April 23, 2018

Christopher W. Turner  
U.S. Government Accountability Office  
Defense Capabilities & Management  
441 G Street NW  
Office 4C12  
Washington, DC 20036  

Dear Mr. Turner:

On behalf of the American Bar Association (ABA), I write in response to the congressional mandate contained in section 1038 of Public Law 115-91, the National Defense Authorization Act (NDAA) for Fiscal Year 2018, that directs the Comptroller of the United States to conduct a study “on the feasibility and advisability of expanding the public availability of military commission proceedings that are made open to the public.” This submission documents and expands on information that Kevin Scruggs, Staff Director for the ABA’s Criminal Justice Section, and I provided you during an initial discussion on February 15, 2018, in the ABA Washington DC office.

The ABA, with its more than 400,000 members across the nation, strongly supports public access and availability to all criminal court proceedings, including military commissions proceedings. The ABA is also committed to the belief that all courts should experiment with electronic media coverage of their proceedings. We understand the House version of the NDAA for FY 2018 proposed authorizing the “military judge of a military commission to order arrangements for the availability of a military commission proceeding to be watched remotely by the public through the internet, in the case of any proceeding that is made open to the public” (See House Report 115-404, section 1038). While this authorization was not included in the final bill, the ABA would support adoption of such an initiative in the future to protect the integrity of the military commission process and better educate the public about these proceedings.

The ABA appreciates that the NDAA conferees specifically mention our Association in House Report 115-404 as a source of information for your study. As you correctly noted in your email requesting information, the ABA has addressed legal issues involving military commissions since they were first contemplated for post-9/11 cases in 2001. We began sending observers to commissions proceedings when they started in 2004 and remain one of the original five nongovernmental organizations guaranteed a seat at future proceedings, as explained in the August 19, 2013, memorandum addressing the NGO observer representatives’ selection policy (enclosure 1). A February 1, 2018 email explaining the current Office of Military Commissions
process for inviting NGOs to send representatives to specific commission case hearings is at enclosure 2.

In addition to the ABA’s experience with the military commission process, we have also studied federal and state judicial proceedings. Prosecutors, defense attorneys, judges, legislatures, and scholars have relied on the ABA Standards for Criminal Justice because they recognize that these standards are the product of careful consideration and drafting by experienced and fair-minded experts drawn from all parts of the criminal justice system. Based on our extensive experience with both military commissions and other judicial proceedings, the ABA offers for your consideration the following information specifically addressing the importance of public access to criminal proceedings whenever possible:

1. ABA Task Force on Terrorism and the Law, Report and Recommendations on Military Commissions, January 4, 2002 (enclosure 3)

The ABA Task Force on Terrorism and the Law submitted a report with recommendations to Secretary of Defense Donald Rumsfeld addressing some of the major legal issues involved with the President’s announcement on November 13, 2001, that certain noncitizens would be subject to detention and trial by military authorities -- including whether the proceedings should be open to the public. The report recognizes on page 12 that the United States is a party to the International Convention on Civil and Political Rights and that the basic rights and procedures in the convention have been respected in the United Nations for all courts and tribunals, including special tribunals for war crimes. Article 14 of the Convention requires public hearings except for specific and compelling circumstances. It states:

All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interests of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgment rendered in a criminal case . . . shall be made public . . .


Shortly after the release of the 2002 Task Force report at enclosure 3, the ABA’s House of Delegates adopted policy regarding the use of military tribunals recommending that they comply with Article 14 of the International Convention on Civil and Political Rights discussed above. Paragraph 6 of this policy specifically includes the requirement that the “proceedings [be] open
April 23, 2018  
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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.” The importance of this provision is underscored on pages 5 and 6 of the explanatory report submitted to support this policy where specific concerns about the tribunal process are mentioned, including a concern that the trials would be able to be held in secret. The report concludes by discussing the American principles of justice, the challenges levied by nations abroad, and concerns about fundamental fairness in the commission process. Full and fair trials are critical to the United States’ credibility and its position in the world, and public access to commission proceedings is critical to ensuring the fairness of this judicial process.

The Military Affairs and Justice Committee of the New York City Bar Association also scrutinized President Bush’s November 13, 2001, Military Order and mentioned the importance of public trials in several places (enclosure 5). Commenting on the lack of regulations for the commissions at the time, the report noted it would 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” (page 16, emphasis added). The report also commented that other countries may decline to permit extradition of defendants for trial by military tribunals if they fall short of minimally acceptable international judicial standards, just as the United States does when American citizens are involved (citing on page 17 of the report an example of a secret trial for espionage in Russia).

Accepting that a court-martial was the best option for conducting terrorism trials abroad because of the need to present secret material in camera and the ability to keep the information more secure on protected military installations, the report concluded that a public trial was still an important part of due process: “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” (page 22).

3. Amici Curiae Brief Opposing Protective Order 007 by the American Bar Association and three other nongovernmental organizations on January 14, 2009 (enclosure 6)

In response to your written discussion question to the ABA on what public interests are served by having public access to military commission proceedings, the ABA offers the Amici Curiae brief we submitted on January 14, 2009, after a military judge issued Protective Order 007 effectively limiting public and press access to military commission proceedings and evidence in United States versus Khalid Sheikh Mohammed, et al. The ABA and other Amici Curiae argued that the Military Commissions Act and implementing regulations created a statutory right of access to the criminal proceedings so that the watching world would accept their validity. The First Amendment also independently protects the public’s right to meaningful access to the proceedings and the records of the military commissions.
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Pages 18 and 19 of the brief specifically discuss the following five public interests advanced by public access to open adjudicatory proceedings as identified by the Supreme Court:

(1) ensuring that proper procedures are being followed; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing an outlet for community hostility and emotion; (4) ensuring public confidence in a trial’s results through the appearance of fairness; and (5) inspiring confidence in government through public education regarding the methods followed and remedies granted by the government. See Richmond Newspapers, 448 U.S. at 569-71 (a case involving access to a criminal trial that the State of Virginia had conducted entirely in secret).

The brief asserts that the very same policy arguments that mandated the constitutional right of access in criminal trials in the civilian court system apply to criminal trials conducted by the Department of Defense.

Any “adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.” Lugosch, 435 F.3d at 124 (quoting Joy v. North, 692 F.2d 880, 893 (2d Cir. 1982)). Like other adjudicatory proceedings, military commissions are presided over by an impartial arbiter, judgment is based on a record created by the tribunal through an adversarial process that involves the presentation of evidence and the opportunity to cross-examine witnesses. In this setting, public access improves the performance of all involved, protects judges and prosecutors from claims of dishonesty, and provides a forum for education of the public. (See Amici Curiae brief page 19).

The brief further supports its argument that openness in military commission proceedings plays a vital role by considering what might happen if the converse were true.

Secret hearings – though they be scrupulously fair in reality – are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court’s decision sealed from the public’s view. Gannett Co. v. DePasquale, 443 U.S. 368, 429 (1979) (Blackmun, J., concurring in part and dissenting in part).

4. ABA’s perspective on providing or expanding public access to military commission proceedings

The ABA has longstanding policy that states “in any criminal matter, the public presumptively should have access to all judicial proceedings, related documents and exhibits, and any record made thereof not otherwise required to remain confidential,” subject to limited exceptions stated in enclosure 7, ABA Standards for Criminal Justice, Fair Trial and Public Discourse Standard 8-5.2. Considering this policy, and for all the reasons discussed above, the ABA firmly believes
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that military commission hearings and evidence must be open to the public to the extent possible to ensure fairness and transparency of the commission process.

5. ABA’s perspective on the use of electronic media coverage of judicial proceedings

The ABA is committed to the belief that all federal courts, including the Supreme Court, should experiment with electronic media coverage of both civil and criminal proceedings as explained in a December 9, 2014 letter we submitted to the House of Representatives Judiciary Committee for a hearing on the issue of cameras in the courtroom (enclosure 8). While that letter targets the use of cameras in federal courts, the analysis is also relevant for your study of expanding access to commission proceedings. The ABA believes that courts that conduct their business under public scrutiny protect the integrity of the judicial system by advancing accountability and providing an opportunity for the people they serve to learn about the court process. In 2014, the ABA adopted a standard advising courts to think proactively and develop plans that address electronic media coverage and other methods for accommodating the public interest in criminal proceedings, recognizing that individual jurisdictions are best suited to address their concerns. In 2016, the ABA adopted another policy involving electronic access to proceedings, this time urging the Supreme Court to record and make available video recordings of its oral arguments in furtherance of public access and education. A copy of the ABA’s 2016 policy is at enclosure 9 for your consideration.

Thank you for the opportunity to provide these comments and documents as part of your study into the feasibility and advisability of expanding access to military commission proceedings that are open to the public. The ABA recognizes there may be times when the military judge determines that the proceedings must be closed for security, privacy, or other limited reasons, but when they are not closed for these reasons, the ABA supports public access and encourages the use of electronic media coverage to protect the integrity of the process and to advance the public interests as discussed in this submission.

If you have any questions about this response or the accompanying documents, please feel free to contact me at 202-662-1860 or holly.cook@americanbar.org.

Sincerely,

Holly O’Grady Cook

9 enclosures
MEMORANDUM FOR NON-GOVERNMENT ORGANIZATION OBSERVER REPRESENTATIVES

SUBJECT: New Non-Government Organization Observer Representatives Selection Policy

In 2003, the Office of Military Commissions (OMC) invited several large national and international Non-Government Organizations (NGOs) to observe commission proceedings at Guantanamo Bay, Cuba (GTMO). These NGOs were invited to observe, due in large part, to their ability to reach large groups of people around the world, experience in incorporating international human rights and humanitarian standards in criminal trials, and having a stated mission to advance human rights through advocacy and respect for the law. Given logistical limitations relating to escort personnel, housing, and available seats on military aircraft and civilian airlines, we determined that we would accommodate no more than five NGO observers per hearing. After receiving responses from various organizations, we extended offers to Amnesty International, Human Rights Watch, Human Rights First, the American Civil Liberties Union, and the American Bar Association. At that time, only these five NGOs were guaranteed a seat, and alternate NGOs could only attend if any one of the original five NGOs declined to participate.

In 2011, this policy was updated as numerous other NGOs expressed interest in sending an observer to view commission proceedings. Since then, eighteen NGOs have been approved to each send an observer to view commission proceedings at GTMO.

To date, OMC has been able to accommodate all NGO observers who have expressed interest in traveling to view proceedings. However, in light of increasing NGO interest and persistent logistical limitations, effective immediately, the following procedure will be used to approve NGO observer participation in viewing commission proceedings.

- The maximum number of observers allowed to observe each commission proceeding in person is fourteen.
- The original five NGO observer organizations (i.e., Amnesty International, Human Rights Watch, Human Rights First, the American Civil Liberties Union, and the American Bar Association) will have a right of first refusal to send an observer to view each commission proceedings at GTMO.
- All remaining NGO observer organizations will be invited to send a representative.
- NGO observer organizations that wish to send an observer will express their intent to view proceedings by a set date and time defined in the OMC invitational email.
- Allocation of remaining available slots will be done by a random number generator should expression of interest exceed availability.
- Those NGOs not selected to send an observer will be given priority, within the not-original five NGO observer organization selection process, to send a representative to view the next commissions hearing at GTMO should the particular NGO observer organization express interest to observe that hearing.

As a reminder, NGO observer organizations, irrespective of their participation at GTMO, are welcome to send observers to view the proceedings via the closed circuit television feed at the public site at Fort Meade, Maryland.

Michael I. Quinn  
Chief of Staff  
For Military Commissions
Chris,

Thanks to you and your team for meeting with Kevin and me at the ABA office this morning. As promised, below is a copy of the last email we received from OSD OMC asking for military commission observer nominees from the ABA and alerting us to new procedures that would provide more notice for these proceedings in the future.

We will send you other written materials from our conversation soon, and let you know if we have contact information to share as requested.

Best regards,

Holly

Holly O’Grady Cook
Principal Deputy Director, Governmental Affairs American Bar Association | 1050 Connecticut Avenue, NW, 4th floor | Washington, DC 20036
T: 202-662-1860 | M: 571-405-4946
holly.cook@americanbar.org | www.americanbar.org

-----Original Message-----
From: Codosea, Diego E CIV OSD OMC CA (US) [mailto:diego.e.codosea.civ@mail.mil]
Sent: Thursday, February 01, 2018 3:32 PM
To: OSD Pentagon OMC Mailbox Convening Authority NGO <osd.pentagon.OMC.mbx.convening-authority-ngo@mail.mil>
Cc: Cook, Holly <Holly.Cook@americanbar.org>; rfreer@amnesty.org; Nshah@aiusa.org;
CosgroveK@humanrightsfirst.org; smithp@hrw.org; pitterl@hrw.org; sreiners@aclu.org; hshamsi@aclu.org; Jhafetz@aclu.org; agorski@aclu.org; RWM@clｌ.com; jmusa@nacdl.org; Charles.Stimson@heritage.org;
michael.price@nyu.edu; ewilson1@milbank.com; jjetwilson@gmail.com; Jason.D.Wright@gmail.com;
gwenda.davis@shu.edu; mdenbeaux@yahoo.com; jRurup@JUDICIALWATCH.ORG; cfedeli@judicialwatch.org;
ben.davis@utoledo.edu; gabriela.mcquade@duke.edu; Gabriela.McQuade@gmail.com; Morris@law.duke.edu;
kkc@ndajustice.org; joshua.kastenberg@law.unm.edu; amckenzie@pacificcouncil.org; kbzdak@pacificcouncil.org;
robin.simcox@henryjacksonsociety.org; jonathan.kaplan@openseocietyfoundations.org; gedwards@indiana.edu;
andrew.clapham@graduateinstitute.ch; adz9@georgetown.edu; pwg7@law.georgetown.edu;
na76@law.georgetown.edu; colleenkelly2014@gmail.com; agardner@911memorial.org; shelby.sullivansen@repprieve.org; katie.minton@repprieve.org
Subject: Request for Nominees for MARCH and APRIL 2018 Hearing Weeks - ***SUSPENSE / DUE 8 FEB 2018 COB***

Good Morning Non-Governmental Observer Organization Representatives,
In preparation for a demanding 2018 summer and 2019 hearing schedule we are asking for nominees for both MARCH and APRIL 2018. It’s a tight timeline for submissions but we are currently scheduled for 2 1/2 weeks of hearings in March and 3 weeks of hearings in April which is a good time to make some NGO procedural changes before the larger wave of July and August hearing approach.

Part of these procedural changes is creating a longer timeline for nominee requests and submissions which will allow NGO representatives and nominees additional time/flexibility to identify observers and at the same time allow OMC additional time/flexibility to prepare travel and security documentation. The three initial intended goals as we transition into a longer timeline are as follows:

1. Front load nominees in March and April and create a buffer for May and future nominee requests and submissions.

2. Institute a recurring/standardized request schedule for nominees on the first of every month for the follow on month (60days out), see example:

   1 March - Request NGO nominees for the month of May. (60days out)
   15 March - Nominees names and initial information form is due back by COB on 15 March. (NGOs will have 2 weeks to identify nominees vice the current 5 day turnaround)
   15-16 March - Nominees are notified of confirmation and sent packages for completion.
   22 March - Nominees selected will submit required documentation to OMC for processing. (Nominees will have 1 week to submit completed documents vice the current 2 day turnaround)

   -This timeline should allow NGO observers a bit more flexibility to coordinate schedules, classes, and work load. This will also create an approximate 30 day buffer to adjust nominees or submit replacement observers if desired.
   -This plan will also give DoD Security and Travel teams the opportunity to provide better support throughout the process.

