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FIGHTING THE WAR ON TERRORISM WITH THE LEGAL SYSTEM: A DEFENSE OF MILITARY COMMISSIONS

JESSICA ERIN TANNENBAUM *

I. INTRODUCTION

On November 8, 2004, Judge James Robertson of the United States District Court for the District of Columbia entered an order halting the trial of Salim Ahmed Hamdan before a military commission, ordering that the trial may not be continued until a “competent tribunal” determines that Mr. Hamdan is not entitled to the protections accorded prisoners of war under the Geneva Conventions.¹ This was but the latest installment in a saga that has garnered much attention since the attacks on September 11, 2001, but actually traces its genesis to events that took place in central Asia in the 1970’s. Mr. Hamdan is a Yemeni citizen and former driver for Osama bin Laden, who was captured in Afghanistan and detained as an enemy combatant at the United States military base at Guantanamo Bay, Cuba.² His case is but one example of an issue that has been at the forefront of the American psyche since 9/11: how to balance our national security interests with the interests of international law and human rights.

During the course of the War on Terrorism, many issues involving the United States’ approach to international law and human rights have

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1. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 173 (D.D.C. 2004).

2. Neil A. Lewis, *Judge Halts War-Crime Trial at Guantanamo*, N.Y. TIMES, November 9, 2004, at A1.

arisen. Among these have been allegations of torture both in Iraq and in Guantanamo Bay, accusations that the United States illegally invaded and occupied Iraq, charges that the American government illegally assassinated al Qaeda members in Yemen and claims that the United States violates the rights of foreign visitors with harsh immigration rules. But perhaps of most interest to the legal community is the Bush administration's decision to re-institute the use of military commissions for those accused of terrorism. Citing the acts of terrorism against the United States, the national security interests and the probability of future attacks, President Bush issued a military order requiring trial by military commission for accused international terrorists, which, although not uncommon throughout history, had not been used by the United States for decades.³

In early 2002, the United States began transporting prisoners captured in Afghanistan to the naval base at Guantanamo Bay. Almost immediately, an uproar broke out over the detention of prisoners there. The United States was, and continues to be, almost universally criticized by the international community for its handling of the prisoners at Guantanamo Bay. The most common criticisms are of the detention of accused terrorists without charges and the indefinite detention of non-citizens certified as dangers to national security as authorized by the USA PATRIOT Act.^{4,5} Although all of the issues regarding the detention of prisoners in the War on Terrorism are interesting and significant to the legal community, this paper will be limited in scope to the planned use of military commissions to try accused terrorists. The military commissions, developed in accordance with the Military Order of November 13, 2001, comport fully with both international and American law and provide the best method to meet the security needs of the United States while prosecuting those who commit or plan to commit terrorist acts against this country.

There are many advantages to the use of military commissions, not the least of which are the assured secrecy of the proceedings, a higher conviction rate, the possibility of a death penalty and the use of trials as an extension of the military campaign. Furthermore, those al Qaeda members detained for acts of terrorism do not even qualify for prisoner-of-war status under the Geneva Conventions and thus the protections do not

3. Anton L. Janik, Jr., *Prosecuting Al Qaeda: America's Human Rights Policy Interests are Best Served by Trying Terrorists Under International Tribunals*, 30 DENV. J. INT'L. L. and POL'Y 498, 507 (2002).

4. *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*, 107 H.R. 3162 (2001) [hereinafter PATRIOT Act].

5. See Sean D. Murphy, *Contemporary Practice of the United States Relating to International Law*, 96 AM. J. INT'L. L. 461, 472 (2002).

apply to them. Arguments that the military commissions do not comport with the standards of international law fail, as al Qaeda operatives and other terrorists are not entitled to the protection of the Geneva Conventions and the military commissions do meet the requirements of the International Covenant on Civil and Political Rights. Arguments that the military commissions are unconstitutional are equally without merit, as the military commissions have been established in full accordance with American law.

This paper will first discuss the history leading up to the detention of al Qaeda and Taliban members at Guantanamo Bay, Cuba. Then, the historical development of military tribunals, the arguments for and against the current plan to try accused terrorists before military commissions, and relevant portions of American and international law will be discussed, ultimately showing that the trial of accused terrorists by military commission is supported by the interests of national security as well as by international law and the Constitution.

II. EVENTS LEADING TO THE DETENTION OF SUSPECTED TERRORISTS AT GUANTANAMO BAY

A. THE RISE OF THE TALIBAN IN AFGHANISTAN

In 1973, Afghanistan became a republic under the leadership of President Sardar Mohammed Daud. Daud turned to the Soviet Union for help in putting down an Islamic fundamentalist movement. The Soviets gave him over \$2.5 billion in military and economic aid, but he failed to build institutions or establish a strong central government.⁶ In 1978, Marxist sympathizers in the Afghan army supported by the Soviet Union overthrew the Afghan government, massacring Daud and his family. However, the Marxists began to fight among themselves, and shortly after the coup many rural tribal groups began to revolt against them. The country quickly deteriorated into a civil war, which would eventually claim 1.5 million Afghani lives over 11 years. The United States supported the Afghanis, who were seen as anti-Soviet troops fighting against a Com-

6. Jaime Jackson, *Trial of the Accused Taliban and Al Qaeda Operatives Captured in Afghanistan and Detained on a U.S. Military Base in Cuba*, 34 CUMB. L. REV. 195, 199 (2004) (citations omitted).

munist attempt to destroy an age-old culture and religion.⁷ The Soviet troops were eventually expelled in 1989.⁸

The Taliban gained control of Afghanistan in 1996. The Taliban was formed out of the Mujahideen, who had fought against the Soviets. A Mujahideen fighter named Mullah Mohammed Omar Mujahed started the Taliban movement when he became disgusted by fighting among the Mujahideen leaders and the Taliban gained widely held support among the Mujahideen, eventually gaining control over the majority of Afghanistan with the exception of certain northern areas where rebel forces remained active.⁹

The Taliban had a dictatorial and highly centralized structure controlled largely by Mullah Omar. The main governing body was the Supreme Shura, also known as the Kandahar Shura, which consisted of ten members appointed by Mullah Omar.¹⁰ The Taliban regime was basically unopposed by Afghans or other nations until 2001.¹¹

After the 9/11 attacks, the United States Congress passed a resolution empowering President George W. Bush to "use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on September 11, 2001, or *harbored* such organizations or persons..."¹² The investigation of the 9/11 attacks quickly focused on Osama bin Laden, who was believed to be harbored by the Taliban regime in Afghanistan.¹³ On September 20, 2001, President Bush spoke to the Congress. During his speech, he demanded that the Taliban turn over to the United States all al Qaeda leaders, terrorists and terrorist supporters, close every terrorist training camp in Afghanistan and allow the United States full access to terrorist training camps. After Taliban offi-

7. *Id.*, citing Ahmed Rashid, *TALIBAN: MILITANT ISLAM, OIL, AND FUNDAMENTALISM IN CENTRAL ASIA* 12 (2001).

