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Queries from Querin: Guantanamo Tribunals and the Separation of Powers Doctrine

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QUERIES FROM *QUIRIN*: GUANTANAMO TRIBUNALS AND THE SEPARATION OF POWERS DOCTRINE

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INTRODUCTION

Many recent nonfiction writings contemplate recent history with one watershed event: the catastrophic terrorist attacks of September 11, 2001. Whether in social commentary, political discourse, or even economic calculation, the attacks have generated debate on not only the appropriateness of the resulting Global War on Terror ("GWOT"), but also future ramifications of any newly-set precedent. Not surprisingly, the law and the legal profession have played prominent roles in these debates. Recently, many legal scholars have focused their attention on the ongoing[1] military commissions trying enemy combatants captured in the GWOT and held in Guantanamo Bay, Cuba.

President George W. Bush authorized the creation of military commissions in the "Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."[2] In section 1(e) of this order, the President stipulated that "individuals subject to this order . . . be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."[3] Less than two months after this declaration, the first detainees captured in the GWOT were transferred to Guantanamo Bay.[4]

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[1] News Release, Dep't of Def., Military Comm'ns Update — November 3, 2004 (Nov. 4, 2004), *available at* http://www.defenselink.mil/news/Nov2004/d20041104update.pdf (last visited Dec. 23, 2005) (on file with author).

[2] 66 Fed. Reg. 57,833 (Nov. 16, 2001) [hereinafter Military Order of Nov. 13, 2001].

[3] *Id.* § 1(e).

[4] Gwen Robinson, *Protests Over Transfer of Prisoners to Cuba*, FIN. TIMES, Jan. 15, 2002, at 8.

This Note analyzes the legal foundations of the commissions themselves and questions whether their creation was constitutionally permissible under the separation of powers doctrine. Those who argue in the affirmative contend historical precedent and a series of United States Supreme Court decisions have crystallized the President's ability to create the commissions.[5] Conversely, those who argue in the negative contend that the President has overstepped his bounds and that the detainees are entitled to process in traditional U.S. courts.[6] Following a deeper consideration of these differing viewpoints, this Note proposes that military commissions are *not* a violation of the separation of powers doctrine for three reasons: (1) the President was acting pursuant to powers historically afforded to the Commander-in-Chief; (2) Congress has traditionally deferred to the Commander-in-Chief in this regard; and (3) the courts have crystallized the ability of the President to create military tribunals in cases such as *Ex Parte Quirin*, which is applicable to the detainees in Guantanamo Bay.

I. A BRIEF LEGAL HISTORY OF THE GLOBAL WAR ON TERROR

The Global War on Terror formally began in September 2001,[7] but the American government had been fighting skirmishes against terrorism for at least a decade prior.[8] While it is beyond the scope of this Note to consider each of these encounters specifically, it is important to consider the general legal methods used by the United States to address past acts by terrorist groups, particularly Al Qaeda.

The United States has been legally dealing with Al Qaeda, and persons associated with Al Qaeda, for over seventeen years.[9] Initially, the government's preferred legal

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[5] *See, e.g.*, Kenneth Anderson, *What to Do With Bin Laden and Al Qaeda Terrorists?: A Qualified Defense of Military Commissions and United States Policy on Detainees at Guantanamo Bay Naval Base*, 25 HARV. J.L. & PUB. POL'Y 591 (2002).

[6] *See, e.g.*, Martin A. Pedata, *President Bush's Military Order Establishing Military Tribunals to Try Noncitizens: Is It Beyond His Constitutional and Statutory Authority?*, 76 FLA. B.J. 30 (2002).

[7] In response to the attacks of September 11, 2001, President Bush announced, "The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war." Press Release, President George W. Bush, Remarks by the President in Photo Opportunity with the National Security Team (Sept. 12, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html (last visited Jan. 31, 2006) [hereinafter Press Release].

[8] Ruth Wedgwood, *Al Qaeda, Terrorism, and Military Commissions*, 96 AM. J. INT'L L. 328, 329–30 (2002).

[9] Osama bin Laden founded Al Qaeda in 1988. Dan Murphy & Howard LaFranchi, *Special Briefing: How Radical Islamists See the World*, CHRISTIAN SCI. MONITOR, Aug. 2, 2005, at 4. For a general timeline of Al Qaeda activities, including dates of attacks on U.S. interests abroad, see BBC News, *Timeline: Al-Qaeda* (Nov. 1, 2004), http://news.bbc.co.uk/1/hi/world/3618762.stm (last visited Feb. 13, 2006).

tactic against these individuals was criminal law:[10] through long-arm maneuvering, the government filed federal statute-based charges in federal district court.[11] Indeed, "[d]etention of an Al Qaeda member as an enemy combatant was not contemplated. Rather, restraint on Al Qaeda's freedom of action was sought only where intelligence reports could be fleshed out . . . . no one contemplated that we could hold him as a combatant in an ongoing conflict . . . ."[12] In short, because the acts of terrorism in the previous decade[13] occurred outside the mantle of war, declared or undeclared, conventional wisdom prescribed that any perpetrators should be handled by courts in the same manner as other peacetime criminals. This paradigm of domestic judicial intervention shifted following the terrorist attacks of September 11, 2001.[14] Within months of this incident, President Bush, in his response to the terrorist attacks, took many legal steps which laid the foundation for taking the legal fight against newly captured Al Qaeda terrorists out of the haven of U.S. domestic courts and into the battlefield where the terrorists were first captured. First, the President issued Proclamation 7463, a "Declaration of National Emergency by Reason of Certain Terrorist Attacks."[15] This declaration of national emergency is legally important because it empowers the President to confiscate property of foreign interests involved in any attack.[16]

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[10] *See* Wedgwood, *supra* note 8, at 329–30.

[11] *Id.*

[12] *Id.* at 329.

[13] The terrorist acts against American interests here include the 1996 bombing of the American barracks at Khobar Towers, Saudi Arabia (1996), the bombing of the U.S. Embassies in Nairobi, Kenya, and Dar Es Salaam, Tanzania (1998), and the bombing of the *U.S.S. Cole* (2000). While this is not an exhaustive list of attacks against U.S. interests abroad, these arguably larger-scale attacks were dealt with through traditional courts. The Khobar Towers attack resulted in fourteen men being indicted. Barbara Slavin, *Officials: U.S. 'Outed' Iran's Spies in 1997*, USA TODAY, Mar. 30, 2004, at A6. Of these fourteen, ten are in Saudi Arabian custody and the remaining four are at large. *Id.* As of March 2004, no public trial of these individuals had been held. *Id.* The embassy bombing also resulted in civilian court process. In 2001, four Al Qaeda men received life sentences for their roles in the 1998 attacks. Phil Hirschkorn, *Four Embassy Bombers Get Life*, CNN.com, (Oct. 21, 2001), http://archives.cnn.com/2001/LAW/10/19/embassy.bombings/index.html (last visited Jan. 31, 2006) (on file with author). Third, the bombing of the *U.S.S. Cole* also resulted in court process. With active U.S. legal involvement, eleven suspects were tried in Yemen for their role in the attack. *Cole Terror Suspects to Stand Trial in Yemen*, MILWAUKEE J.-SENTINEL, Apr. 2, 2004, at 4A. Two of these men were eventually sentenced to death. William Branigin, *2 Sentenced to Die for USS Cole Attack*, WASH. POST, Sept. 30, 2004, at A18.

[14] *See* Wedgwood, *supra* note 8, at 330.

[15] Proclamation No. 7463, 66 Fed. Reg. 48,199 (Sept. 18, 2001).

[16] Frederic Block, *Civil Liberties During National Emergencies: The Interactions Between the Three Branches of Government in Coping With Past and Current Threats to the Nation's Security*, 29 N.Y.U. REV. L. & SOC. CHANGE 459, 464 (2005).

Second, the President issued the Military Order of November 13, 2001, entitled "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."[17] This document is at the heart of the military commissions question.[18] In seminal part, it found that the protection of U.S. domestic, international, and military interests necessitated that "individuals subject to this order . . . be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."[19] Third, Bush issued Executive Order 13239 of December 12, 2001, "Designation of Afghanistan and the Airspace Above as a Combat Zone."[20] The official designation of Afghanistan is jurisdictionally critical as it is the country-of-capture for many of the accused combatants.[21] Simply put, opponents of the aforementioned Order contend that the Order is illegitimate, but even if it were legitimate, its applicability should be narrowly circumscribed to combat or operations in Afghanistan.[22]

Congress also took an active role in responding to the September 11, 2001, attacks. On September 18, 2001, it passed Joint Resolution 23 authorizing the use of force in response to the terrorist attacks.[23] This resolution stated that the acts of September 11, 2001, "render it both necessary and appropriate that the United States exercise its rights to self-defense and to protect United States citizens both at home and abroad . . . the President has authority under the Constitution to take action to deter and prevent acts of international terrorism."[24] Joint Resolution 23 is important in light of other Congressional statutes assigning power to the Commander-in-Chief, especially Article 21[25]

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[17] Military Order of Nov. 13, 2001, *supra* note 2.

