

2002

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Recommended Citation

Gregory P. Noone, *Essay: President Bush's Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terror*, 34 Case W. Res. J. Int'l L. 253 (2002)

Available at: <https://scholarlycommons.law.case.edu/jil/vol34/iss2/13>

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**ESSAY: PRESIDENT BUSH'S MILITARY ORDER: DETENTION,
TREATMENT, AND TRIAL OF CERTAIN NON-CITIZENS IN THE WAR
AGAINST TERRORISM**

*Gregory P. Noone**

Not a day goes by without a reminder of the horrors of September 11, 2001. America is united in its desire to hold accountable those responsible for those crimes. Osama bin Laden and his al Qaeda terrorist organization have been identified as the perpetrators of the attacks. On November 13, 2001, President George W. Bush added to the arsenal of prosecutorial options by signing the Military Order regarding the Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.¹ It is clear that the President has the authority to establish such tribunals and prescribe their rules. The President's authority resides in his Constitutional role as Commander-in-Chief, Articles 21 and 36 of the Uniform Code of Military Justice (UCMJ), which is federal law passed by Congress, and legal precedent.²

This essay is limited to an examination of the Military Order of November 13th and is not a summary of opposing views. It will not attempt to point out every issue that may be contrary to standard U.S. justice practices, address the somewhat related "detainee-prisoner of war"

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¹ Military Order of Nov. 13, 2001, 66 Fed. Reg. 57831-57836 (The President Nov. 16, 2001).

² See *Ex parte Quirin, et al. v. Cox*, 317 US 1(1942).

debate, or confront issues of the law of war that have been raised in the last several months.

CONCERNS

This author's primary concern is that the military commissions are conducted in a fundamentally fair way because the United States is a principled nation dedicated to the rule of law. The forums must be conducted fairly, impartially, and with transparency so that justice is done and seen to be done. Military commissions cannot be perceived as shortcuts to obtaining convictions. Ultimately, if the commissions are seen as less than evenhanded, it could actually damage the war against terrorism by de-legitimizing American efforts and, potentially, its cause. The United States must not allow the legal use of U.S. presidential authority to be distorted and instead, used to breed the next generation of suicide bombers. Another concern with the use of military commissions is whether the U.S. will lose its high ground if a U.S. citizen is detained and tried overseas by a "military court." Is the United States willing to make that trade off?

Military commissions are not the same as courts-martial under the U.S. military justice system. Military lawyers understandably take great pride in the military judicial system. It is not perfect – no system is – but most familiar with the system agree that if they were accused of a crime they did not commit, they would want to be sent to a U.S. military court-martial. The jury (or panel members) for a court-martial is one of the most experienced, worldly, intelligent, and vigilant in the American justice system. There is no reason to believe a military commission panel drawn from the U.S. Armed Forces would be anything less.

Section 4 of the Military Order describes the Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order. The Secretary of Defense (SECDEF) is tasked with promulgating the regulations by which the military commissions will abide.³ Many, if not all, of the issues being raised in this essay and elsewhere, can ultimately be remedied by the Department of Defense (DOD) rules for procedure and evidence. With that said, an appropriate point of departure in developing these rules would logically be the military justice system. For instance, any commission's panel should include at least five members, which would be consistent with the minimum requirement for the most serious of courts-martial – the general court-martial. If these rules are seen as fair, they will mollify the international community and can legitimately remedy some of the Military Order's shortcomings and at times overly broad text. On the other hand, if the regulations simply mirror the Order's language, they will

³ This essay was written prior to the promulgation of the Department of Defense Military Commission Order No. 1 on March 21, 2002 entitled "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism" (DoD MCO No. 1, March 21, 2002).

not be able to perform their essential clarifying role and will likely be of little help in winning any hearts and minds at home or abroad.

EVIDENCE AND FORUMS

Some maintain that the existence of an effective and functioning court-martial system vitiates the need for military commissions. Others disagree and argue that military commissions are necessary, primarily because of the difficulty with evidence. It would be difficult to maintain any chain of custody for evidence discovered on the "battlefield," and hearsay evidence would probably be even more difficult because many eyewitnesses may be afraid to testify against a worldwide terrorist organization such as al Qaeda. A suppression hearing is as serious at a court-martial as any other U.S. forum. The Military Rules of Evidence essentially mirror the Federal Rules of Evidence. The military judges fiercely guard their independence, and there is no wink and nod to the government counsel with respect to the admissibility of evidence.

Section 4 (c)(3) of the Military Order allows for the admission of evidence that has "probative value to a reasonable person." The admissibility of evidence is a cornerstone of the American judicial system that sets the U.S. apart from the rest of the world. There must be clear rules of evidence, and there should be at least one judge advocate with military judge experience advising the commission. It must be evident that the rules do not change whenever it suits the United States.

Others argue that the best forum for al Qaeda members is an ad hoc international tribunal, similar to the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). But these contrary viewpoints would agree that American due process standards far exceed internationally accepted standards. Both the ICTY and the ICTR admit hearsay evidence when it is deemed relevant and reliable, as do many European criminal courts. There is no doubt that the lesser international standard with regard to the admissibility of evidence would be a more powerful tool for these military commissions than the more stringent American standard.

