ARTICLE

ON THE SLIPPERY SLOPES OF AFGHANISTAN: MILITARY COMMISSIONS AND THE EXERCISE OF PRESIDENTIAL POWER

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Peace is not an absence of war.
—Spinoza

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1 BARUCH SPINOZA, POLITICAL TREATISE 62 (Samuel Shirley trans., Hackett 2000) (1670).

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INTRODUCTION

On September 11, 2001, two commercial airliners were highjacked while in U.S. airspace and purposely flown into the Twin Towers of the World Trade Center in New York City, killing the highjackers, all passengers and crew, and several thousand people on the ground. Shortly thereafter, another highjacked airliner slammed into the Pentagon Building in Washington, D.C., under similar circumstances, and with equally dire consequences. A fourth airliner crashed in a field near Pittsburgh, Pennsylvania, killing all on board. This thwarted highjacking was apparently intended to cause additional damage and deaths in the nation’s Capital. These well-coordinated and well-executed terrorist attacks against the United States and its citizens were the latest and most dramatic in a series of such actions, which have included the bombing of the U.S. military barracks in Khobar, Saudi Arabia on January 23, 1996, killing nineteen U.S. servicemen and wounding nearly 500 Americans and Saudis; the dual truck-bombings at the U.S. embassies in Kenya and Tanzania on August 7, 1998, killing 244 people and injuring thousands more; and the attack upon the naval ship U.S.S. Cole in Yemen on October 12, 2000, killing and wounding several of the crew.2

In direct response to the September 11 incidents, President George W. Bush, on September 14, 2001, issued Presidential Proclamation 74633 declaring that a national emergency exists by reason of the terrorist attacks.4


On September 12, 2001, at the request of the United States, the North Atlantic Treaty Organization’s North Atlantic Council resolved that the September 11 attack was considered an action covered by Article V of the Washington Treaty, which provides that an armed attack against one or more of the
Congress acted on September 18, 2001, by proclaiming Joint Resolution 23 (JR 23), which authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determine[d] planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbor[d] such organizations or persons...." Congress also provided extensive emergency funding for federal and state governments to confront this national crisis, and, on October 26, 2001, at the request of the President, enacted the so-called "USA PATRIOT Act," enhancing in several significant ways the law enforcement capabilities of the United States government.

On November 13, 2001, President Bush signed an order entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism" ("The Order"). It states that it is issued pursuant to the authority vested on President Bush "as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution and sections 821 and 836 of Title 10, United States Code..."

In brief, The Order directs the Secretary of Defense to detain and try before military commissions appointed by him, non-U.S. citizens whom the President has "reason to believe" are members of al Qaida or have

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Allies in Europe or North America shall be considered an attack against all. See The North Atlantic Treaty, Apr. 4, 1949, art. 5, 63 Stat. 2241, 2244, 34 U.N.T.S. 243, 246.


2 Id. § 2.


5 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter "The Order"]. See the Appendix for the full text of The Order. On March 22, 2002, the Secretary of Defense issued Military Commission Order No. 1, which establishes the procedure for implementing The Order and trials held under its authority. Military Comm'n Order No. 1 (Dep't of Defense Mar. 22, 2002) [hereinafter MCO No. 1].


8 "Al Qaida" or "al Qaeda," means "the base" in Arabic. It is purportedly a global umbrella organization engaged in various terrorist activities, principally targeting the United States and its citizens. See generally STEVEN EMERSON, AMERICAN JIHAD: THE TERRORISTS LIVING AMONG Us (2002). Reportedly, al Qaida was formed in 1989 from a group based in Peshawar, Pakistan, called the Office of Services for Alkaifa, which was engaged in recruiting volunteers and raising funds for the jihad (holy war) against the Soviets in Afghanistan. See id. Allegedly, al Qaida has cells throughout the world, including the United States, and is reportedly led by Usamah (Osama) bin Laden, a former Saudi
engaged in or have aided and abetted international terrorism against the United States. The commissions may “sit at any time and any place.” The rules to govern these proceedings are to be established by the Secretary of Defense, but the admissibility of evidence is to be determined by the presiding judge, dependent upon the evidence having “probative value to a reasonable person.” A two-thirds majority vote of a commission is sufficient to convict and to impose sentence, which can be up to “life imprisonment or death.” These commissions are to have jurisdiction exclusive of all courts.

The present Article undertakes to examine the constitutional and legal underpinnings of The Order. In doing so, this Article will first delve into the authority upon which it purportedly stands. As part of this inquiry, the Article will relate the more important historical and legal precedents in which similar presidential action was taken, particularly those occurring during the Second World War era related to the German saboteurs cases, as well as those directed at Japanese-Americans. This Article will then analyze the substantive provisions of The Order, seriatim. Next, it will examine the issue of the venues where these proceedings may take place and the constitutional and legal implications that might follow from the choice of venue. Finally, this Article will discuss some of the major policy issues to be considered in the enforcement of The Order, as well as inventory possible consequences that may result from its implementation, assuming its validity. This discussion will also consider some of the possible alternatives to The Order.


13 The Order, supra note 9, at 57,835.
14 Id.
15 Id. at 57,834. MCO No. 1 purports to amend this provision as it pertains to the imposition of a death sentence. See MCO No. 1, supra note 9, § 6.F.
16 Id. at 57,835.
17 See Ex parte Quirin, 317 U.S. 1 (1942); see also Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942).
19 As amended by the provisions of MCO No. 1, supra note 9.
In undertaking this study, I am aware that because of the dynamic circumstances of the moment, this study is to some degree undertaking an analysis of a moving target. Although the Secretary of Defense issued MCO No. 1 on March 22, 2002, this may not be the final regulation issued under The Order. Furthermore, no one has actually been charged pursuant to The Order, although persons have been detained, presumably under color of The Order's authority. This notwithstanding, I am of the view that academic analysis of The Order alone is of some value in understanding this difficult area of competing national values.

I. PRESIDENTIAL AUTHORITY TO ISSUE THE ORDER

The authority of President Bush to issue The Order, whether in his capacity as President or as Commander in Chief, presents a threshold question. The Order states various bases for its authority: the Constitution and the laws of the United States, including the Authorization for Use of Military Force Joint Resolution ("Joint Resolution 23"), as well as Sections 821 and 836 of Title 10 of the U.S. Code. Each will be addressed in turn.

A. The Constitution

The Constitution establishes a government of enumerated powers for three separate branches, and, in addition, it further endows some of the branches with implied or inherent powers. We commence our inquiry by mapping the relevant boundaries for the executive and legislative branches and restating the judicially developed rules that gauge the validity of legislative and executive actions.

Article II of the Constitution delineates the powers of the President. Section 1 provides that "[t]he Executive power shall be vested in [the] President of the United States of America." Section 2 appoints the President as "Commander in Chief of the Army and Navy of the United States" when these are called to federal service. Additionally, Section 2 gives the President, with the advice and consent of the Senate, the power to grant reprieves and pardons, and the power to

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20 MCO No. 1, supra note 9.
21 U.S. CONST. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."). § 2, cl. 1 ("The President shall be Commander in Chief of the Army and Navy of the United States").
23 The Order supra note 9 at 57,833.
24 "Congress and the President, like the courts, possess no power not derived from the Constitution." Quirin, 317 U.S. at 25.
25 U.S. CONST. art. II, § 1, cl. 1.
26 Id. § 2, cl. 1.
27 Id.
make treaties and nominate various officers of the United States. Finally, Section 3 delegates to the President the authority to see "that all laws be faithfully executed."

Beyond these expressed powers, the President also enjoys certain implied powers, although this has not been without controversy. Some, including James Madison, contended that the authority of the President is limited to those powers specifically enumerated in Sections 2 and 3. However, Alexander Hamilton's more expansive views eventually prevailed. It was his belief that these "enumeration[s] . . . [were] intended merely to specify the principal articles implied in the definition of executive power; leaving the rest [of the implied presidential powers] to flow from the grant of that power, interpreted [together] with other parts of the Constitution." This formulation received judicial imprimatur in Meyers v. United States, in which the Court indicated that the President's "executive power was given in [the Constitution in] general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed . . . ."

Thus, under present constitutional doctrine, the President has all those powers that are specifically enumerated in the Constitution, as well as those implied powers necessary to effectuate the enumerated ones. The only limitation on these implied powers occurs when there is a particularized assignment to other branches of government. The President, however, does not have general inherent authority to exercise power in "the public interest." He must ground all actions on an act of Congress or a provision of the Constitution.

28 Id. § 2, cl. 2
29 Id. § 3.
30 See 6 THE WRITINGS OF JAMES MADISON 138, 147-50 (Gaillard Hunt ed., 1910). Even some modern commentators have adopted this limited view. See, e.g., Charles L. Black, Jr., The Working Balance of the American Political Departments, 1 HASTINGS CONST. L.Q. 13 (1974) (claiming that the President possesses primarily the five specified powers enumerated in Article II).
31 7 THE WORKS OF ALEXANDER HAMILTON 76, 80-81 (John C. Hamilton ed., 1851).
32 272 U.S. 52 (1926). This opinion was authored by Chief Justice Howard Taft, who was himself President of the United States from 1909 to 1913. He served as Chief Justice from 1921 to 1930.
33 Id. at 118.
34 In contrast to this doctrine of implied presidential powers, there is no such counterpart for Congress. Congress can only exercise those powers specifically assigned to it by the Constitution. See Afroyim v. Rusk, 387 U.S. 253, 257 (1967) (rejecting the argument that Congress has the implied power to strip an American of citizenship based on its foreign affairs powers, because the government's powers are limited to those explicitly granted by the Constitution or to those that are necessary and proper to carry out the explicit powers); United States v. Harris, 106 U.S. 629, 635-36 (1883) (holding that Congress's power is limited to that which is expressly authorized or incident to an express power).
36 Id. Although The Order references constitutional provisions in a general manner, MCO No. 1 specifically cites Article II, Section 2 of the Constitution (the Commander in Chief clause) as a source of authority. MCO No. 1, supra note 9. Also, MCO No. 1 dubs The Order the "President's Military
Although Congress is the principal repository of the legislative powers of the United States, the President does have certain limited authority to create law, such power implicitly emanating from the office. Additionally, except in those areas in which the Constitution specifically requires Congress to itself take action, such as declaring war, Congress can make delegations of its powers to the executive or judicial branches, subject to various constraints. Properly delegated congressional power is, of course, an important source of executive activity and regulation, e.g., the many regulatory and administrative agencies of the federal government.

It seems reasonable to conclude that The Order constitutes an act of legislation by the President. Yet, there does not appear to be any existing law specifically delegating to the President the authority to regulate

Order,” although it is captioned a “Notice” in the original text. Id. § 2. As will be further discussed, this may be an attempt to further insulate The Order from judicial review.

37 See U.S. CONST. art. I, § 1 (“All legislative Powers herein granted shall be vested in a Congress of the United States”); Youngstown, 343 U.S. at 887 (discussing that even in war-time, the Constitution vests Congress, rather than the President, with the lawmaking function).

38 Compare United States v. Russell, 80 U.S. (13 Wall.) 623 (1871) (discussing the government’s power to take private property for military necessity during war), In re Debs, 158 U.S. 564 (1895) (upholding the President’s power to obtain an injunction to prevent a Pullman strike, despite the absence of any statutory warrant, to prevent interference with interstate commerce and the mails), In re Neagle, 135 U.S. 1 (1890) (holding that the State of California was barred from prosecuting a U.S. Marshal for homicide committed while protecting a Supreme Court Justice, despite the absence of a law authorizing the President to require the U.S. Marshal Service to undertake such duties), Meyers v. United States, 272 U.S. 52 (1926) (finding that control over dismissal of subordinate executive officials is exclusively within the power of the Executive department), and United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936) (finding that the Executive Branch has the exclusive power to negotiate with foreign governments), with Youngstown, 343 U.S. at 667 (finding that in the absence of a statute to said effect, the President lacked authority to seize steel mills to avert a nation-wide strike, notwithstanding that it would affect the Korean War effort).

39 See U.S. CONST. art. I., § 8, cl. 11.

40 Compare INS v. Chadha, 462 U.S. 919 (1983) (finding that the presentation clause, which establishes the procedure for the enactment of laws in Congress, including the presentment of bills to the President for approval or disapproval, and the bicameral requirement, which requires bills to be considered and voted upon by both Houses of Congress, constitute limitations on the power of Congress to delegate), with Curtiss-Wright, 299 U.S. at 304 (in the area of foreign affairs, a relatively broad delegation of congressional powers is permissible). Certain congressional powers are non-delegable by reason of the nature of the power in question, i.e., the power to try impeachments under Article I, Section 3, or the power to approve or veto treaties. In those areas where Congress can delegate, the delegation must contain intelligible standards establishing what is the “policy of Congress and a definition of the circumstances in which its command is to be effective.” Opp Cotton Mills, Inc. v. Adm’r of the Wage and Hour Div. of the Dep’t of Labor, 312 U.S. 126, 144 (1941). The courts have been particularly sensitive to broad delegations of congressional power involving areas of substantive liberty. See Green v. McElroy, 360 U.S. 474 (1959) (rejecting the delegation of authority, on statutory grounds, for the Department of Defense to administer a constitutionally questionable security clearance program).

41 See Chadha, 462 U.S. at 952 (finding a legislative act where the House’s action “had the purpose and effect of altering the legal rights, duties, and relations of persons”); see also Youngstown, 343 U.S. at 587, 588; id. at 630 (Douglas, J., concurring) (“The legislative nature of the action taken by the President seems to me to be clear.”).
the matters covered by The Order. The question thus becomes whether there is anything inherent in the office of the President, or in his capacity as Commander in Chief of the Armed Forces, that authorizes by implication the issuance of The Order, absent specific congressional delegation.

There should be little doubt that the Constitution empowers the President, both in that capacity and as Commander in Chief, to conduct and direct any congressionally declared war. Implicit within that power is the duty of the President to engage in war effectively. Without a congressional declaration of war, however, the President's authority to promulgate a directive like The Order is questionable. Historically, such presidential actions have been circumscribed to conditions prevalent during constitutionally declared wars. In this respect, it is appropriate to note, that the President has neither sought a formal declaration of war by Congress, nor has Congress seen fit to declare such a state in the manner contemplated in Article I, Section 8, Clause 11 of the Constitution.

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42 See infra notes 104-21 and accompanying text.
43 Cf. Youngstown, 343 U.S. at 579.
44 See U.S. CONST. art. I, § 8, cl. 11 (providing Congress the power to declare war), cl. 14 (providing Congress the power to make rules and regulations for the land and naval forces), cl. 18 (providing power to make all laws necessary and proper to carry out the foregoing powers).
45 See Hirabayashi v. United States, 320 U.S. 81, 93 (1943) (discussing that “[t]he war power of the national government is ‘the power to wage war successfully’”).

See WINTHROP, MILITARY LAW AND PRECEDENTS 831 (photo reprint 1920) (2d ed. 1899):

[It] is those provision of the Constitution which empower Congress to “declare war” and “raise armies,” and which in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its prosecution, from which this tribunal [i.e. military commissions] derives its original sanction. Its authority is thus the same as the authority for making and waging war and for the exercise of military government and martial law. The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-Chief in war.

... Hence, in our military law, the distinctive name of military commission has been adopted for the exclusive war-court, which ... [is] essentially a distinct tribunal from the court-martial of the Articles of War.

Id., cited in Madsen v. Kinsella, 343 U.S. 341, 346-47, n.9 (1952). See also Madsen, 343 U.S. at 348:

In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe jurisdiction and procedure of military commissions, ... in territory occupied by Armed Forces of the United States.

Id. at 348 (emphasis added).
47 See Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 14, 2001) (“A national emergency exists by reason of the terrorist attacks at the World Trade Center, New York, and the Pentagon, and the continuing and immediate threat of further attacks on the United States.” (emphasis added)); The Order, supra note 9, at 57,893 (“a state of armed conflict [exists] that requires the use of the United States Armed Forces” (emphasis added)).
tion,49 and, most assuredly, not in the manner that declarations of war have been effectuated in the past.49

Although the President has certain inherent powers as a function of being the Commander in Chief,50 it should be noted that it is Congress that has the power to "make Rules for the Government and Regulation of the land and naval Forces"51 and "to define and punish... Offences against the Law of Nations."52 It is likely that these are non-delegable, at least without a formal declaration of war by Congress.53 Viewed within this framework, The Order appears to amend Congress's Joint Resolution 23.54

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49 The declaration of war against Japan in 1941 is typical of the others. It states:

Whereas the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it Resolved by the Senate and the House of Representatives of the United States America in Congress assembled, That the state of war between the United States and the Imperial Government of Japan which has thus been thrust upon the United States is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and to bring the conflict to a successful termination, all the resources of the country are hereby pledged by the Congress of the United States.


50 See The Prize Cases, 67 U.S. (2 Black) 635, 690-91 (1863) (finding that the President has the authority as Commander in Chief to repel an invasion or rebellion without first seeking congressional approval).


52 U.S. CONST. art. I, § 8, cl. 10.

53 See Hirabayashi v. United States, 320 U.S. 81, 91-92, 102-03 (1943) (finding that subsequent congressional action "ratified" the presidential order and that statute was not an improper delegation).

54 See Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948) ("[I]f the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may... swallow up all other powers of Congress... "); see also Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 589, 588 (1952) ("The Founders of this Nation entrusted the lawmaking power to the Congress alone in both good and bad times," and "did not subject this lawmaking power of Congress to presidential or military supervision or control."); Hirabayashi, 320 U.S. at 102 (finding that a statute authorizing a presidential order during time of war was not an improper delegation of Congress's legislative power).
1. The Youngstown Sheet case

If The Order is eventually challenged in the courts, Youngstown Sheet & Tube Co. v. Sawyer could be a major hurdle for those defending the President's authority to issue this directive. This case, decided in 1952, at the height of the Korean War, is both a more recent counterweight to Meyers v. United States in 1926, and more relevant to the factual and constitutional scenario surrounding The Order. First, both the presidential directive in Youngstown and in The Order involve similar claims of presidential power (i.e., inherent authority as President and as Commander in Chief). Second, both situations involve presidential orders issued in the midst of congressionally undeclared wars. Third, neither of these orders were specifically authorized by any statute. Finally, the subject matter of both presidential orders had been assigned by Congress to the jurisdiction of the federal courts by legislation predating the issuance of the orders.

Youngstown involved Executive Order 10,340, whereby President Truman, in the face of an imminent and potentially crippling nationwide strike in the steel industry, directed the Secretary of Commerce to take possession of the principal steel mills of the country, and to keep them running. Thereafter, the Secretary issued possessory orders requiring the management of these companies to serve as operating managers of the mills on behalf of the government. Although the President then sent two messages to Congress reporting these actions, no action was taken by Congress with respect to the subject of the executive order. The President's takeover was challenged by the mill owners, who claimed that it was unauthorized by any act of Congress or the Constitution. The government responded that the President acted under his "inherent power" to protect the "well-being and safety of the Nation." The Court, in a somewhat terse opinion authored by Justice Black, rejected this contention and specifically ruled that "[t]he order cannot properly be sustained [either] as an exercise of the President's military power as Commander in Chief of the Armed Forces...[n]or can the...order be sustained because of the several constitutional provisions that grant executive power to the President."

55 343 U.S. 579 (1952).
56 See id. at 583, 589; Exec. Order No. 10,340, 17 Fed. Reg. 3139 (Apr. 8, 1952) ("Directing the Secretary of Commerce to Take Possession of and operate the Plants and Facilities of Certain Steel Companies").
57 See Youngstown, 343 U.S. at 590-91 ("[A] work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us in resisting aggression, and would add to the continuing danger of our soldiers in the field.").
58 See 98 CONG. REC. 3955-62 (1952) ("Seizure of the Steel Plants"); 98 CONG. REC. 4192-95 (1952) ("Powers of the President—Seizure of the Steel Mills").
59 Youngstown, 343 U.S. at 584.
60 Id. at 587.
Most of the judges weighed in separately, filing either concurring or dissenting opinions. Of these, Justice Jackson's concurrence is particularly cogent. He commences his argument by commenting upon "the infirmity of confusing the issue of a power's validity with the cause it is invoked to promote, of confounding the permanent executive office with its temporary occupant... [and] the strong tendency... to emphasize transient results upon policies... [while] losing sight of enduring consequences upon the balanced power structure of our Republic." Justice Jackson then proceeds to classify into three groups the various attempts at exercising presidential power, and of the legal consequences which result from each alternative.

The first is "[w]hen the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." As an example of presidential action falling within this group the opinion refers to United States v. Curtiss-Wright Export Corp., which suggested that in external affairs the President might be allowed to act without congressional authority, but not contrary to an Act of Congress.

Second, "[w]hen the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain... In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." Because of the inertia preventing congressional action, there is, in effect, an invitation for the President to act. An example of this is the suspension of the writ of habeas corpus. Although the Constitution allows for the suspension of habeas corpus "when in...
cases of rebellion or invasion the public safety may require it, the Constitution makes no mention as to who is to exercise this power. Justice Jackson pointed to the suspension of the writ of habeas corpus by President Lincoln during the Civil War. In the face of numerous judicial challenges, Congress eventually ratified President Lincoln's action.

Finally, "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb, for then he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter. Courts can sustain exclusive presidential control in such a case 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 established by our constitutional system." Justice Jackson referred to judicial rejection of President Roosevelt's attempt to remove a Federal Trade Commissioner in the face of a congressional policy to the contrary as an example of a presidential action that falls within this third category.

Similarly, Justice Clark determined that President Truman's directive fell into the third group of executive actions and concluded:

that where Congress has laid down specific procedures to deal with the type of crisis confronting the President, he must follow those procedures in meeting the crisis; but that in the absence of such action by Congress, the President's independent power to act depends upon the gravity of the situation confronting the nation.

In agreement with Justice Black's opinion, he concluded that Congress had in fact specifically legislated and, therefore, the President could not override this action by decree, even in the face of a negative impact upon the war effort.

Justice Jackson's argument is relevant to the circumstances presently under consideration: the distinction between congressionally unauthorized presidential actions directed at extraterritorial government activity as opposed to similar actions focused on "the internal affairs of the

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68 U.S. Const. art. I, § 9, cl. 2.
69 See, e.g., Ex parte Merryman, 17 F. Cas. 144 (C.C.D. Md. 1861) (No. 9487); Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
70 Habeas Corpus Act of Mar. 3, 1863, ch. 81, 12 Stat. 755. A similar situation occurred in the Prize Cases, 67 U.S. 635, where there was subsequent ratification of the President's acts by congressional legislation. See also Hirabayashi, 320 U.S. at 91-92 ("[W]e conclude that it was within the constitutional power of Congress and the executive . . . to prescribe this curfew order . . . and that its promulgation by the military commander involved no unlawful delegation of legislative power.").
71 Youngstown, 343 U.S. at 637-38 (Jackson, J., concurring).
72 See Humphrey's Executor v. United States, 295 U.S. 602 (1935) (holding that when Congress provides for the creation of a body, like the FTC, of legislative and judicial quality, and limits the grounds upon which its appointed officers can be removed from office, the President has no constitutional power to remove them for other reasons).
73 Youngstown, 343 U.S. at 662 (Clark, J., concurring).
country" is critical. He contended that "the Constitution did not contemplate that the title Commander in Chief of the Army and Navy will constitute him also Commander in Chief of the country, its industries and its inhabitants." Justice Jackson further admonished, "[t]hat [the] military powers of the Commander in Chief were not to supersede representative government of internal affairs," which to him "seems obvious from the Constitution and from elementary American history."