[18] Military commissions created by the Military Order are not U.S. military courts. Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 ARMY LAW. 19, 19 (2002). "Although both courts have existed since the beginning of the United States, they have existed for different purposes, based on different sources of constitutional authority, and with different jurisdictional boundaries." *Id. See also* Major General (Ret.) Michael J. Nardotti, Jr., *Military Commissions*, 2002 ARMY LAW. 1, 4 (2002).

[19] Military Order, *supra* note 2, § e.

[20] Exec. Order No. 13,239, 66 Fed. Reg. 64,907 (Dec. 14, 2001).

[21] Press Release, Dep't of Def., JTF-GTMO Information on Detainees (Mar. 4, 2005), *available at* http://www.defenselink.mil/news/Mar2005/d20050304info.pdf (last visited Jan. 31, 2006) (on file with author).

[22] Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT'L L. 345, 353 (2002).

> Military commissions are linked to wartime, specifically the prosecutions of violations of the laws of war and the legal vacuum often created by the exigencies of war . . . . To the extent that the United States employs military commissions to try those directly involved in the armed conflict in Afghanistan, their use may be justified.

Id.

[23] S.J. Res. 23, 107th Cong. (2001) (enacted).

[24] *Id.*

[25] 10 U.S.C.A. § 821 (1998).

and Article 36[26] of the Uniform Code of Military Justice ("UCMJ"). President Bush explicitly cited all three of these authorities in his Military Order.[27]

In March 2002, the Department of Defense released detailed procedures for the implementation of the Order.[28] While several of these procedures were different from practices first articulated in the Order,[29] the substantive standards or goals were unaltered. Pursuant to President Bush's Order, hundreds of detainees have been transferred to a military prison in Guantanamo Bay, Cuba. Many have been released as new prisoners arrive.[30] As of this writing, there are 550 detainees currently being held as "enemy combatants,"[31] fifteen of whom have been deemed subject to commission jurisdiction under the Order.[32] The first of these commissions was convened on August 24, 2004.[33] Several of these detainees are actively pursuing habeas

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[26] 10 U.S.C.A. § 836.

[27] Military Order of Nov. 13, 2001, *supra* note 2.

> 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 . . . .

Id.

[28] Dep't of Def. Mil. Comm'n Order No. 1 (Mar. 21, 2002), *available at* http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf (last visited Jan. 31, 2006) (on file with author).

[29] Among other changes, the Bush Order required two-thirds majorities for conviction and sentencing, including death sentences. Military order of Nov. 13, 2001, *supra* note 2, at 57,835, § 4(7). The DOD procedures kept the two-thirds requirement for conviction but amended the voting requirement to be unanimity in death cases. Dep't of Def. Military Comm'n Order No. 1, *supra* note 28, § 6(F); *see also* LOUIS FISHER, NAZI SABOTEURS ON TRIAL 168–69 (2003).

[30] News Release, Dep't of Def., Guantanamo Detainees (Feb. 13, 2004), *available at* http://www.defenselink.mil/news/Apr2004/d20040406gua.pdf (last visited Dec. 23, 2005).

[31] Carol D. Leonnig, *Judge Rules Detainee Tribunals Illegal*, WASH. POST, Feb. 1, 2005, at A1.

[32] News Release, Dep't of Def., Presidential Military Order Applied to Nine More Combatants (July 7, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040707-0987.html (last visited Jan. 31, 2006).

[33] News Release, Dep't of Def., First Military Commission Convened at Guantanamo Bay, Cuba (Aug. 24, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040824-1164.html (last visited Jan. 31, 2006). Three other commissions also began that week. *United States v. Hicks* began on August 25, 2005. News Release, Dep't of Def., Australian Citizen is the Second Commissions Case (Aug. 25, 2004), *available at* http://www.defenselink.mil/ releases/2004/nr20040825-1169.html (last visited Jan. 31, 2006). *United States v. Hamza* began on August 26, 2005. News Release, Dep't of Def., Third Military Commission Interrupted by Yemeni Detainee Request (Aug. 26, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040826-1174.html (last visited Jan. 31, 2006). Lastly, *United States v. al-Qosi* began on August 27, 2005. News Release, Dep't of Def., Fourth Military Commission Concludes Week of Trials (Aug. 27, 2004), *available at* http://www.defenselink.mil/releases/2004/nr20040827-1180.html (last visited Jan. 31, 2006).

petitions in U.S. domestic courts with mixed results. In mid-January 2005, a D.C. judge refused to grant a habeas petition, citing a lack of viable supporting law.[34] Just a few weeks later, another D.C. judge conversely held that the current military proceedings violated due process.[35]

In an effort to reconcile these conflicting interpretations on commission legality, the Supreme Court granted certiorari to *United States v. Hamdan* on November 7, 2005.[36] Arguments in this case will be heard on Tuesday, March 28, 2006.[37] The first of two questions presented will force the Court to analyze the validity of the November 13, 2001, Order:

> Whether the military commission established by the President to try petitioner and others similarly situated for alleged war crimes in the "war on terror" is duly authorized under Congress's Authorization for the Use of Military Force (AUMF), Pub. L. No. 107-40, 115 Stat. 224; the Uniform Code of Military Justice (UCMJ); or the inherent powers of the President?[38]

Despite the Court's grant of certiorari in *Hamdan*, the government remains resolute in its belief in the commission's legality. In fact, on the very day certiorari was awarded, the government instituted commissions against five other eligible detainees.[39] Of the fifteen detainees subject to commission under the Order, ten are now in active process.[40]

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[34] Khalid v. Bush, 355 F. Supp. 2d 311, 314 (D.D.C. 2005) ("[N]o viable legal theory exists by which [the Court] could issue a writ of habeas corpus under these circumstances.").

[35] *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 445 (D.D.C. 2005) ("[T]he procedures implemented by the government to confirm that the petitioners are enemy combatants subject to indefinite detention violate the petitioners' rights to due process of law.").

[36] Hamdan v. Rumsfeld, 126 S. Ct. 622 (2005). Newly appointed Chief Justice John Roberts will *not* take part in the *Hamdan* decision because he has previously voted in favor of the commissions while on the federal appeals bench. Caroline Daniel & Patti Waldmeir, *Miers Expected to Be President's Terror Ally: Bush's Court Nominee Is More Likely to Make Her Mark on the War on Terror than on Abortion*, FIN. TIMES, Oct. 15, 2005, at 7.

[37] Supreme Court of the United States, Argument Calendar (October Term 2005), Session Beginning March 20, 2006, *available at* http://www.supremecourtus.gov/oral_arguments/argument_calendars/monthlyargumentcalmarch2006.pdf (last visited Mar. 9, 2006).

[38] Petition for Writ of Certiorari, *Hamdan*, 126 S. Ct. 622 (2005) (No. 05-184), *available at* http://www.supremecourtus.gov/qp/05-00184qp.pdf (last visited Jan. 31, 2006).

[39] Kathleen T. Rhem, *Judge Orders Military Trial at Guantanamo Bay Halted*, Am. Forces Info Serv., Nov. 15, 2005, *available at* http://www.defenselink.mil/news/Nov2005/20051115_3356.html (last visited Jan. 31, 2006).

[40] Dep't of Def., *Military Commissions: Charge Sheets*, *available at* http://www.defenselink.mil/news/Nov2004/charge_sheets.html (last visited Mar. 6, 2006).

II. PRESIDENTIAL AUTHORITY AND MILITARY COMMISSIONS

The designation of the President as Commander-in-Chief stems from the Constitution.[41] "The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States . . . ."[42] The precise function this military role plays within the general power of the President has been the subject of much controversy. The Framers, for their part, provided little concrete clarification in the matter. According to some analysts, the Framers intended limits on the executive's power at all times: "[The Framers] were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws."[43] Other analysts suggest the Framers intended both a peacetime and a "'*fighting* Constitution.'"[44] Justice Burton articulated this latter view in his dissent in *Duncan v. Kahanamoku*,[45] a case regarding the use of military tribunals in the governance of Hawaii while that territory was under emergency martial law following the 1941 Pearl Harbor attack. Justice Burton wrote:

> [The Constitution] was written by a generation fresh from war. The people established a more perfect union, in part, so that they might the better defend themselves from military attack. In doing so they centralized far more military power and responsibility in the Chief Executive than previously had been done. The Constitution was built for rough as well as smooth roads. In time of war the nation simply changes gears and takes the harder going under the same power.[46]

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[41] U.S. CONST., art. II, § 2, cl. 1.

[42] *Id.*

[43] Duncan v. Kahanamoku, 327 U.S. 304, 322 (1946).

[44] ERNEST R. MAY, THE ULTIMATE DECISION: THE PRESIDENT AS COMMANDER IN CHIEF 4 (1960) (emphasis in original) (quoting Charles Evans Hughes, *War Powers Under the Constitution*, 42 A.B.A. REP. 232, 248 (1917)). Several scholars have expanded on this idea of a "*fighting* Constitution" by elaborating various presidential policy goals served by the creation of military commissions in times of conflict. The first, and perhaps important, goal of any President following domestic attack is to safeguard the nation against subsequent attack. In accomplishing this goal, a President may be forced to take actions that affect the processing of not only U.S. nationals, but also foreign nationals. In short, for the sake of protecting national security, the President may adopt protective and victory-oriented goals *in certain wartime contexts*. This is a shift from the deterrent and rehabilitative goals of court processes in peacetime. In the words of Professor Laurence Tribe, "Civil liberties is not only about protecting us from our government. It is also about protecting our lives from terrorism." George Will, *Military Tribunals Are the Only Solution*, CHI. SUN-TIMES, Nov. 22, 2001, at 35 (quoting Laurence Tribe).

