
THE USE OF MILITARY COMMISSIONS IN THE WAR ON TERROR

David B. Rivkin, Jr. & Lee A. Casey

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INTRODUCTION

President Bush’s decision to establish military commissions was one of his most controversial responses to the terror attacks on September 11, 2001. The President was, however, well within his constitutional and statutory authority when he issued his Military Order of November 13, 2001 (hereinafter “November 13, 2001, Order”).¹ Military commissions have, in fact, been an integral part of the American legal tradition since the War for Independence.² These tribunals developed as part of the common law of war.³ They were recognized statutorily by Congress in the Articles of War in provisions that remain part of the Uniform Code of Military Justice (“UCMJ”).⁴ The Supreme Court has consistently upheld the use of such commissions to try captured enemy combatants for violations of the laws of war, including their use in the war on terror.⁵

Notwithstanding these facts, U.S. policy critics reject the use of military commissions in the war on terror. It is doubtless that some of these critics simply remain unfamiliar with the institution. For others, however, opposition appears to be part of a much deeper hostility to the exercise of executive power without the immediate and continuing supervision of the civilian courts and an opposition to military justice more generally. In

¹ Military Order of Nov. 13, 2001, 3 C.F.R. 918 (2002).

² *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

³ See *Madsen v. Kinsella*, 343 U.S. 341, 346-48 (1952) (referring to military commissions as “our common-law war courts”).

⁴ 10 U.S.C. §§ 821, 836 (2000).

⁵ See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749 (2006); *Ex parte Quirin*, 317 U.S. 1.

either case, the principal objections to the use of military commissions are ill-founded. This is especially true of claims that the organization and processes of these tribunals are either fundamentally unfair or unprecedented.

The military commissions established pursuant to the President's November 13, 2001, Order do not provide defendants with the same protections guaranteed to civilians in ordinary federal or state courts. The recently established military commissions do, however, provide a standard of due process that compares very favorably with the last major utilization of military commissions in the aftermath of World War II.⁶ Moreover, the rules of procedure and rights guaranteed to the accused in these military commissions are comparable to those of the principal international criminal tribunals established after the Cold War, including the International Criminal Court ("ICC") and the ad hoc United Nations International Criminal Tribunals for the Former Yugoslavia ("ICTY") and Rwanda ("ICTR").

The most common objections to the President's decision to try certain captured enemy combatants by military commission can be summarized as follows: (1) such tribunals are not regularly established courts; (2) they are not impartial (especially in view of their military character); (3) their rules of evidence are less stringent than those applicable in the United States District Courts under the Federal Rules of Evidence; (4) their proceedings can be held in secret; and (5) their decisions cannot be appealed to the civilian court system. (Congress specifically addressed the appeal issue by passing legislation that permits certain appeals to the United States Court of Appeals for the District of Columbia Circuit.)⁷ None of these objections have merit.⁸

⁶ From an international law perspective, the processes established by post-World War II military commissions are important because the military commissions involved a number of the great powers attempting to act legally and legitimately in circumstances where they clearly recognized some basic legal obligation to do so. In other words, the general rules to be drawn from the post-war military commissions have a good claim to carry the *opinio juris* necessary to a conclusion that the victorious nations were following what they considered to be customary international law.

⁷ Detainee Treatment Act, Pub. L. No. 109-148, 119 Stat. 2739-44 (2005).

⁸ In *Hamdan*, 126 S. Ct. at 2790-91, the Supreme Court concluded that the military commissions established under the President's November 13, 2001, Order were not "regularly established," but only because their rules differed from those applicable in regular courts-martial and because such differences had not been justified by presidential findings of impracticability under 10 U.S.C. § 836(b).

A. *Military Commissions are Regularly Constituted and Impartial Tribunals*

Under the Geneva Conventions of August 12, 1949, (to which the United States is a party but which are largely inapplicable to al Qaeda) and the 1977 Protocol I Additional to the Geneva Conventions (to which the United States is not a party but which may, at least with respect to the requirement of a regularly constituted court, establish binding customary norms), captured enemies can only be tried by “regularly” constituted and impartial courts.⁹ Neither the 1949 Geneva Conventions nor Protocol I Additional define “regularly constituted.” The relevant commentary by the International Committee of the Red Cross (“ICRC”) suggests, however, that the phrase was used simply to negate the possibility of “summary justice.”¹⁰ Significantly, the commentary goes on to note that nothing in this provision prevents “a person presumed to be guilty from being arrested and so placed in a position where he can do no fur-

⁹ See Geneva Convention Relative to the Treatment of Prisoners of War arts. 3, 84, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]; Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 75, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I Additional]. Article 75 of the Protocol I Additional, of course, binds the United States only to the extent that its requirements essentially restate otherwise applicable customary international law. For purposes of this article, we assume, at least with respect to the requirement of an “impartial and regularly constituted court,” that Protocol I Additional does reflect customary norms. Based on the state practice to be drawn from the Allied military commissions convened at the end of World War II, we believe that this is certainly the better view.

¹⁰ See INT’L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 40 (J. Pictet ed. 1960) [hereinafter ICRC COMMENTARY ON GENEVA CONVENTION III]. This is hardly surprising because the Allies tried and punished the use of summary military punishments, including the death penalty, as a war crime. In particular, William Keitel, commander-in-chief of the German Armed Forces during the war, was condemned, among other things, for signing the infamous “Commissar Order,” under which captured Soviet political officers were summarily executed. See also 6 U.N. WAR CRIMES COMM’N, LAW REPORTS OF TRIALS OF WAR CRIMINALS 95 (1947-49).

It should also be noted that the ICRC’s commentaries on the Geneva Conventions must be used with care. They are often identified as “authoritative.” The ICRC, however, has no authority to interpret the Geneva Conventions because interpretation is a matter solely for the State parties. (In the case of a serious dispute between parties about the applicable requirements, an arbitration procedure is established in Common Article 132, which may or may not involve the ICRC. Geneva Convention III, *supra* note 9, art. 132.) Nevertheless, to the extent that the commentaries follow the relevant negotiating history of the treaties, which they often do, they are useful guides to the purposes and intentions of the Conventions’ drafters.

ther harm; and it leaves intact the right of the State to prosecute, sentence and punish according to the law.”¹¹

In that regard, military commissions clearly are tribunals established in accordance with the law. Although some critics of the President’s November 13, 2001, Order have asserted that these bodies are illegitimate, and perhaps even inventions of an Administration bent on maximizing its own power without regard to law,¹² military commissions have been a well-established part of the laws of war throughout the United States’ national existence. As the Supreme Court explained in *Ex parte Quirin*:

By universal agreement and practice the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.¹³

In *Quirin*, which involved the capture, detention, trial and execution of several German saboteurs during World War II, the Court also emphasized that whatever inherent authority the President might have in ordering trials by military commission in appropriate cases, the President acted here with the authorization of Congress. In fact, as part of the Articles of War, Congress recognized military commissions as an appropriate and lawful means for the trial and punishment of offenses against the laws of war.¹⁴ The relevant portions of the Articles of War remain a part of the UCMJ and are equally applicable today.¹⁵ They, along with the Constitu-

¹¹ ICRC COMMENTARY ON GENEVA CONVENTION III, *supra* note 10, at 40.

