

Inter Arma Silent Leges: In Times of Armed Conflict, Should the Laws be Silent?

**A Report on The President's Military Order of November 13, 2001
Regarding "Detention, Treatment, and Trial of Certain Non-Citizens
in the War Against Terrorism"**

*By the Committee on Military Affairs and Justice
of the Association of the Bar of the City of New York¹*

Introduction

On November 13, 2001, President Bush issued a "Military Order" (the "Order") regarding "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."² The Order would apply to all non-citizens determined by the President (1) to be members of the international organization known as al Qaeda³; or (2) to have engaged in, aided or abetted or conspired to commit, acts of international terrorism or acts in preparation therefor that have caused, threaten to cause or have as their aim to cause injury or adverse affects on the United States, its citizens, national security, foreign policy or economy; or (3) to have intentionally harbored such persons⁴. Such individuals are to be "detained at an appropriate location designated by the Secretary of Defense

¹ The Committee on Military Affairs and Justice was established by the Association of the Bar of the City of New York in 1946. It is engaged in study and comment on the military justice system and other legal aspects of military affairs, including the use and regulation of the armed forces.

² The Order is reproduced in Appendix A.

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

⁴ Military Order, at §2(a).

outside or within the United States.”⁵ There is no time period set forth with respect to such detention; nor is there any sunset provision, for that matter, for the Order itself.

The Order authorizes the creation of military commissions to try such persons, when and if they are to be subject to prosecution⁶. Further, such individuals, whether detained or tried under the Order, are not permitted under its terms to seek “any remedy” or “maintain any proceeding” in any U.S. federal or state court, any foreign court or any international tribunal⁷. Presumably, this very broad prohibition on *any* proceeding or remedy is an attempt, when read with the detention provisions of the order, to deny the detainees the privilege of the writ of habeas corpus and thereby prolong their detention as a matter of public safety when necessary, as determined by the President. Further still, although military commissions bear certain similarities to courts martial under the Uniform Code of Military Justice⁸ (including, for example, by providing trial by appointed judges—rather than a jury—of both fact and law), the similarity is misleading. Courts martial follow procedural rules closely parallel to those of the federal criminal courts, while the commissions to be established under the Order are very different and may function *without regard to “principles of law and the rules of evidence generally recognized in the trial of criminal cases.”*⁹ Further, they are not subject even to the *procedural* rules governing courts martial, which include the right of appeal to a higher court and, ultimately, to the Supreme Court of the United States.

The “privilege of habeas corpus” is a fundamental Constitutional right. The Order’s literal terms suspend it by preventing subject persons from pursuing *any judicial remedy in any court* whatsoever. When combined with the provisions for unlimited detention (including the recent rule-making announced by the Attorney General

⁵ Military Order, at §3(a).

⁶ Military Order, at §7(b)(2).

⁷ Military Order, at §3(a).

⁸ 10 U.S.C. §§801 – 946 (hereinafter, the “UCMJ”).

⁹ Military Order, at §1(f).

providing for virtually unlimited detention of certain aliens before INS courts), it seems plain that this is a use to which the Order may be put, despite only recent public statements by the Administration to the contrary¹⁰. If so, such use would be an extreme measure, not used since the time of the Civil War rebellion. Moreover, suspension of the privilege of habeas corpus is permitted only in the two crisis circumstances of rebellion or invasion. Even then, the power to suspend habeas corpus is vested by Constitution only with the Congress and not to the President.¹¹

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

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

The Context of the Order

The Order was issued two months after the September 11, 2001 terrorist attacks against the World Trade Center and the Pentagon ("9/11 attacks") by 18 foreign nationals believed by the U.S. Government to have been associated with the al Qaeda organization based primarily in Afghanistan¹². Al Qaeda has been accused of providing the inspiration,

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

¹¹ U.S. Constitution, Article 1, Section 9, Clause 2.

¹² The President has said that al Qaeda operates in no less than 60 nations, including the United States, but because it is believed that Osama bin-Laden, its head, is in Afghanistan, it is that country which is the organization's base. On September 20, 2001, President Bush spoke to Congress: "This group and its leader

training, financing and control of the 9/11 attacks, as well as assaults on two U.S. embassies in Africa, and on the *U.S.S. Cole* in Yemeni waters. In response to the 9/11 attacks, the Congress on September 18 authorized military action¹³ but did not declare war. The United States' decision to use force was supported generally by resolutions of the United Nations Security Council¹⁴ and specifically by the North Atlantic Treaty Organization, as well as by many national governments. On September 21, the President declared that a National Emergency had been in existence since September 11.¹⁵ After the Islamic fundamentalist Taliban “government” of Afghanistan refused to surrender the al Qaeda leaders, U.S. and U.K. armed forces launched a military campaign against Taliban forces in Afghanistan.

Almost simultaneously with issuance of the Military Order on November 13, Afghan units opposing the Taliban and assisted by U.S. air support expelled the Taliban from the country’s major cities, including from its capital Kabul. Although the course of the conflict remains uncertain due to its ongoing nature, it is, as this is written, within the

— a person named Osama bin Laden — are linked to many other organizations in different countries, including the Egyptian Islamic Jihad and the Islamic Movement of Uzbekistan. There are thousands of these terrorists in more than 60 countries. They are recruited from their own nations and neighborhoods and brought to camps in places like Afghanistan, where they are trained in the tactics of terror. They are sent back to their homes or sent to hide in countries around the world to plot evil and destruction. The leadership of al Qaeda has great influence in Afghanistan and supports the Taliban regime in controlling most of that country. In Afghanistan, we see al Qaeda's vision for the world.” Quoted on White House Web Site, subsection *America Responds*, visited November 24, 2001.

¹³ S.J.Res.23, September 18, 2001 (Public Law No: 107-40)

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

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

realm of possibility that some al Qaeda leaders (as opposed to soldiers or leaders from the Taliban's armed forces) may be captured and come within the control of U.S. armed forces, at which time it would have to be determined when, where and how they might be tried.

These acts occurred against the domestic backdrop of the discovery of a number of intentionally-inflicted cases of anthrax infection in Florida, Washington, D.C., New York City and Connecticut. Some anthrax-tainted letters were discovered in the mail, including ones delivered to government officers. As of this writing there have been 5 deaths from 18 confirmed cases of anthrax infection¹⁶. No evidence has been disclosed as of now to indicate that these incidents are related in any way to the 9/11 attacks or even to al Qaeda, but their occurrence – and their undiscovered source – nonetheless informs the public debate about terrorist activities at this time.

Moreover, a large number of foreign nationals have been detained within the U.S.—according to Justice Department officials exceeding 1,000 in number but whose actual number remains undisclosed—many of whom are still in custody. It appears that some if not all of these detainees may be transferred from the control and custody of the Department of Justice (*i.e.*, Immigration and Naturalization Service) to the control and custody of the Department of Defense, as such transfer is directed by the Order.

