

**Military Tribunals, the
Constitution, and the UCMJ**

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Abstract

Recently, the Bush Administration has decided it will use military tribunals to try suspected terrorists. The authors review the history of the use of such tribunals by the Executive Branch and the court's decisions addressing the resulting legal questions. Their analysis of that case law suggest to them that the tribunals are not unconstitutional on their face but that the Order's provision that completely blocks access to the federal courts is unconstitutional and in violation of a congressional statute. The authors note that the Order initially did not specifically indicate the procedures to be used during the trials. Fortunately, the Secretary of Defense thereafter issued an order outlining the procedural aspects of the military tribunals, many of which are similar to those specified in the Uniform Code of Military Justice and should meet most objections. The authors, however, conclude that much work remains to be done to insure that procedures in the tribunals meet pertinent constitutional demands; among the remaining troublesome issues are pendent criminal jurisdiction, appropriate judicial review of the results of the tribunals, lack of confrontation and cross-examination, and the applicability of exclusionary rules.

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I. Introduction

[1.1] [President Bush's Military Order of November 13, 2001](#) (the "Order")¹, authorizing military trials of alleged terrorists, raises challenging issues of both law and policy. Depending on how it is applied, [the Order](#) may lead to constitutional cases in the Supreme Court. Apart from constitutional issues, [the Order](#) implicates significant considerations of public policy about how to proceed in such cases consistently with the American commitment to fair trials.

[1.2] Our conclusions, as developed in this article, are:

[1.3] 1. [The Order](#) is not unconstitutional on its face in providing for military tribunals to try alleged terrorists, although certain applications could invoke various constitutional protections. The President can constitutionally authorize military tribunals to try violations of the law of war, such as espionage and sabotage, to which acts of international terrorism may be assimilated, although not without difficulties.

[1.4] 2. [The Order](#) may be both too narrow and too broad—too narrow because it does not include all persons who may be validly tried by military tribunals, and too broad because it appears to encompass offenses not triable by military tribunals.

[1.5] 3. One provision of [the Order](#)—that purporting to fore close access to the federal courts even to consider the jurisdiction of military tribunals—is contrary to Supreme Court precedent and an Act of Congress and should be treated as a nullity.

[1.6] 4. [The Order](#) left the procedures governing such trials to the Secretary of Defense to fashion *de novo*. It appears to have been drafted in ignorance of the fact that a fair system of criminal procedure, the Uniform Code of Military Justice ("UCMJ"), already exists to govern military courts-martial and could be applied to trials before military tribunals.

[1.7] 5. In apparent recognition of some of the defects in [the original Order](#), the Secretary of Defense issued procedures in March 2002 incorporating many of the procedural provisions of the UCMJ for proceedings before military tribunals. This [second Order](#), produced by people knowledgeable about the military justice system, represented a substantial step forward toward the creation of a fair procedural system for such cases.

[1.8] 6. Even [the new procedures of the Secretary](#), however, do not address or solve all the problems engendered by [the President's Order](#). More remains to be done,

¹ [Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 \(2001\)](#).

either by Congress or the Executive, or the two working together, to construct a sound basis for the operation of military tribunals.

II. The President's Order

A. The Statutes

[II.A.1] The President promulgated [the Order](#) pursuant to his powers as Commander-in-Chief of the armed forces,² the [Congressional Joint Resolution](#) authorizing the use of military force to combat international terrorism against the U.S., and two provisions of the UCMJ, [10 U.S.C. A. §§ 821](#) and [836](#) (1998).

[II.A.2] [10 U.S.C.A. § 821](#) (1998) provides that the sections of the UCMJ creating court-martial jurisdiction “do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost courts, or other military tribunals.”

[II.A.3] The second statute relied on, [10 U.S.C. A. § 836](#) (1998), provides:

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

[II.A.4] The most important provisions of [the Order](#) are the following:

[II.A.5] 1. [The Order](#) refers repeatedly to “international terrorists” and “international terrorism” although it nowhere defines these terms, as some commentators have attempted to do.³ Perhaps the drafters, for reasons of state and diplomacy, elected not to include a definition. Since some of our coalition partners

² See [U.S. Const. art. II, § 2, d. 1](#).

³ *E.g.*, Barr and McBride, *Military Justice for al Qaeda*, Wash. Post, Outlook Section, Nov. 18, 2001 (defining terrorism as “unprovoked surprise attacks out of uniform with the clear intent to target unarmed civilians”).

believe that “one man’s terrorist is another man’s freedom fighter,” avoiding a definition may avoid rocking the boat in which all are presently embarked.

[II.A.6] The closest [the Order](#) comes to a definition is in Section 2 (“Definition and Policy”), which provides that individuals not U.S. citizens may be tried in military tribunals if the President determines in writing that “there is reason to believe” that the individual, at the relevant times, (1) “is or was a member of the organization known as al Qaida,” or (2) “has engaged in, aided or abetted, or conspired” to commit “acts of international terrorism” or “acts in preparation” for it that “have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects” on the U.S., “its citizens, national security, foreign policy, or economy,” or (3) “has knowingly harbored” any of the individuals described in the first two categories.⁴

[II.A.7] 2. [The Order](#) further provides that any such individual shall be tried by military commission “for any and all offenses triable by military commission that such individual is alleged to have committed.”⁵ The punishment may include life imprisonment or death.⁶

[II.A.8] 3. Based on the President’s finding that “it is not practicable to apply in military commissions” under [the Order](#) “the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the U.S. district courts”, the Secretary of Defense is directed to issue orders and regulations, including “rules for the conduct of the proceedings of military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualification of attorneys.” At a minimum, these rules are to provide for “a full and fair trial, with the military commission sitting as the triers of both fact and law”; admission of such evidence as would “in the opinion” of the presiding officer or a majority of the commission “have probative value to a reasonable person”; protection of “classified or classifiable” information, including “closure” of proceedings; the right to counsel for “conduct of the defense”; conviction on concurrence of two-thirds of the members of the commission; sentencing on the concurrence of two-thirds of the members; and review of the conviction or sentence by the President or the Secretary of Defense if so designated by the President.⁷

⁴ [Military Order of Nov. 13, 2001 at § 2.](#)

⁵ [Id. at § 4\(a\).](#)

⁶ [Id.](#)

⁷ [Id.](#)

[II.A.9] 4. [The Order](#) also provides that, with respect to any individual subject to [the 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 seeking any remedy in “any court of the United States.”⁸

B. The Constitution.

[II.B.1] Several provisions of the [U.S. Constitution](#) are relevant to the constitutionality of [the Order](#), on its face and as applied.⁹

[II.B.2] [Article III, Section 2](#), of the main body of the Constitution, provides:

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.¹⁰

[II.B.3] The [Fourth Amendment](#) guarantees the “right of the people” to be “secure in their persons, houses, papers, and effects” against “unreasonable searches and seizures.”¹¹

[II.B.4] The [Fifth Amendment](#) provides, in relevant part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself,

⁸ [Id. at § 7\(b\)](#).

