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REPORT ON MILITARY COMMISSIONS FOR THE TRIAL OF TERRORISTS

Approved by the Board of Regents
March, 2003

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REPORT ON MILITARY COMMISSIONS FOR THE TRIAL OF TERRORISTS*

Introduction

In the wake of the September 11, 2001 attacks by Islamic extremists, the President and the Department of Defense issued orders prescribing trials by military commission of certain non-citizens connected with those attacks or related in some way to al Qaeda. This report analyzes the major issues raised by these orders. The first section discusses the various policy interests that must be balanced in evaluating mechanisms for trying suspected terrorists. The second section summarizes the orders of the President and the Department of Defense. The third section discusses the threshold issues of legal authorization for the orders and the classes of persons potentially subject to them. The fourth section addresses the adequacy of the procedures prescribed for trial by military commission. The fifth section contrasts the procedures with those to be applied in the International Criminal Court and discusses the relative advantages and disadvantages of trying suspected terrorists in international tribunals. The sixth section summarizes the committee's recommendations regarding the procedures and instructions governing trials by military commission.

I. POLICY INTERESTS

When devising the orders, the President and the Department of Defense were required to balance a variety of competing policy interests. Many of those interests militate against scrupulous adherence to norms that apply to criminal defendants in federal district courts:

- Deterrence of future acts of terrorism through punishment of the September 11 perpetrators and incarceration of others who might commit terrorist acts;
- Gathering intelligence regarding the planning of future terrorist acts;
- Protecting the secrecy of classified information and intelligence sources and methods;
- Speed and efficiency of adjudication; and
- Ensuring that trials do not provide terrorists with a "bully pulpit" from which they might incite others to acts of terrorism.

Countervailing interests would suggest that greater care should be taken to ensure the fairness of military commission procedures:

- American traditions of fairness and transparency in the judicial process, both for the sake of the accused and also to preserve the integrity of our justice system;
- Constitutional protections for resident aliens;

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- Longstanding U.S. State Department objections to trials by military tribunals in other countries (*e.g.*, China, Colombia, Egypt, Malaysia, Peru, Sudan, and Turkey);[1]
- Maximizing the likelihood that U.S. soldiers will receive fair treatment from other countries; and
- Compliance with international treaty obligations and customary law to promote extradition of terrorists to the U.S. and international support for the war on terrorism.

This report does not attempt to second-guess the policy choices that resulted from this balancing process by the President and the Secretary of Defense. Rather, this report identifies and discusses the principal legal issues raised by the orders.

II. SUMMARY OF ORDERS GOVERNING MILITARY COMMISSIONS

A. The President's Order

On November 13, 2001, President George W. Bush issued a Military Order for the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" (the "Order"). 66 F.R. 57833 (Nov. 16, 2001). The order authorizes the Secretary of Defense to detain and try by military commission any non-citizen whom the President determines in writing (a) is a current or former member of al Qaeda, or (b) has aided or abetted terrorist acts against the U.S., or (c) has knowingly harbored persons described in (a) or (b), provided that the President also determines that "it is in the interest of the United States that such individual be subject to this order." Order, § 2(a). The Order provides that such individuals shall be "detained at an appropriate location . . . outside or within the United States," but the Order does not specify any limitation on the term of detention. *Id.* at § 3(a). The Order provides that such individuals be prosecuted "for any and all offenses triable by military commission[.]" *Id.* at § 4(a).

The Order contains general guidelines that grant the Secretary of Defense wide latitude in relaxing evidentiary rules, permitting secret evidence and closed proceedings, and imposing the death penalty by a less-than-unanimous vote of a three-person military commission. *Id.* at §§ 4(b) and (c). The Order provides for review of the military commission's decisions by the President or the Secretary of Defense, and it purports to exclude review by any state, federal, foreign, or international court. *Id.* at §§ 4(8) and 7(b)(2).

Immediately after the September 11 attacks, government officials detained many resident aliens, mostly Muslims, for questioning and/or immigration violations. In January 2002, U.S. armed forces began transporting selected persons captured during military operations in Afghanistan to the U.S. Naval Base at Guantanamo Bay, Cuba. As of January 2003, there were over 600

[1] *See* Human Rights Watch, *Fact Sheet: Past U.S. Criticism of Military Tribunals*, Nov. 28, 2001, *available at* www.hrw.org/press/2001/11/tribunals1128.htm. Many of the features that the U.S. found objectionable in those military tribunals are present in the current plans for U.S. military commissions.

detainees from 38 countries at Guantanamo, and military officials have not said whether or when charges might be brought against them.[2]

B. The Defense Department's Trial Procedures

On March 21, 2002, the Department of Defense promulgated "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism" (the "Procedures"). The Procedures purport to establish jurisdiction of the military commissions over "violations of the laws of war and all other offenses triable by military commission." Procedures, § 3(B).[3] Under the Procedures, the Secretary of Defense or his designee will appoint for each commission between three and seven members, including one Presiding Officer, and one or two alternate members. *Id.* at §4(A). All members of the commissions will be commissioned U.S. military officers, and the Presiding Officer will also be a judge advocate (*i.e.*, military lawyer). *Id*. The Presiding Officer will be responsible for making initial evidentiary and pre-trial rulings, preserving order, and presiding over trial and sentencing proceedings. *Id.* at § 4(A)(5).

1. Rights of the Accused

Every person tried before a military commission will be represented by an appointed military lawyer (the "Detailed Defense Counsel"). *Id.* at § 4(C)(2). The accused person may choose another military lawyer to serve in place of the appointed Detailed Defense Counsel or, with the approval of the Secretary of Defense or his designee, as an additional Detailed Defense Counsel. *Id*. at § 4(C)(3)(a). In addition, the accused person may retain, at his own expense, a civilian attorney who is eligible for access to information classified as secret and who agrees in writing to comply with all applicable rules for the proceedings. *Id.* at § 4(C)(3)(b). The accused person must be represented at all times by Detailed Defense Counsel, and the Procedures do not permit accused persons to represent themselves. *Id.* at § 4(C)(4).

Section 5 of the Procedures itemizes the specific procedural safeguards and rights to be afforded persons tried by military commission, including the presumption of innocence, proof of guilt beyond a reasonable doubt, the accused's right not to testify and not to have adverse inferences drawn therefrom, the prosecution's duty to provide the defense with exculpatory evidence and evidence to be introduced against the accused, the right to present evidence and cross-examine prosecution witnesses, and protection against double jeopardy. *Id.* at § 5.

2. Evidence

The commissions may admit a wide array of evidence that would not be admissible in criminal trials in federal courts or courts martial, such as unsworn statements and other hearsay evidence, arguably coerced confessions, and unauthenticated physical evidence. The Procedures permit the Presiding Officer to admit any evidence that "would have probative value to a reasonable person." *Id.* at § 6(D)(1). In addition, the commission may consider "any other evidence

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[2] Frank Davies, *U.S. Readies Guidelines for Terrorism Trials*, MIAMI HERALD, Dec. 26, 2002; *Four terror suspects have tried to commit suicide in Guantanamo*, USA TODAY, Aug. 16, 2002.

[3] The Procedures also provide that the Order shall prevail if it conflicts with the Procedures. *Id*. § 7(b).

including . . . sworn or unsworn written statements, physical evidence, or scientific or other reports." *Id.* at § 6(D)(3). Witnesses may be permitted to testify by "telephone, audiovisual means, or other means," but all witnesses are subject to cross-examination. *Id.* at §§ 6(D)(2)(a), 6(D)(2)(c). The commission may call witnesses not requested by the prosecution or the defense and may question any witness. *Id.* at §§ 6(D)(2)(a), 6(D)(2)(c). The Presiding Officer rules on all evidentiary issues unless another member of the commission requests that the entire commission decide an issue, in which case the majority opinion of the commission shall prevail. *Id.* at § 6(D)(1).

The Procedures authorize, at the discretion of the Secretary of Defense, his designee, or the Presiding Officer, various steps to safeguard witnesses or confidential, classified, state secret, intelligence, or law enforcement information or "information concerning other national security interests." *Id.* at §§ 6(D)(5), 9. These steps include excluding the accused, his civilian attorney, and the public from part or all of the proceedings; withholding from the defense exculpatory or inculpatory evidence; and limiting the defense's ability to investigate the case and obtain witnesses and documents. *Id.* at §§ 5(E), 5(H), 5(K), 5(O), 6(B)(3), 6(D)(5). Detailed Defense Counsel may not be excluded from any commission proceedings, and evidence withheld from Detailed Defense Counsel may not be considered in determining the guilt of the accused. *Id.* at §§ 6(B)(3), 6(D)(5)(b). Unless authorized by the Presiding Officer, however, Detailed Defense Counsel is prohibited from revealing to his client or the civilian attorney "any information presented during a closed session" of the commission. *Id.* at § 6(B)(3). In addition, the prosecution is not obliged to provide any defense counsel, including Detailed Defense Counsel, with exculpatory information deemed protected on national security or other grounds. *Id.* at § 6(D)(5)(b).

3. Verdict and Sentencing

There is no right to trial by jury before the military commission. A two-thirds majority vote of the commission is required for a finding of guilt. *Id.* at § 6(F). The commission may convict the accused of a lesser-included offense but not of an offense more serious than that charged. *Id.*

A two-thirds majority of the commission determines the sentence to be imposed, except that the death penalty may only be imposed by unanimous vote of a seven-member commission. *Id.* at §§ 6(F), 6(G). The Procedures do not specify any sentencing guidelines or factors in aggravation or mitigation to be considered when imposing the death penalty. *Id.* at § 6(G).

4. Post-Trial Procedures

Every commission trial and sentence will be reviewed by a Review Panel of three military officers, including one with judicial experience. *Id.* at § 6(H)(4). Civilians may be appointed to serve on a Review Panel by special commission. *Id.* The commission must prepare a verbatim record of the trial and sentencing proceedings "as soon as practicable at the conclusion of a trial." *Id.* at §§ 6(B)(5), 6(H)(1). The record will also include all exhibits admitted into evidence, as well as any classified or otherwise protected evidence that was reviewed *in camera* by the Presiding Officer but withheld from the defense. *Id.* at §§ 6(D)(5)(d), 6(H)(1). The Review

Panel has the discretion but is not required to permit written submissions by the prosecution or defense, and the Procedures do not provide for oral argument. *Id.* at § 6(H)(4).

Within 30 days after receiving the trial record, the Review Panel will either recommend a disposition to the Secretary of Defense or, if "a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred," return the case for further proceedings. *Id.* The Procedures specifically direct the Review Panel to "disregard any variance from [the Procedures] that would not materially have affected the outcome of the trial[.]" *Id.* The Secretary of Defense will review the trial record and the Review Panel's recommendation and make his own recommendation to the President, unless the President has delegated final decision making authority to the Secretary. *Id.* at §§ 6(H)(5), 6(H)(6). Any sentence of imprisonment will begin immediately after the trial. *Id.* at § 6(H)(2). The Procedures also call for the prompt execution of any sentence (including, presumably, the death penalty) once it becomes final by action of the President or the Secretary of Defense. *Id.* The Procedures do not provide for independent review of final decisions by civilian courts.

