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**THE AUTHORITY AND SUITABILITY OF MILITARY
COMMISSIONS TO TRY THE SEPTEMBER 11TH TERRORISTS**

BY

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ABSTRACT

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In response to the horrific terrorist attacks of September 11th, the President as Commander-in-Chief issued an order directing the trial of al Qaeda members and other terrorists before military commissions. The order provoked a hornets' nest of reactions from the press, the legal community, and the public. Based on the rhetoric of many pundits and press, it was immediately apparent that little of substance is known about military commissions, which were last used following World War II. This paper traces the historical role and origins of these tribunals, their legal authority, and the advantages they offer over alternative means to try the September 11th terrorists. It concludes that military commissions are more than just appropriate forums for trying these perpetrators; they are, in fact, singularly suited for this purpose.

Our nation is at war. Under the law, the al Qaeda terrorists are unlawful combatants who perpetrated monumental war crimes. The use of military commissions to successfully try such war crimes has been consistent throughout the history of war-fighting. There is constitutional authority and jurisdiction for their use, authority that the Supreme Court has upheld. Given the implementing procedures recently announced by the Department of Defense, military commissions will comport with due process and the rule of law, while ensuring the needs of national defense are well protected.

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AUTHORITY AND SUITABILITY OF MILITARY COMMISSIONS TO TRY SEPTEMBER 11TH TERRORISTS

Whether we bring our enemies to justice, or bring justice to our enemies, justice will be done.

—President George W. Bush¹

The September 11th terrorist attacks against the United States were unprecedented in this nation's history. With the exception of the attack by the Japanese at Pearl Harbor, Americans have only experienced wars in other countries. On September 11th, 2001, an act of war was committed against America on American soil. It was an unprovoked, surprise attack on a peaceful, largely civilian population. Although the attack was by a trained, organized, and resourced force, unlike Pearl Harbor, it was not by regular soldiers clad in the uniforms of their national army. And although the attack was devastating in its magnitude, it was not delivered with the arms and munitions of a conventional force. The hijacking of four aircraft and the horrific devastation inflicted against the World Trade Center and the Pentagon was, nonetheless, an act of war.

A massive international investigation was launched. The evidence was clear and compelling: it pointed conclusively to al Qaeda and its mastermind, Osama bin Laden. Accordingly, the September 11th attack was linked with the 1993 World Trade Center bombing, the 1998 American embassy bombings in Kenya and Tanzania, and the recent attack upon the USS Cole. These were not random or isolated terrorist acts. This was but one more barrage in bin Laden's declared holy war -- his jihad -- against the United States, a war he had been waging relentlessly, and with some success, for years.²

On November 13, 2001, the President took the nation by surprise with his extraordinary Military Order directing the trial of al Qaeda members and other terrorists before military commissions.³ The immediate outcry from many legal pundits and press was largely condemning, with references to "kangaroo courts" and "secret military tribunals."⁴ Some legal analysts labeled the tribunals a historical anachronism and an obsolete relic of a by-gone era. The public, still rallying around the President and a newly bi-partisan Congress, had a generally more favorable reaction, ranging from skepticism to cautious support to raging patriotism. Most Americans had never heard of a military commission; some had vague recollections of their use against war criminals in World War II. The public's understanding was hardly enlightened by the raging and heated debate in the press and among legal commentators, whose positions

appeared more tied to political partisanship than to any informed or reasoned judgment. The initial news stories were so polemical, adamant, and apparently so hurriedly researched that it was difficult to draw any informed conclusions from them.

This paper will attempt to battle through this fog of war, to separate the fact from the fiction and the myth from the legend. It will examine in detail whether a military commission is a legal and appropriate forum in which to try the September 11 terrorists. This analysis will attempt to answer the questions: what are military commissions and how have they been used in past? How do they compare to courts-martial? What is the legal basis for the use of commissions? Does the President have the power to do what he has ordered? What facts have to exist to subject the terrorists to this forum? What are the other possible forums for trying the September 11th terrorists and how do they compare with military commissions? What must the procedures look like in order to ensure fundamental fairness?

This paper concludes that military commissions are appropriate tools in conducting the war on terrorism. However, use of these tribunals is only supportable if the nation's focus is on prosecuting a war and punishing war criminals, not prosecuting garden-variety criminals. Commissions are uniquely suited and well proven under international law to respond to war crimes. Viewed in context of warfighting history, their use is not a departure; it is consistent throughout the ages. Military commissions are legal – there is constitutional authority and jurisdiction for their use, authority that has been upheld by the Supreme Court. With the implementation of appropriate procedures, military commissions are fundamentally fair; they comport with due process and the rule of law. Finally, they are inimitably suited to meet the unique constraints of trying the al Qaeda terrorists, such as ensuring the security of persons and sensitive information.

BACKGROUND

RESPONSES TO THE SEPTEMBER 11TH ATTACK

The response of the United States to the September 11 attack, as well as the reactions of the international community, are important in laying the foundation for the President's military commission order. In response to the attack, the President immediately ordered service members into action to defend and secure the nation and to capture those responsible for the attacks. On September 18, Congress authorized military action with enactment of a Joint Resolution, Public Law 107-40. The Resolution authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or

harbored such organizations or persons in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.”⁵

The decision to use force was supported by many national governments. For the first time in the history of the NATO Alliance, the North Atlantic Council invoked Article 5 of the Washington Treaty, which states, “an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against all.”⁶ The United Nations Security Council likewise recognized the United States’ right to self-defense; on September 12 it unanimously approved Resolution 1368, which stated that acts of international terrorism are a threat to international peace and security and must be combated.⁷ This was followed by Resolution 1373, which reiterated the need to combat “by all means” threats to international peace and security caused by terrorist acts.⁸ On September 21, the President declared that a National Emergency had been in existence since September 11. In so doing, he reported to Congress that he exercised this statutory authority “in response to the unusual and extraordinary threat posed to the national security, foreign policy, and economy of the United States by grave acts of terrorism and threats of terrorism committed by foreign terrorists”⁹

THE PRESIDENT’S MILITARY ORDER

The President’s order contains several key elements that will be discussed in detail throughout this paper:

(1) The characterization of the Order as a military order, not an executive order, and President’s invocation of his authority as “Commander in Chief” sets the tone for the order as a military response, not a law enforcement response, to the terrorist acts.¹⁰

(2) In the Findings, citing the Uniform Code of Military Justice (UCMJ), the Order indicates that it is not practicable to apply in military commissions the rules of evidence and principles of law generally applied in U.S. federal criminal courts.¹¹ This will be further discussed in the procedures portion of this paper.

(3) In defining applicability, although the term “individual subject to this order” does not include U.S. citizens, it is otherwise exceptionally broad. It vests the President with authority to determine to whom the Order applies, using a “reason to believe” standard, when it is in the United State’s interest to subject individuals to the Order. The Order purports to apply to present or past members of al Qaeda; to those who have engaged in, aided or abetted, or conspired to commit acts of international terrorism against the U.S.; or to those who have knowingly harbored such a person.¹²

(4) The Order directs detention by the Secretary of Defense of all subject individuals and outlines the conditions of their detention.¹³

(5) The Order clarifies that the death penalty shall apply, if applicable under law.¹⁴

(6) The Order directs the Secretary of Defense to issue orders and regulations to implement military commissions. The regulations shall include all pretrial, trial, and post-trial procedures necessary to ensure a "full and fair trial." The standard for admission of evidence is that which has "probative value to a reasonable person." Classified information will be protected, including by closure of the trial. Conviction and sentencing will be by two-thirds concurrence of the members. Trial review will be conducted by the President or the Secretary of Defense.¹⁵

(7) The Order makes military tribunals the exclusive jurisdiction for subject individuals; precluding any other remedy or proceeding by or on behalf of a subject individual in any court in the U.S. or abroad or in any international tribunal.¹⁶

AVAILABLE FORUMS TO TRY 9/11 TERRORISTS

There are at least four means by which the 9/11 terrorists can be tried. They are: (1) trial in federal civilian courts; (2) trial before an international tribunal, either one in existence or one created specifically for these trials; (3) trial in the courts of another country, under the principle of universal jurisdiction for acts of terrorism; and (4) trial by military commission.¹⁷ Each forum has advantages, each has inherent limitations. Beyond a brief comparison of the advantages and disadvantages, which will follow later in this paper, this article will focus on military commissions.