8. Manooher Mofidi and Amy Eckert, "Unlawful Combatants" or "Prisoners of War": *The Law and Politics of Labels*, 36 *CORNELL INT'L L.J.* 59, 83 (2003) (citing KAMAL MATINUDDIN, *THE TALIBAN PHENOMENON: AFGHANISTAN 1994-1997* 5 (1999)).

9. *Id.*

10. Jackson, *supra* note 6, at 200.

11. *Id.* at 201. (citing Rashid, *supra* note 7, at 102-04.) Jackson suggests that the lack of opposition to the Taliban regime implies that the Taliban was in fact the legitimate government of Afghanistan, which will be important later in discussing the legal status of Taliban detainees. See Thom Shanker and Katharine Q. Seelye, *Who is a Prisoner of War? You Could Look It Up, Maybe.*, *N.Y. TIMES*, Mar. 10, 2002, at A1.

12. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (2001) (*emphasis added*).

13. Mofidi and Eckert, *supra* note 8, at 77.

cials refused, American and British forces invaded Afghanistan on October 7, 2001.¹⁴

B. THE FORMATION AND STRUCTURE OF AL QAEDA

Al Qaeda was set in motion in 1982 when 100,000 Islamic militants, backed by the United States and Britain, traveled from 43 Islamic states to fight against the Soviets in Afghanistan. Among these fighters was Osama bin Laden, who became head of the network in 1989 and gave it its name, which means ‘the military base.’¹⁵ At the head of al Qaeda is the emir, a position held by bin Laden.¹⁶ Beneath the emir sits a council called the shura, which consists of about 12 advisers to bin Laden. Within al Qaeda, there are two types of operatives: the first group is in charge of intelligence, surveillance and bomb making and the second, expendable type carries out the attacks. The al Qaeda network is made up of numerous cells located worldwide and funded by bin Laden. Al Qaeda acts as an umbrella group, sending operatives and funds to support terrorist acts carried out against ‘infidels’ by its cells worldwide.¹⁷

After the 9/11 attacks, the United States declared that these attacks were an act of war and that it was engaged in an international armed conflict.¹⁸ However, rather than declaring war against another state, the United States declared a war on terrorism and, in particular, against al Qaeda worldwide.¹⁹ The invasion of Afghanistan met with quick success, and by late November, 2001, the Northern Alliance forces supported by the United States had gained control of Afghanistan.²⁰ With this success came the capture of many Taliban and al Qaeda accused of supporting terrorism. Initially, these prisoners were detained near Mazar-e-Sharif in Afghanistan.²¹ In January, 2002, the United States began transporting these prisoners to the United States Naval Base at Guantanamo Bay, Cuba.²²

14. *Id.* at 78.

15. *Id.*

16. Jackson, *supra* note 6, at 202.

17. *Id.*

18. Marco Sassoli, *Use and Abuse of the Laws of War in the “War on Terrorism”*, 22 LAW AND INEQ. J. 195, 197 (2004).

19. *Id.* Of course, the United States has engaged in war against other states in connection to the war on terrorism, specifically Afghanistan and Iraq.

20. Mofidi and Eckert, *supra* note 8, at 78-79.

21. *Id.* at 79.

22. Jackson, *supra* note 6, at 195.

C. THE UNITED STATES AT GUANTANAMO BAY

The United States has leased the naval base at Guantanamo Bay since American forces occupied Cuba in 1903. Cuba agreed that the United States would exercise “complete jurisdiction and control over and within” the naval base at Guantanamo Bay.²³ In return, the United States recognized the *ultimate* sovereignty of Cuba over that area. However, “ultimate” in this context meant final or eventual, meaning that Cuban sovereignty would be interrupted until the United States terminated its occupancy of Guantanamo Bay. The United States and Cuba solidified this agreement in the Treaty of 1934, which gave the United States a perpetual lease on the naval base, which is voidable only if the United States abandons the area or by mutual agreement between the two nations.²⁴

III. THE HISTORY AND LEGALITY OF MILITARY TRIBUNALS

On November 13, 2001, President Bush issued the Military Order Regarding Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.²⁵ President Bush is authorized to issue such military orders by his authority as Commander-in-Chief of the armed forces as well as by Articles 21 and 36 of the Uniform Code of Military Justice.²⁶ Although this modern usage of military commissions has met with much controversy and criticism, in fact military tribunals are nothing new and, throughout history, have been essentially considered the entitlement of the victorious power. In order to understand the justification for the planned use of military commissions to try those accused of terrorism against the United States, it is first necessary to understand the historical and international context of military tribunals over the past 25 centuries.

A. INTERNATIONAL HISTORY OF MILITARY TRIBUNALS

Traditionally, a military tribunal, or commission, is a wartime judicial proceeding used to try violations of the laws of war.²⁷ Internationally, military tribunals have been used for at least 2500 years.²⁸ Although historically the reason that military tribunals came into being was that this

23. *Id.* at 197 (*citations omitted*).

24. *Id.* at 198 (*citations omitted*).

25. Military Order Regarding Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism [hereinafter “Military Order”], 66 Fed. Reg. 57, 833 § 1(e) (Nov. 13, 2001).

26. Jamik, *supra* note 3, at 508 (*citing* U.S. CONST. art. II, § 2; 10 U.S.C. 821 (2001); 10 U.S.C. 836 (2001)).

27. *Id.* at 499.

28. *Id.* at 500.

was the only means to conduct a trial proceeding, in the modern age of national court systems the main attraction has been that military tribunals offer the ability to bring the leaders of foreign adversaries to justice. Also, military tribunals generally allow for the application of the death penalty.²⁹

The first known use of military tribunals occurred in ancient Greece when Lacedaemonian military leaders met briefly to discuss the fate of captured Athenian troops, who were summarily executed. The modern form of military tribunals was first seen in the Middle Ages, when trials were actually held. In 1474, Sir Peter of Hagenbach was tried for war crimes. He argued that he had only followed orders, but this defense was rejected and he was sentenced to die.³⁰ A more famous example is the trial of Napoleon Bonaparte. After his return from exile in Elba, Napoleon was again captured. Under the provisions of the Congress of Vienna's Declaration of 1815, Napoleon had been declared an outlaw and subject to any actions that the allied European powers deemed appropriate. Napoleon was handed over to the British, who tried him and sentenced him to exile at St. Helena. This famous case set the precedent for military tribunals' ability to try an adversary's supreme leader.³¹

In the Twentieth Century, the bloodiest century in history with its many wars, military tribunals, particularly international ones, gained popularity. The Treaty of Versailles, signed at the end of World War I in 1919, established a special international tribunal comprised of judges from the United States, Great Britain, France, Italy and Japan to try Kaiser Wilhelm II of Germany for offense "against international morality and the sanctity of treaties."³² Other treaties signed after World War I provided for tribunals to try Austrian, Bulgarian, Hungarian and Turkish leaders. The Allied powers requested that 896 Germans be handed over for trial before such tribunals. However, diplomatic concerns caused the Allies to abandon the Treaty of Versailles requirement that the Germans surrender their accused citizens for trial.³³

After World War II, international military tribunals were again used to try those responsible for war crimes and crimes against humanity. The 1945 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, signed by the United States, Britain, the

29. *Id.* at 501.