C. Draft Military Commission Instruction

On February 28, 2003, the Department of Defense issued a draft Military Commission Instruction ("Instruction") identifying 24 substantive offenses that may be tried by military commissions authorized by the Order. *Id.* § 6(A).[4] The Instruction further identified seven "other forms of liability and related offenses" that may be tried by military commissions. *Id.* § 6(B).[5] The Instruction does not purport to be an exhaustive list of offenses triable by military commission. *Id.* § 3(C). In its press release, the Department stated that the list was designed to incorporate crimes that are recognized, under both international and domestic law, as violations of the law of war.[6]

The Instruction states that defenses such as self-defense, mistake of fact, duress, combat immunity and lack of mental responsibility may be raised. *Id.* § 4(B). The burden of going forward with these defenses falls upon the accused. *Id.* The Instruction confirms that "[o]nce an applicable defense of an issue of lawful justification or excuse is fairly raised by the evidence presented, except for lack of mental responsibility, the burden is on the prosecution to establish beyond a reasonable doubt that the conduct was wrongful or that the defense does not apply." *Id.* If this defense is not raised, the charged conduct is presumed to have been wrongful. *Id.* For the defense of lack of mental responsibility, "the accused has the burden of proving by clear and

[4] These offenses are: willful killing of protected persons; attacking civilians; attacking civilian objects; attacking protected property; pillaging; denying quarter; taking hostages; employing poison or analogous weapons; using protected persons as shields; using protected property as shields; mutilation or maiming; use of treachery or perfidy; improper use of flag of truce; improper use of protective emblems; degrading treatment of a dead body; rape; hijacking or hazarding a vessel or aircraft; terrorism; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; aiding the enemy; spying; perjury or false testimony; and obstruction of justice related to military commissions.

[5] These offenses are: aiding and abetting; solicitation; command/superior responsibility -- perpetrating; command/superior responsibility -- misprision; accessory after the fact; conspiracy; and attempt.

[6] Department of Defense, *Release of the Military Commission Draft Crimes and Elements Instruction*, Feb. 28, 2003, available at www.defenselink.mil/news/Feb2003/t02282003 commission.html.

convincing evidence, that, as a result of severe mental disease or defect, the accused was unable to appreciate the nature and quality of the wrongfulness of the accused's acts." *Id.*

The offenses identified by the Instruction are not subject to any statute of limitations. *Id.* § 4(C). The Instruction "does not preclude trial for crimes that occurred prior to its effective date [February 28, 2003]." *Id.* § 3(A).

III. THRESHOLD ISSUES RAISED BY THE ORDERS

A. Constitutional and Legislative Authorization for the Orders

Both the President's Order and the Defense Department's Procedures were carefully crafted in light of Supreme Court precedent. They reflect an aggressive stance in asserting executive authority, but most of the provisions of the Order and the Procedures fall within the bounds of executive authority defined by Supreme Court decisions dating from World War II.

The Supreme Court has never decided whether or to what extent the President, acting without Congressional authorization, has the constitutional power to establish military commissions. *See Ex parte Quirin*, 317 U.S. 1, 28-29, 63 S. Ct. 2, 11 (1942). Here, Congress has authorized the use of military commissions at least in a narrow range of cases. The President's Order cites three specific acts of Congress as such authority:

- a joint resolution (Pub. L. 107-40) 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 that occurred on September 11, 2001" or those who harbored them;

- Section 821 of the Uniform Code of Military Justice ("UCMJ"), which preserves the common law jurisdiction of military commissions "with respect to offenders or offenses that by statute or by the law of war" are triable by military commission, 10 U.S.C. § 821; and

- Section 836 of the UCMJ, which authorizes the President to prescribe "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." 10 U.S.C. § 836.

Under the National Emergencies Act, 50 U.S.C. § 1631, the Congressional grant of authority to the President is limited to these cited sources. The Supreme Court has construed UCMJ Section 821 as authorizing prosecutions of violations of the law of war before military commissions. *Quirin*, 317 U.S. at 26-27, 63 S. Ct. at 10. This provision, together with Congress' joint resolution, appear to provide ample authority for the President to establish military commissions for the trials of those accused of violating the law of war.

The fact that Congress has not formally declared war should not diminish the President's authority to establish military commissions. Congress has authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons" that were involved in the September 11 attacks or that harbored the perpetrators. Thus, the United States is probably in a state of war even without a declaration of war by Congress. *See Bas v. Tingy*, 4 U.S. 37, 1 L. Ed. 731 (1800) (holding that U.S. was at war with France despite lack of formal declaration by Congress).

The President's Order and the Defense Department's Procedures apply only to non-citizens, who do not enjoy the full panoply of constitutional protections accorded to U.S. citizens.[7] Resident aliens enjoy some constitutional rights, such as due process and habeas corpus. *Zadvydas v. David*, 553 U.S. 678, 688-90, 121 S. Ct. 2491, 2498-2500 (2001). Aliens residing outside the United States have the least entitlement to constitutional safeguards. *Johnson v. Eisentrager*, 339 U.S. 763, 776, 70 S. Ct. 936, 943 (1950) (holding that alien enemies who were never on American soil have no right to petition U.S. courts for writ of habeas corpus); *but see United States v. Tiede*, 86 F.R.D. 227, 228 (U.S. Ct. Berlin 1979) (non-resident aliens had constitutional rights, including right to jury trial). By limiting the scope of his Order to non-citizens and detaining suspects outside the U.S., the President has minimized the objections that may be asserted against the military commissions' procedures and decisions.

There are only three areas in which the Order and the Procedures are subject to serious challenge as exceeding executive authority.[8] First, the Order and the Procedures attempt to preclude independent review of military commission decisions by civilian courts, through *habeas corpus* petitions or otherwise. Second, the President and the Defense Department have suggested that they may attempt to expand the jurisdiction of the military commissions beyond trials for violations of the law of war. Third, the Order and the Procedures specify procedures contrary to and inconsistent with the Uniform Code of Military Justice, in apparent conflict with UCMJ Section 836. These issues are discussed below.

1. Lack of Judicial Review

Under Article I of the Constitution, only Congress has the power to suspend the writ of *habeas corpus*. Congress may grant the President the authority to do so, but the President is bound by the limits of this authorization specified by Congress. *See Ex parte Milligan*, 71 U.S. 2, 115, 126, 18 L. Ed. 281, 294, 297 (1866). The USA Patriot Act of 2001 prescribes specific procedures for the detention of aliens suspected of terrorist activities, and specifically authorizes judicial review

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[7] Even U.S. citizens deemed unlawful belligerents may be tried by military commission for violating the laws of war. *Quirin*, 317 U.S. at 37, 63 S. Ct. at 15; *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957).

[8] The detention provisions of the Order are outside the scope of this report. Note, however, that the Order may violate the Constitution and the USA Patriot Act if construed to permit the indefinite detention of resident aliens. *Zadvydas*, 533 U.S. at 690, 121 S. Ct. at 2500; USA Patriot Act of 2001, Pub. L. 107-56, § 412(a); *see also Ex parte Milligan*, 71 U.S. 2, 115, 126, 18 L. Ed. 281, 294, 297 (1866) (holding that neither the Constitution nor the Habeas Corpus Act of 1863 authorized indefinite detentions and that executive branch was required to comply with specific procedures mandated by the Act).

of alien detentions and related decisions by *habeas corpus* proceedings. USA Patriot Act of 2001, Pub. L. 107-56, § 412(a) and (b).

In contrast, the President's Order (§ 7(b)) explicitly excludes review of military commission decisions by civilian courts, and the Defense Department Procedures (§ 6(H)(2)) implicitly do the same thing. Two other presidents, Abraham Lincoln and Franklin Roosevelt, issued orders establishing military commissions and attempting unsuccessfully to preclude judicial review of the commissions via the writ of *habeas corpus*. *See Milligan*, 71 U.S. 2, 18 L. Ed. 281; *Quirin*, 317 U.S. at 25, 63 S. Ct. at 9 ("[N]either the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."); *In re Yamashita*, 327 U.S. 1, 66 S. Ct. 340 (1946). In *Milligan*, *Quirin*, and *Yamashita*, the Supreme Court rejected the presidents' attempts to foreclose *habeas* review of military commission decisions by issuing an order forbidding such review. Nevertheless, the Court in all three cases upheld the jurisdiction and the decisions of the military commissions, thus demonstrating that executive overreaching on the *habeas corpus* issue does not render invalid the other aspects of a Presidential order. These cases also demonstrate the great deference that the Supreme Court historically has shown toward the Commander-in-Chief during times of conflict.

Milligan involved a U.S. citizen living in Indiana; *Quirin* involved eight German-born persons, including one alleging U.S. citizenship, who entered the United States surreptitiously; and *Yamashita* involved a Japanese citizen who was captured in the Philippines. In *Johnson v. Eisentrager*, 339 U.S. 763, 70 S. Ct. 936 (1950), the Supreme Court held that alien enemies who were neither captured nor detained on American soil have no right to petition U.S. courts for a writ of *habeas corpus*. Based on this holding, two federal courts have upheld the dismissal of *habeas corpus* petitions brought on behalf of Guantanamo detainees. *Al Odah v. United States*, Civ. Nos. 02-5251, 02-5284 & 02-5288, 2003 WL 938861, *7 (D.C. Cir. March 11, 2003) ("[N]o court in this country has jurisdiction to grant habeas relief, under 28 U.S.C. § 2241, to the Guantanamo detainees, even if they have not been adjudicated enemies of the United States. We cannot see why, or how, the writ [of habeas corpus] may be made available to aliens abroad when basic constitutional protections are not.")[9]; *Coalition of Clergy v. Bush*, 310 F. 3d 1153, 1165 (9th Cir. 2002) (dismissing complaint on the basis that Coalition lacked standing). The district court in *Al Odah* noted that *Eisentrager* established two separate tests for *habeas* jurisdiction: a permissive one for citizens, wherever located, and a stringent one for non-citizens. "If an alien is outside the country's sovereign territory, then courts have generally concluded that the alien is not permitted access to the courts of the United States to enforce the Constitution." *Rasul v. Bush*, 215 F. Supp. 2d 55, 68 (D.D.C. 2002).

The U.S. government attempted unsuccessfully to expand that rule to encompass U.S. citizens whom the military has designated "enemy combatants," arguing that this designation by executive or military authorities is a non-reviewable political decision. *See Hamdi v. Rumsfeld*, 296 F.3d 278, 282-83 (4th Cir. 2002); *United States v. Lindh*, 212 F. Supp. 2d 541, 545 (E.D. Va.

