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## The Military Commission in the War on Terrorism

Haridimos V. Thralalos

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2006]

## Comment

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#### I. INTRODUCTION

"The history of the world had taught [the Founding Fathers] that what was done in the past might be attempted in the future."<sup>1</sup>

Presidents, like judges and lawyers, follow precedent.<sup>2</sup> Shortly after the al-Qaeda terrorist network attacked the United States on September 11, 2001, President George W. Bush recalled the military commission to

1. *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 120 (1866).

2. See, e.g., Memorandum from the Office of the Legal Adviser, U.S. Dep't of State, *Authority of the President To Repel the Attack in Korea* (July 3, 1950), 23 DEP'T ST. BULL. 173, 173 (1950) (justifying President Harry S. Truman's use of force in Korean conflict partly on executive branch precedent).

active duty after more than a half-century of dormancy.<sup>3</sup> Relying on precedent established by President Franklin D. Roosevelt,<sup>4</sup> President Bush issued a military order on November 13, 2001 (“Military Order”) authorizing military commissions—wartime military courts—to try suspected al-Qaeda members for their role in the September 11th attacks.<sup>5</sup> The Military Order ignited a firestorm of criticism over whether President Bush exceeded his constitutional authority and acted in derogation of domestic and international law.<sup>6</sup>

This Comment examines the Military Order, both legally and historically, to determine whether military commissions lawfully may try al-Qaeda members and the Taliban militia for alleged violations of the law of war.<sup>7</sup> Part II of this Comment describes the history of military commissions, tracing their evolution from the Mexican-American War through the September 11th attacks.<sup>8</sup> Part III sets forth an analytical framework for assessing

3. See generally NAT’L COMM’N ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT (2004) (describing events leading up to and including September 11th attacks).

4. See Alberto R. Gonzales, Editorial, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27 (stating that similar to “presidents before him,” President George W. Bush established military commissions to try violations of law of war and citing President Franklin D. Roosevelt’s actions during World War II as particularly apt precedent); see also Tim Golden, *After Terror, A Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1 (reporting that President Roosevelt’s precedent of trying unlawful combatants by military commission was “model” for contemporary law-of-war military commissions).

5. See President George W. Bush, Military Order of November 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 4, 3 C.F.R. 918, 919-20 (2002) [hereinafter Military Order] (authorizing use of military commissions).

6. See David Glazier, Note, *Kangaroo Court or Competent Tribunal? Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2005-08 (2003) (noting widespread academic criticism of Military Order).

7. For an evaluation of the Bush administration’s legal position and brief conclusions on the legality of President Bush’s law-of-war military commissions, see *infra* notes 187-269 and accompanying text. Although the Military Order was drafted broadly, a variety of procedural regulations promulgated by the U.S. Department of Defense have significantly narrowed its contours. See, e.g., U.S. Dep’t of Defense, Military Commission Order No. 1, *Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism* (Aug. 31, 2005), available at <http://www.dod.mil/news/Sep2005/d20050902order.pdf> (“implement[ing] policy, assign[ing] responsibilities, and prescrib[ing] procedures . . . for trials before military commissions” pursuant to Military Order). By its express terms, the Military Order applies to any person who “is or was a member of” al-Qaeda, thus Taliban detainees may be excluded from the Military Order’s ambit. See Military Order, *supra* note 5, § 2(a), 3 C.F.R. at 919 (defining persons subject to Military Order). This Comment, however, also will examine whether military commissions may try Taliban detainees, as the President could decide to try captured Taliban detainees under the common law of war or under a separate military order.

8. For a discussion of the history of military commissions, see *infra* notes 13-92 and accompanying text.

the lawfulness of all military commissions.<sup>9</sup> Part IV examines the Bush administration's legal position regarding the trial of al-Qaeda and Taliban detainees within this analytical framework.<sup>10</sup> Part V evaluates the Bush administration's legal position to determine whether contemporary law-of-war military commissions are lawful under constitutional, domestic and international law.<sup>11</sup> Finally, Part VI concludes that President Bush's law-of-war military commissions are an appropriate forum for trying violations of the law of war in the "War on Terrorism" because they satisfy the analytical framework and are consistent with the Constitution, U.S. Supreme Court precedent and domestic and international law.<sup>12</sup>

## II. THE HISTORY OF MILITARY COMMISSIONS

The United States Constitution has been described as "the most wonderful work ever struck off at a given time by the brain and purpose of man."<sup>13</sup> It is the source of all federal government power and, therefore, it is to the Constitution that one must turn first.<sup>14</sup> Although the Constitution contains no express language creating military commissions, numerous provisions can be interpreted as implicitly authorizing their use.<sup>15</sup> In

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9. For a discussion of the Time-Person-Offense-Place Framework, see *infra* notes 93-113 and accompanying text.

10. For a discussion of the Bush administration's legal position within the Time-Person-Offense-Place Framework, see *infra* notes 114-86 and accompanying text.

11. For a critical evaluation of the Bush administration's legal position, see *infra* notes 187-262 and accompanying text.

12. For conclusions on the analysis in this Comment, see *infra* notes 263-69 and accompanying text.

13. W.E. Gladstone, *Kim Beyond Sea*, 127 N. AM. REV. 179, 185 (1878).

14. See *Ex parte Quirin*, 317 U.S. 1, 25 (1942) ("Congress and the President, like the courts, possess no power not derived from the Constitution."); *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 141 (1866) (Chase, C.J., concurring in result) (observing that "there is no law for the government of the citizens, the armies or the navy of the United States, within American jurisdiction, which is not contained in or derived from the Constitution").

15. See A. Wigfall Green, *The Military Commission*, 42 AM. J. INT'L L. 832, 834 (1948) (noting that Constitution provides abundant authority for military commissions); Thomas C. Marmon, Joseph E. Cooper & William P. Goodman, *Military Commissions* 12 (Apr. 1953) (unpublished L.L.M. thesis, The Judge Advocate General's School) (on file with The Judge Advocate General's Legal Center and School Library, Charlottesville, Va.), available at <http://handle.dtic.mil/100.2/ADA438079> [hereinafter Marmon Thesis] ("Although military commissions are not constitutional courts in the sense that they were expressly provided for in that document, they exist under the Constitution."). Historically, military commissions were said to derive their authority from two principal constitutional sources: (1) Congress's power to "declare War" and (2) Congress's power to "raise and support armies," each of which may be augmented by Congress's power to "define and punish . . . Offences against the Law of Nations" [hereinafter Offenses Clause]. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 831 (2d rev. ed. 1920) [hereinafter WINTHROP] (enumerating constitutional provisions sanctioning military commissions). Subsequently, however, the U.S. Supreme Court held that military commissions derive their authority primarily from the Offenses Clause. See *In re*

analyzing military commissions, the overarching question is whether the power of Congress and the President to wage war is limited by Article III, Section 2 of the Constitution and the Fifth and Sixth Amendments.<sup>16</sup> By answering this question, one can determine whether President Bush's law-of-war military commissions are lawful.<sup>17</sup>

### A. *The Four Types of Military Jurisdiction*

Under the Constitution, four types of military jurisdiction exist: (1) military law, (2) martial law, (3) military government and (4) the law of war.<sup>18</sup> Military law governs the U.S. Armed Forces in peace and in war, at home and abroad.<sup>19</sup> Martial law is the military rule exercised by a state

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Yamashita, 327 U.S. 1, 7 (1946). Congress also believes that military commissions derive their authority from the Offenses Clause. See H. COMM. ON THE JUDICIARY, WAR CRIMES ACT OF 1996, H.R. REP. NO. 104-698, at 7 (1996) (noting that "constitutional authority to enact federal criminal laws relating to the commission of war crimes is undoubtedly the same as the authority to create military commissions").

16. See Military Commissions, 11 Op. Att'y Gen. 297, 310-11 (1865) (James Speed, U.S. Att'y Gen.) [hereinafter Speed Opinion] (observing that opponents of military commissions challenge military commission jurisdiction on Article III and Fifth and Sixth Amendment grounds).

17. See *id.* at 311-13 (noting that military commissions must be consistent with Constitution).

18. See MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 EDITION) ¶ 2(a) (2005) [hereinafter MCM 2005] (setting forth four types of military jurisdiction). The Supreme Court definitively described the first three forms of military jurisdiction in *Ex parte Milligan*, 71 U.S. at 141-42 (Chase, C.J., concurring in result). The fourth type of military jurisdiction—law of war jurisdiction—is founded upon the law of war, which is "that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals." *Quirin*, 317 U.S. at 27-28. The law of war is also known as the "law of armed conflict" or "international humanitarian law." See DOCUMENTS ON THE LAWS OF WAR I-2 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) [hereinafter DOCUMENTS ON THE LAWS OF WAR] (explaining use of different terms for same concept). This Comment refers to this branch of international law as the "law of war" because it has been the traditional terminology employed by military commentators and is the term the U.S. Armed Forces currently employ. See WINTHROP, *supra* note 15, at 773 (using and defining "law of war"); U.S. Dep't of Defense, Directive No. 2311.01E, *DoD Law of War Program* ¶ 3.1 (May 9, 2006) (same); see also S. COMM. ON FOREIGN RELATIONS, INTER-AMERICAN CONVENTION AGAINST TERRORISM, S. EXEC. REP. NO. 109-3, at 4 (2005) (noting U.S. Armed Forces use term "law of war," not "international humanitarian law"). The law of war is binding upon states and individuals, particularly members of a state's armed forces. See U.S. DEP'T OF THE ARMY, FIELD MANUAL NO. 27-10, THE LAW OF LAND WARFARE ¶ 3(b) (1956) [hereinafter FM 27-10] (describing breadth of circumstances to which law of war applies).

19. See GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 304 (3d rev. ed. 1915) [hereinafter DAVIS] (providing definition of "military law"); see also MCM 2005, *supra* note 18, ¶ 2(a)(1) (defining "military law" as "that branch of the municipal law which regulates [a government's] military establishment"). The Constitution confides to Congress the power to enact laws governing the Armed Forces. See U.S. CONST. art. I, § 8, cl. 13 (granting Congress power to "make Rules for the Government and Regulation of the land and naval Forces"). The Uniform Code of Military Justice (UCMJ) is the military law that governs all of the Armed Forces. See Act of May 5, 1950, ch. 169, 64 Stat. 107, 108

over its citizens during an emergency, such as a rebellion or an invasion.<sup>20</sup> Military government is the law implemented by a state over an enemy state's territory and people.<sup>21</sup> Law of war jurisdiction is that authority exercised by a state over offenses against the international law of war.<sup>22</sup> These four types of military jurisdiction are enforced through military tribunals known as courts-martial and military commissions.<sup>23</sup>

Both general courts-martial and military commissions have jurisdiction to try violations of the law of war.<sup>24</sup> In U.S. Army ("Army") practice, a

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("[U]nifying, consolidating, revising, and codifying the Articles of War, the Articles for the Government of the Navy, and the disciplinary laws of the Coast Guard."). The UCMJ is codified at 10 U.S.C. §§ 801-946 (2000). For convenience, UCMJ provisions will be cited by article in the text but by U.S. Code section in the footnotes.

20. See WINTHROP, *supra* note 15, at 817 (providing definition of "martial law"); see also MCM 2005, *supra* note 18, ¶ 2(a)(2) (defining "martial law" as "[a] government temporarily governing the civil population within its territory or a portion of its territory through its military forces as necessity may require").

21. See WINTHROP, *supra* note 15, at 799 (providing definition of "military government"). See generally CHARLES E. MAGOON, REPORTS ON THE LAW OF CIVIL GOVERNMENT IN TERRITORY SUBJECT TO MILITARY OCCUPATION BY THE MILITARY FORCES OF THE UNITED STATES (3d ed. 1903) (collecting legal opinions concerning U.S. military government during Spanish-American War and Philippine Insurrection).

22. See MCM 2005, *supra* note 18, ¶ 2(a)(4) (defining "law of war jurisdiction").

23. See FM 27-10, *supra* note 18, ¶ 13 (listing military tribunals through which Army exercises military jurisdiction); see also MCM 2005, *supra* note 18, ¶ 2(b) (adding courts of inquiry to this list of military tribunals).

24. See 10 U.S.C. § 818 (providing that "[g]eneral courts-martial also 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"); *id.* § 821 (giving military commissions concurrent jurisdiction over offenders or offenses against law of war); see also FM 27-10, *supra* note 18, ¶ 505(d) (explaining that violations of law of war are within jurisdiction of general courts-martial, military commissions and international tribunals). Military commissions received concurrent law of war jurisdiction by statute in 1916, as evidenced by the testimony of Army Judge Advocate General Enoch H. Crowder. Specifically, during testimony before the House Committee on Military Affairs on May 14, 1912, Brigadier General Crowder, urging adoption of a revision to the Articles of War, explained:

The next article, No. 15, is entirely new, and the reason for its insertion in the code are these: In our war with Mexico two war courts were brought into existence by orders of Gen. Scott, viz, the military commission and the council of war. By the military commission Gen. Scott tried cases cognizable in time of peace by civil courts, and by the council of war he tried offenses against the laws of war. The council of war did not survive the Mexican War period, and in our subsequent wars its jurisdiction has been taken over by the military commission, which during the Civil War period tried more than 2,000 cases. While the military commission has not been formally authorized by statute, its jurisdiction as a war court has been upheld by the Supreme Court of the United States. It is an institution of the greatest importance in a period of war and should be preserved. In the new code the jurisdiction of courts-martial has been somewhat amplified by the introduction of the phrase "Persons subject to military law." There will be more instances in the future than in the past when the jurisdiction of courts-martial will overlap that of the war courts, and the

military commission is a “common law war court set up during periods of hostilities, martial rule or military government as an instrumentality for the more efficient execution of the war powers vested in Congress and the President.”<sup>25</sup> A court-martial, on the other hand, is a military trial of a member of the Armed Forces governed by the Uniform Code of Military Justice (UCMJ).<sup>26</sup> Historically, military commissions tried law of war violations because courts-martial did not possess law of war jurisdiction.<sup>27</sup>

### B. *Executive Military Commission Precedent*

American history is replete with examples of military commissions that have tried nation-state enemies and other persons who are not members of the Armed Forces.<sup>28</sup> These military commissions have been utilized during declared and undeclared wars, both inside and outside the United States, and under each of the four forms of military jurisdiction.<sup>29</sup> In addition, military commissions have been convened by direct order of the President of the United States, by military commanders representing the President on the battlefield, and under the express direction of Congress.<sup>30</sup> Because military commissions are quintessentially war-courts, the federal courts have had relatively few occasions to squarely address their

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question would arise whether Congress having vested jurisdiction by statute the common law of war jurisdiction was not ousted. I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent.

Revision of the Articles of War: Hearing on H.R. 23628 Being a Project for the Revision of the Articles of War Before the H. Comm. on Military Affairs, 62d Cong. 28-29 (1912).

25. Marmon Thesis, *supra* note 15, at 3 (citation omitted); *see also* Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 367 (1996) (defining “military commission” as “military court trial of an enemy belligerent on charges of violation of the laws of war”); *see* Green, *supra* note 15, at 832 (describing military commission as “an arm of the military forces which has proved invaluable in dispensing justice during combat and occupation”).

26. *See* Crona & Richardson, *supra* note 25, at 367-68 (defining term “court-martial”); *see also* Henry Wager Halleck, *Military Tribunals and Their Jurisdiction*, 5 AM. J. INT’L L. 958, 966 (1911) (“[C]ourts-martial exist in peace and war, but military commissions are war courts and can exist only in time of war.”).

27. *See* FM 27-10, *supra* note 18, ¶ 13 (noting that customary American military practice is to try offenders against law of war by military commission). Similarly, the customary Army practice is to try violations of Articles of War/UCMJ by courts-martial. *See* Green, *supra* note 15, at 843 (setting forth customary practice regarding courts-martial).

28. *See infra* notes 29-92 and accompanying text.

29. *See* WINTHROP, *supra* note 15, at 831-55 (tracing history of all species of military commissions).