It should be noted that events with respect to the Order – including its interpretation and possible application – are fast-moving and may be evolving even as this Report is being prepared. This Committee, in fact, had the opportunity to interact with various members of the Executive Branch instrumental in the creation, drafting and future interpretation and application of the Order and, as a result, obtained information and insights from such individuals, apparently as the policies were being formulated and developed.¹⁷ Because such policies and interpretations appear to have been more deeply

¹⁶ CNN website, <http://www.cnn.com/2001/HEALTH/conditions/11/24/connecticut.anthrax/index.html>, visited November 24, 2001.

¹⁷ The circumstance was the annual meeting of the Committee's counterpart at the American Bar Association – the Standing Committee on Law and National Security – held in Washington, D.C. on

developed and/or changed as this Report was being prepared, the Committee has not had the benefit of a fixed and fully determined legal scheme to analyze; in fact, several of the persons interviewed cautioned the Committee members that the procedural regulations which are now being prepared and will soon be issued will not only elucidate the President's true "intent" with respect to the Order, but that such intent may not have been apparent from the text of the Order. In view of the importance of the matter, the Committee has opted to work primarily from the text of the Order and the powers asserted by the President therein, giving consideration to the discussions and interviews referred to and the material published in the press by members of the Administration, but with the awareness that such views are not only not binding on the President but could again be revised at any time. Indeed, if the powers asserted by the President in the Order were upheld, this President or a future President could use the Order as precedent to exercise those powers in a different context and without the gloss now presented by his representatives.

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

Authority Cited by the Order.

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

1. The President's authority as Commander-in-chief of the Armed Forces¹⁸;
2. The Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224); and
3. Sections 821 and 836 of Title 10, United States Code (the Uniform Code of Military Justice).

November 29 and 30, 2001. Persons with whom we spoke included the White House Counsel, the General Counsel of the Department of Defense, the Legal Adviser to the National Security Council, Counsel to the Chairman of the Joint Chiefs of Staff and others in similar capacities. (Hereinafter, references to this event will be to "ABA Meeting").

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

Although civilian lawyers are unfamiliar with military commissions, they are nevertheless not unknown in American history. Such commissions have been upheld by the U.S. Supreme Court, and, despite disuse for nearly one-half century during which time the U.S. has participated in several major armed conflicts, they are in fact contemplated by existing law¹⁹. U.S. military commissions convicted British Major Andre of espionage in the Revolutionary War, tried those accused of the assassination of President Lincoln, imposed the death penalty on German saboteurs who landed on Long Island during World War II (including one who claimed U.S. citizenship), and tried some 1,200 German war crimes defendants (more than eight times the number tried by the international Nuremberg tribunal) and many Japanese defendants.

Judicial Authority – The *Quirin* Case.

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

In *Ex parte Quirin*²⁰, impliedly relied upon by President Bush (and explicitly by officials in his Administration) as a precedent for the Order,²¹ the Supreme Court upheld during a declared war a military commission's jurisdiction over German military saboteurs who had landed in the U.S. from a German submarine and then operated in civilian clothing and, therefore, in violation of the laws of war. The prosecution, in opposing the defendants' application for a writ of habeas corpus in *Quirin*, asserted that

¹⁹ See, e.g., 10 U.S.C. §826.

²⁰ 317 U.S. 1 (1942) ("*Quirin*").

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

no federal court had jurisdiction to hear the case because the military commission's authority was exempt from habeas corpus under the terms of its constitutive order²². The Court rejected that contention, holding that even alien members of enemy armed forces were entitled to the writ when found within the U.S. Having found jurisdiction, the Court went on to consider the merits of the military commission's authority notwithstanding the absence of Fifth and Sixth Amendment protections in the conduct of the trial before the commission, such as the right to trial by jury and other procedural rights that are normal in criminal cases. The Court upheld the authority of the commission, grounded on the time-honored practice of trying unlawful, enemy-state combatants in a declared war by military commission, which the Court found to be exempt from the constitutional right to trial by jury. That exemption exists, the Court said, because the practice of such military proceedings was recognized by the law of war prior to the adoption of the Constitution and was consistently followed in subsequent wars between the U.S. and other countries, as well as during the Civil War.²³

The *Quirin* decision addressed a case arising within the territory of the U.S. during declared war, and, accordingly in view of other cases addressing the distinctive rights of citizens and aliens, its constitutional holding must be limited to that situation. With respect to aliens outside the U.S., the authority to convene military commissions to try law of war violations is subject only to statutory and international law limitations.²⁴

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

²³ See historical examples from the Revolution, the Mexican War and the Civil War cited in *Quirin, supra*, at notes 9 and 10.

²⁴ "[A]t least since 1886, we have extended to the person and property of resident aliens important constitutional guaranties -- such as the due process of law of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356. But, in extending constitutional protections beyond the citizenry, the Court has been at pains to point out that it was the alien's presence within its territorial jurisdiction that gave the Judiciary power to act." *Johnson v. Eisentrager*, 339 U.S. 763, 770 (1950). Even in U.S. possessions the right to trial by jury was not guaranteed and only extended when so provided by Congress. See e.g., *Dorr v. U.S.*, 195 U.S. 138 (1904). Citizens are, however, entitled to trial by jury, even abroad, except in time of war. See, *Reid v. Covert*, consolidated with *Kinsella v. Krueger*, 354 US 1 (1957); *Kinsella v. Singleton*, 361 US 234 (1960); *Grisham v. Hagan*, 361 US 278 (1960); and *McElroy v. Guargliardo*, 361 U.S. 281 (1960), which overrule prior UCMJ court martial/commission jurisdiction over US citizen spouses accompanying US forces abroad, invalidating inconsistent provisions of the UCMJ. This is the background

Legislative Authority – the UCMJ.

Although the *Quirin* Court did not find it necessary to determine whether the President had independent authority as Commander-in-Chief to create such commissions²⁵, we believe that although the President may have implied authority to do so absent Congressional action, when Congress acts, Congress has the exclusive authority to define the use of military commissions by exercise of its powers “to constitute tribunals inferior to the Supreme Court,”²⁶ “to define offenses against the law of nations,”²⁷ and “to make rules for the government and regulation of the land and naval forces.”²⁸ In a manner that appears to be consistent with the constitutionally permitted exclusion from the domestic right to trial by jury of proceedings before traditional military commissions, Congress has specifically authorized military commissions to act under the laws of war.²⁹ As will be discussed, however, use of such commissions – as *Quirin* found – requires a war, at the least *de facto*, if not declared.

Substantively, Article 21 of the UCMJ,³⁰ among the statutory provisions cited in the Order as authority for its issuance,³¹ provides that the UCMJ does not deprive

for Pub. L. 106-523, 18 U.S.C. 3261 *et seq.*, which creates Article III jurisdiction in such cases to fill the gap. In *Reid v. Covert* the Court allowed court-martial jurisdiction to continue over such persons in time of war, but the Court of Military Appeals limited that jurisdiction to declared war; *U.S. v. Averette*, 19 C.M.A. 363 (1970). See also, *The Military Extraterritorial Jurisdiction Act of 2000: Closing the Gap*, 95 Am.J.Intl.L. 446 (2001).