[9] The D.C. Circuit also denied the detainees' request for relief under the Alien Tort Act, 28 U.S.C. § 1350, because "[t]hey cannot seek relief based on violations of the Constitution or treaties or federal law; the courts are not open to them." *Id.* at *11.

2002).[10] The Fourth Circuit Court of Appeals firmly rejected the notion that, "with no meaningful judicial review, any American citizen alleged to be an enemy combatant could be detained indefinitely without charges or counsel on the government's say-so." *Hamdi*, 296 F. 3d at 283. The Fourth Circuit ultimately dismissed Hamdi's petition, holding that "further judicial inquiry is unwarranted when the government has responded to [habeas] petition by setting forth factual assertions which would establish a legally valid basis for the petitioner's detention" as an enemy combatant. *Hamdi v. Rumsfeld*, 316 F.3d 450, 476 (4th Cir. 2003); *see also Padilla v. Bush*, 233 F. Supp. 2d 564, 607-08 (S.D.N.Y. 2002) (concluding that President "is operating under maximum authority [under the] constitution" and that court will require only "some evidence to support his conclusion that Padilla was [an enemy combatant]").[11] Similarly, the *Lindh* court rejected the government's argument for the non-reviewability of the President's designation of Taliban forces as unlawful combatants, but the court analyzed the question under a deferential standard and upheld the President's designation. *Lindh*, 212 F. Supp. 2d at 554-558; *see Hamdi*, 316 F.3d at 475-76 (concluding that U.S. citizen who took up arms abroad against the United States could be held as enemy combatant).

It appears that the content of the Order and the Procedures, particularly the exclusion of U.S. citizens from their reach and the placement of the detainees at Guantanamo, were carefully designed to evade judicial scrutiny and to test the limits of the President's constitutional authority. Either *Eisentrager* will insulate the military commission decisions from *habeas corpus* (or any other judicial) review, or the Supreme Court will determine that the exclusion of *habeas* review contravenes the USA Patriot Act and *Milligan*, *Quirin*, and *Yamashita* – in which case the Court will review the remaining provisions of the Order and the Procedures under a deferential standard.

2. Jurisdiction Beyond War Crimes

Both the Order (§§ 1(e), 4(a)) and the Procedures (§ 3(B)) suggest that military commissions might be called upon to try cases involving offenses other than violations of the law of war. On February 28, 2003, the Department of Defense issued a draft Military Commission Instruction identifying 24 substantive offenses that "may be tried by military commissions" authorized by the Order. In its press release, the Department stated that the list, while not intended to be

[10] The Bush administration is exploring other options regarding U.S. citizens who are deemed terrorists. The proposed Domestic Security Enhancement Act of 2003 ("DSEA"), a potential successor bill to the Patriot Act, would make it easier for the government to strip U.S. citizens of their citizenship. Currently, a citizen has to state their intent to relinquish his citizenship. The DSEA would allow intent to be inferred from conduct. *See* Charles Lane, *U.S. May Seek Wider Anti-Terror Powers,* WASH. POST, Feb. 8, 2003.

[11] The Court ordered that Padilla's appointed counsel have access to Padilla in preparation for this "some evidence" hearing. *Id.* at 610. The government moved to reconsider this order, arguing, based on *Hamdi*, that a declaration from a government official stating that Padilla was an enemy combatant was sufficient to overcome the "some evidence" standard. *See Padilla v. Rumsfeld*, 02 Civ. 4445, at 7 (S.D.N.Y. March 11, 2003). The government contended that this standard "focuses exclusively on the evidence relied on by the executive," and thus, Padilla's own factual showing was irrelevant. *Id.* at 26. The Court denied the government's motion for reconsideration, holding that "Padilla must have the opportunity to present evidence that undermines the [government's] declaration," and the "only practicable way to present evidence" is through counsel, requiring that Hamdi be allowed to consult with counsel. *Id.* at 29-30. The Court distinguished *Hamdi* on the basis that Padilla was not captured "in a zone of active combat operations abroad," and thus, the court was not required to "second-guess[] battlefield decisions." *Id.* at 32, 34.

exhaustive, was designed to incorporate crimes that are recognized as violations of the law of war under both international and domestic law.[12] The majority of offenses identified in the Instruction are indeed war crimes and, therefore, would fall within the jurisdiction of the military commissions.

Early press reports had indicated that investigators were having difficulty gathering evidence of war crimes by the Guantanamo detainees and, as a result, the administration was considering charging detainees with an offense based solely or primarily on membership in al Qaeda.[13] Some analysts had questioned the validity of this type of status crime under Supreme Court precedent. In releasing the draft Instruction, the Department of Defense has now made clear that it does not intend to try persons before military commissions based solely on their membership in al Qaeda.[14]

The first 18 offenses identified in the draft Instruction are widely acknowledged as violations of the law of war.[15] Some of the offenses, however, may not constitute war crimes and therefore would not be subject to the military commission's jurisdiction. For example, the draft Instruction identifies spying as a violation of the law of war. International law recognizes "the well-established right of belligerents to employ spies and other secret agents for obtaining information of the enemy. Resort to that practice involves no offense against international law."[16]

Section 821 of the UCMJ preserves the traditional jurisdiction of military commissions over "offenders or offenses that by statute or by the law of war may be tried by military commissions." 10 U.S.C. § 821. No statute permits trial by military commission of offenses other than violations of the law of war. *See* 10 U.S.C. § 904 (permitting military commissions to try offense of aiding and abetting war crimes). The Supreme Court has approved military commission trials only for violations of the law of war or in other limited circumstances not present here.[17] *Yamashita*, 327 U.S. at 13 ("Neither congressional action nor the military orders constituting the commission authorized it to place petitioner on trial unless the charge preferred against him is of a violation of the law of war."). Accordingly, the use of military commissions for trials of offenses other than war crimes likely exceeds the authority that Congress granted to

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[12] Department of Defense, *Release of the Military Commission Draft Crimes and Elements Instruction*, Feb. 28, 2003, *available at* www.defenselink.mil/news/Feb2003/ t02282003commission.html.

[13] Neil A. Lewis, *U.S. Weighing New Doctrine for Tribunals*, N.Y. TIMES, Apr. 21, 2002; Frank Davies, *U.S. Readies Tribunals for Terrorism Trials*, MIAMI HERALD, Dec. 26, 2002 (quoting anonymous lawyer familiar with tribunal discussions that "cases will amount to 'membership plus' -- allegiance to al Qaeda along with additional evidence").

[14] Department of Defense, *supra* at n.12.

[15] These offenses are willful killing of protected persons; attacking civilians; attacking civilian objects; attacking protected property; pillaging; denying quarter; taking hostages; employing poison or analogous weapons; using protected persons as shields; using protected property as shields; mutilation or maiming; use of treachery or perfidy; improper use of flag of truce; improper use of protective emblems; degrading treatment of a dead body; rape; hijacking or hazarding a vessel or aircraft; and terrorism.

[16] Department of the Army, *Field Manual FM 27-10: The Law of Land Warfare* ¶ 77 (1956) ("*Army Field Manual*").

[17] Military commissions also may be used during post-war occupations of foreign countries and periods of martial law when civilian courts are unable to function. *Mudd v. Caldera*, 26 F. Supp. 2d 113, 121 (D.D.C. 1998).

the President. The Committee recommends that the Order and draft Instruction be clarified to limit military commission trials to alleged violations of the law of war.

3. Procedures Inconsistent with UCMJ

Section 836 of the UCMJ provides that "Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter . . . triable in . . . military commissions . . . may be prescribed by the President by regulations which . . . may not be contrary to or inconsistent with [the Uniform Code of Military Justice]." 10 U.S.C. § 836. A number of the procedures authorized by the President's Order and set forth in the Procedures are, in fact, contrary to or inconsistent with the UCMJ. For example,

- The standard for admission of evidence before the military commissions is greatly relaxed. Evidence may be admitted if it "would have probative value to a reasonable person."[18] The Procedures specifically permit the introduction of unsworn written statements and physical and other evidence that would not be considered reliable enough to be admitted in federal district courts or in courts martial.[19]

- The Procedures permit the prosecutor to withhold from the defense, including Detailed Defense Counsel, exculpatory evidence and investigatory resources on the ground that it might compromise classified or other sensitive information or "other national security interests."

- The Procedures permit Detailed Defense Counsel to attend closed commission proceedings but prohibit Detailed Defense Counsel from disclosing those proceedings to his client or the civilian attorney.

Each of these examples (and those discussed in Section IV) represents a departure from the procedures for courts martial and, taken together, these departures could dramatically alter the fairness of the proceedings.

Despite the Order's explicit reference to Section 836, however, an argument could be made that the Section does not apply to military commissions under the President's Order. By its terms, Section 836 now applies to "cases arising under" the Uniform Code of Military Justice. The Supreme Court in *Yamashita* held that an enemy combatant was not subject to the predecessor of the UCMJ and, therefore, was not entitled to its procedural benefits. *Yamashita*, 327 U.S. at 20, 66 S. Ct. at 350. At the time of the *Yamashita* decision, the predecessor of Section 836 did not refer to cases arising under the UCMJ but rather referred to "cases before courts martial, courts of inquiry, military commissions, and other military tribunals[.]" *Id.* at 61, 66 S. Ct. at 369 n.29. The *Yamashita* Court reasoned that Section 821 preserves the jurisdiction of military

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[18] This is almost identical to the standard approved in *Yamashita*, 327 U.S. at 18, 66 S. Ct. at 349 ("would have probative value in the mind of a reasonable man.").

[19] The UCMJ mandates evidentiary rules quite similar to the Federal Rules of Evidence.

commissions without distinguishing between the two classes of offenders: U.S. military personnel and their dependents, and other persons (including enemy combatants) triable by military commission. *Id.* at 19, 66 S. Ct. at 349. According to the Court, Section 836 draws a distinction between the two classes of offenders and extends procedural protections only to the former. *Id.* at 20, 66 S. Ct. at 350. Justices Rutledge and Murphy dissented, noting the majority's strained interpretation of the UCMJ. *Id.* at 64-65, 66 S. Ct. at 370.

B. Classes of Persons Potentially Subject to Trial by Military Commission

President Bush's November 13 Order has been described by Lawrence Tribe, in a statement to the Senate Judiciary Committee on December 4, 2001, as a Sword of Damocles that hangs over an unreasonably large number of people potentially within its scope. To many of its critics, the breadth of the President's Order is its greatest fault. The Order puts tremendous discretion in the hands of the President to determine who is subject to its terms. Furthermore, even though there is a specific provision in the Order that addresses who qualifies under it, the language used in this provision is defined very broadly, if at all. Finally, whereas the Department of Defense Procedures clarified the process by which the military commissions are to be formed and the procedures they must follow, they did little to address the Order's unclear and potentially sweeping scope.