3. Current documentation packages have been modified and updated to reduce redundancy, and create a more user friendly documents. (This will be an evolving process over the next few months)

I look forward to your thoughts and comments as we continue to improve the NGO observer travel and security procedures.

====================================================================================================
Request for Nominees for MARCH and APRIL 2018 Hearing Weeks - ***SUSPENSE / DUE 8 FEB 2018 COB***
====================================================================================================

Please provide your organization’s nominees, (one observer with a valid U.S. Passport) per each hearing. The date ranges include tentative travel days to and from Guantanamo Bay, Cuba. Actual flight times will be announced at a later date.

MARCH 2018-
1. NASHIRI - Hearing Week: 4-10 March 2018 2. NASHIRI - Hearing Week: 11-17 March 2018

APRIL 2018-
1. HADI - Hearing Week: 7-14 April 2018 2. HADI - Hearing Week: 14-21 April 2018
3. KSM - Hearing Week: 28 April - 5 May 2018

==========================================
Organization Nominee Documents-
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-GUANTANAMO BAY NGO OBSERVERS NOMINEE INFO Form: DUE NLT 8 FEB 2018 COB Nominees traveling to GUANTANAMO BAY - Complete information requested in NGO Observer Nominee Info Form (ATTACHED (A)). Ensure ALL information is accurate and return to OMC by due date.

-FORT MEADE OBERVERS BASE ACCESS FFGM Form 191: DUE NLT 8 FEB 2018 COB Nominees viewing the hearing from FORT MEADE, MD will require a visitor badge and base access - Provide nominees the Fort Meade FFGM Form 191 (ATTACHED (1) enable all features). Ensure ALL information is accurate and return to OMC by due date.

***Incomplete data or non-response by the due date will forfeit the organization's opportunity to send an observer to view the scheduled proceedings***

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PRE-PLANNING purposes ONLY- (no response required) ==================================

The following hearings are scheduled for May thru July 2018. The date ranges include tentative travel days to and from Guantanamo Bay and are subject to change. Actual flight times will be announced at a later date.

MAY 2018 (Tentative Hearing Schedule)-
1. KSM - Hearing Week: 5-12 May 2018

JUNE 2018 (Tentative Hearing Schedule)-
1. HADI - Hearing Week: 24-30 June 2018

* Ramadan 2018: 15 May - 14 June 2018*

JULY 2018 (Tentative Hearing Schedule)-

=================================================================

Best Regards,

Diego E. Codosea
Program Analyst, Operations Directorate
Office of Military Commissions (OMC)
4800 Mark Center Drive, Suite 11F09-02
Alexandria VA 22350-2100
office: 571 372 3669
nipr: diego.e.codosea.civ@mail.mil

*** NOTES: SELECTED OBSERVER MUST HAVE A VALID U.S. PASSPORT TO TRAVEL TO GUANTANAMO BAY. FAILURE TO HAVE A VALID U.S. PASSPORT WILL PREVENT OBSERVERS FROM TRAVELING TO GUANTANAMO BAY.
NON US CITIZENS REQUEST FOR GUANTANAMO BAY OBSERVERS - Non US Citizens requesting travel to Guantanamo Bay will require a MINIMUM of 60 DAY security lead time to process travel and base access.

ALL hearings are subject to a continuance or schedule change per the direction of the Military Judge. OMC will inform all personnel of any schedule changes once informed by the Trial Judiciary.***
### VCC EVENT REQUEST FORM

**Date/Time of Event:**

**Event Name:** OMC -

**Location of Event:** Ft. Meade

**Event POC:** (Name, phone, email) MARCUS MILLER, marcus.j.miller20.cvn@mail.mil, Office: 301-677-6506 / 2624, Cell: 443-887-0370

**Sponsors Signature:**

---

Provide an alphabetical list of all adults that do not possess a valid federal government or locally issued ID. Juveniles under 18, Military, or DoD Civilians are not required to be listed. List must be in the requested format. Submit 10 working days prior to event, or we can not guarantee visitors will be vetted in time. Use continuation pages as necessary.

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**Data Required By the Privacy Act of 1974, Authority 5 U.S.C. 301, Dept., Regulations 10 U.S.C. 3013**

**Principal Purpose(s):** In addition to those disclosures generally under 5 U.S.C. 552a(b) of the Privacy Act, this information contained therein may be disclosed outside DOD as a routine use pursuant to 5 U.S.C. 552a(b)(3), AR 340-21, Para 3-2

**Disclosure:** VOLUNTARY, individual may disclose his or her personal information; however, failure to provide your SSN and personal data may delay or preclude access to the installation. (Authorized under AR 190-45, AR 190-5, MDW requirements, and U.S.C.3013)

FGGM 191-002-R-E

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**HAND WRITTEN MAY NOT BE ACCEPTED**
NGO Observer Nominee Information Form
(Please complete information below for nominees)

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

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

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

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

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

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

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

I. AUTHORITY FOR MILITARY COMMISSIONS

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

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

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunals.¹

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

[I]t was feared by the proponents of the 1916 legislation that in the absence of a saving provision, the authority given by Articles [of War] 12, 13, and 14 to try such persons before courts-martial might be construed to deprive the non-statutory military commission of a portion of what was considered its traditional jurisdiction. To avoid this, and to preserve that jurisdiction intact, Article 15 was added to the Articles. ... By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction, as we held in Ex parte Quirin, to any use of the military commission contemplated by the common law of war. Id., at 19-20. (footnote omitted)
Military commissions have existed, albeit under different names, since before the beginning of the Republic. George Washington ordered the trial of John Andre for spying by a “Board of Officers,” which was, in all but title, a military commission. The term “military commission” came into use during the Mexican War, and by the time of the Civil War was well embedded in usage. Military commissions have had the authority to try persons not otherwise subject to military law for violations of the law of war and for offenses committed in territory under military occupation.

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

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

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

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

The Court expressly left open the question whether the President’s commander-in-chief power alone is authority to establish a military commission, since Article of War 15 recognized such authority. “It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.” (*Id.*, at 29)

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

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

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

3 Winthrop, supra n. 2 at 832.


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

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

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

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

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

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


\(^7\) *Id.* Conviction rates were about 85% in both theaters. *Id.*

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

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

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

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

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

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

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

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⁹ Although in the latter two cases the hostilities had ended when the trials occurred.
¹⁰ See *The Prize Cases*, 67 U.S. (1863); *Bas v. Tingy*, 4 U.S. 37 (1800). In *Talbot v. Seeman*, 5 U.S. 1 (1801), Chief Justice Marshall, for the Court, wrote, "It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial hostilities, in which case the laws of war, so far as they apply to our situation, must be noticed." *Id.*, at 28. Of course, this leaves open the question, how "far" do they apply? Marshall provided no clear answer, but the opinion did recognize that their application need not be explicit in Congress' authorizing act. See also Congress' declaration in the Mexican War, where Congress did not "declare war." Rather, it recognized that "by the act of the Republic of Mexico, a state of war exists between that government and the United States." *Winthrop, supra* note 2, at 668.
¹¹ See *Madsen v. Kinsella*, 343 U.S. 341, 346; *Winthrop, supra* note 2 at 831-835. However, in the Civil War, Congress specifically authorized the use of military commissions in several acts. See *Winthrop*, at 833.
On September 18, 2001, Congress enacted a Joint Resolution (Public Law 107-40, 115 Stat. 224) authorizing the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” The Preamble to the resolution states that the acts of September 11 were attacks against the United States that “render it both necessary and appropriate that the United States exercise its rights to self-defense.”

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

II. JURISDICTION OF MILITARY COMMISSIONS

A. Offenses against the law of war\textsuperscript{12}

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

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

\textsuperscript{12} In modern usage, the term “law of armed conflict” is ordinarily used. Because the term “law of war” is used in the U.C.M.J., that term is used in this paper.

\textsuperscript{13} Arguably Article 104, U.C.M.J., 10 U.S.C. sec. 904, might apply. Article 104 provides:

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

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

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

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

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

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

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

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

Additional war crimes might include unlawful belligerency, that is, the commission of acts of war without complying with the laws of war for recognition as a belligerent. See Department of the Army Field Manual 27-10, The Law of Land Warfare (1956) paras. 80-82. See also Geneva Convention Relative to the Treatment of Prisoners of War, August 12, 1949 (T.I.A.S. 3364).


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

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

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

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

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

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

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

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

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

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


19 Absent a grant of jurisdiction under some other statute. See note 13 and accompanying text, supra.

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

Thus, Congress has recently recognized, and taken steps to preserve, the authority of military commissions to try offenses and offenders under the law of war.
complicit in "acts of international terrorism," and to those who have "harbored" such persons. The offenses, and hence offenders, described in the order are not limited to the September 11 attacks, or to acts related to them. This raises several questions.

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

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

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

B. Persons addressed in the President’s order

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

Aliens not within the United States have few, if any, constitutional protections.  

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

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

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

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

III. Judicial Review of Military Commissions

The President’s order provides:

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

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

24 As discussed in note 6 and accompanying text, supra, in Ex parte Quirin, the Supreme Court upheld jurisdiction of a military commission to try a U.S. citizen for offenses committed in the United States because the citizen was a “belligerent” in a declared war. It distinguished Ex parte Milligan, which held a military commission lacked jurisdiction to try a citizen who was not a belligerent for offenses committed in the United States. The President’s order excludes citizens from the jurisdiction of military commissions, but arguably the belligerent – non-belligerent distinction Quirin drew with Milligan may have some relevance to the application of the President’s order to aliens in the United States. Of course, the issue is further blurred by the fact that defining who is a “belligerent” is problematic in the current situation.
Notwithstanding the broad nature of this language, it does not expressly suspend the writ of habeas corpus, and it is most unlikely that it could. Although the Supreme Court has held that military commissions are outside the normal process of judicial review (Ex parte Vallandigham, 68 U.S. 243 (1863)), it has reviewed applications for writ of habeas corpus by persons being tried by military commission. See, e.g., Madsen v. Kinsella, Application of Yamashita, Ex Parte Quirin, all discussed above. (But see Johnson v. Eisentrager, 339 U.S. 763 (1950) wherein the Court denied habeas review of the jurisdiction of a military commission outside the United States to try an enemy alien who was never in the United States for war crimes alleged to have been committed outside the United States. The Court distinguished its review of jurisdiction in Yamashita, pointing out that Yamashita’s offenses and trial occurred in the Philippines, which were, at that time, possessions of the United States.) The Court has carried out these reviews even in the face of language in the implementing Presidential order that purported to foreclose judicial review, much as in the current order.25 In conducting such reviews, the Court has examined whether the legal predicates for a military commission were established. Consequently, if the President’s order leads to trial of one or more individuals, it can be assumed that the validity of the order and the jurisdiction of such commissions will be reviewed in federal courts—at least with respect to any persons or trials within the United States, if the defendant has legal counsel who seeks review notwithstanding the prohibitory language of the President’s order.

IV. PROCEDURES FOR MILITARY COMMISSIONS

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

25 “The Proclamation also stated in terms that all such persons were denied access to the courts.” Ex parte Quirin, 317 U.S. at 23.
26 Article 36(a), U.C.M.J., 10 U.S.C. sec. 836(a), provides:
Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.
The President’s order refers to this provision; it also states that “I find consistent with section 836 of title 10 United States Code, that it is not practicable to apply in military commissions under this order the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”
27 Under section 4(c)(5) of the order, the Secretary of Defense is authorized to prescribe regulations for “the conduct of the defense by attorneys for the individual subject to this order. Presumably, these would concern the qualifications of counsel and perhaps access to classified information. Extensive or unusual regulation could be cause for concern.

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

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

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

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

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

³⁰ Article 14 provides:

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

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

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

V. OTHER CONSIDERATIONS

Trying individuals by military commission would be a controversial step. Military commissions probably will not afford the same procedural protections as civilian courts.\(^{32}\) The United States has protested the use of military tribunals to try its citizens in

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3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
   
   (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
   
   (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
   
   (c) To be tried without undue delay;
   
   (d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
   
   (e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
   
   (f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;
   
   (g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to have his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.

7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

\(^{31}\) The Human Rights Committee, established under Part 1V, Articles 28-45, of the ICCPR has stated, in General Comment Number 13, that it “notes the existence, in many countries, of military or special courts which try civilians,” and that “[w]hile the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees of Article 14.” The ICCPR also includes, in Article 4, a provision permitting parties to derogate from their obligations, “In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed.”

\(^{32}\) This view could complicate requests for extradition, or some other form of delivery, of suspected terrorists to control of the United States. For example, it has been reported that Spanish officials will refuse Military Commissions

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

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

U.S. civilian courts, federal or state, would have jurisdiction to try war crimes and other offenses under various criminal statutes. Major concerns with the exercise of such jurisdiction center on security. This includes the physical security of the courthouse and the participants (including jurors) in the trial. It also includes the ability to safeguard classified information, including intelligence sources and methods whose compromise could facilitate future terrorist acts. While mechanisms exist to protect evidence of a classified nature from public exposure, these may not suffice to protect the information from the defendants and, through them, others who may use such information to the harm of the U.S. and its citizens.\(^3^3\)

Trial before an international tribunal would have many of the same problems as trial in a U.S. court. The risk to intelligence sources would probably be substantially greater. Also, it is unlikely that the death penalty would be available in such a forum. Finally, given experience with international tribunals in Yugoslavia and Rwanda, it could take an unacceptably long time to authorize and set up an international tribunal to address these cases.\(^3^4\)

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


\(^3^3\) The Classified Information Protection Act, 18 U.S.C. Appendix secs. 1-16, provides procedures for notice to the government and judicial screening when the defendant wishes to reveal classified information. It is designed to limit the defense's ability to leverage its possession of classified information in plea negotiations. CIPA provides no protection for information that the prosecution might need to introduce or for information that the defense is permitted to introduce.

\(^3^4\) It should also be noted that the procedures in such tribunals do not necessarily comport with those in U.S. civilian trials. See Note, Due Process in International Criminal Courts: Why Due Process Matters, 87 Virginia Law Review 1381 (November 2001).
VI. SUMMARY

1. The unprecedented and horrible attacks of September 11 demonstrated that the United States faces an organized enemy with the resources and the will to cause mass death and destruction in the United States and elsewhere.

2. It is the duty of our Government to bring those responsible to justice and to take all legal measures to minimize the possibility of future terrorist attacks, consistent with its duty to preserve fundamental rights and liberties.

3. There is historical authority supporting the President’s establishment of military commissions in wartime, under the Constitution and laws of the United States.

4. Military commissions have been used in periods other than declared war.

5. Congress has authorized the President to use armed force against those persons, organizations, and states responsible for the September 11 attacks.

6. The scope of the President’s power to act alone with respect to military commissions has not been developed in case law. The President’s constitutional authority to use military commissions is least open to question when the President consults with and has the support of Congress.

