

Military Commissions and the War on Terrorism

by **Christopher Schroeder**

On November 13, 2001, President Bush issued a Military Order announcing that persons detained in the war on terrorism might be tried before military commissions. The order was greeted by many with consternation and stinging criticism. Even in the name of fighting terrorism, the prospect of trial of terrorists by military commissions rather than by civilian courts frightened civil libertarians. Implementing rules were then promulgated by the Department of Defense on March 21, 2002, and are known as Military Commission Order No. 1.

Some of the early criticism of the president's order establishing terrorist trials by military commissions has been blunted by the implementing rules. Under them, defendants will enjoy vital protections traditionally recognized under American law: the presumption of innocence, proof of guilt beyond a reasonable doubt, assistance of counsel, the right against self-incrimination, the prohibition against double jeopardy, and the right to confront witnesses and to present evidence in self-defense. The implementing rules thus contain many of the features we expect when a defendant is placed on trial in the civil courts. They continue to omit common features of civilian criminal justice, most notably trial by jury. Trial by jury is also lacking, however, in ordinary courts-martial, the proceedings through which our own armed service members are tried for offenses under the Uniform Code of Military Justice.

The remaining major difference between courts-martial proceedings and commission proceedings is the availability of review by appellate military courts for courts-martial. The only form of review from the commission is directly to the president. The absence of appellate judicial review ought to be remedied, but this deficiency is hardly fatal to a commission system that so closely mirrors procedures under which our own military service men and women are tried. Some of

the initial dismay as to whether the procedural rules governing military commissions would provide the "full and fair trial" promised by the president's order was clearly premature.

At present there are hundreds of individuals in United States custody at Guantanamo Bay in Cuba and in Afghanistan. Many may be subject to trial before such commissions. As the war on terrorism continues, the number of potential commission defendants will increase. Yet few lawyers now practicing have had any experience with commission proceedings, because the United States last used them during and shortly after World War II. It therefore would be useful to examine the role military commissions have played in our past.

Historically, military commissions have been used predominantly in conditions of declared martial law or in the theaters of ongoing military operations. Approximately 2,000 trials by military commission occurred during and after the Civil War. World War II saw about 1,600 individuals tried by commission in Germany, as well as approximately 1,000 in the Far East. Military commission trials also were used during the Revolutionary War, the Mexican-American War, the Spanish-American War, and wars with Native Americans, albeit in fewer numbers.

With regard to commission use in the theaters of war, a number of justifications have been advanced. If the battlefield is active, circumstances are hardly conducive to trials before local civil courts, which in the case of war fought on foreign soil would be unreliable, hostile to United States' interests, or in shambles. Transporting prisoners back to the United States has in the past been arduous and time-consuming, draining resources away from the war effort. Besides, witnesses and evidence would be found in the theater, and so holding trials there makes good sense. If battlefield trials are held, certain aspects of criminal procedures, such as full compliance with modern chain of custody requirements, may have to be relaxed. Lack of suitable detention facilities, the need to move troops quickly, and the difficulties of supply further militate

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against granting enemy combatants the leisure of peacetime judicial proceedings afforded to noncombatant citizens. Thus in the heat of battle the choice was between trial before military commissions or summary executions.

In the present circumstances, it seems undeniable that some kind of trial for at least some of the people we have captured and will capture will be in the best interests of the United States. The situation now confronting the United States in the war on terrorism does not conform to the historic battlefield model against an enemy state. But neither does the present "war" conform to any historic model of war in which the United States has been involved.

Most combatants who lay down their arms become prisoners of war, and few are ever tried at all. They are released to return home once the war is over. We now find ourselves in a different sort of battle. Many of these combatants are not expected to return home to peaceful lives once the battle is won. Instead, we expect that if they are released, we shall have to fight them yet again another day in another venue. That being the case, what is to be done with the perhaps hundreds or thousands who may be caught rather than killed in distant places?

In certain cases, individuals caught abroad might be turned over to local authorities, assuming such authorities continue to function and are not also our declared enemies. This may well be preferable and even politically necessary in those countries that have invited our assistance. It certainly is not likely where a hostile regime is attacked and destroyed in the process of attack, such as Afghanistan or even Iraq, should we mount a future military operation there. Yet turning over prisoners to foreign local authorities will not serve our interests in all circumstances, and certainly not in cases of domestic terrorist acts.

International tribunals have been proposed, but so far these are fraught with at least as many complications and unsatisfactory features as our own commissions have. No existing international tribunal has jurisdiction over the captured Taliban or Al Qaeda fighters. Creating one whose jurisdiction and rulings could be respected by all sides would require drawn-out negotiations that in the end have only a minute prospect of being successful. It is likely that such a tribunal would prove even more unpopular in this country than trial by

commission, because it would seem to deny the sufficiency of American procedures to try those accused of acts of terrorism against America.