1. The President's Order

Section 1(e) of President Bush's Order provides that "it is necessary for individuals subject to this order . . . to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals." The term "individual subject to this order" is defined in Section 2. There are three major components to this definition. First, an "individual subject to this order" means any individual who is not a United States citizen. Order, § 2(a). Thus, the Order can apply to citizens of every nation in the world except the United States. It can also apply to both legal and illegal aliens within the United States, including roughly 18 million aliens lawfully residing in the country. Second, the President must find that there is "reason to believe" that such an individual, "at the relevant times," did one of the following three things: (i) is or was a member of al Qaeda; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation thereof; or (iii) has knowingly harbored one or more individuals described in subparagraph (i) or (ii). *Id.* at § 2(a)(1). Third, it must be "in the interest of the United States that such individual be subject to this Order." *Id.* at § 2(a)(2).

Of the three requirements, only the first, regarding citizenship, involves an objective determination. The Order allows President Bush to be the sole judge of whether an individual meets the second and third requirements. The only limitation placed on the President's discretion is that he make these determinations "from time to time in writing." *Id.* at § 2(a).

The crux of who qualifies as an "individual subject to this order" is the second part of the definition: the requirement that the individual has "engaged in, aided or abetted, or conspired to commit acts of international terrorism." *See id.* at § 2(a)(1)(ii). President Bush's Order does not include a definition of "international terrorism." However, Section 2(a)(1)(ii) goes on to require

that such acts of international terrorism "have caused, threatened 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." It is unclear whether this provision provides a complete definition for "international terrorism" or merely supplements what is meant by the term.

2. Other Definitions of International Terrorism

Other sources of law provide a more thorough definition of "international terrorism." These definitions may be incorporated by reference into the President's Order. Specifically, 18 U.S.C. § 2331 includes a three-part definition of what constitutes "international terrorism." *See* 18 U.S.C.A. § 2331 (West 2002). Section 2331 was substantially amended by the USA Patriot Act, which was passed on October 26, 2001, in response to the September 11 terrorist attacks. *See* USA Patriot Act of 2001, Pub. L. 107-56, § 802.

According to 18 U.S.C. § 2331, the term "international terrorism" means engaging in activities that satisfy three requirements. First, the activities must involve violent acts or acts dangerous to human life which are a violation of the criminal laws of the United States (or that would be a criminal violation if committed within the jurisdiction of the United States). *See* 18 U.S.C. § 2331(1)(A). Second, the acts must "appear to be intended" for one of the following purposes: (i) to intimidate or coerce a civilian population; (ii) to influence the policy of a government by intimidation or coercion; or (iii) to affect the conduct of a government by mass destruction, assassination or kidnapping. *See* 18 U.S.C. § 2331(1)(B).[20] Third, the acts must occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries through the way in which they are accomplished, the persons they appear intended to intimidate or coerce, or the locale in which the actors operate or seek asylum. *See* 18 U.S.C. § 2331(1)(C).

Even if one incorporates the Patriot Act's definition of "international terrorism," President Bush's November 13 Order can still sweep broadly. First, all aliens residing in the United States and all citizens of any other country are potentially subject to its terms. Next, a broad range of "acts" may trigger the statute: any act that causes or threatens to cause injury to the United States, its citizens, national security, foreign policy, or economy can potentially be an act of "international terrorism." Many forms of civil disobedience, including legitimate and peaceful protests, may fall within this definition. If one incorporates the Patriot Act's definition of "international terrorism," the scope of acts that trigger the use of military tribunals is somewhat narrowed. The Patriot Act requires that acts of international terrorism be violent or dangerous to human life, as well as criminal. *See* 18 U.S.C. § 2331(1)(A). Under this definition, some forms of civil disobedience may not qualify as acts of international terrorism. However, as discussed above, the Patriot Act's definition of "international terrorism" is not specifically referenced in the President's Order; therefore, it is unclear whether any additional limitations on the definition apply. Finally, the only time frame identified in the Order is that an individual commit the required acts "at the relevant times." *See* § 2(a)(1). Combined with other sections of the Order, this means that someone can be subject to trial by military commission based on aiding or harboring someone years, or even decades, ago.

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[20] The Instruction's elements for the offense of terrorism are similar to these first two requirements. Instruction § 6(A)(18).

In constitutional law, a statute is void for vagueness if a normal individual cannot discern to whom the statute applies or which behaviors the statute prohibits. The President's Order may contain both of these faults. As of yet, it is unclear who the Administration plans to try with the military commissions authorized by President Bush's Order: the captured leaders and top officials of the al Qaeda network and the Taliban; other members of al Qaeda or the Taliban currently held in Guantanamo Bay, Cuba; or other individuals living within the United States or abroad who have varying ties to al Qaeda, the Taliban, or the September 11 attacks. What is clear, however, is that the scope of President Bush's Order grants the Administration the authority to try before military commissions individuals from all three of these categories. The committee recommends clarification of the meaning of "international terrorism" for purposes of the Order.

IV. ISSUES RAISED BY MILITARY COMMISSION PROCEDURES

The Procedures contain evidentiary, trial, sentencing, and post-trial rules to be applied by military commissions for "violations of the laws of war and all other offenses triable by military commission." The trier of fact (the military commission members) and some of the substantive, procedural, and evidentiary rules differ from traditional criminal and court martial proceedings. The Procedures also adopt a sentencing structure that allows for more discretion than a typical criminal trial. This section addresses these Procedures, their similarities and differences to traditional criminal and court martial proceedings, and recommends some revisions that would enhance the fairness of military commission proceedings.

A. Independent Tribunal

The Procedures state that each commission shall consist of between three and seven members named by the Appointing Authority (the Secretary of Defense or a designee). Procedures, § 4(A)(1)-(2). The Appointing Authority presumably has the power to remove commission members, although this power is not granted explicitly. Commission members must be commissioned officers of the United States armed forces, including active reserve personnel, active National Guard personnel in Federal service, and retired personnel recalled to active duty. *Id.* at § 4(A)(3). The Presiding Officer of the commission must be a judge advocate of the U.S. armed forces. *Id.* at § 4(A)(4). The commission is directed to proceed impartially and expeditiously to guarantee a full and fair trial of the charges, excluding irrelevant evidence, and preventing any unnecessary interference or delay. *Id.* at § 6(B)(2).

Despite this broad, protective language, some critics argue that the Procedures are inadequate to assure the impartiality of commissions made up of current or former military officers. *See* Universal Declaration of Human Rights, 1948, art. 10 ("Everyone is entitled . . . to a fair and public hearing by an independent and impartial tribunal"); Geneva Conventions of 1949, Protocol I (1978), art. 75(4) [hereinafter Geneva Protocol] (persons accused of war crimes entitled to trial before "impartial and regularly constituted court"); International Covenant on Civil and Political Rights, 1976, art. 14, 999 U.N.T.S. 171 [hereinafter ICCPR] ("everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."). These critics argue that military officers cannot be objective when judging

enemy fighters. Critics also point out that the President or the Secretary of Defense has the power to name those who will be tried, to appoint and to remove the commission members who will try them, to appoint the panel that will review convictions, and to make final decisions on convictions and sentencing. Commission members effectively serve at the pleasure of the primary prosecuting decision maker and, therefore, the commission cannot be considered an independent tribunal.[21]

Other commentators argue that these concerns are unfounded. They point to the 85% conviction rate (less than the conviction rate in most federal courts) in more than 2500 military trials of Japanese and German soldiers after World War II. They also argue that the court martial system (which admittedly differs in some ways from the Procedures) has fairly used military personnel as the trier of fact for years, and commission members will face no less or different pressure than civilian jurors in a federal or state trial.[22]

The trier of fact in general courts martial is markedly more independent than a military commission. Courts martial judges belong to an independent judiciary. They do not report to, and their performance is not evaluated by, prosecutors or the appointing authority convening the court martial. Military officers and enlisted personnel serve as "members," the court martial equivalent of the jury. The members are subject to a voir dire procedure similar to that of federal district courts, wherein the prosecution and defense have the opportunity to evaluate the members' possible biases. The military judge will excuse members whose impartiality is placed in doubt. In addition, the prosecution and defense each may exercise one peremptory challenge. The UCMJ also contains extensive rules to prevent "Unlawful Command Influence," which is defined as improper influence in a military justice case by senior military personnel, either intentionally or otherwise.

The committee recommends that the Procedures be clarified to prohibit the removal of commission members or to limit the circumstances under which they may be removed. The committee also recommends that the Defense Department issue a regulation adopting the Unlawful Command Influence rules for military commission proceedings.

B. Defense Counsel

The accused is guaranteed "[a]t least one Detailed Defense Counsel . . . ." Procedures, § 5(D). Detailed Defense Counsel must be a military officer and judge advocate of any branch of the United States armed forces. *Id.* at § 4(C)(2). The accused may select a different Detailed

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[21] *See* Peter Ford, *Videotape aired yesterday bolsters case on bin Laden*, CHRISTIAN SCIENCE MONITOR, Dec. 14, 2001 (noting Spain's refusal to extradite 14 al Qaeda suspects without assurances that they would not be tried by military tribunals); Kathleen Knox, *Death Penalty, Military Trials Complicating Al Qaeda Suspects' Extradition from Europe*, RADIO FREE EUROPE/RADIO LIBERTY, Nov. 28, 2001 (noting European concern that "military judges may not be independent."); *Bad Example: Military Tribunals for Afghanistan Prisoners Turn the U.S. Into Judge, Jailer, Prosecutor*, Newsday, Apr. 24, 2002, at A34; James Griffith, *Mock Justice*, Chicago Tribune, Apr. 1, 2002, at A16 (contending that "no officer, hoping for a promotion, would be foolish enough to vote for an acquittal in the face of an indication from his or her superior officer that a conviction was sought").

[22] *The ABA Goes to War*, Wall Street Journal, Feb. 14, 2002, at A20; Gerald Skoning, *Military Will Bring Justice to Accused Terrorists*, Chicago Tribune, Mar. 24, 2002, at 9.

Defense Counsel to replace his assigned Detailed Defense Counsel or to serve as an additional Detailed Defense Counsel. *Id.* at § 4(C)(3)(a). The accused also may hire a civilian attorney ("Civilian Defense Counsel") of his choosing (at no expense to the United States Government) provided that the attorney: (1) is a U.S. citizen; (2) is properly admitted to a State or Federal Court; (3) has not been disciplined by any court or bar for "relevant misconduct;" (4) is eligible to access at least SECRET information; and (5) has signed an agreement to comply with the commission's procedures. *Id.* at § 4(C)(3)(b).

The accused must be represented at all times by Detailed Defense Counsel. *Id.* at § 4(C)(4). As set forth more fully below, this requirement is necessary because Civilian Defense Counsel (and the accused) may be faced with situations in which only Detailed Defense Counsel will have access to certain evidence or witnesses. *See id.* at § 4(c)(3)(b) ("qualification of a Civilian Defense Counsel does not guarantee that person's presence at closed commission proceedings or that person's access to any information protected under section 6(D)(5)"). Thus, trial attorneys serving as Civilian Defense Counsel should be prepared to play a secondary role in any commission proceedings.

