. A conflict ensued, and soon thereafter the Indians allegedly murdered several local citizens and their families. More fighting between the U.S. troops and the Modoc Indians broke out. The U.S. detachment sent forth several emissaries to negotiate a peaceable conclusion. During the negotiations, the Modocs “treacherously assassinated” two negotiators and severely wounded the third. Captain Jack, the leader of the Modoc tribe, was captured along with most of his tribe, and the military sought the Attorney General’s opinion as to whether the accused might be tried by military tribunal. The Attorney General agreed that they should be tried by the military commission, although he found that

It is difficult to define exactly the relations of the Indian tribes to the United States; but as they have been recognized as independent communities for treaty-making purposes, and as they frequently carry on organized and protracted wars, they may properly, as it seems to me, be held subject to those rules of warfare which make a negotiation for peace after hostilities possible, and which make perfidy like that in question punishable by military authority.<sup>139</sup>

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(...continued)

the hands and power of another, and is charged with dishonorable conduct and a breach of the laws of war, he must be tried according to the usages of war. Justice and fairness say that an open enemy to whom dishonorable conduct is imputed, has a right to demand a trial. If such a demand can be rightfully made, surely it cannot be rightfully refused. It is to be hoped that the military authorities of this country will never refuse such a demand, because there is no act of Congress that authorizes it. In time of war the law and usage of war authorize it, and they are a part of the law of the land.

<sup>137</sup> Mudd. v. Caldera, 134 F. Supp. 2d 138, 140 (2001).

<sup>138</sup> *Id.* at 146 (reading together *Ex Parte Milligan* and *Ex Parte Quirin*).

<sup>139</sup> 14 Op. Atty Gen. 249; 1873 U.S. AG LEXIS 27 (1873).

## World War I.

President Wilson did not use military commissions during World War I to try individuals for war crimes committed within the territory of the United States. Military authorities sought to try Pable Waberski, a Russian national sent by the Germans to “blow things up in the United States,” by military commission. Waberski was arrested upon crossing the border from Mexico into the United States and charged with “lurking as a spy” under article 82 of the Articles of War.<sup>140</sup> The Attorney General opined in a letter to the President that the jurisdiction of the military was improper, noting

He had not entered any camp, fortification or other military premises of the United States. He had not, so far as appears, been in Europe during the war, so had not come through the fighting lines or field of military operations. Martial law had not been declared at Nogales or thereabouts nor anywhere in the United States, and the regular federal civilian courts were functioning in that district and throughout the United States with at least their normal efficiency.

The Attorney General cited *Ex Parte Milligan* for the proposition that offenses committed outside of the field of military operations and by a person not a member of the military where regular civilian courts were functioning were not subject to the jurisdiction of a military tribunal. The Attorney General therefore found that the words “or elsewhere” in Article 82 of the Articles of War were not constitutional.<sup>141</sup> The law of war, the opinion stated, defined a spy as

[a] person who, without authority and secretly, or under a false pretext, contrives to enter within the lines of an army for the purpose of obtaining material information and communicating it to the enemy; or one who, being by authority within the lines, attempts secretly to accomplish such purpose.<sup>142</sup>

According to the Attorney General, Waberski, therefore, was not a spy according to the laws of war and, if guilty of any criminal offense, was triable only by the regular civilian criminal courts. It seemed plain to the Attorney General that “Congress can not constitutionally confer jurisdiction upon a military court to try and sentence any man not a member of the military forces and not subject to the

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<sup>140</sup> Superseded by UCMJ article 106, codified at 10 U.S.C. § 906.

<sup>141</sup> Trial of Spies by Military Tribunal, 31 Op. Atty Gen. 356; 1918 U.S. AG LEXIS 2 (1918) Section 1343 of the United States Revised Statutes and article 82 of the Articles of War, which were practically identical in language and read as follows:

All persons who, in time of war, or of rebellion against the supreme authority of the United States, shall be found lurking or acting as spies, in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial, or by a military commission, and shall, on conviction thereof, suffer death.

<sup>142</sup> See 31 Op. Atty Gen. 356; 1918 U.S. AG LEXIS 2 (1918) (citing article 29 of the Hague Convention of 1917, Respecting the Laws and Customs of War on Land).

jurisdiction of such court under the laws of war or martial law.”<sup>143</sup> He explained to the President:

If he could constitutionally be tried by court-martial, then it would logically follow that Congress could provide for the trial by military courts of any person, citizen or alien, accused of espionage or any other type of war crime, no matter where committed and no matter where such person be found and apprehended.<sup>144</sup>

In 1920, Congress reenacted Article of War 15 with the addition of the wording “by statute or” before the words “by the law of war.”<sup>145</sup> The words “or elsewhere” remain in article 106 of the UCMJ.<sup>146</sup>

## **World War II.**

The post-World War II response to war crimes included both national and international military tribunals. While the Nuremberg war crimes tribunal was the most visible venue in the European theater, the number of national military tribunals far exceeded the number of trials conducted in the international tribunals.<sup>147</sup>

The Supreme Court confirmed the authority of the President, under his power as Commander in Chief of the Armed Forces and as delegated to him by Congress to try accused war criminals in occupied territories even though hostilities had ceased.<sup>148</sup> The Supreme Court granted *habeas corpus* review to General Tomoyuki Yamashita, who had been sentenced by military commission to be hanged for atrocities committed by troops under his command. However, the Court declined to review the merits of the case or the sufficiency of evidence.<sup>149</sup> Yamashita argued, among other things, that no charge was stated against him under the law of war, because the military command did not allege that Yamashita committed or ordered the offenses of his troops against the civilian population in the Philippines that formed the basis for the charges. The Supreme Court disagreed, noting he had been

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<sup>143</sup> *Id.* at LEXIS \*11-12.

<sup>144</sup> *Id.* at LEXIS \*12.

<sup>145</sup> *See* Madsen v. Kinsella, 343 U.S. 341, 351 n.17 (1952)(citing 41 Stat. 790, 10 U.S.C. § 1486).

<sup>146</sup> 10 U.S.C. § 906. FM 27-10 notes that it is undecided whether the phrase “or elsewhere” justifies trial by military tribunal of civilians outside the designated places or territory under martial law. *See* FM 27-10 § 76.