7. Military commissions have authority to try persons for violations of the law of war. It can reasonably be argued that the September 11 attacks were violations of the law of war.

8. Absent additional congressional authority, military commissions do not have authority to try persons for crimes other than law of war violations.

9. The President’s order of November 13, on its face, appears to apply to offenses that may not have been war crimes, and that may not be connected to the September 11 attacks.

10. The President’s order applies to all non-citizens, including aliens lawfully present in the United States. The breadth of the President’s order raises serious constitutional questions under existing precedent.

11. Military commissions are subject to habeas corpus proceedings in federal court, at least as to persons present in the United States and to U.S. citizens.

12. The President’s order states that any military commission must provide a “full and fair” trial. It leaves to the Secretary of Defense to prescribe most of the procedures. Paragraph 2(b)(2) of the Preamble of the Manual for Courts-Martial suggests those procedures should generally follow those used in courts-martial.

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

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

VII. RECOMMENDATIONS

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

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

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

1. Any use of military commissions should be limited to narrow circumstances in which compelling security interests justify their use.

2. Unless there is additional specific authority from Congress, the following persons should not be tried by military commission: persons lawfully present in the United States; persons in the United States suspected of accused of offenses unconnected with the September 11 attacks; and persons not suspected or accused of violations of the law of war.

3. The procedures for any military commission should fulfill the President’s direction that they afford a “full and fair trial.” They should “be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial,” Manual for Courts-Martial, Preamble, paragraph 2(b)(2), and should conform to Article 14 of the International Covenant on Civil and Political Rights. The procedures in Article 14 include: an independent and impartial tribunal, with the proceedings open to the press and public, except for specific and compelling reasons, and the following rights for the defendant: presumption of innocence; prompt notice of charges, and adequate time and facilities to prepare a defense; trial without undue delay; to be present, and to be

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

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

ADOPTED BY THE HOUSE OF DELEGATES

February 4-5, 2002

(Report Nos. 8C)

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, state or territorial laws, as opposed to violations of such law of war, are alleged;

4. Not permit indefinite pretrial 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 except Article 32 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.
REPORT

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 "reasonable belief" that such individual, at the relevant times
   (i) is or was a member of the organization known as al Qaeda;
   (ii) has been, or at any time has been, a part of, an al Qaeda cell, or has been associated with, an al Qaeda cell; 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 opinion available for all terrorism prior to the issuance of the order on November 13th, and which remains available for all terrorism 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 an accused in any military tribunal be equal to the level that would satisfy the requirements of fundamental fairness.

In making this Recommendation, The Bar Association of the District of Columbia (BADC) has taken 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 each commission's proceedings 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, insofar as the purposes of this Recommendation, BADC recognizes that military commissions have been used in the past in this country in certain circumstances and under certain circumstances, and that the Manual for Courts-Martial (MCM), the regulations promulgated by the President to implement the Uniform Code of Military Justice (UCMJ) (10 U.S.C. 801 et seq.), states in its preamble that military commissions constitute one of the agencies of military justice 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 criminals, advocated in the military order, and to the status of the United States as the leader of the

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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.

Concerns about the military order have raised several questions. Some have
particularly questioned the breadth of the order, asserting that it encompasses billions of persons,
including millions of innocent aliens with green cards, people hereafter unknowingly protected by the
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 American overseas." See, e.g., George Lassiter, Jr., "Democrat Blasts Order on Tribunals,"
Washington Post, Nov. 16, 2001, at A22. At least one noted commentator has labeled military
2001. Others have written that meaningful judicial review of the commissions is "the most important
damage needed in the President's military order," and that "it cannot be constitutional to exclude the

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 and must be protected by the use of military
commissions which do not depart from accepted norms of due process in this country, or of
fundamental fairness overseas. There are several particular 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 are not being applied in coun-
ternational, which parallel provisions for protection of classified information applicable in federal district
court, including balancing 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 inadmissibly
prosecut national security interests, any non-compliance should be documented in the record to facilitate
appropriate review.

Part 6.4

In the first section of the Recommendation, BADC recommends that in all aspects of these
commission, care be taken to ensure that the proceedings are conducted in a manner which meets a
standard of fundamental fairness. Issued 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 8(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' concerns.

In Findlay v. United Kingdom,1 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 "convening 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 standard, "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" he 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
d 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 8(b)

In Part 8(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 court-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 court-martial.2 In the current Manual

2 Id. at Pre-61 and 4-76.
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
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for Court-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 evidence prescribed for courts-martial." This provision is consistent with Article 36 of the UCMJ, which requires that "petitional, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter [except in courts-martial, military commissions, and other military tribunals, . . .] may be prescribed by the President by regulation which shall, so far as it 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. § 8366(a).

The November 13th order is a clear departure from those longstanding regulatory requirements, and carve out for these military commissions a blatan exception to the presumptive statutory requirement. The President specifically computed 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 court-martial. RADC misses the absence of any specific reason justifying this finding. If there are reasons to support a complete withdrawal from the district court model, rather than some 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 court-martial) during World War II or earlier. But court-martial in World War II were based on raised 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 derive from civil liberties, 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 court-martial have further evolved and expanded since 1950, and now include the requirement for military judges to provide 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 practiced for court-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 illegal system. Spate has strenuously insisted it may not tarnish suspected terrorists unless the U.S. agree 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 concerns of the critics will be allayed, and the commission can be of value that all are seeking: namely independent and impartial tribunals.


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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 severed 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 lower 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 (d)

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 judges, to review all trials by military commission, and to have power to approve, disapprove, or modify (but not to increase) findings or sentences. 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 (1920). 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, carried with the civilian Article 61 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 petitions 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 afforded 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.

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clothed with sufficient power and sufficient inducements of independence to be accepted as meaningful judicial review of those convictions and sentences. BADC urges that he do so.

Conclusion

BADC has sound, but does not accept sacrificially, the assertion by those who defend the military commissions as currently structured that practical concerns regarding the difficulty of trying terrorists overseas trample American (and world) principles of justice. To sacrifice one’s principles as a justification for preserving those same principles is a logically unsound.

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 measured 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 to these rules themselves to allay current concerns, and to make appropriate principles of law and rules of procedure and evidence applicable. In addition, major 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 speed adjudicate the charges against those war criminals consistent in conformance with our nation’s traditional principles of justice and fundamental fairness.

Respectfully submitted,

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

February 2002
GENERAL INFORMATION FORM

Submitting Entity: The Bar Association of the District of Columbia

Submitted By: J. Gustainis Forest, President, The Bar Association of the District of Columbia

1. **Summary of Recommendations.** The Recommendations proposes that military commissions established under the military order issued by the President on November 13, 2001 be structured and implemented in a manner that meets the requirements of fundamental fairness as generally recognized both in the United States and among our principal allies in the fight against terrorism, including having procedures that conform to those established for general court-martial convened pursuant to the Uniform Code of Military Justice, and being made subject to judicial review in an appropriate federal civilian court. The Recommendation takes no position on any issue other than those named, and assumes that the President has inherent authority to vest victims military commissions.

2. **Approval by Submitting Entity.** The Bar Association of the District of Columbia (BADC) approved this Recommendation on December 10, 2001.

3. **Previous Submission to the Board of Governors.** BADC understands that other entities are contemplating Recommendations to be submitted to the Board of Governors addressing the subject of military commissions, but is unaware of the particulars of those potential submissions.

4. **Relation to Relevant Existing Association Policies.** BADC is aware of no prior policies directly related to military commissions. The Association has consistently adopted policies which are consistent with the need for fundamental fairness in processes which involve punitive sanctions, particularly where the death penalty is possible.

5. **Need for Action at this Meeting.** The attacks of September 11, 2001, and the potential, perhaps imminent, promulgation of rules by the Department of Defense to implement the military order of November 13, 2001, makes action at this meeting necessary if the Association's views are to be able to considered by the Administration and the Congress.

6. **Status of Legislation.** Congress is currently (December) holding hearings on the implementation of the military order of November 13, 2001, but we are aware of no relevant legislation which has yet been introduced before Congress.

7. **Cost to the Association.** There will be no cost to the Association.

8. **Disclosure of Interest.** Members of The Bar Association of the District of Columbia could potentially become involved in matters related to military commissions pursuant to the order of November 13, 2001, but there are no known conflicts of interest by anyone involved in the preparation or approval of this recommendation.

9. **Referrals.** This Recommendation and Report is being referred to the following entities, but no responses have been received:

Military Commission - February 2002
The General Practice, Solo and Small Firm Section
The Criminal Justice Section
The Litigation Section
The Section on International Law and Practice
The Section of Individual Rights and Responsibilities
The Section of Administrative Law and Regulatory Practice
The Judicial Division
The Government and Public Sector Lawyers Division
The Young Lawyers Division
The Law Student Division
The Senior Lawyers Division
The Standing Committee on Armed Forces Law
The Standing Committee on Law and National Security
The Federal Bar Association
The Judge Advocates Association
The Bar Association of the City of New York
The National Association of Criminal Defense Lawyers
The National Bar Association
The American Bar Association

10. Contact Person. (Prior to consideration by the Board of Governors)

Grant Leith
Chair, Military Law Committee
The Bar Association of the District of Columbia
1990 Sherman Circle
Lake Ridge, VA 22192
Tel: (703) 495-0000
Fax: (703) 497-7249
E-mail: grauitlatt@net.com

11. Contact Person. (Who will present the report to the Board of Governors)

J. Gooden Foreman
President, The Bar Association of the District of Columbia
1963 N Street, NW
Washington, DC 20006
Phone (202) 395-5523
Fax (202) 783-2330
E-Mail: jgooden@baacd.com

12. Adoption. There are no known proposed amendments to the Resolution.
The Association of the Bar of the City of New York

Report

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; (2) to have 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 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 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 "privelege 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.

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 Afghanistan. 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 action but did not declare war. The United States’ decision to use force was supported generally by resolutions of the United Nations Security Council 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. 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. 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 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. This Committee, in fact, had the opportunity to interact with various members of the Executive Branch instrumental in the creation, drafting and future interpretation and application of the Order and, as a result, obtained information and insights from such individuals, apparently as the policies were being formulated and developed. Because such policies and interpretations appear to have been more deeply developed and/or changed as this Report was being prepared, the Committee has not had the benefit of a fixed and fully determined legal scheme to analyze; in fact, several of the persons interviewed cautioned the Committee members that the procedural regulations which are now being prepared and will soon be issued will not only elucidate the President's true "intent" with respect to the Order, but that such intent may not have been apparent from the text of the Order. 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 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.

The Quirin 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. [23]

Legislative Authority - the UCMJ.

Although the Quirin Court did not find it necessary to determine whether the President had independent authority as Commander-in-Chief to create such commissions [24], 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," [25] "to define offenses against the law of nations," [26] and "to make rules for the government and regulation of the land and naval forces." [27] 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. [28] As will be discussed, however, use of such commissions - as Quirin found - requires a war, at the least de facto, if not declared.

Substantively, Article 21 of the UCMJ, [29] among the statutory provisions cited in the Order as authority for its issuance, [30] 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." [31] 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 [32]. 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 [33] could be 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 [34] 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 that such persons were subject to the laws of war and trial by military tribunal because - in times of war: "A bushwacker, a jayhawkers, 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." 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.

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. 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.

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 ..." [41]

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, [42] and certainly not to persons captured during hostilities conducted by the US armed forces [43].

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 [44] 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).

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 [45]. 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.

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.\textsuperscript{146}

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 \textit{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.\textsuperscript{147}

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 described in \textit{Quirin}. That possible legal infirmity and, at the very least, uncertainty, severely undercuts the policy objectives of the Order as more fully discussed below.

\textbf{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,\textsuperscript{148} 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 \textit{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\textsuperscript{149}. However, the framework of the Order is already inconsistent with the essential elements of due process provided for in the UCMJ in numerous respects.\textsuperscript{150} Accordingly, if Section 36 is indeed necessary authority for the Order, then the Order appears to be procedurally defective.

\textbf{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
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 confinement or not, and the cause
of his confinement; and if no sufficient ground of detention appears, the party is entitled
to his immediate discharge. This writ is most beneficially construed; and is applied to
every case of illegal restraint, whatever it may; for every restraint upon a man's liberty is,
in the eye of the law, an imprisonment, wherever may be the place, or whatever may be
the manner, in which the restraint is effected.

Chief Justice Rehnquist has praised the privilege: "It has been rightly regarded as a
safeguard against executive tyranny, and an essential safeguard to individual liberty." Beginning in the nineteenth century and continuing without exception through to the
present day, the Supreme Court has consistently held that non-citizens within the
jurisdiction of the United States are "persons" within the meaning of the Fifth Amendment and are thus entitled to the protections of the due process clause. In fact, it was recognized by the Supreme Court in the wartime cases Quirin and Yamashita as available even to members of the German military and to the Japanese command within the U.S. (or in Yamashita's case, in the Philippines, under U.S. rule) to test the authority of a military commission to detain and try them. It is also available to persons charged under the UCMJ and held for court martial under that statute.

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.

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 ...," 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 military commissions, discussed supra, and, thus, too, offer no authority for the detention provisions of the Order.

It appears clear, therefore, that the three bases cited in the Order by the President do not in fact provide the legal authority necessary to validate these provisions of the Order effectively suspending habeas corpus. The conclusion is that the power to suspend the...
privilege of the writ of habeas corpus is given to the Congress and that the President may not exercise it.

Congress, in fact, has acted with respect to the events of September 11, 2001 specifically in connection with habeas corpus. On October 26, 2001, it adopted legislation sought by the Administration; the USA Patriot Act of 2001, whose full name is "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act [sic] of 2001." The Act was intended, as its name indicates, to provide a comprehensive set of "tools" to the federal government in the service of law enforcement and intelligence gathering.

The USA Patriot Act specifically addresses habeas corpus in Section 412 (Mandatory Detention Of Suspected Terrorists; Habeas Corpus; Judicial Review). That Section amends Section 236 of the Immigration and Nationality Act to provide that aliens subject to the Act who are detained must be criminally charged or placed in removal proceedings within seven days following commencement of detention unless release of the alien will result in activity that endangers the national security of the United States. In that case, the Attorney General must so certify and recertify every 6 months thereafter, if the alien is to continue in detention. Importantly, habeas corpus proceedings to review decisions made under the Section are available to the suspect alien on application to the Supreme Court, any Justice of the Supreme Court, any circuit judge of the D.C. Circuit Court of Appeals, or any district court with jurisdiction. Further still, determinations by district courts or circuit court judges are subject to appeal to the D.C. Circuit Court of Appeals.

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 *de jure*), nor his obligation to faithfully execute the laws could trump the Constitution's plain grant of authority to Congress to raise and support armies and to provide and maintain a navy. [65]

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 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 [66]. 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 [67].

**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. [68]"
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."[69] 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.[70] 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.[71] It is noted that the Commission on Wartime Relocation and Internment of 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."[72]

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"[73] - and even then only for "violations of the laws of war."[74] 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
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." [25] 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. [26] 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 [27].

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 or 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. [28] 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.

**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. 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.

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.

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. 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.