¹² Similar unfounded claims have been made with respect to the categories of “enemy combatant” and “unlawful enemy combatant.” These terms long pre-date September 11, 2001, and describe a longstanding concept in the laws and customs of war. *See, e.g., In re Yamashita*, 327 U.S. 1, 19-20 (1946); *Ex parte Quirin*, 317 U.S. at 30-31. For example, the British Military Manual used during both World War I and World War II explains the distinction between lawful and unlawful (i.e., privileged or unprivileged) enemy combatants. *See GREAT BRITAIN WAR OFF., MANUAL OF MILITARY LAW* 238-44 (1914).

¹³ *Ex parte Quirin*, 317 U.S. at 30-31 (footnote omitted). *See also* 3 U.N. WAR CRIMES COMM’N, *supra* note 10, at 103 (“The United States Military Commissions are an old institution which existed prior to the Constitution of the United States of America. They have been described as the American Common Law War Courts.”).

¹⁴ *Ex parte Quirin*, 317 U.S. at 28. In fact, the Supreme Court relied on these very provisions in *Hamdan*, 126 S. Ct. at 2774-75, to invalidate the military commissions established by the President pursuant to the November 13, 2001, Order.

¹⁵ 10 U.S.C. § 821, 836 (2000).

tion, were recited as the legal support for the President's November 13, 2001, Order.¹⁶

Simply because military commissions have never been permanent or continuous judicial bodies does not mean that they are not regularly established. Military commissions are courts developed for unique circumstances and have been employed only during times when it is appropriate to use them—to try individuals who are subject to military justice because of their status as enemy belligerents or combatants but who do not fall within the categories of individuals ordinarily subject to trial by courts martial under the Articles of War or the UCMJ.¹⁷ Most of the military commissions utilized by the Allies after World War II were ad hoc tribunals, and many were established by executive action. This was true of the various American tribunals which were convened based on regulations issued by the various theater commanders-in-chief.¹⁸ Similarly, the British tribunals were organized pursuant to a Royal Warrant dated July 14, 1945, issued as an exercise of King George VI's prerogative.¹⁹

¹⁶ See Military Order of Nov. 13, 2001, 3 C.F.R. 918.

¹⁷ *Ex parte Quirin*, 317 U.S. at 27.

¹⁸ There were a number of different types of American military commissions organized after World War II, all with slightly different procedures. These were the Mediterranean Theater military commissions, established by General McNarney through the Regulations for the Trial of War Crimes for the Mediterranean Theatre of Operations 23 September 1945; the European Theater military commissions, established by General Eisenhower's Order of 25 August 1945; the United States Armed Forces, Pacific, Regulations Governing the Trial of War Criminals, issued by General MacArthur on 24 September 1945 (under which General Yamashita was tried); the Regulations Governing the Trials of Accused War Criminals, issued on 5 December 1945 (commonly known as the "SCAP Regulations"); and the Regulations for the China Theatre, 21 January 1946. See generally, 3 U.N. WAR CRIMES COMM'N, *supra* note 10, at 104-08.

These commissions differed somewhat in their jurisdictions. For example, the Mediterranean commissions were limited to trying offenses against the laws and customs of war, whereas the European commissions could try violations of the laws and customs of war and violations of the laws of nations or the occupied territories. *Id.* at 106. Similarly, the SCAP Regulations permitted the trial of violations of the laws and customs of war, offenses against peace, and what we would now refer to as crimes against humanity. *Id.* at 106-07. In addition, President Roosevelt's Executive Order dated July 2, 1942, established the military commission that tried the eight Nazi saboteurs and was the subject of the Supreme Court's opinion in *Quirin*. See Order of July 2, 1942, 7 Fed. Reg. 5103 (1942).

¹⁹ 1 U.N. WAR CRIMES COMM'N, *supra* note 10, at 105. See also TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10, app. E, at 254-57 (1949). Most of the other Allies also established special courts. France used two different types of war crimes tribunals immediately after World War II. The most important war crimes tribunals were the "Permanent Military Tribunals," established

Claims that military commissions are impermissible because they are not independent or impartial are also misplaced. Military commissions are, in fact, no more or less partial than any other judicial body in the military justice system. Military commissions are, of course, staffed by individuals who are subject to the orders of their superiors, but this is also the case with ordinary courts-martial, which are composed of active duty officers and service members.²⁰ Simply because they are military in character does not establish, nor does it suggest, bias. Indeed, under Geneva Convention III and Geneva Convention IV, it is assumed that both enemy combatants (whether privileged or unprivileged) and civilians (in certain circumstances) may be subject to the military justice of their captors.²¹ In the case of legitimate prisoners of war, treatment according to military justice is considered a benefit.²² Thus, under Article 84 of Geneva Convention III:

A prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offence alleged to have been committed by the prisoner of war.²³

All courts must “offer the essential guarantees of independence and impartiality as generally recognized,”²⁴ but the clear assumption of Article 84 is that military courts are entirely capable of providing these guarantees. When measured by past practice, the military commissions established pursuant to the President’s November 13, 2001, Order clearly meet these requirements.

pursuant to an Ordinance dated August 28, 1944. 3 U.N. WAR CRIMES COMM’N, *supra* note 10, at 93. The Netherlands used its regular courts-martial to try offenses in the Netherlands East Indies, but for trying offenses in Europe, the Netherlands used special courts established under the authority of an Extraordinary Penal Law Decree of 22 December 1943. *See* 11 U.N. WAR CRIMES COMM’N, *supra* note 10, at 86. Both Canada and Australia proceeded along the lines of the British Royal Warrant, although Australia adopted this instrument as the Commonwealth of Australia War Crimes Act of 1945. 4 U.N. WAR CRIMES COMM’N, *supra* note 10, at 125; 5 U.N. WAR CRIMES COMM’N, *supra* note 10, at 94. Norway took an unusual position and tried war crimes in its regular courts. War crimes, however, were tried according to special procedures, and by special chambers, pursuant to the Law of December 13th, 1946 on the Punishment of Foreign War Criminals, which confirmed the earlier provisional decree of May 4, 1945. Norway’s special procedures for trying alleged war criminals were established in the Law No. 2 of 21st February, 1947. 3 U.N. WAR CRIMES COMM’N, *supra* note 10, at 81.

²⁰ 10 U.S.C. § 825 (2000).

²¹ Geneva Convention III, *supra* note 9, art. 84; Geneva Convention IV, *supra* note 9, art. 66.

²² Geneva Convention III, *supra* note 9, art. 84.

²³ *Id.*

²⁴ *Id.*

Under the November 13, 2001, Order and a Department of Defense Directive dated February 10, 2004,²⁵ individual military commissions are established by an Appointing Authority, an office established within the Office of the Secretary of Defense that reports to the Secretary.²⁶ The individual commissions are composed of several military officers, including a presiding officer and at least three other members, all selected by the Appointing Authority. Each commission member must be a commissioned officer in the United States Armed Services, and the presiding officer also must be a judge advocate of one of the services.²⁷ This is entirely consistent with the United States' (and Allied) post-World War II practice.