WHAT ARE MILITARY COMMISSIONS?

TERMINOLOGY

Before tracing the history of this forum, it is necessary to briefly clarify the distinction between the terms "military commission," "military tribunal," and "court-martial." The military reader may well understand the differences between these terms but it is clear from the early reactions to the President's announcement that the general American public does not.¹⁸ The ambiguity is understandable in light of the lapse since the last widespread use of commissions and the many changes throughout history in the name used to describe this forum.¹⁹ Briefly, as it is used today, the term military tribunal is an umbrella term that includes courts-martial, military commissions, and provost courts.²⁰ The authority and jurisdiction for courts-martial and military commissions are outlined in the Uniform Code of Military Justice (UCMJ). Both are

convened or appointed by military commanders. While there is some overlap in their jurisdiction, as a general rule, courts-martial are used to try military members and, under certain conditions, those accompanying the force, for conventional violations of criminal laws.²¹ The focus of military commissions is the prosecution of war crimes. Although commissions can be used to try members of the force, they are primarily used for civilians who violate the law of war, including martial law or occupation law.²² In the absence of a valid regulation or rule specifying otherwise, military commissions are to follow the principles of law and rules of procedure and evidence used for courts-martial.²³

HISTORY

Military commissions have been used throughout history to prosecute violations of the law of war, martial law, and military occupation law. Early forms of military commissions in Europe date as far back as the early seventeenth century. The celebrated 1776 British trial of Captain Nathan Hale for spying during the American Revolution was by a form of military commission known then as a "court-martial." As a fledgling nation, the United States adopted the British system of military commissions. Use of the forum in this country has been traced through the American Revolutionary War, the Indian Wars, the Mexican American War, the Civil War, and World War II.²⁴

General George Washington convened one of the earliest and most notorious military commissions in this nation for the trial of Major John André. A British Army officer accused of spying, André was captured wearing civilian clothing and carrying defensive plans for West Point. He was convicted of spying by a "board of officers" and sentenced to death. During the Indian Wars of the early 19th century, General Andrew Jackson convened a military commission, titled a "special court-martial," which convicted and executed two British Indian traders for aiding and abetting the Seminole Indian uprising.²⁵

General Winfield Scott frequently used this forum, also known then as a "council of war" to prosecute Mexicans, civilians, and soldiers for violations during the occupation of Mexican territory. With the prevalence of such courts during the Mexican-American War and the Civil War, the various early titles were less used, and the term "military commission" became the standard. Use of commissions by the Union during the Civil War was widespread, primarily to try Southern sympathizers for attempts to impede the Union war effort.²⁶ Confederate Captain Henry Wirz, commandant of the notorious Andersonville prison camp in Georgia, was convicted by military commission for violations of the law of war in connection with the death of thousands of Union prisoners. Eight civilians involved in the Lincoln assassination were also prosecuted in this forum for conspiring to aid the Confederacy; four were imprisoned and four executed.²⁷

Perhaps the most famous and often-cited military commission was the 1942 trial of eight German saboteurs. These special operations soldiers entered the United States via submarine, in secrecy after burying their uniforms and indicia of military status, for the purpose of committing sabotage. All eight were convicted, six were executed, and two served lengthy prison terms.²⁸ Their case, which was reviewed and upheld by the Supreme Court in Ex parte Quirin, will be discussed in greater detail in the authority and jurisdiction discussions below.

Although the Nuremberg and Tokyo trials of major World War II German and Japanese war criminals were international war crimes tribunals created through the authority of the Allied Conferences, they were convened as military commissions. Lesser-known military commissions convened in other locations by the US Army under the Articles of War, however, were even more widely used to prosecute war crimes during the Second World War. In Germany, military commissions tried over 1600 persons for war crimes, while only some 200 were tried by international military tribunals.²⁹ In the Far East, nearly 1000 military commissions were convened to prosecute war crimes.³⁰ For example, Japanese General Yamashita, the "Tiger of Malaya," was prosecuted for his role as commander in his soldiers' atrocities against thousands of mostly noncombatant Philippine civilians. The Supreme Court's review of the Yamashita commission, as well as the Quirin trial, remains an influential and relevant analysis for today's debate.

The last widespread use of military commissions was immediately following World War Two. Some critics today imply that this fifty-year gap renders them an outdated and obsolete relic of a by-gone era.³¹ To the contrary, viewed contextually in the timeline of the history of warfare, that gap is negligible. History instructs us that commissions have been consistently and successfully used in times of modern warfare. The decline in the use of this forum in the recent past does not make them a historical anachronism. Rather, it is more likely attributable to the international community's emphasis after the war on codifying and enforcing the laws of armed conflict in international treaties and conventions. This, coupled with enhanced training in the law of armed conflict and the public's increased visibility of military operations, has dramatically reduced the number of war crimes violations, decreasing the need for military commissions. Despite this development, however, commissions remain a viable and valuable tool in the commander's arsenal for punishment, for protection of the force, and for advancing the war effort.

ORIGIN AND ROLE OF THE MILITARY COMMISSION

Having established its prevalence in history is only the first step toward understanding the purpose and role of the military commission. In order to comprehend the President's

authority to use the commission today, it is necessary to trace its origins and development. This is made all the more challenging by the fact that the military commission is a creature of common law. That is, the military commission is largely the product of customary, unwritten international law -- law that is nonetheless binding and enforceable.

Customary international law has long recognized military commanders' inherent authority to convene ad hoc military courts to try war criminals. Throughout the history of warfare, commanders have found it necessary to deal with "spies, brigands, bushwhackers, jayhawkers, war rebels, and assassins,"³² unlawful belligerents, pirates, and other violators of the common law of war. Commissions became an important disciplinary weapon in the commander's arsenal to punish offenders, to protect the force, to protect local citizens and their property, and to advance the war effort.³³ As such, military commissions have long been considered courts of necessity.

While commanders have always had the inherent authority to dispose of those guilty of law of war offenses, at some point they chose to avoid bearing sole responsibility for these decisions. They opted instead to convene a board or council of officers to hear the cases and make recommendations as to disposition. This evolution is well illustrated by a quote from an 1865 Attorney General opinion. "[T]he position of a commander would be miserable indeed if he could not call to his aid the judgments of such tribunals; he would become a mere butcher of men, without the power to ascertain justice, and there can be no mercy where there is no justice."³⁴ While the precise date of origin of these boards is not known, legal scholars have recognized their existence for many centuries.³⁵

Customary international law has long recognized three general types of military commissions: martial law courts, military government courts, and war courts.³⁶ While all have been called military commissions, as well as other titles, each has unique differences based on the circumstances giving rise to its use. Understanding the distinctions between these uses is important in understanding current authority to convene military commissions to try the terrorists involved in the September 11 attacks.

