MILITARY TRIBUNALS, TERRORISTS, AND THE CONSTITUTION
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I. INTRODUCTION

On November 13, 2001, a little over two months after the September 11th attacks, President George W. Bush signed an executive order authorizing the trial of non-U.S. citizens before military commissions if they were found to be members of al Qaeda, had engaged in acts of international terrorism aimed at the United States, or had harbored such persons. Regulations governing the procedures to be followed by these commissions were promulgated in March 2002. A spirited debate followed President Bush's order approving military commissions. The debate centered on the legal authority supporting the executive order, as well as its scope and application. This article, which is divided into three parts, analyzes the legal authority that President Bush relied upon in support of the order establishing military commissions. First, the article sets forth the background leading to the issuance of the order and briefly discusses its aftermath. Second, the article provides a general overview of the history of military commissions. Lastly, the article discusses the authorities relied upon in the order establishing military commissions and examines the arguments that have been raised by opponents and proponents of this measure.

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1. See Military Order of November 13, 2001—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Military Order]. As observed by one commentator:

Trying terrorists before military commissions offers a number of practical advantages over ordinary civilian trials. First, commissions enable the government to protect classified and other sensitive national-security information that would have to be disclosed publicly before an Article III court. Second, ordinary criminal trials would subject court personnel, jurors, and other civilians to the threat of terrorist reprisals; the military is better suited to coping with these dangers. And third, military commissions can operate with more flexible rules of evidence, which would allow the introduction of all relevant evidence regardless of whether, for example, it has been properly authenticated.


3. Compare Charles W. Gittins, "Military Commissions" Wrong Response to September 11, WASH. TIMES, Nov. 28, 2001, at A16. ("The order exceeds presidential authority, ignores due process and is unnecessary."); Joel B. Grossman, Careless with the Constitution, at http://www.findlaw.com (last visited Oct. 18, 2002) (arguing that "neither the President's Commander-in-Chief status, nor whatever inherent powers the Constitution allows him, nor any act of Congress, has properly authorized these tribunals") with Peter J. Wallison, In Favor of Military Tribunals, CHRISTIAN SCI. MONITOR, Jan. 3, 2002, at 9 ("The protests over the president's decision to authorize military tribunals to try terrorists call to mind Barry Goldwater's remark that 'extremism in defense of liberty is no vice.'"); Lee A. Casey, David B. Rivkin & Darin R. Bartram, Unlawful Belligerency and Its Implications Under International Law, at http://www.fed-soc.org (last visited Oct. 18, 2002) (noting that unlawful belligerents or unlawful combatants "can be processed through a military justice system instead of being tried by civilian courts").

4. Throughout this article, the terms military commission and military tribunal are used interchangeably.
II. BACKGROUND

Throughout the past decade, the United States has been the object of several major terrorist attacks. Initially, the attacks centered on American interests and property abroad. For example, in June 1996, a truck bomb exploded near the Khobar Towers military complex in Saudi Arabia killing nineteen Americans and wounding 372 others. In August 1998, terrorists bombed the American embassies located in the cites of Nairobi, Kenya, and Dar es Salaam, Tanzania, resulting in the death of 224 persons, including twelve Americans, and the wounding of 4600 others. In October 2000, terrorists bombed the American destroyer USS Cole in Adan Harbor, Yemen, killing seventeen sailors.

Then, on September 11, 2001, Osama bin Laden and members of his terrorist organization al Qaeda perpetrated a series of major attacks on America's mainland by hijacking four commercial jetliners and crashing them into the World Trade Center in New York, the Pentagon in Virginia, and the Pennsylvania countryside. These attacks, which resulted in the death of more than 3100 persons, prompted a broader governmental response. Three days after the attacks, Congress passed a joint resolution authorizing the use of military force against those responsible and


10. See Brooke A. Masters, Invoking Allah, Terror Suspect Enters No Plea; U.S. Judge in Alexandria Schedules October Trial, WASH. POST, Jan. 3, 2002, at A1 (noting that the hijacked jets that crashed into the World Trade Center, the Pentagon, and the Pennsylvania countryside killed more than 3100 persons).

11. Authorization for the Use of Military Force Joint Resolution, Section 2(a), Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001). See also Neil A. Lewis, Measure Backing Bush’s Use of Force Is as Broad as a Declaration of War, Experts Say, N.Y. TIMES, Sept. 18, 2001, at B7. It has been reported that, under this new campaign, the government may target terrorists who have killed Americans in prior attacks on America such as the bombi...
providing forty billion dollars to help cover the cost of rebuilding and military action. As part of a broader diplomatic, intelligence, economic, and military effort, the government undertook a course of action intended to enlist the cooperation and support of other countries in responding to the terrorist attacks.

Domestically, the administration implemented a number of initiatives. On September 20, 2001, in an address to the nation, President Bush announced the creation of the Office of Homeland Security. Three days later, on September 23, President Bush issued an executive order directing financial institutions to freeze any assets belonging to fifteen organizations and twelve individuals suspected of funding terrorists. On October 26, President Bush signed the “USA Patriot Act of 2001” into law, legislation intended to assist authorities in tracking and disrupting the activities of suspected terrorists in the United States.


13. See U.S., E.U. to Share Terrorist Data, ASSOCIATED PRESS, July 4, 2002 (reporting that the European Union and the United States are expected to reach agreement in 2002 regarding the exchange of personal data on terror suspects); Bob Woodward, 50 Countries Detain 360 Suspects at CIA’s Behest: Roundup Reflects Aggressive Efforts of an Intelligence Coalition Viewed as Key to War on Terrorism, WASH. POST, Nov. 22, 2001, at A1 (reporting that a “senior White House official said...the intelligence coalition is as important as the military and diplomatic coalitions involved in the war on terrorism”); Steven Mufson & Alan Sipress, Bush to Seek Nation’s Support Tonight; First Warplanes Head to Targeted Area; Battle Called “A War of Will and Mind,” WASH. POST, Sept. 20, 2001, at A1 (“Bush and senior administration officials spent another day lining up international support for military, financial and economic actions that the president said would be designed to locate terrorist leaders, ‘get them out of their caves, get them moving, cut off their finances.’”); Henry Kissinger, Destroy the Network, WASH. POST, Sept. 12, 2001, at A31 (“[U]ntil now we have been trying to [combat the network of terrorist organizations] as a police matter, and now it has to be done in a different way.”).