[45] *Duncan*, 327 U.S. at 342 (Burton, J., dissenting).

[46] *Id.*

While neither the "non-fighting" nor "fighting" Constitution viewpoints has been formally adopted, certain tenets eventually emerged that guide the President's powers in times of formally declared war.[47] Unfortunately, the reality of modern conflict is that wars often go undeclared,[48] leaving the President and Congress to coordinate military affairs and foreign policy in ways that could seem improvised to an observing Framer.

The proper scope of presidential power in times "'short of war,'"[49] or times otherwise lacking explicit Congressional mandate to act, is undefined. Courts have consistently found that the propriety of a given presidential activity should be tested only within its context.[50] This sentiment was most succinctly elaborated in *Youngstown Sheet & Tube*, where the Court found that the President's seizure of steel mills on the eve of a strike constituted an improper use of his executive power.[51] Justice Jackson wrote, "[A]ny actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law."[52] While this mandate offers little in the way of direction, courts have consistently upheld presidential authority in a number of areas, including the establishment of military commissions.[53]

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[47] First, if the United States is the victim of attack, the role of the President, as Commander-in-Chief, is that of defense. The President may mobilize the military to protect domestic interest from foreign assaults. THOMAS F. EAGLETON, WAR AND PRESIDENTIAL POWER: A CHRONICLE OF CONGRESSIONAL SURRENDER 10 (1974). Second, in times of war, the President is tasked with directing military activities. While Congress is charged with formally declaring war, the President is charged with carrying out the war. *Id.* Third, the President is constrained to keep the war's conduct within the scope of Congressional authorization. The President may not change the scope of the conflict. *Id.*

[48] While the last officially declared war was World War II, the U.S. has engaged militarily in Korea, Vietnam, Grenada, and the Middle East.

[49] DOROTHY SCHAFFTER & DOROTHY M. MATHEWS, THE POWERS OF THE PRESIDENT AS COMMANDER IN CHIEF OF THE ARMY AND NAVY OF THE UNITED STATES, at VIII (Da Capo Press photo. reprint 1974) (1956).

[50] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

[51] *Id.* at 579 (majority opinion).

[52] *Id.* at 637 (Jackson, J., concurring), *cited in* Juan R. Tortuella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648, 659 (2002).

[53] In 1946, for instance, the Supreme Court expressly labeled the Presidential power to create commissions as a "war power." *In re* Yamashita, 327 U.S. 1, 12 (1946). Justice Stone wrote:

> The *war power*, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced.

Id. Later scholars further added that

> [the Supreme Court in *ex Parte Quirin*] emphasized that military commissions predated the Constitution. The *Quirin* Court held that the Framers did not intend to change the pre-Constitution common law rules of military commissions. . . .

Additionally, the presidential power to establish military commissions is arguably codified in the Uniform Code of Military Justice vis-à-vis the United States Code.[54] Article 21 of the UCMJ states that the jurisdiction of courts-martial is not exclusive, i.e., "this chapter conferring jurisdiction upon courts-martial *do[es] 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 tribunals."[55] Article 36 of the UCMJ additionally states that "[p]retrial, trial, and post-trial procedures . . . for cases arising under this chapter triable in . . . military commissions . . . may be prescribed by the President."[56] Together, these articles are seen by many as a general Congressional authorization of the President, as Commander-in-Chief, to create military commissions.[57]

The use of military commissions to try domestic threats has been upheld since the early days of the Revolutionary[58] and Civil[59] Wars. However, one of the first

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> [T]herefore, it follows that the Constitution did not prevent the pre-Constitution common law authority of military commanders to establish military commissions when they thought necessary.

Anne English French, Note, *Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?*, 63 OHIO ST. L.J. 1225, 1250–51 (2002) (footnote omitted).

[54] R. Peter Masterton, *Military Commissions and the War on Terrorism*, 36 INT'L LAW. 1165, 1166 n.13 (2002).

> The UNIFORM CODE OF MILITARY JUSTICE (the "UCMJ") is contained in 10 U.S.C. §§ 801–946 (2000). The UCMJ provides that the President may prescribe rules for trials by military commissions. 10 U.S.C. § 836. Articles 106 and 104 of the UCMJ specifically mention the use of military commissions in the trial of spies and persons who aid the enemy. 10 U.S.C. §§ 906, 904 . The preamble to the Manual for Courts-Martial also mentions military commissions as an authorized exercise of military jurisdiction.

Id.

[55] 10 U.S.C.A. § 821 (1998). Admittedly, "Article 21 does not expressly give the President authority to establish a military commission, but merely states that statutes and the law of war define the permissible jurisdiction of military commissions." French, *supra* note 53, at 1255 n.135.

[56] 10 U.S.C.A. § 836 (1998).

[57] *See, e.g.*, Col. Frederic L. Borch III, *Why Military Commissions Are the Proper Forum and Why Terrorists Will Have "Full and Fair" Trials: A Rebuttal to* Military Commissions: Trying American Justice, ARMY LAW., Nov. 2003, at 10, 11n.12.

[58] Christopher M. Evans, Note, *Terrorism on Trial: The President's Constitutional Authority to Order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831, 1836–37 (2002) (footnotes omitted) ("Throughout the Revolutionary War, a number of enemy spies were tried and convicted before military commissions. George Washington personally ordered the executions of several of those convicted.").

[59] During the early years of the Civil War, General Henry Halleck, a Commander of Union forces, faced resistance from Southern sympathizers near his bases in Illinois, Indiana, and Ohio. Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002, at 41, 43. In response, he issued a military order subjecting those unlawful

instances of their use to deal with foreign threats was seen in *Ex Parte Quirin*.[60] In *Quirin*, eight German saboteurs were caught infiltrating the United States.[61] In response, President Franklin D. Roosevelt issued Proclamation 2561, "Denying Certain Enemies Access to the Courts of the United States,"[62] and the Military Order of July 2, 1942, "Appointment of a Military Commission."[63] The combination of these documents effectively pronounced that the saboteurs' legal process would take place by way of military tribunals.[64] While the saboteurs appealed that they were entitled to U.S. civil court access, the Supreme Court held they were *not* constitutionally entitled to civil trials.[65] In an 8–0 decision (Justice Murphy took no part in the case[66]), Justice Stone affirmed the use of military commissions because the President had been acting under his constitutionally vested authority to establish the commissions and designate the defendants as "unlawful belligerents."[67] The *Quirin* decision crystallized the President's power to create military tribunals with effective jurisdiction over foreign unlawful belligerents.

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combatants to process by military commission. *Id.* Several convictions through these commissions resulted in appeal to the Supreme Court, including one undertaken by Lambdin Milligan. *Id.* at 43–44. Milligan's conviction was ultimately overturned in the seminal *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866), where the Court articulated: "Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction." *Id.* at 127.

[60] 317 U.S. 1 (1942).

[61] *Id.*

[62] JENNIFER ELSEA, TERRORISM AND THE LAW OF WAR: TRYING TERRORISTS AS WAR CRIMINALS BEFORE MILITARY COMMISSIONS, at CRS-46 (Cong. Research Serv., CRS Report for Cong., Order Code RL31191, Dec. 11, 2001), *available at* http://fpc.state.gov/documents/organization/7951.pdf (last visited Jan. 31, 2006).

[63] *Id.* at CRS-47.

[64] The operative wording of Roosevelt's Proclamation 2561 reads: "By virtue of the authority vested in me by the Constitution and the statutes of the United States, do hereby proclaim that all persons [subject to this proclamation] . . . shall be subject to the law of war and to the jurisdiction of military tribunals . . . ." Proclamation 2561, 7 Fed. Reg. 5101 (July 2, 1942) [hereinafter Roosevelt's Proclamation 2561]. Roosevelt's Military Order, in pertinent part, reads: "By virtue of the authority vested in me as President and as Commander in Chief [I establish a military commission which] . . . shall have power to and shall, as occasion requires, make such rules for the conduct of the proceeding . . . ." Appointment of a Military Commission, 7 Fed. Reg. 5103 (July 2, 1942) [hereinafter Roosevelt's Military Order].

[65] *Quirin*, 317 U.S. 1.

[66] Justice Murphy voluntarily removed himself from the case because he was on active military reserve duty. Michael R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 78 (1980). Murphy felt that having a member of the military involved in deciding the propriety of a Military Order could subject the Court to a "breath of criticism." Letter from Frank Murphy to Ed Kemp (Sept. 10, 1942), *quoted in* Belknap, *supra*, at 78.

[67] *Quirin*, 317 U.S. at 35.