By and large, U.S. post-war military commissions were composed of at least three members, all of whom were required to be officers.²⁸ (In the Pacific, other service personnel and civilians could also serve.) Similarly, British military tribunals were required to consist of a president and at least two officers, preferably of equal or higher rank than the accused.²⁹ Moreover, Britain's Royal Warrant contemplated that at least one member of the panel would be from the same branch of service, navy, or air corps as the accused.³⁰ Additionally, officers from Allied Forces would be designated to sit on the courts where foreign citizens or territory was involved, and this was actually done in appropriate cases.³¹ A judge advocate was to be appointed as an "impartial" legal advisor. However, his advice, even with regard to the law, was not binding on the court.³²

B. *Who is Subject to Trial by Military Commission?*

The question of who is properly subject to trial by military commission is, in fact, the most critical due process issue arising from the use of military commissions in general, and from the November 13, 2001, Order in particular. Military commissions do not offer the guarantees of the Bill of

²⁵ Dep't of Def. Directive No. 5105.70, Appointing Authority for Military Commissions (Feb. 10, 2004).

²⁶ *Id.* The Appointing Authority reports directly to the Secretary of Defense and is responsible for, among other things, selecting commission members, designating a presiding officer (who must be a military officer and judge advocate), approving charges and plea agreements, deciding interlocutory questions certified by the presiding officer of a military commission, and reviewing trial records "for administrative completeness and determin[ing] the appropriate disposition, either transmitting the record of trial to the Review Panel or returning it to the military commission for any necessary supplementary proceedings." *Id.* at §§ 4-6.

²⁷ *Id.* at § 4.1.3.

²⁸ 1 U.N. WAR CRIMES COMM'N, *supra* note 10, at 10.

²⁹ British Royal Warrant of June 14, 1945, *reprinted in* TAYLOR, *supra* note 19, at 254-57.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

Rights, and, as a result, civilians cannot ordinarily be tried by military commission. Under the Supreme Court's rulings in both *Hamdan* and *Quirin*, military commissions can try and punish any individual who is accused of "an offense against the law of war which the Constitution authorizes to be tried by military commission."³³ The *Quirin* Court refused to define the precise boundaries of this category, although it made clear that the *Quirin* defendants fell within the categories based on the defendants' status as enemy belligerents accused of violating the laws of war.³⁴ Significantly, however, the Court addressed, reaffirmed, and distinguished its earlier ruling in *Ex parte Milligan*, stating that civilians can be tried by military tribunals within the United States only when the civilian courts are not open and functioning normally because of invasion, rebellion, or other armed resistance to lawful authority.³⁵

In *Milligan*, the Court ruled that a Confederate sympathizer who had never associated with any armed resistance to the federal government could not be tried constitutionally by military commission.³⁶ In distinguishing *Milligan*, the *Quirin* Court highlighted Milligan's status as a civilian who was neither a lawful nor unlawful enemy belligerent:

[T]he [*Milligan*] Court was at pains to point out that Milligan. . . was not an enemy belligerent either entitled to the status of a prisoner of war or subject to the penalties imposed upon unlawful belligerents. We construe the Court's statement as to the inapplicability of the law of war to Milligan's case as having particular reference to the facts before it. From them the Court concluded that Milligan, not being a part of or associated with the armed forces of the enemy, was a non-belligerent, not subject to the law of war save as—in circumstances found not there to be present and not involved here—martial law might be constitutionally established.³⁷

Thus, the critical distinction between those properly subject to trial by military commission and those who the federal government can prosecute only in the Article III courts is the difference between combatant and civilian. There are, in fact, few more important distinctions, either in American law or international law.

The fundamental difference between civilians and combatants has permeated the law of war from its very inception. The most important distinction between the two categories of individuals is that civilians cannot be targeted lawfully, whereas combatants can be attacked with deadly

³³ *Ex parte Quirin*, 317 U.S. at 46. In *Hamdan*, 126 S. Ct. at 2779-80, however, four justices concluded that the conspiracy with which Hamdan was charged was not an offense properly triable by military commission under the laws of war.

³⁴ *Ex parte Quirin*, 317 U.S. 1.

³⁵ *Ex parte Milligan*, 71 U.S. 2, 127 (1866); *Ex Parte Quirin* 317 U.S. at 45.

³⁶ *Ex parte Milligan*, 71 U.S. 2.

³⁷ *Ex parte Quirin*, 317 U.S. at 45.

force at any time and without warning. As explained as early as 1582, by Balthazar Ayala, the Spanish judge advocate in the Netherlands:

[The] intentional killing of innocent persons, for example, women and children, is not allowable in war (if unintentional, as when a town is assaulted with catapults and other engines of war, the case is different, because such things are inevitable in war. . . .)³⁸

This rule remains a basic tenet of the laws of war today.³⁹ As explained by the *Quirin* Court, combatants also “are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals”⁴⁰ It is on this point that the United States and the critics of its war on terror detention policies most strongly disagree.

The category of unlawful enemy combatants has a long history and has been variously described as “unlawful belligerents,” “unprivileged belligerents,” or “franc-tireurs” (a usage dating from the 1871 Franco-Prussian War). As explained in the British Military Manual applicable during both World Wars, “[p]eaceful inhabitants . . . may not be killed or wounded, nor as a rule taken as prisoners If, however, they make an attempt to commit hostile acts, they are not entitled to the rights of armed forces, and are liable to execution as war criminals.”⁴¹ In order for such “irregular” combatants to enjoy the “rights of armed forces,” which would include treatment as a prisoner of war upon capture, they were

³⁸ 2 BALTHAZAR AYALA, THREE BOOKS ON THE LAW OF WAR AND ON THE DUTIES CONNECTED WITH WAR AND ON MILITARY DISCIPLINE 33 (John Pawley Bate trans. 1912) (1582).

³⁹ The rule was applied with full force and effect during the war crimes trials convened after World War II, as explained by Justice Michael Musmanno in the “Einsatzgruppen Case.” *United States v. Ohlendorf, et al.* (Apr. 8-9, 1948) in 9 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 467 (1948).

[T]here still is no parallelism between an act of legitimate warfare, namely the bombing of a city, with a concomitant loss of civilian life, and the premeditated killing of all members of certain categories of the civilian population in occupied territory.

A city is bombed for tactical purposes; communications are to be destroyed, railroads wrecked, ammunition plants demolished, factories razed, all for the purpose of impeding the military. In these operations it inevitably happens that non-military persons are killed. This is an incident, a grave incident to be sure, but an unavoidable corollary of battle action. The civilians are not individualized. The bomb falls, it is aimed at the railroad yards, houses along the tracks are hit and many of their occupants killed. But that is entirely different, both in fact and in law, from an armed force marching up to these same railway tracks, entering those houses abutting thereon, dragging out the men, women, and children and shooting them.

⁴⁰ *Ex parte Quirin*, 317 U.S. at 31-32.

