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Kevin J. Barry, Captain (Ret.), U.S. Coast Guard

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A Rebuttal to *Military Commissions: Trying American Justice*

Colonel Frederic L. Borch, III

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Editor's Note

An article in our April/May 2003 *Criminal Law Symposium* issue, *Moving Toward the Apex: New Developments in Military Jurisdiction*, discussed the recent ACCA and CAAF opinions in *United States v. Sergeant Keith Brevard*. These opinions deferred to findings the trial court made by a preponderance of the evidence to resolve a motion to dismiss, specifically that the accused obtained and presented forged documents to procure a fraudulent discharge. Since the publication of these opinions, the court-martial reached the ultimate issue of the guilt of the accused on remand. The court-martial acquitted the accused of fraudulent separation and dismissed the other charges for lack of jurisdiction. These unpublished results do not appear to affect the value of the *Brevard* opinions as legal precedent.

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tion (17th ed. 2000) and *Military Citation* (8th ed. 2003). Manuscripts will be returned upon specific request. No compensation can be paid for articles.

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• In Memoriam •



On behalf of The Judge Advocate General's Corps, we respectfully dedicate this issue to the memories of Chief Warrant Officer Five Sharon T. Swartworth, Warrant Officer of the Corps and Sergeant Major Cornell Winston Gilmore, Sergeant Major of the Corps.



The soldier above all others prays for peace, for it is the soldier who must suffer and bear the deepest wounds and scars of war.

- General Douglas MacArthur

Military Commissions: Trying American Justice¹

Kevin J. Barry
Captain, U.S. Coast Guard (Retired)

The Department of Defense (DOD) General Counsel's "Military Commission Instructions," issued on 30 April 2003, renew the concerns that surrounded the President's 13 November 2001 military order and again cast serious doubt on the ability of military commissions to be viewed as fundamentally fair and to meet American standards of justice.

On 30 April 2003, the DOD General Counsel issued eight "Military Commission Instructions," the third event in the process of establishing the structure and regulations for the trials of individuals the President has designated as subject to trial by military commission.² Because they depart materially from court-martial practice and procedure, these instructions renew the doubts created by the initial military order issued by the President on 13 November 2001³ about whether military commissions established under that order would—or could—meet basic standards of American justice.⁴ Unless substantially modified to more closely reflect *current* court-martial principles and rules, these military commissions will not achieve the

level of due process that is characteristic of American criminal justice, and the United States could lose the moral high ground it has long enjoyed as a world leader working to ensure fundamental fairness in criminal adjudications.

President's Military Order—13 November 2001

When the President issued the *Military Order (PMO)* on 13 November 2001, it immediately precipitated a storm of criticism. The order—applicable only to non-U.S. citizens that the President determined either to be members of al Qaeda, or to have played a role in international terrorism, or to have harbored any such person—raised doubts about the application of the presumption of innocence, whether the usual criminal standard of "beyond a reasonable doubt" would apply, and whether acquittals could be reversed. It also clearly prohibited judicial review of convictions.⁵ It appeared to allow trials to be conducted in secret—with the possibility that those accused could be denied access to the evidence used against them at trial—and to set aside normal rules of evidence in favor of a generic "probative value to a reasonable person" standard.⁶ It also provided for conviction and sentencing—even the death sentence—by

1. The current article is an expanded and updated version of an article that previously appeared under a similar title in *The Federal Lawyer* and is used with permission. The changes and updates are set forth primarily in the expanded footnotes in this article. See Kevin J. Barry, *Military Commissions: American Justice on Trial*, 50:6 FED. LAW. 24 (2003).

2. Procedures for Trials by Military Commissions of Certain Non-U.S. Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374-99 (July 1, 2003) (to be codified at 32 C.F.R. pts. 10-17); U.S. DEP'T OF DEFENSE, MILITARY COMMISSION INSTRUCTIONS (30 Apr. 2003), available at <http://www.defenselink.mil/news/commissions.html> [hereinafter MCI Nos. 1-8]. The eight instructions were originally made available on the DOD Web site, but were later published in the *Federal Register* as part of a broader rule-making that included, along with the eight military commission instructions and the DOD's *Military Commission Order No. 1* that had previously been issued on 21 March 2002. 68 Fed. Reg. 39,374-99; U.S. DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (21 Mar. 2002), available at <http://www.defenselink.mil/news/commissions.html> [hereinafter MCO No. 1]; see Establishment of New Subchapter B-Military Commissions, 68 Fed. Reg. 38,609 (June 30, 2003). In a remarkable development, after publication of the military commission instructions in the *Federal Register* on 1 July 2003, and after preparation of this article for its initial publication, the DOD placed a modification of Annex B to *Military Commission Instruction No. 5* on its Web site, but without formally announcing that it had done so in the *Federal Register*. The modification continued to carry the original 30 April 2003 date. The changes relaxed several of the restrictions the original order had imposed. See MCI No. 5, *infra* note 2.

3. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> [hereinafter PMO].

4. See, e.g., American Bar Association (A.B.A.) Task Force on Terrorism and the Law, *Report and Recommendations on Military Commissions* (Jan. 4, 2002), available at <http://www.abanet.org/leadership/military.pdf> (recommending that military commissions "be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial" and conform to Article 14 of the International Covenant on Civil and Political Rights, G.A. Res. 2200A, U.N. GAOR, 21st Sess., Supp. No. 16, at 52, U.N. Doc. A/6316 (1966)); J. Gordon Forester, Jr. & Kevin J. Barry, *Military Commissions: Meeting American Standards of Justice*, 49:2 FED. LAW. 28 (2002) (arguing that military commissions must follow court-martial procedures if they are to be viewed as fundamentally fair); see also Robinson O. Everett, *The Law of War: Military Tribunals and the War on Terrorism*, 48:10 FED. LAW. 20, 22 (2001) (explaining that military tribunals to try terrorists would involve many nations, and should be conducted in a manner that "would brook no dispute with the fairness of the results," and that to this end, courts-martial, with well defined rules of procedure and evidence, "are preferable to the use of ad hoc military commissions").

5. 66 Fed. Reg. at 57,833 § 7(b)(2).

6. *Id.* at 57,833 § 4(c)(3).

only a two-thirds majority of those sitting as military commissioners.⁷ *New York Times* columnist William Safire, normally known for his conservative views, characterized military commissions as “U.S. kangaroo courts” with “[n]o presumption of innocence; no independent juries; no right to choice of counsel; [and] no appeal to civilian judges.”⁸ The criticism was international in scope, with Spain and other European countries indicating reluctance or outright refusal to extradite terrorists to the United States if they were to be tried by military tribunals.⁹

The *PMO* is an adaptation of the orders issued in two well-known World War II military commission cases decided by the Supreme Court: *Ex parte Quirin*,¹⁰ the Nazi saboteur case, and *In re Yamashita*,¹¹ the case of the Japanese general tried for his role as commander of troops that committed war crimes in the Philippines. Presumably, the *PMO* authors believed they were on solid legal ground by doing essentially what had been judicially reviewed some sixty years earlier. Throughout this nation’s history, however, the rules and procedures applicable to military commissions have always been closely allied to those rules and procedures applicable to courts-martial at that point in time.¹² Courts-martial today are very different from those of World War II, and they reflect evolving standards in both military and civilian criminal law.¹³ Just as courts-martial have evolved dramatically in the last sixty years, military commissions must similarly be vastly different from those conducted sixty years ago.

Military Commissions and Courts-Martial

Both military commissions and courts-martial are types of military tribunals. Courts-martial are criminal trials conducted within this nation’s military justice system—applicable mostly

to those in our own military services.¹⁴ Courts-martial have always been creatures of statute,¹⁵ with the Second Continental Congress adopting the first Articles of War in 1775.¹⁶ Military commissions, used for the trial of spies, saboteurs, and other war criminals, have been almost completely unregulated by statute, and are the military’s common law war courts.¹⁷ These military war courts have always closely followed the principles of law, rules of evidence, and procedure then applicable in courts-martial, as Colonel William Winthrop, the pre-eminent nineteenth-century military law historian and commentator, stated with succinct clarity:

In the absence of any statute or regulation governing the proceedings of military commissions, the same are commonly conducted according to the rules and forms governing courts-martial. These war-courts are indeed more summary in their action than are the courts held under the Articles of [W]ar [courts-martial], and, as their powers are not defined by law, their proceedings—as heretofore indicated—will not be rendered *illegal* by the omission of details required upon trials by courts-martial But, as a general rule and as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will—like a court-martial— . . . ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence. Where essential, indeed, to a full investigation or to the doing of justice, these rules and principles will be liberally construed and applied.¹⁸

7. *Id.* at 57,833 § 4(c)(6).

8. William Safire, *Voices of Negativism*, N.Y. TIMES, Dec. 6, 2001, at A35.

9. T.R. Reed, *Europeans Reluctant to Send Terror Suspects to U.S.*, WASH. POST, Nov. 29, 2001, at A23.

10. 317 U.S. 1 (1942).

11. 327 U.S. 1 (1946).

12. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 835-36 (2d ed. 1895, 1920 Reprint).

13. See *MANUAL FOR COURTS-MARTIAL, UNITED STATES* pt. II (2002) [hereinafter MCM]; Everett, *supra* note 4 (arguing that general courts-martial are appropriate and the desirable venue for trying civilian terrorists for violations of the law of war).

14. See *id.*; WINTHROP, *supra* note 12, at 831.

15. WINTHROP, *supra* note 12, at 831.

16. See *id.* at 17; see also Kevin J. Barry, *A Face Lift (And Much More) for an Aging Beauty: The Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, LAW REV. MICH. ST. U.-DET. C.L. 57, 60-75 (2002) (explaining the evolution of courts-martial in this country, as well as current proposals for modernization).

17. See WINTHROP, *supra* note 12.

18. *Id.* at 841-42.

The principles of law and rules of evidence and procedure in courts-martial underwent only incremental change from the time of the Revolution through the mid-twentieth century.¹⁹ But beginning after World War I, and particularly during and after World War II, there were widespread perceptions of unfairness, and of unlawful command influence, in the court-martial process; consequently criticism abounded.²⁰ The result was the enactment of the Uniform Code of Military Justice (UCMJ) in 1950, bringing substantial changes and major increases in due process.²¹ Underlying these changes was the adoption of the “largely untested precept that military effectiveness depends on justice and that, by and large, civilian forms and principles are necessary to ensure justice” in military trials.²² Principal among the reforms adopted in the UCMJ was the establishment of a civilian court, known today as the U.S. Court of Appeals for the Armed Forces, to oversee the entire military justice system.²³ In 1983, another statutory change made its decisions subject to certiorari review by the Supreme Court.²⁴

Since 1950, the UCMJ and court-martial practice have been further modernized several times, including the creation of a military judiciary in 1968 for virtually all courts-martial, and the establishment of courts of military review with appellate military judges for each of the military services.²⁵ In addition, there are now independent defense counsel structures in each service that provide military attorney counsel to accused members facing trial by court-martial at no cost.²⁶ Court-martial procedures have thus changed drastically since the last military commissions were conducted during the World War II era. The military commission structures outlined in the *PMO*, including the attempted foreclosure of any judicial review of military commissions and the absence of many commonly accepted

court-martial due process protections, were throwbacks to the outdated military law of a former era.

Applicable Principles of Law and Rules of Evidence and Procedure

Since early in the twentieth century, one of the few statutes that addresses military commissions has empowered the President to make rules for courts-martial and other military tribunals. Little-changed in almost a century, the statute currently reads:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.²⁷

Ever since the adoption of the modern military justice system,²⁸ the President has mandated that military commissions continue the historic close relationship with courts-martial

19. See DAVID A. SCHLUETER, *MILITARY CRIMINAL JUSTICE: PRACTICE AND PROCEDURE* 24 (5th ed. 1999); see also John S. Cooke, *The Twenty-Sixth Annual Kenneth J. Hodson Lecture: Manual for Courts-Martial 20X*, 156 MIL. L. REV. 1, 7 (1998) (“For the first 175 years of its history, military justice . . . changed only slowly.”).

20. See, e.g., JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA* 76-88, 128-131 (2001).

21. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

22. Cooke, *supra* note 19, at 8-9.

23. See generally UCMJ arts. 141-145 (2002). Note that the appellate court was originally called the Court of Military Appeals (COMA) from 1950 until 1968 when Congress redesignated it the U.S. Court of Military Appeals. U.S. Court of Appeals for the Armed Forces, *Establishment*, at <http://www.armfor.uscourts.gov/Establish.htm> (last visited 22 Sept. 2003). “In 1994, Congress gave the Court its current designation, the United States Court of Appeals for the Armed Forces.” *Id.*

24. Pub. L. No. 98-209, 97 Stat. 1393 (1983).

25. Pub. L. No. 90-632, 82 Stat. 1335 (1968).

26. See UCMJ arts. 27, 38. The U.S. Army’s Trial Defense Service (USATDS) is an example of this independent structure. See U.S. DEP’T OF ARMY, REG. 27-10, *MILITARY JUSTICE* para. 6-3 (6 Sept. 2002) [hereinafter AR 27-10] (“USATDS is an activity of the [U.S. Army Legal Services Agency] USALSA, a field operating agency of TJAG. USATDS counsel may be assigned either to USALSA, with duty station at a specified installation, or to another organization (MTOE/TDA) and attached to USALSA for all purposes except administrative and logistical support.”).

27. 10 U.S.C. § 836(a) (2000); UCMJ art. 36.

28. The enactment of the UCMJ in 1950, and the first implementing regulation promulgated under Article 36(a) in the *Manual for Courts-Martial (MCM)* in 1951 resulted in the implementation of the current military justice system. See UCMJ art. 36; *MANUAL FOR COURTS-MARTIAL, UNITED STATES* pt. I, ¶ 2 (1951) [hereinafter 1951 MCM].

noted by Colonel Winthrop. The current provision, almost unchanged since its promulgation in 1951, provides:

Subject to any applicable rule of international law or to any regulations prescribed by the President or by any other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.²⁹

The military commissions as constituted in the *PMO* are a departure from the presumptive rule and from longstanding military practice—and in failing to apply the principles of law or the rules of evidence and procedure of *current* courts-martial, they fail to provide the degree of fairness and due process expected in criminal trials conducted by the United States in the twenty-first century.

The adoption of the World War II military commission model brought with it another flaw—the adoption of the *Yamashita* evidentiary standard of “probative value in the mind of a reasonable man.”³⁰ Until 1916, “courts-martial followed in general the rules of evidence, including the rules as to competency of witnesses to testify, that are applied by Federal courts in criminal cases.”³¹ Since 1916, the President has prescribed the rules in the various editions of the *Manual for Courts-Martial (MCM)*.³² The *Yamashita* evidentiary standard was a drastic departure from the rules of evidence set forth in the then-applicable (1928) edition of the *MCM*, and it never received judicial approval because the Supreme Court found the commission’s rulings on evidence “not reviewable by the courts.”³³ The standard drew scathing criticism in Justice Rutledge’s dissent.³⁴ Yet, fifty-five years later, it was adopted virtually intact in the *PMO* as the sole evidentiary standard applicable to present proposed military commissions. The net result was a military

order that applied standards of fairness more than a half century out-of-date, including an aberrant evidentiary standard that provides virtually no limitations whatsoever on admissible evidence.

Procedures for Trials by Military Commission

On 21 March 2002, after months of open criticism, the Secretary of Defense exercised the authority delegated to him in the *PMO* and issued *Military Commission Order No. 1, Procedures for Trials by Military Commissions (PTMC)* as the second stage in the process.³⁵ In it, he responded directly to much of the criticism by making it clear that the usual criminal due process rules would apply to military commissions, including the presumption of innocence, the requirement for proof beyond a reasonable doubt to convict, the right to counsel, the irreversibility of an acquittal, the requirement for a unanimous vote of the commissioners to impose the death penalty, the presumption that trials would be open and not secret, and the establishment of an appellate review process (albeit, not a judicial review process).³⁶ Although the *PTMC* did not allay the earlier concerns about the lack of “independent juries” or the lack of an “appeal to civilian judges” that had troubled commentators such as William Safire, nonetheless, the groundswell of criticism that had prevailed for four months died abruptly.³⁷

Some of the provisions of the *PTMC* depart from the *PMO*, and although the *PTMC* clearly states the *PMO* controls in the event of conflict, it is seemingly the *PTMC* that will apply in these crucial areas. Much of the confusion stems from the fact that the *PMO* and *PTMC* have started essentially from scratch in building a new trial system. If instead, the *PMO* and *PTMC* used the court-martial rules and procedures as the model, the instructions could easily have departed from that model where necessary or desirable to meet national security concerns or

29. MCM, *supra* note 13, pt. I, ¶ 2(b)(2).

30. *In re Yamashita*, 327 U.S. 1, 18 (1946).

31. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 198 (1917) [hereinafter 1917 MCM].

32. See MCM, *supra* note 13, pt. II; 1951 MCM, *supra* note 28, pt. I, ¶ 2; 1917 MCM, *supra* note 31, ¶ 198.

33. *Yamashita*, 327 U.S. at 23.

34. Justice Rutledge reasoned as follows:

Our tradition does not allow conviction by tribunals both authorized and bound by the instrument of their creation to receive and consider evidence which is expressly excluded by Act of Congress or by treaty obligation; nor is it in accord with our basic concepts to make the tribunal, specially constituted for the particular trial, regardless of those prohibitions the sole and exclusive judge of the credibility, probative value and admissibility of whatever may be tendered as evidence.

Id. at 44-45 (Rutledge, J., dissenting).

35. MCO No. 1, *supra* note 2.

36. *Id.* §§ 5-6.

37. Safire, *supra* note 8.

other anticipated contingencies.³⁸ As a result, very few of the many necessary procedures and rules have been addressed, and a myriad of issues and procedures remain to be resolved. Many of these issues are discussed in the detailed commentary on the *PTMC*.³⁹

Military Commission Instructions

Now, eighteen months later, the ability of military commissions to provide the “full and fair trial”⁴⁰ the *PMO* mandates is again in doubt. On 30 April 2003, the DOD General Counsel, pursuant to the delegation contained in the *PTMC*, issued eight *Military Commission Instructions*.⁴¹ These instructions—setting organizational rules for the defense and the prosecution, establishing procedural rules amplifying and modifying those of the *PTMC*, and establishing the elements of crimes triable by military commission—are sure to present challenges to those involved with military commissions.⁴² In particular, they appear to make it extremely difficult for one accused before a military commission to obtain effective representation by counsel of choice.⁴³

Four of the instructions are less controversial than the remaining ones. Three of the instructions establish general procedural rules: *Military Commission Instructions (MCI) No. 1* (Instructions); *MCI No. 7* (Sentencing); and *MCI No. 8* (Administrative Procedures).⁴⁴ These generally follow and implement the *PTMC*, and will no doubt be subject to challenge, but they are not further addressed here. One, *MCI No. 2* (Crimes and Elements for Trials by Military Commission) is the longest, and the only military commission document that was published in advance for public comment.⁴⁵ A number of

organizations criticized *MCI No. 2*, and the document was modified after receipt of these comments.⁴⁶ Nonetheless, the final rules have already been strongly criticized on a variety of fronts, including for the perception that they extend the jurisdiction of military commissions beyond traditional war crimes, and that the provisions of this *MCI* are certain to be the subject of litigation.⁴⁷ These four instructions may be more palatable than the remaining four.

MCI Limitations on Defense Counsel

The remaining four instructions cause the most concern. Most of the concern is based on the instructions’ obvious potential to restrict the option of an accused to obtain his counsel of choice, and to raise a question as to whether a defense counsel—particularly a civilian defense counsel—would be able to provide competent or effective representation. A number of provisions differ from court-martial practice and are certain to be controversial.

Under *MCI No. 5, Qualification of Civilian Defense Counsel*, civilian attorneys may seek qualification and become “prequalified,” as members of the “pool” of civilian attorneys eligible to represent accused persons before military commissions.⁴⁸ The required qualifications include American citizenship; admission to practice in a state, district, territory or possession, or federal court; and not having been the subject of “any sanction or disciplinary action . . . for relevant misconduct,” a term which *MCI No. 5* does not define.⁴⁹ The attorney is required to provide an affidavit regarding admissions to the bar and discipline history, and to sign an authorization for release of information⁵⁰ so that the Chief Defense Counsel can

38. See generally MCM, *supra* note 13, pt. IV.

39. NATIONAL INSTITUTE OF MILITARY JUSTICE, ANNOTATED GUIDE: PROCEDURES FOR TRIALS BY MILITARY COMMISSIONS OF CERTAIN NON-UNITED STATES CITIZENS IN THE WAR AGAINST TERRORISM (2002).

40. *PMO*, *supra* note 3, § 4(c)(2).

41. See MCI Nos. 1-8, *supra* note 2.

42. See NATIONAL INSTITUTE OF MILITARY JUSTICE, MILITARY COMMISSION INSTRUCTIONS SOURCEBOOK (2003), available at http://www.nimj.org/documents/Supp_Disc_MCI5_Annex_B.pdf [hereinafter NIMJ SOURCEBOOK] (containing a detailed analysis of each of the instructions).

43. *Report and Recommendation on Military Commissions*, A.B.A. Annual Meeting (adopted Aug. 2003), available at <http://www.abanet.org/leadership/recommendations03/109.pdf> [hereinafter ABA Report and Recommendation].

44. See MCI Nos. 1, 7, & 8, *supra* note 2.

45. NIMJ SOURCEBOOK, *supra* note 42, at 9-27; U.S. DEP’T OF DEFENSE, DRAFT MILITARY COMMISSION INSTRUCTIONS (28 Feb. 2003), available at http://www.defenselink.mil/news/Feb2003/b02282003_bt092-03.html; see Eugene R. Fidell, *Military Commissions & Administrative Law*, 6 GREEN BAG 2D 379 (2003) (analyzing the military commission rulemaking process and strongly recommending that Congress repeal the statutory exemptions for military commissions in the Administrative Procedure Act).

46. See NIMJ SOURCEBOOK, *supra* note 42, at 29-71 (reproducing most of the comments received by the DOD).

47. *Trials Under Military Order: A Guide to the Final Rules for Military Commissions* (2003), LAWYERS’ COMM. FOR HUMAN RIGHTS, available at http://www.lchr.org/us_law/a_guide_to_the_final_rules.pdf [hereinafter LAWYERS’ COMM. FOR HUMAN RIGHTS].

48. MCI No. 5, *supra* note 2, ¶ 3.A.2).

conduct an investigation into the attorney's qualifications.⁵¹ In addition, the attorney must possess a valid, current security clearance of "secret" or higher, or be willing to submit to (and pay the government's actual costs for processing) a background investigation to obtain a "secret" security clearance.⁵²

To be qualified, the civilian attorney must also agree to comply with all applicable regulations and instructions for counsel, and to execute a standard form "Affidavit and Agreement" that is provided as Annex B to *MCI No. 5*.⁵³ This is a remarkable document, reflecting the very unusual counsel relationships that these instructions mandate, and imposing a number of restrictions on an attorney representing an accused person. Annex B was quietly revised early in July this year, modifying and relaxing several of its requirements.⁵⁴

Under Annex B, attorneys must agree to ensure that the military commission is their "primary duty," and that they will not seek to delay or continue the proceedings for reasons relating to other matters arising in their "law practice or other professional or personal activities."⁵⁵ The economic considerations implicit in such an agreement—in undertaking a representation of indeterminate duration outside the country—are significant. In addition, the detailed defense counsel remains the lead counsel, and the civilian counsel must agree to cooperate with him or her "to ensure coordination of efforts and to ensure such counsel is capable of conducting the defense independently if necessary."⁵⁶ This arrangement is contrary to the usual situation in court-martial practice, when a retained civilian attorney pre-

sumptively becomes lead counsel, and the client can either dismiss the detailed defense counsel or retain that attorney as associate counsel.⁵⁷

This arrangement is apparently needed, because under *MCI No. 4, Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel*, the civilian counsel is not guaranteed presence at closed sessions of the commission, and may be denied access to protected information admitted against the client, which would be revealed only to the detailed defense counsel. The detailed defense counsel would be prohibited from sharing that information with the civilian counsel, possibly with the client as well—raising the possibility that the accused could be convicted on the basis of information to which he had been denied access.⁵⁸ This provision denying the accused's counsel of choice access to critical evidence is perhaps the most important of the *MCI*'s limitations, and one that clearly has an impact on the ability of counsel to provide effective representation.

Further, as originally drafted, Annex B placed other restrictions upon the defense team. First, counsel must agree that they will not travel or transmit documents from the site of the proceedings while they are ongoing, without approval from the appointing authority or the presiding officer. Second, they must also agree not to do any preparation or any other "work relating to the proceedings, including any electronic or other research" without the advance approval of the presiding officer, except at the site of the proceedings.⁵⁹ The rule is relaxed only for post-

49. *Id.* The provision addressing disciplinary actions reads as follows:

An applicant shall submit a statement detailing all sanctions or disciplinary actions, pending or final, to which he has been subject, whether by a court, bar or other competent governmental authority, for misconduct of any kind. The statement shall identify the jurisdiction or authority that imposed the sanction or disciplinary action, together with any explanation deemed appropriate by the applicant. Additionally, the statement shall identify and explain any formal challenge to the attorney's fitness to practice law, regardless of the outcome of any subsequent proceedings. In the event that no sanction, disciplinary action or challenge has been imposed on or made against an applicant, the statement shall so state. Further, the applicant's statement shall identify each jurisdiction in which he has been admitted or to which he has applied to practice law, regardless of whether the applicant maintains a current active license in that jurisdiction, together with any dates of admission to or rejection by each such jurisdiction and, if no longer active, the date of and basis for inactivation. The above information shall be submitted either in the form of a sworn notarized statement or as a declaration under penalty of perjury of the laws of the United States. The sworn statement or declaration must be executed and dated within three months of the date of the Chief Defense Counsel's receipt of the application.

Id. ¶ 3.A.2)c.

50. *Id.* Annex A. Annex A contains a form authorizing the chief defense counsel to conduct an investigation, and an authorization for release of any relevant records. *Id.*

51. *Id.* ¶ 3.A.2)c.

52. *Id.* ¶ 3.A.2)d.

53. *Id.* ¶ 3.A.2)e.

54. *Id.* Annex B, § II.B. *See supra* note 2.

55. *Id.* This requirement is unchanged in the modification. *Id.*

56. *Id.* Annex B, § II.D. This requirement is unchanged in the modification. *Id.*

57. *See* U.S. DEP'T OF ARMY, PAM. 27-9, MILITARY JUDGES' BENCHBOOK ch. 2, § I, para. 2-1-1 (14 Sept. 2002) [hereinafter BENCHBOOK].

58. *MCI No. 4, supra* note 2, ¶ 3.E.4.

trial proceedings.⁶⁰ Counsel must also agree, absent advance approval from the presiding officer, not to “discuss or otherwise communicate or share documents or information about the case with anyone except persons who have been designated as members of the Defense Team,” which includes the civilian attorney, the detailed defense counsel, and any other personnel provided by appropriate authority.⁶¹ Thus, counsel may not, absent permission, confer with anyone outside the defense team, and may not seek expert assistance, advice, or counsel, even on discrete questions of law.⁶²

The revised Annex B, however, relaxed these rules, as one commentary recently noted:

The revised Annex B expands the scope of defense communications by permitting defense team members to discuss the case with “commissioned personnel participating in the proceedings,” “potential witnesses in the proceedings,” and “other individuals with particularized knowledge that may assist in discovering relevant evidence in the case.” Second, the revised Annex B no longer contains the requirement that the defense team perform all “work relating to the proceedings, including any electronic or other research, at the site of the proceedings.” As a result, it appears that the defense may now perform case-related work, such as research, investigation, and witness interviews, from offsite locations, notwithstanding the other restrictions on communication and handling of information.⁶³

Under *MCI No. 4*, all defense counsel are prohibited from entering into agreements with “other Accused or Defense Counsel that might cause them or the Accused they represent to incur an obligation of confidentiality with such other Accused or Defense Counsel or to effect some other impediment to representation.”⁶⁴ Though described as protections for the accused and intended to prevent impediments to representation, these prohibitions have attracted criticism because they contravene longstanding defense practice in criminal cases, prevent defense counsel from conferring with other defense counsel regarding similarly situated accused or others with a common interest, and have the potential to deny counsel exculpatory evidence that lawyers for other accused may possess.⁶⁵

The instruction places further limits on the attorney client relationship. First, counsel must acknowledge that contacts with their clients are subject to “reasonable restrictions on the time and duration.”⁶⁶ More troubling is that communications with clients, “even if traditionally covered by the attorney-client privilege, may be subject to monitoring or review by government officials, using any available means.”⁶⁷ These requirements are unchanged in the modification.⁶⁸ Although the instruction confirms that information gleaned will not be used “in proceedings against the Accused who made or received the relevant communication,”⁶⁹ the chilling effect of—and difficult issues raised by—such a government policy are apparent.⁷⁰

This aspect of the instructions was the subject of the first of the seven substantive recommendations adopted by the House of Delegates of the American Bar Association at its meeting in August 2003, stating that the “government should not monitor privileged conversations, or interfere with confidential communications, between any defense counsel and client.”⁷¹ The recommendation further called for Congress and the Executive Branch to “ensure that all defendants in any military commis-

59. *Id.* MCI No. 5, Annex B, § II.E. (original Annex B). This requirement has been modified. *Id.*

60. *Id.* MCI No. 5, Annex B, § II.E.1 (original Annex B). This requirement has been modified. *Id.*

61. *Id.* MCI No. 5, Annex B, § II.E.2 (original Annex B). This requirement has been modified. *Id.*

62. *Id.*

63. NIMJ SOURCEBOOK, *supra* note 42, at 129-133.

64. MCI No. 4, *supra* note 2, ¶ 3.B.10.

65. LAWYERS COMMITTEE FOR HUMAN RIGHTS, *supra* note 47.

66. MCI No. 5, *supra* note 2, Annex B, § II.H, I.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *See, e.g.*, ABA Report and Recommendation, *supra* note 43 (supporting this conclusion).

sion trials that may take place have the opportunity to receive the zealous and effective assistance of Civilian Defense Counsel (CDC)” and noted the American Bar Association’s opposition to “any qualification requirements or rules that would restrict the full participation of CDC who have received appropriate security clearances.”⁷²

No document constituting protected information may leave the site of the proceedings,⁷³ and counsel must agree to *never* make “any public or private statements regarding any closed sessions of the proceedings or any classified information or material, or document or material constituting protected information under *MCO No. 1*.”⁷⁴ This seems to be a permanent gag order, covering a very wide range of material. For example, the definition of “protected information” in the *PTMC* includes *classifiable* information, a term that is both broad and vague.⁷⁵ Regrettably, the *PTMC* does not further explain or justify this provision.⁷⁶

Indeed, it is noteworthy that none of these restrictions are explained or justified. The failure to publish any background or source information, or any analysis on any of these instructions makes understanding and interpreting them all the more difficult. As noted, only one, *MCI No. 2*, was published in advance for comment, but that was also without any source or background information, making it difficult to provide meaningful critical comment. Such secrecy, in the case of such unusual and restrictive rules, can only result in questions.

Chief Defense Counsel

Other aspects of these instructions raise additional concerns. First, under *MCI No. 6, Reporting Relationships for Military Commission Personnel*, the Chief Prosecutor and the Chief Defense Counsel are part of one organization. The Chief Prosecutor and Chief Defense Counsel are both military attorneys, who report to different deputy general counsels of the DOD as first-line supervisors but both report to the DOD General Coun-

sel as a second-line supervisor.⁷⁷ In a system where only three people—the President, the Secretary, and the General Counsel—have exercised control,⁷⁸ the supervision of the Chief Defense Counsel by one so heavily involved in the design and administration of the process presents an appearance inconsistent with the independent role of defense counsel. This is so even if the Chief Defense Counsel is not actually a defense counsel—an open question under these instructions.

Second, under *MCI No. 4* and *MCI No. 6*, the role of Chief Defense Counsel is one of questionable efficacy. The Chief Defense Counsel is the reporting supervisor for all the military defense counsel and is required to “supervise all defense activities and the efforts of Detailed Defense Counsel.”⁷⁹ The Chief Defense Counsel, however, is seemingly prohibited from actually functioning as a supervisor, and may *not*: (1) perform duties of a detailed defense counsel; (2) form an attorney-client relationship with any accused person; or (3) incur any concomitant confidentiality obligations.⁸⁰ Accordingly, it would seem that reasonable defense counsel would not normally (if they would ever) choose to actually confer with the Chief Defense Counsel, who cannot be a member of any defense team. The Chief Defense Counsel’s role with regard to civilian defense counsel is to administer the civilian defense counsel pool, to make decisions (subject to review by the General Counsel) on the qualifications of civilian defense counsel to represent persons before military commissions, and to:

monitor the conduct of all qualified Civilian Defense Counsel for compliance with all rules, regulations and instructions governing military commissions . . . [and] report all instances of noncompliance . . . to the Appointing Authority and to the General Counsel of the Department of Defense with a recommendation as to any appropriate action.⁸¹

72. *Id.*

73. *MCI No. 5, supra* note 2, Annex B, § II.G (original Annex B). This requirement has been changed, and counsel are now required to comply with rules, regulations and instructions regarding handling protected information. *See supra* note 42.