²⁵ *Id.*, at 29.

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

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

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

²⁹ In addition to more direct authority, Congress has recognized military commissions in passing. The legislative history of the War Crimes Act of 1996 includes the statement by the House Judiciary Committee that such statute “is not intended to affect in any way the jurisdiction of any court martial, military commission, or other military tribunal under any article of the Uniform Code of Military Justice or under the law of war or the law of nations.” H.R. Rep. No. 104-698 at 12 (1996).

³⁰ 10 U.S.C. 821.

³¹ Despite the President’s assertion of Section 21 as authority, some commentators argue that such Section allows the President’s authority without creating it. The distinction is metaphysical if Congress has the authority, as we believe, to provide preemptively for the rules and regulations of the armed forces and

military commissions “of concurrent jurisdiction with respect to *offenders* or *offenses* that by statute or by the law of war may be tried by military commissions, provost courts or other military tribunals.”³² The classic case where both the *offender* and the *offense* are covered is when Japanese General Yamashita was tried for war crimes committed against U.S. personnel during the then recently ended World War II. Either the defendant’s whereabouts (Yamashita was in custody, taken during battle) or the predicate offense (traditional war crimes) could serve as a basis for jurisdiction in that case. As an example of jurisdiction over the offender, the U.S., as an occupying power, could use military commissions to try persons within occupied territory pending establishment of civil government, as it did extensively in the post-war occupation of Germany and Japan. This was so whether or not the offense related to the war, generally applying local law then in effect³³. Article 21, and therefore, statutory support for military commissions (and constitutional authority within the U.S. under *Quirin*), reaches its limits as to persons who are neither offenders, nor charged with offenses, traditionally tried under the law of war by such military commissions.

Offenses—The Law of War.

With respect to the offense, it is not at all clear that at the time of the 9/11 attack the U.S. was engaged in a war or even armed conflict to which the law of war³⁴ could be

compliance with the laws of nations, including the laws of war, if it chooses to do so. Consequently the terms under which Congress permits the President to act concurrently are equivalent to rules authorizing the President to act. *Compare Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (the “Steel Seizure Case”) where the President was found to have acted directly contrary to the specific intent of Congress in a matter subject to Congressional power.

³² Emphasis supplied.

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

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

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

applied. International treaty law has black letter rules defining when the law of war (or as now often termed, the law of armed conflict) applies. Common Article 2 of the Geneva Conventions³⁵ provides that “the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”

Thus, for a state of war to exist under the classic definition of war, the conflict must be between states. “The law of war has been conceived primarily for armed conflicts between States or groups of States, that is, for international armed conflicts.”³⁶ This international law requirement is unfulfilled with respect to the persons covered by the Order. It is fulfilled for international law purposes with respect to Afghanistan, with whose *de facto* Taliban government the United States is engaged in armed conflict (albeit an undeclared war under US domestic laws).

Conflicts *not* between states are covered by the laws of war to a lesser degree, as made more precise in the 1977 Protocols. Protocol II for “non-international conflicts”, that is, non-state conflicts, applies to those conflicts which “take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military

Department of Defense Directive Number 5100.77, December 9, 1998, viewed November 25, 2001 on the Defense Department web site at http://www.dtic.mil/whs/directives/corres/pdf/d510077_120998/d510077p.pdf (emphasis supplied). The law of war is not, however, coextensive with the broader field of international law or law of nations. For example, money laundering and drug trafficking are the subject of international treaties, but do not relate to the conduct of hostilities.

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

³⁶ Frederic de Mulinen, *International Committee on The Red of the Red Cross Handbook on the Law of War for Armed Forces* (ICRC 1987), at 3.

operations and to implement this Protocol.”³⁷ Clearly this definition—also—does not apply to al Qaeda, as it does not exercise control over any part of U.S. territory.³⁸

Illustrative of the need for a predicate war is the 1865 opinion of Attorney General James Speed issued with respect to whether military tribunals (by which he meant the courts for military justice generally) could be used to try the civilian assassins of President Lincoln, whom he found to be serving the war aims of the enemy. He found that such persons were subject to the laws of war and trial by military tribunal because – *in times of war*:

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

Some have argued, including officials in the Bush Administration, that this is a “new kind of war,” one in which state participants are not required for a determination of war because of the amorphous nature of international terrorism. Others have argued that while a “war” is required for the Order to be lawful, the armed conflict of the United States with Afghanistan’s Taliban puts the country at war for some if not all domestic law purposes, the existence of the conflict would, thus, allow the Order’s actions toward the non-citizen residents to whom it is directed by virtue of their nexus with international terrorism generally, even if they have no relationship to Afghanistan or the Taliban. Still others have refined this latter argument by “imputing” the al Qaeda to the Taliban, or,

³⁷ Part I, Art. 1(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), *opened for signature* Dec. 12, 1977, 1125 U.N.T.S. 609.

³⁸ It has been suggested that the limitations on the international law of armed conflict tending to exclude most violence not between nations was deliberately intended to deny belligerent status to dissidents so that national authorities a freer hand in suppressing them. *See generally* George H. Aldrich, *The Law of War on Land*, 94 A.J.I.L. 42 (2000). “Perversely, the application of Protocol II is far too narrow. . . . It is perhaps cynical, but undoubtedly true, that this narrow applicability of Protocol II explains why there are now 147 states party to it.” *Id.* at 60.

³⁹ A.G. James Speed, *Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President*, Attorney General’s Office (Washington, July, 1865). Emphasis supplied.

even, vice-versa, noting that recent evidence indicates that al Qaeda may have in fact been controlling the Taliban.⁴⁰

Although the United States has not declared war and the President, in fact, said that he was not seeking a declaration of war, it is not difficult to find that for *international* law purposes the United States is at war in Afghanistan⁴¹. However, in this regard, it is important to note that the Order is not limited to the “enemy aliens” with whom we are at war, i.e., all Afghans, much less to the Taliban and not even to al Qaeda. It goes to all non-citizens, U.S. resident or not, alleged to commit the acts set forth in it. In contrast, had the Order been limited to enemy aliens, members of an armed body, they would be classic “offenders” subject to the law of war, including the Geneva Protocols. Had the Order been directed to the al Qaeda and the Taliban as a *combined entity*, it might arguably be easier to characterize that joint force as an enemy subject to the laws of war during a time of war with them. Separating al Qaeda from the state elements of territory, governance and organized troops makes it that much more difficult to view as a military, as distinguished from a criminal (though terrorist) organization.

The 1942 Order, which served as the basis for the military commission in *Quirin*, stated the specific, objective and wholly traditional standard. It applied to:

“all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation... .”

It is doubtful whether the constitutional logic behind the Court’s opinion in *Quirin* upholding that order could be stretched to apply instead to the current Order’s novel application to “any individual who is not a United States citizen with respect to whom I

⁴⁰ See, e.g., Bob Woodward, *Bin Laden Said to “Own” the Taliban*, The Washington Post, October 11, 2001, at A1.

