

# Military Commissions and the War on Terrorism

R. PETER MASTERTON\*

## I. Introduction

On November 13, 2001, President Bush unveiled a new weapon in the war on terrorism: The military commission. Military commissions have long been used to deal with those who violate the laws of war. President Bush has now authorized their use to deal with today's war criminals: international terrorists. The President's goal was to create an efficient means of prosecuting these criminals without the delay, publicity, and danger of compromise to classified information that might result from criminal trials in federal district court. The military commission is perfectly suited for this task.

This article will discuss the history of military commissions, their legal basis, and the limitations on their use. It will also discuss the procedures contemplated by the President's Order of November 13, 2001.<sup>1</sup>

## II. History

Military commissions have been in use for a long time. During the Revolutionary War, military commissions were convened to try a number of spies captured by the Continental Army. One of the most renowned of these trials involved Major John Andre, Adjutant General to the British Army, who was tried by a board of general officers appointed by General Washington. Andre was captured in disguise and under an assumed name carrying papers containing intelligence for the British. Andre was convicted of spying and hanged on October 2, 1780, three days after his trial.<sup>2</sup>

During the Mexican War a number of military commissions were created for the trial of various offenses.<sup>3</sup> During the Civil War military commissions were used extensively. They

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\*R. Peter Masterton is a Lieutenant Colonel in the United States Army and currently serves as the Staff Judge Advocate at Fort Dix, New Jersey. Lt. Col. Masterton has over eighteen years of service in the Army Judge Advocate General's Corps and has served as a Prosecutor, Supervisory Defense Counsel, Professor of Criminal Law, and Executive Officer. The opinions expressed in this article are solely those of the author and do not represent official positions of either the Army or the United States Government.

1. Military Order of November 13, 2001, Detention, Treatment, and Trial of Certain Non-citizens in the War Against Terrorism, 66 Fed. Reg. 57331 (Nov. 16, 2001) [hereinafter Military Order of November 13, 2001 or Order].

2. *Ex Parte Quirin*, 317 U.S. 1, 31 n.9, 42 n.14 (1942).

3. *Id.* at 31 n.10.

were used to try Confederate soldiers who were captured as spies or saboteurs in civilian dress.<sup>4</sup> Military commissions were also used to prosecute civilians who committed crimes in occupied territories or whose crimes adversely affected the war effort.<sup>5</sup> After the Civil War, military commissions tried a number of ex-Confederate soldiers and civilians for crimes committed during the war. Perhaps the best known was the trial of the conspirators in the assassination of President Lincoln.<sup>6</sup> Another well-known trial involved Major Henry Wirz, the commander of Andersonville Prison, who was tried by a military commission and hung for the mistreatment of Union prisoners of war.<sup>7</sup>

Military commissions were also convened during World War II. In 1942, President Roosevelt authorized military commissions to try persons who entered the United States to commit "sabotage, espionage, hostile or warlike acts, or violations of the law of war."<sup>8</sup> Such commissions tried a number of saboteurs caught in civilian clothing in the United States.<sup>9</sup> After the war a number of military tribunals were established to punish those responsible for war crimes. The most famous were the multinational tribunals convened in Nuremberg and Tokyo.<sup>10</sup> The United States convened military commissions of its own to deal with war crimes committed by enemy soldiers during the war.<sup>11</sup> The United States also used military commissions to try civilians, including American citizens, for crimes committed in occupied territories.<sup>12</sup>

### III. Legal Basis

Military commissions are creatures of common law. While the Uniform Code of Military Justice recognizes military commissions as an authorized means of dealing with civilians who commit certain crimes it does not create any procedural rules for their conduct.<sup>13</sup>

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4. *Id.*

5. Lieutenant Colonel Michael J. Davidson, *The Flag, the First Amendment, and the Military*, ARMY LAW., Aug. 2001, at 1, 7. (In 1862 a military commission authorized the hanging of William Mumford for pulling down, dragging in the mud, and shredding an American flag in a Union-occupied area of Louisiana.) *Id.* In *Ex Parte Vanlandingham*, 68 U.S. 243 (1863), the United States Supreme Court denied certiorari to a citizen of Ohio who was tried by military commission for making statements disloyal to the Union and advocating peace with the Confederacy.