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 and, we believe, does a disservice to the entire process. It would permit indefinite detention without charges, much less trial, a tactic likely to be used when 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 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.

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, \textit{i.e.}, the defeat of the enemy nation, and thus a clear end date. \textsuperscript{[85]} 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 \textsuperscript{[86]}, the almost total curtailment of liberties previously available to foreign nationals living in or visiting this country has no natural end in sight. \textsuperscript{[87]}

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 used yet" \textsuperscript{[88]} 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, \textsuperscript{[89]} 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 \textit{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. \textsuperscript{[90]} We 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.

\textbf{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 ..." \[\text{\textsuperscript{1011}}\]

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." \[\text{\textsuperscript{1022}}\] Al Qaeda may be analogous to pirates of old \[\text{\textsuperscript{1023}}\]. 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 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 harbormen, 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, 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 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. However, the federal District Courts may be less adapted to trying enemy combatants (lawful or unlawful) detained in armed conflict.

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 Noriega, who surrendered to American soldiers after extended military operations)."

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, 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," [29] (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, 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 [100]. 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 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.

Committee on Military Affairs and Justice

December, 2001
New York City, New York

Stephen J. Shapiro, Chair*
Nicholas Defabrizio
Ralph Dengler
Thomas Elwood
Melissa Epstein*
Miles P. Fischer*
Richard Hartzman*
Matt Hawkins
Paul Kerian
Patricia Murphy, Secretary
Joseph Obrien
Irvin Rosenthal
Alice Slater
Richard Yeskoo

* Primary authors of Report

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 supersedes 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)(iii), 212(a)(3)(B), 237(a)(4)(A)(i), 237(a)(4)(A)(iii), 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 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)."

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.

[1] The Order is reproduced in Appendix A.

[2] 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.


Military Order, at §7(b)(2).

Military Order, at §3(a).

10 U.S.C. §§801 - 946 (hereinafter, the "UCMJ").

Military Order, at §1(f).

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.

U.S. Constitution, Article 1, Section 9, Clause 2.

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.

S.J.Res.23, September 18, 2001 (Public Law No: 107-40)

United Nations Security Council Resolutions 1368 (September 12, 2001) and 1373 (September 28, 2001).

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(e) 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."


[16] The circumstance was the annual meeting of the Committee's counterpart at the American Bar Association - the Standing Committee on Law and National Security - held in Washington, D.C. on November 29 and 30, 2001. Persons with whom we spoke included the White House Counsel, the General Counsel of the Department of Defense, the Legal Adviser to the National Security Council, 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").

[17] 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.


[21] The 1942 order is set forth in Appendix B ("1942 Order").

[22] See historical examples from the Revolution, the Mexican War and the Civil War cited in Quirin, supra, at notes 9 and 10.

[23] "[A]t least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties - 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.


[27] U.S. Constitution, Article I, Section 8, Clause 14.

[28] 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).


[30] 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.

[31] Emphasis supplied.

[32] 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.
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. Department of Defense Directive Number 5100.77, December 9, 1998, viewed November 25, 2001 on the Defense Department web site at <http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/> (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.

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.


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.


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.
[41] Order, at Sec. 2.


[44] 71 U.S. 2 (4 Wall.) (1866)

[45] Whether the Taliban is recognized as the de jure government of Afghanistan (which is doubtful considering 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.

[46] 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.

[47] In his concurring opinion in Hirabayashi 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


[49] Such procedures have not yet been issued at the time this Report was prepared.

[50] 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.

Military Order, §7(b)(1).

UCMJ, §802 (a)(9).

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.


See, e.g., Wong Wing v. United States, 163 U.S. 228, 238 (1886) (resident aliens entitled to Fifth Amendment rights); Kwong Hai Chew v. Colding, 344 U.S. 590, 596 (1953) (resident alien is a "person" within the meaning of the Fifth Amendment);
Mathews v. Diaz, 426 U.S. 69, 77 (1976) ("There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.") (citations omitted); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (distinguishing reach of Fourth Amendment to cover only "the people" - as in "we the people" - from Fifth Amendment's protection of "any person"). See also United States v. bin Laden, 132 F.Supp.2d 168, 181 (2001) (a non-citizen whose only connections to the United States are his alleged violations of U.S. law and his subsequent U.S. prosecution is entitled to due process of law under the Fifth Amendment).

[58] "In Ex parte Quirin, 317 U.S. 1, we held that status as an enemy alien did not foreclose "consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." Id. at 25. This we did in the face of a presidential proclamation denying such prisoners access to our courts. ... [I]n Yamashita v. United States, 327 U.S. 1, we held that courts could inquire whether a military commission, promptly after hostilities had ceased, had lawful authority to try and condemn a Japanese general charged with violating the law of war before hostilities had ceased. There we stated: "[T]he Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus." Id. at 9." Black, J. dissenting in Johnson v. Eisentrager, 339 U.S. 763, 794 (1950).

[59] See, e.g., 28 USC 2241(c).

[60] 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.")

[61] The Resolution is set forth in Appendix C.

[62] Public Law 107-56. Interestingly, Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, which took the Administration's urgent request for the Act and reported it out rapidly, albeit without significant modification, expressed surprise that the Administration should have requested this Act on an urgent basis, failed to act under it
and then issued - without any prior notice to Congress, much less authority from it - the Military Order, which contains very different provisions. Comments by Senator Patrick Leahy made on the television news show Meet the Press, November 25, 2001. Perhaps the President's action is not so surprising considering the refusal of Congress to approve the full range of powers sought by the Administration. Having failed to get the desired statutory authority, the President acted as if he did not need it.

Section 412 of the USA Patriot Act is reproduced in Appendix D.

It should be noted that the USA Patriot Act is viewed by many civil liberties lawyers as "dangerous" in its expansion of the definition of what constitutes terrorism, the basis for an alien's detention and the like. See, e.g., New York Times, November 25, 2001, A1, B4.

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.

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

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.

1942 Order.
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.

"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.


Gonzales Op-Ed, supra.


Rehnquist Remarks, supra.

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.
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.

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.

18 USC 2441, set forth in Appendix E.


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.


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."

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.

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.


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.

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

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.

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.

Steel Seizure Case, supra, at 635 (1952) (Jackson, J., concurring)

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."

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.

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.


Gonzales Op-Ed, supra.

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. It is expected that the Association of the Bar of the City of New York will soon comment upon First Amendment concerns arising from the Order and the role of the media in proceedings thereunder.
1. The American Bar Association

My name is Neal R. Sonnett. I certify that I am licensed to practice law in the State of Florida. I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor I am seeking to be habeas counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person.

b. I further state the submission is only to be considered for its value as an amicus brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.

c. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in
the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

Issues presented, Facts, Law and Argument are in the body of the appended brief. A statement of the interests of the ABA is attached hereto as Appendix A.

Neal R. Sonnett  
Chair, Task Force on Treatment of Enemy Combatants  
American Bar Association  
Two South Biscayne Boulevard, Suite 2600  
Miami, Florida 33131-1804  
nrs@sonnett.com  
Tel: (305) 358-2000  
Fax: (888) 277-0333

2. The American Civil Liberties Union

My name is Jameel Jaffer. I certify that I am licensed to practice law in the State of New York. I further certify:

a. On 8 December 2008, the American Civil Liberties Union ("ACLU") filed a motion with this Commission as an intervenor seeking similar relief with respect to a related issue. The instant submission is only to be considered for its value as an _amicus_ brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.

b. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited
in the brief, and that I am not aware of any contrary authority not cited to in the brief
or substantially addressed by the contrary authority cited to in the brief.

Issues presented, Facts, Law and Argument are in the body of the appended brief. A
statement of the interests of the ACLU is attached hereto as Appendix B.

Jameel Jaffer
Director, National Security Project
American Civil Liberties Union Foundation
125 Broad St.
New York, NY 10004
jjaffer@aclu.org
Tel: (212) 519-7814
Fax: (212) 549-2583

3. **Human Rights First**

My name is Deborah Coolson. I certify that I am licensed to practice law in the State of
New York. I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client
relationship with any person whose case has been referred to a Military Commission, I
am not currently nor I am seeking to be *habeas* counsel for any such person, and I am not
currently nor am I seeking to be next-friend for such person.

b. I further state the submission is only to be considered for its value as an *amicus* brief and
not for any other purpose to include as a brief on behalf of any specific party to any
Commission proceeding.

c. I certify my good faith belief as a licensed attorney that the law in the attached brief is
accurately stated, that I have read and verified the accuracy of all points of law cited in
the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

Issues presented, Facts, Law and Argument are in the body of the appended brief. A statement of the interests of Human Rights First is attached hereto as Appendix C.

Deborah Colson
Interim Director - Law & Security
Human Rights First
333 7th Avenue, 13th Floor
New York, NY 10001
ColsonD@HumanRightsFirst.org
Tel: (212) 845-5247
Fax: (212) 845-5299

4. **Human Rights Watch**

My name is Jennifer Daskal. I certify that I am licensed to practice law in the State of New York and the District of Columbia. I further certify:

a. I am not a party to any Commission case in any capacity, I do not have an attorney-client relationship with any person whose case has been referred to a Military Commission, I am not currently nor am I seeking to be habeas counsel for any such person, and I am not currently nor am I seeking to be next-friend for such person.

b. I further state the submission is only to be considered for its value as an amicus brief and not for any other purpose to include as a brief on behalf of any specific party to any Commission proceeding.

c. I certify my good faith belief as a licensed attorney that the law in the attached brief is accurately stated, that I have read and verified the accuracy of all points of law cited in
the brief, and that I am not aware of any contrary authority not cited to in the brief or substantially addressed by the contrary authority cited to in the brief.

Issues presented, Facts, Law and Argument are in the body of the appended brief. A statement of the interests of the ABA is attached hereto as Appendix D.

Jennifer Daskal
Human Rights Watch
1630 Connecticut Avenue NW
Washington, DC 20008
daskell@hrw.org
Tel: (202) 612-4349

1. **Timeliness:** This is an amicus brief, filed on behalf of the American Bar Association ("ABA"), the American Civil Liberties Union ("ACLU"), Human Rights First ("HRF"), and Human Rights Watch ("HRW"). It is timely filed pursuant to the Military Judge’s 5 January 2009 direction that any amicus briefs regarding Protective Order 007 be received by 14 January 2009.

2. **Relief Sought:** *Amici Curiae* respectfully request that the Commission rescind Protective Order 007 ("PO 007" herein), dated 18 December 2008, or in the alternative, modify PO 007 in accordance with D-___ ("Rescission of Protective Order 007").

3. **Overview:** Protective Order 007, signed by the Military Judge on 18 December 2008, is overbroad and impermissibly restricts the right to a fair and public trial in violation of the Military Commissions Act of 2006 ("MCA") and the Constitution of the United States. Consequently, the Military Judge should rescind PO 007. In effect, PO 007 creates a presumption that the proceedings in this case will be closed to the public and press. It expands
the definition of Classified Information to include “[a]ny document or information … referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government . . . or information in the possession of such agency” as well as “any statements made by the accused.” PO 007 also considers as Classified previously disclosed information that is already in the public domain if confirmed or denied by someone with access to the classified information, thereby potentially making already disclosed information off limits. As a result, PO 007 diminishes the transparency and fairness of these proceedings by permitting the government to exercise virtually unlimited authority to exclude the press, public, and trial observers – including Amici – from the courtroom.


5. **Facts:**

   a. The Military Commission Act (“MCA”) provides for proceedings of the military commission to be open to the public. On 21 March 2002, Secretary of Defense Donald H. Rumsfeld issued Military Commissions Order No. 1, detailing the operational rules and regulations for the military commissions. The regulations similarly stated that military commission trials would be open to the public.
b. Beginning in May 2003, HRF, HRW and Amnesty International ("AI")\(^1\) wrote separately to the Pentagon requesting access to the United States Naval Base at Guantanamo Bay, Cuba in order to observe the military commission proceedings. Each group followed up with its request in writing or by phone.

c. The Department of Defense did not respond to the requests for more than 6 months. By letter dated 7 January 2004, the Department denied AI’s request for access. An identical denial letter dated 11 February 2004 was issued to HRW. HRF did not receive a response.

d. On 20 February 2004, HRF, HRW, and AI sent a joint letter to Secretary Donald H. Rumsfeld again requesting authorization to observe the Commission proceedings.

e. In August 2004, the government reversed its position, and General John D. Altenburg, Jr., the Appointing Authority for Military Commissions, invited the four *Amici Curiae* and AI to send representatives to observe the Commission proceedings at Guantanamo Bay.

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\(^1\) Amnesty International has not formally joined this amicus brief. However, the organization supports the broadest possible access to criminal and other legal proceedings by trial observers, in no event to be less fulsome than that contemplated by international standards. Such openness is recognized as a key element of the fairness of proceedings by international law, and the right of individuals and associations to observe trials and to draw public attention to failures to respect human rights in that and other contexts has been specifically recognized by the United Nations General Assembly. While some international instruments recognize limited exceptions to openness, such exceptions are strictly drawn and narrowly construed. Amnesty International, too, therefore calls for rescission of Protective Order 007, dated 18 December 2008, as the same substantive aspects that are highlighted in this brief render it inconsistent with international standards. Relevant international standards are attached hereto in Appendix E.
f. Since that time, Amici Curiae have consistently sent representatives to observe military commission hearings and trials at Guantanamo Bay.

g. Many, if not all, of those hearings and trials have involved protected information, and measures have been taken to permit observation without disclosure of such information.

h. For example, observers watch the tribunal proceedings either via a closed-circuit video monitor or in a soundproof viewing room separated from the courtroom by a panel of glass. An audio feed is transmitted into the viewing room with a delay, permitting courtroom security officials to cut off the audio feed whenever the prisoners appear to be discussing protected information, such as the conditions of their detention or interrogations.

i. Observers have been permitted to attend past proceedings involving the five men accused of involvement in the September 11th attacks. During these proceedings, observers have been permitted to hear statements made by the defendants.

j. On 18 December 2008, the Military Judge signed PO 007.

k. On 9 January 2009, the Military Judge ordered the Assistant Secretary of Defense for Public Affairs to publically release PO 007. Attached hereto as Appendix F is a copy of PO 007.

l. Protective Order 007 purports to forbid the disclosure of any information that is currently classified, as well as any information related in any way to classified information. Among other things, it forbids disclosure of: “any statements made by the accused” and “any . . . information . . . that refers to or relates to national security or intelligence matters . . . including but not limited to any subject referring to the
Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency[]."

m. On 5 January 2009, the Military Judge directed that parties submit briefs addressing whether:

a. Protective Order 007 expands the definition of “classified information” and the scope of protective orders generally beyond that provided for in the MCA and other applicable legal authority; and

b. Modifications to Protective Order 007 should be made to ensure that it does not conflict with the legal authority cited above.

6. **Discussion:** A right of access to the proceedings of this tribunal is expressly granted by the Military Commissions Act (“MCA”) and independently mandated by the Constitution of the United States. The right of access helps ensure that the trial is fair, is perceived as fair, and helps to provide closure to affected victims. Its embodiment in the MCA demonstrates the importance that Congress placed on this right. Any compromise of that right must be strictly limited to that which is necessary for national security and personal safety, and the government bears the burden of proof of demonstrating that the limitation is necessary and narrowly tailored.