30. *Id.* (citations omitted).

31. *Id.*

32. *Id.* at 502 (citing Treaty of Versailles, June 28, 1919, art. 227, 2 Bevans 43).

33. *Id.*

Soviet Union and France, provided for what became known as the Nuremberg Trials. These trials set the precedent for the international trial and punishment of war criminals.³⁴ Nearly a year later, the first trial concluded when 12 defendants, including Hitler's second-in-command Herman Goering, were sentenced to die and executed. Similar trials were conducted for Japanese citizens accused of war crimes, and 24 of 25 defendants were convicted, including Japanese Prime Minister General Hideki Tojo, who was executed.³⁵ The 1945 Agreement also provided for domestic tribunals, which were used in the United States and will be discussed *infra*.

It would be nearly 50 years before tribunals were again used in the international context, although in their most recent form these international tribunals have been governed by the United Nations rather than a military body. The International Court of Justice, the main judicial body of the United Nations, has no jurisdiction over individuals; however, the United Nations has on a case-to-case basis created tribunals to hear cases against individuals accused of war crimes. In 1993, the Security Council established the International Criminal Tribunal for the Former Yugoslavia to try individuals accused of genocide and crimes against humanity. This tribunal is still ongoing. Following the precedent set by the trials of Napoleon and Hideki Tojo, the United Nations has brought to trial former Yugoslavian President Slobodan Milosevic, who stands accused of genocide and crimes against humanity. Unlike prior trials of those accused of war crimes and the current military tribunals in the United States, those tried under the auspices of the United Nations will not face the death penalty. In 1994, the Security Council again formed an international tribunal to try those accused of genocide, this time in the Rwandan genocide. In contrast with the current tribunal system instituted in the United States with President Bush's military order, the Yugoslavian and Rwandan tribunals were limited in that they only dealt with specific crimes committed during a specific crime period.³⁶

Another international tribunal under the auspices of the United Nations was set up in July 1998 with the passage of the Rome Statute of the International Criminal Court, which entered into force after being ratified by 60 nations on April 11, 2002.³⁷ The International Criminal Court [hereinafter ICC] can exercise its jurisdiction over individuals accused of

34. *Id.* (citations omitted).

35. *Id.* at 503.

36. *Id.*

37. *Id.* at 505. For current ratification data by country, see <
<http://www.iccnw.org/index.php?mod=romesignatures>>.

certain crimes specified in its charter³⁸ and only when national courts are unable or unwilling to investigate or prosecute those crimes.³⁹ Because of these limitations, the United States would not be able to avail itself of the ICC to try accused terrorists; furthermore, although President Clinton signed the Rome Statute shortly before leaving office, the United States Senate has not ratified it.⁴⁰ Therefore, the ICC is not a possible option for the trial of those accused of acts of terrorism against the United States.

B. AMERICAN USE OF MILITARY TRIBUNALS

Military tribunals are created by the President pursuant to his Article II powers as Commander-in-Chief of the Armed Forces and under Article 21 of the Uniform Code of Military Justice.⁴¹ The first American use of a military tribunal occurred in 1780, when British Army Major John Andre was convicted as a spy before a tribunal called the 'Board of General Officers.' The first official military tribunals were set up during the war between the United States and Mexico, where American soldiers accused of violations of the laws of war were tried by military tribunals. A military tribunal was also used to try those accused in the conspiracy to assassinate President Lincoln in 1865.⁴²

The most famous use of a military tribunal is the case of *Ex Parte Quirin*, the rules of which still apply today.⁴³ The petitioners in *Quirin* were eight German citizens who entered the United States for the purpose of committing espionage and sabotage and were arrested by federal agents and charged with violations of the laws of war. President Roosevelt ordered that the prisoners be tried by military tribunals. The petitioners challenged this order, claiming a right to a jury trial under Article III, Section 2 and the Fifth and Sixth Amendments. The Court found that, under the Articles of War, offenses against the laws of war could be tried by a military tribunal.⁴⁴ The Court also found that Article III and the Fifth and Sixth Amendments do not require that a jury be made

38. *Id.* These crimes include genocide, crimes against humanity, war crimes and "aggression". Importantly, terrorism is not included on this list.

39. *Id.*

40. See < <http://www.iccnw.org/index.php?mod=romesignatures>>.

41. Janik, *supra* note 3, at 499. See also U.S. CONST. art. II, § 2; 10 U.S.C.S. 821 (2004). For a more in-depth discussion of the constitutional process by which the Executive may create military tribunals, see *Ex Parte Quirin*, 317 U.S. 1, 26-28 (1942).

42. Janik, *supra* note 3, at 506.

43. *Id.*

44. *Ex Parte Quirin*, 317 U.S. at 28.

available at a military tribunal or that offenses against the laws of war be tried in the civilian courts.⁴⁵

The plan articulated in the Military Order developed following the events of September 11, 2001. The PATRIOT Act became law on October 26, 2001. The PATRIOT Act requires the detention of any non-citizen whom the Attorney General has certified as having reasonable grounds to believe is a terrorist, a participant in terrorist activity or is engaged in any other activity that endangers the national security of the United States.⁴⁶ Detainees may be held for up to seven days without charges, after which removal proceedings must be initiated or charges must be filed. However, the Attorney General may continue to detain non-citizens certified as a danger to national security even after removal proceedings have been initiated. Furthermore, any non-citizen whose removal is unlikely in the near future may be detained for up to six months if the Attorney General finds that releasing that person will threaten national security.⁴⁷ The PATRIOT Act requires that the Attorney General review the detainee's certification every six months⁴⁸ and allows detainees to seek review in habeas corpus proceedings in the Article III courts.⁴⁹

The Military Order also provides for the detention of individuals subject to the Order. Individuals subject to the Military Order include: any non-citizen who is a current or former member of al Qaeda; anyone who has engaged in, aided or abetted or conspired to commit acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause or have as their aim to cause injury to or adverse effects on the United States, its citizens, national security, foreign policy or economy; or anyone who has knowingly harbored one or more such individuals.⁵⁰ Any individual determined by the President to be subject to the order shall be detained at a location designated by the Secretary of Defense.⁵¹

⁵²

45. *Id.* at 40.

46. 107 H.R. 3162 §§ 236A(a)(1)-(4).

47. *Id.* at §§ 236A(a)(5)-(6).

48. *Id.* at § 236A(a)(7).

