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## XII

## Military Commissions: Constitutional, Jurisdictional, and Due Process Requirements

## Jordan J. Paust\*

## Presidential Power to Create a Military Commission and Jurisdictional Competence

he President's power as Commander-in-Chief to set up a military commission and the jurisdictional competence of a military commission apply only during an actual war within a war zone or a war-related occupied territory. As Colonel William Winthrop recognized in his classic study of military law: "A military commission . . . can legally assume jurisdiction only of offences committed within the field of command of the convening commander," and regarding military occupation, "cannot take cognizance of an offence committed without such territory . . . . The place must be the theater of war or a place where military government or martial law may be legally exercised; otherwise a military commission . . . will have no jurisdiction . . . . "2 The military commission set up within the United States during World War II and recognized in *Ex parte Quirin* had been created during war for prosecution of enemy belligerents for violations of the laws of war that occurred within the United States and within the convening authority's field of command—which in that case was within the Eastern Defense Command of the United States Army. 4

<sup>\*</sup> Mike and Teresa Baker Law Center Professor, University of Houston.

#### Limitations with Respect to Place

What is unavoidably problematic with respect to military commission jurisdiction at Guantanamo, Cuba is the fact that the US military base at Guantanamo is neither in a theater of actual war nor in a war-related occupied territory,<sup>5</sup> and, thus, a military commission at Guantanamo will not be properly constituted and will be without lawful jurisdiction. Moreover, alleged violations of the laws of war during war in Afghanistan or Iraq clearly did not occur in Cuba. Another problem with respect to prosecution of certain persons in a military commission at Guantanamo involves an absolute prohibition under the laws of war. Any person who is not a prisoner of war and who is captured in occupied territory in Afghanistan or Iraq must not be transferred out of occupied territory. Article 49 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War<sup>6</sup> expressly mandates that "[i]ndividual or mass forcible transfers . . . of protected persons from occupied territory . . . are prohibited, regardless of their motive." Further, "unlawful deportation or transfer" is not merely a war crime; it is also a "grave breach" of the Geneva Convention.8 To correct such violations of the laws of war, persons who are not prisoners of war and who were captured in occupied territory and eventually found at Guantanamo or other areas under US control outside of occupied territory should be returned to the territory where they were captured.

### **Limitations with Respect to Time**

The President's power and a military commission's jurisdiction are limited in terms of time to a circumstance of actual war until peace is finalized. As Major General Henry Halleck wrote early during the last century, military commissions "are established by the President, by virtue of his war power as commander-inchief, and have jurisdiction of cases arising under the laws of war," adding: "[they] are war courts and can exist only in time of war." Similarly, in 1865 Attorney General Speed formally advised the President:

A military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offences as the laws of war permit . . . . In time of peace neither Congress nor the military can create any military tribunals, except such as are made in pursuance of that clause of the Constitution which gives to Congress the power "to make rules for the government of the land and naval forces."

From the Attorney General's opinion, one can recognize that relevant presidential power is tied to a war circumstance and law of war competencies such as the competence of a war-related occupying power to set up a military commission to try violations of the laws of war in accordance with the laws of war.

## **Crimes Triable Before Military Commissions**

Since their authority is tied to war powers, military commissions generally have jurisdiction only over war crimes, which are violations of the laws of war. In fact, some writers have stated that military commissions have jurisdiction only over war crimes. <sup>12</sup> In 10 U.S.C. Sections 818 and 821, Congress has only expressly conferred military commission jurisdiction for prosecution of "offenders or offenses that by statute or by the law of war may be tried by military commissions." Such a congressional grant of competence, without additional grants of jurisdiction over offenders or offenses by statute, limits the offenders and offenses that are triable to those that the law of war permits to be tried in a military commission. The Supreme Court has also recognized that when Congress enacted the 1916 Articles of War, which contained similar language, Congress "gave sanction" to uses of a "military commission contemplated by the common law of war." <sup>13</sup> Section 4(A) of the President's 2001 Military Order <sup>14</sup> states that accused shall be tried for "offenses triable by military commission." <sup>15</sup> Thus, one question is whether the law of war allows a military commission to address crimes other than war crimes.

In practice, some military commissions have addressed other crimes under international law that occurred during war (such as crimes against humanity occurring during World War II) when, but only when, the military commissions were convened in war-related occupied territory. 16 A war-related occupying power actually has a greater competence under the international law of war to maintain law and order in the occupied territory and to prosecute various crimes. <sup>17</sup> Since international law is a constitutionally based part of the law of the United States and law that the President is bound faithfully to execute here or abroad in time of peace or war, 18 the President actually has an enhanced power to execute laws of war that confer powers on a war-related occupying power to prosecute such crimes. 19 Congress has also conferred such a competence in 10 U.S.C. Section 821, since the law of war with respect to war-related occupation permits the trial of such offenders and offenses. Thus, when the United States is exercising a war-related occupying power, a military commission in such territory could prosecute crimes other than war crimes because of a special competence conferred by the law of war concerning war-related occupation. Where the United States is not such an occupying power, it is apparent that military commission jurisdiction can be permissible in a theater of war but will be limited to prosecution of war crimes.