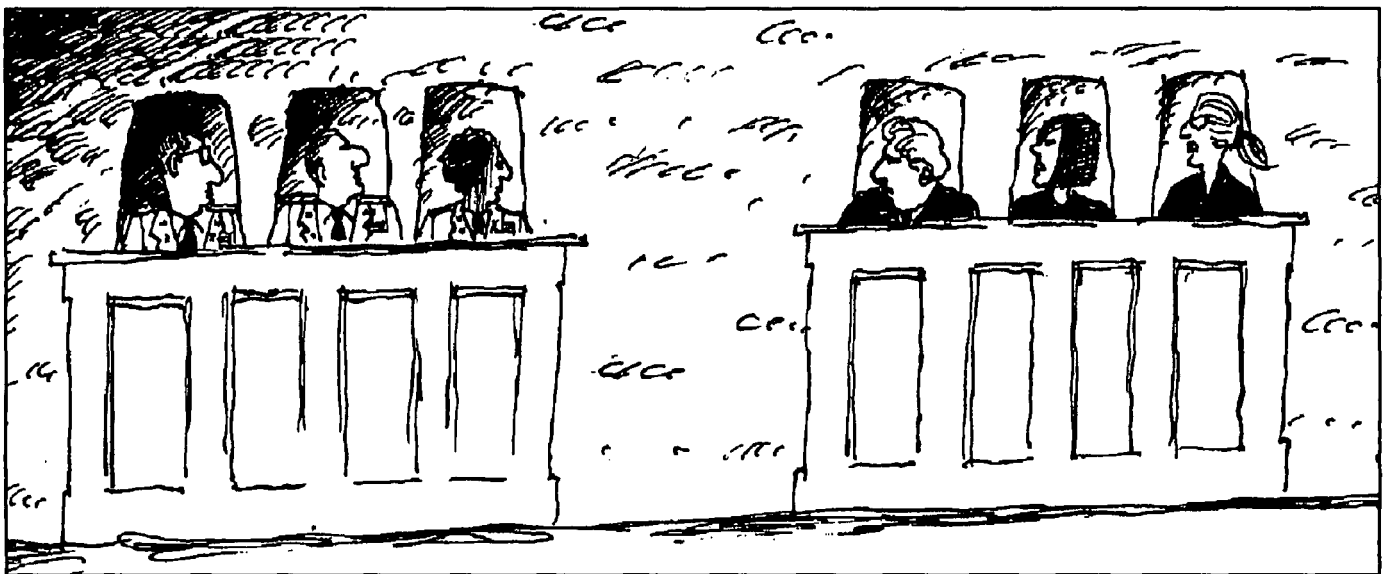
The only remaining options are trial in our own civilian criminal courts, or trial before military commissions. Thus, the choice between our civilian courts and our own military commissions is being hotly debated today.

In making that choice, logistical considerations that supported the use of military commissions in the battlefield in the past seem less applicable today. Transport from Afghanistan to Guantanamo Bay clearly has been shown to be feasible. Those detainees are now a short plane ride away from a federal district courthouse. Trial in Guantanamo will be no less distant from evidence and witnesses than trial in Miami. The war we are fighting against terrorism will often lack any well-defined field of battle; it will often not be waged against any foreign government, and the "battlefield" dimensions of it will be sporadic and probably over quickly. It is no wonder that the Department of Defense concluded that we should create a secure and stable facility in Guantanamo to detain persons captured abroad. Nonetheless, what we have done there undercuts many of the considerations that support battlefield use of military commissions.

Seeking Guidance

American-born terrorists caught abroad are being tried in federal court, as are a foreign-born terrorists caught in America. On what principled basis might the remaining Guantanamo detainees or additional foreign terrorists caught on United States' soil to be treated differently? What is the permissible scope of commission jurisdiction? Delving more deeply into our historical experience with the use of military commissions provides some partial guidance on the law of military commissions.

One of the first uses of military commissions came during the Revolutionary War. Major John Andre, a high-ranking officer in the British Army, was captured behind the Revolutionary Army's lines seeking to obtain information from Benedict Arnold. General George Washington convened a military commission to try Andre as a spy. General Washington was perhaps mindful that the British had convened a sim-



ilar commission to try and hang Nathan Hale as a spy some four years earlier. The Andre trial took one day. Andre was convicted and was hanged three days later.