Then, on November 13, 2001, interpreting the events of September 11 as acts of war and citing the "extraordinary emergency" presented as a result of the attacks and the possibility that future attacks could "place at risk the continuity of the operations of the United States government," President Bush issued an order empowering him to detain and direct military prosecutions and trials for non-U.S. citizens who were determined to be members of al Qaeda, had engaged or conspired to participate in international terrorism, or had harbored such persons. Administration officials maintained that because the United States was in a state of war, it was "important to give the president of the United States the maximum flexibility with his constitutional authority." After pointing out that there was historical precedent for this action, Vice President Dick Cheney publicly explained:

The basic proposition here is that somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans, men, women, and children, is not a lawful combatant. They don't deserve to be treated as a prisoner of war. They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process.... [T]hey will have a fair trial, but it [will]
be under the procedures of a military tribunal and rules and regulations to be established in connection with that.\textsuperscript{24}

Unlike most other measures undertaken in response to the attacks on September 11,\textsuperscript{25} the promulgation of this order generated a good deal of controversy both at home and abroad.\textsuperscript{26} At home, civil libertarians decried the order as illustrative of an administration "totally unwilling to abide by the checks and balances that are so central to our democracy."\textsuperscript{27} Some members of the press criticized the order and other measures implemented by the administration as "a grave assault on civil liberties."\textsuperscript{28} Lawmakers from both parties criticized the order because Congress had not been consulted beforehand,\textsuperscript{29} and also because the order could become a model for use against Americans overseas by foreign governments.\textsuperscript{30} Overseas, it was

\textsuperscript{24} Vice President Cheney on Military Tribunals for Terrorists, supra note 23.

\textsuperscript{25} Although the debate surrounding whether those responsible for the September 11 attacks should be tried in civilian courts had been taking place for some time, see William Glaberson, A Nation Challenged: The Law; U.S. Faces Tough Choices If Bin Laden Is Captured, N.Y. TIMES, Oct. 22, 2001, at B5 (noting that trial of Osama bin Laden in federal court "would present problems. Among other things, American courts give defendants access to much of the government’s evidence against them. A federal court trial could provide terrorists with a road map to the country’s intelligence sources...giving them an advantage in the continuing battle against terrorism."); Karen De Young & Michael Dobbs, Bin Laden: Architect of New Global Terrorism; Evolving Movement Combines Old Theology and Modern Technology in Mission Without Borders, WASH. POST, Sept. 16, 2001, at A8 (discussing in part how prosecution of terrorists enables terrorist organizations to learn how authorities investigate and pursue organizations when evidence related to those questions is presented in open court); John Lancaster & Susan Schmidt, U.S. Rethinks Strategy for Fighting with Spain: Policy Shift Would Favor Military Action, Tribunal Pursuing Suspects Through American Courts, WASH. POST, Sept. 14, 2001, at A9 ("Stunned by the magnitude of...terrorist attacks, Congress and the White House are reassessing an approach to fighting terrorism that...has favored the tools of law enforcement over those of war."); the question became more pressing during the week of November 12, 2001, when Northern Alliance forces, backed by the United States, advanced across Afghanistan pushing back the Taliban militia. See Lardner & Slevin, supra note 19, at A12.

\textsuperscript{26} See, e.g., Richard A. Greene, Analysis: Military Tribunals, BBC NEWS (Jan. 11, 2002), at http://www.news.bbc.co.uk/hi/english/world/americas/newsid_1701000/1701789.stm (last visited Oct. 18, 2002) ("Few White House proposals in the war on terror have caused as much controversy as President George W. Bush’s order to try suspected terrorists in military tribunals rather than the regular court system."); Sam Dillon & Donald G. McNeil, Jr., A Nation Challenged: The Legal Front: Spain Sets Hurdle for Extraditions, N.Y. TIMES, Nov. 24, 2001 (reporting that officials indicated "Spain w[ould] not extradite the eight men it ha[d] charged with complicity in the Sept. 11 attacks unless the United States agree[d] that they would be tried by a civilian court and not by the military tribunal envisioned by President Bush").


\textsuperscript{29} See Frank J. Murray, Justice to Use FDR Precedent for Military Tribunals, WASH. TIMES, Dec. 5, 2001, at A1 ("In addition to civil rights concerns, senators of both parties [w]ere unhappy that they were not consulted before the president’s executive order was revealed."); Jess Bravin, Bush Signs Executive Order Establishing Military Tribunals to Try Terror Suspects, WALL ST. J., Nov. 14, 2001, at A3 ("The order was drafted with little or no consultation with Congress, and some members reacted harshly.").

\textsuperscript{30} See George Lardner, Jr., Democrats Blast Order on Tribunals; Senators Told Military Trials Fall Under President’s Power, WASH. POST, Nov. 29, 2001, at A22 (reporting how Senate Judiciary Committee Chairman
reported that a number of European nations, which had arrested dozens of alleged terrorists since the attacks, would likely resist extradition requests if they involved the possibility of a military trial.31

Notwithstanding President Bush's consistently strong public defense of his decision to establish military tribunals,32 the Senate Judiciary Committee held a series of hearings in November and December of 2001 in which constitutional scholars, civil rights and military justice experts, and present and former Department of Justice officials testified.33 While the hearings were taking place, administration officials clarified plans for implementation of the order. This led Chairman of the Senate Judiciary Committee Patrick J. Leahy (D-Vt.) to remark, upon the conclusion of the hearings, that the Senate's constitutional oversight power had "taken a unilateral edict by the Administration and turned it into a lesson in democracy."34

On December 21, 2001, shortly after the conclusion of the hearings, Zacarias Moussaoui, a 33-year old French national of Moroccan descent, was charged in

Patrick J. Leahy (D-Vt.) had criticized order, in part because Congress had not been consulted, and in part because "it could become a model for use by foreign governments against Americans overseas"; "Dead or Alive" for Bin Laden, ASSOCIATED PRESS, Nov. 15, 2001 (reporting that Sen. Chuck Hagel (R-Neb.) had concerns about the "closed dynamic" of proposed tribunals and that Sen. Arlen Specter (R-Pa.) indicated Congress should weigh in on this issue through hearings and possibly legislation). See also Fact Sheet: Past U.S. Criticism of Military Tribunals, Human Rights Watch (Nov. 28, 2001), at http://www.hrw.org/press/2001/11/tribunals1128.htm (last visited Oct. 18, 2002) (arguing that order "may become a model for governments seeking a legal cloak for political repression").

31. See T.R. Reid, Europeans Reluctant to Send Terror Suspects to U.S.; Allies Oppose Death Penalty and Bush's Plan for Secret Military Tribunals, WASH. POST, Nov. 29, 2001, at A23 (reporting that legal analysts predicted objections to extraditions requested by the United States of suspects jailed in Britain, Belgium, France, and Germany likely if military tribunals involved); Sam Dillon & Donald G. McNeil, Jr., A Nation Challenged: The Legal Front; Spain Sets Hurdle for Extraditions, N.Y. TIMES, Nov. 24, 2001, at A1 (reporting that officials indicated "Spain w[ould] not extradite the eight men it ha[d] charged with complicity in the Sept. 11 attacks unless the United States agree[d] that they would be tried by a civilian court and not by the military tribunals envisioned by President Bush").

