CATO INSTITUTE

POLICY FORUM

TERRORISTS, MILITARY TRIBUNALS, AND THE CONSTITUTION

Thursday, December 6, 2001

Moderator:

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Featuring:

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Former Assistant Judge Advocate General;

Michael Nardotti, Major General, U.S. Army (Ret.),

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The Cato Institute

F.A. Hayek Auditorium

Washington, D.C.

P R O C E E D I N G S

MR. PENA: Good afternoon, everyone. Welcome to the Cato Institute and today's Policy Forum: "Terrorists, Military Tribunals, and the Constitution."

Our timing is both perfect and imperfect. As we are here right now, Attorney General Ashcroft is testifying up on Capitol Hill before the Senate Judiciary Committee on this very issue.

My name is Chuck Pena, and I'm a Senior Defense Policy Analyst here at Cato.

Before we begin, I would first like to acknowledge and thank our conference staff for organizing today's forum, who put this together on very short notice, in real time, quite literally, and we did not adhere to our usual time lines and deadlines for doing Policy Forums. So I would like to thank Laura Major, Christie Raniszewski, Julie Johnson, and Megan Brumleve for making everything happen today.

Given that the subject of today's forum is largely legal in nature, and our expert panel consists of four legal scholars, you're probably wondering why a defense policy analyst is up here hosting and moderating, particularly when here at Cato we do have more than a few legal luminaries. Well, I thought about that. And the only thing I could come up with as the best

way to explain it -- and I do this as a trained analyst -- is one conclusion. And that is too many -- and insert your choice of adjective here -- lawyers.

(Laughter.)

MR. PENA: Having said that, I should also probably say something like, but some of my best friends are lawyers, except that my best friend is a dentist. But the real reason I'm here at the podium today is because we wouldn't even be talking about this issue if it weren't in a national security context. The war on terrorism frames the whole debate on these special military tribunals that have been proposed by the administration. The executive order signed by President Bush specifically states:

To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order to be detained and, when tried, to be tried for violations of the Laws of War and other applicable laws by military tribunals. And given the danger to the safety of the United States and the nature of international terrorism, it is not practical to apply in military commissions under this order the principles of the laws and rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

I should also add that, in my discussions with people, that my understanding is that, at least as they were originally proposed, they are not likely to adhere to even the Uniform Code of Military Justice. And I'm sure our speakers will talk more about that.

Clearly the administration has defended the use of these tribunals. Attorney General Ashcroft has said: Foreign terrorists who commit war crimes against the United States, in my judgment, are not entitled to, nor do they deserve, the protections of the American Constitution.

According to Vice President Cheney: Terrorists don't deserve the same guarantees and safeguards of the American judicial system, but somehow they will have a fair trial.

And President Bush contends that: We must not let foreign enemies use the forums of liberty to destroy liberty itself.

Critics on both the left and right have assailed the order, saying that it goes too far and compromises American principles. And many are critical in Europe, our coalition partners in Europe, and they have indicated a reluctance to extradite al Qaeda terrorists that they may have apprehended in their countries.

But despite these criticisms, at least according to one Newsweek poll that I've seen, nearly 7 out of 10 Americans agree

that non-U.S. citizens who are charged with terrorism should be put to trial in a special military tribunal. That number is probably not quite so high in discussing the actual details, but, quite
frankly, to me that is an astonishingly high percentage of the American public.

In other words, another way to look at this is that more people than voted for George Bush to be President of the United States don't seem to have a problem with the President having sole discretion of who will be judged, that the proceedings can be in secret, that hearsay might be used as evidence, that guilt might not be proven beyond a reasonable doubt, that the defendant doesn't have the absolute right to necessarily see or challenge the evidence presented against him, the defendant might not have access to legal counsel of his choice, and a verdict, including the death sentence, might be rendered by less than unanimous decision.

Public sentiment is probably best described by an op ed piece in the Washington Times, by Bruce Fein and Yonah Alexander, when they said that Queensberry rules don't apply, but does that necessarily mean that the rules, in extremis, should resemble Stalinist Russia?

Apparently the American public believes that these are extraordinary times that demand extraordinary action. We believe

we are at war in the country and that civilization itself is at stake. But the fact is that although the rhetoric is that of war and that we are indeed on a wartime footing -- we are engaged in military operations in Afghanistan as we speak -- we do not have a formal declaration of war. The joint resolution by Congress authorizes the President to use military force against those responsible for the September 11th attacks. And, as a non-lawyer, no where in there do I see the word "war." And if we are not at war, what is the basis for establishing these tribunals for violations of the Laws of War?

I don't know the legal answer, but we have four distinguished speakers here today who I'm sure will enlighten us about that. But before we begin the legal discussion, let me provide a defense and foreign policy perspective. There are over 1 billion Muslims in the world. The number who subscribe to the extremist view of Islam espoused by Osama bin Laden and other militant Islamic movements is very, very small; they number in the thousands. In other words, a very small minority of the total Muslim population throughout the world.

Bin Laden has issued fatwahs, calling for global jihad against the United States. He has told Muslims who do not take up his call of jihad that they will be punished by God. And yet, you don't see 1 billion Muslims rallying around Osama bin Laden and his view of jihad and Islam. I don't think he has the power

to be able to do that. But my concern is whether actions that we take here in the United States that are short-sighted might have some unintended consequences. And one of those, which I think is quite realistic, is that people, Muslims, moderate Muslims, Muslims who don't have an enraged hatred of the United States or profess to radical or extremist views, that if we institute these military tribunals, they might be willing to think twice about the United States and their views of the United States, and maybe change their minds and be more sympathetic to extremists and Islamic fundamentalists causes. And in my opinion, we can ill afford to turn the Muslim world against us and have this become a war of civilizations, religions and cultures.

On that note, I would like to introduce our first speaker, who is Major General (Retired) Michael Nardotti. He is a Partner at the law firm of Patton & Boggs in Washington, D.C. He is a member of the Government Contracts Practice Group and works closely with the Litigation and Public Policy Practice Groups. He advises and represents clients in a variety of commercial litigation and on matters of defense and national security policy. He also provides advice and assistance on criminal matters and in internal investigations.

General Nardotti is a decorated combat veteran, with over 28 years on active duty as a soldier and a lawyer. His last active duty position was as the Judge Advocate General for the

United States Army, 1993 through 1997. As such, he was the senior military lawyer in the Army and the senior partner of one of the world's largest law firms. The Army's Judge Advocate General Corps comprises over 4,000 full-time and part-time military and civilian attorneys and 5,000 full-time and part-time military and civilian administrative personnel.

General Nardotti is a member of the District of Columbia and New York Bars and is admitted to practice before the U.S. Supreme Court, the U.S. Court of Appeals for the 2nd Circuit, the U.S. District Courts for the Southern and Eastern Districts of New York, and the Court of Appeals for the Armed Forces.

General Nardotti.

MICHAEL NARDOTTI, MAJOR GENERAL, U.S. ARMY (RET.),
FORMER JUDGE ADVOCATE GENERAL

MR. NARDOTTI: Thank you very much, Chuck. Thank you all for coming today. I sincerely appreciate the opportunity to contribute to the dialogue on this very important subject.

I think where we have been so far in the debate, obviously there has been vigorous debate over a number of weeks now. And with the information and the education that has taken place about the concept of military commissions, I believe we are

getting more to the issue of not so much any more of whether the President has the authority to do this, but should he do it and how should he do it.

Now, on the issue of the authority to do it, as you have heard probably many times in the news reports that have followed, there is a lengthy history for the use of military commissions in times of extraordinary need. Now, when this first came up on the screen for most folks, there weren't a whole lot of people who knew a lot about it because we don't have a deep wellspring of experience, since the last time we did this was during World War II, but that does not make the proposition any less valid in these particular circumstances.

There is in-depth support in international law for the concept of dealing with people who fall into the category of unlawful combatants -- and we can talk about that later; that is specifically what that means -- in this particular way. The inherent authority of the President, as Commander-in-Chief, support this. And there has been a recognition by Congress. There has been a lot of discussion in the hearings and elsewhere about the lack of consultation and whether the administration should have done a better job in educating the Congress or consulting with Congress before. I won't get into that issue. The point is, where do we go from here? But, as a matter of fact, there has been recognition by Congress of the use of

military commissions and other tribunals in the Uniform Code of Military Justice and other authorities.