The principles in Youngstown Sheet were reiterated in Dames & Moore v. Regan. In that case a prejudgment attachment was effectuated on the assets of certain Iranian banks. These funds had been frozen by President Carter pursuant to authority granted to him under the International Emergency Economic Powers Act (IEEPA) in response to the taking of American hostages at the American Embassy in Iran. Pursuant to that statute the President granted licenses allowing private parties to file suit against the government of Iran, but these licenses did not allow these parties to proceed to judgment. Thereafter the President entered into a settlement with the government of Iran for the release of the hostages. In exchange for their release, the United States agreed to terminate all legal proceedings in the U.S. courts involving claims by U.S. nationals against the government of Iran and to nullify all attachments. Such claims would be submitted to binding arbitration in a newly created Iran-United States Claims Tribunal. Upon the release of the hostages, President Reagan issued an executive order implementing these agreements. A suit was filed seeking the enjoinment of the United States and the Secretary of the Treasury from enforcing the various orders, claiming that the President had acted beyond his statutory and constitutional powers.

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74 Id. at 643 (Jackson, J., concurring) (emphasis added). He elaborated:

Nothing in our Constitution is plainer than that declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.

75 Id. at 642.

Cf. Gulf of Tonkin Resolution, Pub. L. No. 88-404, 73 Stat. 384 (1964) (repealed 1971) (Congress delegates to the President authority to determine use of armed forces to assist treaty ally); Act of Feb. 6, 1802, ch. 4, 2 Stat. 129-30 (Congress empowering the President to take action against Tripoli).

76 Id. at 644 (Jackson, J., concurring).


79 Dames & Moore, 453 U.S. at 663-66.

80 Id. at 666-67.
The Court's opinion was delivered by then-Justice Rehnquist, relying heavily on Justice Jackson's concurrence in Youngstown Sheet, with a caveat to the effect that not all cases dealing with a response to international crisis should be expected to fall neatly into one of Jackson's pigeon holes.

The Court found that Congress had delegated sweeping powers to the President in enacting IEEPA:

Because the President's action in nullifying the attachments and ordering the transfer of the assets was taken pursuant to specific congressional authorization, it is "supported by the strongest of presumptions and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." The Court, however, distinguished that authority from presidential power to suspend claims pending in American courts, this being closer to the issue presented by The Order. It found that such authority was not contained in either IEEPA or the so-called Hostage Act of 1868, as the government defendants had claimed. Nevertheless, again relying on Justice Jackson's Youngstown Sheet analysis, the Court concluded that congressional authorization was implied by "a [long] history of congressional acquiescence in conduct of the sort engaged in by the President." Thus, the Court found to the contrary and held that the President had acted under the sweeping powers delegated by IEEPA.

The Court rejected the allegation that the President, by suspending the claims, had circumvented the jurisdiction of the U.S. courts in violation of Article III of the Constitution. Instead, following longstanding practice, the President had provided an alternate forum capable of providing meaningful relief. The Court thus stated that where the settlement of claims has been determined to be a necessary incident to the resolution of a major foreign policy dispute between our country and another, and where . . . we can conclude that Congress acquiesced in the Presi-

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81 Justice Rehnquist had clerked for Justice Jackson at the time of the Youngstown Sheet decision. See The Justices of the Supreme Court, http://www.supremecourtus.gov/about/biographiescurrent.pdf, at 1 (last visited May 1, 2002).
82 Justice Rehnquist wrote: The parties and the lower courts, confronted with the instant questions, have all agreed that much relevant analysis is contained in Youngstown Sheet. Justice Jackson's concurring opinion elaborated in a general way the consequences of different types of interaction between the two democratic branches in assessing presidential authority to act in any given case . . . .
83 Dames & Moore, 453 U.S. at 668.
84 Id. at 669.
85 Id. at 674 (citing Youngstown, 343 U.S. at 637 (Jackson, J., concurring)).
87 Dames & Moore, 453 U.S. at 678-79, 680-82.
88 Id. at 684-87. Lest it be overlooked, we are dealing with alternate civil forums. There is no alternate criminal forum. The closest thing to an alternate criminal forum is a criminal forum of concurrent jurisdiction in which double jeopardy is not implicated.
dent’s action, we are not prepared to say that the President lacks the power to settle such claims.\footnote{Id. at 688.}

Youngstown Sheet and progeny thus stand for the principle that where Congress has not specifically authorized executive action, but has instead legislated on the subject matter at issue, the President is without authority to proceed in a manner that is inconsistent with said legislation.

2. Has Congress expressed a legislative preference?

Congress has legislated that the actions of terrorists and terrorist groups, both in the United States and elsewhere, against our citizens and our property, constitute violations of federal criminal statutes. These include, among others, federal criminal laws that prohibit destroying aircraft, or harming individuals aboard aircraft,\footnote{18 U.S.C. § 32; see also id. § 1201 (a) (3).} causing injury or death to any officer or employee of the United States (including any member of the uniformed services while engaged in or on account of performance of official duties),\footnote{Id. § 1114.} causing injury to the property of the United States,\footnote{Id. § 1361.} contaminating or infecting national defense facilities,\footnote{Id. § 2155.} attempting, conspiring, or performing acts of domestic and international terrorism abroad against U.S. nationals,\footnote{Id. §§ 2331 et seq.} providing material support to terrorists or to terrorist organizations,\footnote{Id. § 2339A.} engaging in terrorist attacks and other acts of violence against mass transportation systems,\footnote{Id. § 2339B.} and committing a war crime inside or outside the United States.\footnote{Id. §§ 1991-92.} This statute includes actions taken either “inside or outside the United States,” and where the victim “is a member of the Armed Forces of the United States or a national of the United States.” \footnote{Id. § 2441(a), (b).} Contrary to other criminal statutes mentioned above, the legislative history of § 2441 contains the following statement in the House Report: “The enactment of H.R. 3680 is not intended to affect in any way the jurisdiction of any court-martial, military commission, or other military tribunal under the law of war or the law of nations.” H.R. Rep. No. 104-698, at 12 (1996), reprinted in 1996 U.S.C.C.A.N. 2166, 2177.

The Military Extraterritorial Jurisdiction Act of 2000, 18 U.S.C. § 3261, also contains a provision to the effect that: “Nothing in this chapter may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.” \footnote{Id. §§ 2441 et seq.} Of course, that statute deals with criminal offenses committed by members of the Armed Forces and by persons employed by or accompanying them outside the United States. Cf. Reid v. Covert, 354 U.S. 1 (1957). This statute does not seem to have direct relevance to the issues raised by The Order, except to the extent that both this provision and the report regarding 18 U.S.C. § 2441 would seem to indicate that Congress has limited the con-
Perhaps the most relevant of these criminal statutes is the Anti-Terrorism Act of 1990. This comprehensive anti-terrorist criminal legislation prohibits terrorist acts that "transcend national boundaries in terms of the means by which [the acts] are accomplished, [of] the persons they appear intended to intimidate or coerce, or the locale in which their perpetrators operate or seek asylum," and criminalizes any violent action intended to intimidate or coerce a civilian population, alter the policy of a government by intimidation or coercion, or affect the conduct of a government by assassination. This statute, therefore, tracks fairly closely the subject matter of The Order, and includes within its coverage all "persons," whether U.S. citizens or not.

This statute, as well as similar legislation, seems to present clear evidence that Congress considered the subject-matter in depth, and indicated its preference regarding the forum where these crimes against the United States, its citizens, and their property, are to be tried and decided. While circumstances now facing the United States may require new approaches and new solutions to these situations, until Congress changes its legislative scheme or appropriately delegates to the President those powers that can constitutionally be delegated to the executive, it would appear that Youngstown requires compliance with Congress's preference.

As it does not appear that the Constitution, alone, can sustain The Order, we will now look to the supposed statutory support for its validity.

current jurisdiction between the civil and military courts to those two specific statutes, leaving intact its preference for a civilian forum in all other instances.


100 18 U.S.C. §§ 2331 (1) (B) (i), (ii), (iii).

101 Id. § 2331(3).

102 As part of its anti-terrorism strategy, Congress also enacted the 1984 Act to Combat International Terrorism, 18 U.S.C. §§ 3071 et seq., which establishes a scheme to allow for rewards for the provision of information leading to the arrest or conviction of persons engaged in terrorist activities or to the prevention or frustration of such acts against a United States person or property.

103 Cf. Michael P. Scharf, Defining Terrorism as the Peace Time Equivalent of War Crimes, 7 ILSA J. INT'L & COMP. L. 391, 392 (2001) ("[T]errorism is not covered by the laws of war, but rather by a dozen anti-terrorism conventions.").
B. Of legislation and joint resolutions

We begin with Joint Resolution 23 (JR 23),104 cited by The Order as authority for its issuance. It is not clear how JR 23 creates presidential authority to issue The Order. As is apparent from its text, Congress passed JR 23 because Congress understood that it was needed to comply with the requirements of Section 8(a)(1)105 and 5(b)106 of the War Powers Resolution, a relic of the Vietnam War.107 Congress thus sought to exempt the President from the War Powers Resolution’s proscriptions. JR 23 authorizes 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.”108 It is not a grant of unlimited powers to the President; it does not go beyond its stated purpose: authorizing the President “the use [of] all necessary and appropriate force.”109 Nothing in the text of JR 23, including its references to the War Powers Resolution, explicitly authorizes the President to issue a directive in the nature of The Order. Furthermore, nothing in the scant legislative history of JR 23 leads to a different conclusion.110 Neither, of course, is JR 23 a declaration of war by

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105 See H.R.J. Res. 542 § 8(a)(1), 93d Cong. (1973) (specifying that the authority to commit United States Armed Forces is not to be inferred from any law, but requires specific authorization by Congress).
106 See H.R.J. Res. 542 § 5 (b), 93d Cong. (1973) (requiring that the report required by Section 4(a) by the President to Congress, when United States Armed Forces are committed to hostilities in the absence of a declaration of war, is dispensed with if Congress has enacted specific authorization for use of the armed forces). Cf. Chadha, 462 U.S. at 919.
109 Id. (emphasis added).
Congress as such procedure is contemplated in the Constitution, or as it has been acted upon by Congress in the past.\footnote{\textsuperscript{111}See supra note 49.}

Second, The Order points to Sections 821\textsuperscript{112} and 836\textsuperscript{113} of Title 10 of the U.S. Code as a basis of authority, but again this may also be subject to some question. These provisions are simply part of the Uniform Code of Military Justice (U.C.M.J.)\footnote{\textsuperscript{114}10 U.S.C. § 821. Section 821 states: The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military courts.\textit{Id.} See \textit{In re Yamashita}, 327 U.S. 1, 65 n.31, for the history of the military commission and an explanation of the various types of military courts mentioned in Article 21.\textsuperscript{115}} and authorize the President solely to prescribe rules for the conduct of courts-martial and other military tribunals and commissions, \textit{in cases arising under the U.C.M.J.} The U.C.M.J. was enacted pursuant to Article I, Section 8, Clause 14, of the Constitution, which empowers Congress "[t]o make rules for the Government and Regulation of the \textit{land and naval Forces}.”\footnote{\textsuperscript{116}U.S. CONST. art. 1, § 8 (emphasis added).} Military commissions are not within the rules established by the U.C.M.J.\footnote{\textsuperscript{117}See \textit{In re Yamashita}, 327 U.S. at 20. Military commissions “have been called our common-law war courts. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth.” \textit{Madsen v. Kinsella}, 343 U.S. 341, 346-48 (1952). This has taken place, however, upon declaration of war by Congress. \textit{Id.} at 348; \textit{see also Yamashita}, 327 U.S. at 20.\textsuperscript{118}} Therefore, it would appear that the text of the U.C.M.J.\footnote{\textsuperscript{119}This may not be the case during a congressionally declared war. \textit{See Ex parte Quirin}, 317 U.S. 1, 30-36; \textit{Yamashita}, 327 U.S. at 7. In those cases the Court relied on the text of Article 15 of the Articles of War, which is substantially the same as Article 21 of the U.S.M.J. (10 U.S.C. § 821), to hold that Congress had authorized the military commission.\textsuperscript{120}} was not intended to cover the subject matters upon which The Order focuses.

Article 2 of the U.C.M.J.\footnote{\textsuperscript{121}10 U.S.C. §§ 801-950.} enumerates all persons subject to the provisions of this statute. Although, in addition to military personnel, it also covers “[p]risoners of war in custody of the armed forces,”\footnote{\textsuperscript{122}Id. § 802(a)(9).} this language only applies to prisoners of war tried for acts committed \textit{after their capture and during their detention as prisoners of war.}\footnote{\textsuperscript{123}See \textit{Yamashita}, 327 U.S. at 20 (interpreting a similar provision in the Articles of War that preceded the U.C.M.J.).} This stipulation is
similar to provisions found in international law. Although the U.C.M.J. is also applicable to foreign nationals serving alongside United States troops outside the United States by reason of a treaty or agreement, that is obviously not the situation contemplated by The Order.

Thus, it would appear that there is also some question whether Sections 821 or 836 of Title 10 of the U.S. Code provide a legal basis for issuance of The Order.

C. Historical and precedential comparisons

Despite the seeming lack of authority for The Order in the Constitution and in the Acts of Congress, it is not without historical and precedential equivalents. However, after closer examination these are distinguishable from the legal and constitutional circumstances present when The Order was promulgated. As previously alluded, the principal distinguishing feature is that past presidential directives creating military commissions were promulgated during congressionally declared wars.

The closest precedents, in terms of time and facts, are those that took place during World War II.

1. The German saboteur cases

*Ex parte Quirin,* decided in 1942, involved the imposition of the death sentence upon several German saboteurs caught after landing on the Atlantic coast of the United States. Their trials were conducted before military commissions created by virtue of two presidential orders, similar in many respects to The Order. President Roosevelt established military commissions to try non-U.S. citizens "of any nation at war with the United States" who, "during time of war," enter the United States

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123 See Ex parte Quirin, 317 U.S. 1 (1942); Korematsu v. United States, 323 U.S. 214 (1944); In re Yamashita, 327 U.S. 1 (1946). Cf. 13 Op. Att'y Gen. 470, 471 (1871) (war need not be formally proclaimed for laws of war to apply to military engagements with Indian tribes); see also discussion supra notes 41-54.
124 317 U.S. 1 (1942).
125 By the Presidential Order of July 2, 1942, the President appointed a Military Commission, directed it to try the petitioners for offenses against the law of war and the Articles of War, and prescribed regulations for the procedures to be followed at the trial and for review of the record and any judgment or sentence. See Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 7, 1942).
126 Presidential Proclamation No. 2561, entered on the same day, declared that "all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States... and are charged with committing... sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals..." Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942). The Proclamation also provided that persons so charged were to be denied access to the courts.
and are charged with committing or attempting to commit "sabotage, espionage, hostile or warlike acts, or violations of the law of war ... 

The trials were held in the United States, a fact not without constitutional significance. The saboteurs challenged their convictions on Fifth and Sixth Amendment grounds, contending that the President lacked the authority to create the military tribunals or to try petitioners before them, and also claimed the right to be indicted by a grand jury and to be tried before a petit jury in the civil courts.

Before addressing these challenges the Supreme Court had to decide whether petitioners were lawfully before the Court. The government contended that petitioners should be denied access to the civil courts, "both because they are enemy aliens or have entered our territory as enemy belligerents, and because the ... Proclamation undertakes in terms to deny such access" similar to a provision found in The Order. However, the Court concluded that nothing in the Proclamation or the fact that they were enemy aliens foreclosed consideration by the courts of the constitutional challenges presented by the petitioners.

The Court then proceeded to reject petitioners' contentions on the merits, relying on the various constitutional provisions which authorize Congress and the President in time of war to enact stipulations for military tribunals to try enemy agents apprehended in the United States during such periods. The Court, in approving the summary proceedings at issue, explicitly referred to situations where there is a declared war by Congress, a point made abundantly clear by the Court's thirteen references to war, as well as citations to previous times when military commissions or tribunals were used or authorized.

After sanctioning the trial of enemy saboteurs before military commissions, and confirming their death sentences—proceedings and sentences that would appear to be totally warranted in a declared war—the Supreme Court next passed to one of its least glorious moments, suc-
cumbing perhaps to the war hysteria of the moment, by approving the internment of U.S. citizens of Japanese descent.

2. The internment of Americans of Japanese descent

In two seminal cases, Hirabayashi v. United States and Korematsu v. United States, the Court addressed the various restrictive presidential orders directed at Japanese-Americans during World War II.

In Hirabayashi, the defendant, a U.S.-born citizen of Japanese ancestry, was convicted of a misdemeanor for disregarding a curfew restriction imposed by a military commander against Japanese-Americans. At the time the order was issued, however, no act of Congress specifically authorized the presidential action or the restrictions imposed by the military commander. Nevertheless, in affirming the conviction against a challenge to the President's authority to issue the order, the Court indicated that Congress, by enacting a later statute had "ratified" the executive order and the actions taken thereunder. The Court then approved all these actions based on the war powers of the national government.

In language that might be applicable to the present controversy, were it not for the lack of a congressional declaration of war, the Court said:

The war power of the national government is "the power to wage war successfully." It extends to every matter... so related to war as substantially to affect its conduct and progress. The power is not restricted to the winning of victories in the field and the repulse of enemy forces. It embraces every phase of the national defense, including the protection of war materials and the members of the armed forces from injury and from the dangers which attend the rise, prosecution and progress of war.

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134 320 U.S. 81 (1943).
135 323 U.S. 214 (1944).
137 See Declaration of State of War with Japan, ch. 561, 55 Stat. 795 (1941).
138 Hirabayashi, 320 U.S. at 91-92. Compare Hirabayashi to congressional ratification of President Lincoln's suspension of the writ of habeas corpus during Civil War. See supra note 70; see also William H. Rehnquist, ALL THE LAWS BUT ONE ch. 2 et seq. (1995). It is important to note, in distinguishing the order in Hirabayashi from The Order, that there is a considerable difference between an order that merely requires compliance with a military directive, even though onerous, in wartime, and one that seeks to supplant the civil courts, particularly if the latter is issued in the absence of a congressional declaration of war.
139 Hirabayashi, 320 U.S. at 93. As authority for this proposition the Court cites to United States v. Miller, 78 U.S. (11 Wall.) 268, 303, 314 (1870) (finding that Act of Congress during Civil War authorized confiscation of property used by "rebels"); Steward v. Kahn, 78 U.S. (11 Wall.) 493, 506, 507 (1870) (holding that Act of Congress extended statute of limitations in area where the courts were
The Court continued:

Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.\(^1\)

It is clear that upon the formal declaration of war Congress was, by that extraordinary act, conferring extraordinary powers on the President to prosecute that war to a successful conclusion. As will be further emphasized, the formal declaration of war is not a mere constitutional formality, it is a solemn affirmation by Congress, entrusting one person, the President, with far-reaching authority unknown in time of peace.

*Korematsu* involved the conviction of another native-born U.S. citizen of Japanese ancestry for failure to comply with a military order promulgated pursuant to the same presidential decree at issue in *Hirabayashi*, and which effectively excluded Korematsu from his home located within a prohibited military area.\(^1\) The outcome of this appeal tracked *Hirabayashi* in reasoning and outcome,\(^1\) except that Justice Black's majority opinion was challenged in a strongly worded and well-reasoned dissent by Justice Murphy, as well as in separate dissents by Justice Roberts and Justice Jackson. All three dissents coincide, however, in that the exclusionary order, and the subsequent actions taken, constituted racially motivated constitutional violations.\(^1\)

\(^1\) Inoperative during Civil War); Selective Draft Law Cases, 245 U.S. 366 (1918) (finding that statute of Congress authorizing the draft in 1917 is constitutional); McKinley v. United States, 249 U.S. 397 (1919) (holding that Act of Congress delegating to the Secretary of War authority to determine allowable distance of brothels to military camp held constitutional); United States v. Macintosh, 283 U.S. 605 (1931) (holding that Congress, not the Constitution, is the appropriate body to determine whether a conscientious objector serves in the Armed Forces).
\(^2\) *Hirabayashi*, 320 U.S. at 93 (citing *Ex parte Quirin*, 317 U.S. 1 (1942)).
\(^4\) See *Korematsu*, 323 U.S. at 223:

[Korematsu] was excluded [from the area in which his home was located] because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this.

*Id.* (emphasis added).

\(^5\) See *id.* at 226 (Roberts, J., dissenting) (stating that unlike in *Hirabayashi*, this is the case "of convicting a citizen as a punishment for not submitting to imprisonment in a concentration camp, based on his ancestry, and solely based on his ancestry, without evidence or inquiry concerning his loyalty and good disposition towards the United States"), 233 (Murphy, J., dissenting) (noting that the exclusion of persons of Japanese ancestry from the Pacific Coast area "goes over 'the very brink of Constitutional power' and falls into the ugly abyss of racism"), 242 (Jackson, J., dissenting) (noting that a citi-
Justice Murphy was of the view, the logic of which seems inescapable, that

[in dealing with matters relating to the prosecution and progress of a war, we must accord great respect and consideration to the judgments of the military authorities who are on the scene and who have full knowledge of the military facts . . . .

[However, at the same time . . . it is essential that there be definite limits to military discretion, especially where martial law has not been declared[,] because] [individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support.]

Justice Murphy went on to state that:

like other claims conflicting with the asserted constitutional rights of the individual, the military claim must subject itself to the judicial process of having its reasonableness determined and its conflicts with other interests reconciled. “What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions.”

On this point at least, the majority, following its holding on this issue in *Ex parte Quirin*, agreed with Justice Murphy that the actions of the military were subject to judicial review. This, of course, will be at least one of the issues arising in the present situation: obtaining judicial review of actions taken under The Order.

Justice Murphy laid down the standard to be employed when reviewing the actions of military authorities in which it is arguably claimed that they cause constitutional deprivations:

The judicial test of whether the Government, on a plea of military necessity, can validly deprive an individual of any of his constitutional rights is whether the deprivation is reasonably related to a public danger that is so “immediate, imminent, and impending” as not to admit of delay and not to permit the intervention of ordinary constitutional processes to alleviate the danger.

