

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

SALIM AHMED HAMDAN,

Petitioner,

- v. -

DONALD RUMSFELD,  
Secretary of Defense, *et al.*,

Respondents.

No. 1:04-CV-01519-JR

**BRIEF AMICI CURIAE OF SIXTEEN LAW PROFESSORS  
IN SUPPORT OF PETITIONER AND IN OPPOSITION TO RESPONDENTS'  
CROSS-MOTION TO DISMISS**

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## **INTEREST OF AMICI CURIAE**

Amici curiae are professors of law whose areas of expertise include constitutional law, federal jurisdiction, and international law. We have an interest in providing this Court with materials illuminating the law relevant to the interpretation of the Constitution's allocation of powers. Amici and their institutional affiliations (provided for purposes of identification only) are set forth in the accompanying Unopposed Motion for Leave to File a Brief Amici Curiae. Amici respectfully submit this brief to address the constitutional allocation of powers issues raised by the President's Order of November 13, 2001, and implementing regulations establishing military commissions to try certain persons designated by the President. Although the President's Order raises other constitutional questions, amici submit this brief only on the separation-of-powers question.

## **STATEMENT OF THE CASE**

One week after September 11, 2001, Congress authorized the President 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." Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter "Authorization of Use of Military Force," or "AUMF"]. Pursuant to this authorization, the President on October 7, 2001, initiated a military operation in Afghanistan "to subdue al Qaida and quell the Taliban regime that was known to support it." Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2635 (2004). During that operation, U.S. armed forces took custody of numerous persons suspected of being unlawful combatants, some

of whom, including Petitioner Salim Ahmed Hamdan, were transported to the U.S. naval base at Guantánamo Bay, Cuba.

On November 13, 2001, the President issued an executive order titled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism” [hereinafter “Military Order”]. 66 Fed. Reg. 57, 833 (Nov. 13, 2001). The Military Order provides that certain individuals “shall, when tried, be tried by military commission for any and all offenses triable by military commission . . . .” Military Order § 4(a).<sup>1</sup> The Order does not specify the composition of the commission or the procedures it should follow; it calls upon the Secretary of Defense to “issue such orders and regulations . . . as may be necessary,” id. § 4(b), including “orders for the appointment of one or more military commissions,” id., and “rules for the conduct of the proceedings of military commissions.” Id. § 4(c). The Order calls for the “submission of the record of the trial, including any conviction or sentence, for review and final decision by [the President] or by the Secretary of Defense if so designated by [the President] for that purpose,” id. § 4(c)(8), it provides that no courts other than military tribunals have jurisdiction over offenses by individuals subject to the order,<sup>2</sup> id. § 7(b)(1), and it purports to deny such individuals the “privilege[] to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United

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<sup>1</sup> The individuals subject to the Order are those who the President determines there is reason to believe “(i) is or was a member of the organization known as al Qaida, (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii).” Military Order § 2(a).

<sup>2</sup> Presumably “military tribunals” includes military tribunals other than military commissions. Apparently, the Order purports to strip federal and state courts of jurisdiction even for offenses not triable by military commission.

States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.” Id. § 7(b)(2). Notwithstanding this last provision, the President’s Counsel has stated that the order does not bar detainees within the United States from petitioning for a writ of habeas corpus. Alberto R. Gonzales, Martial Justice, Full and Fair, N.Y. Times, Nov. 30, 2001, at A27.

The Secretary of Defense has issued regulations setting forth the procedures for commissions established pursuant to the Military Order. 32 C.F.R. §§ 9-17. The regulations provide that commissions shall be appointed by the Secretary of Defense or by his designee (the “Appointing Authority”) to try particular individuals subject to the Military Order for violations of the law of war. Id. § 9.2. The commissions are to consist of three to seven members, as determined by the Appointing Authority, each of whom is required to be “a commissioned officer of the U.S. armed forces,” and may be removed by the Appointing Authority for “good cause.” Id. §§ 9.4(a)(2)-(3). After the commission reaches a decision, the record of the trial is transmitted to the Appointing Authority, who transmits it to a review panel consisting of three military officers designated by the Secretary of Defense. 32 C.F.R. §§ 9.6(h)(3)-(4).<sup>3</sup> Failure to follow the procedures set forth in the regulation is to be disregarded by the review panel unless it

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<sup>3</sup> The regulations provide that the review panels “may include civilians commissioned pursuant to section 603 of title 10.” 32 C.F.R. § 9.6(h)(4). The Secretary of Defense has exercised this option. See Military Commission Review Panel Members to be Designated and Instruction Issued, Department of Defense Press Release, Dec. 30, 2003. Section 603 provides that, “[i]n time of war, or of national emergency . . . , the President may appoint any qualified person . . . to any officer grade in the Army, Navy, Air Force, or Marine Corps, except . . . grades above major general or rear admiral.” 10 U.S.C. § 603(a). It provides further that “[a]ny appointment under this section . . . may be vacated by the President at any time,” id. § 603(b), with no “good cause” or other limitation on the President’s power. A decision by the President to vacate such an appointment would apparently disqualify the person from serving on a review panel. See 32 C.F.R. § 9.6(h)(4). Members of the review panels are required to take an oath to support the “rules applicable to the review filed by a military commission,” but not an oath to support the U.S. Constitution. Military Commission Instruction No. 9, § 4(B)(4).

materially affected the outcome of the trial. Id. If the review panel forwards the case to the Secretary of Defense, the Secretary may either return the case for further review or, unless the President has designated the Secretary the final decisionmaker, forward it to the President with a recommendation as to disposition. Id. § 9.6(h)(5). In the absence of such a designation, the President makes the final decision. Id. § 9.6(h)(6). The regulations provide that “[a]n authenticated finding of Not Guilty as to a charge shall not be changed to a finding of Guilty,” 32 C.F.R. § 9.6(h)(2), presumably even by the President, but apparently the President does have the power under the regulations to increase the sentence, even to impose the death penalty where the commission has not. Id. § 9.6(h)(6).<sup>4</sup> Like the Military Order, the regulations specify that they do not “create any right, benefit, or privilege, substantive or procedural, enforceable by [the accused] against the United States . . . ,” id. § 9.10; Military Order § 7(c), and the regulations themselves are subject to amendment by the Secretary of Defense. 32 C.F.R. § 9.11.

The Secretary of Defense has designated John D. Altenburg Jr. as the Appointing Authority. Military Commission Order No. 5, Department of Defense (Mar. 15, 2004). Altenburg has issued an order appointing a military commission to try Petitioner Salim Ahmed Hamdan. The single charge against Mr. Hamdan is Conspiracy. He is alleged to have been a member of al Qaida and to have conspired with other members of that organization to “commit the following offenses . . . : attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism.” Charge at 2 (Exhibit A of Government Brief). The specific acts that Mr. Hamdan is alleged to

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<sup>4</sup> 32 C.F.R. § 9.6(h)(6) provides that the Secretary of Defense, if designated the final decisionmaker, may “mitigate, commute, defer, or suspend” the sentence, thus suggesting that he may not increase it, but no such limit applies to the President. Military Commission Instruction No. 9 is to the same effect.

have performed in furtherance of the conspiracy include acting as a bodyguard and driver for Osama bin Laden from 1996 to 2001; delivering weapons, ammunition, trucks and other supplies to al Qaida members; and receiving weapons from al Qaida training camps. Id. at 3.

Petitioner Hamdan now challenges the validity of the military commissions on various grounds. This amicus brief addresses only the claim that the military commissions violate the constitutional separation of powers. The brief argues that the President lacks the power to establish military commissions outside the theater of war or occupied territory without Congress' authorization. It argues further that Congress has not authorized the commissions that have been established pursuant to the Military Order. The brief does not address other possible grounds based on the U.S. Constitution or treaties or customary international law for concluding that the military commissions are invalid.

### **SUMMARY OF ARGUMENT**

The President's position as Commander in Chief of the army and the navy does not encompass the power to establish military commissions to try enemy combatants for violation of the laws of war outside the theater of war without the authorization of Congress. Justice Jackson set forth the governing test in his concurring opinion in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). President Bush's Military Order falls within the third of Justice Jackson's categories because Congress has authorized the use of military commissions in certain contexts but not this one, and because Congress has authorized another tribunal (courts-martial) to try enemy combatants for violations of the laws of war. The Military Order does not meet the strict test applicable to Presidential action falling in the third category because the Constitution expressly confers on Congress the powers most directly relevant to the use of military commissions to try violations of the laws of war outside the theater of war, including the power

“to define and punish . . . Offenses against the Law of Nations,” “to make Rules for the . . . Regulation of the land and naval Forces,” and “to establish Tribunals inferior to the Supreme Court.” U.S. Const. art. I, § 8, cl. 9, 10, 14. To hold that the President may establish such tribunals for this purpose in such circumstances, where Congress has authorized their use in other circumstances and has authorized the use of other tribunals for this purpose, would effectively “disabl[e] the Congress from acting on the subject,” Youngstown, 343 U.S. at 637-38, in contravention of the constitutional allocation of powers.

Even if the Military Order were placed in the second of Justice Jackson’s categories, it would be invalid. The “imperatives of events” do not justify the creation of military commissions to try enemy combatants that have been removed from the theater of war and may be detained during the pendency of the armed conflict, especially where, as here, a different tribunal has been authorized by Congress to try such combatants. Nor do “abstract theories of law” support the Order. The Founders allocated to Congress the power to create “tribunals inferior to the Supreme Court” precisely to deny the President the power enjoyed by the king in England to establish ad hoc tribunals for the trial of crimes against the crown, a power they feared would be abused. The tests the Supreme Court has articulated to determine the validity of departures from the usual requirements of Article III and the Due Process Clause confirm that such departures must be authorized by Congress. Finally, although the Supreme Court in Ex parte Quirin, 317 U.S. 1 (1942), and Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004), said it was not deciding whether the President could establish such tribunals without congressional authorization, the Court’s analysis in both cases revealed significant misgivings about the President’s claim to such a power. Finally, the Respondents have failed to identify historical

uses of military commissions to try violations of the laws of war outside the theater of war and without congressional authorization.