There has been a dramatic evolution in military justice and how things are done in the military justice system over the past 50 years. And I think that is relevant to this debate. And I will try to tie it in as we go from the issue of dealing with the perpetrators of the events of September 11th either in an Article III Federal criminal court versus a court martial versus the military tribunal which have been proposed. The reason that I suggest that progression is because what is going to be done in the military tribunals, in my opinion -- and this is not inside information from the Department of Defense but in my opinion, looking at what's happened in the past -- certainly a starting point for what's going to happen in military tribunals will have some relation to how military courts operate.

When the tribunals were conducted, when the commissions were conducted, in World War II, both those that were done in the case of Quirin, although there were key differences between those cases, the Quirin cases, involving saboteurs that were caught six months after Pearl Harbor, and several thousand tribunals, commissions, that were conducted after World War II to deal with those of the German and the Japanese armies that had violated the Laws of War, there is an important statistic in there that I also think is important that I will speak to later in terms of the

results of those commissions, but basically they were modeled, what they did in the tribunals, was modeled in some respect -- it was not intended to be identical -- but they use as a starting point how we were trying cases under the Articles of War, how we were trying courts martial. So logic would suggest that if you are going to rely on a military solution as a follow-on or some subset of what happens in military justice, that what happens in courts martial should have some bearing on it.

First, in comparing Federal criminal court prosecutions versus courts martial, I think there is kind of an instructive point for all of us to take into account. I am glad that Chuck quoted both the Vice President and the Attorney General and what they said early on with respect to the use of the tribunals. I must express vigorous disagreement with their point about what is deserved and what is not deserved. We don't make decisions as to what fora we send criminals to for judgment based on what they deserve. If that were the case with Timothy McVeigh, I don't think much effort would have been spared in his case.

It was not a question, and it is not a question, of what the person deserves. It depends on what is the lawful basis to take action. And that is where the determination and the support in international law for dealing with unlawful combatants, those who enter surreptitiously, those who do not carry their arms openly, and those who do not conform their

conduct with the Law of War and, in this case, those who perpetrated the September 11th attacks targeting civilians, a clear and egregious violation of the Law of War, so these participants clearly fall into that category, and the wealth of authority says they can be dealt with more summarily than others. That is accepted through international law.

And that is an important point to remember, because that should be the starting point. The debate was skewed at the beginning of this on the presumption, almost, that we deal with all criminals in the same way. They should always have the same protections, generally, of those you would find in a Federal criminal court.

Well, if you take, for example, what happens in a Federal criminal court and compare it to what happens in a courts martial, and consider the population that is subjected to justice in the military, I would ask you what group of people generally would you consider to be more deserving of the greatest protections that we can provide than those who put their lives on the line on a regular basis and risk their lives in the cause of national defense? Yet we do not give them the same rights that accused would receive in a Federal criminal fora.

Why is that? That is because Congress recognizes that in the circumstances in which the military must operate, when commanders are charged with accomplishing difficult missions and

with the welfare of their subordinates, under circumstances that have no parallel in the civilian world, something different needs to be used. You cannot simply rely on the Federal court system, because that is not a workable or useful solution to the issue. So they came up with the Uniform Code of Military Justice in 1950 to make uniform what was not.

A little bit of history: The Army was under the restrictions and the guidance of the Articles of War. There were articles for the government of the naval forces. The Coast Guard had their disciplinary laws. At the end of World War II of course, we established the Air Force. So we had a larger defense establishment. And Congress decided to come up with one uniform code that would apply to all the services.

And in doing that, they gave the President the authority to prescribe the rules. Generally, he follows what you would do in a Federal court, but, to the extent that's not practical, he has the authority to modify the rules. And as a result of that combination of statutory authority that the Congress has given him, through the Uniform Code of Military Justice and his rule-making procedure, the process has evolved.

But they recognized that something different had to be good enough for military personnel, a very deserving population. And that is a good example that due process does not have to be

identical. It can be achieved, and you may have a different form of it.

Now, by parallel logic, when you go from military courts to tribunals, or to commissions -- let me call them "commissions"; that's the term the administration is using and they were talking about using commissioned officers, so military commission -- there are differences. Why are there differences? Well, there are differences because the lawful basis for convening those bodies is in an extraordinary circumstance, when you're dealing with the unlawful combatants. And the very practical issues that the President has raised, if you can deal with them in a more summary fashion -- no one is saying that all we are going to do is check their identification and proceed with execution. What they're saying is we are going to do something to judge these people. But because we don't have to do, by the standards of international law, as much as what we do in other cases, what is it that's going to constitute a full and fair trial?

Well, I would suggest that just as in World War II, where they took the model of what was happening in courts martial and adjusted that model for the time, that what they should do -- this is my opinion again -- is look at the model that we have in the military court system and gear that back to accommodate the very practical concerns that the President has stated. There are

legitimate public safety concerns. Given what this group, al Qaeda, has demonstrated they are capable of doing, the global reach, and the ability to inflict terrorism on a massive scale, there certainly will be public safety concerns if we were to try these cases in New York City or Washington, D.C., or any other public venue in the United States. It is not a frivolous argument to say that there are safety concerns.

Secondly, the compromise of intelligence is an extremely important consideration. And I would point here again to the Quirin example, the case of the saboteurs in World War II. Again, that happened six months after Pearl Harbor. As one of my predecessors, a judge advocate general many times removed, pointed out, when he was asked to explain why the proceedings were closed, he pointed out that there are many questions that our enemies are puzzling about right now as a result of us capturing these saboteurs. They're wondering how we caught them so quickly, what our intelligence sources were, how far we are, how deeply we can reach into their intelligence network, what capabilities we have at our borders to capture them. And, he said, we have no intention of helping our enemies solve this puzzle and give them this information. And the only way not to tell them is not to tell them.

So we did something at the beginning of the war, where there were legitimate concerns about releasing too much

information and affecting our ability to provide not just for the public safety but for a successful prosecution of the war, and they had a very restrictive environment. Now, after the war, when they conducted the military tribunals in Japan and in Europe, many of those proceedings were open. In Europe, also an instructive figure, they put almost 1,700 German soldiers before military commissions. In Japan they had almost 1,000. The conviction rate in those proceedings was about 85 percent.

Now, for comparison today, in the Federal courts it's about 93 percent. The courts martial conviction rate is about 93 percent. So I would suggest to you that, for those who have said or claimed that you cannot get a fair shake, you cannot expect fairness from military officers who are charged with the judgment of others, in that kind of scenario that it cannot be fair, I suggest that the track record, the historic record, shows otherwise.

And these were with officers who sat in judgment, U.S. military officers who sat in judgment of the enemy, people who were responsible for the deaths of their colleagues, of their subordinates. Yet they were able to remove them self enough and to be dispassionate enough to do it in a way that resulted in that conviction rate. And that does not even take into account what may have washed out in the process before going to trial. Undoubtedly, in the screening of who should go before a

commission, some evaluation of the evidence was made, and there had to have been determinations that certain of the accusations were not sufficient to go before tribunals.

But the President has noted the compromise of sensitive intelligence. And I think, as a general proposition, at the beginning of this there were many criticisms about the failures of our overall intelligence effort in not being able to predict that something like this was coming. And it also is very reasonable to say, in the course of this, as we gather information, it is a very legitimate concern to make sure that we're not giving away information that would inhibit our efforts to continue the war on terrorism.

Finally, on the evidentiary rules, where there is another reason why you need some flexibility, there is a great difference between gathering evidence under the normal restrictions of law enforcement and gathering information in the context of a military operation. Obviously we have restrictions in place, and exclusionary rules that we apply in the courts throughout the country, in order to discourage the improper conduct of law enforcement officials -- because that has occurred in the past. And the way to do it, the courts have adjudged, is not simply to punish those who have erred -- and in some cases it's not necessarily intentional -- but they concluded that the

greatest disincentive to that kind of conduct would be simply to exclude the evidence.

Now, when you go into a military operation, which is what we are engaged in now, as part of the operations, if they're gathering information, not gathering evidence for criminal prosecution purposes but gathering evidence for intelligence to conduct further operations, it would be illogical to suggest that those collecting that information should or would conform their conduct to the rules that would be acceptable for the admission of evidence in the Federal courts. Some flexibility has to be accorded, because there can be probative evidence gathered in that way. And there are methods to examine evidence and consider the methods with which it was obtained to determine whether it has the indicators of reliability and trustworthiness and whether they have some probative value.