But he warns the courts that, “[i]n adjudging the military action taken in light of the then apparent dangers, we must not erect too high or too
meticulous standards; it is necessary only that the action have some rea-
sonable relation to the removal of the dangers."\(^{147}\)

In between Hirabayashi and Korematsu, the Court decided *Ex parte Endo*,\(^{148}\) a decision which breaks pace with the other two cases in terms of outcome. As in the other two cases, Mitsuye Endo was a U.S. born citi-
zen of Japanese ancestry, who was sent to what was euphemistically called the "Central Utah Relocation Center," in Topaz, Utah, pursuant to vari-
ous presidential orders and military proclamations issued thereunder.\(^{149}\)

Although the government conceded that the petitioner was "a loyal and law abiding citizen," she was required to remain in the camps and was allowed to leave only temporarily and on condition that she not enter certain areas of the United States.\(^{150}\) Her leave could be revoked at the discretion of the director of the Relocation Center if it was found that it was necessary "in the public interest."\(^{151}\)

The opinion of the Court by Justice Douglas manages to avoid the main constitutional issues presented by focusing on the fact that Mitsuye Endo was detained by a civilian agency. This civilian detention dis-
tinguishes *Endo* from *Ex parte Quirin*, where German saboteurs were held in custody by the military authorities. "[W]hatever power the War Reloca-
tion Authority may have to detain other classes of citizens, it has no au-
thority to subject citizens who are concededly loyal to its leave pro-
cedure."\(^{152}\) The bottom line was that Mitsuye Endo got her freedom, an outcome that does not seem extraordinary today but required a break with previous Supreme Court action. However, it is important to note that Justice Douglas left the door open to the continued detention of "other classes of citizens."\(^{153}\) Ultimately, the Court's narrow language

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147 Korematsu, 323 U.S. at 235 (Murphy, J., dissenting).
151 Endo, 323 U.S. at 291-92 n.9.
152 Id. at 297.
153 Id.
makes this case of restricted precedential value, and limits its symbolic importance.

Justice Murphy, although concurring, was "of the view that detention in Relocation Centers of persons of Japanese ancestry regardless of loyalty [was] not only unauthorized by Congress or the Executive but [was] another example of the unconstitutional resort to racism inherent in the entire evacuation program."\(^{154}\)

We thus come to one of the major World War II cases involving issues of presidential war powers, \textit{In re Yamashita},\(^ {155}\) a case which, although factually different from others of similar vintage, was a watershed in terms of producing jurisprudence that is relevant to the subject matter under discussion.

3. The trial of General Yamashita

On September 3, 1945, the Japanese Army occupying the Philippine Islands surrendered to the United States Armed Forces there. For some time prior, General Tomoyuki Yamashita was the Commanding General of the Japanese forces in those Islands.\(^ {156}\) Upon becoming a war prisoner, he was charged with a violation of the law of war, specifically, failing to discharge his duties as commander of the Japanese troops in the Philippine Islands by not controlling and preventing these forces from committing numerous atrocities against the Philippine civilian population and against prisoners of war under the custody of the Japanese Army. To try him of this charge, Lt. General Wilhelm D. Styer, Commanding General of the United States Forces, Western Pacific, which included the Philippine Islands,\(^ {157}\) convened a military commission. General Styer purportedly was acting under authority delegated to General Douglas MacArthur, Commander in Chief, United States Forces, Pacific, by the President. This delegation can be traced to a presidential proclamation, issued on July 2, 1942\(^ {158}\) and also used in \textit{Quirin}, which declared that all enemy belligerents who entered the United States, or any

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\(^{154}\) \textit{Id.} at 307 (Murphy, J., concurring). This tracks his concerns in \textit{Korematsu}. Justice Roberts, also concurring, was of similar view. \textit{See id.} at 310 (Roberts, J., concurring).

\(^{155}\) 327 U.S. 1 (1946).

\(^{156}\) \textit{Id.} at 52 n.17 (1946).

\(^{157}\) At the time, the Commonwealth of the Philippine Islands was still an unincorporated territory of the United States. \textit{See Dorr v. United States}, 195 U.S. 138 (1901) (holding that territories, if not made part of the United States by congressional action, are not entitled to a system of laws guaranteeing trial by jury); \textit{Downes v. Bidwell}, 182 U.S. 245 (1901) (holding that Puerto Rico Territory was "not part of the United States within the revenue clauses of the Constitution"). It was granted independence in 1946. \textit{See Proclamation No. 2695, 3 C.F.R. 86 (July 4, 1946) ("Independence of the Philippines").}

\(^{158}\) \textit{Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942) ("Denying Certain Enemies Access to the Courts of the United States").}
of its territories or possessions, during time of war, and who violated the law of war, would be subject to trial by military tribunals.\footnote{159}

After pleading not guilty, General Yamashita was tried before a military commission composed of five Army officers, all appointed by General Styer. General Yamashita’s main defense was that the devastating attacks by American forces made it physically impossible for him to communicate with or control his troops throughout the far-flung Philippine archipelago. This defense fell on deaf ears and on December 7, 1945(!), the commission found him guilty of the offense charged and sentenced him to death.\footnote{160}

Various issues were raised before the Supreme Court, only two of which are relevant to this discussion. The first was whether the commission which tried and convicted General Yamashita was created lawfully and could be convened after the cessation of hostilities between United States and Japan. The second questioned the legality of General Yamashita’s trial by military commission, it being alleged that the proceeding was contrary to the Geneva Convention of 1929,\footnote{161} to Articles 25 and 38 of the Articles of War,\footnote{162} and to the due process clause of the Fifth Amendment of the Constitution.

It did not take long for Chief Justice Stone, writing for a majority of the Court, to dispose of the first question. For the proposition that authority existed to try enemy combatants accused of offenses against the law of war before military commissions, the Court looked to \textit{Ex parte Quirin}.\footnote{163} The fact that the German saboteurs in \textit{Quirin} were not in uniform when captured, and thus “unlawful combatants” according to international law, was neither mentioned or distinguished from the Yamashita situation despite the heavy reliance of the \textit{Quirin} Court on that very point.\footnote{164} The Court indicated, as it had done in \textit{Ex parte Quirin}, that Congress had, by approving Article 15 of the Articles of War,\footnote{165} author-
ized the President to create military commissions to try “person[s] who by the law of war [were] subject to trial by military tribunals.” Furthermore, the Court said, that by making reference to the law of war, Congress “thus adopted the system of military common law applied by military tribunals so far as it should be recognized and deemed applicable by the courts, and as further defined and supplemented by the Hague Convention.” As we shall see, the “common law of war” is considerably more amorphous than the Common Law itself.

the law of war is subject to trial by military tribunal and may adjudge any punishment permitted by the law of war.”

Yamashita, 327 U.S. at 7.

Id. at 8. See also Hague Convention, No. IV of Oct. 18, 1907, 36 Stat. 2295, art. I, annex (defining the persons to whom belligerent rights and duties attach).

See 1 The LAW OF WAR 782, supra note 160:

The present state of the law of war is necessarily uncertain. The many trials after World War II established strict rules of accountability to the highest military and political levels to mitigate the cruelties of war. But the Vietnam cases show that the principles have not taken firm root among the laws of nations. Nations are extremely reluctant to expose the wrongs of their own soldiers or to punish their own men for overreacting to the pressures of war, let alone to bring their generals into court to answer these charges.

Id. The author points out that the instructions to the members of the courts-martial that tried Captain Ernest Medina, for actions against civilians in the My Lai massacre by troops under the command of his subordinate, Lt. William Calley, Jr., where directly counter to those that convicted Gen. Yamashita. Id. at 782. Cf. “Court-Martial of Gen. Jacob H. Smith,” held in the Philippine Islands, Apr. 1902, S. Doc. 213, 57th Cong., 2d Sess., pp.5-7 (General Smith, upon being found guilty of ordering the commission of atrocities against the civilian population of the Philippine Island of Samar, was directed to be retired from the active list and to “repair to his home.”). See also BRIAN McALLISTER LINN, THE PHILIPPINE WAR, 1899-1902 at 306, 312-16 (2000).

A succinct history of the law of war by Telford Taylor is found in Foreword to 1 The LAW OF WAR at xiii, supra note 160. Quincy Wright, in his STUDY OF WAR, has an incisive comment on this subject:

If it is Christianity against Islam, each may be prepared to destroy all the adversaries if only a few of its side can remain to perpetuate the true faith . . . . When war is fought for broad, ideological objectives, such rules [limiting destructiveness and attacks on civilian populations] have tended to break down because the end is thought to justify all means and war has tended to become absolute.

1 QUINCY WRIGHT, STUDY OF WAR 160 (1942). These views are reflected in parts of both the Bible (“You go and smite Amalek, and utterly destroy all that they have, and spare them not; but slay both man and woman, infant and suckling, ox and sheep, camel and ass.” 1 Samuel 15:3, (King James)) and the Qur’an (“But there is a ban on any population which we have destroyed: that they shall not return” Qur’an 21: 95 (Abdullah Yusuf Ali trans., 1999)).

Thus Joan of Arc announced to the British that no quarter would be given in her campaigns, and thus we have seen how unarmed civilian populations have been decimated in all wars, commencing with the Crusades, to pick an arbitrary historical point, to the most recent conflicts. This almost inevitable fact of war did not prevent numerous scholars, starting with the Spaniards Francisco de Victoria (1484-1546), Balthazar Aylas (1548-1584) and the Dutch Hugo Grotius (1583-1645), from writing and expounding as to what should be deemed acceptable behavior in the conduct of war. See FRANCISCO DE VICTORIA, DE INDIS ET DE IVRE BEU RELECTIONS [ON THE INDIES AND THE LAW OF WAR] (Ernest Nydes ed., J.P. Baie, trans., Carnegie Inst. Ed. 1917) (1557); BALTHAZAR AYLA, THREE BOOKS ON THE LAW OF WAR AND ON THE DUTIES CONNECTED WITH WAR (John Westlake ed., 1935) (1882); HUGO GROTIUS, THE LAW OF WAR AND PEACE (Leon Friedman ed., 1922) (1646). Many of these principles, particularly those of Grotius, were eventually written into the latter-day Hague and Geneva Conventions, although even the ostensibly enlightened Grotius stated that the right of killing enemies in a
The Court, in narrowing its holding, discusses an issue that is more than tangentially related to the subject matter of The Order: it states that it is not "concerned with the power of military commissions to try civilians."\(^6\) This limitation may have been inserted because the Court recognized that there is considerable doubt whether under normal circumstances jurisdiction exists to try civilians before military commissions.\(^7\) However, this is an issue that will arise under The Order. The government will have to classify individual detainees, both members of al public war included "the right to kill and injure all who are in the territory of the enemy." 1 LAW OF WAR at 33, supra note 160.

In between the time when these scholars wrote and the time when these Conventions were actually negotiated, there were periodic multinational conferences, some which resulted in the signing of treaties dealing with the subject of the law of war. One of the earliest of these treaties was entered into between the United States and Prussia in 1785 and dealt with the treatment to be accorded prisoners of war. See A Treaty of Amity and Commerce, Sept. 1785, U.S.-Prussia, 8 Stat. 84. Since the Declaration of Paris in 1856 there have been in excess of sixty treaties, conventions, agreements and proclamations that have attempted to restate or codify the law of war and the various customs and practices that provide its common law. See generally 1 THE LAW OF WAR, supra note 160, for a full compendium of these, the most important of which are: Laws and Customs of War on Land (Hague IV) (1907), The Hague Rules of Air Warfare (1922), Convention on Treatment of Prisoners of War (Geneva, 1929), Geneva Convention (I) (Wounded and Sick) (1949), Geneva Convention (III) (Prisoners of War) (1949), Geneva Convention (IV) (Protection of Civilians) (1949), Report on Human Rights in Armed Conflicts (United Nations, 1970) (Part IX, Guerrilla Warfare; Part X, "Freedom fighters"), Report to the Secretary General, A/8052, Resolution on Protection of Civilians, United Nations, Dec. 9, 1970. General Assembly Resolution 2675.

The law of war, whose genesis is the Law of Nations and international law, often overlaps with military law, which derives from the common law. In the United States, military law has many of the common law's principles, doctrines and techniques of resolving legal issues related to the federal military regime. See generally WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 41 (2d ed. 1920).

According to Winthrop, laws and customs of war will be taken into consideration by military commissions in passing upon offenses, but these must be "uniform, known practice[s] of long standing, which are also certain and reasonable, and [are] not in conflict with existing statutory or constitutional provisions." Id. at 778. "All officers or soldiers offending against the rules of immunity of non-combatants... become liable to the severest penalties." Id. at 779.

Irregular armed groups or persons not forming part of the organized forces of a belligerent are not generally recognized as legitimate troops, and are subject upon capture to summary punishment, even death. Id. at 783. Such actions were taken in many instances during the American Civil War. Id. at 784 n.87. This would be in keeping with Pomponius who said: "Enemies are those who in the name of the state declare war upon us, or upon whom we in the name of a state declare war, others are brigands and robbers." GROTIUS, supra note 160, ch. III(1), cited in 1 LAW OF WAR, supra note 160, at 21. The United Nations seems to take a more "progressive" view of this issue. See Report on Human Rights in Armed Conflicts, supra note 168; see also infra note 232 and accompanying text.

\(^6\) Yamashita, 327 U.S. at 9.

\(^7\) See id.; see also Ex parte Milligan, 71 U.S. (4 Wall.) 2, 121 (1866) (finding that a military commission had no jurisdiction to try a civilian where "the courts are open and their process unobstructed"); Sterling v. Constantin, 287 U.S. 378 (1930) (finding that district court had jurisdiction to review Texas governor's declaration of martial law and subsequent commandeering of oil production). But see Quirin, 317 U.S. at 45 (concluding that "the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commission"). An example of where there are no civil courts in operation. See Milligan, 71 U.S. at 121. See generally WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE (1993). This issue will be further discussed in connection with Duncan v. Kahanamoku, 327 U.S. 304 (1946), infra notes 192-98 and accompanying text.
Qaida and/or the Taliban, to determine what rights, if any, these detainees have under the Constitution, the laws of the United States, and the various treaties to which the United States is a signatory. Although the issue is whether the detainees are civilians or combatants, and if the latter, whether they are "unlawful combatants." Although The Order is directed at non-U.S. citizens, additional issues arise if either the detention or the trial takes place in the United States.

The Court next discusses whether the commission to try General Yamashita was lawfully created and, if so, whether this authority allowed his trial to take place after the cessation of hostilities. The Court finds ample support in "long-established American precedents sanctioning lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information... or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.


The situation changes once an alien is within the United States, whether or not that presence is legal. See Zadvydas v. Davis, 533 U.S. 678 ("The Due Process Clause applies to all persons within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); Wong Wing v. United States, 163 U.S. 228 (1896) (holding that aliens, whether or not lawfully in the United States, are entitled to the rights of the Fifth and Sixth amendments before criminal penalties may be imposed). Cf. Ex parte Quirin, 317 U.S. 1 (1942); 14 Op. At'y Gen. 249 (1873) (arguing that Modoc Indian prisoners accused of crimes against civilians during hostilities with the United States could be tried by military tribunals). These issues will be further discussed later, infra notes 192, 250, 293-306 and accompanying text.


Id. at 10. The Court does not cite any precedents in particular, although there are many, during times of congressionally declared wars. See supra note 133. The Court's citation to Article of War 8, which deals with the authority to appoint general courts-martial, would seem irrelevant to the authority to appoint military commissions. Although sometimes overlapping in subject matter jurisdiction, military commissions are a different type of military tribunal, created by a different source of author-
the creation of military commission "by any field commander, or by any commander competent to appoint a general court-martial," where such officers have been authorized by order of the President, as they had in *Yamashita.*

In language directly relevant to the subject at hand, the Court next resolves the question of whether the authority to create the military commission, and to direct a trial by military order, continued even after the cessation of hostilities:

> The trial and punishment of enemy combatants who have committed violations of the law of war is... not only a part of the conduct of war operating as preventive measures against such violations, but is an exercise of authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed.

A formal state of war had been proclaimed by Congress, but peace had not been agreed upon or proclaimed. Therefore, the President retained his full war powers as Commander in Chief to appoint and to put in effect military tribunals, even after hostilities had ceased but before the official end of the war, when peace was officially proclaimed. Thus, the Court again lays heavy emphasis on the need for a *formal declaration of war by Congress* in order for the President to exercise the extraordinary powers that allow him to establish special judicial procedures, notwithstanding that they are part of a separate military regime.

General Yamashita's objection to the proceedings, by virtue of their alleged violations of Articles 25 and 38 of the then applicable Articles of War, was also rejected. The Court concluded that enemy combatants were not among those persons subject to the Articles or entitled to their benefits; although Article 15 spoke of the concurrent jurisdiction of courts-martial, military commissions, and other military tribunals, the

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176 Id.
177 Id.
178 Id. at 11-12 (emphasis added). As applied to the present situation, the proscribed actions would have to be *prospective.*
180 See Burn v. Wilson, 346 U.S. 137, 140 (1953) ("Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment."); Duncan v. Kahanamoku, 327 U.S. 304, 309 (1946) ("[M]ilitary tribunals are not part of our judicial system").
181 41 Stat. 787, Art. 25 (1920) (providing for the taking and use of depositions in non-capital military tribunals, except that they may be used by the defense in a capital case).
182 Id. Art. 38 (1920) (providing that the President shall establish the procedures to be followed in the various military tribunals, including military commissions).
183 See Yamashita, 327 U.S. at 20.
military commission convened to try General Yamashita was not summoned pursuant to the Articles of War but rather "pursuant to the common law of war." The Court thus indicates that military commissions are not created by the authority of the Articles of War (or their successor, the U.C.M.J.), but rather are established pursuant to the common law of war to try combatants for violations of the common law of war, after war had been proclaimed by Congress.

The Court reached a similar conclusion in responding to General Yamashita's contention that he was entitled to the benefits of Articles 25 and 38 of the Articles of War because Article 63 of the Geneva Convention of 1929 required that he be tried "only by the same courts and according to the same procedures as in the case of persons belonging to the armed forces of the detaining Power." The Court determined that this provision was meant to cover only offenses "committed while a prisoner of war, and not for a violation of the law of war committed while a combatant." Thus was sealed General Yamashita's fate.

But this did not occur without vehement dissents from Justices Murphy and Rutledge. Justice Murphy could very well have been writing about a case under The Order:

The grave issue raised by this case is whether a military commission ... may disregard the procedural rights of an accused person as guaranteed by the Constitution, especially by the due process clause of the Fifth Amendment. The answer is plain. The Fifth Amendment guarantee of due process of law applies to "any person" who is accused of a crime by the Federal Government or any of its agencies. No exception is made as to those who are accused of war crimes or as to those who possess the status of enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights which makes the Constitution the great living document that it is. The immutable rights of the individual, including those secured by the due process clause of the Fifth Amendment, belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, color or beliefs. They rise above any status of belligerency or outlawry. They survive any popular passion or frenzy of the moment. No court or legislature or executive, not even the mightiest army in the world, can ever destroy them. Such is the universal and indestructible nature of the rights which the due process clause of the Fifth Amendment recognizes and protects when life or liberty is threatened by virtue of the authority of the United States. The existence of these rights ... cannot be ignored by any branch of Government, even the military, except under the most extreme and urgent circumstances .... The trial was ordered to be held in ter-

184 Id.
185 47 Stat. 2052 (1929).
186 Yamashita, 327 U.S. at 21. The Court rejected on similar grounds General Yamashita's challenge under Article 60 of the Geneva Convention, to the failure of the United States to notify Japan's representative as Protecting Power, Switzerland, of the proceedings against him.
ritory over which the United States has complete sovereignty. No military necessity or other emergency demanded the suspension of the safeguards of due process.\textsuperscript{187}

Justice Murphy continues, in language that provides a warning for the future:

The high feelings of the moment doubtless will be satisfied. But in the sober afterglow will come the realization of the boundless and dangerous implications of the procedure sanctioned today. No one in a position of command in an army, from sergeant to general, can escape those implications. Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision. But even more significant will be the hatred and ill-will growing out of the application of this unprecedented procedure . . . . The effect in this instance, unfortunately, will be magnified infinitely, for we are dealing with the rights of man on an international level.

. . . That just punishment should be meted out to all those responsible for criminal acts of this nature is . . . beyond dispute. But these factors do not answer the problem . . . . They do not justify the abandonment of our devotion to justice . . . . To conclude otherwise is to admit that the enemy has lost the battle but has destroyed our ideals.

. . . .

If we are ever to develop an orderly international community based upon a recognition of human dignity it is of the utmost importance that the necessary punishment of those guilty of atrocities be as free as possible from the ugly stigma of revenge and vindictiveness.\textsuperscript{188}

The balance of Justice Murphy’s dissent cogently refutes, point by point, the majority’s finding that a recognized violation of the laws of war had been proven, much less by competent evidence.

Justice Rutledge’s dissent is as passionate as that of Justice Murphy:

It is not too early, it is never too early, for the nation steadfastly to follow its great constitutional traditions, none older or more universally protective against unbridled power than due process of law in the trial and punishment of men, that is, of all men, whether citizens, aliens, alien enemies or enemy belligerents. It can become too late. This long-held attachment marks the great divide between our enemies and ourselves. Theirs was a philosophy of universal force. Ours is one of universal law, albeit imperfectly made flesh of our system and so dwelling among us. Every departure weakens the tradition,

\textsuperscript{187} Id. at 26-27. \textit{But see} Downes v. Bidwell, 182 U.S. 245 (1901) (finding that the Constitution does not follow the flag except as to fundamental rights); United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that the Fourth Amendment is not applicable to a search in Mexico of a non-U.S. citizen’s house). The question arises as to the Constitution’s applicability to the United States military enclave in Guantánamo, Cuba, where persons captured in Afghanistan by United States forces, or turned over to them, are presently being detained for interrogation and possibly trial pursuant to The Order. \textit{See} Katharine Q. Seelye, \textit{For America’s Captive Home Is a Camp in Cuba, with Goggles and a Koran}, \textit{N.Y Times}, Jan. 20, 2002, at A12.

\textsuperscript{188} Yamashita, 327 U.S. at 28-29.
whether it touches the high or the low, the powerful or the weak, the trium-
phant or the conquered. If we need not or cannot be magnanimous, we can
keep our own law on the plane from which it has not descended hitherto and
to which the defeated foes' never rose.189

The balance of Justice Rutledge's dissent includes a devastating at-
tack on the majority's rulings on the denial of a reasonable opportunity
to prepare a defense by General Yamashita's lawyers, the vagueness of
the charge itself, the proof and findings of the military commission, and
the applicability of the safeguards provided by the Articles of War, the
Geneva Convention, and the due process clause of Fifth Amendment.
Justice Rutledge, as did Justice Murphy, warns that the majority's con-
struction of the Geneva Convention as inapplicable would have adverse
effects on "the security of our own soldiers, taken prisoner, as much as . . .
that of prisoners we take."190

As the Second World War wound down so did the Supreme Court's
enthusiasm for military tribunals, and thus we come to the last of the ma-
ajor cases coming out of that period in our history.