<sup>147</sup> *See* Aldykiewicz, *supra* note 107, at 75-76 (noting that only 200 cases were tried by the Nuremberg tribunal, while the United States Army judge advocate prosecuted some 1,600 German war crimes defendants of crimes committed against American troops, or in Nazi concentration camps that had been overrun and “liberated” by American forces. French and British tribunals tried about an equal amount.).

<sup>148</sup> *In re Yamashita*, 327 U.S. 1 (1946).

<sup>149</sup> *See id.* at 17 (“These are questions within the peculiar competence of the military officers composing the commission and were for it to decide”).

properly charged for his breach of duty by failing to control the operations of the members of his command, permitting them to commit the specified atrocities.<sup>150</sup>

General Yamashita also argued that he was entitled to a trial using the same procedures as would be applied in courts martial, according to article 63 of the Geneva Convention of 1929.<sup>151</sup> The Supreme Court interpreted article 63 as applying only to offenses committed during captivity,<sup>152</sup> and therefore declined to examine the procedural rules applied by the military commission.

Less established was the authority to try enemy saboteurs caught within the territory of the United States during war. After eight Nazi saboteurs were caught by the Coast Guard, the President issued a proclamation that all such enemy saboteurs would be tried by military commission.<sup>153</sup> The eight German saboteurs (one of whom was purportedly a U.S. citizen) were tried by military commission for entering the United States by submarine, shedding their military uniforms, and conspiring to use explosives on unknown targets. In the case of *Ex Parte Quirin*, the Supreme Court denied their writs of *habeas corpus*, holding that trial by such a commission did not offend the Constitution and was authorized by statute.

Despite the fact that the civil courts were open and functioning normally, the Court held that the charge made out a valid allegation of an offense against the law of war for which the President was authorized to order trial by a military commission.<sup>154</sup> The Court also distinguished *Milligan*, noting that he had not been a part of or associated with the armed forces of the enemy, and therefore was a non-belligerent, not subject to the law of war.<sup>155</sup> The Court did not explain where it would draw the line:

We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform – an offense against the law of war. We hold only that those particular acts

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<sup>150</sup> See *id* (“Obviously charges of violations of the law of war triable before a military tribunal need not be stated with the precision of a common law indictment.”)

<sup>151</sup> 47 Stat. 2052. Article 63 provided:

Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedures as in the case of persons belonging to the armed forces of the detaining Power.

327 U.S. at 20-21.

<sup>152</sup> *Id.*

<sup>153</sup> Proclamation No. 2561, of July 2, 1942, 7 Fed. Reg. 5101, 56 Stat. 1964.

<sup>154</sup> *Ex Parte Quirin*, 317 U.S. 1, 45 (1942).

<sup>155</sup> *Id.*

constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.<sup>156</sup>

The Court declined to apply the language of the Articles of War to determine whether the procedures comported with the statute, but the Justices were unable to agree whether Congress had not meant to apply the Articles of War to military commissions or whether the Articles could be interpreted to support the procedures used.<sup>157</sup> In 1945, President Roosevelt issued a new military order establishing rules for convening military commissions to try enemy saboteurs, in which he clarified the applicability of some of the Articles of War.<sup>158</sup> There was no occasion to test the new order, however. When Congress incorporated the Articles of War into the UCMJ in 1950, it included Article of War 15, “Jurisdiction of courts martial not exclusive”, as Article 21 of the UCMJ to “preserve existing Army and Air Force law which gives concurrent jurisdiction to [other] military tribunals...”.<sup>159</sup>

### Other Rulings on Military Courts.

The Supreme Court has issued several more recent opinions limiting the authority of military courts-martial to persons reached pursuant to constitutional powers to regulate the armed forces.<sup>160</sup> The Court held that an honorably discharged former soldier could not be tried by court martial for a crime he allegedly committed while stationed overseas.<sup>161</sup> The Court also set aside the military conviction of a civilian dependant of a servicemember stationed overseas for a capital crime, at least during time of peace when the United States was not occupying the country in which the crime took place.<sup>162</sup> The Court extended that ruling to civilian dependants overseas charged with noncapital crimes, voiding the conviction by court martial of

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<sup>156</sup> *Id.* at 45-46.

<sup>157</sup> *Ex Parte Quirin*, 317 U.S. 1, 46-47. Petitioners had argued the commission was required to comply with Articles 38 (rules of evidence), 43 (unanimous verdict for death penalty offenses), 46, 50 1/2, and 70 (procedures for review).

<sup>158</sup> *See* Governing the Establishment of Military Commissions for the Trial of Certain Offenders Against the Law of War and Governing the Procedure for Such Commissions, Military Order of January 11, 1945, 10 Fed. Reg. 549 (Jan. 16, 1945) (reprinted at Appendix B). Article 70 was to be deemed inapplicable, while Article 50 1/2 was to apply. *Id.* Article 70 prescribed pre-trial procedure, including charges and specification, investigation, the right to cross-examine witnesses and present a defense, the right to a speedy trial and notification of charges. *See* 10 U.S.C. § 1542 (1940). Article 50 1/2 concerned procedure for review by a board of the record to determine its legal sufficiency, forwarding of the record with recommendations to the President, and possible rehearing. *See* 10 U.S.C. § 1522 (1940).

<sup>159</sup> *See* S. Rep. 81-486, reprinted in 1950 U.S.C.C.A.N 2222, 2236 (citing *Ex Parte Quirin* as the reason for preserving the article).

<sup>160</sup> U.S. CONST. art. I § 8, cl. 14.

<sup>161</sup> *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11 (1955).

<sup>162</sup> Reid v. Covert, 354 U.S. 1 (1957).

a military wife charged with involuntary manslaughter.<sup>163</sup> The Court later ruled that civilian employees could not be tried by court martial, even for crimes committed overseas.<sup>164</sup> While these more recent cases seem to demonstrate a trend toward limiting the jurisdiction of military courts martial, they may have little bearing on the jurisdiction of military commissions to try enemy belligerents under the constitutional war powers. The validity of any military commissions that might be convened pursuant to the President's Military Order of November 13, 2001, therefore, will likely depend in large part on whether the defendants are legitimately classified as "enemy belligerents" and "unlawful combatants," or whether they are merely alien civilians.