Another difficulty with a court-martial as a forum to prosecute al Qaeda members is that it could only address violations of the law of war in accordance with Article 18 of the UCMJ, which provides for jurisdiction over non-U.S. service members for such offenses. Courts-martial could not assimilate any of the federal anti-terrorist legislation, such as the murder or kidnapping of a U.S. national abroad. In all likelihood, it would take an act of Congress to adapt these Title 18 statutes, which are used in the U.S. federal courts to prosecute terrorists, for use at a court-martial. In contrast, the military commissions are specifically designed to cover international terrorism and its related offenses.

FINDINGS AND SENTENCING

Sections 4 (c)(6) and 4 (c)(7) of the Order state that only a two-thirds vote is required for conviction and for sentencing. Many jurisdictions in the United States and around the world do not require unanimous decisions. In fact, U.S. courts-martial under the UCMJ require a two-thirds vote of the panel (i.e. jury) in order to convict an accused in the findings phase of a court-martial. A two-thirds vote in the sentencing phase is required as well. However, these provisions are problematic with respect to the death penalty, which is an obvious sticking point with the United States' European allies, as well as others. The U.S. military has had difficulty obtaining custody over U.S. service members accused of murders in Europe, despite the jurisdiction provisions of the NATO Status of Forces Agreement. Our allies have demanded assurances that the charges will not be referred as a capital offense (i.e. death as a possible punishment). This issue has also been at the core of civilian extradition problems as well.

However, a U.S. court-martial that is referred as a capital case under the UCMJ requires a unanimous vote of the panel (i.e. jury) during the findings phase of the trial in order to continue the possibility of a death sentence. Then, during the sentencing phase, the court-martial members must again vote unanimously for the sentence of death. If just one member does not vote for death, the sentence is automatically adjudged as life in prison. The military commissions should follow the same procedures.

Lastly, the "present at the time of the vote" language should not have been included in the Military Order because it may suggest to some that the commissions are not fully sensitive to the gravity of their responsibility. The DOD rules should make it clear that when people are assigned to a commission, this service is their primary duty, and an extremely serious one, just as it is in a court-martial. However, a provision in the rules to excuse a member for extraordinary circumstances would be reasonable.

DETENTION, CLOSED COURTS, HABEAS CORPUS, AND APPELLATE
REVIEW

Section 3 of the Military Order details the Detention Authority of the Secretary of Defense and re-affirms any detainee's basic human rights. However, there are two troubling omissions in this section. First, it is imperative that detained persons have a stated right to an attorney. Second, in all U.S. jurisdictions, there is a requirement to appear before a magistrate in a reasonable period of time (usually one to seven days) after being detained. Releasing a suspect before obtaining all evidence against them is a law enforcement nightmare, nevertheless, there must be some type of preliminary hearing at a "reasonable" point in the process. However, in light of the circumstances, "reasonable" certainly does not mean one week, but a hearing does need to be conducted – preferably earlier rather than later – in order to justify detention.

The Order's Section 4 (c)(4) allows the military commissions to limit access or close the courts when it is necessary for the protection of classified information. This is not unreasonable and, in fact, is done in national security cases regularly, both here and abroad. However, a closed court needs to be a legitimate exception rather than the rule.

Section 4 (c)(8) describes the appellate review process as including the president or SECDEF. The military has an appellate review process that is effective and ultimately ends at the U.S. Supreme Court. The military's highest appellate court, the Court of Appeals for the Armed Forces (CAAF), is comprised of civilian judges appointed by the president. The accused appearing before military commissions will need a right of appeal, and using CAAF as the first level of appellate review would strengthen the credibility of the process.

Another cornerstone of the U.S. judicial system is the concept of habeas corpus (i.e. seeking relief from the courts). However, Section 7 (b)(2) eliminates any such relief. A practical suggestion that would build international and national support is to designate CAAF to review habeas corpus issues, detention orders, and rulings that close courts from the public, as well as act as the first level of appellate review.

CONCLUDING THOUGHTS

The new DOD rules also need to establish the burden of proof as beyond a reasonable doubt, the concept of innocent until proven guilty, the right not to incriminate oneself, the right to hire defense counsel of one's own choosing, and the right to present evidence in accordance with the same rules that government prosecutors use. The United States should be prepared to look to the ICTY and the ICTR for guidance. Both tribunals allow the identity of witnesses to be withheld from the accused, less than unanimous votes, and the protection of national intelligence used as evidence. The standard of proof is often lower than American courts, and the United States should make it very clear that it is modeling some of the DOD rules on accepted international legal practice.

Hopefully, some of the suggestions and comments made throughout this essay would strengthen the integrity and legitimacy of these commissions and their work, as well as prevent future legal historians from debating any perceived negative effects of military commissions on the American justice system for years to come. These issues can, and in all likelihood, will be alleviated by the dedicated military and civilian lawyers who, at this writing, are hard at work developing the rules of procedure, evidence, and administration that will apply to the military commissions. However, until such rules are released, critics and champions alike should pause before offering either unqualified support or condemnation.

