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ANTITERRORISM MILITARY COMMISSIONS:
COURTING ILLEGALITY

Jordan J. Paust*

On November 13, 2001, President Bush issued a sweeping and highly controversial Military Order for the purpose of creating military commissions with exclusive jurisdiction to try certain designated foreign nationals “for violations of the laws of war and other applicable laws” relevant to any prior or future “acts of international terrorism.” The Order reaches far beyond the congressional authorization given the President “to use all necessary and appropriate force,” including “use of the United States Armed Forces,” against those involved in the September 11th attack “in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.” The Order contains no time limit, it is potentially applicable to any acts of international terrorism that have “adverse effects on the U.S., its citizens, national security, foreign policy, or economy,” and prosecutions under it can involve war crimes or violations of “other applicable laws.” In the Order, the President also declared that “it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of


3. See Military Order, supra note 1, §§ 1(e), 2(a)(1)(ii). Counsel to the President Alberto Gonzales apparently did not understand the Order. He claimed that it “covers only foreign enemy war criminals... and they must be chargeable with offenses against the international laws of war.” Alberto R. Gonzales, Martial Justice, Full and Fair, N.Y. TIMES, Nov. 30, 2001, at A27. See also George Lardner, Legal Scholars Criticize Wording of Bush Order, WASH. POST, Dec. 3, 2001, at A10; sources cited infra note 52 and accompanying text (regarding other claims of Mr. Gonzales); 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? at 25–26 & n.68, 28 (Dec. 2001), http://www abcny.org/pdf/Should%20the%20Laws%20be%20Silent.pdf (last visited Feb. 18, 2002) [hereinafter N.Y. City Bar Report]. The ill-conceived order was apparently prepared by only a few new White House and Department of Justice lawyers who failed to seek input from those at the Departments of State or Defense or other JAG lawyers familiar with international law. See, e.g., Josh Tyrangiel, The Legal War: and Justice For . . ., TIME, Nov. 26, 2001, at 66 (naming deputy assistant attorney general John Yoo and deputy White House counsel Tim Flanigan as individuals that “felt that offshore military tribunals would be upheld without much problem”); Toni Locy & Richard Willing, Proposal Would Widen Defendants’ Rights, USA TODAY, Dec. 31, 2001, at 9A (noting that in the face of widespread criticism DOD lawyers have attempted to form rules of procedure that meet some of the international law concerns despite inconsistent language in the order).
criminal cases in the United States district courts." This statement defies logic since its validity must be tested contextually, yet it was made before the creation of any military commission for trial of any particular persons and before any particular rules of evidence had been devised by the Secretary of Defense. In addition, it purports to apply to every future military commission created under the Order regardless of its location or time of creation or other relevant circumstances.

In its present form and without appropriate congressional intervention, the Military Order will create military commissions that involve unavoidable violations of international law and raise serious constitutional challenges. Both problems might undermine overall prosecutorial efforts. Further, exclusive jurisdiction in military commissions is needlessly limiting of U.S. options in the long-term fight against international terrorism. New ad hoc rules of procedure, changeable by the Secretary of Defense, might solve some of the problems created by the Military Order, but issues concerning the validity of certain rules of procedure exist since they are inconsistent with requirements under the Order. Some of the problems have not been solved, and today’s rules might be changed.

When I was a Captain on the faculty of the U.S. Army JAG School during the Vietnam War, we took a different approach when we drafted a military commission to try ex-service persons for alleged war crimes. The Department of Defense also prepared a study on such a commission in 1970. Government officials and/or President Nixon rejected these ideas, however, stating that it was politically “too hot” to prosecute, thus

4. Military Order, supra note 1, § I(f).

5. The statement apparently involved an attempt to comply with the congressional mandate in 10 U.S.C. § 836(a) that military commissions follow, to the extent practicable, “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.” 10 U.S.C. § 836(a) (2000). Since the President is bound by the U.S. Constitution to faithfully execute the law (U.S. Const. art. II, § 3) and Congress has created a legislative mandate concerning rules of evidence to be applied in military commissions, the judiciary should not accept a sweeping and illogical statement concerning what is allegedly not practicable for every military commission now and in the future. See generally Woods v. Cloyd W. Miller Co., 333 U.S. 138, 146–47 (1948) (Jackson, J., concurring); Sterling v. Constantin, 287 U.S. 378, 400–01 (1932) (“What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”); JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 469–78 (1996) [hereinafter INT’L LAW AS LAW OF THE U.S.]; N.Y. City Bar Report, supra note 3, at 9–10 & n.31 (noting 10 U.S.C. § 821 sets limits regarding jurisdiction), 19 (stating exclusive jurisdiction conflicts with the congressional mandate of concurrent jurisdiction in 10 U.S.C. §§ 818, 821).

6. Military Order, supra note 1, § I(c).

7. Military Orders, Dep’t of Defense, Office of the General Counsel and Dep’t of the Army, OTJAG, MJ 1970 (copy on file with the author) [hereinafter 1970 DOD Study].
setting up a continual violation of the obligations of the United States under international law to bring those reasonably accused into custody and then to initiate prosecution or to extradite them to another country.\(^8\)

The military commission, as envisioned in the JAG school proposal and DOD study, would have generally followed the Federal Rules of Criminal Procedure and it was hoped to have former federal judges as judges in order to assure that convictions were less likely to be challenged in view of the expansion of due process guarantees since World War II. The 1970 DOD study noted that jury trials would not be required, but “specific protections of the Bill of Rights, unless made inapplicable to military trials by the Constitution itself, have been held applicable to courts-martial,” and “[b]oth logic and precedent indicate that a lesser standard for military commissions would not be constitutionally permissible.”\(^9\) Further, “Congress directed the President to establish procedures for courts-martial or other military tribunals which follow, to the extent practicable, the principles of law and rules of evidence generally followed in United States district courts.”\(^10\) Thus, the

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10. Id. tab G, at 2 (citing 10 U.S.C. § 836). See also sources cited infra notes 32, 48, 51. Under Article II, § 3 of the U.S. Constitution, the President is bound to faithfully execute such law as well as relevant international law. U.S. Const. art. II, § 3. With respect to the President’s constitutionally-based duty to comply with international law, see, for example, Int’l. Law as Law of the U.S., supra note 5, at 143–66, and the numerous cases cited therein; Jordan J. Paut, Paquete and the President: Rediscovering the Brief for the United States, 34 Va. J. Int’l. L. 981 (1994).

Additionally, federal statutes, such as 10 U.S.C. §§ 821, concerning jurisdiction of military commissions, and 836, concerning procedures to be followed, must be construed consistently with international law. 10 U.S.C. §§ 821, 836. They “can never be construed to violate ... rights ... further than is warranted by the law of nations as understood in this country.” Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804). See also, Int’l. Law as Law of the U.S., supra note 5, at 107 n.9, passim; Jordan J. Paut et al., International Law and Litigation in the U.S. 141–42 (2000) [hereinafter Int’l Law and Litigation]; Manual for Courts-Martial, United States pmbl. § 2(b)(2) (2000) (“Subject to any applicable rule of international law or to any regulations prescribed by the President or by other competent authority, military commissions ... shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial.”) Thus, §§ 821 and 836 must be interpreted consistently with the confluence of human rights, denial of justice, law of war, and other international law requirements noted in this essay.
DOD study recommended that "procedures adopted should provide every safeguard which an accused would be entitled to in a court-martial or a Federal district court."

Previously, in 1951, the United Nations Command in Korea had set up other military commissions on paper. They were never activated but would have guaranteed the same procedural rights to due process that existed in general courts-martial in the U.S. military and that are required under the 1949 Geneva Convention Relative to the Treatment of Prisoners of War. These rights included the right to counsel, to a "reasonable opportunity to consult with his Counsel before and during trial," to at least three weeks notice of charges before trial and at least two weeks to prepare a defense, to interpretation of charges and "the substance of the proceedings" as well as any documentary evidence, to remain silent, to cross-examine adverse witnesses, to a presumption of innocence "until his guilt is established by legal and competent evidence
beyond a reasonable doubt,” to trial in compliance with “the rules of evidence prescribed in the Manual for Courts-Martial, United States, 1951,” and to an appeal.13

The President’s Commander-in-Chief power to set up military commissions applies only during actual war within a war zone or relevant occupied territory and apparently ends when peace is finalized.14 The United States was clearly at war (however undeclared) in Afghanistan after the insurgency between the Taliban and the Northern Alliance was upgraded to an international armed conflict when the United States used military force in Afghanistan on October 7. The United States was also at war in the Gulf region with respect to Iraq (i.e., regarding the continuing international armed conflict in that region), and both international armed conflicts triggered application of the 1949 Geneva Conventions and other customary laws of war, including various due process guarantees for criminal accused.15 While “war” remains in


14. See, e.g., In re Yamashita, 327 U.S. 1, 11–13 (1946) (“We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law of war committed before their cessation, at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government.”); Ex parte Quirin, 317 U.S. 1, 28 (1942); Cross v. Harrison, 57 U.S. (16 How.) 164, 190 (1853); 24 Op. Att’y Gen. 570, 571 (1903); INT’L CRIMINAL LAW, supra note 12, at 309–10; WINTHROP, supra note 11, at 86 (jurisdiction of military commissions “is determined by the existence and continuance of war”); 831 (jurisdiction is tied to the war powers, “exclusively war-court”). 836 (“A military commission . . . can legally assume jurisdiction only of offences committed within the field of the command of the convening commander,” and regarding military occupation, “cannot take cognizance of an offence committed without such territory . . . . The place must be the theatre of war or a place where military government or martial law may be legally exercised; otherwise a military commission . . . will have no jurisdiction . . . .”), 837 (“An offence . . . must have been committed within the period of the war or of the exercise of military government . . . [J]urisdiction . . . cannot be maintained after the date of a peace . . . .”); DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY 1068 (1912); Henry Wager Halleck, Military Tribunals and Their Jurisdiction, 5 AM. J. INT’L L. 958, 965–66 (1911) (Military commissions “are established by the President, by virtue of his war power as commander-in-chief, and have jurisdiction of cases arising under the laws of war. . . . [They] are war courts and can exist only in time of war”). Halleck was a General during the Civil War and a prominent international legal scholar who participated in the creation of the 1863 Lieber Code on the laws of war; Major Michael A. Newton, Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes, 153 MIL. L. REV. 1, 15 (1996); N.Y. City Bar Report, supra note 1, at 9; sources cited infra notes 77–78.