Contrary to the MCA and the First Amendment, there has been no finding by the Military Judge that the government’s national security concerns require a sweeping protective order that presumptively and categorically designates the defendants’ speech as Classified Information. Similarly, there has been no finding that these concerns require a protective order that presumptively classifies documents or information if they merely reference federal agencies such
as the CIA, FBI, State Department, simply relate to national security or intelligence matters, or have already been in the public domain.

The discussion that follows explains the statutory and constitutional grounds for the continued right of access sought by *Amici Curiae*. Section A establishes that the MCA expressly grants a right of access to the proceedings of this tribunal. Section B demonstrates that the First Amendment independently protects the public’s right of access to these proceedings. Section C discusses how the expansive definition of “Classified Information” in PO 007 violates the right of access found in the MCA and the First Amendment. Finally, Section D requests modifications to PO 007 consistent with D-____ (“Rescission of Protective Order 007”) to ensure that the Order does not conflict with the MCA or constitutional law.


In adopting the MCA, Congress recognized the critical importance that these criminal proceedings be conducted in the open so the watching world would accept their validity. The MCA thus expressly mandates access by “the public” to all “proceedings” of any military commission, unless specifically delineated exceptions are found to apply. 10 U.S.C. § 949d(d)(l). The MCA permits a denial of access “*only* upon making a *specific finding* that such closure *is necessary* to – (A) protect information the disclosure of which could reasonably be expected to cause damage to the national security, including intelligence or law enforcement sources, methods, or activities; or (B) ensure the physical safety of individuals.” 10 U.S.C. § 949d(d)(2) (emphasis added).

The Regulation for Trial by Military Commissions ("Reg. MC" or the "Regulation") and the Manual for Military Commissions ("MMC") containing the Rules for Military Commissions ("RMC") also recognize and implement this statutory right of access. *See* Reg. MC 19-7(a)
("The sessions of military commissions shall be public to the maximum extent practicable.") (emphasis added)); RMC 806(a) ("[M]ilitary commissions shall be publicly held." (emphasis added)).

Rule 806(b)(2) authorizes a military judge to close a "session of a military commission" only for limited purposes and only after making "essential findings of fact, appended to the record of trial." Similarly, Military Commission Order No. 1 (March 21, 2002) guarantees the accused "a trial open to the public" subject only to closure for the "protection of information classified or classifiable under reference" or the "physical safety of participants in the Commission proceedings."

The MCA and its implementing regulations make clear that the public’s right of access extends beyond the "trial" to all aspects of the "proceeding" against an accused. The MCA at various times differentiates between "trial," "pre-trial" and "post-trial" procedures, e.g. 10 U.S.C. § 949a(a), but extends the public right of access more broadly to all "proceedings." Id. § 949d(d). Under the Regulation, the right of access applies "from the swearing of charges, until the completion of trial or disposition of the case without trial," Reg. MC 19-2, and extends specifically to all "[i]nformation that has become part of the record of proceedings of the military commission in open session," and "[t]he scheduling or result of any stage in the judicial process." Reg. MC 19-4(a)(3)-(4). Motions, rulings, and summaries of Rule 802 conferences are all required to be part of the Record of Trial, and hence expressly subject to the right of access. The MMC reflects this same understanding. It empowers the military judge to "exercise

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2 This Rule defines "public" to include "representative of the press, representative of national and international organizations, as determined by the Office of the Secretary of Defense, and certain members of both the military and civilian communities." RMC 806(a). The Office of the Secretary of Defense has determined that Amici are national organizations that meet this standard.
reasonable control over the proceedings,” RMC 801(a)(3), and then identifies pre-trial motions as being among the “proceedings” a judge controls. See also RMC 908(b)(8)(A) (motions not affected by order on appeal “may be litigated, in the discretion of the military judge, at any point in the proceedings”).

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3 When the presentation of classified evidence is anticipated and the government desires closure, the “Government may submit at the request of the military judge (or make available for review) the classified information and an affidavit ex parte for examination by the military judge only” laying out why the government is entitled to closure. RMC 505. In addition, RMC 505 requires both the government and defense to advise the tribunal of whether they will be presenting classified evidence. The “discussion” appended to RMC 806 and RMC 505 approvingly cite the process used by military courts as stated in United States v. Grunden, 2 M.J. 116, 122-23 (C.M.A. 1977), to address the public’s right of access when closure to protect classified evidence is anticipated:

Although the actual classification of materials and the policy determinations involved therein are not normal judicial functions, immunization from judicial review cannot be countenanced in situations where strong countervailing constitutional interests exist which merit judicial protection. . . . Before a trial judge can order the exclusion of the public on this basis, he must be satisfied from all the evidence and circumstances that there is a reasonable danger that presentation of these materials before the public will expose military matters which in the interest of national security should not be divulged. . . . [The trial judge must determine] that the material in question has been classified by the proper authorities in accordance with the appropriate regulations. . . . The trial judge’s determination that the prosecution has met its burden as to the nature of the materials does not complete his review in this preliminary hearing. He must further decide the scope of the exclusion of the public. The prosecution must delineate which witnesses will testify on classified matters, and what portion of each witness’ testimony will actually be devoted to this area. Clearly, unlike the instant case, any witness whose testimony does not contain references to classified material will testify in open court. The witness whose testimony is only partially concerned with this area should testify in open court on all other matters. For even assuming a valid underlying basis for the exclusion of the public, it is error of “constitutional magnitude” to exclude the public from all of a given witness’ testimony when only a portion is devoted to classified material.
These statutory and administrative provisions plainly establish the public right of access to proceedings of this tribunal. While not an absolute right, this statutory right can be overcome only upon specific judicial determination that information must be withheld for reasons of national security or personal safety. 10 U.S.C. § 949d(d)(2).


The First Amendment independently “protects the public and the press from abridgement of their rights of access to information about the operation of their government.” Richmond Newspapers, 448 U.S. at 584 (Stevens, J., concurring) (recognizing First Amendment right of public access to criminal trials); Globe Newspaper, 457 U.S. at 604-06 (same); Press-Enterprise I, 464 U.S. at 508-10, 513 (recognizing First Amendment right of public access to voir dire proceedings); Press-Enterprise II, 478 U.S. at 10 (same as to preliminary hearings in a criminal prosecution). The scope of this constitutional right was first defined by the U.S. Supreme Court in Richmond Newspapers, a case involving access to a criminal trial that the State of Virginia had conducted entirely in secret. A Virginia statute specifically granted the trial judge discretion to conduct a secret trial, but the Supreme Court held that the First Amendment created an affirmative, enforceable constitutional right of access to certain government proceedings, such as a criminal trial.

The Court held this First Amendment right to be implicit in the guarantees of free speech and press, just as the right of association, right of privacy, right to travel and the right to be
presumed innocent are implicit in other provisions of the Bill of Rights.\(^4\) As the Court later put it in *Globe Newspaper Co. v. Superior Court*, the First Amendment right of access is based upon:

the common understanding that a “major purpose of that Amendment was to protect free discussion of governmental affairs.” By offering such protection, the First Amendment serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government.

457 U.S. at 604 (citation omitted). *Richmond Newspapers* “unequivocally holds that an arbitrary interference with access to important information is an abridgement of the freedoms of speech and of the press protected by the First Amendment.” 448 U.S. at 583 (Stevens, J. concurring). Under *Richmond Newspapers* and its progeny, this right of access exists where government proceedings and information historically have been available to the public, and public access plays a “significant positive role” in the functioning of government. *E.g.*, *Globe Newspaper*, 457 U.S. at 605-07; *Press-Enterprise II*, 478 U.S. at 8-9; *Washington Post*, 935 F.2d at 287-92.

Under the “experience” and “logic” analysis applied by the Supreme Court, the right of access “has special force” when it carries the “favorable judgment of experience,” but what is “crucial” in deciding where an access right exists “is whether access to a particular government process is important in terms of that very process.” *Richmond Newspapers*, 448 U.S. at 589 (Brennan, J., concurring). See also *Globe Newspaper*, 457 U.S. at 605-06; *Press-Enterprise II*, 478 U.S. at 89;

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\(^4\) See *Richmond Newspapers*, 448 U.S. at 577 (Burger, J.) (the right of access is “assured by the amalgam of the First Amendment guarantees of speech and press” and their “affinity to the right of assembly”); *id*. at 585 (Brennan, J., concurring) (“[T]he First Amendment – of itself and as applied to the States through the Fourteenth Amendment – secures such a public right of access.”).
United States v. Simone, 14 F.3d 833, 837 (3d Cir. 1994); Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1173 (3d Cir. 1986).

While this right has most frequently been asserted to compel access to judicial proceedings and documents, the right also applies to proceedings and information in the executive and legislative branches. E.g., Detroit Free Press v. Ashcroft, 303 F.3d 681, 695-96, 700 (6th Cir. 2002) (right of access to executive branch deportation proceedings); Whiteland Woods, L.P. v. Twp. Of West Whiteland, 193 F.3d 177, 181 (3d Cir. 1999) (municipal planning meeting); Cal-Almond, Inc. v. U.S. Dep’t of Agric., 960 F.2d 105, 108-10 (9th Cir. 1992) (agriculture department voters list); Soc’y of Prof’l Journalists v. Sec’y of Labor, 616 F. Supp. 569, 574-75 (D. Utah 1985) (administrative hearing), vacated as moot, 832 F.2d 1180 (10th Cir. 1987).

Historical Experience. Our country has a tradition of public access to adjudicative military tribunals. William Winthrop, known as the “Blackstone of Military Law” (Reid v. Covert, 354 U.S. 1, 19 n.38 (1957) (plurality opinion)), described a history of open proceedings that dates back centuries:

Originally, (under the Carlovingian Kings,) courts-martial . . . were held in the open air, and in the Code of Gustavus Adolphus . . . criminal cases before such courts were required to be tried “under the blue skies.” The modern practice has inherited a similar publicity. . . . [O]nce opened, the court-martial room . . . is, in general, continued open throughout the investigation, (except when the doors are closed for deliberation on interlocutory matters,) and also during the closing arguments of the counsel, or till the final clearing for judgment. While thus open the public is allowed to come and go much as in the civil courts.

William Winthrop, MILITARY LAW AND PRECEDENTS 161-62 (rev. 2d ed. 1920) ("Winthrop"). Based on this long tradition of access, military courts recognized the right to public access to trials even before the Supreme Court recognized the First Amendment right of public access to criminal proceedings in Richmond Newspapers. United States v. Brown, 22 C.M.R. 41, 48 (C.M.A. 1956), overruled, in part, on other grounds by Grunden, 2 M.J. at 116.

This tradition of public access to courts-martial also runs through the history of military commissions specifically. Military commissions, after all, historically have “differed from the court-martial only in terms of jurisdiction.” David Glazier, Notes, Kangaroo Court or

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5 While history and policy are interrelated in the Supreme Court’s definition of the right of access, the absence of historical evidence would not defeat the right. In Press Enterprise II, the Court noted that the First Amendment right attached to pretrial proceedings even when such proceedings had “no historical counterpart,” but the “importance of the . . . proceeding” was clear. 478 U.S. at 10 n.3. See also United States v. Crider, 675 F.2d 550, 555 (3d Cir. 1982) (right of access applies to pretrial proceedings even where public had no common law right to attend); United States v. Chagra, 701 F.2d 354, 363 (5th Cir. 1983) (lack of historic record of access to bail proceedings does not bar recognition of a First Amendment right of access).

[T]he procedures governing trials by military commission historically have been the same as those governing courts-martial. . . . The military commission was not born of a desire to dispense a more summary form of justice than is afforded by courts-martial; it developed, rather, as a tribunal of necessity to be employed when courts-martial lacked jurisdiction over either the accused or the subject matter. See Winthrop 831. Exigency lent the commission its legitimacy, but did not further justify the wholesale jettisoning of procedural protections. That history explains why the military commission's procedures typically have been the ones used by courts-martial.


While there have been some exceptions, military commissions throughout our nation's history have been conducted publicly:

- During the Civil War, for example, the members of the 1864 military commission of Lambdin P. Milligan and others retired from the room to deliberate in order "to avoid the inconvenience of dismissing the audience assembled to listen to the proceedings." Winthrop, 289 (emphasis added and internal quotation marks omitted).

- The military commission established to try John Wilkes Booth's co-conspirators in Lincoln's assassination was opened to the public after reporters complained and General Ulysses S. Grant "led them to the White House to talk to the president." See James Johnston, Swift and Terrible: A Military Tribunal Rushed to Convict After Lincoln's Murder, Wash. Post, Dec. 9, 2001.


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6 The United States Court of Military Commission Review has recognized that Congress intended the procedures and practices of military commissions to "mirror" those of courts-martial, and that the procedures herein "are based upon the procedures for trial be general courts-martial." United States v. Khadr, CMCR 07-001 at 23 & n.35 (Sept. 24, 2007) (quoting MCA §§ 949a(a) & 948b(c)).
The military commissions established by the United States at Dachau were, like the international tribunal at Nuremberg, open to the press and public, with “more than four hundred spectators crowd[ing] into the courtroom on” the opening day. See Joshua M. Greene, JUSTICE AT DACHAU: THE TRIALS OF AN AMERICAN PROSECUTOR 39 (2003); id. at 245 (noting that judge denied defense request to prohibit press from photographing the accused).

While a 1942 trial of Nazi saboteurs found in the United States was famously conducted in secret, that precedent shows how secrecy can be counterproductive in the long run. See Ex parte Quirin, 317 U.S. 1 (1942). It is now widely believed that the “real reason President Roosevelt authorized these military tribunals was to keep evidence of the FBI’s bungling of the case secret.”

Policies Advanced by Public Access. The logic prong of the Supreme Court’s test for access is readily met. In recognizing the constitutional right to attend criminal proceedings, the Supreme Court identified at least five distinct interests advanced by open adjudicatory proceedings, each of which applies to criminal proceedings in this forum as well: (1) ensuring that proper procedures are being followed; (2) discouraging perjury, misconduct of participants, and biased decisions; (3) providing an outlet for community hostility and emotion; (4) ensuring public confidence in a trial’s results through the appearance of fairness; and (5) inspiring confidence in government through public education regarding the methods followed and remedies granted by government. See Richmond Newspapers, 448 U.S. at 569-71.

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Concurring in *Richmond Newspapers*, Justice Brennan explained the crucial structural role that public access plays in the proper functioning of our nation’s criminal justice system: “Open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous ‘checks and balances’ of our system, because ‘contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power.’” *Id.* at 592 (Brennan, J., concurring) (quoting *In re Oliver*, 333 U.S. 257, 271 (1948)).