⁹ For a general critique of military tribunals, see Neal K. Kaytal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002). See also Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 Mich. J. Int'l L. 1 (Fall 2001); Curtis A. Bradley & Jack L. Goldsmith, *The Constitutionality of Military Commissions*, 5 Green Bag 2d 249 (Spring 2002).

¹⁰ [U.S. Const. art. III, § 2](#).

¹¹ [U.S. Const. amend. IV](#).

nor be deprived of life, liberty, or property, without due process of law.¹²

[II.B.5] The [Sixth Amendment](#) provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defense.¹³

[II.B.6] One other Amendment may also be relevant; the [Eighth Amendment](#) provides that: “[E]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”¹⁴

C. The Supreme Court Cases

[II.C.1] There is a surprisingly small body of Supreme Court law on the constitutionality of military tribunals. These cases answer some, but by no means all, the constitutional questions which may arise, depending on how [the Order](#) is implemented and applied. The three principal cases are [Ex parte Milligan](#);¹⁵ [Ex parte Quirin](#);¹⁶ and [Application of Yamashita](#).¹⁷

1. [Ex parte Milligan](#)

[II.C.1.a] This is the post-Civil War case containing rhetoric which civil libertarians love to quote. Five members of the Court there held that Milligan, a citizen of Indiana, had been unconstitutionally tried and sentenced to death by a military tribunal during the Civil War for conspiracy against the U.S. government, affording aid and comfort to the Rebellion,

¹² [U.S. Const. amend. V.](#)

¹³ [U.S. Const. amend. VI.](#)

¹⁴ [U.S. Const. amend. VIII.](#)

¹⁵ [71 U.S. \(2 Wall.\) 2 \(1866\).](#)

¹⁶ [317 U.S. 1 \(1942\).](#)

¹⁷ [327 U.S. 1 \(1946\).](#)

inciting insurrection, “disloyal practices,” and violation of the laws of war, at a time when the civilian courts in Indiana were open, as they had been at all times during the War.

[II.C.1.b] Some samples of this rhetoric are:

The Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection *all classes of men at all times and under all circumstances*. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government.¹⁸

* * * *

[I]f ideas can be expressed in words, and language has any meaning, [the right of trial by jury]—one of the most valuable in a free country—is preserved to *everyone accused of crime* who is not attached to the Army or Navy or Militia in actual service. The Sixth Amendment...[has] language broad enough to embrace all persons and cases.¹⁹

[II.C.1.c] It is often forgotten that Justice Davis, the author of these words, wrote for a bare majority. Four other members of the Court, led by Chief Justice Chase, concurred in the result but did not reach the constitutional question. They went off on the statutory ground that Congress, in the Habeas Corpus Act of 1863, authorizing the suspension of the writ of habeas corpus, had provided for prompt grand jury consideration of charges against persons held in federal custody and for discharge of the prisoner if he was not indicted. In Milligan’s case, there had been no such indictment, and, on that ground alone, the four Justices concurred in overturning his conviction and sentence. They asserted, however, that it was not beyond the war power of Congress to authorize military tribunals, even for the trial of U.S. citizens, in exigent circumstances.²⁰

[II.C.1.d] If either opinion in *Milligan* was prophetic, it was the minority’s, not the majority’s. Although it would be an exaggeration to characterize the majority opinion in *Milligan* as a “derelict on the waters of the law,” to quote Justice Frankfurter in a different

¹⁸ 71 U.S. at 120-21 (emphasis supplied).

¹⁹ *Id.* at 123 (emphasis supplied).

²⁰ *Id.* at 139.

context,²¹ nevertheless the later Supreme Court cases establish that there is a disconnect between the rhetoric and the result in *Milligan* and that the military tribunal has a role—albeit limited—under the U.S. Constitution.

2. *Ex parte Quirin*

[II.C.2.a] The Supreme Court laid out the broad contours for trial by military tribunals in *Quirin*.²² The case involved Germans landed by submarine in the U.S. to commit acts of sabotage against American military and defense industrial facilities; they were arrested wearing civilian clothes. The Court upheld, under the law of war, the authority of the military tribunal created by order of the President which tried, convicted, and sentenced most of them to death. In the course of its unanimous opinion, the Court issued a number of important rulings as to trial by military tribunal.

[II.C.2.b] *First*, the Court held the citizenship or alienage of the defendants irrelevant to the right of the military tribunal to try them.²³ One of the defendants claimed American citizenship, but the Court found it unnecessary to pass on that claim because of the view it took as to the jurisdiction of the military court to try alleged violations of the law of war. It stated that the constitutional protections for criminal defendants presented “no greater obstacle” to military trial “of citizen enemies” than of “aliens.”²⁴

[II.C.2.c] As citizenship is irrelevant to the jurisdiction of military tribunals, so it is likewise irrelevant to the applicability of the constitutional provisions in the Bill of Rights. None of the potentially applicable provisions—the Fourth, Fifth, Sixth or Eighth Amendments—protects only citizens. The [Fourth Amendment](#) protects “the right of the people” against unreasonable searches and seizures; the [Fifth Amendment](#) provides that “No person” may be denied the procedural protections of that Amendment; the [Sixth Amendment](#) refers to the “right of the accused”; and the Eighth Amendment is without limitation as to persons. Yet the Court in *Quirin* held that citizen and non-citizen alike were subject to a military trial for violation of the law of war which was not bound by these provisions.

²¹ *Lambert v. People of the State of California*, [355 U.S. 226, 232](#) (1957) (Frankfurter, J., dissenting).

²² The best treatment of the facts and proceedings is contained in the following Congressional Research Service document: [Louis Fisher, *Military Tribunals: The Quirin Precedent*](#), CRS Order Code RL31340 (Mar. 26, 2002).

²³ [317 U.S. at 20.](#)

²⁴ *Id.* at 44.

