Military Commissions

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Editor's Note: Major General (Retired) Michael J. Nardotti, Jr., The Judge Advocate General of the Army (1993-1997), made these remarks before the Senate Judiciary Committee Subcommittee on Administrative Oversight and the Courts on 4 December 2001. General Nardotti's incisive observations on the President's proposed use of military commissions, the need for the military justice system, and the purposes of courts-martial and military commissions begin our series of articles on military commissions and their use.

Mr. Chairman and Members of the Committee, thank you for the opportunity to contribute to this important dialogue.

The possible use of military commissions, as ordered by the President in his role as Commander-in-Chief of our Armed Forces, to conduct trials of non-United States citizens for violations of the law of war, as described in the Military Order of November 13, 2001, concerning the "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,"[1] is [an] extraordinary measure in response to extraordinary events. Careful explanation of the justification and basis for this proposed action and related actions which will follow, certainly will inform the vigorous public debate.

To assist in this effort, I have been asked to highlight and discuss some of the similarities and differences between the prosecution of criminal matters in our Armed Forces in courts-martial under the Uniform Code of Military Justice and those matters prosecuted in Article III federal courts. Further, I have been asked to relate these similarities and differences to military commissions as some of those tribunals have been conducted in the past and may be conducted in the future under the President's Order.

Background

As a matter of background, I am a veteran of over twenty-eight years of active duty in the United States Army. Early in my career, I served as an infantry platoon leader in combat in Vietnam and, later, in a variety of positions in the United States and overseas as a soldier and lawyer. I served as The Judge Advocate General of the Army from 1993 until my retirement in 1997. Since that time, I have been in the private practice of law in Washington, DC.

The President's Proposed Use of Military Commissions

Before describing the issues which will be the primary focus of my statement, I should make clear my view of the President's proposed use of military commissions to [try] non-citizens who planned, perpetrated, or aided and abetted the attacks of September 11, without restating the arguments previously made to this Committee in support of the President.

I agree with those who believe the President, as Commander-in-Chief, has the authority under the Constitution to take these actions. The terrorist acts of the organization known as al Qaida, up to and including the horrendous attacks of September 11, 2001, leave no doubt that the United States is in a state of armed conflict with an outside enemy and that the President is most certainly correct in his conclusion that "an extraordinary emergency exists for national defense purposes."

The Joint Resolution of the Senate and House of Representatives underscores this conclusion and supports the need for extraordinary action in authorizing the President, "to use all necessary means and appropriate force" against those who planned and perpetrated these acts to prevent them from committing future terrorist acts.

The use of military commissions under these circumstances is a lawful means available to the President, as Commander-in-Chief, to achieve this end. The justification for the use of military commissions is well-established in international law, and the use of tribunals of this type has a lengthy history in times of extraordinary emergency in our country. Congress has recognized and affirmed their use previously in the Articles of War and currently in Articles 21 and 36 of the Uniform Code of Military Justice.

The United States Supreme Court upheld the constitutionality of trial by military commissions of enemy saboteurs caught within the United States during World War II in *Ex parte Quirin*, 317 U.S. 1 (1942). The Court's reasoning in that case with respect to the lawfulness of trying unlawful combatants—those who do not wear uniforms or distinctive insignia, who do not carry arms openly, and who do not conduct operations in accordance with the law of war—would appear to be particularly applicable to those who planned, perpetrated, or aided and abetted the attacks of September 11—acts of monumental and extreme violence against thousands of our civilian citizens.

1. President Bush's Military Order is attached as an appendix to this article.

The more debatable and critical issue may well be how the President chooses to exercise this option. The *Quirin* model is relevant to an extent, but it does not necessarily provide all the answers for a similar undertaking today. The Military Order of November 13, 2001, raises important issues which will need further clarification, and Administration officials have already begun to clarify some of those points. They have stressed repeatedly that the specifics of the rules to be applicable to military commissions in this instance are still under development and review by the Department of Defense.