Again, military commissions at Guantanamo are not within a theater of war or war-related occupied territory and have no such jurisdiction.<sup>20</sup> Even if they were constituted in an actual theater of war such as Afghanistan or Iraq, questions have been raised whether the current list of crimes set forth in Military Commission Instruction No. 2<sup>21</sup> is partly improper because it attempts to list crimes that are not prosecutable as war crimes as such despite a statement that the "crimes and elements derive from the law of armed conflict, . . . the law of war" and "constitute violations of the law of armed conflict or offenses that, consistent with that body of law, are triable by military commission."22 For example, Human Rights First has stated that the list includes crimes that are not war crimes and that offenses prosecutable by military commission must occur during an armed conflict to which the laws of war apply.<sup>23</sup> The list does include some crimes that are not war crimes per se; but conduct relevant to some of the crimes, such as "hijacking or hazarding a vessel or aircraft"24 and "terrorism,"25 could constitute a war crime during actual war in a given circumstance and the Instruction requires that "[t]he conduct took place in the context of and was associated with armed conflict."<sup>26</sup> In fact, terrorism is not new to the laws of war and some forms of "terrorism" are war crimes.<sup>27</sup> Some crimes on the list can be war crimes if they are committed against persons or property protected from attack or destruction by the laws of war. These could involve murder or destruction of property<sup>28</sup> if in a given context the murder or destruction were war crimes.<sup>29</sup> Yet, some of the crimes listed are merely crimes against the state as such or "pure political offenses"<sup>30</sup> and are not war crimes. These include: "aiding the enemy, spying,31 perjury or false testimony, and obstruction of justice related to military commissions."32 The Human Rights First Report also correctly notes that definitions of "armed conflict" are too broad with respect to the laws of war and that an attempted jurisdictional reach through such a definition and concepts such as "associated with" an armed conflict are potentially improper.33

#### **Other Constitutional Limitations**

### General Conferral of Competence by Congress

Some have argued that Congress must authorize the creation of military commissions and that Congress has not done so with respect to military commissions addressed in the 2001 Military Order of the President. However, as noted Congress has generally conferred military commission jurisdiction with respect to prosecution of war crimes in 10 U.S.C. Sections 818 and 821; and it has done so in the same general language that existed in the 1916 congressional Articles of War<sup>34</sup> addressed by the US Supreme Court in *Ex parte Quirin* and *In re Yamashita* which not only

allows such jurisdiction to obtain when a military commission is otherwise properly constituted and is being used in a manner "contemplated by the common law of war," but also incorporates the laws of war by reference as offenses against the laws of the United States whether they are committed by United States or foreign nationals here or abroad. The President expressly mentioned such a conferral of jurisdictional competence in his 2001 Military Order. Ido not agree that Congress must do so again in more specific legislation, although it is the case that Congress has not approved the type of military commissions or procedures set forth in the 2001 Military Order. Order or instructions.

### A Violation of the Separation of Powers

Nonetheless, a serious violation of the separation of powers exists with respect to the attempt by the President in his 2001 Military Order to preclude any judicial review of US military commission decisions<sup>39</sup> concerning offenses against the laws of war and other international crimes over which there is concurrent jurisdictional competence in federal district courts.<sup>40</sup> Additionally, under Article I, Section 8, clause 9 of the United States Constitution, Congress merely has power "[t]o constitute Tribunals inferior to the supreme Court" and, thus, tribunals subject to ultimate control by the Supreme Court.<sup>41</sup> For this reason, the congressional authorization for creation of military commissions in 10 U.S.C. Section 821 is necessarily subject to the constitutional restraint contained in Article I, Section 8, clause 9 and the President's attempt to preclude any form of judicial review is constitutionally improper whether or not a military commission has support in a general congressional authorization.<sup>42</sup>

# Problems Concerning Present DoD Rules of Procedure for Military Commissions

Since 9/11, we have witnessed the deliberate creation of rules of procedure for US military commissions that would violate human rights and Geneva law guarantees<sup>43</sup> and can create war crime civil and criminal responsibility for those directly participating in their creation and application if the military commission rules are not changed and are utilized. We have seen a refusal to even disclose the names of persons detained and false Executive claims are made before our courts and media that human beings have no human rights or Geneva law protections, no right of access to an attorney or to their consulate, and no right of access to a court of law to address the propriety of their detention without trial. Despite commendable efforts by professional military lawyers to stretch the DoD rules of

procedure where they can in order to follow the mandate of the President's Military Order requiring that all accused have "a full and fair trial," 46 present DoD rules for military commissions would assure denial of the customary and treaty-based human rights to trial before a regularly constituted, competent, independent, and impartial court;<sup>47</sup> to counsel of one's choice and to effective representation;<sup>48</sup> to fair procedure and fair rules of evidence, including the right to confrontation and examination of all witnesses against an accused (an important due process guarantee that can be violated, for example, by use of unsworn written statements, declassified summaries of evidence, testimony from prior trials or proceedings, certain forms of hearsay, other testimony from witnesses who do not appear before the military commission, and reports);<sup>49</sup> to review by a competent, independent, and impartial court of law;<sup>50</sup> and to various other human rights, including freedom from discrimination on the basis of national origin (since only aliens will be subject to prosecution before the military commissions), rights to equality of treatment and equal protection, and "denial of justice" to aliens.<sup>51</sup> Relevant customary human rights to due process are also incorporated through common Article 3 of the Geneva Conventions as minimum due process guarantees for all persons in any armed conflict, regardless of their status as combatants or noncombatants<sup>52</sup> and whether or not the due process requirements are mirrored elsewhere in the Conventions.