The standard outlined in *Quirin* has been expanded upon in subsequent court cases. By 1952, in *Madsen v. Kinsella*,[68] the Supreme Court had outlined that military tribunals were appropriate venues to try civilians who had violated the law in three areas: those who violate the traditional laws of war,[69] those who violate the non-traditional laws of war,[70] and those who commit crimes in occupied territories.[71] While the facts of *Madsen*[72] are dissimilar from those of the Guantanamo detainees, Justice Burton's discussion of tribunal jurisdiction is still applicable today.[73]

While the common law evolution of the presidential power to create military tribunals is persuasive on its own, it is not the only source of the President's authority in this area. Statute, too, has provided the foundation for the recently established tribunal system. As mentioned, Joint Resolution 23, coupled with Articles 21 and 36 of the UCMJ, add Congressionally-provided weight to the President's common law power.[74] This point is key, given the common criticism of several Order opponents, who contend that

> in the absence of an emergency that threatens truly irreparable damage to the nation or its Constitution, that Constitution's text, structure, and logic demand approval by Congress .... Congress at a minimum must clearly provide *by law* for the trial of such ["unlawful"] combatants by military commissions; it can do so either through a formal declaration of war or by specific authorizing legislation.[75]

However, these critics overlook a number of salient facts that suggest the very criterion they outline has been satisfied: while the United States is without a *formal* declaration of war, such a fact is not sufficient to conclude that partial-war conditions do

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[68] 343 U.S. 341 (1952).

[69] *See Quirin*, 317 U.S. 1.

[70] *See In re* Yamashita, 327 U.S. 1 (1946).

[71] *See Madsen*, 343 U.S. 341.

[72] *Madsen* involved a wife charged for the murder of her Army-serviceman husband while both were living in the U.S. Area of Control, Germany. *Id.* at 343. The wife, a U.S. citizen, had been tried and convicted by a military court. *Id.* In deciding the tribunal properly had jurisdiction over the wife, the Court held that "[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief... [the President] may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions." *Id.* at 348.

[73] *Madsen* has not been overruled. In fact, it is cited in the dissenting opinion in the very recent *Hamdi v. Rumsfeld*, 542 U.S. 507, 588 (2004) (Thomas, J., dissenting).

[74] Bush's Military Order cites Articles 21 and 36. Military Order of Nov. 13, 2001, *supra* note 2.

[75] Neal K. Katyal & Laurence H. Tribe, Essay, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1266 (2002) (emphasis in original).

not exist. As such, after historical analysis of similar situations with similar statutory underpinnings, it can be argued that Joint Resolution 23 (with UCMJ Articles 21 and 36) *does* suffice as specific authorizing legislation.

While the United States has not formally declared war since 1941, it has nevertheless often engaged abroad militarily, including the Vietnam War and the first Persian Gulf War.[76] Indeed, like the undeclared Vietnam and Gulf wars, the current undeclared GWOT, which began following the catastrophic events of September 11th and Joint Resolution 23, should be viewed as equally potent Congressional mandates for Commander-in-Chief action. Joint Resolution 23

> seems to be as robust as a declaration of war would be. It authorizes the President to use "all necessary and appropriate force" and specifically invokes the War Powers Resolution . . . . [T]he intent of Congress to recognize a state of war seems impossible to avoid when one considers other contemporary legislation.[77]

In sum, the President's authority to create military tribunals stems from both a common law understanding of the power of the Commander-in-Chief and statutory mandate. While the system of checks and balances and separation of powers remains essential for an effective government, the creation of military tribunals remains a respected tool by which the President may achieve national security ends in times of conflict.

III. CONGRESSIONAL AUTHORITY AND MILITARY COMMISSIONS

"[The Congress shall have Power] [t]o constitute Tribunals inferior to the supreme Court;"[78] and "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations . . . ."[79] The power derived from these two Constitutional provisions is tantamount to a Congressional power of enabling authority: the separation of powers doctrine requires that most Presidential action taken under the mantle of Commander-in-Chief occur only following Congressional approval.[80] In short, "the Constitution specifies that Congress must first vest the executive

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[76] Military engagement in Vietnam was authorized by House Joint Resolution 1145. H.R.J. Res. 1145, 88th Cong. (1964). Military engagement in the Persian Gulf War was authorized by House Joint Resolution 77. H.R.J. Res. 77, 102d Cong. (1991).

[77] John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH. L. REV 899, 917 (2003).

[78] U.S. CONST. art. I, § 8, cl. 9.

[79] U.S. CONST. art. I, § 8, cl. 10.

[80] There is only a narrow set of circumstances where the President may act without Congressional approval or in the face of Congressional disapproval. "In the latter category, the President can veto bills, make recess appointments, remove purely executive officials at will, receive ambassadors, convene Congress 'on extraordinary Occasions,' and adjourn Congress when there is internal disagreement about when to adjourn." Katyal & Tribe, *supra* note 75, at 1267.

with additional authority, just as it must first vest jurisdiction in the judicial branch or in other 'Tribunals inferior to the supreme Court' to hear certain categories of cases."[81] Without a doubt, Joint Resolution 23 (against the backdrop of Articles 21 and 36 of the UCMJ) provides for *some* Congressional enabling of Commander-in-Chief action.[82] However, proponents and opponents of the Order diverge in answering whether these statutes provided *sufficient* enabling authority to convene military tribunals in the instant case.[83] Analysis of historical events, coupled with the Bush administration's documented clarification of the tribunals' purpose and scope, suggests the Joint Resolution and UCMJ Articles, first, suffice as enabling authority within the contemporary meaning of the statutes[84] and, second, suffice as current enabling authority given what sufficed as enabling authority in the past.[85] Third, even if the Joint Resolution is deemed to add nothing, i.e., that Congress has been silent in the issue, the President still did not tread upon the toes of Congress in his actions.[86]

First, President Bush's Military Order of November 13, 2001, does not violate separation of powers because it was specifically enabled by citing Joint Resolution

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[81] *Id.* at 1268 (footnote omitted).

[82] For illustrative purposes, the Joint Resolution, as its short title clearly suggests, affords the President the ability to dispatch troops. S.J. Res. 23, 107th Cong. (2001).

[83] For instance, Kathleen Clark, Professor of Law at Washington University in St. Louis, Missouri, contends that while these authorities allow for military commissions generally, they do not allow for the specific commissions created by the President in his November 13th Military Order. Kathleen Clark, *President Bush's Order on Military Trials of Non-Citizens: Beyond His Constitutional or Statutory Authority*, http://www.cnss.org/ClarkMemo.Final.doc (last visited Jan. 31, 2006).

[84] As William P. Barr, former U.S. Attorney General, and Andrew G. McBride, former assistant to the Attorney General, write, "The President's decision to provide for military tribunals is well grounded in constitutional law, historical precedent and common sense." William P. Barr & Andrew G. McBride, *Military Justice for al Qaeda*, WASH. POST, Nov. 18, 2001, at B7.

[85] While there are differences, President Roosevelt's Order and President Bush's Order also bear striking similarities. *See* FISHER, *supra* note 29, at 159–60. The constitutionality of Roosevelt's Order was upheld in *Quirin*. *Ex parte* Quirin, 317 U.S. 1, 25 (1942). In fact, Justice Jackson, in agreeing with Justice Stone's majority opinion, wrote, "I think . . . we are exceeding our powers in reviewing the legality of the President's Order and that experience shows the judicial system unfitted to deal with matters in which we must present a united front to a foreign foe." Memorandum by Mr. Justice Jackson (Oct. 22, 1942), *quoted in* Belknap, *supra* note 66, at 79. In parallel, the Bush administration contends *Quirin* should prove persuasive precedent over the detainees in Guantanamo Bay. Elisabeth Bumiller & Steven Lee Myers, *Presidential Order: Senior Administration Officials Defend Military Tribunals for Terrorist Suspects*, N.Y. TIMES, Nov. 15, 2001, at B6.

[86] W. TAYLOR REVELEY III, WAR POWERS OF THE PRESIDENT AND CONGRESS: WHO HOLDS THE ARROWS AND OLIVE BRANCH? 191–92 (1981) ("So long as the legislators do not explicitly condition or reject policy adopted by the Executive and so long as he can lawfully obtain the necessary implementing tools, he ought to control the operation from initiation through conduct to termination.").

23 and the accompanying UCMJ provisions.[87] Joint Resolution 23 allows the President "to use *all necessary and appropriate force* against those nations . . . he determines planned, authorized, committed, or aided the terrorist attacks . . . *in order to prevent* any future acts of international terrorism."[88] Here, the military tribunals were instituted for the sake of preventing future harm. The tribunal's purpose is not correction, but rather protection.[89]

Indeed, Joint Resolution 23 does not explicitly sanction — or even mention — military tribunals. Critics contend that "[i]t authorizes the President to activate the reserves and send troops to Afghanistan, but says nothing about the methods to be used to try those who are captured and accused of participating in the attacks."[90] However, a lack of language should not automatically eliminate the Resolution as an enabling authority. Congress has traditionally deferred to the President in foreign affairs and given him a broad swath of power in this area.[91] In fact, the Supreme Court has upheld "plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations — a power which does not require as a basis for its exercise an act of Congress."[92] This fact should be particularly persuasive given the comments of senior members of Congress following the adoption of Joint Resolution 23. Senator Joseph R. Biden, Jr., former chairman of both the Senate Foreign Relations Committee and Senate Judiciary Committee, remarked:

> [W]e authorize you, in the name of the American people, to take action, and we define the action in generic terms which you can take. We gave the President today, as we should have and as is our responsibility, all the authority he needs to prosecute these individuals or countries, without yielding our Constitutional right to retain the judgment in the future as to whether or not force could, should, or would be used.
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> . . . .