15. See generally INT’L CRIMINAL LAW, supra note 12, at 807–20. When an international armed conflict exists, certain persons are entitled to prisoner of war status under GPW Article 4. GPW, supra note 12, art. 4. It should be noted that the requirements of having “a fixed distinctive sign recognizable at a distance,” “carrying arms openly” during an attack, and generally following the laws of war appear only in Article 4(A)(2) with respect to members of certain “militias and members of other volunteer corps” and do not appear in 4(A)(1) regarding “[m]embers 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” or in 4(A)(3) regarding “[m]embers of regular armed forces who profess allegiance to a government or an entity not recognized by the Detaining Power.” Id. See also G.I.A.D. DRAPER, THE RED CROSS CONVENTIONS 52 (1958); 1 HOWARD S. LEVIE, THE CODE OF INTERNATIONAL ARMED CONFLICT 13–14 (1986); RICHARD I. MILLER, THE LAW OF WAR 29 (1975); George H. Aldrich, New Life for the Laws of War, 75 AM. J. INT’L L. 764, 768–69 (1981) (GPW Article 4(A)(2) criteria apply only to certain “irregular” armed forces and “[m]embers of regular, uniformed armed forces do not lose their PW [prisoner of war] entitlements no matter what violations of the law their units may commit, but the guerrilla unit is held to a tougher standard . . . .”). Cf. III PICTET, supra note 12, at 49, (1949 Convention did not follow the 1907 Hague Convention or 1929 Convention but listed separate categories of prisoners of war), 52 (noting States should also assure that members of armed forces are recognizable from civilians); Geneva Protocol I, supra note 12, arts. 43–44. “Any combatant . . . shall be a prisoner of war . . . except as provided in paragraphs 3 and 4” of Article 44; for example, some combatants may not qualify as prisoners of war if they do not distinguish themselves from the civilian population and if they do not carry their arms openly. Id. Even those who forfeit their prisoner of war status under the Protocol “shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention [GPW] and by this Protocol . . . .” Id. Further, the Protocol “is without prejudice to the right of any person to be a prisoner of war pursuant to Article 4” of GPW. Id. art. 44. Cf. FM 27–10, supra note 12, ¶¶ 73–74 (stating that members of armed forces also lose their prisoner of war status in such circumstances but are protected by the Geneva Civilian Convention). But see Ruth Wedgwood, The Rules of War Can’t Protect Al Qaeda, N.Y. TIMES, Dec. 31, 2001, at A17 (also assuming in error that unlawful combatants lose their right to “claim protection of the law” and stating that “it would be a mistake to demand for Al Qaeda and the Taliban leadership the full protections” of the Geneva Conventions). It is a war crime to engage in attacks out of uniform, but whether prisoner of war status is lost under the 1949 Convention is a separate issue. Even if prisoner of war status is lost, any criminal accused of terrorist activities has due process protections under the Geneva Conventions, Protocol I, human rights law, and other international laws as noted herein. There is no gap in protection and in case of doubt as to their status, all persons “having committed a belligerent act and having fallen into the hands of the enemy” shall enjoy prisoner of war protections “until such time as their status has been determined by a competent tribunal.” GPW, supra note 12, art. 5. Further, all such persons are entitled to the due process guarantees contained in GPW concerning trials of prisoners of war whether or not the person is being prosecuted for a crime that occurred prior to the creation of prisoner of war status. See id. art. 85; FM 27–10, supra note 12, ¶ 505(c) (“prisoners of war accused of war crimes benefit from the provisions of GPW, especially Articles 82–108”); III PICTET, supra note 12, at 413–23, 625, 628. There was a split in In re Yamashita whether Articles 60 and 63 of the old 1929 Convention applied to precapture offenses. Compare In re Yamashita 327 U.S. 1, 20–24 (1946) with id. at 74–76, 78 (Rutledge, J., dissenting). Whether or not the majority was in error, the materials cited above make it clear that the 1949 Conventions were changed and that due process provisions apply to all judicial proceedings against a prisoner of war. The International Committee of the Red Cross Commentary expressly notes In re Yamashita and that the 1949 changes provide due process protections for all prisoners of war with respect to all offenses. See, e.g., III PICTET, supra note 12, at 413, 415–18, 421–22; INTERNATIONAL COMMITTEE OF THE RED CROSS, 4 GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, COMMENTARY 349, 354 (Jean S. Pictet ed. 1958) [hereinafter IV PICTET]; GPW, supra note 12, art. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 70, 6 U.S.T. 3516, 75 U.N.T.S. 287, 332 [hereinafter GC or Geneva Civilian Convention].

Some persons accused of crimes arising from the September 11th attack may not have been prisoners of war prior to October 7th (see text and sources cited infra note 16), but might be prisoners of war thereafter if they meet the criteria set forth in Article 4 from Octo-
ber 7th until their capture. Members of the armed forces of the Taliban were clearly members of the armed forces of a “Party to the conflict” that occurred since October 7th within the meaning of GPW Article 4(A)(1). GPW, supra note 12, art. 4(A)(1). It is also probable that they had distinctive recognizable dress and openly carried arms. The word “Party” does not have the same meaning as, and is not limited to, state, nation, or government. Whether various al Qaeda units in Afghanistan were “militias or volunteer corps forming part of such armed forces” would have to be considered in context. Id. Concerning the dispute over whether they should be considered prisoners of war, see Bryan Bender, Red Cross Disputes US Stance on Detainees, BOSTON GLOBE, Feb. 9, 2002, at A1 (stating ICRC considers “both the Taliban and Al Qaeda fighters held by US forces . . . to be prisoners of war”); Tamara Lytle, Taliban, Al-Qaeda Captives Arrive as Rights Groups Fret, ORLANDO SENTINEL, Jan. 12, 2002, at A1; Thom Shanker & Katharine Q. Seelye, Behind-the-Scenes Clash Led Bush to Reverse Himself on Applying Geneva Conventions, N.Y. TIMES, Feb. 22, 2002, at A12 (stating the President’s reversal and application of the Geneva Conventions came after the State Department and Pentagon jointly opposed the administration’s lawyers in DOJ and White House Counsel Gonzales). Secretary of Defense Rumsfeld has stated that all al Qaeda members are “unlawful combatants.” John Hendren, ’Bad Guys’ 1st to Arrive at U.S. Base, L.A. TIMES, Jan. 12, 2002, at A1. This statement seems overly broad and of doubtful validity. It could also threaten the protection of U.S. military under GPW Article 4(A)(1) if they were captured by opposition forces. Under GPW Article 5, the status of the al Qaeda prisoners should be tested by a competent court or tribunal. GPW, supra note 12, art. 5. During an armed conflict, all persons who are not prisoners of war, including so-called unprivileged or unlawful combatants who may or may not have prisoner of war status, have at least various nonderogable rights to due process under the Geneva Conventional and Geneva Protocol I. See, e.g., IV PICTET, supra, at 595 (“applying the same system to all accused whatever their personal status”); FM 27-10, supra note 12, ¶ 73 (“If a person is determined by a competent tribunal, acting in conformity with Article 5, GPW, not to fall within any of the categories listed in Article 4, GPW, he is not entitled to be treated as a prisoner of war. He is, however, a ‘protected person’ within the meaning of Article 4, GC.” (citations omitted)); GC, supra, arts. 3(1)(d) (stating all captured persons “shall in all circumstances” be tried in “a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples” thus necessarily incorporating all such guarantees by reference and as nonderogable Geneva protections, including the customary guarantees mirrored in Article 14 of the International Covenant), 5; Geneva Protocol I, supra note 12, art. 75(4), (7). See also III PICTET, supra note 12, at 51 n.1 (“the Convention contains a safety clause for the benefit of persons not covered [as prisoners of war] . . . in Article 3”), 76, 423 (prisoners charged with war crimes retain benefits of the Convention). Today, common Article 3 of the Geneva Conventions provides customary minimum protections for all persons captured in any armed conflicts. See, e.g., Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 14, at ¶¶ 218, 255; Prosecutor v. Duško Tadić, 35 I.L.M 32, ¶¶ 65-74 (Int’l Tribunal for the Prosecution of Person Responsible for Serious Violations of Int’l Hum. Law Committed in the Territory of Former Yugoslavia 1995) (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction); INTERNATIONAL CRIMINAL LAW, supra note 12, at 692-95, 816. Additionally, all persons have minimum due process guarantees under human law.

The White House stated recently that the Geneva Convention will apply to the Taliban but not al Qaeda: al Qaeda “cannot be considered a state party to the Geneva Convention. Its members, therefore, are not covered by the Geneva Convention and are not entitled to POW status.” The White House added: “[t]he war on terrorism is a war not envisaged when the Geneva Convention was signed in 1949.” Katharine Q. Seelye, In Shift, Bush Says Geneva Rules Fit Taliban Captives, N.Y. TIMES, Feb 8, 2002, at A1. The White House statement demonstrates remarkable ignorance of the nature and reach of treaties and customary international law. First, any member of al Qaeda who is a national of a state that has ratified the relevant treaties is protected by them. Nearly every state, including Saudi Arabia, is a
Afghanistan, the United States can set up a military commission in Afghanistan (as a non-occupying power, with the consent of the new Afghan regime) to try those reasonably accused of war crimes,¹⁰ as it did

signatory to these treaties. Second, the 1949 Geneva Conventions are part of customary international law that is universally applicable in times of armed conflict and, as such, protect all human beings according to their terms. Third, common Article 3 provides nonderogable protections and due process guarantees for every human being who is captured and, like common Article 1, assures their application in all circumstances. Also, international terrorism and war in war are not new and clearly were contemplated during the drafting of the treaties. See, e.g., Jordan J. Paust, Terrorism and the International Law of War, 64 MIL. L. REV. 1 (1974); GC, supra, art. 33; IV PICTET, supra, at 31, 225–26, 594.