Nor do the statutes cited by the President supply the requisite authority. The AUMF authorizes the use of military force against those responsible for the events of September 11 and those who harbor them. While the Court in Hamdi held that this authorization encompassed the detention of enemy combatants during the pendency of the military campaign, the Court did not hold that it also encompassed the trial and punishment of enemy combatants. To the contrary, the Court stressed that the purpose of such detention was not to punish such combatants, but merely to prevent them from rejoining the battle.

The required congressional authorization is not supplied by 10 U.S.C. § 821. Although the Supreme Court in Quirin interpreted this provision as authority for the trial by military commission of alleged Nazi saboteurs during World War II, Quirin does not control this case for three reasons. First, Quirin construed this provision as authority for the establishment of military commissions at a time of declared war; its construction of the statute should not be extended beyond that context. Second, section 821 at best authorizes the use of military commissions to the extent consistent with the laws of war. Developments in the laws of war since Quirin was decided make it clear that military commissions of the sort established pursuant to the Military Order may not be used today to try enemy combatants in the circumstances contemplated by the Order and implementing regulations. Third, just as the Court in Hamdi held that the broad authorization of military force in the AUMF authorized the detention only of enemy combatants involved in the conventional military campaign in Afghanistan for the duration of that particular conflict, if section 821 authorizes the establishment of military commissions for the trial of enemy combatants, it authorizes such trials only for alleged violations of the laws of war

committed in connection with the military campaign under way in Afghanistan. At a minimum, the Military Order is invalid to the extent it is used — as it has been in Mr. Hamdan’s case — to try crimes not closely related to the armed conflict in Afghanistan.

## ARGUMENT

### I. THE PRESIDENT LACKS THE POWER TO ESTABLISH MILITARY COMMISSIONS OUTSIDE THE THEATER OF WAR OR OCCUPIED TERRITORY WITHOUT CONGRESSIONAL AUTHORIZATION

“The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny.” The Federalist No. 47 (James Madison). The President’s Military Order and the regulations that implement it seek to combine the powers of the Executive with that of the Judiciary. It seeks to unite in the Executive the powers of the grand jury, prosecutor, defense lawyer, judge, jury, appeals panel, sentencing authority, and, in some cases, executioner.<sup>5</sup> The Order and implementing regulations call for the establishment of military commissions and review panels to assist the President in carrying out these functions, but the members of these bodies are subordinates of the President and others in the chain of command. See 32 C.F.R. §§ 9.4(a)(3), 9.6(h)(4). Although the regulations include provisions that seek to give these subordinates a degree of independence, *id.* §§ 9.6(e)(9), (e)(12); *id.* § 15.3(a)(8), and provide for streamlined trial-like procedures, *id.* §§ 9.5, § 9.6(b)-(g), they also make it clear that these provisions may be amended by the Secretary of Defense, *id.* § 9.11, and do not create any rights enforceable by the accused against the United States. *Id.* § 9.10. The

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<sup>5</sup> The Order also seeks to grant the Executive legislative power insofar as it confers unguided discretion to determine the appropriate sentence. 32 C.F.R. § 9.6(g).

Order purports to preclude the involvement of an Article III court at any stage. Military Order § 7(b)(2).

Whether this scheme would satisfy the Constitution's guarantee that no one shall be deprived of life, liberty, or property without due process of law is a serious question that will not be taken up here.<sup>6</sup> What is certain is that this accumulation of Executive and Judicial powers may be accomplished outside the theater of war only with the authorization of the Legislative Branch. Without Congress' authorization, the President's Order would be an arrogation of the powers of all three branches, amounting to what the Founders regarded as the very definition of tyranny.

In his famous concurring opinion in Youngstown, Justice Jackson articulated the tripartite test that the Court continues to employ to assess the validity of Presidential action that intrudes upon the legislative sphere. See Dames & Moore v. Regan, 453 U.S. 654, 668-69 (1981) (applying approach of Jackson's concurrence in Youngstown). The President's power is at its apex when he acts pursuant to congressional delegation. Youngstown, 343 U.S. at 636-37. Presidential action taken in the face of congressional silence exists in a sort of twilight zone, where "any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." Id. at 637. The President's power is at its weakest when he acts in contravention of Congress. In such

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<sup>6</sup> Although the Supreme Court in Ex parte Quirin upheld a Presidential Order authorizing the use of a military commission to try violations of the laws of war (save for the order's exclusion of federal habeas review), due process doctrine has developed significantly since Quirin was decided. Moreover, differences between the Quirin case and this one may well significantly influence the due process calculation. See generally Hamdi v. Rumsfeld, 124 S. Ct. 2633 (2004) (applying balancing test of Mathews v. Eldridge, 424 U.S. 319 (1976), to determine what due process requires in the context of detention of enemy combatants).

circumstances, “he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.” Id. at 637-38.

The President’s Military Order falls in the third of the Youngstown categories and may not be sustained under the test applicable to presidential conduct in that category. Congress has not been silent with respect to military commissions. As the Supreme Court noted in Ex Parte Quirin, 317 U.S. 1 (1942), Congress authorized their use to try cases of spying, 10 U.S.C. § 906 (cited in Quirin as Article of War 82), and aiding the enemy. 10 U.S.C. § 904 (cited in Quirin as Article of War 81). In addition, according to the Supreme Court, Congress in Article of War 15 (now 10 U.S.C. § 821) authorized their use to try offenders or offenses that by the laws of war may be tried by military commissions. Quirin, 317 U.S. at 35, 46. Respondents do not contend that the first two statutes authorize the military commissions created pursuant to the Military Order, and we explain below why the third does not authorize them.<sup>7</sup> If we are wrong with respect to section 821, then it is unnecessary to consider whether the President has independent authority to create them under Article II. We therefore assume, for purposes of our analysis in this section, that Congress has authorized the use of military commissions in certain circumstances but not those contemplated by the Military Order. The Military Order thus falls into the third of Justice Jackson’s categories. The President is relying on his Article II powers because he seeks to exceed the limits that Congress has placed on the use of such commissions.

Also placing the Military Order in the third Youngstown category is the fact that Congress has provided the President with another mechanism for addressing the problem at

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<sup>7</sup> Specifically, we argue in Part II(B) that section 821 authorizes military commissions only in declared wars and only in accordance with the laws of war, whereas the Military Order seeks to employ such commissions without a declaration of war and in a manner not consistent with the laws of war.

hand: it has authorized the use of general courts-martial to try enemy combatants for violations of the laws of war. 10 U.S.C. § 818.<sup>8</sup> As the noted authority on military law William Winthrop wrote before the jurisdiction of courts-martial was extended to such cases,

The occasion for the military commission arises principally from the fact that the jurisdiction of the court-martial proper, in our law, is restricted by statute almost exclusively to members of the military force and to certain specific offenses defined in a written code. It does not extend to many criminal acts, especially of civilians, peculiar to time of war; and for the trial of these a different tribunal is required.

William Winthrop, Military Law and Precedents 1296 (2d ed. 1920) (emphasis in original). The extension of the jurisdiction of courts-martial means that this “different tribunal” is no longer required. Indeed, the availability to President Bush of another mechanism authorized by Congress to address the problem at hand places this case on all fours with Youngstown. The President’s decision to forego courts-martial in favor of military commissions calls to mind President Truman’s decision to forego the tools Congress had placed at his disposal to address the problem facing him (labor injunctions under the Taft-Hartley Act) in favor of his own preferred solution to the problem. “In choosing a different and inconsistent way of his own, the President cannot claim that [his Order] is necessitated or invited by failure of Congress to legislate upon the [matter].” Youngstown, 343 U.S. at 639.

Presidential action falling in the third Youngstown category may be upheld “only by disabling the Congress from acting upon the subject. Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium

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<sup>8</sup> See generally Major Jan E. Aldykiewicz & Major Geoffrey S. Corn, Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts, 167 Mil. L. Rev. 74 (2001). As discussed in section II(B)(2), courts-martial differ from the military commissions established pursuant to the Military Order in numerous respects, and as a consequence the former tribunals are consistent with the laws of war (and hence authorized by statute) while the latter tribunals are not.

established by our constitutional system.” Youngstown, 343 U.S. at 637-38. The Constitution gives Congress “all legislative Powers” granted by the Constitution, U.S. Const. art. I, § 1, including the power “to declare War,” “to define and punish . . . Offenses against Law of Nations,” “to make Rules for the . . . Regulation of the land and naval Forces,” “to establish Tribunals inferior to the Supreme Court,” and to make all laws “necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof[.]” id. § 8, cl. 9-11, 14, 18, including the President’s power as Commander in Chief. Against this array of powers, the President rests on his designation as “Commander in Chief of the Army and Navy.” U.S. Const. art. II, § 2, cl. 1. But, as Justice Jackson stressed in Youngstown, “the Constitution did not contemplate that [this] title . . . will constitute him also Commander-in-Chief of the country . . .” 343 U.S. at 643-44. While the President can insist on freedom from congressional interference in the conduct of a military campaign — which may include the power to use military commissions for certain purposes within the theater of war — he may set up military tribunals outside the theater of war, except in the direst of emergencies, only with the sanction of Congress. Ex parte Milligan, 71 U.S. 2, 139-40 (1866) (Chase, C.J., concurring).

