Memorandum

TO: House of Delegates
FR: Rules and Calendar Committee
RE: Resolutions regarding Military Tribunals
DT: February 4, 2002

Resolutions 8C from the Bar Association of the District of Columbia and 8D from the Association of the Bar of the City of New York have been combined into Revised 8C as attached. The reports of the Bar Association of the District of Columbia and the Association of the Bar of the City of New York also are attached.
RESOLVED, that the American Bar Association urges that, with respect to the November
13, 2001, Military Order Regarding "Detention, Treatment, and Trial of Certain Non-
Citizens in the War Against Terrorism," or any similar military order that is issued, the President
and Congress should assure that the law and regulations governing any tribunal will:

1. Not be applicable to United States citizens, lawful resident aliens, and other persons lawfully
present in the United States;

2. Not be applicable to persons apprehended or to be tried in the United States, except for
persons subject to the settled and traditional law of war who engage in conduct alleged to be in
violation of such law of war;

3. Not be applicable to cases in which violations of Federal or state laws, as opposed to
violations of such law of war, are alleged;

4. Not permit indefinite detention of persons subject to the order;

5. Require that its procedures for trials and appeals be governed by the Uniform Code of
Military Justice and provide the rights afforded in courts-martial thereunder, including, but not
limited to, provision for certiorari review by the Supreme Court of the United States (in addition
to the right to petition for a writ of habeas corpus), the presumption of innocence, proof beyond a
reasonable doubt, and unanimous verdicts in capital cases; and

6. Require compliance with Articles 14 and 15(1) of the International Covenant on Civil and
Political Rights, including, but not limited to, provisions regarding prompt notice of charges,
representation by counsel of choice, adequate time and facilities to prepare the defense,
confrontation and examination of witnesses, assistance of an interpreter, the privilege against
self-incrimination, the prohibition of ex post facto application of law, and an independent and
impartial tribunal, with the proceedings open to the public and press or, when proceedings may
be validly closed to the public and press, trial observers, if available, who have appropriate
security clearances.

FURTHER RESOLVED, That the American Bar Association urges the Executive and
Legislative branches, in establishing and implementing procedures and selecting venues for trial
by military tribunals, to give full consideration to the impact of its choices as precedents in (a)
the prosecution of U.S. citizens in other nations and (b) the use of international legal norms in
shaping other nations' responses to future acts of terrorism.
Introduction

On November 13, 2001, the President of the United States issued a military order addressing "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." This order authorizes trial, exclusively by military commission, of "individuals subject to this order." An individual becomes subject to the order if that individual is not a United States citizen, and the President personally determines, 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 Qaeda;
   (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) [above] and

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

The order has raised great controversy. By its terms, it authorizes trials with substantially fewer protections for those accused than would apply were such individuals tried in federal district court, an option available for all terrorists prior to the issuance of the order on November 13th, and which remains available for all terrorists except for those made subject to this order.

This Recommendation urges – by modification to the military order, and by the issuance of appropriate implementing regulations by the Secretary of Defense – that the protections to be afforded to an accused in any military tribunal be raised to the level that would satisfy the requirements of fundamental fairness.

In making this Recommendation, The Bar Association of the District of Columbia (BADC) takes no position on any of the issues raised by the military order except as stated in the Recommendation. That is to say, we assume that the President has authority to order military commissions for the trial of terrorists, but we submit that such commissions nevertheless must be conducted in such a manner as to meet standards generally recognized as fundamentally fair in the United States and by civilized nations of the world. Thus for purposes of this Recommendation, BADC recognizes that military commissions have been used in the past in this country in certain times and under certain circumstances, and that the Manual for Courts-Martial (MCM), the regulation promulgated by the President to implement the Uniform Code of Military Justice (UCMJ) (10 U.S.C. 801-846), states in its Preamble that military commissions constitute one of the agencies of military jurisdiction under United States law. BADC further recognizes that a number of legal scholars believe that the full panoply of constitutional due process rights do not apply to trials of non-citizen war criminal terrorists brought to trial before military commissions.

Having said this, BADC is greatly concerned that the use of military commissions, in the terms authorized in the military order, stands to undermine the stature of the United States as the leader of the
free world both in ensuring fair and just tribunals for trials conducted in our own country, and in calling for other nations around the world to respect civil liberties and ensure independent and impartial tribunals and fair processes in their own justice systems.

Commentators questioning the military order have raised several concerns. Some have particularly questioned the breadth of the order, asserting that it encompasses millions of persons, including millions of resident aliens with green cards, people heretofore undoubtedly protected by the Constitution. See e.g., Anthony Lewis, “Right and Wrong,” New York Times, Nov. 24, 2001. Many, including Senator Patrick J. Leahy, have questioned the military tribunals because the structure of the tribunals does not present the appearance of an independent and unbiased tribunal, or because the procedures are so favorable to the government as to raise doubts that trials before such commissions would be deemed fundamentally fair. Senator Leahy particularly questioned how the United States would be able in the future to challenge the use of secret military courts by other countries against U.S. citizens, and voiced fears that these tribunals “could become a model for use by foreign governments against Americans overseas.” See, e.g., George Lardner, Jr., “Democrats Blast Order on Tribunals,” Washington Post, Nov. 29, 2001, at A22. At least one noted commentator has labeled military commissions as “kangaroo courts.” William Safire, “Kangaroo Courts,”, New York Times, Nov. 26, 2001. Others have written that meaningful judicial review of the commissions is “the most important change needed in the President’s military order,” and that “it cannot be constitutional to exclude the courts altogether.” Walter Dellinger & Christopher H. Schroeder, “The Case for Judicial Review,” Washington Post, Dec. 6, 2001, at A39.

With due regard to the fact that the United States is now involved in an armed conflict, and that public safety and national security concerns are of unquestioned priority and importance, BADC believes that the interests of public safety and national security can well be protected by the use of military commissions which do not so depart from accepted norms of due process in this country, or of fundamental fairness overseas. There are several particulars addressed in the Recommendation.

Recommendation

The Recommendation seeks to balance practical and legal concerns regarding trials of terrorist war criminals, and to preserve traditional core values of the American justice system. It recognizes the very real need to protect a variety of national security interests, including the protection of sources of intelligence and evidence, but believes that the provisions of federal law currently applied in courts-martial, which parallel provisions for protection of classified information applicable in federal district court, including authorizing closing portions of proceedings, already strike a fair and workable balance between a fair process and the protection of national security. These recommendations are not intended or envisioned to require the disclosure of information which would compromise national security. Should there be instances where compliance with the principles enumerated herein would inadequately protect national security interests, such non-compliance should be documented in the record to facilitate appropriate review.

Part (a)

In the first section of the Recommendation, BADC recommends that in all aspects of these commissions, care be taken to ensure that the proceedings are conducted in a manner which meets a standard of fundamental fairness. Issues raised that fall into this category include the composition of the military commissions and the independence of individuals sitting on these commissions, as well as the
procedures and rules of evidence addressed primarily in Part (b) of the Recommendation. The perception of lack of independence and impartiality of military officers, who are dependent on their superiors for promotion, sitting on the commissions, has been raised in the United States. See, e.g., Lewis, supra.

This perception is particularly troublesome abroad, due to the provision that the Commander-in-Chief will personally determine who will be subject to these trials, and that the commissions are convened and reviewed by only two persons – the Secretary of Defense and finally the President. The following exemplifies our allies’ concern.

In Findlay v. United Kingdom, the European Court of Human Rights considered the propriety of the United Kingdom’s court-martial process which (at the time) was quite similar in many respects to the U.S. court-martial system, with strong parallels to the military commissions at issue, in that the same officer (the “convening officer”) who exercised prosecutorial discretion and decided who goes to trial and for what charges, also appointed the members, (as well as appointing the prosecutor and defense counsel). The same officer thereafter served as “confirming officer” to approve the court, a step necessary before the decision of the court-martial could have any effect.

The European Court determined that this organizational structure violated Mr. Findlay’s right to a fair hearing before an independent and impartial tribunal, under Article 6 § 1 of the “Convention for the Protection of Human Rights and Fundamental Freedoms,” and that under the above scenario, “Mr. Findlay’s doubts about the tribunal’s independence and impartiality could be objectively justified."

The military commissions envisioned in the President’s military order raise the very same issues regarding the “independent and impartial tribunal’s as did the case of Findlay. Our allies who are signatory to the European Convention on Human Rights are only too aware of cases such as Findlay and their implications. They look at the order for these military commissions and they do not see a tribunal with adequate independence or structural integrity.

If the world is to deem these military commissions as “independent and unbiased tribunals,” and if these trials are to be viewed as the “full and fair trial” required by the military order, some serious attention needs to be paid to these concerns in particular. Similar attention needs to be paid to all other aspects of these trials which might be deemed to render them less than fundamentally fair.

Part (b)

In Part (b) we call for the application of principles of law and rules of procedure and evidence which comport with the principles and rules applied in courts-martial conducted pursuant to the UCMJ. For more than 150 years, military commissions have been conducted in this country, and at all times they have been guided in their operation by the rules applicable to courts-martial. In the current Manual

1 Findlay v. United Kingdom, 24 EUR. Ct. H.R. 221 (1997)

2 Id. at Pre- §1 and § 76.

3 “In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing
for Courts-Martial, the President has required—consistent with MCM regulations ever since the UCMJ was adopted more than 50 years ago—that military commissions “shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial.” This provision is consistent with Article 36 of the UCMJ, which requires that “pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, . . . may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.” Article 36(a), UCMJ, 10 U.S.C. § 836(a).

The November 13th order is a clear departure from those longstanding regulatory requirements, and carves out for these military commissions a blanket exception to the presumptive statutory requirement. The President specifically exempted these military commissions, finding that compliance with the usual statutory requirement was impracticable: “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.” This is a crucial finding, allowing the abandonment of those principles of law and rules of procedure and evidence that generally apply in district court, and that underlie the provisions of the MCM for trials by courts-martial. BADC notes the absence of any specific reasons supporting this finding. If there are reasons to support a complete withdrawal from the district court model, rather than more tailored and specific departures, they are not specified in the military order.

The rules set out in this military order may possibly be consistent with rules applied by military commissions (and by courts-martial) during World War II or earlier. But courts-martial in World War II were found to raise questions of fairness, and to be overly subject to unlawful command influence, and in 1950 Congress replaced the Articles of War with the UCMJ. The UCMJ implemented a variety of protections, often derived from civilian practice, many based on the Bill of Rights, and established for the first time a civilian court to oversee the military justice system and to review court-martial convictions. The protections deemed appropriate for courts-martial have further evolved and expanded since 1950, and now include the requirement for military judges to preside at general courts-martial, and provide in many cases the opportunity to petition for a writ of certiorari to the United States Supreme Court.

By establishing and authorizing commission rules which—subject to further regulations to be prepared by the Secretary of Defense—differ markedly from the principles and rules currently prescribed for courts-martial, and which afford far less protection to those accused before such commissions than would have been the case under the previously required court-martial principles and rules, the military order has raised worldwide concerns that the United States is operating an unjust system. Spain has already indicated it may not extradite suspected terrorists unless the U.S. agrees to an alternative forum. Such international impressions detract from our national image, and are avoidable. By returning to the longstanding rule, and requiring that military tribunals follow recognized and established military court martial procedures, much of the concern of the critics will be allayed, and the commissions can be the type of forum that all are seeking: namely independent and impartial tribunals.

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Military Commissions - February 2002
providing full and fair trials.

