NEW YORK STATE BAR ASSOCIATION
COORDINATING COMMITTEE ON
FEDERAL ANTI-TERRORISM MEASURES

REPORT ON MILITARY COMMISSIONS

PERTINENT BACKGROUND

On September 11, 2001 terrorists using hijacked passenger aircraft as deadly missiles attacked the World Trade Center in New York City, and the Pentagon in Washington, D.C. and crashed into the Pennsylvania countryside More than 3,000 civilians were killed in these incidents. The unprecedented terrorist attacks on the United States have brought vast changes to our nation, our world and to each of us personally. Suddenly, the nation confronted firsthand the terrible destruction of human life and property that can be caused by a group of terrorists who lived among us, enjoyed our constitutional freedoms but used those very freedoms to escape detection and hide their evil plans.

While much has changed in the wake of the September 11th attacks, not everything has changed. Our national response to the September 11th attacks, and to global terrorism generally, must not give the perpetrators of these vicious crimes against humanity victory in the form of our reduced commitment to the rule of law. The attackers' hatred of our freedoms must not cause us to lose our faith and trust in the sanctity of human rights and civil liberties on which our nation was founded. The choice this nation confronts in the current war against terrorism is not between protecting liberty and preserving national security. Both objectives must be accomplished simultaneously. Liberty would be meaningless without security from both terrorist attacks and governmental abuse of civil rights.

This challenge can be met only if the structure of our government constituting the separation of powers works properly, if there is a genuine commitment by all three branches – the President, Congress and the courts -- to the rule of law during a wartime emergency, and if

there is a careful weighing and balancing of competing interests in preserving constitutional liberties while protecting national security.

This nation has faced the same challenge to a greater or lesser degree throughout its history. President John Adams enforced the Alien and Sedition Acts during the quasi-war with France in the 1790s. President Abraham Lincoln suspended the writ of habeas corpus during the Civil War. President Woodrow Wilson rounded up resistors to the draft in World War I, and his Attorney General engaged in the infamous "Palmer raids" against suspected communists and anarchists. President Franklin D. Roosevelt ordered the detention of more than 70,000 Japanese Americans in internment camps during the Second World War. These examples of Presidential wartime initiatives, bolstered on some occasions by the active or passive support of Congress and decisions of the Supreme Court of the United States, such as in *Korematsu v. United States*, 323 U.S. 214 (1944), however, do not provide assurance that the challenge of preserving constitutional liberties while protecting national security will be met wisely or without "sacrificing our constitutional principles on the altar of public safety."[1]

Before September 11, these Presidential wartime initiatives were not viewed with pride by many of our nation's legal scholars and lawyers. They were not considered to be our nation's "finest hour" or decisions we would want to repeat if the occasion arose. Our constitution is neither a "suicide pact"[2] nor a chameleon when confronting the difficult challenges that wartime emergencies present. Wars must be fought not only abroad against our nation's enemies but also at home when emergency conditions challenge our commitment to preserving constitutional liberties while maintaining the rule of law.

A. The November 13th Order

On September 20, President Bush addressed Congress and the nation and promised that the perpetrators of the September 11th terrorist attacks would be brought to justice or justice would be brought to them.[3] But exactly what form would this American meting out of justice take? On November 13, 2001, President Bush provided part of the answer when he issued a Military Order directing the Department of Defense to establish military commissions to determine the guilt or innocence of certain non-citizens suspected of involvement in the September 11th attacks and other terrorist activities (the November 13th Order).[4]

The November 13th Order was issued under extraordinary circumstances. A state of national emergency was declared following the September 11th terrorist attacks. Several intentionally inflicted cases of anthrax infection were reported in Washington, D.C. and in Florida, New Jersey, Connecticut and New York whose source was and remains unknown. Armed conflict began in Afghanistan against al Qaeda and Taliban military forces. There was also an intelligence alert in October 2001 that terrorists were believed to have obtained a 10-kiloton nuclear weapon from the Russian arsenal and planned to smuggle it into and detonate it in New York City. The national government was apparently so certain of future terrorist attacks that it assigned 100 civilian government officials to 24-hour rotations in underground bunkers as part of a "shadow government" ready to operate in the event the government in Washington, DC was destroyed or disabled.[5]

The President did not act alone in responding to the September 11th attacks. By Joint Resolution on September 14, Congress authorized the use of all necessary and appropriate force against those nations, organizations or persons that planned, authorized, committed or aided those terrorist acts or harbored such persons or organizations.[6] Congress also passed the

USA Patriot Act which, among other things, greatly expanded the wiretapping and surveillance powers of federal law enforcement.