The very same policy arguments that mandated the constitutional right of access to criminal trials in the civilian court system apply to criminal trials conducted by the Department of Defense. Any “adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.” *Lugosch*, 435 F.3d at 124 (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)). Like other adjudicatory proceedings, military commissions are presided over by an impartial arbiter, judgment is based on a record created by the tribunal through an adversarial process that involves the presentation of evidence and the opportunity to cross-examine witnesses. In this setting, public access improves the performance of all involved, protects judges and prosecutors from claims of dishonesty, and provides a forum for the education of the public. *See* The Comm. On Commc’ns & Media Law of the Ass’n of the Bar of the City of New York, “*If it Walks, Talks and Squawks . . .*” *The First Amendment Right Of Access to Administrative Adjudications: A Position Paper*, 23 Cardozo Arts & Ent. L.J. 21, 25 (2005). As with other types of military tribunals, an open proceeding “reduces the chance of arbitrary or capricious decisions and enhances public confidence,” which would “quickly erode” if the proceedings are arbitrarily closed. *Scott*, 48 M.J. at 665 (citations and internal quotation marks omitted); *see also Anderson*, 46 M.J. at 731 (same).
Indeed, judges within the military justice system have long recognized that openness significantly assists the functioning of the adjudicative process. “A public trial is believed to effect a fair result by ensuring that all parties perform their functions more responsibly, encouraging witnesses to come forward, and discouraging perjury.” Hershey, 20 M.J. at 436. Even before the Supreme Court recognized the right of access to criminal proceedings in Richmond Newspapers, the Court of Military Appeals had identified the functional benefits of public proceedings: (1) improving the quality of testimony; (2) curbing abuses of authority; and (3) fostering greater public confidence in the proceedings. See Brown, 22 C.M.R. at 45-48. As explained by Professor Wigmore in his seminal treatise quoted in Brown, “[n]ot only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.” Wigmore, Evidence § 1834 (3d ed.), quoted in Brown, 22 C.M.R. at 45; see also United States v. Hood, 46 M.J. 728, 731 n.2 (A. Ct. Crim. App. 1996).

The vital role that openness plays in ensuring public respect for the results produced by an adjudicative process is perhaps best demonstrated by considering the converse:

Secret hearings – though they be scrupulously fair in reality – are suspect by nature. Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court’s decision sealed from public view.


8 See also Nebraska Press Ass’n v. Stuart, 427 U.S. 539, 587 (1976) (Brennan, J., concurring):
For all the above reasons, as well as the unbroken chain of precedents issued by United States military tribunals since \textit{Brown}, openness of adjudicative military bodies, including the military commissions, promotes the functioning of those bodies, thereby satisfying the logic prong of the \textit{Press Enterprise II} analysis.

\textbf{Once the Presumption of Openness Attaches, it Can Only Be Overcome by An Overriding Interest That is Narrowly Tailored.}

The presumption of openness that attaches to the proceedings of the military commissions can be overcome only by "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." \textit{Press-Enterprise Co. II}, 464 U.S. at 510. If access is to be denied, judicial findings on the need for closure or sealing must be entered as written findings of fact, made with sufficient specificity to allow appellate review. \textit{Press-Enterprise II}, 478 U.S. at 9-10, 14; \textit{ABC, Inc.}, 360 F.3d at 98; \textit{Hartford Courant}, 380 F.3d at 96; \textit{In re Time, Inc.}, 182 F.3d 270, 271 (4th Cir. 1999); \textit{Matter of New York Times Co.}, 828 F.2d 110, 116 (2d Cir. 1987) ("Broad and general findings by the trial court, however, are not sufficient to justify closure."). The adjudicatory tribunals of the military branches have applied this same standard. As explained in \textit{Hershey}, "the party seeking closure must advance an overriding interest that is likely to be prejudiced [by openness]; the closure must be narrowly tailored to protect that interest; the trial court must consider reasonable

Secrecy of judicial action can only breed ignorance and distrust of courts and suspicion concerning the competence and impartiality of judges; free and open reporting, criticism, and debate can contribute to public understanding of the rule of law and to comprehension of the functioning of the entire criminal justice system, as well as improve the quality of that system by subjecting it to the cleansing effects of exposure and public accountability.

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alternatives to closure; and it must make adequate findings supporting the closure to aid in review.” 20 M.J. at 436; see also Anderson, 46 M.J. at 729 (“[T]he military judge placed no justification on the record for her actions. Consequently, she abused her discretion in closing the court-martial.”); Scott, 48 M.J. at 665.

C. The Expansive Definition of “Classified Information” in Protective Order 007 Violates the Right of Access Mandated by the MCA and the First Amendment.

Protective Order 007 does more than protect documents and information lawfully classified under M.C.R.E. 505(b) or Executive Order 12958 from public dissemination. It deprives Amicus Curiae of access to traditionally public, unclassified aspects of a criminal trial, including statements made by the accused as well as a significant amount of information relating to the charges against them. Amici Curiae believe that under PO 007, most, if not all of the proceedings in this case will be off-limits to trial observers, diminishing the transparency and fairness of the Commissions process in violation of the MCA and the First Amendment.

The MCA and the First Amendment mandate a right of access subject only to a specific finding by the Military Judge that information must be withheld for reasons of national security or personal safety. Protective Order 007 turns this presumption of openness on its head by impermissibly expanding the definition of Classified Information to encompass virtually all substantive statements, documents, and information related to this case. There have been no “specific findings” that the wholesale exclusion of the public from this information is necessary to protect national security or personal safety – as required by the MCA. 10 U.S.C. § 949d(d)(2). Nor were there specific factual findings that the exclusion reflects an overriding interest or was narrowly tailored – as required by the First Amendment. Press-Enterprise II, 478 U.S. at 9-10, 14. In short, the effect of PO 007 on the public, the press, and Amici Curiae is a presumption of exclusion from these proceedings.
Military Commission Rule for Evidence 505(b)(1) defines the term “classified information” as “… any information or material that has been determined by the United States Government pursuant to an executive order, statute, or regulation, to require protection against unauthorized disclosure for reasons of national security, and any restricted data, as defined in 42 U.S.C. § 2014(y).” See also MCA, 10 U.S.C. § 948(4). Protective Order 007 dramatically expands this definition to include:

1. **Protected information.** This term does not appear in Executive Order 12958, as amended, and is entirely foreign to the context of classified information. Protective Order 007 defines “protected information” as “information that is unclassified but otherwise privileged, such as Law Enforcement sensitive (LES) information or information For Official Use Only (FOUO), which does not warrant a national security classification but nonetheless requires limitation in dissemination and/or disclosure.” PO ¶ 8. The Order states that any documents or information containing “protected information” shall be considered Classified Information. PO ¶ 6(e).

Because the Commission proceedings are by definition “official,” every document or bit of information related to this case would presumably fall within the definition of “official use” / "protected information” and would therefore be Classified Information under PO 007 and inaccessible to Amicus Curiae. The government, however, “has no legitimate interest in censoring unclassified materials.” McGehee v. Casey, 718 F.2d 1137, 1141 (D.C. Cir. 1983); see also Snepp v. United States, 444 U.S. 507, 767 n.8 (1980). While the government may protect properly classified information, courts impose narrow protective orders to protect such information. See generally United States v. Pappas, 94 F.3d 795 (2d Cir. 1996); Grunden, 2 M.J. at 121 (“The blanket exclusion of the spectators from all or most of a trial . . . has not been
approved ... nor could it be absent a compelling showing that such was necessary to prevent the disclosure of classified information.")}; Denver Post Corp., Army Misc. 2004 1215 at 3. The government may classify only certain kinds of extraordinarily sensitive information, see Exec. Order No. 13,292 § 1.4, 68 Fed. Reg. 15315, and it may not classify any information without complying with stringent procedural requirements, see Exec. Order No. 13, 292 §§ 1.2-1.3, 68 Fed. Reg. 15315. A departure from this established procedure will undercut the ability of Amici Curiae to effectively observe the Commission proceedings.

2. Sources and methods. Paragraph 6(e) also defines Classified Information to capture “[a]ny document or information ... [that] implicates sources, methods or activities of the United States to acquire [Classified or protected] information if those sources, methods and activities remain classified.” Although a “method” or technique may be properly classified, when the government employs a classified method against a person who does not possess the requisite security clearance and has no obligation of non-disclosure, there is no basis for preventing that person from disclosing his experience in court. Prohibiting the accused from openly describing his exposure to otherwise classified sources and methods deprives the accused of a full and fair defense.

Moreover, if the use of a particular method is illegal, or was intentionally used in an unauthorized or illegal manner, the government can have no legitimate interest, let alone a compelling one, in preserving its ability to employ tactics that are prohibited by law. Thus, a

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9 For example, the abuse of prisoners – and the use of illegal interrogation methods – are expressly prohibited both by U.S. law, see 18 U.S.C. § 2340A (providing for prosecution of a U.S. national or anyone present in the U.S. who, while outside the U.S., commits or attempts to commit torture); 18 U.S.C. § 2441 (making it a criminal offense for U.S. military personnel and U.S. nationals to commit grave breaches of Common Article 3 of the Geneva Convention), and by international law, see Convention Against Torture and Other Cruel, Inhuman or Degrading
protective order that permits the suppression of allegations of illegality is overbroad on its face and violates the public right of access to these proceedings.

3. **Statements made by the accused.** Paragraph 6(f) “presumptively” classifies “any statements made by the accused, and any verbal classified information known to the accused or Defense.” PO ¶ 6(f). There is no such thing as “presumptive classification” in the MCA, its implementing regulations, or Executive Order 12958, as amended. Classification requires an affirmative act by a proper Classification Authority. Protective Order 007 effectively upends the classification process, shielding anything the accused might say during the course of these proceedings from the public unless affirmatively declassified.

Once again, there have been no “specific findings” that the wholesale withholding from the public of “any statements made by the accused” is necessary to protect national security or personal safety. On the contrary, *Amici* have sent observers to several hearings in this case. At those hearings, the observers heard defendants speak and heard numerous references to

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Similarly unlawful are the practices of rendition to torture and secret detention. Rendition to torture contravenes the Foreign Affairs Reform and Restructuring Act, Pub. L. No. 105-277, § 2242, 112 Stat. 2681-822 (1998), which states that the United States “[shall] not . . . expel, extradite, or otherwise effect the involuntary return of any person to a country in which there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States,” and contravenes Article 3 of the Convention Against Torture, which includes a similar proscription. Secret detention is prohibited by both the Geneva Conventions, see Geneva Convention relative to the Treatment of Prisoners of War, *entry into force* October 21, 1950 (Third Geneva Convention), Articles 122 to 125; Geneva Convention relative to the Protection of Civilian Persons in Time of War, *entry into force* October 21, 1950 (Fourth Geneva Convention), Articles 136 to 141; and by the UN Standard Minimum Rules for the Treatment of Prisoners and the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment.

In light of these prohibitions, the Military Judge should make individualized findings of whether the documents or information covered by PO 007 contain evidence that U.S. personnel violated these laws. If so, this information should not enjoy protection.
governmental agencies, which appear to be prohibited under this Order. At no time has there been a suggestion from the prosecutors that the presence of the observers at these hearings posed any threat to national security or personal safety. Such specific instances of jeopardy caused by the open courtroom are precisely what the law requires the government to demonstrate to overcome the presumption of openness, and these past observation experiences strongly suggest, if not conclusively prove, that no such jeopardy exists. Paragraph 6(f) amounts to a de facto gag order on the accused and diminishes the transparency and fairness of the proceedings in violation of the MCA and the First Amendment. 10 U.S.C. § 949d(d)(2); Press-Enterprise II, 478 U.S. at 9-10, 14.

4. Documents or information relating to national security or intelligence matters and governmental agencies, or in the possession of such agencies. Paragraph 6(g) is overbroad. It prohibits the disclosure of “any document or information . . . that refers to or relates to national security or intelligence matters . . . including but not limited to any subject referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency[.]” Under a strict reading of this provision, Amici would not be allowed to hear the defense read a passage from the 9/11 Commission Report absent written authorization from the tribunal. In short, there is virtually no substantive aspect of these proceedings that would remain open to the public without the express authorization of the Military Judge. This aspect of PO 007 threatens to censor significant portions of these proceedings, effectively closing them to the public, the press, and Amici Curiae at the mention of a single government agency.
5. **Information in the public domain.** Paragraph 6(h) is also overbroad. Under this provision, documents or information already in the public domain can effectively become Classified Information: “While information in the public domain is ordinarily not classified, such information may be considered classified, and therefore subject to the provisions of MCRE 505 and this Order, if it is confirmed or denied by any person who has, or has had, access to classified information and that confirmation or denial tends to corroborate or tends to refute the information in question.” PO ¶ 6(h). *Amici Curiae* believe that section 6(h) prohibits the accused and their counsel from publicly referencing or responding to relevant information in the public domain, including print and electronic media published by *Amici*. Even if this paragraph does not completely prohibit such comments, *Amici* are concerned that the threat of serious criminal and administrative sanctions for any violation of PO 007 will unnecessarily chill public speech. See PO ¶¶ 15-16. Access to otherwise properly classified information should not be allowed to double as a *de facto* gag order.

**D. Requested Modifications to Protective Order 007.**

Given the expansive definition of Classified Information in PO 007, the Order appears to create a presumption of closed – or at least mute – proceedings. Under PO 007, *Amici Curiae* would be unable to continue as effective trial observers in this case. If, however, this tribunal upholds the right of public access and opts to continue making specific determinations about whether information must be withheld for reasons of national security or personal safety, then there is little reason to believe that closed proceedings are necessary. *Amici Curiae* therefore respectfully request that the Military Judge rescind PO 007. In the alternative, *Amici* request that the Military Judge modify PO 007 in a manner consistent with D-__ ("Rescission of Protective
Order 007") to ensure that the Order does not conflict with the MCA or the First Amendment as discussed above.

7. **Attachments:**

   A. Interest of Amicus Curiae American Bar Association
   B. Interest of Amicus Curiae American Civil Liberties Union
   C. Interest of Amicus Curiae Human Rights First
   D. Interest of Amicus Curiae Human Rights Watch
   E. Statement of Amnesty International
   F. Protective Order 007

DATED this 14 day of January, 2009.

Respectfully submitted,

![Signature]

Neal R. Sonnett  
Chair, Task Force on Treatment of Enemy Combatants  
American Bar Association  
Two South Biscayne Boulevard, Suite 2600  
Miami, Florida 33131-1804  
[nrs@sonnett.com](mailto:nrs@sonnett.com)  
Tel: (305) 358-2000  
Fax: (888) 277-0333

![Signature]

Jameel Jaffer  
Director, National Security Project  
American Civil Liberties Union Foundation  
125 Broad St.  
New York, NY 10004
jjaffer@aclu.org
Tel: (212) 519-7814
Fax: (212) 549-2583

Deborah Colson
Interim Director – Law & Security Program
Human Rights First
333 7th Avenue, 13th Floor
New York, N.Y. 10001
ColsonD@humanrightsfirst.org
Tel: (212) 845-5247
Fax: (212) 845-5299

Jennifer Daskal
Human Rights Watch
1630 Connecticut Avenue NW
Washington, DC 20008
daskalj@hrw.org
Tel: (202) 612-4349
Appendix A
INTEREST OF AMICUS CURIAE AMERICAN BAR ASSOCIATION

The American Bar Association ("ABA") is the leading national membership organization of the legal profession. The ABA’s membership of more than 400,000 spans all 50 states and includes attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and law students.¹

The ABA’s mission is to serve “our profession and the public by defending liberty and delivering justice as the national representative of the legal profession.” Among the ABA’s goals is to “[a]dvance the Rule of Law” by “increase[ing] public understanding of and respect for the law, the legal process, and the role of the legal profession.”² As the voice of the legal profession, the ABA has a special interest and responsibility in protecting the rights guaranteed by the Constitution, safeguarding the integrity of our legal system, and ensuring the sanctity of the rule of law.