⁴¹ GREAT BRITAIN WAR OFF., *supra* note 12, ¶ 19.

required to be associated with a group meeting four basic conditions: (1) a responsible command structure; (2) a uniform or other distinctive dress separating them from the civilian population; (3) carrying arms openly; and (4) conducting operations in accordance with the laws and customs of war.⁴²

Significantly, these four criteria were not drafted as part of the 1949 Geneva Conventions and applicable only to militias and volunteer corps under Article 4 of that instrument. In fact, these criteria developed as part of customary international law, and were equally applicable to the lawful belligerent armed forces of states as the *sine qua non* of that status. It was fully recognized that if the regular “armed forces” of a sovereign state failed to meet these four minimum criteria then its members would lose their status as lawful combatants: “It is taken for granted that all members of the army as a matter of course will comply with the four conditions; should they, however, fail in this respect they are liable to lose their special privileges of armed forces.”⁴³ Thus, claims that Taliban members are entitled to lawful belligerent status, including the rights and privileges of prisoners of war, simply because they were the “armed forces” of Afghanistan are legally specious.⁴⁴

When the *Quirin* Court ruled that unlawful enemy combatants “are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful,”⁴⁵ it was stating a long-established and universally accepted rule of law. Moreover, despite concerted efforts by various governments and non-governmental organizations (“NGOs”) to eliminate the category of unlawful enemy combatant over the last thirty years, *Quirin* remains a correct statement of the law as applicable to the United States. This statement of law was not altered by the Court’s ruling in *Hamdan*.⁴⁶ In this case, decided on statutory grounds, the majority ruled that the specific requirements of UCMJ § 836 (regarding the procedural rules applicable in courts-martial and military commissions) had not been satisfied.⁴⁷

Unlawful combatants remained entirely unprivileged under the laws and customs of war (although the post-World War II war crimes trials made clear that such individuals could no longer be summarily executed upon capture) until the mid-1970s, when Protocol I Additional was drafted. This instrument was promoted by a coalition of activist NGOs, including and especially the ICRC, and a number of “Third World” gov-

⁴² *Id.* ¶¶ 22-28.

⁴³ *Id.* ¶ 28.

⁴⁴ Of course, whether they were the Afghani “armed forces” is also a debatable point because the Taliban was never the lawfully recognized government of Afghanistan. It was, from first to last, merely a rebel militia.

⁴⁵ *Ex parte Quirin*, 317 U.S. at 31.

⁴⁶ *Hamdan*, 126 S. Ct. 2749.

⁴⁷ *Id.* at 2791.

ernments anxious to legitimize the guerilla tactics so prevalent in wars of “national liberation.” They did not entirely succeed, even for states that have become parties to Protocol I Additional, but did manage to obtain very significant advantages for irregular forces over the regular armies of the developed countries. Thus, under Article 44, irregular combatants are entitled to prisoner of war status so long as they “distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack,”⁴⁸ by carrying arms openly during an engagement and by making themselves be visible to the enemy while “engaged in a military deployment preceding the launching of an attack in which [the individual] is to participate.”⁴⁹ In other words, under Protocol I Additional, guerilla forces are entitled to hide among the civilian population up until the time they choose to attack.

Not surprisingly, the United States rejected Protocol I Additional, as explained by President Reagan in his message to the Senate:

Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war [It] would grant combatant status to irregular forces even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the laws of war.⁵⁰

Having definitively refused to ratify Protocol I Additional, the United States is bound by its provisions only to the extent that they represent customary international law. The guidelines contained in Protocol I Additional were not customary law before the Protocol I Additional was drafted. Indeed, in the 1960s, when the United States determined, for policy purposes, to grant Viet Cong prisoners POW rights, the ICRC itself acknowledged that this policy went beyond the United States’ legal obligations: “[A] government goes far beyond the requirements of the Geneva convention in an official instruction to its armed forces. The dreams of today are the realities of tomorrow.”⁵¹ Leaving aside the issue

⁴⁸ Protocol I Additional, *supra* note 9, art. 44(3), (4).

⁴⁹ *Id.*

⁵⁰ Message to the Senate Transmitting Protocol II Additional to the Geneva Conventions of August 12, 1949, 1 PUB. PAPERS 88, 88-9 (Jan. 29, 1987).

⁵¹ MAJOR GENERAL GEORGE S. PRUGH, *LAW AT WAR VIETNAM 1964-1973*, 66 (1975). Similarly, claims that the United States has accepted Protocol I as representative of customary international law, ordinarily based upon the remarks of Michael J. Matheson, then serving as the U.S. Department of State’s Deputy Legal Adviser, at a 1987 workshop on Protocol I Additional held in Washington, D.C., are incorrect. In fact, Matheson did not claim on behalf of the United States that the relevant provisions of Protocol I represented customary norms. Indeed, he refused to say whether any specific part of that document represented customary norms. Rather, he merely indicated that the United States believed that a number of the principles embodied in Protocol I Additional represented customary norms. *See*

of whether the United States could be bound to a customary norm to which it has objected, there is little state practice suggesting that Protocol I's attempt to eliminate the four critical criteria of lawful belligerency has achieved customary status.⁵²

Claims that the Fourth 1949 Geneva Convention, Relative to the Protection of Civilian Persons in Time of War ("Geneva Convention IV"), effectively eliminated unlawful combatant status are similarly misguided. This position is largely based on claims by the ICRC that the treaties were meant to be comprehensive and, more specifically, that irregular forces that do not merit POW status under Geneva Convention III "must be considered to be protected persons within the meaning of the present Convention."⁵³ In fact, the treaties do not state that any person who is not a member of the "armed forces" is a protected civilian, regardless of whether that person engages in hostilities. The ICRC itself acknowledged that "the 1949 Convention relative to the protection of civilian persons does not abrogate the Regulations respecting the Laws and Customs of War on Land" (the "Hague Regulations" in which the four criteria of lawful combatancy were restated).⁵⁴ It does not take the place of the Hague Regulations or the otherwise applicable laws and customs of war.⁵⁵

Moreover, as the ICRC has conceded, there are two main categories of "protected" person who are accorded specific rights and privileges under Geneva Convention IV: "(1) *enemy nationals* within the national territory of each of the Parties to the conflict and (2) *the whole population* of occupied territories (excluding nationals of the Occupying Power)."⁵⁶ The treaty does not clearly protect individuals who are captured in the context of ongoing hostilities if they are not enemy aliens either within the opponent's territory or within occupied territory. A capture of individuals in disputed territory is, of course, the very context in which most questions

Michael J. Matheson, Commentary, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT'L L & POL'Y 419, 419-31 (1987).

⁵² Notably, the ICRC 2005 customary international law study failed to identify any actual instances where states engaged in armed conflict accorded irregular combatants who failed to meet the four traditional criteria of lawful belligerency the rights of lawful combatants, and did so based on a belief that this was legally compelled by applicable customary norms. See INT'L COMM. OF THE RED CROSS, 2 CUSTOMARY INTERNATIONAL HUMANITARIAN LAW 78-96, 100-07, 2537-61 (Jean-Marie Henckaerts & Louise Doswald-Beck, eds. 2005).

⁵³ INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE GENEVA CONVENTIONS OF 12 AUGUST 1949: GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 50 (Jean S. Pictet, ed., Major Ronald Griffin & C. W. Dumbleton trans., 1958).

⁵⁴ *Id.* at 9.

⁵⁵ *Id.* at 46.