30. *See id.* at 835, 853-55 (explaining who may convene military commissions).

legality; thus, military commission precedent is mostly executive, rather than judicial, in nature.<sup>31</sup>

### 1. *The Revolutionary War Through the Mexican-American War*

Prior to 1847, the Army used ad-hoc military tribunals based on the common law of war to try law of war violations.<sup>32</sup> During the American Revolutionary War, the Army tried a variety of persons for violating the law of war.<sup>33</sup> For example, numerous Americans were tried by American courts-martial or examined before boards of general officers and sentenced to death for spying.<sup>34</sup> Upon ratification of the Constitution, how-

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31. See, e.g., Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 68 (1990) (noting that federal courts heard few challenges to military commission jurisdiction during Civil War).

32. See WILLIAM E. BIRKHMIR, *MILITARY GOVERNMENT AND MARTIAL LAW* 351 (3d rev. ed. 1914) (indicating military tribunals tried cases under common law of war prior to Mexican-American War).

33. See Harold L. Kaplan, *Constitutional Limitations on Trials by Military Commissions* (pt. 1), 92 U. PA. L. REV. 119, 121 (1943) [hereinafter Kaplan I] (noting Major John Andre's case was first American trial of enemy soldier for violating law of war). General George Washington convened a "Board of General Officers" to inquire into Major Andre's case. See Gen. George Washington, Letter Order, Head Quarters, Tappan, Sept. 29, 1780, in 20 THE WRITINGS OF GEORGE WASHINGTON 101, 101 (John C. Fitzpatrick ed., 1937) [hereinafter WRITINGS OF WASHINGTON] (appointing Board of General Officers to inquire into case). The Board reported that Major Andre should "be considered as a Spy from the enemy, and that agreeable to the law and usage of nations, it is their opinion, he ought to suffer death." PROCEEDINGS OF A BOARD OF GENERAL OFFICERS RESPECTING MAJOR JOHN ANDRE 13 (Phila., Francis Bailey 1780). Notably, Joshua Hett Smith, a New York lawyer and Major Andre's confederate, was tried by court-martial; but, unlike Major Andre, Smith was tried pursuant to two Continental Congress resolutions. See Gen. George Washington, Letter Order, Head Quarters, Sept. 30, 1780, reprinted in 10 HIST. MAG. 1, 1 (Supp. I 1866) (ordering trial of Joshua Hett Smith by general court-martial). See generally THE TRIAL OF JOSHUA H. SMITH FOR ASSISTING THE ENEMY, TAPPAN, NEW YORK, SEPTEMBER 1780, in 6 AMERICAN STATE TRIALS 486-513 (John D. Lawson ed., 1916) (reprinting court-martial proceedings).

34. See Letter from Gen. George Washington to Maj. Gen. William Heath (Jan. 12, 1777), in 6 WRITINGS OF WASHINGTON, *supra* note 33, at 497, 497 (opining that death sentence should be confirmed in connection with court-martial of Daniel Strang, convicted of being spy); Gen. George Washington, General Orders, Head Quarters, V. Forge, June 3, 1778, in 12 WRITINGS OF WASHINGTON, *supra* note 33, at 14, 14 (indicating that Thomas Shanks was convicted by Board of General Officers for being spy); Gen. George Washington, General Orders, Head Quarters, Fredericksburgh, Oct. 23, 1778, in 13 WRITINGS OF WASHINGTON, *supra* note 33, at 135, 139-40 (ordering death sentence be executed in court-martial of David Farnsworth and John Blair, convicted of being spies). In addition, General Washington was aware that trying Americans by military tribunals rather than civilian courts was of questionable legality, and he used this power sparingly. See Letter from Gen. George Washington to Gov. William Livingston (Apr. 15, 1778), in 11 WRITINGS OF WASHINGTON, *supra* note 33, at 262, 262-63 (entertaining doubts about trying civilians by courts-martial); Letter from Gen. George Washington to Col. Oliver Spencer (Apr. 9, 1779), in 14 WRITINGS OF WASHINGTON, *supra* note 33, at 357, 357-58 (opining that Robert Land is not subject to military jurisdiction under Articles of War of 1776).



ever, the prevailing practice appeared to change, as the civil courts in the Washington and Adams administrations tried individuals for treason, and law of war jurisdiction was not invoked.<sup>35</sup> One exception occurred during the War of 1812, in which some U.S. citizens were tried for violating the law of war by acting as spies.<sup>36</sup> On the whole, however, the accused were released by the civil courts on writs of habeas corpus or at the direction of President James Madison.<sup>37</sup>

The origin of today's military commissions can be traced directly to Major General Winfield Scott, who created the "military commission" in 1847 during the Mexican-American War.<sup>38</sup> At the war's outset, a variety of offenses—committed by and upon American soldiers, and Mexican soldiers and civilians—went unpunished because no congressional law criminalized acts committed in Mexico, and the Mexican courts could not exercise jurisdiction because of the American occupation.<sup>39</sup> In response

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35. See OPPOSITION TO THE EXCISE LAW IN PENNSYLVANIA, *reprinted in* 1 AM. STATE PAPERS: MISC. 83-113 (1834) (reporting treason trials during second Washington administration); TRIAL OF NORTHAMPTON INSURGENTS, *in* 12 ANNALS OF CONG. APP. AT 1354-554 (1851) (cataloguing treason prosecutions during Adams administration).

36. See *Ex parte Quirin*, 317 U.S. 1, 42 n.14 (1942) (listing examples); see also *Smith v. Shaw*, 12 Johns. 257, 265 (N.Y. Sup. Ct. 1815) (holding U.S. citizen could not be court-martialed for spying). *But cf.* ARREST AND TRIAL OF E.L. LOULLIER, H.R. DOC. NO. 27-69 (3d Sess. 1843) (reprinting court-martial proceedings convened under martial law jurisdiction during War of 1812). Moreover, military tribunals tried two persons for law of war violations in 1818. See THE TRIAL AND EXECUTION OF ARBUTHNOT AND AMBRISTER, *reprinted in* 1 AM. STATE PAPERS: MIL. AFF. 681, 721-34 (1832) (reprinting proceedings of special court-martial).

37. See Ingrid Brunk Wuerth, *The President's Power To Detain "Enemy Combatants": Modern Lessons from Mr. Madison's Forgotten War*, 98 NW. U. L. REV. 1567, 1580-85 (2004) (explaining detention and release of U.S. citizens). The official correspondence concerning these cases is illustrative of the Madison administration's approach to punishing alleged violators of the law of war. See, e.g., Maj. Gen. Amos Hall, General Orders, Head Quarters, Manchester, Niagara Frontier, Aug. 13, 1812, *reprinted in* 1 MIL. MONITOR 121 (Feb. 1, 1813) (suspending sentence of general court-martial in case of Elijah Clark, apprehended as spy, until pleasure of President James Madison could be known); Letter from William Eustus, Sec'y of War, to Maj. Gen. Amos Hall (Oct. 20, 1812), *reprinted in id.* at 122 (transmitting President Madison's opinion on general court-martial of Elijah Clark that "the said Clark being considered a citizen of the U. S. & not liable to be tried by a court martial as a spy, the President is pleased to direct, that unless he should be arraigned by the civil court for treason . . . he must be discharged"); Maj. Gen. Amos Hall, General Orders, Consequent on the Opinion of the President, Bloomfield, Dec. 2, 1812, *reprinted in id.* (ordering Elijah Clark released); see also Letter from Commodore Isaac Chauncey to William Jones, Sec'y of the Navy (July 4, 1813), *reprinted in* 1 AM. STATE PAPERS: MIL. AFF. 384 (1832) (reporting apprehension of Samuel Stacey, an American citizen, as spy); Letter from John Armstrong, Sec'y of War, to Sen. Joseph Anderson, Chairman, S. Military Comm. (July 26, 1813), *reprinted in id.* (reporting discharge of Samuel Stacey "on the ground that a citizen cannot be considered as a spy").

38. See WINTHROP, *supra* note 15, at 832 (describing creation of military commissions).

39. See Letter from Maj. Gen. Zachary Taylor to the Adjutant General of the Army (Oct. 6, 1846), *reprinted in* H.R. EXEC. DOC. NO. 30-60, at 430, 430 (1st Sess.

to this jurisdictional gap, General Scott created military commissions to try criminal cases until Congress could legislate on the matter.<sup>40</sup> Because Congress did not act, General Scott unilaterally issued a military order declaring that he would convene military commissions to try all persons for crimes that otherwise would have been prosecuted, had the Mexican criminal courts been functioning.<sup>41</sup> Consequently, many American generals operating in Mexico employed the military commission to enforce public order.<sup>42</sup>

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1848) (reporting atrocities committed by Texas Volunteers in Mexico); Letter from Maj. Gen. Zachary Taylor to the Adjutant General of the Army (Oct. 11, 1846), *reprinted in id.* at 431, 431 (requesting guidance in case of person accused of murdering Mexican soldier in Mexico); Letter from W.L. Marcy, Sec'y of War, to Maj. Gen. Zachary Taylor (Nov. 25, 1846), *reprinted in id.* at 369, 369-70 (ordering person released from confinement, as "very serious doubts" were entertained as to whether military tribunal could exercise jurisdiction).

40. See Maj. Gen. Winfield Scott, Project on Martial Law (Oct. 8, 1846), *reprinted in H.R. EXEC. DOC. NO. 30-59*, at 49 (1st Sess. 1848) (submitting draft letter, discussing martial law and councils of war, to Secretary of War); Letter from W.L. Marcy, Sec'y of War, to the President (Dec. 5, 1846), *reprinted in S. DOC. NO. 29-1*, at 46, 55-56 (2d Sess. 1846) (recommending that Congress pass legislation authorizing military tribunals to try offenses committed beyond limits of United States and in territory occupied by U.S. Armed Forces); Letter from W.L. Marcy, Sec'y of War, to Maj. Gen. Winfield Scott (Feb. 15, 1847), *reprinted in H.R. EXEC. DOC. NO. 30-60*, at 873, 874 (1st Sess. 1848) (reporting enactment of additional Article of War unlikely because particular Senate committee chairman felt legislation unnecessary, "as the right to punish in such cases necessarily resulted from the condition of things when an army is prosecuting hostilities in an enemy's country").

41. See Elbridge Colby, *Courts-Martial and the Laws of War*, 17 AM. J. INT'L L. 109, 110-111 (1923) (describing effect of General Orders, No. 20); see, e.g., Maj. Gen. Winfield Scott, General Orders, No. 20, Head Quarters of the Army, Tampico, Feb. 19, 1847, in Book 41<sup>1/2</sup>, Orders and Special Orders, Headquarters of the Army, War With Mexico, 1847-1848; Orders and Circulars, 1797-1910; Records of the Adjutant General's Office, 1780s-1917: Record Group 94 (Entry 44); Nat'l Archives & Records Admin., Washington, D.C., at 139 [hereinafter Book 41<sup>1/2</sup>] (authorizing trials by military commission); Maj. Gen. Winfield Scott, General Orders, No. 190, Headquarters of the Army, Puebla, Mexico, June 26, 1847, in *id.* at 380, 380 (republishing General Orders, No. 20 "with important additions"); Maj. Gen. Winfield Scott, General Orders, No. 287, Headquarters of the Army, National Palace of Mexico, Sept. 17, 1847, in *id.* at 507, 507, and *reprinted in H.R. EXEC. DOC. NO. 30-8*, at 387, 387 (1st Sess. 1848) (same).

42. See, e.g., Maj. Gen. William O. Butler, Orders No. 29, Head Quarters Army of Mexico, Mexico, Mar. 19, 1848, in Nat'l Archives & Records Admin., Orders and Special Orders Issued by Maj. Gen. William O. Butler and Maj. Gen. William J. Worth to the Army in Mexico 1848, *microfilmed on Nat'l Archives Microfilm Publ'ns No. T-1114* (appointing military commission); Maj. Gen. William O. Butler, Orders No. 33, Head Quarters Army of Mexico, Mexico, Mar. 22, 1848, in *id.* (same); Maj. Gen. William J. Worth, Orders No. 20, Head Quarters Army of Mexico, Jalapa, July 8, 1848, in *id.* (same); Maj. Gen. William J. Worth, Orders No. 21, Head Quarters Army of Mexico, Jalapa, July 8, 1848, in *id.* (approving judgment of military commission that tried U.S. soldiers for robbery and theft); Maj. Gen. William J. Worth, Orders No. 22, Head Quarters Army of Mexico, Jalapa, July 9, 1848, in *id.* (approving judgment of military commission that tried U.S. soldiers for stealing); see WINTHROP, *supra* note 15, at 832 (noting that other generals, in addition to General Scott, employed military commissions in Mexico).

In addition to military commissions, General Scott created a second species of wartime tribunal, known as a "council of war," to try offenses against the law of war.<sup>43</sup> These councils of war were identical to military commissions in composition and procedure, differing solely in the types of offenses brought before them.<sup>44</sup> Thus, General Scott created two types of war-courts to try criminal offenses in Mexico: (1) military commissions to try crimes against the Army's military government and (2) councils of war to try violations of the law of war.<sup>45</sup>

## 2. *The Civil War Through World War I*

During the Civil War, the two war-courts of the Mexican-American War—the military commission and the council of war—were united into one, taking the name of the former.<sup>46</sup> Military commanders in the field, like their predecessors in Mexico, repeatedly utilized military commissions to try law of war violations.<sup>47</sup> In fact, President Abraham Lincoln formally sanctioned the use of military commissions by presidential proclamation.<sup>48</sup> Shortly thereafter, Union army orders declared that law of war of

43. See WINTHROP, *supra* note 15, at 832-33 (noting that General Scott created councils of war to try violations of law of war, and reporting that actual number of such trials were few).

44. See *id.* at 832 (describing differences between military commissions and councils of war). Generally, the charges preferred against persons before councils of war were for enticing U.S. soldiers to desert the service of the United States, a violation of the law of war. See, e.g., Maj. Gen. Winfield Scott, General Orders, No. 187, Headquarters of the Army, Puebla, June 24, 1847, in BOOK 41<sup>1/2</sup>, *supra* note 41, at 376 (approving judgment of council of war that tried Mexican citizens for persuading or endeavoring to procure desertion from Army); Maj. Gen. Winfield Scott, General Orders, No. 22, Headquarters of the Army, Mexico, Jan. 19, 1848, reprinted in AM. STAR (Mex.), Jan. 27, 1848, at 1 (same). General Scott previously informed the Mexican people of his intention to try violations of the law of war by military tribunal. See Maj. Gen. Winfield Scott, Proclamation (Apr. 11, 1847), reprinted in H.R. EXEC. DOC. NO. 30-60, at 937, 937 (1st Sess. 1848) (proclaiming that violators of law of war would be punished). The jurisdiction and procedure of councils of war was defined by general order. See Maj. Gen. Winfield Scott, General Orders, No. 372, Headquarters of the Army, Mexico, Dec. 12, 1847, in BOOK 41<sup>1/2</sup>, *supra* note 41, at 629, 629 (establishing councils of war to try violations of law of war and prescribing their jurisdiction and procedure).

45. See WINTHROP, *supra* note 15, at 832-33 (explaining differences between military commissions and councils of war).

46. See *id.* at 834 (estimating number of military commission trials that took place during Civil War as "upwards of two thousand cases"); see also MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 168-73 (1991) (asserting 4271 such trials took place).

47. See WINTHROP, *supra* note 15, at 835-38 (enumerating various military commission orders issued by American commanders in field).