In May 1861, General Winfield Scott of the Union Army detained John Merryman, accused of participating in the destruction of railroad bridges in Baltimore during riots by Southern sympathizers eager to prevent Northern troops from reaching Washington to aid in its defense. To ensure Northern troops safe passage, Lincoln suspended the writ of habeas corpus and authorized General Scott to detain persons thought to be aiding the insurrection. Merryman nonetheless brought a writ of habeas corpus for his release. Chief Justice Taney, riding circuit, issued a release order, which Lincoln refused to enforce.

Lincoln's Defense

In an address to a special session of Congress later that year, Lincoln recounted the events leading up to the Civil War and justified the war as necessary to prevent the dissolution of the Union. Lincoln used the occasion to reply to critics who claimed that he violated his constitutional oath to "take care that the laws be faithfully executed" when he ignored Taney's release order. He reminded Congress that a massive civil uprising was under way in which "the whole of the laws, which were required to be faithfully executed, were being resisted, and failing in execution, in nearly one-third of the states." Referring to the "single law" of habeas corpus, Lincoln asked whether all the other laws "must ... be allowed to fail of execution, even had it been perfectly clear, that by use of the means necessary to their execution, some single law, made in such extreme tenderness of the citizen's liberty, that practically, it relieves more of the guilty, than of the innocent, should to a very limited extent, be violated?" Should it be the case, he continued, "that all the laws, *but one* ... go unexecuted, and the government itself go to pieces, lest that one be violated?"

Merryman was eventually released on bail. He never was brought to trial, either before a military commission or in a civilian court. Lincoln's clash with Taney, however, crystallized the tensions confronting presidents in times of national emergency, tensions that often led them to consider extraordinary measures, including the use of military commissions to mete out justice.

Based on his own sense of what was necessary to preserve the Union, Lincoln did not hesitate to employ measures analogous to some taken by President Bush in the current crisis. Lincoln indefinitely detained persons suspected of complicity with the Southern cause. He avoided and resisted judicial review of his actions. He caused organizations suspected of aiding the South to be infiltrated. He took steps to cut off foreign support for the South. With regard to military commissions, by the end of the Reconstruction Era, military commissions had tried more than 2,000 cases, many of them in battlefield conditions, others in circumstances where martial law had been formally declared.

The most famous military commission occurred late in the Civil War and involved several individuals thought to be Southern sympathizers, captured in Indiana, and accused of plotting an uprising to take place during the 1864 Democratic National Convention in Chicago. Allegedly, they planned to free some 8,000 Confederate troops held in a military fort. The men were charged with a number of offenses, including "violations of the laws of war." Even though no battle was then raging in Indiana and duly constituted civil courts were available, they were tried before a military commission. Only a majority

vote was required to convict. A death sentence could be imposed with a two-thirds vote of the commission. By comparison, President Bush's commissions would require a two-thirds vote to convict and unanimity to impose the death sentence.

All the defendants were found guilty and received death sentences, which Lincoln commuted to life at hard labor. The habeas corpus petition of one of the defendants, Lambdin Milligan, reached the Supreme Court, which was thus called upon to decide the constitutionality of the military commission procedures. *In Ex Parte Milligan*, 71 U.S. 2 (1866), the Supreme Court unanimously found the procedures to have been unconstitutional, but they split 5-4 as to the rationale. Justice Davis's opinion for the Court concluded that the Constitution provided no exceptions to the guarantees of jury trial and trial before an Article III judge when a duly constituted civil authority exists or, as he put it, "The Federal authority was always unopposed, and its courts always open to hear criminal accusations and redress grievances." When such circumstances exist, "no usage of war could sanction a military trial ... for any offence whatever of a citizen in civil life, in no ways connected with the military service. Congress could grant no such power." Because the federal authority was unopposed and the courts duly constituted in Indiana at the time the men had been arrested, their trial before a military commission was thus unconstitutional.

Chief Justice Chase, along with three other justices, thought the majority's pronouncement that the Congress lacked the power to establish commissions in such situations to be quite unnecessary—because Congress had made no attempt to authorize the Milligan commission, and thus the issue was not before the Court—and wrong in any event. "We cannot doubt," Chase wrote, "that, in such a time of public danger [as existed in Indiana], Congress had power, under the Constitution, to provide for the organization of a military commission, and for trial by that commission of persons engaged in this conspiracy." According to Chase, the military commission trials were unconstitutional only because Con-

Military commissions pose a problem if used in geographic areas where civilian courts continue in effect.

gress had not chosen to authorize them. "The fact that the federal courts were open was regarded by Congress as a sufficient reason for not exercising that power, but that fact could not deprive Congress of the right to exercise it. Those courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators." Milligan and his co-defendants had benefited from an amnesty prior to the Court's ruling. Thus the decision setting aside their convictions had less impact on their individual situations than it had in establishing a benchmark regarding the circumstances under which commissions constitutionally may be employed.