16. Whether war crimes were committed by Mr. bin Laden and his followers prior to October 7th is highly problematic, since he was not then a leader or member of a state, nation, belligerent, or insurgent group (or in a territory where such a group operated) that was at war with the United States. A different result would pertain if the Taliban had attacked the United States on September 11th and thus created a state of war with the United States. If it is assumed that the Taliban attacked the United States and did not merely harbor or receive money and other support from bin Laden and his followers, and if bin Laden was complicit in that attack, then bin Laden can be considered a complicit in certain war crimes. See, e.g., Jordan J. Paust, Addendum: War and Responses to Terrorism (Sept. 2001), available at www.asil.org/insights/insigh77.htm#adendum2; Jordan J. Paust, Addendum: Prosecution of Mr. bin Laden et al. for Violations of International Law and Civil Lawsuits by Various Victims (Sept. 21, 2001), available at www.asil.org/insights/insigh77.htm#adendum5; Warren Richey, Tribunals on Trial, THE CHRISTIAN SCIENCE MONITOR, Dec. 14, 2001, at 1 (quoting Professor Leila Sadat: not a war or war crimes on Sept. 11th). Under international law, war conduct and war crimes can occur at the hands of non-state actors, but they must be participants in a war or insurgency, or have achieved a status of belligerents or insurgents involved in an armed conflict. Al Qaeda did not meet insurgent criteria of controlling their own defined territory, having their own government, having an organized armed force, having their own stable population, or purporting to be or to have the characteristics of a state.

Any attempts to expand the concept of war beyond the present minimal levels of belligerency and insurgency would be extremely dangerous because certain forms of non-state actor violence and targetings that would otherwise remain criminal (even during an insurgency) could become legitimate. See TELFORD TAYLOR, NUREMBERG AND VIETNAM 19–20 (1970); Waldemar A. Solf, War Crimes and the Nuremberg Principle, in NATIONAL SECURITY LAW 359–61 (John Norton Moore et al. eds., 1990). Two such targetings could be the September 11th attack on the Pentagon and the earlier attack on the U.S.S. Cole, which during war are lawful military targets, and thus their targeting would be considered legitimate belligerent acts (assuming no other violations existed, such as attacking without uniforms or distinctive insignia). See William Glaberson, Critics’ Attack on Tribunals Turns to Law Among Nations, N.Y. TIMES, Dec. 26, 2001, at B1.

Section 1(a) of the November 13th Military Order states that “[i]nternational terrorists, including members of al Qaida have carried out attacks on [the U.S.]. . . on a scale that has created a state of armed conflict . . . .” Military Order, supra note 1, § 1(a). This, of course, is legal nonsense. Its acceptance would have unwanted consequences of legitimizing various attacks on proper military targets like the President and U.S. “military personnel and facilities” mentioned in that very section of the Military Order. Id. The President’s new and unique defense for prior and future non-state terrorists must be rejected.

Some may assume that a war necessarily exists whenever the United States has been subjected to an armed attack by a non-state actor that triggers a right of self-defense under Article 51 of the U.N. Charter. This would be incorrect. Self-defense is not limited to armed attacks by states, nations, or belligerents. See, e.g., Thomas M. Franck, Terrorism and the Right of Self-Defense, 95 AM. J. INT’L L. 839, 840 (2001); Jordan J. Paust, Responding Law-
with respect to the trial of General Yamashita for war crimes during World War II.

If the United States had been an occupying power in Afghanistan, it could have created a military commission in the occupied territory to try individuals for terrorism in violation of international law, genocide, other crimes against humanity, and aircraft sabotage in addition to war crimes. However, outside of the occupied territory, it is apparent that military commissions can only be constituted in an actual war zone and can only prosecute war crimes. In any event, pertinent Commander-in-Chief powers and jurisdictional competence of the antiterrorism military commissions appear to end when a relevant war (but not merely war hostilities) formally ends. Given such limitations, it does not seem to be in the long-term interest of the United States to state that only military commissions can prosecute persons covered by the Military Order who are reasonably accused of participating in prior and future acts of fully to International Terrorism: The Use of Force Abroad, 8 WHITTIER L. REV. 711, 716, 723, 729 (1986); Robert F. Turner, Legal Responses to International Terrorism: Constitutional Constraints on Presidential Power, 22 Hous. J. INT’L L. 77, 87, 89 (1999); U.N. S.C. Res. 1373, 56th Sess., 4385th mtg. pmbl. and ¶ 3(c), U.N. Doc. S/RES/1373 (2001); the Caroline Incident (1837), in 2 MOORE, DIGEST OF INTERNATIONAL LAW 409–14 (1906) (self-defense against insurgents).

17. Since their authority is tied to war powers, military commissions generally have jurisdiction only over war crimes, which are violations of the laws of war. See sources cited supra note 14; sources cited infra notes 41, 50, 77–78. 10 U.S.C. §§ 818 and 821 expressly confer jurisdiction for prosecution of violations of the law of war and are silent with respect to other crimes. 10 U.S.C. § 818, 821. Section 4(a) of the Military Order states that accused shall be tried for “offenses triable by military commission.” Military Order, supra note 1, § 4(a). Thus, one question is whether military commissions can address crimes other than war crimes. In practice, some have addressed other crimes under international law that occurred during war (such as crimes against humanity during World War II) when, but only when, the military commissions were convened in occupied territory. See, e.g., INTERNATIONAL CRIMINAL LAW, supra note 12, at 288–93. Occupying powers actually have a greater competence under the law of war to prosecute various crimes. See, e.g., GC, supra note 15, arts. 64, 66–68, 71–75, 147; Hague Convention No. IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, Annex, art. 43, 36 Stat. 2277, 1 Bevans 631. Since international law is part of the law of the United States and the President is bound to faithfully execute it (see text and sources cited supra note 10), the President actually has an enhanced power to execute laws of war that confer powers on an occupying power to prosecute crimes. Concerning enhancement of Executive power by international law, see, for example, INT’L LAW AS LAW OF THE U.S., supra note 5, at 6, 34–37 n.39, 72 n.82, 154 n.2, 159 n.36, 441, 464–65 n.62. Thus, when the United States is an occupying power, a military commission could prosecute crimes other than war crimes because of a special competence conferred by the law of war. When the United States is not an occupying power, it is apparent that military commission jurisdiction is limited to prosecution of war crimes. Concerning the issue whether the United States had been an occupying power of part of Afghanistan, see text and sources cited infra note 67. A recent A.B.A. resolution recommends that the military commissions prosecute only war crimes. See Jeff Blumenthal, ABA Overwhelmingly Votes to Favor Carbs on Bush’s Military Tribunals, LEGAL INTELLIGENCER, Feb. 5, 2002, at 24 [hereinafter A.B.A. res.].
international terrorism, as opposed to setting up a regional or more general international criminal court by Executive Agreement or using Article III federal courts. Like Article III courts, a regional or more general international criminal court with jurisdiction over impermissible acts of terrorism and related international crimes would be able to prosecute accused long after peace is reinstated in Afghanistan.

Additionally, the United States has told the world that it is fighting terrorism for democratic values and freedom. Certain forms of military commissions could appear to be most inappropriate in view of what the United States stands for and what it has told the world it is fighting for and against. Military commissions are generally suspect under newer international criminal law—human rights treaties and human rights law. In a landmark case in 1999, the Inter-American Court of Human Rights denounced the use of military commissions in Peru, ruling that civilians should have been tried in civilian courts, that accused were detained too long prior to charges or trial, that the right to be brought promptly before a judge must be subject to judicial control, that the right to judicial protection must include the right to habeas corpus petitions (which cannot be suspended during an emergency), that defense attorneys lacked access to witnesses and evidence and did not have adequate time to prepare their cases, that the accused must be able to cross-examine all witnesses against them, that trials cannot be held in secret, and that there must exist a right of appeal to an independent and impartial tribunal. Even earlier, in 1984, the Human Rights Committee created under the International Covenant declared that trial of civilians


19. See, e.g., the Inter-American Convention on the Forced Disappearance of Persons, June 9, 1994, 33 I.L.M. 1529, 1531, art. IX (“Persons alleged to be responsible . . . may be tried only in the competent jurisdictions of ordinary law in each state, to the exclusion of all other special jurisdictions, particularly military jurisdictions.”).

by military or special courts “should be very exceptional” and must “genuinely afford the full guarantees stipulated in article 14” of the treaty. The 1999 U.S. Department of State Country Report on Human Rights Practices for Peru noted particular human rights violations, including:

Proceedings in these military courts—and those for terrorism in civilian courts—do not meet internationally accepted standards of openness, fairness, and due process. Military courts hold treason trials in secret. . . . Defense attorneys in treason trials are not permitted adequate access to the files containing the State’s evidence against their clients. . . . 22

The 1999 Country Report on Egypt addressed denials of human rights to “fair public trial” in the military and State Security Emergency courts, noting particular infractions:

the military courts do not ensure civilian defendants due process before an independent tribunal. . . . There is no appellate process for verdicts issued by military courts; instead, verdicts are subject to a review by other military judges and confirmation by the President, who in practice usually delegates the review function to a senior military officer. Defense attorneys have complained that they have not been given sufficient time to prepare defenses and that judges tend to rush cases involving a large number of defendants.

. . . .

The State Security Emergency courts share jurisdiction with military courts over crimes affecting national security. . . . Sentences are subject to confirmation by the President but may not be appealed. 23

In addition, the 1999 Country Report on Nigeria addressed denials of rights to fair trial in prior military tribunals that sometimes used a presumption of guilt. “In most cases . . . the accused had the right to legal counsel, bail, and appeal,” but “decisions of the tribunals were exempt from judicial review.” 24

23. Id. at 2037–38.
24. Id. at 388.
At a minimum, U.S. military commissions must now comply with Article 14 of the International Covenant on Civil and Political Rights,\(^\text{25}\) which sets forth a minimum set of customary and treaty-based human rights to due process guaranteed to all persons in all circumstances by customary international law,\(^\text{26}\) the International Covenant,\(^\text{27}\) and thus also

\(^{25}\) International Covenant on Civil and Political Rights, Mar. 23, 1976, 999 U.N.T.S. 171, 176 [hereinafter International Covenant or ICCPR]. In times of armed conflict or occupation, rights under the 1949 Geneva Conventions and Protocol I will also be applicable. See, e.g., text and sources cited supra note 12; text and sources cited infra notes 31-32, 34-36, 39.