⁵⁶ *Id.*

of unlawful combatancy are likely to arise. Indeed, if the 1949 Conventions left only two categories of individual, lawful combatants and civilians, much of Protocol I Additional would have been superfluous. It was because irregular combatants were not clearly protected under the 1949 Conventions that efforts were made to redefine the concept of combatant in Protocol I Additional. As noted in the ICRC's commentaries on Protocol I Additional:

In armed conflict with an international character, a person of enemy nationality who is not entitled to prisoner-of-war status is, in principle, a civilian protected by the Fourth Convention, so that there are no gaps in protection. However, things are not always so straightforward in the context of armed conflicts of Article 1 (General principles and scope of application), paragraph 4, as the adversaries can have the same nationality. Moreover, the *concept of alien occupation often becomes rather fluid in guerilla operations as no fixed legal border delineates the areas held by either Party, and this may result in insurmountable technical difficulties with regard to the application of some of the provisions of the Fourth Convention.* This is one of the reasons why the paragraph under consideration here provides that in the absence of more favourable treatment in accordance with the Fourth Convention, the accused is entitled at all times to the protection of Article 75 of the Protocol (Fundamental guarantees).⁵⁷

Even Protocol I Additional does not require that irregular combatants be tried in the regular civilian courts. Under Article 45, an irregular combatant simply has the right to challenge his status before a "judicial tribunal,"⁵⁸ which can be of either military or civilian character.⁵⁹

Thus, the requirements applicable in American courts remain those articulated in *Milligan* and *Quirin*, both of which recognize that individuals who have associated themselves with the enemy in ongoing hostilities are subject to military justice, a point consistent with the plurality opinion

⁵⁷ INT'L COMM. OF THE RED CROSS, COMMENTARY ON THE ADDITIONAL PROTOCOLS OF 8 JUNE 1977 TO THE GENEVA CONVENTIONS OF 12 AUGUST 1949, 558 (Yves Sandoz, Christophe Swinarski & Bruno Zimmermann eds. 1987) [hereinafter ICRC COMMENTARY ON PROTOCOL I ADDITIONAL] (emphasis added). Certainly, if Geneva Convention IV actually did require that anyone who failed to qualify as a POW under Geneva III must be treated as a civilian, then much of the 1977 Protocol I would have been unnecessary, especially Article 45 of that instrument, which provides that "[a]ny person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol." Protocol I Additional, *supra* note 9, art. 45(3). This clearly recognizes that there will be individuals who have "taken part in hostilities" that do not enjoy Fourth Convention status.

⁵⁸ Protocol I Additional, *supra* note 9, art. 45(2).

⁵⁹ ICRC COMMENTARY ON PROTOCOL I ADDITIONAL, *supra* note 57, at 554-55.

in *Hamdi v. Rumsfeld*⁶⁰ and with *Hamdan*. In *Hamdan*, the Court never questioned that Osama bin Laden's personal driver could properly be subject to trial by military commission, although the Court did rule that the military commission rules currently prescribed under the President's November 13, 2001, Order were inconsistent with the UCMJ.⁶¹

It must be noted, however, that President Bush's November 13, 2001, Order authorizes the trial by military commission of three categories of individual: (1) members of al Qaeda; (2) individuals who have aided, abetted, or conspired to commit "acts of international terrorism, or acts in preparation therefor," that have injured or may injure the United States or its citizens; and (3) anyone who knowingly harbors individuals who fall within the first two categories.⁶² As the *Hamdan* decision correctly suggests, the category of "combatant" is broader than combat soldiers and includes many individuals in supporting roles who may never themselves fire a shot.⁶³ It is, however, at least conceivable that an individual who has not associated himself with an armed enemy sufficiently enough to qualify as a combatant could be designated for trial by military commission. In such a case it is doubtful whether the trial of a genuine non-combatant by military commission would survive scrutiny under *Milligan*, assuming that the proceedings were conducted in a place otherwise subject to the jurisdiction of the federal courts.⁶⁴

C. *Minimum Due Process Requirements*

The President's Order of November 13, 2001 established certain minimum due process requirements, including (1) a full and fair trial, (2) conviction only upon the agreement of two-thirds of the commission members, and (3) and sentencing only upon the agreement of two-thirds

⁶⁰ 542 U.S. 507 (2004) (holding that an al Qaeda operative, even though American citizen, was subject to detention as an enemy combatant).

⁶¹ *Hamdan*, 126 S. Ct. at 2791.

⁶² Military Order of Nov. 13, 2001, 3 C.F.R. at 919. Before an accused can be tried by military commission, the President must have himself determined in writing that the individual falls within one of these categories and United States citizens are specifically excluded from the order. *Id.*

⁶³ *Hamdan*, 126 S. Ct. at 2791.

⁶⁴ *Ex parte Milligan*, 71 U.S. 2, did not address the question of whether non-American citizen civilians could constitutionally be tried by military commissions overseas. Moreover, the Court's decision in *Johnson v. Eisentrager*, 339 U.S. 763 (1950), suggests that such trials would not be subject to judicial review by the United States courts unless the relevant individuals were present at the Guantanamo Naval Station, or some place similarly subject to U.S. jurisdiction as defined in *Rasul v. Bush*, 542 U.S. 466 (2004). International law, it should be noted, does permit the trial of civilians by military courts in some limited circumstances. Thus, under Geneva Convention IV, the population of an occupied territory can be subjected to the occupying powers' non-political military courts for certain security offenses. See Geneva Convention IV, *supra* note 9, arts. 64, 66.

of the commission members.⁶⁵ In addition, Military Commission Order No. 1 established due process criteria fully consistent with the practice in post-World War II military commissions and present day international criminal courts.⁶⁶ Namely, anyone facing trial by military commission has the right to:

- (1) receive notice of the charges sufficiently in advance of his trial in order to prepare a defense;
- (2) access the evidence the prosecution plans to introduce at trial (with the exception of certain protected information as determined by the presiding officer);
- (3) remain silent (and no adverse inference may be drawn from an accused's exercise of this right);
- (4) be represented by appointed military counsel and civilian counsel at no cost to the government, and to be present during trial—unless an accused is excluded to avoid disclosure of protected information or is disruptive;⁶⁷
- (5) have witnesses cross-examined;
- (6) be presumed innocent; and
- (7) be convicted only if the prosecution's case has been proved beyond a reasonable doubt.⁶⁸

These rights are not, of course, as protective of the accused as are the guarantees of the Bill of Rights. There is no right to trial by jury, and the right to a public trial (as will be discussed below) is a qualified one. The absence of these rights, however, is attributable to the military character of the courts rather than any inherent deficiency in the November 13, 2001, Order or Military Order No. 1. As the *Quirin* Court explained, the rights to grand jury indictment and petit jury trial “were procedures unknown to military tribunals, which are not courts in the sense of the

⁶⁵ Military Order of Nov. 13, 2001, 3 C.F.R. at 920.

⁶⁶ Military Commission Order No. 1 (Dep't of Defense Mar. 21, 2002), <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>.

⁶⁷ An accused's civilian counsel also can be excluded to protect certain information, although his military counsel has the right to be present at every stage of the trial proceedings. *Id.* § 5.