Even if the Military Order were placed in the second of the Youngstown categories, the President would lack the power to create such tribunals unilaterally. The “imperatives of events,” Youngstown, 343 U.S. at 637, do not justify the Order, since Congress has given the President other effective means to address the problem at hand. If necessity is the test, the military commissions established to try Guantánamo detainees fail for additional reasons. Historically, military commissions employing summary procedures not acceptable elsewhere were tolerated on the field of battle, where better procedures were obviously impracticable, but

not elsewhere. See Winthrop, supra, at 1304-07 (military commissions may be used to try enemy combatants for violating the laws of war only if offense committed in theater of war and the commission operates there); id. at 1305 (“These rules . . . have their origin in the fact that war, being an exceptional status, can authorize the exercise of military jurisdiction only within the limits — as to place, time, and subjects — of its actual existence and operation”). Where an enemy combatant (lawful or unlawful) has been removed from the theater of war and is being detained far from any battlefield, and may be held there for the duration of the armed conflict, See Hamdi, 124 S. Ct. at 2640, the necessity that historically justified the exercise of summary battlefield justice is wholly lacking.

“[A]bstract theories of law,” Youngstown, 343 U.S. at 637, are equally unavailing. The Constitution addresses the federal judiciary primarily in Article III, which provides that federal judges shall serve during good behavior and shall receive salaries that shall not be diminished during their continuance in office. U.S. Const. art. III, § 1. These guarantees of judicial independence “serve[] as ‘an inseparable element of the constitutional system of checks and balances,’” and thus “safeguard[] the role of the Judicial Branch in our tripartite system.” Commodity Futures Trading Com. v. Schor, 478 U.S. 833, 850 (1986) (quoting N. Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 58 (1982) (plurality opinion)). It is clear that the members of the military commissions and review panels contemplated by the Military Order and implementing regulations lack the tenure and salary protections of Article III.

The Supreme Court has held that non-Article III tribunals may validly be employed under certain circumstances and subject to certain constraints. See generally Schor, 478 U.S. at 852-

57; N. Pipeline, 458 U.S. at 66, 85 (plurality opinion).<sup>9</sup> It is clear, however, that non-Article III federal tribunals may be employed only if established or authorized by Congress.<sup>10</sup> To assess the constitutionality of non-Article III federal tribunals, the Supreme Court has articulated a balancing test. On one side of the balance, the courts must consider “the extent to which the ‘essential attributes of the judicial power’ are reserved to Article III courts.” Schor, 478 U.S. at 851. On the other side of the scale, the courts must consider “the concerns that drove Congress to depart from the requirements of Article III.” Id. (emphasis added). The test the Court has adopted thus confirms that the decision to depart from Article III in establishing federal adjudicatory tribunals must be made by Congress, not by the President acting alone.

The requirement of congressional authorization of the use of non-Article III tribunals is memorialized in Article I’s allocation to Congress of the power “to constitute Tribunals inferior to the Supreme Court.” This provision was included in the Constitution specifically to deny the Executive the power enjoyed by the king in England to establish ad hoc tribunals for the trial, in particular, of crimes against the crown, a power that was “very much abused; as in the

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<sup>9</sup> Whether the military commissions set up pursuant to the Military Order would satisfy the Court’s test for upholding non-Article III adjudicatory tribunals if they had been established by Congress is another serious question not taken up here. We note, however, that criminal prosecution is among the areas in which the need for an Article III tribunal is strongest. Cf. N. Pipeline, 458 U.S. at 70 n. 24 (criminal prosecutions are not “public rights” cases even though the government is a party). The Court has also indicated that the availability of review in an Article III court is among the important factors to be considered in evaluating the constitutionality of non-Article III adjudication. See Schor, 478 U.S. at 851. The President’s Order purports to preclude all such review. Military Order § 7(b)(1).

<sup>10</sup> See Ex parte Milligan, 71 U.S. at 121 (“Every trial involves the exercise of judicial power; and from what source did the military commission . . . derive their authority? . . . They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws.”); Dynes v. Hoover, 61 U.S. 65, 79 (1857) (“Congress has the power to provide for the trial punishment of military and naval offenses” in non-Article III courts) (quoted in N. Pipeline, 458 U.S. at 66) (emphasis added).

establishment of the famous courts of high-commission, and of the star-chamber; two of the most infamous engines of oppression and tyranny, that ever were erected in any country. . . . Wisely, then, did the constitution of the United States deny to the executive magistrate a power so truly formidable . . . .” 1 Blackstone’s Commentaries 267-68 (Tucker ed. 1803). Consistent with this allocation of powers, the Supreme Court has never upheld the use of non-Article III federal tribunals outside a theater of war or occupied territory where it has not been authorized by Congress.

That the Military Order impinges upon numerous constitutional rights of criminal defendants is another reason for concluding that such tribunals may be established, if at all, only by Congress.<sup>11</sup> Prominent among the constitutional rights implicated by the Military Order is the right not to be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V. In considering whether this provision was violated in adjudication before courts-martial, whose judges, like the members of military commissions, do not serve for a fixed term, the Court in Weiss v. United States observed that “a fixed term of office is a traditional component of the Anglo-American civilian judicial system.” 510 U.S. 163, 178 (1994). While observing that fixed terms have never been a part of the military justice tradition, id., the Court rejected the proposition that “any practice in military courts which might have been accepted at some time in history automatically satisfies due process of law today.” Id. at 179. The Court concluded that the Due Process question turned on whether “Congress ha[d] achieved an

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<sup>11</sup> The constitutional provisions discussed below are not by their terms limited to criminal trials taking place on United States territory or involving United States citizens. To the contrary, Article III expressly applies where the crime took place “outside any State,” the Fifth Amendment applies to any “person,” and the Sixth Amendment to “the accused.” That at least some of these provisions apply to persons detained in Guantánamo is made clear in Rasul v. Bush, 124 S. Ct. 2686, 2698 n. 15 (2004) (citing United States v. Verdugo-Urquidez, 494 U.S. 259, 277-78 (1990) (Kennedy, J., concurring)).

acceptable balance between independence and accountability” of the military judges. *Id.* at 180 (emphasis added); see also *id.* at 177 (stressing the need to give “deference to the determination of Congress, made under its authority to regulate the land and naval forces”).<sup>12</sup> Thus, like the test for assessing the constitutionality of non-Article III tribunals, the test for assessing the compliance of military tribunals with Due Process requires a determination by Congress that departures from the normal protections of the Due Process Clause are justified.

Other constitutional rights on which the military commissions impinge include the right to trial by jury in criminal cases guaranteed by Article III and the Sixth Amendment, and the right to presentment or indictment by grand jury recognized in the Fifth Amendment. In *Ex parte Milligan*, a majority of the Court famously held that Congress lacked the power to suspend these rights for persons not in the U.S. armed forces even in time of war if the civil courts were open and operating. 71 U.S. 2, 121-22 (1867). More important for the separation of powers question, however, is the position taken by the concurring Justices in *Milligan*. These Justices would have recognized the government’s power to dispense with the jury-trial right of Article III and the Sixth Amendment and the grand jury right of the Fifth Amendment even when the civil

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<sup>12</sup> The Court concluded that the lack of fixed terms for court-martial judges did not violate due process, relying on a number of factors that are not present in the case of military commissions trying enemy combatants. First, the Court stressed Congress’ particularly strong powers with respect to “the rights of servicemembers.” *Weiss*, 510 U.S. at 177. Second, it relied on the existence of statutory provisions “insulating military judges from the effects of command influence.” *Id.* at 179. There are no similar statutory provisions applicable to military commissions. Although some such provisions may be found in the regulations implementing the Military Order, these provisions provide weaker protection, are subject to amendment by the Secretary of Defense, 32 C.F.R. § 9.11, and in any event do not provide any rights to the accused. See *id.* § 9.10. Finally, the Court relied on the availability of review in the Court of Military Appeals (now the Court of Appeals for the Armed Forces), whose judges are civilians who sit for 15-year terms. *Weiss*, 510 U.S. at 181; see 10 U.S.C. § 941 (describing composition of Court of Appeals for the Armed Services and tenure of its judges). The decisions of the military commissions are reviewed by other commissioned officers who do not serve for fixed terms and then by purely political officials (the Secretary of Defense and the President).

courts remained open, see 71 U.S. at 137-38 (Chase, C.J., concurring), yet they insisted that only Congress could suspend these rights:

The power to make the necessary laws is in Congress; the power to execute in the President . . . . [T]he President [may not], in war more than in peace, intrude upon the proper authority of Congress, nor Congress upon the proper authority of the President . . . . Congress cannot direct the conduct of [military] campaigns, nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offenses, either of soldiers or civilians, unless in cases of a controlling necessity . . . .

Id. at 139-140 (emphasis added).