[II.C.2.d] Thus there was no constitutional or legal necessity for President Bush to limit [the Order](#) to non-U.S. citizens, as he did in Section 2(a)—assuming that the authority to create military tribunals for the trial of terrorism cases passes constitutional muster. In this respect [the Order](#) is narrower than it needed to be. One can only speculate as to what prompted the exclusion of U.S. citizens from the reach of the military tribunals. Perhaps it was a calculation that applying [the Order](#) only to aliens would be more politically acceptable to the country. Although the Court’s opinion in [Milligan](#) is replete with references to the fact that Milligan was a citizen of the United States and the State of Indiana, that is of no significance now in light of the Court’s approach in [Quirin](#) to the jurisdiction of military tribunals.²⁵

[II.C.2.e] *Second*, the Court’s approach was to analyze the alleged offenses and offenders in terms of history and customary international law and practice to determine whether they were charged with violations of the law of war. The Court held that they were, and, accordingly, the military tribunal had jurisdiction to try, convict, and sentence them—all without regard to the constitutional provisions and to such other factors adverted to in [Milligan](#) as whether the defendants were U.S. citizens or whether the civilian courts in the U.S. were open, as they were throughout World War II. The Court assimilated sabotage to espionage as categories of cases triable by military tribunal. The actual holding was rather narrow, however. One charge of violation of the law of war—sabotage by enemies in civilian clothes—was sufficient to justify trial, conviction, and sentence by the military tribunal on that charge. The Court stated: “We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.”²⁶ And, the Court emphasized that it had “no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war.”²⁷ [Milligan](#) was distinguished on the ground that Milligan was not “part of or associated with the armed forces of the enemy,” and therefore “was a non-belligerent, not subject to the law of war.”²⁸

[II.C.2.f] The question whether “international terrorism,” as encompassed by [the Order](#), is triable by military tribunal is thus not definitively resolved by [Quirin](#), since no such charge was brought there. Nor has it been definitively resolved by any Supreme Court decision since.

[II.C.2.g] Nevertheless, it is certainly not a giant leap from sabotage to terrorism. Assimilating “international terrorism,” by persons acting clandestinely while in civilian

²⁵ See [Mudd v. Caldera](#), 134 F. Supp. 2d 138, 145-46 (D.D.C. 2001).

²⁶ 317 U.S. at 46.

²⁷ *Id.* at 45-46, 48.

²⁸ *Id.* at 45.

clothes, to espionage and sabotage by such persons, the two categories discussed in *Quirin*, appears justifiable. For that reason a facial attack on the validity of the entire Order appears doomed to failure.

[II.C.2.h] On the other hand, some distinguishing features of *Quirin* should be noted. The U.S. and Nazi Germany were in a state of declared war by act of Congress exercising its constitutional power to declare war. The defendants were agents of a belligerent power and were acting under the direction of the German high command.

[II.C.2.i] None of these features is present in the current situation, with the possible exception of the existence of a state of war between the U.S. and the terrorists who planned and executed the attacks of September 11. There has been no Congressional declaration of war. One obvious problem is whom war would be declared against, since al Qaida is not a nation-state. The Congressional joint resolution authorizing the use of military force to prevent “any future acts of international terrorism” does not appear to be a declaration of war. Moreover, it has not been asserted that the terrorists were acting as agents of a belligerent power or under the direction of its military forces. Indeed, the Administration has been careful not to affix responsibility for the attacks of September 11 on any foreign government.

[II.C.2.j] One further distinction should be noted. The Court in *Quirin* pointed out that by “a long course of practical administrative construction by the military authorities,” our government “has recognized that saboteurs have the status of unlawful combatants punishable as such by military law.”²⁹ The terrorists charged in the leading cases of the 1990’s—the first attack on the World Trade Center in 1993 and the bombings of the U.S. embassies in Kenya and Tanzania in 1998—were all tried, convicted, and sentenced in the civilian courts of the United States, specifically in the U.S. District Court for the Southern District of New York. Trial by military tribunal might therefore be seen as a departure from established U.S. practice, rather than a continuation of a recognized practice. Certainly some other countries have tried alleged terrorists by military tribunal, notably Israel. But Great Britain in Northern Ireland used civilian courts, operating without juries, to try suspected IRA terrorists. Whether an established international practice has emerged, among countries with independent judicial systems, of using military tribunals in terrorist cases, remains to be demonstrated, to the extent it is deemed relevant to establish the authority of U.S. military tribunals. Little weight should be given to trials by military tribunals in countries which lack a well-developed legal and independent judicial system.

[II.C.2.k] *Third*, the Court in *Quirin* found Congressional sanction for trials by military tribunal in the provisions of the then-existing Articles of War—the predecessors of the provisions of the UCMJ relied on by President Bush—as recognizing trial by “military

²⁹ *Id.* at 35.

commission” for offenses against the law of war.³⁰ Congress, the Court further held, was not required to define or enumerate the particular offenses triable by military commission, but could choose to adopt “the system of common law applied by military tribunals.”³¹ It therefore appears that the absence of specific Congressional authorization of [the Order](#) is not a basis for attacking its validity, at least on its face.³² As we shall show, however, at least one provision of [the Order](#)—that purporting to foreclose access to the federal courts—may run afoul of a Congressional act.

[II.C.2.l] *Fourth*, as indicated, the Court in [Quirin](#) left undecided the precise boundaries of the power to try alleged violators of the law of war in military tribunals. [The Order](#) raises interesting questions in that regard, which may lead to “as applied” attacks on its validity, depending on how it is applied. On the one hand, Section 4(a) provides that individuals subject to [the Order](#) shall be tried by military commission “for any and all offenses triable by military commission that such individual is alleged to have committed.”³³ That looks in the direction of limiting the jurisdiction of such tribunals to violations of the law of war, which is all that was upheld in [Quirin](#). On the other hand, Section 7(b) provides that military tribunals “shall have exclusive jurisdiction with respect to offenses by the individual.”³⁴ This may be intended simply to establish that the jurisdiction of the military tribunals is exclusive of that of any other tribunal, e.g., court-martial, civilian courts, international tribunal. But it also could be construed as purporting to create a kind of pendent criminal jurisdiction in military tribunals, whereby offenses not constituting a violation of the law of war would be joined with those which do. There is support for this interpretation in Section 1(e) of [the Order](#), providing that individuals covered by the Order should “be tried for violations of the laws of war and *other applicable offenses* by military tribunals.”³⁵

[II.C.2.m] Such a construction would raise serious issues, since the Supreme Court has never decided whether such jurisdiction exists in military tribunals. Indeed, the Court has expressed distaste for trials of ordinary criminal cases in military tribunals. In [Duncan v.](#)

³⁰ [Id. at 26-27.](#)

³¹ [Id. at 29-30.](#)

³² See Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, Mar. 2002 Army Law. 19, 20-21 (Mar. 2002); America Bar Association Task Force on Terrorism and the Law, *Report and Recommendations on Military Commissions*, Mar. 2002 Army Law. 8, 9-11 (Mar. 2002).