32. See David E. Sanger, A Nation Challenged: Civil Liberties; President Defends Secret Tribunals in Terrorist Cases, N.Y. TIMES, Nov. 30, 2001, at A1 (reporting that at a meeting of the country's top prosecutors, President Bush "portrayed the tribunals and the detentions as necessary byproducts of America's wartime footing. 'The enemy has declared war on us,' he said. 'And we must not let foreign enemies use the forums of liberty to destroy liberty itself."); Mike Allen, Bush Defends Order for Military Tribunals; President Hosts Ramadan Iftar Dinner, WASH. POST, Nov. 20, 2001, at A14 ("President Bush said yesterday that his order allowing foreign terrorism suspects to be tried in military tribunals is 'the absolute right thing to do,' despite fears expressed by both liberals and conservatives that long-cherished principles of American justice could be compromised.").


34. See Senator Patrick Leahy, Chairman, Senate Judiciary Committee, DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism, Hearing with Attorney General John Ashcroft, supra note 33. Following the hearings, Chairman Leahy indicated in remarks before the Senate that anonymous and identified administration sources had indicated that (1) the administration [d[id] not intend to use military commissions to try people arrested in the United States; (2) these tribunals [w(ould] be limited to "foreign enemy war criminals" for "offenses against the international laws of war"]; (3) the military commissions [w(ould] follow the rules of procedural fairness used for trying U.S. military personnel; and (4) the judgments of the military commissions [w(ould] be subject to some form of judicial review.

Senator Patrick Leahy, Chairman, Senate Judiciary Committee, The Continuing Debate on the Use of Military Commissions, Remarks on the Senate Floor, supra note 33.
federal court with conspiring with al Qaeda and bin Laden to murder thousands of innocent people in connection with the attacks on September 11. That decision prompted criticism from two senior Democratic senators on the grounds that the Department of Justice allegedly had failed to discuss Mr. Moussaoui's prosecution before a military tribunal with Department of Defense officials. One of these senators was quoted as stating that he "[f]eared that the decision to try [Moussaoui] in the federal district courts of the United States...with all the rights of evidence and rights of due process...may let this big fish get away." In response, the General Counsel for the Department of Defense reportedly stated that "[t]his [wa]s an illustration of how carefully the president plan[ned] to employ this tool he ha[d] created."

In the meantime, while the debate on military commissions and the rules that should govern their operation was taking place, U.S. armed forces were capturing al Qaeda and Taliban prisoners. By late January 2002, 158 prisoners had been brought to the U.S. naval base in Guantanamo Bay, Cuba, while approximately 270 prisoners remained in Kandahar, Afghanistan. The transfers of al Qaeda and Taliban prisoners to Cuba subsequently were suspended for several weeks while the government expanded the facilities at the base. In February 2002, the transfers

37. Pincus, supra note 36.
38. Id. The decision to try Mr. Moussaoui in a civilian court came under question again when, at a hearing, he spoke for fifty minutes calling for the destruction of Israel and the United States and the return of parts of the world, including Spain, to Muslim rule. See The Moussaoui Problem, WASH. POST, Apr. 27, 2002, at A20; Brooke A. Masters, Moussaoui Wants to Be Own Lawyer; Suspect Also Denounces U.S., Israel During Hearing, WASH. POST, Apr. 23, 2002, at A1. Expounding on the possibility that the trial of Mr. Moussaoui may turn into a circus, one commentator has remarked:

Moussaoui clearly doesn't appreciate how fortunate he is to be within the jurisdiction of the U.S. District Court for the Eastern District of Virginia as opposed to the jurisdiction of the Department of Defense. Or, perhaps he doesn't care. Either way, he's chosen to play games with people and a process that is designed to protect the rights of unpopular defendants just like him.
39. See Carol Morello, FBI Team to Question Detainees; Marines Take Custody of Captives at Camp Kandhar, WASH. POST, Dec. 19, 2001, at A18 (reporting that U.S. Marines had taken custody of fifteen battlefield prisoners).
41. See Katharine Q. Seelye & Steven Erlanger, A Nation Challenged: Captives; U.S. Suspends the Transport of Terror Suspects to Cuba, N.Y. TIMES, Jan. 24, 2002, at A1 (reporting that total capacity was planned for 1000 prisoners). The apprehension of these prisoners also raised a debate concerning whether they were prisoners of war. Id. See also John Mintz, Debate Continues on Legal Status of Detainees, WASH. POST, Jan. 28, 2002, at A15 (reporting that the "Bush administration ha[d] ruled out any prospect of declaring that the al Qaeda
resumed. They were suspended later that month and resumed once again in May. By November 2002, the naval base, which not only has been identified as a site where military commissions will convene but also as a possible terrorist penal colony, was holding over 600 men from 43 countries.

The fate of at least some of these detainees will be determined by the outcome of proceedings before military commissions. Before addressing the particulars of the President’s order establishing military commissions, a brief historical overview of their prior use is instructive.

and Taliban prisoners being held at the U.S. naval base in Cuba were considered prisoners of war, but a debate would arise over whether to formally state that they were covered by the Geneva Conventions’); John Mintz, On Detainees, U.S. Faces Legal Quandary; Most Experts Say Al Qaeda Members Aren’t POWs but Taliban Fighters Might Be, WASH. POST, Jan. 27, 2002, at A22 (reporting that according to a number of experts in international law, most members of Osama bin Laden’s al Qaeda movement detained at the Guantanamo Bay naval base probably do not deserve to be labeled prisoners of war under the Geneva Conventions and legal precedents); Paisley Dodds, U.S. Legislators Visiting Guantanamo, ASSOCIATED PRESS, Jan. 25, 2002 (reporting that “[s]everal governments are demanding the United States give the captives prisoner-of-war status under the Geneva Conventions, which rule[d] out trial by military tribunal”). In February 2002, the administration declared that combatants who fought for Afghanistan’s Taliban regime and were captured would be covered by the Geneva Conventions but not deemed prisoners of war. John Mintz & Mike Allen, Bush Shifts Position on Detainees; Geneva Conventions Cover Taliban but Not Al Qaeda, WASH. POST, Feb. 8, 2002, at A1. Members of the al Qaeda terrorist network, who likewise were not considered prisoners of war, would not be covered by the Geneva Conventions, however, since that network was not a party to the signed accord. Id. See also Michael C. Dorf, What Is an “Unlawful Combatant,” and Why It Matters (Jan. 23, 2002), at www.findlaw.com (last visited Dec. 18, 2002) (noting that al Qaeda and Taliban members need not be treated as prisoners of war because they do not satisfy criteria governing irregular militias under Article IV of the Geneva Convention).

42. See U.S. Plans to Resume Flying Captives to Guantanamo Bay, WASH. POST, Feb. 6, 2002, at A13 (reporting how flights of captives resumed after being suspended for two weeks “pending expansion of the jail facilities at the base”).