Among the specific concerns that have been raised are that the trials would be able to be held in secret, the accused could be barred from seeing evidence against him, only a two-thirds vote would be needed to impose the death penalty, that the presumption of innocence would not apply, that the standard for conviction would be something less than the "beyond a reasonable doubt" standard that applies for a criminal trial under U.S. civilian law or under the UCMJ, and that the rules of evidence and privilege would not apply, but would be replaced by a lesser standard of "probative value to a reasonable person." All these issues may be addressed with reference to principles and rules now contained in the MCM for trials by courts-martial. Writing rules for military commissions which complied with Article 36 would resolve many of the concerns now being expressed.

Part (c)

In the final section of the Recommendation, BADC calls for the President to establish an independent civilian review tribunal, which BADC suggests might appropriately be comprised of civilian jurists, to review all trials by military commission, and to have power to approve, disapprove, or modify (but not to increase) findings or sentence. When commissions were used during World War II, it appears that some sort of review mechanism, in addition to the review by the convening authority, was employed - initially based on the review function established for courts-martial in the 1920 Articles of War, and set forth in the then applicable Manual for Courts-Martial (1928). A variety of later review bodies were also used. However, the World War II review mechanisms were found insufficient, and in 1950 a distinct appellate review structure for courts-martial was put in place, capped with the civilian Article I Court of Military Appeals (now the United States Court of Appeals for the Armed Forces (CAAF)). No serious court-martial sentence, including death, can today be carried out without extensive judicial review, including the opportunity for petition for certiorari to the United States Supreme Court for cases reviewed by CAAF, and including as well, where appropriate, the opportunity for habeas corpus petitions in federal civilian courts, including the Supreme Court.

In contrast, the military order issued by The President purports to preclude any judicial review:

the individual [subject to this order] shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the 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.

Thus, the order not only does not allow judicial review of the conviction, but it may also amount to a suspension of the writ of habeas corpus for these individuals. As such it purports to leave the authority to execute sentences, even to death, to the President alone, after review by the Secretary of Defense, without any review by anyone not involved in the decision to prosecute. This cannot be considered fundamental fairness and it will not be accepted worldwide as a fair or just process.

While military commissions are not subject to direct review in Article III courts, or in the military appellate courts established in the UCMJ, if the President has inherent power to authorize such commissions, then it follows that the President has inherent authority to establish a review function
clothed with sufficient power and sufficient indicia of independence to be accepted as meaningful judicial review of these convictions and sentences. BADC urges that he do so.

Conclusion

BADC has noted, but does not accept uncritically, the assertion by those who defend the military commissions as currently structured that practical concerns regarding the difficulty of trying terrorists override traditional American (and world) principles of justice. To sacrifice one’s principles as a justification for preserving those same principles is a logical contradiction.

The United States is a great nation, proclaiming “truth, justice, and the American way” to the world. We believe that no nation better upholds the principles of freedom and justice than does ours. The proposed military commissions have been challenged by our friends abroad as failing to meet those standards and principles. It is our national credibility, and our continued position as a nation that believes it stands on the world’s legal and moral high ground, that are now at risk. We can, with reasoned argument, retain military commissions, and all their benefits, if we but modify them to meet our own and world standards of fundamental fairness. If we are to continue to hold the high moral and legal position, implementing these recommendations is mandatory.

It is also important that these issues be addressed prior to the promulgation of rules by the Defense Department implementing the President’s military order. Much can be done in those rules themselves to alleviate current concerns, and to make appropriate principles of law and rules of procedure and evidence applicable. In addition, modest modifications of the President’s military order are also appropriate. With such action, these commissions will be able to be viewed as independent tribunals providing full and fair trials, and to quickly and with reasonable safety adjudicate the charges against these war criminal terrorists in consonance with our nation’s traditional principles of justice and fundamental fairness.

Respectfully submitted,

J. Gordon Forester, Jr.
President
The Bar Association of the District of Columbia

February 2002
Introduction

On November 13, 2001, President Bush issued a "Military Order" (the "Order") regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism." The Order would apply to all non-citizens determined by the President (1) to be members of the international organization known as al Qaeda, or (2) to have engaged in, aided or abetted or conspired to commit, acts of international terrorism or acts in preparation therefore that have caused, threaten to cause or have as their aim to cause injury or adverse affects on the United States, its citizens, national security, foreign policy or economy; or (3) to have intentionally harbored such persons. Such individuals are to be "detained at an appropriate location designated by the Secretary of Defense outside or within the United States." There is no time period set forth with respect to such detention; nor is there any sunset provision, for that matter, for the Order itself.

The Order authorizes the creation of military commissions to try such persons, when and if they are to be subject to prosecution. Further, such individuals, whether detained or tried under the Order, are not permitted under its terms to seek "any remedy" or "maintain any proceeding" in any U.S. federal or state court, any foreign court or any international tribunal. Presumably, this very broad prohibition on any proceeding or remedy is an attempt, when read with the detention provisions of the order, to deny the detainees the privilege of the writ of habeas corpus and thereby prolong their detention as a matter of public safety when necessary, as determined by the President. Further still, although military commissions bear certain similarities to courts martial under the Uniform Code of Military Justice (including, for example, by providing trial by

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1 This report was prepared by the Committee on Military Affairs and Justice, which was established by the Association of the Bar of the City of New York in 1946. Since that time, it has engaged in study and comment on the military justice system and other legal aspects of military affairs, including the use and regulation of the armed forces. The Committee was involved in the drafting of the Uniform Code of Military Justice.

2 The Order is reproduced in Appendix A.

3 The organization known as al Qaeda is widely believed to be the propagator of many terrorist acts directed toward the United States, including the horrific ones of September 11, 2001 in New York City and Washington, D.C.

4 Military Order, at §2(a).

5 Military Order, at §3(a).

6 Military Order, at §7(b)(2).

7 Military Order, at §3(a).

8 10 U.S.C. §§801 - 946 (hereinafter, the "UCMJ").
appointed judges—rather than a jury—of both fact and law), the similarity is misleading. Courts martial follow procedural rules closely parallel to those of the federal criminal courts, while the commissions to be established under the Order are very different and may function without regard to "principles of law and the rules of evidence generally recognized in the trial of criminal cases." Further, they are not subject even to the procedural rules governing courts martial, which include the right of appeal to a higher court and, ultimately, to the Supreme Court of the United States.

The "privilege of habeas corpus" is a fundamental Constitutional right. The Order's literal terms suspend it by preventing subject persons from pursuing any judicial remedy in any court whatsoever. When combined with the provisions for unlimited detention (including the recent rule-making announced by the Attorney General providing for virtually unlimited detention of certain aliens before INS courts), it seems plain that this is a use to which the Order may be put, despite only recent public statements by the Administration to the contrary. If so, such use would be an extreme measure, not used since the time of the Civil War rebellion. Moreover, suspension of the privilege of habeas corpus is permitted only in the two crisis circumstances of rebellion or invasion. Even then, the power to suspend habeas corpus is vested by Constitution only with the Congress and not to the President.

In both the area of the President's authority to create military commissions for the trial of the persons subject to the Order and his authority to detain persons without charge and to suspend habeas corpus, the issuance of the Order raises serious questions of both constitutional law and statutory interpretation, in addition to important international and domestic policy considerations.

This report considers, therefore, whether (1) if the Order were employed for detention or trial of alleged al Qaeda members or supporters, whether in the U.S. or abroad, it would be found to be constitutional; (2) if so, whether it complies with statute; (3) whether its use would be effective as a matter of policy and, (4) if not, what alternatives exist.

Based on the legal and policy analysis and conclusions below, we urge that with respect to this or any similar military order that is issued, Congress and the President should assure that the order will:

1. Not be applicable to persons lawfully present in the United States, including United States citizens and lawful resident aliens;

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9 Military Order, at §1(f).

10 As will be explained, events are fast moving and in the course of preparing this Report, it appears as if the Administration may have changed, or may be changing, its position with respect to this issue.

11 U.S. Constitution, Article 1, Section 9, Clause 2.
2. Not be applicable to persons apprehended or to be tried in the United States, except for persons subject to the settled and traditional law of war who engage in conduct alleged to be in violation of such law of war;

3. Not be applicable to cases in which violations of Federal or state criminal laws, as opposed to violations of such law of war, are alleged;

4. Not permit indefinite detention of persons subject to the order;

5. Require that its proceedings be governed by the Uniform Code of Military Justice and provide the rights afforded in courts-martial thereunder, including but not limited to the right of appellate review by the judicial branch and the privilege of the writ of habeas corpus.

The American Bar Association should address these issues promptly. As the voice of the nation's organized bar, it must speak out to protect the rights afforded in the Constitution and the delicate balance of power the Constitution provides among the branches of our government during times when it may seem popular or expedient to flaunt basic constitutional values. The Military Order should not be allowed to encroach on these values, which underlie the country's power, its role in the world scheme, and its democratic way of life.

The Context of the Order

The Order was issued two months after the September 11, 2001 terrorist attacks against the World Trade Center and the Pentagon ("9/11 attacks") by 18 foreign nationals believed by the U.S. Government to have been associated with the al Qaeda organization based primarily in Afghanistan12. Al Qaeda has been accused of providing the inspiration, training, financing and control of the 9/11 attacks, as well as assaults on two U.S. embassies in Africa, and on the U.S.S. Cole in Yemeni waters. In response to the 9/11 attacks, the Congress on September 18 authorized military action13 but did not declare war. The United States' decision to use force was supported generally by resolutions of

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12 The President has said that al Qaeda operates in no less than 60 nations, including the United States, but because it is believed that Osama bin-Laden, its head, is in Afghanistan, it is that country which is the organization's base. On September 20, 2001, President Bush spoke to Congress: "This group and its leader - a person named Osama bin Laden - are linked to many other organizations in different countries, including the Egyptian Islamic Jihad and the Islamic Movement of Uzbekistan. There are thousands of these terrorists in more than 60 countries. They are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan, where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to plot evil and destruction. The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan, we see al Qaeda's vision for the world." Quoted on White House Web Site, subsection America Responds, visited November 24, 2001.

13 S.J.Res.23, September 18, 2001 (Public Law No: 107-40).
the United Nations Security Council\(^{14}\) and specifically by the North Atlantic Treaty Organization, as well as by many national governments. On September 21, the President declared that a National Emergency had been in existence since September 11.\(^{15}\) After the Islamic fundamentalist Taliban "government" of Afghanistan refused to surrender the al Qaeda leaders, U.S. and U.K. armed forces launched a military campaign against Taliban forces in Afghanistan.

Almost simultaneously with issuance of the Military Order on November 13, Afghan units opposing the Taliban and assisted by U.S. air support expelled the Taliban from the country's major cities, including from its capital Kabul. Although the course of the conflict remains uncertain due to its ongoing nature, it is, as this is written, within the realm of possibility that some al Qaeda leaders (as opposed to soldiers or leaders from the Taliban's armed forces) may be captured and come within the control of U.S. armed forces, at which time it would have to be determined when, where and how they might be tried.

These acts occurred against the domestic backdrop of the discovery of a number of intentionally-inflicted cases of anthrax infection in Florida, Washington, D.C., New York City and Connecticut. Some anthrax-tainted letters were discovered in the mail, including ones delivered to government officers. As of this writing there have been 5 deaths from 18 confirmed cases of anthrax infection.\(^ {16}\) No evidence has been disclosed as of now to indicate that these incidents are related in any way to the 9/11 attacks or even to al Qaeda, but their occurrence - and their undiscovered source - nonetheless informs the public debate about terrorist activities at this time.