49. *Id.* at §§ 236A(b)(1)-(2). Critics of the PATRIOT Act complain that this allows a single person, the Attorney General, to detain non-citizens indefinitely on mere suspicion of involvement in terrorism. *See, e.g.*, 96 A.J.I.L. at 472.

50. 66 Fed. Reg. 57,833 at §§ 2(a)(1)(i-iii).

51. *Id.* at § 3(a). The Order also provides that detainees shall be treated humanely; afforded food, water, shelter, clothing, and medical care; and allowed the free exercise of religion to an extent consistent with the conditions of detention. *See id.* at §§ 3(b)-(d).

52. The Supreme Court upheld the constitutionality of such detentions in *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 159 L. Ed. 2d 578 (2004), even if the detainee is a United States citizen captured in a combat zone. *See also* 344 F. Supp. 2d at 173. Hamdi is an American citizen

President Bush's Military Order of November 13, 2001, mandates that such detainees be tried before military commissions rather than international tribunals or Article III courts. The Military Order is implemented by the Department of Defense.⁵³ The creation of military tribunals is within the Executive's power as discussed *supra*, and the Supreme Court has upheld the constitutionality of such tribunals on not one but two occasions.⁵⁴

The Military Commissions function as follows: first, the President must determine that an individual is subject to the Military Order. Until this determination is made, the Military Commission will not have jurisdiction over any individual. Once an individual is determined to be subject to the military order, the Appointing Authority⁵⁵ may decide to bring criminal charges against him upon the recommendation of the Chief Prosecutor. The Appointing Authority also appoints the members of the Military Commission panel who will hear the case. Each panel consists of no less than three and no more than seven officers in the United States Armed Forces and is headed by a Presiding Officer, who must be a Judge Advocate General. The panel must reach a two-thirds majority to reach a guilty verdict and impose a sentence, with the exception of a death sentence, which may only be imposed upon unanimous agreement.⁵⁶

Defendants before the Military Commissions are assured of many procedural safeguards. First, the proceeding is generally required to be full and fair. Defendants are presumed innocent until proven guilty beyond a reasonable doubt. They have the right to call and cross-examine witnesses. Although the attorney-client privilege does not apply in the same manner in which it applies in proceedings before Article III courts, nothing said by a defendant to his attorney, nor anything derived therefrom, may be used against him. No negative inference will be made should a defendant choose to remain silent. Military Defense Counsel is provided free-of-charge to all defendants, or the defendant may hire an attorney of his own choosing provided that the attorney is a citizen of the United

who challenged his detention on the grounds that 18 U.S.C. § 4001(a) forbids the detention of citizens by the United States except pursuant to act of Congress. The Court held that the Authorization for Use of Military Force, S.J. RES. 23, 107th Cong. (2001), is an act of Congress authorizing such detentions. The Court has also held that the right to petition for a writ of habeas corpus, is available to all detainees regardless of citizenship pursuant to U.S. CONST. art I, § 9, cl. 2 and 28 U.S.C. § 2241. *See Rasul v. Bush*, 542 U.S. 466, 124 S. Ct. 2686, 159 L. Ed. 2d 548 (2004).

53. The Department of Defense has done so through a series of Military Commission Orders and Instructions. *See generally* <<http://www.defenselink.mil/news/commissions.html>>.

54. *See In re Yamashita*, 327 U.S. 1 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942).

55. The 'Appointing Authority' is designated by the Secretary of Defense to issue orders establishing and regulating military commissions.

56. *See* Department of Defense Fact Sheet on Military Commission Procedures, available at <<http://www.defenselink.mil/news/Aug2003/d20030812factsheet.pdf>>.

States who is admitted to practice in a jurisdiction of the United States, has not been the subject of disciplinary action, obtains a Secret level clearance and agrees to follow the rules of the military commission. Furthermore, after the panel has reached a verdict and imposed a sentence, the trial record must be reviewed by the Appointing Authority, a three-member Review Panel of military officers, one of which must have prior experience as a judge, and the Secretary of Defense. The President has the final decision authority over the case, which he may delegate to the Secretary of Defense. The President or Secretary of Defense may change a guilty verdict to a guilty verdict on a lesser-included offense or otherwise mitigate, commute or defer the sentence but may not change a not guilty verdict to a verdict of guilty.⁵⁷

C. AN OVERVIEW OF THE BENEFITS OF TRYING ACCUSED TERRORISTS BEFORE MILITARY COMMISSIONS

Any non-citizen who is a current or former member of al Qaeda, anyone who has engaged in, aided or abetted or conspired to commit acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause or have as their aim to cause injury to or adverse effects on the United States, its citizens, national security, foreign policy or economy, or anyone who has knowingly harbored one or more such individuals is subject to the Military Order of November 13, 2001.⁵⁸ In the Military Order, President Bush cited “the danger to the safety of the United States and the nature of international terrorism;”⁵⁹ “[t]he ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks;”⁶⁰ and that “[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant... to be tried for violations of the laws of war and other applicable laws by military tribunals.”⁶¹ These three findings of fact echo the most compelling and commonly used arguments in favor of military commissions and of the Military Order in particular.

57. *Id.*

58. 66 Fed. Reg. 57,833 at §§ 2(a)(1)(i-iii).

59. *Id.* at § 1(f).

60. *Id.* at § 1(d).

61. *Id.* at § 1(e).

A first and very pressing argument in support of the use of military commissions is the argument that military commissions allow the government to protect sensitive information that would have to be publicly disclosed if the case were heard before an Article III court. Second, many argue that ordinary trials would expose all those involved in the judicial system, including court staff, judges, attorneys and jurors to the threat of retaliation by terrorists, a threat which the civilian judicial system is not equipped to handle. Third, military commissions operate with more flexible rules of evidence than civilian courts. The rules of evidence used in military commissions allow the introduction of all relevant evidence.⁶² In his Military Order, President Bush stated 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 criminal cases in the United States district courts.'⁶³ Other rights not accorded prisoners detained under the Military Order include the right to counsel during interrogation and the requirement of a unanimous verdict.⁶⁴ These standards likely will lead to a higher conviction rate than a trial before an international tribunal or Article III court would attain.⁶⁵

Another argument in favor of military commissions is that the commissions are an extension of the United States' military campaigns in the War on Terrorism. This argument is supported by Section 1(d) of the Military Order, quoted *supra*. Proponents of this argument see the military commissions as an exercise of the United States' right as a sovereign nation to capture and bring to trial terrorists who have killed or plan to kill American citizens or otherwise attack or injure the United States. They further argue that even though the use of military commissions may bring international criticism, the United States risks greater damage if accused terrorists are able to take advantage of the more liberal rules and privileges accorded to defendants in Article III courts.⁶⁶

A final argument in support of military commissions is that military commissions often impose the death penalty. Although a death penalty is available in trials before Article III courts, it is not available in interna-

62. Viet D. Dinh, *Foreword: Freedom and Security after September 11*, 25 HARV. J. L. & PUB. POL'Y 399, 405 (2002).

63. 66 Fed. Reg. 57,833 at § 1(f).