When added to prior experience with commissions, *Ex Parte Milligan* indicates that military commissions are an accepted practice in the theater of war, but problematic if used in geographic areas where civilian authority and its courts continue in effect. The pattern of commission usage set during the Civil War continues to be accepted—commissions perform well-established functions in the theater of war, but their use in domestic situations is subject to significant constitutional constraints.

World War II produced circumstances that shed further light on the use of commissions when the courts of law are open and functioning. In 1942, eight German saboteurs were caught within the United States. George Dasch, a member of the group, had come voluntarily to the FBI to assist them in catching the others. Dasch came to believe that the United States government was not living up to its side of a plea bargain. He then insisted on a full district court trial. Such a trial would have revealed embarrassing matters that the United States did not wish disclosed.

Trial before a military commission offered the advantage of closed proceedings and relaxed burdens of proof, and provided stiffer sentences. These and other considerations moved President Roosevelt to issue an order creating a military commission to try the eight would-be German saboteurs. The president himself appointed the prosecutors and defense counsel and the seven generals who formed the panel of judges for the commission.

Despite a provision in Roosevelt's order precluding judicial review, the Supreme Court entertained a writ of habeas corpus. After two days of oral argument, the Court upheld the constitutionality of the commission proceedings. In the process of deciding *Ex Parte Quirin*, 317 U.S. 1 (1942), the Supreme Court also revisited issues raised by *Ex Parte Milligan*. In *Quirin*, the Court distinguished the German defendants from the Indiana citizens in the *Milligan* case. The Germans were foreign combatants who came to these shores in stealth to do acts of sabotage. The Indiana citizens were civilian citizens of a Northern state which was part of the Union. The distinction was sufficient for the Supreme Court to find that military commissions were an acceptable forum in which to try foreign combatants in times of war.

Once the constitutional green light had been given, the military commission took only three additional days to convict and to sentence all eight defendants to death. President Roosevelt reviewed the 3,000 pages of commission proceedings the next day. He commuted the death sentences of two of the eight who had cooperated with the FBI and the prosecution, giving them sentences of 30 years and life, respectively. *The New York Times* surmised that these two were given leniency in order to encourage others involved in sabotage and espionage to turn on their colleagues. The death sentences on the remaining six were carried out by electrocution on August 8, less than two weeks after the Supreme Court held the military commission procedure to have been constitutional.

President Bush's order creating military commissions to try terrorists in many respects parallels President Roosevelt's order creating military commissions to try enemies caught on our shores for acts of sabotage. Both establish military commission jurisdiction over violations of the laws of war. Although not defined in the U.S. Code, the "laws of war" define what constitutes acceptable methods of conducting armed conflicts and have come to be generally accepted in

international law. They preclude targeting civilians with acts of violence and forbid acts of sabotage carried out by armed services personnel operating out of uniform. Both President Bush's and President Roosevelt's orders allow the commission to admit evidence that would have "probative value to a reasonable person." Both leave most of the specific rules of proceedings to be developed by others. Under President Roosevelt's order, the military commission was to issue its own procedural rules. President Bush's order provides that procedural rules for the military commissions are to be established by the Secretary of Defense, which he has done by Military Commission Order No. 1. Both allow for conviction and sentencing by a two-thirds vote. Both allow for the death penalty

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based on an unanimous vote. Both provide for "review and final decision" by the president of the United States.

After the *Quirin* case, President Roosevelt questioned the wisdom of review by himself, the same executive officer who had appointed the commission and who lacked judicial experience. Thus, when a second military commission was convened in 1945 for trial of other German spies, the order did not lodge review in the president. In keeping with the Articles of War provisions governing courts-martials at the time, appeals were addressed by having the Office of Judge Advocate General convene a Board of Review composed of military officers with some judicial experience. Because one ground for attack on President Bush's order is that he has the final review, he might have avoided some criticism by following the post-*Quirin* review procedures instead of following the *Quirin* model.

In other respects, President Bush's order creating military commissions for dealing with terrorists and the Defense Department's implementing regulations improve upon Roosevelt's proclamation and order for dealing with enemy alien saboteurs. As noted, President Roosevelt's military commissions formulated their own procedural rules. This made the commissions vulnerable to the charge of making up rules as they went along. The Department of Defense implementation regulations help to establish general rules of procedure to be applied in the future. Unlike President Roosevelt's order that made him the one to appoint the commission members, the Bush order directs the Secretary of Defense to establish selection procedures.