74. *MCI No. 5, supra* note 2, Annex B, § II.F. This requirement is unchanged in the modification. *Id.*

75. *Id.* *MCO No. 1*, ¶ 6(D)(5).

76. *Id.*

77. *Id.* *MCI No. 6*, ¶ 3.A.3, 5.

78. *See id.*

79. *Id.* *MCI No. 4*, ¶ 3.B.3.

80. *Id.*

81. *Id.* ¶ 3.E.5.

These instructions, read together, make it clear that the Chief Defense Counsel is less a defense counsel than he is a government administrator operating on behalf of the General Counsel. The structure makes it difficult to imagine any civilian defense counsel being comfortable dealing with the Chief Defense Counsel—except to consider him simply as another member of the government (prosecution) team.

Summary

The drafters of these instructions were faced with the task of attempting to strike a balance between guaranteeing the rights of accused persons at military commissions on the one hand, and protecting the national security interests of the United States on the other. Doing so surely required consideration of the application of traditional criminal law guarantees as they exist in American law and of constitutional and statutory rights as they have developed in the American military justice system—especially in the almost sixty years since the last common-law war-courts were held in the World War II era. Those principles and rules have changed drastically since World War II; the fact that a military commission process or procedure passed (or escaped) judicial review in 1942 or 1946 is irrelevant to what is acceptable for military commissions in 2003.

The enactment of the UCMJ in 1950 brought dramatic changes to the military justice system. One of the most controversial at the time—now an indispensable element—was the establishment of a civilian court at the apex of the system.⁸² In establishing a military commission structure without the availability of civilian judicial review, the administration has failed to account for a cardinal principle of military justice in effect for more than a half-century. Indeed, in an attempt to thwart

some of the intense criticism of the *PMO*, the President's counsel assured the nation that the *PMO* "preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through a habeas corpus proceeding in a federal court."⁸³ Since that time, however, the Administration has argued steadfastly and successfully against U.S. courts exercising habeas corpus jurisdiction over those incarcerated in Guantanamo.⁸⁴ The world will question American standards of justice and our commitment to the rule of law if the United States tries and sentences the Guantanamo detainees, perhaps to death, with no U.S. court able to review the conviction.

What is at stake is our prestige in the world community and our own heritage. For two centuries, we have viewed ourselves as a nation that believes in and adheres to the rule of law and treasures the concepts of truth and justice—all supported by, perhaps incorporated in, our American sense of fairness. We must take care that we do not sacrifice our principles on the altar of our response to the terrorism of 11 September 2001 and the recently perceived needs of national security, or we may find ourselves sacrificing the very values we prize in an abortive effort to protect them. In the oft-repeated words of Benjamin Franklin, "They that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety."⁸⁵

Unless we change some of the rules that have been promulgated, when the first military commissions are convened, it will not just be alleged war criminals called before the bar of military commission justice. The world will be watching, and it is American justice that will be on trial.⁸⁶

82. See UCMJ arts. 141-145 (2002).

83. Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27 (serving as counsel to President Bush).

84. See, e.g., *Coalition of Clergy v. Bush*, 189 F. Supp. 2d 1036 (C.D. Cal. 2002) (dismissing writ of habeas corpus filed on behalf of detainees held by the military at U.S. Naval Base Guantanamo Bay, Cuba and finding that the "court lacks jurisdiction to entertain this petition because no custodian responsible for the custody of the detainees is present in the territorial jurisdiction of this district").

85. JOHN BARTLETT, *FAMILIAR QUOTATIONS* 392:9 (10th ed. 1919), available at <http://education.yahoo.com/search/bfq?lb=q&p=num%3A245.1>.

86. It would appear that American justice is already on trial, well before the first military commission has been appointed. The 12 July 2003 cover of the British weekly *The Economist* reads "*Unjust, unwise, unAmerican: Why terrorist tribunals are wrong.*" *ECONOMIST*, July 12, 2003, at 9, 26. Both the editorial and the news article in this issue are highly critical. See *id.* In particular, the editorial alleges the Administration has "avoided America's own courts repeatedly," and harshly criticizes its current approach:

Mr. Bush could have asked Congress to pass new anti-terrorism laws. Instead he is setting up a shadow court system outside the reach of either Congress or America's judiciary, and answerable only to himself. Such a system is the antithesis of the rule of law which the United States was founded to uphold . . . Mr. Bush is not only dismaying America's friends but also blunting one of America's most powerful weapons against terrorism.

Id. at 9. The risk is that such criticism will increase and multiply should the United States convene military commissions as it has currently structured them.

Why Military Commissions Are the Proper Forum and Why Terrorists Will Have “Full and Fair” Trials:

A Rebuttal to *Military Commissions: Trying American Justice*¹

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Captain (Capt.) Barry's article, *Military Commissions: Trying American Justice*, raises several issues regarding the upcoming military commission prosecutions of terrorists and their associates. The purpose of this article is to rebut some of his major points. The thesis of Capt. Barry's article appears to be that the military commissions do not satisfy “basic standards of American justice” because they “depart materially” from current practice and procedure in courts-martial.² He also asserts that military commissions are flawed in other ways. His major criticisms can be fairly summarized as follows: commissions “set aside normal rules of evidence in favor of a generic ‘probative value to a reasonable person’ standard;”³ the role of defense counsel is unduly restricted;⁴ and the Chief Defense Counsel is actually “another member of the government (prosecution) team.”⁵

These criticisms, however, are unfounded. Military commissions are necessary in our continuing war on terrorism to best guarantee a “full and fair” trial protecting all personnel par-

ticipating in the process, including the accused while also safeguarding classified and sensitive information used as evidence in the proceedings.⁶ Despite the assertion to the contrary, the evidentiary standard adopted for use by the commission has been approved by the U.S. Supreme Court, meets international judicial standards and, because it is applicable to both the prosecution and defense, benefits both.⁷ The claim that restrictions on defense counsel will preclude effective representation is unsupported. On the contrary, any limitations on the defense are both reasonable and necessary given that the commissions will be operating during wartime and, in any event, do not constitute a real obstacle to a zealous defense.⁸ The assertion that the Chief Defense Counsel is just another prosecutor is unsubstantiated, for it ignores the plain language of Military Commission Order No. 1.⁹ In sum, when the President established military commissions in November 2001, he directed that commission proceedings be “full and fair”—the legal framework developed to date guarantees that both the letter and the spirit of the President's command will be satisfied.¹⁰

1. See Kevin J. Barry, *Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 1. Mr. Barry's article is reprinted under a different name from a previous edition of *The Federal Lawyer*, albeit in a substantially expanded and more heavily footnoted version. See Kevin J. Barry, *Military Commissions: American Justice on Trial*, 50:6 FED. LAW. 24 (2003).

2. See Kevin J. Barry, *Military Commissions: Trying American Justice*, ARMY LAW., Nov. 2003, at 1.

3. *Id.* at 1 (citing Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 § 7(b)(2) (Nov. 16, 2001) [hereinafter PMO]).

4. *Id.* at 5, 8.

5. *Id.* at 8.

6. PMO, *supra* note 3, § 4(c)(2).

7. See Dep't. of Defense's Implementation of the President's Military Order on Detention, Treatment, and Trial by Military Commission of Certain Non-citizens in the War on Terrorism: Hearing Before the Senate Armed Service Comm., 107th Cong. 68 (2001) (statements of Paul D. Wolfowitz, Deputy Secretary of Defense and William J. Haynes, General Counsel, Dep't. of Defense), available at http://www.senate.gov/~armed_services/hearings/2001/c011212.htm [hereinafter *President's Military Order Hearing*] (“[M]ilitary tribunals can permit more inclusive rules of evidence, a flexibility which could be critical in wartime. . . . Military commissions allow those judging the case to hear all probative evidence, including evidence obtained under conditions of war, evidence that could be critical to obtaining a conviction.”); Senior Defense Official, U.S. Dep't of Def., Background Briefing on the Release of Military Commission Instructions, at the Pentagon (May 2, 2003), available at <http://www.defenselink.mil/transcripts/2003/tr20030502-0144.html>.

8. Procedures for Trials by Military Commissions of Certain Non-U.S. Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374-99 (1 July 2003) (to be codified at 32 C.F.R. pts. 10-17); U.S. DEP'T OF DEFENSE, MILITARY COMMISSION INSTRUCTIONS (30 Apr. 2003) [hereinafter MCI Nos. 1-8].

9. Military Commission Order No. 1, 68 Fed. Reg. 39,374-99 (21 Mar. 2002) [hereinafter MCO No. 1]; see discussion, *infra*, at text accompanying nn.56-68.

10. PMO, *supra* note 3, § 4(c)(2).

Military Commissions Are the Proper Forum for Terrorists Accused of War Crimes and other War-related Offenses and Need Not Follow Courts-Martial Practice Because They Satisfy International Criminal Legal Standards

In 1950, when it enacted a uniform statute for courts-martial in the armed forces, Congress expressly recognized that military commissions would be utilized in the future.¹¹ As contemplated by Article 36, Uniform Code of Military Justice (UCMJ), “courts-martial, military commissions and other military tribunals” would all continue to exist, and be utilized when appropriate.¹² Moreover, as the Army and Navy had recently prosecuted more than 3000 German and Japanese defendants at military commissions,¹³ Congress certainly understood that military commissions would be used in future prosecutions of enemy combatants for war crimes and war-related offenses. It follows that Congress foresaw orders similar to the President’s Military Order of November 13, 2001, which provides for the trial by military commission of al Qaida members and other international terrorists who have committed war crimes and other war-related offenses.¹⁴ Additionally, there is no doubt that establishing military commissions was a lawful exercise of the President’s power under Article II:¹⁵ after al Qaida’s 11 September 2001 attacks, the President took action as Commander-

in-Chief to defend the United States.¹⁶ As Usama Bin Laden had previously declared war upon the United States,¹⁷ and as al Qaida was waging its armed conflict against America by intentionally violating the law of war, the President properly exercised his authority as Commander-in-Chief to direct the prosecution by military commission of any captured enemy combatant who had committed a war crime or war-related offense.¹⁸

Unlike courts-martial—which today are essentially the U.S. Armed Forces’ equivalent of Article III¹⁹ courts—military commissions are special war courts; they exist only during war or in the aftermath of armed conflict.²⁰ Moreover, in contrast to the general criminal jurisdiction of courts-martial and U.S. District Courts, military commissions (whether created by Congress or by the President) are courts of extremely narrow focus, having subject-matter jurisdiction only over war crimes and war-related offenses.²¹ Also note that the military commissions established by the President in November 2001 are even more restricted in scope, in that *in personam* jurisdiction is limited to non-U.S. citizens.²² Additionally, by virtue of their military backgrounds, the panel members, prosecutors and defense counsel participating in those proceedings have a real-world expertise that makes them well-suited to handle war crimes and

11. Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950) [hereinafter 1950 UCMJ]; see MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. I, ¶ 2 (1951) [hereinafter 1951 MCMJ]; *President’s Military Order Hearing*, *supra* note 7 (“U.S. Congress also recognized the use of military commissions after World War II when it passed the Uniform Code of Military Justice in 1950, which included statutory language preserving the jurisdiction of military commissions.”).

12. UCMJ art. 36 (2002). Also note that UCMJ, article 21, states that the jurisdiction of courts-martial are not exclusive; military commissions are not deprived of jurisdiction that “by the law of war” may be exercised over offenders or offenses. *Id.* art. 21.

13. NORMAN E. TUTOROW, WAR CRIMES, WAR CRIMINALS, AND WAR CRIMES TRIALS 5 (1986) (“The United States held in all approximately 900 war crimes trials, involving more than 3000 defendants. About half these cases were tried in Germany.”).

14. PMO, *supra* note 3.

15. U.S. CONST. art. II, § 2.

16. See James Dao, *A Nation Challenged: The War Budget; U.S. is Expecting to Spend 1 Billion a Month on War*, N.Y. TIMES, Nov. 12, 2001, at B5.

17. Usama Bin Muhammed Bin In Laden, Declaration of Jihad Against the Americans Occupying the Land of the Two Holy Places (Aug. 23, 1996), available at http://www.terrorismfiles.org/individuals/declaration_of_jihad1.html. In August 1996, Usama bin Laden issued a “Declaration of Jihad Against the Americans,” in which he vowed that al Qaida would take violent action against the United States unless American military forces withdrew from Saudi Arabia. Between the time of this declaration of war and the 9/11 attacks, al Qaida bombed U.S. targets in Kenya, Tanzania, and Yemen, with great loss of life and property. *Id.*; see Diana Elias, *Video Suggests Bin Laden Men Perpetrated Cole Bombing*, WASH. POST, June 20, 2001, at A24; Vernon Loeb and Christine Haughney, *Four Guilty in Embassy Bombings*, WASH. POST, May 30, 2001, at A1.

18. PMO, *supra* note 3.

19. U.S. CONST. art. III, § 2. Section 2 defines the power of Article III courts as follows:

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;--to all cases affecting ambassadors, other public ministers and consuls;--to all cases of admiralty and maritime jurisdiction;--to controversies to which the United States shall be a party;--to controversies between two or more states;--between a state and citizens of another state;--between citizens of different states;--between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

Id.

20. PMO, *supra* note 3.

21. *Id.*; MCO No. 1, *supra* note 9.

22. PMO, *supra* note 3.

related offenses. Finally, unlike Article I courts-martial, which may be tied to a command's location,²³ or Article III courts, which must be held in the United States, military commissions may be held at any geographic location.²⁴ As the Department of Defense (DOD) intends to begin prosecutions while the armed conflict with al Qaida continues,²⁵ the ability to hold commission proceedings at any location allows classified and sensitive information to be better protected and also ensures the safety of all personnel involved in the process—panel members, defense counsel, prosecutors and the accused. In sum, Congress and the UCMJ contemplated the use of military commissions; military commissions are specialized war courts whose limited jurisdiction and military participants makes them best able to deal with criminal offenses arising out of armed conflict; and the commissions are best able to protect classified information critical to national security and safeguard all personnel participating in the process.

Captain Barry also asserts that unless the rules and procedures used at military commissions “closely reflect” the courts-martial model, they will fall short of American standards of justice.²⁶ This assertion, however, is contrary to the President's mandate and the language of the Commission Order. First, the President mandated in his military order that all commissions be “full and fair;”²⁷ this certainly comports with the American ideal that every accused is entitled to a fair trial. Second, Military Commission Order No. 1 provides the following safeguards for an accused—all of which are similar to those protections enjoyed by an accused at courts-martial: (1) the presumption of innocence; (2) proof of guilt beyond a reasonable doubt; (3) the right to call and cross-examine witnesses (subject

to rules regarding production of witnesses and protection of information); (4) access to all evidence the prosecution intends to introduce at trial and any exculpatory evidence known to the prosecution; (5) no statements made by an accused to his attorney, or anything derived from those statements, may be used against him at trial; (6) the right to remain silent at trial, with no adverse inference from such silence; (7) the right to military defense counsel at no cost to the accused; (8) the right to civilian defense counsel at no cost to government (provided counsel is a U.S. citizen and obtains a security clearance); and (9) the right to have any findings and sentence reviewed by an appellate panel.²⁸ Finally, American courts-martial should not be the measure of fairness. Instead, the public should use international legal standards to evaluate the fairness of military commissions. By way of example, the rules governing prosecutions before the new International Criminal Court (ICC) provide for the following: (1) a presumption of innocence; (2) proof beyond a reasonable doubt; (3) choice of counsel at no cost; (4) right to cross-examine witnesses against him; (5) right against self-incrimination; and (6) a right to appeal any findings or sentence to an “Appeal Chamber.”²⁹ While the United States is not a party to the Treaty of Rome, and while the ICC does not apply to our armed conflict with al Qaida and the Taliban, a comparison of its rules with the regulations governing military commissions shows that there is no difference between the rights enjoyed by an accused at either proceeding.³⁰ Assuming *arguendo* that the ICC's rules satisfy international jurisprudential norms, it follows that military commissions also do—and that there is every reason to conclude that they will be fair.

23. Note, however, that “[c]ourts-martial have power to try any offense under the code except when prohibited by the Constitution.” MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. II-15 (2002) [hereinafter MCM]. Additionally, “the authority to convene courts-martial is independent of rank and is retained as long as the convening authority remains a commander in one of the designated positions.” *Id.* pt. II-48.

24. See U.S. CONST. art. III; MCO No. 1, *supra* note 9.

25. This is an unusual situation given that almost all war crimes and war-related offenses are prosecuted *after* the end of hostilities, when the need to protect national security information and safeguard participants in the trial is greatly reduced. *President's Military Order Hearing*, *supra* note 7. Deputy Secretary of Defense, Paul Wolfowitz, explained the unusual situation created by terrorist hostilities as follows:

Because of the ongoing threat from terrorists, the risks to jurors are of a kind that military officers are trained and prepared to confront but that are not normally imposed on jurors in civilian trials. Indeed, the judge who handled the trial for the first World Trade Center attack is still under 24 hour protection by federal marshals—and probably will be for the rest of his life.

It is also important to avoid the risk of terrorist incidents, reprisals or hostage takings during an extended civilian trial. Moreover, appeals or petitions for habeas corpus could extend the process for years. Military commissions would permit speedy, secure, fair and flexible proceedings, in a variety of locations, that would make it possible to minimize these risks.

Id.

26. Barry, *supra* note 2, at 1.

27. PMO, *supra* note 3.

28. MCO No. 1, *supra* note 9, para. 5.

29. Rome Stat. of the Int'l Crim. Court, U.N. Doc. A/CONF. 183/9 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998), *reprinted in* 37 I.L.M. 998 (1998), *available at* www.un.org/law/icc/statute/rome.htm [hereinafter Rome Statute].

30. Compare *id.*, with MCO No. 1, *supra* note 9, and PMO, *supra* note 3.

“Probative to a Reasonable Person” is the Correct Evidentiary Standard

Under the ICC rules, and at the International Criminal Tribunal for the Former Yugoslavia, hearsay evidence is admissible if deemed to have probative value.³¹ It stands to reason that there is nothing fundamentally unfair about admitting hearsay at a criminal proceeding even though such evidence is generally excluded at courts-martial by virtue of the Military Rules of Evidence.³² Similarly, given that Article 36, UCMJ, permits the President to direct the use of different modes of proof at military commissions, there is nothing improper about deciding that all evidence “probative to a reasonable person” is admissible.³³ This standard not only takes into account the unique battlefield environment in which much evidence will be obtained, but explicitly recognizes that what happens in a war setting is markedly different from traditional peacetime law enforcement practices in the United States. Soldiers cannot be expected to complete a chain-of-custody document when under fire from an enemy combatant in a cave.

Additionally, those who complain about the “probative to a reasonable person standard” forget that the accused and his counsel benefit from this provision at least as much as the prosecutor; defense counsel are also able to introduce written and oral hearsay, documents of uncertain or unknown origin—anything that is “probative.”³⁴ As one lawyer, writing about his experiences in war crimes trials held in Yokohama (Japan) from 1945 to 1947, observed about the “probative to a reasonable person” standard:

The relaxation of certain rules of evidence and presumption, which are basic in American Federal jurisprudence, *proved a blessing in disguise to some of the American defense counsel.* They turned the interpretation of the evidence in their favor by continued pro-

testations of “adherence to fundamental Anglo-Saxon principles,” “fair-play,” “civilized law systems” . . .³⁵

Defense counsel would continually protest against the reception of hearsay evidence in spite of the repeated admonitions of the court that such evidence was admissible in accordance with the prevailing rules of procedure.³⁶ Then, when counsel with a show of great resignation would reluctantly concede the court was correct in its ruling, they were permitted to all the more strongly argue the lack of probative value of such evidence.³⁷ This gave them a strong talking point to attack the admittedly weak evidence, oftentimes carrying down with them other strong evidence.³⁸ There is every reason to believe that defense counsel in the instant military commissions, in providing the accused with a zealous defense, will take a similar approach to evidence offered by the prosecution at trial.

Finally, while the presiding officer and panel members may give the government (and the defense) wide latitude in admitting evidence, all members will have taken an oath prior to the commencement of the trial.³⁹ Having sworn to give the accused a full and fair trial, and hold the prosecution to its burden of proving the case beyond a reasonable doubt, the members may well disregard or give less weight to admissible evidence that they conclude is unreliable or of low probative value.⁴⁰

Captain Barry also claims that the “probative to a reasonable person” standard comes from *In re Yamashita*,⁴¹ that this was a drastic departure from the rules of evidence in the then-applicable 1928 *Manual for Courts-Martial*, and that the “probative to a reasonable person” standard has never received judicial review.⁴² These claims are incorrect. In fact, the standard comes from the 1942 Nazi U-boat saboteur case, *Ex parte Quirin*.⁴³ President Roosevelt directed that the military commission use this method of proof in his 2 July 1942 Executive Order⁴⁴ and the Supreme Court, *in reviewing and then affirming*

31. See Rome Statute, *supra* note 29.

32. See MCM, *supra* note 23, MIL. R. EVID.; President’s Military Order Hearing, *supra* note 7.

33. PMO, *supra* note 3; UCMJ art. 36 (2002).

34. PMO, *supra* note 3.

35. Albert Lyman, *A Reviewer Reviews the Yokohama War Crimes Trials*, J. OF BAR ASS’N OF D.C. 267, 274 (1950) (emphasis added).

36. *Id.* at 275.

37. *Id.*

38. *Id.*

39. MCO No. 1, *supra* note 9, sec. 5C.

40. See *id.*

41. *In re Yamashita*, 327 U.S. 1 (1946).

42. PMO, *supra* note 3; MANUAL FOR COURTS-MARTIAL, UNITED STATES (1928); Barry, *supra* note 2, at 1, 4.

the *Quirin* proceedings on 31 July 1942, concluded that the defendants had been lawfully tried.⁴⁵ This identical evidentiary standard was used in military commissions held in Germany and the Far East after World War II—all of which, in the view of many historians and commentators, conducted fair trials of war criminals.⁴⁶

Restrictions on Defense Counsel are Both Necessary and Reasonable

Since commissions will be held while the armed conflict with al Qaeda and international terrorists continues, the government must ensure that information critical to the protection of the United States is not disclosed to the enemy, while also ensuring that all individuals participating in the commission, including the accused, are protected from harm. Reasonable restrictions on defense counsel are necessary to safeguard information and people—Military Commission Instruction No. 5 is a reasonable balance of these two requirements and the right of the accused to effective representation.⁴⁷

First, the accused’s detailed defense counsel—a highly experienced Army, Navy, Air Force or Marine judge advocate—*always* has access to evidence the prosecution intends to introduce at trial and will *never* be excluded from any trial proceeding.⁴⁸ But, given the need to preclude the enemy from obtaining classified evidence that might aid him in his war against the United States, all those participating in the proceed-

ings—including both military counsel and any civilian attorney hired by the accused at his own expense—must have security clearances.⁴⁹ This explains why Instruction No. 5 requires U.S. citizenship and at least a SECRET clearance for civilian attorneys who desire to represent a detainee.⁵⁰ As to the claim that civilian defense counsel will be denied access to highly classified or sensitive information—and may be excluded from the proceedings if such information is introduced at commission proceedings—this is possible. The requirement, however, that commission proceedings be both “full and fair”⁵¹ and “open”⁵² mandates the use by the prosecution of unclassified evidence to the greatest extent possible. If classified information is introduced at trial, it is logical that the prosecution will utilize the evidence with the lowest classification level.

Regarding the monitoring of conversations between the accused and his counsel, the policy decision to permit monitoring is based on three factors—the government’s intent to start commissions while the war continues, the requirement to protect national security information, and the need to safeguard the lives of those participating in the proceedings. It is similar to the need to put reasonable restrictions on defense counsel. Four important points should be considered. First, monitoring will not occur as a routine matter; rather, monitoring is expected to occur infrequently, with at least a general notice of intent to monitor provided to defense counsel prior to its occurrence.⁵³ Second, monitoring is an intelligence and security function and not a law enforcement function.⁵⁴ Third, no prosecutors associated with the proceedings against the monitored accused are

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

44. Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 2, 1942). As an aside, Roosevelt’s order appointing a commission to try the eight U-boat saboteurs also directed that the proceedings be “full and fair”—the phrase used almost sixty years later by President Bush in his Military Order of November 13, 2001. *Id.*; PMO, *supra* note 3.

45. *Quirin*, 317 U.S. at 1.

46. See, e.g., Maximilian Koessler, *American War Crimes Trials in Europe*, 39 GEO. L.J. 18-112 (1950). The following statement is representative of the views of many historians that the trials were fair:

Those responsible for the war crimes trials by American military commissions or military government courts in Germany were inspired by the honest desire to give the defendants the full benefit of a fair trial . . . The result of this philosophy . . . was a procedure which, in all external aspects, represented an American trial, but was conducted under rules which were neither purely American, nor purely European ones but a kind in themselves.

Id. at 54-55; see also Paul E. Spurlock, *The Yokohama War Crimes Trials*, 36 ABA J. 387-89, 436-37 (1950) (“Trials were examples of democratic ideals . . . It was considered that, under the system employed, an accused received outstandingly fair and honest justice.”).

47. See MCI No 5, *supra* note 7.

48. *Id.* para. 6.B.(3).

49. *Id.* para. 3.A.(2)d.

50. *Id.*

51. *Id.* para. 6.B.(2).

52. *Id.* paras. 5.O. & 6.B.(3).

53. *Id.* sec. II-I.

involved in the process.⁵⁵ Finally, and most importantly, information obtained as a result of monitoring will not be used against the accused that made the statement; it is inadmissible in any commission proceeding against him.⁵⁶

The Chief Defense Counsel's Mission: "Proper Representation of All Accused"

One basis of Capt. Barry's criticism is that the Chief Defense Counsel is, like the Chief Prosecutor, part of the DOD General Counsel's office.⁵⁷ Although the General Counsel has overall responsibility for legal operations in the DOD, he is not the decision-maker for pre-trial, trial, or post-trial issues at military commissions.⁵⁸ It is the appointing authority that controls what cases are tried and how military commissions are conducted.⁵⁹ The General Counsel's ultimate supervision of the Chief Defense Counsel is an administrative function and not an attempt to affect the independence of that defense counsel or the defense function.⁶⁰

In fact, defense counsel practicing within the military justice system may see analogies to the current relationship between the General Counsel and the Chief Defense Counsel. For example, The Judge Advocate General of the Air Force ultimately "supervises" the Chief Circuit Defense Counsel responsible for overseeing the delivery of all defense services at courts-martial in a particular geographical region.⁶¹ That supervisory relationship, however, in no way adversely affects the independence of the Chief Circuit Defense Counsel, or his freedom of action in supervising defense counsel at Air Force courts-martial—just as it will not at trials by military commissions.⁶²

Captain Barry also takes issue with whether the Chief Defense Counsel actually is a defense counsel since he may not perform the duties of a detailed defense counsel or enter into an attorney-client relationship with any accused.⁶³ This criticism may seem unusual to those attorney-supervisors who have experience detailing subordinates generally, and specifically in potential conflict scenarios. The Chief Defense Counsel is required to ensure "proper representation of all accused,"⁶⁴ to detail one or more judge advocates who will "defend the accused zealously within the bounds of the law without regard to personal opinion" as to his guilt,⁶⁵ and otherwise ensure that the accused is represented at all stages of the proceedings.⁶⁶ To carry out his duties—and to ensure that he does not have a conflict of interest with any accused—the Chief Defense Counsel necessarily is precluded from entering into an attorney-client relationship with any accused. Of course, were he to represent an accused, there is a very high likelihood that the Chief Defense Counsel would be unable to ensure proper management of defense personnel and resources, to include precluding conflicts of interest among military defense counsel under his direct supervision.

There is nothing, however, to prohibit defense counsel from seeking the advice of the Chief Defense Counsel on matters that would not reveal client confidences. Once again, this supervisory function is not uncommon to military defense counsel that regularly supervise subordinate defense counsel and provide general advice and guidance without forming attorney-client relationships with individual accuseds.⁶⁷ Additionally, these supervisors regularly detail different defense counsel to represent different clients in conflict cases, and this function in no way aligns the supervisor with the prosecution or prevents the detailed defense counsel from communicating or seeking general advice in a given case.⁶⁸

54. *Id.*

55. *Id.*

56. *Id.*

57. Barry, *supra* note 2, at 9.

58. See MCO No. 1, *supra* note 9.

59. *Id.* para. 3A.

60. MCI No 5, *supra* note 8.

61. U.S. DEP'T OF AIR FORCE MANUAL 51-204, U.S. AIR FORCE JUDICIARY para 1.1 (1 July 1995).

62. See generally *President's Military Order Hearing*, *supra* note 7.

63. Barry, *supra* note 2, at 8.

64. MCI No. 5, *supra* note 8, para. 4.C.(1).

65. *Id.* para. 4.C.(2).

66. *Id.*

67. See U.S. DEPT' OF ARMY, REG. 27-1, JUDGE ADVOCATE LEGAL SERVICES para. 3-2 (30 Sept. 1996).

**Conclusion: Trials at Military Commissions Will Be
“Full and Fair”**

For the foregoing reasons—starting with the President’s command that military commissions be “full and fair,” there is every reason to expect that this is exactly what will occur when the first trials get underway.⁶⁹ The military commissions established by the President in 2001 are war courts of extremely narrow jurisdiction. Because they exist only to prosecute terrorists for war crimes (and other related offenses) committed in the ongoing war on terrorism, the rules and procedures used in previous wars to prosecute war crimes are the proper model for the current military commission process.

In his criticism of military commissions, Capt. Barry does not consider the people who will be a part of the commission process. In my view, people—who they are, what they will do, how they will do it—are a critical component in any evaluation of the fairness of military commissions. This is because no criminal legal system—U.S., foreign, civilian or military—can be judged without examining the men and women who take part in it. Ultimately, it is people—in this case commissioned officers, many of whom will be experienced judge advocates—who will ensure that the President’s command for “full and fair” trials is carried out, both in letter and in spirit. It would be much more fair if Capt. Barry and others, who are critical of military commissions, would wait to see how the first trials are conducted—especially if, as I believe, they will both be “full and fair” and something of which Americans will be proud.

68. *See id.* para. 2-5.

69. *See PMO, supra* note 3, § 4(c)(2).

Editorial Comment:

A Response to Why Military Commissions Are the Proper Forum and Why Terrorists Will Have “Full and Fair” Trials

Kevin J. Barry
Captain, U.S. Coast Guard (Retired)

The Army Lawyer provided Captain Barry an opportunity to review and reply to Colonel Borch’s A Rebuttal to “Military Commissions: Trying American Justice.”¹ Captain Barry submitted the following response:

There is no question as to the commitment, caliber, or integrity, of the military personnel who will be engaged in the effort to ensure that any trials by military commission are “full and fair” as the President has directed.² My quarter-century in uniform, and well over a decade of involvement in this system since retirement,³ convince me that if by heroic effort they can make this process fair, they will do it. They are not the issue.

On the contrary, it is the process itself that is so troubling. It is one that Colonel Borch declares to be fair—as acting chief prosecutor that is his job. But the citations of authority he uses to support his view are almost exclusively the military commission regulations themselves, statements of those in the administration who have prepared those regulations, and views of a couple of commentators from the post-World War II era.⁴ Thus, the administration position he espouses actually stands alone, unsupported by any independent voice.

In a recent op-ed article, former deputy solicitor general Philip Lacovara expressed his deep concern for the fairness of

these procedures.⁵ He reiterated his early and strong support for military commissions as the appropriate venue for international terrorist war-criminals.⁶ Two years later, however, he has now concluded that the administration’s approach to military commissions confirms many of the critics’ worst fears—the rules governing military commissions depart substantially from standards of fair procedure.⁷ In particular, he is troubled by rules that undermine the basic right to effective counsel by imposing significant legal constraints on civilian defense counsel.⁸ He also challenged the administration’s constant reliance on World War II judicial cases such as *Quirin* and *Yamashita*.⁹

The administration needs to do more than simply defend its regulations and the deficient trial structure it has created. It needs to substantially modify the procedures. Otherwise, notwithstanding the best intentions and efforts of those involved, military commissions will not be perceived as fair, either here or internationally. We are a nation guided by the rule of law, and part of our goal in the war against terrorism is to win the hearts and minds of friend and foe alike—but on this issue we are losing even our friends. If we hope to use military commissions as an effective alternative to courts-martial or federal civilian prosecutions, we *must* substantially change the rules.