⁴¹ The conceptual difficulty of characterizing this conflict is typified by the fact that although the U.S. may be at war “in Afghanistan”, it is not at war “with Afghanistan.” Nationals of Afghanistan are not per se “enemy aliens” and may even be allies, without any reliable mechanism, legal or otherwise, to distinguish friend from foe. It is an ambiguous environment in which to apply the black and white distinctions of the classic law of war.

determine ... there is reason to believe that such individual ... has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy ...”⁴²

This point, it should be emphasized, does not diminish the right of the US armed forces fighting in Afghanistan to both capture and try by military commission abroad members of either the Taliban or al Qaeda who are participating in the combat. Abroad, many of the constitutional guarantees under the Fourth, Fifth and Sixth Amendments do not apply to non-citizens,⁴³ and certainly not to persons captured during hostilities conducted by the US armed forces⁴⁴.

Offenders – In the U.S. and Abroad.

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

⁴² Order, at Sec. 2.

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

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

⁴⁵ 71 U.S. 2 (4 Wall.) (1866)

far short of violating the laws of war applicable to saboteurs and the like, are among the direct targets of the Order (compare this to Mr. Milligan, who was accused of rebellion).

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

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

For these persons (at least unlawful, Taliban combatants), the subject matter authority for the President to utilize a military commission to try such persons based on their acts seems clear under the Constitution as interpreted by *Quirin*. With respect to the individual status of such captured “combatants,” the Taliban members would almost certainly qualify as combatants under the law of armed conflict (although potentially unlawful, depending on such factors as their uniforms and behavior) whose prosecution is subject to the provisions of the international law of armed conflict⁴⁶. The al Qaeda

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

members are more difficult to characterize, depending on the evidence linking them to being controlled by, or controlling, the Taliban, a state-like entity, leaving some doubt as to the legality of the use of a commission to try them in the United States without a jury trial.

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

Substantive Overreach – Pervasive Death Penalty and Unrelated Terrorism

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

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

with the concept of a “war on terrorism” but inconsistent with any definable “war” in the sense known to U.S. jurisprudence.⁴⁷

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

We must, therefore, conclude that the Order substantively violates both Article 21 of the UCMJ and, as to persons within the U.S., the Constitution, as well, to the extent that it covers offenses and offenders not covered by the law of war as historically described in *Quirin*. That possible legal infirmity and, at the very least, uncertainty, severely undercuts the policy objectives of the Order as more fully discussed below.

Procedural Concerns Under the UCMJ

In addition to the substantive issue, there is a procedural concern. The Order cited as additional authority Section 36 of the UCMJ,⁴⁹ which provides that in cases under the

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

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

⁴⁹ 10 U.S.C. 836.

UCMJ the President may prescribe by regulation the procedures for military commissions subject to two qualifications. First, the procedures “shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.” In the Order, President Bush declares *in haec verba* that such principles and rules are not practicable to apply under the order. That extraordinary finding is presumably his prerogative, whether or not it is a wise exercise thereof.

Secondly, and more importantly for present purposes, Article 36 specifies that the procedures “may not be contrary to or inconsistent with this chapter [the UCMJ].” The Order only outlines the parameters for procedures to be implemented by orders and regulations of the Secretary of Defense⁵⁰. However, the framework of the Order is already inconsistent with the essential elements of due process provided for in the UCMJ in numerous respects.⁵¹ Accordingly, if Section 36 is indeed necessary authority for the Order, then the Order appears to be procedurally defective.

Exclusive Jurisdiction to Military Commissions

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

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

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

- Proof beyond reasonable doubt (10 U.S.C. Sec. 851(c)), whereas the Order does not specify a standard of proof, which could under minimum standards of the laws of war be less than proof beyond reasonable doubt.
- The right of the defendant to be present at proceedings (10 U.S.C. Sec. 839), whereas the Order allows for the possibility of secret ex parte proceedings (Sec. 4(c)(4)(b)).
- Defense role in selection of the court-martial panel, whereas the members of a military commission convened under the Order would not be subject to challenge by the defense.
- Defense right to choose counsel (10 U.S.C. Sec. 838(b)) whereas the Order limits defense counsel to attorneys "subject to this order" (Sec. 4(c)(5)).
- Unanimity in applying death sentence (10 U.S.C. Sec. 852(a)), whereas the Order provides for "conviction only upon the concurrence of two-thirds of the members of the commission" (Sec. 4(c) (6)).
- – Appellate review of decisions (10 U.S.C. Sec. 866, 867, 867(a), 869), whereas the Order precludes any appellate review by the courts (Sec. 7(b)), and allows review only insofar as the regulations promulgated under the Order may provide as a matter of administration.

individual...”⁵² This grant of exclusive jurisdiction to military commissions appears to conflict with the Congressional intent set forth in Article 18 of the UCMJ, which provides that for purposes of prosecutions for violations of the law of war, general courts martial shall have jurisdiction concurrent with military tribunals:

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

Inasmuch as the UCMJ by its terms applies to prisoners of war,⁵³ we conclude that Order conflicts with Congress’ determination that courts martial and military tribunals (commissions) should have concurrent jurisdiction with respect to prosecution of POWs for violations of the laws of war.

Preventive Arrest, Indefinite Detention and the Suspension of Habeas Corpus

The provisions of the Order regarding detention of persons subject to it permit seemingly indefinite detention without charges, trial,⁵⁴ or the right to seek a remedy in federal or state courts. Thus, they provide for ‘preventive arrests,’ unlimited detention and literally suspends the privilege of the writ of habeas corpus, notwithstanding statements by Administration officials to the contrary. These provisions are clearly unconstitutional as to the writ of habeas corpus and extremely controversial as to detention.

⁵² Military Order, §7(b)(1).

⁵³ UCMJ, §802 (a)(9).

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

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

Habeas Corpus

The privilege of the writ of habeas corpus is considered a “*magna carta* of the kingdom.”⁵⁵ Justice Story said of it:

It is ... justly esteemed the great bulwark of personal liberty; since it is the appropriate remedy to ascertain, whether any person is rightfully in confinement or not, and the cause of his confinement; and if no sufficient ground of detention appears, the party is entitled to his immediate discharge. This writ is most beneficially construed; and is applied to every case of illegal restraint, whatever it may; for every restraint upon a man’s liberty is, in the eye of the law, an imprisonment, wherever may be the place, or whatever may be the manner, in which the restraint is effected.⁵⁶

Chief Justice Rehnquist has praised the privilege: “It has been rightly regarded as a safeguard against executive tyranny, and an essential safeguard to individual liberty.”⁵⁷

Beginning in the nineteenth century and continuing without exception through to the present day, the Supreme Court has consistently held that non-citizens within the jurisdiction of the United States are “persons” within the meaning of the Fifth Amendment and are thus entitled to the protections of the due process clause.⁵⁸ In fact, it

⁵⁵ William Blackstone, *Commentaries*, 3:129-37 (1768), reprinted in *The Founders’ Constitution*, Vol. 1, at 324 -327 (University of Chicago Press 1987).