C. Pretrial Disclosure and Investigation

The Procedures require that investigative or other resources be made available to the defense as the Appointing Authority deems necessary for a full and fair trial. Procedures, § 5(H). Nonetheless, trial attorneys may face difficulties in their investigations due to national security issues. The prosecution of John Walker Lindh provides some insight into these potential roadblocks. Lindh's attorneys have sought to personally question about 20 detainees who may have trained or served alongside Lindh in the Taliban. The government argued that face-to-face or telephone questioning posed threats to national security interests and would delay the government's interrogation of these detainees. In a May 30, 2002 order, U.S. District Judge T.S. Ellis denied Lindh's request for face-to-face or telephone interviews of Guantanamo detainees. Judge Ellis ruled that the Fifth Amendment guarantees all defendants the right to pretrial access to potential witnesses, but that this right was not absolute and did not always mandate face-to-face access. Rather, the court ordered Lindh's attorneys to submit written questions to the Department of Defense, who reviewed the questions, and then allowed some or all of the questions to be posed by Defense Department interpreters. The Department of Defense then would videotape the interviews and provide a copy to Lindh's attorneys. *See United States v. Lindh*, 2002 WL 1298601 (E.D. Va. May 30, 2002).[23] Trial attorneys can expect to face similar, or even more severe, limitations on their investigative efforts for the detainees, who may not have the Fifth Amendment rights possessed by Mr. Lindh.[24] *But cf. Army Field Manual FM 27-10: The Law of Land Warfare* ¶¶ 181, 505(b) (1956) (persons accused of war crimes are entitled

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[23] Lawyers for Zacarias Moussaoui, also facing trial in the Eastern District of Virginia relating to the September 11 attacks, reportedly were ordered to receive access to Ramzi Binalshibh, a detainee currently held abroad named as an unindicted co-conspirator in Moussaoui's indictment. In response, the government filed a notice to appeal the judge's order and asked that proceedings be halted until this appellate issue is resolved. Jerry Markon, *Justice Dept. Wants Moussaoui Trial Put on Hold*, WASH. POST, February 7, 2003.

[24] The Department of Defense similarly has blocked federal prosecutors from access to Guantanamo detainees. *See* Susan Schmidt, *Prosecution of Moussaoui Nears a Crossroad*, WASH. POST, January 21, 2003.

to defense counsel that may "confer with any witnesses for the defense, including prisoners of war.").

Defense counsel also may face difficulties obtaining exculpatory evidence from the government because of national security and other concerns. Trial attorneys will be allowed document discovery "to the extent necessary and reasonably available as determined by the Presiding Officer," and subject to the "[national security] requirements of Section 6(D)(5) and . . . section 9." Procedures, § 5(H). Indeed, the Procedures are clear that "[n]othing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them." *Id.* at § 9. Thus, defense counsel may be denied access to certain evidence or prohibited from confirming or rebutting that evidence through other witnesses.

Detailed Defense Counsel is entitled to access all evidence considered by the commission in determining the guilt of the accused, but the prosecution may withhold exculpatory evidence from the defense for national security reasons. *See* Procedures, §§ 5(E), 5(H). This aspect of the Procedures raises significant concerns. Indeed, without appropriate safeguards, it may result in conviction even though the government knows, or has evidence that indicates, that the defendant may not be guilty. When the government invokes the state secrets privilege as to evidence that may be material to the defense in a criminal proceeding before an Article III federal court, there are statutory procedures to balance the defendant's rights with national security interests. *See* 18 U.S.C. App.3, §1, *et seq.* And, the remedy may be dismissal. *See United States v. Reynolds,* 345 U.S.1, 12 (1953), and cases cited therein.

Prosecutorial discretion should be carefully exercised when evidence is withheld from the defense. Furthermore, safeguards should be adopted and enforced to enable the Presiding Officer and the Review Panel to deter any abuse of prosecutorial discretion. To some degree, the Procedures provide safeguards because they require any withheld evidence to be provided to the Presiding Officer and to be included in the record before the Review Panel. *See above,* § II.B.4. Other safeguards should also be considered. *See below*, §IV.D.3.

D. Trial Issues

The President's November Order provided little detail about the conduct of trials by military commission, instead requiring the Secretary of Defense to draft appropriate regulations. *See* Order, § 4(b)-(c). And, where the Order contained more detail, concerns arose due to apparent restrictions on the fair trial rights that would apply in trials by military commission. For example, the Order found "that it is not practicable to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." *Id.* at § 1(f). The Order dismissed traditional evidence standards, allowing "admission of such evidence as would . . . have probative value to a reasonable person." *Id.* at § 4(c)(3). The Order also dispensed with the traditional requirement of a unanimous verdict, allowing "conviction only upon concurrence of two-thirds of the members of the commission." *Id.* at 4(c)(6). This combination of explicit limitations and wide latitude to draft the Procedures was troubling for many legal commentators.

1. Procedural and Substantive Rights of the Accused

The Procedures alleviated some of these concerns. Indeed, the Procedures provide a lengthy list of rights similar to those guaranteed in civilian criminal trials. The Procedures profess to ensure:

- The presumption of innocence until found guilty beyond a reasonable doubt. Procedures, § 5(B)-(C).

- The right to counsel "sufficiently in advance of trial to prepare a defense." *Id.* at §§ 5(D), 4(C)(3).

- The right against self-incrimination: The accused may, but need not, testify at trial on his own behalf (and no adverse inference may be drawn from an accused's decision not to testify). *Id.* §§ 5(F)-(G).

- The right to present witnesses and evidence (to the extent necessary and reasonably available as determined by the Presiding Officer and consistent with national security concerns). *Id.* at §§ 5(H); 6(D)(2)(a) (allowing admissible and non-cumulative evidence).

- The right to contest witnesses and evidence (subject to limitations on badgering the witness and introduction of immaterial issues). *Id.* at §§ 5(I); 6(D)(2)(c).

- The right to exculpatory evidence (consistent with national security concerns). *Id.* at § 5(E).

- The right to an open and public trial (except proceedings closed by the Presiding Officer consistent with national security or other concerns). *Id.* at § 5(O); *see id.* at § 6(B)(3) ("Proceedings should be open to the maximum extent practicable (including discretionary press attendance).")

Other Procedures provide protections in the context of this unique situation, allowing the testimony of defendants (and witnesses) who are not English speakers or who are unwilling to swear an oath in court. For example, the Procedures provide:

- "[T]he substance of the charges, the proceedings, and any documentary evidence [will be] provided in English and, if appropriate, in another language that the Accused understands," and interpreters may be provided "to assist the Defense, as necessary." *Id.* at § 5(J).

- Testimony of witnesses is allowed "by telephone, audiovisual means, or other means; however, the Commission shall consider the ability to test the veracity of that testimony in evaluating the weight to be given to the testimony of the witness." *Id.* at § 6(D)(2)(a).

- Witnesses need not "swear an oath or make a solemn undertaking; however, the Commission shall consider the refusal to swear an oath or give an affirmation in evaluating the weight to be given to the testimony of the witness." *Id.* at § 6(D)(2)(b).

Thus, the Procedures provide a number of important, traditional safeguards for the detainees.

2. Limitations on Defense Rights

A closer examination of the above protections, however, reveals some important departures from traditional criminal practice in federal courts and general courts martial. First, evidentiary standards have been relaxed to allow evidence if it "would have probative value to a reasonable person." *Id.* at § 6(D)(1). Numerous groups, including the American Bar Association, have expressed concern over this relaxed standard.[25] The Procedures also allow the consideration of "any other evidence including, but not limited to . . . sworn or unsworn statements . . . ." *Id.* at § 6(D)(3). These relaxed standards likely allow for the admission of the infamous Osama Bin Laden "confession" videotape, despite authenticity and chain of custody issues, a likely common problem for evidence collected abroad in abandoned towns or caves or from foreign governments or individuals. Commentators have suggested that this relaxation is a reasonable accommodation that reflects the reality of the situation. They point out that significant evidence gathering is occurring in a foreign country, in a war setting, and by soldiers or non-U.S. citizens, not trained evidence technicians or law enforcement personnel. Commentators also note that the Procedures are consistent with the World War II military commissions which allowed for unauthenticated documents and photographs.

Second, although the Procedures give the accused the right to be represented by legal counsel, they do not explicitly protect the confidentiality of any information exchanged between the accused and his lawyers. Section 6(D)(5)(a)(ii) permits the Presiding Officer to issue protective orders to safeguard "Protected Information," including "information protected by law or rule from unauthorized disclosure[.]" The context of that section indicates, however, that it is directed only at information that the *government* seeks to protect from disclosure. Thus, the argument could be made that attorney-client communications would be admissible at trial as "evidence [that] would have probative value to a reasonable person." *Id.* at § 6(D)(1); *but cf. Army Field Manual*, ¶¶ 181, 505(b) (defense counsel must be allowed to interview accused war criminal "in private."). Obviously, the lack of any attorney-client privilege would seriously undermine the accused's right to legal representation. The committee recommends that the Department of Defense issue a regulation clarifying that confidential communications between the accused and his counsel are protected by the attorney-client privilege and are neither discoverable nor admissible at trial.

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[25] Margaret Graham Tebo, *Qualified Praise: ABA Reps See Things They Like In Tribunal Rules, Still Have Some Legal Concerns*, ABA JOURNAL, May 2002, at 59; Nat Henthoff, *This Is Not America's Way Of Justice*, SAN DIEGO UNION-TRIBUNE, Apr. 15, 2002, at B6; Jonathan Turley, *Military Tribunal Rules Put Our Values to the Test*, BALTIMORE SUN, Mar. 25, 2002, at A7 ("It is obvious that these are rules that only a prosecutor would love – hardly a surprise since the prosecutors were allowed to write the rules that would govern their own prosecutions.").

Third, the Procedures make clear that, during custodial interrogation, the accused has no right to remain silent or to seek the advice of counsel. The right to counsel does not attach until after a trial has been scheduled, and the privilege against self-incrimination applies only to statements made at trial. Procedures, §§ 5(D) (right to advice of counsel "sufficiently in advance of trial to prepare a defense") and 5(F) (right not to testify "during trial," but accused's pretrial statements and conduct are admissible).

Fourth, the Procedures conspicuously do not prohibit the use of coerced confessions in obtaining convictions. *See id.* at § 5(F) ("This subsection shall not preclude admission of evidence of prior statements or conduct of the Accused."). Statements made by the accused under physical or mental duress are admissible if "the evidence would have probative value to a reasonable person." *Id.* at § 6(D)(1). The Secretary of Defense undoubtedly wished to avoid protracted pretrial suppression hearings, particularly in light of press reports of inhumane conditions and coercive methods of interrogation at Guantanamo. The committee recommends that the Defense Department issue a regulation directing the commission to exclude evidence of statements by the accused made in response to physical force or the threat thereof.