³³ [Military Order of Nov. 13, 2001 at § 4\(a\).](#)

³⁴ [Id. at § 7\(b\).](#)

³⁵ [Id. at § 1\(e\)](#) (emphasis added).

Kahanamoku,³⁶ the Court held that an act of Congress, the Hawaii Organic Act, in authorizing “martial law” in some circumstances, should not be interpreted to permit military tribunals in Hawaii, even in wartime, to try civilians for the crimes of embezzlement and assault. Chief Justice Rehnquist has written: “Edwin Stanton at his most autocratic during the Civil War never suggested that military commissions try garden-variety civilian offenses against state law or military orders. The post-World War II court surely reached the right result in *Duncan*.”³⁷

[II.C.2.n] There may be a temptation to try alleged terrorists for non-terrorist offenses. Suppose that the government has a weak case against a person suspected of involvement in terrorism, but the suspect has failed to pay federal income taxes on income earned in the U.S., or has committed passport, immigration or some other form of fraud, or has engaged in illegal drug dealing. It is doubtful whether any of these offenses, standing alone, would constitute violations of the law of war justifying trial by a military tribunal. The government might join them with an alleged terrorist offense and seek a conviction on the lesser charges so as to take the accused out of circulation. Every lawyer is familiar with how the Internal Revenue Code was used to prosecute Al Capone and other suspected “gangsters,” where there was not enough evidence to convict them on the more serious offenses, such as murder, they were believed to have committed.

[II.C.2.o] *Fifth*, the questions left open by *Quirin* may also include whether unconstitutional vagueness or overbreadth in the Order could be asserted as an objection to the exercise of jurisdiction by a military tribunal. For example, Section 2(a)(1), in defining individuals subject to *the Order*, includes a person believed to be “a member of the organization known as al Qaida.”³⁸ This organization is not otherwise described in *the Order*, nor is what constitutes “membership” further defined, nor is any participation in or conspiracy to commit terrorist acts required to bring such a person before a military tribunal.

[II.C.2.p] The Supreme Court has been unsympathetic to so-called “status” or “membership” offenses which are not further defined or do not require proof of “active and purposive membership, purposive that is as to the organization’s criminal ends.”³⁹ Presumably membership in al Qaida is not like registration in a political party in the United States. It may be deemed too loose an organization, or “membership” in it too ambiguous

³⁶ [327 U.S. 304](#) (1946).

³⁷ William J. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* 217 (1998).

³⁸ [Military Order of Nov. 13, 2001 at § 2\(a\)\(1\)](#).

³⁹ *United States v. Scales*, [367 U.S. 203, 209](#) (1961). See also *Lanzetta v. New Jersey*, [306 U.S. 451](#) (1939) (status as “gangster” and member of “gang” too vague to satisfy due process).

and amorphous, to withstand a claim that jurisdiction should not be postulated on such a concept. Admittedly, the Court has shown more tolerance of vagueness in the military context.⁴⁰ And, establishment of jurisdiction is not the same as the quantum or type of evidence required to establish guilt of an offense. But if the only offense is “membership,” without more, in such an organization, this may be a constitutionally questionable basis on which to proceed.

3. *Application of Yamashita*

[II.C.3.a] In *Yamashita*, the Court dealt with the third in this trilogy of constitutional cases involving military tribunals. Yamashita, the Japanese commander in the Philippines toward the end of World War II, was accused of permitting and failing to prevent atrocities by members of his command against the civilian population and U.S. POWs. He was tried, convicted, and sentenced to death by an American military tribunal on a charge that he had violated the law of war. On an application for habeas corpus, the Court held that the military tribunal was authorized to try him. The Court stressed that neither Congressional action nor the military orders constituting the tribunal authorized it to try Yamashita on anything except an alleged violation of the law of war.⁴¹ Finding that the conduct alleged did constitute a violation of the law of war, the Court upheld the jurisdiction of the tribunal. It declined to consider any procedural issues, such as evidentiary rulings and modes of trial, ruling that these matters were up to the military to decide and were not reviewable by the courts, although it reserved any questions as to the applicability of the Due Process Clause of the Fifth Amendment to other situations.⁴²

[II.C.3.b] For present purposes, the most significant holding in *Yamashita* was that habeas corpus was available to test the authority of the military tribunal to try the accused. The Court stated: “[T]he Executive branch of the government could not, unless there was suspension of the writ, withdraw from the courts the duty and power to make such inquiry into the authority of the commission as may be made by habeas corpus.”

[II.C.3.c] In that regard, the Court followed the precedent of both *Milligan* and *Quirin*, holding that habeas corpus was the vehicle to test “the lawful power of the commission to try the petitioner for the offense charged.”⁴³

[II.C.3.d] This focuses on what may be the most troubling and vulnerable portion of *President Bush’s Order*, a provision that may be unconstitutional on its face: Section 7(b),

⁴⁰ See *Parker v. Levy*, 417 U.S. 733, 747-48, 752-54 (1974).

⁴¹ 327 U.S. at 13-14.

⁴² *Id.* at 20-23.

⁴³ *Id.* at 8. See also *Madsen v. Kinsella*, 343 U.S. 341 (1952).

denying individuals charged in military tribunals the right (disingenuously and erroneously labeled a “privilege” in [the Order](#)) to seek any remedy or maintain any proceeding seeking any remedy in any court of the United States. This provision appears to conflict with the settled doctrine of the Court in [Quirin](#) and [Yamashita](#) as to the availability of habeas corpus to test at least the authority of the military tribunal to try the individual. It also appears to conflict with an Act of Congress, authorizing the courts of the United States, up to and including the Supreme Court, to entertain a writ of habeas corpus by a prisoner who is “in custody under or by color of the authority of the United States or is committed for trial before some court thereof.”⁴⁴

[II.C.3.e] The only possible exception would be the case of an alleged terrorist who was never in the United States and was captured in Afghanistan or elsewhere abroad and held abroad for trial by a military tribunal for a violation of the law of war committed entirely outside the United States. The Supreme Court held habeas corpus unavailable even to test jurisdiction in such a situation in [Johnson v. Eisentrager](#).⁴⁵ There the Court distinguished [Yamashita](#) on the grounds that Yamashita’s offenses were committed within United States territory, since the Philippines were still an American possession at the time of the case, and he was imprisoned within U.S. territory. The majority opinion in [Eisentrager](#) drew a strong dissent by Justice Black, joined by Douglas and Burton, and it is not certain that it would be followed today. Even if it were, it would create only a limited exception to the principle that habeas corpus is still available to challenge the jurisdiction of a military tribunal.⁴⁶