The decision on which Respondents place the greatest reliance, Ex parte Quirin, does not reach the question whether the President may establish military commissions to try enemy combatants for war crimes without the authorization of Congress. 317 U.S. at 28-29. The Court’s analysis, however, reveals the Justices’ misgivings on that score. The Court avoided the constitutional question by interpreting Article 15 of the Articles of War (now 10 U.S.C. § 821) as affirmative congressional authorization for the establishment of such commissions. As many have observed, that Article is written merely as a preservation of jurisdiction having its source elsewhere.<sup>13</sup> By its terms, Article 15 just clarified that the conferral of jurisdiction on courts-martial to try those “who by the law of war [are] subject to trial by a military tribunal,” 10 U.S.C. § 818, “do[es] not deprive military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions . . . .” 10 U.S.C. § 821. The Court’s interpretation of that Article as affirmative

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<sup>13</sup> See, e.g., Jack Goldsmith & Cass R. Sunstein, Military Tribunals and Legal Culture: What a Difference Sixty Years Makes, 19 Const. Comm. 261, 274-275 (2002); Neal K. Katyal & Laurence H. Tribe, Waging War, Deciding Guilt: Trying the Military Tribunals, 111 Yale L. J. 1259, 1283 (2002) ; Derek Jinks, The Declining Significance of POW Status, 45 Harv. Int’l L. J. 367, 435 (2004); Timothy C. MacDonnell, Military Commissions and Courts Martial: A Brief Discussion of the Constitutional and Jurisdictional Differences between the Two Courts, 2002 (Mar.) Army Law. 19, 21.

authorization of military commissions for the trial of war crimes was thus clearly a stretch — a stretch that evinces the Court’s clear disinclination to hold that the President has the power to establish such commissions without congressional authorization.

Similar misgivings are evident in the Court’s recent decision in Hamdi v. Rumsfeld. The President had argued that his Commander-in-Chief powers encompassed the power to detain enemy combatants during the pendency of an armed conflict. Although the plurality said it was not reaching the question of inherent presidential power in the absence of congressional authorization, its narrow interpretation of the scope of the President’s power *with* congressional authorization belies any notion of broad inherent presidential power. The plurality said that it did not have to decide whether the President had the power to detain under Article II because, in its view, Congress had authorized such detentions in the AUMF. But the plurality declined to go further than to hold that the AUMF authorized detentions of a “narrow category” of persons involved in a particular way in a narrowly defined conflict, for the duration of that particular conflict. Hamdi, 124 S. Ct. at 2639-40, 2641. “[I]ndividuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States’” may be detained if “United States troops are still involved in active combat in Afghanistan.” Id. at 2642. The plurality’s analysis of other issues in the case suggests that there is less to its reservation of the Article II question than meets the eye. In discussing “the question of what process is constitutionally due to a citizen who disputes his enemy-combatant status,” id. at 2643, and in particular whether the evidence submitted by the Executive Branch made further hearing or fact-finding unnecessary, the plurality relied on the limited nature of the detentions authorized by the AUMF:

Under the definition of enemy combatant that we accept today as falling within the scope of Congress’ authorization, Hamdi would need to be “part of or

supporting forces hostile to the United States or coalition partners” and “engaged in an armed conflict against the United States” to justify his detention in the United States for the duration of the relevant conflict.

Id. at 2645. Further fact finding was necessary, according to the plurality, because Hamdi had not conceded the crucial facts. The plurality’s resolution of this issue by relying on the limited nature of the detention authorized by Congress is in tension, to say the least, with the possibility that the President has independent authority to detain enemy combatants without authorization by Congress. If the Constitution does not give the President independent power to take the more modest step of detaining enemy combatants during the pendency of a military campaign, then a fortiori it does not give him the power to set up tribunals to try such combatants for violations of the laws of war. See, e.g., Hamdi, 124 S. Ct. at 2682 (Thomas, J., dissenting) (distinguishing Milligan and other cases on the ground that they involved criminal punishment as opposed to mere detention).

Respondents and their amici place great stress on historical uses of military commissions. As amici recognize, however, many of those uses were “with . . . explicit congressional approval.” Brief of Washington Legal Foundation at 12-13. Others were uses of military commissions “on . . . the battlefield.” Id. at 13. Indeed, military commissions originated as boards of advisers to military commanders administering justice on the battlefield or in occupied territory at a time when the conduct of such commanders was largely unregulated. See Harold Hongju Koh, The Case Against Military Commissions, 96 Am. J. Int’l L. 337, 339 (2002) (military commissions traditionally consisted of “an advisory board of officers, convened for the purpose of informing the conscience of the commanding officer, in cases where he might act for himself if he chose”). Additionally, many of the historical examples pre-dated Congress’ decision to authorize the use of military commissions under some circumstances and not others,

and to authorize the use of courts-martial to try enemy combatants for violation of the laws of war. Respondents and their amici have not identified uses of military commissions without congressional approval, off the battlefield, after the extension of court-martial jurisdiction to violations of the laws of war.<sup>14</sup> In any event, the historical examples cited by Respondents and amici were considered by the Court in Ex parte Quirin, and the Court was unwilling to go further than to approve the use of military commissions as authorized by Congress, straining to interpret Article 15 as authorization. This court should be equally unwilling to approve the use of military commissions outside the theater of war or occupied territory where Congress has not authorized their use but has authorized the use of a different tribunal.

## **II. THE MILITARY COMMISSIONS HAVE NOT BEEN AUTHORIZED BY CONGRESS**

In addition to his Commander-in-Chief powers, the President cited several statutes as the legal basis for the Military Order. Respondents rely on two such statutes: the AUMF and 10 U.S.C. § 821, the present-day version of Article 15 of the Articles of War.<sup>15</sup> Neither statute

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<sup>14</sup> Winthrop gives only one example of a military commission operating outside the theater of war. See Winthrop, supra, at 1305 (describing case of T.E. Hogg and his six associates).

<sup>15</sup> The third statute cited by the President as authority for the Military Order is 10 U.S.C. § 836, which authorizes the President to prescribe rules of “[p]retrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals,” and requires that the rules “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 courts, but . . . may not be contrary to or inconsistent with this chapter.” Presumably, the President relied on this provision as authority for the Order’s substantial departures from the principles of law and rules of evidence generally recognized in the trial of criminal cases in the United States district courts. See Military Order § 1(f) (“Given the danger to the safety of the United States and the nature of international terrorism, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district

authorizes the establishment of the military commissions contemplated by the Military Order.

**A. The AUMF**

The AUMF, passed by Congress in the immediate aftermath of the attacks of September 11, 2001, authorized the President to use all necessary and appropriate force against the nations, organizations or persons that were responsible for the September 11 attacks or harbored such persons or organizations, in order to prevent any future acts of international terrorism against the United States. The Supreme Court in Hamdi held that this congressional resolution authorized the detention of a narrow category of persons for a limited period of time. It based this holding on the proposition that the detention of enemy combatants for the duration of the particular conflict in which they were captured “is so fundamental and accepted an incident of war as to be an exercise of the ‘necessary and appropriate force’ Congress has authorized the President to use.” Hamdi, 124 S. Ct. at 2640. In the course of its discussion, the plurality wrote that “[t]he capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by ‘universal agreement and practice,’ are ‘important incident[s] of war.’” Id. (citing Quirin, 317 U.S. at 28). Respondents claim that the plurality there “made clear that the AUMF authorizes the President to exercise ‘against individuals Congress sought to target in passing the AUMF’ his traditional war powers, including ‘the capture, detention and trial of [unlawful] combatants.’” Government Brief at 44 (quoting Hamdi, 124 S. Ct. at 2640). The plurality’s dicta concerning the “trial” of “unlawful combatants,” cannot bear the weight Respondents place on it.

The plurality in Hamdi did not conclude that the detention of enemy combatants was authorized by the AUMF solely because it was an “important incident of war.” The plurality

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courts.”). Section 836 does not authorize the President to establish military commissions for any particular type of case or for any particular purpose.

went on to examine the purpose of such detentions, emphasizing that their purpose was not to punish the detainee, see, e.g., Hamdi, 124 S. Ct. at 2640 (“[C]aptivity in war is ‘neither revenge, nor punishment, but solely protective custody, the only purpose of which is to prevent the prisoners of war from further participation in the war.’”) (quoting Yasmin Naqvi, Doubtful Prisoner of War Status, 84 Int’l Rev. Red Cross 571, 572 (2002)), but to “prevent captured individuals from returning to the field of battle and taking up arms once again.” Hamdi, 124 S. Ct. at 2640. The plurality’s analysis establishes that the detention of enemy combatants is essential to the successful use of military force in a way that the trial and punishment of unlawful combatants is not. Killing such combatants when they can be captured is contrary to the laws of war, and releasing them would harm the military effort. Because detention is the only option, the Court was thus justified in concluding that “detention to prevent a combatant’s return to the battlefield is a fundamental incident of waging war.” Hamdi, 124 S. Ct. at 2641 (emphasis added). The same cannot be said of the trial and punishment of enemy combatants for violations of the laws of war, which can be and usually is done after the cessation of hostilities.<sup>16</sup> Given the pains the Court took in Hamdi to distinguish detention from punishment, its decision cannot be read to support the conclusion that the AUMF authorizes the establishment of special military commissions to punish unlawful combatants. To the contrary, the Court emphasized that the detentions themselves were justified solely as a means to disable the combatant from continuing to fight, not for other purposes that might advance the military effort, such as the extraction of intelligence. Hamdi, 124 S. Ct. at 2640, 2651.

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<sup>16</sup> During drafting of Article 85 of Third Geneva Convention, several delegations noted that trying prisoners of war accused of war crimes while hostilities were still in progress would be inappropriate and even unjust. ICRC, The Geneva Conventions of 12 August 1949 Commentary 416 (Jean S. Pictet, ed.1958).