(As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence.)

\(^{27}\) International Covenant, supra note 25. When it ratified the International Covenant, the United States placed a declaration in its instrument of ratification that attempted to func-
by and through Articles 55(c) and 56 of the United Nations Charter. These rights include the general right of all persons “in full equality” to “a fair and public hearing by a competent, independent and impartial tribunal established by law,” although the press and public can be excluded for reasons, for example, of “public order (ordre public) or national security in a democratic society;” the right to be presumed innocent until proved guilty; the right to be informed “promptly and in

28. U.N. CHARTER art. 55(c), 56. Concerning the guarantee of customary human rights to all persons by and through the U.N. Charter, see, for example, Filartiga v. Pena-Irala, 630 F.3d 1282, 1284 (11th Cir. 2000) (noting that despite the declaration, the ICCPR is part of the supreme law of the land) aff’g 132 F. Supp. 2d 1036, 1040 n.8 (S.D. Fla. 2001) (holding the prohibition against private causes of action does not apply when raising “ICCPR claims defensively”). Additionally, the declaration is not relevant to the reach of customary human rights to due process (now reflected in Article 14 of the ICCPR), customary prohibitions of “denial of justice” to aliens, or customary human rights norms **jus cogens**.

29. International Covenant, supra note 25, art. 14, ¶ 1. See text supra notes 20, 22; United States ex rel. Knauff v. Shaughnessy, 338 U.S. 537, 551 (1950) (Jackson, J., dissenting) (“In the name of security the police state justifies its arbitrary oppressions on evidence that is secret . . . .”); Rafeedie v. INS, 880 F.2d 506, 516 (D.C. Cir. 1989). But see GPW, supra note 12, art. 105 (“exceptionally held in camera in the interest of State security”); GC, supra note 15, art. 74 (“as an exceptional measure, to be held in camera”). If full trials cannot be held in secret under the International Covenant and GPW, national security interests can nonetheless be accommodated through use of in camera inspection of materials and the closing of portions of proceedings to the general public. See Rome Statute of the International Criminal Court, supra note 12, arts. 68(2) (“to protect victims and witnesses or an accused, [the court may] conduct any part of the proceedings in camera”), 72 (regarding protection of national security information). Section 4(c)(4) of the Military Order directs the Secretary of Defense to devise rules of procedure that protect certain classified information from unauthorized disclosure. Military Order, supra note 1, § 4(c)(4).

30. International Covenant, supra note 25, art. 14, ¶ 2. Human rights and law of war treaties typically do not mention the standard of proof applicable to a suspect’s guilt, but the trend evident in rules of procedure and evidence in the newer international criminal tribunals, reflecting current and widespread opino juris concerning human rights to due process, is to require proof beyond a reasonable doubt. See, e.g., the Rome Statute of the International Criminal Court, supra note 12, art. 66(3) (“the Court must be convinced of the guilt of the accused beyond reasonable doubt”); Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia, Rule 87(A), U.N. Doc. IT/32/REV.13 (1998), in Basic Documents, International Tribunal for the Prosecution of Persons Responsible for
detail in a language [the accused] understands of the nature and cause of the charge against him;" the right "[t]o have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;" the right "[t]o be tried without undue delay;" the right "[t]o be tried in his presence, and to defend himself in person or through legal assistance of his choosing;" the right "[t]o examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf;" the right "[t]o have the

Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 119 (1998) [hereinafter ICTY Rules] ("A finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond a reasonable doubt."); U.N. Rules, supra note 13, Rule 32.

31. International Covenant, supra note 25, art. 14, ¶ 3(a)–(b). Concerning access to counsel and adequate time and facilities for preparation, see Report of the Mission, supra note 26, at 37–42; GPW, supra note 12, arts. 104–105; GC, supra note 15, art. 72; sources cited supra notes 13, 20, 22. See also GC, supra note 15, arts. 3(1)(d), 5, 71 (three weeks notice before trial), 76 ("right to be visited"). 146 ("In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Articles 105" and following of GPW); GPW, supra note 12, arts. 3(1)(d), 102, 129; Geneva Protocol I, supra note 12, art. 75(4)(a); U.N. Rules, supra note 13, Rules 25–27; IV PICTET, supra note 15, at 356–57, 595–96 (GC art. 146 guarantees are too numerous to list but include those mirrored in GPW arts. 87, 99, 101, 103, 105–106); SUBSTANTIVE AND PROCEDURAL ASPECTS, supra note 26, at 439–41, 531; RESTATEMENT, supra note 26, § 711 reporters’ note 4. The November 13th Military Order does not state that accused have a right to counsel of their choice. See Military Order, supra note 1, § 4(c)(5). However, it must be interpreted consistently with international law. See text and sources cited supra note 10; text and sources cited infra note 81.

Once a detainee is reasonably accused of a crime, the detainee should be provided notice of the right to counsel and foreign accused should be notified of the right to communicate with their government. Vienna Convention on Consular Relations, art. 36, 596 U.N.T.S. 261 (1963). Concerning notification under the Vienna Convention, see INT’L LAW AND LITIGATION, supra note 10, at 394–96; Frederic L. Kirgis, Restitution as a Remedy in U.S. Courts for Violations of International Law, 95 AM. J. INT’L L. 341 (2001). No logical reason exists why U.S. nationals should be informed of their rights without delay but foreign nationals should not.

32. International Covenant, supra note 25, art. 14, ¶ 3(c)–(e). See also sources cited supra notes 20, 26; GPW, supra note 12, art. 105; GC, supra note 15, arts. 3(1)(d), 72; Geneva Protocol I, supra note 12, art. 75(4)(g). Unlike U.S. practice, this does not include full cross-examination and does not seem to preclude every use of hearsay evidence. See, e.g., SUBSTANTIVE AND PROCEDURAL ASPECTS, supra note 26, at 448–49, 473–74, 460–62, 532–35, 556–57, 569–70, 580; PAUST ET AL., supra note 12, at 648–49; Rome Statute of the International Criminal Court, supra note 12, arts. 67–69, 72–73; Major Marsha V. Mills, War Crimes in the 21st Century, 3 HOFRNDA L. & POL’Y SYMP. 47, 55–56 (1999) (also addressing ICTY and ICTR decisions regarding permissible hearsay evidence); RESTATEMENT, supra note 26, § 711 reporters’ note 2; cf. sources cited supra note 20. The November 13th Military Order directs that orders and regulations prepared by the Secretary of Defense “shall ... provide for ... admission of ... evidence” of “probative value to a reasonable person.” Military Order, supra note 1, § 4(c)(3). However, the 1970 DOD study focused on Article 36 of the U.C.M.J. 10 U.S.C. § 836 (2000). The study noted that Congress has directed the President to follow rules of evidence, as far as practicable, that conform with those applicable in federal district courts. It concluded that “it would be difficult to argue that hearsay or other arguably probative but objectionable evidence would [be] permissible by
free assistance of an interpreter;" the right "[n]ot to be compelled to testify against himself or to confess guilt;" and the right to have "his conviction and sentence . . . reviewed by a higher tribunal according to law."3

Section 4(c)(8) of President Bush's November 13th Military Order requiring that orders and regulations issued by the Secretary of Defense shall provide for "submission of the record of the trial . . . for review and final decision" by the President or Secretary of Defense clearly violates the venerable human right to an appeal in a higher tribunal.34 Also,}

'practicality'" and, further, "the right to confront witnesses is clearly fundamental to a fair trial." See 1970 DOD Study, supra note 9, tab K. See also sources cited infra note 51. Additionally, prisoners of war must have at least the same due process rights that U.S. military personnel would have. See GPW, supra note 12, art. 102; III PICTET, supra note 12, at 623. See also GC, supra note 15, art. 146; IV PICTET, supra note 15, at 595-96 ("the same system" is required for civilians and others protected by the Convention who are prosecuted for war crimes); Geneva Protocol I, supra note 12, art. 75(1); sources cited infra note 39. Further, human rights law requires equal protection for all accused. See sources cited infra notes 37-38. Prisoners of war are also specifically entitled to "the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the" United States. See GPW, supra note 12, art. 105.

33. International Covenant, supra note 25, art. 14, ¶ 3(f)-(g), 5.

34. See id. § 7(b)(2)(i). Concerning related denials of appeal see also infra text accompanying notes 57-61. With respect to prisoners of war, the November 13th Military Order would also violate the Geneva Conventions. See GPW, supra note 12, arts. 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 quashing or revising of the sentence or the reopening of the trial."); Geneva Protocol I, supra note 12, art. 75(4)(j). The European Court of Human Rights has ruled that British military tribunal use of appointment of members and review by the convening authority violates the suspects' rights to a fair trial by an independent and impartial tribunal and to an appeal by a tribunal reflected in Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 6, 213 U.N.T.S. 221; Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 22, 1984, art. 2(1). See, e.g., Findlay v. United Kingdom, 30 Eur. Ct. H.R. 263 (1997). See also R. v. Généreux, [1992] S.C.R. 259 (Canadian military tribunals lacked independence and impartiality in violation of the Canadian Charter); Report of the Secretary-General, supra note 26 (human right to appeal is fundamental); Bucherer supra note 20; Constitutional Rights Project v. Nigeria, African Commission on Human and Peoples' Rights, Comm. No. 60/91, ACHPR/RPT/8th/Rev.1, Annex VI, at 4 (1994-95), reproduced in part in FRANCISCO MARTIN ET AL., INTERNATIONAL HUMAN RIGHTS LAW & PRACTICE 607-08 (1997); U.S. Dep't of State Country Reports on Human Rights Practice for 1999, supra notes 22-24, at 379, 1292, 2031. Concerning appellate review of U.S. courts-martial decisions, see, for example, 10 U.S.C. §§ 866–867(a), 869 (2000). As the above demonstrate, presidential review in place of an appellate tribunal would also violate the customary human right to independent and impartial justice. The recent A.B.A. resolution also recommended "certiorari review
under Article 7 of the International Covenant and customary human rights law, torture and cruel or inhumane treatment of any detained person clearly would be illegal. 35 Politically at least, other common rules of evidence adopted by the International Criminal Tribunals for the Former Yugoslavia and for Rwanda should form part of the minimum set of due process guarantees under rules of procedure and evidence of any military commission that the United States creates. Additionally, foreign states cannot lawfully extradite accused to the United States when there is a real risk that their human rights and/or protections under the Geneva Conventions will be violated. 36 Similarly, other states cannot lawfully

by the U.S. Supreme Court (in addition to the right to petition for a writ of habeas corpus). 37 See A.B.A. res., supra note 17.