6. James Speed, Attorney General, *Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President* (July 1865), available at <http://207.158.193.20/documents/Bplact16.pdf>.

7. See Captain Glenn W. LaForce, *The Trial of Major Henry Wirz—A National Disgrace*, ARMY LAW., June 1988, at 3.

8. *Quirin*, 317 U.S. at 23.

9. *Id.*; see *Colepaugh v. Looney*, 235 F.2d 429 (1956).

10. See M. Cherif Bassiouni, *Establishing an International Criminal Court: Historical Survey*, 149 MIL. L. REV. 49 (1995).

11. *In re Yamashita*, 327 U.S. 1 (1946). The United States also used military commissions to try United States citizens who violated the law of war while acting as enemy belligerents. See *Quirin*, 317 U.S. at 37; *Colepaugh*, 235 F.2d at 432.

12. See, e.g., *Madsen v. Kinsella*, 343 U.S. 341 (1952) (military commission properly tried a civilian, a United States citizen, who was the dependent wife of an American soldier, for the murder of her husband in an American area of control in Germany).

13. The UNIFORM CODE OF MILITARY JUSTICE (the "UCMJ") is contained in 10 U.S.C. §§ 801–946 (2000). The UCMJ provides that the President may prescribe rules for trials by military commissions. 10 U.S.C. § 836. Articles 106 and 104 of the UCMJ specifically mention the use of military commissions in the trial of spies and persons who aid the enemy. 10 U.S.C. §§ 906, 904. The preamble to the Manual for Courts-Martial also mentions military commissions as an authorized exercise of military jurisdiction. MANUAL FOR COURTS-MARTIAL, UNITED STATES, pt. I, Preamble, ¶ 2 (2000) [hereinafter MCM].

Military commissions are fundamentally different from courts-martial. The jurisdiction of courts-martial is limited to members of the armed forces and those accompanying the armed forces.<sup>14</sup> Military commissions, on the other hand, have broader jurisdiction—they can be used to try persons who are not part of an armed force.<sup>15</sup>

Military commissions may try civilians and enemy soldiers who violate the laws of war. The best example of this is the saboteur who wears civilian clothing while destroying enemy targets. In *Ex Parte Quirin*, the United States Supreme Court upheld the use of a military commission to try a group of Nazi saboteurs who entered the United States intending to sabotage war facilities.<sup>16</sup> The Court found that they were unlawful belligerents because they were traveling in civilian clothes for the purpose of committing sabotage. Lawful belligerents are required to carry arms openly, wear a distinctive uniform or emblem, be subject to command, and obey the laws of war. Those who do not meet these criteria and engage in acts of belligerency violate the laws of war. Such unlawful belligerents are subject to trial by a military commission.<sup>17</sup>

Military commissions can also try civilians and enemy soldiers who violate other laws of war. An example is *In re Yamashita*, where the Supreme Court upheld a military commission's conviction of the Japanese commander of the Philippines who permitted his troops to commit murder, rape, and other atrocities against civilians and prisoners of war under his control.<sup>18</sup>

Military commissions may also be used to try civilians who commit crimes in occupied territories. For example, in *Madsen v. Kinsella*, the Supreme Court upheld a military commission's trial of a civilian American citizen for crimes committed in occupied Germany.<sup>19</sup> Such trials are only permitted during the period of occupation when civilian courts are not functioning. In *Ex Parte Milligan*, the Supreme Court overturned a military commission's conviction of a civilian during the Civil War because the defendant was not a resident of an occupied territory and the civilian courts in his state were open and operating.<sup>20</sup> In *Duncan v. Kahanamoku*, the Supreme Court struck down the use of military commissions to try civilians in Hawaii during World War II when the civilian courts were functioning.<sup>21</sup>

14. 10 U.S.C. § 802; MCM, *supra* note 13, Rule 202.

15. See *Madsen*, 343 U.S. at 347 n.9.

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

17. *Id.* at 31. The Hague Convention No. IV, Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. I annex, 36 Stat. 2277, 1 Bevans 631, states,

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: (1) to be commanded by a person responsible for his subordinates, (2) to have a fixed distinctive emblem recognizable at a distance, (3) to carry arms openly; and (4) to conduct their operations in accordance with the laws and customs of war.