43. See Military Flies 12 Detainees to Cuba from Afghanistan, REUTERS, Feb. 16, 2002, at A18 (reporting that, according to a military spokesperson, the military had flown twelve more detainees to the Guantanamo Bay Navy base, the last shipment until more facilities were built).

44. See Guantanamo Bay Prison Camp Receives 21 More Detainees, WASH. POST, May 7, 2002, at A6 (reporting transport of twenty-one more al Qaeda and Taliban captives); Transfer of Captives to Cuba Base Resumed, WASH. POST, May 2, 2002, at A13 (reporting transport of thirty-two detainees to the base, “resuming transfers that were suspended in mid-February”).


46. See Susan Schmidt & Bradley Graham, Military Trial Plans Nearly Done; Bush to Decide Which Detainees Will Be Tried by Tribunals, WASH. POST, Nov. 18, 2002, at A10; John Mintz, 4 Prisoners Sent Home; More May Be Released, WASH. POST, Oct. 29, 2002, at A15; Katharine Q. Seelye, Threats and Responses: The Detainees; Guantanamo Bay Faces Sentence of Life as Permanent U.S. Prison, N.Y. TIMES, Sept. 16, 2002, at A1; Katharine Q. Seelye, A Nation Challenged: The Prisoners; Rumsfeld Lists Outcomes for Detainees Held in Cuba, N.Y. TIMES, Feb. 27, 2002, at A10. In connection with these detentions, some of the captives housed at the base in Guantanamo Bay filed, or had filed on their behalf, petitions for writs of habeas corpus in federal court challenging the right of the government to hold them without charges and deny them the right of access to lawyers. In two separate cases, Coalition of Clergy v. Bush, 189 F. Supp. 2d 1036, 1047-50 (C.D. Cal. 2001) (aff’d in part, rev’d in part Coalition of Clergy, Lawyers and Professors v. Bush, 310 F.3d 1153 (9th Cir. 2002)) (holding dismissal of petition appropriate for lack of standing), and Rasul v. Bush, 215 F. Supp. 2d 55 (D.D.C. 2002) (appeal pending 02-CV-299), district courts rejected these challenges and ruled that since the naval base in Guantanamo Bay was located outside the sovereign territory of the United States, the courts simply had no jurisdiction to hear the case.

47. See Schmidt & Graham, supra note 46 (holding that “[t]he military proceedings currently are contemplated only for a small number of prisoners held in camps outside the United States and would be conducted outside this country”).
III. HISTORY OF MILITARY COMMISSIONS

Military commissions⁴⁸ have their roots in the Revolutionary War.⁴⁹ In 1780, George Washington appointed a “Board of General Officers” to preside over the trial of Major John Andre, a British spy.⁵⁰ In 1818, a military tribunal tried two British citizens for inciting Seminole Indian attacks on civilians in the state of Georgia.⁵¹ During the war with Mexico in the 1840s, “councils of war” were convened to try Mexican citizens accused of violations of the law of war,⁵² such as enticing American soldiers to desert or committing guerrilla warfare.⁵³ During the Civil War and the reconstruction period that followed, military commissions tried more than two thousand cases.⁵⁴

Most recently, military commissions were used extensively following World War II.⁵⁵ Two cases decided by the Supreme Court during that period, addressing the

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48. Generally speaking,

[the term “military commission” is applied to describe a military court trial of an enemy belligerent on charges of violation of the laws of war. A panel of military officers typically presides over such a proceeding, but it is distinguishable from a court martial in that a court martial is a trial of a member of our military forces governed by the Uniform Code of Military Justice.


50. See Ex Parte Quirin, 317 U.S. 1, 31 n.9 (1942); Report and Recommendations on Military Commissions, supra note 49; Testimony of William P. Barr, supra note 49.

51. Testimony of William P. Barr, supra note 49.

52. The law of war is a subset of the law of nations. In re Yamashita, 327 U.S. 1, 7 (1945). As explained by one commentator, the law of war is a composite of many sources and is subject to varying interpretations constantly adjusting to address new technology and the changing nature of war. It may also be referred to as jus in bello, or law in war, which refers to the conduct of combatants in armed conflict, as distinguished from jus ad bellum—law before war—which outlines acceptable reasons for nations to engage in armed conflict. The main thrust of its principles requires that a military objective be pursued in such a way as to avoid needless and disproportionate suffering and damages. Sources of the law of war include international agreements, customary principles and rules of international law, judicial decisions by both national and international tribunals, national manuals of military law, treaties and resolutions of various international bodies.


54. See Report and Recommendations on Military Commissions, supra note 49; Madsen v. Kinsella, 343 U.S. 341, 345 n.8 (1951) (“By practice dating from 1847 and renewed and firmly established during the Civil War, military commissions have become adopted as authorized tribunals in time of war.”) (quoting HOWLAND, DIGEST OF OPINIONS OF THE JUDGE-ADVOCATES GENERAL OF THE ARMY 1066-67 (1912); Crona & Richardson, supra note 48, at 368 (noting that “[m]ilitary commissions first had extensive use during the Civil War”).

55. See Crona & Richardson, supra note 48, at 369; Report and Recommendations on Military Commissions, supra note 49 (“Following the surrender and occupation of Germany and Japan in 1945, military commissions were used extensively. In Germany, over 1600 persons were tried for war crimes by U.S. military commissions. In the Far East nearly 1000 persons were tried by such commissions.”) (footnotes omitted).
origins and jurisdiction of what have been described as "our common law war courts," provide a useful backdrop against which to analyze President Bush's recent order. It is to an analysis of those cases that we now turn.

A. The German Saboteurs Case

In *Ex Parte Quirin*, petitioners, eight German saboteurs, entered the United States surreptitiously after disembarking from two submarines off the Atlantic coast. Four of the men landed on Ponte Vedra Beach, Florida; the remainder landed in Amagansett Beach on Long Island, New York. After landing, petitioners buried their uniforms, as well as their supplies of explosives, fuses, and incendiary devices, and proceeded in civilian dress to Jacksonville, Florida, and New York City. Subsequently, all of the saboteurs were apprehended by the Federal Bureau of Investigation (FBI) in New York and Chicago.

President Roosevelt appointed a military commission and instructed it "to try petitioners for offenses against the law of war and the Articles of War," and the saboteurs were turned over by the FBI to the Provost Marshal of the Military District of Washington for trial before the commission. Petitioners thereafter challenged their detention in applications for writs of habeas corpus on the grounds that the President lacked statutory or constitutional authority to order that they be tried before a military commission instead of a civilian court.

In rejecting petitioners' contentions, the Court preliminarily outlined the various powers granted to Congress and the President under the Constitution relating to war and defense. The Court reasoned that, as Commander in Chief, the President had the "power to wage war which Congress ha[d] declared, and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offenses against the law of nations, including those which pertain[ed] to the conduct of war."
With respect to statutory authority, the Court noted that by its terms, Article of War 15, then codified at 10 U.S.C. Section 1486, provided that nothing relating to the laws conferring jurisdiction upon courts-martial should be "construed as depriving military commissions...or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by statute or by the law of war may be triable by such military commissions." By enacting the Articles of War, and in particular Article 15, the Court found that "Congress ha[d] explicitly provided, so far as it may constitutionally do so, that military tribunals sh[ould] have jurisdiction to try offenders or offenses against the law of war in appropriate cases."