35. See, e.g., Abbebe-Jira v. Negewo, 72 F.3d 844, 845-46 (11th Cir. 1996); Katik v. Karadzic, 70 F.3d 232, 237, 243 (2d Cir. 1995), cert. denied, 518 U.S. 1005 (1996); Filartiga v. Pena-Iralu, 630 F.2d 876, 882-84 (2d Cir. 1980); Estate of Cabello v. Fernandez-Larios, 157 F. Supp. 2d 1345, 1360-61 (S.D. Fla. 2001); Xuncal v. Gramajo, 886 F. Supp. 162, 184-87 (D. Mass. 1995). See also INT'L LAW AND LITIGATION, supra note 10, at 274-342. Such conduct would also be illegal under the Geneva Conventions regardless of the status of accused (e.g., as a prisoner of war or civilian, terrorist or terrorist supporter); GPW, supra note 12, arts. 3, 13-14, 87, 99, 130; GC, supra note 15, arts. 3, 27, 31-33, 147; Geneva Protocol I, supra note 12, arts. 75(1) and (2), 85(3). Section 3(b) of the Military Order rightly requires that persons subject to the order "shall be . . . treated humanely . . . ." Military Order, supra note 1, § 3(b). Additionally, the Rome Statute of the International Criminal Court, states that "[e]vidence obtained by means of a violation of this Statute or internationally recognized human rights shall not be admissible if: (a) The violation casts substantial doubt on the reliability of the evidence; or (b) The admission of the evidence would be antithetical to and would seriously damage the integrity of the proceedings." Rome Statute of the International Criminal Court, supra note 12, art. 69(7). See also Case 11.0006, Inter-Am. C.H.R. 71, OEA/Ser.L/V/II.88, doc. 9 rev. (1995) (exclusionary rule applies to material seized during violation of due process and other rights), reproduced in part in MARTIN, ET AL., supra note 31, at 644-46; Kirgis, supra note 31, at 346-48.

36. See, e.g., Chahal v. United Kingdom, 22 Eur. Ct. H.R. 1831, 1832 (1996); Soering v. United Kingdom, 161 Eur. Ct. H.R., Ser. A (1989). See also U.N. CHARTER arts. 55(c), 56 (duty to take action to achieve universal respect for and observance of human rights); GPW, supra note 12, art. 12 (transference must be willing and able to comply with the Convention); GC, supra note 15, art. 1 (It is the duty of all signatories "to respect and to ensure respect for the present Convention in all circumstances."); Geneva Protocol I, supra note 12, art. 88(2)-(3); IV PICTET, supra note 15, at 16. Spain has already indicated that it will not extradite eight persons suspected of complicity in the September 11th attack unless the United States agrees that they will not be tried in a military commission. See, e.g., Sam Dillon & Donald G. McNeil, Jr., Spain Sets Hurdle for Extraditions: Tells U.S. That Terror Suspects Must Receive Civilian Trials, N.Y. TIMES, Nov. 24, 2001, at A1 (adding that "a senior European Union official . . . doubted that any of the 15 [EU] nations . . . would agree to extradition that involved the possibility of a military trial."). Shanker and Seelye, supra note 15, ("Britain and France warned they might not turn over Taliban and Al Qaeda fighters captured by their troops in Afghanistan unless Mr. Bush" pledges to honor the Geneva Conventions.). Further, an occupying power cannot transfer a person protected under the Geneva Civilian Convention out of occupied territory. See, e.g., GC, supra note 15, arts. 49, 66, 76, 147; Geneva Protocol I, supra note 12, art. 85(4)(a); Rome Statute of the International Criminal Court, supra note 12, art. 8(2)(a)(vii) and (b)(viii).
tolerate violations of human rights and laws of war by U.S. military commissions operating within their territories.

An additional human rights violation is built into the present Military Order. Section 2(a) limits applicability of the Order to "any individual who is not a United States citizen." Thus, the enforcement of U.S. and/or international laws through military commissions will unavoidably involve national or social origin discrimination and a denial of equal protection of the law in violation of customary and treaty-based human rights law, as well as various provisions of the Geneva Conventions and Protocol I.


38. On the prohibition of a denial of equal protection of the law, especially concerning enforcement in courts or tribunals, see, for example, International Covenant, supra note 25, arts. 14(1) ("All persons shall be equal before the courts and tribunals.") and (3) ("everyone shall be entitled to the following minimum guarantees, in full equality"), 26 ("All persons are equal before the law and are entitled without any discrimination to the equal protection of the law."); Universal Declaration of Human Rights, supra note 37, arts. 2, 7. Additionally, bilateral friendship, commerce, and navigation treaties often require access to courts and equality of treatment. See, e.g., Restatement, supra note 26, § 713(2) and cmt. h, reporters’ note 3; Wilson, Access-to-Courts Provisions in United States Commercial Treaties, 47 Am. J. Int’l L. 20 (1953); Asakura v. City of Seattle, 265 U.S. 332, 340–41 (1924); Provisional Agreement in Regard to Diplomatic and Consular Representation, Juridical Protection, Commerce, and Navigation, Nov. 7, 1933, U.S.—Saudi Arabia, art. II, 1933 U.S.T. Lexis 55 (nationals of one country in the “territories and possessions” of the other country “shall enjoy the fullest protection of the laws and authorities of the country, and they shall not be treated ... in any manner less favorable than the nationals of any other foreign country.”).

39. Prisoners 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...." GPW, supra note 12, art. 102. See also id. arts. 106, 129, 130; GC, supra note 15, arts. 3(1)(d), 146; Geneva Protocol I, supra note 12, art. 75(1) (no adverse discrimination is allowed and courts must be "regularly constituted" and utilize "regular judicial procedures"); IV Pictet, supra note 15, at 595–96 (GC requires provision of "the same system to all accused whatever their personal status" and GC art. 146 guarantees for civilians and others protected by the Convention who are prosecuted for war crimes are too numerous to list but include those mirrored in GPW arts. 87, 99, 101, 103, 105–106); Rome Statute of the International Criminal Court, supra note 12, art. 8(2)(b)(xiv);
allow hearsay and other evidence that would be inadmissible in federal district courts or courts-martial, allow conviction or sentencing by a percentage of a panel that is less than that required in federal district courts or courts-martial, create an appellate process that is not the same as that available to U.S. nationals, and/or deny habeas corpus to foreign nationals prosecuted abroad would violate equal protection guarantees. In addition, no rational and lawful reason exists why U.S. military tribunals must follow certain procedures during trials of U.S. nationals but cannot follow the same procedures during trials of foreign accused, especially when several foreign nationals have already been indicted, convicted, or are being prosecuted in federal district courts. Claims that some foreign accused should be relegated to military commissions with less due process protections because application of the same rules of procedure and evidence mirrored in the Federal Rules of Criminal Procedure might not facilitate conviction are facially unacceptable.

There are also important constitutional issues involving due process, especially in view of the rationale in Reid v. Covert concerning the lawful power or authority of the government of the United States (de-
spite cases like *Eisentrager* 41). The Reid rationale is consistent with the fundamental myth system adopted since the Founders that ours is a government of delegated powers and one that is entirely a creature of the Constitution and has no power or authority to act here or abroad inconsistently with the Constitution. 42 Under this approach, the major question is not whether aliens abroad in time of war have rights, but whether our government has any power or delegated authority to act inconsistently with the Constitution. 43 Additionally, the rationale in

41. Johnson v. Eisentrager, 339 U.S. 763 (1950) (involving the limiting circumstance of arrest and prosecution in China of war-time enemy belligerents for war crimes committed “by engaging in, permitting or ordering military activity against the U.S. after surrender of Germany and before surrender of Japan”). *Eisentrager* occurred prior to Reid and did not use the lawful powers approach which was identified in the Reid rationale. See id. *Eisentrager* also occurred prior to many major developments in human rights law regarding due process. Nonetheless, it held by merely a 6–3 vote that enemy alien belligerents “engaged in the hostile service of a government at war with the United States” charged and prosecuted in a foreign country for war crimes have no constitutional “right of security or an immunity from military trial and punishment” and could not seek relief by habeas corpus. *Id.* at 771, 781, 785. Concerning the limited reach and suspect precedential authority of *Eisentrager*, see also United States v. bin Laden, 132 F. Supp. 2d 168, 181–83 & n.10 (S.D.N.Y. 2001); United States v. Yunis, 681 F. Supp. 909, 916 & n.13 (D.D.C. 1988), rev'd on other gds., 859 F.2d 953 (D.C. Cir. 1988); Jordan J. Paust, An Introduction to and Commentary on Terrorism and the Law, 19 CONN. L. REV. 697, 726–34 (1987); text infra notes 63–67. But see Paul B. Stephon III, Constitutional Limits on the Struggle Against International Terrorism: Revisiting the Rights of Overseas Aliens, 19 CONN. L. REV. 831, 834–45 (1987). There are also serious questions whether bin Laden and his followers were enemy alien belligerents or committed war crimes on September 11th. See text and sources cited supra note 16.


43. See *Reid v. Covert*, 354 U.S. at 5–6, 12, 35 n.62. See also Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 668 n.5 (1974), quoting Mora v. Mejias, 206 F.2d 377, 382 (1st Cir. 1953) (“there cannot exist under the American flag any governmental authority untrammeled by the requirements of due process of law as guaranteed by the Constitution of the United States.”); Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 585 (1952) (President’s power “must stem either from an act of Congress or from the Constitution itself.”); id. at 646, 649–50 (Jackson, J., concurring) (the President’s power to execute law “must be matched against words of the Fifth Amendment” and the Founders omitted “powers ex necessitate to meet an emergency”); *Ex parte Quirin*, 317 U.S. 1, 25 (1942) (“Congress and the President . . . possess no power not derived from the Constitution.”); *Balzac v. Porto Rico*, 258 U.S. 298, 312–13 (1922) (“The Constitution of the United States is in force . . . wherever and whenever the sovereign power of that government is exerted.”); United States v. Lee, 106 U.S. 196, 200 (1882); United States v. Worrall, 2 U.S. (2 DalI.) 384, 393–94 (C.C. Pa. 1798) (“government can never assume any power, that is not expressly granted by that instrument, nor exercise a power in any other manner that is there prescribed.”); *Int’l. Law As Law of the U.S.,* supra note 5, at 329, 333–34, 469–78, passim.