That the AUMF does not suffice to authorize the establishment of military commissions to try suspected war criminals follows as well from the reasons for concluding that congressional authorization is required. As noted above, the test for assessing the constitutionality of using non-Article III federal adjudicatory tribunals requires the balancing of the extent to which the tribunals impinge upon Article III values against the concerns that drove Congress to depart from the requirements of Article III. Fundamental to this test is the requirement that the decision to depart from Article III must come from Congress, not the President. The AUMF does not explain the concerns that drove Congress to depart from the requirements of Article III because Congress made no decision to depart from Article III. Similarly, the Court in Weiss held that courts addressing a due-process challenge to military procedures must defer to Congress' balancing of the relevant considerations. The AUMF does not reflect Congress' careful assessment of the need for substandard adjudicatory procedures because Congress made no determination that substandard procedures were necessary.

Finally, and conclusively, the insufficiency of the AUMF to authorize the creation of military commissions to try violations of the laws of war is demonstrated by the sole decision cited by the plurality in Hamdi to support the proposition that the trial of unlawful combatants is an "important incident of war" — Ex parte Quirin. The military commission at issue in that case was established during a declared war, yet the Court was not content to rely on the declaration of war as the source of the President's authority to establish the commissions. The Court instead relied on a statute that specifically referred to military commissions, Article 15 of the Articles of War. Quirin, 317 U.S. at 35. The Court interpreted this Article as an explicit congressional statement that military commissions may exercise jurisdiction over offenders against the laws of war in appropriate cases. Id at 28. Far from supporting Respondents' claim that the AUMF

suffices to authorize the military commissions, Quirin establishes that, at a minimum, it takes a statute that expressly refers to military commissions to authorize the President to establish such commissions.

**B. 10 U.S.C. § 821**

The provision of the Articles of War that the Court in Quirin read as explicit authority for the creation of military commissions for the trial of enemy combatants for violations of the laws of war remains on the books today. Nevertheless, Quirin's reading of this statute does not control this case.

**1. Quirin's Interpretation of Section 821 Should Not Be Extended Beyond Declared Wars**

In Quirin, the Court approved the establishment of a military commission pursuant to section 821 in the context of a declared war, a fact on which the Court relied in reaching its decision. See Quirin, 317 U.S. at 26. While authorizations short of declarations of war may suffice to validate the use of military force,<sup>17</sup> statutes that confer power in times of “war” have sometimes been construed to apply only in the context of a declared war. For example, Article 2(10) of the Uniform Code of Military Justice, which gives courts-martial jurisdiction over persons accompanying the armed forces in the field “in time of war,” has been construed to apply only during formally declared wars, thus excluding the Vietnam conflict. United States v. Avarete, 41 C.M.R. 363, 365 (1970); see Zamora v. Woodson, 42 C.M.R. 5 (1970); Robb v. United States, 456 F.2d 768 (Ct. Cl. 1972); see also Opinions of the Office of Legal Counsel Relating to the Iranian Hostage Crisis, 4A Op. Off. Legal Counsel 71, 91-92 (1984) (opinion of

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<sup>17</sup> Curtis A. Bradley & Jack L. Goldsmith, The Constitutional Validity of Military Commissions, 5 Green Bag 2d 249, 254 (2002); but see J. Gregory Sidak, To Declare War, 41 Duke L. J. 27, 32-33 (1991) (arguing that a formal declaration of war is necessary for the President to begin a war for the purposes of the War Clause of the Constitution).

Theodore Olson) (Trading With the Enemy Act, which confers certain presidential powers “in time of war,” confers such powers only in declared wars); Campbell v. Clinton, 203 F.3d 19, 29-30 (D.C. Cir. 2000) (Randolph, J., concurring) (identifying several “profound consequences” of congressional declarations of war as distinguished from authorizations for the use of military force); William H. Rehnquist, All the Laws But One: Civil Liberties in Wartime 218-19 (1998) (“Without question the government's authority to engage in conduct that infringes civil liberty is greatest in time of declared war . . .”). There is evidence that Members of Congress carefully chose the language of the AUMF to avoid triggering all Presidential “incidents” of war, especially those involving the curtailment of civil liberties.<sup>18</sup> The Supreme Court has never upheld a military commission to try violations of the laws of war under section 821 or its predecessor outside the context of a declared war. To the contrary, the Court in In re Yamashita interpreted the statute to authorize the military to “administer the system of military justice recognized by the law of war . . . so long as a state of war exists — from its declaration until peace is proclaimed.” 327 U.S. at 11-12 (emphasis added); see also id. at 12 (authorization does not terminate “before the formal state of war has ended”).

Because Quirin was “not [the Supreme] Court’s finest hour,” Hamdi, 124 S. Ct. at 2669 (Scalia, J., dissenting), its holding does not warrant extension to contexts not before the Court.

Indeed, Quirin is a good illustration of some of the dangers of military commissions. Historical

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<sup>18</sup> “By not declaring war, the resolution preserves our precious civil liberties. This is important because declarations of war trigger broad statutes that not only criminalize interference with troops and recruitment but also authorize the President to apprehend ‘alien enemies.’” 147 Cong. Rec. H5638, H5680 (daily ed. Sept. 14, 2001) (statement of Rep. Conyers); see also id. at H5653 (statement of Rep. Barr) (arguing that “[w]e need a declaration of war” from Congress to “[g]ive the President the tools, the absolute flexibility he needs”); id. at H5673 (“I would have strong reservations about a resolution authorizing the use of force in an open ended manner reaching far beyond responding to this specific terrorist attack on America. This is not that resolution.”) (statement of Rep. Wu).

research has shown that the Executive Branch wanted the secrecy provided by a military commission not for legitimate reasons of national security, but to cover up the FBI's bungling of the investigation and to permit J. Edgar Hoover to take undeserved credit for the capture of the saboteurs. The saboteurs' mission would not have been stymied as soon as it was had not two of them decided to turn themselves in and provided the FBI the information necessary to apprehend the others. Instead of the leniency they were promised, they were subjected to a nonpublic trial before a military commission whose procedures permitted the concealment of their voluntary surrender and cooperation, and all were sentenced to death.<sup>19</sup> The case was further marred by improper ex parte communications between the Executive and the Court,<sup>20</sup> President Roosevelt's threat to disregard an adverse decision,<sup>21</sup> and Justice Frankfurter's appeal to his colleagues to overlook legal niceties and rule in the government's favor out of patriotism.<sup>22</sup> Even the Justices who concurred in the decision eventually came to regret it.<sup>23</sup> Should the occasion arise, the

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<sup>19</sup> The sordid story is told in detail in Louis Fisher, Nazi Saboteurs on Trial 1-42 (2003); David J. Danelski, The Saboteurs' Case, 1 J. Sup. Ct. Hist. 61 (1996); Jonathan Turley, Tribunals and Tribulations: The Antithetical Elements of Military Governance in a Madisonian Democracy, 70 Geo. Wash. L. Rev. 649, 735-43 (2002).

<sup>20</sup> See Turley, supra, at 737; Danelski, supra, at 66.

<sup>21</sup> Turley, supra, at 738; Danelski, supra, at 68.

<sup>22</sup> Frankfurter made such an appeal in his infamous "Soliloquy," reproduced in Michael Belknap, Frankfurter and the Nazi Saboteurs, in Supreme Court Historical Society Yearbook 69-70 (1982). See Turley, supra, at 740.

<sup>23</sup> Justice Frankfurter later said that the decision "was not a happy precedent[,] and Justice Stone described the process of writing the opinion as a "mortification of the flesh." Danelski, supra, at 80; Alpheus Thomas Mason, Harlan Fiske Stone: Pillar of the Law 659 (1956). Justice Douglas later regretted the deferred opinion, stating that "it is extremely undesirable to announce a decision on the merits without an opinion accompanying it. Because once the search for the grounds, the examination of the grounds that had been advanced is made, sometimes those grounds crumble." Conversation between Justice Douglas and Professor Walter F. Murphy, June

Supreme Court would be justified in treating the decision as anti-precedent, much as we treat other disgraceful decisions in our history. See Hamdi, 124 S. Ct. at 2649-50 (plurality opinion) (relying on dissenting opinion in Korematsu). For the present, it suffices to note that its holding does not reach this case.

**2. The Laws of War No Longer Permit the Use of Military Commissions of the Sort Contemplated by the Military Order to Adjudicate Violations of the Laws of War**

Even if section 821 were treated as affirmative authorization of military commissions outside the context of a declared war, it would not authorize the military commissions established pursuant to the Military Order. The statute contemplates the use of military commissions “with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions . . . .” 10 U.S.C. § 821. Thus, unless expressly permitted by other statutes, section 821 contemplates the use of such commissions only to the extent permitted by the laws of war. The laws of war have developed significantly since Quirin was decided, and, as they stand today, do not permit the trial of the sorts of offenders or offenses encompassed by the Military Order before the sorts of military commissions established pursuant to the Military Order.

The principal development in the laws of war since Quirin has been the entry into force of the four Geneva Conventions, which include numerous provisions that regulate the judicial procedures to which various categories of combatants and detainees may be subjected in various contexts. Of particular relevance are the Third Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter “Geneva III”], and

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6, 1962, Seeley G. Mudd Manuscript Library, Princeton University, cited in Louis Fisher, Presidential War Power 207 (2004).

the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter “Geneva IV”].<sup>24</sup> Most of the protections of these conventions apply in the context of an international armed conflict. The United States has acknowledged that the military operation in Afghanistan constitutes an international armed conflict and that the Geneva Conventions apply because both the United States and Afghanistan are parties to it. See Press Secretary Ari Fleischer, Statement by the Press Secretary on the Geneva Conventions (May 7, 2003) (acknowledging that the Geneva Conventions apply to Taliban detainees captured in Afghanistan).