Fifth, the inability to procure the presence of witnesses may hamper the defense. As in the Lindh prosecution, witnesses may be fellow detainees or foreigners living (or held captive) abroad. The Presiding Officer may not allow such defense witnesses to testify in person because of national security, cost, or other concerns. As a result, the government's refusal to procure the physical presence of defense witnesses could lessen the weight accorded their testimony and thereby prejudice the defense. *Id.* at § 6(D)(2)(a); *contra* Geneva Protocol, art. 75(4)(g) (accused war criminal has the right "to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him"); *accord* ICCPR, art.14(3(e). The committee recommends that the Defense Department issue regulations requiring that any limitations on procuring the attendance of witnesses be applied equally to the prosecution and the defense.

3. National Security Interests

The Procedures prohibit access to certain evidence or witnesses in the name of national security. Section 6(D)(5)(b) provides:

> The Presiding Officer, upon motion of the Prosecution or *sua sponte*, shall, as necessary to protect the interests of the United States and consistent with Section 9, direct (i) the deletion of specific items of Protected Information from documents to be made available to the Accused, Detailed Defense Counsel, or Civilian Defense Counsel; (ii) the substitution of a portion or a summary of the information for such Protected Information; or (iii) the substitution of a statement of the relevant facts that the Protected Information would tend to prove.

Section 9 further provides that "[n]othing in this Order shall be construed to authorize disclosure of state secrets to any person not authorized to receive them." Thus, in the case of documents (including exculpatory information), the Procedures allow evidence to be redacted or substituted in the name of national security, with neither the accused, civilian counsel, or Detailed Defense Counsel having access to these materials in their original form. *See* Procedures, §§ 5(E), 5(H).

The commission may not consider this Protected Information unless it is presented to Detailed Defense Counsel, but the defense could be compromised if significant exculpatory evidence were withheld from the defense. *Id.* at § 6(D)(5)(b).

Similar measures are statutorily authorized to protect classified information from disclosure in criminal proceedings in federal courts under the Classified Information Procedures Act, 18 U.S.C. App. 3 §§ 4 and 6(c)(1) (1980).[26] The Procedures differ, however, from the Classified Information Procedures Act in two significant ways. First, the Procedures authorize protective measures with respect to a broad spectrum of information designated as "Protected," including both classified and "classifiable" information, information "which may endanger the physical safety of . . . prospective witnesses," "information concerning intelligence and law enforcement sources, methods, or activities," and the vague category of "information concerning other national security interests." Procedures, § 6(D)(5)(a). The Classified Information Procedures Act, on the other hand, applies only to "classified information" designated as such by "Executive order, statute, or regulation . . . for reasons of national security[.]" 18 U.S.C. App. 3 § 1. Second, the Procedures merely direct the Presiding Officer to consider "the interests of the United States." Procedures, § 6(D)(5)(b). In contrast, the Classified Information Procedures Act requires the court to consider the defendant's interests and to authorize substitutions for classified information "if it finds that the statement or summary will provide the defendant with substantially the same ability to make his defense as would disclosures of the specific classified information." 18 U.S.C. App. 3 § 6(c)(1). The committee recommends that the Department of Defense provide by regulation that, in making a determination under § 6(D)(5)(b) of the Procedures, the Presiding Officer must balance the accused's ability to make his defense against the national security interests involved.

National security interests may also limit a trial attorney's access to witnesses. The Procedures mandate that the Presiding Officer consider the safety of witnesses and others in determining the appropriate methods of receiving testimony. Procedures, § 6(D)(2)(d).[27] The prosecution or the defense may make an *ex parte, in camera* presentation regarding the safety of potential witnesses to aid this determination. *Id.* Thus, the Presiding Officer may allow "testimony by telephone, audiovisual means, or other electronic means; closure of the proceedings; [or] *introduction of prepared declassified summaries of evidence*." *Id.* (emphasis added). The Procedures do not address whether this last term, prepared declassified summaries of evidence, could include summaries of witness testimony absent cross-examination. And earlier provisions only require cross-examination for a witness "presented by the Prosecution *who appears before the Commission*." *Id.* at § 5(I) (emphasis added). Thus, trial attorneys might be unable to cross-examine key prosecution witnesses, including sources of such declassified summaries.

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[26] This raises questions about the argument that military commission trials are necessary in order to safeguard classified information for reasons of national security.

[27] Press reports note that "federal judges say the main terrorism fear facing them is . . . that a court could be targeted as a consequence of holding a trial of terrorists." Charles Lane, *Reprisal From Terrorism Trial No. 1 Fear For Federal Judges*, PITTSBURGH POST, Apr. 14, 2002, A16; *see* Vernon Loeb, *Rumsfeld Announces New Military Tribunal Rules*, WASHINGTON POST, Mar. 21, 2002 (noting that the federal judge who presided over the first trial of the individuals convicted of the 1993 World Trade Center bombing remains under 24-hour guard).

Finally, the Procedures also allow the exclusion of the accused and his civilian counsel (though not Detailed Defense Counsel) from certain stages of the trial in accordance with section 6(B). *Id.* at § 5(K).[28] Section 6(B) broadly states that closure may be ordered to safeguard Protected Information. *Id.* at § 6(B)(3). Closure, in whole or part, can occur *sua sponte* by the Presiding Officer or based upon a presentation, including an *ex parte, in camera* presentation, by either the Prosecution or the Defense. *Id.* Detailed Defense Counsel may not disclose any information presented during a closed session to individuals excluded from such proceeding or part thereof, including his own client and civilian co-counsel. *Id.*; *contra* Geneva Protocol, art. 75(4)(e) ("Anyone charged with an offence shall have the right to be tried in his presence"); *accord* ICCPR, art. 14(3)(d).

E. Sentencing Issues

The sentencing provisions of the Procedures take a pragmatic approach to sentencing, giving the Commissions wide discretion to impose the sentence deemed appropriate by them. The appropriate role of discretion in a sentencing scheme has been long debated. In any sentencing scheme, there are two goals which are always in tension: on the one hand, the desire to tailor a punishment to fit the offense and the offender, and, on the other hand, the desire to ensure that like offenses and like offenders receive sentences which are consistent and proportional. Discretion generally favors the former goal over the later. U.S. courts, and in particular the federal courts, have engaged and remain engaged in a laborious struggle to reconcile these policy goals. It is unrealistic to think that the commissions will have any more success grappling with these issues. It is also impossible to say that the approach taken in the Procedures is wrong. The committee therefore takes the position, with the exception of capital cases, that the commissions may properly be given a wide measure of discretion in sentencing without affecting the fundamental fairness of the proceedings.

1. The Death Penalty

The President made clear in his November 13, 2001 Order that persons convicted by the military commissions would be subject to the death penalty. Order, § 4(a). Indeed, the Order purported to authorize the imposition of the death penalty upon a less-than-unanimous verdict of a three-person military commission. *Id.* The Defense Department Procedures provide, however, that the death penalty may only be imposed by a unanimous vote of a seven-member commission. Procedures, §§ 6(F), 6(G). Even so, the ability of the military commissions to impose the death penalty has serious practical and legal implications.

The availability of the death penalty in military commission proceedings has drawn the ire of traditional allies of the U.S. in western Europe and elsewhere and, in some cases, has prompted those allies to limit their cooperation with U.S. anti-terrorism investigations and prosecutions. The 15 members of the European Union and the 43 members of the Council of Europe are

[28] The accused also may be barred for disruptive conduct. *Id.* at § 5(K). This provision is not surprising, given the pre-trial issues involving accused terrorist Zacarias Moussaoui. Moussaoui, in an April 22, 2002 court appearance, denounced the U.S. and Israel in an hour-long diatribe in which he announced his intent to defend himself. Andrew Cohen, *On Second Thought, How About a Tribunal?*, WASHINGTON POST, Apr. 28, 2002, at B2.

signatories of the European Convention on Human Rights, which prohibits the death penalty. The European Court of Human Rights has ruled that member states may not extradite suspects to jurisdictions where they might face the death penalty. Accordingly, Spain, Britain, Germany, Belgium, and France have refused U.S. requests to extradite suspected terrorists in their custody unless the U.S. agrees not to seek their execution. Courts in Canada and South Africa have announced that they would do the same. Historically the U.S. has agreed not to seek the death penalty in order to obtain extraditions of particular suspects. It is not clear whether the U.S. is willing to waive the possibility of the death penalty for persons accused of international terrorism.[29]

Perhaps more troubling, France and Germany have announced that they will not disclose information to U.S. law enforcement authorities if that information could be used to convict an alleged terrorist who might then be subject to the death penalty. Germany reportedly has information linking Zacarias Moussaoui to the September 11 hijackers, but has refused to share this information without assurances that it will not be used to convict Moussaoui on the four capital charges he faces.[30] The information possessed by the German authorities may be relevant to wider ongoing terrorism investigations, not just to Moussaoui's prosecution. Moreover, other European countries may follow Germany's example, not only with respect to present prosecutions but also with respect to future trials of the Guantanamo detainees. These possibilities jeopardize U.S. success in its fight against international terrorism.

2. Guidelines for Imposing the Death Penalty

Putting aside the question of whether the risk of international noncooperation with the war on terrorism is justified in order to permit military commissions to impose the death penalty, the availability of death sentences raises serious due process issues under U.S. law. The committee believes that additional procedures and substantive rules must be implemented to guide the commissions. To a large extent, the committee defers in this area to the jurisprudence of the Supreme Court, which has held that such procedures and substantive rules are necessary to ensure the fundamental fairness of death sentences. The committee recognizes there is a tension in approving the Procedures' wide discretion in non-capital sentences while recommending against the same measure of discretion in capital sentences. However, this tension exists as a matter of Supreme Court jurisprudence, which has held that the distinction must be drawn because "death is different." However intellectually unsatisfying, there is certainly moral weight in this distinction – implicitly recognized, for instance, in the Procedures' enhanced requirement that capital sentences be imposed only upon the unanimous approval of a commission of seven members. Moreover, given the distinct possibility that Article III federal courts will exercise *habeas* jurisdiction over persons convicted by the commissions, it is prudent to enact procedures

[29] *See* Ford, *supra* at n.21; Knox, *supra* at n.21; Sam Dillon, *Spain sets hurdles for extraditions*, N.Y. TIMES, Nov. 24, 2001; Associated Press, *Global help in war on terror helping*, N.Y. TIMES, Sept. 5, 2002; American Friends Service Committee, *U.S. Military Tribunals*, Jan. 29, 2002, *available at* www.afsc.org/nomore/tribunal.htm; Paul Weinberg, *RIGHTS-CANADA: Supreme Court bans extradition to countries with death penalty*, INTER PRESS SERVICE, Feb. 15, 2001, *available at* www.oneworld.org/ips2/feb01/02_53_004.html; *Extradition of US bomb suspect was illegal: SA court*, DAWN, May 28, 2001, *available at* www.dawn.com/2001/05/29/ int5.htm.