Having determined that under Section 1486 Congress had exercised its power under the Constitution "to define and punish offenses against the law of nations by sanctioning, within constitutional limitations, the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals," the Court interpreted the President's decision to order the trial of petitioners by military commission simply as reflecting an invocation of the law. In other words, by issuing the order creating the commission, the President had "undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself g[a]ve the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war."

In rejecting petitioners' contentions and ruling that it was "within the constitutional power of the national government" to try them before a military commission, the Court specifically declined to rule on the extent to which the "President as Commander in Chief ha[d] constitutional power to create military commissions without the support of Congressional legislation." In the case involving petitioners, the Court held, "Congress ha[d] authorized trial of offenses against the law of war before such commissions."

As to whether the conduct engaged in by petitioners may have violated the law of war, the Court noted that an analysis of that question centered upon the distinction between lawful and unlawful combatants. The former, the Court observed, were "subject to capture and detention as prisoners of war by opposing military forces," while the latter were "likewise subject to capture and detention, but in addition they [we]re subject to trial and punishment by military tribunals for acts which rendered their belligerency unlawful." And in the case of petitioners, the Court ruled that the controlling authorities "recognized that those who during time

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68. The Court observed that "[b]y the Articles of War, 10 U.S.C. §§ 1471-1593, Congress ha[d] provided rules for the government of the Army." Id. at 26.
69. Id. at 27 (quoting Article 15).
70. Id. at 28.
71. Id.
72. Id.
73. Id. at 29.
74. Id.
75. Id. at 30-31.
76. Id. at 31-32 (footnote omitted).
of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property, have the status of unlawful combatants punishable as such by military commission.

In Quirin, the trial of the saboteurs occurred during a time of war. As discussed below, the Supreme Court has held that offenses against the law of war may be tried before military commissions even after the cessation of hostilities.

B. Operation of Military Commissions after the Cessation of Hostilities

In Application of Yamashita, petitioner General Tomoyuki Yamashita, the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, was tried and convicted before a military commission of violations of the law of war and sentenced to death by hanging. One of the arguments raised by petitioner was that the military commission that tried him for violations of the law of war was not lawfully convened because hostilities had ceased between the armed forces of Japan and the United States.

Rejecting petitioner's contention that the cessation of hostilities deprived military commissions of jurisdiction over the trial of offenses relating to the law of war, the Supreme Court ruled:

An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and
subject to disciplinary measures those enemies who, in their attempt to thwart
or impede our military effort, have violated the law of war. The trial and
punishment of enemy combatants who have committed violations of the law of
war is thus not only a part of the conduct of war operating as a preventive
measure against such violations, but is an exercise of the authority sanctioned
by Congress to administer the system of military justice recognized by the law
of war. That sanction is without qualification as to the exercise of this authority
so long as a state of war exists—from its declaration until peace is proclaimed.83

In short, Application of Yamashita provides support for the prosecution before a
military commission of some of those detained in Guantanamo Bay, even after a
cessation of hostilities is declared.

IV. THE NOVEMBER 13TH ORDER

In support of his order establishing military commissions, President Bush relied
upon the authority vested in him by the Constitution as President and Commander
in Chief, as well as the laws of the United States, which included the congressional
resolution authorizing the use of force, and 10 U.S.C. Sections 821 and 836.84

Before presenting the competing arguments that have been advanced relating to the
constitutionality of the order, each of the authorities relied upon is briefly discussed.

A. The Constitution

Article I of the Constitution grants Congress the power to “provide for the
common defense and general Welfare of the United States,”85 as well as to “declare
War... and make Rules concerning Captures on Land and Water”86 and also “[t]o
define and punish.... [o]ffenses against the Laws of Nations.”87 Congress also has the
power to “constitute Tribunals inferior to the Supreme
Court.”88 Article II provides
that all “executive Power” under the Constitution is vested in the President.89

Additionally, the President is designated the “Commander in Chief” of the armed
forces.90

Two distinguished commentators have observed that “it is sometimes argued that
the commander-in-chief clause, read in concert with provisions vesting executive
power in the President to see that the laws are faithfully executed and peace
preserved, authorizes the President to use military force where required to protect

83. Id. at 11-12 (citations omitted). Indeed, the authority of the executive in time of war to establish and
prescribe the jurisdiction and procedures governing military commissions “has been recognized, even after peace
has been declared, pending complete establishment of civil government.” Madsen, 343 U.S. at 348 n.12. See also
Johnson v. Eisentrager, 339 U.S. 763, 786 (1950) (“The jurisdiction of military authorities, during or following
hostilities, to punish those guilty of offenses against the laws of war is long-established.”).
84. See Military Order, Preamble. President Bush’s order apparently was modeled after President
Roosevelt’s order in Quirin. See Frank J. Murray, Justice to Use FDR Precedent for Military Tribunals, WASH.
86. U.S. CONST. art. I, § 8, cl.11. An example of Congress exercising its authority to define and punish
89. U.S. CONST. art. II, § 1, cl.1.
national interests unless Congress prohibits such action.\footnote{91} The Constitution, after all, "does not delegate to Congress the power to ‘conduct’ war or to ‘make’ war; it only delegates the power to ‘declare’ war."\footnote{92}

B. The Congressional Resolution Authorizing the Use of Force

One week after the September 11 attacks, Congress passed a joint resolution authorizing the use of force against those responsible.\footnote{93} The resolution stated in part:

[T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.\footnote{94}

Prefacing this authorization to use force was the recognition that the acts of September 11 rendered it necessary for the United States to exercise "self-defense," that such acts "pose[d] an unusual and extraordinary threat to the national security," and that "the President ha[d] authority under the Constitution to take action to deter and prevent acts of international terrorism against the United States."\footnote{95}

C. The Uniform Code of Military Justice

Lastly, in support of the order establishing military commissions, President Bush relied upon Articles 21 and 36 of the Uniform Code of Military Justice (UCMJ).\footnote{96} Article 21, codified at 10 U.S.C. Section 821, provides that the jurisdiction of courts-martial to try persons subject to the UCMJ does "not deprive military commissions...of concurrent jurisdiction with respect to offenders or offenses that

\footnote{91}{RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW, § 6.9, 594 (3d ed. 1999) (footnote omitted).}
\footnote{92}{Id. Two other commentators have explained: Declaring war is not tantamount to making war; indeed, the Constitutional Convention specifically amended the working draft of the Constitution that had given Congress the power to “make” war. When it took up this clause on August 17, 1787, the Convention voted to change the clause from “make” to “declare.” A supporter of the change argued that the new language would “leave[e] to the Executive the power to repel sudden attacks.” In addition, other elements of the Constitution describe “engaging” in war. This fact demonstrates that the Framers understood “making” and “engaging” in war to be somewhat broader than simply “declaring” war. A State constitution at the time of the ramification included provisions that prohibited the government from “making” war without legislative approval. If the Framers had wanted to require congressional consent before the initiation of military hostilities, they would have used such language. Robert J. Delahunty & John C. Yoo, The President’s Constitutional Authority to Conduct Military Operations Against Terrorist Organizations and the Nations that Harbor or Support Them, 25 HARV. J.L. & PUB. POL’Y 488, 491-92 (2002) (footnotes omitted).}
\footnote{94}{Id.}
\footnote{95}{Id. Preamble.}
\footnote{96}{See Military Order, supra note 1, Preamble. The Uniform Code of Military Justice was enacted in 1950 and is found at 10 U.S.C. §§ 801-946 (2003).}
by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.”

