

Resolution on Military Commissions

Preamble: On September 11, 2001, terrorists attacked the Pentagon and the World Trade Center and crashed a civilian aircraft in western Pennsylvania causing massive numbers of deaths and injuries to United States citizens and citizens of other countries, and substantial destruction of property. In the wake of these attacks and continuing threats of terrorism, the President of the United States proclaimed a national emergency on September 14, 2001 and, on that date by resolution, Congress authorized the use of all necessary and appropriate force against those nations, organizations or persons that planned, authorized, committed or aided those terrorist attacks or harbored such persons or organizations.

The September 11 terrorist attacks resulted in several U.S. Government initiatives to combat terrorism. On November 13, 2001, the President issued a military order providing for the detention, treatment and trial by military commission of certain non-citizens as part of this nation's war against terrorism (the "November 13th Order"), followed by the Secretary of Defense's issuance on March 21, 2002 of regulations purporting to insure "a full and fair trial" by military commissions that may be convened pursuant to the November 13th Order. The Order and regulations raise important constitutional, legal and policy issues, particularly involving the separation of powers and due process.

In times of national emergency and war, it is especially challenging to maintain the rule of law and the delicate constitutional balance of protecting national security and civil liberties while giving high regard to both.

Article I of the United States Constitution confers upon Congress, and not the President, the powers to "constitute Tribunals inferior to the Supreme Court" (Clause 9), to "define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations" (Clause 10), to "repel Invasions" (Clause 15), and to "make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers" (Cause 18).

As of the date of this resolution, no military commission has been convened or announced for the trial of an individual who the President or the Secretary of Defense has determined is subject to prosecution under the Order, and no such individual has been so identified publicly.

It is appropriate for the members of the New York State Bar Association, as both citizens and lawyers, to study and comment upon the constitutional, legal and policy issues raised by the anticipated use of military commissions, and for this Association to adopt, publish and distribute those comments.

Resolution: On June 22, 2002, the House of Delegates of the New York Bar Association adopted the following resolution, urging and recommending the following:

1. Military commissions should be convened under the November 13th Order only in narrow

circumstances, that is, where: (a) there are compelling national security interests to use such a tribunal rather than existing Article III or state courts; (b) the persons to be tried are accused of taking actions that violate the law of war or were involved in the September 11th terrorist attacks; (c) the persons to be tried are non-citizens apprehended and appropriately detained outside the United States; and (d) the trials take place outside the United States.

2. Any military commission convened under the November 13th Order should afford due process at a minimum matching that provided in the Uniform Code of Military Justice, and should apply the rules of evidence applicable under that Code. Procedures governing military commissions should provide for habeas corpus relief and the right of appeal, including by writ of certiorari, to the United States Supreme Court.

3. The Congress of the United States should take immediate steps to consider the extent to which military commissions should be convened, and/or special courts should be created under Article I of the United States Constitution, for any other purpose relating to defense against terrorism.