**a. Protections Applicable to Prisoners of War**

Under Geneva III, POWs enjoy immunity from prosecution for acts that would be violations of domestic law in peacetime, but may be performed by lawful combatants in a war, such as the killing of enemy combatants. POWs may be prosecuted for violations of the laws of war committed before their capture, but they enjoy certain procedural rights in such prosecutions. Most relevant for present purposes is Article 102, which provides that “[a] prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power.” Geneva III, art. 102. The military commissions created pursuant to the Military Order may not be used to try POWs for war crimes because these are not the tribunals that try members of the U.S. armed forces for war crimes, nor do they employ the same procedures as the courts that try members of the U.S. armed forces. See MacDonnell, *supra* note 14, at 31. Members of the U.S. armed forces are tried criminally in courts-martial, as the recent

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<sup>24</sup> It is unnecessary to consider whether these conventions are self-executing. To the extent they require execution, section 821 provides such execution by incorporating the laws of war as a limit to the potential jurisdiction of military commissions.

prosecutions of the soldiers implicated in the prisoner abuse at Abu Ghraib shows.<sup>25</sup> Geneva III permits the trial of POWs only in such courts.

In addition to requiring that POWs be tried only in the same tribunals and according to the same procedures as members of the U.S. armed forces, Geneva III entitles POWs to certain specific procedural rights. For example, Geneva III specifically entitles POWs to the same right to appeal that members of the U.S. armed forces enjoy. Geneva III, art. 106. Under the UCMJ, members of the U.S. armed forces may appeal a conviction by court-martial to the Court of Criminal Appeals, consisting of not less than three commissioned officers or civilians, and thereafter to the Court of Appeals for the Armed Forces, composed of five civilian judges, each of whom serves for a 15-year term. 10 U.S.C. § 866(a); 10 U.S.C. § 867; 10 U.S.C. § 942(a), (b)(2). Thereafter, members of the U.S. armed forces may petition the U.S. Supreme Court for certiorari. 10 U.S.C. § 867a. The decisions of the military commissions, by contrast, are reviewed by a panel consisting of three commissioned officers removable by the President, and are reviewed thereafter only by the Secretary of Defense and then by the President, who (unlike the courts that review the judgments of courts-martial) is empowered to increase the sentence.

President Bush has issued an order to the effect that “the Taliban detainees are unlawful combatants and, therefore, do not qualify as prisoners of war” under the Geneva Conventions. Memorandum from President George Bush to Vice President Dick Cheney *et al.* (Feb. 7, 2002). The blanket determination that the Taliban detainees are not POWs is not in accordance with the

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<sup>25</sup> See, e.g., Angie Cannon & Chitra Ragavan, [A Big Legal Mess, Too](#), U.S. News & World Rep. May 24, 2004 (reporting on Jeremy Sivits, the first U.S. soldier to face court-martial in the Abu Ghraib prison scandal, as well as three others who have been charged); Richard A. Serrano, [Efforts to Halt Prison Abuse Told; Witness testifies that he confronted guards and reported mistreatment at Abu Ghraib in fall](#), L.A. Times, Aug. 5, 2004, at A11 (reporting on Lynndie England, one of six soldiers facing possible court martial in the Abu Ghraib prison scandal).

Conventions. The President reached that conclusion on the ground that the armed forces of the Taliban did not satisfy the conditions set forth in Article 4(A)(2) of Geneva III, namely “(a) . . . being commanded by a person responsible for his subordinates; (b) . . . having a fixed distinctive sign recognizable at a distance; (c) . . . carrying arms openly; [and] (d) . . . conducting their operations in accordance with the laws and customs of war.” Memorandum from Assistant Attorney General Jay S. Bybee to Alberto R. Gonzales, Counsel to the President (Jan. 22, 2002); Letter from Attorney General John Ashcroft to President George Bush (Feb. 1, 2002). However, Article 4(A)(1) provides, without qualification, that the term “prisoner of war” includes “[m]embers of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.”<sup>26</sup> The conditions set forth in Article 4(A)(2) — those the President concluded were not satisfied by the Taliban fighters — determine whether “[m]embers of other militias and members of other volunteer corps” qualify as POWs. Geneva III, art. 4(A)(2) (emphasis added). Moreover, even if the conditions of Article 4(A)(2) did apply to members of the armed forces of a party to the conflict, it is far from clear that none of the Guantánamo detainees satisfy those conditions. According to Article 5 of Geneva III, “should any doubt arise as to whether persons . . . belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.”

**b. Protections Applicable to Unlawful Combatants**

Even detainees who are determined by a competent tribunal to be unlawful combatants rather than POWs enjoy certain procedural rights under the laws of war. First, if they are

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<sup>26</sup> Guantánamo detainees may also qualify as POWs under Article 4(A)(3): “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power . . . .” Geneva III, art. 4(A)(3).

prosecuted for violating the Geneva Conventions themselves, “[i]n all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the [Third] Geneva Convention.” Geneva IV, art. 146.<sup>27</sup> The latter provisions include the right to counsel of the defendant’s choice and to confer privately with counsel, Geneva III, art. 105, and the same right of appeal as that accorded members of the armed forces of the Detaining Power, *id.* art. 106. These rights are not protected by the order or regulations relating to the military commissions. The procedures created by the Military Order and accompanying regulations thus violate article 146 of Geneva IV.<sup>28</sup>

Perhaps most importantly, unlawful combatants enjoy the protections of Common Article 3 of the Geneva Conventions. President Bush has “accept[ed] the legal conclusion of the Department of Justice . . . that common Article 3 of Geneva does not apply to either Al Qaida or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and Common Article 3 applies only to ‘armed conflict not of an international character.’” Memorandum from President George Bush to Vice President Dick Cheney, *et al.* (Feb. 7, 2002).<sup>29</sup> Although it is true that Common Article 3 by its terms applies only to “armed conflicts

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<sup>27</sup> These protections apply even to unlawful combatants. See Derek Jinks, The Declining Significance of POW Status, 45 Harv. Int’l L. J. 367, 380 (2004).

<sup>28</sup> At least some of the crimes that the military commissions are authorized to try are violations of the Geneva Conventions. For example, the regulations include among the war crimes triable by commissions the willful killing of protected persons, 32 C.F.R. § 11.6(a)(1), the attacking of protected property, *id.* § 11.6(a)(4), and the use of protected persons as shields, *id.* § 11.6(a)(9), and they define “protected persons” and “protected property” by reference to the Geneva Conventions, see *id.* § 11.5(f), (g). In addition, a strong case has been made that the standards set forth in article 146 apply to all war crimes prosecutions. See Jinks, *supra*, at 397-99.

<sup>29</sup> Although the President’s memorandum stated that this was one of several bases for the conclusion of the Department of Justice, the available documents do not disclose another basis

not of an international character,” it does not follow that the protections set forth in that article do not apply to international armed conflicts as well. The laws of war historically focused on international armed conflicts, leaving other armed conflicts unregulated. Common Article 3 was regarded as a breakthrough because, for the first time, it offered some protection to those affected by non-international armed conflicts.<sup>30</sup> The protections of that article were regarded as a floor “a fortiori applicable in international conflicts.” ICRC, Commentary: IV Geneva Convention Relative to the Protection of Civilian Persons in the Time of War 14 (Jean S. Pictet ed., 1958).<sup>31</sup> That the protections in this article are a minimum standard applicable in any armed

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for concluding that Common Article 3 is inapplicable to Al Qaida or Taliban detainees. See Memorandum from Jay S. Bybee, Assistant Attorney General, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, General Counsel of the Department of Defense (Jan. 22, 2002), at 5-9; Memorandum from John Yoo & Robert J. Delahunty, U.S. Department of Justice, to William J. Haynes II, General Counsel, Department of Defense (Jan. 9, 2002), at 6-11.

<sup>30</sup> According to the ICRC Commentary, Article 3 “marks a new step forward in the unceasing development of the idea on which the Red Cross is based, and in the embodiment of that idea in international obligations. It is an almost un hoped-for extension of Article 2.” ICRC, The Geneva Conventions of 12 August 1949 Commentary 38 (Jean S. Pictet, ed.1958).

<sup>31</sup> See also Prosecutor v. Tadic, Case No. IT-94-1-AR72 (ICTY Appeals Chamber, Oct. 2, 1995), ¶¶ 98-127. As the International Court of Justice explained in Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States),

Article 3, which is common to all four Geneva Conventions of 12 August 1949, define [sic] certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules that also apply in international armed conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called ‘elementary considerations of humanity.’

1986 I.C.J. at 114, reprinted in 15 I.L.M. 1073; see also id., 1986 I.C.J. at 129, reprinted in 15 I.L.M. 1081 (Common Article 3 evinces “general principles of humanitarian law . . . accepted by States, and extending to activities which occur in the context of armed conflicts, whether international in character or not.”).

conflict has also become a universally accepted rule of customary international law.<sup>32</sup> The U.S. Army itself has recognized that Article 3 “operates . . . during any type of armed conflict.” Dep’t of Army, Law of War Workshop Deskbook (Brian J. Bill, ed., 2000), at 129 (emphasis in original).

Section 1 of Common Article 3 prohibits certain acts “at any time and in any place whatsoever” with respect to “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ‘hors de combat’ by sickness, wounds, detention, or any other cause.”<sup>33</sup> Among the prohibited acts are “the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Geneva III, art. 3(1)(d). The prosecution of unlawful combatants by the military commissions set up pursuant to the Military Order violates this provision.