The ABA has sent a representative to observe Military Commission proceedings at Guantanamo Bay since August 2004 as one of the five original organizations invited by the Office of the Secretary of Defense. The ABA joins this brief because it believes that PO 007 is overbroad and impermissibly restricts the right to a fair and public trial in violation of the Military Commissions Act of 2006 and the Constitution of the United States.

¹ Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

Appendix B
INTEREST OF AMICUS CURIAE AMERICAN CIVIL LIBERTIES UNION

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU was founded in 1920, largely in response to the curtailment of liberties that accompanied America's entry into World War I, including the prosecution of political dissidents and the denial of basic due process rights for non-citizens. In the intervening eight decades, the ACLU has frequently appeared before the Supreme Court of the United States during other periods of national crisis when concerns about security have been used by the government as a justification to abridge individual rights. This case raises those issues once again. The military commission procedures call into question both our nation's commitment to fair process, even for those accused of war crimes, and to the right of public access to criminal proceedings. The ACLU therefore has a significant interest in the proper resolution of this issue.
Appendix C
INTEREST OF AMICUS CURIAE HUMAN RIGHTS FIRST

Human Rights First is a non-profit, nonpartisan international human rights organization based in New York and Washington D.C. To maintain our independence, we accept no government funding.

Human Rights First was founded in 1978 as the Lawyers Committee for International Human Rights to promote laws and policies that advance universal rights and freedoms. We exist to protect and defend the dignity of each individual through respect for human rights and the rule of law.

We fight for equality and for freedom of thought, expression, and religion; We support people who struggle to promote these principles within their own societies; We work to hold accountable under the law those who violate these principles; We strive to ensure the security of individuals and to protect against the arbitrary exercise of state power; We confront human rights challenges with strategic responses that do not compromise our integrity; and We are committed to building a global movement of people who share these principles.

Human Rights First believes that building respect for human rights and the rule of law will help ensure the dignity to which every individual is entitled and will stem tyranny, extremism, intolerance, and violence.

Human Rights First protects people at risk: refugees who flee persecution, victims of crimes against humanity or other mass human rights violations, victims of discrimination, those whose rights are eroded in the name of national security, and human rights advocates who are targeted for defending the rights of others. These groups are often the first victims of societal instability and breakdown; their treatment is a harbinger of wider-scale repression. Human Rights First works to prevent violations against these groups and to seek justice and accountability for violations against them.

Human Rights First is practical and effective. We advocate for change at the highest levels of national and international policymaking. We seek justice through the courts. We raise awareness and understanding through the media. We build coalitions among those with divergent views. And we mobilize people to act.

Human Rights First has consistently worked to close Guantanamo and to end the Military Commissions. Human Rights First has monitored nearly every military commission hearing and has published several reports related to the prosecution of terrorism cases, including Analysis of Proposed Rules for Military Commissions Trials; Tortured Justice: Using Coerced Evidence to Prosecute Terrorist Suspects; and In Pursuit of Justice:Prosecuting Terrorism Cases in the Federal Courts.
Appendix D
INTEREST OF AMICUS CURIAE HUMAN RIGHTS WATCH

Human Rights Watch (HRW) is a non-profit organization established in 1978 that investigates and reports on violations of fundamental human rights in over 70 countries worldwide. It is the largest international human rights organization based in the United States. By exposing and calling attention to human rights abuses committed by state and non-state actors, HRW seeks to raise the cost of human rights abuse and build pressure upon offending governments and others to end abuses. Human Rights Watch's terrorism and counterterrorism program documents abuses committed by terrorist groups and their supporters, and monitors counterterrorism laws, policies, and practices that infringe upon basic human rights. HRW has been observing the proceedings of the Guantanamo Bay military commissions since 2004.
Appendix E
STATEMENT OF AMNESTY INTERNATIONAL.

1. While Amnesty International (AI) has not formally joined the amicus brief, the organisation supports the broadest possible access to criminal and other legal proceedings by trial observers, in no event to be less fulsome than that contemplated by international standards. Such openness is recognised as a key element of the fairness of proceedings by international law. While some international instruments recognise limited exceptions, such exceptions are strictly drawn and narrowly construed. Amnesty International, too, therefore calls for rescission of Protective Order 007, dated 18 December 2008, as the same substantive aspects that are highlighted in the joint brief render it inconsistent with international standards. Relevant standards are set out below.

2. Article 10 of the Universal Declaration of Human Rights (UDHR), adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948, states:

   Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

3. Article 11(1) of the UDHR states:

   Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

4. Article 14(1) of the International Covenant on Civil and Political Rights, 1966 (ICCPR), ratified by the United States in June 1992, provides:

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

5. The strict limits on the concept of ‘national security’ as grounds for exclusion of the public from trials, under the ICCPR and other instruments, were explicated by international legal experts in the Johannesburg Principles on National Security, Freedom of Expression and Access to Information, Freedom of Expression and Access to Information, annexed to the Report of the UN Special Rapporteur on Promotion and protection of the right to freedom of opinion and expression, UN Doc. E/CN.4/1996/39, 22 March 1996, include the following:

[Principle 1(d)]
No restriction on freedom of expression or information on the ground of national security may be imposed unless the government can demonstrate that the restriction is prescribed by law and is necessary in a democratic society to protect a legitimate national security interest. The burden of demonstrating the validity of the restriction rests with the government.

[Principle 1.2]
Any restriction on expression or information that a government seeks to justify on grounds of national security must have the genuine purpose and demonstrable effect of protecting a legitimate national security interest.

[Principle 1.3]
To establish that a restriction on freedom of expression or information is necessary to protect a legitimate national security interest, a government must demonstrate that:

(a) the expression or information at issue poses a serious threat to a legitimate national security interest;
(b) the restriction imposed is the least restrictive means possible for protecting that interest; and
(c) the restriction is compatible with democratic principles.

[Principle 2]
(a) A restriction sought to be justified on the ground of national security is not legitimate unless its genuine purpose and demonstrable effect is to protect a country’s existence or its territorial integrity against the use or threat of force, or its capacity to respond to the use or threat of force, whether from an external source, such as a military threat, or an internal source, such as incitement to violent overthrow of the government.
(b) In particular, a restriction sought to be justified on the ground of national security is not legitimate if its genuine purpose or demonstrable effect is to protect interests unrelated to national security, including, for example, to protect a government from embarrassment or exposure of wrongdoing, or to conceal information about the functioning of its public institutions, or to entrench a particular ideology, or to suppress industrial unrest.

6. The right of individuals and associations to observe trials and to draw public attention to failures to respect human rights in that and other contexts, was specifically recognised and promoted by the United Nations General Assembly in adopting the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms in 1999 (resolution 53/144).

   a. Article 6 of the Declaration states:

   Everyone has the right, individually and in association with others:

   (a) To know, seek, obtain, receive and hold information about all human rights and fundamental freedoms, including having access to information as to how those rights and freedoms are given effect in domestic legislative, judicial or administrative systems;

   (b) As provided for in human rights and other applicable international instruments, freely to publish, impart or disseminate to others views, information and knowledge on all human rights and fundamental freedoms;

   (c) To study, discuss, form and hold opinions on the observance, both in law and in practice, of all human rights and fundamental freedoms and, through these and other appropriate means, to draw public attention to those matters

   b. Article 9(3) of the Declaration further states in part:

   [E]veryone has the right, individually and in association with others, *inter alia*:

   ...
(b) To attend public hearings, proceedings and trials so as to form an opinion on their compliance with national law and applicable international obligations and commitments;

c. Article 17 of the Declaration states:

In the exercise of the rights and freedoms referred to in the present Declaration, everyone, acting individually and in association with others, shall be subject only to such limitations as are in accordance with applicable international obligations and are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
Appendix F
1. This Protective Order is issued pursuant to the authority under the Military Commissions Act (MCA) (10 U.S.C. §948a, et seq.) and the Manual for Military Commissions (MMC), to include, but not limited to:

   a. Rules for Military Commissions (RMC) 701(f)(8) and (1)(2);
   b. Military Commission Rule of Evidence (MCRE) 505;
   c. Regulation for Trial by Military Commission (DoD Trial Reg), Sec. 1703.

2. The Commission has considered the following matters prior to issuing this order:

   c. Declaration by the Director, Central Intelligence Agency, dated 30 May 2008.

This order will be attached to the record at trial. The appellate exhibits referenced above will be sealed.

3. The Commission finds that this case involves information that has been classified in the interests of national security as set forth by MCRE 505(b)(1) and (2) as well as by Executive Order 12958, as amended. The storage, handling, and control of this information will require
special precautions mandated by statute, executive order, and regulation, and access to which requires appropriate security clearances and a need to know. The Commission further finds that this case involves “protected information” that is unclassified but which remains sensitive and should be protected from dissemination outside the defense.

4. The purpose of this Order is to establish procedures that must be followed by all defense counsel of record, defense paralegals, defense translators and all other persons assisting the Defense (hereinafter the “Defense”) as well as any other person who comes into possession of classified information and protected information as a result of their participation in this case.

5. The procedures set forth in this Protective Order, and MCRE 505 and 506, will apply to all stages in this case, including discovery and disclosure of classified information subject to modification by further Order. This Order does not abrogate Protective Order #3 – Protection of Classified Information at Arraignment and Other Pretrial Proceedings, nor revises any protections contained within any previous Protective Order issued in this case.

6. As used herein, the term Classified Information shall mean:

a. Any document or information which has been classified by any Executive Branch agency in the interests of national security or pursuant to Executive Order 12958, its predecessors or as amended, as CONFIDENTIAL, SECRET or TOP SECRET, or additionally controlled as SENSITIVE COMPARTMENTED INFORMATION (SCI), or any information in such document;

b. Any document or information which has been classified as “SECRET – Releasable to Sheikh Mohammed, Bin Attash, Binalshibh, Aziz Ali, Hawsawi.”

c. Any document or information, regardless of physical form or characteristics, now or formerly in the possession of the Defense, private party or other person, which has been derived from United States government information that was classified, including any document or information that has subsequently been classified by the government pursuant to Executive Order 12958;
d. Any document or information that the Defense knows or reasonably should know, contains Classified Information; or

e. Any document or information as to which the Defense has been notified orally, or in writing, that such document or information contains Classified Information, or protected information, or implicates sources, methods or activities of the United States to acquire such information if those sources, methods and activities remain classified.

f. Presumptively Classified Information, including any statements made by the accused, and any verbal classified information known to the accused or Defense.

g. Any document or information, regardless of place of origin, and including documents classified by a foreign government, that could reasonably be believed to contain classified information, or that refers to or relates to national security or intelligence matters. Any document or information including but not limited to any subject referring to the Central Intelligence Agency, National Security Agency, Defense Intelligence Agency, Department of State, National Security Council, Federal Bureau of Investigation, or intelligence agencies of any foreign government, or similar entity, or information in the possession of such agency, shall be presumed to fall within the meaning of “classified national security information or document” unless and until the SSA or Prosecution advises otherwise in writing.

h. This provision shall not apply to documents or information which the Defense obtains from other than classified materials, or documents provided by the Prosecution with a marking to indicate that the document has been “declassified.” While information in the public domain is ordinarily not classified, such information may be considered classified, and therefore subject to the provisions of MCRE 505 and this Order, if it is confirmed or denied by any person who has, or has had, access to classified information and that confirmation or denial tends to corroborate or tends to refute the information in question. Any attempt by the Defense to have such information confirmed or denied at trial or in any public proceeding in this case shall be governed by MCRE 505 and all provisions of this Order.

i. The words “documents” and “information” shall include, but are not limited to, all written or printed matter of any kind, formal or informal, including originals, conforming copies and non-conforming copies (whether different from the original by reason of notation made on such copies or otherwise), handwritten notes, or any electronic storage on any electronic storage media or device of any documents or information or information acquired orally, including but not limited to papers, correspondence, memoranda, notes, letters, reports, summaries, photographs, maps, charts, graphs, inter-office communications, notations of any sort concerning conversations, meetings or other communications, bulletins, teletypes, telegrams, and telefascimilie, invoices, worksheets and drafts, alterations, modifications, changes and amendments of any kind to the foregoing; graphic or oral records or representations of any kind, including but not limited to photographs, charts, graphs, microfiche, microfilm, videotapes, sound recordings of any kind and motion pictures; electronic, mechanical or electric records of any kind, including but not limited to tapes, cassettes, disks, recordings, films, typewriter ribbons, word processing or other computer
tapes, disks, or thumb drives and all manner or electronic data processing storage; and
Classified Information acquired orally.

7. All Classified Documents and other matters and the Classified Information contained
therein shall remain classified unless the documents bear a clear indication that they have
been declassified by the agency or department that is the originator of the document or the
information contained therein (hereinafter, the “Original Classification Authority”).

8. As used herein, the term Protected Information shall mean:

a. Protected information that is unclassified but otherwise privileged, such as Law
   Enforcement sensitive (LES) information or information For Official Use Only (FOUO),
   which does not warrant a national security classification but nonetheless requires limitation
   in dissemination and/or disclosure.

9. The Prosecution will provide the classified discovery for each of the Accused to the
Senior Security Advisor (SSA) on compact disks (CD’s) that are properly marked with the
security classification level. The SSA will ensure that the material is delivered to each of the
Accuseds’ respective Defense teams together with a copy of this Order and will verify that
the person receiving the materials has the appropriate security clearances and has otherwise
complied with this Order and Protective Order #3. The person receiving the materials on
behalf of each Defense team will be responsible for ensuring that access to and storage of the
CD’s is in accordance with this Order and Protective Order #3. Pending the establishment of
storage facilities and procedures for the materials at the Accuseds’ detention facility, Defense
counsel are responsible for the appropriate handling and storage of the classified material.

10. Any and all discovery materials are to be provided to the Defense, and used by the
Defense, solely for the purpose of allowing the Accused to prepare their defenses and that
none of the discovery materials produced by the Prosecution to the Defense shall be
disseminated to, or discussed with the media or any other individual or entity outside the
defense team. This provision does not prohibit the media from obtaining copies of any items that become declassified public exhibits at any hearing, trial or other proceeding.

11. The Defense is prohibited from disclosing classified information or information they know or reasonably should know is classified to the Accused absent a specific Order from this Commission.

12. Persons subject to this Order are advised that all information to which they obtain access by this Order, or any previous protective order issued by the Commission, is now and will forever remain the property of the United States Government. The Defense shall return all materials that may have come into their possession for which they are responsible because of such access upon demand by the Prosecution or SSA.

13. The Defense shall comply with MCRE 505(g) prior to any disclosure of Classified Information during any proceeding in this case. The Defense is required to notify the Prosecution in writing of any intention to disclose, or cause the disclosure of, classified information in any manner at any stage of the proceedings. The Defense notice must be particularized and set forth the specific classified information sought to be disclosed. The Defense notice must be provided to the Prosecution with sufficient time for the Prosecution to respond and seek relief under MCRE 505(h) prior to the proceeding in which the disclosure is expected to occur.