So, again, I would suggest that if you take the analysis in those terms and look first at the comparison of Federal courts versus courts martial, there is a good example of situations where there are differences, significant differences, and certainly supported by specific provisions in the Constitution to treat the respective groups that way. But there are differences, and you can still achieve due process in some form in the way you need to.

And with respect to the commissions, in my estimation and my judgment, the President has said these will be full and fair proceedings. And he can do that. There will be a way to do that and, at the same time, take into consideration the other important points that he must.

And my time is up, so I look forward to your questions. Thank you.

(Applause.)

MR. PENA: Thank you, Mike.

Our next speaker is Brigadier General (Retired) Joseph Robert Barnes, or Bob as I call him on the telephone. He has a 32-year career in the Army, first as an air defense officer and then as a judge advocate. His final assignment was as the Assistant Judge Advocate General for Civil Law and Litigation, where his responsibilities included the defense of Army personnel in civil litigation and contract disputes, and the supervision of Army lawyers serving as trial and appellate defense counsel in courts martial.

Previously he was the Assistant Judge Advocate General for Military Law and Operations, where his responsibilities included providing legal advice on military justice matters, emergency authorities, and on domestic and international military operations involving the Army -- certainly quite relevant to what is going on today. His other assignments included Staff Judge

Advocate, U.S. Army Forces Command; Senior Legal Advisor to the Joint Task Force Olympics; Chief, Administrative Law Division; and Deputy Legal and Legislative Counsel to the Chairman of the Joint Chiefs of Staff.

General Barnes received a bachelor of arts in biochemistry and physiology from the University of Kansas and a juris doctor magna cum laude from the University of Kansas Law School.

Bob.

JOSEPH ROBERT BARNES,

BRIGADIER GENERAL, U.S. ARMY (RET.),

FORMER ASSISTANT JUDGE ADVOCATE GENERAL

MR. BARNES: Thanks, Chuck. It's an honor to be here to try to add something to this critical debate that's going on in our country. I think it is an interesting testimony to the nature of our country that we are having this debate at all kinds of levels. I'm proud of us as a people.

In my portion of today's panel I would like to discuss the possibility and advantages of using an international military tribunal for the trial of persons associated with the events of 11 September.

Perhaps the fundamental question that underlies the current debates on military tribunals is whether we are dealing with a problem of law enforcement, of crime and criminals, or a situation of armed conflict, of enemies and targets. We don't fit neatly into either category, in my opinion. We are I think in a gray zone, in between crime in the ordinary sense and war as classically understood. It is this mixed character that has made the determination of the proper response a difficult one indeed. Yet, in this ambiguous zone, the closest available analog has appeared to be that of a crime committed by unlawful belligerents within the context of an armed conflict; that is, a war crime.

In the classic sense, war of international character involves the action of a state and individuals as agents of that state. We are not dealing with that here. We are dealing with individuals not of a state but of an organized group. Again, are members of such a group suspects to be apprehended or enemies to be targeted, or perhaps both?

The simple fact is we are trodding ground now without, in my opinion, a clear legal regime or precise historical precedent to guide us. In my view, that is one of the reasons this debate is so important.

Many argue, and I think some of my panelists today will take this view, that at the end of the day we are dealing with criminals and that the criminal law, with all the panoply of

procedures and investigations and judicial review and context, is the best course to follow. Yet these are not ordinary criminals. The threat they pose to both domestic safety and international peace and security transcends ordinary crime. Given the increasing availability of weapons of mass destruction -- and please, God, they don't already have them -- the damage they can cause to domestic security and international peace and security is really more akin to that of a rogue state than to an ordinary criminal. So as we debate the proper response, I would urge us to keep that reality and that context in mind.

Nor, in my view, is the domestic criminal law of the United States truly adequate to deal with the problem. For example, it is not at all clear to me that the acts of September 11th would fall within the scope of the 1996 War Crimes Act. In my opinion, they do not. That is carefully circumscribed to certain provisions of the Law of War. And, in my view, the acts do not fall within that. The problems of procedure and protection of sensitive information have been discussed at length, and I won't go into them in my portion, although of course I will respond to any questions.

What has been less discussed perhaps is what, in my opinion, is the greatest weakness of our criminal law system with regard to response to the September 11th events. And I won't go into this in great detail now, but perhaps I can respond to a

question later. I would ask you to compare the difference between the law of conspiracy on the one hand, in our criminal codes, and the law of command responsibility on the other, in the context of the Law of War. They are quite different.

Now let me turn to what I'm supposed to be talking about, which is an international military tribunal. The use of international military tribunals for the trial of persons accused of war crimes is clearly not new. Such tribunals have been employed, just as national military tribunals have, for centuries. And like a national military tribunal, they are creatures, in the first instance, of the Law of War. Most notable historically of course were the international military tribunals following World War II that Mike Nardotti has already mentioned. The legality of such tribunals under both domestic and international law to adjudicate violations of the Law of War I think is well established. However, there remains that gray zone question: Are we at war?

As creatures of the Law of War, both national and international military tribunals depend, at least as to their substantive law, on the existence of a state of conflict sufficient to bring the Law of War into play.

The first question to be addressed then is: Does a state of international armed conflict exist? With regard to Afghanistan, I think it is safe to say there is no question about

that. But let me focus now on September 11th, not on what happened afterwards. Did, at that moment of the first impact of the first airplane, a state of international armed conflict exist? Can private parties, not acting on behalf of a state, no matter how horrific their act, create an international armed conflict?

This is some of that gray zone and untrodden ground that I have been talking about. In my opinion, we have been, we are, and private parties can indeed trigger, a state of international armed conflict, implicating and giving rise to the applicability of the Law of War.

Now I will speak in a minute about the policy advantages of an international military tribunal, but let me state at this point that, to me, probably the most compelling is that I think they would serve as a powerful engine for the development of customary international law to regulate this very gray zone between crime and war we are likely to find ourselves in for a good part of this century, just as the Nuremberg Tribunal was a powerful engine for the development of humanitarian law and law of genocide and crimes against peace and individual responsibility as officials for their international dealings.

So, are we at war? Are we, more accurately stated -- in fact, in the Department of Defense, we now talk of the law of

armed conflict rather than the Law of War -- are we in a period of armed conflict? As I said, I think we are. Well, what supports that?

For one thing, I think some critical international bodies have taken that future, either explicitly or implicitly. I think the North Atlantic Council's determination to invoke Article V of the NATO Treaty, which is predicated on the existence of an armed attack against one of its members, is powerful evidence in that regard. I think the Security Council resolution, based in part on Article 51, the inherent right of self-defense against armed attack, is more evidence of that.

Domestically, the Senate joint resolution, for whatever else it is or does, authorizes the use of armed force, whatever means necessary -- in my view, the modern functional equivalent of a congressional declaration of war. So, the Law of War applies and, therefore, there is a legal basis both for national and international military tribunals, in my opinion.

As compared to a national military tribunal now, an international military tribunal offers a number of distinct legal and policy advantages, both domestic and international. Such a tribunal would be created by executive agreement among several states -- a sort of juridical coalition of the willing, if you will -- and would combine the President's authority as Commander-in-Chief with his constitutional authority for the

conduct of foreign affairs. This confluence of authority would create the strongest possible posture should the jurisdiction of an international military tribunal be challenged in a U.S. Article III court.

It would combine both the Supreme Court's recognition in a series of cases that national and international military tribunals are not courts of law or equity within the meaning of Article III and the traditional reluctance of the judiciary to intervene in foreign affairs -- here specifically with the executive branch's determination that an international state of armed conflict existed, sufficient to trigger the Law of War.

At a more technical level, the use of an international military tribunal would undercut any argument that, by virtue of the wording of Article 36 of the UCMJ, the procedures of a military tribunal would be required, as a matter of statute, to align closely with those of courts martial.

From a domestic and international policy perspective, the international military tribunal has manifest advantages. On the domestic side, use of an international tribunal would, in my view, not trigger the same level of concerns about civil liberties that possible use of a national military commission has, if for no other reason than it would be less like a domestic criminal trial, and less likely to raise concerns, I think, about

the trial in that form of a U.S. citizen or a person with an established legal nexus to the United States.