B. The March 21, 2002 Secretary of Defense Rules and Regulations

The President indicated in the November 13th Order that the Department of Defense would issue rules and regulations governing the "full and fair" trial to be conducted by military commissions. Secretary of Defense Donald Rumsfeld described the November 13th Order as an "option" the Government may "need," and that it was a "blueprint made public so that . . . work would begin" in earnest to define jurisdiction and determine appropriate procedures. On March 21, 2002 Secretary Rumsfeld announced the rules and procedures for the conduct of military commissions.[7]

C. Who, if Anyone, is to be Tried by Military Commission Under The November 13th Order?

As of today, no military commission has been convened or scheduled. Moreover, no individual has been identified publicly as subject to trial before military commission. Several identified terrorists would appear at first blush to be candidates for trial before a military commission according to the terms of the November 13th Order. Yet, in each case, the Government has chosen to try them in federal court. Zacarias Moussaoui, a non-U.S. citizen suspected of planning and involvement in the September 11th terrorist attacks, the so-called "twentieth hijacker," apprehended in Minnesota, will be tried in the United States District Court in Alexandria, Virginia. Richard Reid, the non-U.S. citizen accused of attempting to blow up a civilian airliner with explosives packed in his sneakers, who was apprehended in Boston, will also be tried in the same court.

The possible subjects of trial before a military commission appear to be the approximately 500 captured members of al Qaeda and the Taliban military apprehended in Afghanistan and brought to and being detained at the U.S. Naval Base at Guantanamo Bay, Cuba. This location was chosen not only because it allows for tight security of the detainees but also because it is outside the jurisdiction of any United State court. There are reports that interrogations of these detainees have not produced sufficient evidence to proceed to trial or, indeed, helpful intelligence in the war on terrorism. There are also reports that the Department of Defense is looking into whether membership in or support of al Qaeda could be an offense tried before a military commission. Secretary Rumsfeld has said that the United States wants to conduct as few military commissions as possible and to reserve the process for the most senior al Qaeda and Taliban leaders. In short, the use of military commission under the November 13th Order appears to be an "option" in the war on terrorism, as Secretary Rumsfeld described it, that may not be used in the near future or indeed, at all.

D. Scope of Report

Accordingly, now, before any military commission is convened, is an appropriate time to consider and comment upon the important constitutional issues raised by the November 13th Order. This report will cover only the "trial" provisions of the November 13th Order. It does not address the separate and distinct constitutional, legal and policy issues raised by the indefinite detention and treatment of persons who may be subject to the November 13th Order. No determinations have been made as to status of the detainees, such as whether they are "unlawful combatants" or "prisoners of war," or with respect to the duration of the "hostilities" triggering detention or in what forum these decisions will be made.

Military Commissions

Military commissions have been used throughout the nation's history to try persons not otherwise subject to military law for violations of the law of war or for offenses committed in territory under military occupation. The law of war or law of armed conflict, as currently defined by the Department of Defense, includes that "part of international law that regulates the conduct of armed hostilities ... including treaties and international agreements to which the United States is a party, and applicable customary international law. It prohibits war crimes and crimes against humanity, including the killing of noncombatant civilians, the execution, torture or mistreatment of prisoners of war, and aiding or harboring the enemy.[8]

Beginning with the trial of the spy, John Andre, that was ordered by General George Washington and continuing throughout the Revolutionary War, the Mexican War the Civil War (including the Lincoln assassination conspirators), the First World War and especially during and after the Second World War, military commissions have been convened to try individuals for violations of the law of war. Indeed, more than 1600 persons were tried in Germany and more than a thousand were tried in the Far East. Military commissions have been described by the Supreme Court as "our common-law war courts" and "constitutionally recognized agencies for meeting many urgent government responsibilities relating to war."[9]

Constitutional authority for military commissions can be found in Congress' Article I and the President's Article II powers. The President has convened military commissions pursuant to his powers as Commander-in-Chief and Chief Executive. Congress' powers with respect to military commissions include: "To…. Provide for the common Defense" (clause 1); "To constitute tribunals inferior to the Supreme Court," "To Define and Punish Piracies on the High Seas, and Offenses Against the Law of Nations;" "To Declare War, Grant

Letters of Marquee and Reprisal, and Make Rules Concerning Captures on Land and Water;" "To Raise and Support Armies…..;" "To Provide and Maintain a Navy;" "To Make Rules for the Government and Regulation of Land and Naval Forces" (clause 9-14).