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[87] The Military Order explicitly cited these as enabling authority: "By the authority vested in me as President and as Commander in Chief . . . and the laws of the United States of America, including [Joint Resolution 23] and [Articles 21 and 36 of the UCMJ]." Military Order of Nov. 13, 2001, *supra* note 2, at 57, 833.

[88] S.J. Res. 23, 107th Cong. (2001).

[89] Barr & McBride, *supra* note 84 ("Our body politic is not attempting to discipline an errant member; it is protecting itself from an external threat to its own collective safety.").

[90] BARBARA OLSHANSKY, SECRET TRIALS AND EXECUTIONS: MILITARY TRIBUNALS AND THE THREAT TO DEMOCRACY 38 (2002).

[91] Greg Neugebauer, *Military Tribunals and the War on Terrorism: Does Congress Matter?*, 35 DUQ. SCH. L. NEWS MAG., No. 2 (Spring 2002), *available at* http://www.juris.duq.edu/spring2002/pdf/military.pdf (last visited Jan. 31, 2006).

[92] United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936), *cited in* Neugebauer, *supra* note 91.

> . . . [H]e has our commitment under the Constitution now to support him in what action he takes as defined by the authority he has.[93]

Finally, critics contend in this juncture that Joint Resolution 23 is not sufficient enabling authority to act because this is not a time of formally declared war.[94] However, it can be persuasively argued that Joint Resolution 23 itself is practically equivalent to a declaration of war.[95] As such, Bush's Order establishing tribunals can be categorized as "war power" — as the Court noted in *Yamashita*: "The war power, from which the [military] commission derives its existence, is not limited to victories in the field . . . ."[96]

Second, President Bush's Military Order does not violate the separation of powers doctrine because its enabling provisions parallel, in seminal part, the enabling provisions in Roosevelt's 1941 Order. In *Quirin*, the Supreme Court found Roosevelt's Order to be constitutional.[97] In analyzing this contention further, it is useful to consider the two salient areas where Roosevelt's Order and Bush's Order are directly parallel. Along these lines, it is also useful to consider where the Roosevelt and Bush Orders diverge and to analyze the importance — if any — of the differences.

The Orders parallel one another procedurally.[98] Both required the same voting proportions for conviction and sentencing[99] and prescribed the same "probative value to a reasonable" person[100] standard for evidence admittance. Both also required a

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[93] Senator Joseph R. Biden, Jr., Statement on Senate Joint Resolution 23 Authorizing the President to Use Force to Respond to September 11th Terrorist Attacks (Sept. 14, 2001), *available at* http://biden.senate.gov/newsroom/details.cfm?id=229863&& (last visited Jan. 29, 2006).

[94] *See generally* Fitzpatrick, *supra* note 22.

[95] Bickers, *supra* note 77, at 917.

> Yet the Joint Resolution seems to be as robust as a declaration of war would be. It authorizes the President to use "all necessary and appropriate force" and specifically invokes the War Powers Resolution in so doing. Indeed, the intent of Congress to recognize a state of war seems impossible to avoid when one considers other contemporary legislation.

Id. (footnotes omitted). *See also* Evans, *supra* note 58, at 1851 (noting that Bush has "the constitutional power under *Quirin* to establish military commissions to punish offenses against the law of war, even without an official declaration by Congress").

[96] *In re* Yamashita, 327 U.S. 1, 12 (1946).

[97] *Ex parte* Quirin, 317 U.S. 1, 25 (1942).

[98] FISHER, *supra* note 29, at 159.

[99] Two-thirds for each, though the Department of Defense vis-à-vis the Bush Order later added a unanimity requirement for death cases. *Compare* Roosevelt's Military Order, *supra* note 64, *with* Military Order of Nov. 13, 2001, *supra* note 2, § 4(c)(7), amended by Dep't of Def. Mil. Comm'n Order No. 1, *supra* note 28, § 6(F).

[100] *Compare* Roosevelt's Military Order, *supra* note 64, *with* Military Order of Nov. 13, 2001, *supra* note 2, § 4(c)(3).

"full and fair" trial process[101] and prohibited judicial review.[102] Additionally, the Orders parallel one another in substantive purpose. Under the Roosevelt Order, which was meant to protect

> the safety of the United States[,] . . . all persons who are subjects, citizens or residents of any nation at war with the United States . . . [*and* who] enter or attempt to enter the United States or any territory or possession thereof . . . [*and* who are] charged with . . . violations of the law of war[103]

shall be subject to military tribunals. In parallel, the purpose of the Bush Order was to

> protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks . . . . [All persons subject to this order shall] be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.[104]

For these reasons, the Bush Order of 2001 should be recognized as being as legally potent as the Roosevelt Order in 1942.

While the Roosevelt and Bush Orders are parallel in many procedural and substantive aspects, there are a number of marked differences which fuel the fires of critics' contentions that the 2001 Order is illegitimate.[105] Perhaps one of the most salient differences is the scope:[106] where the Roosevelt Order was backward-looking at the eight saboteurs at issue, the Bush Order is forward-looking at whomever the President "from time to time in writing"[107] deems a threat. However, while this difference may be marked, it is not enough to detract from a Roosevelt Order-Bush Order parallel for three reasons. First, the nature of contemporary threats is salient enough to suggest that a more open-ended scope should be articulated. As President Bush articulated in the weeks following the terrorist attacks, the United States is

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[101] *Compare* Roosevelt's Military Order, *supra* note 64, *with* Military Order of Nov. 13, 2001, *supra* note 2, §4(c)(2).

[102] *Compare* Roosevelt's Proclamation 2561, *supra* note 64, *with* Military Order of Nov. 13, 2001, *supra* note 2, § 7(b)(2).

[103] Roosevelt's Proclamation 2561, *supra* note 64.

[104] Military Order of Nov. 13, 2001, *supra* note 2, § 1(e).

[105] Some critics contend that the broad purview of the Order makes "the risk that the Military Order will ensnare innocent people seeking to help relief efforts in other nations seem[] very high indeed." OLSHANSKY, *supra* note 90, at 17.

[106] FISHER, *supra* note 29, at 158–59.

[107] Military Order of Nov. 13, 2001, *supra* note 2, § 2(a).

facing a new kind of enemy: a nebulous non-nation-state.[108] Second, while Roosevelt and Bush made different decisions as to the appropriate scope of their Orders, both were nonetheless based on principles of political decision. In other words, the important factor is not the determination of physical scope, but rather the *power to have made the scope determination in the first place.*[109] Third, the broad scope of Bush's Order in no way implies an imminent slippery slope of "dictatorial power" as some critics contend.[110] Aside from the fact that critics do not present any empirical evidence of this executive power running amok,[111] it is also unlikely — in the abstract — that the President would allow the broad nature of the Order to snowball into extremism.[112]

Third, President Bush's Military Order does not violate separation of powers because, even if Joint Resolution 23 and UCMJ provisions are considered silent on the matter of tribunals, the President still behaved vis-à-vis his common law power as Commander in Chief.[113] In the words of one scholar: "[In the face of] congressional

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[108] Press Release, *supra* note 7.

[109] "[T]he determination that someone is an *enemy* of the United States, and therefore subject to [military commissions] for trying their alleged criminality — is a political, not a judicial, decision. . . . Political authorities determine the identity of our nation's enemies." Anderson, *supra* note 5, at 634 (emphasis in original). Indeed, Congress may be said to make political decisions as well. However, "it is for [the President] to judge at the outset where defense ends and aggression begins, subject to later review by Congress and the public." REVELEY, *supra* note 86, at 192–93. As of the time of this writing, there are no pending bills which either attempt to limit the definition section of the Order or otherwise to redefine who is subject to tribunals.

[110] William Safire, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A31 ("Misadvised by a frustrated and panic-stricken attorney general, a president of the United States has just assumed what amounts to dictatorial power to jail or execute aliens."). Other critics take the slippery slope argument further by contending Bush's Order provides license for the GWOT to continue until all groups associated with terrorism — including the Japanese Aum Shinrikyo, Irish IRA, and Peruvian Shining Path — "are eradicated." Fitzpatrick, *supra* note 22, at 347.

[111] A survey of secondary sources offered no empirical instances of the Military Order being used to secure any individual who was not found in combat zones under suspicious circumstances or suspected of having direct ties to Al Qaeda operations.