[II.C.3.f] [The Order](#) does not *in haec verba* purport to suspend the writ of habeas corpus. In [Yamashita](#), as indicated, the Court held that the Executive could not, unless there was a suspension of the writ, foreclose the courts from the “duty and power” to inquire into the authority of the military court.⁴⁷ Thus, if this provision is not a suspension of the writ, it is ineffective to deprive the federal courts of jurisdiction at least to inquire into the jurisdiction of the military tribunals established under [the Order](#). If it were interpreted to be a suspension of the writ, it would raise profound questions as to the power of the Executive, acting unilaterally even as Commander-in-Chief, to suspend the writ in derogation of both Supreme Court decisions and an Act of Congress. The power to suspend the writ appears in [Article I](#) of the Constitution, detailing the powers of Congress, not in [Article II](#), setting forth the powers of the President. Furthermore, under [Article I, Section 9](#), the writ may be suspended—by whoever is authorized to do it—only in “Cases

⁴⁴ [28 U.S.C.A. § 2241](#) (1994).

⁴⁵ [339 U.S. 763](#) (1950).

⁴⁶ See [Coalition of Clergy v. Bush](#), [189 F. Supp. 2d 1036](#) (C.D. Cal. 2002).

⁴⁷ [327 U.S. at 9](#).

of Rebellion or Invasion,” when “the public Safety may require it.”⁴⁸ None of these conditions has been met at the present time.

[II.C.3.g] This portion of [the Order](#) is an overreach by the drafters of [the Order](#) and should be treated as a nullity, except possibly in the circumstances described above. In the absence of a severability provision in [the Order](#), the provision could jeopardize [the entire Order](#), although it is probably sufficiently separate from the rest of [the Order](#) that a court could sever and annul it even in the absence of a severability clause, especially since it goes to remedy rather than the substantive provisions of [the Order](#).

III The Procedures

A. Under [the President's Order](#)

[III.A.1] The procedural aspects of [the Order](#) raise a different range of issues. The Supreme Court has given broad leeway to the President and the military to fashion appropriate procedures in cases properly triable before military tribunals. In *Yamashita*, the Court refused to review the constitutionality or appropriateness of the procedures employed there. Some of the provisions of [President Bush's Order](#) track the procedures used in Yamashita's trial, e.g., the provision for admission of such evidence as would in the opinion of the tribunal “have probative value to a reasonable person.”⁴⁹

[III.A.2] But it does not follow that, because these procedures may not be vulnerable to constitutional or other attack in the federal courts, it was wise to authorize the Secretary of Defense to make up the rules and regulations for the conduct of such proceedings, as Section 4(c) of [the Order](#) does. [The Order](#) itself provides minimal guidance as to the conduct of proceedings before the military tribunals, although it expresses a policy in favor of “a full and fair trial.”⁵⁰

[III.A.3] The proponents of [the Order](#) in the Administration seem to have been unaware that there are well-established procedures for “a full and fair trial” already in being. They are the provisions of the UCMJ governing general courts-martial. Even if not constitutionally required in trials by military tribunals, they would obviate most questions as to the fairness of the trials contemplated by [the Order](#). There was no finding by the President in [the Order](#) that it is not practicable to follow the procedures of general courts-

⁴⁸ U.S. Const. art. I, § 9.

⁴⁹ 327 U.S. at 48, n.9.

⁵⁰ [Military Order of Nov. 13, 2001 at § 4\(c\)\(2\)](#).

martial in trials before the military tribunals, but there was such a finding as to the principles of law and rules of evidence in criminal cases in the federal district courts.⁵¹

[III.A.4] The Uniform Code of Military Justice and the Manual for Courts-Martial provide well-tested methods for fairly trying members of the United States Armed Forces for criminal activity. The Uniform Code and Manual provide detailed pretrial, trial, and post-trial procedures.

[III.A.5] [The Order](#) is silent as to many aspects of fair procedure set forth in the UCMJ, such as pretrial hearings and the right to military counsel. For example, [the Order](#) does not specify what, if any, pre-trial procedures apply to the tribunals. [Article 32 of the Uniform Code](#) requires that a thorough investigation of the charges be conducted before an accused can be tried at a general court-martial.⁵² At this [Article 32](#) hearing, which is akin to a grand jury proceeding, the accused is represented by counsel, and counsel for the accused may fully examine any witnesses and question any evidence presented by the prosecution.⁵³ The presiding officer at the [Article 32](#) hearing makes a recommendation whether the evidence is sufficient to go forward with a court-martial.⁵⁴ Such a hearing provides the accused with the ability to be advised of the charges and allows the defense counsel to discover the extent of the evidence against the client.⁵⁵

[III.A.6] [The Order](#) provides that the regulations will apply to the “conduct of the defense by attorneys for the individual subject to this order,” but who will represent those subject to [the Order](#) was left unclear.⁵⁶

[III.A.7] One of the flaws in the scheme created by [the Order](#) was the absence of a presiding judge. Instead, the scheme envisioned a panel of officers acting as both finder of fact and interpreter of law. [The Order](#) also conflicted with the UCMJ in a vital

⁵¹ [Id. at § 1\(f\)](#). Robinson O. Everett, former Chief Judge of the Court of Appeals for the Armed Forces, writing before the President issued the Order, recommended that alleged terrorists be tried by court-martial and advised against the use of tribunals. Robinson O. Everett, *The Law of War: Military Tribunals and the War on Terrorism*, 48 Fed. Law. 20 (Nov./Dec. 2001).

⁵² [10 U.S.C. § 832](#) (1998); U.C.M.J. art. 32.

⁵³ [Id.](#)

⁵⁴ [Id.](#)

⁵⁵ [Id.](#)

⁵⁶ [Military Order of Nov. 13, 2001 at § 2\(a\)\(1\)](#).

particular—it provided for a death sentence on the vote of two-thirds of the military tribunal, whereas the UCMJ requires unanimity for a death sentence in a general court-martial.⁵⁷

[III.A.8] Perhaps the most difficult and contentious issues arising under [the Order](#) involve evidentiary matters. The Military Rules of Evidence mirror in most respects the Federal Rules of Evidence and provide in essence the same privileges and protections as the Federal Rules, including limitations on the use of hearsay and irrelevant evidence. [The Order](#) appeared to do away with these well-established evidentiary principles by substituting the standard of admissibility of evidence that would “have probative value to a reasonable person.”