## Analysis of President's Military Order

The Military Order issued by President Bush, and the circumstances under which it was issued, differ substantially from the World War II precedent used in *Quirin*. Perhaps the most obvious difference is that war had been formally declared by Congress against foreign states. It should be remembered that the law of war has undergone significant changes since the *Quirin* case was decided, most notably with the 1949 Geneva Conventions. While the importance of a formal declaration of war has faded since World War II, the law regarding the treatment of enemy civilians and combatants has progressed significantly.

### Wartime Basis.

President Roosevelt issued Proclamation 2561 under the caption "Denying Certain Enemies Access to the Courts of the United States" on July 2, 1942,<sup>165</sup> after the capture of the eight Nazi saboteurs. On that same day, the President issued a Military Order appointing a commission of seven general officers to try the named defendants for "offenses against the law of war and the Articles of War."<sup>166</sup> The order cited the President's authority as President and Commander in Chief, the Constitution and statutes of the United States, and specifically Article of War 38.<sup>167</sup>

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<sup>163</sup> *Kinsella v. United States ex rel. Singleton*, 361 U.S. 234 (1960).

<sup>164</sup> *McElroy v. United States ex rel. Guagliardo*, 361 U.S. 281 (1960).

<sup>165</sup> 7 Fed. Reg. 5101 (July 7, 1942), reprinted at Appendix B.

<sup>166</sup> 7 Fed. Reg. 5103 (July 7, 1942), reprinted at Appendix B.

<sup>167</sup> Codified at 10 U.S.C. § 1509 (1940), which stated:

The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: *Provided*, That nothing contrary or inconsistent with these articles shall be so prescribed: *Provided further*, That all rules made in pursuance of this article shall be laid before the Congress annually.

(continued...)

Proclamation 2561 does not mention Congress' declaration of war against Germany. The findings state simply that the safety of the United States demands that all enemies who enter U.S. territory "as part of an invasion or predatory incursion" or have entered "to commit sabotage espionage or other hostile or warlike act" should be promptly tried in accordance with the law of war. The "invasion" language appears to be borrowed from the Alien Enemy Act, which states that during declared war between the United States and any foreign nation or government, or when an invasion is perpetrated by any foreign nation or government, and the President makes a proclamation of the event, the President may "direct the conduct to be observed, on the part of the United States toward the aliens who become ... liable [as alien enemies]"...<sup>168</sup> The use of this language suggests that Proclamation 2561 might have been intended as a proclamation pursuant the Alien Enemy Act. On the other hand, a review of contemporaneous Presidential proclamations shows that President Roosevelt ordinarily cited specific statutory authority to support actions taken.<sup>169</sup>

President Bush's Military Order of November 13 relies in large part on the congressional authorization to use force, which gives the President the authority to

to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred 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.<sup>170</sup>

The resolution does not address military tribunals explicitly, but could be interpreted as a broad authorization to exercise the President's power as Commander in Chief of the Armed Forces to prosecute an armed conflict.<sup>171</sup> The Congress stopped short of declaring war, which would have automatically triggered a number of statutes,<sup>172</sup>

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<sup>167</sup>(...continued)

The reworded provision is now contained in article 36 of the UCMJ, codified at 10 U.S.C. § 836, and is essentially the same but adds "the principles of law" prior to the "rules of evidence generally recognized" and removes the requirement to report the rules to Congress.

<sup>168</sup> 50 U.S.C § 21(1940) (the language has not changed).

<sup>169</sup> See, e.g., Proclamation 2537, Regulation Pertaining to Alien Enemies (Jan. 14, 1942) (citing the Alien Enemy Act to support proclamation, without mentioning declaration of war.)

<sup>170</sup> P.L. 107-40.

<sup>171</sup> See *Ex Parte Quirin*, 317 U.S. 1, 26 (1942):

The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war.

<sup>172</sup> See *Declarations of War Authorizations for the Use of Military Force: Background and Legal Implications*, CRS Report RL31133 (Sept. 27, 2001).

including the Alien Enemy Act.<sup>173</sup> The President could invoke the Act by proclamation without a declaration of war if “a predatory incursion” has been perpetrated by a hostile nation. Since the current armed conflict does not involve a hostile state as such, the Act is probably not applicable nor very practical, since it would only allow the President to direct the treatment of “natives, citizens, denizens or subjects” of the hostile state.<sup>174</sup>

### **Jurisdiction.**

While the 1942 proclamation defined the acts subject to prosecution by military tribunal, the new order defines a class of non-citizens whose members are subject to military trial upon the President’s determination. The President must first determine that the person is or ever has been associated with terrorist acts or organizations, and that it is in the interest of national security to subject that person to the order. The President has complete discretion once those determinations are made. Alien terrorists and violators of the law of war might not be subject to the order; citizen terrorists and war criminals are never subject to the order.<sup>175</sup>

Proclamation 2561 pertained to “subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation” who are accused of certain offenses. Thus, U.S. citizens who acted as enemy agents were covered by the proclamation.<sup>176</sup> However, violators of the law of war outside the territory of the United States, or those who entered the United States lawfully, fell outside the language of the Proclamation.<sup>177</sup>

The M.O. of November 13 applies only to non-citizens. It should be noted that aliens, even those lawfully admitted to the country, do not necessarily enjoy the same constitutional rights as citizens with regard to freedom from unreasonable seizures of their persons. During time of war, aliens who are citizens of hostile nations may be summarily detained and deported, and their property may be confiscated under the Alien Enemy Act.<sup>178</sup> They may also be denied access to the courts of the United

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<sup>173</sup> 50 U.S.C. §§ 21 *et seq.*

<sup>174</sup> 50 U.S.C. § 21 (1940).

<sup>175</sup> The M.O. appears to leave open the possibility that violators of the law of war who do not fall into the category of persons defined in section 2 may be nevertheless be prosecuted by military commission. M.O. at section 7(3).

<sup>176</sup> *Ex Parte Quirin*, 317 U.S. 1, 37 (1941) (“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.”).

<sup>177</sup> Military commissions were established without presidential proclamation to try war criminals outside the territory of the United States.

<sup>178</sup> 50 U.S.C. § 21 provides:

Whenever there is a declared war between the United States and any foreign nation or government, or any invasion or predatory incursion is perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or

(continued...)