4. The last of the Mohicans: Duncan v. Kahanamoku191

The power of the military to try U.S. civilian citizens,192 even during a
congressionally declared war, is the subject of these companion cases de-
cided in 1946. They arose from incidents that took place in early 1942

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189 Id. at 41-42.
190 Id. at 76. See also id. at 72-73 n.36 ("We should, in my opinion, so hold, for reasons of security to
members of our own armed forces taken prisoner, if for no others.").
191 327 U.S. 304 (1946).
192 John Walker Lindh, a U.S. citizen captured in the present Afghan theater of operations, where
he was allegedly a member of the Taliban forces, has been remitted for trial in the United States. See
Walker Will Face Terrorism Counts in Civilian Court, N.Y. TIMES, Jan. 16, 2002, at A1, A10; see also Duncan
v. Kahanamoku, 327 U.S. 304 (1946) (finding lack of jurisdiction of military tribunals to try civilians
civilian accompanying Armed Forces overseas is entitled to constitutional rights under the Fifth and
Sixth Amendments even when charged with criminal conduct occurring outside the United States);
John Minz, Justice Says It Won't Charge a U.S. Citizen Moved from Cuba; Man in Custody as Government De-

As to the authority of military authorities over non-citizens in U.S. territory during peacetime (in-
cluding possible non-congressionally declared wars), see Zadvydas v. Davis, 533 U.S. 678, 693 (2001)
("But once an alien enters the country, the legal circumstance changes, for the Due Process Clause
applies to all 'persons' within the United States, including aliens, whether their presence here is law-
ful, unlawful, temporary, or permanent."); Wong Wing v. United States, 163 U.S. 228 (1896) (holding
that aliens, whether or not lawfully in the United States, are entitled to the rights of the Fifth and
Sixth Amendments before criminal penalties may be imposed). Cf. Haitian Ctrs. Council v. Sale, 829
F. Supp. 1028, 1041 (E.D.N.Y. 1993) (noting that the due process clause of Fifth Amendment applies
to the United States Naval Base at Guantanamo, Cuba, which is subject to the exclusive jurisdiction
and control of the United States, and where the criminal and civil laws of the United States apply).
But see Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412 (11th Cir. 1995) (denying constitutional
protection to Cuban and Haitian immigrants residing in U.S. military base in Cuba and Panama).
The time that elapsed between these incidents and the decision by the Court is thought by some to have aided in their outcome. The passage of time and the ending of the hostilities probably allowed for a more dispassionate consideration of the issues raised.

In any event, on December 7, 1941, immediately following the Japanese attack at Pearl Harbor, the Governor of Hawaii, acting pursuant to the provisions of the Hawaiian Organic Act, proclaimed a state of martial law for the Islands. To validate the Governor’s action, the Organic Act required that the President approve his action, which was done orally on December 8, 1941, in a message over the radio.

Immediately after the Governor’s proclamation of martial law, the Commanding General of the Army in Hawaii installed himself as Military Governor of the Islands. Thereafter, on December 8, 1941, he issued an order forbidding both the civil and criminal courts from summoning juries or conducting trials. The order also established military tribunals to take the place of these courts. These military tribunals were to try civilians charged with violating the laws of the United States and of Hawaii, as well as the rules, regulations, orders or policies of the Military Government. The order provided that the rules of evidence and procedure applicable in civilian courts did not control, and that penalties commensurate with the offense committed would be imposed upon a determination of culpability, including the death penalty in appropriate cases. By virtue of a subsequent order dated August 25, 1943, courts in Hawaii were prohibited from accepting petitions for writs of habeas corpus. Additionally, both prisoners and their attorneys were prohibited from filing for such writs, with violations of this proscription subjecting them to criminal sanctions.

On August 20, 1942, Harry E. White, a stock broker, was charged in a military court, designated a “provost court,” allegedly for embezzling the stocks of another civilian, all in violation of the laws of Hawaii. Despite challenges to the jurisdiction of this tribunal and a demand for a jury trial, he was tried, convicted, and sentenced to five years by a military judge. Thereafter, on February 24, 1944, the other petitioner, Lloyd C. Duncan, a dockworker at the Navy yards, was charged with brawling with two armed Marine sentries. Notwithstanding challenges similar to those made by White, he was tried, convicted, and sentenced to six months’ imprisonment by a military court for violating a military regulation that prohibited assaults on military personnel. Both White and Duncan sought writs of habeas corpus in the United States District Court for Hawaii, and the court issued the writs. These rulings were promptly

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194 In re Yamashita, 327 U.S. 1, 64 n.31 (1946) (describing the various military courts including the “provost court”).
reversed by the court of appeals. The Supreme Court subsequently granted certiorari, reversed the appellate court, and ordered issuance of the writs.

Given the nature of the military order involved and the charges made, this outcome is hardly surprising when viewed in hindsight. However, at the time, it represented an important change in the almost unbroken line of government victories upholding the exercise of extraordinary powers by the executive in times of a congressionally declared war. As Justice Burton, dissenting in Duncan, stated, it constituted judicial boundary-setting at "the outer limits of the jurisdiction of our military authorities... even under such extreme circumstances as those of the battlefield." Nevertheless, Justice Black, writing for the majority, took care to distinguish these cases from those involving the exercise of military jurisdiction by military courts over "members of the armed forces, those directly connected with such forces, or enemy belligerents, prisoners of war, or others charged with violating the laws of war." Additionally, Justice Black found nothing in the Organic Act to justify what amounted to the "obliteration of the judicial system of Hawaii." [The] military trial of civilians charged with crime, especially when not made subject to judicial review, is so obviously contrary to our political traditions and our institution of jury trials in courts of law, that the tenuous circumstances offered by the government can hardly suffice to persuade us that Congress was willing to enact [into statute, authorization] permitting such a radical departure from our steadfast beliefs.

195 See Ex parte Duncan, 146 F.2d 576 (9th Cir. 1944).
196 See Duncan v. Kahanamoku, 327 U.S. at 314 ("[T]hese petitioners were tried before tribunals set up under a military program which took over all government and superseded all civil laws and courts.").
197 Id. at 342 (Burton, J., dissenting).
198 Id. at 313-14.
199 Id. at 315.
200 Id. at 317.

Justice Jackson did not participate, apparently still involved in the Nuremberg trials. As expected, Justice Murphy, although this time in the majority, railed against the government's arguments to justify "[The] swift trial and punishment which the military desires [but which] is precisely what the Bill of Rights outlaws." Id. at 331 (Murphy, J., concurring). The Justice took particular umbrage against the claim that the failure of the civil courts to convict in some cases would diminish the military's authority and ability to perform because this claim "assumes without proof that civil courts are incompetent and are prone to free those who are plainly guilty." Id.

Chief Justice Stone's concurrence points to the fact that from February of 1942 the civil courts in Hawaii were capable of functioning and that the trial of petitioners in the civil courts no more endangered the public safety "than the gathering of the populace in saloons and places of amusement, which was authorized by military order." Id. at 337 (Stone, CJ., concurring).

Justice Burton's dissent, joined by Justice Frankfurter, raises some valid points, suggesting that the majority was second guessing military decisions with the benefit of hindsight. Since "[w]ithin the field of military action in time of war, the executive is allowed wide discretion," the Justice asked: "What is a battle field and how long does it remain one after the first barrage?" Id. at 342 (Burton, J., dissenting).
a. *Shades of the Lost Battalion: Ex parte Milligan*201

The outcome in *Duncan* should not have come as any great surprise, were it not for the hysteria resulting from the attack on Pearl Harbor. As far back as the Civil War era, a time of obvious strain on civil liberties, the Supreme Court has laid down rules that placed military commissions on a short leash.

In *Ex parte Milligan*, the Court granted a writ of habeas corpus to ex-carcereate a civilian convicted by a military commission in a trial held outside the theater of the ongoing civil war. In doing so the Court provided some instructional language which may be considered applicable to the present situation:

If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity . . . as no power is left but the military [for the military to temporarily step in] . . . . As necessity creates the rule, so it limits its duration; for if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.202

Finally, in words that seem tailor-made for *The Order*, the Court stated:

We by no means assert that Congress can establish and apply the laws of war where no war has been declared or exists . . . . [I]t is within the power of Congress to determine [when] . . . . such great and imminent public danger exists as justifies the authorization of military tribunals.203

Although mathematical certainty is hardly an attribute of the law—and within the law, the subject under study is imprecise indeed—some general guidelines can be gleaned from the prior discussion. The first and foremost is that although military commissions are part of our legal and constitutional history, in recent times they have received judicial approval only when Congress has authorized them by virtue of a formal declaration of war. These are extraordinary tribunals, and extraordinary action by Congress seems to be a *sine qua non* to their validity. The second general principle seems to be that where Congress has specifically legislated on a subject matter, the courts will be reluctant to override the path chosen by Congress in favor of executive action which departs from that legislative solution.

With this background to serve as our framework, we delve into the substance of *The Order*.

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201 71 U.S. 2 (1866).
202  *Id.* at 127 (emphasis removed).
203  *Id.* at 140 (Chase, C.J., concurring).
II. THE ORDER

A. The findings

The Order makes findings, preliminary to its substantive provisions, that are important in establishing the background against which it was issued and in helping to frame its parameters.204

The first finding205 is that “[i]nternational terrorists, including members of al Qaida,” have carried out attacks upon United States diplomatic and military personnel, facilities abroad, citizens, and domestic property on such a scale as to have created a “state of armed conflict” requiring the use of the Armed Forces of the United States. It is then indicated that because of these attacks, including those perpetrated on September 11, 2001 in the United States, the President has proclaimed a national emergency.206 These findings define the scope of The Order in broader

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204 As to the significance of the preamble to the operative parts of The Order, see generally NORMAN J. SINGER, 1A STATUTES AND STATUTORY CONSTRUCTION § 47:04 (5th Ed.). See also Yazoo v. Thomas, 132 U.S. 174 (1889) (matters in the preamble not having been enacted cannot be given any binding legal effect); Price v. Forrest, 173 U.S. 410, 427 (1899) (holding that the preamble cannot control the enacting part of legislation where the enacting part is expressed in clear, unambiguous terms, but where such is not the case it may be resorted to help discover the intention of the lawmaker). Where facts found by the enacting body appear in the preamble, this legislative determination is usually beyond the reach of judicial inquiry. However, where the determination of fact also involves judgment factors, such as the existence of any emergency, and where the fact could potentially change, then the courts may review the origin of the facts and the justification for their continuation in the enactment. See Block v. Hirsh, 256 U.S. 135 (1921) (upholding law made necessary by emergencies of war upon review of facts); A.L.A. Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935) (striking down congressional law despite claim of economic crisis); Leary v. United States, 395 U.S. 6 (1969) (questioning statutory presumption upon examination of facts); United States v. Morrison, 529 U.S. 598, 614 (2000) (concluding that a statute is not immune from judicial review just because it is based on congressional findings; whether a statute is within Congress’s power is “ultimately a judicial question”); Turner Broad. Sys., Inc. v. FCC, 520 U.S. 180, 195 (1997) (noting that courts should review predictive judgments of Congress with “substantial deference” when determining the constitutionality of a statute, since Congress is better equipped to amass and evaluate large quantities of data); Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (“The fact finding process of legislative bodies is generally entitled to a presumption of regularity and deferential review by the judiciary.”) (citing Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488-89 (1955)).

As for factual findings in executive orders, it can be argued that such an order, when supported by findings of fact similar to those supporting a congressionally promoted statute, is also entitled to deference. Cf. United States v. Morrison, 529 U.S. 598 (2000); United States v. Lopez, 514 U.S. 549 (1995).

In a somewhat different setting, however, Justice O’Connor stated in Richmond v. J.A. Croson Co., 488 U.S. 469, 501 (1989), that “blind judicial deference to legislative or executive pronouncements of necessity [have] no place in equal protection analysis” (citing to Justice Murphy’s dissent in Korematsu, 323 U.S. at 235-40).

205 See supra note 9, § 1(a).

206 See id. § 1(b).

207 Proclamation No. 7463, 66 Fed. Reg. 48,199 (2001). In this document the President declares that a national emergency has existed as of September 11, 2001 and invokes the National Emergencies Act (50 U.S.C. §§ 1601 et seq.) to put into effect sections 123 (suspension of scheduled separation of officers of the Armed Forces), 123a (suspension of end-strength limitations), 527 (suspension of the
terms than at least one of the sources of authority upon which The Order relies, JR 23, which both in its preamble\(^{209}\) and in its substantive provisions makes clear that its authorization for use of military force is with reference only to "the terrorist attacks that occurred on September 11, 2001."\(^{209}\) This is an important point because the apparent intent of The Order, as well as expressions made by the Executive branch, indicate that military operations will be expanded to a more general "war against terrorism," including various countries and organizations.\(^{210}\)

The third finding\(^{211}\) states that “[i]ndividuals acting alone and in concert involved in international terrorism” have both the capability and intention of carrying out terrorist acts of such magnitude against the United States to “place at risk the continuity of the operations of the United States Government.” This very portentous statement appears to be based upon the President's superior knowledge about prospective dangers to the nation. Therefore, it is highly unlikely that any court will probe into this finding or attempt to second-guess the President's ability to perform his most basic duty, protecting the existence and continuity of the nation.\(^{212}\) The importance of the President's finding cannot be underestimated, particularly in the initial period after The Order is issued.\(^{213}\) Nevertheless, this conclusion may not totally insulate the substantive provisions of The Order from judicial scrutiny if an appropriate constitutional challenge is made.

The fourth finding concludes that the ability of the United States to protect itself and its citizens and “to help its allies and other cooperating

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\(^{209}\) SJ. Res. 23, 107th Cong., Pub. L No. 107-40, 115 Stat. 224, pmbl. (2001) (enacted) ("To authorize the use of United States Armed Forces against those responsible for the recent attacks launched against the United States"; "Whereas, on September 11, 2001, acts of treacherous violence were committed against the United States.").

\(^{210}\) Id. § 2(a).


\(^{212}\) See The Order, supra note 9, § 1(c).

\(^{213}\) It is also a position that is not likely to be assailed by the normal political processes, at least at the beginning, while there is still a sense of emergency.

\(^{214}\) As we have seen, the Court also tempered its views in the period between Korematsu and Duncan. See supra notes 192-205.
nations protect their nations and their citizens" from further terrorist attacks in the future depends in "significant part" upon using the United States Armed Forces "to identify terrorists and those that support them, to disrupt their activities, and to eliminate their ability to conduct and support such attacks." The purported intention of using U.S. troops in aid of "allies and other cooperating nations" is again a significant departure from the congressional authorization of JR 23, which makes no mention of such broader activities. Thus, this situation raises a series of important but tangential issues which are beyond the scope of this Article.

The fifth and sixth findings are the most crucial in terms of the substantive portions of The Order. First, the President determines that in order to protect the United States and its citizens and "for the effective conduct of military operations and prevention of terrorist attacks," it is necessary for individuals, subject to The Order, to be detained and "tried for violations of the laws of war and other applicable laws by military tribunals." Second, "[g]iven the danger to the safety of the United States and the nature of international terrorism . . . it is not practicable to apply in military commissions under [The Order] the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts." These findings raise the question whether the President is authorized to appoint these military tribunals absent a declaration of war by Con-

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214 See The Order, supra note 9, § 1(d).
215 The President can deploy troops abroad in defense of American lives and property for brief periods of time and has historically exercised such powers without any legal challenge having been successfully made. Examples include the invasion of Grenada in 1983, allegedly to rescue American students, see Robert J. Beck, International Law and the Decision To Invade Grenada: A Ten-Year Retrospective, 33 Vt. J. INT’L L. 765, 772-84 (1993), and the invasion of Panama in 1989 to aid the "war on drugs," see Louis Henkin, The Invasion of Panama Under International Law: A Gross Violation, 29 COL. J. TRANSNAT’L L. 293 (1991). See also STEVE ALBERT, THE CASE AGAINST THE GENERAL: MANUEL NORIEGA AND THE POLITICS OF AMERICAN JUSTICE (1993). The issue is more blurred when it comes to such actions on behalf of other nations or their citizens. See generally Note, Congress, the President, and the Power To Commit Forces To Combat, 81 HARV. L. REV. 1771 (1968); North Atlantic Treaty, Apr. 4, 1949, 63 Stat. 2244, T.I.A.S. No. 1964; Southeast Asia Collective Defense Treaty, Feb. 4, 1955, 1 U.S.T. 81, T.I.A.S. No. 3170. Such actions are more sustainable where the President acts in compliance with a treaty obligation. Under those circumstances it can be argued that the Senate, which ratifies the treaty, has acted to authorize such action beforehand. Treaty obligations by the United States are usually couched in terms such that the United States must be "in accordance with constitutional process." Such action could also be grounded on the duty of the President to "take Care that the Laws be faithfully executed," U.S. CONST. art. II, § 3, in that treaties have the force of law. See U.S. CONST. art. VI, cl. 2 (stating that treaties are "the supreme Law of the Land").

Interestingly enough, the September 11 terrorist attacks have set in motion an inverse scenario with the United States invoking the mutual defense provisions of the North Atlantic Treaty and thus seeking the support of its European allies in its "war against terrorism." See supra note 5.

216 See The Order, supra note 9, § 1(e).
217 See id. § 1(f).
218 Id.
gress, especially given the availability of U.S. civilian courts to try these cases and their proven ability to do so.\textsuperscript{2} It is unlikely that a court of law can or will question the premises upon which this finding is based, that the use of military commissions is necessary "for the effective conduct of military operations and prevention of terrorist attacks" and that the "danger to the safety of the United States and the nature of international terrorism" make it "not practicable to apply the principles of law and rules of evidence" used in the federal courts. However, these vague and ill-defined general statements are difficult to accept at face value. The manner and method by which persons accused of engaging in international terrorism are tried would seem to bear little relevance to "military operations." Furthermore, the connection to other, prospective terrorist attacks seems even more tenuous, unless The Order contemplates that the detention of suspects without bail prior to trial is a means of preventing such attacks. If so, the outcome would in all likelihood be the same if the trial were held in a federal court, given the provisions of the Bail Reform Act.\textsuperscript{221}

It should be recognized, however, that there is one important benefit to the government, and indeed the public, derived from the ability indefinitely to incarcerate individuals covered by The Order, and, in the process, interrogate them while incommunicado and outside the constraints of the Constitution, the Geneva Conventions, or the U.C.M.J.: the securing of information about past crimes, and more importantly, receiving intelligence on future terrorist activities. In this respect, we are likely, sometime in the future, to be faced with an \textit{in extremis} situation in which the rights of the few may have to give way to those of the many.\textsuperscript{221}


\textsuperscript{220} See 18 U.S.C. § 3142 (placing the burden of production on the defendant to show his release would not pose a flight risk or danger to any person or the community). In none of the trials held in federal court involving terrorism has bail pending trial been granted to persons accused of terrorism or related activities.

\textsuperscript{221} A possible, no longer far-fetched, scenario would be one in which a terrorist is detained after it is known that he has placed a nuclear device in the heart of a major city in the United States. The question is: to what extent is our society willing to go to obtain whatever information is needed to prevent such a mass disaster? These are moral and legal issues that we must face, discuss, and attempt to resolve, before they happen. There must be in place some mechanism to deal with these \textit{in extremis} situations. There will not be time for seeking search warrants or engaging in debate. Compare Philip B. Heymann, \textit{Torture Should Not Be Authorized}, \textit{Boston Globe}, Feb. 16, 2002, at A15, with Alan M. Dershowitz, \textit{Yes, It Should Be 'On the Books,' Boston Globe}, Feb. 16, 2002, at A15. A similar situation is the "shoot down" authority of civilian air craft by the military. Eric Schmitt, \textit{New Power To Down Jets Is Last
There is an urgent need to discuss these scenarios and look for practical, constitutional solutions.

It should also be stated that an argument can be made, relying on Yamashita, that the use of military commissions is an integral part of the prosecution of the “war effort.” However, there are several problems with this argument. First, it fails to take into account that Yamashita dealt with a congressionally declared war. There, Congress specifically instructed the President “to employ . . . all the resources of the country” to carry on the war. Here, we have no declaration of war, and JR 23 limits the President to “use all necessary and appropriate force.” Second, on a related point, there is a distinct difference as to what is entailed in action in aid of a “war effort” and that which is related to supporting “military operations.” The implied scope of the latter is considerably more limited in nature. These are not mere plays on words. We should keep in mind that the Supreme Court did not hesitate to strike down what was undoubtedly a much more serious impediment to the “war effort” during the Korean War when the President overstepped his constitutional powers.

The idea that allowing the “principles of law and rules of evidence” to apply in a proceeding in which the liberty, and possibly the life, of the accused are at stake, is “not practical” because of the nature of international terrorism, and because such standards somehow pose a “danger to the safety of the United States,” are premises that are difficult to accept on simple faith. First, whether constitutional protections are “practical” or not, by which apparently is meant, “expedient,” has never been relevant to determining whether constitutional rights need to be respected by the government. It is always more “practical” or “expedient” for the government to act without such restraints. However, ease in attaining convictions should not be a primary constitutional goal of government.

Furthermore, such a conclusion runs contrary to experience, plain facts, and common sense. Trials of this nature have been taking place in United States District Courts with some regularity, with an almost unbro-

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Resort, Rumsfeld Says, N.Y. TIMES, Sept. 28, 2001, at B7. The detention of a large number of persons as “material witnesses” by the Department of Justice shortly after the September 11 incidents could also be related to these concerns. 18 U.S.C. § 3144.

222 “The trial and punishment of enemy combatants who have committed violations of the law of war is . . . a part of the conduct of war . . . . That sanction is without qualifications as to exercise of this authority so long as a state of war exists—from its declaration until peace is proclaimed.” In re Yamashita, 327 U.S. 1, 11-12 (1946) (emphasis added).


225 Youngstown, 343 U.S. at 589 (Vinson, C.J., dissenting) (noting that the President was enjoined from taking over the steel industry notwithstanding that “a work stoppage would immediately jeopardize and imperil our national defense and the defense of those joined with us, in resisting aggression, and would add to the continuing danger of our soldiers in the field”).
There have been no allegations that these trials pose any danger to the safety or security of the nation, although the government is held to a higher standard of proof than is contemplated by The Order. None of these allegations seem a sufficient justification, under the Constitution, to dispense with the requirements of due process under the Fifth Amendment. Furthermore, any fear that classified information may be divulged by virtue of the nature of these trials, thus compromising American intelligence sources and adversely affecting national security, a legitimate concern, has been addressed by Congress through the passage of the Classified Information Procedures Act in 1980. These procedures have been used on numerous occasions in security-sensitive trials, again most of which the government has won.

Let there be no doubt that there are considerable, mostly practical, problems raised by the application of the normal criminal procedures to the Afghanistan scenario. But these are not insurmountable and not completely unlike many of the problems that have been successfully overcome with relation to the "war on drugs" or organized crime. It may be that there is a need for special legislation to deal with the special problems of this special crime wave. However, this is properly a matter for Congress to consider in light of relevant Constitutional protections.

The rejection of the "principles of law and rules of evidence" applicable in federal courts for military commissions has the unintended negative effect of downgrading the quality of this type of military justice by permitting the use of less reliable evidence in these tribunals. This is contrary to the intent of Congress when it enacted the Uniform Code of Military Justice. This downgrading gives the appearance that the government record for the government.

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226 See supra notes 2 and 219.