1. See Colonel Frederic L. Borch III, *A Rebuttal to “Military Commissions: Trying American Justice,”* ARMY LAWYER, Nov. 2003, at 10.

2. See Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 § 7(b)(2) (Nov. 16, 2001).

3. Captain Kevin J. Barry USCG (Ret.), served on active duty with the U.S. Coast Guard for twenty-five years, during which time he had assignments at sea and a variety of legal duties, including chief trial judge and appellate military judge. He is a founding member of the Board of Directors of the National Institute of Military Justice (NIMJ), a past president of the Judge Advocates’ Association and the Pentagon Chapter of the Federal Bar Association, and a past chair of the American Bar Association Standing Committee on Armed Forces Law. He has authored a number of works, including *A Face Lift (And Much More) for an Aging Beauty: the Cox Commission Recommendations to Rejuvenate the Uniform Code of Military Justice*, [2002] L. REV. M.S.U.-D.C.L. 57.

4. See Borch, *supra* note 1, at 10-16.

5. Philip Allen Lacovara, *Trials and Error*, WASH. POST, Nov. 12, 2003, at A23.

6. *Id.*

7. *Id.*

8. *Id.*; see Procedures for Trials by Military Commissions of Certain Non-U.S. Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374-99 (1 July 2003) (to be codified at 32 C.F.R. pts. 10-17).

9. Lacovara, *supra* note 5, at A23 (citing *In re Yamashita*, 327 U.S. 1, 18 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942)).

Afghanistan, *Quirin*, and *Uchiyama*: Does the Sauce Suit the Gander?

Evan J. Wallach¹

Following the terrorist attacks of 11 September 2001, President Bush issued a military order providing for trials of captured members of al Qaeda and their Taliban supporters by military tribunals² under evidentiary and appellate rules similar to those used in military commissions during and after World War II. The thesis of this article is that these rules violate the Geneva Convention Relative to the Treatment of Prisoners of War (GPW) because they do not provide an accused with the same rights accorded a U.S. service member charged with a similar offense.³ Also, the proposed rules do not meet current international law standards for trials of war criminals. As a result, any participant in a military commission trial of a person protected by the GPW would, in turn, be guilty of a breach of the GPW, a war crime under U.S. law.⁴

I. Introduction

This article examines the structure and history of applicable sections of GPW and their application to the proposed defendants. Section I outlines the promulgation of President Bush's military order, concluding that the system fails to provide adequately for those accorded Prisoner of War (POW) status. This article then argues that members of the Taliban and possibly certain al Qaeda members qualify for POW status under the GPW as detainees of an international conflict. In this context, Section I then identifies the issues raised by America's current proposed use of military commissions.

With this background, Section II traces the history of military commissions. The article then emphasizes the evidentiary and procedural problems associated with the post-World War II military commission rules derived from *Ex parte Quirin*,⁵ upon which President Bush's proposed commissions are based. Next, Section III discusses the legality of military tribunals under current international law. Section IV then argues that *Quirin*-based military commissions fail to meet current standards for trying POWs and that they fail to satisfy the procedural and evidentiary requirements of the Uniform Code of Military Justice (UCMJ). Finally, based upon the precedent of *United States v. Uchiyama*,⁶ the article concludes that participating in such a commission, when it tries a POW, violates the law of war.

A. Background

On 11 September 2001, thousands of civilians were murdered when armed conspirators hijacked three airliners and used them as flying bombs to attack the World Trade Center complex in New York City and the Pentagon in Washington, D.C. The passengers of a fourth hijacked aircraft foiled an additional attack, but that flight ended in the deaths of the passengers, crew, and hijackers. The President of the United States immediately characterized those attacks as "an act of war."⁷ Shortly thereafter, he announced that credible evidence pointed to Osama bin Laden, the leader of the al Qaeda terrorist group, and members of bin Laden's organization.⁸

1. Judge, U.S. Court of International Trade; Adjunct Professor, Law of War, Brooklyn Law School, New York Law School; Visiting Professor, Law of War, University of Münster; Major (JAG) U.S. Army (Inactive Reserve, until July 2003); and Webmaster, International Law of War Association, Law of War Home Page, at <http://www.lawofwar.org>. J.D., Berkeley, 1976; LL.B. (International Law), Cambridge, 1981. The author dedicates this article to the memory of his father, Albert A. Wallach, 1916-2002, who served from private to captain in the United States Army from 1941 to 1946 and to the memory of U.S. Supreme Court Associate Justice Frank Murphy. The author thanks Sara Schramm of Brooklyn Law School and Raymond Cho of Columbia Law School for their research assistance with this article. Tremendous gratitude is also owed to the numerous editors at the Army Judge Advocate General's School who challenged the author to make this a more accurate, comprehensive and complete work. The author's views in this article represent only those of the author and not of any person with whom, or entity with which, he is or was affiliated.

Portions of this article are reprinted from the author's previous work, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline for International Legal Procedure?*, 37 COLUM. J. TRANSNAT'L L. 851 (1999). The Columbia School of Law has granted permission to reprint the article.

2. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html>; U.S. DEP'T OF DEFENSE, MILITARY COMMISSION ORDER NO. 1 (21 Mar. 2002), available at <http://www.defenselink.mil/news/commissions.html> [hereinafter MCO No. 1]; Procedures for Trials by Military Commissions of Certain Non-U.S. Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374-99 (July 1, 2003) (to be codified at 32 C.F.R. pts. 10-17).

3. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, art. 3, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GPW]; see MANUAL FOR COURTS-MARTIAL, UNITED STATES pt. II (2002) [hereinafter MCM].

4. MCM, *supra* note 3, art. 130; see secs. I.B-I.C., *infra* (analyzing who is entitled to prisoner of war (POW) status, and when and how this status is determined).

5. 317 U.S. 1 (1942).

6. Case-35-46, War Crimes Branch Case Files, Records of The Judge Advocate General, Record Group 153 (Yokohama, 18 July 1947) (on file with author).

As al Qaeda members planned and carried out the attacks in America, bin Laden and his terrorist network were living in sanctuary in Afghanistan. President Bush, characterizing the U.S. response to those attacks as a “war on terror,”⁹ demanded that Afghanistan’s ruling party, the Taliban, end that sanctuary and turn the members of al Qaeda over to American custody.¹⁰ On 18 September 2001, in a joint resolution, Congress, without declaring war, authorized military action against the Taliban.¹¹ By the end of September, the United Nations Security Council had also adopted two resolutions which (1) identified the attacks on the United States as a threat to international peace and security; and (2) mandated that states “[d]eny safe haven to those who finance, plan, support, or commit terrorist acts.”¹²

While the Taliban equivocated, the United States engaged in extensive diplomacy. On 7 October, with the consent of countries surrounding Afghanistan, the United States began extensive air attacks on the Taliban military infrastructures and the al Qaeda terrorist organization.¹³ By 21 December 2001, the allied coalition held in custody about seven thousand suspected al Qaeda and Taliban members in Afghanistan.¹⁴

On 13 November 2001, President Bush issued a military order providing for the trial of non-U.S. citizens who were members or culpable supporters of al Qaeda before military tribunals.¹⁵ That order, and subsequent statements by the President,¹⁶ Vice President,¹⁷ Attorney General,¹⁸ Secretary of Defense,¹⁹ the White House Counsel,²⁰ and others,²¹ made it

7. BBC News Online, *Bush Calls Attacks “Acts of War”* (Sept. 12, 2001), at http://news.bbc.co.uk/1/hi/english/world/americas/newsid_1537000/1537534.stm (last visited Nov. 17, 2003).

8. See, e.g., President George W. Bush, Speech to the Joint Session of Congress, Washington, D.C. (Sept. 20, 2001) (“The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda.”).

9. *Id.*

10. *Id.*

11. S.J. Res. 23, 107th Cong. (2001) (enacted as Pub. L. No. 1-7-40, 115 Stat. 224). In a further response to the attacks, on 26 October 2001, Congress adopted the USA Patriot Act of 2001, Pub. L. No. 107-56, 115 Stat. 272, which addresses domestic national security issues.

12. S. Con. Res. 1368, U.N. SCOR, 56th Sess., 4370th mtg., U.N. Doc. S/RES/1368 (2001); S.C. Res. 1373, U.N. SCOR, 56th Sess., 4385th mtg., U.N. Doc. S/RES/1373 (2001).

13. Ian Christopher McCaleb, *Bush Announces Opening of Attacks*, CNN.com (Oct. 7, 2001), available at <http://www.cnn.com/2001/US/10/07/ret.attack.bush/>

14. *US Questions 7,000 Taliban and al-Qaeda Soldiers*, GUARDIAN (Dec. 21, 2001), available at <http://www.guardian.co.uk/afghanistan/story/0,1284,623701,00.html>.

15. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> [hereinafter Bush Order]. The Bush Order provides, in part, that individuals subject to the order include: (1) current or past members of al Qaeda; (2) individuals who “engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore” that adversely affected wide United States interests; and (3) individuals who “knowingly harbored one or more individuals” described above. *Id.* sec. 2(A).

16. On 19 November 2001, President Bush said that the nation was fighting “against the most evil kinds of people, and I need to have that extraordinary option at my fingertips.” Elisabeth Bumiller, *Military Tribunals Needed in Difficult Time, Bush Says*, N.Y. TIMES, Nov. 20, 2001, at B5.

17. Vice President Dick Cheney, responding to questions following his speech to the U.S. Chamber of Commerce on 14 November 2001,

[S]poke favorably of World War II saboteurs being “executed in relatively rapid order” under military tribunals set up by President Franklin D. Roosevelt A military tribunal, he said, “guarantees that we’ll have the kind of treatment of these individuals that we believe they deserve” The basic proposition here is that somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans[,] . . . is not a lawful combatant They don’t deserve to be treated as prisoners of war.

Elisabeth Bumiller & Steven Lee Myers, *A Nation Challenged: The Presidential Order; Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, N.Y. TIMES, Nov. 15, 2001, at B6.

This statement raises a serious question—can a terrorist operating under civilian cover in the United States claim POW status? Under the Hague Regulations, a spy falls outside the protection of the Geneva Convention and may be subject to the death penalty depending on the domestic law of the state where he was caught. Hague Convention IV Respecting the Laws and Customs of War on Land, Annexed Regulations, art. 29, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations].

18. According to the Attorney General, John Ashcroft,

Foreign terrorists who commit war crimes against the United States, in my judgment, are not entitled to and do not deserve the protections of the American Constitution, particularly when there could be very serious and important reasons related to not bringing them back to the United States for justice. I think it’s important to understand that we are at war now.

Robin Toner & Neil A. Lewis, *White House Push on Security Steps Bypasses Congress*, N.Y. TIMES, Nov. 15, 2001, at A1.

clear that the tribunals were intended to follow procedural and evidentiary rules similar to those used to try spies and war criminals during and after the Second World War.²²

Those rules, as applied between 1942 and 1947, do not meet the current international law standards for trials of prisoners of war.²³ Moreover, they are insufficient under the requirements of GPW.²⁴ The U.S. Army teaches that “treaty obligations provide a floor of procedural rights, at least as to offenses by prisoners of war, that precludes military commissions in this category of cases.”²⁵

On 21 March 2002, the Secretary of Defense promulgated Military Commission Order No. 1 (MCO No.1),²⁶ which prescribes procedures for tribunals under the President’s military

order. While it appears that MCO No. 1 made some advances towards fairness, including finessing the Presidential order’s two-third’s sentencing requirement,²⁷ it retained the World War II evidentiary rules and failed to provide a system of independent appeals. Therefore, MCO No.1 confirms the Bush Administration’s intention to *deny* defendants the *evidentiary rules and procedural safeguards*, provided under the Uniform Code of Military Justice (UCMJ). Thus, even though MCO No.1 “made concession to critics who worried that President Bush’s original order . . . had codified a secret rigged system,”²⁸ the system created *still fails* to provide the trial rights guaranteed to a prisoner of war (POW) under GPW.

On 1 July 2003, the Department of Defense (DOD) issued a series of rules and regulations concerning military tribunals.²⁹

19. Secretary of Defense Donald Rumsfeld recognized

that the rules for military tribunals would be decidedly differently [sic] from those for civilian trials. And Pentagon officials said today that they were devising regulations that were likely to include a more flexible standard for evidence than civilian trials would accept. They said the tribunals would probably allow a conviction of a suspected terrorist on a two-thirds vote of the officers on the panel.

Steven Lee Myers & Neil A. Lewis, *Assurances Offered About Military Courts*, N.Y. TIMES, Nov. 16, 2001, at B10. The military order itself provides for “sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present.” Bush Order, *supra* note 15, sec. 4(c)(7).

20. At a meeting of the American Bar Association’s Standing Committee on Law and National Security, White House Counsel Alberto Gonzales acknowledged nearly identical provisions in the two orders. COMMITTEE ON MILITARY AFFAIRS AND JUSTICE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, INTER ARMA SILENT LEGES: IN TIMES OF ARMED CONFLICT *SHOULD* THE LAWS BE SILENT? A REPORT ON THE PRESIDENT’S MILITARY ORDER OF NOVEMBER 13, 2001 REGARDING “DETENTION, TREATMENT, AND TRIAL OF CERTAIN NON-CITIZENS IN THE WAR AGAINST TERRORISM” (2001), available at http://www.abcnyc.org/pdf/should_the_laws.pdf.

21. See Bumiller & Myers, *supra* note 17, at 6. Former Attorney General William P. Barr is credited with bringing the idea of military tribunals to the attention of the White House. He stated, “What I don’t understand about civil libertarians is, if our boys did something wrong in this conflict, they’d be tried in a military court. An al Qaeda terrorist shouldn’t have any claim to different procedures.” Robin Toner, *Civil Liberty vs. Security: Finding a Wartime Balance*, N.Y. TIMES, Nov. 18, 2001, at A1. A member of the U.S. military charged with war crimes would, of course, be tried under the UCMJ and its Military Rules of Evidence (MRE). As discussed below, the UCMJ and the MRE provide substantial guarantees of a fair and impartial trial. See *infra* sec. IV.

In his 14 November 2001 statement, see *supra* note 17, Vice President Cheney said that “[t]he basic proposition here is that somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans[,] . . . is not a lawful combatant They don’t deserve to be treated as prisoners of war.” Bumiller & Myers, *supra* note 17, at 6. The Vice President’s statement raises a serious question. Can a terrorist operating under civilian cover in the United States claim POW status? The question may be somewhat mooted, however, by the fact that any claim of status necessarily implies the claimant is a combatant captured while engaged in hostilities, but not in uniform; to wit, a spy. Under the Hague Regulations, a spy falls outside the protection of the Geneva Convention and is subject to the death penalty. Hague Convention IV Respecting the Laws and Customs of War on Land, Annexed Regulations, art. 29, Oct. 18, 1907, 36 Stat. 2277, T.S. No. 539 [hereinafter Hague Regulations].

22. The *New York Times* reported that “[a] Bush administration official with knowledge of the planning said officials had been studying the World War II cases.” William Glaberson, *Closer Look at New Plan for Trying Terrorists*, N.Y. TIMES, Nov. 15, 2001, at B6. “[A]s one White House official put it, ‘it’s a new reality.’ The old rules, the old legal and law enforcement cultures, have to change” Toner, *supra* note 21, at 1. Thus, something more effective than civilian law enforcement is necessary. According to the *New York Times*, “The incident that was uppermost on the minds of Bush administration officials in setting up tribunals took place in June 1942, when Nazi Germany dispatched eight saboteurs to this country to blow up war industries” *Id.* That incident resulted in the military commission procedures used in *Ex parte Quirin*, 317 U.S. 1 (1942). “‘The commission itself is going to be unique,’ said one military officer involved in the discussions. ‘It will be separate and distinct from a civilian criminal trial. It will be separate and distinct from a court-martial.’” Matthew Purdy, *Bush’s New Rules to Fight Terror Transform the Legal Landscape*, N.Y. TIMES, Nov. 25, 2001, at A1.

23. See the discussion related to the application of these rules *infra* notes 164-187 and accompanying text. See also the discussion related to current international standards *infra* notes 198-231.

24. See *id.* arts. 85 (“Prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention.”), 102. Article 102 states the following:

A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.

Id.

These trial procedure regulations retain the World War II evidence rule which states:

(d) *Evidence*—(1) *Admissibility*.

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.³⁰

The regulations also fail to provide for a system of independent appeals, instead tracking the procedure of MCO No.1.³¹ As a

result, they *still fail* to meet the essential requirements for trying POWs.

B. The POW Status of Captured Members of the Taliban and Al Qaeda

If the conflict in Afghanistan is in fact an international armed conflict,³² then the coalition forces may have to treat the detained Taliban and possibly al Qaeda members as POWs.³³ The GPW was drafted, in part, to address conflicts in which one state does not recognize the legitimacy of the government of another.³⁴ It covers “all cases of declared war or any other armed conflict, which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”³⁵ Article 4(3) of GPW includes as

25. INT’L & OPERATIONAL LAW DEP’T, THE JUDGE ADVOCATE GENERAL’S SCHOOL, U.S. ARMY, LAW OF WAR WORKSHOP DESKBOOK ch. 8, at 216 (2000), available at <http://www.jagcnet.army.mil/TJAGLCS>. The deskbook notes the following:

In theory, [military commissions] could provide very limited evidentiary and procedural formality, *see, e.g., Yamashita*, 327 U.S. [1,] 18 [(1946)] and a very streamlined appeal process. *Cf. Eisentrager v. Forrestal*, 174 F.2d 961 (1949) (finding that German nationals, confined in custody of the U.S. Army in Germany following conviction by military commission of having engaged in military activity against the United States after the surrender of Germany, had substantive right to writ of *habeas corpus* to test legality of their detention) But treaty obligations provide a floor of procedural rights, at least as to offenses by prisoners of war, that precludes military commissions in this category [cases where the accused has POW status] of cases.

Id. *Eisentrager* was, of course, reversed in *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

26. MCO No.1, *supra* note 2.

27. *Id.*, sec. 6(F) (providing that “[a]n affirmative vote of two-thirds of the members is required to determine a sentence, except that a sentence of death requires a unanimous, affirmative vote of all the members”).

28. Katherine Q. Seelye, *Government Sets Rules for Military on War Tribunals*, N.Y. TIMES, Mar. 21, 2002, at A1.

29. Procedures for Trials by Military Commissions of Certain Non-U.S. Citizens in the War Against Terrorism, 68 Fed. Reg. 39,374-99 (July 1, 2003) (to be codified at 32 C.F.R. pts. 10-17).

30. *Id.* § 9.6(h)(1).

31. *See id.*; MCO No. 1, *supra* note 2.

32. The invasion by armed forces of one state into the territory of another, supported by massive air strikes against command, control, and communications targets equals an Article 2, international armed conflict. Thus, it activates the remainder of the GPW. This is true, even if a *de facto* government rules the invaded state. *See Kadic v. Karadzic*, 70 F.3d 232, 244-45 (2d Cir. 1995) (“[A] state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities”).

33. *See GPW, supra* note 3, art. 2.

34. This point was made clear during the discussions relating to the drafting of Article 2. As the Official Commentary to Article 2 notes:

The Preliminary Conference of National Red Cross Societies, which the International Committee of the Red Cross convened in 1946, fell in with the views of the Committee and recommended that a new Article, worded as follows, should be introduced at the beginning of the Convention: “The present Convention is applicable between the High Contracting Parties from the moment hostilities have actually broken out, even if no declaration of war has been made and whatever the form that such armed intervention may take.” The Conference of Government Experts recommended in its turn that the Convention should be applicable to “any armed conflict, whether the latter is or is not recognized as a state of war by the parties concerned,” and also to “cases of occupation of territories in the absence of any state of war.” Taking into account these recommendations, the International Committee of the Red Cross drew up a draft text, which was adopted by the XVIIth International Red Cross Conference and subsequently became Article 2 of the Convention

Commentary to GPW, available at <http://www.icrc.org/IHL.nsf/1a13044f3bbb5b8ec12563fb0066f226/07b4dad7719e37e4c12563cd00424d17?OpenDocument> [hereinafter OFFICIAL COMMENTARY TO GPW].

35. GPW, *supra* note 3, art. 2.

POWs “[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”³⁶

Even if the Taliban was not recognized as a de facto government, Article 4(3) deems members of the Taliban as protected combatants.³⁷ Various U.N. Security Council resolutions directed at the Taliban before its defeat make that government’s de facto status clear. For example, in demanding that the Taliban cease providing sanctuary for international terrorists, U.N. Security Council Resolution 1267 specifically references “the territory under its control.”³⁸ Because Afghanistan is a signatory of GPW,³⁹ any interpretation of article 4(3) includes members of the Taliban as protected combatants even if the Taliban is not recognized as a de facto government.⁴⁰ Furthermore, before 11 September 2001, the United Arab Emirates, Saudi Arabia, and Pakistan had formally recognized the Taliban as the *de jure* government of Afghanistan and entered into diplomatic relations.⁴¹

The more interesting question is whether those members of al Qaeda captured in combat in Afghanistan and fighting as auxiliaries to the Taliban are entitled to treatment as POWs. The al Qaeda member could be entitled to POW treatment under the following theories: (1) as a member of the Taliban armed forces; (2) an irregular adjunct to the Taliban armed forces; or (3) part of a *levee en masse* or popular uprising.

1. The Taliban and Possibly al Qaeda Are Entitled to POW Status Even Without Application of the Four-Part Test As Set Forth in Article 4 of the GPW

In determining the legal status of the Taliban and al Qaeda detainees, the preliminary question often asked is whether those detainees qualify as legal combatants.⁴² The Bush administration argues that to qualify as legal combatants, the detainees⁴³ must meet the requirements of GPW Article 4(A)(2), which

36. *Id.* art. 4(3).

37. *Id.*

38. U.N. SCOR, 54th Sess., 4051st mtg., at 1, U.N. Doc. S/RES/1267 (1999).

39. *Id.*; see International Committee of the Red Cross, *States Party to the Geneva Conventions and Their Additional Protocols*, at <http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList444/77EA1BDEE20B4CCDC1256B6600595596> (last visited Nov. 19, 2003).

40. The President has apparently recognized this point. In a White House briefing, Presidential Press Secretary Ari Fleischer said: “Afghanistan is a party to the Geneva Convention. Although the United States does not recognize the Taliban as a legitimate Afghani government, the President determined that the Taliban members are covered under the Treaty because Afghanistan is a party to the Convention.” Press Release, Statement by White House Press Secretary Ari Fleischer (Feb. 7, 2002), available at <http://www.us-mission.ch/press2002/0802fleischerdetainees.htm> [hereinafter Fleischer Statement].

In a later expansion of that discussion Mr. Fleischer said:

Afghanistan is a party to the Geneva Convention. Although the United States does not recognize the Taliban as a legitimate Afghani government, the President determined that the Taliban members are covered under the treaty because Afghanistan is a party to the Convention.

Under Article 4 of the Geneva Convention, however, Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, al Qaeda and Taliban detainees would have to have satisfied four conditions: They would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.

The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the al Qaeda.

See Statement by the Press Secretary on the Geneva Convention, May 7, 2003, at <http://www.whitehouse.gov/news/releases/2003/05/20030507-18.html>.

41. See CNN, *UAE Withdraws Recognition from the Taliban* (Sept. 22, 2001), at <http://www.cnn.com/2001/US/09/21/gen.america.under.attack>.

42. See, e.g., Ruth Wedgewood, *Prisoners of a Different War*, FIN. TIMES, Jan. 30, 2002. Professor Wedgewood states,

The convention’s premise is that both parties to the conflict will obey the fundamental rules for lawful belligerency: that any fighting force must refrain from terrorizing innocent civilians and avoid masking soldiers in civilian dress, lest an adversary target innocent civilians in response.

The test is put in four parts. Lawful combatants must have a responsible commander (to ensure accountability for violations); wear a fixed distinctive sign visible at a distance; carry their arms openly; and fight in accordance with the laws and customs of war.

These requirements apply as much to regular armies as to militia forces. It is thus fallacious to suppose that the Taliban should be allowed any exemption.

Id.

require that a “[m]ember[] of the armed forces [of an opposing Party],”⁴⁴ as well as “[m]embers of . . . militias [or] volunteer corps” forming part of those armed forces⁴⁵ must “(a) . . . be[] commanded by a person responsible for his subordinates; (b) .

. . . have[] a fixed distinctive sign recognizable at a distance; (c) . . . carry[] arms openly; [and] . . . conduct[] their operations in accordance with the laws and customs of war,”⁴⁶ requirements otherwise known as GPW’s four-part test.

43. In a news conference on 27 January 2002, Secretary of Defense Rumsfeld was quite clear on this issue:

These are detainees.

The Convention in certain situations raises the possibility if there are ambiguities that you can have a three-person panel or tribunal to sort out those ambiguities. There are not ambiguities in this case. The al Qaeda is not a country. They did not behave as an army. They did not wear uniforms. They did not have insignia. They did not carry their weapons openly. They are a terrorist network. It would be a total misunderstanding of the Geneva Convention if one considers al Qaeda, a terrorist network, to be an army and therefore ambiguous and requiring the kind of sort that you’ve suggested.

With respect to the Taliban, the Taliban also did not wear uniforms, they did not have insignia, they did not carry their weapons openly, and they were tied tightly at the waist to al Qaeda. They behaved like them, they worked with them, they functioned with them, they cooperated with respect to communications, they cooperated with respect to supplies and ammunition, and there isn’t any question in my mind—I’m not a lawyer, but there isn’t any question in my mind but that they are not, they would not rise to the standard of a prisoner of war.

Secretary of Defense Donald H. Rumsfeld, Remarks on Ferry from Air Terminal to Main Base, Guantanamo Bay, Cuba (Jan. 27, 2002), *available at* http://www.defenselink.mil/news/Jan2002/t01282002_t0127sd2.html; *see also* Secretary of Defense Donald H. Rumsfeld & General Richard Myers, Chairman, Joint Chiefs of Staff, Department of Defense News Brief, Washington, D.C. (Feb. 8, 2002), *available at* http://www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html. On that same day Secretary Rumsfeld also said that:

There is a definition of what a lawful combatant is and there are four or five criteria that people look to historically. There’s precedent to this, and there is a reasonable understanding of what an unlawful combatant is.

The characteristics of the individuals that have been captured is that they are unlawful combatants, not lawful combatants. That is why they are characterized as detainees and not prisoners of war. The al Qaeda are so obviously a part of a terrorist network as opposed to being part of an army -- they didn’t go around with uniforms with their weapons in public display, with insignia and behave in a manner that an army behaves in; they went around like terrorists, and that’s a very different thing.

It’s important for people to recognize that this is a different circumstance, the war on terrorism. It requires a different template in our thinking. All of the normal ways that we think about things simply don’t work.

For example, there were no armies or navies or air forces for us to go after in Afghanistan. We’re going after terrorists.

See Rumsfeld, U.S. Senators Brief Media at Guantanamo Bay, United States Mission to the European Union, Jan 27, 2002, *at* <http://www.useu.be/Terrorism/USResponse/Jan2702RumsfeldSenatorsGuantanamo.html>.

In the press briefing of 8 February 2002, Secretary Rumsfeld said:

The determination that Taliban detainees do not qualify as prisoners of war under the convention was because they failed to meet the criteria for POW status.

A central purpose of the Geneva Convention was to protect innocent civilians by distinguishing very clearly between combatants and non-combatants. This is why the convention requires soldiers to wear uniforms that distinguish them from the civilian population. The Taliban did not wear distinctive signs, insignias, symbols or uniforms. To the contrary, far from seeking to distinguish themselves from the civilian population of Afghanistan, they sought to blend in with civilian non-combatants, hiding in mosques and populated areas. They were not organized in military units, as such, with identifiable chains of command; indeed, al Qaeda forces made up portions of their forces.

Id. In addition, Presidential Press Secretary Ari Fleischer stated that

[u]nder Article 4 of the Geneva Convention, . . . Taliban detainees are not entitled to POW status. To qualify as POWs under Article 4, Al Qaeda and Taliban detainees would have to have satisfied four conditions: they would have to be part of a military hierarchy; they would have to have worn uniforms or other distinctive signs visible at a distance; they would have to have carried arms openly; and they would have to have conducted their military operations in accordance with the laws and customs of war.

The Taliban have not effectively distinguished themselves from the civilian population of Afghanistan. Moreover, they have not conducted their operations in accordance with the laws and customs of war. Instead, they have knowingly adopted and provided support to the unlawful terrorist objectives of the Al Qaeda.

Fleischer Statement, *supra* note 40.

44. GPW, *supra* note 3, art. 4(A)(1).

45. *Id.* art. 4(A)(2).

a. The Parties to GPW Did Not Intend to Subject Regular Armed Forces and Constituent Militia and Volunteer Units to the Four-Part Test

According to the *travaux preparatoires* of Article 4, the four qualifying requirements for POW status under Article 4(A)(2) apply *only* to militias, volunteer corps, and organized resistance groups which do not form part of the armed forces of a party to the conflict.⁴⁷ To make this distinction clear, the drafters split Article 4(A)⁴⁸ into two subparagraphs, Article 4(A)(1) and Article 4(A)(2).⁴⁹ Following extensive debate on Article 4,⁵⁰ the *Rapporteur* and the Secretariat proposed a working text that defined prisoners of war as “[m]embers of armed forces who are in the service of an adverse belligerent, as well as members of militia or volunteer corps, belonging to such belligerent, and fulfilling [the conditions of Hague Convention IV].”⁵¹

In discussing this proposed language, the Soviet Union representative said that “the working text would appear [to require] members of the Armed forces . . . to fulfill the four traditional requirements . . . in order to obtain prisoner of war status, which was contrary to the Hague Regulations.”⁵² The Chair proposed splitting the draft text of Article 4 into subparagraphs that divided “members of the armed forces” and “militias and volunteer corps” in order “to overcome the drafting difficulty.”⁵³ The Soviet response was that it was necessary to distinguish between “(a) The militia or volunteer corps which constituted or were part of the army; [and] (b) The militia or volunteer corps which were not part of the army. *Only those groups to which (b) related should fulfill all four conditions.*”⁵⁴ The reason was “that even with the suggested wording, the new subparagraphs (1) and (2) would not correspond to the Hague Regulation.”⁵⁵ After further discussion, the *Committee* “*deemed it desirable*” to “*draft a text as close as possible to that of the Hague Regulation of 1907.*”⁵⁶ The resulting draft contained the

46. *Id.* art. 4(A)(2)(a)-(d).

47. 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, at 465-67 [hereinafter FINAL RECORD] (reprinting the *travaux preparatoires*).

48. In the initial draft (the Stockholm Draft), what became Article 4 was Article 3. For clarity, this article refers to Article 3 in the Stockholm Draft as Article 4. For numerical comparison of the 1929 Convention, the Stockholm Draft, the working draft and the final GPW Convention *see*, 3 FINAL RECORD, *supra* note 47, at 217.

49. During negotiations, a Special Committee was formed to draft Article 4. The Special Committee’s *Rapporteur* described Article 4 as “the keystone of the Convention.” 2 FINAL RECORD, *supra* note 47, at 386 (Committee II, 30th mtg.).

He explained, among other things, that in order to coordinate the Convention with the Hague Regulations of 1907 respecting the Laws and Customs of War on Land, the Special Committee had first of all decided to insert the four conditions with which militias or volunteer corps *not* forming part of the regular armed forces must comply immediately after the end of sub-paragraph I of the first paragraph of Article [4]. In order to avoid any possibility of misunderstanding, it was subsequently decided to subdivide sub-paragraph I into two separate sub-paragraphs, a new subparagraph 1 relating to members of the armed forces *and* members of militias or volunteer corps forming part of those armed forces and a new sub-paragraph 2 relating to *members of other militias and volunteer corps which were required to fulfill the four conditions* laid down in the Hague Regulations.

Id. at 387 (emphasis added).

50. 3 FINAL RECORD, *supra* note 47, at 465-467. This debate took place at the 21st meeting of the Special Committee. *Id.*

51. Hague Regulations, *supra* note 17, art. 1. To satisfy the requirements of the four-part test, the conditions of the Convention required the following:

Article 1. The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- [1] To be commanded by a person responsible for his subordinates;
- [2] To have a fixed distinctive emblem recognizable at a distance;
- [3] To carry arms openly; and
- [4] To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army.”

Id. art. 1 (emphasis added).

The emphasized language makes clear the intent of Article 1, which distinguishes between militias and volunteer corps that form part of the regular armed forces from those that do not. If the intention had been to apply the four conditions to all combatants, the last sentence of Article 1 would be superfluous.

52. *Id.* at 466. The proposed definition differed slightly from Article 1 of the Hague Regulations Concerning the Laws and Customs of War, 1907.

53. 2 FINAL RECORD, *supra* note 47, at 467.