States if they would use the courts to the advantage of the enemy or to impede the U.S. prosecution of a war.<sup>179</sup>

Even during times of peace, nonimmigrant aliens may be subjected to different treatment based on their nationality.<sup>180</sup> In deportation proceedings, deportable aliens probably have no constitutional right protecting them from selective deportation<sup>181</sup> and the First Amendment does not provide protection against removal based on association.<sup>182</sup> Aliens who have entered the country and established a connection to it, however, are protected by the Constitution, though their rights may differ from those of citizens. In criminal proceedings, such aliens receive full due process under the Constitution. Whether certain non-enemy aliens may be subjected to criminal punishment or detained indefinitely for their suspected association with terrorist groups is uncertain.<sup>183</sup>

### **Offenses Triable by Military Commission.**

10 U.S.C. § 821 allows concurrent jurisdiction between courts martial and military commissions for cases that by statute or by the law of war are triable by military commission. Military commissions trying enemy belligerents for war crimes apply directly the international law of war, without recourse to domestic criminal statutes unless such statutes are declaratory of international law.<sup>184</sup>

Proclamation 2561 limited the predicate offenses to entering the United States surreptitiously during war and “committing or attempting or preparing to commit

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<sup>178</sup>(...continued)

government, and the President makes public proclamation of the event, all natives, citizens, denizens, or subjects of the hostile nation or government, being of the age of fourteen years and upward, who shall be within the United States and not actually naturalized, shall be liable to be apprehended, restrained, secured, and removed as alien enemies. The President is authorized in any such event, by his proclamation thereof, or other public act, to direct the conduct to be observed, on the part of the United States, toward the aliens who become so liable; the manner and degree of the restraint to which they shall be subject and in what cases, and upon what security their residence shall be permitted, and to provide for the removal of those who, not being permitted to reside within the United States, refuse or neglect to depart therefrom; and to establish any other regulations which are found necessary in the premises and for the public safety.

<sup>179</sup> See *Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950).

<sup>180</sup> See *Narenji v. Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), *cert. denied*, 446 U.S. 957 (1980) (upholding INS regulations requiring Iranian students to report to INS).

<sup>181</sup> *American-Arab Anti-Discrimination Comm. v. Reno*, 525 U.S. 471 (1999).

<sup>182</sup> *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952).

<sup>183</sup> See President’s order at § 2 (defining as persons subject to the order any alien who “is or was a member of the organization known as al Qaeda” at “the relevant times”).

<sup>184</sup> See U.S. Army Field Manual (FM) 27-10, *The Law of Land Warfare*, section 505(e).

sabotage, espionage, hostile or warlike acts, or violations of the law of war.”<sup>185</sup> The proclamation did not contain any definitions of the offenses. The eight saboteurs were charged with violations of the law of war and articles 81 and 82 of the Articles of War, as well as conspiracy to commit the foregoing.<sup>186</sup> Therefore, the possibility that the language “hostile or warlike acts” was meant to include offenses that were not already included in the term “violation of the law of war,” possibly causing the proclamation to exceed the statutory limit on jurisdiction, was not addressed.

President Bush’s M.O. is ambiguous as to which offenses may be tried by military commissions. While the President’s authority to try as saboteurs those responsible for the September 11 attacks appears to be supported by precedent,<sup>187</sup> the M.O. could be construed as a grant of authority to detain and perhaps try persons not suspected of direct participation or complicity in those attacks. The order allows the President to subject a non-citizen to trial by military tribunal if he determines that person is or was a member of al Qaida or committed, participated, aided and abetted, or conspired in any terrorist act, even those unrelated to al Qaida’s campaign of terror against the United States. The order appears to apply to any act of terrorism during the “relevant time” and anywhere in the world, so long as damage or injury to United States persons was intended or caused. The order may also include persons who are protected under the Geneva Conventions and are entitled to due process in accordance with international law. A court could construe the order as incorporating those standards in order to avoid conflict with U.S. treaty obligations.<sup>188</sup>

Section 4 of the order provides that “[a]ny individual subject to this order shall, when tried, be tried by military commission *for any and all offenses triable by military commission....*” (Emphasis added). This language could be construed as

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<sup>185</sup> Espionage was subject to the jurisdiction of military commissions by statute. 50 U.S.C. § 38 (1940).

<sup>186</sup> Article 81, *codified at* 10 U.S.C. 1553 (1940) stated:

Whosoever relieves or attempts to relieve the enemy with arms, ammunition, supplies, money, or other thing, or knowingly harbors or protects or holds correspondence with or gives intelligence to the enemy, either directly or indirectly, shall suffer death or such other punishment as a court martial or military commission may direct.

This language is superceded by Article 104, UCMJ, *codified at* 10 U.S.C. § 904.

Article 82, *codified at* 10 U.S.C. 1554 (1940) stated:

Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by a general court martial or by a military commission, and shall, on conviction thereof, suffer death.

This language is superceded by Article 106, UCMJ, *codified at* 10 U.S.C. § 906.

<sup>187</sup> *Ex Parte Quirin*, 317 U.S. 1 (1942); *Mudd v. Caldera*, 134 F.Supp.2d 138, 146 (2001).

<sup>188</sup> *See Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) .

impliedly limiting the offenses to those validly triable by military commission pursuant to 10 U.S.C. § 36 under the relevant circumstances, which would sharply narrow the scope of the order. Such an interpretation would lead to the conclusion that the language in section 2 confines the offenses triable to only those war crimes that are committed by non-citizens who fit the definition in section 2. In other words, the offenses in section 2 are not necessarily the offenses for which the defendant will be tried, but rather, are to be used by the President to determine whether an individual may be subject the order. Violations of the law of war by others could still be tried by military commission, but such a commission need not comply with the M.O. of November 13.

If the order is interpreted to be consistent with the congressional authorization for the use of force and 10 U.S.C. § 821, incorporating by reference the law of war, the order would not permit the trial of individuals for terrorist acts unless the acts occurred as part of the present armed conflict (including preparation therefor) and they are violations of the law of war. Therefore, the language “at the relevant time” in Section 2(a)(1) should probably be construed to mean during and related to the present armed conflict with terrorist forces emanating from Afghanistan.