⁶⁸ *Id.* By comparison, individuals brought before the ICC are guaranteed the rights to: (1) prompt notice of the charges; (2) adequate time and facilities to prepare a defense; (3) be tried without undue delay; (4) a qualified right to be present at trial; (5) cross-examine witnesses; (6) be provided the assistance of an interpreter; (7) to remain silent with no adverse inference on that account; (8) make unsworn oral or written statements (presumably without being cross-examined on it); (9) disclosure of prosecution evidence that may show innocence, mitigate guilt, or otherwise affect the credibility of the prosecution's evidence. In addition, the accused enjoys the presumption of innocence—a court will convict only if guilt is proven beyond a reasonable doubt. Rome Statute of the International Criminal Court, arts. 66-67, July 17, 1998, 37 I.L.M. 1002, 2187 U.N.T.S. 90.

Judiciary Article [at the time the Bill of Rights was adopted], and which in the natural course of events are usually called upon to function under conditions precluding resort to such procedures.”⁶⁹ As every youth inducted into the armed forces discovers, the rights of soldiers and civilians are fundamentally different. These differences are largely attributable to the practical exigencies of armed conflict, the necessity to maintain good order and discipline in the ranks, and the need to enforce some level of respect for the laws and customs of war.

Obviously, how the rights provided for in military commissions are interpreted and applied in practice is critical. At this point in time, there is no reason to anticipate that individuals before military commissions will not be accorded a high quality of justice. Admittedly, there is no right to a speedy trial in the relevant orders. This, however, is also a function of the military nature of the accused’s status. Enemy combatants may be attacked at any time during armed conflict, and they may also be captured and detained until hostilities have been concluded. This rule was affirmed by the *Quirin* Court⁷⁰ and reaffirmed in *Hamdi*.⁷¹

The consequence of this rule is that individuals captured in war may remain incarcerated for many years without having the benefit of a criminal trial. The legal justification is that the detention of captured enemy combatants is not considered to be penal in nature.⁷² The moral and practical justification is that the right to detain, which lasts until hostilities have ended, is a simple concomitant of the obligation to give quarter.⁷³ Armed conflict is not a perverse sport in which the players must be restored to their respective team at days end to begin again in the morning. Even legitimate POWs, who have complied with the laws of war, are not entitled to a criminal judicial process to justify their detention.⁷⁴ POWs may, however, be tried for war crimes either during or after the conflict is concluded.

Thus, Geneva Convention III provides that POWs must be repatriated “without delay after the cessation of active hostilities,” but also that those against whom criminal proceedings are pending “may be detained until the end of such proceedings, and, if necessary, until the completion of the punishment.”⁷⁵ It is only after a determination is made to pursue such

⁶⁹ *Ex parte Quirin*, 317 U.S. at 39.

⁷⁰ *Id.* at 31.

⁷¹ *Hamdi*, 542 U.S. at 518.

⁷² See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 788 (2d ed. 1920) (“It is now recognized that – ‘captivity is neither a punishment nor an act of vengeance,’ but ‘merely a temporary detention which is devoid of all penal character.’”) (footnote omitted).

⁷³ *Id.*

⁷⁴ See *In re Territo*, 156 F.2d 142 (9th Cir. 1946).

⁷⁵ Geneva Convention III, *supra* note 9, arts. 118-19.

criminal charges that a right to trial “as soon as possible” arises.⁷⁶ Indeed, the Convention does not require a speedy trial during hostilities for the very reason that it may be “more difficult to ensure a fair trial . . . during the war than after the end of hostilities.”⁷⁷

It should also be noted that the “war on terror” is no more or less “indefinite” than any other conflict. The belligerents involved in the World Wars, for example, did not know when those wars would end until conflict actually concluded. (Indeed, in November 1918, when Germany sought an armistice, the Allies were preparing for operations that would last at least through 1919.) The metes and bounds of the “war on terror” can, in fact, be measured by Congress’s Authorization for the Use of Military Force of September 18, 2001.⁷⁸ Once the “nations, organizations, or persons [who] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons,”⁷⁹ are no longer capable of “future acts of international terrorism against the United States,” the war will end.⁸⁰ Because of the nature of the principal enemy in the war on terror—a transnational terrorist organization which has chosen to conduct its operations in a manner inconsistent with the laws and customs of war—it may well be more difficult to determine the precise point at which hostilities end. Eventually, hostilities will reach an end-point, and a decision will then have to be made to release the captives or to begin a criminal process.

D. *The Rules of Evidence*

Under the President’s November 13, 2001, Order, all evidence that “would, in the opinion of the presiding officer of the military commission . . . have probative value to a reasonable person” is to be admissible in military commission proceedings.⁸¹ This relaxation of the rules of evidence is one of the most striking differences between the military commission and the civilian courts. This provision, however, is nearly universal with respect to the military tribunals convened by the Allies after World War II, the more recent international war crimes tribunals established in the 1990s, and the ICC. None of these bodies would meet

⁷⁶ *Id.* art. 103.

⁷⁷ ICRC COMMENTARY ON GENEVA CONVENTION III, *supra* note 10, at 478. The commentary goes on to confirm that, at least with respect to war crimes charges, “there is nothing in the Convention to prevent [POWs] from being tried later or even, in the interim, from being placed in separate camps in order to preclude any possibility of their obtaining false evidence.” *Id.* at 478-79 (footnote omitted).

⁷⁸ Authorization for Use of Military Force Against Sept. 11 Terrorists, Pub. L. No. 107-40, 115 Stat. 224 (2001) (codified at 50 U.S.C. § 1541 (2001)).

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ Military Order of Nov. 13, 2001, 3 C.F.R. 918.

the evidentiary requirements applicable in the Article III courts of the United States.

In fact, it appears that the language incorporated into the President's November 13, 2001, Order with respect to the admission of evidence was modeled from the language in President Roosevelt's order establishing the *Quirin* military commission. President Roosevelt's order provided that "[s]uch evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man."⁸² This standard is fully consistent with the evidentiary rules adopted by other U.S. commissions⁸³ and those of other Allied Powers. Under the British Royal Warrant, for example, the rules of evidence were articulated as follows:

At any hearing before a Military Court convened under these regulations the Court may take into consideration any oral statement or any document appearing. . . to the Court to be of assistance in proving or disproving the charge, notwithstanding that such statement or document would not be admissible as evidence in proceedings before a Field General Court-Martial⁸⁴

Similarly, in trials conducted by French authorities, the presiding officer of the court was vested with the "discretionary power in relation to the conduct of the proceedings and the finding of the truth" and the power "during the proceedings, to cause to be produced any evidence which seems to him to be of value for the finding of the truth."⁸⁵ In fact, a basic relaxation of the rules of evidence has become routine on the international level. Under the statutes of the U.N. International Criminal Tribunals for both the Former Yugoslavia and Rwanda, the courts are not bound by national rules of evidence and can "admit any relevant evidence which [they] deem[] to have probative value."⁸⁶ This is also true of the ICC, which is expressly authorized to "request the submission of all evidence that it considers necessary for the determination of the truth."⁸⁷

⁸² Order of July 2, 1942, *supra* note 18.

⁸³ See 3 U.N. WAR CRIMES COMM'N, *supra* note 10, at 109-10.

⁸⁴ British Royal Warrant, *reprinted in* TAYLOR, *supra* note 19, Reg. 8, at 256.