227 Although it could be argued that jurors and witnesses may be put at risk by these proceedings, this is true of many criminal trials in federal courts, particularly those involving organized crime or illegal narcotics. There are many time-tested methods for shielding jurors and witnesses from these situations. See, e.g., David Weinstein, Protecting a Juror's Right to Privacy: Constitutional Constraints and Policy Options, 70 TEMP. L. REV. 1, 26 (1997) (describing precautions taken to maximize juror safety).

228 Pub. L. No. 96-456, 94 Stat. 2025 (1980), codified at 18 U.S.C. app. 3, §§ 1 et seq. Although it can be argued, with some validity, that this statute does not sufficiently protect the sensitive sources and methods of the intelligence community, it is up to Congress to correct these perceived deficiencies. Furthermore, the statute has considerable self-correcting mechanisms. See 18 U.S.C. app. § 3 (1980).

229 For example, the Military Extraterritorial Act of 2000, 1400 Stat. 2488 (Nov. 22, 2000), authorizes a federal magistrate to hold some of the preliminary proceedings by telephone with the defendant, who is represented by a qualified judge advocate.

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The President is creating a special forum for the specific purpose of attaining preordained convictions. This perception unnecessarily undermines our image in the international arena.

Finally, the President concludes "that an extraordinary emergency exists for national defense," constituting "an urgent and compelling government interest" which makes the issuance of The Order "necessary to meet the emergency."

1. Of terrorists and freedom fighters

One identifiable problem with The Order is that it fails to define some of its key terminology. The terms "international terrorist," "acts of international terrorism," and "terrorism" are at the forefront of this conundrum. In the context of what we are dealing with here, it may not

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21 See The Order, supra note 9, § 1(g).

22 The word "terrorist" is defined in the dictionary as one who systematically employs terror as a means of coercion to achieve an end. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1213 (10th ed. 2001). The modern use of the term "terrorist" developed to describe the Jacobin regime during the French Revolution. See Todd S. Purdum, What Do You Mean, Terrorist?, N.Y. TIMES, Apr. 7, 2002, § 4, at 1. It is now more generally applied to describe those who use violent action, or the threat thereof, against a civilian population for the purpose of attaining political goals. Clearly a bank robber is not normally considered a terrorist, although violent action is used to accomplish this crime. So, if, in addition to being a common criminal, the same bank robber perpetrates the crime for the purpose of raising funds to promote a political goal, he could be called a "terrorist," although in the United States such actions are commonly charged as common crimes regardless of motivation. See United States v. McVeigh, 940 F. Supp. 1571 (D. Colo. 1996); Maureen Dowd, Black Berets Rising, N.Y. TIMES, Jan. 20, 2002, § 4, at 13; James Sterngold, 4 Former Radicals Are Charged in 1995 Killings in Bank Robbery, N.Y. TIMES, Jan. 17, 2002, at A1.

If the use of stealth is used as a criteria, we would run into problems with certain methods of warfare commonly used by modern armies, such as those carried out by our own Special Forces and similar groups who many times operate behind enemy lines and may use stealth accompanied by violence. A distinguishing feature of these, and most military operations, is that the participants are usually uniformed, which grants them theoretical Hague Convention status as lawful combatants. See Hague Convention No. IV of Oct. 18, 1907, 36 Stat. 2295; see also Quirin, 317 U.S. at 30-31. But see photograph appearing in the N.Y. TIMES, Jan. 12, 2002, at A8, captioned, "Americans on the Watch—American soldiers who identified themselves as members of the Special Forces, arrived in Spin baldak, Afghanistan, yesterday to provide security," and depicting armed, non-uniformed U.S. personnel in Afghanistan. Typical guerrilla operations, in which those so engaged are not usually uniformed, come closer to what would be considered "terrorist." But under such criteria the United States would have qualified as a supporter of terrorism, because the United States granted aid to the guerrillas who fought the Soviet troops In Afghanistan (which in turn, probably are now subject to the proscriptions of The Order because many of them joined the Taliban or al Qaeda), as well as those in Nicaragua, Vietnam, Cambodia, and many of the covert operations carried out or supported by our various government agencies so occupied. John J. Lumpkin, C.I.A.'s Paramilitary a Cross Between Spies and Soldiers; Part of Secret War, CANADIAN PRESS, Dec. 2, 2001, available at 2001 WL 30389724.

The use of nationality or citizenship as a factor in determining whether a particular action is "terrorist" in nature is particularly problematic considering such home-grown terrorists as Timothy McVeigh, the Puerto Rican Macheteros, and others in the United States, or the I.R.A. or Basque separatists, among others, elsewhere. Cf. Is This a Terrorist?, BOSTON GLOBE, Feb. 10, 2002, at Cl.
be possible to define those terms in an all-encompassing manner, perhaps leaving us with an unsatisfactory but practical answer: we know one when we see one.233

Another issue raised by the language in the Findings is the reference to “[i]nternational terrorists, including members of al Qaida” as the perpetrators of the various attacks against the United States and its citizens and property.234 This finding seems to be broader in scope than the substantive definition of who is an “individual subject to the order,” which focuses on members of al Qaida, although aiders and abettors, and those knowingly harboring them, are also included within its coverage, irrespective of al Qaida membership.

At least one problem with defining what constitutes terrorism, or better yet who is a terrorist, is that “one man’s terrorist is another’s freedom fighter.” See Russia Urges West To Condemn Chechen Terrorism, N.Y. Times, Feb. 4, 2002, at A13 (quoting Sergei Ivanov, Russia’s Defense Minister: “If those who blow up apartment houses in Moscow or Buinakak in Dagestan are declared freedom fighters, while in other countries such persons are referred to as terrorists, one cannot even think of forging a united anti-terrorist front.”); Anthony Deutsch, Milosevic Opens Defense at Tribunal, Claims He Was Fighting Terrorism, SAN JUAN STAR, Feb. 15, 2002, at 22 (referring to Milosevic’s accusation that NATO bombed civilian villages and collaborated with a terrorist force, the KLA); see also James Watkins, Countering Terrorism: A New Challenge to Our National Conscience, SEA POWER MAG. Nov. 1984; Michael Connon, Terrorism 1-6 (1987) (chapter entitled “Terrorism: A Definition”); Oliver Libby, Defining Terrorism: Little Agreement on Here To Draw the Line, ABCNews.com, http://www.abcnews.go.com/sections/us/dailynews/strike_011011definingterror.html. It is reported that at the early stages of our War for Independence the British refused to give combatant status to captured “rebels.” This changed as the Continental Army took on a more European look and form and as Americans began taking British prisoners. See William Winthrop, Military Law and Precedents 796 (2d ed. 1920) (explaining case of Maj. Gen. Charles Lee). Several of Israel’s Prime Ministers, including Ben Gurion and Menachem Begin, were members of organizations labeled as “terrorist” by the British authorities and engaged in activities that would fall under the proscription of The Order. The Palestinian Liberation Organization, as well as its chairman, Yasser Arafat, are equally compromised. See Todd S. Purdum, President Assails Palestinian Chief on Arms Shipments, N.Y. Times, Jan. 26, 2002, at A1 (“In harshest words on subject, Bush suggests that Arafat is ‘enhancing terror.’”). Michael R. Gordon, U.S. Is Given Papers That IsraelisAssert Tie Arafat To Terror, N.Y. Times, Apr. 12, 2002, at A1; Frank Rich, The Bush Doctrine, R.I.P., N.Y. Times, Apr. 13, 2002, at A17 (op-ed). If we engage in activities to destabilize Saddam Hussein’s regime in Iraq, will we be supporting “terrorist organizations” or “freedom fighters,” and how will we know the difference? If our special operation forces engage in clandestine operations there, will they be “unlawful combatants,” or will they be entitled to Geneva Convention protection if captured? See Bryan Bender, Bush Sees Military As Option on Iraq—But Covert Action May Be the Focus, BOSTON GLOBE, Feb. 14, 2002, at A1.

Although The Order does not define these terms, there are several Federal criminal statutes that use these terms, and provide definitions within the context of the particular statute involved. See 18 U.S.C. § 2331(1) (“international terrorism”); 18 U.S.C. § 2332b(g)(5) (“Federal crime of terrorism”); 18 U.S.C. § 2339(B) (g) (6) (“terrorist organization”); 18 U.S.C. § 3077(1) (“act of terrorism”); 8 U.S.C. § 1182(a)(3)(B)(ii) (“terrorist activity”). It is probably legally acceptable to incorporate these definitions in interpreting the application of The Order. Cf. A. Magano Co. v. Hamilton, 299 U.S. 40, 46-47 (1934) (noting that words used in a statute will be construed according to their ordinary meaning unless the context demonstrates that they are being used differently).

235 See Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (“I know it when I see it,” referring to pornography). The fact of the matter is that in realpolitics, the definition of terrorism is often a flexible one.

234 See The Order, supra note 9, § 1(a).
In this respect the unmentioned quandary (or should we say “quarry”) is the Taliban.²²⁵ Specifically, what are the consequences under The Order of membership in the Taliban, whether as part of the government or of its army? This and other subsidiary questions are not subject to facile disposition.

The Taliban is a fundamentalist Islamic group that assumed control of a large part of Afghanistan and became the de facto government of Afghanistan after the departure of the Soviet troops in 1989, and the fall of its puppet government during the 1990s.²²⁶ It arose in response to a power vacuum in the region created by the withdrawal of the United States from the scene, which gave Pakistan and Saudi Arabia “free rein” in the civil war that ensued, in which they backed the Taliban.²²⁷ Despite consolidating power in over ninety percent of the country,²²⁸ the Taliban regime was refused diplomatic recognition by most of the international community, including the United States, as well as denied a seat in the United Nations.²²⁹ It was, however, accredited by the governments of Pakistan, the United Arab Emirates, and Saudi Arabia.²³⁰ In fact, the Taliban’s ambassador to Pakistan is presently being detained by United States forces in Afghanistan, apparently under the authority of The Order.²³¹ This, together with the detention of members of the Taliban’s armed forces captured in Afghanistan by the Northern Alliance,²³² some

²²⁵ See generally Ahmed Rashid, TALIBAN: MILITANT ISLAM, OIL AND FUNDAMENTALISM IN CENTRAL ASIA (2001). “Talib” is arabic for an Islamic student. “Taliban,” which is the plural for talib, means “students of Islam.” For a brief sketch of Afghan history from 1709 to the present, see From Empire to Revolt and Back: A Sampling of Afghanistan’s Warriors, Kings and Dynasties, N.Y. TIMES, Dec. 9, 2001, at B5.

²²⁶ See Rashid, supra note 225, at 17-30. Its basic agenda was, and still remains, “to restore peace, disarm the population, enforce Sharia law, and defend the integrity and Islamic character of Afghani-

²²⁷ See Rashid, supra note 225, at 175-76.

²²⁸ For a detailed listing of the Taliban’s governmental and military structure, see Rashid, supra note 225, at App. 2, 229.

²²⁹ There were a number of high level contacts between the Taliban government and the United States and other nations, as well as with the United Nations. These were basically interrupted as a result of the September 11 incidents and the refusal of the Taliban government to turn over Osama bin Laden to the United States. Talib Bank, Refuse Bin Laden Handover, N.Y. DAILY NEWS, Sept. 22, 2001, available at 2001 WL 27901686.

²³⁰ See Rashid, supra note 225, at 58.

²³¹ See Robin Wright, U.S. Troops Head to Cuba To Build Jail; Afghan Detainees Expected in Days, CHICAGO TRIBUNE, Jan. 7, 2002, at 1.

²³² The Northern Alliance is a conglomerate of mostly Uzbek and Tajik Afghan tribes from northwestern Afghanistan, who became the Taliban’s principal opposition in the struggle to take over that country after the Soviet withdrawal in 1989. Notwithstanding their being backed by Iran, Turkey, Russia, Uzbekistan, Kazakhstan, Kyrgyzstan and Tajikistan, they were soundly routed on the battlefield in almost every encounter with the Taliban, who in turn was backed by Pakistan and Saudi Arabia, until the United States joined forces with it after the September 11 incidents. The Northern Alliance provided the bulk of the troops that eventually defeated the Taliban’s forces in Afghanistan. See generally
of whom have been transported to the United States Naval base in Guan-
tánamo, Cuba, would lead to the conclusion that The Order is being
interpreted to apply to members of the government and armed forces of
the Taliban regime. Although, if found to be "unlawful combatants,"
their rights under international law may be limited, their designation
as such is a major issue yet to be decided, and is probably dependent on
the facts of each particular case. There is rising concern on this matter
among some members of the international community.

B. Definition and policy

1. Individuals subject to The Order

Section 2 of The Order contains its only definition, that of the term
"individual subject to this order." This is obviously a key provision
whose import is best understood by a dissection of its provisions.

An individual is subject to the provisions of The Order if he or she is
not a citizen of the United States, and the President has determined in
writing that there is reason to believe that such individual:

(i) is or was a member of al Qaida, [OR]

(ii) has engaged in, aided or abetted, or conspired to commit, acts of interna-
tional terrorism, or acts in preparation thereof, 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 [covered by The Or-
der]; [AND]

(2) it is in the interest of the United States that such individual be subject to
[The Order].

The non-citizenship requirement of the definition avoids many of the
constitutional entanglements raised by the trial of U.S. citizens by mili-

Rashid, supra note 235, at 2-6. Cf. David Filipov, Alliance that Drove Out Taliban Unraveling, Boston


244 This is probably pursuant to the provisions of Section 2(a) (1) (iii) which relates to persons who
knowingly harbor members of al Qaida. It is also possible that those detained are suspected of being
or having been members of al Qaida, in which case they would be subject to the provisions of Section
2 (1) (i) of The Order.

245 See Ex parte Quirin, 317 U.S. 1 (1942); In re Yamashita, 327 U.S. 1 (1946).


247 The Order, supra note 9, § 2(a).

248 Id. § 2(a).
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249 Those entanglements may not be altogether avoided, however, if the trial of the non-citizen is held in U.S. territory.

The presidentially self-imposed standard, "reason to believe," is a low one. It is certainly much lower than what the Constitution requires to make a valid arrest in the civilian system. However, such standards, and in fact, most of the Constitutional protections available to U.S. citizens anywhere, or to all persons, including aliens, while in U.S. territory, are not relevant if these detainees are considered prisoners of war, regardless of whether they are legal or unlawful combatants, particularly if their detention and trial is wholly outside the United States.

Most likely, following the pattern of the World War II cases, the detentions and/or convictions will be challenged in the federal courts by petition of habeas corpus. If the detainees are not in U.S. territory, and if existing Supreme Court precedent is followed, these courts, will likely declare themselves without jurisdiction to act. However, if the detention is within U.S. territory, the initial substantive questions likely to be raised in the federal courts will be: (1) whether the detainees are prisoners of war or civilian detainees in military custody; and (2) if they are prisoners of war, whether they are lawful or unlawful combatants. A third issue will be what process they are entitled to under the Constitution.

As previously discussed, there has been no congressional declaration of war. Although this raises the issue of the President's authority to appoint military commissions in this conflict, once that problem is solved, the question still remains whether persons engaged in hostile activities in Afghanistan are entitled to the recognition of any rights. This issue is complicated by the fact that most, if not all, of those detained by United States forces are either persons not captured in the battlefield, as is the case of the former Afghan Ambassador to Pakistan, or are combatants


250 Zadvydas v. Davis, 533 U.S. 678, 693 (2001) ("But once an alien enters the country, the legal circumstance changes, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."); Wong Wing v. United States, 163 U.S. 228 (1896) (finding that aliens, whether or not lawfully in the United States, are entitled to the rights of the Fifth and Sixth Amendments before criminal penalties may be imposed). Cf. Haitian Ctrs. Council v. Sale, 823 F. Supp. 1028, 1041 (E.D.N.Y. 1993) (noting that the due process clause of Fifth Amendment applies to the United States Naval Base at Guantánamo, Cuba which is subject to the exclusive jurisdiction and control of the United States, and where the criminal and civil laws of the United States apply). But see Cuban Am. Bar Ass'n v. Christopher, 43 F.3d 1412 (11th Cir. 1995) (holding that Haitian and Cuban migrants held in military bases in Cuba and Panama did not have constitutional rights).

251 U.S. CONST. amend. IV ("[N]o Warrant[] shall issue, but upon probable cause").

252 Johnson v. Eisentrager, 339 U.S. 763 (1950) (noting that habeas corpus relief is not available to enemy alien to challenge military commission where crimes charged, and the detention and trial all occurred outside the United States).

253 Id.

captured by the Northern Alliance and turned over to the United States Armed Forces.255

The United States has engaged in several undeclared wars or armed conflicts since World War II. These include the Korean, Vietnam and Gulf Wars.256 Notwithstanding Congress's failure to act constitutionally pursuant to Article I, Section 8 with respect to those conflicts, the United States has considered itself bound by the provisions of the Geneva Convention, and other international treaties to which the United States is a signatory, with regards to the rights of captured enemy combatants in those actions.257 This includes non-uniformed Viet Cong prisoners during the Vietnam conflict, who were accorded, at least in theory, lawful combatant status when captured by our forces. Interestingly, in none of these past conflicts were presidential directives similar to The Order issued nor were military commissions created to try enemy combatants, lawful or otherwise. It is also of some relevance that in all those conflicts, we claimed prisoner of war status and treatment under the Geneva Accords for all our troops captured by the enemy.

As previously stated, the Afghan government under the Taliban regime was not recognized by the United States as the legitimate government of that country. This matter may be a closed issue in the courts of the United States because it is likely to be considered a political question beyond the purview of judicial adjudication.258 This probably means that the fighting elements of the Taliban in Afghanistan, and possibly also those of al Qaida, could be considered rebel or insurgent groups under Protocol II of the Geneva Convention, as "organized armed groups which, under responsible command, exercis[ing]... control over a part of its territory as to enable them to carry out sustained and concerted

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258 Baker v. Carr, 369 U.S. 186, 211 (1962) ("[S]uch issues frequently turn on standards that defy judicial application, or involve the exercise of a discretion demonstrably committed to the executive or legislature...such questions uniquely demand single-voiced statement of the Government's view.")
military operations and to implement [the Protocol]. As such they are entitled to certain protections.


Article 2 of Part I indicates that the Convention applies to “any armed conflict” even if the state of war is not recognized by one of the parties. It further provides that any signatory to the Convention is bound by its provisions even if opposing belligerents are not. Article 3 states that

[i]n case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties . . . the following acts are and shall remain prohibited: (1) (d) 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.

Article 4 includes within the definition of “prisoners of war,” members of militias and organized resistance movements “(a) that . . . [are] commanded by a person responsible for his subordinates . . . (b) that . . . hav[e] a fixed distinctive sign recognizable at a distance; (c) that . . . carry[] arms openly; [and] (d) that . . . conduct[] their operations in accordance with the laws and customs of war.” Article 7 prohibits waiver of Geneva Convention rights by prisoners of war.

Part II of Section I of the Convention deals with the treatment that must be accorded prisoners of war. Under Article 17 it is established that such persons need only give their name, rank, date of birth, and serial number, or equivalent information, to their captors. This Article also provides:

[n]o physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

Article 20 states that “[t]he evacuation of prisoners of war shall always be effected humanely and in conditions similar to those for the forces of the Detaining Power in their changes of station.”

Section II deals with the conditions of internment of prisoners of war. Article 21 provides that subject to penal or disciplinary sanctions, “prisoners of war may not be held in close confinement except where necessary to safeguard their health and then only during the continuation of the circumstances which make such confinement necessary.” Article 22 provides that they be assembled in camps or camp compounds, “provided that such prisoners shall not be separated from prisoners of war belonging to the armed forces with which they were serving at the time of their capture, except with their consent.” Article 25 indicates that

[p]risoners of war shall be quartered under conditions as favourable as those for the forces of the Detaining Power who are billeted in the same area . . . . The foregoing provisions shall apply in particular to the dormitories of prisoners of war as regards both total surface and minimum cubic space, and the general installations, bedding and blankets.

Section V deals with relations of “prisoners of war with the exterior” and provides the right of a prisoner of war to write his or her family within one week of arrival at a camp. It gives the Detaining Power a duty to notify the Central Prisoner of War Agency of the prisoner’s capture, address, and state of health for the purpose of forwarding this information to the prisoner’s family (Article 70).

Chapter III of Section VI of the Convention relates to penal and disciplinary sanctions to which a prisoner of war may be subject. Article 82 sets the general premise that

[a] prisoner of war shall be subject to the laws, regulations and orders in force in the armed forces of the Detaining Power; the Detaining Power shall be justified in taking judicial or disciplinary measures in respect of any offence committed by a prisoner of war against such laws, regulations or orders. However, no proceedings or punishments contrary to the provisions of this chapter shall be allowed.

Any law, regulation or order of the Detaining Power that declares as punishable acts committed by a prisoner of war, that would not be punishable if committed by a member of the Detaining Power can only entail “disciplinary punishment.” Article 84 provides for trial of prisoners of war “only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power” with respect to the offense charged. This Article goes on to state that
An individual initial determination will have to be made whether a detainee was a member of the Taliban, or al Qaida, or both, and the position of each individual within each organization, to decide upon the applicability of The Order.\textsuperscript{2} It would be impractical to bring within the aegis of The Order all persons who were members of the Taliban, including common foot soldiers, even though it might be possible to do so under a very broad and general conspiracy theory. The logistical nightmare of detaining, charging, and trying thousands of such Talibans, however, is mind boggling, and would dilute the effort of going after the leading culprits.\textsuperscript{6}

The case of the Taliban leaders, who may have harbored terrorists, is different from that of the rank and file.\textsuperscript{6} Knowing participation in the harboring of al Qaida operatives would place such persons within the zone of probable accusation under The Order. Whether they are “un-

\begin{quote}
In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and in particular, the procedure of which does not afford the accused the rights and means of defense provided for in Article 105.

Article 85 provides that prisoners of war retain their rights under the Convention, even for acts committed “prior to capture.” Under Article 87 the military authorities and courts of the Detaining Power are prohibited from sentencing a prisoner of war applying penalties different than would be applied to a member of the Power’s armed forces for the same acts.

Chapter III also refers to judicial proceedings to which prisoners of war may be subjected. Article 99 prohibits ex post facto application to a prisoner of war of any law of the Detaining Power or of international law. It also prohibits the use of “moral or physical coercion” to induce admission of guilt, and provides that no prisoner of war may be convicted without having been granted the opportunity to present a defense with “the assistance of qualified advocate or counsel.” Under Article 102, a prisoner of war can only be validly sentenced if it is “pronounced by the same courts according to the same procedure as in the case of members of the armed forces of the Detaining Power, and if, furthermore, the provisions of the present Chapter have been observed.” Further, confinement awaiting trial cannot exceed three months (Article 103).

In defense of charges, war prisoners are entitled under Article 105 to the assistance of one of his “prisoner comrades,” to representation by a qualified advocate or counsel chosen by him, to the right to call witnesses, and to the services of a qualified interpreter. Also, according to Article 105, the advocate or counsel shall have at least two weeks to prepare a defense and shall be provided with adequate facilities to do so, to freely visit the accused in private, as well as to confer with any witnesses for the defense, including other prisoners of war. The particulars of the charges against the prisoner of war must be communicated to him or her, and defense counsel “in good time before the opening of the trial” (Article 105).