48. See President Abraham Lincoln, Proclamation (Sept. 24, 1862), reprinted in 13 Stat. 730 (1862) (subjecting certain persons to trial by military commission). Although this proclamation was based on martial law jurisdiction, President Lincoln, and his successor, President Andrew Johnson, also used law of war jurisdiction to try Confederate soldiers and southern sympathizers for violating the law of war by acting as guerillas and spies. See WINTHROP, *supra* note 15, at 838 (describing offenses tried by military commissions during Civil War). For example, John Y.

fenses were to be tried by military commission.<sup>49</sup> In this period, military commissions tried more than two thousand cases.<sup>50</sup> The U.S. Supreme Court, however, heard few of these cases because President Lincoln suspended the privilege of the writ of habeas corpus, making judicial review impossible.<sup>51</sup>

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Beall of the Confederate Navy was tried by military commission for violating the law of war and acting as a spy. See Maj. Gen. John A. Dix, General Orders, No. 17, Headquarters Department of the East, New York City, Feb. 21, 1865, *reprinted in* 8 U.S. WAR DEP'T, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ser. 2, at 279 (Washington, Gov't Printing Office 1899) [hereinafter WAR OF THE REBELLION] (approving conviction). See generally TRIAL OF JOHN Y. BEALL, AS A SPY AND GUERRILLERO, BY MILITARY COMMISSION (New York, D. Appleton 1865) (printing transcript of military commission proceedings and related orders). Further, Confederate soldiers were convicted of unlawful warfare for fighting in civilian clothes. See Maj. Gen. Irvin McDowell, General Orders, No. 52, Headquarters Department of the Pacific, San Francisco, California, June 27, 1865, *reprinted in* 8 WAR OF THE REBELLION, *supra*, ser. 2, at 674 (approving conviction of T.E. Hogg and other Confederate soldiers for violating laws and usages of civilized warfare). A military commission also tried Major Henry Wirz in 1865 for his role as the commander in charge of the Confederate POW camp in Andersonville, Ga. in which upwards of ten thousand Union soldiers perished. See General Court-Martial Orders, No. 607, War Department, Adjutant-General's Office, Washington, Nov. 6, 1865, *reprinted in id.* at 784 (approving conviction). See generally TRIAL OF HENRY WIRZ, H.R. EXEC. DOC. NO. 40-23 (2d Sess. 1867) (printing summary of transcript of military commission proceedings and related orders); Lewis L. Laska & James M. Smith, 'Hell and the Devil': Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865, 68 MIL. L. REV. 77 (1975) (analyzing trial). Moreover, a military tribunal convicted a sitting U.S. congressman for aiding the enemy. See General Court-Martial Orders, No. 260, War Department, Adjutant-General's Office, Washington, June 1, 1865, *reprinted in* 8 WAR OF THE REBELLION, *supra*, ser. 2, at 632 (approving conviction but remitting sentence of Rep. Benjamin G. Harris). See generally HON. BENJAMIN G. HARRIS, H.R. EXEC. DOC. NO. 39-14 (1st Sess. 1866) (printing transcript of general court-martial proceedings and related orders).

49. See General Orders, No. 100, Instructions for the Government of Armies of the United States in the Field, War Department, Adjutant General's Office, Washington, Apr. 24, 1863, *reprinted in* 3 WAR OF THE REBELLION, *supra* note 48, ser. 3, at 148 [hereinafter General Orders, No. 100]. General Orders, No. 100, prepared by Dr. Francis Lieber, served as the model for many other national military manuals and led to the calling of the 1874 Brussels Conference on the laws and customs of war, as well as the Hague Peace Conferences of 1899 and 1907. See DOCUMENTS ON THE LAWS OF WAR, *supra* note 18, at 12-13 (tracing impact of General Orders, No. 100). In addition to its international impact, General Orders, No. 100 directly supported President Lincoln's actions vis-à-vis military commissions during the Civil War. See General Orders, No. 100, *supra*, ¶ 13 (stating that "military offenses which do not come within the [Articles of War] must be tried and punished under the common law of war"); see also *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 249 (1864) (agreeing with principle).

50. See WINTHROP, *supra* note 15, at 834 (estimating number of military commissions cases heard during Civil War).

51. See Chomsky, *supra* note 31, at 68 (discussing effect of suspension of privilege of writ of habeas corpus). Congress, months after President Lincoln suspended the writ under presidential authority, authorized the President to suspend the writ by law. See Act of Mar. 3, 1863, ch. 81, § 1, 12 Stat. 755, 755 [hereinafter

Although the roar of cannon-fire subsided and the rebellion finally was subdued, military commissions continued trying cases during the Reconstruction period under express statutory authority.<sup>52</sup> The Army, however, relying on the common law of war, also tried certain non-state actors by military commission during the 1860s and 1870s.<sup>53</sup> Thus entrenched in military practice, the Army continued to utilize military commissions during the Spanish-American War,<sup>54</sup> the Philippine Insurrection that followed,<sup>55</sup> the American occupations of Haiti and Vera Cruz,

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Habeas Corpus Act] (authorizing President to suspend privilege of writ of habeas corpus).

52. See WINTHROP, *supra* note 15, at 853-56 (summarizing use of military commissions during Reconstruction era). Congress authorized military commanders to convene military commissions if the civil authorities in the southern states proved inadequate in administering the criminal justice system. See Act of Mar. 2, 1867, ch. 153, §§ 3-4, 14 Stat. 428, 428-29 [hereinafter Reconstruction Act] (conferring power on military commanders to convene military commissions and prescribing their procedure). These military commissions exercised military government jurisdiction over the southern states. See WINTHROP, *supra* note 15, at 846 (noting that Reconstruction Act inaugurated military government in southern states). In their totality, Reconstruction-era military commissions tried approximately two hundred cases, none of which embraced violations of the law of war. See *id.* at 853. Significantly, President Johnson, who sanctioned the use of military commissions during the Civil War, vetoed the Reconstruction Act because he felt that military tribunals could exist solely in time of war, which did not then exist. See President Andrew Johnson, Veto Message (Mar. 2, 1867), reprinted in 6 JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789-1897, at 498, 505 (Washington, Gov't Printing Office 1897) [hereinafter MESSAGES AND PAPERS] (objecting to Reconstruction Act because it "asserts a power in Congress, in time of peace, to set aside the laws of peace and to substitute the laws of war"). For an interesting example of a Reconstruction Act military commission, see General Court Martial Orders No. 41, Headquarters of the Army, Adjutant General's Office, Washington, June 10, 1869 (on file with author) (upholding military commission conviction of James Weaver for murder under authority of Reconstruction Act).

53. See Chomsky, *supra* note 31, at 15-46 (describing conflict between Sioux/Dakota Indians and Army, in which Army tried certain persons by military commission for violating law of war). A similar episode occurred with the Modoc Indians in 1873. See The Modoc Indian Prisoners, 14 Op. Att'y Gen. 249, 249-50 (1873) (reciting facts). See generally PROCEEDINGS OF A MILITARY COMMISSION CONVENED AT FORT KLAMATH, OREGON, FOR THE TRIAL OF MODOC PRISONERS, reprinted in H.R. EXEC. DOC. NO. 43-122, at 131-203 (1st Sess. 1874) (reprinting proceedings).

54. See Brig. Gen. Guy V. Henry, General Orders No. 27, Headquarters Department of Porto Rico, San Juan, Dec. 8, 1898 (on file with author) (appointing military commissions to try bandits committing crimes in Puerto Rico); *Ex parte Ortiz*, 100 F. 955, 963 (C.C.D. Minn. 1900) (upholding legality of military commission in Puerto Rico based on military government jurisdiction). "While the state of war existed [Ortiz] might lawfully be tried by a military commission for offenses committed." *Id.* at 962.

55. See Lester Nurick & Roger W. Barrett, *Legality of Guerrilla Forces Under the Laws of War*, 40 AM. J. INT'L L. 563, 574-78 (1946) (explaining use of military commissions during Philippine Insurrection); Maj. Gen. Wesley Merritt, Proclamation (Aug. 14, 1898), reprinted in 1 WAR DEP'T ANN. REP. pt. 7, at 104 (1901) (establishing military government in Philippines and creating military commissions). See generally CHARGES OF CRUELTY, ETC., TO THE NATIVES OF THE PHILIPPINES, S. DOC.

Mexico,<sup>56</sup> and during World War I.<sup>57</sup>

### 3. *World War II Through the Vietnam War*

The military commission was used last during World War II, though it remained a viable option for trying law of war offenses in subsequent con-

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No. 57-205, pt. 2 (1st Sess. 1902) (reprinting hundreds of military commission general orders).

56. See John H. Russell, Commander of the United States Forces in Haiti, Proclamation (May 26, 1921), *reprinted in* 2 U.S. DEP'T OF STATE, PAPERS RELATING TO THE FOREIGN RELATIONS OF THE UNITED STATES: 1922, at 558 (1938) (authorizing trials by military tribunals in Haiti); Letter from John H. Russell, High Comm'r in Haiti, to William Phillips, Acting Sec'y of State (Sept. 6, 1922), *reprinted in id.* at 555 (discussing use of provost courts by American occupation in Haiti); Letter from Charles E. Hughes, Sec'y of State, to John H. Russell, High Comm'r in Haiti (Oct. 4, 1922), *reprinted in id.* at 559 (same); Willard B. Cowles, *Universality of Jurisdiction over War Crimes*, 33 CAL. L. REV. 177, 212-15 (1945) (documenting use of military commissions in Vera Cruz, Mex.).

57. See General Orders, No. 7, War Department, Washington, Jan. 17, 1918, *reprinted in Establishment of Military Justice: Hearings on S. 64 Before the S. Subcomm. of the Comm. on Military Affairs*, 66th Cong. 897, 898 (1919) (directing that records of trials before military commissions convened by American Expeditionary Forces be sent to Acting Judge Advocate General for review). Under this authority, the American Expeditionary Forces sanctioned the use of military commissions. See Gen. John J. Pershing, General Orders No. 225, G.H.Q., American Expeditionary Forces, France, Dec. 10, 1918, ¶ 5 (on file with author) (providing that military commissions could be convened for trial of inhabitants violating law of war or laws of military government); Officer in Charge of Civil Affairs in Occupied Territory, Orders No. 1, Advance General Headquarters, American Expeditionary Forces, Treves, Germany, Dec. 13, 1918, *reprinted in* 4 I.L. HUNT, AMERICAN MILITARY GOVERNMENT OF OCCUPIED GERMANY, 1918-1920: REPORT OF THE OFFICER IN CHARGE OF CIVIL AFFAIRS, THIRD ARMY, AND AMERICAN FORCES IN GERMANY 10 (1943) (authorizing use of military commissions); Maj. Gen. J.T. Dickman, Letter of Instructions No. 5, *Civil Affairs: Procedure of Provost Courts*, Dec. 24, 1918, *reprinted in id.* at 50 (directing that procedures used in military commissions would be, in substance, same as in trials by general courts-martial). Significantly, the peace treaties ending World War I also made provision for the trial of offenders against the law of war by military tribunals. See, e.g., Treaty of Peace with Germany arts. 228-229, June 28, 1919, 2 Bevans 43 (providing for trial of offenders against law of war by military tribunals); Treaty of Peace Between the Allied and Associated Powers and Austria arts. 173-174, Sept. 10, 1919, 226 Consol. T.S. 8 (same); Treaty of Peace Between the Allied and Associated Powers and Hungary arts. 157-158, June 4, 1920, 15 AM. J. INT'L L. 1 (Supp. 1921) (same). With respect to Germany, the military tribunals never initiated proceedings, as the defendants were tried before German criminal courts. See, e.g., Judgment in the Case of Karl Heynen (2d Crim. Senate of Imperial Ct. of Justice at Leipzig, Germany 1921), *reprinted in* 16 AM. J. INT'L L. 674 (1922). Domestically, in the United States, military tribunals tried two German agents for spying. See Trial of Spies by Military Tribunals, 31 Op. Att'y Gen. 356 (1918) (offering opinion on case of Lather Witcke, alias Pablo Waberski); see also United States *ex rel.* Wessels v. McDonald, 265 F. 754 (E.D.N.Y. 1920) (holding German agent could be tried by naval court-martial for spying), *appeal dismissed per stipulation*, 256 U.S. 705 (1921). Although the district court found the court-martial had jurisdiction to try Wessels, the Secretary of the Navy, at the insistence of the Department of Justice, dismissed the court-martial proceedings, thereby making the appeal unnecessary. See FREDERICK BERNAYS WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 138 n.31 (1940) (explaining subsequent history of *Wessels*).

flicts.<sup>58</sup> During World War II, the United States convened military commissions domestically and abroad to try nation-state enemies for law of war violations.<sup>59</sup> For example, the Army tried two groups of German saboteurs who landed on American shores in 1942 and 1944.<sup>60</sup> Similarly, the Allied Powers convened military tribunals within their respective spheres of occupation in Germany, through the International Military Tribunal at Nuremberg and the International Military Tribunal for the Far East.<sup>61</sup> The United States also convened hundreds of military commissions without Allied participation.<sup>62</sup> Moreover, during the Korean War, the United Nations authorized military commission trials, although they were never used.<sup>63</sup> Finally, during the Vietnam War, the Army contemplated trying members of the Armed Forces by military commission for law of war violations, but ultimately did not use these military commissions because of political concerns.<sup>64</sup>

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58. See generally TELFORD TAYLOR, FINAL REPORT TO THE SECRETARY OF THE ARMY ON THE NUERNBERG WAR CRIMES TRIALS UNDER CONTROL COUNCIL LAW NO. 10 (1949) (cataloging World War II war-crimes trials).

59. See Green, *supra* note 15, at 833 (describing use of U.S. military commissions).

60. See *Ex parte Quirin*, 317 U.S. 1, 45 (1942) (holding military commission that tried Nazi saboteurs was lawful); *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956) (same).

61. See Glazier, *supra* note 6, at 2062-73 (tracing history of World War II war-crimes trials). National military tribunals, acting under the authority of the Allied Control Council in Germany, conducted the trials of lesser German war criminals. See Control Council Law No. 10, *Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity* (Dec. 20, 1945), in 3 *Official Gazette of the Control Council for Germany* 50 (Jan. 31, 1946). The International Military Tribunal sitting at Nuremberg tried the major war criminals of the European axis under the authority of an international agreement concluded between the victorious Allies. See Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279, 3 Bevans 1238. The International Military Tribunal for the Far East tried the major Japanese war criminals, and was established by General Douglas MacArthur acting as Supreme Commander for the Allied Powers. See Gen. Douglas MacArthur, Special Proclamation (Jan. 19, 1946), T.I.A.S. No. 1589, 4 Bevans 20 (establishing Charter of International Military Tribunal for Far East).

62. See Green, *supra* note 15, at 833 (noting that, during World War II, U.S. military commissions tried persons in Austria, France, Germany, Italy, Japan and Korea for acts of terrorism, subversive activity and law of war violations).

63. See Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 4 (2001) [hereinafter Paust, *Courting Illegality*] (reporting that military commissions were created "on paper" but were "never activated" during Korean conflict). These U.N. military commissions had jurisdiction to try law of war violations. See Gen. Douglas MacArthur, Letter Order, File AG 000.5 (28 Oct 50) JA, General Headquarters, United Nations Command, Tokyo, Japan, Subject: Trial of Accused War Criminals, Oct. 28, 1950, reprinted in JORDAN J. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 724 (1996) (authorizing trial of persons accused of violating law of war in Korean conflict by military commission).

64. See Paust, *Courting Illegality*, *supra* note 63, at 2-4 (discussing Vietnam War-era military commissions); see also Michael Getler, *Viet Trials of Ex-GIs: 'Too Hot,'* WASH. POST, Apr. 13, 1971, at A1 (reporting that military commission trials of for-

### C. *Judicial Military Commission Precedent*

Three U.S. Supreme Court decisions speak directly to the legality of military commissions.<sup>65</sup> Moreover, the United States Court of Appeals for the District of Columbia Circuit in 2005 upheld the lawfulness of one of President Bush's law-of-war military commissions.<sup>66</sup> Although these opinions do not set forth a precise test to determine the legality of all military commissions, they delineate the outer limits of military commission jurisdiction.<sup>67</sup>

In *Ex parte Milligan*,<sup>68</sup> a Civil War-era military commission convicted Lambdin P. Milligan of conspiring against the United States and violating the law of war.<sup>69</sup> The United States contended that Milligan could be tried under martial law jurisdiction, but Milligan argued that the military commission was unlawful because it derived its power solely from the President and expressly contravened the Habeas Corpus Act of 1863.<sup>70</sup> The Supreme Court, in freeing Milligan, held that the military commission lacked jurisdiction because the Habeas Corpus Act specifically vested the federal courts with jurisdiction over cases like Milligan's.<sup>71</sup> In addition, the Court held that Congress lacked the constitutional power to authorize military tribunals to try citizens not part of the Armed Forces.<sup>72</sup>

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mer U.S. servicemen for alleged war crimes committed in Vietnam would not be pursued because issue was "too hot" politically).