Martial law courts are those convened by a military commander whose legitimate occupation government has displaced the civil government within the United States. Martial law courts were used to try offenses that would normally be tried by civil courts, but for the courts' suspension or closure caused by war or emergency.³⁷ General Andrew Jackson directed an early and notorious commission at the close of the War of 1812, during a period of martial law continuing after the war was ended but before he received official word of the treaty. Jackson ordered the trial by military commission of Louisiana Congressman Louis Louallier for his

editorial criticizing the continued state of martial law rule in New Orleans.³⁸ (The commission acquitted Louallier.) Martial law courts were also widespread during the Civil War. President Lincoln's extensive and disputed curtailment of civil liberties during this time included a declaration of a limited state of martial law and some fifteen thousand arrests by Union Army forces. Approximately two thousand military commissions were convened during the war as part of his effort to curb Southern sympathizers and suppress internal disorder and dissent.³⁹

Military government courts are similar to martial law courts except that they were generally established during an occupation outside the United States.⁴⁰ General Winfield Scott's use of military government courts during his occupation of Mexican territory in 1847 is considered the beginning of the modern history of commissions in the U.S. military.⁴¹ During the occupation, he was confronted with common law crimes by soldiers against the local citizenry, in addition to crimes by soldiers against soldiers and Mexicans against soldiers. While those crimes would normally be punishable under domestic law, with no functioning Mexican courts and no extraterritorial jurisdiction for either courts-martial or for U.S. civil courts, they could not be punished. Recognizing the importance of maintaining amicable relations with the local populace, General Scott believed that if occupying forces were to be accepted as liberators rather than exploiters, they must be respectful and fair in their dealings with the local populace. Accordingly, he made aggressive use of commissions to try soldiers, as well as locals, for such crimes as murder, rape, assault and battery, robbery, and destruction of property.⁴²

War courts were historically convened to try those accused of violations of the law of war. War courts date back at least as early as seventeenth century when King Gustavus Adolphus of Sweden instituted a panel of officers to make recommendations for the resolution of law of war violations.⁴³ The 1780 trial of Major John Andre' before a "court of inquiry" convened by General George Washington is one of the earliest and most legendary war courts in American history.⁴⁴ Also commonly referred to as a "council of war," by the mid-nineteenth century the war court was regularly in use by U.S. forces. The commissions convened to try German and Japanese war criminals following World War II were war courts. It is as what has historically been known as war courts that military commissions today have authority to try the September 11 terrorists for their violations of the law of war.

Commanders' authority over unlawful combatants and war criminals is obviously necessary to ensure appropriate punishment, to protect the force, and to safeguard the citizenry and its property. What is less evident and perhaps less appreciated, however, is the importance of military commissions as a means to further the war effort.⁴⁵ "The commander of an army in

time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles."⁴⁶ Spies, pirates, illegal combatants, and those committing criminal violations in the theater pose a significant danger to the warfighter's mission. Their actions disrupt the war effort, distract the attention of the force, and divert resources from the mission. Wars are fought by the rules; those who refuse to follow the rules must be punished by the rules. In authorizing commanders the use of military commissions as an expedient and well-tailored approach to dealing with these criminals, the war effort is advanced. Accordingly, it was more than an option for a commander to try those public enemies, it was viewed as his duty under the usages of war, and he was derelict if he did not fulfill this duty.⁴⁷

The Supreme Court recognized this important proposition in both the Yamashita and Quirin cases. The Quirin Court noted that "[a]n important incident to the conduct of war is the adoptions of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."⁴⁸ The Yamashita Court, in upholding the commission's trial of Japanese General Yamashita for war crimes, emphasized that the "trial and punishment of an enemy combatant who has committed violations of the law of war is . . . a part of the conduct of war."⁴⁹ The Court added "[t]he 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 operation have produced."⁵⁰

LEGAL AUTHORITY FOR MILITARY COMMISSIONS

Authority for military commissions is found in the Constitution, statutes, and customary international law, and is upheld in Supreme Court case law. In order for any branch of government to convene a court, there must be a source of authority under the Constitution.⁵¹ Military commissions are unique among courts in that they are not expressly provided for in Article III of the Constitution, which sets out the powers of the judicial branch.⁵² This article vests the judicial power of the United States in the Supreme Court and in inferior courts established by Congress, and generally requires that crimes be tried before juries. Congress did not, however, establish the military commission as a court under this constitutional clause. Rather, its constitutional basis lies at the juxtaposition of war powers shared by Congress and the President.

CONGRESSIONAL AUTHORITY

Two Constitutional clauses involve Congress' authority regarding military commissions. Article I, Section 8 sets out Congress' power "[t]o . . . provide for the common Defence; To *define and punish* piracies and felonies on the high seas, and *Offenses against the Law of Nations . . .*"⁵³ Note that this provision gives Congress power to "define and punish," but not to create or enact, offenses against the law of nations. This Constitutional clause evidences that the laws of nations are the customary law of the land, in existence prior to the adoption of the Constitution.⁵⁴ This will be discussed in greater detail below.

Article 1 goes on to give Congress power "To declare War . . . and make Rules concerning Captures on Land and Water; To raise and support Armies . . .; To *make Rules* for the Government and Regulation of the land and naval Forces." Here Congress has express authority to enact – as opposed to define – laws regulating the forces. Congress expressed this authority by enacting the Uniform Code of Military Justice (UCMJ).⁵⁵ The UCMJ is a comprehensive body of law that defines crimes, authorizes establishment of criminal procedures, establishes a system of courts, and defines their jurisdictions.

The UCMJ and its precursors discuss statutory authority for military commissions. The UCMJ does not, however, contain an affirmative enactment of this tribunal. Rather, it acknowledges that commissions were already in existence. In enacting the UCMJ in 1950, Congress recognized that military commissions were historically in use by military commanders. In discussing courts-martial jurisdiction, Article 21 of the UCMJ 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 commission, provost court, or other military tribunals.*"⁵⁶

The reference in Article 21 to "provisions of this chapter conferring jurisdiction upon courts-martial" refers to Article 18 of the UCMJ. Article 18 states in part, "General courts-martial . . . have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."⁵⁷ Taken together, Articles 21 and 18 evidence Congress' intent to preserve the existing jurisdiction of military commissions over war crimes.

If Congress *recognized* the *preexisting* authority for military commissions in the UCMJ, where does the authority originate? The answer is found in customary international law. Tracing its history, UCMJ Article 21 discussed above was derived verbatim from Article 15 of the Articles of War.⁵⁸ Article 15 dates back to the 1916 revisions to the Articles of War. In

hearings on the 1916 amendments, the chief proponent of Article 15 described the military commission as a "common law of war" court. Although Congress did not regulate by written law the constitution, composition, and jurisdiction of military commissions, he emphasized that the Supreme Court had upheld the jurisdiction of the military commission as a war court. He testified that the "concurrent jurisdiction" language of Articles of War 15 would ensure that military commissions would "continue to be governed as heretofore by the laws of war rather than statute."⁵⁹

This history represents legislative affirmation of the long-standing existence of military commissions as a creature of customary international law, without an express grant of authority under a statute. It also sheds light on the Constitutional language empowering Congress to define and punish, but not to create, offenses against the long-standing, customary law of nations. But Congressional authority is only half the equation. This history also signifies Congress' acknowledgment that the President has authority to appoint and convene commissions under the law of war.

EXECUTIVE AUTHORITY

The President's authority to govern military commissions derives from Article II of the Constitution. Article II, Section 2 states "The President shall be Commander in Chief of the Army and Navy of the United States."⁶⁰ As Commander in Chief, the President is empowered to execute the laws passed for the conduct of war and for the government and regulation of the armed forces. Inherent in this power is the President's authority to convene military commissions. As the discussion above indicates, customary international law has long recognized the importance of commanders using their inherent authority to convene military commissions to address war crimes violations a means of advancing the war effort. The President's authority as Commander in Chief of the Armed Forces is reflective of this long-standing principle of law.

JUDICIAL AUTHORITY

The Supreme Court has upheld the authority of military commissions. In Ex Parte Quirin, the German saboteur case, the Supreme Court examined the authority for military commissions found in the Constitution, in statutes, and in the common law of war.⁶¹ The Court noted that military tribunals are not courts in the sense of the Judiciary Article of the Constitution. Rather, the Court recognized that military commissions are a product of the convergence of executive and legislative authority in the Constitution. The Court found that the President, in directing the commission, appropriately exercised his constitutional authority as Commander in Chief and the authority conferred by Congress in the Articles of War. Congress

properly exercised its authority to make rules governing the military forces and its authority to define and punish offenses against the law of war by codifying the Articles of War, particularly Article 15. In so doing, Congress *sanctioned* the historical jurisdiction of military commissions under customary international law to try law of war offenses.⁶² Describing the incorporation by reference of the law of war into the Articles of War, the Court noted that Congress chose not to codify into permanent form and detail offenses against the law of war, choosing instead to adopt the system of international common law historically applied by military tribunals.⁶³ The Supreme Court in In re Yamashita reiterates this theme, upholding the President's authority to direct General Yamashita's trial by military commission.⁶⁴

EXECUTIVE AUTHORITY WITHOUT ADDITIONAL CONGRESSIONAL ACTION

Because the President signed the Military Order without advance notice to or coordination with Congress, there has been great debate over whether the President has the authority to convene military commissions without any additional, specific legislation or authorization from Congress.⁶⁵ Some argue that, at a minimum, Congress must specifically authorize use of military commissions and prescribe minimal procedural standards. Others counter that Congress' recognition in the UCMJ of the existence of military commissions as a function of the President's inherent authority as commander in chief is sufficient Congressional action.