44. See Paust, supra note 41, at 722–34; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120–23, 127, 131 (1866) (recognizing that the Executive has no powers outside the Constitution or ex necessitate, that the Constitution “covers within the shield of its protection all classes of men, at all times, and under all circumstances,” and, importantly, that trials must occur in federal district courts when such courts are reasonably available.). With respect to human rights, *Milligan* also affirmed: “By the protection of the law human rights are secured; withdraw that protection, and they are at the mercy of wicked rulers. . . .” *Id.* at 119.
Verdugo-Urquidez,\textsuperscript{45} noting language in the Fourth Amendment that differs from words in the Fifth and Sixth Amendments (which can apply to aliens),\textsuperscript{46} could form an additional basis for Supreme Court recognition consistent with that of many lower federal courts that Fifth and Sixth Amendment rights apply to aliens abroad.\textsuperscript{47} Several courts have also recognized that international law can inform the meaning of "due process" protected by the Fifth Amendment here and abroad.\textsuperscript{48} Yet, what process is constitutionally due abroad, viewed contextually and as informed by international law, might not be the same as that required in a federal district court.\textsuperscript{49}

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46. See id. at 265–66 (noting that the phrase "the people" in the Fourth Amendment refers to a class of people with a "sufficient connection with this country" in contrast with "person" and "accused" used in the Fifth and Sixth Amendments). Cf. id. at 269 (discussing Eisenhart holding); Int’l Law and Litigation, supra note 10, at 209–10. Reid also recognized that the Fifth and Sixth Amendments "are ... all inclusive with their sweeping references to 'no person' and to 'all criminal prosecutions.' " Reid v. Covert, 354 U.S. at 8 (1957). The Fourteenth Amendment also provides equal protection guarantees to "any person" and such guarantees have been applied to the federal government through the Fifth Amendment. See, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 215 (1995).
47. See, e.g., In re Yamashita, 327 U.S. 1, 26–27 (1946) (Murphy, J., dissenting); id. at 79–81 (Rutledge, J., dissenting); United States v. Caicedo, 47 F.3d 370, 371–72 (9th Cir. 1995); United States v. Toscanino, 500 F.2d 267, 276–80 (2d Cir. 1974); United States v. Yunis, 681 F. Supp. 909, 911, 916–18 & nn.13–14 (D.D.C. 1988); United States v. Tiede, 86 F.R.D. 227, 259 (1979) (also recognizing the reach of the Fifth and Sixth Amendments to any "person" or "accused"). See also Dostal v. Haig, 652 F.2d 173, 176–77 (D.C. Cir. 1981) ("We accept, arguendo, [Judge Stern's] attractive position that the Bill of Rights is fully applicable to govern the conduct . . . in Berlin . . ."); Turman v. United States, 115 F. Supp. 457 (Ct. Cl. 1953) (Fifth Amendment applies abroad regarding taking of alien property). Cf. Harbury v. Deutch, 233 F.3d 596, 602–04 (D.C. Cir. 2000) (distinguishing, among others, cases applying the Fifth Amendment to conduct in "territories controlled by the U.S." or to conduct in foreign territory when an accused is later subject to "trial in a United States court."). There was no consideration of relevant international law or its use as an interpretive aid. Id. at 603–04.
48. See, e.g., In re Yamashita, 327 U.S. at 26–28 (Murphy, J., dissenting); United States v. Caicedo, 47 F.3d at 372; United States v. Davis, 905 F.2d 245, 249 n.2 (9th Cir. 1990), cert. denied, 498 U.S. 1047 (1991); Int’l Law as Law of the U.S., supra note 5, at 192, 196, 248 n.392 (citing several Supreme Court and other courts’ decisions addressing human rights and due process under the Fifth and Sixth Amendments), 254–55 n.459 (same). In 1814, Justice Story, in his dissent, affirmed the unswerving expectation that the President "cannot lawfully transcend the rules of warfare established among civilized nations. He cannot unlawfully exercise powers or authorize proceedings which the civilized world repudiates and disclaims." Brown v. United States, 12 U.S. (8 Cranch) 110, 153 (1814) (Story, J., dissenting). Verdugo-Urquidez also recognized that restrictions on government conduct can be imposed by treaty despite inapplicability of the Fourth Amendment to aliens abroad. See 494 U.S. 259, 275 (1990).
49. See text and sources cited supra notes 29, 32. Whether or not the Fifth Amendment applies abroad in a certain way, due process and equal protection requirements under international human rights law, other treaties, and laws of war will still apply. See also text and sources cited supra notes 10, 37–39; text infra notes 72–75.
In view of Milligan,\textsuperscript{50} it appears that removal of certain accused from the United States, where Article III district courts are clearly available, to a military commission in Afghanistan or some other foreign territory would be constitutionally impermissible. Mr. bin Laden and several of his entourage, including Mr. Moussaoui, have already been indicted in a federal district court, and some have been convicted.\textsuperscript{51} Besides being unconstitutional under Milligan when Article III courts are available, Sections 2(b) ("is tried only in accordance with Section 4"), 4(a) ("shall . . . be tried by military commission"), and 7(b)(1) ("military tribunals shall have exclusive jurisdiction") of the Military Order needlessly attempt to limit U.S. prosecutorial options.

Another specific question is whether the President, without approval by Congress, has the power to suspend habeas corpus, as he attempts to do under Section 7(b)(2)(i) of the November 13th Military Order.\textsuperscript{52} Although President Lincoln did so during the Civil War, such

\textsuperscript{50} Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). See text and sources cited supra note 44; see also Duncan v. Kahanamoku, 327 U.S. 304, 326 (1946) ("Only when a foreign invasion or civil war actually closes the courts and renders it impossible for them to administer criminal justice can martial law validly be involved to suspend their functions."); United States v. Averette, 19 C.M.A. 363, 365 (1970) (noting "words 'in time of war' mean, for the purposes of Article 2 (10) [of the U.C.M.J., 10 U.S.C. § 802 (10) ] . . . . a war formally declared by Congress:" the Vietnam War was not such a war, and military courts therefore do not have jurisdiction over civilians). Cf. Ex parte Quirin, 317 U.S. 1, 23–24 (1942) (noting that federal courts were open). Ex parte Quirin distinguished Milligan by noting that the case at hand involved offenses against the laws of war committed by enemy belligerents whereas Milligan involved an accused who was not an enemy belligerent and was not subject to the law of war. See Ex parte Quirin, 317 U.S. at 45–46. There are serious questions whether bin Laden and his followers were enemy belligerents or committed war crimes on September 11th. See text and sources cited supra note 16.


\textsuperscript{52} The language in the Order is extremely broad and clearly attempts to deny habeas corpus: "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States . . . ." Military Order, supra note 1, § 7(b)(2). See also N.Y. City Bar Report, supra note 3, at 2. Professor Peter Raven-Hansen agrees and noted that the word "privilege" appears rarely in the U.S. Constitution and is used uniquely in connection with the suspension of habeas corpus provision found in Article I, Section 9, concerning congressional power. Workshop for Federal District Judges II, Federal Judicial Center, Dec. 4, 2001, San Diego (oral remarks during a panel session at which the author also participated). Counsel to the President Alberto Gonzales was in extreme error
action is constitutionally suspect, especially since suspension is addressed in Article I, Section 9, of the Constitution in connection with congressional powers, and Congress actually ratified Lincoln’s action in 1863.\footnote{33} Further, habeas corpus or certiorari review was available to accused in \textit{Ex parte Quirin} and \textit{In re Yamashita}, and such review has been expanded in cases like \textit{Calley v. Callaway}.\footnote{34} Additionally, the Court in \textit{Ex parte Quirin} recognized that military commission decisions can be “set aside by the courts” when there is “clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted,”\footnote{55} and affirmed that “the duty ... rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty.”\footnote{56} Like the Bush Military Order, President Roosevelt’s 1942 Proclamation concerning persons subject to trial by military commission attempted to deny “all such persons ... access to the courts.”\footnote{55} The Executive argued that if when he wrote: “The order preserves judicial review in civilian courts. Under the order, anyone arrested ... will be able to challenge the lawfulness of the commission’s jurisdiction through a habeas corpus proceeding in a federal court.” Gonzales, \textit{supra} note 3. This is the same person who, as General Counsel to Governor George Bush and in response to a letter from the Office of the Legal Adviser of the U.S. Department of State in 1997 inquiring about implementation of the Vienna Convention on Consular Relations (a treaty ratified by the United States), wrote: “Since the State of Texas is not a signatory to the Vienna Convention ..., we believe it is inappropriate to ask Texas to determine whether a breach” occurred. Letter of June 16, 1997, quoted in part in \textit{INT’L LAW AND LITIGATION}, \textit{supra} note 10, at 390-91. \textit{But see} U.S. CONST. art. VI, cl. 2.

\footnote{33}{33} \textit{See Youngstown Sheet & Tube Co. v. Sawyer}, 343 U.S. 579, 631 n.1 (Douglas, J. concurring), citing \textit{Ex parte Merryman}, 17 F. Cas. 144 (C.C. Md. 1861) (No. 9,487) (noting the President alone has no power to suspend the writ of habeas corpus); JOSEPH STORY, \textit{COMMENTARIES ON THE CONSTITUTION} 342 (1883); N.Y. City Bar Report, \textit{supra} note 3, at 3 (“the power to suspend habeas corpus is vested by Constitution only with the Congress”), 21-22 & n.61, 25. Moreover, congressional participation seems critical for an adequate check and balance of powers, especially when suspension of the writ can preclude even the limited judicial role in the check and balance process available through habeas corpus review.