As an old, in many senses, practitioner of military justice, I would also note that the international military tribunal would be clearly distinct from a court martial in the public perception, in a way that national military tribunals would not be, with, I think, manifest advantages to the long-term perceptions of the fairness of military justice.

At the international level, the international military tribunal also has manifest policy advantages. For one, it would emphasize the nature of the conflict as not simply the United States versus al Qaeda but, rather, as the entire international community versus international terrorists, helping cement the standing of those international terrorists as the new hostis humani gentium, the enemies of all mankind.

The procedural start point of an international military tribunal would not be our Article III procedures or the Uniform Code of Military Justice but, rather, the Nuremberg Tribunal and the International Court for the Trial of Criminals in Yugoslavia, the ICTY. Those tribunals used well-recognized procedures at the international level that are well-suited to suit both the safety of witnesses and the protection of sensitive information. I might also note that the use of an international military tribunal would serve to maintain the credibility of the

expressions of concern we have made in the past with the use by other nations of national military tribunals for the trial of both domestic or international terrorists.

Could an IMT be established by a coalition of the willing outside the auspices of the U.N.? I'm running out of time, so let me just state my conclusion. Absolutely yes. Nations of the world are still empowered, along with the U.N., to, by agreement, form international tribunals.

So, why not just go to the U.N. and ask the Security Council to do it? There are two reasons. And I think these two reasons are behind the thundering silence, if you will, on this issue. One is concern about the death penalty, and two is concern about loss of control of sensitive information. Many would say, well, an international military tribunal is impracticable because it couldn't adjudge the death penalty.

I just simply think that is not true. For one thing, often cited is the European Convention on Human Rights as a prohibition against the death penalty. Yet, Protocol 6, Article II, of that Convention, which actually creates that for nations willing to sign up to it, creates within it an exception that nations can avail themselves in time of war, or imminent war, authorizing them to reimpose the death penalty. But even aside from asking one of our European allies to go through that national process, there are nations that are key allies in this

fight that would join us, I think, in a coalition of the juridically willing.

Let me mention two: Turkey and Russia. Why particularly Turkey and Russia, aside from the obvious, that they continue to have the death penalty in their national systems? One, Turkey is a democratic, secular Muslim state, and their participation in an international military tribunal would send a powerful message to the Islamic world that it is not in fact U.S. v. al Qaeda, and that in fact the acts of September 11th are not the proper acts of an Islamic person.

Russia will be a key ally, is now, and will be even more so in the future, on the control of flow of weapons of mass destruction to international terrorists. I think an IMT involving our three nations could establish an important foundation for the continuing battle against international military terrorism.

Let me conclude by saying the two major advantages, in my opinion. One is, just like Nuremberg served as a forum for the world on the horrors of the Nazi regime, so too could an international military tribunal serve as a forum for the world, in its largely public proceedings, on the problem of international terrorism. Also, as I mentioned, just like the Nuremberg tribunals did with regard to the development of humanitarian law as customary international law, with all the

value we ascribe to that today, so too, I think, an IMT could lead to similar development in a legal regime to regulate this gray zone in which we now find ourselves.

Thank you very much.

(Applause.)

MR. PENA: Thank you, Bob, for I think a different and interesting perspective on the issue of tribunals.

Our next speaker is Lee Casey, who is a partner at the law firm of Baker & Hostetler, here in Washington, D.C. His practice areas include administrative, environmental, and Federal constitutional law, as well as public, international and international humanitarian law. Prior to joining Baker & Hostetler, he was an associate with Hunton & Williams, specializing in international, environmental and constitutional law.

From 1986 to 1993, Mr. Casey served in various capacities in the Federal Government, including the Office of Legal Counsel and the Office of Legal Policy at the U.S. Department of Justice. At the Office of Legal Counsel he was responsible for advising the Attorney General and the White House on issues of constitutional law and statutory interpretation. The Office of Legal Policy served as a think tank for the Reagan Justice Department.

Mr. Casey is a graduate of the University of Michigan Law School and his undergraduate degree is from Oakland University in Rochester, Michigan. He is a member of the California, Michigan and District of Columbia Bars. He has been an adjunct professor of law at George Mason University School of Law. And some of his publications include "Against an International Criminal Court," with David B. Rivkin, Jr., in commentary, and "Presidents and War Powers: Another View," also with David B. Rivkin, Jr., in commentary.

Lee.

LEE CASEY,

BAKER & HOSTETLER

MR. CASEY: Thank you.

I would like to spend a little bit of time talking about some of the constitutional issues that the use of military commissions raise. At the outset, however, I would like to point out that I think much of the criticism the administration has received on account of the President's order has been unfair. Much of it has in fact been well thought out and reasoned, but there certainly have been a number of individuals who I think have gone over the top -- William Safire for instance, who accuses the President of seizing dictatorial power; former Deputy

Attorney General Phil Heymann, who recently suggested that we were going to have a Paraguay on the Potomac, and that the President had claimed the critical powers of a police state.

I think probably, though, the most interesting comment that I've seen comes from Justice Richard Goldstone, of the South African Constitutional Court. Justice Goldstone believes that individuals brought before these military tribunal commissions will get a "second- and third-class justice." Well, he should know. From 1993 to 1996, he served as the prosecutor of the International Criminal Tribunal for the Former Yugoslavia in The Hague, where the characteristics that make military commissions so troubling -- the lack of a jury, conviction based on a two-thirds vote, secret hearings and secret witnesses, the use of uncontrolled hearsay evidence, the lack of an independent appeal -- are all on display every day. They don't even charge you for the ticket.

Moreover, the proposed International Criminal Court, the permanent court, would also feature these attributes. And many of the President's staunchest critics -- Amnesty International, Human Rights Watch, the Lawyers Committee on Human Rights, to name a few -- have fully and enthusiastically embraced the ICC.

There is, however, I think one crucial difference. While the President's order falls within a narrow, rarely invoked

exception to the general rules of American justice, in these international institutions they are business as usual.

Now, none of this suggests that the President's order is not deeply troubling or that there are not honest and serious questions regarding its constitutionality. The order is broadly drafted, and it could clearly be applied in an unconstitutional manner. However, the same can be said for most statutes passed by Congress. The order itself subjects no one to trial by military commission. It merely creates the framework for such trials if the President authorizes them.

If that authorization comes, there is reason to believe that the President will not exceed applicable limits on their usage. His own statements, indicating that the affected individuals are "unlawful combatants," and Judge Gonzales's affirmation that the order does not purport to preclude judicial review through the writ of habeas corpus, suggests that the administration fully understands those limitations.

That said, the constitutional status of military commissions remains a complicated question. They represent departures from some of the most fundamental tenets of our Common Law system. For anyone schooled in the history of the Common Law, they dredge up vague memories of ancient battles and long-dead men, of rule by major generals, of bloody assizes, and Kirke's dragoons. Today these references seem hopelessly

obscure, but the Constitution's framers would have recognized each, and each would have summoned an entire spectrum of legal and political associations, just as references to Vietnam or Watergate or Monica do for us.

To a man, they could have explained that more than a century earlier Oliver Cromwell had ended Britain's brief republican experiment, imposing a military dictatorship, and governing the country through his major generals. That a generation after that, in 1685, Colonel Percy Kirke, while putting down a rebellion in western England, had imposed drumhead justice, "hanging men without so much as the forum of law," as one contemporary stated, only to be followed a few weeks later by Judge George Jeffries, who conducted a series of summary trials and executions, dubbed the bloody assizes.

These events, and their role in the glorious revolution of 1688, were all part of the Whig interpretation of history, which itself was part and parcel of the legal and political language of the founding generation. Many of the framers and ratifiers of the Constitution distrusted military power. And whether the new Constitution would even permit a federal standing army was seriously debated.

More than anything else, the survival of a national armed force was a tribute to Washington. By simply going home after the Revolution, he had exorcised Cromwell's ghost, and the

powerful and civilian-controlled armed forces of the United States are indeed his legacy. But for all of the discussion of military affairs at the founding -- and there was plenty of it -- there appears to have been little thought given to the specific question of when or whether military justice might be used in the United States. This may have been because the framers assumed it never would be. However, Washington, as Commander-in-Chief during the War for Independence, had used military commissions many times, and the potential was clearly present when that title and authority was vested in the new presidency.