Congress has specifically granted jurisdiction to military commissions in Article 21 of the Uniform Code of Military Justice ("UCMJ")[10] to try offenses and offenders under the law of war. Further, Congress has expressly authorized the President in Article 106 of the UCMJ to try anyone acting as a spy before a military commission.[11] Article 104 of UCMJ authorizes trial by military commissions of: "…any person who aids, or attempts to aid, the enemy with ammunition, supplies, money or other things; or without proper authority, knowingly harbors or protects of gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, directly or indirectly."[12]

The rules and procedures governing the operation of military commissions throughout history have generally followed those used in court-martials. Article 36 of the UCMJ requires that procedures in court martials and military commissions "may not be contrary to or inconsistent with this chapter."[13] Paragraph 2(b)(2) of the *Preamble* to the *Manual for Courts-Martial* (2000) states that military commissions shall be "guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial."[14] However, there is a caveat in the UCMJ. Such guidance is "subject to any applicable rule of international law or to any regulations prescribed by the President or any other competent authority."[15] In the November 13th Order and the Secretary of Defense's Rules, the Executive branch has determined that not all UCMJ rules and procedures ordinarily applied in court-martials will govern in military commissions.

Furthermore, the Supreme Court has emphasized that civilians and particularly U.S. citizens are not ordinarily subject to military justice and must be tried for federal crimes in United States courts if they are operating. In the landmark case of *Ex parte Milligan*, 71 U.S. 2 (1866), decided shortly after the end of the Civil War, and involving the trial of a citizen who was "a non-belligerent," and not "subject to the law of war," the Supreme Court held that military justice "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[16]

However, there are exceptions to the holding in Milligan. The Supreme Court has consistently upheld the jurisdiction of military commissions to try individuals accused of war crimes, spying or aiding the enemy. In *Ex Parte Quirin,* 317 U.S. 1 (1942), the Court affirmed the jurisdiction of a military commission ordered by President Roosevelt to try eight saboteurs trained in Nazi Germany who had entered the United States surreptitiously in Long Island, New York and Jacksonville, Florida with the intention of blowing up manufacturing plants, railroads, industrial plants and utilities. The defendants were captured, held and tried in the United States, and six of the eight were executed following trial before the military commission who found them guilty of violations of the law or war on behalf of a hostile foreign power. One defendant claimed to be a United States citizen. All were classified as unlawful belligerents who were not entitled to prisoner of war status.[17]

In *Application of Yamashita*, 327 U.S. 1 (1946), the Court upheld the jurisdiction of a military commission to try General Tomoyuki Yamashita for war crimes committed by members of his command against U.S. personnel, in the Philippines during World War II. The Supreme Court emphasized that the "trial and punishment of enemy combatants who have committed violations of the Law of War is thus not only part of the conduct of war operating as

preventative measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the Law of War."[18]

Following its decision in *Quirin*, the Supreme Court re-emphasized that "the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language of Art. I, §§ 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law."[19] The Court further warned that "[e]very extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections."[20]

Analysis of The November 13th Order
And
The Secretary of Defense's Rules and Regulations

The November 13th Order applies to all non-citizens determined by the President: (1) to be members of the international organization known as al Qaeda; 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 persons. Such individuals are to be "detained at an appropriate location designated by the Secretary of Defense outside or within the United States." Whether detained or tried under the Order, these individuals are not permitted under its terms to seek "any remedy" or "maintain any proceeding" in any U.S. federal or state court, any foreign court or any international tribunal. There is no time period set forth in the November 13th Order with respect to detention; nor is there any sunset provision for the Order itself. The Order authorizes the creation of military commissions to try such persons, when and if they are to be subject to prosecution.[21]

A. Threshold Considerations

In deciding to issue the November 13th Order, the President confronted unchartered waters with some but not many navigational aids. Congress had not declared war. The individuals apparently responsible for the September 11th attacks, members of al Qaeda, appear to be civilians without explicit support by a foreign government although they trained in and were given financial and other support by the Taliban regime in Afganistan. The acts committed by the terrorists were certainly criminal, but it is arguable whether they were also war

crimes or violations of the law of war. In the past the United States had treated individuals accused of terrorism, such as the perpetrators of the 1993 World Trade Center bombing and the 1998 Kenyan and Tanzanian bombings, as civilians and had subjected them to trial in federal courts with the full panoply of due process rights provided by the Constitution.