See also Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, art. 4 [hereinafter Geneva Convention]. Both are reproduced in U.S. DEP'T OF ARMY, PAM. 27-7, TREATIES GOVERNING LAND WARFARE (Dec. 7, 1956).

18. *Yamashita*, 327 U.S. at 1. See also Major Bruce D. Landrum, Note: *The Yamashita War Crimes Trial: Command Responsibility Then and Now*, 149 MIL. L. REV. 293 (1995); Colonel Frederick Bernays Wiener, Comment: *The Years of MacArthur, Volume III: MacArthur Unjustifiably Accused of Meting Out "Victor" Justice* in *War Crimes Cases*, 113 MIL. L. REV. 203 (1986).

19. *Madsen*, 343 U.S. at 341.

20. *Ex Parte Milligan*, 71 U.S. 2 (1866).

21. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946).

In *Reid v. Covert*, the Court struck down the use of military tribunals to try civilians overseas during times of peace.<sup>22</sup>

The terrorists who carried out the attacks on September 11, 2001 are clearly unlawful belligerents. They violated the law of war by waging a war of aggression against civilians and by attacking without uniforms and carrying concealed weapons. Any accomplices of these terrorists are guilty of the same war crimes. This includes terrorists directly involved in the al Qaida network and those who provided them with facilities and support. Whether captured in Afghanistan or elsewhere, they are subject to trial by a military commission.

Whether any of these individuals is entitled to protection as a prisoner of war is open to debate. Al Qaida terrorists who wear civilian clothes to avoid detection are clearly not entitled to prisoner of war protections. Taliban soldiers fighting in Afghanistan may, arguably, be entitled to such protections if they meet the criteria of the Hague and Geneva conventions by carrying arms openly, wearing a distinctive uniform, being subject to command, and obeying the laws of war.<sup>23</sup> However, this will not preclude their trial by military commission; they may still be tried for war crimes committed prior to their capture, despite their prisoner of war status.<sup>24</sup>

#### IV. Procedures

The military commissions created by President Bush's Order of November 13, 2001 (the "Order"), are designed to try only non-U.S. citizens.<sup>25</sup> The Order applies to all persons who are members of the terrorist organization al Qaida or who have engaged in acts of international terrorism adversely affecting the United States. The Order also applies to those who knowingly harbor such terrorists. The Order states that it will apply only when "it is in the interest of the United States that such individual be subject to this Order" and requires that the President determine in writing that an individual meets the above criteria.<sup>26</sup> This gives the President the discretion to decide on a case-by-case basis whether it is appropriate to use military commissions.

22. *Reid v. Covert*, 354 U.S. 1 (1956).

23. The Hague Convention No. IV, *supra* note 17, art. I annex; Geneva Convention, *supra* note 17, art. 4. Arguably Taliban forces qualify as prisoners of war even if they do not meet these criteria because they are members of a "regular armed force" within the definition of the Geneva Convention, art. 4. Under the Convention, members of a "regular armed force" are not required to show compliance with the four criteria listed above. However, the better view is that the Taliban is a "volunteer corps" under the meaning of the Geneva Convention, art. 4, since the Taliban has received negligible international recognition and is composed of a conglomeration of persons from different nations. Such "volunteer corps" are required to meet the criteria mentioned above to obtain prisoner of war status under the Convention.

24. Geneva Convention, *supra* note 17, art. 85, requires that "prisoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention." Article 102 of the Geneva Convention requires that the trial of a prisoner of war be conducted "according to the same procedure as in the case of members of the armed forces of the Detaining Power." *Id.* art. 102. This means that if a Taliban soldier is granted prisoner of war status, the military commissions must provide him with procedural protections equivalent to those provided to American soldiers.

25. Military Order of November 13, 2001, *supra* note 1, § 2(a). The law does not mandate this limitation; military commissions are authorized to try United States citizens. One of the defendants in the *Quirin* case alleged that the military commission had no jurisdiction over him because he was a United States citizen. The Court held that his citizenship was irrelevant. *Quirin*, 317 U.S. at 37. *See also Madsen*, 343 U.S. at 362 (U.S. citizen tried by military commission for murder committed in occupied Germany).

