OREGON
CIVIL RIGHTS
NEWSLETTER

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Doing Justice in the War on Terrorism

> Unfortunately, the nature of these crimes is such that both prosecution and judgment must be by victor nations over vanquished foes. The worldwide scope of the aggressions carried out by these men has left but few real neutrals. Either the victors must judge the vanquished or we must leave the defeated to judge themselves. . . . We must never forget that the record on which we judge these defendants today is the record on which history will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our own lips as well. We must summon such detachment and intellectual integrity to our task that this Trial will commend itself to posterity as fulfilling humanity's aspirations to do justice.
>
> *Justice Jackson, opening statement, Nuremberg Tribunals*[1]

Over half a century after Justice Jackson offered those prophetic words, the United States is once again faced with the challenge of bringing to justice a captured enemy. We would do well to heed his warnings.

The task is complicated by the fact that rules that we now rely on to guide our conduct were developed for a different sort of war—a war between nations, with soldiers in uniform, meeting on a battlefield as they had done for centuries. The "war" on terrorism involves nonstate actors, dispersed worldwide, in a loose network seeking not the defeat of armies but the spread of terror through acts that we have typically conceived of not as acts of war, but as crimes.

James D. Noteboom
Aaron J. Noteboom

The law of war, now often referred to as the law of armed conflict (LOAC), is the part of international law that regulates the conduct of armed hostilities. It has two primary sources—customary law, which arises out of the conduct of nations over centuries, and treaty law, which frequently reflects customary law. Treaty law is generally divided into two branches—Hague law, which deals mainly with methods and means of warfare, defining such things as lawful weapons, ammunition, and targets, and Geneva Law, which concerns the protection of people involved in war (prisoners of war, wounded and sick, civilians).

Military Commissions

In this context, on November 13, 2001, the Bush administration announced that the president would exercise the seldom-used power of the presidency to establish military commissions[2] to try captured Al Qaeda and Taliban detainees. There was an immediate reaction across both the United States and the international community, with cries of "victor's justice" and "kangaroo court." Several concerns were raised about the commissions, ranging from the right to due process, admission of evidence, independence of the commissions, closed proceedings, and the right to habeas corpus to the possibility of a less than unanimous vote for inflicting the death penalty. Critics questioned the need for military commissions and suggested as alternatives the federal court system, traditional military courts-martial, the newly formed International Criminal Court, or international tribunals.[3]

On March 21, 2002, Defense Secretary Donald Rumsfeld signed Military Commission Order No. 1, establishing the rules under which the military commissions would operate.[4] The rules dealt with many, but not all, of the public's concerns. The order provides that each commission will consist of a presiding officer (a lawyer) and three to seven members, all of whom will be military personnel. Commission members act as the jury and are responsible for determining whether the accused is guilty beyond a reasonable doubt or not guilty, as well as determining appropriate sentences. A guilty verdict requires a two-thirds majority of the members, while a conviction and sentence of death require a unanimous verdict.

The presiding officer acts as the judge and is responsible for the conduct of the trial, admits or excludes

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Notice of OSB Civil Rights Section Annual Meeting and CLE Seminar

WHEN: October 24, 2002
Meeting: 8:50 a.m.; CLE Seminar: 9 a.m.

WHERE: Oregon Convention Center
777 N.E. Martin Luther King Jr. Blvd.
Portland, Oregon

MEETING AGENDA: Elect Executive Committee for 2003

SLATE: OFFICERS

Chair: Carl Kiss
Chair-Elect: John Clinton Geil
Past Chair: David A. Landrum
Secretary: Edward Johnson
Treasurer: Michelle Holman Kerin

ONE-YEAR MEMBERS

David D. Park
Dennis Steinman
Dana L. Sullivan
Margaret J. Wilson

TWO-YEAR MEMBERS

Barbara J. Diamond
Kyle B. Dukelow
Richard F. Liebman
Tracy Pool Reeve

SEMINAR: Civil Rights: . . . and Access for All

8:00	Registration
8:50	[Civil Rights Section Annual Meeting]
9:00	Judicial Access: *Christopher v. Harbury* Featuring Jennifer K. Harbury from Texas Rural Legal Aid
10:30	Economic Access
11:15	Four-Footed Access: Guide and Assistance Animals
12:15	Lunch (available at the Portland program)
1:15	Courthouse Access: Opening the Courthouse Doors
3:00	Attorney Responsibilities to Clients with Access Issues
4:30	Adjourn

This CLE has been approved for 3.25 diversity credit hours.