The Supreme Court did not actually address the issue until more than 75 years later, in In Re Milligan, a case from 1866. Like a number of individuals during the Civil War, Lamdin P. Milligan, an alleged Confederate sympathizer, was tried for his life in a military commission. In reviewing the case, the Supreme Court framed the question as whether Milligan, who was not "a resident of one of the rebellious States or a prisoner of war, and never in the military or naval service," was subject to trial by military commission when the civilian courts were open and available. The answer was no. No usage of war, the Court ruled, could sanction a military trial for any offense whatever of a citizen in civil life in no wise connected with the military service. And that remains the law today.

In the United States, so long as the Article III courts remain open, no civilian can be subjected to trial by courts martial, military commission, or any other military authority.

The Milligan court, however, did not consider whether an individual, not regularly enrolled in the armed forces but who, nevertheless, undertook the activities and therefore the status of a combatant, could be tried by military commission. Under the Laws of War, as recognized in the United States and elsewhere, there are three classes of person: civilians, lawful combatants, and, as we've heard, unlawful combatants. The category of unlawful combatant includes spies and saboteurs and anyone else who undertakes hostile action but who is not subordinated to regular military command, in uniform, carrying arms openly, and is part of a body that acknowledges the force and effect of the Laws of War.

Osama bin Laden, al Qaeda, and similar terrorists are in fact textbook examples of unlawful combatants. And here there is an important distinction. Merely because an individual is accused of a violation of international humanitarian law does not make him an unlawful combatant. The questions are quite distinct. So that a civilian accused of offenses, at least in the United States, would be entitled to be tried in the regular civilian courts.

Unlawful combatants, however, are entitled to very much less. Once, they could have been killed out of hand, like outlaws. Today, some basic process is probably required under customary international law. There is no question, however, that unlawful combatants may be subjected to military commissions, with minimal procedural protections, not because they are accused of particularly heinous crimes but because, as a class, unlawful combatants are considered to be so dangerous, unacceptable, and contrary to the interests of all civilized states, and they may be condemned merely for being unlawful combatants.

And this is true even if they are captured in the United States while the civilian courts are open, and even if they are American citizens. Such treatment does not violate the rule of In Re Milligan because the individuals involved are not civilians.

This, at any rate, is the rule and rationale of the second Supreme Court decision to address the use of military commissions in the United States Ex Parte Quirin, which there has been a great deal of talk about recently, and of course it has already been referenced here. This case, from 1942, is the authority under which the President's order has clearly been issued. Quirin involved the trial of eight men, one of whom was an American citizen, who were recruited by Germany as saboteurs during World War II. None of the men appears to have been

enlisted in the German Army, and all were to be paid for their services as saboteurs. All were taken before performing any act of sabotage. The President ordered their trial before a military commission, in accordance with statutory provisions that remain on the books today. All were condemned; six were executed.

In reviewing their case, the Court approved the use of military commissions, holding that each defendant was an unlawful combatant, subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. Milligan was carefully distinguished on the ground that he had never been a combatant, unlawful or lawful.

All of this, of course, took place in the context of a declared war; and this fact was at least noted by the Quirin court in its reasoning. But the Court did not, and never has, addressed the specific question of whether unlawful combatants, when captured in the United States, can be tried by military commission when Congress has not declared war. And this is indeed a critical point, because the Laws of War governing unlawful combatants apply only during a period of armed conflict.

An individual who behaves as an unlawful combatant in time of peace would likely be considered a terrorist, but would also be merely a criminal suspect, subject to trial in the civilian courts. In this regard, there are powerful arguments that a formal declaration is not necessary for the United States

to be considered at war. And they are grounded in precedence from the Republic's earliest days, when the Constitution's framers and ratifiers still ran the government they had created.

Specifically, in 1802, Congress authorized hostilities between the United States and the Bey of Tripoli without a formal declaration of war. In doing so, it authorized the President to "cause to be done all such other acts of precaution or hostility as the state of war will justify," suggesting that it believed a state of war could exist even though it had not formally declared it.

This was also the conclusion of the Supreme Court in two cases from its 1800 and 1801 terms. Both cases, Bas v. Tingy and Talbott v. Seeman, involved the measure of prize money due for the capture of ships at sea, which depended in that instance upon whether the United States had been at war with France. The Court ruled that it had been, based upon the actual naval hostilities and Congress' authorization of those hostilities.

In the Talbott case, Chief Justice Marshall noted that Congress may authorize general hostilities, in which case the general Laws of War apply, or partial hostilities, in which case the Laws of War, so far as they actually apply to our situation, must be noticed. The Laws of War with respect to who is and who is not a lawful combatant are so basic that it is difficult to argue that they do not apply whenever there is an armed conflict,

and in fact that is the accepted international rule. This clearly suggests that unlawful combatants can be subjected to trial by military commission during an undeclared war.

At the same time, it is true that Quirin was decided during a period of declared war, and it remains the only Supreme Court precedent specifically approving the use of military commissions within the United States. This is a very close call. Seeking a declaration of war would certainly have put the President's order on the best possible legal foundation. It cannot be said, however, that in authorizing the use of military commissions to try what he has himself described as unlawful combatants the President acted unreasonably or arbitrarily. He is fully entitled to interpret the Constitution's requirements in executing his office, keeping in mind that, in the end, the Supreme Court will indeed have the final word.

Thank you.

(Applause.)

MR. PENA: Thank you, Lee.

Before we get to our last speaker, there have been a lot of cases thrown out and legal terms, I hope everyone is taking notes; we are going to have a quiz after the forum. That will be the entree to lunch.

Our last speaker today is my colleague here at Cato, Tim Lynch, who is the Director of the Institute's Project on

Criminal Justice, which examines governmental policies for their constitutionality and efficacy. Tim is an outspoken critic of police misconduct and corruption, hate crime legislation, gun control, and the militarization of police tactics. In 2000, he served on the National Committee to Prevent Wrongful Executions.

Since joining Cato in 1991, Tim has published articles in the New York Times, the Washington Post, the Wall Street Journal, the Los Angeles Times, the ABA Journal, and the National Law Journal. He has been seen on TV shows such as the Lehrer Hour, NBC Nightly News, ABC World News Tonight, Fox News Channel's the O'Reilly Factor, and C-SPAN's Washington Journal. He has also filed several amicus briefs in the U.S. Supreme Court in pending cases involving constitutional rights.

Tim is a graduate of the Marquette University School of Law and is a member of the Wisconsin and District of Columbia Bars.

Tim.

TIM LYNCH, DIRECTOR,

PROJECT ON CRIMINAL JUSTICE, CATO INSTITUTE

MR. LYNCH: Thank you.

I would like to begin my talk by agreeing with everybody who has said that the attacks of September 11th on the

World Trade Center and the Pentagon really represent not just a crime but an act of war. Our country has been attacked by, in my view, a group of barbarians, who have technological know-how. They use cell phones; they use laptop computers; they have learned to fly airplanes. But what is most disturbing is that these people hold a philosophy that exhibits really nothing but contempt for human life.

Our country, in my view, stands for the exact opposite of what these people believe in. Our country is founded upon a declaration and a constitution that acknowledge and enhance the dignity of individual human life. These fanatics deeply resent free societies, where individuals get to make up their own minds about how they want to live their own lives. We must respond to this new threat without losing sight of what we are fighting for.

Our troops are not just defending our buildings against having them torn down and destructed. They are not just defending a population of nice people who happen to live in the geographic location between Canada and Mexico. Our troops are defending the basic American idea that individuals have the right to life, liberty and the pursuit of happiness. In my view, that is what makes America the most unique country in all of world history. It is that we acknowledge that individuals have rights that must be respected.

Our government must defend those rights against enemies both foreign and domestic. That is the whole purpose of government.

Now, having said that, I have to say that some of the actions taken by our government since the September 11th attacks here at home are very, very troubling. I know that President Bush and his Attorney General are acting in good faith and that they are attempting to forestall additional attacks by other terrorist cells that may be here in America. At the same time, I am absolutely certain that the President has overstepped his authority under the Constitution when he issued the executive order that he did on November 13th. The order sweeps way beyond the idea of capturing al Qaeda leadership in Afghanistan and trying them for war crimes.