The Supreme Court resolves this issue. As noted above, the Quirin Court recognized that the President, in directing the commission, appropriately exercised both his constitutional authority as Commander in Chief and the authority conferred by Congress in the Articles of War. The decision in Yamashita echoes this analysis. In neither case, however, did the Court discuss the extent of the President's constitutional authority over military commissions in the absence of Congressional support. The Quirin Court opined "it is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions."⁶⁶ Several years later in Madsen v. Kinsella,⁶⁷ the Court answered the question it had earlier evaded.

Madsen involved a review of a military commission's jurisdiction to try a civilian woman for the murder of her military spouse in the American Zone of Occupied Germany. In rejecting Mrs. Madsen's attacks on the commission's jurisdiction, 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 of the Army and Navy of the United States, he may, in time of war, establish and prescribe the

jurisdiction and procedure of military commissions.⁶⁸ Not only did Congress not attempt to limit the President's authority regarding commissions, it recognized and sanctioned this authority in the Articles of War.⁶⁹ Thus, Madsen stands for the proposition that, absent opposing or limiting congressional action, the power to convene commissions is inherent in the President's role as Commander in Chief.

Critics of this analysis would point out that all three cases cited followed a Congressional declaration of war. Certainly a state of declared war offers the strongest authority for the President's war powers as Commander in Chief.⁷⁰ However, nothing in the UCMJ limits the use of military commissions absent a declaration of war, and commissions have been used in conflicts in which there was no formal declaration of war, including the Civil War and the Indian Wars.⁷¹

JURISDICTION OF MILITARY COMMISSIONS

If constitutional authority exists to try terrorists by military commission, what other legal prerequisites must be met? General principles of law require that a trial in any forum have jurisdiction over the person being tried and jurisdiction over the offenses at issue. The lines between these categories are somewhat blurred in this analysis because both personal and subject matter jurisdiction are defined by reference to offenders or offenses under the law of war, or the law of armed conflict, as it more commonly referred to today.⁷²

PERSONAL JURISDICTION

UCMJ Article 21 limits the jurisdiction of military commissions to "offenders or offenses that by statute or by the law of war may be tried by military commissions."⁷³ As there is no relevant statute here, the military commission's jurisdiction is predicated on the law of war. Recall that historically, military commissions have been used in three instances: as martial law courts, military government courts, and as war courts to prosecute law of war violations. Obviously, only the latter basis is at issue here. It is tempting to assume without further analysis that the al Qaeda attacks violate the law of armed conflict; however, there is a legitimate debate over whether and how they constitute such violations.⁷⁴ If they do not, we must treat the attacks as a law enforcement matter and look to domestic courts for trial and punishment.

This analysis is somewhat obscured by the common characterization of the al Qaeda acts as terrorist acts. While terrorist acts may violate the law of armed conflict, that is not a given proposition. There is no single, authoritative definition of terrorism; none has been accepted by a majority of nations, by the United Nations, or by adoption in a generally accepted treaty.⁷⁵ The term is simply too broad, vague, and politically loaded.⁷⁶ The generally accepted

definitions of terrorism do not include reference to times of armed conflict or theaters of war. Accordingly, whether the al Qaeda terrorist acts also violate the law of armed conflict requires a closer look at that body of law.

The law of armed conflict, also referred to as international humanitarian law, is that body of the law of nations that prescribes the duties, rights, responsibilities, and status of states and individuals engaged in armed conflict. This law is derived from two primary sources: treaties or conventions such as The Hague and Geneva Conventions, and customary law that has not been codified into a written law, treaty, or convention. This unwritten law is nonetheless firmly established and defined by the customs and usages of civilized peoples, as it is derived over centuries "from the laws of humanity and the dictates of the public conscience."⁷⁷ The customary or unwritten law of war both binds and protects all nations and inhabitants, including belligerents.⁷⁸

In order to determine whether the terrorist acts and conspiracies constitute a violation of the law of armed conflict, it must first be determined whether there is an armed conflict. Whether we are in a state of armed conflict is clearly a gray area in the law and one of the greatest sources of dispute in the debate over military commissions.⁷⁹ The present state of events certainly does not look like the traditional textbook conflict involving warring nation-states. All factors taken together, however, support the conclusion that -- at least as of September 11th -- we were engaged in armed conflict with Osama bin Laden and his al Qaeda terrorist forces.⁸⁰ The attacks were not isolated or random terrorist acts; those would not be sufficient to thrust us into armed conflict. This was war. The magnitude and intensity of the attacks -- the number of perpetrators and conspirators involved, the amount of planning, the international nature of the conspiracy, and the massive destruction wrought -- are all factors supporting this determination. The acts were quickly recognized worldwide as the work of bin Laden. The conclusion was inescapable -- the attacks were just one more barrage in his carefully planned and orchestrated international campaign of violence that began with the first World Trade Center bombing in 1993, the 1998 bombings of the U.S. embassies in Kenya and Tanzania, and the attack upon on the USS Cole in 2000.⁸¹

The reaction of our government to the September 11th attacks makes clear that the U.S. believed we were involved in an international armed conflict. The immediate mobilization of U.S. armed forces, the Congressional resolution authorizing use of force, and the declaration of a national emergency all indicate our treatment of the attacks as acts of war. The response of the international community also supports this conclusion. NATO's invocation of the mutual self-defense provisions of Article 5 of the North Atlantic Treaty recognized that the September

11 attacks were acts of war.⁸² The United Nations Security Council's issuance of Resolutions 1368 and 1373, as well as the concomitant reactions of governments worldwide, all reinforce the conclusion that we were at war.⁸³

One significant hurdle remains in this analysis. It is not completely clear under international law whether the U.S. can be in a state of armed conflict with an organization that does not represent a nation. Some critics of military commissions point to the general principle of international law that legitimate wars are fought only between nation-states. Traditionally, only sovereign states have had the legal right to wage war as belligerents; the law of armed conflict did not recognize "private wars" with non-state actors.⁸⁴ Clearly, if the al Qaeda attacks were committed under state sponsorship, they would be considered without question to be acts of war.

Other analysts, however, note that international humanitarian law has slowly shifted towards the acknowledgment that a state can be involved in an armed conflict against an organization. This school of thought recognizes that although the law of armed conflict traditionally applied to state-to-state wars, it has developed to apply to civil wars, evolving to recognize dissident armed factions and liberation movements as quasi-states.⁸⁵ They also point to historical precedents indicating that the United States has engaged in armed conflict with non-state actors. Two such examples are the use of the U.S. expeditionary force to engage the Barbary Pirates in Tripoli in 1805, and the 1916 deployment of the U.S. military to Mexico to subdue Pancho Villa and his band.⁸⁶

Given this evolution, there is ample support for the position that the law of armed conflict can be extended to apply to an organization that engages in hostilities such as the September 11 attacks. The purpose of the law is to protect innocent noncombatants and avoid unnecessary suffering of combatants by regulating conflicts. These foundations are equally compelling in the case of massive, organized, repeated transnational terrorist attacks of this nature.⁸⁷ As the American Bar Association Task Force on Terrorism and the Law concluded, "[I]t would be anomalous to argue that, by operating so far outside the norms and principles of international law, the perpetrators of the attacks are beyond the application of the law of war."⁸⁸ It is illogical to conclude that because international humanitarian law does not on its face appear to apply, it can be used as a shield to protect the perpetrators against trial for war crimes violations.