B. Under [the Secretary's Order](#)⁵⁸

[III.B.1] Many of the problems under [the Order](#) were alleviated by the procedures issued by the Secretary of Defense on March 21, 2002 as [Military Commission Order No. 1](#). In significant ways, the procedures adopt in whole or in part the procedures set forth in the UCMJ and the Manual for Courts-Martial, thus providing a defendant before a tribunal many of the same protections provided a military accused.

[III.B.2] Tribunal defendants, like military accused, are provided a detailed defense counsel at no charge to the defendant, who must zealously represent the defendant.⁵⁹ If the defendant desires, he may request another defense counsel, who will be provided if available.⁶⁰ The tribunal defendant may also retain a civilian counsel at “no expense to the government” if the counsel is licensed in a state, district, territory, or possession of the United States, or before a Federal court, agrees to comply with the tribunal regulations, and is eligible to access classified information at the Secret level.⁶¹ These are the same counsel rights afforded a military accused in a classified case.

[III.B.3] The procedures “accorded the accused” are in most respects identical to those afforded a military accused before a court-martial. The tribunal defendant can review the charges before trial and has the ability, with the assistance of counsel, to prepare a defense.⁶² The defendant is presumed innocent; a member can only vote to convict the defendant if that member finds that based on the evidence the accused is guilty beyond a

⁵⁷ [Id.](#) 10 U.S.C. § 852(b)(2) (1998); U.C.M.J. art. 52.

⁵⁸ [Military Commission Order No. 1 of Mar. 21, 2002](#).

⁵⁹ [Id.](#)

⁶⁰ [Id.](#)

⁶¹ [Id.](#)

⁶² [Id.](#) at §§ 5A, 5D.

reasonable doubt.⁶³ The accused cannot be forced to testify and the members can draw no adverse inference from his failure to do so. He also has those investigative tools necessary to prepare his defense, apparently even expert assistance if he can show such assistance is necessary for his defense.⁶⁴ The defense may view the evidence the prosecution intends to present during sentencing and, if convicted, present evidence in extenuation and mitigation.⁶⁵ The defendant may also present a statement, apparently unsworn, during the sentencing proceedings.⁶⁶

[III.B.4] The procedures also allow a defendant to plead guilty in exchange for a sentence limitation, but only if the defendant agrees to sign a stipulation of fact that “confirms” the defendant's guilt and “the voluntary and knowing nature” of the guilty plea.⁶⁷ While not specifically requiring an oral inquiry into the nature and circumstances of the crime, as is required in accepting a servicemember's guilty plea,⁶⁸ [the Secretary's Order](#) requires the tribunal to determine that the plea is voluntarily and knowingly made.⁶⁹

[III.B.5] The military tribunals will look in many respects like a court-martial. In language almost identical to that in the Manual,⁷⁰ the procedures provide that each hearing will include a prosecutor, a defense counsel, a court reporter, bailiffs, and clerks.⁷¹ The trial procedures are also nearly identical to those followed in courts-martial. The charges are read, the prosecution presents its opening statement, and the defense presents its opening statement (unless it chooses to reserve the statement until it presents the defense case). The prosecution then presents its witnesses, the defense has the right to cross-examine these witnesses, and then the defense presents its case. The prosecution rebuts and the defense sur-rebuts, then both sides present closing argument. The tribunal then retires to

⁶³ [Id. at §§ 5B, 5C.](#)

⁶⁴ [Id. at § 5H.](#)

⁶⁵ [Id. at §§ 5L, 5N.](#)

⁶⁶ [Id. at § 5M.](#)

⁶⁷ [Id. at § 6A\(4\).](#)

⁶⁸ See [10 U.S.C. § 845](#) (1998); U.C.M.J. art. 45. See R.C.M. § 910(d).

⁶⁹ [Military Commission Order No. 1 at § 6A\(4\).](#)

⁷⁰ See R.C.M. § 501(c).

⁷¹ [Military Commission Order No. 1 at § 4D.](#)

deliberate. If the defendant is convicted, both parties present sentencing evidence and argument, and the tribunal determines an appropriate sentence.⁷²

[III.B.6] As in a court-martial, the members do not have to find guilt by a unanimous vote. Two-thirds of the members must find the defendant guilty to convict him of an offense, and such voting is done by secret written ballot.⁷³ A death sentence requires a unanimous affirmative vote of all the members, and the tribunal considering sentencing a defendant to death must consist of at least seven members.⁷⁴

C. Remaining Issues

[III.C.1] Although [the Secretary's Order](#) represents a substantial advance over [the President's Order](#), a number of significant issues remain. As a matter of policy, further modification and clarification of the procedures are, in our view, advisable.

1. Jurisdiction Over Offenses

[III.C.1.a] As discussed,⁷⁵ [the original Order](#) lacked clarity as to the jurisdictional reach of the military tribunals, particularly as to whether it contemplated a form of pendent criminal jurisdiction, in which offenses ordinarily tried in civilian courts could be joined with offenses triable in military tribunals. The language of [the new Order](#) varies somewhat from the old. It provides: “Commissions established hereunder shall have jurisdiction over violations of the laws of war and all other offenses triable by military commissions.”⁷⁶

[III.C.1.b] The new provision does not deal explicitly with the issue of pendent criminal jurisdiction, and it does not expressly preclude such jurisdiction. However, it looks in the direction of imposing limitations on the subject matter jurisdiction of military tribunals. A proper construction of it should eliminate the possibility of pendent criminal jurisdiction.

[III.C.1.c] The phrase “violations of the laws of war” embodies the jurisdictional bases established by the previously cited caselaw. The phrase “all other offenses triable by military commission” has an element of circularity and tautology. Its meaning is hardly self-evident. But if it is read in conjunction with the UCMJ, it acquires a defined and limited context. Three provisions of the UCMJ--and only three--provide for certain offenses to be

⁷² [Id.](#) at § 4.

⁷³ [Id.](#) at § 6F.

⁷⁴ [Id.](#) at §§ 6F, 6G.

⁷⁵ See Part A, *supra*.

⁷⁶ [Military Commission Order No. 1](#) at § 3B.

tried by military tribunals. These offenses are contempt of a tribunal,⁷⁷ aiding the enemy,⁷⁸ and spying.⁷⁹ If the phrase “all other offenses triable by military commissions” is read with reference to these provisions of the UCMJ, it acquires an intelligible definition. Even more importantly, it provides a construction which would preclude pendent criminal jurisdiction over “garden-variety” criminal offenses under Title 18 and other provisions of the U.S. Code which are customarily tried in the civilian courts of the United States.