65. For a discussion of three U.S. Supreme Court cases concerning military commissions, see *infra* notes 68-83 and accompanying text.

66. For a discussion of the D.C. Circuit case upholding President Bush's law-of-war military commissions, see *infra* notes 84-89 and accompanying text.

67. For a discussion of the ways in which case-law modifies the Time-Person-Offense-Place Framework, see *infra* notes 68-89 and accompanying text.

68. 71 U.S. (4 Wall.) 2 (1866).

69. See General Court-Martial Orders, No. 214, War Department, Adjutant-General's Office, Washington, May 2, 1865, *reprinted in* 8 WAR OF THE REBELLION, *supra* note 48, ser. 2, at 543 (approving conviction of Lambdin P. Milligan).

70. See Argument for the United States, *in Milligan*, 71 U.S. at 13 (arguing that military commission was exercising martial law jurisdiction); Argument for the Petitioner, *in id.* at 22 ("Whatever has been done in these cases, has been done by the executive department alone."). Milligan further argued that because no act of Congress established his military commission, it "depended entirely upon the executive will for its creation and support." *Id.* at 30.

71. See *id.* at 117 (holding Indiana circuit court had plenary jurisdiction over Milligan's case). Moreover, the Court noted that the military commission was not a court established by Congress. See *id.* at 121 (questioning power of military commission because it was not ordained by Congress).

72. See *id.* at 120-21 (holding Congress does not possess power to subject civilians to military trials). Four members of the Court, though concurring in the result on statutory grounds, disagreed with the Court's constitutional reasoning. See *id.* at 134-35 (Chase, C.J., concurring in result) (finding military commission lacked jurisdiction because case was brought "within the precise letter and intent" of Congress). To the minority, therefore, the Habeas Corpus Act was controlling and the majority's analysis properly should have ended without addressing the constitutional issues. See *id.* at 136, 141. Because the majority did not so limit itself, the minority also analyzed the issue of whether Congress could have author-



Three-quarters of a century later, the Court ruled on the lawfulness of military commission jurisdiction in *Ex parte Quirin*.<sup>73</sup> The story of the “Nazi saboteurs” is an oft-told tale.<sup>74</sup> In 1942, eight German agents were dispatched to the United States via submarine to sabotage U.S. industrial plants and railroads.<sup>75</sup> Upon landing on the coasts of New York and Florida, the agents removed their military uniforms and donned civilian clothing.<sup>76</sup> When the saboteurs were apprehended, President Franklin D. Roosevelt issued a proclamation denying the saboteurs access to the courts, and a military order convening a military commission to try the agents for offenses against the law of war and the Articles of War.<sup>77</sup> In denying the saboteurs’ petition for a writ of habeas corpus, the Court held that the federal government, as a whole, had the power to try unlawful enemy combatants for violating the law of war.<sup>78</sup>

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ized Milligan’s trial by military commission. *See id.* at 136-41. The minority concluded that Congress did indeed have that power. *See id.* at 137.

73. 317 U.S. 1 (1942).

74. *See* LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 91-126 (2005) (analyzing *Quirin*). *See generally* LOUIS FISHER, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* (2003) [hereinafter FISHER]; PIERCE O’DONNELL, *IN TIME OF WAR: HITLER’S TERRORIST ATTACK ON AMERICA* (2005).

75. *See Quirin*, 317 U.S. at 21-22 (1942) (discussing facts); FISHER, *supra* note 74, at 18 (describing saboteurs’ intended mission).

76. *See Quirin*, 317 U.S. at 22 (indicating that saboteurs buried their uniforms and “proceeded in civilian dress”).

77. *See id.* at 22-23 (discussing President Franklin D. Roosevelt’s proclamation and military order).

78. *See id.* at 28 (holding President and Congress were acting concurrently). The Court found it unnecessary to decide whether the President could convene military commissions solely on his own constitutional authority. *See id.* at 29. In addition, the Court drew the following distinction between lawful and unlawful combatants: “Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.” *Id.* at 31. The Army drew a similar distinction between lawful and unlawful combatants during the Philippine Insurrection. *See, e.g.*, Maj. Gen. Arthur MacArthur, Proclamation (Dec. 20, 1900), *reprinted in* 1 *WAR DEP’T ANN. REP.* pt. 4, at 91 (1901) (declaring that certain persons would not be entitled to POW privileges). Some commentators, however, suggest that “unlawful belligerency” is actually “unprivileged belligerency.” *See* Richard R. Baxter, *So-Called ‘Unprivileged Belligerency’: Spies, Guerrillas, and Saboteurs*, 28 *BRIT. Y.B. INT’L L.* 323, 343 (1951) (arguing that “armed and unarmed hostilities, wherever occurring, committed by persons other than those entitled to be treated as prisoners of war or peaceful civilians merely deprive such individuals of a protection they might otherwise enjoy under international law and place them virtually at the power of the enemy”). Under the “unprivileged belligerency” theory, the *Quirin* saboteurs did not violate the law of war; rather, the saboteurs simply could not assert the protections of the law of war. *See id.* at 340 (stating that while secret agents like *Quirin* saboteurs are subject to trial under military common law, “the characterization of such conduct as a violation of international law arises, it is submitted, from a fundamental confusion between acts punishable under international law and acts with respect to which international law affords no protection”).

Again during World War II, the Court addressed the issue of law of war jurisdiction in *In re Yamashita*.<sup>79</sup> There, the Court considered whether a military commission had jurisdiction to try a Japanese general for alleged violations of the law of war.<sup>80</sup> In upholding the use of military commissions, the Court found that the trial of “enemy combatants who have committed violations of the law of war is thus not only a part of the conduct of war operating as a preventive measure against such violations, but is an exercise of the authority sanctioned by Congress to administer the system of military justice.”<sup>81</sup> The Court noted further that the “war power . . . is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict.”<sup>82</sup> Thus, the Court held that a military commission could try prisoners of war (POWs) for violations of the law of war.<sup>83</sup>

Finally, in *Hamdan v. Rumsfeld*,<sup>84</sup> the Court of Appeals for the District of Columbia Circuit held that a military commission convened pursuant to President Bush’s Military Order had jurisdiction to try a suspected al-Qaeda member for allegedly violating the law of war.<sup>85</sup> In denying Hamdan’s petition for a writ of habeas corpus, the Court of Appeals first determined that President Bush’s designation of a military commission to

79. 327 U.S. 1 (1946) (holding World War II-era military commission had jurisdiction to try Japanese general, held as POW, for violating law of war).

80. *See id.* at 8 (stating issue presented to Court). General Yamashita was charged with failing to stop his troops from committing atrocities in the then-occupied Philippines. *See id.* at 14-15.

81. *Id.* at 11.

82. *Id.* at 12.

83. *See id.* at 9 (holding military commission had jurisdiction to try General Yamashita).

84. 415 F.3d 33 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (U.S. Nov. 7, 2005) (No. 05-184). The Court will decide whether (1) the President’s military commissions are duly authorized under the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter AUMF], the UCMJ or the inherent powers of the President and (2) detainees can obtain judicial enforcement of rights protected under the Third Geneva Convention by writ of habeas corpus challenging the legality of their detention. *See* Questions Presented, *Hamdan v. Rumsfeld*, No. 05-184, *available at* <http://www.supremecourtus.gov/qp/05-00184qp.pdf> (last visited May 26, 2006). The Court heard oral argument on March 28, 2006. *See* Transcript of Oral Argument, *Hamdan v. Rumsfeld*, No. 05-184 (U.S. Mar. 28, 2006), *available at* [http://www.supremecourtus.gov/oral\\_arguments/argument\\_transcripts/05-184.pdf](http://www.supremecourtus.gov/oral_arguments/argument_transcripts/05-184.pdf). *But see* Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2680, 2739 [hereinafter DTA] (containing provision that could possibly divest Court of jurisdiction in case); President George W. Bush, Statement on Signing the Department of Defense, Emergency Supplemental Appropriations To Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918, 1919 (Dec. 30, 2005) (construing DTA as removing jurisdiction from Court).

85. *See Hamdan*, 415 F.3d at 35-36 (setting forth facts and procedural history). Hamdan was made subject to the Military Order by presidential directive. *See* Memorandum from President George W. Bush to the Secretary of Defense (July 3, 2003), *available at* <http://www.dod.mil/news/Dec2005/d20051215prtbHamdan.pdf> (determining that Salim Ahmed Hamdan is subject to Military Order).

try Hamdan did not violate the separation of powers doctrine. The court found no separation of powers violation because Congress sanctioned Hamdan's military commission through (1) its joint resolution of September 18, 2001 ("AUMF"), which authorized the use of military force against those responsible for the September 11th attacks, (2) UCMJ Article 21 and (3) UCMJ Article 36.<sup>86</sup> Next, the court found that Hamdan was not entitled to POW status under the Geneva Convention Relative to the Treatment of Prisoners of War of 1949 ("Third Geneva Convention")<sup>87</sup> because the Third Geneva Convention does not apply to al-Qaeda and its members.<sup>88</sup> Last, the court held that even if the Third Geneva Convention applied to al-Qaeda or its members, and was judicially enforceable, the trial of an enemy combatant, like Hamdan, by military commission does not violate the Third Geneva Convention's terms.<sup>89</sup>

Clearly, military commissions have enjoyed a rich history.<sup>90</sup> Nevertheless, as the U.S. Supreme Court noted, simply because "an unconstitu-

86. *See Hamdan*, 415 F.3d at 38 (holding President Bush's law-of-war military commission was statutorily authorized). Here, the court relied on *Yamashita* for the proposition that the trial and punishment of enemy combatants by military commission is part of the "conduct of war." *See id.* at 37. Significantly, the court found the distinction between a formally declared war and an authorization of force to be immaterial. *See id.* at 37-38. Next, the court found that Article of War 15, which the *Quirin* Court held authorized the 1942 military commission of the Nazi saboteurs, is materially similar to UCMJ Article 21. *See id.* at 38. As a result, the court concluded, "it is impossible to see any basis for [the] claim that Congress has not authorized military commissions." *Id.*

87. *See Geneva Convention Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention].

88. *See Hamdan*, 415 F.3d at 40-41 (holding Hamdan does not qualify as POW under Article 4 and that Third Geneva Convention does not apply to al-Qaeda or its members). The court's POW analysis closely followed the reasoning of the January 22, 2002 OLC Opinion, *infra* note 121, in that the court first found that Hamdan did not fit the Article 4 definition of a POW because Hamdan is not a member of a group that purports to have complied with Article 4(A)(2)(b) or (d). *See Hamdan*, 415 F.3d at 40 (arguing that Hamdan lacks Article 4 POW status because "he does not purport to be a member of a group who displayed a fixed distinctive sign recognizable at a distance and who conducted their operations in accordance with the laws and customs of war"). Next, the court concluded that the Third Geneva Convention did not apply to al-Qaeda or its members. *See id.* at 41 (presenting "[a]nother problem" Hamdan faced). Here, the court reasoned that Article 2 did not apply because al-Qaeda is neither a state nor a party to the convention. *See id.* (noting that Third Geneva Convention only contemplates two types of armed conflict: "[A]ll cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties"). Thus, Hamdan was not entitled to POW status. *See id.* (rejecting argument under exception to Article 2, which binds signatory states to Third Geneva Convention as long as non-signatory power accepts and applies provisions of convention, by finding no evidence to support notion that al-Qaeda had accepted or applied its provisions).

89. *See id.* at 40-42 (holding President Bush's law-of-war military commission to be consistent with international law).

90. *See supra* notes 28-89 and accompanying text (tracing evolution of military commissions).

tional action has been taken before surely does not render that same action any less unconstitutional at a later date."<sup>91</sup> Thus, while examining these precedents is necessary to understand the military commission's role in U.S. history, the outstanding question is whether past legal justifications for military commissions continue to be viable in the twenty-first century.<sup>92</sup>

### III. THE TIME-PERSON-OFFENSE-PLACE FRAMEWORK

Neither Congress nor the courts have adopted a comprehensive analytical framework to determine the legality of all military commissions.<sup>93</sup> Nevertheless, prior to the September 11th attacks, each of the three coordinate branches of government recognized the military commission as a lawful war-court, through judicial opinions,<sup>94</sup> acts of Congress<sup>95</sup> and orders and proclamations of the President,<sup>96</sup> as well as opinions of the U.S.

91. *Powell v. McCormack*, 395 U.S. 486, 546-47 (1969).

92. For a discussion of the continuing validity of law-of-war military commissions, see *infra* notes 93-262 and accompanying text.

93. See Harold L. Kaplan, *Constitutional Limitations on Trials by Military Commissions* (pt. 2), 92 U. PA. L. REV. 272, 272 (1944) [hereinafter Kaplan II] (noting lack of guidance from Congress and courts).

94. See WINTHROP, *supra* note 15, at 834 (listing cases upholding military commissions); see also *In re Yamashita*, 327 U.S. 1, 7 (1946) (upholding particular military commission and noting that Congress "recognized the 'military commission' appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war") (emphasis added).

95. See WINTHROP, *supra* note 15, at 833-34 (enumerating congressional statutes recognizing military commissions); see also Act of June 15, 1917, ch. 30, § 7, 40 Stat. 217, 219 (saving military commission jurisdiction for offense of spying).

96. See President Abraham Lincoln, Proclamation (Sept. 24, 1862), *reprinted in* 13 Stat. 730 (1862) (making all rebels and insurgents, and their aiders and abettors, subject to martial law and trial by court-martial or military commission); President Andrew Johnson, Military Order (May 1, 1865), *reprinted in* 6 MESSAGES AND PAPERS, *supra* note 52, at 334 (ordering trial of Lincoln conspirators by military commission); President Andrew Johnson, Proclamation (Apr. 2, 1866), *reprinted in* 14 Stat. 811 (1866) (declaring end of insurrection in certain states of Union and opining that military tribunals may be used in cases of actual necessity, for suppressing insurrection or rebellion); President Andrew Johnson, Proclamation (Aug. 20, 1866), *reprinted in id.* at 814 (announcing insurrection in Texas over, that insurrection in United States was at end, and opining that military tribunals may be used in cases of actual necessity, for suppressing insurrection or rebellion); President Theodore Roosevelt, Proclamation (July 4, 1902), *reprinted in* 32 Stat. 2014 (granting amnesty to Philippine insurgents, except those convicted by military tribunals during insurrection); General Orders, No. 32, War Department, Washington, June 4, 1920 (on file with author) (confirming and commuting sentence of Lather Witcke, alias Pablo Waberski, who was tried by military commission in 1918 for spying); President Franklin D. Roosevelt, Proclamation No. 2561 (July 2, 1942), *Denying Certain Enemies Access to the Courts of the United States*, 7 Fed. Reg. 5101 (July 7, 1942); President Franklin D. Roosevelt, Military Order (July 2, 1942), *Appointment of a Military Commission*, 7 Fed. Reg. 5103 (July 7, 1942); President Franklin D. Roosevelt, Military Order (Jan. 11, 1945), *Governing the Establishment of Military Commissions for the Trial of Certain Offenders Against the Law of War, and Governing the Procedure for Such Commissions*, 10 Fed. Reg. 549 (Jan. 16, 1945). President Lincoln also issued military orders and proclamations concerning the trial of per-

Attorneys General.<sup>97</sup> Congress, however, has never defined the military

sons by court-martial. *See, e.g.*, President Abraham Lincoln, Military Order (Aug. 7, 1861), *reprinted in* 1 WAR OF THE REBELLION, *supra* note 48, ser. 3, at 390 (announcing that Article 57 of Articles of War of 1806, subjecting civilians to trial by court-martial, would be enforced); President Abraham Lincoln, Proclamation (Mar. 17, 1865), *reprinted in* 13 Stat. 753 (1865) (directing arrest and trial by court-martial of those who furnish arms to hostile Indians).