Some of these challenges were easily addressed; others raise difficult and complicated issues of constitutional and international law. First, the September 11th attacks involved the deliberate kidnapping and killing of noncombatant civilians and, thus, were certainly violations of law of war as defined in Common Article 3 of the Geneva Convention of 1949. Second, the law of war applies to individual actors who may not be associated with a state, such as rebel groups or insurgents within a state. Third, a credible argument can be made that the terrorists planning and conducting the September 11th attacks were "unlawful belligerents," in that they failed to satisfy any of the requirements for being treated as "lawful combatants," such as wearing a uniform or other "fixed emblem recognizable at a distance or carrying their arms openly.[22] Unlawful belligerency is itself a war crime. Fourth, there is a sufficient level of armed hostilities between the United States military forces and those of the Taliban government members of al Qaeda in Afghanistan to satisfy the requirements under international law and the Constitution that a state of war exists.

B. Separation of Powers Issues

In the November 13th Order the President created an alternative system of justice within which to prosecute and try suspected terrorists. In this new system of justice, the Executive Branch defines the offenses, apprehends and tries the suspects and serves as the exclusive source of appellate relief. Congress has not been involved at any step in the process – whether in authorizing military commissions or commenting upon the rules and regulations for

their conduct. Congress, however, has exclusive authority under the Constitution, to declare war and commit armed forces to hostilities, to create courts inferior to the Supreme Court and to define and punish "offenses against the law of Nations," which include violations of the law of war.

1. The President's Authority As Commander-In-Chief To Establish Military Commissions

President Bush based his November 13th Order on three sources of authority:

1. The President's Authority as Commander-in-Chief of the Annual Forces;

2. The Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stal. 224); and

3. Sections 821 and 836 of Title 10, United States Code (Uniform Code of Military Justice).[23]

In evaluating President Bush's claim to authority to create military commissions, some commentators have emphasized that there is no formal declaration of war by Congress against al Qaeda or global terrorists in general, and that this important omission means that the November 13th Order violates the doctrine of separation of powers. Moreover, according to these critics, this omission undermines the precedential authority of *Quirin* and *Yamashita* where there was a formal declaration of war.[24] These critics point out that in *Quirin* the Supreme Court recognized that it was "unnecessary for present purposes to determine to what extent the President as Commander-in-Chief has constitutional power to create military commissions without the support of congressional legislation. For here Congress has authorized trial of offenses against the Law of War before such commissions."[25]

The scope of the President's power to act alone with respect to military commission has not been well developed in the case law. However, the President's inherent

power as Commander-in-Chief, especially in times of national crisis or war, can reasonably be interpreted to include the power to create military commissions to try those accused of violations of the law of war. In this regard, military tribunals have been used in armed conflicts that were not formally declared wars, such as The Indian Wars, the Mexican War and the Civil War.[26] Moreover, as the Supreme Court recognized in *Quirin*: "An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the Law of War."[27]

The issue of the President's inherent power as Commander-in-Chief to convene military commissions to try enemy combatants for violations of the law of war, while probably supportable as a matter of constitutional law, need not be resolved because the President has been joined in the exercise of his war powers here by Congress by virtue of the Joint Resolution. Congress' grant of authority to the President to use "all necessary and appropriate force" includes the authority to implement Article 21 of the UCMJ (which does not require a declaration of war) for violations of the law of war related to the September 11th attacks. Furthermore, both the Supreme Court and Congress have recognized that a state of war can exist without a formal declaration of war by Congress.[28] In this regard, Congress, despite the requirement for explicit approval of the use of U.S. armed forces in cases of imminent hostilities under the War Powers Resolution of 1973, has felt constitutionally comfortable with resolutions rather than formal declarations of war. Even during the Persian Gulf War, Congress used a resolution authorizing military action rather than declare war. Here, the Joint Resolution stated that it was "intended to constitute specific statutory authorization within the meaning of Section 5(h) of the War Powers Resolution."[29] While the Joint Resolution said nothing about the right to

convene military commissions or forums and procedures with which to deal with enemy combatants, such a right in emergency circumstances or *de facto* wartime conditions is implicit in the authorization of the use of military force itself.