\footnote{34}{34} \textit{Calley v. Callaway}, 519 F.2d 184, 194–202 (5th Cir. 1975), \textit{cert. denied}, 425 U.S. 911 (1975) (noting inquiry into errors of “substantial constitutional dimension” such as those “so fundamental as to have resulted in a gross miscarriage of justice” is also permitted). Since international law is supreme federal law with constitutional bases and moorings (see text and sources cited \textit{infra} note 75), it would appear to be appropriate under even habeas review to address violations of international law that have such a substantial dimension or that would result in a gross miscarriage of justice.

\footnote{55}{55} \textit{Ex parte Quirin}, 317 U.S. 1, 25 (1942).

\footnote{56}{56} \textit{Id.} at 19. \textit{See also Ex parte Yerger}, 75 U.S. (8 Wall.) 85, 102–03 (1868) (regarding review of the trial of a civilian by a military commission, the Court “in the exercise of its appellate jurisdiction, may, by the writ of habeas corpus, aided by the writ of certiorari, revise” lower military or judicial decisions).

\footnote{57}{57} \textit{Ex parte Quirin}, 317 U.S. at 23; Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942) (containing nearly the same language found in Section 7(b)(2)(i) of the Bush Military Order).
the President’s 1942 Proclamation “has force, no court may afford the petitioners a hearing.”\textsuperscript{58} Importantly, the Supreme Court emphatically denied that such a power is held by the President:

neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners’ contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.\textsuperscript{59}

Similarly, in \textit{In re Yamashita} the Court affirmed that generally the Executive “could not . . . withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.”\textsuperscript{60} Justice Murphy also noted in dissent that all of the Justices had agreed that an Executive assertion that military trials of war criminals are “completely outside the arena of judicial review, has been rejected fully and unquestionably,” that “the writ of habeas corpus is available,” and that its “ultimate nature and scope . . . are within the discretion of the judiciary unless validly circumscribed by Congress.”\textsuperscript{61} Thus, the attempt in Section 7(b)(2)(i) of the November 13th Military Order to preclude “any remedy or . . . proceeding . . . in any court of the United States”\textsuperscript{62} has been foreclosed by the Supreme Court in \textit{Ex parte Quirin} and \textit{In re Yamashita}.

The only limitation approved by the Court appears in a 6–3 decision in \textit{Eisentrager}, where the majority concluded that enemy alien belligerents “engaged in hostile service of a government at war with the United States” captured, charged and prosecuted in China for war crimes committed in China have no right to seek relief by habeas corpus.\textsuperscript{63} As noted by Justice Black in dissent, the majority “expressly disavows conflict with the \textit{Quirin} and \textit{Yamashita} decisions” and relied solely “on the fact that they were captured, tried and imprisoned outside our territory.”\textsuperscript{64} The majority had distinguished \textit{Yamashita} because the capture and trial of General Yamashita in the Philippines had occurred in “insular possessions” subject to “our sovereignty” and the “offenses were

\textsuperscript{58} \textit{Ex parte Quirin}, 317 U.S. at 25.
\textsuperscript{59} \textit{Id.} See also \textit{Johnson v. Eisentrager}, 339 U.S. 763, 794 (1950) (Black, J., dissenting) (“The contention that enemy alien belligerents have no standing whatever to contest conviction for war crimes by habeas corpus proceedings has twice been emphatically rejected by a unanimous Court.”); \textit{Ex parte Milligan}, 71 U.S. (4 Wall.) 2, 121 (1866) (noting the military commission could not be justified “on the mandate of the President”).
\textsuperscript{60} \textit{In re Yamashita}, 327 U.S. 1, 9 (1946).
\textsuperscript{61} \textit{Id.} at 30 (Murphy, J., dissenting).
\textsuperscript{62} Military Order, \textit{supra} note 1, § 7(b)(2)(i).
\textsuperscript{63} \textit{Eisentrager}, 339 U.S. at 785, 771, 781.
\textsuperscript{64} \textit{Id.} at 795 (Black, J., dissenting).
committed on our territory,” whereas in *Eisentrager* the offenses, capture, and trial had all occurred in China and there was “not . . . any intraterritorial contact.” These are interesting points of distinction, especially with respect to September 11th attacks on our territory and persons captured or detained in the United States or in territory subject to U.S. sovereign power, which should include foreign occupied territory subject to our sovereign power and jurisdiction and should cover persons who have been transferred to U.S. warships and/or in U.S. military

65. Id. at 780.

66. Id. at 781 (“None of these heads of jurisdiction can be invoked by these petitioners.”).

67. See id. at 798 (Black, J., dissenting) (arguing in favor of habeas corpus “in any land we govern”); Balzac v. Porto Rico, 258 U.S. 298, 312–13 (1922); Downes v. Bidwell, 182 U.S. 244 (1901); Hague Convention No. IV, supra note 17, art. 43 (“The authority of the legitimate power having in fact passed into the hands of the occupant . . .”); IV PICETET, supra note 15, at 60 (“occupation” under Geneva law “has a wider meaning than it has in” the Hague Convention and applies to “troops advancing into” foreign enemy territory, “whether fighting or not,” and “[e]ven a patrol which penetrates into enemy territory without any intention of staying there must respect the Conventions . . . When it withdraws, for example, it cannot take civilians with it, for that would be contrary to Article 49 . . . The same thing is true of raids made into enemy territory or on his coasts.”). Cf. FM 27-10, supra note 12, ¶ 358 (Military occupation “does not transfer the sovereignty [of the occupied state] . . ., but simply the authority or power to exercise some of the rights of sovereignty.”). Under the Geneva standard, the United States seems to have been an occupying power over portions of Afghan territory prior to any control exercised with the consent of the new Afghan regime. For example, U.S. military completed the prison camp at Kandahar on December 15, 2001. See, e.g., Patrick Healy, Fighting Terror: Military Plans: Kandahar: US Readsies Prison for Anticipated Hard-Line Captives, BOSTON GLOBE, Dec. 16, 2001, at A30. The first detainees arrived there on December 18, 2001. See, e.g., First Prisoners Arrive at US Detention Centre in Kandahar, AGENCE FRANCE PRESSE, Dec. 18, 2001; however, the new interim Afghan regime did not assume power until December 22, 2001. See, e.g., David Rohde, Afghan Leader is Sworn In, Asking for Help to Rebuild: Unexpected Appearance of Rival Generals Adds Air of Unity to Calm Transition, N.Y. TIMES, Dec. 23, 2001, at A1; Elizabeth Neuffer, Diverse Afghan Cabinet Sworn In, BOSTON GLOBE, Dec. 23, 2001, at A1. A U.S. detention facility had been used earlier at the U.S. marine Camp Rhino. See, e.g., Howard Witt, Bin Laden Haunts Take Air Pounding, CHICAGO TRIBUNE, Dec. 10, 2001, at 1. Clearly, the United States had been in complete control of certain areas and of its own military units.

68. Under international law, U.S. flag vessels (especially warships) are the equivalent of U.S. territory and provide “territorial jurisdiction” (a phrase addressed in *Eisentrager*, 339 U.S. at 770). See, e.g., INT’L LAW AND LITIGATION, supra note 10, at 404 & n.2, 744–51, 758. U.S. warships are also “territory” over which the United States exercises full sovereign power, including the exercise of military justice and other enforcement competencies. See also Neil A. Lewis, Rules on Tribunal Require Unanimity on Death Penalty, N.Y. TIMES, Dec. 28, 2001, at A1 (“Holding the trials on ships remains an option . . .”). When the United States is an occupying power, the Geneva Civilian Convention and Protocol I prohibit transfers of protected persons (including civilians and “unlawful combatants”—see text and sources cited supra note 15) from the occupied territory and require detention and trial of criminal accused and the serving of sentences in the occupied territory. See GC, supra note 15, arts. 49, 76; Geneva Protocol I, supra note 12, art. 85(4)(a); IV PICETET, supra note 15, at 60. Further, “unlawful . . . transfer or unlawful confinement of a protected person” is a “grave breach” of the Convention and Protocol. See GC, supra note 12, art. 147; Geneva Protocol I, supra note 12, art. 85(4)(a). See also Rome Statute of the International Criminal Court, supra
aircraft but the more significant issue is whether \textit{Eisentrager} should survive after Reid’s fundamental recognition that our government, which is entirely a creature of the Constitution, simply has no lawful authority to act here or abroad inconsistently with the Constitution. Moreover, there is nothing in the text or structure of the Constitution that requires adherence to an \textit{Eisentrager} form of deviation. Additionally, newer customary and treaty-based international human rights law and laws of war, other treaties, and the customary prohibition of denials of justice provide independent bases for due process and equal protection guarantees, access to courts, and the

\footnote{12, art. 8(2)(a)(vii) and (b)(viii). However, when the United States is not an occupying power it should be able to capture in foreign territory, and bring to trial in the United States, persons who are directly responsible for an armed attack or process of attacks against the United States or its military and other nationals overseas. This is in conformity with Article 51 of the U.N. Charter. When the United States is authorized to use force by the U.N. Security Council or is acting under a lawful exercise of power of a regional organization, then it is in conformity with Articles 52–53 of the U.N. Charter. \textit{See, e.g., INT’L CRIMINAL LAW, supra note 12, at 500, 504–05; INT’L LAW AND LITIGATION, supra note 10, at 494–96. Persons who are not directly responsible for an armed attack or process of attacks against the United States or its military and other nationals overseas would have to be extradited, and related law enforcement activities would have to be engaged in, with the consent of the foreign government. \textit{See, e.g., INT’L LAW AND LITIGATION, supra note 10, at 460–61, 467–97, 499; RESTATEMENT, supra note 26, §§ 432–33. The I.C.J. has ruled that a state exercising self-defense cannot use such power merely to obtain evidence of prior infractions of the law. The Corfu Channel Case (United Kingdom v. Albania), 1949 I.C.J. 1, 34–35.}}

69. Like warships, U.S. military aircraft are the equivalent of U.S. territory and both territorial and enforcement jurisdictional competencies exist on board such aircraft, especially when flying over the high seas. \textit{See, e.g., INT’L LAW AND LITIGATION, supra note 10, at 404, 414.}

70. Guantanamo Bay is territory specially occupied by the United States under military occupation and a treaty regime providing “complete jurisdiction and control” by the United States. \textit{Jordan J. Paust, Non-Extraterritoriality of “Special Territorial Jurisdiction” of the United States: Forgotten History and the Errors of Erdoes, 24 YALE J. INT’L L. 305, 327 (1999) (citation omitted); Haitian Ctr. Council, Inc. v. McNary, 969 F.2d 1326, 1342 (2d Cir. 1992); United States v. Rogers, 388 F. Supp. 298, 301 (E.D. Va. 1975). Cf. Cuban Am. Bar Ass’n v. Christopher, 43 F.3d 1412, 1425 (11th Cir. 1995) (stating Guantanamo Bay is not U.S. territory as such). Guantanamo Bay is clearly outside the war zone in Afghanistan and outside the reach of relevant presidential war powers, especially since the offenses were not committed at Guantanamo. \textit{See, e.g., WINTHROP, supra note 14, at 831, 836. Thus, it is apparent that a military commission cannot be properly constituted at Guantanamo Bay. Even if one could, federal district courts are available only a few miles away.}}

71. \textit{See text and sources cited supra notes 41–44.}

72. \textit{See text and sources cited supra notes 12, 15, 20–22, 26, 30–32, 34–35, 37–39. See also GC, supra note 15, arts. 3(1)(d), 70–73, 147.}

right to review; international law is part of the supreme law of the United States with its own constitutional and historic moorings and is law that must be applied by the judiciary; and international law can inform the full meaning of due process and equal protection protected by and through the Constitution.