64. Janik, *supra* note 3, at 531.

65. *Id.* at 529. After World War I, only six of 45 Germans accused of war crimes were eventually convicted when tried before a German domestic court. Dissatisfied, the Allies decided to conduct the trials before domestic military tribunals pursuant to Articles 228-230 of the Treaty of Versailles. The military tribunals, which used standards similar to those allowed by the Military Order of November 13, 2001, had an 85 percent conviction rate. See ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* (1962).

66. *Id.* at 530.

tional commissions under the auspices of the United Nations, including the ICC, due to the United Nations' stance that the death penalty is violative of human rights.⁶⁷ Historically, the death penalty was used in international military commissions, however an international military tribunal is not a likely option for those arrested in the War on Terrorism because no foreign nations have been specifically targeted in this war.⁶⁸ A majority of Americans continue to support a death penalty as a sentencing option, and President Bush specifically stated that a death penalty would be a sentencing option for those tried pursuant to the Military Order.⁶⁹

D. ARGUMENTS AGAINST TRIAL BY MILITARY COMMISSIONS

Arguments opposing the use of military commissions also abound. Such arguments generally take one of two distinct forms: the plan spelled out in the Military Order tramples upon the Constitution and civil liberties, or it violates international law and human rights. A third argument, which combines the first two yet makes a distinctly different point, is that the plan elucidated in the Military Order, while it may not technically violate international law, does disregard international norms and also weakens civil liberties, which has the effect of worsening, rather than raising, national security. The first two arguments must generally be addressed together as the questions of the applicability of international law generally intermingle with Constitutional questions regarding the powers of the President to order military commissions and United States' obligations under international treaties.

1. Background

Since September 11, many Americans have felt that they have to choose between their civil liberties and national defense or security, that the two cannot coexist. This impression is nothing new; in fact, as early as 1759, Benjamin Franklin stated that 'they that can give up essential liberty to obtain a little temporary safety deserve neither liberty nor safety.'⁷⁰ However, for Abraham Lincoln, who is considered by many to be the strongest protector of liberty in American history, liberty was not always

67. See Universal Declaration of Human Rights, art. III, G.A. Res. 217A(III), available at <<http://www.un.org/Overview/rights.html>>. Although the Universal Declaration of Human Rights does not specifically prohibit the imposition of a death penalty and many U.N. member states continue to impose capital punishment, the provision that 'everyone has the right to life' has been used to justify a refusal to allow the imposition of a death penalty in international tribunals under the auspices of the U.N.

68. Janik, *supra* note 3, at 529. This is in contrast with the two World Wars, both of which resulted in international military tribunals that did impose capital punishment as discussed *supra*.

69. 66 Fed. Reg. 57,833 at § 4(a).

70. Dinh, *supra* note 62, at 399, citing BENJAMIN FRANKLIN, HISTORICAL REVIEW OF PENNSYLVANIA (1759) (*citations omitted*).

the ultimate good- in 1861, President Lincoln unilaterally suspended the writ of habeas corpus, stating, 'Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?' To Lincoln, liberty could be a threat to the government's very existence.⁷¹ However, many Americans have criticized the Military Order and the PATRIOT Act as violative of civil liberties.

The Supreme Court has unanimously upheld the constitutionality of military tribunals⁷² and recent cases have shown no indication that the Court will change its mind. However, recent litigation shows that the constitutionality claims are not without merit. In order to understand the issues raised in recent cases, one must first have a cursory understanding of the Geneva Conventions.

The Geneva Conventions are the codification of the international regulations governing the treatment of prisoners and other persons during armed conflict. There are four Geneva Conventions, which were concluded in 1949: the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; the Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea; the Geneva Convention Relative to the Treatment of Prisoners of War; and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War.⁷³ The debate over the status of the detainees at Guantanamo Bay centers on the Third Convention. The United States is a High Contracting Party to the Conventions, which were ratified by the Senate on August 2, 1955.⁷⁴ The Third Convention applies to all High Contracting Parties, regardless of whether the party has actually declared a state of war. Parties must abide by the Convention even when involved in a conflict with a state that is not a party to the Convention.⁷⁵ The Geneva

71. *Id.* at 399-400, citing Abraham Lincoln, Message to Congress in Special Session (July 4, 1861) (citations omitted).

72. See *Ex parte Quirin*, 317 U.S. 1 (1942); see also *In re Yamashita*, 327 U.S. 1 (1946).

73. Heather Anne Maddox, Comment, *After the Dust Settles: Military Tribunal Justice for Terrorists after September 11, 2001*, 28 N.C.J. INT'L L. & COM. REG. 421, 443 (2003). These Conventions are commonly known as the First, Second, Third and Fourth Geneva Conventions, respectively.

74. See <http://www.icrc.org/eng/party_gc>. There were two Protocols to the Geneva Convention adopted in 1977, which the United States did not ratify.

75. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Part I, Art. 2, 6 U.S.T. 3316 [hereinafter Third Geneva Convention], available at <<http://www.ohchr.org/english/law/prisonerwar.htm>>.

Convention is the law of the United States pursuant to the Supremacy Clause.⁷⁶

2. Presidential Authority to Establish Military Commissions and the Applicability of the Third Geneva Convention

The most recent case to garner attention is *Hamdan v. Rumsfeld*.⁷⁷ Mr. Hamdan, like many other detainees, was captured in Afghanistan in 2001 and transferred to Guantanamo Bay in 2002. The President, finding that there was reason to believe that Mr. Hamdan and five other enemy combatants were al Qaeda members or otherwise involved in terrorism, determined that those six detainees were subject to the Military Order, thereby setting the stage for the first trials by military commission. In February 2004, Mr. Hamdan filed a demand for charges to be filed and a speedy trial pursuant to Article 10 of the Uniform Code of Military Justice,⁷⁸ but the Appointing Authority determined that the UCMJ did not apply to him. Pursuant to a recent Supreme Court decision holding that federal district courts have jurisdiction over habeas corpus petitions filed by Guantanamo Bay detainees,⁷⁹ Mr. Hamdan filed a petition for mandamus or habeas corpus in April 2004.⁸⁰ Charges were formally filed against Mr. Hamdan by the Military Commission on July 9, 2004.

On November 8, 2004, the district court ordered that Mr. Hamdan may not be tried by Military Commission for the offenses with which he is charged. The court found that the President did not properly have the authority to determine that Mr. Hamdan was subject to trial by military commission, even though a Congressional resolution had given him that authority. Stating that Article II does not confer upon the President the authority to establish military tribunals, the court found that the authority to establish military tribunals was instead found in the Articles of War, which were the predecessor to the UCMJ.⁸¹ The court went on to state: “Quirin and Yamashita make it clear that Article 21 [of the UCMJ]⁸²

76. U.S. CONST. art. VI, Cl. 2, which states: “all Treaties made, or which shall be made, under the authority of the United States, shall be Supreme Law of the land...”