The other provision of the UCMJ relied upon in the order was Article 36. This article, codified at 10 U.S.C. Section 836, delegates authority to the President to prescribe “[p]retial, trial, and post-trial procedures, including modes of proof...for military commissions and other military tribunals.” Section 836 also states that in promulgating such rules, the President “shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district court” not contrary to or inconsistent with the UCMJ.

V. DISCUSSION

Before addressing the arguments raised by the proponents and critics of the President’s order establishing military commissions, it is useful to note that, at its core, the different positions appear to be influenced by a conceptual disagreement. This disagreement centers on whether the criminal justice system is the appropriate tool to use in responding to terrorist attacks of the magnitude perpetrated by al Qaeda on September 11, particularly considering its prior history. In other words, many “who criticize the tribunals believe that the traditional criminal justice system is capable of protecting intelligence sources and is too important to eschew, even as a means to combat terror.” Some, on the other hand, maintain that “we are at war and that the criminal justice system is not designed as a weapon.” The reality is

97. 10 U.S.C. § 821. Article 21 is identical in all material respects to its predecessor, Article of War 15, which the Supreme Court discussed in Quirin and Yamashita. Report and Recommendation on Military Commissions, supra note 49; see Newton, supra note 53, at 14 (“Article 21 of the current UCMJ is based on Article of War 15.”) (footnote omitted).

98. 10 U.S.C. § 836(a).

99. Id.


101. Murdoch, supra note 100, at 22. One commentator has forcefully argued:

The perpetrators of September 11 and other terrorist attacks are not morally and legally analogous to the perpetrators of domestic crime in a settled domestic society....The ability to prosecute domestic crime, and the necessity of providing constitutional standards of due process, including the extraordinarily complex rules of evidence, suppression of evidence, right to counsel, and the rights against self-incrimination have developed within a particular political community, and fundamentally reflect decisions about rights within a fundamentally domestic, democratic setting in which all of us have a stake in both sides of the equation, as prosecutors and prosecuted, because we are part of the political community which must consider both individual rights and collective security. It is a system, in other words, that fundamentally treats crime as a deviation from the domestic legal order, not fundamentally an attack upon the very basis of that order. Terrorists who come from outside this society, including those who take up residence inside this society for the purpose of destroying it, cannot be assimilated into the structure of the ordinary criminal trial.

that both the law model and the war model are going to be used in response to the attack by al Qaeda.102 With this general backdrop in place, we now turn to the debate.

Critics of the President’s order establishing military commissions maintain that, without authorizing congressional legislation, the use of military commissions raises serious constitutional separation of powers concerns that may lead to reversal of convictions emanating from such commissions.103 They argue that in the past military commissions have been established when Congress had authorized such commissions or declared war104—neither circumstance of which is present with respect to the congressional response to the events of September 11.105 In a similar vein, critics contend that the administration’s reliance on Quirin is misplaced,106 since Congress had formally declared war when President Roosevelt issued his order directing a military commission to try the eight German saboteurs.107

ordinary law enforcement. If terrorism is a military threat, and it is, then the terrorists are more appropriately punished by the system of military tribunals that has a long history in our nation.”); John P. Elwood, Prosecuting the War on Terrorism: The Government’s Position on Attorney-Client Monitoring, Detainees, and Military Tribunals, 17 CRIM. JUSTICE 30, 34 (2002) (maintaining that “[t]he trial of terrorists will represent more than an effort to discipline an errant member of society for violating domestic law—it will also be an act of self-defense against an external threat to our collective safety”).

102. See David Luban, The War on Terrorism and the End of Human Rights, 22 PHIL. & PUB. POL. Q. 9 (2002) (discussing the hybrid war-law model approach). As recognized by the American Bar Association’s Task Force on Treatment of Enemy Combatants:

[t]he September 11 attacks were viewed as both crimes and acts of war, and the United States has responded with both military operations and law enforcement actions. Under the circumstances, legal doctrines and principles from both domestic criminal procedure and international law, including the law of war, have been applied. Because of the unique nature of the attacks and our responses to it, it is not surprising that these doctrines and principles have been applied in new ways and have, to some extent, overlapped.

American Bar Association Task Force on Treatment of Enemy Combatants—Preliminary Report (Aug. 8, 2002), at http://www.abanet.org/leadership/enemy_combatants.pdf (last visited Oct. 18, 2002); Charles Lane, In Terror War, Second Track for Suspects: Those Designated “Combatants” Lose Legal Protections, WASH. POST, Dec. 1, 2002, at A1 (reporting that Administration officials maintain “parallel system is necessary because terrorism is a form of war as well as a form of a crime, and it must not only be punished after incidents occur, but also prevented and disrupted through the gathering of timely intelligence”); Jim Oliphant, Bush’s Burden: Seeking Justice in Terror’s Wake, LEGAL TIMES, Sept. 17, 2001, at 13 (“Ultimately, it is likely that an extensive military campaign will exist side by side with a domestic prosecutorial effort.”).


104. It is noteworthy that from the time of the adoption of the Constitution until the present, Congress has passed only six declarations of war. ROTUNDA & NOWAK, supra note 91, § 6.9, 595. They include War of 1812, Barbary Wars, Mexican War, Spanish-American War, World War I, and World War II. Id. There were no declarations of war for the Korean War in the 1950s or the war with Iraq in 1991. Id.

105. See Testimony of Neal Katyal, supra note 103; Gittins, supra note 3 (“Absent the declaration of war...the president arguably has no constitutional or statutory authority to employ military commissions.”).

106. Commentators have noted that “[a]lthough both the rule and reasoning of Quirin have been questioned (at least with respect to the treatment of unlawful combatants captured in the United States), it remains the leading American case on the use of military commissions during wartime.” Casey, Rivkin & Bartram, supra note 3, at 2.