First, such commissions cannot be regarded as “regularly constituted courts.” Military commissions originated as battlefield panels tasked with advising the commanding officers on

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<sup>32</sup> See Jan E. Aldykiewicz & Geoffrey S. Corn, Authority to Court-Martial Non-U.S. Military Personnel for Serious Violations of International Humanitarian Law Committed During Internal Armed Conflicts, 167 Mil. L. Rev. 74, 129 (2001); Lisa L. Turner & Lynn G. Norton, Civilians at the Tip of the Spear, 51 A.F. L. Rev 1, 76 n.534 (2001). It is unnecessary to consider the status of customary international law as domestic law in the United States because section 821 incorporates the law of war into our domestic law for the purpose being discussed here. The law of war is that branch of the law of nations that addresses, inter alia, the rights and obligations of belligerents in armed conflicts, Ex parte Quirin, 317 U.S. 1, 27-28 (1942), and it consists of both customary and conventional law. Chairman of the Joint Chiefs of Staff Instruction, CJCSI 5810.01B (Mar. 25, 2002) (“The law of war . . . includes treaties . . . to which the United States is a party, as well as applicable customary international law.”).

<sup>33</sup> It is clear that unlawful combatants are included among the persons protected by Common Article 3. See Jinks, supra note 27, at 403-405; Jordan Paust, Anititerrorism Military Commissions: Courting Illegality, 23 Mich J. Int’l L. 1, 7 n. 15 (2001).

how to deal with battlefield detainees. As such, they were not “courts” at all. The military commissions established pursuant to the Military Order continue to operate essentially as advisers to military or political officials (the President as Commander in Chief or the Secretary of Defense) who have the final say with respect to the sentences to which detainees are subjected. If they can be deemed courts at all, they are certainly a most irregular variety of court. They are established not by the legislature but by the designee of the Secretary of Defense acting pursuant to regulations passed by the Secretary pursuant to delegation by the President. Their procedures are not set forth in statutes, but instead in regulations that are subject to amendment by the Secretary and do not provide any rights to the accused. Unlike the regular military courts (general courts-martial), the military commissions are not supervised by the civil courts. Instead, the final decisions are made by political officials, who are empowered to modify sentences.

It is also clear that “regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” means, at a minimum, a court that is both independent and impartial. See Knut Dörman, Elements of War Crimes under the Rome Statute of the International Criminal Court 413 (2002); Jinks, supra note 27, at 406.<sup>34</sup> The requirement

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<sup>34</sup> This uncontroversial proposition is supported, inter alia, by the negotiations that led to the adoption of Article 75 of the First Additional Protocol to the Geneva Conventions, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), June 8, 1977, 16 I.L.M. 1391, art. 75; and Article 6 of the Second Additional Protocol, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), June 8, 1977, 16 I.L.M. 1442, art. 6. Both of these articles were modeled on Common Article 3 and were intended to clarify and explain its requirements. Michael Bothe et al., New Rules for Victims of Armed Conflict 456, 651 (1982); Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 [hereinafter “ICRC Protocol Commentary”] 878, 1398 (1987); ICRC Protocol Commentary at 878,1397; see also Dörman, supra, at 401, 412, 413; Lindsay Moir, The Law of Internal Armed Conflict 207-08 (2002). Article 75 requires an “impartial and regularly constituted court,” and Article 6 requires a “court offering the essential guarantees of independence and impartiality.” The United States is not a party to either Protocol, but its failure to ratify them is unrelated to these articles. In fact,

that judicial tribunals be independent and impartial has received substantial elaboration by international human rights tribunals.<sup>35</sup> The U.N. Human Rights Committee, interpreting a similar provision in the International Covenant on Civil and Political Rights,<sup>36</sup> concluded that a tribunal comprised of serving members of the armed forces could not guarantee independence and impartiality. Polay Campos v. Peru, Comm. No. 577/1994, Report of the Human Rights Committee, U.N. GAOR, 53rd Sess., Supp. No. 40, at 67, U.N. Doc. A/53/40 (1998).<sup>37</sup> The Human Rights Committee has also written that a situation in which the executive is able to control or direct the judiciary is incompatible with the requirements of independence and impartiality. Bahamonde v. Equatorial Guinea, Comm. No. 468/1991, Report of the Human

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the United States recognizes that these articles have the status of customary international law. See Michael J. Matheson, The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions, 2 Am. U. J. Int'l L. & Pol'y 419, 419-20, 427-28 (1987); Jordan Paust, Antiterrorism Military Commissions: Courting Illegality, 23 Mich. J. Int'l L. 1, 4 n.12 (2001); Diane F. Orentlicher & Robert K. Goldman, When Justice Goes to War: Prosecuting Terrorists before Military Commissions, 25 Harv. J. L. & Pub. Pol'y 653, 661 (2002); Jinks, supra note 27, at 431-32 & nn. 359, 360.

<sup>35</sup> The human rights bodies discussed below were interpreting cognate provisions in various human rights instruments. That the United States is not a party to some of these instruments is not relevant to the analysis, as these decisions are being consulted here for what they tell us about the “the judicial guarantees which are recognized as indispensable by civilized peoples,” a standard that appears in a treaty to which the United States is a party and which has the status of customary international law, which is in turn incorporated into U.S. law through 10 U.S.C. § 821. For similar reasons, it is irrelevant that the United States is a party to some of the treaties but has declared them to be non-self-executing.

<sup>36</sup> Article 14(1) provides that, “[i]n the determination of any criminal charge against him, . . . everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.” International Covenant on Civil and Political Rights, Dec. 19, 1966, art. 14(1), 999 U.N.T.S. 171.

<sup>37</sup> The European Court for Human Rights has also expressed concern that verdicts by military judges — the branch charged with protecting national security — would be “unduly influenced by considerations [irrelevant] to the . . . case,” namely concerns about national security. Ocalan, App. No. 46221/99, 37 Eur. Ct. H.R. Rep. 221, ¶ 114 (2003).

Rights Committee, U.N. GAOR, 49th Sess., Supp. No. 40, at 187, U.N. Doc. A/49/40 (1994). Along the same lines, the Inter-American Commission on Human Rights, interpreting Article 8(1) of the American Convention on Human Rights,<sup>38</sup> has stated that a special military court is not an independent and impartial tribunal inasmuch as it is subordinate to the ministry of defense, and thus the executive. Salinas v. Peru, Case 11.084, Inter-Am. C.H.R. 113, OEA/Ser.L/V/II.88, doc. 9, rev. 1 (1995).<sup>39</sup> The Inter-American Commission has also emphasized that an independent and impartial tribunal requires granting judges security of tenure. Inter-Am. C.H.R. Annual Report 1992-3, 207; see also Garcia v. Peru, Case 11.006, Inter-Am.C.H.R. 71, OEA/Ser.L/V/II.88 doc. 9, rev.1 (1995) (“The irremovability of judges . . . must . . . be considered a necessary corollary of their independence.”) (quoting Campbell and Fell v. United Kingdom, App. No. 7819/77 [1984] ECHR 8, June 18, 1984). The U.N. Human Rights Committee stated in Polay Campos v. Peru, *supra*, that a special, ad-hoc tribunal under anti-terrorist legislation composed of serving members of the military could not be seen as impartial and independent, and the Inter-American Commission recently stated that “the right to be tried by a competent, independent, and impartial tribunal . . . generally prohibits the use of ad hoc, special, or military tribunals or commissions to try civilians for terrorist-related or any other crimes.” Inter-Am. C.H.R., Report on Terrorism and Human Rights, exec. summ., ¶ 18,

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<sup>38</sup> “Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law . . . .” American Convention on Human Rights, Nov. 22, 1969, art. 8(1), 1144 U.N.T.S. 123.

<sup>39</sup> See also Juan E. Méndez, Human Rights Policy in the Age of Terrorism, 46 St. Louis U. L. J. 377, 384 (2002) (“Military commissions whose members serve at the discretion of the President by definition do not meet the standard of an independent and impartial judiciary.”); Kim Lane Scheppele, Law in a Time of Emergency: States of Exception and the Temptations, 6 U. Pa. J. Const. L. 1001, 1063-64 (2004) (commissioners serving under the direct control of the President and Secretary of Defense cannot be considered impartial or independent).

OEA/Ser.L/V/II.116, doc. 5 rev. 1 corr. (2002).<sup>40</sup> Finally, the European Court of Human Rights has held that “the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of a ‘tribunal’ [and] can also be seen as a component of the ‘independence’ required by Article 6 § 1” of the European Convention of Human Rights. Morris v. United Kingdom, App. No. 38784/97 [2002] ECHR, Feb. 26, 2002.<sup>41</sup> The military commissions established pursuant to the Military Order fail these tests because they are ad hoc bodies composed of active duty military officers who are directly subordinate to the President and lack security of tenure, and because their decisions are reviewable by non-judicial authorities with the power, inter alia, to modify the sentence.

It is true that general courts-martial suffer from some of these same deficiencies, yet these are the courts that must be used to try POWs for war crimes. Although it might seem anomalous to conclude that the Geneva Conventions require courts-martial for POWs but prohibit them for unlawful combatants,<sup>42</sup> there may well be reasons for preferring military courts

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<sup>40</sup>See also Michael Ratner, Moving Away from the Rule of Law: Military Tribunals, Executive Detentions, and Torture, 24 Cardozo L. Rev. 1513, 1516 (2003) (ad hoc military commissions, set up for a specific purpose, are precisely the type of tribunals Common Article 3’s requirement of “regularly constituted courts” sought to proscribe).

<sup>41</sup> Article 6, § 1 provides that “[i]n the determination of . . . any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.”

