As some of you know, I recently completed a year of active duty as a U.S. Marine Corps reservist activated in support of Operation Enduring Freedom (OEF) as Assistant Staff Judge Advocate for Operational Law, at U.S. Central Command, including five weeks in Afghanistan. In this capacity, I was responsible for providing legal advice to this joint command on issues related to operational, international, and criminal law issues arising out of the war on terrorism.

During my tour of duty, I heard many criticisms from the media, academia, and the international community regarding our conduct of OEF. For example, some organizations and individuals have taken issue with the U.S. government position that we are engaged in an armed conflict with al Qaida. Their position is that only states can be engaged in international armed conflict, and a private organization such as al Qaida cannot engage in armed conflict. Some have even claimed that our operations in Afghanistan against al Qaida and its state-sponsor, the Taliban regime, constitute an unjust war.

A substantial amount of public misinformation also exists regarding the processing, interrogating, and holding of detainees at Guantanamo Bay, Cuba (GTMO). Some critics have speculated that a large proportion of the GTMO detainees are prisoners of war or innocent non-combatants. Such speculation may stem in part from the court pleadings on behalf of some detainees who claim that they were performing humanitarian or religious activities in Afghanistan when they were captured by coalition forces hoping to profit from the transfer of enemy combatants to U.S. government control. Some see the lack of criminal prosecutions as support for the allegation that some detainees have been detained by mistake. There is also a widespread assumption that the law requires the U.S. government to charge the detainees with crimes or release them.

Those who are familiar with the Geneva Convention on prisoners of war, military regulations, and past practice are especially concerned about the
U.S. government's failure to convene so-called Article 5 tribunals to make status determinations. Some organizations and members of the press have even speculated that the U.S. government may be using torture, or allowing other coalition partners to use torture, as an interrogation tactic. Consequently, the U.S. government is under ever-increasing pressure to permit greater judicial or outside scrutiny of some kind, cease interrogations, accelerate and finish investigations, and prosecute or release the detainees.

Others have an entirely different perspective. For example, some supporters of U.S. policies and practices have become frustrated by what they perceive as a lack of progress or success in gathering information from detainees and punishing the perpetrators of the September 11 attacks. Unfortunately, because of my position, I was never able to respond to these critics or engage in the debate over these issues until now. This evening, I would like to address some of these misperceptions.

In my view, much of the criticism demonstrates a fundamental lack of understanding of some basic points relevant to the war on terrorism. Contrary to what some believe, the conduct of the war on terrorism is based on sound legal policy and we are determined to do the right thing in this war, as in all wars, notwithstanding the truly unique nature and challenging circumstances of this war.

First, regarding our conflict with al Qaida, and the justness of our cause, there can be little doubt that al Qaida is engaged in a protracted armed conflict against the United States, our citizens, and our allies, which began as late as 1998 and perhaps as early as 1992.

Al Qaida itself “claims to have shot down U.S. helicopters and killed U.S. servicemen in Somalia in 1993 and to have conducted three bombings that targeted U.S. troops in Aden, Yemen, in December 1992.”

It has been linked to multiple unsuccessful conspiracies involving the assassination of various world leaders.

As early as 1998, al Qaida’s leader, Osama bin Laden, called upon Muslims everywhere, including his al Qaida organization, “to kill U.S. citizens-civilian or military and their allies everywhere.” Shortly thereafter, al Qaida killed at least 301 individuals and injured thousands in August 1998 when it bombed the United States Embassies in Kenya and Tanzania.

In October 2000, al Qaida directed an attack on the USS Cole in the port of Aden, Yemen, killing 17 U.S. Navy members, and injuring another 39.
Most recently, as you all know, on September 11, 2001, 19 al Qaida suicide attackers hijacked and crashed four U.S. commercial jets, two into the World Trade Center towers in New York City, one into the Pentagon, and a fourth into a field in Pennsylvania, leaving about 3,000 individuals dead or missing.

These events lead to only one conclusion: a foreign, private terrorist network has issued a declaration of war against the United States, and has organized, campaigned, and trained for, and over the course of years has repeatedly carried out, unlawful and indiscriminate armed attacks against innocent civilians and military forces, including the largest attack in history against the United States. These latest attacks were of sufficient magnitude to persuade most of the world, including NATO and even the United Nations, that the United States was warranted in invoking its right to use force in self-defense.

Although we have eliminated the Taliban regime in Afghanistan and we have al Qaida on the run, at this point, there is no indication that al Qaida and its supporters have relented in their so-called “holy war” against the U.S. and its citizens. They have neither surrendered nor withdrawn their declaration of their intent to kill U.S. citizens-civilian or military and our allies everywhere. As recent events in Bali demonstrate, Al Qaida continues to wage war. As long as this state of active hostilities continues, the U.S. government has the right under international law—and the responsibility under the U.S. Constitution—to defend its citizens against further attacks. Moreover, as long as hostilities continue, we must—as a matter of national security, military necessity, and common sense—continue to detain enemy combatants who would rejoin the fight against us if given the chance.