Clearly, the DoD rules should be changed. Moreover, they should be construed consistently with the President's requirement of a "full and fair trial" wherever possible, since in case of a potential clash between lawful portions of the President's Military Order and subsequent DoD rules of procedure or military commission instructions the lawful portions of the Military Order must prevail.<sup>53</sup> Additionally, since the Executive is bound by international law,<sup>54</sup> the Military Order and subsequent DoD rules and instructions should be construed consistently with international legal requirements wherever possible.<sup>55</sup> In cases where the Military Order or DoD rules or instructions are unavoidably violative of international law, international law must prevail as supreme law of the United States.<sup>56</sup>

#### Conclusion

Military commissions are "war courts" and their jurisdiction is limited in terms of context and time to a circumstance of actual war and in terms of place to a theater of war or a war-related occupied territory. Guantanamo Bay, Cuba is not in a theater of war or war-related occupied territory and, thus, a military commission situated there would not have lawful jurisdiction. Some of the crimes that might be charged are also not within the competence of a military commission. A serious

violation of the separation of powers exists because the military commissions at Guantanamo Bay do not comply with Article I, Section 8, clause 9 of the US Constitution, which requires that tribunals be constituted "inferior to the supreme Court" and, thus, subject to its ultimate control.

Some of the present DoD rules of procedure and instructions for military commissions do not comply with international law, which is the constitutionally based supreme law of the United States, and they should be changed. Some DoD rules and instructions have a potential to create violations of international law and to violate the President's requirement of a "full and fair trial." They should be interpreted consistently with international law or changed if compliance is not possible.

Serious short- and long-term consequences can ensue for the United States, other countries, United States and other military personnel, and other US nationals if violations of human rights and rights under the Geneva Conventions occur. Violations are unnecessary. They would degrade this country, its values, and its influence. They can fulfill terrorist ambitions<sup>57</sup> and pose serious long-term threats. As military officers, we took an oath to preserve and protect the Constitution and we are bound to comply with the laws of the United States, not to violate or degrade them here or abroad even at the order of a President.<sup>58</sup>

#### Notes

- 1. See, e.g., The Grapeshot, 76 U.S. (9 Wall.) 129, 132–33 (1869) (jurisdiction exists "wherever the insurgent power was overthrown"); WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 836 (2d ed. 1920); Jordan J. Paust, Antiterrorism Military Commissions: Courting Illegality, 23 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1, 5 & n.14, 25 n.70, 26–27 (2001); see also Madsen v. Kinsella, 343 U.S. 341, 348 (1952) (a military commission is proper in a war-related occupied enemy territory "in time of war"); Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946) ("occupied enemy territory"); id. at 326 (Murphy, J., concurring) ("[o]nly when a foreign invasion or civil war actually closes the courts"); Coleman v. Tennessee, 97 U.S. 509, 515 ("when ... in the enemy's country"), 517 (when occupation of enemy territory occurs) (1878).
- 2. WINTHROP, supra note 1, at 836.
- 3. 317 U.S. 1 (1942).
- 4. See 317 U.S. at 22 n.1. Petitioners had also been charged with war-time espionage, but the Supreme Court merely approved military commission jurisdiction to try violations of the laws of war.
- 5. See, e.g., Paust, supra note 1, at 25 n.70. See also Rasul v. Bush, 542 U.S. 466, 487 (2004) (Kennedy, J., concurring) (it is territory "far removed from any hostilities").
- 6. Done Aug. 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 2516, T.I.A.S. No. 3365, reprinted in DOCUMENTS ON THE LAWS OF WAR 301 (Richard Guelff & Adam Roberts eds., 3d ed. 2000) [hereinafter GC or Geneva Civilian Convention]. The Convention applies to the wars in Afghanistan and Iraq even though the United States cannot be at "war" with al Qaeda as such there or elsewhere and members of al Qaeda can be covered under certain provisions of the Convention if captured during war in Afghanistan or Iraq. See, e.g., Paust, supra note 1, at 5-8

n.16; Jordan J. Paust, War and Enemy Status After 9/11: Attacks on the Laws of War, 28 YALE JOURNAL OF INTERNATIONAL LAW 325, 325–28 (2003).

7. GC, supra note 6, art. 49; see also id., art. 76 ("persons accused of offences shall be detained in the occupied country"); Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 85(4)(a), 1125 U.N.T.S. 3, reprinted in DOCUMENTS ON THE LAWS OF WAR, supra note 6, at 422, 471 [hereinafter Geneva Protocol I]; IV COMMENTARY, GENEVA CONVENTION RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR 278-80, 363 (Jean S. Pictet ed., 1958) [hereinafter IV COMMENTARY]; Paust, supra note 1, at 24 n.68. Even if persons are nationals of a "neutral" State and their State of nationality has normal diplomatic relations with the detaining State, they are protected persons if they are in occupied territory or other territory that is not the territory of the detaining State, since the exclusion in paragraph 2 in Article 4 only applies to persons detained in the detaining State. See, e.g., GC, supra note 6, art. 4; IV COMMENTARY, supra, at 48 ("in occupied territory they are protected persons and the Convention is applicable to them"); U.S. Department of the Army, Pam. 27-161-2, 2 INTERNATIONAL LAW 132 (1962) ("If they are in occupied territory, they remain entitled to protection."); UK Ministry of Defence, THE MANUAL OF THE LAW OF ARMED CONFLICT 274 (2004) ("Neutral nationals in occupied territory are entitled to treatment as protected persons under Geneva Convention IV whether or not there are normal diplomatic relations between the neutral States concerned and the occupying power.") [hereinafter UK MANUAL].