77. 344 F. Supp 152.

78. 10 U.S.C.S. § 810 (2004) [hereinafter UCMJ].

79. See *Rasul*, 124 S. Ct. 2686 (holding that United States courts have jurisdiction to consider challenges to the legality of the detention of foreign nationals captured abroad in connection with hostilities and incarcerated at Guantanamo Bay and that the district courts have jurisdiction to hear the petitioners’ habeas corpus challenges under 28 U.S.C. § 2241).

80. Mr. Hamdan initially filed his petition in the United States District Court for the District of Washington, but his case was transferred on July 8, 2004, to the District Court for the District of Columbia when the Ninth Circuit held in *Gherebi v. Bush*, 374 F.3d 727 (2004), that all such cases should be heard in that court.

81. 344 F. Supp. 2d at 158.

82. 10 U.S.C.S. § 821.

represents Congressional approval of the historical, traditional, non-statutory military commission. The language of that approval, however, does not extend past ‘offenders or offenses that by statute or by the law of war may be tried by military commissions...’⁸³ The court went on to reason that the Geneva Conventions are part of the laws of war, and that the trial of Mr. Hamdan before a military commission did not comport with the Geneva Conventions because the Geneva Conventions require that prisoners of war be tried by courts-martial, and therefore the trial before a military commission does not comport with the laws of war or, by extension, the Constitution.

The district court’s reasoning is fundamentally flawed. The court relies on *Quirin*, which sustained the President’s order creating a military commission, explaining that “by his Order creating the... Commission [the President] has undertaken to exercise the authority conferred upon him by Congress and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.”⁸⁴ However, the *Quirin* Court found it unnecessary “to determine to what extent the President as Commander-in-Chief has constitutional power to create military commissions without the support of Congressional legislation...”⁸⁵ The district court goes on to state that the Supreme Court has never made such a determination, and then determines that Article II does not confer upon the President the authority to create military commissions.

The district court ignores the language of the Supreme Court’s decision in *Madsen v. Kinsella*, which states:

In the absence of attempts by Congress to limit the President’s power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. His authority to do this sometimes survives cessation of hostilities. The President has the urgent and infinite responsibility not only of com-

83. 344 F. Supp. 2d at 159.

84. 317 U.S. at 11.

85. *Id.*

bating the enemy but of governing any territory occupied by the United States by force of arms.⁸⁶

The district court's conclusion that Article II does not confer upon the President the authority to establish military tribunals directly contradicts the Supreme Court's interpretation of Article II in *Madsen*.

However, the court does seem to assume that Article 21 of the UCMJ constitutes an 'attempt by Congress to limit the President's power' of the sort mentioned in *Madsen*.

Article 21 states, in its entirety:

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.⁸⁷

It is difficult to see where in this brief paragraph the district court found support for the conclusion that the President overstepped his authority in issuing his Military Order.

It is established that military commissions are constitutional and that the procedures by which they are governed are established not by statute but by the common-law tradition.⁸⁸ The court, according prisoner-of-war status to Mr. Hamdan,⁸⁹ determines that the trial of Mr. Hamdan before a military commission would violate the Geneva Convention, which is recognized as a law of war.⁹⁰ However, assuming *arguendo* that Mr. Hamdan should be designated as a prisoner-of-war under the Geneva Conventions, the court's analysis is still flawed. The Third Geneva Convention applies in "all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties..."⁹¹ The district court assumes that this describes the situation of

86. 343 U.S. 341, 348 (1952).

87. 10 U.S.C.S. § 821.

88. See *Madsen*, 343 U.S. at 346-347 (1952); *Yamashita*, 327 U.S. at 18-23.

89. The court's decision that Mr. Hamdan qualifies for the protections of the Geneva Convention is flawed, as will be discussed *infra*.

90. See Military Commission Instruction No. 2, 32 C.F.R. § 11.5(g) (Apr. 30, 2003) available at <<http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf>>. Interestingly, the district court did not address the issue of whether Mr. Hamdan has standing to challenge the executive's violation of the Geneva Conventions, an issue which is also outside the scope of this paper.

91. 6 U.S.T. 3316, Part I, art. 2.

Mr. Hamdan's capture. However, this is not clear at all. Mr. Hamdan is a Yemeni national who was a member of an international terrorist organization, al Qaeda. He was captured in a war not against any state or party to the Geneva Convention, but against global terrorism. The Third Geneva Convention states:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.⁹²

The Convention makes no reference to non-state actors or international groups. Rather, the text specifically refers to 'Powers' in conflict, a term generally understood to refer to sovereign states. It stands to reason, based upon the text of the Convention, that the Third Geneva Convention does not apply to those who fight on behalf of al Qaeda or similar terrorist organizations. Furthermore, acts of terrorism committed by groups such as al Qaeda are not traditionally regarded as creating an armed conflict and therefore are outside the scope of international humanitarian law and the Geneva Conventions.⁹³ The British campaign against the Irish Republican Army (IRA) and the Spanish campaign against Euskadi ta Askatasuna (ETA) have not been treated as armed conflicts.⁹⁴ Therefore, it follows that the American campaign against al Qaeda, to the extent that the United States does not become involved in armed conflict with another state, is also outside the scope of the Geneva Convention.⁹⁵

3. Evidentiary Proceedings

A second procedure that the district court found illegal is detailed in the provisions of the Military Commission Order on procedure allowing for limited disclosure of evidence or witnesses on security grounds. These provisions allow for the protection of classified or other protected information; information that may abridge the physical safety of participants in the proceeding, including witnesses; information that may impact the confidentiality of law enforcement or intelligence sources and methods; and information that implicates national security interests.⁹⁶ Detailed

92. *Id.*

93. Sassoli, *supra* note 18, at 202, citing LESLIE C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 53-54 (I.M. Sinclair et al. ed., 1993).

94. *Id.*

95. See also Mofidi and Eckert, *supra* note 8, at 74 ("Private citizens, including terrorists, have no claim to the benefits of protection guaranteed soldiers under Geneva Convention III.")

96. Military Commission Order No. 1, 32 C.F.R. § 9.6(d) (Mar. 21, 2002), available at <<http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf>>.

military defense counsel may not be excluded from any proceedings, nor may the commission hear evidence that has not been presented to detailed defense counsel.⁹⁷ The district court found that this is violative of the Confrontation Clause⁹⁸ as well as “international humanitarian and human rights law.”⁹⁹ However, the court declined to enter into analysis of whether Mr. Hamdan was entitled to the protections of the Confrontation Clause, instead finding that this provision violates the UCMJ.