Report to the Section Membership

In 2002, the OSB Civil Rights Section has accomplished the following: produced three newsletters (the fourth will be published in December); drafted and sent to Oregon's Congressional delegation a letter supporting the Civil Rights Tax Act; obtained approval from the OSB board of governors to pursue in the 2003 Oregon legislature a resolution to support the CEDAW treaty; and donated $500 to the Campaign for Equal Justice. In October, we will host a full-day seminar on access to justice, featuring Jennifer K. Harbury from Texas Rural Legal Aid, Weslaco, Texas. As of July 31, 2002, the section's fund balance was $7,198. For 2003, the section plans to continue its tradition of publishing the newsletter, hosting a seminar, contributing to the Campaign for Equal Justice, and monitoring legislation that affects civil rights. The section also plans to improve its web page. ✦

OREGON CIVIL RIGHTS NEWSLETTER

The *Oregon Civil Rights Newsletter* is published by the Civil Rights Section of the Oregon State Bar
P.O. Box 1689
Lake Oswego, Oregon 97035.

The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

♻ Recycled/Recyclable

Supreme Court Update

Decided

Atkins v. Virginia,
No. 00-8452 (June 20, 2002)

In this landmark 6–3 decision, the Supreme Court ended capital punishment in the United States for the mentally retarded. The Court held that the execution of mentally retarded criminals was unconstitutional because a developing national consensus viewed it as cruel and unusual punishment in violation of the Eighth Amendment of the Constitution.

This opinion reversed the Court's decision in *Penry v. Lynaugh,* 492 US 302, 109 S Ct 2934, 106 L Ed 2d 256 (1989), in which the Court ruled that executing mentally retarded defendants did not violate the Eighth Amendment.

Board of Education v. Earls,
No. 01-0332 (June 27, 2002)

In a 5–4 decision, the Supreme Court held that random drug tests for students who participate in competitive extracurricular activities reasonably further the district's interest in detecting and preventing drug use, and therefore do not violate the Fourth Amendment.

The Court stated that "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."

Chevron U.S.A., Inc. v. Echazabal,
No. 00-1406 (June 10, 2002)

In a unanimous decision, the Supreme Court held that the Americans with Disabilities Act (ADA) permits an Equal Employment Opportunity Commission regulation that allows employers to screen out a potential worker with a disability for risks on the job to his own health. The Court upheld an employer's defense to an ADA claim that a worker's disability posed a direct threat to the worker's own health.

Fisher & Phillips LLP

Busse & Hunt

***National Railroad Passenger Corp. v. Morgan,* No. 00-1614**
(June 10, 2002)

The Supreme Court, in a 5–4 decision, held that under Title VII, a plaintiff claiming discrete discriminatory or retaliatory acts must file his or her charge within the appropriate 180- or 300-day period, but a charge alleging a hostile work environment will not be time-barred if all acts constituting the claim are part of the same unlawful practice and at least one act falls within the filing period.

The Court distinguished hostile work environment claims by explaining that by their very nature the claims involve repeated conduct and that the unlawful conduct cannot be said to occur on any particular day.

Republican Party of Minn. v. White,
No. 01-0521 (June 27, 2002)

The Court, in a 5–4 decision, overturned a rule in Minnesota's Code of Judicial Conduct that barred judicial candidates from announcing views on "disputed legal and political issues" because the rule violated First Amendment rights of the candidates.

Applying the strict scrutiny test, the Court determined that the rule's restriction on free speech was not "narrowly tailored to serve . . . a compelling state interest."

U.S. v. Drayton,
No. 01-0631 (June 17, 2002)

In a 6–3 decision, the Supreme Court held that police officers do not need to inform bus passengers on public transportation of their legal right not to submit to questions or searches before searching them for drugs or weapons.

Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton,
No. 00-1737 (June 17, 2002)

The Court, in an 8–1 decision, concluded that a municipal ordinance that requires one to obtain a permit before engaging in door-to-door soliciting and to display that permit, containing the person's name, violates the First Amendment's speech and religion rights.

Justice Stevens, writing for the majority, stated: "It is offensive that in the context of everyday public disclosure a citizen must first inform the government of her desire to speak to her neighbors."