54. *Id.* (emphasis added).

language that eventually became GPW Article 4, subparagraphs (A)(1) and (2).⁵⁷ One further point about GPW eliminates any remaining doubt regarding the drafters' intent to apply the Hague four conditions to Article 4(A)(2) and not to Article 4(A)(1)—the final form of Article 4 includes organized resistance movements in subparagraph (A)(2) and excludes them from subparagraph (A)(1).⁵⁸

b. The Drafters' Treatment of Organized Resistance Movements Demonstrates Their Intent to Distinguish Regular Armed Forces, and Their Constituent Militia and Volunteer Units, from Independent Forces

In the initial draft of GPW (the Stockholm Draft), POWs were those persons "belonging to a military organization or to an organized resistance movement constituted in occupied territory," provided they met the four Hague conditions, and that they "notified the occupying Power of [their] participation in the conflict."⁵⁹ This language caused such controversy that a Special Committee was appointed to consider it.⁶⁰ The drafters

eventually resolved the argument by including resistance movements in Article 4(A)(2) only, demonstrating a stark distinction between Article 4(A)'s two subparagraphs.⁶¹

The Special Committee reported that "to avoid any possibility of misunderstanding, . . . sub-paragraphs (A)(1) and (A)(2) were created to divide regular armed forces and their constituent volunteer corps and militias from independent forces[,] including resistance movements[,] and to apply the Hague conditions to the latter."⁶² That decision must be analyzed in light of the considerable opposition to permitting resistance movements to claim POW status,⁶³ and the ultimate compromise that included them in the newly devolved subparagraph (A)(2).

The debate on this issue is found in the discussion of proposed amendments to the Stockholm Draft. Particularly informative is a United Kingdom proposal⁶⁴ to apply the Hague conditions to "partisans" and to "members of armed forces including militia or volunteer corps," which the other delegations unanimously rejected.⁶⁵ The principal concern seems to have been command and control. The United Kingdom then

55. *Id.*

56. *Id.* (emphasis added).

57. GPW, *supra* note 3, art. 4, subpara.(A)(1) and (2). Those subparagraphs read as follows:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the hands of the enemy:

(1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

(2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:

- (a) that of being commanded by a person responsible for his subordinates;
- (b) that of having a fixed distinctive sign recognizable at a distance;
- (c) that of carrying arms openly;
- (d) that of conducting their operations in accordance with the laws and customs of war.

Id. art. 4(A)(1)-(2).

58. *Id.* As noted by the Representative of the International Committee of the Red Cross in discussing a subsection of draft Article 4, which was eventually incorporated into subparagraph (A)(2):

The Conference of Government Experts had also . . . come to the conclusion that strict rules should be laid down governing the conditions in which civilian combatants captured by the enemy should fulfill in order to be treated as prisoners of war. Certain of those conditions had been accepted by all the Government experts without difficulty; they were the traditional contained in the 1907 Hague Convention . . .

2 FINAL RECORD, *supra* note 47, at 240.

59. *Id.* at 465.

60. *Id.* at 255; *see infra* text accompanying notes 47-58.

61. *See* GPW, *supra* note 3, art.4.

62. *See* 2 FINAL RECORD, *supra* note 47, at 387.

63. The discussion in the Special Committee of proposed subparagraph 6 of the Stockholm Draft reflects this debate. *See id.* at 422.

64. *Id.* annex 90, at 60-61.

offered a proposal to apply the Hague conditions only to military organizations or organized resistance movements in occupied territories, provided they maintained “effective command of lower formations and units,” and that the Occupying Power had been given certain notices.⁶⁶ The other delegations rejected this provision also.⁶⁷

Given the desire of the majority of GPW delegates to ensure that the Hague conditions apply to resistance fighters and that the GPW POW provisions follow the Hague Regulations as closely as possible, the drafters’ eventual inclusion of resistance fighters in subparagraph (A)(2) signifies that the Hague conditions do not apply to regular armed forces and their constituent militias and volunteer corps. Thus, since the Taliban detainees were members of the regular armed forces of the de facto government of Afghanistan, they are entitled to POW status. In addition, to the extent any al Qaeda detainees were acting as militia or volunteer corps members which formed part of the Taliban armed forces, those detainees are also entitled to POW status. Whether they are entitled to POW status is determined by their organizational structure⁶⁸ and status at the time of capture. It is possible that international law requires nations to treat different al Qaeda units differently. For instance, certain al Qaeda units could have been subsumed within the Taliban while others acted independently. Indeed, given the Taliban’s nature to include relatively independent units, which constituted the “armies” of individual “warlords,”⁶⁹ cross-structural status is an evident possibility.

2. Other Classifications Could Entitle al Qaeda Members to POW Status

Even if al Qaeda members do not qualify as members of the Taliban armed forces or as members of its integral volunteer corps or militia, they may still qualify for POW status. This would be the case if they were part of an independent volunteer corps or militia that fulfills the four Hague conditions. That status would depend on the facts, as demonstrated below,⁷⁰ and requires findings by a competent tribunal before an al Qaeda member could be deprived of POW status. In addition, some al Qaeda members could conceivably qualify as members of a *levee en masse*.

a. Members of al Qaeda Could Qualify as Members of Militias or Volunteer Corps Not Forming Part of the Taliban Armed Forces

As discussed above,⁷¹ members of militias and volunteer corps may qualify as prisoners of war if they satisfy a two-part factual inquiry. First, an examining tribunal must determine whether a particular al Qaeda unit was fighting on behalf of the Taliban,⁷² but not as part of its armed forces. If the first hurdle is cleared, the trier of fact must then determine whether the member satisfies the four Hague conditions:⁷³ (1) a responsible command; (2) an easily distinguishable identifying sign;⁷⁴ (3) the open carrying of arms; and (4) general conduct of operations in accordance with the laws and customs of war. Although, the determination whether these conditions are met depends upon specific facts, two issues should be highlighted.

65. *Id.* at 425. According to the *Rapporteur*, “[a]ll the Delegations except the United Kingdom had expressed themselves in favor of the Stockholm text, if necessarily amended.” *Id.*

66. *Id.* annex 92, at 62.

67. *See id.*

68. The Nuremberg Tribunal’s application of organizational guilt to the Nazi SS provides an interesting analogy. *See generally* TELFORD TAYLOR, THE ANATOMY OF THE NUREMBERG TRIALS 41-42, 584-86 (1992) (outlining the problems inherent in such charges).

69. Thom Shanker & Steven Lee Myers, *U.S. Special Forces Step Up Campaign in Afghan Areas*, N.Y. TIMES, Oct. 19, 2001, at A1 (discussing swapping the sides of warlords “in alliances of convenience”); R.W. Apple Jr., *Pondering the Mystery of the Taliban’s Collapse*, N.Y. TIMES, Nov. 30, 2001, at B2 (discussing the shifting allegiances of the Taliban militia).

70. *See infra* sec. I.C.

71. *See infra* sec. I.A(1).

72. *See, e.g.*, S.C. Res. 1267, *supra* note 38. Because al Qaeda is a terrorist organization that directly caused the conflict between the United States, its allies and the Taliban, al Qaeda units may have been fighting as independent terrorist entities. It is conceivable, however, that after the United States intervened, al Qaeda units placed themselves in the Taliban’s service. The apparent intervention of al Qaeda in the Taliban’s civil war with the Northern Alliance makes that possibility more likely. On any given day, an al Qaeda unit might have been training for independent activities; serving as the Taliban’s “shock troops” in an internal conflict; or coordinating its activities against American and Allied forces. Dexter Filkins, *The Legacy of the Taliban Is a Sad and Broken Land*, N.Y. TIMES, Dec. 31, 2001, at A1.

73. GPW, *supra* note 3, art. 4(A)(2).

First, the four-part Hague requirement applies to a unit as a whole, rather than to individuals. That is, Article 4(A)(2) requires that a person seeking POW treatment is a member of a militia or other volunteer corps that meets the requirements.⁷⁵ It would be difficult for a person to qualify for POW status if that person was the only member of his unit who abided by the laws and customs of war. The corollary, however, is also true. The observation of such laws and customs by most members of a body fulfils the condition of compliance, notwithstanding individual commission of war crimes by unit personnel.⁷⁶

Second, if a unit satisfied the four-part Hague requirements, it seems reasonable that an individual belonging to the complying unit would be initially treated as a POW, even if, as an individual, he did not meet the standard. That is not to say the individual soldier could, for example, disregard the requirements to carry arms openly, but rather that a competent tribunal would determine on an individual basis if he disqualified himself from POW status. The distinction is important, for it affords the individual due process in the determination of a status which implicates extremely important procedural rights.⁷⁷

b. Some al Qaeda Members Could Qualify for Treatment as Members of a Levee en Masse

Article 4(6) of GPW provides protections for participants in popular uprisings that constitute a special category—*levee en masse*. “Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”⁷⁸ That provision may be

uniquely applicable to some of the persons captured in Afghanistan, especially given the nation’s tribal and thoroughly xenophobic history.⁷⁹ It is certainly possible that a previously uninvolved group of individuals, upon finding armed foreigners at the gate, might spontaneously resist. Several post-invasion clashes between Allied forces and “non-Taliban” fighters⁸⁰ indicate at least the existence of that possibility.

Thus, members of the Taliban have a colorable claim to POW status under the GPW. Members of al Qaeda captured in Afghanistan also may fall into one of several classifications which provide them with POW status. Allowing these members to claim POW status impacts the United States’ ability to try them before military tribunals.

C. The Determination of Who Is Entitled to POW Status Is Subject to a Presumption of Coverage

The GPW *only* covers those persons with a colorable claim to POW status. Article 5, *however*, provides that the “[c]onvention shall apply to the persons referred to in Article 4 from the time they fall into the power of the enemy and until their final release,” and that “[s]hould any doubt arise as to whether . . . someone is a prisoner of war, that individual . . . shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”⁸¹ The intention of the Convention drafters is unmistakable.

[W]here, for instance, large numbers of prisoners had been taken, doubts had sometimes arisen as to whether it was practicable to apply the Convention without delay. Certain delegates at the Conference of Government

74. The argument whether various colored turbans constitute an identifying sign is one of fact to be determined by a competent tribunal. If available evidence indicated that the various Afghan factions relied solely upon colors, (a distinct possibility in armies where soldiers may be illiterate), or that common religious beliefs precluded the use of symbols, the use of colored turbans might suffice as the necessary identifying sign. But the adversary must understand the symbol to qualify as distinctive identifying sign. If the United States could not distinguish the combatant wearing a green turban from a non-combatant wearing a green turban, it would not suffice. It is the perception of the adversary that is at issue. The U.S. Army field manual on the law of land warfare gives an example of a fixed distinctive sign as “[a] helmet or headdress which would make the silhouette of the individual readily distinguishable from that of an ordinary civilian.” U.S. DEP’T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE para. 64(d) (18 July 1956) [hereinafter FM 27-10].

75. See *id.* art. 4(A)(2).

76. FM 27-10, *supra* note 74, at 28.

77. See *infra* notes 192-197 and accompanying text.

78. GPW, *supra* note 3, art. 4(6). Although some members of al Qaeda may be mercenaries, that distinction has little relevance to this analysis. By definition, mercenaries are motivated by a desire for private gain. The Mercenary Convention and Protocol I suggest that customary international law is moving to exclude mercenaries from POW protective status. Because the al Qaeda members’ decision to fight, however, was based on religious convictions or cultural fervor, they arguably do not qualify as mercenaries. See International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, art. 1, § 1(b), U.N. GAOR, 44th Sess., Supp. No. 43, U.N. Doc. A/RES/44/34 (1989) (entered into force Oct. 20, 2001); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 47, 1125 U.N.T.S. 3.

79. See generally PETER HOPKIRK, GREAT GAME: THE STRUGGLE FOR EMPIRE IN CENTRAL ASIA (1992).

80. See, e.g., *U.S. Troops Comb Afghan Mountains for Taliban Forces; Move Signals Tactical Shift*, MIAMI HERALD, Oct. 3, 2002, at A10 (discussing attacks on U.S. soldiers in Afghanistan by non-Taliban warlords); Julius Strauss, *U.S. Base Hit by Rockets as Violence Spreads Through Afghanistan*, DAILY TELEGRAPH (London), Apr. 15, 2002, at 11. One practical question is whether any local inhabitant, who viewed al Qaeda members as “foreigners” and “Arabs,” would claim to be a member of that member’s organization. See, e.g., Karl Vick, *For U.S., Attack on Kandahar Was a Victory on Two Fronts*, WASH. POST, Dec. 26, 2001, at A6; Jonathan Weisman, *Battle Is Fiercest Yet, and It Won’t Be Last*, U.S.A. TODAY, Mar. 5, 2001, at 7A.

Experts had considered that the exact time of the beginning and ending of the application of the Convention should not be explicitly stated. Some Powers had wished to make it possible to change the status of prisoners of war at some time during their captivity, for instance at the end of hostilities; but the majority at Stockholm had decided against making any such change possible. *Article 4 [of the Stockholm Draft, ultimately GPW Article 5,] had been introduced in order to make the situation clear beyond all manner of doubt.*⁸²

The significance of Article 5 stems from the context surrounding its drafting. Geneva Convention 3, to include Article 5, was drafted immediately following the Second World War.⁸³ The prevailing law on POW treatment during World War II was The Convention Between the United States of America and Other Powers, Relating to Prisoners of War, commonly called the 1929 Geneva Convention.⁸⁴ The 1929 Convention did not contain a provision similar to GPW Article 5.⁸⁵

Three of the principal warring nations during World War II, Germany, Japan, and the Soviet Union, largely ignored the 1929 Convention's provisions. Germany argued that the 1929 Convention did not apply to the treatment of either Soviet or Polish prisoners, because the former was not a signatory to the Convention, and the latter no longer existed as a state.⁸⁶ In fact, Germany turned most Polish prisoners over to the SS for use as slave laborers.⁸⁷ The Germans also refused to treat captured partisans and resistance fighters as POWs.⁸⁸ Japanese and Soviet treatment of prisoners was also improper.⁸⁹ By war's end, there was no real doubt that the 1929 Convention was flawed, and that one major flaw was the refusal of some participants to treat some or all captured combatants as POWs.⁹⁰ Article 5 attempts to resolve that problem by creating a rebuttable presumption that any person captured in an international conflict is entitled to POW rights.⁹¹

The U.S. Army, the primary proponent on POW issues within the DOD, addressed the presumption in *Army Regulation 190-8, Enemy Prisoners of War, Retained Personnel, Civilian Internees and Other Detainees (AR 190-8)*.⁹² The text of AR 190-8 mirrors the relevant provisions of GPW Article 5. In part, AR 190-8 states that

81. GPW, *supra* note 3, art. 5 (emphasis added). One might make a principled distinction between members of an organization apprehended while committing acts of violence outside the protection of Article 4, and members of that same organization, including co-conspirators, captured in or following an international armed conflict. That distinction, of course, relates only to the evidentiary rights and procedural rights due the individual. A detainee who has committed acts of murder and terrorism, within or without an armed conflict, is certainly subject to trial and punishment for those crimes. The phrase "any doubt," necessarily implies any reasonable doubt. If a person is clearly not entitled to POW status, the GPW protections do not apply. For example, in *United States v. Buck*, the defendants claimed status as "revolutionaries" who were part of the Black Liberation Army and thus, supposedly, prisoners of war. 690 F. Supp. 1291 (S.D.N.Y. 1988). The District Court found that the GPW, Article 4, set certain minimum standards for assertion of POW status, and that the "[d]efendants at bar and their associates cannot pretend to have fulfilled these conditions." *Id.* at 1298.

82. 2 FINAL RECORD, *supra* note 47, at 245 (Committee II, 4th mtg.) (emphasis added). The *Report of Committee II to the Plenary Assembly of the Diplomatic Conference of Geneva* specifically notes that the second paragraph of Article 5 "will ensure that in the future no person whose right to be treated as belonging to one of the categories of Article [4] is not immediately clear, shall be deprived of the protection of the Conventions without a careful examination of his case." *Id.* Report of Committee II to the Plenary Assembly of the Diplomatic Conference of Geneva, in 2 FINAL RECORD, *supra* note 47, at 563 (emphasis added) [hereinafter Report of Committee II].

83. The GPW was drafted at a diplomatic conference convened by the Swiss Federal Council for the Establishment of International Conventions for the Protection of War Victims and held at Geneva from April 21 to August 12, 1949. See 3 FINAL RECORD *supra* note 47.

84. Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. 846 [hereinafter 1929 Convention].

85. 2 FINAL RECORD, *supra* note 47, at 245 (13th plen. mtg.). Committee II's Rapporteur, in presenting the Committee's work to the Conference as a whole, noted that [m]any of the provisions here submitted to the Conference establish standards which might possibly be deduced from the 1929 convention. Experience has shown, however, that it is the way in which a general rule is interpreted which affects the daily life of prisoners of war. It was, therefore, appropriate to lay down explicit provisions interpreting in reasonable terms standards, many of which were inadequately defined. Further, even general principles, whose force seemed to be their very brevity, have been so grossly violated, that the Committee deemed it necessary so to clarify and amplify them that any future infringement would be at once apparent.

Id.

86. See RONALD H. BAILEY, PRISONERS OF WAR 11-14 (1982); see generally PAT R. REID, PRISONER OF WAR (Hamlyn, London 1984).

87. BAILEY, *supra* note 86, at 113.

88. See ROBERT B. ASPREY, WAR IN THE SHADOWS: THE GUERRILLA IN HISTORY ch. 31 (1975); see generally RUSSELL MILLER, THE RESISTANCE (1979); RONALD H. BAILEY, PARTISANS AND GUERRILLAS (1978).

89. See BAILEY, *supra* note 86, at 36, 112.

[i]n accordance with Article 5, [GPW], if any doubt arises as to whether a person, having committed a belligerent act and been taken into custody by the US Armed Forces, belongs to any of the categories enumerated in Article 4, [GPW], such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.⁹³

To achieve this goal, AR 190-8 requires that a “competent tribunal”⁹⁴ determine the status of any person “not appearing to be entitled to prisoner of war status who has committed a belligerent act or has engaged in hostile activities in aid of enemy armed forces” who asserts the status *or* concerning whom any doubt exists.⁹⁵ It then describes the composition of the tribunal and its procedures.⁹⁶

Thus, the position of the U.S. military is clear. “When in doubt as to the captive’s status, treat and protect them as [POWs] until their status can be determined.”⁹⁷ This policy is grounded in longstanding ideals.

For over 220 years, our nation’s founding principles have extolled the values of human life, and they form the basis for humane treatment of enemy prisoners of war. National ideals demand it, international law requires it. . . . Because the US Army’s honor and reputation depend on firm but humane [POW] treatment, we must uphold the highest standards of conduct.⁹⁸

90. See, e.g., BOHDAN ARCT, PRISONER OF WAR, MY SECRET JOURNAL (1988) (containing an excellent source of anecdotal evidence relating to this treatment by a former prisoner). There are numerous biographies and anthologies documenting the experiences of former prisoners. See also ROGER AXFORD, TOO LONG SILENT (1986); A.J. BARKER, PRISONERS OF WAR (1975); MITCHELL G. BARD, FORGOTTEN VICTIMS (1994); JOSEF M. BAUER, AS FAR AS MY FEET WILL CARRY ME (1957); RON BAYBUTT, COLDITZ, THE GREAT ESCAPES (1982); HARRY BEAUMONT, OLD CONTEMPTIBLE (1967); ALAN CAILLOU, THE WORLD IS SIX FEET SQUARE (1954); THOMAS D. CALNAN, FREE AS A RUNNING FOX (1970); LEWIS H. CARLSON, WE WERE EACH OTHER’S PRISONERS (1997); CHARLOTTE CARR-GREGG, JAPANESE PRISONERS OF WAR IN REVOLT (1978); GAVAN DAWS, PRISONERS OF THE JAPANESE (1994); ROBERT E. DENNEY, CIVIL WAR PRISONS AND ESCAPES (1993); HAROLD DENNY, BEHIND BOTH LINES (1943); SAM DERRY, THE ROME ESCAPE LINE (1960); TERRENCE DES PRES, THE SURVIVORS (1976); JOHN DUNBAR, ESCAPE THROUGH THE PYRENEES (1955); WILLIAM E. DYESS, THE DYESS STORY (1944); IAN ENGLISH, HOME BY CHRISTMAS (1997); A.J. EVANS, THE ESCAPING CLUB (1921); HELMUT M. FEHLING, ONE GREAT PRISON (1951); HERBERT FORD, FLEE THE CAPTOR (1966); GEORG GAERTNER, HITLER’S LAST SOLDIER IN AMERICA (1985); ROBERT GAYLER, PRIVATE PRISONER (1984); SAMUEL GRASHIO, RETURN TO FREEDOM (1982); NERIN E. GUN, THE DAY OF THE AMERICANS (1966); LINDA GOETZ HOLMES, 4000 BOWLS OF RICE (1994); DAVID HOWARTH, WE DIE ALONE (1955); ALEXANDER JANTA, BOUND WITH TWO CHAINS (1945); LOUIS E. KEEFER, ITALIAN PRISONERS OF WAR IN AMERICA (1992); AGNES NORTON KEITH, THREE CAME HOME (1981); E. BARTLETT KERR, SURRENDER & SURVIVAL (1985); ARNOLD KRAMMER, NAZI PRISONERS OF WAR IN AMERICA (1996); ROLF MAGENER, PRISONERS’ BLUFF (1954); BRUCE MARSHALL, THE WHITE RABBIT (1952); IAN MCHORTON, THE HUNDRED DAYS OF LT. MCHORTON (1963); KURT MOLZAHN, PRISONER OF WAR (1962); WILLIAM MOORE, THE LONG WAY ROUND (1986); AIREY NEAVE, LITTLE CYCLONE (1954); ALAN H. NEWCOMB, VACATION WITH PAY (1947); GRAHAM PALMER, PRISONER OF DEATH (1990); RICHARD PAPE, BOLDNESS BE MY FRIEND (1953); ALEXANDER RAMATI, THE ASSISI UNDERGROUND (1978); SLAVOMIR RAWICZ, THE LONG WALK (1956); PAT R. REID, ESCAPE FROM COLDITZ (1953); REID, *supra* note 75; OSCAR G. RICHARD, KRIEGE, AN AMERICAN POW IN GERMANY (2000); ANTHONY RICHARDSON, ALONE HE WENT (1951); GILES ROMILLY, HOSTAGES OF COLDITZ (1954); JERRY SAGE, SAGE OF THE OSS (1985); A.P. SCOTLAND, THE LONDON CAGE (1957); LLOYD R. SHOEMAKER, THE ESCAPE FACTORY (NEW YORK, 1990); JAMES F. SUNDERMAN, AIR ESCAPE AND EVASION (1963); VIRGIL V. VINING, GUEST OF AN EMPEROR (1968); WILLIAM L. WHITE, THE CAPTIVES OF KOREA (1957); JOHN S. WHITEHEAD, ESCAPE TO FIGHT ON (1990); ERIC WILLIAMS, THE WOODEN HORSE (1950); BARRY WINCHESTER, BEYOND THE TUMULT (1971); J.E.R. WOOD, DETOUR (1946).

91. Taken together, Articles 4 and 5 effectively require the capturing Power to presume that POW status exists. See GPW, *supra* note 3, arts. 4-5. Article 5, however, allows the Detaining Power to rebut that presumption before a fair and competent tribunal. *Id.* art. 5.

92. See U.S. DEP’T OF ARMY, REG. 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES para. 1-4(d) (1 Oct. 1997) [hereinafter AR 190-8] (stating that The Judge Advocate General (TJAG), U.S. Army, will provide guidance and advice regarding GPW Article 5 tribunals).

93. *Id.* para. 1-6.

94. The “competent tribunal” requirement demonstrates the GPW drafters’ close attention to procedural rights. Initially, the Stockholm Draft provided for determination by a “responsible authority.” Stockholm Draft, *supra* note 48, art. 4. An amendment offered by the Netherlands proposed the present language of Article 5, but with determination by a “military tribunal.” 2 FINAL RECORD, *supra* note 47, annex 95, at 63. The Danish delegation proposed substituting the phrase “competent tribunal” because “[t]he laws of the Detaining Power may allow the settlement of this question by a civil court rather than by a military tribunal.” *Id.* at 245 (13th plen. mtg.). The final article, with those amendments, was adopted without an opposing vote. *Id.* at 272. Given the drafters’ concern with both procedural rights and the efficiency of competent tribunals’ determinations, it seems clear that a Detaining Power may not satisfy legal rights through a unilateral declaration that it “has no doubt” about a detainee’s status.

95. AR 190-8, *supra* note 92, para. 1-6b. Thus, under AR 190-8, if someone asserts POW status, that individual is entitled to a tribunal even if the captor believes no doubt exists that he is not entitled to it. This Army regulation, as with all the statements of required actions by the United States, is, of course, evidence of the existence of state practice, and, as such, a primary source of international law. See, e.g., Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1031, 1043, 1978 U.N.Y.B. 1185, 1197; CLIVE PARRY, THE SOURCES OF EVIDENCE IN INTERNATIONAL LAW 8 (Manchester Univ. Press 1965).

96. See AR 190-8, *supra* note 92, para. 1-6 (c), (e). The tribunal must be composed of three commissioned officers with at least one of field grade. Proceedings must be open except for deliberations or when security would be compromised. Those claiming POW status are entitled to a number of substantive rights, including the right to attend the hearing, testify and call witnesses, and the right against self-incrimination. *Id.*

97. Note to Army Military Training Materials for Military Police, *Processing Captives*, available at <http://www.atsc.army.mil/itsd/comcor/mp0001s.htm> (last visited July 29, 2003).

D. Issues Raised by the United States Intention to Use Military Tribunals to Try Persons Captured in Combat

Three questions necessarily arise out of the announced intention to use tribunals. First, are such bodies still legal under international law? The short answer is that they are, but only under certain circumstances and for the trial of certain individuals. The United States may only use tribunals to try captives subject to GPW if the tribunal applies current standards for U.S. courts-martial. Since tribunals are not, in themselves, illegal under U.S. law,⁹⁹ they can satisfy international requirements.

Second, and more important, are the procedural and evidentiary standards applied to World War II tribunals,¹⁰⁰ which were incorporated either directly or by implication into Commission Order 1,¹⁰¹ still valid under current international law? The answer to that question is a most definite no. They meet neither the standards of the GPW, nor the current requirements of international law as evidenced by human rights conventions and the rules of various currently existing¹⁰² and developing¹⁰³ bodies for the trial of international crimes and war criminals.¹⁰⁴

Finally, and of particular interest to those asked to participate in such tribunals as convening authorities, judges, juries, prosecutors, or otherwise, does participation in a trial of a POW that applies those World War II standards in itself constitute a

war crime? Again, the answer is almost certainly yes. Not only does *United States v. Uchiyama*¹⁰⁵ provide precedent for this conclusion, but the GPW makes it clear that violation of a POW's right to a trial is a war crime.¹⁰⁶

II. The History of American Military Commissions

The United States has used military commissions¹⁰⁷ as an alternative to courts-martial¹⁰⁸ for a very long time. The name "military commission" was first used during the Mexican War by General Winfield Scott,¹⁰⁹ who announced that military commissions would try civilians for committing certain crimes in occupied Mexican territory.¹¹⁰ Preceding the Mexican War, however, courts analogous to military commissions heard trials for violations of the laws of war.¹¹¹ Contrary to current popular belief, the use of military commissions was not unchallenged.¹¹² The legality of military commissions was questioned by The Judge Advocate General at the beginning of the Civil War,¹¹³ although trials before commissions were held during that conflict.¹¹⁴ Following the Civil War, Captain Henry Wirz, commandant of the Andersonville prison camp was tried and sentenced to death by a military commission.¹¹⁵ He was convicted of "maliciously, willfully and traitorously" conspiring to "injure the health and destroy the lives" of POWs in violation of the laws of war.¹¹⁶

98. Colonel Walter R. Schumm et al., *Treat Prisoners Humanely*, MIL. REV. 83 (Jan.-Feb. 1998).

99. This is not a question of U.S. constitutional law; military tribunals are still valid under the reasoning of *Ex parte Quirin*. Rather, the issue is whether the proceeding meets international standards, and if not, whether the failure to do so invalidates the proceeding. Note, however, *Quirin* holds in part that

the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the *clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.*

317 U.S. 1, 25 (1942) (emphasis added).

100. See discussion *infra* text accompanying note 148.

101. MCO No. 1, *supra* note 3.

102. See, e.g., Statute of the International Criminal Tribunal for the Former Yugoslavia, 32 I.L.M. 1192 (1993), available at <http://www.un.org/icty>; Statute for the International Criminal Tribunal for Rwanda, 33 I.L.M. 1602 (1994), available at <http://www.ictt.org>.

103. Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, July 18, 1998, as amended through Jan. 16, 2002, (entered into *force* July 1, 2002), available at <http://www.un.org/law/icc/index.html>.

104. See *infra* sec. IV (discussing evidence procedure and appellate rights).

105. Tried at Yokohama, *supra* note 6.

106. See GPW, *supra* note 3, art. 3. For a discussion of *Uchiyama*, see *infra* notes 234-237 and accompanying text.

107. The Supreme Court has held that

[n]either the United States Constitution nor United States legislation provides that crimes committed by military personnel, crimes which violate the laws of war, or crimes related to the conduct of war must be tried before military authorities. The Supreme Court has characterized as "well-established" the power of military tribunals to exercise jurisdiction over enemy belligerents, prisoners of war and others charged with violating the laws of war

Johnson v. Eisentrager, 339 U.S. 763, 786 (1950). The Supreme Court, however, has never stated or implied that such jurisdiction is exclusive. *In re Demjanjuk*, 603 F. Supp. 1468, 1476 (N.D. Ohio 1985).

A. Procedural History of Military Tribunals

Although military commissions were long characterized by an absence of set rules and procedures, they generally followed the principles of law and procedural rules¹¹⁷ governing courts-martial.¹¹⁸ That policy is unsurprising, given that commissions were originally developed so judicial bodies could try defendants otherwise outside their jurisdiction. The judicial participants—military officers—were the same; their adoption of the procedures and rules they normally used naturally followed.

Military commissions remained unchanged from the Mexican-American War through the period before World War II.¹¹⁹ The 1928 *Manual for Courts-Martial* noted:¹²⁰ Military Commissions . . . These tribunals are summary in their nature, but so far as not otherwise provided *have usually been guided by the applicable rules of procedure and evidence prescribed for*

courts-martial.¹²¹ America's sudden entry into World War II, and the resulting pressure for swift, stringent, and secret punishment of enemy agents, however, brought substantial changes to existing practice. Those pressures quickly culminated in the espionage cases that became *Ex parte Quirin*.¹²²

B. U.S. Military Commissions in World War II

I. Ex parte Quirin

The use of commissions to try extraordinary crimes, and resulting questions about their governing rules and procedures, arose early in the war. In *Ex parte Quirin*,¹²³ a military commission comprised of seven U.S. Army officers¹²⁴ appointed by President Roosevelt tried German saboteurs caught on U.S. soil.¹²⁵ The most startling departure from previous practice in

108. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 831 (2d ed. 1920 reprint).

Military commissions have also been called “common-law war courts.” *Madsen v. Kinsella*, 343 U.S. 341, 346 (1952). Military historian William Winthrop explains the development of the name “military commission” as follows:

The occasion for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offenses defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for these a different tribunal is required. A commander indeed, where authorized to constitute a purely war-court, may designate it by any convenient name. . . . But to employ the [name “court-martial”] for the two kinds of court could scarcely but result in confusion.

WINTHROP, *infra* note 108, at 831.

109. “Hence, in our military law, the distinctive name of military commission has been adopted for the exclusively war-court” *Id.*

110. The Mexican territory commissions were ordered pursuant to Headquarters, Dep’t of Army, Gen. Orders No. 20 (19 Feb. 1847) [hereinafter Gen. Order No. 20]. Note that offenses against the laws of war were tried by a council of war. WINTHROP, *supra* note 108, at 832. The general order provided that “[a]ssassination, murder, poisoning, rape, wanton destruction of churches . . . and destruction . . . of public or private property, whether committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces . . . should be brought to trial before Military Commissions.” Gen. Order No. 20, *infra* note, *quoted in* Nathan April, *An Inquiry into the Juridical Basis for the Nuernberg War Crimes Trial*, 30 MINN. L. REV. 314, 317 (1946).

111. *See Ex parte Quirin*, 317 U.S. 1, 12 nn. 9-10 (1942) (discussing cases, including the 1780 hanging of convicted spy Major John Andre of the British Army by order of a Board of General Officers appointed by General George Washington). In *Madsen v. Kinsella*, the Court noted:

By a practice dating from 1847 and renewed and firmly established during the Civil War, military commissions have become adopted as authorized tribunals in this country in time of war. They are simply criminal war courts, resorted to for the reason that the jurisdiction of the courts-martial, creatures as they are of statute, is restricted by law, and can not be extended to include certain classes of offense which in war would go unpunished in the absence of a provisional forum for the trial of offenders.