[112] In fact, the Bush administration *does* offer empirical evidence that a snowball effect is unlikely. In December 2001, Secretary of Defense Rumsfeld reminded the nation: In Germany, during and following WWII, the United States "prosecuted 1,672 individuals for war crimes before U.S. military commissions. Convictions were obtained in 1,416 cases. In Japan, we tried 996 suspected war criminals before military commissions — of which 856 were convicted. These conviction rates . . . are lower than the felony conviction rate in the U.S. federal courts [in 2000]." Donald H. Rumsfeld, U.S. Sec'y of Defense, Prepared Statement: Senate Armed Services Committee "Military Commissions" (Dec. 12, 2001), *available at* http://www.defenselink.mil/speeches/2001/s20011212-depsecdef2.html (last visited Jan. 25, 2006) [hereinafter Rumsfeld Statement].

[113] While the President may also be enabled by statute, he has a "[c]ommon law authority for the military commission [which] is derived from the law of war." A. Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 834 (1948).

silence, the President should be constitutionally free to act, limited only by (1) the necessity to inform the legislators fully of developments on a continuing basis, (2) defensive purpose, and (3) the availability of implementing tools."[114] Given the President's general common law power to create military commissions, as discussed in the first section of this Note, these three factors should be analyzed in determining whether President Bush has stayed within constitutional limits in the face of what critics contend is congressional silence.

First, President Bush *has* sufficiently informed Congress. Some critics present evidence that Congress was not sufficiently apprised of the prospect of military tribunals vis-à-vis an apparent lack of tribunal discussions at Joint Resolution 23 debates.[115] However, pursuant to his obligations under Joint Resolution 23, Bush has offered numerous reports to Congress informing them of progress in the GWOT.[116]

Second, President Bush *has* a sufficiently defensive purpose. The Military Order makes no mention of offensive, aggressive purposes, rather only the goal "[t]o protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks."[117] In the immediate weeks following the Military Order's promulgation, Alberto Gonzales, then-White House General Counsel and current Attorney General, remarked, "Obviously, those who were responsible for the acts of September 11 should be caught and they need to be punished. *But equally important*, is to do everything that we can to insure that there are no future attacks on Americans here or overseas."[118] In turn, the Supreme Court has also consistently validated the permissibility of tribunals in executive action meant to protect the nation.[119]

Third, Bush *has* sufficient constitutional implementing tools to create the Order. Several critics highlight that the Court in *Quirin* "expressly left open the question whether the President's commander-in-chief power alone is authority to establish a military commission, since Article of War 15 recognized such authority."[120] However,

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[114] REVELEY, *supra* note 86, at 191.

[115] Pedata, *supra* note 6, at n.8.

[116] President Bush reported progress in the GWOT in the form of letters to the Speaker of the House of Representatives and the President Pro Tempore of the Senate. These report letters were delivered on September 24, 2001, October 9, 2001, March 20, 2002, September 20, 2002, and March 21, 2003. Press Release, White House Office of the Press Secretary, Text of a Letter from the President to the Speaker of the House of Representatives and the President Pro Tempore of the Senate (Mar. 20, 2003), *available at* http://usinfo.org/wf-archive/2003/030321/epf517.htm (last visited Jan. 27, 2006).

[117] Military Order of Nov. 13, 2001, *supra* note 2, § 1(e).

[118] Interview by Jim Lehrer with Alberto Gonzales, White House General Counsel, on *The MacNeil/Lehrer NewsHour* (PBS television broadcast Nov. 28, 2001), *available at* http://www.pbs.org/newshour/bb/white_house/july-dec01/gonzales_11-28.html (last visited Jan. 25, 2006).

[119] Lacey, *supra* note 59, at 47. ("On several petitions for review, the Supreme Court has upheld the legitimacy of such tribunals.").

[120] Am. Bar Ass'n Task Force on Terrorism & the Law, Report and Recommendations on Military Commissions 3 (Jan. 4, 2002), *available at* http://www.abanet.org/leadership/military.pdf (last visited Jan. 25, 2006) [hereinafter ABA Report].

the question of whether *Quirin*, alone, is "sufficient" precedential foundation for Bush's Military Order has an answer in the affirmative. First, the use of *Quirin*-style military commissions may be deemed "codified" within the UCMJ.[121] Specifically, Congress passed UCMJ Article 21 in 1950, six years *after* the decision in *Quirin*: "The legislative history to this reenacted [UCMJ] provision suggests that Congress was aware of, and accepted, *Quirin*'s interpretation of the provision."[122]

In conclusion here, a survey of historical events and contemporary statements by the administration suggests first that Joint Resolution 23 (and its accompanying UCMJ provisions) suffices as enabling authority within the contemporary meaning of the statutes. Second, these authorities suffice as current enabling authority given what has been deemed adequate enabling authority in the past. Third, even if the Joint Resolution is deemed to add zero authorization, in that Congress has been silent on the issue, the President did not overstep his executive powers in enacting the Order.

IV. CLARIFICATION BY THE COURTS

"It is emphatically the province and duty of the judicial department to say what the law is."[123] The Court, in numerous cases, has expounded on the separation of powers doctrine generally and Presidential powers specifically. It has decided that, when the President and Congress are in apparent conflict, it shall be the role of courts to determine the proper division of power.[124] The realm of military actions is no exception.[125]

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[121] UCMJ Articles 21 and 36 are the second and third cited sources for authority under the Military Order. Military Order of Nov. 13, 2001, *supra* note 2. Article 21 reads:

> 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 tribunals.

10 U.S.C. § 821 (1994). Article 21 was intended to "retain the common law jurisdiction of military commissions." ABA Report, *supra* note 120, at 2 n.1. Article 36 states that "[p]retrial, trial, and post-trial procedures . . . for cases arising under this chapter triable in . . . military commissions . . . may be prescribed by the President." 10 U.S.C. § 836 (1994).

[122] Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENTARY 261, 275 (2002).

[123] Marbury v. Madison, 5 U.S. (1 Cranch.) 137, 177 (1803).

[124] *See, e.g.*, *id.* at 167 (holding that "[t]he question [of] whether a right has vested or not, is, in its nature, judicial, and must be tried by the judicial authority.").

[125] *Ex parte* Quirin, 317 U.S. 1, 26 (1942).("The Constitution thus invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect all laws passed by Congress for the conduct of war . . . ."). Chief Justice Chase's dissent in *Ex parte Milligan* further articulated that "Congress has . . . the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success, *except such as interferes* with the [President's] command of the forces and the conduct of campaigns." *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., dissenting).

Perhaps the more pertinent case in discussing the constitutionality of Bush's Order is *Ex parte Quirin*, a 1942 case detailing the fate of eight Nazi saboteurs who entered the United States during World War II for the purposes of espionage and inflicting damage to key U.S. infrastructure.[126] Roosevelt ordered, through the Military Order of 1942, that these individuals were subject to process by military tribunal.[127] The individuals appealed this Order and sought habeas relief in U.S. federal courts.[128] This relief was denied; Justice Stone articulated: "[Roosevelt's Order detaining and trying the petitioners is] not to be set aside by the courts without the clear conviction that [it is] in conflict with the Constitution or laws of Congress constitutionally enacted."[129] Likewise, "[Roosevelt's Order] convening the Commission was a lawful order and . . . the Commission was lawfully constituted . . . ."[130] All eight saboteurs were ultimately tried by these tribunals.[131]

The facts in *Quirin* parallel the pertinent facts in the September 11th attacks. First, both "were terrorist attacks motivated to coerce and intimidate the United States to obtain a political benefit."[132] In *Quirin*, the goal of the saboteurs' "Operation Pastorius" was to inflict major damage on U.S. interests and philosophies[133] through espionage and sabotage.[134] In taking "credit" for the September 11th attacks, Osama bin Laden expressed that his (and al Qaeda's) goals had also been to do damage to U.S. interests and philosophies,[135] but this time through destruction and murder.[136]

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[126] *Quirin*, 317 U.S. 1.

[127] *Id.* at 18–19.

[128] *Id.* at 20.

[129] *Id.* at 48.

[130] *Id.* at 25.

[131] All eight saboteurs were found guilty and sentenced to death on August 1, 1942. *2 Nazi Saboteurs Freed by Truman*, N.Y. TIMES, Apr. 27, 1948, at 9. Within one week of this sentence, six of these eight had been executed by electric chair. Steve Wick, *The Nazi Invasion of LI*, NEWSDAY, May 19, 1998, at A17. The remaining two had their sentences commuted for aiding the administration in the capture of the others. *Id.* John George Dasch received thirty years; Ernest Peter Burger received life. *Id.* Both, however, were ultimately released and flown back to Germany nearly six years later. *Id.* In the ensuing years, Dasch complained of poor treatment in Germany, "where he was perceived as a traitor. He wanted to return to the United States." Wick, *supra*.

[132] Keith S. Alexander, Note, *In the Wake of September 11th: The Use of Military Tribunals to Try Terrorists*, 78 NOTRE DAME L. REV. 885, 896 (2003).