Moreover, a large number of foreign nationals have been detained within the U.S.-according to Justice Department officials exceeding 1,000 in number but whose actual number remains undisclosed-many of whom are still in custody. It appears that some if not all of these detainees may be transferred from the control and custody of the

\(^ {14}\) United Nations Security Council Resolutions 1368 (September 12, 2001) and 1373 (September 28, 2001).

\(^ {15}\) In a proclamation of that date, the President declared that "by virtue of the authority vested in me as President by the Constitution and the laws of the United States, I hereby declare that the national emergency has existed since September 11, 2001, and pursuant to the National Emergencies Act (50 U.S.C. 1601 et seq.), I intend to utilize the following statutes: sections 123, 123a, 527, 2201(c) 12006, and 12302 of title 10, United States Code, and sections 331, 359, and 367 of title 14, United States Code." The President reported this declaration to Congress in a letter dated September 24, 2001: "Pursuant to section 204(b) of the International Emergency Economic Powers Act, 50 U.S.C. 1703(b) (IEEPA), and section 301 of the National Emergencies Act, 50 U.S.C. 1631, I hereby report that I have exercised my statutory authority to declare a national emergency in response to the unusual and extraordinary threat posed to the national security, foreign policy, and economy of the United States by grave acts of terrorism and threats of terrorism committed by foreign terrorists, including the September 11, 2001, terrorist attacks at the World Trade Center, New York, at the Pentagon, and in Pennsylvania."

Department of Justice (i.e., Immigration and Naturalization Service) to the control and custody of the Department of Defense, as such transfer is directed by the Order.

It should be noted that events with respect to the Order - including its interpretation and possible application - are fast-moving and may be evolving even as this Report is being prepared. In view of the importance of the matter, the Committee has opted to work primarily from the text of the Order and the powers asserted by the President therein, giving consideration to the discussions and interviews referred to and the material published in the press by members of the Administration, but with the awareness that such views are not only not binding on the President but could again be revised at any time. Indeed, if the powers asserted by the President in the Order were upheld, this President or a future President could use the Order as precedent to exercise those powers in a different context and without the gloss now presented by his representatives.

The President's Authority to Order Trial by Military Commission and To Establish Ad Hoc Rules For Their Use

Authority Cited by the Order.

The Order states that it is issued under three sources of authority:

1. The President's authority as Commander-in-chief of the Armed Forces;
2. The Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224); and
3. Sections 821 and 836 of Title 10, United States Code (the Uniform Code of Military Justice).

Although civilian lawyers are unfamiliar with military commissions, they are nevertheless not unknown in American history. Such commissions have been upheld by the U.S. Supreme Court, and, despite disuse for nearly one-half century during which time the U.S. has participated in several major armed conflicts, they are in fact contemplated by existing law. U.S. military commissions convicted British Major Andre of espionage in the Revolutionary War, tried those accused of the assassination of

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17 This report was informed by statements made at a meeting of the ABA Standing Committee on Law and National Security – held in Washington, D.C. on November 29 and 30, 2001. Persons with whom the authors spoke included the White House Counsel, the General Counsel of the Department of Defense, the Legal Adviser to the National Security Counsel, Counsel to the Chairman of the Joint Chiefs of Staff and others in similar capacities. (Hereinafter, references to this event will be to “ABA Meeting”).

18 It has been suggested that the Order may have been issued by the President under his “Executive Powers,” such as they are, but its specific designation as a “military order” seems clearly intended to invoke his power as Commander-in-Chief and not as the chief executive officer.

19 See, e.g., 10 U.S.C. §826.
President Lincoln, imposed the death penalty on German saboteurs who landed on Long Island during World War II (including one who claimed U.S. citizenship), and tried some 1,200 German war crimes defendants (more than eight times the number tried by the international Nuremberg tribunal) and many Japanese defendants.

**Judicial Authority - The Quirin Case.**

U.S. Supreme Court cases have clearly established the constitutionality of military commissions within at least the prototypical declared war between nations involving members of the armed forces of an enemy state. Less clear is the support for military commissions in the context of an act of mass murder by 18 individuals neither members of the armed forces of any nation state nor, even, organized in a conventional military or even para-military formation.

In *Ex parte Quirin*, impliedly relied upon by President Bush (and explicitly by officials in his Administration) as a precedent for the Order, the Supreme Court upheld during a declared war a military commission’s jurisdiction over German military saboteurs who had landed in the U.S. from a German submarine and then operated in civilian clothing and, therefore, in violation of the laws of war. The prosecution, in opposing the defendants' application for a writ of habeas corpus in *Quirin*, asserted that no federal court had jurisdiction to hear the case because the military commission’s authority was exempt from habeas corpus under the terms of its constitutive order. The Court rejected that contention, holding that even alien members of enemy armed forces were entitled to the writ when found within the U.S. Having found jurisdiction, the Court went on to consider the merits of the military commission’s authority notwithstanding the absence of Fifth and Sixth Amendment protections in the conduct of the trial before the commission, such as the right to trial by jury and other procedural rights that are normal in criminal cases. The Court upheld the authority of the commission, grounded on the time-honored practice of trying unlawful, enemy-state combatants in a declared war by military commission, which the Court found to be exempt from the constitutional right to trial by jury. That exemption exists, the Court said, because the practice of such military proceedings was recognized by the law of war prior to the adoption of the Constitution and was consistently followed in subsequent wars between the U.S. and other countries, as well as during the Civil War.

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20 317 U.S. 1 (1942) ("Quirin").

21 President Bush said on November 19: "These are extraordinary times. And I would remind those who don't understand the decision I made [regarding using a military tribunal] that Franklin Roosevelt made the same decision in World War Two. Those were extraordinary times as well." *Bush Defends Military Court Option in U.S. Attacks*, Reuters, Monday, November 19, 2001, 6:06 PM ET, reprinted at http://dailynews.yahoo.com/b/n/n/20011119/pl/attack_bush_courts_dc_6.html, viewed November 26, 2001.

22 The 1942 order is set forth in Appendix B ("1942 Order").

23 See historical examples from the Revolution, the Mexican War and the Civil War cited in *Quirin, supra*, at notes 9 and 10.
The Quiroin decision addressed a case arising within the territory of the U.S. during declared war, and, accordingly in view of other cases addressing the distinctive rights of citizens and aliens, its constitutional holding must be limited to that situation. With respect to aliens outside the U.S., the authority to convene military commissions to try law of war violations is subject only to statutory and international law limitations. 24

**Legislative Authority - the UCMJ.**

Although the Quiroin Court did not find it necessary to determine whether the President had independent authority as Commander-in-Chief to create such commissions,25 we believe that although the President may have implied authority to do so absent Congressional action, when Congress acts, Congress has the exclusive authority to define the use of military commissions by exercise of its powers "to constitute tribunals inferior to the Supreme Court,"26 "to define offenses against the law of nations,"27 and "to make rules for the government and regulation of the land and naval forces."28 In a manner that appears to be consistent with the constitutionally permitted exclusion from the domestic right to trial by jury of proceedings before traditional military commissions, Congress has specifically authorized military commissions to act under the laws of war.29 As will be discussed, however, use of such commissions - as Quiroin found - requires a war, at the least de facto, if not declared.

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24 "At least since 1886, we have extended to the person and property of resident aliens important constitutional guarantees -- such as the due process of law of the Fourteenth Amendment. Yick Wo v. Hopkins, 118 U.S. 356. But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." Johnson v. Eisentrager, 339 U.S. 763, 770 (1950). Even in U.S. possessions the right to trial by jury was not guaranteed and only extended when so provided by Congress. See e.g., Dorr v. U.S., 195 U.S. 138 (1904). Citizens are, however, entitled to trial by jury, even abroad, except in time of war. See, Reid v. Covert, consolidated with Kinsella v. Krueger, 354 US 1 (1957); Kinsella v. Singleton, 361 US 234 (1960); Grisham v. Hagan, 361 US 278 (1960); and McElroy v. Guariglia, 361 U.S. 281 (1960), which overruled prior UCMJ court martial/commission jurisdiction over US citizen spouses accompanying US forces abroad, invalidating inconsistent provisions of the UCMJ. This is the background for Pub. L. 106-523, 18 U.S.C. 3261 et seq., which creates Article III jurisdiction in such cases to fill the gap. In Reid v. Covert the Court allowed court-martial jurisdiction to continue over such persons in time of war, but the Court of Military Appeals limited that jurisdiction to declared war; U.S. v. Averette, 19 C.M.A. 363 (1970). See also, The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap, 95 Am.J.Intl.L. 446 (2001).

25 Id., at 29.

26 U.S. Constitution, Article I, Section 8, Clause 9.

27 U.S. Constitution, Article I, Section 8, Clause 10.

28 U.S. Constitution, Article I, Section 8, Clause 14.

29 In addition to more direct authority, Congress has recognized military commissions in passing. The legislative history of the War Crimes Act of 1996 includes the statement by the House Judiciary Committee that such statute "is not intended to affect in any way the jurisdiction of any court martial, military commission, or other military tribunal under any article of the Uniform Code of Military Justice or under the law of war or the law of nations." H.R. Rep. No. 104-698 at 12 (1996).
Substantively, Article 21 of the UCMJ, among the statutory provisions cited in the Order as authority for its issuance, provides that the UCMJ does not deprive military commissions of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts or other military tribunals. The classic case where both the offender and the offense are covered is when Japanese General Yamashita was tried for war crimes committed against U.S. personnel during the then recently ended World War II. Either the defendant's whereabouts (Yamashita was in custody, taken during battle) or the predicate offense (traditional war crimes) could serve as a basis for jurisdiction in that case. As an example of jurisdiction over the offender, the U.S., as an occupying power, could use military commissions to try persons within occupied territory pending establishment of civil government, as it did extensively in the post-war occupation of Germany and Japan. This was so whether or not the offense related to the war, generally applying local law then in effect. Article 21, and therefore, statutory support for military commissions (and constitutional authority within the U.S. under Quirin), reaches its limits as to persons who are neither offenders, nor charged with offenses, traditionally tried under the law of war by such military commissions.

**Offenses-The Law of War.**

With respect to the offense, it is not at all clear that at the time of the 9/11 attack the U.S. was engaged in a war or even armed conflict to which the law of war could be

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30 10 U.S.C. 821.

31 Despite the President's assertion of Section 21 as authority, some commentators argue that such Section allows the President's authority without creating it. The distinction is metaphysical if Congress has the authority, as we believe, to provide preemptively for the rules and regulations of the armed forces and compliance with the laws of nations, including the laws of war, if it chooses to do so. Consequently the terms under which Congress permits the President to act concurrently are equivalent to rules authorizing the President to act. Compare Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952) (the "Steel Seizure Case") where the President was found to have acted directly contrary to the specific intent of Congress in a matter subject to Congressional power.

32 Emphasis supplied.

33 Not long before the adoption of the Constitution, Americans were on the receiving end of the military justice of an occupying power when, during the Revolutionary War, British military tribunals became the default criminal justice system successively in Boston, Newport, New York, Philadelphia and Charleston, some of whose judgments continued to be respected by American authorities after the war. See generally, F. B. Wiener, Civilians under Military Justice, (Chicago, 1967) at 134.

34 The Department of Defense defines the law of war as follows:

- **3.1. Law of War.** *That part of international law that regulates the conduct of armed hostilities. It is often called the law of armed conflict. The law of war encompasses all international law for the conduct of hostilities binding on the United States or its individual citizens, including treaties and international agreements to which the United States is a party, and applicable customary international law.*

applied. International treaty law has black letter rules defining when the law of war (or as now often termed, the law of armed conflict) applies. Common Article 2 of the Geneva Conventions provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."