343 U.S. 341, 346 n.8 (1952) (citing HOWLAND, *DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY* 1066-1067 (1912)).

112. *Id.*

113. William Fratcher, *American Organization for Prosecution of German War Criminals*, 13 MO. L. REV. 45, 46 (1948) (citing Case of Col. Ebenezer Magoffin, CSA, 1 MS Op. JAG 285).

114. Stephen Young, *United States Military Commissions: A Quick Guide to Available Resources*, at <http://www.llrx.com/features/military.htm>; *see also* Winthrop, *supra* note 108, at 833.

115. *Famous Trials The Trial of Captain Henry Wirz*, at <http://www.law.umkc.edu/faculty/projects/ftrials/wirz/wirz.htm>.

116. 8 AM. ST. TRIALS 666 (1918), *reprinted in* 1 THE LAW OF WAR 783 (Leon Frieman ed., 1972).

117. Interestingly, the Rules of Proceeding in at least one post-Civil War military commission are still available. Those rules governed the trial of David Herold and other alleged assassins of President Lincoln. The commission allowed the defendants to choose their own counsel, examine witnesses, object to testimony of witnesses, and provided the defendants’ counsel a written daily transcript with a discretionary provision to the press. *See Proceedings of a Military Commission*, Washington D.C. (May 1, 1865), *available at* <http://www.surratt.org/documents/Bplact01.pdf>.

the rules created under the Roosevelt Order was the wholesale abandonment of prior procedural safeguards, including several steps for appeal.¹²⁶ The *Quirin* commission rules, including a reduced standard for the admissibility of evidence and limited appeals, were applied in later war crimes trials conducted by military commissions following the end of the war.¹²⁷

2. Development of the Nuremberg and Tokyo Rules

The *Quirin* rules were applied to post-war trials. Well before combat ended, the allies evaluated procedures for trials of war criminals.¹²⁸ Justice Robert H. Jackson of the Supreme Court, who had been appointed¹²⁹ chief U.S. prosecutor at the Nuremberg trial of major war criminals, issued a *Report to the President on Atrocities and War Crimes* on 7 June 1945.¹³⁰ Justice Jackson's report urged that

118. See Memorandum, Procedural Law Applied by Military Commissions (n.d.) [hereinafter Military Commissions Memorandum] (copy on file with the National Archives, Records of SCAP Legal Division Record Group 331, Stack 290, Row 9, Compartment 31, Shelf 1+, Box 1853, File 46, the Legal Division of the office of the Supreme Commander Allied Powers (General Douglas MacArthur)) (quoting several authorities, including Charles Fairman, *The Law of Martial Rule* para. 251, at 264 (2d ed. 1943)) ("There are no requisite formalities, the omission of which would entitle the accused to an acquittal." (citations omitted)); see Memorandum, Colonel Fairman, to Officers Attending Army JAG School (Feb. 1943) ("Questions concerning such a tribunal are not to be regarded from any narrow technical view . . . but on general principle."). While the commission followed general principles of law and the procedural rules governing courts-martial, they were not, however, bound to do so. *Id.* Much of the authority cited, however, indicated that

as the only quite safe and satisfactory course for the rendering of justice to both parties, a military commission will, like a court-martial, permit and pass upon objections interposed to members, . . . receive all material evidence desired to be introduced, . . . and, while in general even less technical than a court martial, will ordinarily and properly be governed, upon all important questions, by the established rules and principles of law and evidence.

WINTHROP, *supra* note 108, at 841-42. The Military Commissions Memorandum concluded that

[a] military commission is not bound by a rigid set of rules governing the procedure and evidence since the authority by which they are brought into being did not provide them with any rules to follow. *If the conduct of military commissions in the past is to be a guide, the same rules for procedure and rules of evidence governing General Courts Martial would prevail.* But no rules of procedure or evidence are prescribed by international law or otherwise, and commissions are not bound to follow court martial procedures.

Military Commissions Memorandum, *infra* note 118, at 3 (emphasis added).

119. See WINTHROP, *supra* note 108, at 832.

120. MANUAL FOR COURTS-MARTIAL, UNITED STATES ¶ 2, at 1 (1928) [hereinafter 1928 MCM] (emphasis added).

121. Once again, however, they were not bound to do so. As the-then current *Field Manual of Military Government & Civil Affairs* provided, "[i]t is generally advisable to direct that Military Commissions follow the procedure of General Army or Navy courts Martial, except where such procedure is plainly inapplicable . . ." U.S. DEP'T OF ARMY, FIELD MANUAL 27-5, FIELD MANUAL OF MILITARY GOVERNMENT & CIVIL AFFAIRS 1 (22 Dec. 1943), cited in Memorandum, (n.f.n.) Greenberg, subject: Military Commissions Are Not Bound by Rigid Rules of Procedure of [sic] Evidence (n.d.), (copy on file with National Archives, Records of SCAP Legal Division Record Group 331, Stack 290, Row 9, Compartment 31, Shelf 1+, Box 1853, File 46c).

122. LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 46 (Univ. of Kansas Press) (2003).

123. 317 U.S. 1 (1942). This case was tried between 8 July to 4 August 1942. *Id.*

124. The trial was held in the Department of Justice Building, Washington, D.C. The prosecutors included Attorney General Frances Biddle and The Judge Advocate General, U.S. Army, Major General Myron C. Cramer. Defense counsel included Colonel Kenneth C. Royall (later Secretary of War under President Truman) and Major Lausen H. Stone (son of Harlan Fiske Stone, the Chief Justice of the Supreme Court). Federal Bureau of Investigation (FBI) Office of Pub. & Cong. Affairs, *George John Dasch & The Nazi Saboteurs*, at <http://www.fbi.gov/libref/historic/famcases/nazi/nazi.htm> (last visited 13 Oct. 2003).

125. *Id.* The order of appointment provided that

The Commission shall have power to and shall, as occasion requires, make such rules for the conduct of the proceedings, consistent with the powers of Military Commissions under the Articles of War, as it shall deem necessary for a full and fair trial of the matters before it. Such evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man. The concurrence of at least two-thirds of the members of the Commission present shall be necessary for a conviction or sentence. The record of the trial, including any judgment or sentence, shall be transmitted directly to me for my action thereon.

Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 3, 1942). The rules developed for the *Quirin* commission followed the Presidential Order. See *Ex parte Quirin*, 317 U.S. 1, 46-48 (1942).

126. FISHER, *supra*, note 122, at 48-49.

127. John Elwood, *Prosecuting the War on Terrorism: The Government's Position on Attorney-Client Monitoring, Detainees, and Military Tribunals*, 17 CRIM. JUST. 30, 51 (2002). The *Quirin* rules were "followed in hundreds of military commissions after World War II." *Id.* Wallach, *supra* note 1, at 862 nn.47- 49.

[t]hese hearings . . . must not be regarded in the same light as a trial under our system where defense is a matter of constitutional right. Fair hearings for the accused are, of course, required to make sure that we punish only the right men and for the right reasons. But the procedure of these hearings may properly bar obstructionist and dilatory tactics resorted to by defendants in our ordinary criminal trials.¹³¹

Thus, based upon *Quirin* and its extraordinarily rules, the United States developed procedural and evidentiary approaches for the trial of post-war criminals. Those rules were initially developed for the International Military Tribunal at Nuremberg (IMT), expanded for the International Military Tribunal for the

Far East (IMTFE), and applied thereafter to military commissions trying war criminals in both theaters.¹³² The rules allowed for great flexibility in their application; consequently, a fair trial depended upon the good faith of the various military commanders empowered to create the commissions.

3. Application of the Rules in Military Tribunals

The procedural development of the IMT sprang from the London Charter¹³³ and Control Council Law No. 10,¹³⁴ which allowed each power, within its zone, to arrest suspects and bring them “to trial before an appropriate tribunal.”¹³⁵ These follow-up tribunals¹³⁶ were comprised of three or more members that the parties could not challenge.¹³⁷ They applied rules¹³⁸ similar to the IMT¹³⁹ governing indictments and inher-

128. Memorandum, Major General Myron Cramer, The Judge Advocate General, U.S. Army, subject: Applicability of Articles of War to Trials of War Criminals by Military Commissions 4 (n.d.) (on file with National Archives, Records of SCAP Legal Division Record Group 331, Stack 290, Row 9, Compartment 31, Shelf 1+, Box 1853, File 2A). In this memorandum, The Judge Advocate General, Myron Cramer, noted:

[T]he proponents of the claim that Congress by the Articles of War intended to regulate the extraterritorial relations of the Army with foreign belligerents, have a heavy initial burden. I am the more moved to this viewpoint by [*Ex parte Quirin*, which held] that Congress by providing in the Articles of War for the trial of offenses committed by enemy belligerents “has not itself undertaken to codify that branch of international law or to mark its precise boundaries, or to enumerate or define by statute all the acts which that law condemns.” *If therefore, Congress has not invaded the substantive field of these offenses, there is a fair inference, proof to the contrary being lacking, that it did not intend to enter the procedural field in this respect.*

Id. (emphasis added). Thus, unrestrained by the Articles of War, Cramer proceeded with his reasoning on development and application of procedures for war crimes commissions:

You have asked my opinion whether the Articles of War constitute a limitation on the procedure of military commissions appointed by authority of United States army commanders in occupied territory for the trial of war criminals. The question is important for the reason that if applicable, alleged war criminals would be entitled to assert a privilege against self-incrimination under Article of War 24, testimony by deposition could not be adduced against their consent under Article of War 25, and the reviewing or confirming authority would be required to refer the record of trial to his staff judge advocate or The Judge Advocate General before acting thereon under Article of War 46.

Id. at 1. His conclusion is telling. After a review of applicable law, Cramer stated that

[c]arried to its logical extent, the claim that the Articles of War apply to trials of war criminals results in the conclusion that Congress intended, as a matter of public policy, to extend the protection of the Articles of War to such offenders. This in turn would outlaw American participation in international tribunals convened for such trials unless the protections of the Articles of War were observed by those tribunals. *I cannot bring myself to reach any such conclusion.*

Id. at 6 (emphasis added).

129. Exec. Order No. 9547, 10 Fed. Reg. 4961 (1945).

130. JUSTICE ROBERT H. JACKSON, REPORT TO THE PRESIDENT ON ATROCITIES AND WAR CRIMES (June 7, 1945).

131. *Id.* para. III(2).

132. See PHILLIP PICCIGALLO, THE JAPANESE ON TRIAL (1979). See also Wallach, *supra* note 1, at 862 nn.53-54, 66-70 (demonstrating application of *Quirin* rules to later Far East “minor” trials). Roosevelt’s order in *Quirin* has been cited as the “first . . . expression” of the “basic position toward admission of evidence” in trials of war criminals. *Id.*

133. Charter of the International Military Tribunal, annexed to the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279. The Charter provided that “[t]he constitution, jurisdiction and functions of the International Military Tribunal shall be those set in the Charter annexed to this Agreement, which Charter shall form an integral part of this Agreement.” *Id.* art 2; see generally Wallach, *supra* note 1. The procedural and evidentiary discussion that follows may be found, in expanded form, in that article.

134. Control Council Law No. 10, Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity, art. 3 (Dec. 20, 1945), 3 Official Gazette Control Council for Germany 50-55 (1946) [hereinafter Control Council Law No. 10].

ent powers.¹⁴⁰ These rules provided for the required confirmation of any death sentence by the theater commander and that trials would be held in open court “except when security, protection of witnesses, or other considerations make this inadvisable.”¹⁴¹ The rules did contain certain substantive changes,¹⁴² however, including expansion of the evidentiary rules.¹⁴³

The Tokyo and Nuremberg Charters had important differences.¹⁴⁴ The IMTFE Charter was created on 19 January 1946, by order of General Douglas MacArthur.¹⁴⁵ The Charter pro-

vided that the IMTFE would consist of six to eleven members. MacArthur would appoint those members from names submitted by the victor nations in the Far East.¹⁴⁶ The Charter did not provide for appointment of alternates; instead, “the presence of a majority of all members [was] necessary to constitute a quorum. All decisions and judgments, including convictions and sentences, were by a majority vote of members present.”¹⁴⁷ Per its Charter, the IMTFE drafted its own procedural and evidentiary rules.¹⁴⁸

135. *Id.*

136. The United States conducted two sets of follow-up trials in Germany under Control Council Law No. 10. The first group of trials were prosecuted under Telford Taylor at Nuremberg. See generally TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUREMBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (Aug. 15, 1949) [hereinafter TAYLOR, FINAL REPORT]. Most of the other trials were held at the former German concentration camp at Dachau. Maximilian Koessler, *American War Crimes Trials in Europe*, 39 GEO. L.J. 18, 25 (1950). The “common trial” approach, (involving related acts, times, and locales) was used in both Europe and Asia. Paul Spurlock, *The Yokohama War Crimes Trials: The Truth About a Misunderstood Subject*, 36 ABA J. 387, 389 (1950).

137. Control Council Law No. 10, *supra* note 134, art. 3.

138. Control Council Ordinance No. 7 (18 Oct. 1946) [hereinafter Control Council Ordinance No. 7]; see also Regulation on Military Commissions Issued by Letter of Headquarters, U.S. Forces, European Theater (25 Aug. 1945), *reprinted in* 39 GEO. L.J. 106-12 (1950).

139. See Charter of the International Military Tribunal *supra* note 133. The tribunals were also permitted to promulgate their own supplemental rules of procedure. Control Council Law No. 10, *supra* note 134, art. 5. Several sets of rules were issued, providing for, inter alia, the specifics of representation by counsel, the filing of motions, and the production of evidence at trial. A uniform set of procedures was eventually issued by joint action of the tribunals. Office of Military Government (U.S.), Uniform Rules of Procedure, Military Tribunals Nuremberg, (Jan 24, 1948) (final iteration of rules), *available at* <http://www.yale.edu/lawweb/avalon/imt/rules5.htm>.

140. Control Council Law No. 10, *supra* note 134, arts. 4-5.

141. Control Council Ordinance No. 7, *supra* note 138; see also Regulation on Military Commissions Issued by Letter of Headquarters, U.S. Forces, European Theater (25 Aug. 1945), *reprinted in* 39 GEO. L.J. 106-12 (1950).

142. See TAYLOR, FINAL REPORT, *supra* note 136, at 89. One modification was the appointment by the tribunals of commissioners. It had implications on the resolution of the overwhelming numbers of defendants—a continuing problem.

Upon the conclusion early in 1948 of the “RuSHA case,” . . . Judge Crawford (who had been a member of that tribunal) was appointed as the Chief of the Commissioners for the Tribunals. Judge Crawford, assisted by several associate commissioners, took testimony from then until the conclusion of the court proceedings in the “Ministries case” in the fall of 1948. The commissioners had no power to rule on questions of evidence, but certified the transcript of proceedings before them to the tribunals.

Id.

143. See Elwood, *supra* note 127, at n.53.

144. Unlike the protracted London Charter negotiations, there was no need for any decision making other than by fiat. The Potsdam ultimatum, issued by the Allies on 26 July 1945, provided that “stern justice shall be meted out to all war criminals, including those who have visited cruelties upon our prisoners.” Potsdam Declaration, art. 10 (July 26, 1945).

145. Greg R. Vetter, *Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)*, 25 YALE J. INT’L L. 89, 105 (2000) (“The Tokyo tribunal in the Far East (IMT-FE) was set up by proclamation of General Douglas MacArthur . . . on January 19, 1946.”). The embodiment of sovereignty in General MacArthur as Supreme Commander for the Allied Powers (SCAP) meant there was no need to negotiate. General MacArthur could have issued rules similar to the U.S. Articles of War, those governing military commission in the United States, or an exact copy of the Nuremberg Charter. He did not. The absence of the negotiating process had at least one significant effect. Article 9, which began with the same words as Article 16 of the Nuremberg Charter (“In order to insure fair trial”), did not require a continental indictment including “full particulars which specified the charges in detail. Instead, following the American rule, the indictment was to “consist of a plain, concise and adequate statement of each offense charged.” CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST art. 9 (Jan. 19, 1946), *available at* <http://www.yale.edu/lawweb/avalon/imtfech.htm> (last modified Sept. 9, 2003) [hereinafter IMTFE CHARTER].

146. IMTFE CHARTER, *supra* note 145, art. 2. General MacArthur appointed judges from eleven nations: India, the Netherlands, Canada, the United Kingdom, the United States, Australia, China, the Soviet Union, France, New Zealand, and the Philippines. Walter McKenzie, *The Japanese War Crimes Trial*, 26 MICH. STATE B.J. 16, 17 (1947).

147. IMTFE CHARTER, *supra* note 145, art. 4. If an absent member returned, he could take part in all subsequent proceedings, unless he declared “in open court that he [was] disqualified by reason of insufficient familiarity with the proceedings which took place in his absence.” *Id.* art. 4.

Prior to the Japanese surrender, the allies began plans for trials of minor¹⁴⁹ war criminals. The War Crimes branch was organized in March 1945, in the office of the Theater Judge Advocate.¹⁵⁰ These “minor” tribunals¹⁵¹ used procedures derived from the *Quirin* commission. The internal memoranda of SCAP’s (Supreme Commander for the Allied Powers) Legal Division¹⁵² indicate an intention¹⁵³ to apply the procedures of U.S. military commissions directly.¹⁵⁴ Their regulations laid out the same rules of evidence and procedure discussed above.¹⁵⁵ When compared with the application of the Nuremberg Rules, however, the tribunals’ application of their own rules provides a stark example of the potential for abuse when rules are so flexible as to be non-existent.

a. Procedural Issues in the Post-World War II Trials

The flexible nature of the procedural rules used in the post-World War II trials gave rise to substantial and repeated procedural issues. The evidentiary rulings were more questionable, and are treated separately below. The lax nature of the trial proceedings, however, also raised many other substantive questions.

Procedural problems in the trials went well beyond evidentiary issues,¹⁵⁶ especially in the IMTFE. For example, both IMTs indicted arguably senile or insane defendants.¹⁵⁷ At various times, there were improper communications with judges,¹⁵⁸ inconsistent rulings favoring the prosecution,¹⁵⁹ vague and ambiguous indictments under the Tokyo rules,¹⁶⁰ questions regarding the applicability of the Geneva Conventions to the defendants,¹⁶¹ and the denial of motions to recuse biased

148. *Id.* arts. 7, 13. The Tribunal’s evidentiary powers were a synthesis of those contained in the Nuremberg Charter and Rules and those in the Royal Warrant issued for the trial of war criminals by the United Kingdom. See The Royal Warrant, Regulations for the Trial of War Criminals (United Kingdom) (June 18, 1945), available at <http://www.yale.edu/lawweb/avalon/imt/imtroial.htm>.

149. “The word ‘minor’ is not used as a definition of the offenses involved, but merely to distinguish the persons they are trying from the ‘major war criminals’ being tried by the next division.” McKenzie, *supra* note 146, at 16.

150. Spurlock, *supra* note 136, at 387. On 6 December 1945, General MacArthur directed General Robert Eichelberger to appoint military commissions to conduct trials immediately. *Id.* n.81.

151. Most of the “minor” trials were held at Yokohama, Japan. *Id.*

152. See Military Commissions Memorandum, *supra* note 118.

153. That they were completely successful in doing so may be explained by the complete control exercised by General MacArthur as SCAP, and the pervasive influence which must exist when the power to appoint prosecution, defense, and the judiciary, as well as all administrative services and powers, rest in the hands of one individual. See Spurlock, *supra* note 136, at 388. General MacArthur’s letter of 6 December 1945, shows the sort of influence which that could be exercised without direct orders:

[T]he following special provisions will be applied to war criminal suspects . . .
A. They will not be treated as prisoners of war
B. Quarters, food and privileges will be accorded suspects in keeping with those customarily provided for ordinary criminals, *charged with an equally revolting domestic crime.*

Letter from General Douglas MacArthur, Supreme Commander for the Allied Powers, to the Commanding General, Eighth Army, subject: Detention, Interrogation and Trial of Suspected Japanese War Criminals (Dec. 6, 1945) (SCAP Letter AG 000.5), *quoted in* Robert Miller, *War Crimes Trials at Yokohama*, 15 BROOK. L. REV. 191, 192 (1949) (emphasis added).

154. See Military Commissions Memorandum, *supra* note 118. General MacArthur’s issuance of *Regulations Governing the Trial of War Criminals* on 24 September 1945, aided the Legal Division in achieving that goal. These regulations were the precursor to both the December minor trials order and the IMTFE tribunal order. See National Archives, Records of SCAP Legal Division Record Group 331, Stack 290, Row 9, Compartment 31, Shelf 1+, Box 1855, File 124 [hereinafter SCAP].

155. The similarity included an article on evidence, Article 16, which was precisely the same as that issued for the Tokyo Tribunal. See *Regulations Governing the Trial of War Criminals*, *supra* note 154.

156. ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 228 (1962). One major substantive distinction between the major war crimes tribunals was that “the Tokyo Tribunal [under Article 5] . . . had jurisdiction over persons only if they were accused of having committed offenses which included crimes against peace, in contrast to the Nuremberg Tribunal which had no exclusive provision of this kind.” *Id.*

157. For example, the Nuremberg Tribunal severed Gustav Krupp as a defendant. TAYLOR, *supra* note 68, at 157. Rudolf Hess was probably insane, but stood trial and was convicted. *Id.* at 177-80. Shumei Okawa was adjudged insane on 17 May 1946, but retained as a defendant. Gordon Ireland, *Ex Post Facto from Rome to Tokyo*, 21 TEMP. L.Q. 27, 51-52 (1947).

158. In his capacity as a prosecutor, Justice Jackson engaged in ex parte communications with Judge Biddle before the Tokyo Tribunal. TAYLOR, *supra* note 68, at 134. These communications sent “the proprietaries ‘by the way’ for fair.” *Id.*

159. 2 The Tokyo Judgment, Opinion by Judge Pal 633-34 (Amsterdam Press 1977) [hereinafter Pal Opinion] (emphasis added); TAYLOR, *supra* note 68, at 321.

judges.¹⁶² In addition, to an extent often confounding to counsel, there were many unresolved questions.¹⁶³

The distinction between the number of judges at Nuremberg and Tokyo, and the concomitant quorum rules, provides a classic example of the flexibility of the rules and their effect on fairness.¹⁶⁴ The same court could, in good faith, issue diametrically opposed rulings on different days in a case involving the same parties and precisely the same issues.¹⁶⁵

The procedural flaws of the post-war tribunals illustrate the importance of standardized and closely articulated rules. While it is easy to complain about “technicalities” and “lawyers spouting off,” conducting a fair trial without some sort of predictable model is not.¹⁶⁶ The farther a procedure strays from a closely articulated model, the more likely it will go wrong. The divergence in evidentiary issues under the *Quirin* rules in the post-war trials illustrates that lesson even more starkly.

160. 1 The Tokyo Judgment, Opinion by Judge Bernard 494 (Amsterdam Press 1977) (explaining that the lack of specificity in indictments was one reason Judge Bernard of France dissented stating, “Though I am of the opinion that the Charter permitted granting to the Accused guarantees sufficient for their defense, I think that actually these were not granted to them”). Although the SCAP stated that the accused was “entitled to have in advance of trial a copy of the charges and specifications clearly worded so as to apprise the accused of each offense charged,” these requirements were not often followed. Miller, *supra* note 153, at 195-96.

For example, the specifications might specifically name two or three prisoners alleged to have been abused by the accused and the manner of abuse. Then might follow several wherein it was alleged that between 15 January 1942 and 1 June 1945, he did beat, wound, kick, abuse and otherwise torture an American prisoner of war known as “Whitey” or “Shorty” or some other nickname. The final or “catch-all” specification was that he, between the above-stated periods, abused numerous other American or Allied prisoners of war, no names or other data being stated. The affidavits would usually not identify the party whose nickname had been used. The “catch-all” specification was supported by affidavit statements that the accused was “always slapping and kicking” the prisoners, or “whenever he was around, there was always trouble.”

Inasmuch as there was no standing commission to which a motion for a bill of particulars could be addressed prior to trial, such remedy was foreclosed until after trial [commenced] . . . [the name specification might be the same incident as the nick-name specification]. The attempt by way of motion, either for a bill of particulars or to strike, had scant chance for success.

Id.

161. Both in Japan and Germany, the Allies denied war crime defendants their rights to housing, allowances, and association under the existing Geneva Convention. *See In re Yamashita*, 327 U.S. 1, 20 (1946); Miller, *supra* note 153, Koessler, *supra* note 136, at 192 n.69; , *supra* note 30, at 19 n.6. Yet, an Axis defendant was subject to prosecution for denying those same Geneva Convention rights to Allied prisoners charged with war crimes. *United States v. Uchiyama*, Case-35-46, War Crimes Branch Case Files, Records of The Judge Advocate General, Record Group 153 (Yokohama, 18 July, 1947) (on file with author); *see* discussion, *infra* nn.234-237 and accompanying text.

162. *See, e.g.,* RICHARD MINEAR, *VICTOR’S JUSTICE* (1971). Minear points out that the Soviet delegate at the London Conference and later judge at Nuremberg, General I. T. Nikitchenko, said

with regard to the position of the judge the Soviet Delegation considers that there is no necessity in trials of this sort to accept the principle that the judge is a completely disinterested party with no previous knowledge of the case. The case for the prosecution is undoubtedly known to the judge before the trial starts and there is, therefore, no necessity to create a sort of fiction that the judge is a disinterested person who has no legal knowledge of what has happened before.

Id. at 80-81 (quoting The Avalon Project, Minutes of Conference Session of June 29, 1945, in INTERNATIONAL CONFERENCE ON MILITARY TRIALS: LONDON (1945)), available at <http://www.yale.edu/lawweb/avalon/imt/jackson/jack17.htm>.

The French Government appointed its London representative as an alternate justice. The United States appointed Francis J. Biddle as Attorney General and a co-author of a memorandum that expressed a preference for military justices, such justices “being less likely to give undue weight to technical contentions and legalistic arguments. *Id.* (quoting The Avalon Project, Minutes of Conference Session of June 29, 1945, in INTERNATIONAL CONFERENCE ON MILITARY TRIALS: LONDON (1945)), available at <http://www.yale.edu/lawweb/avalon/imt/jackson/jack17.htm>. At Tokyo, the Philippine justice, Delfin Jaranilla, was a survivor of the Bataan death march; the second American justice, General Cramer, had submitted a legal brief to President Roosevelt on the responsibility for the attack on Pearl Harbor; and President Webb had been Australian war crimes commissioner during the war. *Id.* at 81-82.

After the Tokyo Tribunal rejected the challenge of any judge, on jurisdictional grounds, President Webb stated

that, before he accepted his appointment, he seriously considered what effect his reports would have on his position as a member of the Tribunal. He had come to the conclusion without difficulty that he was eligible, his views being supported by the best legal opinion available to him in Australia.

Flight-Lieutenant Harold Evans, *The Trial of Major Japanese War Criminals*, 23 N.Z. L.J. 8, 23 (1947). This was the same judge who, at a later point in the trial, asked a Japanese witness if “the purpose of the Imperial Rule Assistance Association was to prepare the people for an inhumane and illegal war against Great Britain and America, a war which should not have been begun and a war which cannot be defended?” 1 THE TOKYO WAR CRIMES TRIAL 1684 (Garland Publishing Co., 1981).

163. One such question is how to obtain an authoritative translation? Attorneys, who often did not speak the language of the defendants, were at the mercy of the ability and integrity of their translator for vital document reviews and interrogations. *See* TAYLOR, *supra* note 68, at 176. General MacArthur ordered one case retried because of a failure to translate a confidential document to the accused, although the court admitted it into evidence. Spurlock, *supra* note 136, at 437; Robert Grier Stephens, *Aspects of the Nuremberg Trial*, 8 GA. B.J. 262, 266 (1946).

b. *Evidentiary Issues in the Post-World War II Trials*

The permissive nature of the evidentiary rules used in the post-World War II tribunals allowed for the admission of evidence that raised concerns well beyond mere technical quibbles. For example, German suspects in the Malmedy Massacre case¹⁶⁷ claimed the prosecution subjected them to improper methods of investigation, in particular mock trials. An Administrative Review Board¹⁶⁸ (Raymond Board) investigated this complaint.¹⁶⁹ According to the Raymond Report:

When the prisoner was brought into the mock trial room[,] sometimes other people were brought in who purported to testify against him. There is no evidence on which the board can find that the prisoner himself was forced to testify at such trial. One member of the prosecution team would play the part of prosecutor, and another would act as a friend

of the defendant. While this latter may not have been held out affirmatively as defense counsel, the accused had every reason to believe he was taking that part. No sentence was pronounced[,] but the accused was made to understand that it was his last chance to talk and undoubtedly in some cases understood he had been convicted.

Following the mock trial[,] the man who had played the friend of the accused at the mock trial would talk to him confidentially and advise him to tell what he knew. This procedure met with varying success, but undoubtedly some defendants would confess at least part of their crimes under the influence of such procedures.¹⁷⁰

164. At the Tokyo Tribunal, President Webb, with extraordinary candor, describes the fairness of these proceedings.

I am not here to offer any apology on behalf of the Tribunal, but as you know the Charter says we are not bound by the technical rules of evidence. That not merely prevents us from following our own technical rules—we could hardly do that because there are eleven nations represented and in some particulars they all differ in these technical rules—but it has the effect of preventing us from substituting any other body of technical rules of our own. All we can do on each piece of evidence as it is presented is to say whether or not it has probative value, and the decision on that question may depend on the constitution of the court. Sometimes we have eleven members; sometimes we have had as low as seven. And you cannot say, I cannot say, that on the question of whether any particular piece of evidence has probative value you always get the same decision from seven judges as you would get from eleven. I know that you would not You cannot be sure what decision the court is going to come to on any piece of evidence—not absolutely sure—because the constitution of the court would vary from day to day and I would be deceiving you if I said decisions did not turn on how the court was constituted from time to time. They do. On the other day in court on an important point I know the decision would have been different if a Judge who was not here was present. How are we to overcome that? *We cannot lay down technical rules. We might spend months in trying to agree upon them and then fail to reach an agreement. The Charter does not allow us to adopt them in any event. It is contrary to the spirit of the Charter. The decision of the Court will vary with its constitution from day to day. There is no way of overcoming it.*

Pal Opinion, *supra* note 159, at 654-55 (quoting President Webb) (emphasis added).

165. One area in which the procedures cannot be faulted at all is the provision of defense counsel. Indeed, the Court noted in *In re Yamashita* that “[i]n all cases it appears that defense counsel were competent and zealous in their representation. Throughout the proceedings which followed, including those before this Court, defense counsel have demonstrated their professional skill and resourcefulness and their proper zeal for the defense with which they were charged.” *In re Yamashita*, 327 U.S. 1, 5 (1946). Professor Benjamin Ferencz, one of the chief prosecutors in the subsequent Nuremberg cases, pointed out that

no German lawyer [was] ever . . . excluded if he was requested as counsel for a defendant. In fact, most of the German counsel chosen [were] themselves subject to arrest or trial in German courts under German law for membership in the Nazi Party or the criminal SS. If tried, many of them would [have been] barred from legal practice but they [were], through the intervention of the American authorities, . . . given immunity from prosecution in their own courts in order to ensure that accused war criminals [would] have a free choice of counsel from those Germans whom they consider best suited to defend them.

Benjamin B. Ferencz, *Nurnberg Trial Procedure and the Rights of the Accused*, 39 J. CRIM. L. & CRIMINOLOGY 144, 146 (1948).

166. See, e.g. Rich Lowrey, *When to Hold Them Is It OK to Detain the Terrorist-fighters in Guantanamo Bay “Indefinitely”?*, Nat’l Rev. On-Line (March 26, 2002), at <http://www.nationalreview.com/lowry/lowry032602.asp>, and Thomas Sowell, *Two Trials---and future trials*, townhall.com, July 23, 2002, at <http://www.townhall.com/columnists/thomassowell/ts20020723.shtml>

167. Malmedy was the site of the murder of American POWs by SS troops at the orders of their commander. After the press revealed the discovery of the massacre, the American military and the public exerted considerable pressure to discover and punish the perpetrators. See Koessler, *supra* note 136, at 26-27.

168. U.S. Dep’t. of War, FINAL REPORT OF PROCEEDINGS OF ADMINISTRATION OF JUSTICE REVIEW BOARD (The Raymond Report) (14 Feb. 1949).

169. See also Wallach, *supra* note 1, at 870-72. The Raymond Report generally rejected allegations of physical abuse as unfounded, but it found that “in an attempt to ‘soften up’ certain witnesses prosecutors used ‘mock trial’ procedures.” *Id.* at 870.

170. *Id.* paras. 13-14. “This procedure has a further bearing on the preparation of the case when it really came to trial. Defense Counsel appointed for the accused found difficulty in getting the confidence of the defendants because of their experience with the mock trials” *Id.* para. 15.