Additionally, rights and duties under the 1949 Geneva Conventions must be applied "in all circumstances." See, e.g., GC, supra note 6, arts. 1, 3, 27. Importantly, any detainee who is not a prisoner of war has certain protections under the Geneva Civilian Convention and common Article 3, which now applies also in an international armed conflict (i.e., there are no gaps in Geneva law that leave a person without any protections). See, e.g., GC, supra note 6, arts. 3, 5, 13, 16, 27-33; IV COMMENTARY, supra at 18, 58, 595; U.S. Department of the Army Field Manual 27-10, THE LAW OF LAND WARFARE 31, ¶ 73, 98, ¶ 247(b) (1956) [hereinafter FM 27-10]; UK MANUAL, supra, at 5, 145, 148, 150, 216, 255; Derek Jinks, Protective Parity and the Law of War, 79 NOTRE DAME LAW REVIEW 1493, 1504, 1508-11 (2004); Paust, supra note 1, at 6-8 n.15; William H. Taft, IV, The Law of Armed Conflict After 9/11: Some Salient Features, 28 YALE JOURNAL OF INTERNATIONAL LAW 319, 321-22 (2003). Further, the 1949 Geneva Conventions contain express and implied rights and can be self-executing. See, e.g., Jordan J. Paust, Judicial Power To Determine the Status and Rights of Persons Detained Without Trial, 44 HARVARD INTERNATIONAL LAW JOURNAL 503, 515-17 (2003). Additionally, they are "executed" by congressional legislation in, for example, 10 U.S.C. §§ 818, 821. See, e.g., infra note 36; see also Paust, supra at 517 (re: ATCA and habeas statutes). Moreover, the President has an unavoidable constitutional duty to faithfully execute the law. See, e.g., U.S. CONSTITUTION, art. II, § 3; infra notes 11, 18.

That the United States has been an occupying power in Afghanistan and Iraq is well-known. See, e.g., United Nations Security Council Resolution 1438, U.N. SCOR, 58th Sess., 4761st mtg. pmbl., U.N. Doc. S/RES/1483 (2003) (addressing UK and US recognitions); Jordan J. Paust, The US as Occupying Power Over Portions of Iraq and Special Responsibilities Under the Laws of War (May 2003), at http://www.nimj.org/documents/occupation(1).doc; Paust, supra note 1, at 24 n.67.

8. GC, supra note 6, art. 147; IV COMMENTARY, supra note 7, at 280, 599. See also Geneva Protocol I, supra note 7, art. 85(4)(a); Rome Statute of the International Criminal Court, art. 8(2)(a)(vii) and (b)(viii), U.N. Doc. A/CONF.183/9 (1998), reprinted in 37 INTERNATIONAL LEGAL MATERIALS 999 (1998).

- 9. See, e.g., Madsen v. Kinsella, 343 U.S. 341, 346-48 (1952) (recognizing that military commission power is "related to war" and recognizing them as "war courts" that the President "may, in time of war, establish"); In re Yamashita, 327 U.S. 1, 11-13 (1946) (such power exists after cessation of hostilities "at least until peace has been officially recognized by treaty or proclamation of the political branch of the Government."), 20 n.7 (a military commission is a "war court") (1946); Ex parte Quirin, 317 U.S. 1, 28 (1942); The Grapeshot, 76 U.S. (9 Wall.) 129, 132–33 (1869) (permitting jurisdiction "so long as the war continued" and "during war"); Cross v. Harrison, 57 U.S. (16 How.) 164, 190 (1853) (permitting jurisdiction until a "treaty of peace"); 24 Opinions of the Attorney General 570, 571 (1903); 11 Opinions of the Attorney General 297, 298 (1865); JORDAN J. PAUST, M. CHERIF BASSIOUNI, ET AL., INTERNATIONAL CRIMINAL LAW 309–10 (2d ed. 2000); WINTHROP, supra note 1, at 86 (jurisdiction of military commissions "is determined by the existence and continuance of war"), 831 (jurisdiction is tied to the war powers, "exclusively war-court"), 837 ("An offence . . . must have been committed within the period of the war or of the exercise of military government . . . . [J]urisdiction . . . cannot be maintained after the date of a peace . . . . "); DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL 1067 (1912); Henry W. Halleck, Military Tribunals and Their Jurisdiction, 5 AMERICAN JOURNAL OF INTERNATIONAL LAW 958, 965-66 (1911), reprinted in MILITARY LAW REVIEW BICENTENNIAL ISSUE 15, 21 (1975); Michael A. Newton, Continuum Crimes: Military Jurisdiction Over Foreign Nationals Who Commit International Crimes, 153 MILITARY LAW REVIEW 1, 15 (1996); Paust, supra note 1, at 5 & n.14, 9, 25 n.70; Committee on Military Affairs and Justice of the Association of the Bar of the City of New York, Inter Arma Silent Leges: In Times of Armed Conflict, Should the Laws be Silent? - A Report on the President's Military Order of November 13, 2001 at 25-26 n.68, 28 (Dec. 2001); SENATE REPORT. No. 64-130, at 40 (1916) (it is a "war court").
- 10. Halleck, *supra* note 9, at 965–66. General Halleck was a general during the Civil War and a prominent international legal scholar who participated in the creation of the 1863 Lieber Code on the laws of war.
- 11. 11 Opinions of the Attorney General, *supra* note 9, at 297, 298 (1865). Clearly, Congress can regulate the jurisdiction and procedure of military commissions, but must do so consistently with international law and the requirements of international law are of binding force upon the departments and citizens of the Government, though not defined by any law of Congress and neither Congress nor the Executive can abrogate them or authorize their infraction. *See, e.g., id.* at 298–300; Madsen v. Kinsella, 343 U.S. 341, 348–49 (1952); *see also* Dooley v. United States, 182 U.S. 222, 231 (1901) (Executive military powers are "regulated and limited... directly from the laws of war"), *quoting* 2 HENRY W. HALLECK, INTERNATIONAL LAW 444 (1st ed. 1861); *infra* note 18.
- 12. See, e.g., Human Rights First, Trials Under Military Order: A Guide to the Final Rules for Military Commissions 2, 8 (rev. ed. June 2004) [hereinafter Human Rights First Report], available at http://www.humanrightsfirst.org/us\_law/PDF/detainees/trials\_under\_order0604.pdf; Alberto R. Gonzales, Martial Justice, Full and Fair, NEW YORK TIMES, Nov. 30, 2001, at A27 ("The [2001 presidential] order only covers foreign enemy war criminals . . . [they] must be chargeable with offenses against the international laws of war"). See also Madsen v. Kinsella, supra note 11, at 348–49; Johnson v. Eisentrager, 339 U.S. 763, 786 (1950) ("the military commission is a lawful tribunal to adjudge enemy offenses against the laws of war."); Duncan v. Kahanamoku, 327 U.S. 304, 313–14, 322–23 (1946); 11 Opinions of the Attorney General, supra note 9, at 298 ("They may take cognizance of such offenses as the laws of war permit"); WINTHROP, supra note 1, at 831, 836–37; Halleck, supra note 9, at 965–66 (they "have jurisdiction of cases arising under the laws of war"); Newton, supra note 9, at 15, 19–21 (stating