### **Authority to Detain.**

The President’s order could be construed to authorize detention of persons for violations of statutes not expressly triable by military commission, based solely on a determination that the accused belongs to the class of persons subject to the order. Some language in the order could be construed to authorize detention of such persons even though they are not charged with any crime at all.<sup>189</sup>

The authority to detain suspected war criminals is arguably implicit in the power to authorize their trial by military commission. Unless the authority is an inherent power of the Executive, it must flow either from statute or from the law of war. Although the language of the order could be construed to allow the indefinite detention of persons subject to the order without any charge, an interpretation that incorporates the authority it cites would lead to a different conclusion. The order could not consistently with 10 U.S.C. § 821 authorize detention of persons who are neither unlawful combatants accused of violating the law of war nor persons accused of violating 10 U.S.C. §§ 904 or 906.

The law of war does not permit punishment of enemy civilians, non-combatants, or combatants (even unlawful ones) for crimes for which they bear no individual responsibility.<sup>190</sup> Therefore, their detention is likewise not authorized except as provided for by statute or convention. It might be argued that Congress implicitly allows the President to detain non-citizens without explicit statutory authority, because the President is expressly prohibited by statute from detaining citizens except

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<sup>189</sup> See M.O. at § 2(e) (“... it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”).

<sup>190</sup> See Aldrich, *supra* note 71, at 8. Persons detained as a security threat must be accorded proper treatment according to their status under the Geneva Conventions.

in accordance with statute.<sup>191</sup> However, in this case such an argument may be less persuasive because Congress, in enacting the USA PATRIOT Act, placed express limits on the authority of the President to detain aliens for national security purposes.<sup>192</sup> It is arguably insufficient for the President to issue a determination that an alien is subject to the order, unless the determination also contains an allegation that the detainee has committed a violation of the law of war. The interpretation of international law regarding responsibility for the acts of others through indirect participation may be necessary to justify detention of any alien suspected of conspiring with or aiding terrorists in ways that fall short of violating the law of war as an unlawful belligerent.

### **Jurisdiction of Other Courts.**

A feature of the November 13 M.O. not apparent in the Proclamation or Military Orders issued by President Roosevelt is language that appears to divest the federal and state courts of jurisdiction over any offense committed by a person subject to the order.<sup>193</sup> Indeed, the order appears to strip the jurisdiction of foreign courts and international tribunals to hear appeals, even indirect appeals, of persons detained or convicted under the order. (Section 7b(2)ii-iii).

To the extent that the order would affect the jurisdiction of state and federal courts over crimes, especially those not triable by military tribunal under statute or the common law of war, it may be judged to be overbroad. Congress' acknowledgment of concurrent jurisdiction over certain crimes to courts martial and military commissions does not imply that the President has the power to create exclusive jurisdiction in the military tribunals for offenses that might by statute be tried in another court. The President would not seem to have the constitutional authority to regulate the jurisdiction of courts or convene inferior tribunals unless so authorized by act of Congress. Article 21 of the UCMJ recognizes the military commissions' jurisdiction to try only "offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals."<sup>194</sup> Therefore, references to "offenses" and "crimes" in the order most likely must be understood to refer to "offenses against the law of war" and "war crimes," or to those offenses mentioned expressly by statute as triable by military commission.

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<sup>191</sup> 18 USCS § 4001 (2001) provides:

No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

<sup>192</sup> P.L. 107-56 § 412 provides:

The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, not later than 7 days after the commencement of such detention. If the requirement of the preceding sentence is not satisfied, the Attorney General shall release the alien.

<sup>193</sup> See M.O. at section 7(b)(1) ("military tribunals shall have exclusive jurisdiction with respect to offenses by the individual" subject to the order).

<sup>194</sup> 10 U.S.C. § 821. See also Newton, *supra* note 86, at 21 (arguing that "the entire scope of history and American jurisprudence compel the conclusion that Article 21 grants jurisdiction only over violations of the international laws of war.").

## Review and Appeal.

Like FDR's Proclamation, the Bush M.O. directs that "individuals prosecuted by military tribunal 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 individual's behalf." The government argued unsuccessfully in the *Quirin* case that this language deprived the Court of its opportunity to afford the petitioners a hearing.<sup>195</sup> In light of that decision, the order will not likely be interpreted to deprive persons of their right to seek *habeas corpus* relief in federal court, if they would ordinarily have such rights.<sup>196</sup> It is unclear what avenue of redress other than a petition to file a writ of *habeas corpus* the order is meant to block.<sup>197</sup>

If a court agrees to hear a petitioner's *habeas corpus* challenge to a conviction by military commission, it will not likely order the prisoner released or set aside the verdict "without the clear conviction that [the detention and trial] are in conflict with the Constitution or laws of Congress constitutionally enacted."<sup>198</sup> Such a hearing would not inquire into the guilt or innocence of the prisoner,<sup>199</sup> or question the decision of the tribunal, but only whether the tribunal was lawfully convened to hear the case.<sup>200</sup>

The Bush M.O. also denies persons subjected to it the privilege of seeking any remedy in foreign courts or international tribunals. While the language would have no internationally recognized effect on the jurisdiction of foreign courts or international tribunals, it could be interpreted to revoke rights detainees would have under international law, including treaties to which the United States is a party. For example, a detainee claiming POW status has the right under GC III to protest perceived violations of his rights to the Detaining Power, the Protecting Power, and to humanitarian organization.<sup>201</sup> This right may not be denounced by the POW, nor may it be revoked or unnecessarily limited by the Detaining Power.<sup>202</sup> A court or federal agency may interpret the language of the order as an indication that the President wishes to supercede parts of the Geneva Conventions, possibly binding the

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<sup>195</sup> *Ex Parte Quirin* at 24-25 (... there is ... nothing in the Proclamation to preclude access to the courts for determining its applicability to the particular case").

<sup>196</sup> *Id.*; *Colepaugh v. Looney*, 235 F.2d 429 (1956); *In re Yamashita*, 327 U.S. 1 (1946). *But see* *Eisenrager v. Johnson*, 339 U.S. 763, 777-781 (1950)(enemy alien captured overseas in territory not occupied by U.S. forces not entitled to *habeas corpus*).

<sup>197</sup> In his Military Order of January 11, 1945, President Roosevelt reissued the authorization for military commissions without the language denying offenders access to courts. *See* Military Order of January 11, 1945, 10 Fed. Reg. 549 (Jan. 16, 1945) (reprinted at Appendix B).