⁵⁶ Joseph Story, *Commentaries on the Constitution*, 3:§§1333-36 (1883), reprinted in *The Founders’ Constitution*, supra (hereinafter “Story, *Commentaries on the Constitution*”), at 342.

⁵⁷ Remarks of Chief Justice William H. Rehnquist, 100th Anniversary Celebration Of the Norfolk and Portsmouth Bar Association, Norfolk, Virginia, May 3, 2000 available at http://www.supremecourtus.gov/publicinfo/speeches/sp_05-03-00.html (hereinafter “Rehnquist Remarks”).

⁵⁸ See, e.g., *Wong Wing v. United States*, 163 U.S. 228, 238 (1886) (resident aliens entitled to Fifth Amendment rights); *Kwong Hai Chew v. Colding*, 344 U.S. 590, 596 (1953) (resident alien is a “person” within the meaning of the Fifth Amendment); *Mathews v. Diaz*, 426 U.S. 69, 77 (1976) (“There are literally millions of aliens within the jurisdiction of the United States. The Fifth Amendment, as well as the Fourteenth Amendment, protects every one of these persons from deprivation of life, liberty, or property

was recognized by the Supreme Court in the wartime cases *Quirin* and *Yamashita* as available even to members of the German military and to the Japanese command within the U.S. (or in *Yamashita*'s case, in the Philippines, under U.S. rule) to test the authority of a military commission to detain and try them.⁵⁹ It is also available to persons charged under the UCMJ and held for court martial under that statute.⁶⁰

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

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

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

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

without due process of law. Even one whose presence in this country is unlawful, involuntary, or transitory is entitled to that constitutional protection.”) (citations omitted); *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990) (distinguishing reach of Fourth Amendment to cover only “the people” — as in “we the people” — from Fifth Amendment’s protection of “any person”). See also *United States v. bin Laden*, 132 F.Supp.2d 168, 181 (2001) (a non-citizen whose only connections to the United States are his alleged violations of U.S. law and his subsequent U.S. prosecution is entitled to due process of law under the Fifth Amendment).

⁵⁹ “In *Ex parte Quirin*, 317 U.S. 1, we held that status as an enemy alien did not foreclose “consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.” *Id.* at 25. This we did in the face of a presidential proclamation denying such prisoners access to our courts. . . . [I]n *Yamashita v. United States*, 327 U.S. 1, we held that courts could inquire whether a military commission, promptly after hostilities had ceased, had lawful authority to try and condemn a Japanese general charged with violating the law of war before hostilities had ceased. There we stated: “[T]he Executive branch of the Government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.” *Id.* at 9.” Black, J. dissenting in *Johnson v. Eisentrager*, 339 U.S. 763, 794 (1950).

⁶⁰ See, e.g., 28 USC 2241(c).

has upheld that principle and the most prominent of commentators on the Constitution have agreed.⁶¹

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

Finally, the Order refers for authority to Sections 821 and 836 of the UCMJ, both of which go to the issue of military commissions, as discussed, *supra*. Neither provide Congressional suspension of the privilege of habeas corpus or have anything to do with that subject but are cited, apparently, for authority regarding the Order’s establishment of military commissions, discussed *supra*, and, thus, too, offer no authority for the detention provisions of the Order.

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

⁶² The Resolution is set forth in Appendix C.

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

Congress, in fact, *has* acted with respect to the events of September 11, 2001 specifically in connection with habeas corpus. On October 26, 2001, it adopted legislation sought by the Administration; the USA Patriot Act of 2001⁶³, whose full name is “Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act [sic] of 2001.” The Act was intended, as its name indicates, to provide a comprehensive set of “tools” to the federal government in the service of law enforcement and intelligence gathering.

The USA Patriot Act specifically addresses habeas corpus in Section 412 (Mandatory Detention Of Suspected Terrorists; Habeas Corpus; Judicial Review).⁶⁴ That Section amends Section 236 of the Immigration and Nationality Act to provide that aliens subject to the Act who are detained must be criminally charged or placed in removal proceedings within seven days following commencement of detention unless release of the alien will result in activity that endangers the national security of the United States. In that case, the Attorney General must so certify and recertify every 6 months thereafter, if the alien is to continue in detention. Importantly, habeas corpus proceedings to review decisions made under the Section are available to the suspect alien on application to the Supreme Court, any Justice of the Supreme Court, any circuit judge of the D.C. Circuit

⁶³ Public Law 107-56. Interestingly, Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, which took the Administration’s urgent request for the Act and reported it out rapidly, albeit without significant modification, expressed surprise that the Administration should have requested this Act on an urgent basis, failed to act under it and then issued – without any prior notice to Congress, much less authority from it – the Military Order, which contains very different provisions. Comments by Senator Patrick Leahy made on the television news show *Meet the Press*, November 25, 2001. Perhaps the President’s action is not so surprising considering the refusal of Congress to approve the full range of powers sought by the Administration. Having failed to get the desired statutory authority, the President acted as if he did not need it.

⁶⁴ Section 412 of the USA Patriot Act is reproduced in Appendix D.

Court of Appeals, or any district court with jurisdiction. Further still, determinations by district courts or circuit court judges are subject to appeal to the D.C. Circuit Court of Appeals.⁶⁵

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

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

Id., at 637-638. Justice Jackson continued his analysis by finding that neither the President's Constitutional 'Executive' powers, nor his Commander-in-Chief authority (whether in time of war *de facto* or war *de jure*), nor his obligation to faithfully execute

⁶⁵ It should be noted that the USA Patriot Act is viewed by many civil liberties lawyers as "dangerous" in its expansion of the definition of what constitutes terrorism, the basis for an alien's detention and the like. *See, e.g.*, New York Times, November 25, 2001, A1, B4.

the laws could trump the Constitutions' plain grant of authority to Congress to raise and support armies and to provide and maintain a navy.⁶⁶

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

In response to questioning from various sources, including members of this Committee, Administration officers stated that the Administration had no intention of opposing the right of detained persons to seek the writ of habeas corpus, and that the Order was not intended to do so despite the language of Section 7. They acknowledged that the *nearly identical* provisions of the 1942 Order in question in *Quirin* did seek to suspend habeas corpus and had been ruled unconstitutional⁶⁷. Such informal statements about the true meaning of the Order or the President's intent in issuing it, without amendment of the Order or Congressional legislation, are less than satisfactory⁶⁸.

⁶⁶ Nor, for that matter, did “inherent powers never expressly granted but said to have accrued to the office from the customs and claims of preceding administrations” provide the President authority to seize private industry to aid the war effort, *id.*, at 645.