that jurisdiction apparently exists only over violations of the laws of war); O'Callahan v. Parker, 395 U.S. 258, 267 ("court-martial jurisdiction cannot be extended to reach any person not a member of the Armed Forces . . . no matter how intimate the connection between their offense and the concerns of military discipline . . . . [C]ourts-martial have no jurisdiction over nonsoldiers, whatever their offense"), 302 ("we deal with peacetime offenses, not with authority stemming from the war power. Civil courts were open. The offenses were committed within our territorial limits, not in the occupied zone of a foreign country.") (1969); United States *ex rel*. Toth v. Quarles, 350 U.S. 11, 13–14 & n.4 (1955) (ex-service persons are not subject to prosecution in military courts-martial re: murder, yet the case did not involve congressional power to punish offenses against the laws of war). A resolution of the American Bar Association in 2002 recommended that the military commissions prosecute only war crimes. *See* Jeff Blumenthal, *ABA Votes to Favor Curbs on Bush's Military Tribunals*, THE LEGAL INTELLIGENCER, Feb. 5, 2002, at 24, *available at* http://pirate.shu.edu/~jenninju/CivilProcedure/911/ABAOpposesMilitaryTribunalsLawComFeb5.htm [hereinafter ABA Resolution].

- 13. *In re* Yamashita, *supra* note 9, at 19; *see also id.* at 20 n.7 (a military commission is a "war court").
- 14. Military Order of Nov. 13, 2001, 66 Federal Register 57,833 (Nov. 16, 2001), available at http://www.fas.org/irp/offdocs/eo/mo-111301.htm.
- 15. *Id.* § 4(A).
- 16. See, e.g., PAUST, BASSIOUNI, ET AL., supra note 9, at 288–93. The Supreme Court has stated that "jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language of Art. I, § 8," concerning offenses against the law of nations. Reid v. Covert, 354 U.S. 1, 21 (1957).
- 17. See, e.g., GC, supra note 6, arts. 64, 66–68, 71–75, 147; Hague Convention No. IV Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, art. 43, League of Nations Treaty Series vol. XIV (1929), No. 2138, T.S. No. 539, 36 Stat. 2277, reprinted in DOCUMENTS ON THE LAW OF WAR, supra note 6, at 69, 80.
- 18. See, e.g., U.S. CONSTITUTION, art. II, § 3; JORDAN J. PAUST, INTERNATIONAL LAW AS LAW OF THE UNITED STATES 7–9, 169–92, 488, 493–94 (2d ed. 2003), and the many cases and opinions and views of the Founders and Framers cited; Paust, supra note 7, at 517–22; Jordan J. Paust, Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees, 43 COLUMBIA JOURNAL OF TRANSNATONAL LAW 811, 856–861 (2005); supra note 11; see also U.S. CONSTITUTION, arts. III, § 2, VI, cl. 2.
- 19. Concerning the enhancement of Executive power by international law, *see, e.g.*, PAUST, *supra* note 18, at 9, 16, 44–47 n.55, 79, 82, 180, 185, 457, 468–69, 480–81.
- 20. See Part I A supra.
- 21. Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission (rev. ed. Apr. 30, 2003), *available at* http://www.defenselink.mil/news/May2003/d20030430milcominstno2.pdf [hereinafter Instruction No. 2].
- 22. See id. at 1-2, § 3(A).
- 23. See Human Rights First Report, supra note 12, at 2, 8–9, 13.
- 24. In a given case, a hijacking can involve hostage-taking covered under the Geneva Civilian Convention. *See* GC, *supra* note 6, arts. 3(1)(b), 34. Some might involve cruel or inhumane treatment, and so forth.
- 25. See Instruction No. 2, supra note 21, at 13–14,  $\S$  6(B)(1)–(2). The definitional elements of "terrorism" are, however, too broad since they do not require an intent to produce "terror" or intense fear or anxiety but merely an intent to "intimidate or coerce." See id.  $\S$  6(B)(a)(4). Minimum standards of fairness and common sense dictionary definitions require that terrorism

involve an intent to produce "terror" in or to "terrorize" a given human target. Interrogation techniques approved by Secretary Rumsfeld and others would be "terrorism" under such a definition when they violate laws of war such as those in the Geneva Civilian Convention, *supra* note 6, arts. 3, 5, 27, 31–33, 147.