Zelman v. Simmons-Harris,
No. 00-1751 (June 27, 2002)

In a 5–4 decision, the Supreme Court ruled that school voucher programs are constitutional if they provide parents a choice that includes secular schools. Voucher programs will not be invalidated just because the parents' choice also includes religious schools.

Holding that the voucher program did not violate the First Amendment's establishment clause, the Court asserted that the program was neutral in all respects toward religion.

Certiorari Granted

Eldred v. Ashcroft,
No. 01-0618 (Feb. 19, 2002)

The Supreme Court will decide whether the 20-year extension of the terms of all copyrights that is set forth in the Copyright Term Extension Act of 1998 violates the copyright clause of the Constitution or the First Amendment.

Lockyer v. Andrade,
No. 01-1127 (April 1, 2002)

The Supreme Court will decide whether California's "three-strikes" law, which provides for a prison term

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Recent Decisions

Richard F. Liebman
Barran Liebman, LLP

Ninth Circuit Court of Appeals

***Circuit City Stores, Inc. v. Najd,* 294 F3d 1104 (9th Cir 2002)**

The plaintiff sued his former employer in state court, claiming violation of the Fair Employment and Housing Act and California's Anti-Discrimination Law. The trial court granted the employer's request to compel arbitration, and the Ninth Circuit affirmed. The Ninth Circuit also held that the arbitration agreement was not unconscionable, because the plaintiff was given 30 days to review the agreement and opt out.

***Costa v. Desert Palace, Inc.,* 2002 WL 1772643 (9th Cir, Aug. 2, 2002)**

The plaintiff was fired after an escalating series of formal reprimands, revocation of work privileges, and a suspension. Her termination occurred after a physical altercation with a coworker; the plaintiff asserted that her sex was a motivating factor for her discharge. The defendant argued that the plaintiff was fired because of her disciplinary record and the fight with the coworker. The Ninth Circuit reversed a trial court verdict in favor of the plaintiff, holding that the court prejudiced the defendant by giving a mixed-motive jury instruction rather than a pretext instruction. An en banc panel of the Ninth Circuit reversed, finding that direct evidence was not required to support a mixed-motive claim, and thus the trial court's instruction was correct.

***Funkhouser v. Wells Fargo Bank, N.A.,* 289 F3d 1137 (9th Cir 2002)**

The plaintiff employees argued that by changing a sick leave policy, Wells Fargo had switched to a less favorable benefits package, thus violating the Family and Medical Leave Act of 1993 (FMLA). When Wells Fargo and Norwest Corp. merged, Wells Fargo replaced its sick leave and vacation leave policies with a "paid time off" program and a short-term disability benefit program. When the new programs went into place, employees lost their premerger unused sick days, and any unused vacation days were converted to paid time-off days.

The court agreed with the lower court that the employees had not made out a claim under FMLA, noting that FMLA does not require an employer to "lock-in" a particular benefits package. The court also affirmed the lower court's determination that ERISA did not preempt the employees' breach of contract claim. The Ninth Circuit held that the premerger sick leave and vacation leave policies did not constitute "employee benefit plans" within the meaning of ERISA, relying on Department of Labor regulations that exclude payroll practices from the definition of employee benefit plans. The court noted that it would lead to "absurd results" if ERISA preempted claims simply because employee benefit plans were relevant to calculating damages, adding that "Congress did not intend that ERISA preemption have such a radical scope."

***Hernandez v. Hughes Missile Systems,* 292 F3d 1038 (9th Cir 2002)**

The plaintiff resigned rather than face termination after a positive cocaine test. The employer also was aware that he had alcohol problems. Two years later, the plaintiff reapplied for employment. The application was rejected because of an unwritten policy not to rehire former employees who were terminated or resigned for misconduct. The employer's representative who made the decision not to rehire the employee claimed that she was unaware of the reasons for his earlier resignation. However, in a statement submitted to the EEOC, the employer stated that the application was rejected based on the employee's "demonstrated drug use while previously employed and the complete lack of evidence indicating successful drug rehabilitation."

The court found there was a question of fact about the reason the plaintiff's application was rejected. More importantly, however, the court also held that the employer's policy of not rehiring people who had been terminated or resigned for misconduct violated the Americans with Disabilities Act (ADA) as applied to former addicts whose only work-related misconduct derived from their addiction.