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

⁶⁸ They may also be less than accurate. It is reported that Attorney General Ashcroft did try to get Congress to suspend the privilege of the writ of habeas corpus when it adopted the USA Patriot Act. Newsweek, Dec. 10, 2001, at 48, reports that the secret first draft of the anti-terrorism bill presented by the Justice Department had a section entitled “suspension of the Writ of Habeas Corpus.” Rep. Sensenbrenner (Chairman of the House Judiciary Committee said: “that stuck out like a sore thumb. It was the first thing I [crossed] out.” Other claims made by Administration officers likewise do not flow from the text of the Order, *e.g.*, that the Order can provide justice “close to where our forces are fighting,” Alberto R. Gonzales,

Severability

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

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

“[S]uch persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions, *except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.*⁶⁹

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

Detention of Enemy Aliens

Congress has also acted, albeit not recently, in the form of the Alien Enemies Act, 50 U.S.C. 21, permitting the detention or expulsion of aliens over age 14 within the US

Martial Justice, Full and Fair, New York Times, November 30, 2001 (“Gonzales Op-Ed”), whereas the Order can plainly be used for trial in the United States and even provides that the Department of Justice transfer to the Department of Defense subject persons it is detaining; it cannot be imagined that Judge Gonzales is proposing that persons of that group who might be tried under the Order would be shipped to Afghanistan to be close to the combat during their trial. Judge Gonzales also writes that “The order preserves judicial review in civilian courts,” whereas Section 7 specifically precludes *any* proceeding or *any* remedy in *any* court, and when asked at the ABA meeting whether this Section meant denial of the writ of habeas corpus, the Assistant Attorney General for the Criminal Division Michael Chertoff said it did not but was intended to “prevent injunctions *and appeals* from military courts,” thus at odds with Judge Gonzales’ assertions published the next day.

⁶⁹ 1942 Order.

who are citizens of a foreign government or state with which the US is in a declared war or subject to “any invasion or predatory incursion . . .perpetrated, attempted or threatened against the territory of the United States.”⁷⁰ While the 9/11 attacks may have constituted a “predatory incursion against the territory of the United States”, they were not perpetrated by a “foreign nation or government” as required by Section 21 and, thus, the Alien Enemies Act does not apply to the 9/11 attacks.

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

⁷⁰ Section 21 provides:

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

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

⁷² President Gerald Ford issued a national apology in 1976, calling the actions against Americans of Japanese descent a “setback to fundamental American principles.” Presidential Proclamation No. 4417, 41 Fed. Reg. 7741 (1976). The Proclamation formally rescinded Executive Order No. 9066, issued in 1942. Subsequently, compensation was paid to U.S.-citizen detainees.

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

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

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

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

⁷³ Commission on Wartime Relocation and Internment of Civilians, *Personal Justice Denied* (1982), at 3, 10, cited in Dycus, et. al, eds. *National Security Law*, (2d Ed. 1997), at 572-573.

⁷⁴ Gonzales Op-Ed, *supra*.

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

With respect to indefinite detention without remedy, on the one hand, we have no doubt that regarding aliens in the United States during time of declared war, the federal government could create a scheme substantially restricting the rights they were previously provided that would be upheld by the courts. Much, however, would depend on the factual circumstances. In World War II, the internment of Japanese nationals (as distinct from the internment of U.S. citizens of Japanese descent) occurred at a time of very substantial and genuine threats to the security of the nation as a whole. In fact, Chief Justice Rehnquist, in perhaps a prescient speech reviewing this history in May of 2000 provided this conclusion: "The authority of the government to deal with enemy aliens in time of war, according to established case law from our Court, is virtually plenary."⁷⁶ In the present circumstances, however, absent any enemy nation, it is impossible to identify the nationals or citizens of the "enemy." Consequently, the term "enemy alien" has no determinable meaning.

We conclude that the Order's provision of indefinite detention of aliens suspected of terrorist connections or harboring those who have them—particularly given the denial of *all remedy*—is improper since the President does not have the Constitutional authority to issue an order applicable to aliens in the U.S., and Congress has already provided a different scheme with respect to such persons.⁷⁷ As a practical matter, we believe that

⁷⁵ ABA Meeting, November 30, 2001.

⁷⁶ Rehnquist Remarks, *supra*.

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

these provisions of the Order, if utilized, will not only lead to widespread litigation testing both the President's authority to issue it and as it may be applied to the individual detainee, which litigation is likely to be successful at least with respect to the question of the Order's suspension of habeas corpus⁷⁸.

Even if the President has the authority to detain persons within the classes targeted by the Order, it would remain to be determined whether a particular detainee within the U.S. is within one of those classes. Therefore, such habeas corpus proceedings might extend not only to determination of a commission's substantive and procedural authority, but also to whether as a matter of fact the detainee came within the jurisdictional predicate of the Order, namely, membership in al Qaeda or commission or certain kinds of involvement in acts of international terrorism or harboring of persons under the prior categories. While the Order purports to give the President authority to define such persons, the corresponding findings may themselves be subject to finding in habeas corpus proceedings, equivalent to challenging probable cause for arrest.⁷⁹ This would have the result of placing before the federal District Courts the very issues—whether an individual is an al Qaeda member—the Administration is seeking to keep from those courts.

International Law

International law may also have a bearing on the Order. Common Article 3 of the four Geneva Conventions of 1949, which establishes minimal standards even in armed conflicts not of an international nature, and *a fortiori* in international conflicts, in paragraph 1(d) prohibits persons who have laid down their arms from being subjected to “the passing of sentences and the carrying out of executions without previous judgment

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

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

pronounced by a regularly constituted court, affording all of the judicial guarantees which are recognized as indispensable by civilized peoples.”

The U.S. is a party to, and has ratified, the Geneva Conventions and in 1997, violations of Common Article 3 were added to the definition of “war crimes” for the purposes of the War Crimes Act of 1996⁸⁰. Compliance with such international laws of armed conflict is specifically required of the U.S. Armed Forces pursuant to Department of Defense’s Law of War Program⁸¹.

It follows that the international standard has become binding U.S. law. It would be unlawful for the President to authorize a procedure that resulted in the passing of sentences or carrying out executions without such a regularly constituted court affording the judicial guarantees required by the Common Article 3.⁸²

Pending issuance of the regulations for commissions, it would be premature to speculate whether they would violate the applicable international standards, which it should be noted do not require trial by jury, U.S. rules of evidence or habeas corpus. In fact, it has been reported that a Swiss military court has tried at least one war crime defendant from the former Yugoslavia and one from Rwanda, although on request a case was remanded to the International Court for the Former Yugoslavia.⁸³ It would, however, be highly questionable if the regulations did not require proof beyond a reasonable doubt (or an internationally acceptable alternative standard), public trials, defense right to choice of counsel or independent judges.

⁸⁰ 18 USC 2441, set forth in Appendix E.

⁸¹ Department of Defense Directive 5100.77, DOD Law of War Program (Dec. 9, 1998).

⁸² It is not within the purview of this Report to determine or analyze the crimes and/or violations of law, whether they are international or domestic, for which defendants subject to the Order may be tried.

⁸³ *Re G.G.*, unpublished, Military Court of Cassation, Sept. 5, 1997, and *Re N.*, unpublished, Military Court of Appeal, May 26, 2000, <http://www.icrc.org/ihl-nat.nsf> (visited Dec. 3, 2001). The trial court and intermediate appellate courts were composed of military personnel. The defendants had civilian counsel.