- 26. See Instruction No. 2, supra note 21, at 13–14, § 6(B)(1)(a)(3) and (2)(a)(4).
- 27. See, e.g., GC, supra note 6, art. 33; Geneva Protocol I, supra note 7, art. 51; PAUST, BASSIOUNI, ET AL., supra note 9, at 32 (1919 list of war crimes adopted by the Responsibilities Commission of the Paris Peace Conference), 998; Jordan J. Paust, Terrorism and the International Law of War, 64 MILITARY LAW REVIEW 1 (1974).
- 28. See Instruction No. 2, supra note 21, at 13–14, § 6(B)(3)–(4).
- 29. "Murder," for example, involves the unlawful killing of a human being, which partly begs the question because some persons, in some contexts, can be lawfully killed during a war. As an example, once any person is "taking no active part in the hostilities" "violence to life . . . , in particular murder" of such a person would be both murder and a war crime covered by common Article 3(1)(a) of the Geneva Conventions. See also GC, supra note 6, arts. 32, 147. It would not matter whether the perpetrator was "military or civilian." FM 27-10, supra note 7, at 178, ¶ 499. Yet, is the unlawful killing of one soldier by a fellow soldier that constitutes "murder" under domestic law a war crime merely because it happens in a theater of war? Similarly, is "murder" by a noncombatant or unlawful belligerent necessarily a war crime if committed in a theater of war? Professor Yoram Dinstein has written that an unprivileged belligerent who kills on the battlefield lacks combat immunity and, therefore, becomes subject to domestic prosecution for any applicable domestic crimes over which there is jurisdiction, but that the law of war "merely takes off a mantle of immunity from the defendant, who is therefore accessible to penal charges for any offense committed against the domestic legal system." YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 31 (2004). See also Ex parte Quirin, 317 U.S. 1, 28-31, 35-37, 44 (1942) (prosecution of combatants who engaged in combatant operations of sabotage out of uniform in violation of the laws of war); MYRES S. McDougal & Florentino P. Feliciano, Law and Minimum World Public Order 712 (1961); Paust, supra note 6, at 331–32 (regarding combatant immunity).
- 30. Concerning the concept of "pure political offenses," see, e.g., PAUST, BASSIOUNI, ET AL., supra note 9, at 332–33, 367–69.
- 31. Spying as such is not a war crime. *See, e.g., id.* at 854; FM 27-10, *supra* note 7, at 33, ¶ 77, 78(c).
- 32. See Instruction No. 2, supra note 21, at 14–16, § 6(B)(5)–(8). See also Smith v. Shaw, 12 Johns. 257, 265 (N.Y. Sup. Ct. 1815) (civilian who allegedly was an enemy spy exciting mutiny and insurrection during war cannot be detained by the US military for trial in a military tribunal); In re Stacy, 10 Johns. 328, 332 (N.Y. Sup. Ct. 1813) (habeas writ issued in wartime against a military commander holding a civilian charged with treason in aid of the enemy, since US military did not have jurisdiction despite the alleged threat to national security).
- 33. Human Rights First Report, *supra* note 12, at 9–12, addressing Instruction No. 2, *supra* note 21, at 3, § 5(B)–(C). In this regard, it should be noted that although the United States is at war in Afghanistan and Iraq, one cannot be at war with al Qaeda as such. Thus, armed attacks by al Qaeda outside of an actual war, such as those that occurred outside the context of the civil war in Afghanistan between the Northern Alliance and the Taliban or that occurred outside of Afghanistan and prior to the war in Afghanistan involving US armed forces that started in October 2001 might be criminal under some laws but cannot be war crimes. *See*, *e.g.*, Paust, *supra* note 1, at 5–8 & n.16; Paust, *supra* note 6, at 325–28. However, the fact that a state of war or armed conflict cannot exist between the United States and al Qaeda as such does not preclude

United States use of force in self-defense against such non-State actors (and the mere fact that the United States engages in such self-defense actions abroad does not create a state of armed conflict). See, e.g., Jordan J. Paust, Use of Armed Force against Terrorists in Afghanistan, Iraq, and Beyond, 35 CORNELL INTERNATIONAL LAW JOURNAL 533, 534–35, 538–39 (2002).