***Hibbs v. Dept. of Human Resources,* 273 F3d 844 (9th Cir 2001), *cert. granted,* 122 S Ct 2618 (2002)**

Hibbs requested a series of leaves to care for his wife. In October 1997, he was informed that he had exhausted his FMLA leave; his subsequent request for additional leave was denied. In November, his employer informed him that he was required to report for work, but Hibbs failed to appear. At a disciplinary hearing, Hibbs argued that his FMLA leave did not begin to run until he had exhausted employer-provided paid leave. The hearing officer rejected his argument and recommended his dismissal, and Hibbs was fired.

Hibbs sued the Nevada Department of Human Resources under FMLA, and the state argued that it was immune from such suits under the Eleventh Amendment. The district court granted the state's motion, but the Ninth Circuit reversed and reinstated Hibbs's claim. The Supreme Court's decision will clarify whether states are immune from such suits under FMLA.

Thornton v. McClatchy Newspapers, 292 F3d 1045 (9th Cir 2002)

The Ninth Circuit revisited this case following the Supreme Court's ruling in *Toyota v. Williams,* 534 US 184, 122 S Ct 681, 151 L Ed 2d 615 (2002), and held that a newspaper reporter's inability to continuously keyboard or write was not "substantially limiting"

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BOLI Final Orders
October 2001 – August 2002

Helen Russon and **Dan Grinfas**
Oregon Bureau of Labor
and Industries

In addition to investigating complaints, the Oregon Bureau of Labor and Industries (BOLI) conducts administrative hearings in civil rights and wage and hour cases. This regular column summarizes final orders issued recently by BOLI Commissioner Jack Roberts in civil rights cases. Recent BOLI final orders can be accessed through the BOLI website at www.boli.state.or.us. The full text of all BOLI final orders is available for purchase in 23 volumes plus a digest with regular supplements. This set is also available at most local law libraries, and individual orders can be examined and photocopied for 15¢ a page in BOLI's Hearings Unit office. For more information, call Marcia Ohlemiller, BOLI's legal policy advisor, at 503/731-4212.

State Adjustment, Inc.,
23 BOLI ___ (2002)

The complainant, a female, was employed as an office worker at the respondent's debt collection corporation. She was sexually harassed by the respondent's corporate officer in that he repeatedly made sexually derogatory remarks about women and brought sexual materials to the workplace. The commissioner found the respondent liable for the complainant's resulting mental suffering and awarded the complainant mental suffering damages totaling $10,000. *Former* ORS 659.030(1)(b). The commissioner also found that there was insufficient evidence to show that the complainant had been constructively discharged in violation of *former* ORS 659.030(1)(a).

Hermiston Assisted Living, Inc.,
23 BOLI ___ (2002)

BOLI alleged that the respondent suspended and discharged the husband and wife complainants in violation of Oregon's whistleblower law based on the wife's good-faith report of criminal activity and the respondent's perception that the husband had reported criminal activity. The commissioner found that the respondent's belief that both complainants had reported wrongdoing that, if proven, would constitute criminal activity, was a substantial factor in the respondent's decision to suspend and discharge the complainants. The commissioner awarded $2,413.80 and $30,763.03 in back pay to the complainants, and $5,000 and $10,000 in damages for emotional distress. *Former* ORS 659.550; ORS 659A.850; *former* OAR 839-010-0100; *former* OAR 839-010-0110. ❖

Helen Russon and Dan Grinfas are program coordinators with BOLI's Technical Assistance Unit. They answer telephone inquiries and conduct seminars on employment law issues. Please call 503/731-4200, ext. 4, for more information about the Technical Assistance Unit.

RECENT DECISIONS CONTINUED FROM PAGE 4

as defined by the Supreme Court in *Williams.* The court explained that although the reporter's impairment may have substantially limited her within the scope of her chosen profession, it did not affect activities of central importance to most people's daily lives. Accordingly, the Ninth Circuit affirmed its earlier ruling that the trial court properly granted summary judgment on the plaintiff's ADA claims.

Oregon State Courts

DeLong v. Yu Enterprises,
334 Or 166, 47 P3d 8 (2002)

The plaintiff sued his former employer for defamation and malicious prosecution. The employer had reported to the police that property and money had been missing while the plaintiff worked for the employer. The supreme court held that the employer's report to the police was protected by a qualified—rather than an absolute—privilege. The court held that the employer's statements to the police were entitled to protection if they were made in good faith, and thus the plaintiff was required to prove that they were not.