26. Military Order of November 13, 2001, *supra* note 1, § 2(a)(2).

The Order requires that detained terrorists be treated humanely. Detainees must not be discriminated against “based on race, color, religion, gender, birth, wealth, or any similar criteria” and they must be “afforded adequate food, drinking water, shelter, clothing, and medical treatment.”<sup>27</sup> They must also be allowed to freely exercise their religion, to the extent consistent with the requirements of their detention.<sup>28</sup>

The Order states that individuals tried by military commission “may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.”<sup>29</sup> To draft charges, military commissions may rely on the laws of war, which prohibit unlawful belligerency and aggression. The penalty for these crimes is ordinarily death, although lesser penalties can be adjudged.<sup>30</sup> The commissions may also rely on military law, which provides penalties for unlawfully aiding an enemy such as the al Qaida terrorist network. The maximum penalty for this offense is death.<sup>31</sup>

Although Title 18 of the U.S. Code contains an extensive list of crimes applicable to international terrorists, it would not be appropriate for military commissions to rely on these laws.<sup>32</sup> Military commissions have traditionally prosecuted persons for violations of the laws of war and military law, not violations of Title 18.<sup>33</sup>

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27. *Id.* § 3(b)–(c).

28. *Id.* § 3.

29. *Id.* § 4(a).

30. *Quirin*, 317 U.S. at 34; Fred L. Morrison, *The Significance of Nuremberg for Modern International Law*, 149 *MIL. L. REV.* 207 (1995).

31. 10 U.S.C. § 904 (2000). This offense includes providing arms, supplies, or money to any hostile body that our forces are opposing. It also includes harboring or protecting an enemy. MCM, *supra* note 13, pt. IV, paras. 28b, 23c(1)(b). The death penalty is authorized for this offense. *Id.* pt. IV, para. 28e.

32. Federal law contains a number of crimes prohibiting terrorism including the destruction of aircraft or aircraft facilities (18 U.S.C. § 32 (2000)); violence at international airports, (18 U.S.C. § 37 (2000)); arson within special maritime and territorial jurisdiction of the United States (18 U.S.C. § 81 (2000)); the use of biological weapons (18 U.S.C. § 175 (2000)); assassination, kidnapping or assault of congressional, cabinet, and Supreme Court personnel (18 U.S.C. § 351 (2000)); the unlawful use of nuclear materials (18 U.S.C. § 831 (2000)); the use of plastic explosives (18 U.S.C. § 844(m) and (n) (2000)); bombing and arson of certain property (18 U.S.C. § 844(e), (f), and (i) (2000)); conspiracy to injure property of a foreign government (18 U.S.C. §§ 930(c) and 956 (2000)); crimes against officers and employees of the United States (18 U.S.C. § 1114 (2000)); murder or manslaughter of foreign officials, official guests, or internationally protected persons (18 U.S.C. § 1116 (2000)); hostage taking (18 U.S.C. § 1203 (2000)); injury of Government property or contracts (18 U.S.C. § 1361 (2000)); destruction of communication lines, stations, or systems (18 U.S.C. § 1362 (2000)); injury to buildings or property within special maritime and territorial jurisdiction of the United States (18 U.S.C. § 1363 (2000)); destruction of an energy facility (18 U.S.C. § 1366 (2000)); assassination, kidnapping, and assault of the President or presidential staff (18 U.S.C. § 1751 (2000)); injury of fortifications, harbor defenses, or defensive sea areas (18 U.S.C. §§ 1992 and 2152 (2000)); destruction of national defense materials, premises, or utilities (18 U.S.C. § 2155 (2000)); production of defective national defense materials, premises, or utilities (18 U.S.C. § 2156 (2000)); violence against maritime navigation (18 U.S.C. § 2280 (2000)); violence against maritime fixed platforms (18 U.S.C. § 2281 (2000)); homicides and other violence against United States nationals occurring outside of the United States (18 U.S.C. § 2332 (2000)); use of weapons of mass destruction (18 U.S.C. § 2332a (2000)); acts of terrorism transcending national boundaries (18 U.S.C. § 2332b (2000)); providing material support to terrorists (18 U.S.C. §§ 2332c and 2339A (2000)); providing material support to terrorist organizations (18 U.S.C. § 2339B (2000)); torture (18 U.S.C. § 2340A (2000)); sabotage of nuclear facilities or fuel (42 U.S.C. § 2284); aircraft piracy (49 U.S.C. § 46502 (2000)); and the destruction of interstate gas or a hazardous liquid pipeline facility (49 U.S.C. § 60123(b) (2000)).