Critics of President Bush's order also claim that trial for terrorist activities by military commission exceeds the president's executive and commander-in-chief authority and requires an act of Congress. In *Quirin* the United States had argued strenuously that the president possessed sufficient constitutional authority to try the German saboteurs before a military commission without congressional authorization. The Court declined to endorse that position. Instead, it relied

upon Article 15 of the Articles of War, which has been continuously in effect since 1916. It therefore held that it was not necessary to decide whether unilateral authority existed, because Congress had “recognize[d] the military commission appointed by military command as an appropriate commission for the trial and punishments of offenses against the law of war not ordinarily tried by court-martial.”

The current codification of former Article 15 of the Articles of War is found in 10 U.S.C. § 821, which provides that “the provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions ... of concurrent jurisdiction...” This statutory language implies the existence of military commissions and provides that where they do exist they will not be deprived of jurisdiction by courts-martial. There is, however, no express statutory language creating any such commissions. The question thus arises: Must military commissions be *expressly authorized* by Congress or may they be unilaterally created by presidential order?

Congressional “Recognition”

Quirin avoided holding *either* that military commissions were created by an Act of Congress or that the president has unilateral power to create them. It finessed the issue by interpreting Article 15 to “recognize” the existence of such commissions, thereby adopting the position that such commissions were jointly approved by Congress and executive order. This is in keeping with the legislative history of the World War II Articles of War. When the Articles of War were being amended in 1916 to include Article 15, General Enoch Crowder, Army Judge Advocate General, testified before the United States Senate that Article 15 was included to avoid the possibility that the proposed expansion of jurisdiction of courts-martial would be read “to exclude trials by military commissions and other war courts.” “A military commission,” the General explained, “is our common-law war court. It has no statutory existence, though it is recognized by statute law ... These war courts never have been formally authorized by statute.”

Congressional “recognition”—the word used by General Crowder and by *Quirin*—may not be as strong a congressional endorsement as “express authorization” by Congress. Nonetheless, given the statutory amendment of the Articles of War in 1916 and our country’s historic use of military commissions both before and thereafter, it is difficult to avoid the conclusion that military commissions have for long been endorsed by Congress as an available “common law” option.

Indeed, when the Congress replaced the Articles of War with the Uniform Code of Military Justice (UCMJ) in 1950, the language of Article 15 was incorporated verbatim into 10 U.S.C. § 821. The House and Senate Reports accompanying the UCMJ explained that “this article preserves existing Army and Air Forces law which gives concurrent jurisdiction to military tribunals other than courts martial. The language of [Article of War] 15 has been preserved because it has been construed by the Supreme Court (*Ex Parte Quirin*, 317 U.S. 1 (1942)).” Thus, if it was not clear at the time of the *Quirin* decision whether Congress had authorized the use of military commissions, the congressional ratification of their use in the 1950 codification of the UCMJ settles the issue.

Once the Court surmounted the threshold question of lawful authority to establish military commissions, the rest of the Court’s opinion in *Ex Parte Quirin* addressed the matter of what persons and what crimes may be tried before such com-

missions. Because one of the defendants was allegedly an American citizen, the Court needed to face the *Ex Parte Milligan* statement that commissions cannot be used against citizens when the civil courts are functioning normally. The Court lowered the bar on the use of commissions in such cases. *Quirin* distinguished the *Milligan* holding on the grounds that Milligan as “a non-belligerent, [was] not subject to the law of war save as ... martial law might constitutionally be established.” “We have no occasion,” the Court continued, “to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war.” It was enough to hold that members of an enemy’s armed forces—regardless of citizenship—who had crossed behind enemy lines in violation of the laws of war by virtue of shedding their uniforms and insignias could be so tried. Such “unlawful combatants ... were plainly within these boundaries.”

Given the past use of military commissions, the statutory enactments and Supreme Court precedents, certain conclusions seem warranted. The president has the authority to employ military commissions for violations of the laws of war. Even when the civil justice system is functioning normally, military commissions can try combatants for violations of the laws of war during times of armed conflict. The March implementing regulations obviate due process of law objections to commission proceedings. This much ought to be conceded by even the harshest critics of military commissions.

The fight against Taliban soldiers fits within the traditional categories of war and the law of war, and we can fall back on traditional decision making about how to deal with captured Taliban fighters. In these circumstances, there is nothing wrong with trial before a military commission so long as due process safeguards have been provided, as they have been.