***Panpat v. Owens-Brockway Glass Container, Inc.,* 334 Or 342, 49 P3d 773 (2002)**

The Oregon Supreme Court ruled that the estate of a woman who was killed at work by her former boyfriend could sue the employer for wrongful death. Chris Blake and Achara Tanatchangsang worked together at the employer's plant and were involved in a romantic relationship that failed. Blake subsequently told a manager that he was having difficulty coping with the break-up and that he did not want to work the same shift with Tanatchangsang. The manager asked Tanatchangsang if she would like to transfer to a different shift, but she declined. Shortly thereafter, Tanatchangsang reported to her supervisor that Blake had called her derogatory names. Near that time, Blake was placed on medical leave. While still on leave, Blake entered the plant and shot and killed Tanatchangsang while she was at work. He then killed himself. The court allowed Tanatchangsang's estate's wrongful death claim against the employer to proceed, holding that it was not barred by the exclusivity provision of the Oregon Workers' Compensation Law. The court noted that although the employee's death occurred "in the course of" her employment, it did not "arise out of" her employment. ❖

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evidence based on whether the evidence would have "probative value to a reasonable person," and has the authority to close the proceedings. The proceedings will be open to the public to the "maximum extent possible" except when necessity dictates that the presiding officer close the proceedings. Grounds for closing the proceedings include protecting classified or other protected information, and ensuring the physical safety of witnesses and other participants.

The prosecution presents the accused with the charges in English and, when appropriate, in the accused's own language. The commissions have jurisdiction over law of war violations and "all other offenses triable by military commissions." The accused is presumed innocent until proven guilty and may enter into plea agreements.

Defense counsel is charged with zealously defending the accused both at trial and on appeal "without regard to personal opinion as to the guilt of the [a]ccused." The accused may not represent themselves but will, at all times, be represented by appointed military counsel of their choice. The accused may hire an additional civilian attorney who has been determined to be eligible for access to information classified as "secret" or higher. However, neither the civilian attorney nor the accused is guaranteed access to sensitive classified materials. The accused is entitled to access to any other evidence that the prosecution intends to introduce at trial or is exculpatory in nature and may introduce witnesses and evidence on his or her own behalf. The accused does not have to take the stand, but if he or she does, is subject to direct and cross-examination. All witnesses testifying are placed under oath and are subject to direct and cross-examination.

On a finding of guilty, the accused is entitled to have his or her case reviewed in a quasi-appellate process. A three-member panel reviews the case and either remands for further proceedings or forwards to the secretary of defense with a recommendation. The secretary of defense can then remand the case, forward the case to the president, or make a final decision (provided the president has granted the secretary that authority). The final level of review is the president. Only the president and the secretary of defense have final decision-making authority.

Legitimate questions can be raised about the lack of judicial review, potential abuses of closed sessions, evidentiary standards, and other attributes of the commissions. However, military lawyers and officers take their duties seriously. The military has gone to great lengths over the last 30 years to create independent defense counsel and jurors free from command influence. Assuming the good faith of the participants, a fair trial can be achieved under the commission rules.

Will Trials Be Held?

The more troubling question relates to the many detainees who may never be brought before a tribunal. Proving that crimes were committed will be difficult, even under the somewhat relaxed evidentiary standards for the commissions. The Bush administration will, understandably, not want to bring cases in which there is a likelihood of an acquittal. Accordingly, most detainees will probably simply continue to be held in confinement, and only the strongest cases will be tried.

The second, and more important, reason that few trials will probably be held has to do with the legal status of prisoners of war (POWs) and other detainees. Unfortunately, the much-heralded establishment of military commissions created the presumption among the public that each detainee will receive a trial. Historically, the vast majority of POWs are never tried for crimes. Indeed, most POWs have never committed a crime. It is not illegal for a lawful combatant to engage in mortal combat. It takes a criminal act (e.g., summary execution, rape, feigning surrender, or fighting as an unlawful combatant) before criminal charges can be brought.

Under the law of war, prisoners can be held until the end of the conflict and then must be repatriated. That may be one of the reasons that the administration is so reticent to classify Taliban and Al Qaeda members as POWs (restrictions on interrogation of POWs may be another[5]). But this may well be a war without end. There is no state or central authority to surrender and end the war. We will be at war until the president decides we are not. This raises the prospect of U.S. custody over an ever-increasing number of detainees for the indefinite future. POWs are not entitled to trials under the Geneva Convention, except for crimes committed while in captivity. Therefore, until the United States declares victory in the war on terrorism, detainees potentially face life imprisonment. This scenario is, frankly, far more troubling than the possibility of miscarriages of justice by military commissions.