[133] FISHER, *supra* note 29, at 6. Another goal of the Nazi saboteurs was to promote the "Master Race" ideals of Nazi fascism. *Id.*

[134] *Id.*

[135] Osama bin Laden, as is commonly noted, promotes an extremist version of Islam. He has articulated, "Those youth who conducted the [September 11th] operations did not accept any fiqh in the popular terms, but they accepted the fiqh that the prophet Muhammad brought." CNN.com, *Transcript of Osama Bin Laden Videotape*, Dec. 13, 2001, *available at* http://archives.cnn.com/2001/US/12/13/tape.transcript (last visited Jan. 25, 2006).

[136] *Id.* ("[W]hen people see a strong horse and a weak horse, by nature, they will like the strong horse. This is only one goal . . . . [W]e calculated in advance the number of casualties . . . . We calculated [] the floors that would be hit . . . . I was the most optimistic of them all.").

Second, both attacks were not actions by rogue individuals, but rather by a controlled military organization.[137] Third, both attacks involved direct assault on the U.S. mainland. This is significant given that "the President, as Commander-in-Chief, possesses emergency authority to use military force to defend the nation from attack without obtaining prior congressional approval."[138]

Given the similarities between September 11th and the *Quirin* facts, the Bush Administration formally relied on *Quirin* as precedent in justifying the November 13th Order creating military tribunals.[139] In November 2001, less than two weeks after Bush's Military Order creating the tribunals, then-Assistant Attorney General Michael Chertoff told the Senate Judiciary Committee that the terms of the Bush Military Order were "virtually identical"[140] to the terms of Roosevelt's 1942 Proclamation. For Bush officials — and the Court[141] — *Quirin* continues to remain persuasive precedent in the case of military tribunals.[142]

At this juncture, critics often contend that *Quirin* should not be controlling precedent because the context of that case is factually dissimilar from Bush's 2001 establishment of tribunals.[143] These critics attempt to distinguish the *Quirin* tribunals from the Bush tribunals on three main levels: current lack of declared war,[144] current lack of targeted enemy state or entity,[145] and the current need to consider international norms and laws.[146] Indeed, while these criticisms are valid, they should not be persuasive. The discussion below will contend that despite factual differences, the *Quirin*

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[137] *See, e.g.*, Thomas Geraghty, Comment, *The Criminal-Enemy Distinction: Prosecuting a Limited War Against Terrorism Following the September 11, 2001 Terrorist Attacks*, 33 MCGEORGE L. REV. 551, 588 (2002).

[138] Campbell v. Clinton, 203 F.3d 19, 40 (D.C. Cir. 2000) (Randolph, J., concurring), *cert. denied*, 531 U.S. 815 (2000).

[139] *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the S. on the Comm. Judiciary*, 107th Cong. 51 (2001) (statement of Michael Chertoff, Assistant Attorney General, Criminal Division), *available at* http://judiciary.senate.gov/testimony.cfm?id=126&wit_id=66 (last visited Jan. 28, 2006).

[140] *Id.* ("I believe the [Roosevelt] proclamation, in many respects, is virtually identical to this. [The Bush Order] obviously is broader in the sense that it is not directed just at a single group of saboteurs, but it is directed more generally at a potentially larger class of people.").

[141] *Quirin* has not been overruled.

[142] Rumsfeld Statement, *supra* note 112.

> Military commissions have been used in times of war since the Founding of this nation. George Washington used them during the Revolutionary War; They [sic] were used during the Civil War; President Franklin Roosevelt used them during World War II.
>
> . . . .
>
> Indeed in that [latter] case, the Supreme Court upheld the constitutionality of military commissions.

Id.

[143] Evans, *supra* note 58, at 1844.

[144] *Id.* at 1844–45.

[145] *Id.*

[146] Carl Tobias, *Detentions, Military Commissions, Terrorism, and Domestic Case Precedent*, 76 S. CAL. L. REV. 1371, 1401 (2003).

and Bush scenarios should be analogized because they exhibit parallel legal and policy foundations.

First, in *Quirin*, critics argue that President Roosevelt established military commissions after a formal congressional declaration of war.[147] President Bush, conversely, established military commissions without a congressionally declared war.[148] Although this factual distinction is true, its potency should be taken in the context of the time. In short, gone is the era of declared wars; for over fifty years, Congress has declined to declare war formally despite the commitment of thousands of troops and trillions of dollars in combating hostilities abroad.[149] Consider the language of Congress's last declared war in comparison to the language of Joint Resolution 23, authorizing presidential use of force in the wake of September 11th:

> [T]he President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.[150]

Although the semantics between these statements are different, both the official declaration and authorization of force approve markedly similar response-power by the President, including swift military action. In sum, while Joint Resolution 23 should not be conflated as denoting a modern day formal declaration of war, the overlapping content and meaning[151] between the two Congressional responses is enough to detract from the critics' formalistic argument that *Quirin* is inapplicable without an official declaration of war.[152]

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[147] The U.S. declared war on Japan on December 8, 1941, and Germany and Italy on December 11, 1941. DECLARATIONS OF WAR 5 (Ernest V. Klun ed., 2002). President Roosevelt did not make Proclamation 2561 and the subsequent Military Order until July 2, 1942. *See* ELSEA, *supra* note 62, at CRS-46–CRS-47.

[148] Evans, *supra* note 58, at 1844.

[149] The Vietnam and Korean Wars together cost an estimated 72 billion dollars. Preston Quesenberry, Book Note, *Bowling Together During War*, 111 YALE L.J. 1031, 1034 n.15 (2002).

[150] S.J. Res. 23, 107th Cong. § 2(a) (2001).

[151] To further support that "meaning" overlaps between these two authorities, consider the magnitude of the events that precipitated both responses. The Japanese attack on Pearl Harbor resulted in the deaths of 2,400 Americans. The events of September 11th resulted in 3,000 deaths. "When the death toll reaches the thousands the act enters a new realm, comparable only to war." Geraghty, *supra* note 137, at 588. Importantly, however, the *Quirin* tribunals were *not* in response to Pearl Harbor, but rather German infiltration of the east coast which resulted in no casualties. If, as *Quirin* upheld, tribunals are appropriate for a declared wartime incident where no deaths result, surely the spirit of its holding is applicable for an undeclared wartime incident where thousands of deaths result. *Id.*

[152] *See, e.g.*, Bickers, *supra* note 77, at 917.

To some, the applicability of *Quirin* in times without formal declared war suggests it might be used as a platform for expansive executive action.[153] These critics contend that *Quirin* could be used to legitimate unbridled executive power over foreign and domestic citizens in even the most peaceful times.[154] A careful analysis of the historical use of military commissions proves this criticism is without empirical support. In short, military commissions have only been used in times during, or immediately following, declared hostilities and/or within declared combat zones.[155] In exploring some of the most modern examples, Jordan Paust wrote:

> The United States was clearly at war (however undeclared) in Afghanistan after the insurgency between the Taliban and the Northern Alliance was upgraded to an international armed conflict when the United States used military force in Afghanistan on October 7 [2001]. The United States was also at war in the Gulf region with respect to Iraq (*i.e.*, regarding the continuing international armed conflict in that region), and both international armed conflicts triggered application of the 1949 Geneva Conventions and other customary laws of war, including various due process guarantees for criminal accused. While "war" remains in Afghanistan, the United States can set up a military commission in Afghanistan (as a non-occupying power, with the consent of the new Afghan regime) to try those reasonably accused of war crimes, as it did with respect to the trial of General Yamashita for war crimes during World War II.[156]

As Paust alluded, "[a]lthough Congress did not formally declare war after the events of September 11, 2001, they did authorize the use of military force. . . . [T]he Joint Resolution authorizes the use of necessary and appropriate force in response to [terrorist] attacks."[157]

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[153] Tortuella, *supra* note 52, at 724–29.

[154] Katyal & Tribe, *supra* note 75, at 1274 ("'[Nothing seems] 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.'") (quoting Youngstown Sheet & Tube Co. V. Sawyer, 343 U.S. 579, 642 (1952) (Jackson, J., concurring)).

[155] Lacey, *supra* note 59, at 47 ("Since before the birth of the United States, warriors have used such tribunals to determine the guilt or innocence of their fellow warriors for law of war violations, as courts of occupation or under martial law.").

[156] Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 5–9 (2001) (footnotes omitted).

[157] Melvin Heard et al., *Military Commissions: A Legal and Appropriate Means of Trying Suspected Terrorists*, 49 NAVAL L. REV. 71, 76 (2002) (footnote omitted).

Second, critics argue that in *Quirin*, enemy belligerents were acting on behalf of a single enemy state and, conversely, the enemy belligerents subject to Bush's military commissions represent a variety of nationalities, including nations allied with the United States in the GWOT.[158] Although this, too, is true, it ignores the modern reality of non-nation-state actors.[159] The language of Bush's Order reads, in part, "Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks . . . that, if not detected and prevented, will cause mass deaths . . . ."[160] This finding makes clear that the "enemy" in the GWOT is an elusive, non-nation-state actor. To this end, other critics of Bush's Order respond with more specific analysis: since "terrorism" is not recognized as "international armed conflict" under the Geneva Convention,[161] Congress never intended the military tribunal process to apply to terrorists.[162] This contention is unpersuasive for reasons involving both black-letter law and practical policy.