Thus, for a state of war to exist under the classic definition of war, the conflict must be between states. "The law of war has been conceived primarily for armed conflicts between States or groups of States, that is, for international armed conflicts." This international law requirement is unfulfilled with respect to the persons covered by the Order. It is fulfilled for international law purposes with respect to Afghanistan, with whose de facto Taliban government the United States is engaged in armed conflict (albeit an undeclared war under US domestic laws).

Conflicts not between states are covered by the laws of war to a lesser degree, as made more precise in the 1977 Protocols. Protocol II for "non-international conflicts", that is, non-state conflicts, applies to those conflicts which "take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol." Clearly this definition-also-does not apply to al Qaeda, as it does not exercise control over any part of U.S. territory.

Illustrative of the need for a predicate war is the 1865 opinion of Attorney General James Speed issued with respect to whether military tribunals (by which he meant the courts for military justice generally) could be used to try the civilian assassins of President Lincoln, whom he found to be serving the war aims of the enemy. He found

\[ \text{d510077p.pdf (emphasis supplied). The law of war is not, however, coextensive with the broader field of international law or law of nations. For example, money laundering and drug trafficking are the subject of international treaties, but do not relate to the conduct of hostilities.} \]

\[ ^{35} \text{For example, Convention Relative to the Treatment of Prisoners of War, Article 2, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135.} \]

\[ ^{36} \text{Frederic de Mulinen, International Committee on The Red of the Red Cross Handbook on the Law of War for Armed Forces (ICRC 1987), at 3.} \]


\[ ^{38} \text{It has been suggested that the limitations on the international law of armed conflict tending to exclude most violence not between nations was deliberately intended to deny belligerent status to dissidents so that national authorities a freer hand in suppressing them. See generally George H. Aldrich, The Law of War on Land, 94 A.J.I.L. 42 (2000). "Perversely, the application of Protocol II is far too narrow....It is perhaps cynical, but undoubtedly true, that this narrow applicability of Protocol II explains why there are now 147 states party to it." Id. at 60.} \]
that such persons were subject to the laws of war and trial by military tribunal because - in times of war:

"A bushwacker, a jayhawker, a bandit, a war rebel, an assassin, being public enemies, may be tried, condemned and executed as offenders against the laws of war. ... The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle."\(^{39}\)

Some have argued, including officials in the Bush Administration, that this is a "new kind of war," one in which state participants are not required for a determination of war because of the amorphous nature of international terrorism. Others have argued that while a "war" is required for the Order to be lawful, the armed conflict of the United States with Afghanistan's Taliban puts the country at war for some if not all domestic law purposes, the existence of the conflict would, thus, allow the Order's actions toward the non-citizen residents to whom it is directed by virtue of their nexus with international terrorism generally, even if they have no relationship to Afghanistan or the Taliban. Still others have refined this latter argument by "imputing" the al Qaeda to the Taliban, or, even, vice-versa, noting that recent evidence indicates that al Qaeda may have in fact been controlling the Taliban.\(^{40}\)

Although the United States has not declared war and the President, in fact, said that he was not seeking a declaration of war, it is not difficult to find that for international law purposes the United States is at war in Afghanistan.\(^{41}\) However, in this regard, it is important to note that the Order is not limited to the "enemy aliens" with whom we are at war, i.e., all Afghans, much less to the Taliban and not even to al Qaeda. It goes to all non-citizens, U.S. resident or not, alleged to commit the acts set forth in it. In contrast, had the Order been limited to enemy aliens, members of an armed body, they would be classic "offenders" subject to the law of war, including the Geneva Protocols. Had the Order been directed to the al Qaeda and the Taliban as a combined entity, it might arguably be easier to characterize that joint force as an enemy subject to the laws of war during a time of war with them. Separating al Qaeda from the state elements of territory, governance and organized troops makes it that much more difficult to view as a military, as distinguished from a criminal (though terrorist) organization.


\(^{41}\) The conceptual difficulty of characterizing this conflict is typified by the fact that although the U.S. may be at war "in Afghanistan", it is not at war "with Afghanistan." Nationals of Afghanistan are not per se "enemy aliens" and may even be allies, without any reliable mechanism, legal or otherwise, to distinguish friend from foe. It is an ambiguous environment in which to apply the black and white distinctions of the classic law of war.
The 1942 Order, which served as the basis for the military commission in *Quirin*, stated the specific, objective and wholly traditional standard. It applied to:

"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... ."

It is doubtful whether the constitutional logic behind the Court's opinion in *Quirin* upholding that order could be stretched to apply instead to the current Order's novel application to "any individual who is not a United States citizen with respect to whom I determine ... there is reason to believe that such individual ... has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, 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... ."

This point, it should be emphasized, does not diminish the right of the US armed forces fighting in Afghanistan to both capture and try by military commission abroad members of either the Taliban or al Qaeda who are participating in the combat. Abroad, many of the constitutional guarantees under the Fourth, Fifth and Sixth Amendments do not apply to non-citizens, and certainly not to persons captured during hostilities conducted by the US armed forces.

**Offenders - In the U.S. and Abroad.**

With respect to determining the offender status of persons subject to the Order, civilians residing in the U.S. and not in or near a theater of military operations or engaged as combatants are examples of offenders who have never been subject to the jurisdiction of military commissions under our laws. For example in the Civil War *Ex parte Milligan* case, "Milligan, a citizen twenty years resident in Indiana, who had never been a resident of any of the states in rebellion, was found not to be subject to trial by a military commission because he was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents." *Quirin, supra*, at 45. Yet, non-citizen, U.S. residents accused of the crimes set forth in the Order relating to 9/11, such as aiding, abetting and harboring al Qaeda, but who may fall far short of violating the laws of war applicable to saboteurs and the like, are among the direct targets of the Order (compare this to Mr. Milligan, who was accused of rebellion).

42 Order, at Sec. 2.

43 See e.g., *United States v. Verdugo-Urrutia*, 494 U.S. 259 (1990)

44 See e.g., *Johnson v. Eisentrager*, 339 U.S. 763 (1950)

45 71 U.S. 2 (4 Wall.) (1866)
The application for domestic statutory and constitutional purposes of the laws of war should be distinguished from the international law regarding the existence of a state of war or the right of the U.S. to take military action in self-defense against an attack or against a country that harbors the attackers. As indicated above, the latter action has been affirmed internationally by the Security Council of the United Nations and by the North Atlantic Treaty Organization and domestically by Congress. Moreover, as also indicated above, there is no substantive issue as to the statutory or constitutional authority of a military commission to try aliens outside the U.S.

The issue of greatest importance is whether the present circumstances permit the application of the laws of war under domestic law to deny the application of constitutional rights otherwise available to persons within the U.S. That question is most acute as to a circumstance in which armed members of the Taliban, with whom we are engaged in an undeclared war, say, or of al Qaeda, the specific subjects of the Order and whose personal status is less clear, are found entering or already in the United States to commit hostile acts.

For these persons (at least unlawful, Taliban combatants), the subject matter authority for the President to utilize a military commission to try such persons based on their acts seems clear under the Constitution as interpreted by Quirin. With respect to the individual status of such captured "combatants," the Taliban members would almost certainly qualify as combatants under the law of armed conflict (although potentially unlawful, depending on such factors as their uniforms and behavior) whose prosecution is subject to the provisions of the international law of armed conflict. The al Qaeda members are more difficult to characterize, depending on the evidence linking them to being controlled by, or controlling, the Taliban, a state-like entity, leaving some doubt as to the legality of the use of a commission to try them in the United States without a jury trial.

On the other hand, the persons charged only with "aiding," "abetting," "conspiracy" or simply "harboring" the other persons subject to the Order, that is, people who have committed traditionally civilian criminal acts rather than the "commission" of military-like terrorist acts themselves may not be tried in a military commission as the Order contemplates. Such persons are guaranteed by the Bill of Rights, as interpreted by the Supreme Court in Milligan and Quirin, a trial by jury. The aliens detained by the U.S. and charged with crimes were accused of subsidiary offenses, such as immigration violations, money laundering, credit card fraud or other money-raising crimes. Persons charged with civil crimes are exceedingly unlikely to come within the class of persons traditionally tried by the law of war, and, to such extent, the Order must be facially invalid.

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46 Whether the Taliban is recognized as the de jure government of Afghanistan (which is doubtful considering that that government has been recognized neither by the United Nations nor most of the international community) or as a dissident force being fought by the lawful government, their status for law of war purposes is the same. In the first case, there would be a conflict between states subject to the 1949 Geneva Conventions. In the second, under 1977 Geneva Protocol II, as noted supra, they could be deemed dissidents in control of territory of a High Contracting Party and also subject to the protection of that treaty.
Substantive Overreach - Pervasive Death Penalty and Unrelated Terrorism

A corollary of the jurisdictional application of the laws of war is the resulting substantive penalty. The traditional laws of war are draconian in applying the death penalty to irregular combatants out of uniform and not carrying arms openly. Mere presence in the enemy force constitutes the offense without more. Thus, if the laws of war apply to such irregulars, the death penalty follows. If the laws of war do not apply, a military commission has no jurisdiction. This extreme black and white result should require the greatest caution in extending the laws of war to situations not traditionally contemplated.

Moreover, the Order by its terms may be applied to the commission of acts of international terrorism whether or not related to al Qaeda or the 9/11 attacks. It could, for example, be applied to prosecute aliens in the U.S. supporting terrorism in Northern Ireland having "adverse effects on ... [U.S.] foreign policy", a legitimate government measure but far removed from a U.S. war. This broad jurisdictional reach is consistent with the concept of a "war on terrorism" but inconsistent with any definable "war" in the sense known to U.S. jurisprudence.47

As these principles are therefore applied to the Order, the Order does not confine its scope to either offenders or offenses traditionally tried by the law of war, as provided by law, implied in the Constitution and required by the Quirin Court. Absent Congressional action, we cannot see how the President in the current situation has authority permitting him to convene military commissions to proceed inside the U.S. without providing grand jury indictment, jury trials or the right to confront witnesses, among other exceptions from constitutionally guaranteed rights.48

We must, therefore, conclude that the Order substantively violates both Article 21 of the UCMJ and, as to persons within the U.S., the Constitution, as well, to the extent that it covers offenses and offenders not covered by the law of war as historically

47 The Justice Department recently released a partial list of those persons arrested in connection with the anti-terrorist campaign (although not necessarily pursuant to the Order), including, for some of them, the crimes of which they are accused. It is reported that some of the crimes alleged are civilian in nature, even if the larger purpose is to raise money for an organization like al Qaeda. For example: "Three more men on the list were indicted in New Jersey for conspiracy to embezzle, according to Michael Drewniak, a spokesman for the United States Attorney’s office in Newark. The men, Hussein and Nasser Abduali and Rabi Ahmed, were charged with conspiring to buy, receive and possess $43,270 worth of stolen corn flakes. All three have been released pending trial." Lewin, Accusations Against 93 Vary Widely, New York Times on the Web, November 28, 2001.

48 In his concurring opinion in Hirayabashi v. U.S., 320 U.S. 81 (1943), Justice Murphy said, "We give great deference to the judgment of the Congress and of the military authorities as to what is necessary in the effective prosecution of the war, but we can never forget that there are constitutional boundaries which it is our duty to uphold. It would not be supposed, for instance, that public elections could be suspended or that the prerogatives of the courts could be set aside, or that persons not charged with offenses against the law of war (see Ex parte Quirin, 317 U.S. 1, 63 S.Ct. 2, 87 L.Ed. 3) could be deprived of due process of law and the benefits of trial by jury, in the absence of a valid declaration of martial law." Id. at 110
described in *Quirin*. That possible legal infirmity and, at the very least, uncertainty, severely undercuts the policy objectives of the Order as more fully discussed below.