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

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

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

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

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

To the extent, however, that the Order seeks to ‘stack the deck’ against defendants, it betrays uncertainty about the ability to obtain a conviction even in a secret,

non-jury trial under existing civilian or military law⁸⁴, and, we believe, does a disservice to the entire process. It would permit indefinite detention without charges, much less trial, a tack likely to be used when there is insufficient evidence to convict even by loose standards; and all without the possibility of judicial review. We do not believe that the full range of such procedures contemplated by the Order are necessary and, as a result, hope that the procedural regulations now being crafted do not take full advantage of the overbroad provisions of the Order.

Further, as a practical matter, such overbroad provisions may well hamper the very swiftness with which the government understandably seeks to act in this crisis. Given the constitutional and statutory questions about the validity of the Order with respect to persons placed in custody within the United States, the availability to them of habeas corpus proceedings (including the likelihood that the courts hearing the petitions will go on to determine the validity of the substantive characterization of defendants by the President as members of al Qaeda or another class of persons covered by the Order), and the likely appeals therefrom (notwithstanding the Order's attempt to close them off), it is probable that the Administration will not achieve the quick and final resolution of cases against alleged terrorists that it seeks. Indeed, the defects in the Order—unless they are corrected by the procedures to come or otherwise—make it particularly vulnerable to attack.⁸⁵

Further still, the Order suffers from a lack of a sunset mechanism. Examples of presidential use of military commissions—such as for the Lincoln assassins and the

⁸⁴ It has been argued widely that the use of commissions is necessary to ensure convictions which may not be obtainable in other for a. *See, e.g., Terrorists on Trial – II*, Wall Street Journal Review and Outlook, December 4, 2001: “As recently as 1996, the Clinton Administration rejected Sudan's offer to turn over Osama bin Laden because it didn't think it had enough evidence to convict him in a criminal court. A military tribunal would certainly have come in handy then.”

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

Quirin saboteurs—were pursuant to either one-time operations, as with the Lincoln assassination, or were issued with respect to a declared war that had a visible victory marker, *i.e.*, the defeat of the enemy nation, and thus a clear end date.⁸⁶ Here, in an undeclared war with the allies professing that the ‘new war on terrorism’ could last 50 years against an undefined enemy beyond al Qaeda⁸⁷, the almost total curtailment of liberties previously available to foreign nationals living in or visiting this country has no natural end in sight.⁸⁸

It is of utmost regret that the 9/11 crisis has led the executive branch to give the impression that it would deny as to any class of persons almost the entirety of the procedural rights that have characterized this Republic since 1789, apparently without any effort to find a workable alternative. Even if the Order is never used in practice, or if wiser heads prevail and it is used in a more reasonable manner than its language permits, the Order stands as an historic repudiation of the legal ideals on which the Nation was founded, potentially permitting a reversion to the worst practices of the Star Chamber, Inquisition and other notorious tribunals that put the interests of State or Church ahead of individual rights. Protestations that the Order is but “one tool available, and hasn’t been used yet”⁸⁹ ring hollow when matched with the Order’s stunning scope, exclusive jurisdiction and total absence of review.

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

⁸⁷ *See, War on Terror 'May Last 50 Years'*, BBCi, October 27, 2001, available at http://news.bbc.co.uk/1/hi/english/uk/newsid_1623000/1623036.stm, visited December 4, 2001.

⁸⁸ *See, Robinson O. Everett, Military Justice in the Armed Forces of the United States* (Military Service Publishing Co. 1956): “If an undeclared war suffices to permit trial of a spy by court-martial or by military commission, a subsidiary issue is when that jurisdiction comes to an end. Had there been a declared war, military jurisdiction would continue until there was some formal proclamation of peace.” *Id.*, at 30.

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

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

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

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

⁹¹ Rehnquist said:

The courts, for their part, have largely reserved the decisions favoring civil liberties in wartime to be handed down after the war was over. Again, we see the truth in the maxim *Inter Arma Silent Leges* -- time of war the laws are silent. To lawyers and judges, this may seem a thoroughly undesirable state of affairs, but in the greater scheme of things it may be best for all concerned. The fact that judges are loath to strike down wartime measures while the war is going on is demonstrated both by our experience in the Civil War and in World War II. This fact represents something more than some sort of patriotic hysteria that holds the judiciary in its grip; it has been felt and even embraced by members of the Supreme Court who have championed civil liberty in

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

Recommendations and Alternatives

Validating the Order

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

Directed certainly against the Taliban government of Afghanistan, conceivably the declaration of war could also include (but should not be limited to) those named international terrorist *organizations*, notably al Qaeda, to whom that enemy state gave aid and comfort and even vice-versa. President Jefferson, for example, was authorized by Congress in 1802 (following skirmishes with the Barbary pirates in the Mediterranean) “to cause to be done all such other acts of precaution or hostility as the state of war will justify, and, may, in his opinion require,” finding, in fact, that a “state of war now exists.”⁹³ Al Qaeda may be analogous to pirates of old⁹⁴. Such a Congressional

peacetime. Witness Justice Hugo Black: he wrote the opinion for the Court upholding the forced relocation of Japanese Americans in 1944, but he also wrote the Court's opinion striking down martial law in Hawaii two years later. While we would not want to subscribe to the full sweep of the Latin maxim -- Inter Arma Silent Leges -- in time of war the laws are silent, perhaps we can accept the proposition that though the laws are not silent in wartime, they speak with a muted voice.

Rehnquist Remarks, *supra*.

⁹² *Steel Seizure Case, supra*, at 635 (1952) (Jackson, J., concurring)

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

declaration would lay to rest legal concerns with respect to both the President's authority to establish military commissions in a time of undeclared war, since it would now be declared, and also to the status of those persons related to such enemy organizations, since an enemy will have been defined.

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

Alternatives to Military Commissions for Prosecution

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

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

A menu of alternatives is available to the national government to permit effective prosecution of alleged terrorists and their supporters found in the United States, and

⁹⁴ See, e.g., 33 U.S.C. §381: "The President is authorized to employ so many of the public armed vessels as in his judgment the service may require, with suitable instructions to the commanders thereof, in protecting the merchant vessels of the United States and their crews from piratical aggressions and depredations."

thereby avoid the substantive and procedural defects in the Order. The choices include trials in federal district courts, international tribunals, or even UCMJ courts martial. Each has its advantages and its disadvantages with respect to the goal of swift and fair prosecution within the rule of law.