The problem could easily become messier if the war spreads to include offensive actions against Iraq, Iran, or other sovereign nations or the capture of terrorists who are citizens of key U.S. allies. The United States has often criticized other nations for detaining large numbers of people indefinitely without hearing or trial. Unless the United States deals with detainees in a principled way that can be articulated and defended, the high moral ground will be in jeopardy.

In addition, from a strategic point of view, it has been clear from the beginning that the United States cannot win this war by itself. Building a coalition of nations is the only possible route to victory. Widespread belief that the United States is not treating detainees in an appropriate way will make coalition-building much more difficult.

Finally, maintaining support and resolve on the home front is also critical. The American people must believe not only that the cause is just, but also that

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we are pursuing it in a just way. Public support for the war in Vietnam eroded as the public watched widespread use of napalm, bombing of villages, and other actions that may have been legal, but didn't seem right.

Meting justice to potentially thousands of detainees will not be easy. The logistics of trying large numbers of war criminals has proven unworkable in other forums. Consider the situation in Rwanda. Currently over 100,000 prisoners await domestic trial for crimes of genocide in Rwanda. The local courts are inundated, and most defendants are expected to die in prison before they ever have a trial.[6] The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Tribunal for the former Yugoslavia (ICTY) have not fared much better. Since 1996, the two tribunals have spent a combined $1.2 billion[7] to conduct a total of 42 trials, resulting in 36 convictions.[8] Together the Yugoslavian and Rwandan tribunals account for about 10% of the regular U.N. budget.[9] These statistics do not bode well for the new International Criminal Court, also formed under the auspices of the United Nations.

Trying cases such as those from Afghanistan present unique prosecution challenges. The scene of the crime is often a battlefield in an ongoing war, and battlefields, by definition, are chaotic places. Prosecutors will have to deal with such things as preservation of battlefield crime scenes, battlefield chain of custody, death of witnesses in combat, large numbers of relatively anonymous detainees, protection of national security interests, trying members of an ongoing terrorist organization, and risks to ongoing military operations.

Developing a Principled Approach

Several issues need to be considered when developing a principled approach to handling the detainees.

First, if this is truly a war, then who should be considered a POW needs to be fairly determined. From a strictly legal perspective, most current detainees probably do not meet the Third Geneva Convention standard for POWs. Taliban members, particularly the foot soldiers, come pretty close. The Geneva Convention requires that to be classified as POWs, combatants either be a member of the state's regular army or be commanded by a person responsible for subordinates (i.e., in an established chain of command); wear fixed, distinctive insignia recognizable at a distance; carry arms openly; and obey the laws of war. Article 5 of the Third Convention provides that when there is any doubt about whether a person is entitled to POW status, the person will be treated as a POW until status has been determined by a competent tribunal. Most Taliban members, other than those senior members with significant ties to Al Qaeda, should probably be accorded POW status either as a member of Afghanistan's regular army or as an organized irregular army.

Second, many tribunals besides military commissions are available for the trial of war criminals. The U.S. Institute of Peace, an independent, nonpartisan "think tank" established by Congress, recently published a report identifying nine different possible forums, including military commissions.[10] A clearly articulated policy detailing the factors to be considered in the selection of the appropriate forum would help answer questions about when and why a particular forum is appropriate.

Third, this is not just America's war. In particular cases, other countries may be better suited to hold or try detainees or both. Trying Taliban members in Cuba presents enormous logistical challenges—the necessary witnesses and physical evidence may all be located in Afghanistan. There may come a time when the Afghan government will be capable of holding and trying those captured. The Taliban were one of the world's most oppressive regimes long before September 11 and committed unspeakable criminal acts on their own people. The Afghan people have a definite interest in seeing Taliban and Al Qaeda members tried.

Fourth, sooner or later we have to deal with the repatriation question. Holding everyone until we all agree that the war on terrorism is over is probably not a viable option. The war may go on for decades. At some point, we may be able to declare portions of the war over, such as the war in Afghanistan, and repatriate at least some people. If we invade other countries, such as Iraq, the problem will quickly compound itself.