There is certainly more support for the position that the law of armed conflict applies than not. Under the law of armed conflict, the al Qaeda network responsible for the September 11th attacks – transnational terrorists who enter a country without the uniforms or indicia of

military forces to perpetrate forms of warfare that violate the law of armed conflict -- are unlawful combatants or unlawful belligerents.⁸⁹ Unlawful belligerents don't enjoy the legal immunity from prosecution for acts committed during hostilities that is accorded lawful combatants. They are punishable as war criminals and therefore subject to trial by military commission.⁹⁰

While the issue of the jurisdiction of military commissions over the al Qaeda terrorists perpetrating the September 11th attacks is decided, left unresolved is the question whether all those identified in the President's Military Order are subject to trial by commission. The Order's broad definition of "individual subject to this order" includes international terrorists not necessarily affiliated with al Qaeda and those who harbor terrorists, without evidence of more complicity.⁹¹ While they may be terrorists or may harbor terrorists, as the discussion above clarifies, that does not necessarily make them war criminals.⁹² As the jurisdiction of military commissions under both the UCMJ and common international law is limited to those offenders against the law of war, it appears that military commissions do not now have authority over these individuals; accordingly, use of military commission in these cases would exceed the President's war powers authority.⁹³ Additional Congressional authority to extend commissions' jurisdiction to include these individuals and their actions is likely necessary before they could be tried by a commission.⁹⁴

SUBJECT MATTER JURISDICTION

Subject matter jurisdiction requires jurisdiction over the acts committed. The devastating September 11 acts violated specific international law norms. The law of armed conflict requires that combatants target only valid military targets, requires notice when civilians are present, and prohibits attacks on undefended buildings.⁹⁵ The al Qaeda attacks deliberately targeted civilians and undefended civilian property, preceded by the taking of hostages. The law also regulates the lawful means of waging war. In using hijacked civilian aircraft filled with innocent noncombatants as their mean of wreaking destruction, al Qaeda also violated these proscriptions.⁹⁶

Specific violations of the law of armed conflict that the September 11 perpetrators can be charged with include: willful killing; willfully causing great suffering or serious injury to body or health; extensive destruction and appropriation of property not justified by military necessity; taking hostages; intentionally directing attacks against the civilian population or individual civilians not taking direct part in hostilities; intentionally directing attacks against civilian objects; attacking or bombarding, by whatever means, undefended dwellings or buildings that are not military objectives; and conspiracy to commit violations of the law of war.⁹⁷

PROCEDURES

BACKGROUND

In developing procedures for use by military commissions, a certain delicate balance must be met. Protection of the national defense and the need to aggressively combat international terrorism are paramount; yet equally important are the notions of justice, of fundamental fairness, of "doing what's right." This balancing act is critical in maintaining America's reputation and credibility worldwide as we lead the fight against al Qaeda and international terrorism. Furthermore, the legal groundwork laid by upcoming trials by military commission, should they take place, will set critical legal precedent that must be upheld in the generations to come. Given the explosive pace in the growth of transnational terrorism and the fervor of bin Laden and his network, the global war on terrorism threatens to extend interminably into the future. The adaptability, flexibility, and overall success of military commissions today will facilitate their continued successful use into the future as a means to fight this war in whatever forms it takes.

Prior to the recent publication of the Department of Defense (DOD) Procedures for Trials by Military Commission,⁹⁸ many critics and pundits were convinced that military commissions and justice were oxymoronic terms.⁹⁹ The release of the DOD Procedures, however, has demonstrated that the Department is committed to providing justice through military commissions. This has gone a long way -- for the time being -- toward quelling the raging debate over whether military commissions can deliver a fair trial.

Before examining the DOD Procedures, a brief explanation of the legal underpinnings for this order is helpful. As discussed in the Background section above, beyond directing that commissions provide a "full and fair" trial, the President's Military Order provided only general guidance on procedures. In UCMJ Article 36, Congress provided that the President may prescribe procedures for military commissions that apply the principles of law and rules of evidence generally recognized in criminal trials in U.S. federal district courts, "so far as he considers practicable."¹⁰⁰ The President exercised this authority in the Manual for Courts-Martial, where he directs that, subject to any applicable rule of international law or competent regulations issued by the President or other authority, "military commissions . . . shall be guided by the appropriate principles of law and rules of procedure and evidence prescribed for courts-martial."¹⁰¹ In the Military Order, the President invoked his discretion to divert from the procedural requirements of the MCM and UCMJ. Citing the danger to our nation's safety and

the nature of international terrorism, he found it "not practicable" to apply the procedural requirements of the UCMJ.¹⁰²

THE DEPARTMENT OF DEFENSE PROCEDURES

A detailed analysis of the DOD Procedures for conducting military commissions is beyond the scope of this paper. Briefly, the 21 March 2002 DOD Procedures provide for:

- Presumption of innocence
- Proof of guilt beyond a reasonable doubt
- 2/3 vote for both conviction and sentencing; unanimous vote for death sentence
- Defendant's privilege against self-incrimination at trial
- Defendant's right to military defense counsel without cost
- Defendant's right to civilian defense counsel at own expense, subject to security requirements
- Defendant's right to testify at trial
- Defendant's right to cross-examine witnesses
- Provision of translators and translated evidence
- Broad discovery for defendants, subject to certain security provisions
- Appointment of a military judge advocate as presiding officer
- Generally open trial, except for certain security and other requirements
- Review by an impartial military panel¹⁰³

Despite the legitimate concern over the breadth of the President's Military Order, it is clear that these procedures were carefully drafted to provide defendants with the broadest possible rights, while ensuring that the commissions retained needed flexibility and agility. With few exceptions, these procedures provide defendants at military commissions much the same rights as at courts-martial. Accordingly, defendants tried under these procedures will be accorded a full and fair trial.

COMPARISON OF MILITARY COMMISSIONS WITH ALTERNATIVE FORUMS

There are at least four possible forums in which the al Qaeda terrorists can be tried: (1) trial in federal civilian courts; (2) trial before an international tribunal, either one in existence or one created specifically for these trials; (3) trial in the courts of another country, under the principle of universal jurisdiction for acts of terrorism; and (4) trial by military commission. While each has strengths and limitations, military commissions offer many advantages over the other choices.

MILITARY COMMISSIONS

With their flexible procedures for the protection of classified information and sources, military commissions best protect the national defense. This is particularly critical given the nature of evidence and sensitive intelligence-gathering necessary in cases involving international terrorists such as bin Laden and the al Qaeda network. The disclosure of sensitive and expensive sources of intelligence collection, including human intelligence, signals intelligence, and communications intelligence, would devastate the future ability of the United States and our allies to investigate and prosecute future terrorists. This protection is enhanced by the ability of all parties to the trial to hold the appropriate level of security clearance. The portability of military commissions, which are capable of being held worldwide, on board ship, and in isolated locations like Guantanamo Bay, Cuba, is an effective means of securing the safety of the American public, witnesses, victims, and parties to the trial. Finally, the President's flexibility in directing procedural rules sharpens their point as a fact-finding tool. Commissions are bound only by technical rules of evidence that serve only to prove facts and determine truth, not those that are based on prudential or policy concerns.¹⁰⁴

History demonstrates the fairness of military commissions. Of the more than 1600 Germans and 1000 Japanese tried by military commissions following World War II, only 85% were convicted. This is lower than the approximately 82-85% conviction rate in federal court at that time, and the current 90% federal felony conviction rate.¹⁰⁵ After reviewing World War II military commissions, one analyst wrote:

[A] most remarkable work was performed by these bodies. . . . Equally remarkable is the fact that these tribunals, composed of officers who had been at war with the nations of the accused only a short time before, or who were judges of occupied countries which had suffered at the hands of the enemy, were able to rule fairly upon the law and evidence, and even acquit many of those whose guilt seemed clear, but which they did not deem had been established beyond a reasonable doubt When nations have attorneys, military officers, and judges imbued with this passion for fairness, the doctrine of justice will prevail in post-war trials, as well as in courts of the United States.¹⁰⁶

U.S. FEDERAL COURTS

The most obvious forum and the one most advanced by critics of the President's order is traditional trial in federal District Courts. Critics point to the convictions for those involved in the 1993 World Trade Center bombing and the more recent U.S. embassy bombings in Africa as evidence that federal civilian courts are proven successful for the prosecution of terrorists. To

some, the most compelling advantage of this forum is the notion that it provides the maximum due process and the most stringent possible procedural standards for enforcing the rule of law. Quite simply, such trials represent the American way of dealing with crime and dispensing judgment.