107. See Scott L. Silliman, DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism, Testimony Before the United States Senate Judiciary Committee (Nov. 28, 2001) [hereinafter Testimony of Scott L. Silliman], at http://www.hrcr.org/hottopics/tribunal.html (last visited Dec. 18, 2002); Testimony of Neal Katyal, supra note 103; Gittins, supra note 3. See also Orentlicher & Goldman, supra note 100, at 658 (noting that “even
With respect to the joint congressional resolution, critics make the point that nothing contained in the resolution specifically authorized the establishment of military commissions. They note that the resolution “is patently quite far from a declaration of war” and is limited in that it “restricts its reach only to ‘force,’ applies only to persons involved in some way in the September 11 attacks, and permits such activity ‘in order to’ avert prospective damage to the United States.”

Finally, insofar as the UCMJ is concerned, critics contend that Section 821 “can only be read as reflective of Congress’s intent, by enacting statutory authority for trials by courts-martial and providing for the concurrent jurisdiction of courts-martial with military commissions, not to divest the latter of jurisdiction that they have by ‘statute or by the Law of War.’” With respect to Section 836, the argument is that the provision “has relevance only to the rules for the conducting of military commissions, rather than to the authority for establishing them.”

On the other hand, supporters of President Bush’s order maintain that because the President’s power to establish military commissions arises from the authority vested in him by the Constitution as Commander in Chief, under the present circumstances, no act of Congress is legally necessary to support the establishment of such commissions. They argue that the terrorist acts leading up to and culminating in the attacks on September 11 leave no doubt that we are in a state of armed conflict.

If the authority of Quirin were beyond question, it would provide only limited support for President Bush’s order. At most, Quirin supports the use of military commissions to try those responsible for the September 11 attacks and others suspected of violating the laws of war that, by definition, can occur only in the course of armed conflict.

In the *Prize cases*, 67 U.S. 635, (1862), the Supreme Court recognized that “war may exist without a declaration on either side,” id. at 668, and that when the conduct of another country creates a state of war with the United States, the president “does not initiate that war, but is bound to accept the challenge without waiting for any special legislative authority.” Id. Rejecting the contention that the holding in Quirin was limited to formally declared war, the court in *Padilla v. Bush*, No. 02CV445, 2002 U.S. Dist. LEXIS 23086 (S.D.N.Y. Dec. 4, 2002) held that the logic of that argument requires a finding that Quirin *sub silentio* overruled the *Prize* cases.

...That breathtaking conclusion is unwarranted, however, both because it is unreasonable to believe that the Court would deal so casually with its own significant precedents, and because...the *Prize* cases have been found authoritative since Quirin, and appear to be very much alive.

Id. at 85-86.


109. Testimony of Neal Katyal, supra note 103; see Testimony of Scott L. Silliman, supra note 107 (noting that “nowhere in the resolution, or in the presidential signing statement, is there any mention or characterization of the attacks of September 11th as acts of war. They are clearly denoted as terrorist acts.”)

110. Testimony of Scott L. Silliman, supra note 107; see Testimony of Neal Katyal, supra note 103 (arguing need for a declared war before military tribunals have jurisdiction over offenses).

111. Testimony of Scott L. Silliman, supra note 107.

112. *See* Statement of Senator Orrin G. Hatch, Ranking Republican Member, Before the Senate Judiciary Committee Hearing, DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism (Dec. 4, 2001), at http://www.pict-pcti.org/news/archive/Miltrib/hatch.senjudhear.11.28.2001.html (last visited Dec. 18, 2002); Elwood, supra note 101, at 34 (arguing that “the president has considerable independent authority under the Constitution to defend the country when it has been attacked from abroad”).

Moreover, the congressional recognition that a state of armed conflict exists as a predicate for the establishment of military commissions\(^{114}\) is underscored by the language of the joint resolution authorizing the President “to use all necessary means and appropriate force” against those who committed, authorized, planned, or aided the attacks on September 11 in order to prevent future terrorist acts.\(^{115}\) Indeed, supporters of the order contend that our allies in the North Atlantic Treaty Organization interpreted the attacks of September 11 as acts of war because they have invoked the mutual self-defense provisions of Article 5 of the North Atlantic Treaty.\(^{116}\) Additionally, supporters maintain that Congress has “expressly authorized” the use of military commissions under Section 821 and that Congress also has given the President the authority to enact procedures to be used in such commissions under Section 836.\(^{117}\)

Finally, supporters of the order contend that *Quirin* is instructive precedent. They maintain that similar to the German saboteurs in that case, members of al Qaeda are “unlawful combatants” and it is that status that authorizes the “President to exercise military power against such persons—including the use of military tribunals.”\(^{118}\)

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114. See Statement by Pierre-Richard Prosper, supra note 113 (“Because military commissions are empowered to try violations of the law of war, their jurisdiction is dependent upon the existence of an armed conflict, which we have.”).

115. See Statement of Major General Michael J. Nardotti, Jr., supra note 113; Griffin B. Bell, Testimony Before the Senate Judiciary Committee (Nov. 28, 2001) [hereinafter Testimony of Griffin B. Bell], at http://www.pict-pcti.org/news/archive/Miltrib/bell(formerAG).senjudhear.11.28.2001.htm (last visited Dec. 18, 2002) (arguing that “[a]lthough we have not declared war since World War II, war has been authorized by Congress through the authority to use armed forces as they are now being used in Afghanistan”).

116. Testimony of William P. Barr, supra note 49; see Statement of Pierre-Richard Prosper, supra note 113 (discussing NATO’s response and also noting that “[t]he Organization of American States, Australia and New Zealand activated parallel provisions in their mutual defense treaties”) See also Addicott, supra note 2 (noting how the terror attack was framed as an act of war under international law as illustrated by the fact that “for the first time in its history...NATO invoked its collective self-defense clause”).

117. Testimony of Griffin B. Bell, supra note 115; see Elwood, supra note 101, at 35 (arguing that Section A21 “recognizes that the president has authority to use military commissions to try offences under the law of war”).

118. Testimony of William P. Barr, supra note 49; Statement of Major General Michael J. Nardotti, Jr., supra note 115. See Casey, Rivkin & Bartram, supra note 3, at 8 (arguing that inasmuch as members of al Qaeda and the Taliban can be treated as unlawful combatants, “they are subject to trial in the military commissions established by the President’s November 13 Military Order”). As Pierre-Richard Prosper, the Ambassador-at-Large for War Crimes Issues at the State Department explained before the Senate Judiciary Committee:

Under long established principles, the right to conduct armed conflict, lawful belligerency, is reserved only to states and recognized armed forces or groups under responsible command. Private persons lacking the basic indicia of organization and the ability or willingness to conduct operations in accordance with the laws of armed conflict have no legal right to wage warfare against the state. In waging war the participants become unlawful combatants. Because the members of al Qaeda do not meet the criteria to be lawful combatants under the law of war, they have no right to engage in armed conflict and are unlawful combatants. And because their intentional targeting and killing of civilians in time of international armed conflict amount to war crimes, military commissions are available for adjudicating their specific violations of the laws of war.