The President, with this executive order, is basically saying this:

I am declaring a national emergency. I am assuming not only the executive powers of the police and prosecution, which the Constitution vests in the Office of the President, I am assuming the powers of the legislature, and I am assuming the powers of the judiciary. I will be the policeman, the prosecutor, the legislator, and the judge. I am also suspending the right to trial by jury, the right to a speedy trial, the right to a public trial, the protection against

self-incrimination, and the protection against double jeopardy. I am also suspending the writ of habeas corpus. For the time being, these special powers which I am assuming will only affect noncitizens in America. However, I reserve the right to revise this executive order at any time. Abraham Lincoln and Franklin Roosevelt suspended the Bill of Rights for American citizens, and I reserve the right to do so if I deem it appropriate.

Now, I know full well that President Bush has not expressed himself in this way. But when it comes to the government, it is always much more important to watch what they do and pay less attention to what they say, at least if you really want to know what's going on.

What I have given you, I think, is a very fair and candid description of what this executive order means. I know that the President and his advisors say it's very, very limited. Maybe there will only be 12 people or less that will be tried before these military tribunals. But the fact is that this executive order is attempting to set a precedent, and this precedent is drawing distinctions between citizens and noncitizens, and it is setting a precedent about what the President can do under our Constitution.

Just after the Civil War, the Attorney General of the United States went before the Supreme Court and he said that the provisions of the Bill of Rights were, what he called, peace

provisions. He said that, during wartime, the President is Commander-in-Chief, and during that time he becomes the supreme executive, the supreme legislator, and the supreme judge.

Now, even though the Supreme Court rejected that argument, there are people here in the White House, in the Justice Department, people outside of the government, who still hold on to that view, the view that was rejected by the Supreme Court in that case just after the Civil War, Ex Parte Milligan. And they hold this view very sincerely. They think that during wartime the President can assume all of these powers. They do not say so very explicitly and candidly, I think, because it is poor public relations to do so. It is very shocking to think that the President can do those sorts of things. But that is the philosophy that has manifested itself in certain actions, especially in the executive order.

In my view, the Constitution applies in both peacetime and wartime. If you read the Constitution, you will see that it anticipates tumultuous events, such as rebellions in our homeland and actual invasions of our country by foreign troops. The writ of habeas corpus can be suspended by our government in certain circumstances; it's set forth right there in the constitutional text. And the President can use the military to repel an invading army if Congress is out of session or if there just is not time. The Constitution says that the President can go ahead

and take such actions. So the constitutional language anticipates emergency-type circumstances.

But once somebody says that the President can place himself above the law of the Constitution and that he has the power to set aside certain provisions of the Constitution, I have to say that I really do not know how to discuss this concept in an intelligent way. Because if we are putting the rule of law of the Constitution to one side, we are replacing it with something else. And that something else is so mysterious and dangerous that all I have is questions. Because we are entering a realm that is completely foreign to me as a lawyer.

I noticed that Mr. Nardotti has a book on his table, and it's probably the Uniform Code of Military Justice. But we don't have a book that says, when we put the Constitution aside, okay, here are the emergency powers that the President can wield.

Here are the few of my questions: If the President declares an emergency and that certain parts of the Constitution are suspended, do the other branches of our government have to accept it? Harry Truman tried, during the Korean conflict, to seize the steel mills. He said that this is very important, we have a war going on, we don't have time for a labor strike, so he ordered the military to go in and take over these steel mills. They filed suit in the court, and the Supreme Court came back and said that the President's actions were illegal, that you just

cannot declare an emergency and start seizing private property in the way that you did, especially when Congress hasn't said anything on the subject.

Was the Supreme Court wrong to do that? Should they have deferred to his judgment that we had an emergency? If the Court was wrong, why was it wrong?

If we have to accept the President's judgment as to when an emergency begins, do we have to accept his judgment about when the emergency has come to an end? If not, why not?

What if he says that elections have to be postponed, that we're in a state of emergency? Lots of foreign leaders do that. We accept the fact that he can declare an emergency and suspend certain things. What argument are we going to make in response to that claim by the President that elections do have to be postponed?

What if the governor of some State were to call out the militia and were to start rounding up people with a Middle Eastern background, whether they are citizens or noncitizens, and to put them in prison? If President Bush objects, they might respond to him by saying: Look, Mr. President, the Constitution is not a suicide pact. You are protected by a small army of Secret Service agents and you have access to all of the latest intelligence. We are going to take the steps that we think are necessary to protect ourselves, because we are not just at risk

from an ordinary type of crime, we are at risk from a potentially devastating bio-chemical attack.

Suspending the Constitution is not only patently illegal, it is an invitation to political chaos here at home. There are many, many problems, I think, with the President's executive order. But the central problem is not whether or not the burden of proof is going to be the same in these military tribunals as it is an ordinary criminal case. It is really not whether people who are accused of war crimes are going to have the effective assistance of counsel. Those issues are serious, and we can get into that type of thing during the Q&A period.

But, in my view, very quickly, about what our options are under these circumstances, it is that we have two primary options if we want to conduct trials for war crimes. And that is, we can conduct them in our ordinary criminal justice system, where the ordinary constitutional rules will apply. Or our second option is the one that was laid out by Bob Barnes. I think if we were to agree to an international tribunal with our allies, along the types of Nuremberg Principles that were established after World War II, that type of proceeding would be consistent with our Constitution, because the country is exercising its treaty power.

But the main central problem with the executive order, in my view, is that it represents a belief and a willingness to

abrogate the rule of law, the rule of law that sets the boundaries and the limits on the institutions of our government, limits that were set down in writing in order to protect individual rights. Even if this executive order is withdrawn tomorrow, I think that we should still be shocked and upset that there are people around the President who looked at this executive order, studied it very closely, and they said, yes, this is okay.

In my view, these people, while acting in good faith, have completely lost sight of what our troops are fighting for.

Thank you.

(Applause.)

MR. PENA: Thank you, Tim.

We are going to move to Q&A, but a couple of rules before we get going here. Please wait for the microphone to come around, identify who you are and, if you are affiliated with an organization, please state the name of that organization. Try not to make a lengthy statement but actually ask a question. And if it is directed at a particular panelist, please let us know whom.

And I want to exercise my prerogative as moderator and get a real quick answer from all four of our panelists. This is from a non-legal perspective, and I'm sure all of you have some very good legal questions. If I am looking at this from a grand

strategy perspective, as from a defense and foreign policy perspective, looking at the war on terrorism, do the military tribunals help me or hurt me as I prosecute this war? And I will start with Mike here on my right.

MR. NARDOTTI: I believe it will help, for the reasons that I stated. I think the concerns, and under the specific circumstances that it's being proposed for use, under these circumstances, it would help.

MR. PENA: Tim?

MR. LYNCH: That question, Chuck, is really outside of my area of competence. I have been focusing on what the Constitution allows and what it does not allow. And I would invite you to answer your own question, because you're the national security expert. All I can tell you is that public opinion here at home very strongly supports the President and his executive order. It may be unpopular overseas. We're getting some negative reaction from governments overseas, who might otherwise have been willing to extradite people who they have in custody, who they think may be associated with al Qaeda. There is now some reluctance to do so. But that is more your realm.

MR. PENA: That's a typical lawyer's answer.

(Laughter.)

MR. PENA: Lee?

MR. CASEY: I'll give you the other typical lawyer's answer. I don't know.

(Laughter.)

MR. CASEY: I can certainly conceive of circumstances where these courts would be justified and where they would be helpful to the war effort. But I wasn't elected to make that choice; George Bush was.

MR. PENA: Bob?

MR. BARNES: As I think you can probably tell from my dress, I think the use of an international military tribunal would in fact be a deeply strategic option that looks to the long range as well as the short range. The use of a national military tribunal I don't think would be as powerful but, if well done and held almost exclusively in public so that the information considered was generally available and well presented, if you will, as an international educational tool as anything else, and if the procedures were, and were perceived to be, fair, I think it could be quite useful.

MR. PENA: Thank you.

A question here?

DR. MARSHALL: I'm Dr. Joseph Marshall, a private citizen.

The name of the American citizen who was fighting for the Taliban who was captured, whose name escapes me, if he is

brought to trial, would each of the panelists discuss or describe, would it be for treason, or how do you interpret what his status would be?