14. Any pleading or other document filed or transmitted by the Defense, which the Defense knows or has reason to know contains Classified Information in whole or in part, believes may be classified in whole or in part, or implicates information, sources, methods or activities of the United States Government which the Defense knows or has reason to know contains Classified Information, or which concern or relate to national security or
intelligence matters (as defined in paragraph 6 above), shall be filed UNDER SEAL with the SSA in the case of a filing and shall be transmitted in an appropriate manner, commensurate with its classification status.

15. Any breach of this Protective Order may result in disciplinary action or other sanctions.

16. Persons subject to this Order are further admonished that they are obligated by law and regulation not to disclose any national security classified information in an unauthorized fashion and that any breach of this Order may result in the termination of their access to classified information. In addition, they are admonished that any unauthorized disclosure of classified information may constitute violations of the United States criminal laws, including without limitation, the provisions of 18 U.S.C. §§ 371, 641, 1001, 793, 794, 798, 952, and 1503; 50 U.S.C. §§ 421 (the Intelligence Identities Protection Act) and 783; and that a violation of this Order or any portion hereof may be chargeable as a contempt of this Commission.

17. Either party may file a motion for appropriate relief to obtain an exception to this Order should they consider it warranted.

[Signature]
Stephan R. Henley
Colonel, U.S. Army
Military Judge
Standard 8-5.2. Public Access to Judicial Proceedings and Related Documents and Exhibits

(a) Subject to the limitations set forth below, in any criminal matter, the public presumptively should have access to all judicial proceedings, related documents and exhibits, and any record made thereof not otherwise required to remain confidential. A court may impose reasonable time, place and manner limitations on public access.

(b) A court may issue a closure order to deny access to the public to specified portions of a judicial proceeding or to a related document or exhibit only after:

   (i) conducting a hearing after reasonable notice and an opportunity to be heard on the proposed order has been provided to the parties and the public; and

   (ii) setting forth specific written findings on the record that:

      (A) public access would create a substantial probability of harm to the fairness of the trial or other overriding interest which substantially outweighs the defendant's or the public's interest in public access;

      (B) the proposed closure order will effectively prevent or substantially lessen the potential harm; and

      (C) there is no less restrictive alternative reasonably available to prevent that harm, including any of the measures listed in Standard 8-5.3 or permitting access to one or more representatives of the public.

(c) In determining whether a closure order should issue, the court may accept the items for which a seal is being requested under seal, in camera or in any other manner designed to permit a party to make a prima facie showing without public disclosure of that matter. The motion seeking to close access to those items must itself, however, be filed in open court unless the requirements of subsection (b) are met.

(d) If the court issues a closure or sealing order, the court should consider imposing a time limit on the duration of that order and requiring the party that sought the order to report back to the court within a specified time period as to whether continued closure or sealing is justified pursuant to the requirements set forth in subsection (b). If those requirements are no longer met, the documents or transcripts of any sealed proceeding should be unsealed.
December 9, 2014

Honorable Robert W. Goodlatte
Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Mr. Chairman:

We are writing to commend you for recently holding a hearing on H.R. 917 and for continuing to focus public attention on the issue of “cameras in the courtroom.” We would appreciate your including this letter in the hearing record.

The American Bar Association has had a long and cautious history with respect to broadcast coverage of federal judicial proceedings. In 1937, the ABA formulated its original ban on camera coverage as Canon 35 of the then Canons of Judicial Ethics because of concerns about preserving the dignity and decorum of the courtroom, safeguarding the right to a fair trial in criminal proceedings, and avoiding potential adverse impact on the fact-finding process and the administration of justice.

During the 1970s, state courts started to permit camera coverage of judicial proceedings. As courts became more experienced and technology improved, the vast majority reported favorable results. After observing state initiatives, and following the 1981 unanimous decision in Chandler v. Florida, 449 U.S. 560, holding that due process does not require an absolute ban on cameras in the courts, the ABA revised the Model Code of Judicial Conduct to permit judges “to authorize broadcasting, televising, recording, or photographing of judicial proceedings,” consistent with the right to a fair trial and in manner that would not interfere with the administration of justice. A year later, despite the ban against coverage of criminal proceedings in the Federal Rules of Criminal Procedure, the ABA made clear that we believed that electronic coverage should be permissible in criminal proceedings as well as civil proceeding by incorporating the language of the revised Code into its Criminal Justice Standards for Fair Trial and Free Press.

By 1990, 45 states permitted some form of electronic media access to judicial proceedings. The states’ acceptance of, and extensive experience with, electronic media coverage likely informed the decision of the ABA to delete the provision in its 1990 Model Code of Judicial Ethics and recast the issue as a matter of court administration rather than one with ethical dimensions.

In 1991, the Judicial Conference of the United States began a three-year pilot program to permit electronic coverage of federal civil proceedings in selected trial courts and courts of appeals. The
Association welcomed these developments and recommended that the U.S. Supreme Court participate in the pilot program, a recommendation that was not followed.

Without a satisfactory explanation, the Judicial Conference voted in 1995 to terminate all electronic coverage of federal courtroom proceedings, despite the favorable assessment of the Federal Judicial Center that electronic media coverage had not adversely affected the administration of justice. The ABA, believing that the issue had not been examined fully, strongly objected to the finality of the Judicial Conference’s action and urged it to authorize further experimentation with electronic media coverage. In 1996, the Judicial Conference reconsidered its position and compromised by authorizing federal appellate courts to permit coverage in accordance with promulgated guidelines. Many court observers commented at the time that their reluctance to include district courts in the authorization was understandable, given the breakdown in court decorum during the televising of the O.J. Simpson case the year before.

In 2010, the Judicial Conference announced a new three-year pilot project “to evaluate the effect of cameras in district court courtrooms, video recordings of proceedings therein, and publication of such recordings”; the Conference subsequently extended the project for an additional year. Fourteen courts are participating in the pilot, which began in June 2011 and will end in July 2015.

Guidelines issued for the pilot project state that proceedings in civil cases may be video-recorded only with the approval of the presiding judge and consent of the parties. Jurors may never be recorded, and bankruptcy proceedings are not included in the pilot project. Video recordings will be made available to the public unless the presiding judge determines otherwise. As with the first pilot project, the Federal Judicial Center is tasked with evaluating the pilot project and issuing a report with recommendations.

The current pilot, while limited to civil proceedings, is operating under guidelines that closely resemble provisions contained in H.R. 917 and predecessor legislation. In fact, there seems to be substantial agreement between Congress and the Judicial Conference over the structure for implementation of such a program and the safeguards needed to prevent cameras from interfering with the administration of justice. Although progress is slow, the federal judiciary is paying attention to Congress’s interest in expanding public access to court proceedings.

Even the Supreme Court, which is not subject to the governance of the Judicial Conference and has never permitted video recording of its proceedings, has taken significant steps over the past decade to increase transparency and to simplify and expedite access to oral arguments.

In 2000, the Supreme Court, for the first time, released same-day audio recordings of oral arguments in the case of Bush v. Gore. Since then, it has released same-day audio recordings in 20 additional high-profile cases. In 2006, the Supreme Court instituted another heralded change, making same-day transcripts of its oral arguments available for free on its website. Prior to that, same-day transcripts were available only through transcription services and often cost hundreds of dollars. The last notable public access policy change occurred in 2010, when the Supreme
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Court announced that all oral argument recordings would be released on the Friday of the week in which they occurred, rather than after the term ended.

In August 2014, the ABA deleted its endorsement of electronic media coverage in its Fair Trial and Free Press Criminal Justice Standards and replaced it with a best-practice standard advising courts to think proactively and develop plans that address electronic media coverage and other methods for accommodating the public interest in criminal proceedings. This revision reflects the ABA’s recognition that individual jurisdictions are best suited to address these issues based on their specific experiences.

The ABA remains committed to the belief that all federal courts, including the Supreme Court, should experiment with and expand electronic media coverage of both civil and criminal proceedings. We, like many congressional supporters of this legislation, believe that courts that conduct their business under public scrutiny protect the integrity of the federal judicial system by advancing accountability and providing an opportunity for the people they serve to learn about the role of the federal courts in civic life.

We suspect that most judges share these views and that the Judicial Conference’s reluctance to move quicker stems from outdated experiences and lingering concerns that electronic media coverage will taint proceedings. Its willingness to reexamine the bases for its views, and to reevaluate its policies in light of the results of the current pilot project, is a welcome change.

Once the pilot project concludes, we hope that Congress will engage the Judicial Conference in rigorous discussion over the Federal Judicial Center’s analysis of the pilot project and will work to make sure that empirical data inform future decisions with regard to expanding electronic media coverage of federal court proceedings. The ABA supports this objective but prefers to defer to the Judicial Branch in the first instance to effectuate the transition and establish the necessary framework.

Thank you for the opportunity to present the ABA’s views on this topic.

Sincerely,

Thomas M. Susman

c. Members of the Committee
RESOLUTION

1. RESOLVED, That the American Bar Association urges the United States Supreme Court to record and make available video recordings of its oral arguments.
REPORT

The Supreme Court currently provides transcripts\(^1\) and audio recordings of its oral arguments.\(^2\) It does not, however, provide video recordings of those same proceedings. The ABA has previously taken positions that touch on the issue of cameras in the courtroom, generally, but not specifically on recordings of U.S. Supreme Court arguments. The resolutions that have touched on this issue are Resolution 106 (Midyear, 1995), which had urged the U.S. Judicial Conference to "authorize further experimentation with cameras in federal civil proceedings by re-instituting a pilot project to permit . . . recording and broadcasting of civil proceedings in selected federal courts . . . ." The other is Resolution 113 (Midyear, 2005) which had, among other things, stated that "[i]f cameras are permitted to be used in the courtroom, they should not be allowed to record or transmit images of the jurors' faces." Again, neither resolution spoke directly to recordings of U.S. Supreme Court arguments, though the ABA has previously lobbied in support of cameras in the courtroom generally— including in the Supreme Court.\(^3\)

There is a qualitative difference in the understanding one can get from listening to a recording of an argument, versus watching that same argument. The audio recording does not capture the justices' non-verbal reactions to the lawyers' arguments, the lawyers' answers to the justices' questions, or the justices' reaction to each others' questions.

Commentators have remarked for years on the issues the lack of video recordings cause.\(^4\) They have noted the Supreme Court is the lone branch of government whose proceedings citizens cannot watch.\(^5\) Indeed, there is even question whether denying access to video cameras in the Court is consistent with its own First Amendment jurisprudence.\(^6\)

Commentators have also remarked on how the inability to watch arguments contributes to the narrowing of the number of lawyers competent to practice before it.\(^7\) As reported by the New York Times, 66 lawyers were involved in 43 percent of the cases the Supreme Court heard.\(^8\) Of those, "63 of the 66 lawyers were white, 58 were men, and 51 worked for firms with

\(^1\) http://www.supremecourt.gov/oral_arguments/argument_transcript.aspx
\(^2\) http://www.supremecourt.gov/oral_arguments/argument_audio.aspx
\(^3\) http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/judiciary/051117letter_cameras.authcheckdam.pdf (summarizing the history of support for cameras in the court within the ABA and its sections);
http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014dec9_sushineincourtroo
m.authcheckdam.pdf (same, as of 2014).
\(^4\) http://www.nytimes.com/2014/12/26/opinion/the-best-lawyers-money-can-buy.html;
\(^5\) Id.
\(^6\) Id.
\(^7\) http://www.nytimes.com/2014/12/26/opinion/the-best-lawyers-money-can-buy.html;
http://www.americanbar.org/content/dam/aba/administrative/litigation/materials/sac2013/sac_2013/54_520cameras_are_in_the_courts.authcheckdam.pdf.
This narrowing of expertise is not consistent with our commitment to ensuring access to justice or to fostering diversity within the profession.

The Supreme Court’s gallery can seat approximately 250 people. This severely limits the number of people who can view its proceedings. That, and the fact that one must travel to Washington, D.C., to view the proceedings, limits the ability of lawyers to learn from seeing its arguments. It also limits the ability of citizens to view the process of deciding important constitutional issues. More open proceedings would thus help increase educational opportunities for lawyers, and citizens’ access to — and ability to understand — the process of decisions being made. This would likely enhance respect for the judiciary and the rule of law, both of which are critical in light of the current climate of hostility to the judiciary.

Indeed, the ABA itself has remarked on how providing access to video recordings of arguments could further the above-referenced purposes in letters to Congressional Committees charged with considering the issue:

The ABA remains committed to the belief that all federal courts, including the Supreme Court, should experiment with and expand electronic media coverage of both civil and criminal proceedings. We, like many congressional supporters of this legislation, believe that courts that conduct their business under public scrutiny protect the integrity of the federal judicial system by advancing accountability and providing an opportunity for the people they serve to learn about the role of the federal courts in civic life. ¹⁰

At the time of the referenced letters (the most recent of which was sent in 2014), however, the ABA took the position that the decision to broadcast proceedings should be made on a case-by-case basis. ¹¹

There is also pending legislation in Congress on this issue. H.R. 94, introduced on January 6, 2015, is called the “Cameras in the Courtroom Act.” It “[r]equires the Supreme Court to permit television coverage of all open sessions of the Court unless it decides by majority vote that allowing such coverage in a particular case would violate the due process rights of any of the parties involved.” ¹² This legislation has been referred to the Subcommittee on Courts,

⁹ Id.
¹⁰ http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2014dec9_sushinencourtroomauthcheckdam.pdf;
¹¹ Id.
¹² https://www.congress.gov/bill/114th-congress/house-bill/94 (proposing an amendment to add § 678 to Title 28, U.S.C.). This legislation is more strongly worded than an earlier proposal, which would have merely authorized cameras — not mandated them.
States' experience has shown that it can work. Arizona, for example, provides live and archived video recordings of its proceedings on the Court's webpage, and offers its archived video on YouTube. Likewise, the Ninth Circuit offers both live and archived video of its proceedings. The United States Supreme Court should do the same.

This resolution is consistent with, and furthers, ABA policy. The ABA's goals include the following:

**Goal II: Improve Our Profession.**
Objectives:
1. Promote the highest quality legal education.
2. Promote competence, ethical conduct and professionalism.

**Goal III: Eliminate Bias and Enhance Diversity.**
Objectives:
1. Promote full and equal participation in the association, our profession, and the justice system by all persons.
2. Eliminate bias in the legal profession and the justice system.

**Goal IV: Advance the Rule of Law.**
Objectives:
1. Increase public understanding of and respect for the rule of law, the legal process, and the role of the legal profession at home and throughout the world.
2. Hold governments accountable under law.
3. Work for just laws, including human rights, and a fair legal process.
4. Assure meaningful access to justice for all persons.
5. Preserve the independence of the legal profession and the judiciary.

For the reasons stated above, this resolution furthers the above goals.

Respectfully submitted,

Lacy L. Durham, Chair
Young Lawyers Division
February 2016

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13 http://www.azcourts.gov/AZSupremeCourt/LiveArchivedVideo.aspx; https://www.youtube.com/watch?v=r-G9r6nkI;
15 http://www.americanbar.org/about_the_aba/aba-mission-goals.html.
16 Id.