VI. CONCLUSION

The hundreds of detainees currently being held in Cuba face a number of options during the pendancy of the current armed conflict and after the hostilities that brought it about cease. These include prosecution before military commissions, repatriation to their countries of origin, release if they are not determined to be law enforcement threats, or detention until the end of hostilities.

It is well-established that "[s]ince our nation's earliest days...[military] commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war." While it has been noted that a declaration of war, or language in the joint resolution specifically authorizing the use of military commissions, arguably would have provided the strongest legal footing for the establishment of these commissions, it is also recognized that "a state of war may exist without a formal declaration."

For purposes of the present discussion, it cannot be disputed that since at least September 11, 2001, the United States and al Qaeda and its supporters have actively...


120. See John Mintz, Some Detainees May Be Held Even If Acquitted, WASH. POST, Oct. 29, 2002, at A15 (reporting that "U.S. officials say privately that they expect only a small number of [detainees] will face charges before tribunals").


122. See Seelye, Guantanamo Bay Faces Sentence of Life as Permanent U.S. Prison, supra note 46; John Mintz, Some Detainees May Be Held Even If Acquitted, WASH. POST, Mar. 30, 2002, at A7; Lee A. Casey, David B. Rivkin, Jr. & Darin R. Bartram, By the Laws of War, They Aren't POWs, WASH. POST, Mar. 3, 2002, at B3; Katharine Q. Seelye, Rumsfeld Lists Outcomes for Detainees Held in Cuba, N.Y. TIMES, Feb. 27, 2002, at A10. Several commentators have observed:

Although it may be difficult to determine the precise point at which the "war on terrorism" concludes, once the al Qaeda network—like the Taliban—is destroyed, the United States will have to determine whether to try the detainees or repatriate them either to Afghanistan or to their countries of origin. They are not entitled to the rights of and privileges of P.O.W.s, but customary international law does require that even unlawful combatants be given a judicial process before being "punished."

Casey, Rifkin, & Bartram, supra note 3.

123. Madsen, 343 U.S. at 346 (footnote omitted). As the Court recognized in Quirin:

[a]n important incident to the conduct of war is the adoption of measures by military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.

317 U.S. at 28-29. See William Connelly, The Importance of Law When America Is at War, 35 MD. B. J. 28, 30 (2002) ("Military commissions have existed, albeit under different names, since the beginning of the republic.").

124. See Report and Recommendations on Military Commissions, supra note 49, at 5. See also Madsen, 343 U.S. at 348 ("In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions.").

125. See Testimony of Neal Katyal, supra note 103.

126. Report and Recommendations on Military Commissions, supra note 49. The Court observed in Talbot v. Seeman, 5 U.S. (1 Cranch) 1 (1801) that Congress can "declare a 'partial war' targeted at a particular form of enemy aggression, even though we are not at war with the enemy nation in the traditional sense." Crona & Richardson, supra note 48, at 360. Writing for the Court, Chief Justice Marshall explained that "[t]he whole powers of war being, by the [C]onstitution of the United States, vested in Congress...Congress may authorize general hostilities, in which case the general laws of war apply to our situation; or partial [war], in which case the laws of war, so far as they actually apply to our situation, must be noticed." 5 U.S. at 29.
been engaged in a war\textsuperscript{127}—a war declared by al Qaeda on the United States.\textsuperscript{128} As former Attorney General William P. Barr observed in his testimony before the Senate Judiciary Committee:

On September 11, 2001, this Nation was attacked by a highly-organized force known as "al Qaeda." The attack cost more American lives and caused more property damage than the Japanese sneak attack on Pearl Harbor. This same organization has declared itself at war with the United States and has stated its intention to use any weapons at its disposal—including weapons of mass destruction—against both civilian and military targets. Prior to September 11, 2001, al Qaeda acknowledged perpetrating armed attacks on our military personnel, our naval ships, and our embassies. Al Qaeda operatives and their supporters are presently engaged in the field against our own military forces in Afghanistan. They have personnel in over 60 countries, where they are undoubtedly poised to attack United States interests. There can be little doubt that "cells" of this organization remain in the United States, ready to carry out further attacks.

It is clear that a state of war exists between the United States and al Qaeda. Al Qaeda has openly proclaimed war against the United States and has repeatedly carried out attacks against us. The President, as Commander-in-Chief, is empowered to take whatever steps he deems necessary to destroy this adversary and to defend the Nation from further attack.\textsuperscript{129}

In light of those circumstances, and at the minimum, "[i]t can reasonably be argued that Congress’s authorization to use ‘all necessary and appropriate force’ includes authority for the President’s order, at least with respect to offenses relating to the September 11 attacks."\textsuperscript{130}

\textsuperscript{127} The beginning of the state of war with al Qaeda arguably can be traced to the bombings of the American embassies in Kenya and Tanzania. But this requires that some forms of terrorism be viewed under a new legal paradigm. As explained by Professor Ruth Wedgewood:

there are terrorist organizations whose concerted design is to violently disrupt and destroy existing governments and commerce. Against these, one may have to entertain the paradigm of ongoing conflict. An idealist’s desire to address the root causes will not suffice against an organization that opposes all secular regimes in the region or objects to United States protection of essential economic and political interests. And simple reaction in the face of a completed attack will often not be a wise or sufficient policy.

The defense of a nation-state in international war permits the targeting of the adversary’s command and control structure, military facilities, and even his supporting economic assets. This is not a license to overrule good judgment. In limited war, the rules of engagement are carefully moderated to avoid broadening the conflict or drawing in other countries. While attending to third party interests and maintaining the stability of the larger peace, one may need to place terrorist actions within the international legal paradigm of war, rather than unbroken peace, with a right of ongoing offensive action against an adversary’s paramilitary operations and network.


\textsuperscript{128} \textit{See} \textit{The Prize Cases}, 67 U.S. 635, 666, (1862) ("[I]t is not necessary to constitute a war, that both parties should be acknowledged as independent nations or sovereign states."); Hamdi v. Rumsfeld, 296 F3d. 278, 283 (4th Cir. 2002) (recognizing that "[t]he unconventional aspects of the present struggle do not make its stakes any less grave").

\textsuperscript{129} Testimony of William P. Barr, \textit{supra} note 49.

\textsuperscript{130} Report and Recommendations on Military Commissions, \textit{supra} note 49 (footnote omitted); see Addicott, \textit{supra} note 2 ("While issues remain to be worked out, challenging the constitutionality of military tribunals to try the al-Qa’eda terrorists for war crimes will prove a difficult task."); Elsea, \textit{supra} note 53, at 27 ("The resolution does not address military tribunals explicitly, but could be interpreted as a broad authorization to exercise the President’s power as Commander in Chief of the Armed Forces to prosecute armed conflict.").