MR. NARDOTTI: As the President's order on military commissions applies, it would not apply to him since he is a U.S. citizen. I am not a Federal prosecutor and I have not had any experience with cases for treason, but in very general terms -- and treason is defined in the Constitution as levying war or what they call adhering to the enemy and giving the enemy aid and comfort -- so, levying war, in his case, you could make the argument that merely engaging in combat against American troops falls into that category. If you talk to the adhering to the enemy, there is an intent in that act as well; did he intend to betray and intend to support the enemy, and did he engage in acts that give aid and comfort? Which, if you're supporting them in combat against the United States, that would seem to apply.

Now, in the case of Walker, the peculiar circumstances in which he found himself, he apparently signed up with the Taliban before this happened. And, I suppose, trying to extricate himself from that circumstance once the United States armed forces were engaged puts him in a difficult situation. From the news reports, obviously there is consideration to prosecute. He would be prosecuted in Federal court if he is

prosecuted, but I think it's more problematic than somebody simply picking up arms against the United States.

MR. PENA: Does anyone else want to comment?

MR. CASEY: I will jump in. I agree with everything Mr. Nardotti said except I want to stress that although he's not subject to the President's executive order as it stands, I want to stress again that this executive order that the President issued is not binding upon the President; he can issue another executive order tomorrow with completely different terms. It might apply to citizens with a new executive order. So he might find himself subject to a new executive order, where he can be brought before a military commission.

We are still trying to get more information on exactly the specifics on the Walker situation, but it definitely does seem that he can be tried for treason. I am sure the prosecutors are trying to assess the strength of their case, because the Constitution does set some extra high standards for people to be convicted of treason. But from what we know so far, he seems to have definitely levied war against the country for which he is a citizen, so he is subject to treason charges.

MR. PENA: The gentleman here.

MR. MERRY: Wayne Merry, of the American Foreign Policy Council.

To General Barnes, I can't share your optimism that the Turkish or Russian Governments would support use of the death penalty. Because while both countries do have the death penalty on their statute books, they also have executively imposed moratoria, to try to respond to the requirements of membership in the Council of Europe. That is quite controversial in both countries politically, and I think it would be difficult for either government to accede to use of the death penalty for crimes committed against Americans when, for example, the Turkish Government has not imposed the death penalty on someone as odious as Abdullah Ocalan; and where President Putin's entire policy on dealing with terrorism is quite controversial among the political elite in that country.

I would, however, like to ask you to say at least a few words on an issue that you obviously didn't have time to get to, which is the use of classified information in an international tribunal. I think you and I are probably both long-term consumers of product of the intelligence community and know how neurosive this is for them. How do you think, based on the precedence of the Hague Tribunal, it would be possible to use classified information in the tribunal that you propose?

MR. BARNES: As I mentioned, if you had an international military tribunal -- and we can argue at length about the likelihood; I'm more sanguine than you are -- but your

control of procedures would be by unanimous agreement among the three nation-states forming it. If you had three like-minded members of the juridical coalition of the willing, I think you could much more easily craft rules that would satisfy the concerns of the intelligence community with regard to sources and methods without, at the same time, violating any international standards of due process or the, if you will, customary law equivalent of the Confrontation Clause.

Clearly, for example, the ICTY, much to the dismay of one of our panelists, allows, as do most civil law systems, or all civil law systems, consideration of affidavits, concealment of the identity of witnesses, and other things that could be, in some cases, critical to protection of intelligence information.

MR. PENA: Yes?

MR. ELY: My name is Bert Ely. I'm a banking consultant here in town.

It seems to me as we look at these terrorists that there are three sequential questions that come up. First of all, is someone who is an unlawful combatant therefore to be treated as such? Second, what specific acts is he guilty of? Which is essentially an evidentiary proceeding. And the third question is, if guilty, what should the punishment be? It seems to me that, in the short term, only the first question has to be address. Are they an unlawful combatant and therefore ought to

be, if you will, held out of action? Which is effectively what we do with prisoners of war. They are put in some kind of camp and held for the duration of the conflict.

It would seem to me, and I would be interested in the reaction particularly of the retired generals on this point, that with these folks that get captured, in effect, if they are determined to fall under the category of unlawful combatant, or the equivalent since we have an undeclared war, that we just kind of park them off some place for however long we think this undeclared war is going to continue, and then, at some time in the future, after things are over, whenever we think they are over, then we address the second and third questions.

Why do we have to, in the short term, carry all the way through to the point of conviction and punishment?

MR. PENA: He asked the two generals first, but anyone is welcome to jump in.

MR. BARNES: Actually, I would say whether they are unlawful combatants is the second question and not the first one, the first one being whether we are in a state of armed conflict. But getting over that, yes, it is practiced clearly, and in fact it is the international preference to detain for the duration of hostilities before either internal disciplinary within a POW camp or judicial proceedings are applied against POW's. And there are a lot of reasons for that, including access by the defense to

potential defense evidence and other things like that. I don't think that is quite the case here.

For one thing, this conflict may be of indefinite duration. We could be talking decades here. And we may feel all right to do that with certain people who tried to immigrate, but I am not sure we should in this case. The second thing is the difficulties of the access to information in this kind of context are not anywhere near what they are in a normal armed conflict. So I would say, although you could wait, there would be no compelling reason to wait.

MR. NARDOTTI: I would agree with Bob's observation that, considering the possible length of this undertaking, to wait for some end point would create further problems. And that doesn't mean that we would have to start this tomorrow or the next day, but I would assume that at some point in Afghanistan things will be settled enough in terms of the military operations that that would be the point at which we would begin to deal with whatever numbers, if there are any, of people that would fall under that category.

MR. LYNCH: I want to say something about the discussion of unlawful combatants. If the President's executive order were only limited to people captured overseas, then the step would be, we've got these POW's, who among the POW's have committed war crimes, and then initiates the process. But

because the President's executive order is not limited to overseas and it covers people here on American soil, I want to stress what the implications of the executive order is.

The President, with a mere accusation that somebody, perhaps a lawful permanent resident here in the United States, is an unlawful combatant. Once he makes that accusation, that person can be immediately arrested by the FBI. They are going to be taken to a military installation. All of the protections of the Bill of Rights do not apply. The person cannot get into a court of law under the terms of the executive order, because he just does not have a remedy to get into the civilian court system.

So the President's accusation or allegation that this person is an unlawful combatant may or may not be true, but the fact is, as a practical matter, it's non-reviewable. So that the person can be taken away, tried before a military commission, found guilty, and, under the terms of the executive order, he never gets into Federal court to challenge it. That is the practical, hard-nosed implications of the executive order here in America.

MR. PENA: Lee, did you have a comment?

MR. CASEY: I just wanted to add something, indeed, more in response to Tim's point. The executive order eliminates the possibility of substantive judicial review. That is, if you

are convicted, you will not be able to review to a U.S. court of appeals. It does not purport to eliminate the writ of habeas corpus. Anyone who is subjected to one of these courts will be able to challenge his status as an unlawful combatant through the writ, which has not been suspended. And the folks in the Counsel's Office and at OLC know how to spell "habeas corpus." If they intended to attempt -- and they know they cannot, because only Congress can do that -- to suspend the writ, they would have said so specifically.

MR. BARNES: Let me add one procedural point, too. And whatever they come up with in terms of procedures is going to be very important. If you take, again, the model of what happens in courts martial, to take an accused to a felony-level court, it's not the equivalent of a grand jury; it's actually something better from the accused's standpoint. It's an investigation under Article 32 of the Uniform Code of Military Justice, which is an open proceeding, the purpose of which is to determine whether there is reasonable belief that this person has committed the crime. And in that proceeding, the person accused is represented by counsel, they have an opportunity to present evidence, to cross-examine witnesses, to see the government's case.

Again, speaking from my personal standpoint, I believe if they adopt procedures similar to that, certainly as an initial

screening point, you will have at least that much done before they actually go before the tribunal. They would not go before the tribunal merely on an allegation.

MR. PENA: We have time, unfortunately, for only a few more questions. This gentleman here in the front row, please.

MR. MURRAY: Frank Murray, from the Washington Times.

Actually, I have a double-barreled question but they are related, sort of. Despite what has been said here and what has been written, including by me, the President did not actually issue an executive order. He issued what was headed as a military order, and it's not in the series of executive orders. I wonder if that makes any difference constitutionally, and I would like to have your opinion on it.