Finally, to some extent the war on terrorism is a new paradigm for war, and the tools for meting out justice may need to be modified for new circumstances. The paradigm began to shift with the bombing of a Berlin discotheque by Libyan operatives in 1985 and the U.S. retaliatory bombing of Tripoli in 1986. Codified laws of war such as the Geneva Conventions are derived from customary law developed over centuries to deal with conventional warfare. The war on terrorism is really a hybrid in which conventional military forces are used to deal with a situation that has most of the attributes of an ongoing international criminal conspiracy. Suspects are now called "detainees." Foot soldiers are called "unlawful combatants." Members of the ongoing conspiracy, if accorded POW status under the Geneva Convention, are bound to give only name, rank, date of birth, and serial number if interrogated. Perhaps it is time for a fifth Geneva Convention to deal with the unique attributes of this very unconventional war. ❖

Jim Noteboom, a Bend attorney with Karnopp, Petersen, Noteboom, Hubel, Hansen, Arnett & Sayeg LLP since 1977, specializes in federal Indian law. He also has 39 years' military service, most recently as the National Guard liaison and adjunct instructor for the Defense Institute of International Legal Studies in Newport, R.I. His son, Aaron, is a third-year

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law student at the University of Oregon, following four years in the Marine Corps. He is currently an officer in the Oregon Army National Guard. This article represents the views of the authors, not the Department of Defense.

Endnotes

1. A complete transcript of Justice Jackson's opening statement is available at www.holocaust-history.org/works/imt/02/htm/t098.htm.

2. The president's authority to authorize military tribunals resides in his constitutional role as commander in chief; Articles 21 and 36 of the Uniform Code of Military Justice (UCMJ), promulgated by Congress; and legal precedent, including the 1942 Supreme Court decision in *Ex Parte Quirin,* 317 US 1, 63 S Ct 2, 87 L Ed 3 (1942). A copy of the order can be found at www.whitehouse.gov/news/releases/2001/11/20011113-27.html.

3. Use of the International Criminal Court is problematic because only crimes committed after July 1, 2002, can be prosecuted, and terrorism as such is not one of the crimes over which it has jurisdiction.

4. The rules can be accessed at www.defenselink.mil/news/Mar2002/d20020321ord.pdf.

5. Under the Geneva Convention, a POW when questioned is bound to give only his or her name, rank, date of birth, and personal or military serial number. Convention II, art 17.

6. *Genocide Justice,* www.abc.net.au/news/indepth/featureitems/rwanda.htm (June 27, 2002).

7. Mary Kimani, *Expensive Justice: Cost of Running Rwanda Tribunal,* www.internews.org/activities/ICTR_reports/ICTRnews-Apr02.html#0409a (April 9, 2002).

8. Individual case summaries are available at www.un.org/icty/index.html and www.ictr.org.

9. Committee on International Relations, U.S. House of Representatives, *How Well Are International Criminal Tribunals Working?* (Feb. 26, 2002), www.house.gov/international_relations/news0226.htm.

10. The report is at www.usip.org/oc/newsroom/sr78nb.html.

If you would like to write an article for this newsletter, suggest a topic for an article, or join the editorial board, please contact the editor, Elise Gautier, at gautier@attbi.com.

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P.O. Box 1689
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of 25 years to life for a third-strike conviction, violates the Eighth Amendment's prohibition against cruel and unusual punishment when applied to a defendant whose third-strike conviction is for a misdemeanor.

***Nev. Dept. of Human Resources v. Hibbs,* No. 01-1368 (June 24, 2002)**

The Supreme Court will decide whether the family medical care provision of the Family and Medical Leave Act of 1993 is a proper exercise of Congress's power to abrogate the states' Eleventh Amendment immunity from suits by individuals.

***Virginia v. Black,* No. 01-1107 (May 28, 2002)**

The Supreme Court will decide whether a state statute that makes it a crime to burn crosses violates the free speech rights of Ku Klux Klansmen or others. ✦

Fisher & Phillips LLP is one of the oldest and largest national law firms in the country representing employers in labor and employment law matters. Portland-based law firm Gordon & Meneghello, P.C, merged with Fisher & Phillips on September 1, 2002, and will now serve as the firm's Pacific Northwest office.

Busse & Hunt represents employees in employment cases, including civil rights, discrimination, sexual harassment, wrongful discharge, and fraud.