<sup>42</sup> Scholars have observed that developments in the law of war have in fact caused the protections offered to POWs to be overtaken by those offered to unlawful combatants. See Jinks, supra note 27, at 375. It might be noted, however, that historically the principal protection afforded to POWs has been immunity from prosecution for acts which, if performed by noncombatants, would constitute common crimes. Id. at 376 n.38. Because the absence of such immunity for unprivileged combatants leaves them subject to prosecution for such acts as ordinary civilians, it would not be surprising if they also retained the procedural rights of such civilians. See Ex parte Milligan 71 U.S. at 131 (Chase, C.J., concurring) (if Milligan cannot enjoy the immunities attaching to prisoner of war status, he cannot be subject to its “pains and penalties”).

for the trial of members of the enemy's regular armed forces while regarding them as unacceptable for the trial of civilians or unlawful combatants.<sup>43</sup> We may assume, however, that Common Article 3 permits the use of courts-martial to try unlawful combatants for violations of the laws of war. General courts-martial differ from military commissions in several crucial ways. First, the judgments of courts-martial, unlike those of military commissions, may be appealed to panels consisting of civilians who serve for a fixed term, 10 U.S.C. § 941, and may thereafter be reviewed by certiorari in the U.S. Supreme Court. Second, court-martial procedures, unlike those of military commissions, are significantly set forth in statutes,<sup>44</sup> and additional procedures are set forth in regulations that confer rights enforceable by the accused.<sup>45</sup> Third, court-martial proceedings, like most civilian trials, separate the functions of applying the law and finding the facts, see 10 U.S.C. § 851(a) (designating the members of a court-martial as the sole fact-finders); *id.* § 851(b) (designating the military judge as the sole decision-maker as to matters of law), while military commissions combine these functions, see 32 C.F.R. § 9.6 (members of military commissions find both facts and law). Fourth, members of courts-martial and the military judges who preside over such proceedings enjoy significant statutory protection

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<sup>43</sup> For example, it might fairly be anticipated that active duty military officers would identify and empathize with members of the armed forces even of the enemy, and consequently that such officers would be fair judges of the crimes of regular combatants but inappropriate judges of civilians and irregular combatants. Indeed, for members of the opponent's armed forces, a court-martial might be regarded as the closest available equivalent to a jury of their peers.

<sup>44</sup> See, e.g., 10 U.S.C. § 831 (prohibiting compulsory self-incrimination); *id.* § 832 (requiring a "thorough and impartial investigation"); *id.* § 835 (requiring minimum service of process time before trial); *id.* § 837 (prohibiting unlawful influence on the court); *id.* §§ 838-854 (setting forth general trial procedures).

<sup>45</sup> Indeed, the Manual for Courts-Martial extends over 800 dense pages, Manual for Courts-Martial, United States (2002 ed.), while the regulations implementing the Military Order span a mere 16.

from improper command influence, 10 U.S.C. § 837, while the protection from such influence enjoyed by members of military commissions is less extensive,<sup>46</sup> and is conferred by regulations, 32 C.F.R. § 15.3(a)(8), that are declared to be unenforceable by any party, *id.* § 9.10, and may be amended by the Secretary of Defense. *id.* § 9.11. Fifth, the decisions of courts-martial are not alterable by non-judicial authorities. These are just a few of the differences between courts-martial and military commissions that require the conclusion that the latter are not, while the former are, “regularly constituted courts affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” Geneva III, art. 3.

Indeed, the U.S. military itself has reached the judgment that Common Article 3 requires a trial before a general court-martial. As noted above, Article 5 of Geneva III requires that, in the event of doubt about a detainee’s entitlement to POW status, the issue be decided by a “competent tribunal,” in contrast to Article 3, which requires a “regularly constituted court.” The former term, according to the U.S. Army regulations, contemplates a tribunal operating very much like military commissions. “[A] competent tribunal shall be composed of three commissioned officers, one of whom shall be of a field grade.” Army Reg. 190-8, art. 1-6 (c). Any decision adverse to the detainee “shall be reviewed for legal sufficiency when the record is received at the office of the Staff Judge Advocate for the convening authority.” *Id.* art. 1-6 (g). But once a person has been “determined by a competent tribunal not to be entitled to prisoner of war status,” the regulations specify, in accordance with Common Article 3, that they “may not be executed, imprisoned, or otherwise penalized without further proceedings to determine what acts they have committed and what penalty shall be imposed.” *Id.* The nature of such proceedings is

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<sup>46</sup> Compare 10 U.S.C. § 837(a)-(b), with 32 C.F.R. § 15.3(a)(8).

specified in the same regulation: “The CI may be tried by general court martial . . . . The CI will not be tried before summary or special court-martial.” Id. art. 6-13 (a)(4).<sup>47</sup>

**3. The Military Order Exceeds the Authorization of 10 U.S.C. § 821 to the Extent It Authorizes the Use of Military Commissions to Try Violations of the Laws of War Not Closely Related to the Afghan Conflict**

Finally, the Order calling for military commissions is not authorized by section 821 because it purports to authorize the use of such commissions to try offenses unrelated to the only relevant “armed conflict” — the military operation currently underway in Afghanistan. Section 821, as interpreted in Quirin, authorizes military tribunals to try offenses against the laws of war. Because it is Congress that, under our Constitution, has the power to declare war, the Presidential power conferred by section 821 requires a congressional trigger. In this case, the only possible trigger is the AUMF, which authorizes the use of military force against those nations, organizations, or persons responsible for the attacks of September 11. Despite the breadth of the authorization to use force in the AUMF, the plurality opinion in Hamdi concluded that this congressional act triggered the fundamental incidents of war only to the extent there existed a conventional armed conflict. For similar reasons, if the AUMF is sufficient to trigger the authority under section 821 to establish military commissions, such commissions can be used

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<sup>47</sup> A “CI” is a “civilian internee,” which is defined as “a civilian who is interned during armed conflict or occupation for security reasons or for protection or because he has committed an offense against the detaining power.” Army Reg. 190-8, art. 6-13 (a) (4). Section II (Terms). According to the regulations, all detainees examined by a “competent tribunal” and not entitled to the protections of an enemy prisoner of war are to be classified as either a “civilian internee” or an innocent civilian. Id. art. 1-6 (10). Persons in this last category are to be immediately returned to their homes or released. Id. art. 1-6 (10) (c). Thus, a CI is an internee that is neither a prisoner of war nor an innocent civilian.

only to try violations of the laws of war specifically relating to the armed conflict under way in Afghanistan.<sup>48</sup>

That conclusion is the clear import of the Hamdi plurality opinion, which held that Congress authorized the detention of enemy combatants when it passed the AUMF, but did not approve the detention of enemy combatants for the entirety of the campaign against terrorism. Notwithstanding the broad language of the AUMF, the plurality specifically rejected the claim that the AUMF authorized the detention of anyone implicated in the “broad and malleable” global war on terror for the duration of that “unconventional war.” 124 S. Ct. 2633, 2641 (2004). Instead, the Court held that the AUMF authorized the detention of “individuals legitimately determined to be Taliban combatants who ‘engaged in an armed conflict against the United States’” as long as “the record establishes that United States troops are still involved in active combat in Afghanistan.” Id. at 2642. See also id. at 2640 (enemy combatants may be detained “for the duration of the particular conflict in which they were captured”).

Likewise, the military commissions established pursuant to the Military Order may, at best, try violations of the laws of war closely related to the conventional military campaign in Afghanistan. See Prosecutor v. Kunarac, Case Nos. IT-96-23 & IT-96-23/1-A (ICTY Appeals Chamber, June 12, 2002), ¶ 55 (offense not a violation of the “laws and customs of war” unless it is “closely related” to an armed conflict). The Military Order, however, sweeps much more broadly. It is not even limited, as is the AUMF, to persons or groups involved in some way in the attacks of September 11, or who harbor such persons. As the title of the Military Order indicates, the order addresses the “[d]etention, treatment and trial” of aliens involved in “War Against Terrorism.” It includes among the “individual[s] subject to this order” non-citizens who

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<sup>48</sup> This limitation applies a fortiori if the legal basis for the military commissions is the AUMF standing alone, or the President’s power as Commander in Chief.

have “engaged in, aided or abetted, or conspired to commit, acts of terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to the United States, its citizens, national security, foreign policy, or economy,” as well as those who “knowingly harbored” such individuals. Military Order § 2(a)(1). The order thus covers persons who have had no connection to the Afghan conflict.

The Military Order might have been interpreted narrowly in a manner consistent with the Hamdi plurality opinion and the laws of war. The Order provides that “any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission” that such individual is alleged to have committed (emphasis added). This language might have been read to incorporate the limitations imposed by the laws of war and our Constitution upon the use of military commissions, including the requirement of a close nexus to an ongoing armed conflict of a conventional nature. But the government apparently reads the Order as authorizing the use of military commissions for the trial of anyone who has allegedly committed a terrorist act in the Global War on Terrorism, or harbored such a person, as long as his acts had the requisite impact on the United States. The charge against Mr. Hamdan is illustrative: the document charges Mr. Hamdan with a broad conspiracy to commit various asserted war crimes from February 1996 until his capture on November 24, 2001. The injuries caused by this conspiracy are alleged to include “the attacks on the U.S. Embassies in Kenya and Tanzania in August 1998, the attack on the USS Cole in October 2000, and the attacks on the United States on September 11, 2001.” Charge at 3 (Exhibit A of Government Brief). Only the last of these might be said to be a war crime closely related to the armed conflict under way in Afghanistan. To the extent the military commissions purport to exercise jurisdiction over

offenders or offenses not closely related to that military campaign, they exceed their powers under the Constitution and the laws of war.

### CONCLUSION

For the foregoing reasons, the President's Military Order is invalid and should be struck down.

Respectfully submitted,

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