A second area of misperception relates to the Geneva Conventions and the status of detainees in U.S. custody. Critics have raised concerns about our interpretation of the Geneva Convention on POWs, focusing on so-called “Article 4 status determinations” and the alleged requirement to convene “Article 5 tribunals” in cases of doubt. Some continue to assert that the Taliban is covered by Article 4(A)(1) of the Geneva Convention Relative to the Treatment of Prisoners of War (GPW), which refers to “members of the armed forces of a Party to the conflict.” They also contend that a “competent tribunal” under Article 5, GPW, should make the status determinations.

Under the Geneva Conventions, only lawful armed forces are legally entitled to take part in hostilities (and receive “combatant immunity”) and neither the Taliban nor al Qaida is a lawful armed force. Regarding the Taliban, captured Taliban fighters are not entitled to prisoner of war status because they were not the regular armed force of Afghanistan, which was disbanded in the mid-1990’s. Moreover, the Taliban “militia” did not meet the four criteria for lawful combatants. Most notably, they did not wear uniforms or other easily

CATHOLIC SOCIAL SCIENCE REVIEW 337
recognizable insignia and they did not adhere to the laws and customs of war. Nor is al Qaida a lawful armed force. They are a private terrorist organization unlawfully engaged in armed conflict. They are not a state party to the Geneva Conventions and they flagrantly violate even the most fundamental laws and customs of war.

In addition to unlawfully targeting and killing civilians, al Qaida's methods and means of waging war are at odds with every requirement applicable to lawful armed forces, i.e., the requirement to carry arms openly, use responsible military command, follow laws and customs of war, and wear uniforms or other insignia recognizable at a distance. Accordingly, the U.S. government's view is that, because there is no doubt about the status of the detainees, there is no need to convene so-called Article 5 tribunals, which are only required in cases of doubt. This issue, however, is largely academic because the detainees, by Presidential order, have been treated consistent with the GPW and enjoy many of the protections and benefits afforded to bona fide prisoners of war. Even so, some critics of the U.S. government have suggested that detainees in U.S. custody have been mistreated and subjected to poor conditions of detention. For example, in Sweden it was recently reported that combatants "are being held in cages" with "corrugated roofs" with no protection from the intense heat and humidity.

We have constructed new housing units with ventilation systems for the detainees at GTMO and each detainee has his own bed, toilet and running water:

We are providing the detainees with three culturally appropriate meals a day, shelter, new clothing and shoes, showers, and beds and blankets.

We are providing them excellent medical care—the same type of medical care available to U.S. troops in GTMO and Afghanistan.

The detainees have been given personal toiletries, new towels and washcloths, and may take showers regularly.

They have been given the opportunity to worship freely and those who so desire have been given copies of the Koran in their native language.

The detainees are permitted access to an exercise area several times per week. The average weight gain has been about 15 lbs per person.

We are not subjecting the detainees to physical or mental abuse or cruel treatment.
The detainees are not being held incommunicado. Representatives of the International Committee of the Red Cross (ICRC) regularly visit detainees individually and privately. The detainees have regular access to a chaplain of Muslim faith and can meet privately with him. All who so desire have communicated by mail with their families and some have met with government officials from their country of nationality.

As the treatment of Daniel Pearl, a civilian, demonstrates, our treatment of the detainees goes well beyond what our forces could expect were they to fall into enemy hands.

A third misperception is the suggestion that the U.S. lacks the authority to detain enemy combatants unless it brings criminal charges against them. Some apparently believe that the U.S. is violating domestic and international laws that prohibit the indefinite detention of individuals. They assume that detainees must be criminally charged and tried in a court of law or set free. As a result of this faulty assumption, some are pressuring us to expedite interrogations and investigations, and quickly decide the fate of all the detainees. There is a related misperception, fueled perhaps by recent U.S. District Court decisions properly denying habeas jurisdiction over alien enemy combatants held outside U.S. sovereign territory, that the U.S. government is intentionally operating outside of its own legal system and not within any other discernable legal framework. In this regard, it is important to remember some basic points:

First, we are engaged in a war, not a law enforcement operation.
Second, the U.S. is well within its authority to detain enemy combatants and other hostile forces for the duration of hostilities.
Third, the U.S. and its coalition partners have a collective interest in preventing detainees from returning to the battlefield in an ongoing war.
Finally, although some detainees may ultimately face charges, all may be detained for the duration of the war, with or without criminal charges.

As noted previously, the U.S. and its coalition partners are at war—hostilities are ongoing—we continue to fight against enemy combatants who are planning and conducting operations against us.

Just as we have the legal authority to target lawful military objectives such as enemy combatants, so too we have the authority to capture and detain them. This is a universally recognized principal under international humanitarian law—enemy combatants engaged in war may be captured and detained for at least the duration of hostilities and even longer in individual cases where criminal proceedings are ongoing. Such detention prevents enemy combatants from continuing to fight against us and removes them to a place of safety. The capture and detention of enemy combatants—as opposed to the targeting and use of deadly force against them—directly serves the humanitarian purpose of sparing the lives of individuals engaged in hostilities against us. As such, the U.S.
is well within their right under international law to capture and detain enemy combatants, just as the U.S. and its allies have done in every modern war.

