

The Constitution Project



**Recommendations for the Use of
MILITARY COMMISSIONS**

**Released by the
Liberty and Security Initiative of the
Constitution Project**

PRE-PUBLICATION RELEASE

August 9, 2002

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Preface

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In the wake of the tragic events of September 11, 2001, the Constitution Project established a Liberty and Security Initiative and invited a number of prominent Americans, including members of the legal, military, government, media, academic, law enforcement and civil liberties communities, to examine and seek consensus on the line between security and civil liberties.

It is the hope of the Constitution Project that the expertise and ideological diversity of this broad-based committee will contribute to the national dialogue on issues such as military commissions and the military's role in homeland security; First Amendment and government secrecy; detentions and criminal justice; and privacy and technology.

The Constitution Project will issue interim reports on each of these subjects; a final publication will contain all the recommendations we hope will advance proposals for protecting civil liberties while at the same time preserving security in a time of war or other national emergency.

No one has yet been tried by the military tribunals proposed by the Administration, and perhaps no one ever will be. But the proposed use of military tribunals has generated enormous controversy because it throws into question our country's commitment to due process and the rule of law. The report of the Constitution Project's Liberty and Security Initiative delineates the concerns raised by the proposal and recommends ways to allay those concerns.

The central recommendation of the Initiative's blue ribbon panel is that the jurisdiction of the military tribunals be limited to trials of combatants captured overseas on the battlefield. This limitation establishes a bright line between cases that may be heard by tribunals and those that will remain in the civilian court system that is a hallmark of our democracy. The need for such a bright line has been highlighted in a related context by the military detention of Jose Padilla. The treatment of Padilla, who was arrested in Chicago as a suspected terrorist and is now being held by the military without charges and without access to counsel, demonstrates the danger of not clearly defining the limits of military authority.

The report also recommends that the United States comply with the requirement of the Geneva Conventions and the U.S. Army's own regulations by giving the Guantanamo detainees an opportunity to show that they are entitled to POW status. Under the Geneva Conventions, detainees who are POW's could not be tried by the proposed tribunals because members of the U.S. armed forces are not subject to the tribunals for comparable violations of the laws of war.

The report's other recommendations focus on assuring that persons tried by the tribunals receive protections similar to those provided by the U.S. courts martial. The report calls for the right to an appeal to a civilian court, the right to have civilian defense counsel serve as lead counsel (provided such counsel has obtained the appropriate security clearance), and the right to have access to evidence used by the prosecution. It suggests more generally that in cases where it is decided not to rely on civilian courts, the government should use the well-established court martial system rather than military tribunals.

The Constitution Project thanks Juliette Kayyem, Executive Director, Executive Session on Domestic Preparedness, Kennedy School of Government, Harvard University, for her expert and insightful assistance in preparing the report, and the law firm of Arnold & Porter for its invaluable research and advice. We are also grateful to the Nathan Cummings, Public Welfare, and Deer Creek Foundations, and the Open Society Institute, for their generous support for this initiative, and to the following members of the blue ribbon panel for carefully reviewing and endorsing the report*:

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At-a-Glance

Recommendation 1: The military commissions should have jurisdiction only over persons who are captured in the course of an armed conflict and who are charged with violating the laws of war or committing crimes against humanity.

Recommendation 2: There should be a fair and impartial process to determine whether a person is a prisoner of war; detainees in Afghanistan or other parts of the world should be treated as POWs pending final resolution of their status.

Recommendation 3: Military commission decisions should be appealable to a civilian judicial body; the right to habeas corpus should not be abrogated.

Recommendation 4: Commission procedures should conform to those of the Uniform Code of Military Justice.

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This report addresses the proposed use of military commissions (popularly called “tribunals”) to try persons suspected of terrorism. It reflects the committee’s belief that national security interests do not require sacrificing constitutional principles. Among those principles are adherence to due process and support for an independent civilian judiciary that protects individual rights against overreaching by the political branches. While military trials may be appropriate in certain circumstances, we must be careful not to undermine our commitment to strong civilian courts and to judicial review.

This report also reflects the committee’s recognition that the way we use the proposed military commissions may have an important impact on our relations with other nations. The United States may be less able to persuade other nations to extradite terrorist suspects if our commissions are perceived by other countries as unfair. We may be less able to dissuade other nations from inappropriately using military commissions, against our citizens or their own, if our use of commissions is too broad. More generally, our efforts to promote the rule of law and judicial independence throughout the world may be undermined if our prosecution of suspected terrorists does not adhere to the high standards we set for others.