The Chief Prosecutor for the Malmedy case was Lieutenant Colonel (LTC) Burton Ellis. He testified before the Senate¹⁷¹ regarding the propriety of such methods.¹⁷² Ellis's testimony demonstrates the negative effect that unstructured rules may have on the approach of a prosecutor under pressure (external or internal) to achieve successful results. While LTC Ellis' statements may be unusually candid, the attitude he expressed was not his alone.¹⁷³

In *In re Yamashita*¹⁷⁴ and *In re Homma*,¹⁷⁵ the Supreme Court refused to apply constitutional protections to the war crimes trials. In his dissent in *Yamashita*, Justice Rutledge objected to

numerous evidentiary problems, and he specifically objected to Article 16 of the IMTFE's Charter.¹⁷⁶ He noted that "[a] more complete abrogation of customary safeguards relating to the proof, whether in the usual rules of evidence or any reasonable substitute and whether for use in the trial of crime in the civil courts or military tribunals, hardly could have been made."¹⁷⁷

The tribunals experienced many other evidentiary problems¹⁷⁸ due to the extraordinarily loose language under which they operated, including routinely argumentative questions by counsel,¹⁷⁹ questions of judicial notice,¹⁸⁰ the admission of affidavits by witnesses whom there was no opportunity to cross-

171. *Malmedy Massacre Investigation, 1949: Hearings on S. Res. 42 Before a Subcomm. of the Comm. on Armed Services*, 81st Cong. 28-69 (1949).

172. *Id.* Lieutenant Colonel Ellis testified before the Senate to the following:

Colonel Ellis: Sir, . . . the rules of evidence under which the war crimes were tried were most liberal.

. . . .

[Senator Joseph R. McCarthy, D-WI]: Do you think this type of mock trial was proper or improper? . . .

Colonel Ellis: I think the answer to that question would be—so long as I let the court who weighs the evidence know how I obtained that confession, that is the important thing. Then, the duty is on them. . . .

Sen. McCarthy: In other words, you say it would be proper to get a confession in any way you saw fit, so long as you let the court know how you got the confession?

Colonel Ellis: I think under the rules of evidence it would be perfectly proper. There were some things that would be repulsive to one individual that would not be to another. I would certainly not allow a confession to be used where a man was beaten or forced under threats or compulsion to make a confession. I am definitely opposed to that.

. . . .

Sen. McCarthy: . . . You think it is proper then, to use the mock trial if the court were informed. . . .

Colonel Ellis: Under the rules of evidence which we were practicing under over there, I think it would be

Senator McCarthy: Do you feel . . . using different rules of evidence . . . is proper?

Colonel Ellis: Most certainly; they admitted hearsay there and you don't here.

Id. at 46-47 (June 6, 1949).

173. *See, e.g.*, Elton Hyder, *The Tokyo Trial*, 10 TEX. B.J. (1947) ("Considerable hearsay testimony was offered against the accused necessitated by the loss or destruction of original documents. Reason dictated its use.").

174. 327 U.S. 1 (1946). At least one author argues that *Yamashita* was chosen as the first defendant to provide precedence for later trials. He cites reports that General MacArthur had "urged 'haste' upon the military commission." PHILLIP PICCIGALLO, *THE JAPANESE ON TRIAL* 56 (1979).

175. 327 U.S. 759 (1946).

176. *Yamashita*, 327 U.S. at 48-49.

177. *Id.* at 49 (Rutledge, J., dissenting). Rutledge continues,

So far as the admissibility and probative value of evidence was concerned, the directive made the commission a law unto itself. It acted accordingly. As against insistent and persistent objection to the reception of all kinds of "evidence," oral, documentary and photographic, for nearly every kind of defect under any of the usual prevailing standards for admissibility and probative value, the commission not only consistently ruled against the defense, but repeatedly stated it was bound by the directive to receive the kinds of evidence it specified, reprimanded counsel for continuing to make objection, declined to hear further objections, and in more than one instance during the course of the proceedings reversed its rulings favorable to the defense, where initially it had declined to receive what the prosecution offered. Every conceivable kind of statement, rumor, report, at first, second, third or further hand, written, printed, or oral, and one "propaganda" film were allowed to come in

Id. *See also* John T. Ganoë, *The Yamashita Case and the Constitution*, 25 OR. L. REV. 143, 148 (1946).

178. One such problem related to the introduction of character evidence. The later Nuremberg tribunals incorporated a character evidence rule similar to Rule 12(3), *Rules of Procedure in Military Government Courts*. Rule 12(3) reads that "Evidence of bad character of the accused shall be admissible before finding only when the accused has introduced evidence as to his own good character or as to bad character of any witness for the prosecution." *Id.*

179. Taylor says the "Soviet fashion" was to mix "questions with pejoratives." TAYLOR, *supra* note 68, at 430-31.

180. The Soviets argued that the judicial notice provision of Article 21 required that their report blaming the Germans for a massacre of Polish officers in the Katyn Forest should receive binding weight; considerable evidence indicated the Russians themselves committed the murders. The tribunal refused to find the report irrefutable. *Id.* at 468-69.

examine,¹⁸¹ and the exclusion of evidence that was arguably relevant to the defense.¹⁸² These evidentiary problems resulted in inefficiency,¹⁸³ uncertainty,¹⁸⁴ and at least in the view of Justice Rutledge, blatant unfairness.¹⁸⁵

There are most certainly lessons to be learned from the use of the *Quirin* evidentiary rule in the post-war trials. Chief among them is that no matter how good-willed the commission

and its members, when “technical rules of evidence”¹⁸⁶ go by the wayside, and evidence is admitted based solely upon the opinion of the commission that it has probative value to a reasonable person; there is an open invitation to misconduct, unfairness, and what Justice Murphy characterized as “judicial lynchings.”¹⁸⁷ It is the sum of the problems that arose from those trials, both procedural and evidentiary, which strongly

181. The Nuremberg and Tokyo Tribunals resolved this question differently. The Nuremberg Tribunal generally allowed a party to admit an affidavit subject to calling the witness for cross-examination. *Id.* at 241-242. Apparently the Soviet war crimes report, however, admitted under Article 21 as a government report, was based on some 54,784 depositions of witnesses not subjected to cross-examination. *Id.* at 313. Contrarily,

A characteristic feature of the Yokohama trials was the large amount of documentary evidence that was introduced by the prosecution to support the charges and specifications and often by the defense to refute them. The defense contested the introduction of affidavits in the first trial but was overruled by the commission, which pointed out that the protection of the United States Constitution and the Articles of War was not available to the accused as a Japanese citizen and a former belligerent.

Spurlock, *supra* note 136, at 389. The difference probably arose because of the language of the SCAP regulation which allowed admission of “affidavits, depositions or other signed statements,” as well as “any diary, letter or other document, including sworn or unsworn statements, appearing to the commission to contain information relating to the charge.” See SCAP Letter, *supra* note 154.

182. At Tokyo, Justice Pal dissented, in part, based on the refusal of the Tribunal to admit eleven categories of evidence. Pal Opinion, *supra* note 159, at 641-42. He noted, “We had, however, admitted in evidence press release of the prosecuting nations when offered in evidence by the prosecution.” *Id.* at 642.

Those rulings of the Tokyo Tribunal must be compared with the decision at Nuremberg to permit Admiral Doenitz’s counsel, Kranzbuehler, to submit an interrogatory to Admiral Nimitz of the United States Pacific Fleet “to establish that the American Admiralty in practice interpreted the London Agreement in exactly the same way as the German Admiralty, and thus prove that the German conduct of sea warfare was perfectly legal” 8 NUREMBERG TRIAL PROCEEDINGS 548 (1946). Indeed, Telford Taylor pointed out in his *Final Report to The Secretary of the Army on the Nuremberg War Crimes Trials* that

[i]n order to shorten the proceedings, the prosecution used affidavits instead of oral testimony whenever possible. Such matters as the *curriculum vitae* of the defendants, organization charts of the ministries and other governmental agencies, and explanations of the functioning of quasi-governmental industrial bodies were usually presented in affidavit form subject, of course, to the right of the defense to call the affiants for cross-examination. A comparatively small number of affidavits on more controversial matters were also introduced. The defense, however, utilized affidavits in great quantity on a wide variety of subjects, but in order that the court proceedings should not be unduly prolonged, the prosecution waived cross-examination except in the most important instances.

TAYLOR, FINAL REPORT, *supra* note 136, at 89.

183. Taylor notes that the admission of “an overwhelming” number of documents was slowed by requiring the prosecution to read them into the record. TAYLOR, *supra* note 68, at 176. A better result, and a fairer one, might have been obtained by requiring the submission of a proper foundation for each document (even if, in most cases that foundation would have been as governmental records). He also says that the Tribunal, “aghast at the slow pace,” proposed a rule that only one prosecutor might cross-examine a witness, but that “[n]o such rule was ever adopted, and drawn-out examinations and cross-examinations continued.” *Id.* at 324.

184. Taylor notes that “the Tribunal’s failure to lay down any general rule left us uncertain of its action on future affidavit presentations.” *Id.* at 242.

185. See Pal Opinion, *supra* note 159, at 629.

In prescribing the rules of evidence for this Trial the Charter practically disregarded all the procedural rules devised by the various national systems of law, based on litigious experience and tradition, to guard a tribunal against erroneous persuasion, and thus left us, in the matter of proof, to guide ourselves independently of any artificial rules of procedure.

Id. Others, of course, thought the proceedings eminently fair. Joseph Keenan, the United States’ Chief of Prosecution at Tokyo stated: “I have never observed a proceeding in our own country where the rights of the accused were more scrupulously protected by any court. And regardless of what must have been at times a disagreeable duty, the American counsel assigned to the defense manfully performed their duty.” Joseph Keenan, *Observations and Lessons from International Criminal Trials*, 17 U. KAN. CITY L. REV. 117, 123 (1949).

186. See, e.g., Control Council Ordinance No. 7, *supra* note 138, n.130. “The tribunals shall not be bound by the technical rules of evidence. *Id.* at Article VII, available at <http://www.yale.edu/lawweb/avalon/imt/imt07.htm#art7>.

187. *In re Homma*, 327 U.S. 759, 760 (1946) (Murphy, J., dissenting).

Today the lives of Yamashita and Homma, leaders of enemy forces vanquished in the field of battle, are taken without regard to due process of law. There will be few to protest. But tomorrow the precedent here established can be turned against others. A procession of judicial lynchings without due process of law may now follow.

Id.

argues against the legality of their application to military commissions under current law.

III. The Legality of Military Tribunals Under Current International Law¹⁸⁸

Military commissions are still legal if they meet the standards required by current international law.¹⁸⁹ Unless they precisely track a court martial, however, they may not, be used to try persons subject to the protection of GPW.¹⁹⁰ The *Manual for Courts Martial* provides that military jurisdiction is exercised, *inter alia*, by military commissions that, “[s]ubject to any applicable rules of international law or to any regulations prescribed by the President or by other competent authority . . . shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial.”¹⁹¹ In addition, GPW requires certain procedural protection for POWs, the most important of which, in relation to the questions here, are found in:

[1] Article 84. 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[;]¹⁹²

. . . .

[2] Article 102. A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power;¹⁹³ [and]

. . . .

Article 106. Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the

188. This article does not constitute an analysis under U.S. constitutional law. Under the standards articulated in *Yamashita*, however, war crimes charges against a military accused are subject to the standards of international law, and specifically the law of war. *In re Yamashita*, 327 U.S. 1, 14-15 (1946).

189. See UCMJ art. 21 (2002).

190. See GPW, *supra* note 3, arts. 4-5; *supra* secs. I.B-I.C.

191. MCM, *supra* note 3, pt. II. That language is, of course, similar to that found in the pre-World War II 1928 MCM. Compare *id.* with 1928 MCM, *supra* note 120, sec. IIA. Thus, for example, according to the current MCM, a POW could be tried before a military commission for engaging in unauthorized communications with the enemy. MCM, *supra* note 3, pt. IV, ¶ 28c(6)(a). For extensive discussion of this point, see Major Timothy MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinction Between the Two Courts*, ARMY LAW., Mar. 2002. MacDonnell concluded that

based on Articles 84, 85, and 102, the United States could only use military commissions to try prisoners of war when they are used to try U.S. military personnel. Because the United States does not currently use commissions to try its military personnel, it could not use them to try prisoners of war.

Id. at 31.

192. See GPW, *supra* note 3, art. 84.

193. *Id.* art. 102. The language of Article 102 seems self-explanatory. Thus, for example, *Field Manual 27-10* interprets Article 102 as follows:

Prisoners of war, including those accused of war crimes against whom judicial proceedings are instituted, are subject to the jurisdiction of United States courts-martial and military commissions. *They are entitled to the same procedural safeguards accorded to military personnel of the United States* who are tried by courts-martial under the Uniform Code of Military Justice or by other military tribunals under the laws of war.

FM 27-10, *supra* note 74, sec. 178(b), at 69 (emphasis added). In a public forum at New York Law School on 5 March 2002, Professor Ruth Wedgewood, after delivering a talk entitled “Military Commissions, Unlawful Combatants and Terrorism as a Form of War,” stated that Article 102’s guarantees only applied to sentencing, as opposed to trial procedures, and that in any case, U.S. military personnel could be tried by military tribunals. Professor Wedgewood has been repeatedly cited as an authority on this subject. Accordingly, her position is noteworthy. See, e.g., DOD News Briefing by Secretary Donald Rumsfeld & General Richard Myers (8 Feb. 2002), available at http://www.defenselink.mil/news/Feb2002/t02082002_t0208sd.html (stating Professor Ruth Wedgewood’s position that U.S. military personnel could be tried by military tribunals). If Professor Wedgewood is correct, it does not change the substantive position of POWs facing trial before a military commission. The UCMJ permits only very limited sentences against U.S. military personnel tried without the full procedural and evidentiary rights of a court-martial. See UCMJ art. 15 (2002). It also permits trials before military commissions for spying and espionage. *Id.* art. 104, 106.

The intention of the GPW is made clear in the commentary to Article 102 and the structure of the convention including the content of other articles. The structural analysis is made clear by the Report of Committee II: “The provisions relative to judicial proceedings are set forth in logical sequence in three parts; (a) General Observations [current Articles 99 to 101]; (b) Procedure [current Articles 102 to 107]; and (c) Execution of penalties [current Article 108].” Report of Committee II, *supra* note 82, at 571. If Article 102 was not applicable to all procedural issues, but instead limited to sentencing, it seems highly incongruous that the drafters placed it as the first article of the Procedure provisions rather than contiguous with the following part on Execution of Penalties.

quashing or revising of the sentence or the reopening of the trial.¹⁹⁴

The requirement of a Detaining Power to accord detainees the same procedure as the Detaining Power gives to the members its own armed forces bears significance when analyzing the current proposal for military tribunals.¹⁹⁵ The Military Order of 13 November 2001 applies to any non-U.S. citizen who is a member of al Qaeda.¹⁹⁶ This includes all members of al Qaeda captured during combat operations in Afghanistan, and it encompasses any surviving leaders of the organization

who may have planned the September 11 attacks, even if they are entitled by GPW Article 4 to POW status. Undoubtedly, individuals who conspire to commit war crimes, including the mass murder of civilians on 11 September 2001, may be brought to the bar of justice. But equally without doubt, those defendants who properly fall within the GPW must have the same evidentiary procedural standards found in courts-martial under the UCMJ which governs trials of members of the armed forces of the United States.¹⁹⁷

194. GPW, *supra* note 3, art. 106.

195. The discussion in *Yamashita* of Article 63 of the Geneva Convention of 1929, bolsters this analysis. Article 63 provided that "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." See <http://www.yale.edu/lawweb/avalon/lawofwar/geneva02.htm#art63>. The Court determined that "examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence "pronounced against a prisoner of war" for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant." *In re Yamashita*, 327 U.S. 1, 21 (1946). The court based its reasoning on an analysis of the placement of Article 63 in a chapter entitled "Penalties Applicable to Prisoners of War," and the placement of that chapter in section V, "Prisoners' Relations with the Authorities" as part of Title III, "Captivity." See *id.* "The three parts of Chapter 3, taken together," the Court said,

are thus a comprehensive description of the substantive offenses which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of their offenses, and of the procedure by which guilt may be adjudged and sentence pronounced. We think it clear, from the context of these recited provisions, that part 3 and Article 63 which it contains, apply only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war.

Id.

Article 85 of GPW, however, contains a provision not found in the 1929 Convention analyzed in *In re Yamashita*. It provides that "[p]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." GPW, *supra* note 3, art. 85.

The impact of that change on the *Yamashita* analysis is clear. The provisions surrounding Article 85, especially Articles 84 and 102, are all found in Chapter III, "Penal and Disciplinary Sanctions," of section IV, "Relations Between Prisoners of War and the Authorities." See *id.* ch. III. Under the *Yamashita* analysis, Chapter III of the 1949 Convention was clearly designed to apply to judicial proceedings directed against a POW for offenses committed before capture. That was unquestionably the intent of the Convention's drafters. In discussing Article 74 of the Stockholm Draft (the precursor to GPW Article 85), the representative of the Netherlands

pointed out that the 1929 Convention only dealt with crimes committed during captivity. *That view had been adopted by the Supreme Court of the United States of America The Conference of Government Experts of 1947 considered it reasonable, however, not to deprive a prisoner of war of the protection of the Convention on the mere allegation that he had violated the laws and customs of war, but to leave him under the protection of the Convention until such violation had been proven in a court of law, in other words until he had been sentenced by a court of such a crime or offense.*

2 FINAL RECORD, *supra* note 47, at 318 (Committee II, 18th mtg.) (emphasis added). Thus, following that change from the 1929 Convention, and given the drafters' intent, there is simply no legitimate argument that the reasoning of the Court in *Yamashita* is now applicable.

In the case of *In re Quirin*, the Court said:

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. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.

317 U.S. at 30-31.

196. Bush Order, *supra* note 15, sec. 2(a) ("The term 'individual subject to this order' shall mean any individual who is not a United States citizen . . . is or was a member of the organization known as al Qaeda . . .").

IV. The *Quirin* Standards Developed for World War II Tribunals Do Not Meet Current Standards Either Under the Uniform Code of Military Justice or Current International Law

In his dissent in *Homma v. Patterson*,¹⁹⁸ Justice Murphy excoriated the results of a trial held under the *Quirin* standards, characterizing them as a precedent for “judicial lynchings.”¹⁹⁹

Article 36(a) of the UCMJ provides that the President may prescribe procedural and evidentiary rules for tribunals that should “so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts,” but which must in any case be consistent with the UCMJ.²⁰⁰

President Bush’s Military Order of 13 November 2001, based as it is upon *Quirin* precedent, and Commission Order 1 of 21 March 2002,²⁰¹ give rise to a number of problems both in the instance of those prisoners entitled to treatment under GPW,

and those who can only assert the current minimal international standards for a fair criminal trial. The retention of the *Quirin* evidentiary rules and the denial of full appellate rights both represent serious failures to meet those required standards. Unless the proposed rules for the current military tribunals are modified, their application is certainly improper in any trial of a person protected as a POW.

1. The *Quirin* Rules of Evidence Did Not Provide a Fair Trial

The *Quirin* rules of evidence were based directly upon the portion of President Roosevelt’s Order of 3 July 1943, which 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.”²⁰²

As applied in *Quirin* and in tribunals following World War II, the evidentiary rule at issue allowed unfounded affidavit evi-

197. The current *Manual for Courts Martial* includes language similar to the 1928 *MCM* but modified by subsequent sources of international law.

(2) Military commissions and provost courts for the trial of cases within their respective jurisdictions. *Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions and provost courts shall be guided by the appropriate principles of law and rules of procedures and evidence prescribed for courts-martial.*

MCM, *supra* note 3, pt. I (emphasis added).

198. 327 U.S. 759 (1946).

199. *Id.* at 759.

This nation’s very honor, as well as its hopes for the future, is at stake. Either we conduct such a trial as this in the noble spirit and atmosphere of our Constitution, or we abandon all pretense to justice, let the ages slip away and descend to the level of revengeful blood purges.

... [N]either clearer proof of guilt nor the acts of atrocity of the Japanese troops could excuse the undue haste with which the trial was conducted or the promulgation of a directive containing such obviously unconstitutional provisions as those approving the use of coerced confessions or evidence and findings of prior mass trials. To try the petitioner in a setting of reason and calm, to issue and use constitutional directives and to obey the dictates of a fair trial are not impossible tasks. Hasty, revengeful action is not the American way.

Id. at 759-60 (Rutledge, J., dissenting).

200. UCMJ art. 36(a) (2002). For instance, the MRE provide that “an involuntary statement or any derivative evidence therefrom may not be received in evidence against an accused who made the statement if the accused makes a timely motion to suppress or an objection to the evidence.” *MCM*, *supra* note 3, MIL. R. EVID. 304. Also “the privileges against self-incrimination provided by the Fifth Amendment to the Constitution of the United States and Article 31 are applicable only to evidence of a testimonial or communicative nature. The privilege most beneficial to the individual asserting the privilege shall be applied.” *Id.* MIL. R. EVID. 301. Under MRE 304,

[a] person subject to the code who is required to give warnings under Article 31 may not interrogate or request any statement from an accused or a person suspected of an offense without first: (1) informing the accused or suspect of the nature of the accusation; (2) advising the accused or suspect that the accused or suspect has the right to remain silent; and (3) advising the accused or suspect that any statement made may be used as evidence against the accused or suspect in a trial by court-martial.

Id. MIL. R. EVID. 304 (e)(3); *see id.* MIL. R. EVID. 802 (prohibiting the admission of hearsay evidence); *id.* MIL. R. EVID. 701 (limiting opinion by lay witnesses); *id.* MIL. R. EVID. 601 (“A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.”); *see also* United Nations International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14, 999 U.N.T.S. 171 (containing a privilege against self incrimination).

201. MCO No. 1 “prescribes procedures” pursuant to President Bush’s Military Order. MCO No. 1, *supra* note 2, para. 1.

202. 7 Fed. Reg. 5103 (July 3, 1942).

dence, suspect hearsay, and evidence obtained through unfair coercion.²⁰³ Apparently, the Bush Administration intends to apply those same evidentiary standards to the proposed tribunals. Not only does the Bush Order²⁰⁴ and Commission Order 1²⁰⁵ substantially adopt the evidentiary language of the Roosevelt Order, but there have been repeated references to procedural standards comparable to those of the *Quirin* commission.²⁰⁶ As discussed above,²⁰⁷ military commissions employing the *Quirin* rules interpreted the standard “probative value to a reasonable person” to permit (1) evidence obtained involuntarily and by unethical means;²⁰⁸ (2) unfounded affida-

vit evidence not subject to any form of reasonably available rebuttal;²⁰⁹ (3) failure to produce classified exculpatory evidence;²¹⁰ and (4) other evidentiary rulings involving standards and issues now recognized as essential to a fair trial.²¹¹

One may derive the current minimum standards of evidence by examining the Military Rules of Evidence (MRE),²¹² those adopted by the International Criminal Tribunals for the former Yugoslavia²¹³ and Rwanda,²¹⁴ which are similar,²¹⁵ and those developed for the International Criminal Court,²¹⁶ which are even more extensive.²¹⁷ When compared to currently accepted

203. See *supra* notes 168-187 and accompanying text.

204. “[A]dmission of such evidence as would, in the opinion of the presiding officer of the military commission . . . have probative value to a reasonable person.” Bush Order, *supra* note 15, sec. 4(C)(3). Except for the bow to gender neutrality, the operative language is precisely the same.

205. MCO No. 1 makes its acceptance of the *Quirin* standard clear:

Evidence shall be admitted if, in the opinion of the Presiding Officer (or instead, if any other member of the Commission so requests at the time the Presiding Officer renders that opinion, the opinion of the Commission rendered at that time by a majority of the Commission), the evidence would have probative value to a reasonable person.

. . . .

Subject to the requirements [above] concerning admissibility, the Commission may consider any other evidence including, but not limited to, testimony from prior trials and proceedings, sworn or unsworn written statements, physical evidence, or scientific or other reports.

MCO No. 1, *supra* note 2, para. 6(D)(1), (3).

The statements in MCO No. 1 that “[t]hese procedures shall be implemented and construed so as to ensure that any such individual receives a full and fair trial before a military commission,” *id.* para. 1, and that “[t]he Commission shall . . . proceed impartially and expeditiously, strictly confining the proceedings to a full and fair trial of the charges, excluding irrelevant evidence,” *id.* para. 6(B)(2), are not, in themselves, substitutes for failure to provide evidentiary and procedural requirements of the Geneva Convention. If the promise of a full and fair trial was itself a sufficient guarantee, it would by necessity incorporate by reference the rights guaranteed under the UCMJ, rendering the bulk of MCO No. 1 moot.

206. See *Military Commissions: Hearing Before U.S. Senate Armed Services Comm.*, 108th Cong. (2001) (testimony of Secretary of Defense Donald Rumsfeld), available at <http://www.defenselink.mil/speeches/2001/s20011212-secdef.html>. Secretary Rumsfeld stated,

[F]ederal rules of evidence often prevent the introduction of valid factual evidence for public policy reasons that have no application in a trial of a foreign terrorist. By contrast, military tribunals can permit more inclusive rules of evidence—a flexibility that could be critical in wartime, when it is often difficult, for example, to establish chains of custody for documents or to locate witnesses. Military commissions allow those judging the case to hear all probative evidence—including evidence obtained under conditions of war—that could be critical to obtaining a conviction.

Id. See Ray Rivera, *Bush Looks to ‘42 Case to Justify Military Tribunals for Terrorism*, SEATTLE TIMES, Dec. 7, 2001, available at http://seattletimes.nwsourc.com/html/nationworld/134374561_tribunals05m.html.

207. See *supra* sec. II (B)(3)(b).

208. See *supra* notes 168-174 and accompanying text.

209. See *supra* note 181.

210. In at least one instance, it appears that relevant evidence was clearly not provided to post-Nuremberg defendants. Article 6(b) of the Nuremberg Charter and Control Council law No. 10, in paragraph 1(b) of Article II, both recognize without qualification the “killing of hostages” as a war crime. The defendants in the *Hostages Trial* were charged with violations of those provisions, although the Tribunal held that subject to a number of conditions, the killing of reprisal victims or hostages to guarantee the peaceful conduct in the future of the populations of occupied territories was legal. G. Brand, *The War Crimes Trials and the Laws of War*, 26 Y.B. INT’L L. 414, 426 (1949). The defendants did not, apparently, have available a “Top Secret” appendix to a draft 1944 U.S. Army plan for the occupation of Germany entitled, “Measures Which May Be Taken to Enforce the Terms of Surrender or in the Event of No Surrender to Compel the Enemy to Comply with the Laws of War.” That plan provided for four categories of action which could be taken as sanctions or reprisals to enforce compliance with the terms of surrender or the rules of war, including the *taking and execution of hostages*. U.S. Army, *Measures Which May Be Taken to Enforce the Terms of Surrender or in the Event of No Surrender to Compel the Enemy to Comply with the Laws of War* (n.d.) (copy on file with National Archives, Records of USGCC Record Group 260, Stack 390, Row 40, Compartment 17, Shelf 3, Box 17, Folder 4).

211. See Hyder, *supra* note 173, at 137.

212. See MCM, *supra* note 3, pt. III.

standards for trials of war criminals, the *Quirin* rules of evidence are unacceptable for a trial under current international law.²¹⁸

2. *The Right of Appeal Provided by Commission Order 1 Does Not Meet UCMJ Standards*

The appeals procedure provided by Commission Order 1 falls short of that available in a court-martial. The Order provides for a multi-stage series of reviews by: (1) the appointing authority;²¹⁹ (2) a review panel consisting of three military officers;²²⁰ and (3) the Secretary of Defense,²²¹ or if the Secretary of Defense is not the final reviewing authority, the Presi-

dent.²²² The President's military order attempts to eliminate any other appeal by providing that the "military tribunals shall have exclusive jurisdiction"²²³ over the commission defendants, and that

the[se] individual[s] shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought . . . in any court of the United States, or any State thereof[,] . . . any court of any foreign nation, or . . . any international tribunal.²²⁴

213. INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, RULES OF PROCEDURE AND EVIDENCE (as amended through Dec. 13, 2001), available at http://www.un.org/icty/basic/rpe/IT32_rev21.htm#Rule%2042 [hereinafter ICTY Rules].

214. INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, RULES OF PROCEDURE AND EVIDENCE (as amended through May 27, 2001), available at <http://www.ictcr.org/ENGLISH/rules/260503/270503e.pdf> [hereinafter ICTR Rules].

215. Those rules are sometimes cited as providing a similar regime to the World War II commissions because they permit a court to "admit any relevant evidence which it deems to have probative value." ICTY Rules, *supra* note 213, R. 89(C). See, e.g., Joseph L. Falvey, Jr., *United Nations Justice or Military Justice: Which Is the Oxymoron?*, 19 FORDHAM INT'L L.J. 475, 518 (1995) (asserting that the rules follow the example of, or are consistent with, the World War II tribunals); Howard S. Levie, *The Statute of the International Tribunal for the Former Yugoslavia: A Comparison with the Past and a Look at the Future*, 21 SYRACUSE J. INT'L L. & COM. 1, 17 (1995).

216. See INT'L CRIM. CT. R. P. & EVID., available at [http://www.icc-cpi.int/library/basicdocuments/rules\(e\).html](http://www.icc-cpi.int/library/basicdocuments/rules(e).html).

217. The ICC rules include protections for the following: (1) "privileged communications with attorneys and a . . . medical doctor, psychiatrist, psychologist or counselor, [sic] [and] religious clergy;" (2) a right against self-incrimination by a witness; and (3) a privilege against parental, spousal, or child testimony. *Id.* R. 74-75.

218. An additional and separate argument may be made that any accused who is a combatant unprivileged under GPW is still entitled, at minimum to the protection of Additional Protocol 1 (1977) to the Geneva Conventions of 1949. Article 75 of Protocol 1, "Fundamental Guarantees" provides that

[n]o sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include the following:

(a) The procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;

. . . .

(d) Anyone charged with an offence is presumed innocent until proven guilty according to law;

(e) Anyone charged with an offence shall have the right to be tried in his presence;

(f) No one shall be compelled to testify against himself or to confess guilt;

(g) Anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

. . . .

(i) Anyone prosecuted for an offence shall have the right to have the judgment pronounced publicly; and

(j) A convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised

Protocol 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. The United States, however, has not ratified Protocol 1, and would doubtless oppose application of its guarantees to unprivileged combatants. See *id.*

219. MCO No. 1, *supra* note 2, para. 6(H)(3) (holding that this only applies if the Secretary of Defense is not the appointing authority).

220. *Id.* para. 6(H)(4). The panel may include civilians commissioned as officers for that purpose, and must include at least one experienced judge. It must disregard any variance from required procedures "that would not materially have affected the outcome of the trial . . ." *Id.*

221. *Id.* para. 6(H)(5). The Secretary of Defense must, upon review, either return the case for further proceedings or forward it to the President with a recommendation for disposition (unless he is designated as the final reviewing authority under section 4(C)(8) of the President's Military Order). *Id.*

222. *Id.* para. 6(H)(6). If the Secretary of Defense has been designated, he may approve or disapprove findings or change a finding of guilty to one of guilty of a lesser-included offense, or mitigate, defer, or suspend sentence. *Id.*

223. Bush Order, *supra* note 15, sec. (7)(b)(1).

These provisions differ substantially from the rights of appeal provided to a member of the armed forces of the United States. Detailing service members' entire range of available appellate proceedings is beyond the scope of this article;²²⁵ however, they include not only review by the convening authority, but also by a Court of Criminal Appeals,²²⁶ and in certain cases, the Court of Appeals for the Armed Forces,²²⁷ and, by *writ of certiorari*, to the Supreme Court of the United States.²²⁸

Article 106 of GPW provides:

Every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial. He shall be fully informed of his right to appeal or petition and of the time limit within which he may do so.²²⁹

That Article 106 right of appeal is included among the procedural rights discussed by the drafters of GPW.²³⁰ Thus, to the extent the Bush Order and Commission Order 1 deny and attempt to limit the appeal rights of a POW, it is the thesis of this article that they will result in a breach of GPW.²³¹

Taken together, a tribunal that tries POWs using *Quirin*-type evidentiary rules, combined with restricted appeal rights, is both potentially unfair and in direct violation of governing law. The effect of such tribunals on the development and application of the law of war might carry enough weight for military lawyers to oppose their use. Under the circumstances here discussed, however, there is a more compelling reason for opposing the use of commissions. As applied to those with legitimate claims to POW status, the convening of and partici-

pation in an unlawful tribunal is a war crime, with potentially serious ramifications for all involved.