The President, nevertheless, has made certain basic requirements clear, including that there be a full and fair trial. The determination of what constitutes a full and fair trial under these circumstances should include particularly careful consideration to the extraordinary circumstances which justify the use of and compel the need for military commissions in this instance. Further, the significant evolution in the administration of military justice since the *Quirin* decision, and the extent to which that evolution should impact on the conduct of military commissions today, also should be carefully considered.

The Unique Need for the Military Justice System

Before focusing on military commissions, I will explain, as a starting point, why there are differences between criminal prosecutions in Article III federal courts and criminal prosecutions in the Armed Forces. Congress and the courts have long-recognized that the need for a disciplined and combat-ready armed force mandates a separate system of justice for the military.

Our Armed Forces operate world-wide in a variety of difficult and demanding circumstances which have no parallel in the civilian community. Military commanders of all services are responsible for mission accomplishment and the welfare of their troops. In the most difficult operational and training situations, they make decisions that can and do put the lives of their troops at risk.

These commanders also are responsible for administering a full range of discipline to ensure a safe and efficient environment in which their troops must serve. They are able to accomplish this goal through the use of military law, the purpose of which, as stated in the Preamble to the *Manual for Courts-Martial, United States* (2000 Edition), is "to promote justice, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States." The range of disciplinary options and circumstances under which commanders are able to employ them simply make resort to alternatives in the civilian community, whether through the federal courts or other means, an unworkable and unrealistic option.

In recognition of this fact, Congress, acting under its constitutional authority "to make Rules for the Government and regulation of the land and naval Forces," enacted the Uniform Code of Military Justice (UCMJ) in 1950 to set forth the substantive and procedural laws governing the Military Justice System. Congress enacted the UCMJ to make "uniform" what previously was not—the criminal law applicable to all the Military Services.

Substantive law is contained in the various punitive articles which define crimes under the UCMJ. While Congress defines crimes, the President establishes the procedural rules and punishment for violation of crimes. The President's rules are set forth in the *Manual for Courts-Martial*. The *Manual* is reviewed annually to ensure it fulfills its fundamental purpose as a comprehensive body of law.

Article III Federal Courts Prosecutions and Courts-Martial: A Comparison of Certain Rights, Practices, and Procedures

The administration of military justice under these authorities, by congressional and presidential design, is, by necessity, different in some respects from the civilian counterpart, but in other respects is similar. Several examples of differences and similarities in the pretrial, trial, and post-trial phases are the following:

(1) Rights warnings against self-incrimination in the military are broader than those required in the civilian community and actually predated the requirement of the *Miranda* decision by many years; rights advisement in the military is and has been mandated whether or not the interrogation occurs in a custodial session.

(2) Right to counsel in the pretrial and trial phases in the military is broader than in the civilian community where counsel is appointed if the accused is indigent. Military counsel is provided regardless of ability to pay. Individually requested military counsel also may be provided if available. Civilian counsel may be appointed as well at the service member's own expense.

(3) In the pretrial investigation phase for felony prosecutions in the military, there is not the equivalent of a secret grand jury in which the defendant has no right to be present. An investigative hearing, which is routinely open, is conducted under Article 32 of the UCMJ to determine whether there are reasonable grounds to believe the accused service member committed the offense alleged. The accused service member has the right to be advised in writing of the charges, to attend the hearing with counsel, to examine the government's evidence, to cross examine wit-

nesses, to produce witnesses, and to present evidence.

(4) Pretrial discovery in the military is similar to that followed in federal criminal proceedings, but more broad. The government is required to disclose any evidence it will use in the sentencing phase of the proceeding if there is a conviction, or evidence that tends to negate the degree of guilt or reduce the punishment.

(5) Unlawful command influence—an attempt by superior military authority to influence the outcome of a proceeding—is prohibited and is subject to criminal sanctions. There is no equivalent issue in federal proceedings.