**Procedural Concerns Under the UCMJ**

In addition to the substantive issue, there is a procedural concern. The Order cited as additional authority Section 36 of the UCMJ, which provides that in cases under the UCMJ the President may prescribe by regulation the procedures for military commissions subject to two qualifications. First, the procedures "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." In the Order, President Bush declares *in haec verba* that such principles and rules are not practicable to apply under the order. That extraordinary finding is presumably his prerogative, whether or not it is a wise exercise thereof.

Secondly, and more importantly for present purposes, Article 36 specifies that the procedures "may not be contrary to or inconsistent with this chapter [the UCMJ]." The Order only outlines the parameters for procedures to be implemented by orders and regulations of the Secretary of Defense. However, the framework of the Order is already inconsistent with the essential elements of due process provided for in the UCMJ in numerous respects. Accordingly, if Section 36 is indeed necessary authority for the Order, then the Order appears to be procedurally defective.

**Exclusive Jurisdiction to Military Commissions**

Finally, the Order states that "with respect to any individual subject to this order ... military tribunals shall have exclusive jurisdiction with respect to offenses by the

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50 Such procedures had not yet been issued at the time this Report was prepared.

51 Differences between the procedures required by the Order and those assured by the UCMJ include the following:

- Proof beyond reasonable doubt (10 U.S.C. Sec.851(c)), whereas the Order does not specify a standard of proof, which could under minimum standards of the laws of war be less than proof beyond reasonable doubt.
- The right of the defendant to be present at proceedings (10 U.S.C. Sec. 839), whereas the Order allows for the possibility of secret ex parte proceedings (Sec. 4(c)(4)(b).
- Defense role in selection of the court-martial panel, whereas the members of a military commission convened under the Order would not be subject to challenge by the defense.
- Defense right to choose counsel (10 U.S.C. Sec. 838(b)) whereas the Order limits defense counsel to attorneys "subject to this order" (Sec. 4(c)(5).
- Unanimity in applying death sentence (10 U.S.C. Sec. 852(a)), whereas the Order provides for "conviction only upon the concurrence of two-thirds of the members of the commission" (Sec. 4(c) (6).
- Appellate review of decisions (10 U.S.C. Sec. 866, 867, 867(a), 869), whereas the Order precludes any appellate review by the courts (Sec. 7(b)), and allows review only insofar as the regulations promulgated under the Order may provide as a matter of administration.
individual..." This grant of exclusive jurisdiction to military commissions appears to conflict with the Congressional intent set forth in Article 18 of the UCMJ, which provides that for purposes of prosecutions for violations of the law of war, general courts martial shall have jurisdiction concurrent with military tribunals:

"General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."

Inasmuch as the UCMJ by its terms applies to prisoners of war, we conclude that Order conflicts with Congress' determination that courts martial and military tribunals (commissions) should have concurrent jurisdiction with respect to prosecution of POWs for violations of the laws of war.

**Preventive Arrest, Indefinite Detention and the Suspension of Habeas Corpus**

The provisions of the Order regarding detention of persons subject to it permit seemingly indefinite detention without charges, trial, or the right to seek a remedy in federal or state courts. Thus, they provide for 'preventive arrests,' unlimited detention and literally suspends the privilege of the writ of habeas corpus, notwithstanding statements by Administration officials to the contrary. These provisions are clearly unconstitutional as to the writ of habeas corpus and extremely controversial as to detention.

Preventive arrests are anathema to American values. It is bedrock in American constitutional law that the deprivation of liberty may only occur pursuant to the principles and mechanisms of due process enshrined in the Bill of Rights. To determine whether liberty has, in fact, been properly deprived, the Framers maintained the privilege of the writ of habeas corpus.

**Habeas Corpus**

The privilege of the writ of habeas corpus is considered a "magna carta of the kingdom." Justice Story said of it:

It is ... justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in...

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52 Military Order, §7(b)(1).

53 UCMJ, §802 (a)(9).

54 The Order provides only that the detainees be treated humanely; given adequate food, water, shelter and medicine, allowed the free exercise of religion, and otherwise be subject to rules to be made by the Secretary of Defense. It even provides that detention may be outside the borders of the United States. Order, at §3. We assume that circumvention of the rights of aliens within the U.S. by arrest and forced removal from the country for delivery to a remote trial location as literally permitted by this section of the Order (i.e., kidnapping) would violate those rights.

As noted, the President's Order states that the authority for its issuance is (1) the President's authority as Commander-in-chief of the Armed Forces, (2) the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and (3) Sections 821 and 836 of the UCMJ.

The Constitution states in Article I (the enumeration of Congress' powers), Section 9 (a list of limitations on those Congressional powers):

Clause 2: The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.

It seems plain from the text of the Constitution that only the Congress, not the President—whether as Commander-in-chief or otherwise—has the authority to suspend habeas corpus, and then only in the two circumstances mentioned. The Supreme Court has upheld that principle and the most prominent of commentators on the Constitution have agreed. 61

The other bases cited in the Order for the President's authority to detain the subject persons indefinitely without recourse offer no support either. The text of Congress' Resolution Authorizing Use of Military Force—the second cited basis—does nothing to alter habeas corpus whatsoever, much less authorize the President to do so. In fact, it plainly refers specifically and solely to the use of military force, hence its title. Section 2, the substantive section of the Resolution, is titled "Authorization For Use Of United States Armed Forces" and provides simply: "That the President is authorized to use all necessary and appropriate force ...,"62 with nothing said about arrests, detentions, habeas corpus or the like. It therefore appears clear that the Use of Force Resolution cited by the President as a basis for his authority in issuing the Order also does not, in fact, provide such authority.

Finally, the Order refers for authority to Sections 821 and 836 of the UCMJ, both of which go to the issue of military commissions, as discussed, supra. Neither provide Congressional suspension of the privilege of habeas corpus or have anything to do with that subject but are cited, apparently, for authority regarding the Order's establishment of

61 See Ex parte Merryman, 17 Fed. Cas. 144 (No. 9487), (C.C.D. Md. 1861) (Chief Justice Taney, sitting as a circuit judge, wrote: "I had supposed it to be one of those points in constitutional law upon which there was no difference of opinion, ... that the privilege of the writ could not be suspended, except by act of Congress." Id. at 148.) After Lincoln ignored the decision and kept Merryman in prison, Congress acted to authorize the suspension of the writ of habeas corpus. See also, St. George Tucker, Blackstone's Commentaries 1:App.290-92 (1803), reprinted in The Founders' Constitution, supra, at 329: "In the United States, [the writ] can be suspended, only, by the authority of congress; but not whenever congress may think proper; for it cannot be suspended, unless in cases of actual rebellion, or invasion." Accord, Story, Commentaries on the Constitution, supra, at 342 ("It would seem, as the power is given to congress to suspend the writ of habeas corpus in cases of rebellion or invasion, that the right to judge, whether exigency had arisen, must exclusively belong to that body.")

62 The Resolution is set forth in Appendix C.
This provision of the Congressional act differs profoundly from the President's Order with respect to the application of habeas corpus to aliens arrested within the United States and suspected of connection to terrorism, which provides no release process, no certification process, no right to a petition of habeas corpus and no right to appeal adverse decisions. The analogy to the Steel Seizure Case is apparent. There, the President-by seizing strike-bound steel mills in order to continue production of steel to supply the armed forces then engaged in Korea-acted contrary to the will of Congress expressed through various statutory schemes in an area the power over which belonged to Congress. Of such extreme and far reaching Presidential behavior contrary to the expressed will of Congress, Justice Jackson wrote in his concurring opinion:

When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system. ... In short, we can sustain the President only by holding that seizure of such strike-bound industries is within his domain and beyond control by Congress. Thus, this Court's first review of such seizures occurs under circumstances which leave presidential power most vulnerable to attack and in the least favorable of possible constitutional postures.

Id., at 637-638. Justice Jackson continued his analysis by finding that neither the President's Constitutional 'Executive' powers, nor his Commander-in-Chief authority (whether in time of war de facto or war de jure), nor his obligation to faithfully execute the laws could trump the Constitutions' plain grant of authority to Congress to raise and support armies and to provide and maintain a navy.66

Here, as noted, the power to suspend habeas corpus is granted to the Congress by Article I of the Constitution, and the USA Patriot Act—which fails to suspend the privilege—is the act of Congress on the subject. It is, therefore, our conclusion that the Order, which effectively seeks to suspend the privilege of habeas corpus for those aliens subject to it and detained under it, impermissibly seeks to exercise a power not only reserved to the Congress but one already exercised by the Congress in this specific area in a contrary manner. As such, determinations under the Order will likely be subject to successful Constitutional attack on this ground, leading to a significant amount of litigation at a time when efficiency and speed of process is the desired result. The Order in this regard, therefore, not only appears to be illegal, but unwise.

In response to questioning from various sources, including members of this Committee, Administration officers stated that the Administration had no intention of

66 Nor, for that matter, did "inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations" provide the President authority to seize private industry to aid the war effort, id., at 645.
opposing the right of detained persons to seek the writ of habeas corpus, and that the Order was not intended to do so despite the language of Section 7. They acknowledged that the nearly identical provisions of the 1942 Order in question in Quirin did seek to suspend habeas corpus and had been ruled unconstitutional. Such informal statements about the true meaning of the Order or the President's intent in issuing it, without amendment of the Order or Congressional legislation, are less than satisfactory.

**Severability**

If a provision of the Order, such as suspending habeas corpus, were to be found unconstitutional, it is unclear what effect that finding would have on the remainder of the Order, since the Order lacks a severability provision. In Quirin, supra, the 1942 Order lacked a severability provision and its attempt to suspend habeas corpus was found to be invalid without affecting the substance of the military commission's authority set forth in the remaining portion of that order. The Court in Quirin did not discuss severability.

Although it used virtually the same language for the suspension of habeas corpus which appears in the Order (and which was found invalid), the 1942 order expressly provided for the possibility of correction by the regulations to follow:

"[S]uch 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."

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67 See, Comments by Assistant Attorney General Michael Chertoff and White House Counsel Alberto Gonzales, ABA Meeting.

68 They may also be less than accurate. It is reported that Attorney General Ashcroft did try to get Congress to suspend the privilege of the writ of habeas corpus when it adopted the USA Patriot Act. Newsweek, Dec. 10, 2001, at 48, reports that the secret first draft of the anti-terrorism bill presented by the Justice Department had a section entitled "suspension of the Writ of Habeas Corpus." Rep. Sensenbrenner (Chairman of the House Judiciary Committee said: "that stuck out like a sore thumb. It was the first thing I [crossed] out." Other claims made by Administration officers likewise do not flow from the text of the Order, e.g., that the Order can provide justice "close to where our forces are fighting," Alberto R. Gonzales, Martial Justice, Full and Fair, New York Times, November 30, 2001 ("Gonzales Op-Ed"), whereas the Order can plainly be used for trial in the United States and even provides that the Department of Justice transfer to the Department of Defense subject persons it is detaining; it cannot be imagined that Judge Gonzales is proposing that persons of that group who might be tried under the Order would be shipped to Afghanistan to be close to the combat during their trial. Judge Gonzales also writes that "The order preserves judicial review in civilian courts," whereas Section 7 specifically precludes any proceeding or any remedy in any court, and when asked at the ABA meeting whether this Section meant denial of the writ of habeas corpus, the Assistant Attorney General for the Criminal Division Michael Chertoff said it did not but was intended to "prevent injunctions and appeals from military courts," thus at odds with Judge Gonzales' assertions published the next day.