[30] *Germany withholds Moussaoui evidence*, BBC NEWS, Sept. 1, 2002, *available at* news.bbc.co.uk/1/hi/world/europe/2229231.stm.

and substantive rules which have already passed muster with the Supreme Court. The committee suggests applying the same procedures for the determination of eligibility and sentence in capital cases as are applied in capital cases tried in U.S. criminal courts. This involves establishing eligibility factors for capital sentences and mandating consideration of the aggravating and mitigating circumstances of a particular offense and offender.

The Order does not specify what offenses would qualify defendants to receive the death penalty. The Procedures simply provide that "the commission shall impose a sentence that is appropriate to the offense or offenses for which there was a finding of Guilty, which sentence may include death." Procedures, § 6(G).[31] Presumably, there are offenses over which the commission would exercise jurisdiction that would not render a defendant eligible for the death penalty. Supreme Court jurisprudence and modern norms of fairness clearly limit the applicability of the death penalty to cases involving only the most egregious offenses.

3. Supreme Court Capital Jurisprudence

Beginning with *Furman v. Georgia*, 408 U.S. 238 (1972), the Supreme Court created a body of capital jurisprudence which requires that capital sentencing schemes permit individualized consideration of the circumstances of an offense and offender and provide procedures that safeguard against the arbitrary and capricious imposition of the death penalty.

The Supreme Court has rejected sentencing schemes that mandate the death penalty for any class of offenses, and requires that capital sentencing schemes permit individualized consideration of the offense and offender. *Roberts v. Louisiana*, 428 U.S. 325, 333 (1976) (plurality opinion). The requirement of individualized consideration of the circumstances of the offense and offender "stems from our society's rejection of the belief that 'every offense in a like category calls for an identical punishment without regard to the past life and habits of a particular offender." *Id.*

The Supreme Court has also mandated that sentencing schemes provide the fact finders with rules and procedures which "safeguard against the arbitrary and capricious imposition of death sentences." *Roberts*, 428 U.S. at 334. The sentencing schemes which have been approved by the Supreme Court have all involved the consideration and weighing of aggravating and mitigating circumstances. *See, e.g., Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

There is no reason to believe the Supreme Court would alter its capital sentencing jurisprudence for cases prosecuted in the military commissions. While its relevant decisions are grounded in the Eighth and Fourteenth Amendments, it seems unlikely the Supreme Court would approve a capital sentencing scheme which under its jurisprudence results in cruel and unusual punishments, deprives the accused of due process, or results in arbitrary and capricious sentences simply because the accused was not a U.S. citizen. To do so would endorse a system that lacks fundamental fairness, a concern even if the Constitution is not applied.

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[31] The Instruction also fails to designate which offenses may be subject to capital punishment.

If anything, the non-U.S. citizenship of the accused before the military commissions might make federal courts more suspicious of capital sentences rendered by the tribunals. Justice Douglas' concurrence in *Furman* focuses heavily on the history of capital punishment in Anglo-American jurisprudence prior to the adoption of the Eighth Amendment and English Bill of Rights, where "the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime. One cannot read this history without realizing that the desire for equality was reflected in the ban against 'cruel and unusual punishments' contained in the Eighth Amendment." *Furman*, 408 U.S. at 255. The unpopularity of a defendant, or the group to which a defendant belongs, is clearly not an appropriate factor to consider in determining the punishment to be meted out. Supreme Court jurisprudence is obvious in its concern that capital sentencing schemes provide safeguards to minimize the role that the unpopularity of a defendant's political or religious views plays in determining whether the defendant is sentenced to death. No group is so unpopular with Americans as those groups that will likely appear before the commissions – the Taliban and al Qaeda. Both as a matter of constitutional law and good sense, the Defense Department should adopt capital sentencing schemes analogous to those used in U.S. criminal courts.

4. Recommended Capital Sentencing Scheme

The scheme adopted for capital sentencing should require two things: (1) an eligibility determination; and (2) a weighing of aggravating and mitigating circumstances of an offense and offender.

The Department of Defense should enact substantive rules for determining who is eligible for the death penalty and procedures for determining eligibility. Present federal death penalty statutes provide for a variety of eligibility factors that the Secretary can use as models. With the exception of treason, these factors generally require a finding that the defendant acted intentionally to kill another person, or intentionally inflicted grave bodily injury resulting in death, intentionally engaged in an act of lethal force causing death, or intentionally engaged in an act of violence knowing it created great risk of death which in fact caused the death of another person. 18 U.S.C.A. § 3591 (2000). The federal controlled substances act also provides for the death penalty in cases involving a continuing criminal enterprise where the defendant intentionally kills or counsels, commands, induces, procures or causes the intentional killing of an individual. 18 U.S.C.A. § 3591(b)(2). Similar language could no doubt be employed for use in sentencing members of terrorist organizations.

Once an eligibility determination is made, a procedure should be created to permit the weighing of aggravating and mitigating circumstances. Federal law presently provides for seven mitigating factors by statute: impaired capacity, duress, minor participation, equally culpable defendants, no prior criminal record, disturbance, and victim's consent – as well as a catch-all factor which permits the consideration of any other circumstance that mitigates against the imposition of the death penalty. 18 U.S.C.A. § 3592. The committee recommends that the Defense Department adopt these mitigating factors. Federal law also provides for numerous aggravating factors. *See e.g.*, 18 U.S.C.A. §§ 3592 (b), (c), and (d). The committee recommends that the Defense Department review these factors and develop an appropriate set of aggravating factors.

Procedurally, the committee recommends that after conviction, the Commission adopt a procedure by which the sentencing panel makes special findings of a defendant's eligibility to receive the death penalty, if the death penalty is requested by the prosecution. If necessary, a separate hearing should be held to determine eligibility. If the defendant is found eligible, a hearing would be held in which the prosecution and defense would present evidence of aggravating and mitigating circumstances. The panel would impose the death penalty only upon a unanimous finding that the aggravating circumstances outweigh the mitigating circumstances. A split panel, even if a majority favors the death penalty, would result in a non-capital sentence.

F. Review of Convictions and Sentences

Unlike procedures for federal criminal courts and general courts martial, which specifically provide for appellate review,[32] the President's Order purports to exclude any review of military commission trials by civilian courts. Order, § 7(b); *contra Army Field Manual*, ¶¶ 182, 505(b) (a person accused of war crimes is entitled to "have, in the same manner as the members of the armed forces of the [U.S.], the right of appeal or petition from any sentence pronounced upon him"). Instead, the Procedures call for expedited review of commission decisions by another military panel. Procedures, § 6(H)(4). Each Review Panel is directed to affirm the commission decision unless "a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred." *Id.* The accused has no right to oral argument, and written submissions are allowed only at the discretion of the Review Panel. *Id.* The Review Panel must submit its recommendation to the Secretary of Defense within 30 days of receiving the trial record. *Id.* If the President has delegated final decision making authority to the Secretary of Defense, his decision must be executed "promptly." *Id.* at § 6(H)(2).

Certain aspects of these review procedures are problematic. First, the truncated nature of the review – the 30-day limitation, the probable lack of post-trial briefing, and the limited standard of review – may well prevent any meaningful review. Given the time limitation alone, the likelihood is high that Review Panel decisions will be regarded as rubber stamps. Also, a lack of briefing by defense counsel makes it unlikely that the Review Panel would find flaws in the commission verdict within the time allotted.

Perhaps the most troubling feature of the Procedures is the severe restriction of the Review Panel's authority to meaningfully review the commission decision. Review Panels are expressly precluded from any review of the commissions' factual determinations and most procedural rulings. Further, the Procedures suggest that mixed questions of law and fact may fall outside the scope of review. The review is limited to "material error[s] of law," even though (a) the commission is not required to issue oral or written findings of fact or conclusions of law, (b) commission deliberations must remain secret and do not become part of the trial record, (c) only one of the Panel members must have legal training, (d) the Review Panel may prevent defense counsel from making any written submission which could alert the Review Panel to errors in the proceedings below, and (e) the Procedures' lax evidentiary standards virtually negate the possibility of any challenge to evidentiary rulings. Under these circumstances, it is

[32] For most offenses, the UCMJ provides three levels of appeals from convictions in general courts martial: a Court of Criminal Appeals, the Court of Appeals of the Armed Forces, and the U.S. Supreme Court. *See* 10 U.S.C. §§ 866-867a.

difficult to imagine that a Review Panel would have any basis for concluding that the commission committed a "material error of law."

Moreover, although the Procedures purport to require Review Panels to review sentencing determinations, such a review is virtually impossible. The Review Panel may not review issues of fact, and there are no sentencing rules or guidelines by which to judge the appropriateness of any particular sentence. Because sentencing decisions are inherently factual determinations, they are effectively beyond the reach of the Review Panel.

Finally, the combination of the 30-day limit for review and the possibility that the Secretary of Defense might have final decision making authority means that death sentences might be carried out less than two months after the military commission ruling and within days after the Review Panel decision. This leaves almost no time for the accused to seek *habeas* relief in federal court. The *Al Odah* and *Coalition of Clergy* courts refused to exercise *habeas* jurisdiction to review the *detention* of persons at Guantanamo, but that does not exclude the possibility that a federal court might review *death sentences* imposed on such persons. Indeed, the lack of capital sentencing guidelines, the inadequacies of the review procedures, and a perceived undue haste in executing detainees render *habeas* review more likely than not.

The committee recognizes the administration's desire to avoid unnecessary delays in the review process. This goal must be balanced, however, with traditional notions of fairness and due process. For the reasons stated above, the committee recommends that the Department of Defense promulgate regulations:

(1) Requiring the military commissions to issue findings of fact and conclusions of law;

(2) Permitting the prosecution and defense each to submit written briefs within 10 days after receiving the trial record, with such limitations as to length and form as the Review Panel deems appropriate;

(3) Permitting the Review Panel the discretion to extend the 30-day limitation on the review period, at least in capital cases;

(4) Providing that the Review Panel shall be entitled to review commission determinations as to mixed questions of law and fact; and

(5) Specifying that review of sentencing decisions shall not be limited to "material error[s] of law."