(6) In federal prosecutions, a jury of peers is selected at random. General courts-martial must have at least five members selected, as required by Article 25 of the UCMJ, based on "age, education, training, experience, length of service, and judicial temperament." Civilian jury and military court-martial panel members may be challenged for cause or peremptorily.

(7) With respect to trial evidence, the rules in both forums—the Federal Rules of Evidence in federal courts and the Military Rules of Evidence in courts-martial—are almost identical. New Federal Rules of Evidence automatically become new Military Rules of Evidence unless the President takes contrary action within eighteen months.

(8) The burden of proof for conviction in both forums is beyond a reasonable doubt.

(9) For conviction or acquittal in federal prosecutions, jurors must be unanimous. Otherwise, a hung jury results and the defendant may be retried. In courts-martial, except in capital cases, two-thirds of the panel must agree to convict. The first vote is binding. If more than one-third of the panel vote to acquit, then there is an acquittal. A hung jury and retrial on that basis is not possible in the military. In capital cases in courts-martial, a unanimous verdict is required for conviction.

(10) Sentencing in federal courts is done by the judge alone, and sentencing guidelines for minimum and maximum sentences apply. In courts-martial, sentencing is decided by the court-martial panel members or by the military judge (if the accused service member chose to be tried by a military judge alone). There are maximum sentence limitations but no minimums.

The accused service member is entitled to present evidence in extenuation and mitigation, including the testimony of witnesses on his or her behalf, and may make a sworn or unsworn statement for the court-martial's consideration. Two-thirds of the panel must agree for sentences of less than ten years. Three-quarters of the panel must agree for sentences of ten years or more. To impose capital punishment, the panel must unanimously agree to the findings of guilt, must unanimously agree to the existence of an "aggravating factor" required for a capital sentence, and must unanimously agree on the sentence of death. Capital punishment may not be imposed by a military judge alone.

(11) In federal prosecutions, appeal is permissible, but mandatory in cases of capital punishment. There are two levels of appeal—the Circuit Courts of Appeal and the United States Supreme Court.

In the military, appeal is automatic for sentences which include confinement of one year or more or a punitive (Bad Conduct or Dishonorable) discharge. There are three levels of appeal—the Courts of Criminal Appeals of the military services, the Court of Appeals for the Armed Forces, and the United States Supreme Court. Sentences which do not require automatic appeal may be appealed to the Judge Advocate General of the convicted member's service.

(12) Appellate representation in federal prosecutions is provided if the convicted person is indigent. In the military, appellate representation is provided in all cases regardless of financial status.

This comparison of the relative handling of pretrial, trial, and post-trial matters, respectively, in Article III federal courts and courts-martial is not exhaustive. It demonstrates, however, that even in accommodating the needs unique to the administration of military justice, courts-martial, in many important respects, compare very favorably, even though not identically, to process and procedures accorded in the Article III federal courts.

Courts-Marital and Military Commissions

Just as there are sound reasons for differences in rights, practices, and procedures between Article III federal courts and courts-martial, there also are sound reasons for differences between courts-martial and military commissions.

Courts-martial and military commissions, of course, are not one in the same. Courts-martial are the criminal judicial forums in which members of our Armed Forces are prosecuted for criminal offenses, the vast majority of which are defined in the Uniform Code of Military Justice. Congress and the President have given continuing attention to the development and growth of the Military Justice System to ensure that in seeking to achieve "good order and discipline in the armed forces [and] to promote efficiency and effectiveness in the military establishment," justice is also served in the fair treatment of soldiers, sailors, airmen, and marines.

Military Commissions serve a distinctly different purpose and have been used selectively in extraordinary circumstances to try enemy soldiers and unlawful combatants, among others, for violations of the laws of war. In the case of unlawful combatants—those who do not wear uniforms or distinctive insignia, who do not carry arms openly, and who do not conduct operations in accordance with the law of war—their actions and conduct determine their status and the type of action which may be taken against them as a result.