Secondly, why did he issue an order at all, to set off this debate, when he might have waited, as Roosevelt did, until he had somebody specific to assign for trial, and it could be done secretly and it wouldn't have to suffer this debate at this time?

MR. PENA: Anyone?

MR. CASEY: I think that the style of the order does not matter as a constitutional matter, whether it is called a military order or an executive order. I assume that they were trying to distinguish between the ordinary run of executive

orders and this based on his Commander-in-Chief authority rather than his authority as chief executive.

As to the second question, that I'm not sure anyone really knows. Certainly I have no idea.

MR. PENA: Roger?

MR. PILON: Roger Pilon, Cato Institute.

I want to direct my question to you, Lee. Picking up on points that Tim was just making. Whereas the military men focus primarily on policy issues with respect to this issue of the tribunals, the two of you focused on the threshold constitutional and legal issues. And it seems to me that the nub of the matter was just touched upon my Tim, and I want to elaborate a little bit.

In particular, we're concerned about this because we want to know who is subject to these military tribunals. Right now we know there are hundreds of people sitting in jail right now, some of them American citizens, some of them legal immigrants, others perhaps illegal, and all of them potentially, as well as others by your own admission, are subject to these military tribunals. So the status of these people, it seems to me, becomes very important, especially when you tie up with the habeas petition.

Now, you have drawn from the Quirin case to make the distinction between citizens, lawful combatants, and unlawful

combatants. And it seems to me that therein lies the problem, because, as you said, even citizens could be subject to these tribunals. And so I question whether what you are up against is just this simple, in order to determine this threshold question of who is an unlawful combatant -- that's the very question at issue.

In other words, there is a tremendous circularity here. And so what is it that your habeas petition would determine? It seems almost as though it's determining the outcome of the case. The habeas petition is decided as to whether this person is an unlawful combatant, and therefore including American citizens. You get my point, I think.

MR. CASEY: I understand.

MR. PILON: Should the categories be citizen, legal alien and therefore subject to the normal courts, as opposed to illegal aliens who are, strictly speaking, never admitted to the country and they are in a status of excluded aliens and therefore equivalent to Osama bin Laden in his cave, whom we can shoot, and therefore would we do anything lesser to, as distinct from legal aliens who have rights to due process, among other things? I hope that gets to the point. Circularity is my main concern.

MR. CASEY: I think that when the court looks at this it will certainly look at the first case to determine whether the order itself was lawfully issued, whether it falls under Quirin

or whether the court would like to reconsider whether Quirin was rightly decided. It will certainly do that.

In cases following, assuming that they uphold the order, I think the court will at least do a basic review of whether the individual involved falls within this category of unlawful combatant. And, frankly, that may well make it difficult to implement the order in an efficient manner and in a manner that the administration assumed. But that is just tough luck. And I realize that the order is very troubling and very broad, but let's remember that all of the checks and balances in the Constitution are working here. The President asserted a broad power. Congress is, even as we speak, making his Attorney General explain exactly what is the basis he had and why he did, and all the questions we're dealing with.

The courts are open, and the Supreme Court will hear these cases. They heard Milligan. They heard Quirin. They took Hira, various Japanese cases, Yamashita. They will take the case. So I don't think the Constitution is in danger. The Constitution is working.

MR. PENA: I will take one more question.

MR. LEVY: Bob Levy, from the Cato Institute.

There are 18 million noncitizens, the very large majority of whom live here perfectly legally. And they are entitled, every responsible legal authority has argued, to the

protections of the Bill of Rights. Three of panelists suggest today that that doesn't matter because Quirin applies; we are in a state of war, and therefore military tribunals are authorized and they can prosecute violations of the Law of War.

Now, I accept that for the moment as the premise. And that would suggest that the military tribunals in the Bush executive order are indeed legitimate if the executive order had said that persons to be prosecuted by these tribunals are unlawful combatants. But that is not what the executive order said. The executive order said, instead, that any noncitizen can be prosecuted if the President has reason to believe that that person has "engaged in, aided or abetted, or conspired to commit acts of international terrorism or acts in preparation therefor."

Now, by anybody's definition, that is far broader than the category of unlawful combatants. So, is it not the case that the executive order, by its very terms, is invalid?

MR. NARDOTTI: I will start. I am not going to defend the draftsmanship applied to that executive order, or the military order. As has been stated earlier, there are problems with it. But I think the fair interpretation of that order, in terms of the factual basis that the President has laid in the subsequent explanations, demonstrate that the basis is there to deal with the category of unlawful combatants in the way that is directed by that military order.

Obviously the administration may not have considered it a first draft when they issued it, but they are probably considering it a first draft now, and what follows will have to be articulated within parameters that are supported by the authority under international law to deal with unlawful combatants in the way that that has been suggested.

MR. BARNES: I could add to that, because within the context of that question there is a fundamental question. Which is, is it possible to have a terroristic act of violence that crosses borders that does not, ipso facto, automatically constitute or convert the person who does it into an unlawful combatant during an armed conflict? That is another way to phrase that question.

I don't think there is a clear answer to that. I said we are in a gray area; I think that is one of those gray areas. I think there is a range of violence below which would not be viewed by the international community or by me as an international armed attacked. Lunging across the Canadian border with a penknife, for example. And yet, at some point in that scale I think you do cross that line.

In determinations of whether you have crossed that line and have become an unlawful combatant, I think the best analogy is an Article V tribunal under the Geneva Convention for the protection of prisoners of war, which is an administrative

fact-finding tribunal to determine that exact question of status. And I would presume some sort of similar procedure would be applied in the tribunal case.

MR. PENA: Lee?

MR. CASEY: I think obviously it would have been useful had the order been drafted in the language of the Laws of War and not in the language of the civilian civil court system. However, I don't think it affects the order's lawfulness. I think all the order actually does is require the Secretary of Defense to figure out how to do this and to set up a system to do it.

Frankly, I don't think today, at least with respect to the question of military tribunals, there is anyone with standing to challenge the legality of the order. That will come when someone is actually subjected to it. And I think that individual will have a very hard time arguing that, because the order is so broadly drafted I cannot be subjected to it, if he falls within the category of unlawful combatant. So I don't think it affects the legality of the order. I think, obviously, it would have been wise to perhaps rephrase the language that they used.

MR. PENA: Tim?

MR. LYNCH: I just wanted to register a quick disagreement with the statement Lee Casey made just before, about how the checks and balances in our system are operating, and what's the problem? To me, that's like saying Truman declared an

emergency and tried to seize private property whenever he thought it would be a good idea, the Supreme Court said he couldn't do that, so what's the problem?

As I said during my talk, it should disturb us that the President took the action in the first place, in that the advisors around him told him yes, to go ahead and try that. If he gets pushed back by the Supreme Court, so what. That kind of attitude by people in the White House should be upsetting to all of us, because they are supposed to be there protecting and defending our constitutional rights, not coming up with ways in which to expand their power.

MR. BARNES: I would like to offer just a quick response to that. The reason for the public support for the President on this I think is not simply an arbitrary attempt to extend power by the President. We are dealing with real-life circumstances, and I don't think anybody would really question the reasonableness of certain statements that the President has made and assumptions that he had made with respect to the dangers to public safety and security. They have done that in that context.

There are legitimate concerns, and they are trying to figure out how to accommodate, how to deal with the complex problems in the context of a dangerous situation. So I think that really circumscribes this entire debate. And as you argue

about extensions of this power in other unmerited circumstances, I think that if they don't have comparable facts or comparable circumstances to justify it, it is unlikely to happen.

MR. CASEY: I have to throw in a comment here. I have to express disagreement with the characterization of the action taken as designed to suspend the Constitution. You can have legitimate differences of opinion about how the Constitution can be properly applied in a particular context without thereby "deciding to suspend the Constitution." I think the question of the procedures that are due under the Constitution to an unlawful combatant of whatever nationality, wherever tried, are certainly not axiomatic or elementary. I don't think a determination that the full panoply of Article III procedural rights does not apply makes you any less an adherent to the Constitution than the opposite conclusion.

MR. PENA: On that note, I would like to invite you all to lunch upstairs in our Wintergarden. First, again, I would like to thank our conference staff and our interns for putting this together.

(Applause.)

MR. PENA: And I thank you all for coming here today, and of course I thank our speakers. Thank you.

(Whereupon, the Cato Institute Policy Forum concluded.)