On November 13, 2001, President Bush issued a “Military Order” regarding “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” The Order authorizes the creation of military commissions to try any non-citizens determined by the President (1) to be members of the international organization known as al Qaeda; or (2) to have engaged in, aided or abetted or conspired to commit, acts of international terrorism or acts in preparation therefor that have caused, threaten to cause or have as their aim to cause injury or adverse affects on the United States, its citizens, national security, foreign policy or economy; or (3) to have intentionally harbored such persons.

Perhaps no other aspect of this country’s war on terrorism has generated so much controversy. Congress, legal scholars and commentators have debated the military commission provisions, their constitutionality, their compliance with our treaty obligations, and their potential impact on the international effort to end terrorism. The Order provides that the Secretary of Defense shall establish appropriate rules for the military commissions, and on March 21 the Department of Defense (DoD) issued the regulations implementing the Order. These regulations do not resolve all the issues and concerns raised by the Order and are subject both to amendment by DoD and, possibly, congressional action. Thus, the Liberty and Security Initiative believes that it is timely and important to suggest limits on the scope of the Order and appropriate safeguards for those who may become subject to it.

The Initiative’s recommendations should not be understood as an endorsement of the use of military commissions or as a legal conclusion on the constitutionality of commissions in the current context. Members of the Initiative have differing views as to the advisability and legality of using

commissions. Further, unless otherwise specified, the Initiative does not contend that its recommendations are necessarily required by the Constitution.

The Initiative also notes that the President's Order, and the DoD regulations, do not have explicit congressional approval. In *Ex parte Quirin*, the Supreme Court upheld a military commission's jurisdiction over German saboteurs who arrived on U.S. soil and were in violation of the laws of war. *Quirin* was decided during WWII, a declared war, and Congress had authorized the use of military commissions. The Court expressly left open the question whether the President's constitutional authority alone was sufficient to establish a military commission. The Initiative has left unresolved the question whether prior congressional authorization is required before the United States utilizes military commissions in the present conflict and whether, in light of the Joint Resolution enacted by Congress after September 11, it has been given. The Initiative does believe, however, that the President's authority is most clear, and least open to dispute, when Congress has explicitly acted.

Recommendation 1: The military commissions should have jurisdiction only over persons who are captured in the course of an armed conflict and who are charged with violating the laws of war or committing crimes against humanity.

The DoD regulations did not limit the jurisdiction of military commissions as set forth in the President's Order. The jurisdiction of the military commissions should be limited to trials of persons charged with offenses against the laws of war or crimes against humanity who are captured overseas in the course of armed conflict. This limited scope ensures that military commissions will be used as ancillary to the conduct of military operations and that they do not unduly undermine the authority of civilian United States courts. It draws a bright line between the use of military commissions and civilian courts and thereby protects the ability of the United States to argue against the inappropriate use of military tribunals by other countries.

Initiative members did not agree on whether the jurisdiction of the commissions should be limited to persons who are not citizens or resident aliens. Some believe that such a limitation, which is not required by the Supreme Court's decision in *Quirin*, is discriminatory and unjustified. Others believe that such a limitation would appropriately underscore that the commissions constitute a very narrow exception to civilian court jurisdiction. Still others believe that *Quirin* was wrongly decided, and that Fourth, Fifth and Sixth Amendment protections extend to citizens and resident aliens who might otherwise fall within a commission's jurisdiction.

Recommendation 2: There should be a fair and impartial process to determine whether a person is a prisoner of war; detainees in Afghanistan or other parts of the world should be treated as POWs pending final resolution of their status.

Under the Geneva Conventions, prisoners of war (POWs) are afforded certain rights that are not afforded other detainees. Significantly for present purposes, a detainee of the United States who qualifies for prisoner of war status must be tried under regular court-martial procedures or in American civilian courts in the same manner as members of the United States armed forces and thus cannot be brought before the proposed military commissions.

The Third Geneva Convention, Article 5, and United States Army regulations require that captured persons who may be POWs are to be treated as POWs pending final resolution of their status by a competent tribunal. The Initiative believes this presumption is important both as a guide to U.S. armed forces in the field and as a protection for U.S. forces who may be captured. Army regulations, consistent with the Geneva Conventions, call for a three-member panel of military officers to determine the status of captured persons who assert prisoner of war status and grant those persons, *inter alia*, the right to attend all open sessions of the panel and to testify. DoD should adhere to these regulations.