In *The Lessons of Terror*, Caleb Carr claims that the fight against terrorism transcends the categories of the criminal



law. It is, he claims, primarily a military not a criminal law problem. Professor Steven Lubet, of Northwestern University Law School, has come to the same conclusion. See "War Offers Best Defense" in *The Baltimore Sun*, October 9, 2001. The use of military commissions conforms with their perspective on the responses that terrorism requires. It will not suffice to apprehend and then try terrorists one by one in civil courts. Collective and concerted military actions must be taken against terrorist targets, organizations, and capabilities.

Carr's thesis does not, in my view, address the question of what to do about "terrorists" who are civilians in this country and alleged to have committed acts indistinguishable from normal crimes. This question arises because, by its terms, the president's order cuts a much wider swath than war crimes committed by Taliban in Afghanistan. Professor Neal Katyal has worried that the initial order reaches a Basque Separatist who kills an American citizen in Madrid. Professor Laurence Tribe has warned that a Dutch doctor (where assisted suicide is legal) who prescribed a lethal medication for a terminally ill patient in Oregon would be subject to the jurisdiction of a military commission. If the sender of anthrax-laced letters proves to be someone completely unrelated to Al Qaeda, the Taliban, or Afghanistan, his acts might come within the jurisdiction of a military commission. Military commission jurisdiction also extends to individuals giving incidental and perhaps even innocent assistance to a person who engages in terrorist acts.

In all such cases, the criminal justice system has a full panoply of charges that can be brought to try such conduct—aiding and abetting a felony, attempted criminal acts, conspiracies to commit, and the felonies themselves. Harsh sentences are available which were not available at the time of *Quirin*. Surely landing on these shores, hiding uniforms, and setting off incognito, as the *Quirin* defendants did, would be sufficient to sustain a conspiracy conviction today even if the prosecution was pessimistic about a conviction for an attempt in 1942. The civilian courts have been trying members of organized crime conspiracies for years. And in the terrorist mold, albeit the home-grown variety, Timothy McVeigh and Terry Nichols were successfully tried within the civilian criminal justice system for heinous terrorist acts. The death sentence was given and administered to McVeigh. Those who object to trial by military commission argue that no material distinctions as to the nature of the offense separate terrorists from those successfully tried in civilian courts.

Those who endorse use of military commissions argue that members of foreign terrorist organizations, such as the suicide bombers who brought down the World Trade Center towers and hit the Pentagon, make no attempt to conduct themselves under the rules of war applicable to lawful combatants. Their purpose is not to engage armies on a field of battle but to kill innocent civilians, demoralize civilian populations, and wreck our economic infrastructure. Their conduct places them in the category of unlawful combatants under internationally accepted norms. Accordingly, those same norms permit them to be tried for war crimes. If such belligerents are apprehended on United States' soil, the logic of *Quirin* applies. Although the civilian courts are functioning, they can be tried before a properly constituted military commission. The choice becomes a matter of government policy in determining the best course of action, not a matter of compulsion under either United States constitutional principles or those supplied by international law.

That same conclusion cannot be reached with nearly the same confidence regarding those who merely aid a terrorist. A fundamental distinction within the law of war, recognized by the court in *Quirin*, is between "armed forces" and "the peaceful populations" or civilians. On its face, President Bush's order seems to make civilian populations subject to trial before military commissions. Arguably it would suffice to have "harbored" Al Qaeda members, even if the shelter given is not directly related to the terrorist acts committed, to make such "individuals subject to this order," even though historically

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civilians have not been subject to military commission trials.

The question of the applicability of military commissions to civilians caught on domestic soil is unsettled because of ambiguity in what distinguishes the *Milligan* and *Quirin* precedents. One possibility is that *Quirin* countenanced the use of a military commission instead of the civilian courts (which were literally across the street from where the commission hearings were held in downtown Washington) because the defendants were members of the German armed forces. If *Milligan* is the appropriate precedent when defendants are not members of an enemy's armed forces, then that case should preclude civilians captured in this country and who assist members of that enemy's forces from being tried by a military commission rather than a civilian court so long as the civilian justice system is functioning.

Would that things were that simple. After John Wilkes Booth assassinated President Lincoln, a number of Booth's alleged accomplices were tried before a military commission. Among them was Dr. Samuel Mudd, who tended Booth medically during his escape. Mudd's case never made it to the Supreme Court, and he eventually received a full pardon from his prison term for his help in combating yellow fever in the prison. The only judge who heard an appeal from Mudd concluded that the fact that President Lincoln was commander-in-chief made the assassination analogous to someone coming onto a military base and shooting the general in charge, and thus a "military offense" over which a military commission has jurisdiction. Just recently, Mudd's great-grandson sought to have Mudd's conviction vacated on the grounds that the good doctor was innocent and that the military commission lacked jurisdiction to try him. In an opinion handed down just last year, the prior court's reasoning was cited with apparent approval. *Milligan* was found to be a case limited to its "unique facts," but without any clear expression of what made it unique. Mudd's conviction was sustained. *Mudd v. Caldera*, 134 F. Supp. 2d 138, 146 (D.D.C. 2001).