Article 106 provides for the right of appeal from any sentence imposed, “with a view to quashing or revising of the sentence or the reopening of the trial,” in the same manner as the members of the armed forces of the Detaining Power would be able to appeal.


\textsuperscript{262} Id. Mullah Ahmed Muttawaski, former Taliban foreign minister, is in United States custody in Afghanistan while Mullah Fasal Maziloon, former chief of staff of the Taliban armed forces is a detainee in Guantánamo. See also Eric Schmitt, U.S. Takes Custody of a Qaeda Trainer Seized by Pakistan, N.Y. TIMES, Jan. 5, 2002, at A1.
lawful combatants" subject to trial before military commissions, however, is a different issue. Although chargeable under United States aider and abettor and conspiracy statutes, a question exists whether such acts can independently be considered violations of the laws of war, which is a predicate for jurisdiction by a military commission under the Yamashita doctrine, assuming Congress’s failure to declare war is overlooked.

Membership in al Qaida and engaging in or aiding and abetting terrorist acts or conspiracies whose object is to carry out such acts is the strongest case for treating such persons as "unlawful combatants." Such actions, when directed at unarmed civilian populations, are violations of the common law of war, including treaty law. There should be no doubt that the massive attacks against civilian targets in New York on September 11, 2001, constitute violations of the law of war when committed by members of organized militias, which al Qaida claims to be. Under the Yamashita doctrine, in a congressionally declared war, such persons are subject to trial by a military commission because they are considered "unlawful combatants."

A question exists as to whether mere membership in al Qaida, without more, is sufficient for a valid conviction under the law of war or our criminal statutes. But any foreign citizen who can be linked by compe-

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266 See supra note 172 and accompanying text.

tent evidence to the September 11 attacks against civilians may be considered an unlawful belligerent subject to the jurisdiction of military commissions, assuming valid authorization. They can, of course, also be charged in the courts of the United States.\(^{268}\)

The proscription in Section 2(a)(1)(ii) against acts of international terrorism, or in preparation thereof, "that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on... the foreign policy, or economy"\(^{269}\) of the United States, presents a novel problem particularly as applied to military commissions. It appears to be overinclusive to the point of vagueness.\(^{270}\) Although there are certain terrorist actions that have had clearly adverse effects on the foreign policy of the United States, such as the terrorist bombings of its embassies in Kenya and Tanzania, the term "adverse effects" is often an elusive one. The term "foreign policy" is merely an overall description of a conglomerate of ideas and actions. It is hardly the subject of specificity or certainty; in fact, at times it is altogether impossible to discern what is foreign policy on a particular issue or point in time, especially as presidential administrations change.

The problems caused by this uncertainty are exacerbated when applied to the standard, "adverse effects on... the... economy"\(^{271}\) by reason of a terrorist act. Again, the adverse effects on the economy of the crash of the two aircraft into the Twin Towers in New York, which physically destroyed a substantial part of the economic nerve center of the United States are not in any serious doubt. But when one leaves the heartland of such dramatic happenings,\(^{272}\) the focus becomes blurred and there is an incursion into an area of cause and effect speculation not normally permissible when criminal prosecution is the business at hand.

There is the added question, of course, whether terrorist acts against the foreign policy or economy of a nation violate in any manner the laws of war. The proviso in Section 2(a)(2) of The Order,\(^{273}\) reserving to the President the ultimate discretion whether to charge individuals, otherwise meeting the criteria of The Order, according to whether it is "in the interest of the United States," is not a mere recitation of the principle of...
prosecutorial discretion, although undoubtedly the executive branch has that unique authority. It flags the fact that there are areas of sensitive international relations and intelligence gathering, intermingled with the law and order aspects promoted by The Order, which may require the President to stay his hand in prosecuting otherwise culpable individuals.

Sections 2(b) and (c) state that it is the policy of the United States for the Secretary of Defense to detain and try individuals subject to The Order, and that all such persons be put under his custody and control. This seems like a fairly straightforward proposition. Thereafter, this policy is put in effect by Sections 3 (Detention Authority of the Secretary of Defense) and 4 (Authority of the Secretary of Defense Regarding Trials of Individuals Subject to this Order), which establish the authority of the Secretary of Defense to detain and subject to trial by military commissions the individuals covered by The Order, and set out the criteria to be followed by him.

C. Offenses triable under The Order

Although the jurisdiction of the military commissions created under The Order seems to be defined in terms of the individuals subject to The Order, this jurisdiction appears to be expanded by the language of Section 3.B of MCO No. 1, which provides that these commissions "shall have jurisdiction over violations of the laws of war and all other offenses triable by military commission."

The scope of the language is not certain. What is certain is that the Secretary’s regulation broadens the jurisdiction of these tribunals from that of The Order when it was issued and whose original aim was di-

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274 As an example, there is strong evidence that both Saudi Arabia and Pakistan, officially and sub rosa, lent material, and, in the case of the latter, considerable man power support to the Taliban, and in the case of Pakistan, probably also to al Qaeda. See generally Rashid, supra note 235, at 77, 176. Nearly forty percent of the Taliban’s fighters are from Pakistan. See Bill Nichols, Taliban May Be the First Target of U.S. Retaliation for Ten-or Wave, USA TODAY, Sept. 13, 2001, at A8. In fact, Pakistan’s Inter Services Intelligence agency reputedly introduced bin Laden to the Taliban in 1996. See Rashid, supra note 235, at 181; see also Jeff Jacoby, souring on Saudi Arabia Since Sept. 11, BOSTON GLOBE, Jan. 31, 2002, at A21.

275 It has been reported that detainees are being interrogated for purposes of gathering information, not only to be used as evidence in the forthcoming trials, but also for intelligence purposes of uncovering potential terrorist attacks. It would not be unusual for trade-offs to occur, in which information is exchanged for anything from freedom to lesser penalties, as happens under our criminal system. See, e.g., Gerard V. Bradley, Plea Bargaining and the Criminal Defendant’s Obligation To Plead Guilty, 40 S. TEX. L. REV. 65 (1999).

276 See The Order, supra note 9, § 2(b), (c).

277 Id. § 3.

278 Id. § 4.

279 See id. and prior topic heading.

280 MCO No. 1, supra note 9, § 3.B.
rected at the September 11, 2001 acts of terrorism. As a practical matter, however, it may be that the offenses charged under The Order will remain within the scope of its original intent.

**D. The place of detention**

The Secretary of Defense can detain individuals subject to The Order in any “appropriate location . . . outside or within the United States.”281 At present, persons are all being detained outside the United States proper, in facilities located in Afghanistan, in the Guantanamo Bay Naval Base in Cuba, and aboard United States naval vessels located in the Indian Ocean.282 It appears that this course of action is taking place under the perception that the detaining authorities will be able to act without the constraints of the Constitution and laws of the United States because the detention is “outside” the United States. At least as to the detentions in Afghanistan, this may be the case.283 As to those held aboard U.S. ships and in Guantanamo, the situation is not as clear.284

Considering that conditions aboard a U.S. vessel, and at the Guantanamo Base, are totally within the control of the United States government, it is difficult to accept a principle that allows the government, itself a creature of the Constitution, to be wholly outside its proscriptions.285

Let us first consider the question of those detained aboard United States vessels. It is an accepted fiction of law, recognized in both mu-

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281 Id. ¶ 3(a).
283 See Johnson v. Eisentrager, 339 U.S. 763 (1950) (holding that habeas corpus relief is not available to an enemy alien to challenge a military commission when the crimes charged, the detention, and the trial all occurred outside the United States); see also United States v. Verdugo-Urquidez, 494 U.S. 259, 269 (1990) (relying in part on the decision in Eisentrager that aliens are not entitled to Fifth Amendment rights outside the sovereign territory of the United States to conclude that the Fourth Amendment does not apply to search and seizure by U.S. agents of property of a nonresident alien located in a foreign country). Cf. Asahi Metal Indus. Co. v. Superior Court, 480 U.S. 102 (1987) (reversing state court’s decision that it had jurisdiction to hear lawsuit against foreign manufacturer); United States v. Streifel, 665 F.2d 414 (2d Cir. 1981) (holding that principles applicable to investigatory stops on land are applicable to the high seas); United States v. Toscanino, 500 F.2d 267 (2d Cir. 1974) (holding that criminal defendant alleging he was brought into the United States after being kidnapped was entitled to an evidentiary hearing on such allegations). There are other considerations, of a political and international relations nature, which are beyond the scope of this Article but which may ultimately be decisive in resolving many of the issues under discussion.
284 These cannot be considered detentions “in the field,” which is interpreted to mean “in an area of actual fighting.” Reid v. Covert, 354 U.S. 1, 33-34 (1957).
285 “The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution.” Reid, 354 U.S. at 56. “The concept that the Bill of Rights and other constitutional protections against arbitrary government are inoperative when they become inconvenient or when expediency dictates otherwise is a very dangerous doctrine and if allowed to flourish would destroy the benefit of a written Constitution and undermine the basis of our Government.” Id. at 14.
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nicipal and international law, that a ship constitutes an integral part of its territory and the laws of its flag are those that are applicable, at least as to the governance of its internal affairs. This principle of territorial integrity may be even more applicable to naval vessels, whose crews are charged with the defense of their ships against any outside incursion, and who are immune from even peaceful boarding without the consent of the crew.

That conclusion, in itself, does not end the inquiry, which can follow one of two paths. The first is that detainees, being in U.S. territory, are entitled to the protection of the Constitution, at least as to fundamental rights. However, it seems logical to conclude that being a military ship, it is subject to a different regimen of laws and rights than are applicable in civilian national territory. This question is further complicated by the fact that those detained aboard United States ships in the Indian Ocean were mostly combatants, either lawful or, as is claimed by the government, unlawful.

The determination of a detainee's status depends upon an individual inquiry into the relevant facts of each person's participation in unlawful belligerent activities. It would seem that the government's initial determination of a detainee's unlawful combatant status would be subject to challenge and ultimate determination in the courts. This has been the past practice even in congressionally declared wars, and even in the face of presidential orders proclaiming the lack of jurisdiction in the courts to intervene in the matter. Any other course would lead to the anomaly, unprecedented in our system of government, of the accuser determining the rights of the accused.

The second alternative, one which does not appear promising, is for the courts simply to conclude that persons in custody aboard a U.S. vessel as a result of military capture, whether they be lawful or unlawful combatants, are in a situation so far removed from what was contemplated by the Constitution, as to make the Constitution inapplicable. Although these are largely uncharted waters, it is probably safe to say that courts abhor a constitutional vacuum just as much as nature dislikes a physical one. Thus, it seems unlikely that in the long run, any branch of

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289 See United States v. Flores, 289 U.S. 137, 155-56 (1933) (applying United States law to crime committed aboard United States flag vessel 250 miles up the Congo River); McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10, 21 (1963) (holding that the National Labor Relations Act is inapplicable aboard foreign flag vessel even when in U.S. waters).

290 "Under international law, foreign flag vessels are generally accorded the right of undisturbed navigation on the high seas." United States v. Rubies, 612 F.2d 397, 402 (9th Cir. 1979). If a nation wishes to board a foreign flag vessel, it must obtain authorization from the nation whose flag the vessel flies. See United States v. Postal, 589 F.2d 862 (5th Cir. 1979).

291 See, e.g., Verdugo-Urquidez, 494 U.S. at 250.

292 See Parker v. Levy, 417 U.S. 733, 743 (1974) ("This Court has long recognized that the military is, by necessity, a specialized society separate from civilian society.").

293 See In re Yamashita, 327 U.S. 1 (1946); Ex parte Quirin, 317 U.S. 1, 24 (1942).
government can count on having such unfettered constitutional dispensation.\footnote{291}

1. Is Guantánamo an offshore Constitutional haven?

The practice of detaining persons in Guantánamo, particularly for long periods of time,\footnote{91} presumably unencumbered by constitutional scrutiny,\footnote{255} is not new,\footnote{254} but is becoming more prevalent, even outside of the refugee context.\footnote{255} The impression is given that the government views Guantánamo as an offshore haven beyond the reach of the Constitution, something akin to the well-known tax or banking havens that exist throughout the Caribbean.\footnote{256} Since the rights that aliens have under the Constitution depend in large part on the status of the territory on which they stand\footnote{297} or where they claim that the violation took place, it is incumbent upon us to explore further the status of our naval enclave in Cuba.

\footnote{291} "There cannot exist under the American flag any government authority untrammeled by the requirements of due process of law..." Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 669 n.5 (1974) (citations omitted).


A statute permitting indefinite detention of an alien would raise a serious constitutional problem. The Fifth Amendment’s Due Process Clause forbids the government to ‘deprive’ any ‘person... of liberty... without due process of law.’ Freedom from imprisonment—from governmental custody, detention, or other form of physical restraint—lies at the heart of the liberty that the Clause protects.

\footnote{255} This may be an unwarranted assumption because the Supreme Court has on several occasions held that various constitutional limitations apply to the government even when acting outside the continental United States. See Reid v. Covert, 354 U.S. 1, 8 (1956) (as applied to citizens). In U.S. territories, see Balzac v. Porto Rico, 258 U.S. 298, 312-13 (1922) (due process of law); Dorr v. United States, 195 U.S. 138, 144-48 (1904) (“fundamental” constitutional rights); Downes v. Bidwell, 182 U.S. 244, 277 (1901) (First Amendment, prohibition against ex post facto laws and bills of attainder); Lamont v. Woods, 948 F.2d 825 (2d Cir. 1991) (holding that the Establishment Clause is applicable to federal grants to religious schools abroad). Cf United States v. Verdugo-Urquidez, 494 U.S. 259 (1990) (holding that the Fourth Amendment is not applicable to a search conducted by U.S. officials in Mexico of an alien’s house).

\footnote{294} See Mireya Navarro, Last of Refugees from Cuba In ‘94 Right Now Enter U.S., N.Y. TIMES, Feb. 1, 1996, at A1 (noting how Cuban refugees were detained in Guantánamo for nearly two years); see also Cuban Am. Bar Ass’n v. Christopher, 43 F.3d 1412 (11th Cir. 1995) (describing the conditions of the detention of the Cuban and Haitian refugees in Guantánamo).

\footnote{256} See United States v. Li, 206 F.3d 56 (1st Cir. 2000).

\footnote{257} "It is locality that is determinative of the application of the Constitution... not the status of the people who live in it." Balzac, 258 U.S. at 309 (holding that U.S. citizenship of Puerto Rican residents is irrelevant to determination of what constitutional rights apply there); see also Ralpho v. Bell, 569 F.2d 607, 618-19 (D.C. Cir. 1977) (holding that fundamental constitutional rights apply in U.N. Trust Territory to a national of that territory); Gov’t of the Canal Zone v. Scott, 502 F.2d 556 (applying same logic to the Canal Zone); United States v. Tiede, 86 F.R.D. 297 (U.S.D.C. for Berlin, 1979) (same, for alien tried in U.S.-occupied Berlin). But see Cuban Am. Bar Ass’n, 45 F.3d at 1424-25 (holding that the Guantánamo Bay Naval Base is not “United States territory” to which constitutional rights apply).
In 1903, the United States and Cuba entered into an "Agreement for the Lease of the United States of Lands in Cuba for Coaling and Naval Stations" (Lease). This agreement was a side product of the so-called Platt Amendment to the Cuban Constitution whereby the United States exercised considerable control over Cuba's internal affairs. The Lease has no term and has now been in effect for ninety-nine years.

In 1934, the Lease was modified and continued in effect pursuant to a treaty between both countries, in exchange for which the United States gave up its rights under the Platt Amendment. Article III of the Treaty maintains in effect all of the provisions of the Lease governing the United States Naval Base at Guantánamo, including the following:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of the occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas, with the right to acquire (under conditions to be hereinafter agreed upon by the two Governments) for the public purposes of the United States any land or other property therein by purchase or by exercise of eminent domain with full compensation to the owners.

The criminal laws of the United States apply to all persons on the Base, and both aliens and citizens have been prosecuted for crimes committed on the Base premises. As a logical sequel to that proposition, it would further appear that the United States Naval Base at Guantánamo "is subject to the exclusive control and jurisdiction of the United States." As quoted above, the United States even has the right to acquire property by eminent domain, an authority that is usually associated with the sovereign powers of the state.

Because of the nature of the Lease and, thus, the undoubted property interest that the United States has in the Base, it would appear, at least while the United States occupies that enclave and exercises all the

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290 Agreement for Lease of the United States Lands in Cuba for Coaling and Naval Stations, 6 Bevans 1113 (Feb. 23, 1903) [hereinafter Agreement for Lease].
293 Agreement for Lease, supra note 300, at 1114 (emphasis added).
296 United States v. Carmack, 329 U.S. 230, 236 (1946) ("The power of eminent domain is essential to a sovereign government.")).
powers normally associated with sovereignty to the exclusion of the Republic of Cuba, that the Constitution would apply in Guantánamo, by virtue of its territorial clause. It would further appear that all persons on the Base should, at a minimum, be entitled to “fundamental” rights under the Constitution.

2. To be prisoners of war or “unlawful combatants,” that is the question

The more specific question confronting us is whether the persons detained in Guantánamo are either lawful or unlawful combatants. If they are lawful combatants, which has to be decided on a case-by-case evaluation, such a detainee would probably be entitled to prisoners of war status. This will trigger the application of the Geneva Convention even in Guantánamo or aboard ships, which provides a whole panoply of additional rights.

The government has taken a somewhat ambivalent and inconsistent position on the status of the detainees. Originally it claimed that all detainees were unlawful combatants and, thus, not entitled to Geneva Convention protection. The validity of this position requires a case-by-case evaluation and presupposes presidential authority to issue the Order in the first place. During congressionally declared wars, unlawful combatants have enjoyed few rights, although under Quirin and Yamashita judicial oversight over the military commissions was exercised through ha-

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305 See U.S. Const. art. IV, § 3, cl. 2 ("The Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory or other property belonging to the United States").


306 See United States v. Verdugo-Urquidez, 494 U.S. 259, 268 (1990) (stating that “only ‘fundamental’ constitutional rights are guaranteed to inhabitants of... territories” not clearly destined for statehood).

307 See supra note 259.

beas corpus proceedings in the face of presidential directives barring such review.

The government's initial position has now been modified, with the Administration asserting that Taliban members will be accorded rights under the Geneva Conventions, but not prisoner of war status, while al Qaeda members will continue to be considered unlawful combatants.

E. Standards of detention

Sections 3 (b) through (e) spell out the conditions under which individuals subject to The Order are to be detained. They contain no surprises and are the minimum that would be expected of the United States.

Detainees are to be “treated humanely, without any adverse distinctions based on race, color, religion, gender, birth, wealth, or any similar circumstance.” They are to be “afforded adequate food, drinking water, shelter, clothing, and medical treatment,” “allowed the free exercise of religion,” and “such other conditions as the Secretary of Defense may prescribe.”

Although these are all requirements of the Geneva accords, they are not coextensive with the conditions of these treaties.

F. The trials before the military commissions

In many ways Section 4 is at the heart of The Order, for it punctuates the process to be followed in the trials before the military commissions created by this presidential directive. However, it relates not only to procedure. In fact, in its very first paragraph, it sets out the standards and boundaries of the military commissions’ sentencing authority. To such effect, it establishes that those individuals subject to The Order shall be tried before military commissions for all offenses so triable and

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309 See The Order, supra note 9, § 3 (b), (c), (d), (e).
311 See The Order, supra note 9, § 3(b).
312 Id. § 3(c).
313 Id. § 3(d), (e).
314 See supra note 259.
315 See The Order, supra note 9, § 4.
may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.\textsuperscript{316}

The power to impose the death sentence will be presently discussed from a constitutional perspective. However, there are other issues raised by this provision. If extradition is sought of any individual subject to The Order from any of the fifteen member nations of the European Union in which the death penalty has been renounced, it is unlikely that it will be granted.\textsuperscript{317}

Several questions are raised by the phrase "penalties in accordance with applicable law" in Section 4(a). The first question is what is the applicable law and where does one find it? It is a basic principle of federal law, one that has existed from the beginnings of the Republic, that there is no federal criminal common law. All federal criminal law is statutory.\textsuperscript{318} Although there are several federal criminal statutes that prescribe some, if not all, of the acts that The Order penalizes, these laws could only be referenced by analogy, a Soviet legal technique that has been soundly rejected by our courts.\textsuperscript{319}

Although the Uniform Code of Military Justice is a federal statute,\textsuperscript{320} there are several problems raised by attempts to apply it to this situation. As we have previously discussed, this Code only applies to prisoners of war for crimes committed after capture.\textsuperscript{321} In the present circumstances, the government is focused on acts allegedly committed by the detainees before they were captured, and is denying that they are entitled to prisoner of war status, because it is claimed that those acts were violations of the laws of war. Even if the Code were to apply, however, there does not appear to be any penalty authorized by the President under Article 56.\textsuperscript{322} If The Order is the basis for authorization under Article 56, there is the

\textsuperscript{316}Id. § 4(a).
\textsuperscript{319} See United States v. Anzalone, 766 F.2d 676 (1st Cir. 1985).
\textsuperscript{320} 10 U.S.C. §§ 801-950.
\textsuperscript{321} See supra note 186.
\textsuperscript{322} 10 U.S.C. § 856 (U.C.M.J. Art. 56) ("The punishment which a court-martial may direct for an offense may not exceed such limits as the President may prescribe for that offense."). The provisions relating to maximum limits of punishment are found in the Manual for Courts-Martial, United States, 1984, Part II, Rule 1003, and Part IV, 48 Fed. Reg. 17152.
added problem that it was issued on November 13, 2001, after the terrorist attacks of September 11th—its application to prior acts exposes it to challenge as an invalid ex post facto rule.\footnote{U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").}

A possible problem also arises if the military commissions are based on \textit{Yamashita}\.\footnote{In re Yamashita, 327 U.S. 1 (1946).} They would be considered military tribunals authorized by the "common law of war," not the U.S.M.J.\footnote{See Id. at 20.} The presidential order that was the basis for the trial and punishment of General Yamashita and the German saboteurs was in effect prior to the time of the acts that violated the law of war.\footnote{Proclamation No. 2561, which is relevant to both the \textit{Quirin} and \textit{Yamashita} cases, is directed to "subjects, citizens or subjects of any nation at war with the United States" and "during time of war," neither of which are prevalent conditions in the present circumstances. See Proclamation No. 2561, 7 Fed. Reg. 5101 (1942).} The same is not true today, although it can be alleged that the 1949 Geneva Convention for the protection of civilian persons in time of war was sufficient warning that such attacks would violate the laws of war. Unlike The Order, the Convention does not provide for penalties.

It is unlikely that the imposition of any sentence by the military commissions, particularly if they involve long prison sentences or capital punishment, will avoid judicial scrutiny for long.