2. Other Limitations On the President's Right to Convene Military Commissions <u>Without Specific Congressional Authorization.</u>

The November 13th Order extends well beyond the authorization given by Congress. The Joint Resolution's authorization was limited to those persons involved in the September 11th terrorist attacks. The text of the November 13th Order, however, reaches not only members of the organization known as al Qaeda, claimed to be responsible for planning, funding and executing the September 11th attacks, but also individuals complicit in "acts of international terrorism" or who have "harbored" such persons. Thus, according to the November 13th Order, an IRA or Hamas supporter or member of any other recognized terrorist group could possibly be subject to this Order. There is no indication that Congress would permit this extension of the authority given in the Joint Resolution. In order to try individuals accused of terrorist acts which were not part of the September 11th attacks before a military commission, specific congressional authorization would appear to be required.

The November 13th Order fails to set forth a definition of "international terrorism." Moreover, there does not appear to be a recognized definition of what acts would be included within the term "international terrorism." Thus, the Order provides no limitations regarding the acts that may be covered. For example, mere membership in al Qaeda or aiding of al Qaeda by funding its operations or harboring them are not violations of the law of war. This is a threshold problem of definition that must be corrected by Congress if the Order is to have any effect.

While military commissions may constitute a proper forum for the trial of violations by the law of war, the Order also purports to include violations by terrorists of all "other applicable laws." On its face, this language reaches potential state and federal crimes that are not violations of the law of war as well as being beyond the scope of the authority granted by Congress in the Joint Resolution. Specific authority from Congress is needed to make specific acts of terrorism violations of the law of war rather than federal and state crimes.

Finally, a reasonable reading of the November 13th Order allows potential prosecution of resident aliens (legal or illegal) who are accused of involvement in the September 11th attacks or international terrorism. Resident aliens, however, are generally entitled to all of the due process protections as citizens, and, thus, subjecting them to trial by military commission would appear to require specific congressional authority beyond the Joint Resolution. The one possible exception would appear to be a resident alien determined to be an "unlawful belligerent" involved in committing an act of war within the United States who, under *Quirin*, could be subject to trial by military commission.

C. The Secretary of Defense's Rules and Regulations for the Conduct of Military Commissions

On March 21 Defense Secretary Rumsfeld announced that suspected terrorists have the right at military commissions: (1) to the presumption of innocence; (2) to choose counsel and to see the prosecution's evidence; (3) to trial in public though classified information will be kept secret; and (4) to remain silent with no adverse inference to be drawn. Prosecutors will be required to prove guilt beyond a reasonable doubt. There will be no double jeopardy. There is no jury; instead, there is a panel of military judges (three to seven members) who can convict on only two-thirds majority but must be unanimous in any decision imposing the death

penalty. Verdicts and sentences are not final until they are approved by the President and the Secretary of Defense. A verdict of not guilty shall not be changed.

Any appeal will be to a panel of three judges appointed to or by the military. The appellate panel reviews the military commission's findings. It may approve and forward a ruling to the Secretary of Defense or send the matter back to the military commission's appointing authority for further action. The appellate panel is limited to reviewing issues of fact and law in accordance with the military commission's rules. Finally, hearsay will be accepted as evidence, and the rules of evidence are liberalized to the extent that evidence which has "probative value to a reasonable person" is admissible.[30]

The Secretary of Defense's announced rules and regulations appear to have alleviated the concerns of many critics of military commissions with respect to the fairness of the proceedings. The rules and regulations, to be sure, do provide many of the rights to the accused that have come to be thought of as comprising fundamental fairness. In this regard, the rules and regulations compare favorably to those afforded in courts-martial conducted under the UCMJ and required by the International Convention Civil and Political Rights (ICCPR) to which the United States acceded on June 8, 1992. The UCMJ addresses trials of war crimes. The ICCPR does not expressly apply to trials of war crimes or military commissions. However, the ICCPR has been taken into account in war crimes prosecutions conducted by United Nations' special tribunals in the Former Yugoslavia and Rwanda.