<sup>198</sup> *See Ex Parte Quirin* at 25.

<sup>199</sup> *See id.*; *In re Yamashita*, 327 U.S. 1, 8 (1946).

<sup>200</sup> *See In re Yamashita* at 8.

<sup>201</sup> *See* GC III art. 78.

<sup>202</sup> *See id.*; *United States v. Noriega*, 808 F.Supp. 791, 796-797 (1992) (interpreting GC III arts. 5, 7, 78, and 85 to accord General Noriega right to protest treatment in prison).

courts and federal agencies to disregard decisions of an international tribunal or efforts to intervene on the prisoner's behalf by his state of nationality or an international humanitarian organization.

## Rules Applicable to the Military Commission

### Statutes.

The Supreme Court has construed the UCMJ as broadly delegating power to the President. This authority may be further delegated to a field commander or any other commander with the power to convene a general court-martial.<sup>203</sup> Statutes authorize prosecuting persons for failure to appear as witness,<sup>204</sup> punishing contempt,<sup>205</sup> and accepting into evidence certain depositions<sup>206</sup> and records of courts of inquiry.<sup>207</sup> The proceeding is exempt from statutory requirements in other court proceedings for a speedy trial.<sup>208</sup> The rules pertaining to release and detention pending certain judicial proceedings likewise do not apply.<sup>209</sup> Military commissions are also excluded from the definition of "agency" in title 5,<sup>210</sup> which exempts them from, among other things, responding to requests for information under the Freedom of Information Act<sup>211</sup> and challenges under the Administrative Procedures Act.<sup>212</sup>

While the President may set the rules of procedure and evidence for military tribunals and need only apply "the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district court" where he considers it practicable to do so, he may not apply rules contrary to or inconsistent with the UCMJ.<sup>213</sup> Where Congress has included military commissions in parts of the UCMJ regulating courts martial, the President may not apply a

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<sup>203</sup> *In re Yamashita*, 327 U.S. 1 (1946).

<sup>204</sup> 10 U.S.C. § 847.

<sup>205</sup> 10 U.S.C. § 848 provides for 30 days' confinement or a fine of \$100, or both, for any person who disturbs the proceedings.

<sup>206</sup> 10 U.S.C. § 849. Such evidence is inadmissible in a capital case in a court-martial proceeding.

<sup>207</sup> 10 U.S.C. § 850.

<sup>208</sup> 18 U.S.C. § 3172.

<sup>209</sup> 18 U.S.C. § 3156.

<sup>210</sup> 5 U.S.C. § 551 exempts courts martial and military commissions as well as "military authority exercised in the field in time of war or in occupied territory." 5 U.S.C. § 701, Judicial Review, also excludes these entities from the definition of "agency."

<sup>211</sup> *See, e.g.*, 5 U.S.C. §§ 552 *et seq.* (FOIA).

<sup>212</sup> *See* 5 U.S.C. §§ 500 *et seq.*

<sup>213</sup> 10 U.S.C. § 836.

contrary rule.<sup>214</sup> The taking and use of depositions, for example, must adhere to the provisions of Article 49 of the UCMJ.<sup>215</sup>

### Procedural Rules.

As a non-Article III court, a military commission would not be subject to the same constitutional requirements that apply to Article III courts.<sup>216</sup> Defendants properly before a military commission, like defendants before a court-martial, would likely have no right to demand a jury trial<sup>217</sup> before a court established in accordance with rules governing the judiciary.<sup>218</sup> There is no right of indictment or presentment under the Fifth Amendment,<sup>219</sup> and there may be no protection against self-incrimination or right to counsel.<sup>220</sup> While Congress has enacted procedures applicable to courts-martial that ensure basic due process rights,<sup>221</sup> no such statutory procedures exist to define due process rights for defendants before military commissions.

Procedural rules and evidentiary rules are prescribed by the President and may differ among commissions.<sup>222</sup> Courts-martial are conducted using the Military Rules

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<sup>214</sup> *But see In re Yamashita*, 327 U.S. 1, 19 (1946) (finding Articles of War 25 and 38 inapplicable to trial of enemy belligerent, despite express mention of military commissions and other tribunals).

<sup>215</sup> 10 U.S.C. § 849.

<sup>216</sup> *Ex parte Quirin*, 317 U.S. at 38; *see also* *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 53-54 (1989); Audrey I. Benison, *International Criminal Tribunals: Is There a Substantive Limitation on the Treaty Power?*, 37 STAN. J INT'L L. 75, 99 (2001). The same is true for a military court-martial conducted under the Uniform Code of Military Justice. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (noting a servicemember “surrenders his right to be tried by the civil courts”).

<sup>217</sup> *Ex parte Quirin*, 317 U.S. 1, 45 (1942).

<sup>218</sup> *Weiss v. United States*, 510 U.S. 163 (1994) (rejecting challenge to the military justice system based on the fact that military judges are not “appointed” by the President within the meaning of Article II of the Constitution, and the judges are not appointed to fixed terms of office).

<sup>219</sup> *See Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).

<sup>220</sup> *Middendorf v. Henry*, 425 U.S. 25 (1976) (holding there is no right to counsel under U.S. Const. amends. V or VI in summary courts-martial).

<sup>221</sup> *Weiss* at 178 (holding procedures established by Congress to govern military justice to be adequate to ensure a fair trial consistent with the Due Process Clause of the Fifth Amendment).

<sup>222</sup> 10 U.S.C. § 836 provides:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter [10 USCS §§ 801 et seq.] 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

(continued...)

of Evidence set out in the Manual for Courts-Martial;<sup>223</sup> however, these rules need not apply to trials by military commission.<sup>224</sup> Subject to the statutory provisions above, the President may establish any rules of procedure and evidence he deems appropriate.<sup>225</sup>

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<sup>222</sup>(...continued)

chapter [10 USCS §§ 801 et seq.]

(b) All rules and regulations made under this article shall be uniform insofar as practicable.

<sup>223</sup> Exec. Order 12,473, 49 Fed. Reg. 17, 152 (1984). These rules essentially mirror the Federal Rules of Evidence. *See* Everett & Silliman, *supra* note 116, at 517.