The detainees in question—enemy combatants being held in Afghanistan and at GTMO—were captured while engaged in active hostilities against the U.S. or other coalition members. They were bearing arms against us or were otherwise acting in direct support of hostile al Qaida or Taliban forces. Many have pledged that they will rejoin the fight or otherwise provide support to al Qaida if given the chance to do so. We simply cannot release enemy combatants who would rejoin the “jihad” and fight for al Qaida or the Taliban and their supporters. Accordingly, we must detain them while hostilities are ongoing.

This leads to two obvious questions: when do hostilities end and who gets to decide this? In the war against al Qaida—just as in every other war in our history—it is impossible to predict during the war exactly when the war will come to an end. And the uncertainty in this war is perhaps even greater because here, unlike in past wars against other countries, it may be very difficult to say when al Qaida has surrendered or been defeated. Under international law, only the parties to the conflict—in this case, the U.S. government and its coalition partners—can determine when hostilities have ceased. This too has been true of all modern wars.

The act of detaining enemy combatants, however, is not an act of punishment. Rather, the act of detaining is intended first and foremost to prevent enemy combatants from continuing to fight against us. There is no international law that requires the detaining power to “accuse” enemy combatants of crimes, bring charges against them, or put them on trial. Nor is there any law requiring the detaining power to release enemy combatants and send them home prior to the end of hostilities. At the end of traditional wars between nations, combatants typically are released and repatriated to their home country (which becomes responsible for ensuring that hostilities do not resume) unless criminal proceedings were pending against them in the detaining country or elsewhere. While there may be criminal charges filed in some cases while hostilities are ongoing, nations at war traditionally have waited until the end of hostilities to bring charges.

If charges are brought against some individuals during the course of hostilities, this does not mean that these individuals are receiving better or preferential treatment. It simply means that, in addition to being detained enemy combatants, they are also charged with specific acts that violate the criminal laws of the detaining power or the international law of armed conflict. The decision whether to bring charges against a given individual may turn on a variety of factors. For example, it may depend upon the availability of evidence, the scarcity of military resources in wartime, the location of the individual, the nature of the evidence, intelligence and national security concerns, or other factors related to the war effort.
It has also been claimed that we are denying detainees their right to counsel. To the contrary, in this war, as in every modern war, enemy combatants (even those who are bona fide prisoner of war) have no legal right to counsel or to the courts for the purpose of challenging their detention while hostilities are ongoing prior to being charged with a crime. If and when a detainee is charged, he would then have the right to counsel and be afforded other fundamental procedural safeguards. To date, however, no detainee has been charged with a particular crime.

Besides not being required by international law, providing detainees access to counsel in the absence of criminal charges would directly interfere with our ongoing efforts to gather and evaluate intelligence about the enemy, its capabilities and its plans. Such intelligence exploitation is critical to the conduct of the war effort and the prevention of further attacks. Many detainees may have information regarding al Qaida or the Taliban, their past unlawful conduct, or their plans to carry out future attacks. Thus far, we have been successful in obtaining and exploiting this intelligence. For this reason, we must continue to interrogate enemy combatants who may have information relating to al Qaida’s past or present capabilities, or means and methods of war.

Unfortunately, the process of interrogating detainees, especially those trained in resisting, and gathering and analyzing intelligence is extraordinarily time consuming and difficult. This is due to a number of factors, including language barriers and translation requirements, security concerns, operational and logistical challenges, coordination with allies, and the difficulty of gaining the cooperation of individual detainees. Patience is important in this process. No one can reasonably expect us to bring charges against the detainees or alternatively, release them any time soon. Moreover, the unnecessary and inappropriate insertion of counsel into the intelligence exploitation process would undermine our efforts to prevent future attacks and defeat al Qaida.

Finally, some have expressed strong opposition to the potential use of military commissions. They contend that military commissions would not afford defendants their due process rights in accordance with international norms. They have also suggested that military commissions would be unprecedented in modern war and inherently biased and unfair. Others have claimed that military commissions would result in so-called “victors’ justice” and would inevitably be subject to unlawful command influence. To the contrary, military commissions have been used in this country and in many others for over two hundred years. This is not a novel concept.

In light of changes to the U.S. military justice system since World War II, there is every reason to expect fair judicial outcomes from our professional military, particularly in this instance, where convictions and sentences would be automatically appealed to a civilian review panel and subsequently, directly to the President. There is little reason to doubt that any commissions would be fair, just, and consistent with U.S. and international law.
In closing, it is important to recognize that there are many challenges in applying the rules that govern traditional wars in this very unconventional situation involving armed conflict against a private terrorist organization that evidently is not fighting for territory or material gain, but instead is fighting a "holy war" with the purpose of destroying us and our way of life. However, our commitment to the rule of law and legal process remains unchanged. This is one obvious but very important distinction between Al Qaida and us—the U.S., unlike the enemy, will continue to uphold its legal obligations under both international and domestic law—even in wartime against an enemy committed to our very destruction.