
Applying the Geneva Conventions: Military Commissions, Armed Conflict, and Al-Qaeda

ALFRED P. RUBIN

On November 13, 2001, President Bush issued an executive order or a military order as commander-in-chief of the United States Army and Navy which seems to authorize the establishment of military commissions to try accused members of the Al-Qaeda network. Many people and organizations from all points of the political spectrum have expressed doubts about the proposal and, legally, there is a serious question as to the President's authority to establish these bodies in the absence of a declaration of war by the Congress. What many observers have failed to realize is that a simple solution exists to the problem of bringing members of the Al-Qaeda network to justice. It lies in the Geneva Conventions' clauses related to the treatment of prisoners of war.

Is a declaration of war necessary for such commissions? Perhaps not. Declarations of war by Congress seem to have legal effect in the American constitutional order but not in the international legal order, where the United States has acted militarily under the laws of war for over 200 years without declarations. Indeed, there were no declarations of war during the first two wars fought by the United States (the "undeclared war" with France from 1798 to 1800 and the "war" with the Barbary state of Tripoli from 1802 to 1805) or during the last two (the Vietnam action and the "Gulf War" from 1990 to 1991).

The use of military tribunals similar to the one the administration has proposed do have a fairly long tradition in American law during "declared" wars like World War II. Though such tribunals were convened in the absence of such a declaration during

Alfred P. Rubin is Distinguished Professor of International Law at The Fletcher School of Law and Diplomacy.

the American Civil War, it is hard to see those tribunals as precedent setting in light of 140 years of not having used them again. Courts martial—i.e., military courts convened to enforce the rules for the governance of the Army and Navy enacted by Congress under Article I of our Constitution—tried Americans during the Philippine insurrection of 1902, not military commissions.

What the Bush administration seems to have ignored is the fact that—aside from courts martial under Article I—only the Congress can erect tribunals. In addition, under Article II, the President's authority is limited to establishing tribunals to try only members of the American armed forces for violating the rules that Congress has enacted for the governance of our forces.

These are just a few of the constitutional law issues involved in the executive order, and only the United States Supreme Court can pass definitively on them. Beyond the legal matters, there are serious political and moral issues involved. It is hard to see how such commissions can properly be set up by the United States while we dispute the equal ability of equal sovereigns (like Cuba

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and Libya) to set up equivalent bodies that could potentially try Americans. Do we now accept the use by others of administrative tribunals that do not publicize their evidence or provide what we regard as an adequate opportunity for defense?

Indeed, there is so much that seems self-defeating in the idea that one can only hope that such a court is never constituted by the United States. It is true that the perpetrators of these acts cannot be brought before the court—the people who hijacked American civil aircraft to perpetrate the horrors in New York, Virginia, and Pennsylvania are all dead,

after all. But the problem remains: we are addressing the application of our conspiracy laws to the acts of foreigners abroad, just as many countries would apply their laws to the acts of our various secretaries of state, such as Henry Kissinger.¹

The notions that an international tribunal would either keep the evidence secret, or would publicize evidence to the enlightenment of others as to the identities of our spies and our radio intercept capabilities, are so truly frightening that one is led to an equivalent rejection of the thought that some precursor to an International Criminal Court should hear any cases that are tried. Surely, the exposure of our spying and radio intercept capabilities, necessary to allow a criminal trial in the usual way, should be avoided. At the same time, it is hard to justify a conviction of anybody in a closed proceeding not incidental to a person's submission to military discipline under our own constitution. In the precedent-setting

case of *Reid v. Covert* in 1957, the United States Supreme Court held that even the dependents of American military personnel were entitled to fair trial safeguards under the Constitution, thus making it impossible to continue subjecting them to courts martial and releasing the two wives who had been convicted by courts martial of murdering their military husbands.

All of this debate on the commissions seems unnecessary, in fact, because a fairly clear and simple solution to the entire issue of handling Al-Qaeda members can be found in the Geneva Conventions. Under the 1949 Geneva Prisoners of War Convention, to which the United States, Afghanistan, and just about all other countries are parties, an Article 5 tribunal results in the incarceration of any accused as a prisoner of war, even if he or she has never committed vile acts. Even if the "armed conflict" has not been declared by at least one of the parties (the convention is unclear as to whether any declaration of war is necessary at all), those soldiers who have not violated the international laws of war are still "prisoners of war" until the cessation of active hostilities. The questions as to when those hostilities have actually ceased seems to be a question best resolved by the tribunal, which need not accept the word of a prisoner as to his future peaceful intentions.

There need be no special commissions, no criminal trials, no "convictions," to result in life in prison enlivened only by periodic Red Cross visitations. If a wicked actor thinks that this sort of imprisonment is easier than a life sentence for a convicted felon, let him or her try it. ■

NOTES

1 For more on the discussion of trying Henry Kissinger, see Christopher Hitchens, *The Trial of Henry Kissinger* (London and New York: Verso, 2001). See also Alfred P. Rubin, "Henry Kissinger and Christopher Hitchens" *The Times Literary Supplement*, July 20, 2001, 5. <http://www.the-tls.co.uk/archive/linked_story.asp?id=26934> (December 21, 2001).