⁸⁵ 3 U.N. WAR CRIMES COMM'N, *supra* note 10, at 99. Dutch courts-martial (conducted in the East Indies) followed the ordinary rules of procedure, except that the judge was permitted to "recognise as legal evidence 'all documents produced at the sitting and all statements wherever made.'" 6 U.N. WAR CRIMES COMM'N, *supra* note 10, at 108.

⁸⁶ See Statute of the International Criminal Tribunal for the Former Yugoslavia art. 15, May 25, 1993, 32 I.L.M. 1192, 1196; ICTY RULES OF PROCEDURE AND EVIDENCE 89(a), (c) [hereinafter ICTY RULES]; Statute of the International Criminal Tribunal For Rwanda art. 14, Nov. 8, 1994, 33 I.L.M. 1602, 1607; ICTR RULES OF PROCEDURE AND EVIDENCE 89(a), (c) [hereinafter ICTR RULES].

⁸⁷ Rome Statute of the International Criminal Court, *supra* note 68, art. 69(3), at 1042. See also ICC RULES OF PROCEDURE AND EVIDENCE 63(5) ("Chambers shall

E. *Public Nature of the Proceedings*

An open and public trial is one of the most fundamental rights in the Anglo-American legal system. The right to a public trial is guaranteed in the Sixth Amendment⁸⁸ and its importance has been explained by the Supreme Court as follows:

The traditional Anglo-American distrust for secret trials has been variously ascribed to the notorious use of this practice by the Spanish Inquisition, to the excesses of the English Court of Star Chamber, and to the French monarchy's abuse of the *lettre de cachet*. All of these institutions obviously symbolized a menace to liberty

Whatever other benefits the guarantee to an accused that his trial be conducted in public may confer upon our society, the guarantee has always been recognized as a safeguard against any attempt to employ our courts as instruments of persecution.⁸⁹

Although this right is not absolute, courts can and do close certain proceedings when the government can show "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."⁹⁰ It is nevertheless taken for granted that a criminal conviction in the Article III courts can be obtained only if each element of the offense is proved beyond a reasonable doubt by admissible evidence introduced in open court.

In military commissions, each element of an offense must be proved beyond a reasonable doubt, but portions of the trial proceedings may be closed. Under the President's November 13, 2001, Order, and under Military Commission Order No. 1, there is a presumption that proceedings will be open to the public.⁹¹ However, either the Appointing Authority or Presiding Officer can close the proceedings for a number of reasons. These include the protection of: (1) classified (or certain classifiable)

not apply national laws governing evidence"). In *Hamdan*, 126 S. Ct. at 2788, the Court expressed considerable concern regarding the relaxed nature of the evidentiary rules applicable in military commissions. However, it did so without recognition of the general post-World War II practice (beyond General Yamashita's case), or the modern practice in international criminal courts. This was surprising given the Court's recent interest in international precedents and the importance of the post-World War II practice as revealing *opinio juris* on these issues for purposes of customary international law. At any rate, the *Hamdan* Court's main concern appears to have been that the evidentiary rules applicable in military commissions differed from those in courts-martial, and it was in that context that the majority suggested that the "precedential" value of *Yamashita* was now limited. In *Yamashita*, the Court had refused to consider challenges to relaxed evidentiary rules, since it concluded that the defendant was not a "person" subject to the Articles of War at that time.

⁸⁸ U.S. CONST. amend. VI.

⁸⁹ *In re Oliver*, 333 U.S. 257, 268-70 (1948) (footnotes omitted).

⁹⁰ *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984).

⁹¹ Military Commission Order No. 1 § 5(O).

information; (2) other information protected by law or rule from unauthorized disclosure; (3) the physical safety of the participants; (4) “intelligence and law enforcement sources, methods, or activities;” and (5) “other national security interests.”⁹² The commission may also exclude the accused and his civilian lawyers, although the commission must allow the Detailed Defense Counsel to remain.⁹³ Nevertheless, Military Commission Order No. 1 provides public access that is fully consistent with the rules that governed military commissions in the past,⁹⁴ as well as the current rules of the leading international criminal tribunals. Thus, these military commissions should pass muster under the Constitution.

Although the Supreme Court did not specifically address the closure of proceedings in *Quirin*, the trials it reviewed in that case were conducted in the strictest secrecy—to the point where the hearing room windows were blacked out.⁹⁵ The *Quirin* defendants did, indeed, challenge the constitutionality of these proceedings, claiming they were “entitled to be tried in the civil courts with the safeguards, including trial by jury, which the Fifth and Sixth Amendments guarantee to all persons charged in such courts with criminal offenses.”⁹⁶ The Court ultimately ruled that these men were enemy combatants subject to trial in military tribunals, and that “the Fifth and Sixth Amendments [which include the right to a speedy and public trial] did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission.”⁹⁷

⁹² *Id.* § 6(B)(3).

⁹³ *Id.*

⁹⁴ Under the Royal Warrant, for example, proceedings were “ordinarily to be open to the public,” but could be closed “on the ground that it is expedient so to do in the national interest or in the interests of justice, or for the effective prosecution of war crimes generally, or otherwise” British Royal Warrant, reprinted in TAYLOR, *supra* note 19, Reg. 8(v), at 256-57. Similarly, French military trials were to be conducted in public, “except where the Tribunal decides that this appears dangerous to public order or morals.” 3 U.N. WAR CRIMES COMM’N, *supra* note 10, at 98.

⁹⁵ See LOUIS FISHER, CRS REPORT FOR CONGRESS, MILITARY TRIBUNALS: THE QUIRIN PRECEDENT 7 (Mar. 26, 2002).

⁹⁶ *Ex parte Quirin*, 317 U.S. at 24.

⁹⁷ *Id.* at 45. It must be said, however, that this conclusion was reached in discussing the rights to trial by jury and grand jury presentment. The Court did not specifically address the right to a public trial. Therefore, it is largely by implication that *Quirin* approves the use of closed proceedings in military commissions. It is possible that, if this question is presented to the Court in relation to the commissions established pursuant to the President’s November 13, 2001, Order, it will apply a standard similar to that articulated in *Press-Enterprise Co.*, 464 U.S. at 501-502, in determining whether the closure of proceedings violates the Constitution.

This, of course, assumes that the Constitution’s requirements in this regard apply to the trials of non-U.S. citizens conducted at Guantanamo Bay. This is by no means a given. In *Rasul*, 542 U.S. 466, the Court ruled only that the federal habeas corpus statute, 28 U.S.C. § 2241-2243 (2000), applied to prisoners held at Guantanamo Bay.