Other goals which some commentators now suggest are paramount and thus argue for the practical use of commissions—e.g., the need to avoid the requirement that US troops in combat give Miranda warnings to captured al Qaeda or Taliban⁹⁵, courthouse, judge and juror protection, revelations of intelligence through open trials, the slow pace of trials, and the ability to admit into evidence under loose rules material that otherwise could not be admitted in federal District Court or even courts martial trials, such as hearsay—seem to us important but far less so (particularly since to a large extent they can be addressed) than the larger goal referred to above. One need only consider the impact on the development of international humanitarian law that the conduct and decisions of the Nuremberg Tribunal had—laying the ground work for the principle of individual responsibility for wrongful state acts—through its process of open trials, uniform procedures modeled primarily on the British and American systems and careful, written decisions to understand that while obtaining a guilty verdict is important, it is not all-important.

International Tribunals

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

⁹⁵ This is a particularly specious criticism, since there is no assertion that the Fifth Amendment applies in war to foreign combatants captured and tried abroad.

all likelihood, be the only courts to which certain countries would transfer defendants within their custody given the political and cultural realities.⁹⁶

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

The International Criminal Court ("ICC"), were it in effect, would be a likely tribunal for cases involving foreign defendants accused of violating either the international law of armed conflict or crimes against humanity.⁹⁷

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

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

Federal District Courts

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

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

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

However, the circumstances of the 9/11 attacks would admittedly present exceptional difficulties in administering a fair jury trial where hardly any American citizen has not been touched by the events in controversy. Further, despite established procedures to control confidential information,⁹⁹ such procedures relate primarily to pre-

⁹⁷ Rome Statute Of the International Criminal Court, July 17 1998, UN Doc.A/CONF.183/9* (1998) (opened for signature July 17, 1998).

⁹⁸ Harold Koh, *We Have the Right Courts for Bin Laden*, New York Times, November 23, 2001.

⁹⁹ See the Classified Information Procedures Act of 1980, 18 U.S.C. App §§1-16.

trial procedures and are not impenetrable for determined wrongdoers. Nonetheless, while we believe these impediments could be overcome for the purposes of providing the required civilian trials in U.S. District Courts, they are more difficult to overcome for purposes of providing a law of war trial of a foreign combatant.

Courts Martial Under the UCMJ

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

Military courts martial, as described above, combine an essentially non-jury trial in a secure environment—a naval vessel or military base—pursuant to established rules of procedure, evidence and appeal based on written records. The due process provided in these courts is genuine, despite the old adage about military justice and military music, even while the trial process is made more efficient than in civilian courts. A criminal trial in a court martial setting is far quicker than a comparable one in a federal District Court, and not only are there provisions for presenting secret material in camera, the setting on a protected military installation would make such information all the more secure¹⁰¹. In any case, a public trial—as was given even to the worst members of the

¹⁰⁰ Gonzales Op-Ed, *supra*.

¹⁰¹ The concern with respect to the issue that a civilian lawyer who is not cleared to see such information might be hampered in preparing a defense may be addressed either by the clearance of civilian counsel or by the provision of cleared military counsel in those cases where such sensitive material is required to be introduced. It is expected that the Association of the Bar of the City of New York will soon comment upon First Amendment concerns arising from the Order and the role of the media in proceedings thereunder.

Third Reich—is desirable to demonstrate both the fairness of our system and our confidence that using it is not a sign of weakness but of strength.

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

Military Commissions

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

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

It is recommended in any case that at the appropriate time—which we note is not during a period of national emergency and armed conflict—the Congress examine the use of military commissions for the purpose of clarifying statutory authority therefore. The various Articles of the UCMJ that contemplate commissions could be supplemented by

one which provides clear authority for their use and the circumstances in which the President may so establish them. Importantly, Congress could at that time provide the guidelines and framework for the ultimate procedures—e.g., standards of proof, nature of evidence—the President would issue as Commander-in-Chief for trials under such commissions.

In Summation

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

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

Moreover, UCMJ courts martial substantially meet the security needs that are most acute for the type of defendants likely to be apprehended abroad in a shooting war, including the foreign based command and control of al Qaeda. The domestic courts are, or can be made, sufficiently secure for the civilian type of defendants likely to be apprehended in the U.S. whether for committing acts of violence or for various supporting activities (*e.g.*, “harboring” or even stealing in order to raise cash) which are only questionably subject to the laws of war and in any case pose less severe security

issues. In order to avoid the uncertainty inherent in applying the traditional definitions of the laws of war to contemporary circumstances, Congress should consider enacting a statutory definition appropriate to these circumstances.

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

Committee on Military Affairs and Justice

*December , 2001
New York City, New York*

Stephen J. Shapiro, Chair*

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Appendix A

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

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

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

Section 1. Findings.

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

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

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

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

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

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary

emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy.

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

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

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

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

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

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

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

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

Sec. 3. Detention Authority of the Secretary of Defense. Any individual subject to this order shall be—

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

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

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

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

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

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including

orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

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

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

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

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

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law,

(A) the handling of, admission into evidence of, and access to materials and information, and

(B) the conduct, closure of, and access to proceedings;

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

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

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

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

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

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

(a) Nothing in this order shall be construed to—

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order—

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

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

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

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

Sec. 8. Publication.

This order shall be published in the Federal Register.

GEORGE W. BUSH
THE WHITE HOUSE,
November 13, 2001.

Appendix B

1942 Roosevelt Order

Proc. No. 2561, July 2, 1942, 7 F.R. 5101, 56 Stat. 1964

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

NOW, THEREFORE, I, Franklin D. Roosevelt, President of the United States of America and Commander in Chief of the Army and Navy of the United States, by virtue of the authority vested in me by the Constitution and the statutes of the United States, do hereby proclaim that all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States or any territory or possession thereof, through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States, or of its States, territories, and possessions, except under such regulations as the Attorney General, with the approval of the Secretary of War, may from time to time prescribe.

Appendix C

Congressional Resolution Authorization for Use of Military Force

*One Hundred Seventh Congress
of the United States of America*

AT THE FIRST SESSION

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

Joint Resolution

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

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

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

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

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

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

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

SECTION 1. SHORT TITLE.

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

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

(a) IN GENERAL- That the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

(b) War Powers Resolution Requirements-

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

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

Speaker of the House of Representatives.

Vice President of the United States and

President of the Senate.

Appendix D

USA Patriot Act of 2001 (in part)

Public Law No: 107-56, October 26, 2001.

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

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

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

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

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

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

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

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

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

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

`(6) LIMITATION ON INDEFINITE DETENTION- An alien detained solely under paragraph (1) who has not been removed under section 241(a)(1)(A), and whose removal is unlikely in the reasonably foreseeable future, may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person.

`(7) REVIEW OF CERTIFICATION- The Attorney General shall review the certification made under paragraph (3) every 6 months. If the Attorney General determines, in the Attorney General's discretion, that the certification should be revoked, the alien may be released on such conditions as the Attorney General deems appropriate, unless such release is otherwise prohibited by law. The alien may request each 6 months in writing that the Attorney General reconsider the certification and may submit documents or other evidence in support of that request.

`(b) HABEAS CORPUS AND JUDICIAL REVIEW-

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

`(2) APPLICATION-

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

`(i) the Supreme Court;

`(ii) any justice of the Supreme Court;

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

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

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

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

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

Appendix E

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

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

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

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

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

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

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

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