Answers to how far commission jurisdiction extends domestically seem unlikely to be resolved by any direct facial attack on the president's order. Indeed, the way the
(Please turn to page 74)

well as reading them aloud before the opening statements. Jurors are encouraged to take notes and permitted to write down questions they may have. These questions are collected at recesses and, after conferring with counsel on the record, answers or explanations are made when court reconvenes.

Integral Instructions

If a trial lasts more than two weeks, I have the lawyers make “mini-summations” on Friday afternoons to tell the jury what they accomplished during the past week and what they intend to achieve during the next. If the evidence requires me to change an instruction in mid-trial, I tell the jury I made a mistake, pull the incorrect instruction from their notebooks, replace it with a corrected one, and explain the difference. After closing arguments, I again read them aloud with enthusiasm. The instructions are cross-indexed with the specific questions on the special verdict forms. They do not contain the words “plaintiff” or “defendant.” The parties’ names are used. Nor will words such as prior, subsequent, hereinabove, whereas, or nonetheless be heard.

The aim is twofold: to make the instructions understandable to people of ordinary experience and to make them an organic part of the trial rather than an empty ritual. The reason the instructions played an essential part in the jury deliberations in the second DUI trial is that the judge emphasized them from the very start. She not only read them, but she also endowed them with a sense of importance. Because this jury, like all juries in every aspect of a case, took its cues from the judge, waiting until the last minute to instruct would have condemned the instructions to irrelevance. In the happy days before instructions became technical, legalistic, utterly opaque, Friedman, *supra* at n.14, waiting until the last minute to instruct in frank natural language was appropriate. Today, with multiple claims, extended trials and mounds of exhibits, the practice amounts to anachronism.

I don’t pretend to have all the answers, but in numerous post-verdict interviews, jurors have stated they felt good about the experience in my court and they would like to come back. Despite the stress and commitment of time, the courtroom and the decision in the case belonged to them. Isn’t that what democracy is supposed to be

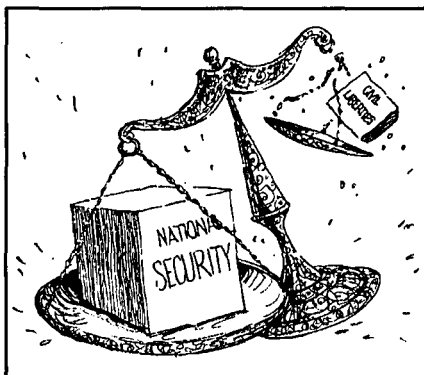
about? That is something about which I have no doubt, reasonable or otherwise.

I would like to instruct on reasonable doubt by advising the jury to satisfy their consciences that the verdict they reach is just and true. If they can live with it without regret, so should we all. □

Military Commissions

(Continued from page 33)

order is crafted may make it valid on its face regardless of what its jurisdictional parameters eventually prove to be. Section 4 of the order provides that “[a]ny individual subject to this order shall, when tried, be tried by military commission for any and all offense triable by military commission.” This provision can blunt any argument that other provisions of the order sweep beyond permissible jurisdictional



boundaries. Its function might be analogous to that of jurisdictional statutes like California’s, which declares that “a court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.” An analysis that takes into account historic, statutory, and judicial precedent as well as contemporary norms will eventually determine the jurisdictional scope of military commissions. Whatever that jurisdictional scope may be, section 4 could be read to say that the president’s order seeks to extend commission jurisdiction only that far. As a court is unlikely to say more than this in any challenge to the order, any judicial resolution of these issues must await the

commencement of an actual prosecution. Eventual habeas corpus proceedings with well-defined facts will address remaining questions of appropriate jurisdiction.

Ultimately, however, the courts may not be the optimal institution for resolving the tension between maintaining civil liberties and maintaining national security in times of danger. In *Korematsu*, which most in our society have belatedly concluded wrongly permitted the internment of Japanese citizens during World War II, Justice Jackson stated that courts are not competent to appraise the reasonableness of military orders. “In the very nature of things military decisions are not susceptible of intelligent judicial appraisal,” he argued. “They do not pretend to rest on evidence, but are made on information that often would not be admissible and on assumptions that could not be proved. Information in support of an order could not be disclosed to courts without danger that it would reach the enemy. Neither can courts act on communications made in confidence. Hence courts can never have any real alternative to accepting the mere declaration of the authority that issued the order that it was reasonably necessary from a military viewpoint.” *Korematsu v. United States*, 323 U.S. 214, 245 (1944) (Jackson, J., dissenting).