V. <u>INTERNATIONAL TRIBUNALS</u>

Many international commentators have suggested that the Guantanamo detainees should be prosecuted before an international criminal tribunal rather than U.S. military commissions. Specialized international tribunals were used after World War II in Nuremberg and Tokyo, and more recently in the aftermath of civil strife in the former Yugoslavia and Rwanda. The

International Criminal Tribunal for the Former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR") were established in 1993 and 1994, respectively, and they represent an attempt to address violations of international human rights law in an international forum devoid of the potential bias and prejudice of national trials. The Rome Statute of the International Criminal Court (the "Rome Treaty") was adopted in 1998 and became effective in July 2002, establishing the first permanent International Criminal Court ("ICC"). The ICC will have jurisdiction to hear cases of alleged genocide, crimes against humanity, war crimes, and crimes of aggression against citizens of countries that have ratified the Treaty or involving crimes committed within such countries. Rome Treaty, art. 5(1), 12(2). The U.S. announced in May 2002 that it will not ratify the Rome Treaty. In any event, the ICC cannot prosecute the Guantanamo detainees because the Rome Treaty applies prospectively only, and the detainees were captured prior to the effective date of the Treaty. *Id.* at art. 11(1), 22(1), 24(1). Nevertheless, having been ratified by 60 countries and approved by twice that number, the Rome Treaty provides a useful measure of internationally recognized norms for fairly prosecuting alleged violations of the law of war.

This section discusses the procedures established in the Rome Treaty and outlines the arguments for and against trying the Guantanamo detainees before a specialized international tribunal.

A. ICC Rules and Procedures

U.S. jurisprudence and legal scholarship have exerted a strong influence in the development of international norms of due process and a fair trial. Thus, many of the rights afforded to defendants in U.S. courts have become a part of customary international law. Not surprisingly, then, many of the procedural protections memorialized in the Rome Treaty mirror those enjoyed by criminal defendants in U.S. federal and state courts. Provisions of the Rome Treaty that differ from the military commission Procedures are outlined below.

1. Rights During Custodial Interrogation

If the ICC Prosecutor has reason to believe that a person has committed a war crime, then prior to being questioned, that person must be informed of his rights to remain silent and to the assistance of counsel. Rome Treaty, art. 55(2).

2. Rights to Exculpatory Evidence and Investigative Resources

During the investigation, the ICC Prosecutor must disclose to the accused such evidence as "he or she believes shows or tends to show the innocence of the accused, or to mitigate the guilt of the accused, or which may affect the credibility of prosecution evidence." *Id.*, art. 67(2). In addition, the accused is entitled "to have adequate time and facilities for the preparation of the defense[.]" *Id.*, art. 67(1)(b).

The Rome Treaty provides extensive measures to resolve national security concerns raised by countries that are requested to disclose information relevant to the prosecution or defense of an ICC case. *Id.*, art. 72. However, the right of the accused to receive exculpatory evidence is not limited by national security or other concerns. Once the information becomes available to the

ICC and the Prosecutor, it is available to the accused as well. Similarly, the Rome Treaty places no limits on the accused's investigation based on issues of national security.

3. Right to a Public Trial

ICC trials are held in public unless the Court determines that certain portions of the proceedings should be closed to the public in order to protect victims, witnesses, or confidential or sensitive information. *Id.*, art. 64(7). Even when the proceedings are closed, however, the accused and his counsel have the right to be present. *Id.*, art. 67(1).

4. Evidentiary Issues

Under the Rome Treaty, the ICC must judge the relevance or admissibility of evidence based on "the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness[.]" *Id.*, art. 69(4). In addition, the ICC must respect evidentiary privileges such as the attorney-client privilege. *Id.*, art. 67(1)(b), 69(5). Finally, evidence obtained in violation of the Treaty or "internationally recognized human rights" is inadmissible if "the violation casts substantial doubt on the reliability of the evidence," or "the admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings." *Id.*, art. 69(7). The Treaty prohibits obtaining evidence, including a confession, through "any form of coercion, duress or threat." *Id.*, art. 55(1)(b).

5. Findings of Fact and Conclusions of Law

The decision of the ICC Trial Chamber must be written and "shall contain a full and reasoned statement of the Trial Chamber's findings on the evidence and conclusions." *Id.*, art. 74(5). Further, the Trial Chamber must "give reasons for any rulings it makes on evidentiary matters" and incorporate those reasons into the trial record. Rule 64(2), Finalized Draft Text of the Rules of Procedure and Evidence, Report of the Preparatory Commission for the International Criminal Court, Nov. 2, 2000.

6. Independent Appellate Review

A person convicted by the ICC Trial Chamber has the right to appeal to the Appeals Chamber on the grounds of procedural error, factual error, legal error, or "any other ground that affects the fairness or reliability of the proceedings or decision." Rome Treaty, art. 81(1)(b). The Appeals Chamber may reverse or amend the trial ruling or remand the case for a new trial before a different Trial Chamber if it finds the proceedings below "were unfair in a way that affected the reliability of the decision or sentence, or that the decision or sentence appealed from was materially affected by error of fact or law or procedural error." *Id.*, art. 83(2).

B. Advantages of an International Tribunal

International public opinion strongly favors trial of suspected terrorists before an international court. (*See* Section IV.E.1 above.) Whether justified or not, distrust in the world community must be considered when determining a strategy to defend against future terrorist acts. The

distrust would be lessened if the prosecutions were conducted under treaties and agreements that were widely accepted around the world, and under procedures that were internationally recognized as fair. National courts of a country involved in an international conflict are more likely to prioritize national objectives over the worldwide implications of a particular prosecution. National judges are also more likely to be influenced by the political climate existing in their country in a time of war. The potential for bias, or at least an international perception of bias, is increased by the open-ended language in both the Department of Defense Procedures and the President's Order with regard to the jurisdiction and procedures of the military commissions. The United Nations could promulgate a statute that is much more specific as to the jurisdiction of the international tribunal, the crimes to be prosecuted, and the procedures applying to such prosecutions.

C. Disadvantages of an International Tribunal

The principal disadvantage to prosecuting alleged terrorists before an international tribunal is the possibility that national security interests could be compromised. If international authorities were responsible for investigating, prosecuting, and guaranteeing the rights of the accused, it is entirely possible that information the U.S. regards as secret or sensitive would be publicly disclosed, to the possible detriment of national or international security.

Although international tribunals could address some of the concerns surrounding the legitimacy of a national prosecution of the detainees, their infancy is a decided disadvantage. There are relatively few examples of an effective administration of international tribunals because they face many constraints that would not be present in U.S. courts or military commissions. Timing is another important factor. The Rome Treaty was approved in 1998, it only became effective in 2002, and the ICC may not prosecute its first case until 2003 or later. Another problem that could face an international tribunal might be lack of funds to operate efficiently. The ICTY faced significant financial hurdles in relying upon the United Nations for its operating income. This severely hampered the ongoing investigations and trial preparation.[33] Another related drawback of an international prosecuting body is that it can only be as effective as the enforcement mechanisms it has to back it up. In order to arrest, extradite, and detain individuals from different countries, it must have the proper political and military power.[34] The financial and enforcement challenges facing an international tribunal could probably be met if the United States and the United Nations Security Council gave their full support.

The plight of the victims of the September 11 attacks and their families is another important consideration. Although an international tribunal may give a just trial to the defendants, it may not be the best forum for the victims to feel that the criminals have been adequately punished. An international tribunal would not impose the death penalty; many U.S. citizens might be dissatisfied with any lesser punishment. The need for retribution or acknowledgment of the crime is not only for the victims' families and friends, but also the nation as a whole. The nation

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[33] Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925, 934-936 (2000) (describing the financial crisis faced by the ICTY during its first few years of operation).

[34] Theodor Meron, *The Case for War Crimes Trials in Yugoslavia*, FOREIGN AFFAIRS, 122 (1993).

that suffered the tragedy of September 11 must feel satisfied with the creation and performance of the tribunal. The difficult fact may be that, as in Rwanda, an international tribunal might not enjoy the benefit of the doubt that the average U.S. citizen might afford to a U.S. tribunal, like a military commission. The families of the victims may not feel that their story was heard and their losses acknowledged.[35] These needs felt by the victims and the nation as a whole may not be met if the verdict is put in the hands of what may be perceived as a foreign, ad hoc body. They may not give the tribunal's decision the finality and respect that would help them close the chapter on a horrible event.

It is clear that the attacks of September 11 violated international law. The more difficult question is whether the forum should be domestic or international. There are legal, political, and practical benefits and drawbacks to both options.

VI. RECOMMENDATIONS

Throughout this report, the committee analyzed the President's Order and the Defense Department's Procedures for trials by military commission from a trial lawyer's perspective, and the committee made modest recommendations that would make the proceedings somewhat more evenhanded without sacrificing the government's aims of protecting national security and providing swift justice for international terrorists. These recommendations are consistent with the Order and the Procedures and therefore could be implemented almost immediately by promulgating supplementary regulations pursuant to Section 7(A) of the Procedures. The committee believes that further revisions would be needed to bring the military commission proceedings into conformity with U.S. treaty obligations, customary international law, and the fundamental fairness that is the foundation of the U.S. justice system. Implementing these modest recommendations would be an important first step in that direction.

The committee recommends the following supplementary regulations:

- Limiting military commission prosecutions to alleged violations of the law of war;
- Clarifying the meaning of "international terrorism;"
- Prohibiting the removal of commission members or limiting the circumstances under which they may be removed;
- Adopting the Unlawful Command Influence rules for military commission proceedings;
- Clarifying that confidential communications between the accused and his counsel

[35] Jose E. Alvarez, *Crimes of State/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L. L. 365, 400-401 (1999). The Rome Treaty addresses this issue by allowing victims to present their views and concerns to the court. Rome Treaty, art. 68(3).

are protected by the attorney-client privilege and are neither discoverable nor admissible at trial;

- Directing the commission to exclude evidence of statements by the accused made in response to physical force or the threat thereof;

- Requiring that any limitations on procuring the attendance of witnesses be applied equally to the prosecution and the defense;

- Requiring the Presiding Officer, when making a determination under § 6(D)(5)(b) of the Procedures, to balance the accused's ability to make his defense against the national security interests involved;

- Adopting a procedure for capital sentencing that includes an eligibility determination and a weighing of aggravating and mitigating circumstances of an offense and offender;

- Requiring the military commissions to issue findings of fact and conclusions of law;

- Permitting the prosecution and defense each to submit written briefs within 10 days after receiving the trial record, with such limitations as to length and form as the Review Panel deems appropriate;

- Permitting the Review Panel the discretion to extend the 30-day limitation on the review period, at least in capital cases;

- Providing that the Review Panel shall be entitled to review commission determinations as to mixed questions of law and fact; and

- Clarifying review standards to state that review of sentencing decisions is not limited to "material error[s] of law."

Conclusion

The President's Order and the Department of Defense's Procedures for trials by military commissions have generated considerable debate nationally and internationally. This debate will intensify if and when military commissions actually try and sentence alleged terrorists. The Procedures depart in significant ways from rules that govern trials in U.S. civilian and military courts and international tribunals, and some of these procedural differences affect the fundamental rights of persons who may be tried by military commissions and the fundamental fairness of the proceedings. Whether the Order and Procedures are justified by the extraordinary circumstances that gave rise to them, trial lawyers in the United States should voice their concerns in the public debate and stand ready to assist in trials before the military commissions, when and if they occur.