97. *See* Jurisdiction of the Federal Judiciary, 5 Op. Att'y Gen. 55, 58-59 (1848) (noting that because particular military commission was dissolved, it could not assert jurisdiction); Murder of the President, 11 Op. Att'y Gen. 215, 215 (1865) (opining that assassins of President Lincoln could be tried by military commission); Military Commissions, *id.* at 297, 317 (same); Case of Jefferson Davis, *id.* at 411, 413 (1866) (noting that POWs, who had not been convicted by military commissions for violations of law of war, could be tried for treason in civil courts); Milliken's Case, 12 Op. Att'y Gen. 332, 335-36 (1867) (stating that military commission would not have jurisdiction to try former Confederate soldier for violating his parole because peace prevailed); Case of James Weaver, 13 Op. Att'y Gen. 59, 66-67 (1869) (concluding that military commission had jurisdiction to try citizen of Texas for murder under Reconstruction Act); The Modoc Indian Prisoners, 14 Op. Att'y Gen. 249, 253 (1873) (explaining that certain Modoc Indians could be tried by military commission for violating law of war); Memorandum Opinion from Cyrus Bussey, Assistant Sec'y, U.S. Dep't of the Interior, *Military Commissions* (Aug. 7, 1890), *in* 4 U.S. DEP'T OF THE INTERIOR, DECISIONS OF THE DEPARTMENT OF THE INTERIOR IN CASES RELATING TO PENSION CLAIMS 103, 113 (George Baber ed., Washington, Gov't Printing Office 1891) (upholding legality of particular military commission); Cuba, 23 Op. Att'y Gen. 120 (1900) (recognizing military commission as war-court); Army Officer, 24 Op. Att'y Gen. 570, 571 (1903) (finding that military commission had no jurisdiction because peace had been proclaimed in Philippines); Trial of Spy by Court Martial, 40 Op. Att'y Gen. 561, 561 (1919) (reversing former Attorney General's opinion and holding, based upon newly discovered facts, that military commission had jurisdiction to try alleged spy); Memorandum from Robert E. Jordan, III, Gen. Counsel, U.S. Dep't of the Army, to the Assistant Attorney General, Office of Legal Counsel, *Trial of Discharged Servicemen for Violation of the Law of War 8* (Dec. 2, 1969) (on file with author) [hereinafter December 2, 1969 Department of the Army Memorandum] (suggesting that trial of former U.S. soldiers by military commission, for violations of law of war committed in Vietnam, would be lawful); *see also* Unlawful Traffic with Indians, 13 Op. Att'y Gen. 470, 471-72 (1871) (noting that persons charged with relieving enemy could be tried by court-martial because state of war existed between United States and certain Indian tribes); Memorandum Opinion from Maj. Gen. E.M. Brannon, J. Advoc. Gen. of the Army, *Application for Relief Under Article of War 53 in the Case of Heinrich Kaukoreit, Herbert Ackermann, and Ernst Bald, Members of the German Surrendered Forces (CM 302791)* (Oct. 25, 1950), *in* MEMORANDUM OPINIONS OF THE JUDGE ADVOCATE GENERAL OF THE ARMY, 1949-1950, at 520, 524 (1951) (finding trial of German soldiers by court-martial lawful). Similarly, the Attorney General of the Confederacy agreed that military tribunals were lawful in time of war. *See* Memorandum Opinion from Wade Keyes, Att'y Gen. ad interim, Confederate States of America, *Jurisdiction of Courts Martial* (Nov. 18, 1863), *in* THE OPINIONS OF THE CONFEDERATE ATTORNEYS GENERAL, 1861-1865, at 352, 353-54 (Rembert W. Patrick ed., 1950) (opining that, under Confederate Constitution, alien enemies cannot claim right to trial by jury for offenses committed during war and that they may be tried by military tribunal for carrying on war without authorization from their government). *But see* Devlin's Claim, 12 Op. Att'y Gen. 128, 128 (1867) (determining that military commission, sitting in Washington during Civil War, lacked jurisdiction to try citizen of New York not in military service); Trial of Spies by Military Tribunals, 31 Op. Att'y Gen. 356, 365 (1918) (postulating that military commission lacked jurisdiction to try alleged spy); Martial Law in Hawaii, 57 Interior Dec. 570,

commission's jurisdictional contours.<sup>98</sup> Moreover, the courts have yet to set forth a precise test for evaluating the legality of all military commissions.<sup>99</sup>

As a result, the common law of war and the attendant rules that have developed over time—as gleaned from judicial opinions, opinions of the U.S. Attorneys General and Judge Advocates General, and authorities on military law—can help determine the lawful scope of military commission jurisdiction.<sup>100</sup> These rules indicate that jurisdiction for all military commissions is divisible into four aspects: (1) time, (2) persons, (3) offenses and (4) place (“Time-Person-Offense-Place Framework”), each of which must be satisfied for a military commission to have jurisdiction under the common law of war.<sup>101</sup>

Therefore, for any military commission to be lawful, the military commission first must have “jurisdiction in time,” such as when martial law is in effect, when military government exists or when war is being waged.<sup>102</sup>

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584 (1942) (finding trial of two civilians by military commission, acting under martial law jurisdiction, unlawful).

98. See DAVIS, *supra* note 19, at 309 (indicating that “the statute law has failed to define [military commissions’] authority, nor has it made provision in regard to their constitution, composition, or procedure”).

99. See Madsen v. Kinsella, 343 U.S. 341, 347 (1952) (“Neither their procedure nor their jurisdiction has been prescribed by statute.”); *Ex parte Quirin*, 317 U.S. 1, 45-46 (1942) (“We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war.”).

100. See Kaplan II, *supra* note 93, at 272 (noting that, because military commissions are not regulated by statute, recourse is had to law of war, as interpreted by customs of U.S. government, to determine “proper circumstances” in which military commissions are lawful).

101. See *id.* (setting forth analytical framework to evaluate legality of military commission jurisdiction). Colonel William Winthrop, U.S. Army first created this framework in 1886. See 2 WILLIAM WINTHROP, MILITARY LAW 65-74 (Washington, W.H. Morrison 1886) (analyzing military commission jurisdiction in terms of time, person, offense and place); see also WINTHROP, *supra* note 15, at 836-41 (restating Time-Person-Offense-Place Framework in 1896). The U.S. Supreme Court described Colonel Winthrop as the “Blackstone of military law” and his impact on military law endures to this day. See generally George S. Prugh, Jr., *Colonel William Winthrop: The Tradition of the Military Lawyer*, 42 A.B.A. J. 126 (1956) (tracing Colonel Winthrop’s distinguished career). In addition to Colonel Winthrop, numerous commentators have adopted this framework. See DAVIS, *supra* note 19, at 309-12; CHARLES FAIRMAN, THE LAW OF MARTIAL RULE §§ 52-53 (2d ed. 1943) [hereinafter FAIRMAN]; U.S. DEP’T OF THE ARMY, A DIGEST OF OPINIONS OF THE JUDGE-ADVOCATES GENERAL OF THE ARMY §§ 1680-81, 1691 (Charles McClure ed., rev. ed. 1901) [hereinafter 1901 JAG DIGEST]; Green, *supra* note 15, at 843-48.

102. See Kaplan II, *supra* note 93, at 273-74 (defining “jurisdiction in time criterion” and explaining that criterion can be satisfied when war is being waged); see also WINTHROP, *supra* note 15, at 837-38 (noting military commissions must assume jurisdiction within “period of war”); DAVIS, *supra* note 19, at 309-10 (stating military commissions must assume jurisdiction during “time of war”); FAIRMAN, *supra* note 101, § 52 (same); 1901 JAG DIGEST, *supra* note 101, § 1691 (same); Green, *supra* note 15, at 848 (observing that military commissions may assume jurisdiction in time until ratification of treaty of peace).

Second, the military commission must have “jurisdiction over the person,” such as those individuals subject to the UCMJ or persons who are subject to trial by military tribunals under the law of war.<sup>103</sup> Third, the military commission must have “jurisdiction over the offense” alleged, which includes crimes tried by the civilian courts when functioning normally, violations of military orders over which courts-martial do not have statutory jurisdiction and violations of the law of war.<sup>104</sup> Last, the military commission must have “jurisdiction over the place,” such as territory that is under martial law, enemy territory that is subject to military government, or territory that is located within the “theatre or zone of operations.”<sup>105</sup> If all four jurisdictional prerequisites are satisfied, the military commission is lawful under the common law of war and Army practice.<sup>106</sup>

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103. See Kaplan II, *supra* note 93, at 274-79 (defining “jurisdiction over persons criterion” and noting that criterion embraces persons subject to military law under Articles of War and civilians under specified circumstances); see also WINTHROP, *supra* note 15, at 838 (noting that members of enemy’s army are amenable to trial by military commission for violations of law of war); DAVIS, *supra* note 19, at 309 (opining that both military persons and civilians are amenable to military commission jurisdiction); FAIRMAN, *supra* note 101, § 53 (noting that persons not subject to military law are amenable to trial by military commission); 1901 JAG DIGEST, *supra* note 101, § 1680 (stating that military persons and civilians may be tried by military commission); Green, *supra* note 15, at 848 (observing that persons subject to military law, U.S. civilians, alien enemies and POWs may be tried by military commission).

104. See Kaplan II, *supra* note 93, at 280-81 (setting forth “jurisdiction over offense criterion” and explaining that offenses triable are violations of law of war, civil crimes generally cognizable by civil courts if open and operating normally, and violations of military orders and regulations not punishable by courts-martial); see also WINTHROP, *supra* note 15, at 839-41 (same); DAVIS, *supra* note 19, at 309-10 (stating that offenses are violations of law of war and civil crimes not tried because civil courts are closed); FAIRMAN, *supra* note 101, § 52 (noting that offenses are violations of law of war, civil crimes generally cognizable by civil courts if open and operating normally, and breaches of military regulations); 1901 JAG DIGEST, *supra* note 101, § 1680 (stating that offenses are violations of law of war and civil crimes not tried because civil courts are closed); Green, *supra* note 15, at 846-47 (asserting that offenses triable are violations of law of war, violations of military orders and regulations, and crimes committed in occupied territory).

105. See Kaplan II, *supra* note 93, at 281-86 (explaining “jurisdiction over place criterion” and noting that places consist of territory where military government is in effect, territory under martial law, and zone of operations); see also WINTHROP, *supra* note 15, at 836-37 (observing that places include territory under military government, territory under martial law, and theatre of war, each of which must be within field of command of convening authority); DAVIS, *supra* note 19, at 309 (stating that places consist of enemy territory under military government and territory under martial law); FAIRMAN, *supra* note 101, § 52 (observing that place can be one of “profound peace” after *Ex parte* Quirin); 1901 JAG DIGEST, *supra* note 101, § 1680 (noting that places include enemy territory under military government and territory under martial law); Green, *supra* note 15, at 847-48 (asserting that places include territory under military government and territory within United States).

106. See Kaplan II, *supra* note 93, at 272 (describing effect of finding that military commission satisfies Time-Person-Offense-Place Framework).

In addition to the Time-Person-Offense-Place Framework, any examination of the lawfulness of military commission jurisdiction must also consider Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>107</sup> which set forth the seminal three-part test for separation of powers analysis.<sup>108</sup> Under the first category of *Youngstown* ("Category One"), when the President acts pursuant to an express or implied authorization of Congress, the President has the maximum amount of authority for his actions.<sup>109</sup> If that action is unconstitutional, it is usually because the federal government, as a whole, lacks the power to act in that manner.<sup>110</sup> Under the second *Youngstown* category ("Category Two"), when the President acts in the absence of either a congressional grant or a denial of authority, the President must rely solely on his own independent powers.<sup>111</sup> Here, congressional inaction or acquiescence might invite independent presidential action.<sup>112</sup> Third, when the President takes measures incompatible with Congress's expressed or implied will ("Category Three"), the President's power is at its "lowest ebb" because the President can rely solely on his own constitutional powers, and not on any power Congress may possess.<sup>113</sup>

#### IV. THE BUSH ADMINISTRATION'S LEGAL POSITION

President Bush's Military Order subjects members of al-Qaeda to law of war jurisdiction through military commissions.<sup>114</sup> The Military Order lists four sources of authority for convening law-of-war military commissions.<sup>115</sup> The first source of authority is the President's constitutional

107. 343 U.S. 579, 635-38 (1952) (Jackson, J., concurring) (setting forth three-category framework). The President's powers "are not fixed but fluctuate, depending upon their disjunction or conjunction with those of Congress." *Id.* at 635.

108. See Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1274-77 (2002) (discussing Justice Jackson's three-category framework).

109. See *Youngstown*, 343 U.S. at 635 (explaining "Category One" test).

110. See *id.* at 635-37 (discussing effect of Category One finding).

111. See *id.* at 637 (setting forth "Category Two" test). This test "is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories of law." *Id.*

112. See *id.* (explaining effect of congressional inaction).

113. See *id.* at 637-38 (setting forth "Category Three" test). Here, a court can sustain the President's power only by disabling Congress from acting on the subject. See *id.* (noting that when President takes action inconsistent with will of Congress, his power is at its nadir).

114. See Military Order, *supra* note 5, § 1(e), 3 C.F.R. at 918 (determining that persons subject to Military Order will be tried for violating law of war); see also John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 TEX. TECH L. REV. 899, 909 (2003) (indicating that Military Order asserts only law of war jurisdiction).

115. See Military Order, *supra* note 5, 3 C.F.R. at 918 (citing President's constitutional power, AUMF and UCMJ as authority for establishing law-of-war military commissions).



power as Commander-in-Chief of the Armed Forces.<sup>116</sup> The second source of authority is the AUMF, which authorizes the use of military force against those responsible for the September 11th attacks.<sup>117</sup> The third source of authority is UCMJ Article 21, which gives military commissions concurrent jurisdiction to try offenders or offenses against the law of war.<sup>118</sup> The last source of authority, UCMJ Article 36, allows the President to prescribe the procedures for cases that are triable by military commission.<sup>119</sup>

Thus, President Bush bases his power to convene law-of-war military commissions on an amalgam of his constitutional authority and the power delegated to him by Congress in the form of two statutes.<sup>120</sup> The Bush administration's legal position vis-à-vis the "War on Terrorism" was the result of various memoranda prepared by the U.S. Department of Justice's Office of Legal Counsel (OLC) and other administration attorneys.<sup>121</sup> Al-

116. See U.S. CONST. art. II, § 2, cl. 1 (vesting Commander-in-Chief power in President).

117. See AUMF, *supra* note 84, § 2(a) (authorizing use of force against al-Qaeda). Shortly thereafter, the United States took military action against al-Qaeda and the Taliban regime that controlled Afghanistan. See President George W. Bush, Address to the Nation Announcing Strikes Against Al Qaeda Training Camps and Taliban Military Installations in Afghanistan, 2 PUB. PAPERS 1201, 1201 (Oct. 7, 2001) (reporting military strikes).

118. See 10 U.S.C. § 821, which provides:

§ 821. Art. 21. Jurisdiction of courts-martial not exclusive

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.

119. See *id.* § 836, which states:

§ 836. Art. 36. President may prescribe rules

(a) Pretrial, trial, and post trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable and shall be reported to Congress.

120. See Military Order, *supra* note 5, 3 C.F.R. at 918 (enumerating constitutional and statutory bases of authority for creating law-of-war military commissions).