- 34. 39 Stat. 619, 653 (Aug. 29, 1916).
- 35. In re Yamashita, 327 U.S. 1, 19 (1946).
- 36. See, e.g., Ex parte Quirin, 317 U.S. 1, 28–30 (1942); In re Yamashita, id. at 7–8, 11; United States v. Schultz, 1 U.S.C.M.A. 512, 519, 4 C.M.R. 104, 111 (1952); Jordan J. Paust, After My Lai: The Case for War Crime Jurisdiction Over Civilians in Federal District Courts, 50 Texas Law Review 6, 10–12 (1971); reprinted in 4 The Vietnam War and International Law 447 (Richard Falk ed., 1976).
- 37. See Military Order, supra note 14, para. 1 ("By authority vested in me as president . . . by the Constitution and the laws of the United States of America, including . . . sections 821 and 836 of title  $10 \dots$ ").
- 38. Congress certainly did not do so in its Joint Resolution to Authorize the Use of United States Forces Against those Responsible for the Recent Attacks Launched Against the United States, Sept. 18, 2001, Pub. L. No. 107-40, 115 Stat. 224, since there was no mention of military commissions and it was passed nearly two months prior to the President's Military Order. *See also* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (stating merely that Congress thereby impliedly authorized the "trial of enemy combatants" covered therein—not that any type of forum was authorized or, especially, that any type of military commission or procedure operative outside an actual theater of war or war-related occupied territory would be appropriate). For a well-argued view contrary to the view that Congress has generally approved military commission jurisdiction and that general approval should suffice, see, e.g., Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE LAW JOURNAL 1259 (2002).
- 39. See Military Order, supra note 14, § 7(B)(1)–(2). See also US Department of Defense, Military Commission Order No. 1, Mar. 21, 2002, §§ 6 H (4)–(6), 7 B, available at http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf. He cannot do so lawfully. See, e.g., Paust, supra note 1, at 10–11, 15; Paust, supra note 7, at 518–24; infra note 50.
- 40. Concerning judicial power and concurrent competence in federal district courts, *see*, *e.g.*, U.S. Const., Art. III, § 2; 28 U.S.C. § 3231; Paust, *supra* note 36, at 17–28, and references cited. 41. *See also* James E. Pfander, *Federal Courts: Jurisdiction-Stripping and the Supreme Court's Power to Supervise Inferior Tribunals*, 78 TEXAS LAW REVIEW 1433, 1454–56 (2000) ("Like other provisions of Article I that operate as restrictions on legislative power, the Inferior Tribunals Clause underscores the inability of Congress to fashion new courts to displace the constitutional supremacy of the one supreme court.").
- 42. The Supreme Court has already recognized the propriety of habeas review concerning detention at Guantanamo. See Rasul v. Bush, 542 U.S. 466 (2004); see also Jordan J. Paust, Antiterrorism Military Commissions: The Ad Hoc DOD Rules of Procedure, 23 MICHIGAN JOURNAL OF INTERNATIONAL LAW 677, 690–94 (2002); Paust, supra note 7, at 517 & n.47, 519–20 n.67. It is not unlikely that the Court will insist that there be habeas review with respect to military commissions if not other forms of review. See also infra note 43.
- 43. See, e.g., Steven W. Becker, "Mirror, Mirror on the Wall...": Assessing the Aftermath of September 11th, 37 VALPARAISO UNIVERSITY LAW REVIEW 563, 580–86 (2003); Paust, supra note 1, at 10–18; Paust, supra note 42, at 677–90; Joshua Rozenberg, Law Chief Calls on US to Give Terror Suspects Fair Trial, THE DAILY TELEGRAPH (London), Sept. 19, 2003, at 1 (United Kingdom's Attorney General Goldsmith identifies some of the British complaints about lack of a

jury, secret hearings, restrictions on counsel for the accused, and the lack of judicial review); Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?*, THE ARMY LAWYER 18, 40, 43–45 (Nov. 2003); *see also* Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CALIFORNIA WESTERN LAW REVIEW 433 (2002); Lord Johan Steyn, Guantanamo Bay: The Legal Black Hole, Twenty-Seventh FA Mann Lecture, British Institute of International & Comparative Law (Nov. 25, 2003) at 11–12, 18, *available at* http://www.nimj.org/documents/Guantanamo.pdf; Jonathan Turley, *Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy*, 70 GEORGE WASHINGTON LAW REVIEW 649 (2002); Lawyers Committee for Human Rights, *Assessing the New Normal: Liberty and Security for the Post—September 11 United States* 57–58, 60–61 (2003), *available at* http://www.lchr.org/pubs/descriptions/Assessing/AssessingtheNewNormal.pdf; *Blair Wants Britons' Legal Status Resolved*, HOUSTON CHRONICLE, Oct. 23, 2003, at A23 (Prime Minister Tony Blair reiterated concerns "about the form of trial that they [UK nationals] will have under a military commission.").