2. Judicial Review

[III.C.2.a] [The President's Order](#) was silent as to the review of the decisions of military tribunals, judicial or otherwise. [The new Order](#) provides for a form of such review, entirely within the military system. Reviewing panels consisting of three military officers, one of whom “shall have experience as a judge,” are empowered to review decisions of the tribunals: a civilian may be specially commissioned to sit on such a review panel. Further review is by the Secretary of Defense and the President, who has the final power of decision unless he delegates it to the Secretary.⁸⁰

[III.C.2.b] The new procedures do not contemplate review by civilian courts and are thus consistent in this respect with [the original Order](#), which purported to preclude any remedy in any court of the United States. This contrasts with the review of court-martial decisions, which are subject to mandatory review by a service court of criminal appeals, then reviewed as of right by the U. S. Court of Appeals for the Armed Forces, an all-civilian body. Court-martial decisions are ultimately reviewable as a discretionary matter on *certiorari* by the U.S. Supreme Court. An assessment of the U.S. Court of Appeals for the Armed Forces is beyond the scope of this article, but it is a fair statement that the availability of judicial review in this Court and the Supreme Court has not significantly impaired the functioning of the military justice system; on the contrary, it has enhanced the reputation of the military justice system for both the substance and appearance of fairness. It is difficult to see any *a priori* or practical reason why such judicial review would not be equally efficacious as to the military tribunals, without impairing their effectiveness in dealing with terrorists. Civilian appellate review would also be a check on command influence, which might be thought to inhere in a self-contained military justice system entirely under the control of the Commander-in-Chief. Provision of such review ought to be high on the agenda as revisions in the new procedures are considered.

⁷⁷ [10 U.S.C. § 848](#) (1998); U.C.M.J. art. 48.

⁷⁸ [10 U.S.C. § 904](#) (1998); U.C.M.J. art. 104.

⁷⁹ [10 U.S.C. § 906](#) (1998); U.C.M.J. art. 106.

⁸⁰ [Military Commission Order No. 1 at § 6B\(4\)-\(6\)](#).

3. Confrontation and Cross-Examination

[III.C.3.a] Perhaps the most striking difference between the new procedures for military tribunals and courts-martial under the UCMJ is the omission of any right of confrontation and cross-examination. [The new Order](#), like the original, adopts the standard for admissibility of evidence of whether it “would have probative value to a reasonable” person.⁸¹ This was the same standard employed in [Yamashita](#).⁸² There the Supreme Court declined to review any of the procedures of the tribunal, including evidentiary issues and methods of trial, over the vigorous dissents of Justices Rutledge and Murphy.⁸³ In [Yamashita](#), the tribunal admitted affidavits and unsworn out-of-court statements, newspapers, personal diaries, and other hearsay evidence, without requiring the presence at trial or opportunity for cross-examination of the declarants.⁸⁴

[III.C.3.b] The new procedures clearly contemplate the admission of such evidence, without regard to confrontation and cross-examination or the limitations of the hearsay rule. Thus [Section 6D\(3\)](#) permits the tribunals to consider “sworn or unsworn statements.” [Section 6D\(2\)\(a\)](#) permits the testimony of witnesses by telephone, audiovisual means, or “other means,” presumably including audio-tape and videotape recordings. Objections go to weight, not admissibility.⁸⁵

[III.C.3.c] Defense counsel in such trials may be expected to challenge the use of such evidence, at least if it is a material part of the prosecution's case. As any trial lawyer knows, it is impossible to cross-examine an affidavit or other out-of-court statement. There is no substitute for the presence of the person who gave the affidavit or statement. Likewise, the testimony of a witness by telephone or audio-tape, outside the sight of the triers of fact, would not pass muster in a civilian court bound to provide the right of confrontation.

[III.C.3.d] Moreover, on April 29, 2002, the Supreme Court refused by a seven-to-two vote to accept an amendment to the Federal Rules of Criminal Procedure proposed by the Judicial Conference providing for “contemporaneous, two-way video presentation in open court of testimony” from an absent witness subject to certain safeguards. Justice Scalia filed a statement stating that the proposed new rule was “of dubious validity under the

⁸¹ [Id. at § 6D\(1\)](#).

⁸² [327 U.S. at 18](#).

⁸³ [Id. at 26, 41](#).

⁸⁴ [Id. at 44](#).

⁸⁵ [Military Commission Order No. 1 at § 6D\(2\)\(a\)](#).

Confrontation Clause of the [Sixth Amendment](#) to the United States Constitution.⁸⁶ This rejected proposal was far more modest than what is permitted under [the Secretary's Order](#).

[III.C.3.e] Whether the ruling of [Yamashita](#) would be reconsidered today is problematic. The “harmless error” doctrine is always available to limit evidentiary challenges.⁸⁷

[III.C.3.f] But adherence to the essence of the Military Rules of Evidence, including the hearsay rule, would not be fatal to the efficient functioning of military tribunals. In some respects, such as admissions of co-conspirators, the Military Rules of Evidence could be relaxed to allow prosecutors to pierce the al-Qaida veil of silence. The evidentiary rules could also be relaxed to allow in hearsay evidence that has circumstantial guarantees of trustworthiness, removing the requirement that the guarantees be “equivalent” to those surrounding the receipt of non-hearsay evidence.

4. Exclusionary Rules

[III.C.4.a] Both [the original Order](#) and [the new](#) are silent as to the application of the exclusionary rules that have been developed in the civilian courts of the United States to protect constitutional and other rights.

[III.C.4.b] The standard of admissibility of evidence having “probative value to a reasonable person” might be deemed to rule out any exclusionary rules before military tribunals; such rules frequently require the exclusion of highly relevant and probative evidence in civilian trials. On the other hand, the obligation of the tribunals to provide “a full and fair trial” and the very discretion granted to them in conducting the proceedings may afford some measure of flexibility in this matter. Once again, this matter need not be decided by all-or-nothing propositions—either that no exclusionary rules apply or that they all do.

[III.C.4.c] For example, the necessity of a rights warning to a suspect pursuant to [Article 31](#) of the UCMJ, or for those in custody,⁸⁸ would be uncalled for and unwise in interrogations in a theater of operations. Accordingly, the rights warnings should be unnecessary in such a setting. But the prohibition against coerced confessions that the warnings are intended to prevent should remain because such methods of interrogation impact the veracity and reliability of statements elicited thereby.

⁸⁶ Amendments to Fed. R. Crim. P. 26(b), H.R. Doc. No. 107-203, at 1 (Apr. 29, 2002) (Statement of Justice Scalia).