69 1942 Order.
The Order provides no such opportunity for subsequent correction and, thus, the courts may take a different view of the absence of a severability provision than did the Quirin court.

**Detention of Enemy Aliens**

Congress has also acted, albeit not recently, in the form of the Alien Enemies Act, 50 U.S.C. 21, permitting the detention or expulsion of aliens over age 14 within the US who are citizens of a foreign government or state with which the US is in a declared war or subject to "any invasion or predatory incursion ...perpetrated, attempted or threatened against the territory of the United States." 70 While the 9/11 attacks may have constituted a "predatory incursion against the territory of the United States", they were not perpetrated by a "foreign nation or government" as required by Section 21 and, thus, the Alien Enemies Act does not apply to the 9/11 attacks.

These provisions - including this statute, its predecessors and those like it (e.g., those establishing military areas within the United States during World War II, serving as the basis for Executive Order 9066 in 1942), were classically applied, if at all, in declared war against the entire class of enemy aliens, all citizens of the enemy state, along with the expropriation of enemy property. 71 In World War II, they were also put into effect ruthlessly against Japanese nationals found in the United States, in an operation now viewed as a national disgrace. Similar steps were taken against U.S. citizens of Japanese descent. 72 It is noted that the Commission on Wartime Relocation and Internment of

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70 Section 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 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.

71 "The resident enemy alien is constitutionally subject to summary arrest, internment and deportation whenever a "declared war" exists. Courts will entertain his plea for freedom from Executive custody only to ascertain the existence of a state of war and whether he is an alien enemy and so subject to the Alien Enemy Act. Once these jurisdictional elements have been determined, courts will not inquire into any other issue as to his internment. Ludecke v. Watkins, 335 U.S. 160." *Johnson v. Eisentrager*, supra at 775.

Civilians, established in 1980 by Congress to review the 1942 Executive Order providing for the internment found there was "no justification in military necessity for the exclusion, ... there was no basis for the detention."73

Broad, class-based detention or expulsion, when confined to enemy aliens, may have made sense in the context of traditional war between national states against persons owing allegiance to the enemy and reasonably be expected to act on its behalf, but such actions have little relevance to the contemporary crisis involving a cross-border, multinational extremist culture and not an enemy state or states. Such a culture has no "citizens," and, thus, determining who to detain or expel as the Order aggressively does - other than based on their individual actions - is nearly impossible without casting a net so broad as to be pernicious. Consequently it is not surprising that the Order failed to cite 50 U.S.C. 21 or indeed any statutory authority for its unlimited detention provisions.

The Administration has sought to portray the Order as applying only to enemy combatants. The White House Counsel said recently that "The order covers only foreign enemy war criminals"74 - and even then only for "violations of the laws of war."75 The Order itself, however, does not in fact specify either the claimed limitation on the class of subject persons or the claimed limitation on the activities by which they become subject to the Order.

The detention provisions of the Order are, therefore, surprising, both in view of the U.S. acknowledgment of its egregious error in World War II - oft cited as precedent - and of the present acquiescence by Congress (through the USA Patriot Act) in expanding the detention powers over aliens suspected of terrorist connections and the specific provision of the right of habeas corpus with appeals from decisions when doing so.

No act of Congress has been found that provides for either the detention provisions referred to in the Order or for authority for the President to act in the area. Simply, the Order purports to give the President this power by fiat. That claim will most certainly be tested by habeas corpus proceedings within the U.S. to determine whether the Order trumps the Constitution's award of authority in this area to Congress, which has acted through Section 412 of the USA Patriot Act.

With respect to indefinite detention without remedy, on the one hand, we have no doubt that regarding aliens in the United States during time of declared war, the federal government could create a scheme substantially restricting the rights they were previously provided that would be upheld by the courts. Much, however, would depend on the factual circumstances. In World War II, the internment of Japanese nationals (as


74 Gonzales Op-Ed, supra.

75 ABA Meeting, November 30, 2001.
distinct from the internment of U.S. citizens of Japanese descent) occurred at a time of very substantial and genuine threats to the security of the nation as a whole. In fact, Chief Justice Rehnquist, in perhaps a prescient speech reviewing this history in May of 2000 provided this conclusion: "The authority of the government to deal with enemy aliens in time of war, according to established case law from our Court, is virtually plenary." In the present circumstances, however, absent any enemy nation, it is impossible to identify the nationals or citizens of the "enemy." Consequently, the term "enemy alien" has no determinable meaning.

We conclude that the Order's provision of indefinite detention of aliens suspected of terrorist connections or harboring those who have them-particularly given the denial of all remedy-is improper since the President does not have the Constitutional authority to issue an order applicable to aliens in the U.S., and Congress has already provided a different scheme with respect to such persons. As a practical matter, we believe that these provisions of the Order, if utilized, will not only lead to widespread litigation testing both the President's authority to issue it and as it may be applied to the individual detainee, which litigation is likely to be successful at least with respect to the question of the Order's suspension of habeas corpus.

Even if the President has the authority to detain persons within the classes targeted by the Order, it would remain to be determined whether a particular detainee within the U.S. is within one of those classes. Therefore, such habeas corpus proceedings might extend not only to determination of a commission's substantive and procedural authority, but also to whether as a matter of fact the detainee came within the jurisdictional predicate of the Order, namely, membership in al Qaeda or commission of certain kinds of involvement in acts of international terrorism or harboring of persons under the prior categories. While the Order purports to give the President authority to define such persons, the corresponding findings may themselves be subject to finding in habeas corpus proceedings, equivalent to challenging probable cause for arrest. This would have the result of placing before the federal District Courts the very issues—whether an individual is an al Qaeda member—the Administration is seeking to keep from those courts.

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76 Rehnquist Remarks, supra.

77 Because of this conclusion, it is not necessary to determine whether the circumstances permitting suspension of the privilege of the writ of habeas corpus - rebellion or invasion - have occurred and have been found to have occurred by the Congress, although it seems plain that the former event has not and the latter is dubious.

78 It is interesting to note that the delays associated with such challenges do not seem to concern the Administration. The Department of Defense General Counsel, William Haynes, when asked by the Committee at the ABA Meeting whether Section 7 was being interpreted as a prohibition on habeas corpus proceedings responded: "I am sure that this will be challenged when and if this [Order] is employed," concluding that he believed the courts would uphold the President's authority.

79 By comparison in the Quirin case, the defendants were acknowledged members of the German military and consequently, without dispute, subject to the claimed jurisdiction of the 1942 commission.
International Law

International law may also have a bearing on the Order. Common Article 3 of the four Geneva Conventions of 1949, which establishes minimal standards even in armed conflicts not of an international nature, and a fortiori in international conflicts, in paragraph 1(d) prohibits persons who have laid down their arms from being subjected to "the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all of the judicial guarantees which are recognized as indispensable by civilized peoples."

The U.S. is a party to, and has ratified, the Geneva Conventions and in 1997, violations of Common Article 3 were added to the definition of "war crimes" for the purposes of the War Crimes Act of 1996\(^6\). Compliance with such international laws of armed conflict is specifically required of the U.S. Armed Forces pursuant to Department of Defense's Law of War Program\(^7\).

It follows that the international standard has become binding U.S. law. It would be unlawful for the President to authorize a procedure that resulted in the passing of sentences or carrying out executions without such a regularly constituted court affording the judicial guarantees required by the Common Article 3.\(^8\)

Pending issuance of the regulations for commissions, it would be premature to speculate whether they would violate the applicable international standards, which it should be noted do not require trial by jury, U.S. rules of evidence or habeas corpus. In fact, it is has been reported that a Swiss military court has tried at least one war crime defendant from the former Yugoslavia and one from Rwanda, although on request a case was remanded to the International Court for the Former Yugoslavia.\(^9\) It would, however, be highly questionable if the regulations did not require proof beyond a reasonable doubt (or an internationally acceptable alternative standard), public trials, defense right to choice of counsel or independent judges.

Moreover, the United States certainly desires to avoid adverse effects on its international prestige and foreign policy effectiveness which would potentially result from any erroneous convictions or, worse, executions in haste of persons possibly misidentified or otherwise misjudged. Thus, in addition to legal and ethical concerns, this practical factor should urge upon the United States a scrupulous regard for the rule of law, including by establishing fair procedures as the Order promises to do.

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\(^6\) 18 USC 2441, set forth in Appendix E.

\(^7\) Department of Defense Directive 5100.77, DOD Law of War Program (Dec. 9, 1998).

\(^8\) It is not within the purview of this Report to determine or analyze the crimes and/or violations of law, whether they are international or domestic, for which defendants subject to the Order may be tried.

Should the definitive procedures for such a fair trial as issued by the Secretary of Defense fall short of accepted international standards, and, until they are defined, it can be expected that many countries will decline to permit extradition of defendants for trial by military tribunals. This issue is separate from the death penalty issue, which already blocks or conditions extradition to the regular U.S. courts. Military commissions would, however, aggravate that issue to the extent that every irregular combatant becomes vulnerable to the death penalty by participation in a non-uniformed force.

The U.S. has vigorously objected to incidents in which it believes that U.S. citizens have not been accorded minimal judicial rights. Recent examples include a secret trial for espionage in Russia, an execution by order of a special military court in Nigeria and a terrorism conviction by a hooded military court in Peru. Obviously, it would not be productive in future incidents for the U.S. to be tarnished with a repudiation of the very civil rights for foreign nationals it seeks to affirm for its own nationals abroad.

U.S. Policy Should be to Promote Respect for the Rule of Law, Even When Prosecuting Those Who Lack Such Respect.

The principal justification of the Order is the paramount national security interest in public safety and national security. In pursuit of that, it relies on mechanisms such as indefinite detention and secrecy (intended, it is said, to permit removal from the public realm persons suspected of terrorist connections) and potentially secret trials (designed, it is said, to protect classified, or even classifiable, information).

To the extent, however, that the Order seeks to 'stack the deck' against defendants, it betrays uncertainty about the ability to obtain a conviction even in a secret, non-jury trial under existing civilian or military law\(^4\) and, we believe, does a disservice to the entire process. It would permit indefinite detenion without charges, much less trial, a tack likely to be used when is there is insufficient evidence to convict even by loose standards; and all without the possibility of judicial review. We do not believe that the full range of such procedures contemplated by the Order are necessary and, as a result, hope that the procedural regulations now being crafted do not take full advantage of the overbroad provisions of the Order.