Those who entered our country surreptitiously and who planned, perpetrated, or aided and abetted the attacks of September 11, causing death and destruction on an unprecedented scale, engaged in an armed attack on the United States in violation of customary international law. Their actions and offenses under the law of war allow them to be treated differently from lawful combatants and others who violate the criminal law.

Military commissions are the appropriate forum for dealing with these unlawful combatants. To reiterate the earlier-stated justifications, the use of military commissions is supported by international law, there is lengthy historical precedent for their use, the United States Supreme Court has upheld their use in similar circumstances, Congress has recognized and affirmed their use in the Uniform Code of Military Justice and in the predecessor Articles of War, and the extraordinary emergency which the President has declared and Congress's support to the President in its Joint Resolution authorizing him "to use all necessary means and appropriate force" where there have been egregious violations of the law of war, all compellingly support this conclusion.

The question of the rules and procedures to apply remains, nevertheless. While the President has determined 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," the appropriate principles and rules of procedures prescribed for courts-martial may still serve as a useful guide.

The propriety of these principles and rules should be measured against the legitimate concerns for public and individual safety, the compromise of sensitive intelligence, and due regard for the practical necessity to use as evidence information obtained in the course of a military operation rather than through traditional law enforcement means. Further, the principles and rules adopted also should take into account the evolution, growth, and improvement in the administration of criminal justice in general, and of military justice in particular, in determining the standards to apply with respect to the most compelling issues, such as those relating to the imposition of capital punishment.

I am confident that the President and the Department of Defense are mindful of the exceptional significance of these issues, and that they will take them into careful account as further decisions are made.

Mr. Chairman and Members of the Subcommittee, I am prepared to answer your questions.

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Military Order of November 13, 2001

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows:

Section 1. Findings.

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.

(d) The 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.

(e) To 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 section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, 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.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Sec. 2. Definition and Policy.

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,

(i) is or was a member of the organization known as al Qaida;

(ii) has engaged in, aided or abetted, or conspired to commit, acts of interna-

tional 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

(iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such written determination to such officer or agent, forthwith be placed under the control of the Secretary of Defense.

Sec. 3. Detention Authority of the Secretary of Defense.

Any individual subject to this order shall be—

(a) detained at an appropriate location designated by the Secretary of Defense outside or within the United States;

(b) treated humanely, without any adverse distinction based on race, color, religion, gender, birth, wealth, or any similar criteria;

(c) afforded adequate food, drinking water, shelter, clothing, and medical treatment;

(d) allowed the free exercise of religion consistent with the requirements of such detention; and

(e) detained in accordance with such other conditions as the Secretary of Defense may prescribe.

Sec. 4. Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order.

(a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.

(b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.

(c) Orders and regulations issued under subsection (b) of this section shall include, but not be limited to, rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys, which shall at a minimum provide for—

(1) military commissions to sit at any time and any place, consistent with such guidance regarding time and place as the Secretary of Defense may provide;

(2) a full and fair trial, with the military commission sitting as the triers of both fact and law;

(3) admission of such evidence as would, in the opinion of the presiding officer of the military commission (or instead, if any other member of the commission so requests at the time the presiding officer renders that opinion, the opinion of the commission rendered at that time by a majority of the commission), have probative value to a reasonable person;

(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

Sec. 5. Obligation of Other Agencies to Assist the Secretary of Defense.

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

Sec. 6. Additional Authorities of the Secretary of Defense.

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of title 10, United States Code.

Sec. 7. Relationship to Other Law and Forums.

(a) Nothing in this order shall be construed to—

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order—

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) 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, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term "State" includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

Sec. 8. Publication.

This order shall be published in the Federal Register.

GEORGE W. BUSH
THE WHITE HOUSE,
November 13, 2001.