There are, nevertheless, obvious practical limitations on the use of federal civilian courts in this context. These include the slow speed of the trial process, evidentiary burdens that could prove impossible given the nature and location of the alleged conspiracy, and security concerns, including both the ability to safeguard trial participants and classified information, including intelligence sources and methods. The most compelling argument against trial in federal courts is simply this: the pursuit, capture, trial, and punishment of al Qaeda terrorists for the September 11th attacks is not law enforcement. These are not garden-variety crimes. These are offenses against the laws of war that are simply unsuitable for trial in civilian courts. As one legal analyst comments, "The notion that military commissions will "usurp" or "hijack" jurisdiction from civilian courts is erroneous. At issue here is military law."¹⁰⁷

INTERNATIONAL TRIBUNAL

An international war crimes tribunal, like one created to deal with war crimes in the former Yugoslavia and Rwanda, would likely be warmly embraced by the international community. The limitations it poses, however, render it an even less desirable choice of forum. Chief among disadvantages are the length of time it would take to authorize and implement an international tribunal and the ponderous pace of such proceedings.¹⁰⁸ It is not likely that a death penalty would be available in an international tribunal. Finally, the risk of compromise of our intelligence programs and sources would likely be substantial in such an international forum.¹⁰⁹

TRIAL IN ANOTHER COUNTRY UNDER UNIVERSAL JURISDICTION

Trial in the domestic courts of another country is possible, as seen for the Pan Am 103 bombing over Lockerbie, Scotland. Because the acts took place over Lockerbie, Scottish law was applied, but the trials took place on neutral territory, in the Netherlands. This is an untenable proposition for several reasons. All of the victims and much of the evidence reside in the United States. The vast majority of the attacks' impacts were to the United States. Putting aside the difficulty of finding a country that would be willing to host such proceedings, the logistical hurdles alone disqualify this option. As with the option of an international war crimes tribunal, grave risks to intelligence sources and the likely lack of death penalty also mitigate against this choice.¹¹⁰

CONCLUSION

The United States is at war. This unprecedented global armed conflict "calls, unquestionably, for a proportionate response of unparalleled determination and focus . . . as well as one that utilizes the full range of formidable tools at our disposal -- diplomatic, military, and economic."¹¹¹ A powerful weapon in the Commander in Chief's arsenal is the military commission. History instructs us that bringing justice to the enemy that violates the law of war is part of the conduct of the war. Military commissions have been used throughout the history of warfare because they are uniquely well-suited and proven under international law to respond quickly, efficiently, and fairly to war crimes. The constitutional authority and jurisdiction for military commissions has been amply established. As Commander in Chief, the President is empowered to execute the laws passed for the conduct of war and for the government and regulation of the armed forces. Inherent in this power is the President's authority to convene military commissions. By his military order of Nov 13, President Bush has exercised his Constitutional authority. He also exercised the authority granted to him by Congress in the September 18th Joint Proclamation. The procedures published by the Department of Defense will ensure that the commissions are fairly conducted and comport with fundamental due process.

The military commission is not only an appropriate forum in which to try the September 11th terrorists; it is one of the strongest forms of symbolism the Commander in Chief can employ to assure Americans, our allies, and especially our foes, that in this global war on terrorism, we will bring our enemies to justice.

Word Count = 8874

ENDNOTES

¹ President George W. Bush, Address to a Joint Session of Congress and the American People, Sep. 20, 2001, available from <http://www.whitehouse.gov/news/releases/2001/09/print/20010920-8.html>; Internet; accessed 15 March 2002.

² In 1996 and 1998, Osama bin Laden issued fatwahs (religious edicts) declaring jihad against Americans. The first urged Muslims to kill U.S. troops in Saudi Arabia and Somalia, the second broadened his call for attacks on American citizens. See Nancy Peckham, et al., "Bin Laden, Millionaire with a Dangerous Grudge," CNN.com, 27 September, 2001, available from <http://www5.cnn.com/2001/US/09/12/binladen.profile/>; Internet; accessed 8 February 2002. The full text of bin Laden's 1998 fatwah ordering jihad against Americans is available on the Internet from <http://www.ict.org.il/articles/fatwah.htm>.

³ President, Military Order 222 of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," Federal Register 66 (16 November 2001): 57831 [hereinafter "Military Order"].

⁴ See, e.g., William Safire, "Kangaroo Courts," New York Times, 26 November 2001, sec. 1A, p. 19; Jerry Seper, "Leahy Challenges Bush on Military Tribunals," Washington Times, 16 November 2001, sec. A, p. 1 (citing "secret trials and summary executions").

⁵ Congressional Resolution Authorization for Use of Military Forces, Public Law 107-40, 115 Stat. 224 (18 September 2001).

⁶ Statement by NATO Secretary General, NATO Headquarters, Brussels, Belgium, 2 October 2001; available from <http://usinfo.state.gov/topical/pol/terror/01100205.htm>; Internet; accessed 1 February 2002.

⁷ United Nations, UN Security Council Resolution 1368, 12 September 2001, available from <http://www.un.org/Docs/scres/2001/res1368e>; Internet; accessed 1 February 2002.

⁸ United Nations, UN Security Council Resolution 1373, 28 September 2001, available from <http://www.un.org/Docs/scres/2001/res1373e>; Internet; accessed 1 February 2002.

⁹ Presidential Proclamation 7463, "Declaration of National Emergency by Reason of Certain Terrorist Attacks," 14 September 2001, available from <http://www.whitehouse.gov/news/releases/2001/09/20010914-4.html>; Internet; accessed 18 February 2002.

¹⁰ Military Order, Preamble.

¹¹ *Ibid.*, sec. 1(F).

¹² *Ibid.*, sec. 2(A).

¹³ Ibid., sec. 2(B), (C) & sec. 3.

¹⁴ Ibid., sec. 4(A).

¹⁵ Ibid., sec. 4(C)(1)-(8).

¹⁶ Ibid., sec. 7(B).

¹⁷ See American Bar Association (ABA), "Report and Recommendations on Military Commissions," ABA Task Force on Terrorism and the Law, 4 January 2002, available from <http://www.abanet.org/leadership/military.pdf>; Internet; accessed 25 January 2002 [hereinafter "ABA Task Force Report"]. See also, Testimony of Scott L. Silliman before the U.S. Senate Committee on the Judiciary, "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism," 28 November 2001; 107th Congress, 1st sess; available from Westlaw at 2001 WL 1506631; accessed 7 February 2002.; Internet; accessed 5 March 2002.

¹⁸ From the outset, the media controversy over commissions has loosely used several terms interchangeably, including "secret military trials" (Jerry Seper, "Leahy Challenges Bush on Military Tribunals," Washington Times, 16 November 2001, sec. 1A, p. 1); "military tribunals" (Mona Charen, "Presidential Power and Military Tribunals," Washington Times, 26 November 2001, sec. 1A, page 17); and "essentially a courts-martial, or a military trial, during a time of war" (Kevin Drew, "Tribunals Break Sharply from Civilian Courts," CNN.com, 6 December 2001), available from www.cnn.com/2001/LAW/12/06/inv.tribunals.explainer/index.html; Internet; accessed 12 March 2002.

¹⁹ At various time throughout history, the military commission has been called a "court-martial," "military court under martial law," "military court," "court of inquiry," "special court-martial," "council of war," "board of officers," and "special military commission." Thomas C. Marmon, Joseph E. Cooper, and William F. Goodman, "Military Commissions," (unpublished thesis, The Judge Advocate General's School, Charlottesville, Virginia, April 1953), 4-7 [hereinafter "Marmon Thesis"].

²⁰ Uniform Code of Military Justice ("UCMJ"), Article 21, U.S. Code, Title 10, sec. 821 (1994). Provost courts are extraordinary courts of very limited jurisdiction, similar to a magistrate court, historically used only in wartime or under martial law, and will not be further discussed in this paper.