The Administration's decision to deny POW status to all Taliban captives raises particular concerns. Many Taliban units appear to be the type of armed force entitled to POW status under the Geneva Conventions. In addition, in some cases it is difficult to determine whether a given person was fighting for al Qaeda or the Taliban. Thus all captives asserting POW status should be granted the individualized determinations envisaged by Army regulations.

Recommendation 3: Military commission decisions should be appealable to a civilian judicial body; the right to habeas corpus should not be abrogated.

All military tribunals are subject to the danger of "command influence," the potential for bias created by the fact that prosecutors, judges and, in many cases, defense counsel are part of a hierarchical military structure. This danger is particularly great under the President's Order because the President himself, as Commander in Chief, will choose the individuals who are to be tried by military commissions.

A primary protection against command influence in military tribunals is some type of independent civilian appeal mechanism. The President's Order, however, bars appellate review by any state or federal court. The DoD regulations do not protect against command influence because they provide for review by a panel that consists only of military officers or civilians commissioned as military officers. Moreover, this military panel lacks many of the indicia of an appellate court. It can make recommendations to the Secretary of Defense or call for further proceedings, but does not have the power to dismiss charges against the accused. It is not required to issue written opinions explaining its decisions. In addition, the Secretary of Defense may appoint a different review panel in every case; thus a panel that decides in favor of an accused runs the risk of non-reappointment.

The Initiative believes that the availability of an appeal to an independent civilian body, which is provided in American court martial proceedings, is crucial to ensure the integrity and impartiality of the commission process. It is a safeguard that the United States government, including the military, promotes in other countries; it should not be abandoned here.

The President's Order also appears to bar resort to habeas corpus proceedings, although White House counsel has subsequently disavowed that position. The DoD regulations are silent on this issue. The Initiative's view is that the Order cannot constitutionally and should not as a matter of policy be interpreted to deny habeas corpus jurisdiction where it is otherwise available. The Initiative notes further that Article 9 of the International Covenant on Civil and Political Rights, to which the United States is a party, requires that resort to a court for habeas-like proceedings be available to all detainees.

Recommendation 4: Commission procedures should conform to those of the Uniform Code of Military Justice.

As provided by the President's Order, the DoD regulations establish the procedural rules for the military commissions. In important respects, the regulations clarify the rights to be accorded the accused. The Initiative endorses those provisions of the regulations that guarantee the presumption of innocence, require that guilt be established beyond a reasonable doubt, affirm the right against self-incrimination and require a unanimous verdict for imposition of the death penalty.

The regulations, however, raise many concerns. They give the government broad and unreviewable discretion to close proceedings to the public. They also give the government broad discretion to designate information as "protected" and on that basis deny accused persons access to evidence that may be material to their cases. Similar limitations on access to information are placed on any counsel retained by the accused, even when such counsel has been granted a security clearance by DoD, but not on military defense counsel appointed by the government. This disparity relegates civilian counsel to second-class status and is contrary to the practice in courts-martial where civilian counsel who obtain a security clearance are ordinarily accorded access to classified information and are able to serve as lead counsel. While the Initiative recognizes the sensitivity of intelligence information, sources and methods in the current struggle, it believes that the accused must not be denied the right to a vigorous defense.

These and other concerns could be remedied if the procedures for military commissions conformed to those of the Uniform Code of Military Justice. The UCMJ procedures assure protection for the rights of the accused and for national security interests. The Code has provisions for protecting classified information, intelligence sources and methods, witnesses and judges. Significantly, the Preamble to the Manual for Courts-Martial states that "...subject to...any regulations prescribed by the President..., military commissions and provost courts shall be guided by the appropriate principles of law and rules and procedures and evidence prescribed in courts martial." The United States military promotes the UCMJ as a model for countries throughout the world; it should also be the model for military commissions.

The Initiative notes that jurisdiction over violations of the laws of war is vested in courts martial to the same extent as in military commissions. Since the Initiative's recommendations, taken together, call for a military commission process similar to already established procedures for courts martial, it makes considerable sense to use courts martial rather than newly created commissions whenever resort to civilian courts is rejected.

The Constitution Project

Virginia E. Sloan, Executive Director

The Constitution Project is a bipartisan, not-for-profit organization, based at Georgetown University's Public Policy Institute. The Constitution Project promotes dialogue across ideological and partisan lines, bringing together prominent Americans to achieve long-term consensus on a variety of legal and governance issues.

In addition to its Liberty and Security Initiative, other Constitution Project programs include: the Election Reform Initiative, the Courts Initiative, the Death Penalty Reform Initiative and the Constitutional Amendments Initiative.

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