Paragraph (b) of Section 4\footnote{See The Order, supra note 9, § 4(b).} starts with a theme that is repeated elsewhere in The Order,\footnote{Id. § 5(a). As noted earlier, MCO No. 1 has labeled The Order the "President's Military Order." See supra note 36.} invoking a "military function" as the basis for The Order. The purpose of this language is to exclude The Order from the strictures of the Administrative Procedures Act,\footnote{5 U.S.C. § 553(a)(1).} which removes from rulemaking procedure any agency action involving military or foreign affairs functions.\footnote{Id. § 554(a)(4).} This seems an appropriate premise, considering how the individuals covered by The Order were detained and other circumstances surrounding the issuance of this directive.

In any event, pursuant to Section 4(b), the Secretary of Defense is authorized to issue orders and regulations, including the appointment of one or more military commissions as required to carry out any trials. MCO No. 1 was issued pursuant to this provision,\footnote{See supra note 9.} although no one has yet been appointed to any commission. Under Section 4(c),\footnote{See The Order, supra note 9, § 4(c).} MCO No. 1 shall govern the procedures of the military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process,
and qualifications of attorneys. At a minimum, these regulations to be issued must provide that:

1. *The Commissions may sit at any time and place consistent with guidelines established by the Secretary of Defense*.

This provision, as well as others yet to be discussed, sets the tone as to what to expect in the proceedings before military commissions: a short leash will be kept on the process through the executive and military chain of command.\(^{334}\) If this is in fact the case, these proceedings are indeed the antithesis of criminal trials before the United States courts, and, to some extent, even the normal military trials covered by the U.C.M.J.\(^{335}\)

This provision raises issues of where individuals charged under The Order will be detained and tried. Trying to avoid entanglement with the United States courts through habeas corpus petitions and similar extraordinary procedures, these trials may be held outside the United States, with Guantánamo Bay Naval Base being the most probable venue. Whether Guantánamo is actually a non-U.S. jurisdiction is an unresolved question.\(^{336}\)

\(^{333}\) Id. § 4(c)(1). See also MCO No. 1, supra note 9, § 6.B.4.

\(^{334}\) Cf. Yamashita, 327 U.S. at 1.

\(^{335}\) Cf. 10 U.S.C. § 826(c) (U.C.M.J. Art. 26):

> Unless the court-martial was convened by the President or the Secretary [of the Service] concerned, neither the convening authority nor any member of his staff shall prepare or review any report concerning the effectiveness, fitness, or efficiency of the military judge so detailed, which relates to his performance of duty as a military judge.

Under Article 37(a) (10 U.S.C. § 837(a)):

> [n]o authority convening a general, special, or summary courts-martial, nor any commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to the findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. Attempts to coerce or influence these tribunals or their members are also proscribed thereunder. Paragraph (b) of Article 37, 10 U.S.C. § 837(b), also prohibits the conduct or rulings of a member of a courts-martial in preparing fitness or similar reports used for promotions, assignments or transfers, or for retention in the armed forces.

Military commissions are specifically excluded from mention as deserving these safeguards, notwithstanding that they are distinctly referred to, separately from "courts-martial ... and other military tribunal" in the prior Article, Article 36, which authorizes the President to prescribe the procedures for the various military courts. See 10 U.S.C. § 836(a) (U.C.M.J. Art. 836(a)).

The Guantánamo venue raises additional Fifth and Sixth Amendment questions that are portentous in nature. Conducting what will likely be weighty criminal trials, some of which may charge capital offenses, in the isolated environment of the Guantánamo Naval Base will likely entail considerable difficulties, if not outright impediments, to the defense lawyers. These problems are not limited to client accessibility, but also to the fact that the defense attorneys will be separated in very practical and physical ways from the support of their offices, staff, and practices for long periods of time. A direct effect of this is not only to limit the pool of qualified lawyers from which detainees will be able to draw legal aid, but also to undoubtedly affect the quality of the attorneys’ work product. Most important, accessibility to defense witnesses and evidence, much of it thousands of miles away, will also be a major problem, although this may very well be the case even if the trials are held in the courts of the United States.

2. A full and fair trial shall be conducted before the military commissions sitting as the triers of both fact and law.337

With the issuance of MCO No. 1 a clearer picture emerges as to what is meant by this provision. Pursuant to Section 4A.2, the commission shall be composed of between three and seven members, which according to paragraph 3 shall be commissioned officers of the United States armed forces.338 These, as well as the alternate members, are appointed by the “Appointing Authority” from persons “determined to be competent to perform the duties involved” and are subject to removal by the Appointing Authority for “good cause.”339

The Appointing Authority shall designate a Presiding Officer who “shall be a Military Officer who is a judge advocate of any United States armed force.”340 The Presiding Officer shall have initial authority to rule upon admission of evidence341 and the closure of proceedings.342

A Chief Prosecutor shall be appointed to supervise the overall prosecution efforts under The Order. The Chief Prosecutor shall be a judge

\[\text{References}\]

337 \textit{Cuban Am. Bar Ass'n v. Christopher}, 43 F.3d 1412, 1424-25 (11th Cir. 1995) (holding that the Guantánamo Bay Naval Base is not “United States territory” to which constitutional rights apply); \textit{Bird v. United States}, 923 F. Supp. 338 (D. Conn. 1996) (finding that the Federal Tort Claims Act does not apply to accident in United States base in Guantánamo because sovereignty over this enclave still lies in the Republic of Cuba and, thus, the accident comes within the “foreign country” exception to that statute, whereby there is no waiver of U.S. sovereign immunity to suit).

338 \textit{See The Order, supra note 9, § 4(c)(2).}

339 \textit{See MCO No. 1, supra note 9, § 4A.2-3.}

340 \textit{Id.} § 4A.3.

341 \textit{Id.} § 4A.4.

342 \textit{Id.} § 4A.5.
advocate of any United States armed force. The Chief Prosecutor shall be assisted by a Prosecutor and, as appropriate, one or more Assistant Prosecutors, who may be judge advocates of any United States armed force or special trial counsel of the Department of Justice. The Prosecutor shall prepare charges for approval by the Appointing Authority, conduct the prosecutions, and "represent the interests of the Prosecution in any review process."

MCO No. 1 also enumerates the rights of the accused before the military commissions which include, in addition those already mentioned:

(A) [to be provided] sufficiently in advance of trial to prepare a defense, a copy of the charges being in English and, if appropriate, in another language that the Accused understands.

(B) [the] presumption of innocence until proven guilty.

(C) [a standard of guilt of] beyond a reasonable doubt, based on the evidence admitted at trial.

(D) [a] least one Detailed Defense Counsel... sufficiently in advance of trial to prepare a defense and until any findings and sentence become final ....

(E) ... access to evidence the Prosecution intends to introduce at trial and with access to evidence known to the Prosecution that tends to exculpate the Accused ....

(F) ... not [to] be required to testify during trial. A Commission shall draw no adverse inference from an Accused's decision not to testify. This... shall not preclude admission of evidence of prior statements or conduct of the Accused.

(G) [to] testify at trial on the Accused's own behalf ....

(H) [to] obtain witnesses and documents for the Accused's defense, to the extent necessary and reasonably available [with] such investigative or other resources... available to the Defense as the Appointing Authority deems necessary for a full and fair trial.

(I) [to have] Defense Counsel present evidence at trial in the Accused's defense and cross examine each witness presented by the Prosecution who appears before the Commission.

(J) [to have] the substance of the charges, the proceedings, and any documentary evidence... provided in English and, if appropriate, in another language that the Accused understands. The Appointing authority may appoint one or more interpreters to assist the Defense, as necessary.

(K) [to] be present at every stage of the trial before the Commission ... unless the Accused engages in disruptive conduct that justifies exclu-

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343 Id. § 4.B.1.
344 Id. § 4.B.2.
345 Id. § 4.B.2.a-c.
sion by the Presiding officer. Detailed Defense Counsel may not be excluded from any trial proceeding or portion thereof.

(L) ... access before sentencing proceedings to evidence the Prosecution intends to present in such proceedings.

(M) [to] make a statement during sentencing proceedings.

(N) [to] have Defense Counsel submit evidence to the Commission during sentencing proceedings.

(O) [to] a trial open to the public (except proceedings closed by the Presiding Officer) . . . .

(P) ... not [to] be tried by any Commission for a charge once a Commission's finding on that charge becomes final . . . .

As a basis for comparison, it may be useful to describe the procedure under the U.C.M.J. for courts-martial convened pursuant to Article 22, 547 which are generally referred to as a general court-martial. In those proceedings, the presiding officers must be commissioned officers of the armed forces who are attorneys licensed to practice and who must be certified as qualified to serve as military judges by their respective Judge Advocate Generals. 548 The military judge makes all rulings of law 549 and does not participate in the deliberations of the members of the courts-martial, who function as a jury. 550 The composition of the courts-martial, whose number is determined by Article 16, 551 depends largely on the rank of the accused. 552 Although initially appointed by the convening authority, both the military judge and the members of the courts-martial are subject to challenge pursuant to procedures detailed in Article 41. 553

It is important to mention that those subject to court-martial are entitled to most, if not all, of the constitutional protections available in civilian courts. 554 These include the right to counsel, which attaches at the investigative stage and allows the right to cross examine witnesses even at that early juncture in the process; 555 the right to be free from compulsory

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548 Id. § 825(b) (U.C.M.J. Art. 25(b)).
549 Id. § 851(b) (U.C.M.J. Art. 51(b)).
550 Id. See also 10 U.S.C. § 851 n.13 (describing the jury-like duties of a court-martial, including determining the credibility of a witness, the weight of evidence, reasonable doubt as to guilt, inferences to be drawn from facts, interest or bias of witnesses, and "where the truth lies").
551 Id. § 816 (U.C.M.J. Art. 16) (noting that a general court martial consists of not less than five members or a military judge; a special court martial consists of three members or a military judge; a summary court martial consists of one commissioned officer).
552 Id. § 825(d)(2) (U.C.M.J. Art. 25) ("When it can be avoided, no member of an armed force may be tried by a court martial [the] member[s] of which [are] junior to him in rank").
553 Id. § 841 (U.C.M.J. Art. 41).
555 10 U.S.C. § 832(b) (U.C.M.J. Art. 32(b)).
self incrimination; and the right not to be put twice in jeopardy for the same offense. The procedure followed in courts-martial is not much different from that of the United States courts, although the President can, as he purports to do in Section 1(f) of The Order, by regulation “so far as he considers practicable, apply [or not] the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with” the U.C.M.J. Thus the evidence at a court-martial is generally presented as in the federal courts, with rulings on evidence by the military judge, and with the right of confrontation and cross examination of witnesses respected. Depositions generally may be taken and used by both the government and the defense under circumstances not unlike that which is allowed in United States courts, with the sole exception being that in capital cases only the defense is entitled to take and use depositions at trial. As previously discussed, this was one of the major issues raised by General Yamashita in his appeal to the Supreme Court, which he lost when the Court ruled that a military commission created under the common law of war was outside the purview of the Articles of War, the predecessor to the U.C.M.J., thereby allowing the use of depositions against him. This may very well be an important issue under The Order considering the geographic dispersion of the prospective witnesses and the isolated nature of Guantánamo, the likely venue. Lastly, the U.C.M.J. provides that the members of the courts-martial, after receiving instruction from the military judge on the applicable law, shall deliberate and determine the guilt or innocence of the accused. A presumption of innocence attaches, and guilt must be “established by legal and competent evidence beyond reasonable doubt.” On many fronts, we can see that the contrast between the procedures and standards under the U.C.M.J. and those of The Order is considerable.

556 Id. § 831 (U.C.M.J. Art. 31).
557 Id. § 844 (U.C.M.J. Art. 44).
558 Id. § 836(a) (U.C.M.J. Art. 36(a)).
562 In re Yamashita, 327 U.S. 1, 20 (1946).
563 Of course, similar concerns will arise if the trials should be held aboard ships, or even in United States courts.
3. Evidence shall be admitted as will have, in the opinion of the presiding officer, probative value to a reasonable man.366

This is a very lax standard for admissibility of evidence, particularly for a criminal proceeding with consequences that might entail long periods of imprisonment or even death and where there is no appeals process for evidentiary matters.367 The fact that it is for use in a military trial, or rather, in a trial before a military commission, should not be an answer sufficient to uphold this open-ended norm which is impossible to predict and even more difficult to challenge. Almost any rumor or hearsay, no matter how far removed, could have some probative value and would, thus, theoretically be sufficient for admission, since the rule gives no standard as to how much probative value is required to convince a reasonable man, that most elusive of legal fictions. Furthermore, if the Yamashita majority rule still prevails, “the commission’s rulings on evidence . . . . are not reviewable by the courts, but only by the reviewing military authorities. From this viewpoint it is unnecessary to consider what, in other situations, the Fifth Amendment might require.”368

Thus, as the law now stands,369 military commissions need not meet any discernible due process standards in admitting evidence. Whether this dispensation from Fifth Amendment application extends to the confrontation requirements of the Sixth Amendment370 has not been specifically decided in a military commission setting.371

4. Classified or classifiable evidence72 shall be protected from unauthorized disclosure by reason of its handling, admission into evidence, and access to the same, and because of the conduct, closure of, and access to the proceedings.733

From the emphasis placed on this subject by MCO No. 1, it is clearly apparent that protection of intelligence sources and sensitive information from unnecessary disclosure are a major concern of the Secretary of Defense.374 These are legitimate national security issues. It may be useful to point out, however, that United States courts routinely hear cases in

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366 See The Order, supra note 9, ¶ 4(c)(3).
367 See Yamashita, 327 U.S. at 23.
368 Id. 327 U.S. at 23.
369 See MCO No. 1, supra note 9, § 6.D.1.
370 U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . . to be confronted with the witnesses against him.”).
371 But see Yamashita, 327 U.S. at 23.
373 See The Order, supra note 9, ¶ 4(c)(4).
which these questions exist, both in the criminal and civil settings, and that there are in place satisfactory, time tested procedures for handling them, although undoubtedly they could be improved.

There are two aspects to this part of The Order. The first concerns disclosure of the information to persons directly involved in the proceedings. At the trial level this includes the members of the military commission and staff, the prosecutors and their staff, defense lawyers and their staff, the accused, interpreters, court reporters, clerks of court, those witnesses as may be required to testify and in some manner be exposed to the secret evidence, and investigators. Depending on the levels of internal (i.e., non-judicial) appeals available, additional persons also may come within the scope of this provision. Lastly, those courts with jurisdiction both at the trial and appellate levels, including eventually the Supreme Court, and their various components, will also be restricted by The Order. It is appropriate to suggest that existing congressional enactments for the courts are a possible guideline for dealing with this situation.

Pursuant to Section 4.A.5.a of MCO No. 1, the Presiding Officer has the authority to close the proceedings or portions thereof to prevent the disclosure of "classified or classifiable" information, to protect the physical safety of the participants in the proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests, and for "any other reason necessary for the conduct of a full and fair trial." This decision can include the exclusion of the Accused and/or his civilian defense counsel, but not his "Detailed Defense Counsel" (i.e., his appointed military lawyer).

The second closely related issue raised by this portion of The Order refers at least in part to questions involving the openness, or rather lack of openness, of a trial before a military commission. This is an important issue. The more public or open these proceedings are, the less weight will be given to charges of governmental heavy handedness, both as to the way they are conducted as well as to their eventual outcome.


\[376\] See Classified Information Procedures Act app. § 3.

\[377\] See MCO No. 1, supra note 9, §§ 4.A.5.a, 6.B.3.

\[378\] Id. § 6.B.3.
The question that arises is whether the Sixth Amendment's requirement of a public trial is binding on military commissions. This appears to be an open question, although there are obviously some basic constitutional doctrines to be kept in mind.

The right to a public trial in criminal cases predates the founding of our nation by several centuries. This right has both individual and societal components, the first component being principally of Sixth Amendment concern, while the second one brings into play mostly First Amendment values. An individual facing criminal charges has an interest in having a public trial because this may encourage witnesses to come forward with evidence in his favor, because the presence of the public and press help to keep the prosecution and judge within proper bounds, and because an accused may want the presence of family and friends for support during what is, at best, a difficult experience.

The public also has a constitutionally protected interest in public trials. Public trials can educate the public about the criminal justice system and allow it to watchdog the system's operation. The ability to observe the judicial process, particularly in cases of renowned notoriety, serves weighty cathartic functions not only to the general citizenry, but more importantly, to the victims and their families. Thus, "[a]bsent an overriding interest articulated in findings, the trial of a criminal case must be open to the public." Furthermore, it is settled law that when trial proceedings or records are closed to the public, media representatives have standing to object.

These principles notwithstanding, an overriding interest in closed or partially closed proceedings may exist in a case involving state secrets or in which evidence implicates national security concerns. However, as

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379 U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a... public trial.").

380 Lord Coke, in referring to rights established in the Statutum de Mainbridge of 1267, noted the need "that all causes ought to be heard, ordered, and determined... openly in the King's courts." E. COKE, SECOND INSTITUTES 103.


382 See Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 571 (1980) ("The crucial prophylactic aspects of the administration of justice cannot function in the dark.").


The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

384 Globe Newspaper Co. v. Super. Ct., 457 U.S. 596, 602 (1982) (granting newspaper standing to sue and holding that state statute prohibiting public from being present in criminal trial of specified sexual offenses involving victims under age eighteen, violated the First Amendment); see also Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 573 (1980) (noting that the news media "enjoy the same right of access [to courts] as the public").

385 See United States v. Bell, 464 F.2d 667 (2d Cir. 1972) (closure to protect safeguards against air piracy).
previously indicated, there are procedures in place in the United States courts for such contingencies.

On a closely related point, if trials are held at Guantánamo, the proceedings may de facto be closed to the public. Such a setting will impact the ability of the families of the thousands of victims of the September 11 attacks to attend the proceedings. In the Oklahoma Bombing case this problem was ameliorated somewhat by providing closed circuit television viewing of the McVeigh trial. However, in that case, there was at least the theoretical opportunity to personally attend the proceedings by traveling to Denver. This will not be the case if the trials are held in the Guantánamo Bay Naval Base because access is completely controlled by the government, and facilities for civilian visitors are limited at best.

Various provisions of MCO No. 1 attempt to deal with these issues. Section 6.B.3 provides that proceedings will be open unless “otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President’s Military Order and this Order.” Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press.

Because of the physical isolation of the likely venue of these trials, this might be an appropriate setting for some type of electronic recording of the proceedings. MCO No. 1, however, prohibits any such possibilities.

It is evident that MCO No. 1 raises as many issues about the openness of the proceedings as it attempts to solve. This may well be an area of major contention involving the rights of both the accused and the press.

5. *The conduct of the prosecution by attorneys designated by the Secretary of Defense and the conduct of the defense by attorneys for the individuals subject to The Order*

This provision in The Order receives considerable attention in MCO No. 1. As the provisions on prosecutors’ conduct have already been discussed, this Section will focus on the provisions on the conduct of defense attorneys.

Under the general title of “Commission Personnel,” MCO No. 1, in addition to listing the Commission members and the Prosecutor’s staff,
lists the Defense. It establishes an "Office of the Chief Defense Counsel," staffed by a Chief Defense Counsel, who shall be a judge advocate of any United States armed force, and who shall supervise the overall defense efforts under The Order. The accused has apparently no choice in this anomalous situation, one which is without an equivalent in the civilian criminal system.

In addition to this general defense counsel, MCO No. 1 provides for a "Detailed Defense Counsel." This position is filled by a military officer who is a judge advocate of any United States armed force. The Detailed Defense Counsel conducts the defense of each case tried before the Commission. Detailed Defense Counsel are charged with defending the "[a]ccused zealously within the bounds of the law without regard to personal opinion as to the guilt of the Accused." This Detailed Defense Counsel may be substituted at the request of the Accused by another military officer.

The Accused is also entitled to retain the service of a civilian attorney of his own choosing and at his own expense. This Civilian Defense Counsel must be a citizen of the United States, admitted to the practice of law in a state, district, territory, or possession of the United States, or admitted to practice before a federal court. He or she must also not have been the subject of any disciplinary action, and must have been determined eligible for access to information classified at the level SECRET or higher, and must have signed a written agreement to comply with all applicable regulations or instructions for counsel, including any rules of court for conduct during the course of proceedings.

Representation by Civilian Defense Counsel does not relieve Detailed Defense Counsel, and the qualification of Civilian Defense Counsel does not guarantee his presence at closed proceedings or, access to any classified information. The accused, however, must be represented at all relevant times at least by Detailed Defense Counsel.

These provision of The Order and the subsequent MCO No. 1 leave one with an uncertain, perhaps undefinable uneasiness concerning the status of the defense, particularly with regard to the use of Civilian Defense Counsel. This, together with the de facto establishment of two

303 See MCO No. 1, supra note 9, § 4.B.1.
304 Public defenders are not supervisors of the defense of any defendant who has not voluntarily accepted or sought their aid, and certainly not in multi-defendant situations in which conflicts of interest are likely to arise. Furthermore, public defenders are appointed by the courts, not the Justice Department.
305 MCO No. 1, supra note 9, § 4.C.2.
306 Id. § 4.C.2.a.
307 Id. § 4.C.3.a.
308 Id. § 4.C.3.b.
309 Id.
310 Id.
311 Id. § 4.C.4.
categories of defense counsel imposed by the government, with one category having access to information that may be barred from Civilian Defense Counsel, constitutes a highly anomalous situation. When one adds to that a provision such as that found in Section 4.A.5.c to the effect that “[i]n no circumstance shall accommodation of counsel be allowed to delay proceedings unreasonably,” one cannot but feel that Civilian Defense Counsel may be sorely tried to adequately represent their clients.

It is not clear what is intended by this language. It may be a simple designation that the Secretary of Defense appoints the prosecuting attorney and the accused’s defense lawyer. However, it would be unnecessary to have a regulation for those purposes. An alternative interpretation is that a regulation will be issued to regulate attorney behavior in the courtroom. Although every tribunal has rules of conduct applicable to all attorneys practicing before it, these are not usually imposed unilaterally on the bar by the regulating court, but rather are jointly agreed to by bench and bar. There is a danger that rules of conduct may go beyond regulating what is permissible, and could have an inadvisable chilling effect on vigorous but appropriate advocacy.

6. The concurrence of the votes of two-thirds of the members of the commission present shall be sufficient for conviction, a majority of the commission constituting a quorum.

This is probably the single most troublesome provision of The Order because, together with the low standards that are allowed in the admission of evidence, it may tip the balance beyond what seems permissible in favor of a conclusion of guilt in a criminal prosecution. The presumption of innocence and the need for the government to overcome this presumption by the use of competent evidence that establishes guilt beyond a reasonable doubt are principles embedded in the Fifth Amendment. These principles have protected the accused in every proceeding where there is a charge of criminal conduct since before the Constitution came into being. Because the provision applies to “per-
sons,” it attaches to non-citizens as well as to citizens of the United States. Additionally, as part of the due process component of the Fifth Amendment, the presumption of innocence and the burden of overcoming this presumption by proof beyond a reasonable doubt, constitute “fundamental” constitutional precepts. They apply to all such actions of the government, in any territory subject to its jurisdiction.