²¹ UCMJ. Art. 21, however, provides that nonmilitary persons may also be tried by general courts-martial for violations of the law of war, including martial law or military occupation law. In practice, this is extremely rare. See Harold Wayne Elliott, "The Trial and Punishment of War Criminals: Neglected Tools in the "New World Order?" (SJD thesis, University of Virginia Law School, Charlottesville, VA, 1998), 168-173.

²² Ibid., 178-79. See also A. Wigfall Green, "The Military Commission," American Journal of International Law, vol. 42 (October 1948): 842-43; Department of the Army, The Law of Land

Warfare, Field Manual 27-10 (Washington, D.C.: U.S. Department of the Army, July 1956), para. 13.

²³ Department of Defense, Manual for Courts-Martial, United States (Washington, D.C.: U.S. Department of Defense, 2000), Preamble para. 2(b)(2) [hereinafter "MCM"]. Procedures for military commissions will be explored in greater detail in "Procedures," below.

²⁴ See generally Major Michael O. Lacey, "Military Commissions: A Historical Survey," The Army Lawyer, U.S. Department of the Army Pamphlet 27-50-350 (March 2002). See also Major Timothy C. MacDonnell, "Military Commissions: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts," The Army Lawyer, U.S. Department of the Army Pamphlet 27-50-350 (March 2002): 21-22; William Winthrop, Military Law and Precedents, 2d ed. (Washington, D.C.: Government Printing Office, 1920), 831-835.

²⁵ Marmon Thesis, 4-5.

²⁶ Winthrop, 833-34; John W. Chambers II, "The Military and Civil Authority," Encyclopedia of the American Military History, Vol. III, ed. John E. Jessup (New York: Scribner, 1994), 1815.

²⁷ *Ibid.*

²⁸ *Ex Parte Quirin*, 317 U.S. 1 (1942).

²⁹ Department of the Army, Report of the Deputy Judge Advocate for War Crimes, European Command, June 1944 to July 1948, (Washington, D.C.: U.S. Department of the Army, 1948), 50 (available at the Army Judge Advocate General's School library, Charlottesville, VA).

³⁰ *Ibid.*

³¹ For example, see Safire, "Kangaroo Courts": "Bush's fiat turns back the clock on advances in military justice, through three wars, in the past half-century." See also Editorial, "A Travesty of Justice," New York Times, 16 November 2001, sec. 1A, page 30, describing a military commission as a "crude and unaccountable system that any dictator would admire."

³² James Speed, U.S. Attorney General Opinion, "Military Commissions," 11 Op. Atty. Gen. 297, (July 1865), 302; available from Westlaw at 1865 WL 1168 (U.S.A.G.); accessed 21 January 2002.

³³ Marmon Thesis, 8-11; Elliott Thesis, 172.

³⁴ Speed Opinion, 308.

³⁵ Marmon Thesis, 8-10.

³⁶ See generally, Winthrop, 836-841; see also MacDonnell, 26-29.

³⁷ Winthrop, 817-18, 837-39.

³⁸ William H. Rehnquist, All The Laws But One, Civil Liberties in Wartime (New York: Vintage Books, 1998), 69-70.

³⁹ Chambers, "The Military and Civil Authority," 1815. The legality and necessity of Lincoln's sweeping control efforts remain hotly debated today. An insightful account of this debate can be found in Chief Justice Rehnquist's book, cited in note 38, above. This turbulent era spawned several several significant Supreme Court cases analyzing the authority for military commissions, some of which are discussed in Rehnquist's book.

⁴⁰ MacDonnell, 26.

⁴¹ John W. Chambers II, "Military Government and Occupation," Encyclopedia of the American Military History, Vol. III, ed. John E. Jessup (New York: Scribner, 1994), 1840.

⁴² *Ibid.*; see also Winthrop, 832; Elliott Thesis, 172-73.

⁴³ Lacey, 42.

⁴⁴ Marmon Thesis, 4.

⁴⁵ *Ibid.*, 8-11.

⁴⁶ Speed Opinion, 305.

⁴⁷ *Ibid.*, 314.

⁴⁸ *Ex parte Quirin*, 317 U.S. at 28-29.

⁴⁹ *In re Yamashita*, 327 U.S. 1, 11 (1946).

⁵⁰ *Ibid.*, 12.

⁵¹ "Congress and the President, like the courts, possess no power not derived from the Constitution." *Ex parte Quirin*, 317 U.S. at 25.

⁵² U.S. Constitution, Art. III, Sec. 1.

⁵³ U.S. Constitution, Art. I, Sec. 8 (emphasis added).

⁵⁴ Speed Opinion, 299.

⁵⁵ U.S. Code, Title 10, secs. 801-946 (1994).

⁵⁶ 10 U.S.C. sec. 821.

⁵⁷ 10 U.S.C. sec. 818.

⁵⁸ The Articles of War were replaced in 1950 by the Uniform Code of Military Justice. See MacDonnell, 21, citing Uniform Code of Military Justice, H.R. Doc. No. 81-491, at 17 (1949); S. Rep. No. 81-486, at 13 (1949).

⁵⁹ *Ibid.*, 21, citing Revisions of the Articles of War, Hearing on H.R. 23628 Before the House Comm. on Military Affairs, 62d Cong. 35 (21 May 1912) (statement of Brig Gen. Enoch H. Crowder, Judge Advocate General, U.S. Army); Revision of the Articles of War, S. Rep. No. 63-229, at 53 (1914).

⁶⁰ U.S. Constitution, Art. II, Sec. 2, cl. 1.

⁶¹ *Ex parte Quirin*, 317 U.S. 1 (1942).

⁶² *Quirin*, 317 U.S. at 27-28. Recall that Article 15 of the Articles of War was the precursor to Article 21, UCMJ, which discusses the authority of military commissions to try offenses under the laws of war.

⁶³ *Ibid.*

⁶⁴ *Yamashita*, 327 U.S. at 11.

⁶⁵ For example, see Senator Leahy's remarks introducing S. 1941, "Military Tribunal Authorization Act of 2002," to the Senate Armed Services Committee, 107th Cong., 2d sess., Congressional Record, vol. 148 (13 February 2002): S741-44. See also Senator Specter's remarks introducing S. 1937, "Military Commission Procedures Act of 2002," to the Senate Armed Services Committee, 107th Cong., 2d sess., Congressional Record, vol. 148 (13 February 2002): S733-34; Testimony of Scott Silliman Before Senate Judiciary Committee, "DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism." 28 November 2001, 107th Congress, 1st sess.; available from Westlaw at 2001 WL 1506631; accessed 7 February 2002.

⁶⁶ *Quirin*, 317 U.S. at 29.

⁶⁷ *Madsen v. Kinsella*, 343 U.S. 341 (1952).

⁶⁸ *Ibid.* at 348.

⁶⁹ *Ibid.* at 354.

⁷⁰ ABA Task Force Report, 5.

⁷¹ Ibid., citing *Madsen v. Kinsella*, 343 U.S. at 346; *Winthrop*, 831-835.

⁷² UCMJ Art. 21, 10 U.S.C. sec. 821.

⁷³ Ibid.

⁷⁴ See, e.g., Michael Ratner, "Prosecuting Al Queda: September 11 and its Aftermath," Crimes of War Project, 13 December 2001, available from <http://www.crimesofwar.org/expert/al-ratner.html>; Internet; accessed 28 January 2002; David Turns, "Terrorism and The Laws of War: September 11 and its Aftermath," Crimes of War Project, 28 September 2001, available from <http://www.crimesofwar.org/expert/attack-turns.html>; Internet; accessed 2 February 2002. Mr. Turns opines, "[t]he attacks on the WTC and the Pentagon were definitely not an act of war in any legal sense, because international law no longer speaks in terms of 'wars' but of 'armed conflicts,' usually understood to be between States" The contributing authors in the Crimes of War Project analyze whether the September 11 attacks are best treated as war crimes, terrorist acts, common crimes under domestic law, or crimes against humanity.