The district court relied on Articles 36 and 39 of the UCMJ, which state, respectively:

Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.¹⁰⁰

When the members of a court-martial deliberate or vote, only the members may be present. All other proceedings, including any other consultation of the members of the court with counsel or the military judge, shall be made a part of the record and shall be in the presence of the accused, the defense counsel, the trial counsel, and, in cases in which a military judge has been detailed to the court, the military judge.¹⁰¹

The district court concluded that the text of these Articles proscribes any procedure or mode of proof that is inconsistent with the UCMJ, implying that military commissions must be conducted with exactly the same evidentiary procedures as those required for courts-martial.¹⁰² This conclusion is flawed for a number of reasons. Congress has expressly authorized the President to promulgate the procedures governing military commissions in Article 36. Since military commissions are mentioned in only nine of the 158 articles of the UCMJ, a literal reading of Article 36 shows that it requires only that those procedures not be inconsistent with

97. *Id.*

98. U.S. CONST. amend. VI.

99. 344 F. Supp. 2d at 168.

100. UCMJ Article 36, 10 U.S.C.S. § 836(a).

101. UCMJ Article 39(b), 10 U.S.C.S. § 839(b).

102. 344 F. Supp. 2 at 169.

the UCMJ Articles which actually deal with military commissions, not with each article. If every article of the UCMJ were intended to govern military commissions, the specific provisions for military commissions in nine of those articles would be redundant.¹⁰³ Furthermore, the Supreme Court held in *Yamashita* that a military commission did not have to adhere to the procedural directives of courts-martial.¹⁰⁴ The Court so held despite language in Article 38 of the Articles of War equivalent to that of Article 36 of the UCMJ.¹⁰⁵ However, the district court found that *Yamashita* is not governing authority. The *Yamashita* court determined that the guarantee of trial by courts-martial in the 1929 Geneva Convention did not apply to Mr. Yamashita because it interpreted that guarantee as applying only to trials for crimes committed while the defendant was a prisoner of war. The Third Geneva Convention, adopted after *Yamashita* and ratified by the United States, makes it clear that this guarantee also applies to crimes committed while the defendant was a combatant, nullifying the Supreme Court's finding to the contrary.¹⁰⁶ The district court's finding, however, assumes that Mr. Hamdan is entitled to the protections of the Geneva Conventions.

One need not look farther than the text of the Third Geneva Convention to determine that Mr. Hamdan is not entitled to their protections, both because the conflict with al Qaeda does not fall under the Geneva Conventions as discussed *supra* and because Mr. Hamdan is not a prisoner-of-war as defined by the Geneva Conventions.

4. Who is a Prisoner of War?

The Third Geneva Convention defines prisoners of war as:

...persons belonging to one of the following categories, who have fallen into the power of the enemy:

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

103. David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2020-2021 (2003). Glazier points to the general principle of statutory interpretation that courts should pay heed to every word of a statute, *citing* NORMAN J. SINGER, 2A STATUTES AND STATUTORY CONSTRUCTION ¶ 46.06 (6th ed. 2000).

104. See 327 U.S. 1.

105. Glazier, *supra* note 103, at 2021.

106. 344 F. Supp. 2d at 170.

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

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

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.¹⁰⁷

When doubt exists as to the status of a detainee, the detainee must be treated as a prisoner of war until his status is determined by a competent tribunal.¹⁰⁸ However, in the case of al Qaeda members, the United States has maintained that there is no doubt and therefore no need for such a determination to be made.¹⁰⁹ The district court in *Hamdan* found that doubt does exist and ordered that a competent tribunal must determine whether Mr. Hamdan should be accorded prisoner-of-war status.¹¹⁰

It is evident that detained al Qaeda members are not Prisoners of War as defined by the Convention. Al Qaeda is not a party to armed conflict within the meaning of the Geneva Conventions, as discussed *supra*, because it is not a state but an international terrorist group outside the scope of international humanitarian law. Detainees from 'other militias' or 'volunteer groups,' into the definition of which al Qaeda may fit, must meet the criteria articulated in section two of Article 4, Paragraph A,

107. 6 U.S.T. 3316 part I, art. 4, para. A.

108. *Id.* at art. 5, para. 2.

109. *See, e.g.*, Testimony of Secretary of Defense Donald H. Rumsfeld, Senate Armed Services Committee (Feb 5, 2002), available at <<http://www.defenselink.mil/speeches/2002/s20020205-secdef4.html>>.

110. 344 F. Supp. 2d at 173-174.

quoted *supra*. Al Qaeda members do not meet these criteria. First, al Qaeda fighters are not commanded by a person responsible for his subordinates. Rather, it is a loosely structured organization made up of numerous cells, sending operatives and funds to support acts of terrorism.¹¹¹ Second, al Qaeda has no distinctive or recognizable sign.¹¹² Al Qaeda members do not generally carry arms openly, rather they resort to suicide bombings and other clandestine forms of attack.

Most significantly, perhaps, al Qaeda does not conduct its operations in accordance with the laws and customs of war. Al Qaeda, as a non-state actor, is not bound by any of the international treaties which make up the laws of war; however, al Qaeda does engage in acts that would plainly violate the laws of war. The Geneva Conventions require that civilians “shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”¹¹³ Al Qaeda deliberately targets civilians, with the aim of killing “infidels,”¹¹⁴ a distinction plainly based on religion. The Geneva Conventions also forbid the taking of hostages,¹¹⁵ a tactic in which al Qaeda has repeatedly engaged, and generally require that attacks avoid civilian and non-military targets whenever possible.¹¹⁶ Even though al Qaeda is not bound by the Conventions, attacks on civilian targets in the manner they are committed by al Qaeda clearly violate the customs of war. Al Qaeda operatives are not members of regular armed forces professing allegiance to any other government or authority. Based on these facts, no doubt can remain that al Qaeda operatives are not prisoners of war and therefore are not eligible for the protections of the Third Geneva Convention.

Combatants fighting on behalf of the Taliban, by contrast, do qualify for prisoner-of-war status as defined by the Geneva Conventions. The Taliban regime was basically unopposed by Afghans or other nations until 2001. This lack of opposition to the Taliban regime implies that the Taliban was the legitimate government of Afghanistan.¹¹⁷ Afghanistan, as a sovereign state, is a “Power in conflict” within the meaning of the Third Geneva Convention and therefore the United States must abide by the Convention with respect to any conflict with Afghanistan.¹¹⁸ There-

111. Jackson, *supra* note 6, at 202.

112. Janik, *supra* note 3, at 513.

113. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516 part I, art. 3, para. 1; 6 U.S.T. 3316 part I, art. 3, para. 1.