With respect to prevailing international standards, the closure provisions of Military Commission Order No. 1 are valid.⁹⁸ In fact, the closure of portions of criminal proceedings (including the taking of testimony) is a common practice in both of the U.N. ad hoc tribunals. The rules of both the ICTY and ICTR are very similar to those established under Military Commission Order No. 1 and include the general assumption that all proceedings shall be public “unless otherwise provided.”⁹⁹ Either “all or part of the proceedings” may be closed for purposes of “public order and morality,” safety and security, or simply because the court decides that it is necessary to “protect the interests of justice.”¹⁰⁰ Similarly, the Rome Statute provides that the ICC trials “shall be held in public,”¹⁰¹ but that proceedings may be closed to protect victims or witnesses, based on a state’s application to protect confidential or sensitive information.¹⁰²

F. *Right of Appeals and Access to the Civilian Court System*

In the Anglo-American post-World War II military commissions there was no right of appeal to a higher military tribunal or into the civilian court systems.¹⁰³ Under U.S. practice, sentences could not be executed until after the Appointing Authority had approved.¹⁰⁴ In addition, death sentences had to be confirmed by the theater commander.¹⁰⁵ Both decisions were based on a review of the record and recommendations by a Staff Judge Advocate.¹⁰⁶ Under the Royal Warrant, convictions and sentences could be challenged by a petition (notice of which had to be

It did not overrule *Eisentrager*, 339 U.S. 763, in which the Court ruled that foreign nationals held overseas could not invoke a constitutional right to habeas corpus.

⁹⁸ Military Commission Order No. 1 § 6(B)(3).

⁹⁹ See ICTY RULES, *supra* note 86, at 79(a), (c); ICTR RULES, *supra* note 84, at 79(a), (c).

¹⁰⁰ ICTY RULES, *supra* note 86, at 79(a), (c); ICTR RULES, *supra* note 84, at 79(a), (c).

¹⁰¹ Rome Statute of the International Criminal Court, *supra* note 68, art. 64(7), at 1038.

¹⁰² *Id.* art. 68(2), (6), at 1041.

¹⁰³ France, by contrast, established special military appeals courts during the war, and permitted appeals to the civilian courts of appeal afterwards (so long as the appeal was noticed within three days of sentencing). See 3 U.N. WAR CRIMES COMM’N, *supra* note 10, at 99-100. Norway also permitted appeals to the civilian courts, *Id.* at 90-91, although the Netherlands established special mixed tribunals, military and civilian, to hear appeals. See 6 U.N. WAR CRIMES COMM’N, *supra* note 10, at 95.

¹⁰⁴ See 3 U.N. WAR CRIMES COMM’N, *supra* note 10, at 112.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* The only access to the civilian courts were the various attempts, all unsuccessful, to obtain habeas relief. See *In re Homma*, 327 U.S. 759 (1946); *In re Yamashita*, 327 U.S. 1; *Ex parte Quirin*, 317 U.S. 1. There was no regular access in which the merits of a trial were reviewed.

made within forty-eight hours of the proceedings' termination), submitted to the Confirming Officer.¹⁰⁷ If the petition challenged the finding of guilt (as opposed to the sentence alone) it was referred to the Judge Advocate General's office for disposition.¹⁰⁸

The President's November 13, 2001, Order and Military Commission Order No. 1 follow a similar pattern, although they are actually more protective of the accused's interests. All convictions and sentences must be reviewed not only by the Appointing Authority but also by the President or the Secretary of Defense (if that authority is delegated to the Secretary of Defense).¹⁰⁹ In addition, Military Commission Order No. 1 also requires the establishment of a review panel composed of three military officers (with the potential for civilian participation by special commission), at least one member of whom must have judicial experience.¹¹⁰ This panel is responsible for reviewing the trial record and for forwarding it to the Secretary of Defense with a recommended disposition or returning the case to the Appointing Authority for further proceedings if the panel finds a material error of law.¹¹¹

Since Military Commission Order No. 1 was issued, Congress has enacted legislation providing Guantanamo detainees with an avenue of appeal to the Article III courts. Under Title X, Division A, of the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, (December 30, 2005), the United States Court of Appeals for the District of Columbia Circuit was vested with the exclusive authority to review the convictions of aliens held at Guantanamo Bay and convicted by a military commission. The defendant has a right of appeal under

¹⁰⁷ British Royal Warrant, reprinted in TAYLOR, *supra* note 19, Reg. 10, at 257.

¹⁰⁸ *Id.* Similar rules were followed by Commonwealth countries. 4 U.N. WAR CRIMES COMM'N, *supra* note 10, at 130 (Canada); 5 U.N. WAR CRIMES COMM'N, *supra* note 10, at 101 (Australia).

¹⁰⁹ Military Order of Nov. 13, 2001, 3 C.F.R. 918. For a time, the Order's requirement that individuals tried by military commission "shall not be privileged to seek any remedy or maintain any proceeding. . . in (i) any court of the United States," was controversial. However, this was clearly modeled on President Roosevelt's Proclamation No. 2561, in which he also sought to close American courts to individuals subject to the jurisdiction of military commissions. Proclamation No. 2561, 3 C.F.R. § 309 (1938-1943), reprinted in 10 U.S.C § 906 (1994). That instrument was addressed by the *Quirin* Court, which acknowledge President Roosevelt's order, but noted that "neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission." *Ex parte Quirin*, 317 U.S. at 25. It is a fair assumption, and a very safe bet, that the President's November 13, 2001, Order was issued with a full understanding of this aspect of *Quirin*, and the limitations it imposes.

¹¹⁰ Military Commission Order No. 1 § 6(H)(4).

¹¹¹ *Id.*

these provisions if he has been sentenced to death or a term of ten years imprisonment or more, and by the court's discretion in other cases.¹¹² The court's review of the case is limited to determining whether the trial was conducted in accordance with the "standards and procedures" set forth in Military Commission Order No. 1 or any successor order, and "to the extent the Constitution and laws of the United States are applicable, whether the use of such standards and procedures to reach the final decision is consistent with the Constitution and laws of the United States."¹¹³

CONCLUSION

The establishment of military commissions to try captured enemy combatants in the war on terror is firmly supported by longstanding American and international legal practice, and by applicable Supreme Court authority. Although the due process rights developed for the tribunals established under the President's November 13, 2001, Order are different from those obtained in the civilian courts, both the Constitution and international law permit such distinctions. Moreover, the military commission rules are fully consistent with those adopted in the post-World War II military tribunals and compare favorably to the rules of more modern "international" criminal tribunals. They are less protective of the defendant than the requirements of the Bill of Rights but nevertheless guarantee defendants a fair trial in the military context.

The Supreme Court's decision in *Hamdan* does not alter this conclusion. In *Hamdan*, the Court ruled that military commission rules must be the same as those applicable in regular courts-martial, unless the President establishes that it is impracticable to follow those rules pursuant to the UCMJ section 836(b).¹¹⁴ In *Hamdan*, as generally, no such finding has been made. As a result, the Court concluded that the military commissions organized pursuant to the President's November 13, 2001, Order were inconsistent with the UCMJ. The Court made clear, however, that this is a statutory requirement that Congress can eliminate or modify.¹¹⁵ How the Congress will respond remains unclear. Nevertheless, the Court affirmed that military commissions are a regular and lawful part of the American military justice system and that they can be employed in the war on terror if organized in a manner otherwise consistent with the UCMJ.

¹¹² Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1005(e)(3), 2005 U.S.C.C.A.N. (119 Stat. 2680) 2739-40.

¹¹³ Detainee Treatment Act of 2005, Pub. L. No. 109-148, § 1001, 119 Stat. 2680, 2739-40 (2005).

¹¹⁴ See 10 U.S.C. § 836(b) (2000); *Hamdan*, 126 S. Ct. at 2755-56.

¹¹⁵ *Hamdan*, 126 S. Ct., at 2754.