V. Convening of and Participation in an Unfair Tribunal Is a War Crime

In *United States v. Uchiyama*,²³² a U.S. military commission tried those Japanese officials involved in the Japanese military commission, which tried two captured Americans who participated in the carpet bombing of Kobe and Osaka. In the bombing raid, the Americans inflicted heavy civilian casualties. The Japanese military commission tried the Americans, and convicted and then executed them. Those officials included the commanding general of the Japanese Fifteenth Area Army, his chief of staff, his judicial officer, the three members of the Japanese commission, the prosecutor, and the executioner.²³³

The prosecution's opening statement before that U.S. commission is significant.

We are now charging the accused with having failed to have applied to these prisoners of war the type of procedure that they were entitled to. In other words *they applied to them a special type of summary procedure which failed to afford them the minimum safeguards for the guarantee of their fundamental rights which were given them both by the written and customary laws of war.*²³⁴

The prosecution finessed the POW/Geneva rights question by *accepting* that one charged with war crimes was not entitled to assert those rights for actions taken before capture. It instead charged that the proceedings in the Japanese trial were "illegal, unfair, false, and null."²³⁵ The commission did not issue any

224. *Id.* sec. (7)(b)(2).

225. See generally UCMJ arts. 66-67, 69 (2002). In an opinion column in the *New York Times*, White House Counsel Alberto Gonzales said, "The order preserves judicial review in the civilian courts." Alberto Gonzales, *Martial Justice, Full & Fair*, N.Y. TIMES, 30 Nov. 2001, at A27. While that right of review does not appear in the President's Order, Mr. Gonzales' statement may indicate an intent to preserve it.

226. UCMJ art. 66; MCM, *supra* note 3, R.C.M. 1203.

227. MCM, *supra* note 3, R.C.M. 1204.

228. *Id.* R.C.M. 1205.

229. GPW, *supra* note 3, art. 106.

230. See Report of Committee II, *supra* note 82.

231. See GPW, *supra* note 3, art. 130.

232. See generally *Tried at Yokohama*, *supra* note 6.

233. *Id.* at 1.

234. *United States v. Uchiyama*, Trial Transcript, Case-35-46, War Crimes Branch Case Files, Records of The Judge Advocate General, Record Group 153 (Yokohama, 18 July, 1947), at 20 (emphasis added) (on file with author).

decision stating the basis for its findings. The reviewing Staff Judge Advocate's analysis, however, makes it clear that the American commission found the Japanese trial, while legal under international and Japanese law, so unfair as to constitute a war crime.²³⁶ Thus, relevant to any current military tribunal are the specific actions the United States alleged were unfair, which included:

[1] the prosecution offered, and the tribunal accepted as evidence, an interrogation report on which the interrogator had obtained the signatures of the American prisoners, "without any attempt to verify the genuineness of the document";

....

[2] the members of the tribunal were disqualified . . . by reason of having participated in the pre-trial preparation of the prosecution's case;

....

[3] the members . . . did not exercise free and independent judgment; [and]

....

[4] no attempt was made by the tribunal to ascertain the facts concerning the offenses alleged against the accused . . .²³⁷

Both the GPW²³⁸ and the domestic law of the United States²³⁹ make it clear that failure to accord fair procedural and evidentiary standards in a trial of a POW is a war crime of substantial magnitude. If *Uchiyama* is valid precedent, and 18 U.S.C. § 2441 seems to say it is, then participants in any U.S. military tribunal that followed the *Quirin* evidentiary and procedural standards should seek counsel. Clearly, an unfair war crimes trial of a POW violates both the GPW and current U.S. and international law. To imagine otherwise would set the law of nations back to the dark days of history when the fate of the captive rested on the whim of their captors.

VI. Conclusion

A military tribunal must meet current standards of fundamental rights under the written and customary laws of war. If such a tribunal tries a POW, it must follow the procedural and evidentiary standards of a court-martial. The *Quirin* rules of World War II do not meet that standard. Several solutions to this problem exist: (1) the tribunal can employ the same rules as a general court-martial, which by their nature comply with fundamental international standards of fairness; or (2) simply try POW defendants before a court-martial or U.S. district court rather than before a military commission.²⁴⁰ It is in the interest of all civilized societies to apprehend, try or punish the perpetrators of mass murders, including those of 11 September 2001. It is also, unquestionably, in the long-term interest of civiliza-

235. *Id.* Charges and Specifications at 4, ¶ 4.

236. *Id.* Review of Staff Judge Advocate, 1 July 1948, at 29 (on file with author).

237. *Id.*

238. Article 130 of GPW provides:

Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the Convention: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial prescribed in this Convention.

GPW, *supra* note 3, art. 130 (emphasis added).

239. 18 U.S.C. § 2441 (2000). Section 2441 provides in part :

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

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

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

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

Id.

240. While not precisely similar, the rights accorded in a U.S. District Court criminal trial are sufficient to satisfy the GPW requirement that a POW "can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedures as in the case of members of the armed forces of the Detaining Power." GPW, *supra* note 3, art. 102. As noted in *United States v. Berrey*, "The Manual, including those Rules [for Court-Martial], was to conform to Federal practice to the extent possible, except where the Uniform Code of Military Justice requires otherwise or where specific military requirements render such conformity impracticable." 28 M.J. 714, 730 (N.M.C.M.R. 1989); see UCMJ, art 36 (2002); MANUAL FOR COURTS-MARTIAL, UNITED STATES, at A21-1 (1984).

tion's advancement that these procedures be fair and in accord with the advances in international law over the past fifty years. In light of *Uchiyama* and the doctrine it represents, it seems obvious that no informed judge advocate advising a tribunal or any of its potential members could permit the proceeding to go forward if a defendant had not been determined to be unprotected by POW status before a competent tribunal under *AR 190-8*. To do otherwise not only provides individuals who may pose a grave threat to the United States with a challenge to their convictions; but also potentially exposes those involved with the tribunals to liability as war criminals.

Because Article 18 of the UCMJ provides for general court-martial jurisdiction over any possible tribunal defendant,²⁴¹ the safety of a military trial may protect both the legitimate state interest in national security and safeguard against potential physical assaults against the trial process itself. At the same time, the demonstrated fairness of the UCMJ would shield the legitimate right of POW defendants to evidentiary and procedural safeguards. That compromise may be the most workable solution legally available to the United States. Since trials under the UCMJ exceed all reasonable standards of fairness, the answer to the government's dilemma may lie directly under its nose.

241. "General courts-martial also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." UCMJ art. 18.

Note from the Field

Legal Cultures Clash in Iraq

Lieutenant Colonel Craig T. Trebilcock¹

As 2003 dawned, the United States had not occupied an enemy nation in over fifty years.² On 20 March 2003, U.S. and British troops (Coalition) crossed the border into Iraq in a drive to remove the regime of Saddam Hussein from power.³ In early April 2003, while the Coalition noose tightened on Baghdad,⁴ U.S. Army judge advocates (JAs) from civil affairs units crossed into southern Iraq to evaluate and restore the Iraqi judicial system.⁵

The situation that the civil affairs attorneys found in southern Iraq was a landscape of smoldering and looted courthouses; rampant criminal activity from thousands of criminals that the Baathist regime released immediately before the war; and a legal system that was broken from years of corruption and political influence.⁶ The arrest of looters and the physical repair of courthouses were concrete goals the Coalition accomplished over several months.⁷ Yet, the most serious challenge in returning justice to the Iraqi people remains the establishment of a judiciary that holds the interests of the Iraqi people foremost in its heart.⁸

Initial assessments of the Iraqi courts revealed that the courts of general jurisdiction within each of Iraq's eighteen provinces were widely subject to political control and influence.⁹ The Ministry of Justice in Baghdad had previously appointed judges based on party loyalty and their willingness to support Baath party policies through their rulings.¹⁰ The individual judges appeared to possess strong professional credentials, as they were trained in one of three quality law schools in Iraq and possessed at least ten year's experience as practicing attorneys.¹¹ Accordingly, on paper, the Iraqi bench appeared strong.

Although the judges in Iraq possessed strong professional credentials, they had existed for thirty-five years in a system whose primary goal was self-preservation.¹² Those who demonstrated too much initiative or independence ran the risk of being viewed as a potential threat to the regime. Operating under a tight hierarchal structure, the chief judge in each province was expected to demonstrate unwavering obedience to Baathist policies and orders from Baghdad. Particularly in the south of Iraq, where the majority Shiite population presented a lingering threat to the Sunni-dominated bureaucracy in Baghdad, the slightest deviation from regime policies led to dismissal and imprisonment.¹³

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2. See generally ROBERT A. ROSENBAUM, ENCYCLOPEDIA OF AMERICAN HISTORY (2003).

3. Judy Keen & Caesar G. Soriano, *U.S. Begins Second Gulf War with a Surprise Missile Strike at Iraq Leaders*, USA TODAY, Mar. 20, 2003, at A1.

4. Dan Balz, *America's Support for War on Rise*, WASH. POST.COM, APR. 7, 2003, available at <http://www.washingtonpost.com/wp-dyn/articles/A51053-2003Apr7.html>.

5. See OVERSEAS PROSECUTORIAL DEVELOPMENT & TRAINING OFFICE OF THE U.S. DEP'T OF JUSTICE, REPORT OF THE IRAQ JUDICIAL ASSESSMENT TEAM (June 2003) (on file with the Center for Law & Military Operations, The Judge Advocate General's Legal Center & School, U.S. Army, Charlottesville, Virginia) [hereinafter DOJ ASSESSMENT].

6. See *id.* at 6.

7. See *id.* at 7.

8. See LIEUTENANT COLONEL CRAIG TREBILCOCK, LEGAL ASSESSMENT OF SOUTHERN IRAQ, 358TH CIVIL AFFAIRS BRIGADE 23 (2003) (on file with the Center for Law & Military Operations, The Judge Advocate General's Legal Center & School, U.S. Army) [hereinafter 358TH CA ASSESSMENT].

9. See DOJ ASSESSMENT, *supra* note 5, at 6-7.

10. *Id.* at 8, 96.

11. *Id.* at 99.

12. *Id.* at 95-96.

13. Interview with Haithem Mohound, Iraqi Judge, in Al Kut, Iraq (May 9, 2003).

After decades of living under such centralized control, the senior members of the Iraqi bench had become political functionaries who knew that their primary goal was obeying the regime, with their secondary duty being administering justice to the Iraqi people. In maintaining a judiciary that was politically obedient, however, the regime also triggered unanticipated secondary consequences. By placing the needs of the people in second place, the regime unwittingly planted the seeds for corruption and bias as the judges placed self-interest above other issues.¹⁴

Over the past thirty-five years, the Iraqi courts have been characterized by bias and favoritism, with verdicts being routinely influenced by payoffs and tribal affiliations. During Coalition interviews with sitting Iraqi judges throughout southern Iraq in June and July 2003, virtually all judges acknowledged that widespread corruption characterized their system. The judges also acknowledged that a litigant's tribal and political connections under the old regime would frequently be a prime consideration in the outcome of both criminal and civil trials.¹⁵

The breadth and scope of the ingrained corruption in Iraq was a serious challenge for military attorneys charged with establishing a fair and de-politicized court system. In the wake of the U.S. military advance, military battalion commanders filled the roles of military governors, responsible for the safety and welfare of the Iraqi citizens within the provinces they occupied. Under the Hague and Geneva Conventions,¹⁶ commanders also had the duty to ensure that Iraqi government institutions within the occupied territory were restored and that Iraqi domestic law was preserved.¹⁷

Under the mantle of authority to maintain civil order, Coalition commanders had the authority to remove government offi-

cial, such as judges, who were corrupt or inextricably linked to the human rights abuses of the Baath party. This was done in almost every one of the eighteen provinces, with roughly one-third of the sitting judges in Iraq being removed and replaced by local attorneys known to be of good character within their communities. Removals were done cautiously, however, and only after a careful review of any adverse evidence against the judge. This was necessary, as the Coalition learned early in the occupation that allegations of corruption were often premised on old personal grudges, inter-tribal rivalries, or on the desire of a particular attorney to gain a judgeship position for himself.¹⁸

As the military campaign against organized resistance came to an end in late April 2003, the White House established the Office of Reconstruction and Humanitarian Affairs (ORHA), which was later renamed as the Coalition Provisional Authority (CPA).¹⁹ Desiring to return Iraqi institutions to civilian control as soon as possible, the CPA Director, Ambassador Paul Bremer, issued CPA Order 1, in which the CPA declared that all legislative, executive, and judicial functions of Iraq were now subject to the control of the CPA.²⁰

Pursuant to that directive, the CPA established a Judicial Review Commission (Commission), comprised of Iraqi judges and Coalition civilian legal personnel to review the records of the sitting Iraqi judges. This Commission, which complemented the earlier actions of Coalition military commanders, examined the judge's fitness to remain from the perspective of judicial credentials, freedom from corruption, and their position within the Baath party prior to the war. The goal of the Commission, which continues to operate, is to leave Iraq with judges free of political influence and dedicated to the rule of law.²¹

14. See 358TH CA ASSESSMENT, *supra* note 8, at 14, 17.

15. Interviews with Haithem Mohound & Hussein Kasham Ozaibi, Iraqi Judges, in Al Kut, Iraq (May 9, 2003) [hereinafter Mohound & Ozaibi Interviews]. *But see* DOJ ASSESSMENT, *supra* note 5, at 110, 112; 358TH CA ASSESSMENT, *supra* note 8, at 18 ("In general when the judges were asked about corruption by the legal assessment team they said that it had existed in the past but that they knew nothing personally about whether it still existed . . . The lawyers on the other hand said that there was much corruption . . .").

16. Hague Convention IV Respecting the Laws and Customs of War on Land, Annexed Regulations, Oct. 18, 1907, art. 29, 36 Stat. 2277, T.S. No. 539; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, *opened for signature* Aug 12, 1949, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.

17. The Coalition legally cancelled security laws and other Iraqi laws designed to preserve the Baath party in power, as inconsistent with the Coalition objectives of restoring peace to Iraq. However, the Coalition left the overwhelming majority of Iraqi domestic laws intact. Coalition Provisional Authority (CPA) Order No. 1, sec. 2, 16 May 2003; CPA Order No. 7, Penal Code, 10 June 2003; CPA Memo No. 3, Criminal Procedures, 18 June 2003, *available at* <http://www.cpa-iraq.org/>.

18. See DOJ ASSESSMENT, *supra* note 5, at 35-95.

19. Secretary of State Colin L. Powell, Statement Regarding the Safeguarding of Iraqi Antiquities and Cultural Property (Apr. 14, 2003), *available at* <http://www.globalsecurity.org/wmd/library/news/iraq/2003/iraq-030414-usia02.htm> (explaining that "the Office of Reconstruction and Humanitarian Affairs will help Iraqis and international experts in their efforts to restore artifacts and the catalogs of antiquities that were damaged by looters"); see Sharon Behn, *U.S.-led Occupation in Iraq Called 'Stumbling Block' to Entrepreneurs*, WASH. TIMES, June 18, 2003, *available at* <http://www.usiraqbc.com/Wash-Times-Art.htm> ("ORHA has since changed its name to the Coalition Provisional Authority (CPA)").

20. CPA Order No. 1, *supra* note 17, para. 2.

21. See DOJ ASSESSMENT, *supra* note 5.

During the initial days of the occupation, many judges refused to resume their seats on the bench without express orders from the Iraqi Ministry of Justice (which no longer existed at that point). Fear that the old regime would return, coupled with the culture of bureaucratic stagnation for thirty-five years, left many judges unable or unwilling to resume their jobs. This presented a serious challenge to the Coalition, as returning security and justice to the streets of Iraq, which were filled with looters, was the number-one goal in the April and May time frame.²²

Coalition military attorneys, who were responsible for restoring the judicial system, encountered a culture where many of the Iraqi judges did not possess a sense of ownership or professional pride in the institutions in which they served. Years of service under a regime where personal and political survival was the prime goal had caused the judges to not develop any fiduciary sense of responsibility for their courts. Rather, the main goal of many Iraqi judges was to use their position to secure as much personal gain as possible. As Coalition JA personnel sought to discuss restoring court operations, senior Iraqi judges focused on obtaining personal cell phones, sport utility vehicles, and air conditioning as a prerequisite to working. As jails burgeoned with looters and the criminals previously released by Saddam Hussein, many courts remained closed as the judges sought to maximize personal privileges.²³

It quickly became apparent to the Coalition that if the Iraqi court system was to have any legitimacy in the post-Saddam era that an infusion of fresh blood was necessary. Corrupt, entrenched, and self-serving judges were stripped of their positions by Coalition military commanders and replaced with younger, ambitious, and dedicated members of the local Iraqi legal unions.²⁴ The first vestiges of democracy in Iraq, in fact, took place in the context of replacing corrupt judges. Through May and June, committees of local legal union members and other community leaders were encouraged to make their own selections for judges. Military judge advocates supervised these judicial selections to ensure that Baath party members did not again coerce their way into power. The Iraqis, however, made their first independent choice of government leaders in over three decades in selecting their own provincial judges.²⁵

The new Iraqi judges serving in the post-Saddam era face tremendous pressures. They face pressure from Iraq's powerful tribal structure and other interested parties to perpetuate a court system based on favoritism. They face danger to their person by those who are aggrieved by their refusal to compromise their verdicts, as well as from pro-Baathist elements of the population who seek to intimidate any Iraqi officials cooperating with the Coalition. The Chief Judge of Babil Province, sixty miles south of Baghdad, was unsuccessfully targeted in his home by a rocket-propelled grenade (RPG) as a result of his dedication to reform. Judges sitting on the new Central Criminal Court in Baghdad have received death threats, but continue to dispense justice. The new Chief Judge in Ad Diwaniyah, a provincial capital southeast of Baghdad, personally defended his courthouse from looters in April and May 2003, sitting on the bench during the day and serving as an armed security guard for the courthouse at night. In facing these dangers, yet continuing to take the bench, these judges have demonstrated strength of character and a dedication to the law, which was completely absent under the old regime. This new breed of Iraqi judges is the foundation on which the future success of Iraq's ability to break free from their Baathist history will rest. Coalition forces can provide the security to temporarily stabilize Iraq, but the Iraqis themselves will have to choose to accept this opportunity, with its risks and potential rewards, and rise above the corruption of the recent past.²⁶

The pitfalls to an independent Iraqi judiciary are many. Physical danger, a culture of self-interest, and a centralized bureaucratic mentality could drag the system down despite the best efforts of the Coalition to support it. The new judges in Iraq must decide if they are willing to forego personal profit, favoritism, and the comfort of position in favor of the personal pride inherent in wresting their legal system away from its past. This is not a change that will occur in one or two years, as the roots of thirty-five years of corruption run deep. The Coalition can bring the opportunity for change to the Iraqi people, but its newly selected judges will have to embrace the difficult route to the rule of law for their judicial system to succeed. If the courage of these new judges in standing up to armed looters and RPG attacks in order to do their job is a litmus test, then there is room for great optimism that Iraq will succeed in establishing a fair and impartial judicial system.

22. Secretary of Defense Donald Rumsfeld, Dep't of Defense Daily Briefing (May 15, 2003), available at <http://usinfo.state.gov/topical/pol/terror/texts/03051503.htm>.

23. Interview with Major Sean Dunn, JA, USMC, in Al Kut, Iraq (June 5, 2003).

24. Iraqis refer to their province level bar associations as legal unions. See 358TH CA ASSESSMENT, *supra* note 8, at 6.

25. *Id.* at 15-16.

26. Mohound & Ozaibi Interviews, *supra* note 15.

The Art of Trial Advocacy

Preparing the Mind, Body, and Voice

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Introduction

A common attribute that top professionals share is their ability to prepare themselves to perform at an optimal level. For example, the athlete thoroughly stretches and warms-up his body prior to the competition; the singer carefully warms-up her voice through the full vocal range before the concert; and the actor painstakingly memorizes his lines prior to the opening curtain call. Many lawyers, however, fail to attain this level of preparation prior to a trial. Throughout a trial, a lawyer is required to use his mind, body, and voice. In order to successfully present his client's case, an advocate should prepare and warm-up these faculties prior to trial. While many advocacy articles focus on courtroom techniques, this article focuses on ways a trial lawyer can prepare for optimal performance before he ever enters the courtroom.¹

The Challenge

One commentator recently reported that a larger percentage of people have a greater fear of speaking in public than of their own physical death.² The fear of speaking in public can cause the body to go into an instinctual fight or flight reaction.³ When undergoing this reaction, the body directs all its energy into sur-

viving, including holding its breath and becoming tense and rigid.⁴ This reaction is antithetical to the advocate who is trying to project a calm and confident image in the courtroom. The solution is to take the nervous energy of "stage fright" and transform and channel it into "stage presence."⁵

Case Preparation

People fear public speaking, in large part, because they fear the unknown.⁶ Therefore, the more an advocate familiarizes himself with the case and the courtroom environment, the more confident he will be at trial. Through a diligent and thorough case investigation, the advocate can intimately familiarize himself with the case. This process involves reading the law-enforcement file several times and paying attention to the details including any inconsistencies.⁷ Additionally, the advocate should carefully interview all relevant witnesses at least once and all key witnesses at least twice.⁸ Advocates should ask all witnesses, "Is there anything else you can tell me that would be helpful to my investigation?" and "Are there any other people I should talk to as part of my investigation?" An advocate will know that his interviews are complete when he is not learning new information from the witnesses and he has interviewed all the people that the witnesses have suggested.⁹

It is also important to examine the physical evidence. The advocate should not rely solely on the law-enforcement investigation file to correctly describe the physical evidence. There may be characteristics of a piece of physical evidence that are either missing or are mischaracterized in the report, but that are very helpful to the advocate's case. The only way to discover this information is to personally and carefully examine the physical evidence. For the same reasons, it is essential for the

1. See JOSHUA KARTON, COMMUNICATION TECHNIQUES FOR PERSUASIVE ADVOCACY (2000) (on file with author) (serving as a source for many of the suggestions in this article). Joshua Karton taught this material at the 6th Advanced Advocacy Training Course at The Judge Advocate's Legal Center and School, U.S. Army, Charlottesville, Virginia on 31 May 2003. He is the President of the Santa Monica, California firm of Communication Arts for the Professional. He is a specialist in teaching litigators how to apply the personal communication skills and the techniques of theatre, film, and television to the art of advocacy. He currently teaches at the School of Theatre, the University of Southern California, the Loyola Law School, and the California Western School of Law.

2. *Id.*

3. *Id.* at 13.

4. *Id.*

5. *Id.*

6. *Id.*

7. Major Timothy MacDonnell, *It Is Not Just What You Ask, But How You Ask It: The Art of Building Rapport During Witness Interviews*, ARMY LAW., Aug. 1999, at 67.

8. See *id.* at 65; Major Edie Moran, *Prevention of Juror Ennui—Demonstrative Evidence in the Courtroom*, ARMY LAW., June 1998, at 24.

9. See generally Lieutenant Colonel Henley, *Horse-shedding the Evidence—Twenty Do's and Don'ts of Witness Preparation*, ARMY LAW., Feb. 1998, at 38.

trial advocate to visit the crime scene. When visiting the crime scene, an advocate should go during the same time of day that the crime occurred and have someone accompany him to help reenact the crime. This will help the advocate better analyze the evidence and will highlight any inconsistencies with the case file and the witness's statements.¹⁰

Rehearsal

Once an advocate has eliminated the mystery of a case through his pretrial investigation, his next step is to reduce the fear of the courtroom by practicing his case presentation. The courtroom is the most effective place for rehearsal. The key parts of a case that an advocate should rehearse in the courtroom include voir dire, opening statement, and closing argument.¹¹ The advocate should also rehearse direct testimony of key witnesses in the courtroom.¹² This preparation is indispensable for child witnesses and victims of violent crimes because they are most likely to have an adverse reaction when having to confront their assailant in the intimidating environment of open court.¹³ Additionally, advocates should always develop contingency plans for using remote testimony with child witnesses.¹⁴ When rehearsing direct examination, the advocate should select a location in the courtroom that directs the panel's focus to the witness.¹⁵ To do so, the advocate should place himself in a position where he is outside of the direct view of the panel while they are looking toward the witness.¹⁶ While the witnesses practice testifying, it is helpful to have a fellow attorney or paralegal sit in the panel box to assist the witness to learn how to talk directly to the panel members. This will also allow the advocate to gain valuable feedback on the effectiveness of the testimony from their mock panel member.¹⁷

The trial lawyer should also practice handling the physical evidence in the case. This is especially true if the evidence may involve mechanical operation during the case, such as a pistol or rifle. The trial lawyer must be able to *clear* a weapon smoothly before handing it to a witness. If the advocate has trouble handling the weapon in front of a panel, he can quickly lose credibility as both a lawyer and a soldier. This advice holds true for demonstrative evidence also, especially diagrams. Before the lawyer uses a diagram in court, he should rehearse its use with any necessary witnesses before trial.¹⁸ Doing this will not only help ensure a smooth presentation in front of the members, but will reduce the chance that a witness will forget key portions of their testimony. Rehearsing with the diagram in the courtroom allows the advocate to find a location for the diagram that will maximize its impact, while still ensuring all court personnel are able to view it.¹⁹

When rehearsing with physical evidence and diagrams, as well as the other evidence he plans to introduce, the advocate should practice laying the necessary evidentiary foundations. This will increase the lawyer's confidence and avoid the awkward moments in front of a panel following a sustained objection to a piece of evidence based on lack of foundation. Even if the advocate feels he has memorized the necessary foundational questions, he should create a foundational checklist for each type of evidence.²⁰

The advocate should also prepare objections to the opposing counsel's anticipated evidence. This preparation includes outlining his objection arguments, with references to the applicable law. The advocate should attempt to anticipate the opposing counsel's objections to his evidence and prepare well-reasoned responses. Finally, he should maintain a list of legal references close at hand, with copies available to provide to the military judge and opposing counsel upon request.²¹

10. See MacDonnell, *supra* note 7, at 67.

11. See generally Moran, *supra* note 8, at 24.

12. See *id.*

13. Major Christina Ekman, *Preparing the Young Child-Victim for Trial*, ARMY LAW., June 2002, at 42.

14. See generally MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 914A (2002); see also United States v. McCollum, 58 M.J. 323 (2003).

15. THOMAS A. MAUET, TRIAL TECHNIQUES 88 (4th ed. 1996).

16. *Id.*

17. See generally MacDonnell, *supra* note 7, at 67.

18. Moran, *supra* note 8, at 23.

19. MAUET, *supra* note 15, at 139.

20. See DAVID A. SCHLUETER, STEPHEN A. SALTZBURG, LEE D. SCHINASI & EDWARD J. IMWINKELRIED, MILITARY EVIDENTIARY FOUNDATIONS (2000) (containing an excellent resource on evidentiary foundations); CRIMINAL LAW DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CENTER AND SCHOOL, 18TH CRIMINAL LAW ADVOCACY COURSE DESKBOOK, tab O (Sept. 2002), available at <http://www.jagcnet.army.mil/TJAGLCS> (last visited 22 October 2003) (explaining the evidentiary foundational elements).

21. Major Norman Allen, *Making and Responding to Objections*, ARMY LAW., July 1999, at 38.

The Day Before Trial

In addition to thoroughly preparing the case, the advocate must prepare his mind, body, and voice for the demands of a trial.²² An advocate must maintain mental sharpness and alertness to process information during the trial. To achieve optimum productivity, the advocate should get a full night's sleep before trial and not be tempted into staying up all night. An advocate's inability to remain alert during trial will often negate the advantages gained through case preparation. Tips for those who have trouble falling asleep include the following: (1) maintaining a regular bedtime routine; (2) reading a relaxing book before bed; and (3) regularly exercising.²³ If an advocate has trouble falling asleep because he cannot stop thinking about the remaining tasks he needs to accomplish, he should keep a notepad and pen next to the bed and write down his ideas as they come to him.

The Day of Trial

On the morning of the trial, an advocate should allow plenty of extra time to get ready. This includes time to eat a nutritious breakfast. Additionally, it is a good idea for the trial lawyer to pack high-energy snacks in his briefcase to eat during the court recesses. Not only will this help to maintain his energy, but it may also be his only food if he has to work through lunch. Finally, the advocate must not forget to drink fluids throughout the trial in order to stay hydrated. Even mild dehydration can cause headaches, lethargy, and poor concentration.²⁴

Rising early in the morning not only allows the advocate time to get ready in a relaxed and unhurried manner, but it also allows him to get to the courtroom early. Arriving at the courtroom early is important, since it allows an advocate time to arrange his materials at his table, to review his voir dire and opening statement one last time, and to handle any last-minute issues with opposing counsel, witnesses, or the trial judge. One of the things that will quickly anger a trial judge, is a counsel who shows up late to trial while members are kept waiting in

the deliberation room. Ideally, an advocate should arrive in court forty-five minutes to one hour early.

After an advocate has prepared mentally for the trial, through both case preparation and rest, he needs to prepare his voice. An advocate cannot afford to wait until halfway through the first day of trial to utilize the full range and potential of his voice. Studies show that eighty percent of jurors decide how they will vote at the end of opening statements—it is paramount for an advocate to utilize the full persuasive ability of his voice from the moment he addresses the panel.²⁵ An advocate should focus on releasing tension from his body and warming-up his vocal cords to allow his voice to fully release itself.²⁶

While these techniques may seem unorthodox, some notable theater and television professionals have recommended the stretches and vocal exercises discussed in this article.²⁷ A couple of quick and easy stretches that will assist in releasing vocal-inhibiting tension from the body include the head-roll and the drop-down.²⁸ To perform the head-roll, allow the head to gently fall forward and then roll it slowly from side to side. Use deep exhalations of breath as the head rolls back and forth—the ear should touch the shoulder. To conduct the drop-down, first release the jaw and again letting the head gently fall forward, with the chin resting on the chest. The weight of the head then slowly leads the rest of the body all the way down—one vertebra at a time—until the body is folded in half with the head, arms and entire top of the body dangling down. The advocate should remain in this relaxed position and allow the breath to flow naturally as the tension is released from the body. This exercise should be repeated at least three times.²⁹

The final step involves warming-up the vocal cords. In order to warm-up the full range of the voice, the advocate should use both “articulators” and “resonators.”³⁰ Articulator drills include the following: (1) alternating between scrunching the face into a tiny fist and then opening the mouth widely with the tongue sticking out; (2) making “raspberry” sounds by blowing through the lips and tongue; and (3) repeating “tongue twister” phrases.³¹ Resonators are designed to warm-up the resonating cavities of the body. One method for doing this vocal

22. See KARTON, *supra* note 1, at 23.

23. National Sleep Foundation, *Top Ten Sleep Tips for Promoting a Healthy Lifestyle*, available at <http://www.sleepfoundation.org/sleeptips.cfm> (last visited 22 Oct. 2003).

24. Martha Brassil, B.A., D.Th.Dip., *How Dehydration Affects the Body*, at <http://www.cell-free.com/dehydration.htm> (last visited 22 Oct. 2003).

25. KARTON, *supra* note 1, at 15.

26. *Id.*

27. *Id.*

28. *Id.* at 26.

29. *Id.*

30. *Id.* at 28.

warm-up includes humming “MEE-MAY-MAH-MOE-MOO” with the sound resonating first from the nasal cavities, then flowing to the throat, and finally down to the chest.³² If this exercise seems too complex, the lawyer can reap vocal warm-up benefits by merely humming his favorite tune while alternating its delivery between his nasal passages, throat, and chest. Doing these vocal exercises will increase the range and placement of the voice. The good thing about this vocal drill is that an advocate can perform it in the car on the way to the courthouse if he is running short of time.

Conclusion

Although many of these preparatory steps may seem more appropriate for the stage actor rather than the courtroom advocate, the courtroom is in fact a stage. It is on this stage that the lawyer presents the drama of his client’s case or a victim’s story. Therefore, it benefits the lawyer to be prepared to deliver a compelling performance from the time he steps foot on the courtroom stage. Advocates can perform at optimal levels if they devote the necessary time and effort to case preparation before trial, and set aside time on the day of trial to prepare their minds, bodies, and voices.

31. *Id.*

32. *Id.*

CLE News

1. Resident Course Quotas

Attendance at resident continuing legal education (CLE) courses at The Judge Advocate General's School, U.S. Army (TJAGSA), is restricted to students who have confirmed reservations. Reservations for TJAGSA CLE courses are managed by the Army Training Requirements and Resources System (ATRRS), the Army-wide automated training system. If you do not have a confirmed reservation in ATRRS, you do not have a reservation for a TJAGSA CLE course.

Active duty service members and civilian employees must obtain reservations through their directorates of training or through equivalent agencies. Reservists must obtain reservations through their unit training offices or, if they are non-unit reservists, through the United States Army Personnel Center (ARPERCEN), ATTN: ARPC-OPB, 1 Reserve Way, St. Louis, MO 63132-5200. Army National Guard personnel must request reservations through their unit training offices.

Questions regarding courses should be directed to the Deputy, Academic Department at 1-800-552-3978, dial 1, extension 3304.