<sup>224</sup> *In re Yamashita*, 327 U.S. at 20. *See* Everett & Silliman, *supra* note 116, at 513.

<sup>225</sup> The evidentiary rules in *Yamashita* included:

16. Evidence. – a. The commission shall admit such evidence as in its opinion would be of assistance in proving or disproving the charge, or such as in the commission’s opinion would have probative value in the mind of a reasonable man. In particular, and without limiting in any way the scope of the foregoing general rules, the following evidence may be admitted:

(1) Any document which appears to the commission to have been signed or issued officially by any officer, department, agency, or member of the armed forces of any government, without proof of the signature or of the issuance of the document.

(2) Any report which appears to the commission to have been signed or issued by the International Red Cross or a member thereof, or by a medical doctor or any medical service personnel, or by an investigator or intelligence officer, or by any other person whom the commission finds to have been acting in the course of his duty when making the report.

(3) Affidavits, depositions, or other statements taken by an officer detailed for that purpose by military authority.

(4) Any diary, letter or other document appearing to the commission to contain information relating to the charge.

(5) A copy of any document or other secondary evidence of its contents, if the commission believes that the original is not available or cannot be produced without undue delay. ...”

Justice Murphy went on to note:

Section 16, as will be noted, permits reception of documents, reports, affidavits, depositions, diaries, letters, copies of documents or other secondary evidence of their contents, hearsay, opinion evidence and conclusions, in fact of anything which in the commission’s opinion “would be of assistance in proving or disproving the charge,” without any of the usual modes of authentication. A more complete abrogation of customary safeguards relating to the proof, whether in the usual rules of evidence or any reasonable substitute and whether for use in the trial of crime in the civil courts or military tribunals, hardly could have been made. So far as the admissibility and probative value of evidence was concerned, the directive made the commission a law unto itself.

*In re Yamashita*, 327 U.S. at 49 (Murphy, J. dissenting).



## Due Process – Search for an International Standard.

Although there may be little judicial review available to persons convicted by U.S. military commissions, it would seem necessary to provide for trials that will be seen as fundamentally fair under both U.S. and international standards regarding the application of the law of war.<sup>226</sup> Telford Taylor noted in evaluating World War II war crimes trials:

It is of the first importance that the task of planning and developing permanent judicial machinery for the interpretation and application of international penal law be tackled immediately and effectively. The war crimes trials, at least in Western Europe, have been held on the basis that the law applied and enforced in these trials is international law of general application which everyone in the world is generally bound to observe. On no other basis can the trials be regarded as judicial proceedings, as distinguished from political inquisitions.<sup>227</sup>

There is some historical precedent from which an international norm regarding procedural rights for accused war criminals might be derived. The Nuremberg Tribunals provide a good starting point,<sup>228</sup> as further refined by the International Criminal Tribunals for Yugoslavia and Rwanda.<sup>229</sup> Perhaps the most recent embodiment of the requirements of the international law of war is to be found in the procedures of the not-yet-operational International Criminal Court established by the Rome Statute.<sup>230</sup>

The evidentiary rules used at Nuremberg and adopted by the Tokyo tribunals were designed to be non-technical, allowing the expeditious admission of “all evidence [the Tribunal] deems to have probative value.”<sup>231</sup> This evidence included hearsay, coerced confessions, and the findings of prior mass trials.<sup>232</sup> While the historical consensus seems to have accepted that the war crimes commissions were

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<sup>226</sup> The President realized the necessity of adhering to the Articles of War in convening the military commission in *Ex parte Quirin*. See Evan J. Wallach, *The Procedural And Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide An Outline For International Legal Procedure?*, 37 COLUM. J. TRANSNAT’L L. 851, 854 n.11 (1999).

<sup>227</sup> Telford Taylor, *An Outline of the Research and Publication Possibilities of the War Crimes Trials*, 9 LA. L. REV. 496, 507 (1948-49) (cited in Wallach, *supra* note 226, at 852.)

<sup>228</sup> See Wallach, *supra* note 226, at 860 (noting that the rules formulated in accordance with the London Agreement of August 8, 1945, by the Allies setting trial procedures for German war criminals, served as a model for subsequent tribunals). The rules used at the Nuremberg trials were, in turn, largely modeled after American military commissions. See *id.* at 851.

<sup>229</sup> See Major Marsha V. Mills, *War Crimes in the 21st Century*, 3 HOFSTRA L. & POL’Y SYMP. 47, 55-56 (1999)(describing due process and evidentiary rules of the tribunals).

<sup>230</sup> See, The Rome Statute of the International Criminal Court, Selected Legal and Constitutional Issues, CRS Report, CRS Report RL30091 (Feb. 22, 1999).

<sup>231</sup> See Wallach, *supra* note 226, at 860.

<sup>232</sup> See *id.* at 871-72.

conducted fairly,<sup>233</sup> some observers argue that the malleability of the rules of procedure and evidence could and did have some unjust results.<sup>234</sup>

Protocol I to the Geneva Convention provides, in article 75, a list of basic guarantees that may be viewed as a baseline for an international standard of due process:

***Article 75.-Fundamental guarantees***

1. In so far as they are affected by a situation referred to in Article 1 of this Protocol, persons who are in the power of a Party to the conflict and who do not benefit from more favorable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances and shall enjoy, as a minimum, the protection provided by this Article without any adverse distinction based upon race, color, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria. Each Party shall respect the person, honor, convictions and religious practices of all such persons.

2. The following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents:

(a) Violence to the life, health, or physical or mental well-being of persons, in particular:

(i) Murder;

(ii) Torture of all kinds, whether physical or mental;

(iii) Corporal punishment ; and

(iv) Mutilation;

(b) Outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault;

(c) The taking of hostages;

(d) Collective punishments; and

(e) Threats to commit any of the foregoing acts.

3. Any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken. Except in cases of arrest or detention for penal offences, such persons shall be released with the minimum delay possible and in any event as soon as the circumstances justifying the arrest, detention or internment have ceased to exist.

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<sup>233</sup> See *id.* at 852 (citing VIRGINIA MORRIS & MICHAEL SCHARF, 1 AN INSIDER'S GUIDE TO THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 9-10 (1995)).