121. The September 11th attacks presented the Bush administration with a variety of novel legal questions, such as the scope of the detention, treatment, interrogation and trial of persons captured in the "War on Terrorism," which resulted in many legal opinions and other official correspondence being produced, many of which are in the public domain. See, e.g., Memorandum Opinion from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Timothy E. Flanigan, Deputy Counsel to the President, *The President's Constitutional Authority To Conduct Military Operations Against Terrorists and Nations Supporting Them* (Sept. 25, 2001), available at <http://www.usdoj.gov/olc/warpowers925.htm> [hereinafter Sep-

tember 25, 2001 OLC Opinion] (providing opinion regarding President's authority to take military action in response to September 11th attacks and concluding that President has broad power); Memorandum Opinion from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President & William J. Haynes II, Gen. Counsel, Dep't of Defense, *Authority for Use of Military Force To Combat Terrorist Activities Within the United States* (Oct. 17, 2001) (not released publicly); Memorandum Opinion from Patrick F. Philbin, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Legality of the Use of Military Commissions To Try Terrorists* (Nov. 6, 2001) (not released publicly); Memorandum Opinion from Patrick F. Philbin, Deputy Assistant Att'y Gen., Office of Legal Counsel & John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense, *Possible Habeas Jurisdiction over Aliens Held in Guantanamo Bay, Cuba* (Dec. 28, 2001), available at [http://www.msnbc.com/modules/newweek/pdf/011228\\_philbinmemo.pdf](http://www.msnbc.com/modules/newweek/pdf/011228_philbinmemo.pdf) (finding it unlikely that U.S. courts have jurisdiction over aliens filing habeas corpus petitions from Guantanamo Bay, Cuba); Draft Memorandum Opinion from John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense, *Application of Treaties and Laws to Al Qaeda and Taliban Detainees* (Jan. 9, 2002), available at <http://www.msnbc.msn.com/id/5032094/site/newsweek> (finding that law of war treaties do not apply to al-Qaeda or Taliban militia); Memorandum from William H. Taft, IV, Legal Adviser, U.S. Dep't of State, to John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, *Your Draft Memorandum of January 9* (Jan. 11, 2002), available at <http://www.cartoonbank.com/newyorker/slideshows/01TaftMemo.pdf> [hereinafter January 11, 2002 State Department Memorandum] (discussing concerns over POW status of Taliban detainees); Letter from John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel & Robert J. Delahunty, Special Counsel, Office of Legal Counsel, to William H. Taft, IV, Legal Adviser, U.S. Dep't of State (Jan. 14, 2002), available at <http://www.cartoonbank.com/newyorker/slideshows/02YooTaft.pdf> (disagreeing with January 11, 2002 State Department Memorandum arguing that Taliban detainees may be due POW protections); Memorandum Opinion from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President & William J. Haynes II, Gen. Counsel, Dep't of Defense, *Application of Treaties and Laws to Al Qaeda and Taliban Detainees* (Jan. 22, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/012202bybee.pdf> [hereinafter January 22, 2002 OLC Opinion] (concluding that Third Geneva Convention did not apply to al-Qaeda); Memorandum from William H. Taft, IV, Legal Adviser, U.S. Dep't of State, to John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, *Your Draft Memorandum of January 18* (Jan. 23, 2002), available at <http://www.cartoonbank.com/newyorker/slideshows/03TaftYooGonzalez.pdf> [hereinafter January 23, 2002 State Department Memorandum] (arguing that Taliban detainees are entitled to POW status, at least as rebuttable presumption); Draft Memorandum from Alberto R. Gonzales, Counsel to the President, to the President, *Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban* (Jan. 25, 2002), available at [http://msnbc.com/modules/newweek/pdf/gonzales\\_memo.pdf](http://msnbc.com/modules/newweek/pdf/gonzales_memo.pdf) (outlining ramifications of President's status determinations and Secretary of State's request for reconsideration); Memorandum from Colin L. Powell, Sec'y of State, to the Counsel to the President & the Assistant to the President for Nat'l Sec. Affairs, *Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan* (Jan. 26, 2002), available at [http://msnbc.com/modules/newweek/pdf/powell\\_memo.pdf](http://msnbc.com/modules/newweek/pdf/powell_memo.pdf) (noting that President had not properly been presented with opinions regarding Third Geneva Convention's application to "War on Terrorism"); Letter Opinion from John Ashcroft, Att'y Gen., to the President (Feb. 1, 2002), available at [Published by Villanova University Charles Widger School of Law Digital Repository, 2006](http://news.findlaw.com/hdocs/docs/tor-</a></p>
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ture/jash20102ltr.html [hereinafter February 1, 2002 Attorney General Opinion] (presenting options to President Bush regarding application of Third Geneva Convention to Taliban detainees); Memorandum Opinion from James C. Ho, Att'y Advisor, Office of Legal Counsel, to John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, *Possible Interpretations of Common Article 3 of the 1949 Geneva Convention Relative to the Treatment of Prisoners of War* (Feb. 1, 2002) (not released publicly); Memorandum from William H. Taft, IV, Legal Adviser, U.S. Dep't of State, to the Counsel to the President, *Comments on Your Paper on the Geneva Convention* (Feb. 2, 2002), available at [http://www.nytimes.com/packages/html/politics/20040608\\_doc.pdf](http://www.nytimes.com/packages/html/politics/20040608_doc.pdf) (urging conclusion that Third Geneva Convention applies to conflict with Taliban regime); Memorandum Opinion from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Status of Taliban Forces Under Article 4 of the Third Geneva Convention of 1949* (Feb. 7, 2002), available at <http://news.findlaw.com/hdocs/docs/torture/bybee20702mem.html> [hereinafter February 7, 2002 OLC Opinion] (concluding Taliban militia cannot satisfy Article 4 of Third Geneva Convention); Memorandum Opinion from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Defense, *Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan* (Feb. 26, 2002), available at <http://www.washingtonpost.com/wp-srv/nation/documents/022602bybee.pdf> [hereinafter February 26, 2002 OLC Opinion] (discussing legal constraints that may apply to interrogation of persons captured in Afghanistan); Memorandum Opinion from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to William J. Haynes, II, Gen. Counsel, Dep't of Defense, *The President's Power as Commander in Chief To Transfer Captured Terrorists to the Control and Custody of Foreign Nations* (Mar. 13, 2002) (not released publicly); Office of the Legal Adviser, U.S. Dep't of State, White Paper (Mar. 22, 2002) (not released publicly but purportedly analyzing application of Third Geneva Convention to "War on Terrorism"); Letter from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to William H. Taft, IV, Legal Adviser, U.S. Dep't of State (Mar. 28, 2002), available at <http://www.cartoonbank.com/newyorker/slideshows/05YooTaft.pdf> (finding "significant points of disagreement" with State Department over whether Afghanistan is "a failed state" and interpretation of Article 5 of Third Geneva Convention); Letter from John C. Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), available at <http://news.findlaw.com/nytimes/docs/doj/bybee80102ltr.html> (arguing that methods used for interrogation do not violate Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, S. TREATY DOC. NO. 100-20 (1988), 1465 U.N.T.S. 85); Memorandum Opinion from Jay S. Bybee, Assistant Att'y Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, *Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), available at <http://news.findlaw.com/hdocs/docs/doj/bybee80102mem.pdf> (discussing standards of conduct under Convention Against Torture); Memorandum from William J. Haynes II, Gen. Counsel, Dep't of Defense, to the General Counsel of the Department of the Air Force, *Working Group To Assess Legal, Policy, and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism* (Jan. 17, 2003), available at <http://www.washingtonpost.com/wp-srv/nation/documents/011703haynes.pdf> (appointing General Counsel of Air Force to head interdepartmental working group addressing issues of detainee interrogation); Memorandum from Maj. Gen. Jack L. Rives, Deputy J. Advoc. Gen., U.S. Air Force, to SAF/GC, *Final Report and Recommendations of the Working Group To Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism* (Feb. 5, 2003), reprinted in 151 Cong. Rec. S8796 (daily ed. July 25, 2005) (recognizing tension within executive branch over limitations on interrogation techniques); Memorandum from Maj. Gen. Jack L. Rives, Deputy J. Advoc. Gen., U.S. Air Force, to SAF/GC, *Comments on Draft Report and Recommendations of the Working Group To*

though the administration did not formally adopt the Time-Person-Of-

*Assess the Legal, Policy and Operational Issues Relating to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism* (Feb. 6, 2003), reprinted in *id.* at S8794 (noting further tension between Department of Justice, international community and executive branch regarding legal limits placed on interrogation techniques); Memorandum from Rear Adm. Michael F. Lohr, J. Advoc. Gen., U.S. Navy, to the General Counsel of the Air Force, *Working Group Recommendations Relating to Interrogation of Detainees* (Feb. 6, 2003), reprinted in *id.* at S8795 (explaining desire to limit legal conclusions to unlawful combatants held outside United States); Memorandum from Brig. Gen. Kevin M. Sandkuhler, Staff J. Advoc., U.S. Marine Corps, to the General Counsel of the Air Force, *Working Group Recommendations on Detainee Interrogations* (Feb. 27, 2003), reprinted in *id.* at S8794 (expressing concern for U.S. servicemen dependent upon OLC's interpretation of international law); Memorandum from Maj. Gen. Thomas J. Romig, J. Advoc. Gen., U.S. Army, to the General Counsel of the Department of the Air Force, *Draft Report and Recommendations of the Working Group To Assess the Legal, Policy and Operational Issues Related to Interrogation of Detainees Held by the U.S. Armed Forces in the War on Terrorism* (Mar. 3, 2003), reprinted in *id.* (fearing ramifications if Department of Defense was to sanction interrogation techniques that may appear to violate domestic and international law); Memorandum from Rear Adm. Michael F. Lohr, J. Advoc. Gen., U.S. Navy, to the Air Force General Counsel, *Comments on the 6 March 2003 Detainee Interrogation Working Group Report* (Mar. 13, 2003), reprinted in *id.* at S8795 (reiterating numerous comments regarding concerns generated by working group report); Memorandum Opinion from John Yoo, Deputy Assistant Att'y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense, *Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (Mar. 14, 2003) (not released publicly); U.S. Dep't of Defense, *Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations* (Apr. 4, 2003), available at <http://www.defenselink.mil/news/Jun2004/d20040622doc8.pdf> (setting forth Department of Defense policy regarding detention of unlawful combatants held outside United States); Memorandum Opinion from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, to James B. Comey, Deputy Att'y Gen., *Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A* (Dec. 30, 2004), available at <http://www.usdoj.gov/olc/dagmemo.pdf> (denouncing torture and intricately defining various elements that constitute torture); Memorandum from Daniel Levin, Acting Assistant Att'y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense, *Memorandum for William J. Haynes II, General Counsel of the Department of Defense, from John Yoo, Deputy Assistant Attorney General, Office of Legal Counsel, Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States (March 14, 2003)* (Feb. 4, 2005), available at <http://balkin.blogspot.com/Levin.Haynes.205.pdf> (confirming that OLC formally withdrew its Mar. 14, 2003 memorandum opinion); Memorandum from William J. Haynes II, Gen. Counsel, Dep't of Defense, to the Judge Advocates General & the Staff Judge Advocate to the Commandant, *Department of Defense Interrogation Policy* (Mar. 17, 2005), available at <http://balkin.blogspot.com/Haynes.Jag.305.pdf> (determining that "Report of Working Group on Detainee Interrogations" should be considered historical document with no standing in policy, practice or law to guide any activity of Department of Defense); Memorandum Opinion from C. Kevin Marshall, Deputy Assistant Att'y Gen., Office of Legal Counsel, to William J. Haynes II, Gen. Counsel, Dep't of Defense, *Proposed Amendments to Military Commission Order No. 1* (Aug. 12, 2005), available at [http://www.usdoj.gov/olc/militarycommissionchangesop\(final\).pdf](http://www.usdoj.gov/olc/militarycommissionchangesop(final).pdf) (concluding that proposed amendments to Military Commission Order No. 1 are consistent with Military Order); U.S. Dep't of Justice, White Paper, *Legal Authorities Supporting the Activities of the National Security Agency Described by the President* (Jan. 19, 2006), available at <http://www.usdoj.gov/opa/whitepaperonnsalegalauthorities.pdf> (arguing that AUMF places President and Congress in *Youngstown* Category One position).

fense-Place Framework, the framework provides a helpful structure for analyzing the lawfulness of President Bush's law-of-war military commissions.<sup>122</sup>

#### A. *The Jurisdiction in Time Criterion*

Under the first prong of the Time-Person-Offense-Place Framework, a law-of-war military commission has jurisdiction in time only when a state of war exists.<sup>123</sup> Therefore, the issue is whether the United States is "at war" with al-Qaeda, as well as with the Taliban regime that controlled Afghanistan.<sup>124</sup> Historically, war has been defined as a "contest by force between independent sovereign States."<sup>125</sup> Prior to the September 11th attacks, the United States viewed international terrorism primarily as a criminal matter that necessitated a criminal-justice response.<sup>126</sup> This view changed drastically following the carnage and economic damage wrought by the September 11th attacks and the United States' subsequent military response.<sup>127</sup>

Initially, commentators doubted whether a nation-state like the United States could be at war with an amorphous, transnational terrorist organization like al-Qaeda.<sup>128</sup> President Bush, however, determined that the September 11th attacks were "on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces."<sup>129</sup> Moreover, the President later declared the armed conflict to

122. For a discussion of the Bush administration's legal position within the Time-Person-Offense-Place Framework, see *infra* notes 114-86 and accompanying text.

123. See Kaplan II, *supra* note 93, at 273 (determining that state of war must exist to obtain jurisdiction in time).

124. See *id.* (noting test for jurisdiction in time criterion).

125. HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW § 295 (Richard Henry Dana, Jr. ed., 8th ed., Boston, Little, Brown 1866) (defining "war"); accord *The Brig Amy Warwick* (The Prize Cases), 67 U.S. (2 Black) 635, 652 (1863) (defining "war" as "the exercise of force by bodies politic, or bodies assuming to be bodies politic, against each other, for the purpose of coercion").

126. See JOHN F. MURPHY, THE UNITED STATES AND THE RULE OF LAW IN INTERNATIONAL AFFAIRS 296 (2004) [hereinafter MURPHY] (noting response of United States to terrorism before September 11th attacks). *But cf.* President William J. Clinton, Letter to Congressional Leaders Reporting on Military Action Against Terrorist Sites in Afghanistan and Sudan, 2 PUB. PAPERS 1464, 1464 (Aug. 21, 1998) (informing Congress that U.S. military conducted military strikes against al-Qaeda camps and installations in Afghanistan, in exercise of right of self-defense under Article 51 of U.N. Charter).

127. See President George W. Bush, Remarks Following a Meeting with the National Security Team, 2 PUB. PAPERS 1100, 1100 (Sept. 12, 2001) ("The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war.").

128. See MURPHY, *supra* note 126, at 168 (discussing concerns of some commentators).

129. Military Order, *supra* note 5, § 1(a), 3 C.F.R. at 918. Under the Constitution, the President can neither declare nor initiate war. See U.S. CONST. art. I, § 8, cl. 11 (granting Congress power to "declare War"). The President, however, can

be “international in scope.”<sup>130</sup> Thus, the President concluded that Common Article 3 of the Geneva Conventions, which sets forth the minimum requirements for the treatment of detainees in non-international armed conflicts, did not apply to the global conflict with al-Qaeda.<sup>131</sup>

The Bush administration’s position was supported by (1) the actions of Congress, (2) the opinions of the U.S. courts and (3) most segments of the international community.<sup>132</sup> First, when Congress enacted the AUMF and authorized President Bush to use “all necessary and appropriate force” against the organizations and persons who perpetrated the September 11th attacks, Congress treated the conflict with al-Qaeda as a war.<sup>133</sup> As such, the Bush administration interpreted the AUMF as providing express legislative authority for prosecuting the global conflict with al-Qaeda, which qualified the President’s actions as falling under Category One of *Youngstown*.<sup>134</sup> Second, like Congress, the U.S. Supreme Court recognized the existence of a state of war in Afghanistan.<sup>135</sup> Third, various international organizations supported President Bush’s view that a state of armed conflict existed by concluding similarly that al-Qaeda committed an “armed attack” upon the United States.<sup>136</sup> Therefore, each branch of the

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recognize the existence of a state of war. See *The Prize Cases*, 67 U.S. (2 Black) at 641.