Further, as a practical matter, such overbroad provisions may well hamper the very swiftness with which the government understandably seeks to act in this crisis. Given the constitutional and statutory questions about the validity of the Order with respect to persons placed in custody within the United States, the availability to them of habeas corpus proceedings (including the likelihood that the courts hearing the petitions will go on to determine the validity of the substantive characterization of defendants by

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\(^4\) It has been argued widely that the use of commissions is necessary to ensure convictions which may not be obtainable in other for a. See, e.g., Terrorists on Trial - II, Wall Street Journal Review and Outlook, December 4, 2001: "As recently as 1996, the Clinton Administration rejected Sudan's offer to turn over Osama bin Laden because it didn't think it had enough evidence to convict him in a criminal court. A military tribunal would certainly have come in handy then."
the President as members of al Qaeda or another class of persons covered by the Order), and the likely appeals therefrom (notwithstanding the Order's attempt to close them off), it is probable that the Administration will not achieve the quick and final resolution of cases against alleged terrorists that it seeks. Indeed, the defects in the Order—unless they are corrected by the procedures to come or otherwise-make it particularly vulnerable to attack. 85

Further still, the Order suffers from a lack of a sunset mechanism. Examples of presidential use of military commissions—such as for the Lincoln assassins and the Quirin saboteurs—were pursuant to either one-time operations, as with the Lincoln assassination, or were issued with respect to a declared war that had a visible victory marker, i.e., the defeat of the enemy nation, and thus a clear end date. 86 Here, in an undeclared war with the allies professing that the 'new war on terrorism' could last 50 years against an undefined enemy beyond al Qaeda 87, the almost total curtailment of liberties previously available to foreign nationals living in or visiting this country has no natural end in sight. 88

It is of utmost regret that the 9/11 crisis has led the executive branch to give the impression that it would deny as to any class of persons almost the entirety of the procedural rights that have characterized this Republic since 1789, apparently without any effort to find a workable alternative. Even if the Order is never used in practice, or if wiser heads prevail and it is used in a more reasonable manner than its language permits, the Order stands as an historic repudiation of the legal ideals on which the Nation was founded, potentially permitting a reversion to the worst practices of the Star Chamber, Inquisition and other notorious tribunals that put the interests of State or Church ahead of individual rights. Protestations that the Order is but "one tool available, and hasn't been

85 Another reason for concern is recognition of terrorists as potentially lawful belligerents. If, for example, some al Qaeda members wearing a uniform and bearing arms were captured while attacking a U.S. military installation (such as U.S.S. Cole or a Marine barracks or the Pentagon), they would be entitled to treatment as prisoners of war and not criminals once the U.S. government had declared the laws of war to be applicable. Most countries insist on treating terrorists as common criminals and go to great lengths to avoid application of the laws of war. See, discussion of the Geneva definitions of armed conflict, infra.

86 An end date has been recognized by the Supreme Court as important. See, e.g., Duncan v. Kahanamoku, 327 U.S. 304 (1946), which struck down martial law in Hawaii so long after the invasion. There, the defendant had violated a military order covering some of the aspects of daily life, which order remained in place and whose violations were punishable only in military tribunals. In a concurring opinion, Chief Justice Stone noted that the bars and restaurants had reopened, and so the alleged crimes in question (essentially civilian ones), should have been referred to civil courts.


88 See, Robinson O. Everett, Military Justice in the Armed Forces of the United States (Military Service Publishing Co. 1956): "If an undeclared war suffices to permit trial of a spy by court-martial or by military commission, a subsidiary issue is when that jurisdiction comes to an end. Had there been a declared war, military jurisdiction would continue until there was some formal proclamation of peace." Id., at 30.
used yet⁸⁹ ring hollow when matched with the Order's stunning scope, exclusive jurisdiction and total absence of review.

These national domestic ideals should be reason enough either to temper the Order in order to avoid a court finding it (or portions of it) unconstitutional, unlawful or unsupportable. Such tempering might be accomplished by its amendment, by Congressional action or, at the least and as has now apparently been promised,⁹⁰ by issuing balanced procedures to put it into effect. After reaching out to the entire world to embrace the American cause against terrorism as a fight for civilization on behalf of all nations, including such former adversaries as Iran and Syria in need of rule-of-law models, the Order effectively declares the second class status of foreign nationals under our laws by asserting our right to make preventive arrests of such persons on the determination of one person, detain them indefinitely without charge, prosecute them in secret and based on ad hoc rules, and then apply the death penalty when even less than all judges find them guilty of crimes not yet specified. After the nation's demonstration of strength, resolve and resilience in the face of the unprecedented attack of 9/11, the Order threatens to becomes a confession of weakness, of the inability of the United States to utilize established means of prosecution and to marshal sufficient evidence to prove the complicity of al Qaeda in the attacks of 9/11.

We believe that national security must be preserved, and that it must be done while giving as much respect as possible in a time of national emergency to the great American values embodied in our laws of due process which make this nation both a target and worth defending. Justice Rehnquist has acknowledged that in times of great national security, the laws, while "muted," are not, in fact, silent—even during war.⁹¹ We

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⁸⁹ See, e.g., remarks by the General Counsel of the Department of Defense at the ABA Meeting.

⁹⁰ See, e.g., the remarks at the ABA Meeting of DoD General Counsel William Haynes; Senior Associate Counsel and Legal Advisor to the National Security Council John B. Bellinger III; and White House Counsel Alberto Gonzales.

⁹¹ Rehnquist said:

The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over. Again, we see the truth in the maxim Inter Arma Silent Leges -- time of war the laws are silent. To lawyers and judges, this may seem a thoroughly undesirable state of affairs, but in the greater scheme of things it may be best for all concerned. The fact that judges are loath to strike down wartime measures while the war is going on is demonstrated both by our experience in the Civil War and in World War II. This fact represents something more than some sort of patriotic hysteria that holds the judiciary in its grip; it has been felt and even embraced by members of the Supreme Court who have championed civil liberty in peacetime. Witness Justice Hugo Black: he wrote the opinion for the Court upholding the forced relocation of Japanese Americans in 1944, but he also wrote the Court's opinion striking down martial law in Hawaii two years later. While we would not want to subscribe to the full sweep of the Latin maxim — Inter Arma Silent Leges -- in time of war the laws are silent, perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.

Rehnquist Remarks, supra.
acknowledge that the balance is difficult, but also that the national will to seek such balance—not a clear tip of the scale—is not only essential but is the greatest show of strength the United States can offer.

Recommendations and Alternatives

Validating the Order

With respect to validating the Order, a Congressional declaration of war would most certainly put the full powers of the national government at work in the anti-terrorism war. Justice Jackson said famously in the Steel Seizure Case that when the President acts "pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all the he possess in his own right plus all that Congress can delegate ... [and acts so taken] would be supported by the strongest of presumptions and the widest latitude of judicial interpretation ..."\textsuperscript{92}

Directed certainly against the Taliban government of Afghanistan, conceivably the declaration of war could also include (but should not be limited to) those named international terrorist organizations, notably al Qaeda, to whom that enemy state gave aid and comfort and even vice-versa. President Jefferson, for example, was authorized by Congress in 1802 (following skirmishes with the Barbary pirates in the Mediterranean) "to cause to be done all such other acts of precaution or hostility as the state of war will justify, and, may, in his opinion require," finding, in fact, that a "state of war now exists."\textsuperscript{93} Al Qaeda may be analogous to pirates of old\textsuperscript{94}. Such a Congressional declaration would lay to rest legal concerns with respect to both the President's authority to establish military commissions in a time of undeclared war, since it would now be declared, and also to the status of those persons related to such enemy organizations, since an enemy will have been defined.

However, a declaration of war carries with it enormous implications for the conduct of daily life in the United States. To declare war solely, or even primarily, to rectify the legal problems with the underpinnings of the President's desire to utilize military commissions to try without traditional due process alien civilians arrested in the United States seems to us too radical a solution. Nor would a declaration of war resolve the constitutional issues relating to domestic use of commissions in a war for crimes not

\textsuperscript{92} Steel Seizure Case, supra, at 635 (1952) (Jackson, J., concurring)

\textsuperscript{93} Quoted in Abraham Sofaer, War, Foreign Affairs and Constitutional Power: The Origins (Ballinger 1976), at 215.

\textsuperscript{94} See, e.g., 33 U.S.C. §381: "The President is authorized to employ so many of the public armed vessels as in his judgment the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations."
uniquely violative of the law of war, issues that arose in the Civil War in the context of the *Milligan* case.

**Alternatives to Military Commissions for Prosecution**

The analysis above demonstrates that the Constitution requires that due process—including jury trials—be given to defendants arrested or tried in the United States for civilian-style crimes that are not violations of the laws of war. Thus, for these defendants, whether they be al Qaeda conspirators or merely harborers, Article 3 federal District Courts must be the forum for their prosecution.

However, with respect to those persons captured abroad in combat or for otherwise violating the traditional laws of war, the Order's proposition of military commissions is not preferred choice. The better approach is to use an alternative means of prosecution.

A menu of alternatives is available to the national government to permit effective prosecution of alleged terrorists and their supporters found in the United States, and thereby avoid the substantive and procedural defects in the Order. The choices include trials in federal district courts, international tribunals, or even UCMJ courts martial. Each has its advantages and its disadvantages with respect to the goal of swift and fair prosecution within the rule of law.

Other goals which some commentators now suggest are paramount and thus argue for the practical use of commissions—e.g., the need to avoid the requirement that US troops in combat give Miranda warnings to captured al Qaeda or Taliban,\(^9\) courthouse, judge and juror protection, revelations of intelligence through open trials, the slow pace of trials, and the ability to admit into evidence under loose rules material that otherwise could not be admitted in federal District Court or even courts martial trials, such as hearsay—seem to us important but far less so (particularly since to a large extent they can be addressed) than the larger goal referred to above. One need only consider the impact on the development of international humanitarian law that the conduct and decisions of the Nuremberg Tribunal had—laying the ground work for the principle of individual responsibility for wrongful state acts—through its process of open trials, uniform procedures modeled primarily on the British and American systems and careful, written decisions to understand that while obtaining a guilty verdict is important, it is not all-important.

**International Tribunals**

The use of international tribunals, perhaps one created for the purpose of this prosecution, is possible. Nuremberg was certainly a precedent. Such a tribunal, however, presents problems of international representation on the bench, not least because of the divergence of views with our allies over the death penalty, and would, in

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\(^9\) This is a particularly specious criticism, since there is no assertion that the Fifth Amendment applies in war to foreign combatants captured and tried abroad.
all likelihood, be the only courts to which certain countries would transfer defendants within their custody given the political and cultural realities.  

Further, to avoid the spectacle of Judeo-Christian civilization sitting combined in judgment on the Muslim civilization—an image some say Bin Laden seeks to foster—participation by Islamic judges would be necessary. At that point, developing rules of procedure gets complicated. Further still, experience with recent international tribunals shows these entities to be truly slow in action, as well as expensive. In such tribunals, juries would not be a concern, but, even given the good faith of most judges, the protection of classified information would have to be assumed to be impossible.

The International Criminal Court ("ICC"), were it in effect, would be a likely tribunal for cases involving foreign defendants accused of violating either the international law of armed conflict or crimes against humanity.

Significantly, crimes against humanity under Article 7 of the Rome Statute are not premised upon the existence of an "armed conflict" within the meaning of the Geneva Conventions and Protocols but instead is premised on the occurrence of any of the listed acts directed toward a civilian population provided they are "widespread and systematic." Thus, this section would include within its subject matter jurisdiction the terrorist acts of 9/11 and others being discovered in the course of the anti-terror campaign. The ICC would be especially useful to try defendants in the custody of countries that might refuse to extradite defendants to the United States, whether for their own domestic political reasons or based on objections to capital punishment or to the procedures of military commissions. The ICC is not an option at this time because the Court is not yet established, due in large part to opposition to the statute by the United States.

Federal District Courts

Time-honored criminal proceedings in the Federal District Courts would be the tried and true solution, not least because it has been proven to work with respect to prosecuting terrorists, including members of al Qaeda. In fact, the federal government has already determined to take the first steps toward prosecuting Bin Laden in Federal District Court by seeking-and obtaining-his indictment in the Southern District of New York. It also will be prosecuting Zacarias Moussaoui, the so-called "20th hijacker", in Federal District Court in Virginia. However, the Federal District Courts may be less adapted to trying enemy combatants (lawful or unlawful) detained in armed conflict.