33. *See, e.g., Quirin*, 317 U.S. at 8 (explaining that a military commission prosecution is based on violations of law of war and violations of Articles of War, precursor to UCMJ).

Military commissions are not bound by the procedural rules of civilian courts. Constitutional protections, including the right to a grand jury hearing and trial by jury, do not apply to military commissions.<sup>34</sup> The preamble of the Manual for Courts-Martial states that military commissions shall be guided by the rules of procedure and evidence prescribed for courts-martial, unless the President or other competent authority directs otherwise.<sup>35</sup> The Order did direct otherwise: it specifically required the Secretary of Defense to issue rules defining the procedures and evidentiary rules for military commissions.<sup>36</sup> The Secretary of Defense released these rules in an Order dated March 21, 2002.<sup>37</sup>

The Defense Department Order (the "DoD Order") establishes pretrial rules for military commissions. Among other things, the DoD Order requires the prosecutor to provide the defendant with evidence that the prosecution intends to offer at trial and exculpatory evidence. It also gives the defendant the right to obtain witnesses and documents for use in the defense case, the right to investigative, and other resources. In addition, the defendant has the right to be notified of the charges, and to obtain interpreters, as necessary.<sup>38</sup>

The commissions will be composed of at least three and no more than seven members. Each commission will also have at least one and no more than two alternate members. The members must be commissioned officers of the U. S. armed forces, to include Reserve and National Guard personnel on active federal duty. One of the members must be a judge advocate who will preside over the commission, rule on the admission of evidence, and perform all of the other duties traditionally associated with a judge.<sup>39</sup>

Qualified military attorneys (judge advocates) will be detailed to represent both the prosecution and the defense before the commissions. The defendant has the right to request a specific military attorney to represent him. This attorney will be detailed to the case, if he or she is reasonably available. The defendant also has the right to be represented by a civilian attorney. However, such civilian attorneys will not be paid by the government and must meet certain criteria; among other things, the civilian attorneys must be eligible for access to information classified as "secret" or higher.<sup>40</sup> In the past, military attorneys have served as prosecutors and defense counsel before military commissions.<sup>41</sup>

The Federal Rules of Evidence will not apply to military commissions. Instead, the Defense Department Order establishes special evidentiary rules. Military commissions will

34. *Id.* at 39; *Yamashita*, 327 U.S. at 19.

35. MCM, *supra* note 13, pt. I, Preamble, ¶ 2.

36. Military Order of November 13, 2001, *supra* note 1, § 4(c).

37. Department of Defense Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism*, Mar. 21, 2002, available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> [hereinafter Defense Department Military Commission Order of March 21, 2002]

38. *Id.* para. 5; Military Order of November 13, 2001, *supra* note 1, § 4(c).

39. Defense Department Military Commission Order of March 21, 2002, *supra* note 37, para. 4A.

40. *Id.* para. 4; Military Order of November 13, 2001, *supra* note 1, § 4(c). The Defense Department Order states that civilian attorneys who represent a defendant before a military commission must (1) be a "United States citizen"; (2) be "admitted to the practice of law in a State, district, territory, or possession of the United States, or before a Federal court"; (3) not have been subject to any sanction or disciplinary action by any court or bar; (4) have "been determined to be eligible for access to information classified at the level of SECRET or higher"; and (5) sign a "written agreement to comply with all applicable regulations or instruction for counsel." Defense Department Military Commission Order of March 21, 2002, *supra* note 37, para. 4C(3)(b).