When requesting a reservation, please have the following information:

TJAGSA Code—181

Course Name—133d Contract Attorneys Course 5F-F10

Course Number—133d Contract Attorney's Course 5F-F10

Class Number—133d Contract Attorney's Course 5F-F10

To verify a confirmed reservation, ask your training office to provide a screen print of the ATRRS R1 screen, showing by-name reservations.

The Judge Advocate General's School, U.S. Army, is an approved sponsor of CLE courses in all states that require mandatory continuing legal education. These states include: AL, AR, AZ, CA, CO, CT, DE, FL, GA, ID, IN, IA, KS, KY, LA, ME, MN, MS, MO, MT, NV, NH, NM, NY, NC, ND, OH, OK, OR, PA, RI, SC, TN, TX, UT, VT, VA, WA, WV, WI, and WY.

2. TJAGSA CLE Course Schedule (August 2003 - September 2005)

Course Title	Dates	ATRRS No.
GENERAL		
52d Graduate Course	18 August 03 - 27 May 04	(5-27-C22)
53d Graduate Course	16 August 04 - 26 May 05	(5-27-C22)
54th Graduate Course	15 August 05 - thru TBD	(5-27-C22)
162d Basic Course	16 September - 10 October 03 (Phase I - Ft. Lee) 10 October - 18 December 03 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
163d Basic Course	6 - 30 January 04 (Phase I - Ft. Lee) 30 January - 9 April 04 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
164th Basic Course	1 - 24 June 04 (Phase I - Ft. Lee) 25 June - 3 September 04 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
165th Basic Course	14 September - 8 October 04 (Phase I - Ft. Lee) 8 October - 16 December 04 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
166th Basic Course	4 - 28 January 05 (Phase I - Ft. Lee) 28 January - 8 April 05 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)

167th Basic Course	31 May - June 05 (Phase I - Ft. Lee) 25 June - 1 September 05 (Phase II - TJAGSA)	(5-27-C20) (5-27-C20)
168th Basic Course	13 September - thru TBD (Phase I- Ft. Lee) TBD (Phase II – TJAGSA)	(5-27-C20)
8th Speech Recognition Training	1- 12 December 03	(512-27DC4)
9th Speech Recognition Training	25 October - 5 November 04	(512-27DC4)
13th Court Reporter Course	26 January - 26 March 04	(512-27DC5)
14th Court Reporter Course	26 April - 25 June 04	(512-27DC5)
15th Court Reporter Course	2 August - 1 October 04	(512-27DC5)
16th Court Reporter Course	24 January - 25 March 05	(512-27DC5)
17th Court Reporter Course	25 April - 24 June 05	(512-27DC5)
18th Court Reporter Course	1 August - 5 October 05	(512-27DC5)
3d Court Reporting Symposium	17 - 21 November 03	(512-27DC6)
4th Court Reporting Symposium	15 -19 November 04	(512-27DC6)
179th Senior Officers Legal Orientation Course	17 - 21 November 03	(5F-F1)
180th Senior Officers Legal Orientation Course	26 - 30 January 04	(5F-F1)
181st Senior Officers Legal Orientation Course	22 - 26 March 04	(5F-F1)
182d Senior Officers Legal Orientation Course	17 - 21 May 04	(5F-F1)
183d Senior Officers Legal Orientation Course	13 - 17 September 04	(5F-F1)
184d Senior Officers Legal Orientation Course	15 - 19 November 04	(5F-F1)
185d Senior Officers Legal Orientation Course	24 - 28 January 05	(5F-F1)
186d Senior Officers Legal Orientation Course	28 March - 1 April 05	(5F-F1)
187d Senior Officers Legal Orientation Course	13 - 17 June 05	(5F-F1)

188th Senior Officers Legal Orientation Course	12 - 16 September 05	(5F-F1)
10th RC General Officers Legal Orientation Course	21- 23 January 04	(5F-F3)
11th RC General Officers Legal Orientation Course	19 - 21 January 05	(5F-F3)
34th Staff Judge Advocate Course	7 - 11 June 04	(5F-F52)
35th Staff Judge Advocate Course	6 - 10 June 05	(5F-F52)
7th Staff Judge Advocate Team Leadership Course	7 - 9 June 04	(5F-F52-S)
8th Staff Judge Advocate Team Leadership Course	6 - 8 June 05	(5F-F52-S)
2004 Reserve Component Judge Advocate Workshop	19 - 22 April 04	(5F-F56)
2005 Reserve Component Judge Advocate Workshop	11 - 14 April 05	(5F-F56)
2004 JAOAC (Phase II)	4 - 16 January 04	(5F-F55)
2005 JAOAC (Phase II)	2 - 14 January 05	(5F-F55)
35th Methods of Instruction Course	19 - 23 July 04	(5F-F70)
36th Methods of Instruction Course	18 - 22 July 05	(5F-F70)
2004 JAG Annual CLE Workshop	4 - 8 October 04	(5F-JAG)
15th Legal Administrators Course	21 - 25 June 04	(7A-550A1)
16th Legal Administrators Course	20 - 24 June 05	(7A-550A1)
15th Law for Paralegal NCOs Course	29 March - 2 April 04	(512-27D/20/30)
16th Law for Paralegal NCOs Course	28 March - 1 April 05	(512-27D/20/30)
15th Senior Paralegal NCO Management Course	14 - 18 June 04	(512-27D/40/50)
16th Senior Paralegal NCO Management Course	13 - 17 June 05	(512-27D/40/50)

8th Chief Paralegal NCO Course	14 - 18 June 04	(512-27D- CLNCO)
9th Chief Paralegal NCO Course	13 - 17 June 05	(512-27D- CLNCO)
5th 27D BNCOC	12 - 29 October 04	
6th 27D BNCOC	3 - 21 January 05	
7th 27D BNCOC	7 - 25 March 05	
8th 27D BNCOC	16 May - 3 June 05	
9th 27D BNCOC	1 - 19 August 05	
4th 27D ANCOC	25 October - 10 November 04	
5th 27D ANCOC	10 - 28 January 05	
6th 27D ANCOC	25 April - 13 May 05	
7th 27D ANCOC	18 July - 5 August 05	
4th JA Warrant Officer Advanced Course	12 July - 6 August 04	(7A-270A2)
11th JA Warrant Officer Basic Course	31 May - 25 June 04	(7A-270A0)
12th JA Warrant Officer Basic Course	31 May - 24 June 05	(7A-270A0)
JA Professional Recruiting Seminar	14 - 16 July 04	(JARC-181)
JA Professional Recruiting Seminar	13 - 15 July 05	(JARC-181)

ADMINISTRATIVE AND CIVIL LAW

3d Advanced Federal Labor Relations Course	20 - 22 October 04	(5F-F21)
58th Federal Labor Relations Course	18 - 22 October 04	(5F-F22)
54th Legal Assistance Course	10 - 14 May 04	(5F-F23)
55th Legal Assistance Course	1 - 5 November 04	(5F-F23)
56th Legal Assistance Course	16 - 20 May 05	(5F-F23)
2004 USAREUR Legal Assistance CLE	18 - 22 Oct 04	(5F-F23E)

28th Admin Law for Military Installations Course	8 - 12 March 04	(5F-F24)
29th Admin Law for Military Installations Course	14 - 18 March 05	(5F-F24)
2004 USAREUR Administrative Law CLE	13 - 17 September 04	(5F-F24E)
2005 USAREUR Administrative Law CLE	12 - 16 September 05	(5F-F24E)
2003 Federal Income Tax Course (Montgomery, AL)	15 - 19 December 03	(5F-F28)
2004 Federal Income Tax Course (Charlottesville, VA)	29 November - 3 December 04	(5F-F28)
2004 Hawaii Estate Planning Course	20 - 23 January 05	(5F-F27H)
2003 USAREUR Income Tax CLE	8 - 12 December 03	(5F-F28E)
2004 USAREUR Income Tax CLE	13 - 17 December 04	(5F-F28E)
2004 Hawaii Income Tax CLE	12 - 16 January 04	(5F-F28H)
2005 Hawaii Income Tax CLE	11 - 14 January 05	(5F-F28H)
2004 PACOM Income Tax CLE	5 - 9 January 2004	(5F-F28P)
2005 PACOM Income Tax CLE	3 - 7 January 2005	(5F-F28P)
22d Federal Litigation Course	2 - 6 August 04	(5F-F29)
23d Federal Litigation Course	1 - 5 August 05	(5F-F29)
2d Ethics Counselors Course	12 - 16 April 04	(5F-F202)
3d Ethics Counselors Course	18 - 22 April 05	(5F-F202)

CONTRACT AND FISCAL LAW

152d Contract Attorneys Course	23 February - 5 March 04	(5F-F10)
153d Contract Attorneys Course	26 July - 6 August 04	(5F-F10)
154th Contract Attorneys Course	28 February - 11 March 05	(5F-F10)
155th Contract Attorneys Course	25 July - 5 August 05	(5F-F10)

6th Advanced Contract Law (Intellectual Property & Non-FAR Transactions)	15 - 19 March 04	(5F-F103)
5th Contract Litigation Course	21 - 25 March 05	(5F-F102)
2003 Government Contract Law Symposium	2 - 5 December 03	(5F-F11)
2004 Government Contract Law Symposium	7 - 10 December 04	(5F-F11)
68th Fiscal Law Course	26 - 30 April 04	(5F-F12)
69th Fiscal Law Course	3 - 7 May 04	(5F-F12)
70th Fiscal Law Course	25 - 29 October 04	(5F-F12)
71st Fiscal Law Course	25 - 29 April 05	(5F-F12)
72d Fiscal Law Course	2 - 6 May 05	(5F-F12)
12th Comptrollers Accreditation Course (Hawaii)	26 - 30 January 04	(5F-F14)
13th Comptrollers Accreditation Course (Fort Monmouth)	14 - 17 June 04	(5F-F14)
6th Procurement Fraud Course	1 - 3 June 04	(5F-F101)
2004 USAREUR Contract & Fiscal Law CLE	12 - 16 January 04	(5F-F15E)
2005 USAREUR Contract & Fiscal Law CLE	10 - 14 January 05	(5F-F15E)
2004 Maxwell AFB Fiscal Law Course	10 - 13 February 04	
2005 Maxwell AFB Fiscal Law Course	7 - 11 February 05	
CRIMINAL LAW		
10th Military Justice Managers Course	23 - 27 August 04	(5F-F31)
11th Military Justice Managers Course	22 - 26 August 05	(5F-F31)
47th Military Judge Course	26 April - 14 May 04	(5F-F33)
48th Military Judge Course	25 April - 13 May 05	(5F-F33)

21st Criminal Law Advocacy Course	15 - 26 March 04	(5F-F34)
22d Criminal Law Advocacy Course	13 - 24 September 04	(5F-F34)
23d Criminal Law Advocacy Course	14 - 25 March 05	(5F-F34)
24d Criminal Law Advocacy Course	12 - 23 September 05	(5F-F34)
27th Criminal Law New Developments Course	17 - 20 November 03	(5F-F35)
28th Criminal Law New Developments Course	15 - 18 November 04	(5F-F35)
2004 USAREUR Criminal Law CLE	5 - 9 January 04	(5F-F35E)
2005 USAREUR Criminal Law CLE	3 - 7 January 05	(5F-F35E)

INTERNATIONAL AND OPERATIONAL LAW

4d Domestic Operational Law Course	25 - 29 October 04	(5F-F45)
1st Basic Intelligence Law Course (TJAGSA)	28 - 29 June 04	(5F-F41)
2d Basic Intelligence Law Course	27 - 28 June 05	(5F-F41)
1st Advanced Intelligence Law (National Ground Intelligence Center)	30 June - 2 July 2004	(5F-F43)
2d Advanced Intelligence Law	29 June - 1 July 2004	(5F-F43)
81st Law of War Course	2 - 6 February 04	(5F-F42)
82d Law of War Course	12 - 16 July 04	(5F-F42)
83d Law of War Course	31 January - 4 February 05	(5F-F42)
84d Law of War Course	11 - 15 July 05	(5F-F42)
41st Operational Law Course	23 February - 5 March 04	(5 F-F47)
42d Operational Law Course	9 - 20 August 04	(5F-F47)
43d Operational Law Course	28 February - 11 March 05	(5F-F47)
44d Operational Law Course	8 - 19 August 05	(5F-F47)

2004 USAREUR Operational Law CLE 12 - 16 January 2004 (5F-F47E)

2005 USAREUR Operational Law CLE 10 - 14 January 2005 (5F-F47E)

3. Civilian-Sponsored CLE Courses

For further information on civilian courses in your area, please contact one of the institutions listed below:

AAJE: American Academy of Judicial Education
P.O. Box 728
University, MS 38677-0728
(662) 915-1225

ABA: American Bar Association
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988-6200

AGACL: Association of Government Attorneys
in Capital Litigation
Arizona Attorney General's Office
ATTN: Jan Dyer
1275 West Washington
Phoenix, AZ 85007
(602) 542-8552

ALIABA: American Law Institute-American Bar
Association
Committee on Continuing Professional
Education
4025 Chestnut Street
Philadelphia, PA 19104-3099
(800) CLE-NEWS or (215) 243-1600

ASLM: American Society of Law and Medicine
Boston University School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 262-4990

CCEB: Continuing Education
of the Bar
University of California Extension
2300 Shattuck Avenue
Berkeley, CA 94704
(510) 642-3973

CLA: Computer Law Association, Inc.
3028 Javier Road, Suite 500E
Fairfax, VA 22031
(703) 560-7747

CLESN: CLE Satellite Network
920 Spring Street
Springfield, IL 62704
(217) 525-0744
(800) 521-8662

ESI: Educational Services Institute
5201 Leesburg Pike, Suite 600
Falls Church, VA 22041-3202
(703) 379-2900

FBA: Federal Bar Association
1815 H Street, NW, Suite 408
Washington, DC 20006-3697
(202) 638-0252

FB: Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300

GICLE: The Institute of Continuing Legal
Education
P.O. Box 1885
Athens, GA 30603
(706) 369-5664

GII: Government Institutes, Inc.
966 Hungerford Drive, Suite 24
Rockville, MD 20850
(301) 251-9250

GWU: Government Contracts Program
The George Washington University
National Law Center
2020 K Street, NW, Room 2107
Washington, DC 20052
(202) 994-5272

IICLE: Illinois Institute for CLE
2395 W. Jefferson Street
Springfield, IL 62702
(217) 787-2080

LRP: LRP Publications
1555 King Street, Suite 200
Alexandria, VA 22314
(703) 684-0510
(800) 727-1227

LSU: Louisiana State University
Center on Continuing Professional
Development
Paul M. Herbert Law Center
Baton Rouge, LA 70803-1000
(504) 388-5837

MLI: Medi-Legal Institute
15301 Ventura Boulevard, Suite 300
Sherman Oaks, CA 91403
(800) 443-0100

NCDA: National College of District Attorneys
University of Houston Law Center
4800 Calhoun Street
Houston, TX 77204-6380
(713) 747-NCDA

NITA: National Institute for Trial Advocacy
1507 Energy Park Drive
St. Paul, MN 55108
(612) 644-0323 in (MN and AK)
(800) 225-6482

NJC: National Judicial College
Judicial College Building
University of Nevada
Reno, NV 89557

NMTLA: New Mexico Trial Lawyers'
Association
P.O. Box 301
Albuquerque, NM 87103
(505) 243-6003

PBI: Pennsylvania Bar Institute
104 South Street
P.O. Box 1027
Harrisburg, PA 17108-1027
(717) 233-5774
(800) 932-4637

PLI: Practicing Law Institute
810 Seventh Avenue
New York, NY 10019
(212) 765-5700

TBA: Tennessee Bar Association
3622 West End Avenue
Nashville, TN 37205
(615) 383-7421

TLS: Tulane Law School
Tulane University CLE
8200 Hampson Avenue, Suite 300
New Orleans, LA 70118
(504) 865-5900

UMLC: University of Miami Law Center
P.O. Box 248087
Coral Gables, FL 33124
(305) 284-4762

UT: The University of Texas School of
Law
Office of Continuing Legal Education
727 East 26th Street
Austin, TX 78705-9968

VCLE: University of Virginia School of Law
Trial Advocacy Institute
P.O. Box 4468
Charlottesville, VA 22905

4. Phase I (Correspondence Phase), RC-JAOAC Deadline

The suspense for submission of all RC-JAOAC Phase I (Correspondence Phase) materials is **NLT 2400, 1 November 2004**, for those judge advocates who desire to attend Phase II (Resident Phase) at TJAGLCS in the year 2005 ("2005 JAOAC"). This requirement includes submission of all JA 151, Fundamentals of Military Writing, exercises.

This requirement is particularly critical for some officers. The 2005 JAOAC will be held in January 2005, and is a prerequisite for most judge advocate captains to be promoted to major.

A judge advocate who is required to retake any subcourse examinations or "re-do" any writing exercises must submit the examination or writing exercise to the Non-Resident Instruction Branch, TJAGLCS, for grading by the same deadline (1 November 2004). If the student receives notice of the need to re-do any examination or exercise after 1 October 2004, the notice will contain a suspense date for completion of the work.

Judge advocates who fail to complete Phase I correspondence courses and writing exercises by 1 November 2004 will not be cleared to attend the 2005 JAOAC. If you have not received written notification of completion of Phase I of JAOAC, you are not eligible to attend the resident phase.

If you have any further questions, contact Lieutenant Colonel JT. Parker, telephone (434) 971-3357, or e-mail JT.Parker@hqda.army.mil.

5. Mandatory Continuing Legal Education Jurisdiction and Reporting Dates

<u>Jurisdiction</u>	<u>Reporting Month</u>
Alabama**	31 December annually
Arizona	15 September annually

Arkansas	30 June annually	New York*	Every two years within thirty days after the attorney's birthday
California*	1 February annually		
Colorado	Anytime within three-year period	North Carolina**	28 February annually
Delaware	Period ends 31 December; confirmation required by 1 February if compliance required; if attorney is admitted in even-numbered year, period ends in even-numbered year, etc.	North Dakota	31 July annually
		Ohio*	31 January biennially
		Oklahoma**	15 February annually
		Oregon	Period end 31 December; due 31 January
Florida**	Assigned month triennially	Pennsylvania**	Group 1: 30 April Group 2: 31 August Group 3: 31 December
Georgia	31 January annually	Rhode Island	30 June annually
Idaho	31 December, admission date triennially	South Carolina**	1 January annually
Indiana	31 December annually	Tennessee*	1 March annually
Iowa	1 March annually		Minimum credits must be completed by last day of birth month each year
Kansas	30 days after program, hours must be completed in compliance period July 1 to June 30	Texas	Minimum credits must be completed by last day of birth month each year
Kentucky	10 August; 30 June is the end of the educational year	Utah	31 January
Louisiana**	31 January annually	Vermont	2 July annually
Maine**	31 July annually	Virginia	31 October annually
Minnesota	30 August	Washington	31 January triennially
Mississippi**	1 August annually	West Virginia	31 July biennially
Missouri	31 July annually	Wisconsin*	1 February biennially
Montana	1 April annually	Wyoming	30 January annually
Nevada	1 March annually	* Military Exempt	
New Hampshire**	1 August annually	** Military Must Declare Exemption	
New Mexico	prior to 30 April annually	For addresses and detailed information, see the March 2003 issue of <i>The Army Lawyer</i> .	

Current Materials of Interest

1. The Judge Advocate General's On-Site Continuing Legal Education Training and Workshop Schedule (2003-2004 Academic Year)

<u>DATE</u>	<u>TRNG SITE/HOST UNIT</u>	<u>SUBJECT</u>	<u>ACTION OFFICER</u>
6 - 7 Dec 03	Charleston, SC 12th LSO	Law of War, ROE, Law of Occupation, Domestic Operations, Legal Assistance & Professional Ethics	COL Daniel E. Shearouse DShearouse@sccourts.org
30 Jan - 1 Feb 04	Columbus, OH 9th LSO Columbus Northwest Marriott Hotel	Operations Law, Administrative and Civil Law	1LT Matthew Lampke (614) 644-7257 Mlampke@ag.state.oh.us
7 - 8 Feb 04	Seattle, WA 70th RRC/6th LSO	Operational Law, Administrative and Civil Law	MAJ Randy Petgrave Randolph.petgrave@us.army.mil
21 - 22 Feb 04	Salt Lake City, UT 96th RRC/87th LSO/UTARNG	Mobilization/Demobilization Law Topics/Operational Law, Criminal Law	LTC Frandsen Richard.frandsen@us.army.mil
27 - 29 Feb 04	Dallas, TX 16th LSO/90th RRC	Administrative and Civil Law, Criminal Law	LTC Jeffrey Stacey Jeffrey.Stacey@mail.va.gov
6 - 7 Mar 04	Washington, DC 10th LSO/99th RRC National War College Fort McNair	Operational Law, Contingency Contracting	CPT Joel Starr (202) 712-5152 joelstarr@aol.com
13 - 14 Mar 04	San Mateo, CA 63rd LSO/75th LSO	Administrative and Civil Law, Criminal Law	MAJ Mark McClenahan mark.mcclenahan@citigroup.com
19 - 21 Mar 04	St. Louis, MO 89th RRC/8th LSO Renaissance (Marriott) Hotel	Administrative and Civil Law, Contract Law	8th LSO POC TBD
2 - 4 Apr 04	Perdido Beach, AL 81st RSC/174th LSO/ 213th LSO	Administrative and Civil Law, Contract Law	CPT William Osborne William.Osborne2@se.usar.army.mil
17 - 18 Apr 04	Indianapolis, IN INARNG	Criminal Law, Administrative Law	COL George C. Thompson (317) 247-3491 George.Thompson@in.ngb.army.mil
24 -25 Apr 04	Boston, MA 94th RRC	Criminal Law, Operational Law	MAJ Angela Horne (978) 784-3931 angela.horne@us.army.mil

* Prospective students may enroll for the on-sites through the Army Training Requirements and Resources System (ATRRS) using the designated Course and Class Number.

2. The Judge Advocate General's School, U.S. Army (TJAGSA) Materials Available through the Defense Technical Information Center (DTIC)

Each year, TJAGSA publishes deskbooks and materials to support resident course instruction. Much of this material is useful to judge advocates and government civilian attorneys who are unable to attend courses in their practice areas, and TJAGSA receives many requests each year for these materials. Because the distribution of these materials is not in its mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is available through the Defense Technical Information Center (DTIC). An office may obtain this material through the installation library. Most libraries are DTIC users and would be happy to identify and order requested material. If the library is not registered with the DTIC, the requesting person's office/organization may register for the DTIC's services.

If only unclassified information is required, simply call the DTIC Registration Branch and register over the phone at (703) 767-8273, DSN 427-8273. If access to classified information is needed, then a registration form must be obtained, completed, and sent to the Defense Technical Information Center, 8725 John J. Kingman Road, Suite 0944, Fort Belvoir, Virginia 22060-6218; telephone (commercial) (703) 767-8273, (DSN) 427-8273, toll-free 1-800-225-DTIC, menu selection 2, option 1; fax (commercial) (703) 767-8228; fax (DSN) 426-8228; or e-mail to reghelp@dtic.mil.

If there is a recurring need for information on a particular subject, the requesting person may want to subscribe to the Current Awareness Bibliography (CAB) Service. The CAB is a profile-based product, which will alert the requestor, on a biweekly basis, to the documents that have been entered into the Technical Reports Database which meet his profile parameters. This bibliography is available electronically via e-mail at no cost or in hard copy at an annual cost of \$25 per profile. Contact DTIC at www.dtic.mil/dtic/current.html.

Prices for the reports fall into one of the following four categories, depending on the number of pages: \$7, \$12, \$42, and \$122. The DTIC also supplies reports in electronic formats. Prices may be subject to change at any time. Lawyers, however, who need specific documents for a case may obtain them at no cost.

For the products and services requested, one may pay either by establishing a DTIC deposit account with the National Technical Information Service (NTIS) or by using a VISA, MasterCard, or American Express credit card. Information on establishing an NTIS credit card will be included in the user packet.

There is also a DTIC Home Page at <http://www.dtic.mil> to browse through the listing of citations to unclassified/unlimited

documents that have been entered into the Technical Reports Database within the last twenty-five years to get a better idea of the type of information that is available. The complete collection includes limited and classified documents as well, but those are not available on the web.

Those who wish to receive more information about the DTIC or have any questions should call the Product and Services Branch at (703)767-8267, (DSN) 427-8267, or toll-free 1-800-225-DTIC, menu selection 6, option 1; or send an e-mail to bcorders@dtic.mil.

Contract Law

- | | |
|------------|--|
| AD A301096 | Government Contract Law Deskbook, vol. 1, JA-501-1-95. |
| AD A301095 | Government Contract Law Deskbook, vol. 2, JA-501-2-95. |
| AD A265777 | Fiscal Law Course Deskbook, JA-506-93. |

Legal Assistance

- | | |
|------------|--|
| AD A384333 | Soldiers' and Sailors' Civil Relief Act Guide, JA-260 (2000). |
| AD A333321 | Real Property Guide—Legal Assistance, JA-261 (1997). |
| AD A326002 | Wills Guide, JA-262 (1997). |
| AD A346757 | Family Law Guide, JA 263 (1998). |
| AD A384376 | Consumer Law Guide, JA 265 (2000). |
| AD A372624 | Uniformed Services Worldwide Legal Assistance Directory, JA-267 (1999). |
| AD A360700 | Tax Information Series, JA 269 (2002). |
| AD A350513 | The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. I (1998). |
| AD A350514 | The Uniformed Services Employment and Reemployment Rights Act (USAERRA), JA 270, Vol. II (1998). |
| AD A329216 | Legal Assistance Office Administration Guide, JA 271 (1997). |
| AD A276984 | Deployment Guide, JA-272 (1994). |
| AD A360704 | Uniformed Services Former Spouses' Protection Act, JA 274 (2002). |

AD A326316 Model Income Tax Assistance Guide,
JA 275 (2001).

AD A282033 Preventive Law, JA-276 (1994).

Administrative and Civil Law

AD A351829 Defensive Federal Litigation, JA-200
(2000).

AD A327379 Military Personnel Law, JA 215 (1997).

AD A255346 Reports of Survey and Line of Duty
Determinations, JA-231 (2002).

AD A347157 Environmental Law Deskbook,
JA-234 (2002).

AD A377491 Government Information Practices,
JA-235 (2000).

AD A377563 Federal Tort Claims Act, JA 241 (2000).

AD A332865 AR 15-6 Investigations, JA-281 (1997).

Labor Law

AD A360707 The Law of Federal Employment,
JA-210 (1998).

AD A360707 The Law of Federal Labor-Management
Relations, JA-211 (1999).

Criminal Law

AD A302672 Unauthorized Absences Programmed
Text, JA-301 (2003).

AD A303842 Trial Counsel and Defense Counsel
Handbook, JA-310 (1995).

AD A302445 Nonjudicial Punishment, JA-330 (1995).

AD A302674 Crimes and Defenses Deskbook,
JA-337 (1994).

AD A274413 United States Attorney Prosecutions,
JA-338 (1994).

International and Operational Law

AD A377522 Operational Law Handbook,
JA-422 (2003).

Reserve Affairs

AD A345797 Reserve Component JAGC Personnel
Policies Handbook, JAGS-GRA (1998).

The following United States Army Criminal Investigation Division Command publication is also available through the DTIC:

AD A145966 Criminal Investigations, Violation of the
U.S.C. in Economic Crime
Investigations, USACIDC Pam 195-8.

* Indicates new publication or revised edition.

3. Regulations and Pamphlets

The following provides information on how to obtain *Manuals for Courts-Martial, DA Pamphlets, Army Regulations, Field Manuals, and Training Circulars*.

(1) The United States Army Publications Distribution Center (USAPDC) at St. Louis, Missouri, stocks and distributes Department of the Army publications and blank forms that have Army-wide use. Contact the USAPDC at the following address:

Commander
U.S. Army Publications
Distribution Center
1655 Woodson Road
St. Louis, MO 63114-6181
Commercial (314) 592-0900
DSN 892-0900

(2) Units must have publications accounts to use any part of the publications distribution system. Consult *Department of the Army Regulation 25-30, The Army Integrated Publishing and Printing Program* (15 July 2002). The U.S. Army Publishing Agency web site provides administrative departmental publications and forms to include Army regulations, circulars, pamphlets, optional forms, standard forms, Department of Defense forms and Department of the Army forms. The web site to access the departmental publications and forms is <http://www.usapa.army.mil>. Consult Table 5-1, *AR 25-30*, for official departmental publications web sites.

4. The Legal Automation Army-Wide Systems XXI—JAGCNet

a. The Legal Automation Army-Wide Systems XXI (LAAWS XXI) operates a knowledge management and information service called JAGCNet primarily dedicated to servicing the Army legal community, but also provides for Department of Defense (DOD) access in some cases. Whether you have Army access or DOD-wide access, all users will be

able to download TJAGSA publications that are available through the JAGCNet.

b. Access to the JAGCNet:

(1) Access to JAGCNet is restricted to registered users who have been approved by the LAAWS XXI Office and senior OTJAG staff:

- (a) Active U.S. Army JAG Corps personnel;
- (b) Reserve and National Guard U.S. Army JAG Corps personnel;
- (c) Civilian employees (U.S. Army) JAG Corps personnel;
- (d) FLEP students;
- (e) Affiliated (U.S. Navy, U.S. Marine Corps, U.S. Air Force, U.S. Coast Guard) DOD personnel assigned to a branch of the JAG Corps; and, other personnel within the DOD legal community.

(2) Requests for exceptions to the access policy should be e-mailed to:

LAAWSXXI@jagc-smtp.army.mil

c. How to log on to JAGCNet:

- (a) Using a Web browser (Internet Explorer 4.0 or higher recommended) go to the following site: <http://jagcnet.army.mil>.
- (b) Follow the link that reads "Enter JAGCNet."
- (c) If you already have a JAGCNet account, and know your user name and password, select "Enter" from the next menu, then enter your "User Name" and "Password" in the appropriate fields.
- (d) If you have a JAGCNet account, *but do not know your user name and/or Internet password*, contact your legal administrator or e-mail the LAAWS XXI HelpDesk at LAAWSXXI@jagc-smtp.army.mil.
- (e) If you do not have a JAGCNet account, select "Register" from the JAGCNet Intranet menu.
- (f) Follow the link "Request a New Account" at the bottom of the page, and fill out the registration form

completely. Allow seventy-two hours for your request to process. Once your request is processed, you will receive an e-mail telling you that your request has been approved or denied.

- (g) Once granted access to JAGCNet, follow step (c), above.

4. TJAGSA Publications Available Through the LAAWS XXI JAGCNet

For detailed information, see the September 2003 issue of *The Army Lawyer*.

5. Legal Technology Management Office (LTMO)

The Judge Advocate General's Legal Center and School, U.S. Army, Charlottesville, Virginia continues to improve capabilities for faculty and staff. We have installed new computers throughout TJAGLCS, all of which are compatible with Microsoft Windows 2000 Professional and Microsoft Office 2000 Professional throughout TJAGLCS.

The Judge Advocate General's Legal Center and School, U.S. Army, faculty and staff are available through the Internet. Addresses for TJAGLCS personnel are available by e-mail at jagsch@hqda.army.mil or by calling the LTMO at (434) 971-3314. Phone numbers and e-mail addresses for TJAGLCS personnel are available on the TJAGLCS Web page at <http://www.jagcnet.army.mil/tjagsa>. Click on "directory" for the listings.

For students who wish to access their office e-mail while attending TJAGLCS classes, please ensure that your office e-mail is web browser accessible prior to departing your office. Please bring the address with you when attending classes at TJAGLCS. If your office does not have web accessible e-mail, you may establish an account at the Army Portal, <http://ako.us.army.mil>, and then forward your office e-mail to this new account during your stay at TJAGLCS. Dial-up internet access is available in TJAGLCS billets.

Personnel desiring to call TJAGLCS can dial via DSN 521-7115 or, provided the telephone call is for official business only, use our toll free number, (800) 552-3978; the receptionist will connect you to the appropriate department or directorate. For additional information, please contact the Legal Technology Management Office at (434) 971-3264 or DSN 521-3264.

6. The Army Law Library Service

Per *Army Regulation 27-1*, paragraph 12-11, the Army Law Library Service (ALLS) must be notified before any redistribution of ALLS-purchased law library materials. Posting such a notification in the ALLS FORUM of JAGCNet satisfies this regulatory requirement as well as alerting other librarians that excess materials are available.

Point of contact is Mr. Dan Lavering, The Judge Advocate General's Legal Center and School, United States Army, ATTN: ALCS-ADD-LB, 600 Massie Road, Charlottesville, Virginia 22903-1781. Telephone DSN: 521-3306, commercial: (434) 971-3306, or e-mail at Daniel.Lavering@hqda.army.mil.

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