Congress has consistently recognized the applicability of the Geneva Conventions to prisoners of war.[163] However, the non-Taliban al Qaeda individuals here are *detainees*, not prisoners of war.[164] Bush made this categorization primarily because al Qaeda is a foreign terrorist group, not a state party to the Geneva Convention.[165] Further, the ability of the President to make such a categorization should not be contested. As one scholar wrote, "[T]he determination that someone is an *enemy* of the United States, and therefore subject to [the military commissions] forum for trying

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[158] Evans, *supra* note 58, at 1844–45.

[159] *See, e.g.*, Robert J. Bunker, *Epochal Change: War Over Social and Political Organization*, PARAMETERS, U.S. ARMY WAR COL. Q. Summer 1997, at 15.

[160] Military Order of Nov. 13, 2001, *supra* note 2, § 1(c).

[161] Lt. Col. Joseph P. "Dutch" Bialke, *Al-Qaeda & Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1, 37 (2004) ("Al-Qaeda is not a state, and has no comparable state authority or international legal personality . . . . When individuals voluntarily join and support such an unlawful organization and then engage in international armed conflict, they are unlawful combatants and, when captured, are outside the POW status rampart of Geneva Convention III.").

[162] David Stoelting, *Military Commissions and Terrorism*, 31 DENV. J. INT'L L. & POL'Y 427, 430 (2003) ("Isolated attacks over a period of years by persons associated with freelance terrorist networks unaffiliated with any government, however, generally have not been defined as an armed conflict. Thus, the threshold requirement for application of the Geneva Conventions . . . is not satisfied . . . .").

[163] Congress's most potent recognition of the Geneva Conventions is its ratification of them. The United States ratified the Geneva Conventions on August 2, 1955. ICRC, *States Party to the Geneva Conventions and Their Additional Protocols* (2005), http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/party_gc/$File/Conventions%20de%20Geneve%20et%20Protocoles%20additionnels%20ENG.pdf (last visited Jan. 28, 2006) [hereinafter ICRC].

[164] White House, Office of the Press Sec'y, *Fact Sheet, Status of Detainees at Guantanamo* (Feb. 7, 2002), *at* http://www.whitehouse.gov/news/releases/2002/02/20020207-13.html (last visited Jan. 28, 2006).

[165] *Id.*

their alleged criminality — is a political, not a judicial, decision."[166] In short, where the courts have scrutinized the legitimacy of Presidentially created military commissions, they have done so through the lens of the President's political determinations.[167] To do otherwise would, itself, be a violation of the separation of powers doctrine.

Third, in *Quirin*, President Roosevelt's established military commissions were not in violation of the international norms and laws of the time.[168] President Bush's commissions, according to critics, violate numerous international commitments including the International Covenant on Civil and Political Rights.[169] Although it is beyond the scope of this Note to discuss international documents generally, they are salient to the extent that President Bush would be in violation of current treaty requirements.[170]

Fourth, critics lastly contend that *Quirin* should be inapplicable because justices in the case purposefully drafted the decision to apply in a narrow context.[171] As Carl Tobias stated:

> The Court intentionally resolved [*Quirin*] on the narrowest grounds, stating as much expressly, and declined to treat many factual and legal questions. For example, Stone neither thoroughly scrutinized the claims against, and defenses proffered by, the saboteurs nor the processes that tested them. This review derived, in essence, from an agreement that rigorous scrutiny exceeded the Court's capacity, given the time constraints.[172]

However, the narrow context of the *Quirin* decision should not be enough to detract from its precedential value. Indeed, several seminal provisions of the UCMJ were codified in 1950, six years *after* the decision in the case. This persuasively suggests that Congress intended for the *Quirin* decision to stand.

In conclusion, the judiciary has consistently recognized the President's ability to create military tribunals in wartime. Though without the formal mantle of war, the events of September 11th were catastrophic enough, in combination with Joint Resolution 23, to constitute a time of "war" under which the Commander-in-Chief could act. Because of these facts, the Supreme Court's seminal case of *Quirin* is

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[166] Anderson, *supra* note 5, at 634 (emphasis in original).

[167] *Id.*

[168] The United States did not ratify the Third Geneva Convention until 1955, thirteen years after the *Quirin* decision. ICRC, *supra* note 163.

[169] Tobias, *supra* note 146, at 1401.

[170] *See, e.g.*, *In re* Austrian & German Holocaust Litig., 250 F.3d 156, 164 (2d Cir. 2001) (holding that "[g]iven that separation of powers, the political-question doctrine restrains courts from reviewing an exercise of foreign policy judgment by the coordinate political branch to which authority to make that judgment has been 'constitutional[ly] commit[ted].'") (internal quotations omitted) (alterations in original).

[171] Tobias, *supra* note 146, at 1396.

[172] *Id.*

applicable precedent. In *Quirin*, the Court ruled that President Roosevelt's Order establishing tribunals was permissible action under the separation of powers doctrine. For the many reasons that *Quirin* and the events of September 11th are similar, "the Court [should find] that the President's Detention Order was lawful under the AUMF and consistent with his war powers under the Constitution."[173]

CONCLUSION

Chapter One of James Patterson's 1986 thriller *Black Friday*[174] begins with an eerily reminiscent scene: "He began to watch morning's earliest light fall on the Wall Street scene. . . . Once he had it all vividly in sight, Colonel Hudson squeezed his fingers tightly together. '*Boom*,' he whispered quietly. The financial capital of the world completely disappeared behind his clenched right fist. *Boom*."[175] Fifteen years after the debut of this book, part of the financial capital of the world was, indeed, destroyed by terrorist hands. The book and real life then converge on a singular question: what could be done to avoid future horrors?

President Bush's answer was twofold, including increasing the nation's domestic level of preparedness as well as mobilizing an international defensive effort. Overlapping both of these response levels was his November 13th Military Order, written "[t]o protect the United States and its citizens."[176] Almost immediately, critics moved to denounce the Order as a violation of separation of powers; this use of executive power should be quickly curtailed by Congress lest, they argued, the "'Bill of Rights in America [be] distorted beyond recognition.'"[177] However, these critics failed to recognize the mandate behind President Bush's action: as Commander-in-Chief, Bush is charged to protect and defend the homeland from attack. Part of this *defense* is the creation of military tribunals to differentiate those who pose current and future threats to national interests from those who do not. This is not the retributive, penal purpose associated with courts, but rather the protective, defensive purpose associated with national security. In short, the President is — as Part III of this Note alludes — acting pursuant to the powers historically afforded to the Commander-in-Chief.

Beyond this authorization from common law authority, the President's Order was permissible under the separation of powers doctrine because of Congress's explicit grant of statutory power; Joint Resolution 23 of September 8, 2001, and its accompanying UCMJ Articles 21 and 36 provisions suffice as enabling authority given the contemporary meaning of the statutes and what has been deemed adequate in the past. Even if the Joint Resolution is deemed to add nothing, the President still did not overstep his executive powers in enacting the Order.

Lastly, as Part V of this Note has attempted to articulate, constitutional ability to create such tribunals has been crystallized in the state and federal courts, including

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[173] Khalid v. Bush, 355 F. Supp. 2d 311, 320 (D.D.C. 2005).

[174] JAMES PATTERSON, BLACK FRIDAY (Warner Books 2000) (1986).

[175] *Id.* at 1.

[176] Military Order of Nov. 13, 2001, *supra* note 2, § 1(e).

[177] Bumiller & Myers, *supra* note 85.

the Supreme Court itself. In *Ex parte Quirin*, the Court deemed President Roosevelt's Order a constitutionally permissible use of his Commander-in-Chief power. As Justice Jackson, in agreeing with Justice Stone's majority opinion, privately wrote, "[There exist] the soundest reasons why courts should refrain from reviewing in any way orders of the President respecting prisoners of war."[178]

This trifold logic will be tested in *United States v. Hamdan*[179] in the months to come. Already, the Supreme Court has given an indication of its willingness to deviate from *Quirin*'s peripheral conclusions. For example, in *Quirin*, "the Court determined that [claims of U.S. citizenship of one of the saboteurs] did 'not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war.'"[180] Conversely, in the summer 2004 case of *Hamdi v. Rumsfeld*,[181] a plurality of the Court held "that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[182] Does *Hamdi* symbolize a willingness by the Court to wholly overrule *Quirin* in *Hamdan*? If so, not only would the legal foundation of Bush's Order be seriously eroded, so too would be the groundwork which supports the Commander-in-Chief's ability to respond to fluid, transborder threats of the new millennium.

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[178] Memorandum by Mr. Justice Jackson (Oct. 22, 1942), *quoted in* Belknap, *supra* note 66, at 79.

[179] 126 S. Ct. 622 (2005).

[180] *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism: Hearings Before the S. on the Comm. Judiciary*, 107th Cong. 83 (2001) (statement of Scott L. Silliman, Executive Director, Ctr. on Law, Ethics & Nat'l Security, Duke Univ. Sch. of Law) (citing *Ex parte* Quirin, 317 U.S. 1, 37 (1942)), *available at* http://judiciary.senate.gov/print_testimony.cfm?id=126&wit_id=70.

[181] 542 U.S. 507 (2004).

[182] *Id.* at 533.