There are several rights, however, that are missing from the Defense Secretary's list. The first is the right to habeas corpus relief. This right would allow persons tried before a military commission to challenge the constitutionality of the November 13th Order and the power

of the military commission to try the petitioner for the offense charged, but not the guilt or innocence of the accused which is left to the military authorities alone to review. The November 13th Order precludes any remedy or proceedings by or on behalf of persons subject to the Order "in any court of the United States." The apparent objective of such language is to eliminate habeas corpus review by persons subject to the order. However, under the Constitution, only the Congress, not the President, can suspend the writ of habeas corpus.[31]

In any event, in *Quirin* the Supreme Court held that *habeas* relief cannot be denied to those tried by military commission. Interpreting language virtually identical to the November 13th Order, the Supreme Court held there was a right to judicial review "for determining [President Roosevelt's Order's] applicability to the particular case" and "petitioners' contentions that ... laws of the United States constitutionally enacted forbid their trial by military commission."[32] The military commission in *Quirin* was conducted in Washington, D.C. and, unlike the al Qaeda and Taliban detainees at the U.S. Naval Base at Guantanamo, Cuba, the German saboteurs had access to federal courts. The Guantanamo Bay Naval Base is leased indefinitely to the United States but remains Cuban territory.[33] Captured enemy belligerents who are not held on the sovereign territory of the United States cannot petition for habeas corpus relief.[34]

Another right missing from the Defense Secretary's list is the right to an appeal on the merits of the military commission's rulings to an independent body. Under the Defense Secretary's rules, the appeal permitted is only to a Review Panel (of three military officers, although a civilian may be appointed to this panel). No review by civilians outside the military system is permitted, including review by the Supreme Court through a writ of certiorari. By way of contrast, the UCMJ provides for review by the Court of Appeals for the Armed Forces and by

the Supreme Court through a writ of certiorari.[35] The ICCPR also requires that "[e]veryone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law." However, there is no specific requirement that appeals be permitted to the civilian court system.

Finally, it is unclear what the right to an open or public trial means under the November 13th Order. The Defense Secretary's rules permit him or the presiding officer of the military commission to close the proceedings to the public or the press when either determines it is necessary to safeguard classified information and sources or to protect the safety of the military judges, prosecutors or prospective witnesses. Rule 806 of the Rules for Courts-Martial, however, recognizes that opening proceedings to "public scrutiny reduces the chance of arbitrary or capricious decisions and enhances public confidence." Thus, there is legitimate concern about the possibility that arbitrary and capricious decisions may result from closed trials before the military commissions. Indeed, the scenario that most concerns the critics of military commissions is that military defense counsel might be forced to keep certain information secret from his client and civilian co-counsel at the request of the government and that information leads to the conviction of the suspect who is then sentenced to death. In this regard, classified information and sources have been discussed and adequately protected under the Classified Information Procedures Act in federal court where criminal trials of terrorists have been conducted as well as in other military trials.

The foregoing rights that are missing from the Defense Secretary's list are important components of due process and the fundamental fairness afforded members of the U.S. military under the UCMJ. The Geneva Convention adopted in 1949 (seven years after the

discussion in *Quirin*) requires that the same due process rights guaranteed to U.S. soldiers tried in military counts be accorded to accused standing trial before military courts.

SUMMARY AND RECOMMENDATIONS

The issuance of the November 13th Order unleashed a firestorm of criticism both here and abroad. Some criticism claims that use of military commissions is inconsistent with this nation's commitment to civil rights and civil liberties and that the Government appears to be looking for a judicial vehicle it controls so that certain and quick convictions can be achieved. Other critics emphasize that there is no need for military commissions because civilian courts have amply demonstrated that they can successfully try terrorists while protecting confidential intelligence sources and information and preserve the security of judge and jury. Still other critics have asserted that the international policy interests are implicated and there is a certain hypocrisy in the United States' reliance upon military commissions after having objected to other nation's use of military tribunals to try its own and U.S. citizens. Finally, some critics opine that the establishment of military tribunals may interfere with the international effort to wage the war on global terrorism.