- 44. *See, e.g.*, Paust, *supra* note 42, at 694; Paust, *supra* note 1, at 4 n.12, 10 n.18, 28 n.81; Wallach, *supra* note 43, at 45–46.
- 45. See generally Hamdi v. Rumsfeld, 542 U.S. 507 (2004); Paust, supra note 7, at 503–04 (also addressing numerous cases recognizing judicial power to review Executive or military decisions, id. at 520–24). See also White House Counsel Alberto R. Gonzales, Memorandum for the President (Jan. 25, 2002), available at http://www.msnbc.msn.com/id/4999148/site/newsweek; John Yoo & Robert J. Delahunty of the Office of Legal Counsel, Department of Justice, Memorandum for William J. Haynes II, General Counsel, Department of Defense (Jan. 9, 2002), available at http://www.msnbc.msn.com/id/5025040/site/newsweek.
- 46. See Military Order, supra note 14, § 4(C)(2).
- 47. See, e.g., Paust, supra note 42, at 687–88; A. Christopher Bryant & Carl Tobias, Quirin Revisited, 2003 WISCONSIN LAW REVIEW 309, 360–61 (2003); Mark A. Drumbl, Victimhood in Our Neighborhood: Terrorist Crime, Taliban Guilt, and the Asymmetries of the International Legal Order, 81 NORTH CAROLINA LAW REVIEW 1, 10–12, 58–59 (2002); Harold Hongju Koh, The Case Against Military Commissions, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 337, 338–39 (2002); Detlev F. Vagts, Which Courts Should Try Persons Accused of Terrorism?, 14 EUROPEAN JOURNAL OF INTERNATIONAL LAW 313, 322 (2003); see also NORMAN ABRAMS, ANTITERRORISM AND CRIMINAL ENFORCEMENT 330–31 (2003); Justice Sandra Day O'Connor, Vindicating the Rule of Law: The Role of the Judiciary, 2 CHINESE JOURNAL OF INTERNATIONAL LAW 1, 3–4 (2003), quoting the Declaration of Rights of the Massachusetts Constitution, Article 29, which "framed by John Adams, boldly declares, 'It is the right of every citizen to be tried by judges as free, impartial and independent as the lot of humanity will admit,'" and adding: "Individual judicial independence is necessary if each case is to be resolved on its own merits, according to the facts and the law."
- 48. See, e.g., Paust, supra note 42, at 690; Human Rights First Report, supra note 12, at 2–3, 17–18, 21–24; supra notes 43, 47.
- 49. See, e.g., Koh, supra note 47, at 339; Paust, supra note 42, at 678–79, 688–89; Human Rights First Report, supra note 12, at 3–4, 27–28, 30; Military Defense Attorneys and Counsel, DoD Office of Military Commissions, letter to the United States Senate Armed Forces and Judiciary Committees (June 1, 2004), available at http://pegc.no-ip.info/omc\_def\_letter\_20040601.html; supra notes 43, 47.
- 50. See, e.g., Paust, supra note 42, at 678–79, 685–86; Human Rights First Report, supra note 12, at 4, 31–32; supra notes 43, 47. The Executive's military "Review Panel" may not overturn a conviction, reverse or amend a decision, or order dismissal or release of the person (or order

anything else), since it "shall either (a) forward the case to the Secretary of Defense with a recommendation as to disposition, or (b) return the case to the Appointing Authority for further proceedings" if a majority of the panel decides that "a material error of law occurred." Military Commission Order No. 1, supra note 39, § 6(H)(4). Further, only one member of the panel must be a lawyer, since only one member must "have experience as a judge," and no member of the panel must have been a judge with expertise in the laws of war, international law more generally, or criminal law more generally. See id. § 6(H)(4). The final "decision" in such a "review" and "recommendation" system will be made by the Secretary of Defense or the President. Id. § 6(H)(2), (6). See also Reid v. Covert, 354 U.S. 1, 36 n.66 (1957), quoting Alexander Hamilton, THE FEDERALIST NO. 78 ("Liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments...").

- 51. See, e.g., Paust, supra note 1, at 10–17; Paust, supra note 42, at 678–85 (including impermissible discrimination on the basis of national origin, denial of equal access to courts and to equality of treatment and equal protection of the law, "denials of justice" in violation of customary international law, and denial of the human right to fair, meaningful and effective judicial review of the propriety of detention).
- 52. See, e.g., GC, supra note 6, art. 3(1)(d); Paust, supra note 7, at 511 n.27, 514 & n.32; Paust, supra note 42, at 678 n.9.
- 53. See Military Commission Order No. 1, supra note 39, §§ 7(B) and 8.
- 54. See, e.g., supra notes 11, 18.
- 55. Even federal statutes must be interpreted and applied consistently with international law. *See, e.g.*, Cook v. United States, 288 U.S. 102, 120 (1933); The Charming Betsy, 6 U.S. (6 Cranch) 64, 117–18 (1804); Talbot v. Seeman, 5 U.S. (1 Cranch) 1, 43 (1801); 11 Opinions of the Attorney General, *supra* note 11, at 299–300; 9 Opinions of the Attorney General 356, 362–63 (1859) ("law . . . must be made and executed according to the law of nations"); PAUST, *supra* note 18, at 99, 120, 124–25 ns.2–3.
- 56. See, e.g., supra notes 11, 18.
- 57. See also Adam Roberts, Role of Law in the "War on Terror": A Tragic Clash, 97 PROCEEDINGS OF THE AMERICAN SOCIETY OF INTERNATIONAL LAW 18, 19–20 (2003); Steyn, supra note 41, at 3 ("unchecked abuse of power begets ever greater abuse of power"). Terrorists may seek to produce governmental overreaction that sends a message that the targeted government does not follow law, thus deflating its legitimacy and possibly enhancing terrorist recruiting, support, and influence or deflating for some the effects of the illegality of terrorist tactics. Claiming to be at "war" with certain non-State terrorists might also unwittingly enhance their status and serve other terrorist purposes.
- 58. See United States v. Lee, 106 U.S. 196, 219–21 (1882); supra notes 11, 18; see also Reid v. Covert, 354 U.S. 1, 5–6, 12, 35 n.62 (1957) (our government is one of delegated powers and one that is entirely a creature of the Constitution and has no power or authority to act here or abroad inconsistently with the Constitution); Paust, supra note 1, at 19–20. As the Supreme Court reminded in *United States v. Lee*:

No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government, from the highest to the lowest, are creatures of the law, and are bound to obey it.

It is the only supreme power in our system of government, and every man who by accepting office participates in its functions is only the more strongly bound to submit to that supremacy, and to observe the limitations which it imposes upon the exercise of the authority which it gives.

106 U.S. at 220.