114. Jackson, *supra* note 6, at 202.

115. See, e.g., 6 U.S.T. 3516 part III, art. 34; 6 U.S.T. 3316 part I, art. 3, para. 1(b).

116. See Mofidi and Eckert, *supra* note 8, at 74.

117. Jackson, *supra* note 6, at 201.

118. 6 U.S.T. 3316, part I, art. 2.

fore, Taliban soldiers were members of the armed forces of a party to the conflict in Afghanistan and are entitled to the protections afforded prisoners-of-war. The United States has acknowledged that Taliban combatants have prisoner-of-war status.¹¹⁹

The International Covenant on Civil and Political Rights sets out the requirements for fairness of any tribunal.¹²⁰ These include the requirements that a tribunal must ensure a “fair and public hearing by a competent, independent and impartial tribunal established by law;” provide the defendant with the presumption of innocence; inform the defendant of the nature of the charge against him; allow the defendant to be represented by counsel of his choosing; be able to face his accuser; have the right to remain silent; and have the right to appeal. The Covenant allows that “[t]he press and the public may be excluded from all or part of a trial for reasons of morals, public order... or national security in a democratic society.”¹²¹ As outlined *supra*, the military commissions ordered in President Bush’s Military Order meet these criteria.

5. Other Considerations

A final argument against the use of military tribunals is that the plan elucidated in the Military Order, while it may not technically violate international law, does disregard international law and also weakens civil liberties, which has the effect of worsening, rather than raising, national security. Proponents of this argument suggest that Americans have traded liberty for supposed security and that the United States has acted with a disregard for international norms, which will cause harm to the United States in the long run.

American Civil Liberties Union President, Nadine Strossen, stated that President Bush weakened constitutional protections when he “bypass[e]d Congress and the people by issuing executive orders that essentially violate separation of powers and the checks and balances system we have in this country.”¹²² However, this argument neglects the fact that the Supreme Court has found that Congress did authorize President Bush to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided

119. K. Elizabeth Dahlstrom, *Humanitarian Law: The Executive Policy Toward Detention and Trial of Foreign Citizens at Guantanamo Bay*, 21 BERKELEY J. INT’L L. 662 (2003).

120. International Covenant on Civil and Political Rights, U.N. GAOR, 21st Sess., Supp. No. 16 at 52, art. 14 (1966). The United States ratified this Convention in 1992. See <<http://www.unhchr.ch/pdf/report.pdf>>.

121. *Id.*

122. Janik, *supra* note 3, at 523.

the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons..."¹²³ The Supreme Court has held that this authorization covers the Military Order of November 13, 2001.¹²⁴ Others have made arguments regarding the infringements on civil liberties made by various provisions of the PATRIOT Act. Although these arguments may be persuasive, they are outside the scope of this paper.

Another argument in favor of prosecuting the detainees before an international tribunal is that this would preserve the United States' stance on human rights. Proponents of this argument hold that it would be difficult for the United States to encourage other states to follow international humanitarian law in its treatment of prisoners if the United States tries detainees before international tribunals.¹²⁵ This argument would hold water if the military commissions did in fact violate international humanitarian law. However, the military commissions do not violate international law. Al Qaeda operatives and other terrorists tried before military commissions are not prisoners of war as defined by the Geneva Conventions. Taliban detainees are prisoners of war and the United States has stated that it will abide by the Geneva Conventions with respect to their treatment. The military commissions do satisfy the requirements for tribunals set forth in the International Covenant on Civil and Political Rights. Furthermore, Secretary of Defense Rumsfeld has stated that the United States will treat all detainees in "a manner that is reasonably consistent with the Geneva Conventions..." regardless of the fact that they are not entitled to prisoner-of-war status.¹²⁶ Given that the United States is comporting fully with international humanitarian law, the military commissions will not weaken the United States' stance on human rights.

A third argument is that there is low international support for the military commissions. Proponents of this argument maintain that establishing an international tribunal under the auspices of the United Nations to try accused terrorists would improve the United States' reputation in the international community and preserve good relations with American allies. However, the security interests of the United States make an international tribunal implausible. It would be difficult to preserve the secrecy of classified information in a trial before an international body including non-American citizens. Furthermore, military tribunals have generally been seen as an extension of the military campaign, and the military

123. S.J. Res. 23, 107th Cong.

124. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633

125. See, e.g., Janik, *supra* note 3, at 526; Jackson, *supra* note 6, at 229.

126. Janik, *supra* note 3, at 512 (*citations omitted*).

commissions for accused terrorists subject to the Military Order are no different.¹²⁷ Prosecuting terrorists under the auspices of the United Nations would be a departure from this view and would represent a weakening of the concept that a sovereign state has the right to capture and try those who engage in armed attacks against its citizens.¹²⁸

A final argument often made opposing the military commissions is the argument that the United States' treatment of non-citizen detainees may affect the treatment of American citizens detained abroad. This argument suggests that the United States, which has protested the use of military tribunals in other countries, will have less leverage in assisting Americans convicted by military tribunals. However, the United States' criticism has generally been limited to tribunal procedures that would constitute a violation of the fundamental fairness required by the International Covenant on Civil and Political Rights.¹²⁹ Furthermore, the national security interests necessitating the use of military commissions - the needs to preserve the confidentiality of classified information, avoid risk to civilians, and allow more flexible rules of evidence - seem to outweigh the national interest in helping citizens who have been convicted before foreign tribunals. The interests of thwarting terrorism and avoiding future attacks are simply more urgent.

IV. CONCLUSION

As of November 2004, about 580 prisoners continued to be detained at Guantanamo Bay.¹³⁰ The trial of these prisoners before military commissions was set in motion with the first determination by the President, on July 3, 2003, that six of these detainees were subject to the Military Order of November 13, 2001, allowing the first military commissions to commence.¹³¹ However, this process was halted by the United States District Court for the District of Columbia's order in *Hamdan v. Rumsfeld* on November 8, 2004. The district court found that the use of military commissions as commanded by the Military Order violated both the Constitution and international law.¹³² However, an analysis of the military commissions shows that they comport with relevant international

127. 66 Fed. Reg. 57,833 at § 1(d)

128. See Laura Ingraham, *Military Tribunals Provide Streamlined Justice*, USA TODAY, Nov. 26, 2001, p. 15A.

129. For example, the United States has criticized the use of military tribunals in Russia, Egypt, China, Peru and Columbia. See 30 Janik, *supra* note 3, at 528.

130. Neil A. Lewis, *Disagreement Over Detainees' Legal Rights Simmers*, N.Y. TIMES, Nov. 1, 2004, at A1.

131. United States Department of Defense Press Release (July 3, 2003) <<http://www.defenselink.mil/releases/2003/nr20030703-0173.html>>.

132. 344 F. Supp. 2d 152.

law and that the President was acting fully within his authority both as Commander-in-Chief and pursuant to the Authorization for the Use of Military Force when he issued the Military Order.

It remains to be seen whether *Hamdan* will be overruled, allowing the military commissions to go forward. However, in order to thwart terrorism, the United States must be permitted to act in the interests of national security, exercising its right as a sovereign state to capture and prosecute those who attack its citizens. Despite international and domestic criticism, the use of military commissions is supported by both international law and the interests of national security and they remain a crucial 'front' in fighting the War on Terrorism.