41. See George F. Guy, *The Defense of Yamashita*, 6 U.S. AIR FORCE ACAD. J. LEGAL STUD. 215, 216 (1995/1996).

admit evidence having probative value to a reasonable person. The commission's presiding officer will decide whether evidence meets this standard, but may be overruled by a majority of the commission.<sup>42</sup> The commission may admit hearsay, such as prior testimony, statements, and reports. However, both the prosecution and the defense have the right to call witnesses to explain or contradict such hearsay evidence. Witnesses will be permitted to testify by telephone or video-teleconference.<sup>43</sup> The creation of such special evidentiary rules for military commissions is consistent with historical precedent.<sup>44</sup>

Military commissions will be required to protect classified information. Although the DoD Order requires military commissions to conduct open hearings, it provides an exception permitting the presiding officer to close a hearing when necessary to protect classified information. The DoD Order also permits the commission to issue protective orders to ensure that the parties do not disclose such information.<sup>45</sup> These protections will help ensure that the intelligence used to defeat and capture terrorists will not be jeopardized.<sup>46</sup>

The DoD Order includes rules for the conduct of trials. Military commissions will be required to grant defendants a full and fair trial. Defendants will be entitled to the presumption of innocence and may be convicted only if proven guilty beyond reasonable doubt. They will not be required to testify against themselves, will have the right to be present at trial, and will not be prosecuted twice for the same offense. Defendants may be convicted only upon the concurrence of two-thirds of the members of the commission and sentenced only upon two-thirds concurrence. Defendants may only be sentenced to death by a unanimous vote of a seven-member commission.<sup>47</sup>

The DoD Order also includes post-trial rules. The commissions will submit verbatim records of their trials to the President for review and final decision, a task that may be delegated to the Secretary of Defense. A special review panel consisting of three officers will review each record of trial and make recommendations on disposition.<sup>48</sup> Military commissions will have exclusive jurisdiction over their cases; defendants will not have the right to seek remedy in any other United States or international court.<sup>49</sup> This is consistent with historical practice; traditionally there is no right to direct appeal of the decisions of military commissions to civilian courts.<sup>50</sup> Although collateral appeals of the decisions of military commissions have been allowed, these have been limited to fundamental questions such as whether the commission was properly constituted and had jurisdiction over the defendant.<sup>51</sup> Even such collateral attacks are not available for trials of foreign nationals overseas.<sup>52</sup>

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42. Defense Department Military Commission Order of March 21, 2002, *supra* note 37, para. 6D(1); Military Order of November 13, 2001, *supra* note 1, § 4(c).

43. Defense Department Military Commission Order of March 21, 2002, *supra* note 37, paras. 6D, 5H.

44. See Guy, *supra* note 41, at 221.

45. Defense Department Military Commission Order of March 21, 2002, *supra* note 37, paras. 6B(3), 6D(5), 9; Military Order of November 13, 2001, *supra* note 1, § 4(c)(4).

46. See Laura Ingraham, *Military Tribunals Provide Streamlined Justice*, USA TODAY, Nov. 26, 2001, available at <http://www.usatoday.com/news/comment/2001-11-26-neguest1.htm>.

47. Defense Department Military Commission Order of March 21, 2002, *supra* note 37, paras. 5, 6F, 6G; Military Order of November 13, 2001, *supra* note 1, § 4(c).

48. Defense Department Military Commission Order of March 21, 2002, *supra* note 37, para. 6H; Military Order of November 13, 2001, *supra* note 1, § 4(c)(8).

49. Military Order of November 13, 2001, *supra* note 1, § 7(b).

50. *Quirin*, 317 U.S. at 23; Guy, *supra* note 41, at 228.

51. *Yamashita*, 327 U.S. at 8.

52. *Johnson v. Eisentrager*, 339 U.S. 763 (1950) (explaining that Germans sentenced by American military commissions for violations of the laws of war and serving their sentences in Germany had no right to petition for *habeas corpus* in American Federal District Court).

## V. Conclusion

During war there is a natural tension between legal safeguards and the military mission. American criminal procedures, established during peacetime, are sometimes out-of-place on the battlefield. As a result, Americans have often sought alternate ways of dealing with criminal cases during armed conflict. The military commission is a time-honored means of doing so.

Military commissions are not courts-martial. President Bush's Order specifically states that the rules applicable to courts-martial will not be applicable to military commissions.<sup>53</sup> The commissions will be governed by special rules established by the Secretary of Defense.

Military commissions are well suited to the trial of international terrorists. They are efficient and effective means of prosecuting terrorists without danger of compromising intelligence or the military mission. They afford terrorists substantial procedural rights while protecting the safety of the men and women combating terrorism worldwide.

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53. See generally Military Order of November 13, 2001, *supra* note 1, §§ 3 and 7.