MCO No. 1 provides that the accused “shall be presumed innocent until proven guilty.” It also states that a vote for a finding of guilty as to an offense can only be made if the commission member is convinced beyond a reasonable doubt, based on the evidence admitted at trial. Although these provisions go a long way toward providing constitutionally mandated protections to the accused, the question remains whether they are de facto and de jure sufficient to overcome the low standard for admission of evidence and the less than unanimous voting standard.

7. The imposition of the sentence upon conviction shall be with the concurrence of two-thirds of the members of the commission who are present, a majority of the commission constituting a quorum.

As previously stated, Section 4(a) provides that any individual subject to The Order who is found guilty by a military commission “may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.” MCO No. 1 provides that “a unanimous, affirmative vote of all members” of the commission is required for the imposition of the death sentence, and that only a commission of seven members may impose capital punishment. It would appear that these provisions of MCO No. 1 contradict the standards of trial by jury provisions of the Sixth Amendment. If we were to apply the principle of expressio unius est exclusio alterius to this interpretation of the text of the Fifth Amendment, it would be reasonable to conclude that all of its other rights, including the right to due process of law, would apply to trials before military commissions.

See, e.g., Almendarez-Torres v. United States, 523 U.S. 224 (1998) (applying the proof beyond a reasonable doubt standard when reviewing a conviction of an alien for violating his deportation). Examining Board of Engineers v. Flores de Otero, 426 U.S. 572 (1976). Cf. Addington v. Texas, 441 U.S. 418 (1979) (holding that in an involuntary civil commitment proceeding for the mentally ill, a “clear, unequivocal and convincing evidence” standard meets due process requirements). The Court never reached the issue of application of Fifth Amendment in Yamashita, 327 U.S. at 23. Appendix 2 of the U.C.M.J. provides that before a vote is taken, the military judge shall instruct the members of the court that the accused shall be presumed innocent until his guilt is established by legal and competent evidence beyond a reasonable doubt. 10 U.S.C. § 851 (U.C.M.J. Art. 51) (Appendix 2). See MANUAL FOR THE COURTS MARTIAL UNITED STATES (2000 Edition), Rule 920(c)(5) (providing a similar provision).

See MCO No. 1, supra note 9, § 5.B. Id. § 5.C. See The Order, supra note 9, § 4(c)(7). Id. § 4 (a). MCO No. 1, supra note 9, § 6.F. Id. § 6.G.
Section 4(a) of The Order which allows the imposition of the death penalty by a two-thirds vote of the commission, with a majority of those present being sufficient. According to Section 7.B. of MCO No. 1, the conflict has to be decided in favor of the requirements of The Order.

The commissions are both judge and jury, as indicated in Section 4(c) (2). This means that the accused does not have a right to a jury trial, a situation that has been held to be valid as to military commissions constituted under the conditions that were applicable when \textit{Ex parte Quirin} was decided.\footnote{317 U.S. at 40.} Leaving aside whether those conditions presently exist, which has been amply discussed previously, the issue remains whether, under Supreme Court case law on the rights of capital offenders, such a sentence would be upheld in a case where a jury trial is not an option available to the accused.\footnote{See, e.g., Walton v. Arizona, 497 U.S. 639 (1990) (upholding the validity of a sentencing scheme which requires the judge to determine aggravating or mitigating circumstances after a jury has determined guilt for the elements of the offense in a death penalty case); Strickland v. Washington, 466 U.S. 668 (1948) (reviewing a case where defendant pled guilty and waived his right to a jury recommendation on sentence and was subsequently sentenced to death).}

8. \textit{The record of the trial, including any conviction or sentence shall be reviewed for final decision by the President or if he so delegates, by the Secretary of Defense.}\footnote{\texttt{See The Order, supra note 9, \S 4(c)(8).}}

This provision is probably the single most radical departure from the type of procedure usually present in a criminal trial.\footnote{"Under certain circumstances, the constitutional requirement of due process is a requirement of judicial process." Crowell v. Benson, 285 U.S. 22, 87 (1932) (Brandeis, J., dissenting).} The final decision on the guilt or innocence of those tried before military commissions or the sentenced imposed belongs to the President. The Commission's "decision" is more in the nature of a report and recommendation. The record and outcome of the proceedings before the commissions are to be packaged and sent to a Review Panel of which the Secretary of Defense is the Appointing Authority.\footnote{\texttt{See MCO No. 1, supra note 9, \S 6.H.1.}} This is not an appeal, and there is no provision in The Order for an appeal as such. It is simply an administrative review of the record of the trial, for a final decision by the President or the Secretary of Defense.\footnote{\texttt{Id. \S 6.H.3.}}

The Review Panel shall be composed of three military officers designated by the Secretary of Defense, but it may include civilians commissioned pursuant to 10 U.S.C. \S 603.\footnote{\texttt{Id. \S 6.H.4.}} At least one member of the panel shall have experience as a judge. Within thirty days of receipt of the record, the Review Panel shall either forward the case to the Secretary of
Defense with a recommendation as to its disposition or return it to the Appointing Authority for further proceedings, provided that a majority of the Review Panel has formed a definite and firm conviction that a material error of law occurred. After review by the Secretary of Defense, the record of the trial and all recommendations will be forwarded to the President for review and final decision. An authenticated finding of not guilty as to a charge shall not be changed to a finding of guilty, but a not guilty finding will not necessarily lead to the release of the detainee. Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly.

However, to fully grasp the import of this provision, it should be read together with the limitations on judicial review that The Order imposes in Section 7(b). In paragraph (1), The Order indicates that "military tribunals shall have exclusive jurisdiction with respect to offenses by the individual." Among the issues raised by this provision is the authority of the President to render inoperative the whole gamut of criminal statutes passed by Congress previously enumerated, or to negate that body's choice as to the forum where those crimes are to be tried.

Paragraph (2) of Section 7(b) is again an attempt by the Executive Branch to insulate itself from judicial oversight. This provision indicates that no individual covered by The Order "shall be privileged 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 any court of the United States, or any State thereof, or any court of any foreign nation or international tribunal." This provision is also similar to the one found in the presidential orders in the Quirin and Yamashita cases, in which President Roosevelt by decree attempted to foreclose judicial review of the actions of those military commissions. As we know, one of the few points won by petitioners in those cases was the right to judicial review of their constitutional claims through habeas corpus petitions in the federal courts. Of course, in those cases the presidential or-

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422 Id.
423 Id. § 6.H.6.
424 Id. § 6.H.2.
425 Id.
428 In re Yamashita, 327 U.S. 1 (1946).
ders were approved by Congress. Here, we do not even have that situation.

The prohibition against filings in foreign national courts and international tribunals is both surplusage and irrelevant. The President has as much control over those entities as they have over us: none.\(^{432}\)

III. CONCLUSION

A. Conclusions

It is always easier to engage in what amounts to after-the-fact second guessing than to take actions that may have been deemed necessary by the exigencies of the moment. The President’s most basic duty is the protection of the nation “against all enemies foreign or domestic,” and it is difficult to fault decisions taken in the heat of situations that required immediate response.\(^{433}\) That said, however, it is not inappropriate, upon the cooling of the urgency that promoted such actions, to step back and weigh the rightness of these responses in the dispassionate light of objective analysis.

It has been said that in war the first casualty is truth. Perhaps we should say that in crisis the first casualty is civil liberty. Because we in the United States have been privileged to live in a relatively sheltered world, we have been slow in developing what has been called “a jurisprudence of civil liberties in times of security crises.”\(^{434}\) Now, as we are faced with the cold realities of a Newer World, it is important that we not lose sight of why it is that we do not want to live in the kind of “society” that terrorists seek. A balance must be struck between what is really required to meet a crisis\(^{435}\) and the civil liberties that preserve our way of life, taking care that the damage to these is as fleeting as possible.\(^{436}\) To a nation like

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\(^{432}\) See Nicaragua v. United States, 1986 I.C.J. 14 (June 27) (military and paramilitary activities); Nicaragua v. United States, 1984 I.C.J. 392 (Nov. 26) (same).


\(^{435}\) “[T]he Constitution . . . is not a suicide pact.” Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1962). See Termiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”)

ours, although the crisis that we face is portentous, the technique lending to its solution(s), the balancing of alternatives, is not new.

The initial question is whether the President has the authority to promulgate The Order.\textsuperscript{437} Considering the lack of specific congressional authorization, there are serious problems in that respect. Such executive actions previously have been sanctioned only in times of congressionally declared wars.\textsuperscript{438} Congress's declaration is not a mere formality or technicality, but evinces a momentous and solemn step whereby the civil powers of the nation are concentrated in the office of the President and there is a delegation by Congress of powers not normally authorized to the President. Furthermore, this delegation is not open-ended; it commences with the formal declaration of war and ends with the proclamation of peace. The creation of a separate, ad hoc military tribunal with exclusive jurisdiction over matters that have already been assigned by Congress to the civil courts, should at the very least require specific congressional authorization.\textsuperscript{439} Clearly, the absolute denial of access to the courts is beyond even the power of Congress.

Absent a determination based on credible evidence that individual detainees engaged in acts against the laws of war, detainees captured by United States forces, or our surrogates, in the field of battle or its equivalent, should either be given prisoner of war status, or charged under the civilian criminal system for violations of those laws, and thereafter processed accordingly.

The detention and possible trial of the detainees in the Guantánamo Naval Base presents significant constitutional problems, unrelated to the issue of the conditions of detainment. It would seem that the issue is not whether the United States Constitution applies to the activities there, but rather to what extent it applies. At a minimum, "fundamental" rights are likely to attach to all persons in this naval enclave. The presumption of innocence, and the need for the government to overcome this presumption by proof beyond a reasonable doubt, constitute fundamental rights.

\textsuperscript{437} The Order, \textit{supra} note 9.

\textsuperscript{438} \textit{See In re Yamashita}, 327 U.S. 1 (1946); \textit{Ex parte Quirin}, 317 U.S. 1, 24 (1942).

\textsuperscript{439} \textit{Cf. H.R. 3468}, 107th Cong. (2001) ("To authorize the President to convene military tribunals for the trial outside the United States of persons other than U.S. citizens and lawful resident aliens who are apprehended in connection with the September 11, 2001, terrorist attacks against the United States") (Introduced Dec. 12, 2001 by Ms. Harman and Ms. Loefgren), and \textit{H.R. 3564}, 107th Cong. (2001) ("To authorize the limited use of military tribunals absent a war declared by Congress in cases arising out of acts of international terrorism committed in the United States") (Introduced by Mr. Barr on Dec. 20, 2001).
Other constitutional rights are probably also implicated by reason of the procedures established by The Order.400

B. Some policy issues and considerations

Most, if not all, of the questions raised by The Order would be resolved in a satisfactory manner, or at least the mechanisms are in place for such resolution, if the detainees were processed, charged and tried pursuant to our normal criminal law system.441

There are many recent examples of such cases being handled in this manner.442 One case that partakes of many similarities with the present circumstances is that of the invasion of Panama in December 1989. The United States Armed Forces took military action in the Republic of Panama against the government of General Manuel Antonio Noriega, bringing about the collapse of his regime. As part of these actions General Noriega was captured by U.S. Armed Forces and arrested there by U.S. Marshals, and brought to the United States, where he was detained, charged, tried and convicted in a United States court.443 He is now serving a long prison sentence in an appropriate federal facility.

This is a felicitous example of the principle, often quoted and usually followed, that our armed forces are best at fighting battles. This is what their training addresses. They are at their best when the objectives are clearly defined. Unfortunately, they are not trained to be, and their effectiveness, not surprisingly, declines when they are called upon to act as policemen. These realities are in part reflected in the Posse Comitatus Act.444

The removal of the Afghanistan detainees from the mainstream criminal law system has brought about several unintended and deleteri-
ous consequences, not the least of which is that these alleged perpetra-
tors of terrorist attacks gain a valuable propaganda tool. Previously, we
have insisted on treating both foreign and domestic terrorists like com-
mon criminals. To sway from that policy just feeds the fire. Further-
more, our failure to process the alleged perpetrators in the civil courts
unjustifiably denigrates the proven ability of these courts to fairly and ef-
ficiently handle these cases. Using the military justice system in this un-
typical manner also does a disservice to that system’s well-earned reputa-
tion under the Uniform Code of Military Justice.

The unnecessarily heavy hand of The Order provides ammunition
against us in the important battle of the minds. Much of the world looks
to the United States as the ultimate paradigm of justice. It will be diffi-
cult to explain the why’s and wherefore’s of an exception to the rules of
justice that we could not and would not apply to our own citizens. Criti-
cally, it will be overwhelmingly difficult to convince our enemies that our
captured soldiers be treated evenhandedly. Additionally, it will be in-
creasingly hard to avoid having our citizens, accused of terrorism, or
other crimes for that matter, tried before secret military courts, regard-
less of whether those nations are allies or enemies (as happened in Peru
in 1996 in the case of Lori Berenson, a situation strongly protested by
our State Department, with a modicum of success).

It has been predicted that most conflicts in the twenty-first century
will be low intensity in nature, largely involving irregular forces, many of
them commencing as intra-national skirmishes. However, considering
the porosity of modern borders, the high mobility of populations, and
the great technological advances in communications, as well as the reali-
ties of the global economy, many of these “local” conflagrations will, as
they have in the recent past, spill out into the international scenario. A
prime example of this hypothesis is the Israeli-Palestinian conflict, which
is basically an internal ethnic/religion civil war that has at times become
a decidedly international one, and more in point, that has been a con-
stant source of violent transnational terrorist actions. This exportation
or spilling over of local conflicts into the global scene is likely to con-
tinue and will probably be a hallmark of this century.

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467 See Raymond Bonner, ‘Sleeper Cells’ in Singapore Show Al Qaeda’s Long Reach, N.Y. TIMES, Jan. 26,
Raymond Bonner, Qaeda Moving Into Indonesia, Officials Fear, N.Y. TIMES, Jan. 23, 2002, at A1; Elisabeth
Rosenthal, Beijing Says Chinese Muslims Were Trained as Terrorists with Money From bin Laden, N.Y. TIMES,
A19; Raymond Bonner, How Qaeda Linked with Malaysian Groups, N.Y. TIMES, Feb. 7, 2002, at A11; An-
drew Selsky, U.S. Plans for Wider Columbia Involvement, BOSTON GLOBE, Feb. 6, 2002, at A3; Somini Sen-
Because the United States, as the world’s remaining super-power, is perceived as having a decisive influence in tipping the balance that ultimately decides these intramural conflicts, it is, and will continue to be, the focus of the various participants in these conflicts, in an attempt to accomplish by indirect means what they are unable to do directly. Thus, rightly or wrongly, the United States will continue to be a major target of attention and reaction from groups and entities, most of whom Americans have never even heard of, much less encountered.48

The United States is probably better prepared to deal with these situations using military preemption and response49 than with other areas of its competency. This is partially because the armed forces have a more central and unified command structure, are continually planning and practicing for various and diverse scenarios, and because they have been extensively exposed to foreign environments, which is a situation that is not within the common experience of most of the other parts of the government or citizenry.49 It goes without saying that the September 11 incidents have had, and will continue to have into the future, far reaching and unforeseen consequences at all levels and throughout the entire nation.5

These are new and unfamiliar scenarios for the American homeland. The labeling of the various actors in these encounters as “terrorists,” “freedom fighters,” “guerrillas,” and “special forces,” may not be very productive. These encounters, although not totally predictable, can in many cases be planned for. There is the need to involve all the branches of government and the citizenry, and to do so in a central, coordinated manner cutting across fictitious, bureaucratic lines.5 There is also an imperative need to restore and upgrade our intelligence mechanisms, which have never fully recovered from the emasculations of the Frank


Church era. We should also inform ourselves about how other societies have dealt with these problems, structurally, not necessarily militarily, keeping in mind that other nation’s solutions may not readily be adaptable to our constitutional and cultural idiosyncrasies, but keeping an open mind.

Lastly, we should consider the fact that complex problems, which undoubtedly these are, are hardly ever resolved by facile solutions. Although terrorism, particularly in the form of mass violence against civilian populations, cannot be excused under any circumstance or for any reason or cause, we must look to the underlying stimuli fomenting these situations. Therein lies a large part of our ability to predict them, and where it is possible to remedy the underlying sore, to eliminate, or at least to reduce, the possibility of their recurrence in such virulent form.

The exigencies of the moment have put us on a slippery slope not unlike the icy hills of Afghanistan. The nation is facing serious challenges to its security, and at this point, we seem to have more questions than we do answers. This is not necessarily a negative point, for we are dealing with new and dynamic experiences. The important thing is that in looking for answers we not allow ourselves to slip backwards down our own national slopes.


456 How long will this “war” last and how will it be brought to a closure? What “war” powers will the President implement to reinforce our homeland security? Are we on the road to internal passports or identification cards? Pervasive electronic surveillance? See Woods v. Clayd W. Miller, 333 U.S. 133, 134 (1948) (“[I]f the war powers can be used in days of peace to treat all the wounds which war inflicts on our society, it may ... swallow up all other powers of Congress . . . .”); Note, Blowout? The Bill of Rights After Oklahoma City, 109 HARV. L. REV. 2074 (1996); Joseph Kahn, Raids, Detentions, and Lists Lead Muslims To Oy Persecution, N.Y. TIMES, Mar. 27, 2002, at A11; Jeffrey Rosen, Silicon Valley’s Spy Game, N.Y. TIMES, Apr. 14, 2002, § 6 (Magazine), at 46.
APPENDIX: THE ORDER

Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism

November 13, 2001

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of Title 10, United States Code, it is hereby ordered as follows:

SECTION 1. FINDINGS.

(a) International terrorists, including members of al Qaida, have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.

(b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).

(c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States government.

(d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.

(f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, 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 courts.

(g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

SEC. 2. DEFINITION AND POLICY.

(a) The term "individual subject to this order" shall mean any individual who is not a United States citizen with respect to whom I determine from time to time in writing that:

(1) there is reason to believe that such individual, at the relevant times,
   (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 therefor, 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) of subsection 2(a)(1) of this order; and

(2) it is in the interest of the United States that such individual be subject to this order.

(b) It is the policy of the United States that the Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, if the individual is to be tried, that such individual is tried only in accordance with section 4.

(c) It is further the policy of the United States that any individual subject to this order who is not already under the control of the Secretary of Defense but who is under the control of any other officer or agent of the United States or any State shall, upon delivery of a copy of such
written determination to such officer or agent, forthwith be placed un-
der the control of the Secretary of Defense.

SEC. 3. DETENTION AUTHORITY OF THE SECRETARY OF DEFENSE.

Any individual subject to this order shall be—
(a) detained at an appropriate location designated by the Secretary
of Defense outside or within the United States;
(b) treated humanely, without any adverse distinction based on race,
color, religion, gender, birth, wealth, or any similar criteria;
(c) afforded adequate food, drinking water, shelter, clothing, and
medical treatment;
(d) allowed the free exercise of religion consistent with the require-
ments of such detention; and
(e) detained in accordance with such other conditions as the Secre-
tary of Defense may prescribe.

SEC. 4. AUTHORITY OF THE SECRETARY OF DEFENSE REGARDING TRIALS OF
INDIVIDUALS SUBJECT TO THIS ORDER

(a) Any individual subject to this order shall, when tried, be tried by
military commission for any and all offenses triable by military commis-
sion that such individual is alleged to have committed, and may be pun-
ished in accordance with the penalties provided under applicable law,
including life imprisonment or death.
(b) As a military function and in light of the findings in section 1, in-
cluding subsection (f) thereof, the Secretary of Defense shall issue such
orders and regulations, including orders for the appointment of one or
more military commissions, as may be necessary to carry out subsection
(a) of this section.
(c) Orders and regulations issued under subsection (b) of this sec-
tion shall include, but not be limited to, rules for the conduct of the
proceedings of military commissions, including pretrial, trial, and post-
trial procedures, modes of proof, issuance of process, and qualifications
of attorneys, which shall at a minimum provide for—
(1) military commissions to sit at any time and any place, consistent
with such guidance regarding time and place as the Secretary of Defense
may provide;
(2) a full and fair trial, with the military commission sitting as the tri-
ers of both fact and law;
(3) admission of such evidence as would, in the opinion of the pre-
siding officer of the military commission (or instead, if any other mem-
ber of the commission so requests at the time the presiding officer ren-
ders that opinion, the opinion of the commission rendered at that time
by a majority of the commission), have probative value to a reasonable
person;
(4) in a manner consistent with the protection of information classified or classifiable under Executive Order 12958 of April 17, 1995, as amended, or any successor Executive Order, protected by statute or rule from unauthorized disclosure, or otherwise protected by law, (A) the handling of, admission into evidence of, and access to materials and information, and (B) the conduct, closure of, and access to proceedings;

(5) conduct of the prosecution by one or more attorneys designated by the Secretary of Defense and conduct of the defense by attorneys for the individual subject to this order;

(6) conviction only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present;

(7) sentencing only upon the concurrence of two-thirds of the members of the commission present at the time of the vote, a majority being present; and

(8) submission of the record of the trial, including any conviction or sentence, for review and final decision by me or by the Secretary of Defense if so designated by me for that purpose.

SEC. 5. OBLIGATION OF OTHER AGENCIES TO ASSIST THE SECRETARY OF DEFENSE.

Departments, agencies, entities, and officers of the United States shall, to the maximum extent permitted by law, provide to the Secretary of Defense such assistance as he may request to implement this order.

SEC. 6. ADDITIONAL AUTHORITIES OF THE SECRETARY OF DEFENSE.

(a) As a military function and in light of the findings in section 1, the Secretary of Defense shall issue such orders and regulations as may be necessary to carry out any of the provisions of this order.

(b) The Secretary of Defense may perform any of his functions or duties, and may exercise any of the powers provided to him under this order (other than under section 4(c)(8) hereof) in accordance with section 113(d) of Title 10, United States Code.

SEC. 7. RELATIONSHIP TO OTHER LAW AND FORUMS.

(a) Nothing in this order shall be construed to—

(1) authorize the disclosure of state secrets to any person not otherwise authorized to have access to them;

(2) limit the authority of the President as Commander in Chief of the Armed Forces or the power of the President to grant reprieves and pardons; or

(3) limit the lawful authority of the Secretary of Defense, any military commander, or any other officer or agent of the United States or of any
State to detain or try any person who is not an individual subject to this order.

(b) With respect to any individual subject to this order—

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged 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 States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

(c) This order is not intended to and does not create any right, benefit, or privilege, substantive or procedural, enforceable at law or equity by any party, against the United States, its departments, agencies, or other entities, its officers or employees, or any other person.

(d) For purposes of this order, the term “State” includes any State, district, territory, or possession of the United States.

(e) I reserve the authority to direct the Secretary of Defense, at any time hereafter, to transfer to a governmental authority control of any individual subject to this order. Nothing in this order shall be construed to limit the authority of any such governmental authority to prosecute any individual for whom control is transferred.

SEC. 8. PUBLICATION.

This order shall be published in the Federal Register.

GEORGE W. BUSH
THE WHITE HOUSE,