130. See Memorandum from President George W. Bush, *Humane Treatment of Al Qaeda and Taliban Detainees* ¶ 2(c) (Feb. 7, 2002), available at <http://www.washingtonpost.com/wpsrv/nation/documents/020702bush.pdf> [hereinafter Status Determination Memorandum] (finding conflict with Taliban regime to be “international in scope”). Although President Bush has not determined formally that Article 2 of the Third Geneva Convention applies to the conflict with the Taliban regime, this is necessarily the case. See January 22, 2002 OLC Opinion, *supra* note 121, at 31 (noting that if President denied Taliban militia members POW status under Article 4 of Third Geneva Convention, President would be conceding conflict with Taliban regime falls within ambit of Article 2).

131. See Status Determination Memorandum, *supra* note 130, ¶ 2(c) (determining Common Article 3 of Geneva Conventions to be inapplicable to conflict with Taliban regime).

132. See Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2060-69 (2005) [hereinafter Bradley & Goldsmith, *Congressional Authorization*] (discussing effects of congressional action and international community’s response to September 11th attacks).

133. See *id.* at 2060 (noting that “both Congress and the President have treated this conflict as a war, and have treated the entities identified in the AUMF as enemy combatants under the laws of war”).

134. See September 25, 2001 OLC Opinion, *supra* note 121 (“[T]he President can be said to be acting at the apogee of his powers [here], for he is operating both under his own Article II authority and with the legislative support of Congress.”); see also Brief for the Respondents in Opposition at 2, *Hamdan v. Rumsfeld*, No. 05-184 (U.S. Sept. 2005), available at <http://www.nimj.org/documents/HamdanBrief.opp.pdf> (arguing that Congress supported President’s use of force against al-Qaeda via AUMF).

135. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 517 (2004) (plurality opinion) (holding Congress authorized detention of enemy combatants through AUMF).

136. See Bradley & Goldsmith, *Congressional Authorization*, *supra* note 132, at 2068-69 (noting that U.N. Security Council, North Atlantic Treaty Organization,

U.S. government, as well as a majority of the international community, supported President Bush's conclusion that the September 11th attacks created a state of war between the United States and al-Qaeda.<sup>137</sup>

With respect to the United States' use of force against the Taliban regime that controlled Afghanistan in 2001, President Bush based his authority to wage war on the United Nations Charter and the AUMF.<sup>138</sup> Specifically, President Bush used Article 51 of the United Nations Charter, which preserves a state's ability to use force in responding to an armed attack, to justify the United States' use of force against the Taliban regime.<sup>139</sup> In addition, the President relied on the AUMF, which authorizes the President to use "all necessary and appropriate force against those nations" that aided the September 11th attacks.<sup>140</sup> Consequently, according to President Bush, the conflicts against both al-Qaeda and the Taliban regime amounted to a state of war.<sup>141</sup>

### B. *The Jurisdiction over Persons Criterion*

For a law-of-war military commission to have jurisdiction over a person, that person must (1) be subject to the UCMJ as a POW or (2) be an individual who has committed an unlawful act of war and is therefore amenable to law of war jurisdiction.<sup>142</sup> Accordingly, the threshold issue is determining the legal status of al-Qaeda and Taliban detainees.<sup>143</sup> UCMJ Article 2 makes POWs subject to military law.<sup>144</sup> The Third Geneva Convention, however, governs the criteria for POW status.<sup>145</sup>

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and Organization of American States treated September 11th attacks as "armed attacks" under United Nations Charter).

137. *See id.* at 2069 (concluding that United States is engaged in state of war with al-Qaeda and Taliban regime).

138. *See id.* at 2068-69 (summarizing Bush administration's position).

139. *See* Letter dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, U.N. Doc. S/2001/946 (Oct. 7, 2001) (reporting that United States and its allies had initiated actions in Afghanistan in exercise of inherent right of individual and collective self-defense under Article 51 of U.N. Charter, in response to "armed attacks that were carried out against the United States" on September 11, 2001).

140. *See* AUMF, *supra* note 84, § 2(a) (authorizing use of force).

141. *See* Status Determination Memorandum, *supra* note 130, ¶ 2(c) (determining that conflicts with al-Qaeda and Taliban regime are "international in scope").

142. *See* Kaplan II, *supra* note 93, at 274, 277-79 (stating that in order to obtain jurisdiction over person, that person must be subject to military law or be someone who is otherwise subject to law of war).

143. *See* JOINT CHIEFS OF STAFF, JOINT PUBL'N 1-02, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS 156 (2005) (defining "detainee" as "any person captured or otherwise detained by an armed force").

144. *See* 10 U.S.C. § 802(a) (9) (subjecting POWs in custody of Armed Forces to UCMJ).

145. *See* Third Geneva Convention, *supra* note 87, arts. 2, 4-5.

Articles 2, 4 and 5 of the Third Geneva Convention determine who qualifies as a POW.<sup>146</sup> As a preliminary matter, Article 2 specifies that the Third Geneva Convention applies only to cases of “declared war” or “any other armed conflict which may arise” between two or more parties to the convention.<sup>147</sup> Article 4 establishes the categories of persons entitled to POW status.<sup>148</sup>

Article 4(A)(1) applies to members of the armed forces of a party to a conflict, as well as to members of militias or volunteer corps forming part of those armed forces.<sup>149</sup> Under Article 4(A)(2), in order to qualify as a POW, members of “other militias” and “other volunteer corps” must have fallen into the power of the enemy, and fulfill four conditions: (1) be commanded by a person responsible for his subordinates, (2) wear a distinc-

146. See *United States v. Noriega*, 808 F. Supp. 791, 794 (S.D. Fla. 1992) (noting that Articles 2, 4 and 5 of Third Geneva Convention “establish the standard for determining who is a POW”).

147. See Third Geneva Convention, *supra* note 87, art. 2 (describing conflicts to which Third Geneva Convention applies).

148. See *id.* art. 4. For present purposes, only Articles 4(A)(1)-(3) are relevant, and read:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions:
  - (a) that of being commanded by a person responsible for his subordinates;
  - (b) that of having a fixed distinctive sign recognizable at a distance;
  - (c) that of carrying arms openly;
  - (d) that of conducting their operations in accordance with the laws and customs of war.
- (3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

*Id.* In addition to the four criteria enumerated in Article 4(A)(2), some authorities contend that there is an implicit, fifth criterion for lawful combatant status; namely, that combatants serve at the direction of a government. Nurick & Barrett, *supra* note 55, at 567-70 (arguing in favor of fifth criterion); *accord* *Military Prosecutor v. Omar Mahmud Kassem*, 42 I.L.R. 470, 476-78 (Israeli Mil. Ct. at Ramallah 1969) (same); *Speed Opinion*, *supra* note 16, at 301 (“The laws of war demand that a man shall not take human life except under a license from his government.”); GREAT BRITAIN, WAR OFFICE, *MANUAL OF MILITARY LAW* ¶ 28, at 291 (1914) [hereinafter *MANUAL OF MILITARY LAW*] (noting that “war must be conducted by persons acting under the control of some recognized government, having power to put an end to hostilities in order that the enemy may know the authority to which he may resort when desirous of making peace”).

149. See Third Geneva Convention, *supra* note 87, art. 4(A)(1) (defining “POW”).



tive sign recognizable at a distance, (3) carry arms openly and (4) conduct operations in accordance with the law of war.<sup>150</sup> Article 4(A)(3) applies to members of the regular armed forces who profess allegiance to a government that is not recognized by the detaining government.<sup>151</sup> Article 5 provides a mechanism for making individualized POW status determinations if a detainee's status under Article 4 is in "doubt."<sup>152</sup>

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150. See *id.* art. 4(A)(2) (setting forth four conditions for POW status). A person has fallen into the power of the enemy when he has been "captured by, or surrendered to members of the military forces . . . who have taken him into custody." FM 27-10, *supra* note 18, ¶ 84(b); see also *id.* ¶ 64 (explaining manner in which four conditions of Article 4(A)(2) may be satisfied). These four conditions for lawful combatant status were first codified in the Hague Convention of 1899. See Jeremy Rabkin, *After Guantanamo: The War over the Geneva Convention*, NAT'L INT'L., Summer 2002, at 15, 20 (describing original promulgation of conditions as resting "pre-eminently on practical considerations"); see also Convention with Respect to the Laws and Customs of War on Land, Annex, art. 1, July 29, 1899, 32 Stat. 1803, 187 Consol. T.S. 429 (enumerating four conditions of lawful combatant status). These conditions were reaffirmed at the 1907 Hague Peace Conference. See Convention Respecting the Laws and Customs of War on Land, Annex, art. 1, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague Regulations] (defining applicability of four conditions to belligerents). It appears that these four conditions were first proposed in 1874. See *United States v. Lindh*, 212 F. Supp. 2d 541, 557 n.34 (E.D. Va. 2002) (noting criteria were first codified in 1874); see also Project of an International Declaration Concerning the Laws and Customs of War art. 9, Aug. 27, 1874, 1 AM. J. INT'L L. 96, 97-98 (Supp. 1907) (identifying conditions of individuals subject to laws, rights and duties of war).

151. See Third Geneva Convention, *supra* note 87, art. 4(A)(3) (noting that POWs are also "[m]embers of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power").

152. See *id.* art. 5, which provides, in relevant part:

Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

*Id.* In 2004, Congress reaffirmed the principles of Article 5. See Ronald W. Reagan National Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375, § 1091(b)(4), 118 Stat. 1811, 2069 (2004) (explaining that when there is doubt as to detainees' status, they are to be treated as POWs until their status is determined by competent tribunal). Article 5 applies to any person not appearing to be entitled to POW status, who (1) has committed a belligerent act and (2) "asserts that he is entitled to treatment as a [POW] or concerning whom any other doubt of a like nature exists." FM 27-10, *supra* note 18, ¶ 71(b) (interpreting Article 5's requirements). A "competent tribunal" of the United States "is a board of not less than three officers acting according to such procedure as may be prescribed for tribunals of this nature." *Id.* ¶ 71(c). If a competent tribunal determines that a person does not fall within Article 4, that person is not entitled to POW privileges. See *id.* ¶ 73 (describing result of adverse finding by competent tribunal); see also U.S. DEP'T OF THE ARMY, ARMY REGULATION 190-8, ENEMY PRISONERS OF WAR, RETAINED PERSONNEL, CIVILIAN INTERNEES AND OTHER DETAINEES (1997) (setting forth current policy, procedures and responsibilities respecting detainees in custody of Armed Forces). In the "War on Terrorism," the United States determined "that Article 5 tribunals were unnecessary because there is no doubt as to the status of [the detainees]." SECOND PERIODIC REPORT OF THE UNITED STATES OF AMERICA TO THE COMMITTEE AGAINST TORTURE, U.N. Doc. CAT/C/48/Add.3/Rev.1/Annex, at

### 1. *President Bush's Status Determination Memorandum*

On February 7, 2002, President Bush issued a memorandum ("Status Determination Memorandum") that declared the Third Geneva Convention inapplicable to al-Qaeda as a whole, and found that individual al-Qaeda detainees do not qualify as POWs under Article 4.<sup>153</sup> Moreover,

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54 (Jan. 13, 2006) [hereinafter *SECOND PERIODIC REPORT*] (explaining that Article 5 only applies where there is doubt as to belligerents' status).

In response to the U.S. Supreme Court's rulings in *Rasul v. Bush*, 542 U.S. 466 (2004), and *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004) (plurality opinion), the Bush administration established Combatant Status Review Tribunals (CSRTs), which "supplement the prior screening procedures and serve as fora for detainees to contest their designation as enemy combatants and thereby the legal basis for their detention." *Id.* The U.S. Department of Defense established the CSRTs by military order. See Deputy Sec'y of Defense Paul Wolfowitz, *Order Establishing Combatant Status Review Tribunal* (July 7, 2004), available at <http://www.dod.mil/news/Jul2004/d20040707review.pdf> [hereinafter CSRT Order] (creating CSRT Order to improve management within U.S. Department of Defense concerning detention of enemy combatants at Guantanamo Bay, Cuba); Memorandum from Gordon H. England, Sec'y of the Navy, *Implementation of Combatant Status Review Tribunal Procedures for Enemy Combatants Detained at Guantanamo Bay Naval Base, Cuba* (July 29, 2004), available at <http://www.dod.mil/news/Jul2004/d20040730comb.pdf> (implementing CSRT Order). The CSRT Order defines an "enemy combatant" as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners. This includes any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces." CSRT Order, *supra*, at 1. The CSRT process was completed in 2005. See U.S. DEP'T OF DEFENSE, *Combatant Status Review Tribunal Summary* (Mar. 29, 2005), available at <http://www.dod.mil/news/Mar2005/d20050329csrt.pdf> (reporting that 520 of 558 detainees then-held at Guantanamo Bay, Cuba were enemy combatants).

Separately, Administrative Review Boards (ARBs) annually review the detention of each Guantanamo Bay detainee to assess "whether an enemy combatant continues to pose a threat to the United States or its allies, or whether there are other factors bearing on the need for continued detention." *SECOND PERIODIC REPORT*, *supra*, at 56 (explaining ARB review procedure). The U.S. Department of Defense created the ARB procedure by military order. See Deputy Sec'y of Defense Paul Wolfowitz, *Order OSD 06942-04, Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba* (May 11, 2004), available at <http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf> [hereinafter ARB Order] (establishing ARB process to assess annually need to detain enemy combatants held at Guantanamo Bay, Cuba); Memorandum from Gordon H. England, Designated Civilian Official, *Implementation of Administrative Review Procedures for Enemy Combatants Detained at U.S. Naval Base Guantanamo Bay, Cuba* (Sept. 14, 2004), available at <http://www.defenselink.mil/news/Sep2004/d20040914adminreview.pdf> (implementing ARB Order). In 2006, the U.S. Department of Defense completed the first annual ARB process. See U.S. DEP'T OF DEFENSE, *Administrative Review Board Summary* (Feb. 2, 2006), available at <http://www.dod.mil/news/Jan2006/d20060130arb.pdf> (reporting final results of ARB-1 proceedings and indicating that 330 of 463 enemy combatants then-held at Guantanamo Bay, Cuba would continue to be detained).

153. See Status Determination Memorandum, *supra* note 130, ¶¶ 2(a), 2(d) (determining group status of al-Qaeda and al-Qaeda detainees); see also *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (U.S. Nov. 7, 2005) (No. 05-184) (finding that al-Qaeda and individual al-Qaeda members do not qualify as POWs). Although the Status Determination Memorandum was

the President determined that the Third Geneva Convention applies to the conflict with the Taliban regime, but that Taliban detainees as a group do not qualify as POWs under Article 4.<sup>154</sup> Finally, the President concluded that Common Article 3 of the Geneva Conventions does not apply to either al-Qaeda or Taliban detainees.<sup>155</sup> The President based his status determination upon two legal opinions, the first rendered by the OLC and the second by the U.S. Attorney General.<sup>156</sup>

## 2. *The Legal Status of Al-Qaeda Detainees*

In a January 22, 2002 legal opinion ("January 22, 2002 OLC Opinion"), the OLC determined that the Third Geneva Convention did not apply to al-Qaeda for three reasons.<sup>157</sup> First, the OLC found that al-Qaeda was not a state and therefore could not receive the benefits that a party to the convention enjoys.<sup>158</sup> Second, the OLC reasoned that, even if the Third Geneva Convention applied to the conflict with al-Qaeda, al-Qaeda detainees failed to meet the POW criteria set forth in Article 4.<sup>159</sup> Third,

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dated February 7, 2002, it appears that President Bush first reached this decision three weeks earlier. See Memorandum from Donald H. Rumsfeld, Sec'y of Defense, to the Chairman of the Joint Chiefs of Staff, *Status of Taliban and Al Qaida* (Jan. 19, 2002), available at <http://www.dod.mil/news/Jun2004/d20040622doc1.pdf> (directing transmittal of substantially similar status determination to U.S. combatant commanders).