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96 Spain-apparently holding important members of al Qaeda who, the investigating judge there claims, had prior knowledge of the 9/11 attacks-has already said it will not extradite to the US because of the possibility of application of the death penalty here. "The European Union already has a policy stating that no member nation must extradite a suspect to a country unless it gets believable assurances that the death penalty will not be asked for or applied." Spain Sets Hurdle for Extraditions, New York Times on the Web, November 24, 2001.

The idea that such trials are slow, that jurors would refuse to serve or that there would be so many defendants that the work would never be done does not strike us as persuasive. These courts are, in fact, contemplated for use in these circumstances. They have not only convicted al Qaeda members but also have successfully tried and convicted a plethora of serious spies in the service of foreign powers at both the CIA and FBI in recent years.

It should be recalled that the Constitution itself was conceived and drafted in a time of great concern regarding national security, and these issues were never far from the minds of the Framers. "American courts have tried international criminals who have violated the law of nations - including pirates and slave traders - since the beginning of the nation. We have convicted hijackers, terrorists and drug smugglers (including Panama's Manuel Nortega, who surrendered to American soldiers after extended military operations)."[^98]

However, the circumstances of the 9/11 attacks would admittedly present exceptional difficulties in administering a fair jury trial where hardly any American citizen has not been touched by the events in controversy. Further, despite established procedures to control confidential information,[^99] such procedures relate primarily to pre-trial procedures and are not impenetrable for determined wrongdoers. Nonetheless, while we believe these impediments could be overcome for the purposes of providing the required civilian trials in U.S. District Courts, they are more difficult to overcome for purposes of providing a law of war trial of a foreign combatant.

**Courts Martial Under the UCMJ**

For use abroad, the alternative we find most acceptable to the commissions proposed by the Order combines most of the benefits sought with fewest of the potential risks: court martial under the UCMJ. White House Counsel Alberto Gonzales described the long, successful and professional history of the American military justice this way: "The American military justice system is the finest in the world, with longstanding traditions of forbidding command influence on proceedings, of providing zealous advocacy by competent defense counsel, and of procedural fairness."[^100] (unfortunately, Judge Gonzales improperly ascribed these attributes to military commissions when they apply instead to military courts martial, a very different kind of tribunal).

Military courts martial, as described above, combine an essentially non-jury trial in a secure environment—a naval vessel or military base-pursuant to established rules of procedure, evidence and appeal based on written records. The due process provided in these courts is genuine, despite the old adage about military justice and military music,


[^100]: Gonzales Op-Ed, supra.
even while the trial process is made more efficient than in civilian courts. A criminal trial in a court martial setting is far quicker than a comparable one in a federal District Court, and not only are there provisions for presenting secret material in camera, the setting on a protected military installation would make such information all the more secure. In any case, a public trial-as was given even to the worst members of the Third Reich-is desirable to demonstrate both the fairness of our system and our confidence that using it is not a sign of weakness but of strength.

A general court martial of persons arrested in the United States would, however, require statutory amendment to confer upon such a court clear jurisdiction to try cases not only under the present UCMJ, but also to the extent that there is any doubt-under the international law of armed conflict, as well as such other laws as Congress may determine to apply. Absent Congressional action, such a court could be assured of constitutional validity for trials of alien defendants only outside the U.S. or of offenders within the United States for offenses within the traditional law of war.

Military Commissions

For the reasons explained in this Report, we do not recommend the use of military commissions, particularly as described in the Order, to prosecute persons arrested in the United States for acts not traditional violations of the laws of war. They are, however, a potential means of dealing with aliens arrested and tried abroad, but only, in our view, with procedures consistent with the rule of law.

One possible variation on the commissions contemplated by the Order would be military commissions under U.S. law and administration but including foreign jurists on the model of the post World War II war crimes commissions, using procedures consistent with international standards (though not necessarily the same as UCMJ courts martial). This would make them somewhat akin to purely international tribunals but under greater U.S. control as they would still be U.S. military commissions. However, lack of the right to a jury trial alone would prevent such hybrid commissions from adjudicating cases involving (i) aliens in the U.S. or (ii) U.S. citizens anywhere not tried for law of war offenses.

It is recommended in any case that at the appropriate time-which we note is not during a period of national emergency and armed conflict-the Congress examine the use of military commissions for the purpose of clarifying statutory authority therefore. The various Articles of the UCMJ that contemplate commissions could be supplemented by one which provides clear authority for their use and the circumstances in which the President may so establish them. Importantly, Congress could at that time provide the guidelines and framework for the ultimate procedures-e.g., standards of proof, nature of

\[101\] The concern with respect to the issue that a civilian lawyer who is not cleared to see such information might be hampered in preparing a defense may be addressed either by the clearance of civilian counsel or by the provision of cleared military counsel in those cases where such sensitive material is required to be introduced.
evidence—the President would issue as Commander-in-Chief for trials under such commissions.

**In Summation**

Viewing these alternatives on a spectrum of their qualities would show the military commission at the top with respect to U.S. control of confidential information and correspondingly at the bottom with respect to international credibility and procedural fairness, while an international tribunal would be at the reverse end of that spectrum, at least with respect to international credibility. Federal District Courts and UCMJ courts martial would be somewhere in the middle, with the District Courts having relatively higher credibility, lower control of confidential information, a slow pace and a high level of due process, and UCMJ courts martial in a somewhat reverse position.

Given the most likely circumstances here—prosecuting members and supporters of international terrorist organizations found and arrested outside the United States for offenses against the laws of war—we believe the choice of courts martial under the Uniform Code of Military Justice is a reasonable one and certainly preferable to military commissions where national security considerations truly require extraordinary measures while basic rights of due process still demand respect. With respect to persons arrested within the United States, Article III courts must constitutionally be used for offenders and offenses not involving the laws of war.

Moreover, UCMJ courts martial substantially meet the security needs that are most acute for the type of defendants likely to be apprehended abroad in a shooting war, including the foreign based command and control of al Qaeda. The domestic courts are, or can be made, sufficiently secure for the civilian type of defendants likely to be apprehended in the U.S. whether for committing acts of violence or for various supporting activities (e.g., "harboring" or even stealing in order to raise cash) which are only questionably subject to the laws of war and in any case pose less severe security issues. In order to avoid the uncertainty inherent in applying the traditional definitions of the laws of war to contemporary circumstances, Congress should consider enacting a statutory definition appropriate to these circumstances.

In the last analysis, it is the behavior of a nation in a time of crisis that determines its greatness. Utilizing the historically fair, widely admired military justice system to prosecute abroad law of war offenses at this point in time where and when it is most appropriate-complete as this system is with rights and remedies available to defendants—while using Article III courts domestically, reflects a confidence in this nation's unique ability to balance the necessary expediency required at this moment with the deliberate fairness expected of it always.
Appendix A

November 13, 2001 Military Order Issued by President George W. Bush

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,
Appendix B

1942 Roosevelt Order


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.
Appendix C

Congressional Resolution Authorization for Use of Military Force

One Hundred Seventh Congress
of the United States of America

AT THE FIRST SESSION
Begun and held at the City of Washington on Wednesday,
the third day of January, two thousand and one

Joint Resolution

To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States.

Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States and its citizens; and

Whereas, such acts render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad; and

Whereas, in light of the threat to the national security and foreign policy of the United States posed by these grave acts of violence; and

Whereas, such acts continue to pose an unusual and extraordinary threat to the national security and foreign policy of the United States; and

Whereas, the President has authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.
This joint resolution may be cited as the 'Authorization for Use of Military Force'.

SEC. 2. AUTHORIZATION FOR USE OF UNITED STATES ARMED FORCES.

(a) IN GENERAL - That the President is authorized 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.
(b) War Powers Resolution Requirements-

(1) SPECIFIC STATUTORY AUTHORIZATION- Consistent with section 8(a)(1) of the War Powers Resolution, the Congress declares that this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution.

(2) APPLICABILITY OF OTHER REQUIREMENTS- Nothing in this resolution supercedes any requirement of the War Powers Resolution.

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.
Appendix D

USA Patriot Act of 2001 (in part)


SEC. 412. MANDATORY DETENTION OF SUSPECTED TERRORISTS; HABEAS CORPUS; JUDICIAL REVIEW.

(a) IN GENERAL- The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) is amended by inserting after section 236 the following:

"SEC. 236A. (a) DETENTION OF TERRORIST ALIENS-

'(1) CUSTODY- The Attorney General shall take into custody any alien who is certified under paragraph (3).

'(2) RELEASE- Except as provided in paragraphs (5) and (6), the Attorney General shall maintain custody of such an alien until the alien is removed from the United States. Except as provided in paragraph (6), such custody shall be maintained irrespective of any relief from removal for which the alien may be eligible, or any relief from removal granted the alien, until the Attorney General determines that the alien is no longer an alien who may be certified under paragraph (3). If the alien is finally determined not to be removable, detention pursuant to this subsection shall terminate.

'(3) CERTIFICATION- The Attorney General may certify an alien under this paragraph if the Attorney General has reasonable grounds to believe that the alien--

'(A) is described in section 212(a)(3)(A)(i), 212(a)(3)(A)(i), 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(ii), or 237(a)(4)(B); or

'(B) is engaged in any other activity that endangers the national security of the United States.

'(4) NONDELEGATION- The Attorney General may delegate the authority provided under paragraph (3) only to the Deputy Attorney General. The Deputy Attorney General may not delegate such authority.

'(5) COMMENCEMENT OF PROCEEDINGS- 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.

'(6) LIMITATION ON INDEFINITE DETENTION- An alien detained solely under paragraph (1) who has not been removed under section 241(a)(1)(A), and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.
(7) REVIEW OF CERTIFICATION- The Attorney General shall review the certification made under paragraph (3) every 6 months. If the Attorney General determines, in the Attorney General's discretion, that the certification should be revoked, the alien may be released on such conditions as the Attorney General deems appropriate, unless such release is otherwise prohibited by law. The alien may request each 6 months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request.

(b) HABEAS CORPUS AND JUDICIAL REVIEW-

(1) IN GENERAL- Judicial review of any action or decision relating to this section (including judicial review of the merits of a determination made under subsection (a)(3) or (a)(6)) is available exclusively in habeas corpus proceedings consistent with this subsection. Except as provided in the preceding sentence, no court shall have jurisdiction to review, by habeas corpus petition or otherwise, any such action or decision.

(2) APPLICATION-

(A) IN GENERAL- Notwithstanding any other provision of law, including section 2241(a) of title 28, United States Code, habeas corpus proceedings described in paragraph (1) may be initiated only by an application filed with--

(i) the Supreme Court;

(ii) any justice of the Supreme Court;

(iii) any circuit judge of the United States Court of Appeals for the District of Columbia Circuit; or

(iv) any district court otherwise having jurisdiction to entertain it.

(B) APPLICATION TRANSFER- Section 2241(b) of title 28, United States Code, shall apply to an application for a writ of habeas corpus described in subparagraph (A).

(3) APPEALS- Notwithstanding any other provision of law, including section 2253 of title 28, in habeas corpus proceedings described in paragraph (1) before a circuit or district judge, the final order shall be subject to review, on appeal, by the United States Court of Appeals for the District of Columbia Circuit. There shall be no right of appeal in such proceedings to any other circuit court of appeals.

(4) RULE OF DECISION- The law applied by the Supreme Court and the United States Court of Appeals for the District of Columbia Circuit shall be regarded as the rule of decision in habeas corpus proceedings described in paragraph (1)."

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Appendix E

War Crimes Act: 18 U.S.C. 2441 (Sec. 2441, War crimes)

(a) Offense. - Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.

(b) Circumstances. - The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

(c) Definition. - As used in this section the term "war crime" means any conduct -

(1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;

(2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;

(3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

(4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.