⁸⁷ See [Military Commission Order No. 1 at § 6H\(4\)](#) (setting aside decisions of a tribunal permissible only for errors “materially” affecting the trial outcome or “material” errors of law).

⁸⁸ *Miranda v. Arizona*, [384 U.S. 436](#) (1966).

[III.C.4.d] Likewise, the [Fourth Amendment](#) guarantees against unreasonable searches and seizures should not be mechanically applied to exclude evidence in search or capture operations in theaters of operation or other overseas locations.⁸⁹ As to searches and seizures in the United States, there may be sufficient differences to lead to a different result. The concept of "unreasonable searches and seizures" incorporated in the [Fourth Amendment](#) is flexible enough to allow the tribunals to take into account and accommodate any relevant differences.

5. Other Issues

[III.C.5.a] A number of other questions, probably none of the same magnitude of those already discussed, arise even under the new procedures.

[III.C.5.b] 1. The new procedures are silent as to the time and locale of trial by tribunal. They provide for "expeditious conduct of the trial,"⁹⁰ but not for a speedy trial after arrest or charges. Nor do they provide for trial in or near the place of the alleged offense, where defense witnesses may be more readily available. Guantanamo Bay is far removed from any of the places of the alleged terrorists' offenses of members of al Qaida. Nevertheless, legitimate practical concerns must be taken into account in evaluating these issues. Interrogating captured al Qaida or Taliban personnel, at length if necessary, may be far more important in uncovering and averting future terrorist attacks and breaking up terrorist cells than putting such persons on trial. If trials must await the completion of such processes, so be it.

[III.C.5.c] Similarly, any interest of the defendant in having his case tried at or near the scene of his alleged offenses is outweighed by the interest of the prosecution in conducting the trial in a safe place, where military operations and acts of terror will not threaten to intrude. Neither Afghanistan nor ships at sea commend themselves as a better venue than Guantanamo or some other location constituting a secure and calm environment for legal proceedings. In any event, in this regard terrorists are being treated no differently than service members accused of a crime. The UCMJ does not mandate that courts-martial be conducted at or near the scene of the crime.

[III.C.5.d] 2. The new procedures contain a provision that no defendant may be tried again on a charge once a tribunal's finding on that charge becomes final. This sounds like the double jeopardy protections of the U.S. Constitution and [Article 44](#) of the UCMJ.

⁸⁹ See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 275 (1990).

⁹⁰ [Military Commission Order No. 1 at § 6B](#).

[III.C.5.e] It must be recognized, however, that unlawful combatants (as well as lawful ones) may be held under the law of war until the conclusion of hostilities. Regardless of which category a defendant is deemed to fall in, he will have no right to be automatically released even on a finding of not guilty because he may still be held as a lawful or unlawful combatant. The rub here is that the war against terrorism may last for generations, and even the immediate war on al Qaida for a number of years. Just as there was no formal declaration of war to commence it, there will be no formal peace treaty to end it. Although this provision may protect an acquitted defendant from another trial on the same charge, it does not guarantee his immediate release from confinement, as the double jeopardy and due process clauses would for an acquitted defendant in a civilian criminal court against whom no other charge or basis for holding him was pending. This particular protection may be more illusory than real.

[III.C.5.f] 3. The treatment of retained civilian counsel—which is provided for under the new procedures⁹¹—also raises some doubts. Although such retained counsel must be cleared at a “Secret” or higher level to have access to classified information, it is nevertheless provided that civilian defense counsel is not guaranteed the right to be present at closed tribunal proceedings or access to “protected information,” which includes both classified information and other types of information, *e.g.*, information which may endanger witnesses.⁹² If civilian counsel has the necessary clearance, it is difficult to see a basis on which properly to exclude him or her from proceedings or relevant information. The military has extensive experience in trying cases involving classified information by court-martial, requiring the participants, including retained defense counsel, to have appropriate security clearances. Allowing full access to proceedings and information to retained civilian defense counsel has not been a problem in courts-martial, and it should not be here.

[III.C.5.g] There are certainly adequate sanctions in the procedures⁹³ and elsewhere to deter misconduct or breach of obligations of confidentiality by such an attorney. Since the defendant himself may be excluded from portions of the proceedings for security and other reasons⁹⁴—a provision that can be justified given the nature of the offenses and the possible dangers

⁹¹ [Military Commission Order No. 1 at § 4C\(2\)\(b\)](#).

⁹² [Id.](#) at §§ 4C(2)(b), 6D(5).

⁹³ *See, e.g., id.* at § 4D(5)(b).

⁹⁴ *See id.* at § 5K.

posed by the persons charged—there is all the more reason to allow the presence of both detailed military counsel and retained civilian counsel at all stages.

[III.C.5.h] 4. Members of the media will no doubt object to the provision relating to their attendance. The procedures express a presumption in favor of “open proceedings,” subject to closure for protection of national security information and other interests.⁹⁵ But whether the media and the public are permitted to attend these “open proceedings” is left to the discretion of the Appointing Authority (the Secretary of Defense or his designee), although the discretion is to be exercised under a standard that proceedings “should be open to the maximum extent practicable.”⁹⁶ Photography and broadcasting of tribunal proceedings are expressly prohibited.⁹⁷ The framers of the procedures were obviously anxious to avoid the much feared transformation of tribunal proceedings into “O.J. Simpson” trials.

[III.C.5.i] Whether they have engaged in overkill in their proposed treatment of the media remains to be determined. News organizations have not been shy about commencing legal proceedings to gain access to closed trials. This sideshow does not appear to be prevented by the provisions of [the President's Order](#) purporting to preclude access to courts.⁹⁸ The drafters of that Order, in their zeal to cut off judicial review, prohibited it only at the instance of persons charged with offenses. Others litigants appear to be left free to initiate legal proceedings relating to the conduct of military tribunals, subject of course to such constitutional doctrines as standing and justiciability.

IV. Conclusion

[IV.1] Military tribunals are still a work in progress. [The initial Order](#) was insensitive to the significant Constitutional and statutory questions it created. [The Secretary's Order](#), which incorporates UCMJ procedures, is a vital improvement but complicated questions persist; for example, application of traditional constitutional guarantees in criminal trials to the procedures of the trials in the tribunals. In the meantime, the purported preclusion of habeas corpus relief is ineffective.

⁹⁵ [Id.](#) at § 6B(3).

⁹⁶ [Id.](#)

⁹⁷ [Id.](#)

⁹⁸ See [Military Order of November 13, 2001 at § 7\(b\)\(2\)](#).