<sup>234</sup> See Wallach, *supra* note 226, at 869; Application of Homma, 327 U.S. 759, 760 (1946) (Murphy, J. dissenting). But see Jonathan A. Bush, *Lex Americana: Constitutional Due Process and the Nuremberg Defendants*, 45 ST. LOUIS U. L.J. 515, 526 (2001)(arguing that in many ways, “the new [Tokyo and Nuremberg] tribunals’ charters gave defendants many rights that went beyond anything allowed in the American system” at the time of the trials).

4. No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defense;

(b) No one shall be convicted of an offense except on the basis of individual penal responsibility;

(c) No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;

(d) Anyone charged with an offense is presumed innocent until proved guilty according to law;

(e) Anyone charged with an offense shall have the right to be tried in his presence;

(f) No one shall be compelled to testify against himself or to confess guilt;

(g) Anyone charged with an offence shall have the right 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;

(h) No one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure;

(i) Anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly; and

(i) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised.

5. Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

6. Persons who are arrested, detained or interned for reasons related to the armed conflict shall enjoy the protection provided by this Article until their final release, repatriation or re-establishment, even after the end of the armed conflict.

7. In order to avoid any doubt concerning the prosecution and trial of persons accused of war crimes or crimes against humanity, the following principles shall apply:

(a) Persons who are accused of such crimes should be submitted for the purpose of prosecution and trial in accordance with the applicable rules of international law; and

(b) Any such persons who do not benefit from more favorable treatment under the Conventions or this Protocol shall be accorded the treatment provided by this Article,

whether or not the crimes of which they are accused constitute grave breaches of the Conventions or of this Protocol.

8. No provision of this Article may be construed as limiting or infringing any other more favorable provision granting greater protection, under any applicable rules of international law, to persons covered by paragraph 1.

## Appendix A

### Military Order of November 13, 2001.

#### **Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism**

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

#### **Section 1. Findings.**

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(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.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, 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 the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

## **Sec. 2. Definition and Policy.**

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

## **Sec. 3. Detention Authority of the Secretary of Defense.**

Any individual subject to this order shall be --

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

- (c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;
- (d) allowed the free exercise of religion consistent with the requirements of such detention; and
- (e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

**Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.**

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for --

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

- (6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;
- (7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and
- (8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

### **Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.**

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

### **Sec. 6. Additional Authorities of the Secretary of Defense.**

- (a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.
- (b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

### **Sec. 7. Relationship to Other Law and Forums.**

- (a) Nothing in this order shall be construed to --
  - (1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;
  - (2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or
  - (3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.
- (b) 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 sought 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.



(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

**Sec. 8. Publication.**

This order shall be published in the Federal Register.

GEORGE W. BUSH

THE WHITE HOUSE,

November 13, 2001.

## Appendix B

### Proclamation No. 2561.

#### DENYING CERTAIN ENEMIES ACCESS TO THE COURTS OF THE UNITED STATES

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA  
A PROCLAMATION

WHEREAS the safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the law of war;

NOW, THEREFORE, I, FRANKLIN D. ROOSEVELT, President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and the statutes of the United States, do hereby proclaim that all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons 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 their behalf, in the courts of the United States, or of its states, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

IN WITNESS WHEREOF I have hereunto set my hand and caused the seal of the United States of America to be affixed.

DONE at the City of Washington this 2d day of July, In the year of our  
Lord nineteen hundred and forty-two, and of the Independence  
[SEAL] of the United States of America the one hundred and sixty  
sixth.

FRANKLIN D ROOSEVELT

By the President:

CORDELL HULL,

Secretary of State.

**Military Order of July 2, 1942.**

APPOINTMENT OF A MILITARY COMMISSION

By virtue of the authority vested in me as President and as Commander in chief of the Army and Navy, under the Constitution and statutes of the United States, and most particularly the Thirty-Eighth Article of War (U.S.C., title 10, sec. 1509), 1, Franklin Delano Roosevelt, do hereby appoint as a Military Commission the following persons:

Major General Frank R. McCoy, President  
Major General Walter S. Grant  
Major General Blanton Winship  
Major General Lorenzo D. Gasser  
Brigadier General Guy V. Henry  
Brigadier General John T. Lewis  
Brigadier General John T. Kennedy

The prosecution shall be conducted by the Attorney General and the Judge Advocate General. The defense counsel shall be Colonel Cassius M. Dowell and Colonel Kenneth Royall.

The Military Commission shall meet in Washington, D. C., on July 8th, 1942, or as soon thereafter as is practicable, to try for offenses against the law of war and the Articles of War, the following persons:

Ernest Peter Burger  
George John Dasch  
Herbert Hans Haupt  
Henry Harm Heinck  
Edward John Kerling  
Hermann Otto Neubauer  
Richard Quirin  
Werner Thiel

The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceeding, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence. The record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,  
July 2, 1942.

**Military Order of January 11, 1945.**

**GOVERNING THE ESTABLISHMENT OF MILITARY COMMISSIONS  
FOR THE TRIAL OF CERTAIN OFFENDERS AGAINST THE LAW OF WAR  
AND GOVERNING THE PROCEDURE FOR SUCH COMMISSIONS**

By virtue of the authority vested in me as President and as Commander in Chief of the Army and Navy, under the Constitution and statutes of the United States, and more particularly the Thirty-Eighth Article of War (10 U.S.C. 1509), it is ordered as follows:

1. All persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals. The commanding generals of the several service and defense commands in the continental United States and Alaska, under the supervision of the Secretary of War, are hereby empowered to appoint military commissions for the trial of such persons.

2. Each military commission so established for the trial of such persons shall have power to make and shall make, as occasion requires, such rules for the conduct of its proceedings, consistent with the powers of military commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it: Provided, that

(a) Such evidence shall be admitted as would, in the opinion of the president of the commission, have probative value to a reasonable man;

(b) The concurrence of at least two-thirds of the members of the commission present at the time the vote is taken shall be necessary for a conviction or sentence;

(c) The provisions of Article 70 of the Articles of War, relating to investigation and preliminary hearings, shall not be deemed to apply to the proceedings;

(d) The record of the trial, including any judgment or sentence, shall be promptly reviewed under the procedures established in Article 501/2 of the Articles of War.

FRANKLIN D ROOSEVELT

THE WHITE HOUSE,

January 11, 1945.