⁷⁵ Robert J. Beck and Anthony C. Arend, "Don't Tread on US': International Law and Forcible State Responses to Terrorism," Wisconsin International Law Journal, no. 12 (Spring 1994): 153, 160-162.

⁷⁶ As a general proposition, however, acts of terrorism can be generally defined as "threats or use of violence with the intent of causing fear in a target group, in order to achieve political objectives." Ibid. at 162.

⁷⁷ FM 27-10, paras 1-4; Hague Convention IV, Respecting the Laws and Customs of War on Land and Its Annex: Regulation Concerning the Laws and Customs of War on Land, The Hague, 18 October 1907, Preamble.

⁷⁸ FM 27-10, paras. 3, 7.

⁷⁹ "The attacks of September 11 were barbaric acts. However, to characterize them as 'acts of war' would not be appropriate in the accepted idiom of international law." Surya Narayan Sinha, "Terrorism and the Laws of War: September 11 and its Aftermath," Crimes of War Project, 28 November 2001, available from www.crimesofwar.org/expert/attack-sinha.html; Internet; accessed 13 January 2002. See also, Silliman Testimony: "I maintain that . . . we were not in a state of armed conflict"

⁸⁰ "Make no mistake, we are at war with Al Qaeda." Ruth Wedgwood, "Prosecuting Al Qaeda: September 11 and its Aftermath," Crimes of War Project, 7 December 2001, available from www.crimesofwar.org/expert/al-wedgwood.html; Internet; accessed 4 February 2002. Professor Wedgwood argues that the present armed conflict dates back to May 1998, when bin Laden declared war on the U.S. by issuing his fatwah, which stipulated that all U.S. citizens were targets of his war.

⁸¹ Testimony of the Honorable Michael Chertoff, Assistant Attorney General, before the Senate Judiciary Committee, 28 November 2001, 107th Cong., 1st sess.; available from Westlaw at 2001 WL 26187917; accessed 7 January 2002. See also, "NATO Says Conclusive Data Links Al Qaida to Sept. 11 Attacks," U.S. Department of State, 2 October 2001, available from <http://usinfo.state.gov/topical/pol/terror/01100205.htm>; Internet; accessed 4 February 2002.

⁸² Statement by NATO Secretary General, NATO Headquarters, Brussels, Belgium, 2 October 2001; available from <http://usinfo.state.gov/topical/pol/terror/01100205.htm>; Internet; accessed 1 February 2002.

⁸³ United Nations, UN Security Council Resolution 1368, 12 September 2001, available from <http://www.un.org/Docs/scres/2001/res1368e>; Internet; accessed 1 February 2002; United Nations, UN Security Council Resolution 1373, 28 September 2001, available from: <http://www.un.org/Docs/scres/2001/res1373e>; Internet; accessed 1 February 2002.

⁸⁴ "To be War, the contention must be *between States* A contention may, of course, arise between the armed forces of a state and a body of armed individuals, but this is not war." L. Oppenheim, International Law: A Treatise, 7th ed., ed. H. Lauterpacht. (New York: D. McKay, 1952), sec. 56, p. 203 (italics in original).

"Even if al Qaeda says it is at war with the United States, the network doesn't meet the Geneva Convention definition of "belligerent" because it is a non-state actor." Michael Ratner, "Prosecuting Al Qaeda: September 11 and its Aftermath," Crimes of War Project, 13 December 13 2001, available from www.crimesofwar.org/expert/al-ratner.html; Internet; accessed 2 February 2002.

⁸⁵ APV Rogers, OBE, "Terrorism and the Laws of War: September 11 and its Aftermath," Crimes of War Project, 21 September 2001, available from www.crimesofwar.org/expert/attack-apv.html; Internet; accessed 3 February 2002. COULD USE ONE MORE IL CITE HERE.

⁸⁶ Robert Kogod Goldman, "Terrorism and the Laws of War: September 11 and its Aftermath," Crimes of War Project, 21 September 21 2001, available from www.crimesofwar.org/expert/attack-gold.html; Internet; accessed 3 February 2002.

⁸⁷ Steven R. Ratner, "Terrorism and the Laws of War: September 11 and its Aftermath," Crimes of War Project, 21 September 2001, available from www.crimesofwar.org/expert/attack-ratner.html; Internet; accessed 28 January 2002.

⁸⁸ ABA Task Force Report, 6-7.

⁸⁹ *Ibid.* See also Quirin, 317 U.S. at 14.

⁹⁰ Francis Lieber, "Instructions for the Government of Armies of the United States in the Field (Lieber Code), promulgated as General Orders no. 100, 24 April 1863, Sections 81-85; Winthrop, 783-84.

⁹¹ Military Order, sec. 2(A).

⁹² See ABA Task Force Report, 8-9.

⁹³ Diane F. Orentlicher and Robert Kogod Goldman, "When Justice Goes to War: Prosecuting Terrorists Before Military Commissions," 25 Harvard Journal of Law and Public Policy 653, Spring 2002, at 654-55.

⁹⁴ ABA Task Force Report, 8-9.

⁹⁵ Hague Convention IV, Respecting the Laws and Customs of War on Land and Its Annex: Regulation Concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. Sec. II, Chap. I, Art. 22-25.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.* See also, Information Paper, no subject, 22 February 2002, unpublished; on file at U.S. Army Military Commission Office, Pentagon, Washington, D.C.

⁹⁸ Department of Defense, Military Commission Order No. 1, "Procedures for Trials by Military Commission of Certain Non-United States Citizens in the War Against Terrorism," U.S. Department of Defense, 21 March 2002 [hereinafter "DOD Procedures"].

⁹⁹ See, e.g., "A Travesty of Justice," New York Times, describing the President's Order as "an end run around the Constitution," as "discard[ing] the rulebook of American justice," and as "a breathtaking departure from due process."

¹⁰⁰ UCMJ Art. 36(a), 10 U.S.C. sec. 836(a).

¹⁰¹ MCM, Preamble para. 2(b)(2). In nearly all respects, the rules and procedures applied at courts-martial, including the rules of evidence, mirror those used in federal district courts. An excellent comparison of the rights, practices, and procedures of military courts-martial with federal civilian procedures is contained in the Testimony of Major General (Ret) Michael J. Nardotti, Jr. before the Senate Judiciary Committee, 4 December 2001, 107th Cong., 1st sess.; available from Westlaw at 2001 WL 26188000; accessed 7 January 2002; also reprinted in "Military Commissions," The Army Lawyer, U.S. Department of the Army Pamphlet 27-50-350 (March 2002): 1-4.

¹⁰² Military Order, sec. 1(F).

¹⁰³ DOD Procedures, sec. 4-6.

¹⁰⁴ Information Paper (no subject), 22 February 2002, unpublished; on file at U.S. Army Military Commission Office, Pentagon, Washington, D.C.

¹⁰⁵ David G. Savage, "Military Tribunal Support Splits Along Party Lines," LATimes.com, 5 December 5 2001, quoting Major General (Ret) Michael J. Nardotti, Jr., in testimony before the Senate Judiciary Committee.

¹⁰⁶ Elliot Thesis, 183 (quoting John A. Appleman, Military Tribunals and International Crimes 344-45 (1954)).

¹⁰⁷ Law Professor Ruth Wedgwood, "Prosecuting Al Qaeda," Crimes of War Project, 7 December 2001, available from www.crimesofwar.org/expert/al-wedgwood.html; Internet; accessed 4 February 2002.

¹⁰⁸ Professor Ruth Wedgwood points to the mere 31 proceedings by the ICTY in eight years. At that rate, if we were to try the 300 current detainees at GITMO in such a forum, it would take approximately 75 years. Ibid.

¹⁰⁹ ABA Task Force Report, 13-14.

¹¹⁰ Ibid.

¹¹¹ Bruce Hoffman, "Terrorism and Counterterrorism After September 11th," Terrorism: Threat Assessment, Countermeasures and Policy; An Electronic Journal of the U.S. Department of State, vol. 6, no. 3 (November 2001): 22-24; available from <http://www.usinfo.state.gov/journals/itps/1101/ijpe/pj63hoffman.htm>; Internet; accessed 15 January 2002.

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