In the commission context, courts will be loathe to intervene. As Chief Justice Rehnquist noted in his recent book on civil liberties in times of war, “*inter arma silent leges*” has been repeatedly shown to be the operative maxim. William H. Rehnquist, *All the Laws but One: Civil Liberties in Wartime* (1998). As a country dedicated to the rule of law, we are rightly worried about that operation of that maxim; yet the reality is that the finer points of civil rights often temporarily become luxuries unaffordable in war time.

There was another reason why Justice Jackson thought courts ought not to pass judgment on such decisions. The executive power is charged with the conduct of a war. “The chief restraint upon those who command the physical forces of the country, in the future as in the past, must be their responsibility to the political judgments of their contemporaries and to the moral judgments of history.” *Korematsu*, 323 U.S. at 248. The judiciary ought to be reluctant to relieve the

pressure generated by the prospect of being called to account for the conduct of the war by announcing that some action is constitutionally justified.

We have learned some of the lessons of World War II, both from the horrors perpetrated by our enemies and from our own mistakes, such as the Japanese internment. Perhaps the initial public outcry concerning military commissions was premature. Then again, perhaps it was that very public outcry that led to implementing rules which provide for fundamental due process. From here on, public debate and public opinion will have a great deal to say about how aggressively we seek to supplant criminal trials in civilian courts with military commissions. That debate ought not to get bogged down exclusively in the finer points of constitutional law, because the real issues to be resolved involve how we want to protect both the rule of law which gives us valued civil liberties and our national security. These are questions that democratic systems of government have the courage to resolve through open debate and criticism. It is that debate and the eventual public opinion on these matters that will be the best guardians of our civil liberties and the rule of law. □

Trial Notebook

(Continued from page 62)

Which takes us back to where we started. Prevention is still cheaper than cure. Next time make the motion at the close of all the evidence.

One last point. Read your letter again. Telling the judge she's wrong and that she didn't read the rule closely is no way to bring her around to your point of view.

Angus

Dear Angus:

I surrender! I keep getting caught in the narrative trap—two evidence rules that close in on me in almost every trial—and I don't know how to get untangled.

Here's how it works. Say you've got a witness on direct examination who needs some guidance in staying on track

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and answering your questions. But when you give the witness a little help, the other side objects and the judge tells you to stop telling the witness what to say.

So you back off a little and say to the witness, "Just tell us in your own words what happened," and the next thing you know, the judge sustains your opponent's objection that your question calls for a narrative.

When you get ping-ponged back and forth between those objections it can really kill your direct.

What should I do?

Tangled in Tulsa

Dear Tangled:

The narrative trap can be daunting until you learn the verbal habits you need for the paragraph method of direct examination.

First get rid of the traditional "guiding questions" like the ones prosecutors always seem to ask: "Q. Directing your attention to the evening of April 3, I ask what, if anything, unusual occurred on that occasion?"

What's wrong with that? It is stilted, overly legalistic, and shows no real concern for the answer. You might as well be chopping wood for all the interest you communicate to the jury.

Instead, think of each topic you want to cover in direct examination as a paragraph. Then come up with a headline—a single title to the paragraph that you give to the witness: "Q. Mr. Watson, we're going to start your testimony with things that happened on the evening of

April 3." Then for the rest of the paragraph, start each question with one of the key words newspaper reporters are taught to use: "who, where, what, when, how, and why."

Then when you're finished with that subject, you announce the next: "Now let's focus on what happened the next morning." Or, "Thank you, Mr. Watson, now we're going to shift gears and talk about something entirely different. Have you ever had any training in hand-to-hand combat?"

"But wait a minute," you say. "That's improper. Your topic sentences aren't questions."

Yes they are. Each one is part of the who, where, what, when, how, and why questions that follow it.

The beauty of the paragraph method is that it guides the witness without asking leading questions. It also shows the judge and jury where you are going because it imposes a system of audible organization on your direct examination that makes it much easier for everyone to follow. It's nice to know what the topic is before the questions begin.

And besides, the paragraph method helps your credibility with the judge and jury because it shows that you know what you're doing and where you're going instead of stumbling around from one subject to another without any order or method the way the other lawyer does.

Angus □