Another constitutional issue is whether the President can set up a military commission outside of occupied territory or an actual war zone during an armed conflict. It appears that he cannot. In 1865, Attorney General Speed advised the President:

A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offences as the laws of war permit . . . .

In time of peace neither Congress nor the military can create any military tribunals, except such as are made in pursuance of that clause of the Constitution which gives to Congress the power “to make rules for the government of the land and naval forces.”

From his opinion, it appears that relevant presidential power is tied to a war circumstance and law of war competencies such as the competence of an occupying power to set up a military commission to try individuals who violate the laws of war in accordance with the laws of

71, 82 (Tex. 2000) (“The Covenant not only guarantees foreign citizens equal treatment in the signatory’s courts, but also guarantees them equal access to these courts.”); sources cited supra notes 22, 26, 38.

74. See text and sources cited supra notes 20–22, 26, 34. The Geneva Conventions require at least the same forms of appellate review, including habeas corpus petitions, that would be available to U.S. military. See GPW, supra note 12; arts. 102, 106; GC, supra note 15, art. 146.

75. See, e.g., U.S. CONST., arts. II, § 3, III, § 2, VI, cl. 2; INT’L LAW AS LAW OF THE U.S., supra note 5, passim.

76. See text and sources cited supra note 48.

77. 11 Op. Att’y Gen. 297, 298 (1865). Clearly Congress can regulate the jurisdiction and procedure of military commissions, but it must do so consistently with international law, and the requirements of international law “are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress. Id. at 299. See, e.g., Madsen v. Kinsella, 343 U.S. 341, 348-49 (1952); sources cited supra notes 5, 10.

78. See also WINTHROP, supra note 11, at 831, 836–67; Halleck, supra note 14; Newton, supra note 14, at 15, 19–21 (stating that jurisdiction apparently exists only over violations of the laws of war); O’Callahan v. Parker, 395 U.S. 258, 267 (1969) (“court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces . . . no matter how intimate the connection between their offense and the concerns of military discipline . . . . [C]ourts-martial have no jurisdiction over nonsoldiers, whatever their
war. *Ex parte Quirin* involved a military commission set up within the United States, but it was created during war for prosecution of enemy belligerents for violations of the laws of war that occurred within the United States and within the convening authority’s field of command—in that case, in the Eastern Defense Command of the United States Army.\(^7^9\)

To summarize, President Bush’s November 13th Order, far from providing an “option,” denies the United States needed flexibility to prosecute those covered by the Order who are reasonably accused of terrorism and other crimes in a federal district court or regional or more general international fora (especially regarding those accused who are later found in various countries outside the region of Afghanistan and with respect to whom the United States seeks extradition); sets up per se violations of human rights of the accused concerning freedom from national origin discrimination and the rights to equal protection and to an appeal to a higher tribunal; sets up similar per se violations of the Geneva Conventions and Protocol I with respect to prisoners of war, unprivileged combatants, and civilians protected under the Conventions; sets up similar violations of various other treaties; creates constitutional problems concerning due process and the right to habeas corpus; needlessly places some prosecutions at risk; and can bring dishonor to the United States. Some of the violations relate not merely to due process guarantees as such, but also to the permissibility of military commission jurisdiction. For example, since the military commissions cannot provide equal protection in general and equal appellate proceedings as required by treaty-based and customary international law, use of such fora would be impermissible.

At a minimum, the Military Order should be amended to allow U.S. prosecution in alternative fora, to require use of appellate tribunals, to allow habeas corpus petitions, and to require compliance with other customary human rights of all persons to due process and equal protection reflected in Article 14 of the International Covenant on Civil and Political Rights and any similar or additional rights reflected in the Geneva Conventions and Protocol I concerning prisoners of war, unprivileged combatants, and civilians. Ad hoc rules of procedure created and

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\(^7^9\) See *Ex parte Quirin*, 317 U.S. 1, 22 n.1 (1942). Petitioners had also been charged with war-time espionage, but the Supreme Court merely approved military commission jurisdiction to try violations of the laws of war. *Id.* at 25.
changeable by the Secretary of Defense, especially those that are inconsistent with the Military Order, do not provide long-term guarantees of due process and equal protection. Indeed, today’s rules of procedure still rest on national origin discrimination and deny equal protection in violation of various international laws. Congress should amend Section 821 of Title 10 of the United States Code to reaffirm concurrent jurisdiction in federal district courts and to assure that any military commission used in our long-term fight against terrorism will provide at least the due process and equal protection guarantees required by international law.80

An additional problem is posed for military personnel faced with implementation of the Military Order. The U.S. military must disobey an order calling for a patent illegality. Such an order would be ultra vires and constitute a war crime if issued during an armed conflict.81 At least for military lawyers, the present Military Order, in part, is such an order and places present and future U.S. military personnel in harms way.

80. An amendment to Section 821 could add the following to the end of the section: “or in federal district courts. Further, any military tribunal must provide at least the due process and equal protection guarantees required by international law.”

81. See, e.g., Captain Jordan J. Paust, My Lai and Vietnam: Norms, Myths and Leader Responsibility, 57 Mil. L. Rev. 99, 171–75 (1972); Rome Statute of the International Criminal Court, supra note 12, art. 33(1)(c); DOD Law of War Program, Dep’t of Defense Directive 5100.77 (Dec. 9, 1998), available at http://dix.mil/whs/directives/corres/pdf/d51007_120998/d510077p.pdf. See also FM 27-10, supra note 12, § 509(a) (stating order is not a defense unless one “did not know and could not reasonably have been expected to know” of the illegality); Mitchell v. Harmony, 54 U.S. (13 How.) 115, 137 (1852) (holding superior’s order to do an illegal act can afford no justification for unlawful conduct abroad in time of war); Brown v. United States, 12 U.S. (8 Cranch) 110, 153 (1814); Little v. Barreme, 6 U.S. (2 Cranch) 170, 179 (1804) (holding presidential orders to military officers in time of war cannot legalize illegal action abroad); United States v. Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801) (stating that the President cannot authorize seizure of a vessel in violation of a treaty); United States v. Smith, 27 F. Cas. 1192, 1230 (C.C.D.N.Y. 1806) (No. 16,342) (holding that the President cannot authorize violations of law); Johnson v. Twenty-One Bales, 13 F. Cas. 855, 863 (C.C.D.N.Y. 1814) (No. 7,417) (holding that the court “cannot give . . . orders a construction that will lead to . . . “the executive abrogating” a right vested by the law and given and recognized in modern warfare); Elgee’s Adm’r v. Lovell, 8 F. Cas. 449, 454 (C.C.D. Mo. 1865) (No. 4,344) (regarding the “law of nations, . . . no proclamation of the president can change or modify this law. . .”); 11 Op. Att’y Gen. 297, 299–300 (1865) (stating that the Constitution does not permit Congress or the government to abrogate the law of nations or to authorize their infrac tion); sources cited supra note 10.

If they do not disobey such orders, violations of the Geneva Conventions can result in war crime prosecutions in the United States, other countries, or an international criminal court exercising universal and/or other bases of jurisdiction. See also FM 27-10, supra note 12, §§ 498–99, 506(b); United States v. Allstetter (The Justice Case), 3 Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10, 983–84 (1951); United States v. Uchiyama, Case No. 35–46 (trial at Yokohama, Japan, 18 July 1947), addressed in Robert W. Miller, War Crimes Trials at Yokohama, 15 Brook. L. Rev. 191, 207 (1949). Further, the President cannot lawfully order violations of the laws of war. See, e.g., text and sources cited supra note 10; N.Y. City Bar Report, supra note 3, at 31.
Current rules of procedure created by the Secretary of Defense pursuant to the Order contain provisions that are inconsistent with the requirements of the Order, thus creating an issue whether the Order or the ad hoc procedure is to be followed. Normally, a President’s military order prevails over a Secretary’s implementing rules and regulations, although any gaps or ambiguities in the order must be filled and interpreted consistently with constitutional and international law. However, to the extent that an Order is inconsistent with constitutional or international law and is thus ultra vires, the Secretary’s rules of procedure that are consistent with constitutional and international law should prevail.

Finally, since it is apparent that military commissions outside of occupied territory can only prosecute war crimes and it is most likely that Mr. bin Laden and his entourage did not commit war crimes during the September 11th attacks on the United States, it is highly probable that a military commission outside of occupied territory in Afghanistan will not have jurisdiction to prosecute the initial prime targets of the November 13th Military Order and will have a very limited jurisdiction with respect to other international terrorists in the future. If alive, Mr. bin Laden and his entourage should be prosecuted for various other crimes in federal district courts or in a new international criminal court.

“He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.”

82. 2 The Complete Writings of Thomas Paine 588 (P. Foner ed., 1945).