Some of the criticism of the proposed military commissions is unfair, and much of it involves issues on which reasonable minds can differ. However, some of the criticism is fair because the November 13th Order has several significant flaws, particularly the absence of specific congressional authorization and its overbreath in terms of the persons and offenses to be tried. The core of the November 13th Order – the President's convening of military commissions under *de facto* wartime emergency conditions to try non-citizens outside the United States for alleged violations of the law of war – is a valid exercise of his constitutional war powers as Commander in Chief and Chief Executive that finds ample support in case law and historical tradition. With respect to the remainder of the November 13th Order, however, it runs afoul of

the separation of powers, and specific Congressional authorization is required before it should be implemented.

We therefore recommend that: 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 suspected or 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. We further recommend that: 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 the defense against terrorism.

Furthermore, the Secretary of Defense's rules and regulations for a "full and fair" trial before a military commission go a long way, but not the entire way, towards achieving the fundamental fairness required in connection with such trials. The principal shortcomings in these rules and procedures, particularly the absence of adequate appellate review and protection of the right to habeas corpus relief, can and should be corrected by Congress (or by the President or Secretary of Defense). At a minimum, the rules of procedures and evidence of the Uniform Code of Military Justice and the Manual for Courts Martial and the rights to habeas corpus

relief and appeal, including by writ of certiorari to the United States Supreme Court, should be made applicable to trials before a military commission.

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Chair

June 12, 2002

[1] Testimony of Professor Laurence H. Tribe before U.S. Senate Judiciary Committee, December 2, 2001, at p. 2.

[2] *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 159-60 (1963).
[3] President George W. Bush Address to Joint Session of Congress, September 20, 2001.

[4] The November 13th Order concerns the "Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism." A copy appears in Appendix A.

[5] "Can We Stop the Next Attack," *Time*, March 3, 2002, at 3.

[6] Congressional Resolution Authorization for Use of Military Force, September 14, 2001. A copy appears in Appendix B.
[7] Department of Defense Military Commission Order No. 1, March 21, 2002. A copy of the "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism" appears in Appendix C.
[8] Department of Defense Directive Number 5100.77, December 9, 1998.
[9] *Madsen v. Kinsella*, 343 U.S.(1952).
[10] 10 U.S.C. § 821.
[11] 10 U.S.C. § 836.
[12] 10 U.S.C. § 834.
[13] 10 U.S.C. § 836.
[14] *Manual for Courts-Martial* (2000).
[15] 10 U.S.C. § 836.
[16] 71 U.S. at 121.
[17] 317 U.S. at 37.
[18] 327 U.S. at 11.
[19] *Reid v. Covert*, 354 U.S. 1, 21 (1952).
[20] *Id*.
[21] See Appendix A.
[22] *See* Convention (No. IV) Respecting the Laws and Customs of War on Land, with Annex of Regulations, Oct. 18, 1907, Annex, art. 1, 36 Stat. 2277 T.S. No. 539 (Jan. 26, 1910) (the "Hague Convention").
[23] See Appendix A.
[24] See generally *ABA Task Force on Terrorism and the Law: Report and Recommendations on Military Commissions,* January 4, 2002; *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,* Committee on Military Affairs and Justice of the Association of the Bar of the City of New York, December, 2001.
[25] 317 U.S. at 26.
[26] See Major General Michael J. Nardotti, Jr., U.S. Army, "Military Commissions," *The Army Lawyer*, March 2002.
[27] 317 U.S. at 27.
[28] *See, e.g., Bas v. Tingy,* 4 U.S. 37, 43 (1800); *Talbot v. Seeman*, 5 U.S. 1, 28 (1801); *The Pedro*, 175 U.S. 354, 363 (1899).
[29] See Appendix B.
[30] See Appendix C.
[31] U.S. Constitution, Art. I, Section 9, clause 2.
[32] 317 U.S. at 24-25
[33] Lease to the United States of Lands in Cuba for Coaling and Naval Stations, Feb. 16-23, 1903, U.S.-Cuba, T.S. No. 418.
[34] Johnson v. Eisentrager, 339 U.S. 763 (1950). See Coalition of Clergy v. Bush, 2002 U.S. Dist. Lexis 2748, 29-40 (C.D. Cal. Feb. 21, 2002).
[35] 10 U.S.C. §867a, 28 U.S.C. § 1259.