154. See Status Determination Memorandum, *supra* note 130, ¶¶ 2(b), 2(d) (determining status of Taliban militia and Taliban detainees); see also *United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002) (upholding President Bush's determination that Taliban militia and Taliban detainees do not qualify as POWs).

155. See Status Determination Memorandum, *supra* note 130, ¶ 2(c) (deciding Common Article 3 of Geneva Conventions is not applicable to al-Qaeda or Taliban detainees).

156. See *id.* ¶ 2 (reciting legal authority status determinations). It appears that President Bush did not rely on the advice contained in the February 1, 2002 Attorney General Opinion. See *id.* (illustrating reliance on conclusions of U.S. Department of Defense and recommendations of U.S. Department of Justice).

157. See January 22, 2002 OLC Opinion, *supra* note 121, at 9 (concluding that Third Geneva Convention does not apply to al-Qaeda).

158. See *id.* (analyzing Article 2 of Third Geneva Convention and concluding it does not apply to al-Qaeda because al-Qaeda is not high contracting party to convention). By its terms, the Third Geneva Convention applies to cases of declared war or armed conflict between two or more high contracting parties. See *id.* (explaining consequential inapplicability of provisions regulating detention of POWs). Because al-Qaeda is a terrorist organization, and not a state, it cannot be a high contracting party. See *id.* (noting that non-governmental organizations cannot be parties to international agreements governing law of war). As such, the OLC argued that the Third Geneva Convention does not apply to the conflict with al-Qaeda. See *id.*

159. See *id.* at 9-10 (reviewing Article 4 of Third Geneva Convention and asserting al-Qaeda detainees fail to satisfy POW eligibility requirements). As a threshold matter, the opinion noted that Article 4 does not expand the application of the Third Geneva Convention beyond the types of conflicts to which it applies. See *id.* (explaining Article 4 does not expand Third Geneva Convention beyond situations enumerated in Articles 2 and 3). Assuming *arguendo*, however, that Article 4 could confer POW status upon al-Qaeda detainees, the OLC found that the

the OLC found that Common Article 3 of the Geneva Conventions did not apply to the conflict between the United States and al-Qaeda.<sup>160</sup> As a result, the OLC reasoned that al-Qaeda detainees could not qualify as POWs as a matter of law.<sup>161</sup> Finally, the OLC concluded that because there was no “doubt” as to al-Qaeda’s collective status, no Article 5 tribunals were necessary to determine individual al-Qaeda members’ status; thus, according to the OLC, if the group, as a whole, cannot qualify under the Third Geneva Convention, a fortiori, members of that group also cannot qualify.<sup>162</sup>

### 3. *The Legal Status of Taliban Detainees*

Whether the Third Geneva Convention applied to Taliban detainees was a more difficult question for the Bush administration.<sup>163</sup> Ultimately,

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detainees could not fulfill Article 4’s criteria. *See id.* at 10 (discussing reasons detainees would not enjoy POW protections). First, al-Qaeda does not qualify as the armed forces, volunteer forces, or militia of a state party to the conflict; accordingly, Article 4(A)(1) does not apply. *See id.* (noting requisite status of party to conflict under Article 4(A)(1)). Second, al-Qaeda detainees cannot qualify as part of the volunteer force, militia or organized resistance under Article 4(A)(2) because they cannot fulfill the criteria applicable to such forces. *See id.* (explaining that militia or volunteer forces must satisfy four conditions of Article 4(A)(2)). Third, al-Qaeda members could not qualify as members of a regular armed force that professes allegiance to a government or authority not recognized by the detaining power under Article 4(A)(3) because the same four criteria for lawful combatant status that apply under Article 4(A)(2) implicitly apply to Article 4(A)(3). *See id.* (reiterating requirement that four Article 4(A)(2) conditions apply to regular armed forces). With respect to Article 5, the OLC argued that because the President found al-Qaeda, as a group, is not entitled to POW status under Article 4, no “doubt” arises and therefore no Article 5 tribunals are necessary. *See id.* at 30-31 (recognizing that pursuant to President’s power to interpret treaties, President could determine that all Taliban forces fall outside scope of Article 4’s definition of POWs).

160. *See id.* at 10 (concluding nature of conflict precludes application of Common Article 3 of Geneva Conventions). Here, the opinion asserted that Common Article 3 does not apply to the conflict with al-Qaeda because it is a “conflict of an international character.” *See id.* (reasoning Third Geneva Convention applies to either traditional wars between state parties or non-international civil wars).

161. *See id.* at 37 (repeating conclusion that Third Geneva Convention does not apply to al-Qaeda). That a person, as a matter of law, may not be entitled to POW status does not preclude conferring those rights upon that person. *See id.* at 25-28 (asserting POW treatment can be, and has been, granted by United States as matter of policy); *see also* FM 27-10, *supra* note 18, ¶ 70 (recognizing that enumeration of persons entitled to be treated as POWs is not exhaustive and “does not preclude affording [POW] status to persons who would otherwise be subject to less favorable treatment”).

162. *See* January 22, 2002 OLC Opinion, *supra* note 121, at 10 (discussing application of Article 5).

163. *See id.* (describing application of Third Geneva Convention to Taliban militia as “a more difficult legal question”). In fact, there appears to have been significant disagreement within the Bush administration in this regard. *Compare id.* at 1 (concluding Third Geneva Convention inapplicable to Taliban detainees), with January 23, 2002 State Department Memorandum, *supra* note 121, at 2 (concluding Third Geneva Convention presumptively applied to Taliban detainees).

President Bush determined that members of the Taliban militia were not POWs because they did not satisfy Articles 4(A)(1)-(3), even though Afghanistan is a party to the Third Geneva Convention.<sup>164</sup> The January 22, 2002 OLC Opinion identified two theories supporting President Bush's conclusion that the Third Geneva Convention did not apply to the Taliban regime.<sup>165</sup> Under the first theory, President Bush could suspend the Third Geneva Convention with respect to the Taliban regime, making the convention inapplicable to the conflict.<sup>166</sup> Alternatively, the OLC argued, even if the Third Geneva Convention applied to the conflict with the Taliban regime, Taliban members would not have to be classified as POWs if President Bush reasonably determined they were not entitled to POW status under Article 4.<sup>167</sup> Here, the OLC declined to make a specific POW-status determination, noting that it did not possess the requisite facts to make such a categorical determination.<sup>168</sup>

Consequently, the OLC prepared a second legal opinion ("February 7, 2002 OLC Opinion") specifically addressing the status of the Taliban militia under Article 4 of the Third Geneva Convention.<sup>169</sup> In this opinion, the OLC concluded that President Bush had reasonable factual grounds for determining that no member of the Taliban militia was legally entitled to POW status under Article 4.<sup>170</sup> First, the OLC found that the Taliban militia did not meet the requirements of Article 4(A)(2) because it failed to satisfy at least three of the four conditions specified in that provision.<sup>171</sup> Second, the OLC concluded that the Taliban militia, as a

164. See Status Determination Memorandum, *supra* note 130, ¶¶ 2(b), 2(d) (determining Third Geneva Convention inapplicable to Taliban detainees).

165. See January 22, 2002 OLC Opinion, *supra* note 121, at 10-25, 30-32 (presenting two theories why Third Geneva Convention is inapplicable to Taliban militia).

166. See *id.* at 10-25 (explicating President Bush's suspension of Third Geneva Convention based on "failed state" rationale).

167. See *id.* at 30-32 (offering possible bases for President Bush finding Taliban militia not entitled to POW status under Article 4 of Third Geneva Convention).

168. See *id.* at 31 (stating that OLC lacks requisite facts for categorical determinations of Taliban detainees' POW status).

169. See February 7, 2002 OLC Opinion, *supra* note 121, at 1 (summarizing question presented).

170. See *id.* (finding President has "reasonable factual grounds to determine that no members of the Taliban militia are entitled to [POW] . . . status").

171. See *id.* at 2-4 (concluding that President has power to determine that Taliban militia is "categorically incapable of meeting" Article 4(A)(2)). First, the opinion analyzed the first criterion of Article 4(A)(2) and concluded that the Taliban militia could not satisfy that criterion because the Taliban militia had no organized command and control structure through which members reported to a military commander who took responsibility for their actions. See *id.* at 2. Next, there was no evidence that Taliban members wore a distinctive uniform, meaning that they failed to meet Article 4(A)(2)(b). See *id.* at 3. Further, while the Taliban militia carried arms openly, as Article 4(A)(2)(c) requires, this fact did not sufficiently distinguish them from other Afghans, many of whom carry arms openly. See *id.* Last, there was no indication that the Taliban militia considered itself bound by

whole, failed to qualify for POW status under Articles 4(A)(1) and 4(A)(3).<sup>172</sup> Here, the OLC reasoned that the four criteria enumerated in Article 4(A)(2), which explicitly apply to militias and volunteer forces, implicitly applied to the references to “armed forces” in Articles 4(A)(1) and 4(A)(3).<sup>173</sup> Third, the OLC determined there was no need to convene Article 5 tribunals for individual status determinations, as the President made a group status determination, thereby eliminating any “doubt” as to the status of individual detainees.<sup>174</sup> Based on the OLC’s analysis, President Bush determined that Taliban militia members, as a matter of law, did not qualify as POWs.<sup>175</sup>

### C. *The Jurisdiction over Offense Criterion*

For a law-of-war military commission to have jurisdiction over an offense, the accused must be charged with a violation of the law of war.<sup>176</sup> The law of war comprises treaty law and customary international law.<sup>177</sup> Admittedly, Congress has neither defined the law of war nor specified the

the law of war; to the contrary, the Taliban militia committed many acts that are considered violations of the law of war. *See id.* As a result, the OLC concluded that the Taliban militia, as a whole, cannot meet the requirements of Article 4(A)(2). *See id.* at 4.

172. *See id.* (asserting Taliban militia cannot qualify as POWs under Article 4).

173. *See id.* at 4-7 (finding four requirements of Articles 4(A)(2) implicitly apply to Articles 4(A)(1) and 4(A)(3), thus Taliban militia would not qualify as POWs under latter provisions). First, the opinion noted that the term “armed forces” is not defined by the convention, and that Articles 4(A)(1) and 4(A)(3) do not contain criteria similar to Article 4(A)(2), which groups must fulfill to achieve POW status. *See id.* at 4. Next, the OLC argued that it would be illogical to read the term “armed forces” as somehow relieving members of these armed forces from the POW requirements applicable to militia members. *See id.* at 5. This would create the possibility that a government could immunize its soldiers from all POW requirements simply by defining them as members of the “armed forces.” *See id.*

174. *See id.* at 7-8 (concluding Article 5 tribunals were unnecessary because President could make blanket Article 4 determination, thereby eliminating doubt regarding status of Taliban detainees). The opinion first noted that, as a threshold matter, Article 5 is triggered only if there is doubt as to a detainee’s Article 4 status. *See id.* at 8. Moreover, Article 5 tribunals are designed to determine whether a particular detainee’s factual circumstances fall within Article 4’s categories, not whether the group as a whole falls under Article 4. *See id.* Therefore, because the President has the power to interpret treaties for the United States under Article II of the Constitution, he reasonably could interpret the Third Geneva Convention in a manner that would exclude Taliban members from Article 4’s POW definition. *See id.* Accordingly, this determination would eliminate any doubt as to the detainees’ status, thereby obviating the need for Article 5 tribunals. *See id.*

175. *See* Status Determination Memorandum, *supra* note 130, ¶ 2(d) (determining Taliban militia did not qualify for POW status).

176. *See* Kaplan II, *supra* note 93, at 280 (suggesting need for allegation of violation of law of war for military commission to obtain jurisdiction over offense).

177. *See* FM 27-10, *supra* note 18, ¶ 4 (indicating law of war is derived from treaties and customary international law).

precise punishment for its infraction.<sup>178</sup> Rather, Congress, for the most part, has incorporated the law of war by reference into U.S. law under its Article I power to “define and punish . . . Offences against the Law of Nations.”<sup>179</sup> Thus, to satisfy the jurisdiction over offense criterion, one must determine whether the offense that a member of al-Qaeda or the Taliban militia allegedly committed constitutes a violation of the law of war.<sup>180</sup> The U.S. Department of Defense, charged with implementing the Military Order, has enumerated a list of offenses against the law of war, which forms the basis of the United States’ prosecution efforts.<sup>181</sup>

#### D. *The Jurisdiction over Place Criterion*

For a law-of-war military commission to have jurisdiction over a particular place, the territory concerned must be within the “theatre or zone of operations.”<sup>182</sup> Consequently, the issue is whether the United States and Afghanistan are territories within the theatre or zone of operations.<sup>183</sup> A theatre of operations is a place where war is being waged.<sup>184</sup> It appears,

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178. See *Ex parte Quirin*, 317 U.S. 1, 30 (1942) (observing Congress’s failure to define what acts constitute offenses against law of war).

179. See *id.* (“Congress has incorporated by reference, as within the jurisdiction of military commissions, all offenses which are defined as such by the law of war. . . .”). Congress has since seen fit to make certain war crimes punishable by explicit statutory enactment. See War Crimes Act, 18 U.S.C. § 2441.

180. See Kaplan II, *supra* note 93, at 280 (arguing violation of law of war must be alleged to obtain jurisdiction over offense).

181. See U.S. Dep’t of Defense, Military Commission Instruction No. 2, *Crimes and Elements for Trials by Military Commission* (Apr. 30, 2003), 32 C.F.R. §§ 11.1-11.6 (2005) [hereinafter *Crimes and Elements*] (defining offenses against law of war triable by President Bush’s law-of-war military commissions). This instruction lists thirty-three offenses that are punishable by military commission. See *id.* § 11.6. Specifically, there are eighteen “war crimes”: (1) willful killing of protected persons, (2) attacking civilians, (3) attacking civilian objects, (4) attacking protected property, (5) pillaging, (6) denying quarter, (7) taking hostages, (8) employing poison or analogous weapons, (9) using protected persons as shields, (10) using protected property as shields, (11) torture, (12) causing serious injury, (13) mutilation or maiming, (14) use of treachery or perfidy, (15) improper use of flag of truce, (16) improper use of protective emblems, (17) degrading treatment of a dead body and (18) rape. See *id.* § 11.6(a). There are eight “other offenses triable by military commission”: (1) hijacking or hazarding a vessel or aircraft, (2) terrorism, (3) murder by an unprivileged belligerent, (4) destruction of property by an unprivileged belligerent, (5) aiding the enemy, (6) spying, (7) perjury or false testimony and (8) obstruction of justice related to military commissions. See *id.* § 11.6(b). In addition, there are seven “other forms of liability and related offenses”: (1) aiding or abetting, (2) solicitation, (3) command/superior responsibility—perpetrating, (4) command/superior responsibility—misprision, (5) accessory after the fact, (6) conspiracy and (7) attempt. See *id.* § 11.6(c).

182. See Kaplan II, *supra* note 93, at 282 (suggesting that territory within zone of operations is sufficient to create jurisdiction over place).

183. See *id.* at 281-86 (setting forth test for jurisdiction over place criterion).

184. See Edmund M. Morgan, *Court-Martial Jurisdiction over Non-Military Persons Under the Articles of War*, 4 MINN. L. REV. 79, 107 (1920) (defining “zone of operations”).

however, that *Ex parte Quirin* modified the jurisdiction over place criterion insofar as it allows law of war jurisdiction to attach where actual peace prevails, so long as the offense charged is an offense against the law of war.<sup>185</sup> With respect to Afghanistan, the Bush administration asserts that Afghanistan is an active theatre of operations because the Armed Forces are currently engaged in an armed conflict there against both al-Qaeda and the remnants of the Taliban regime.<sup>186</sup>

## V. ANALYSIS OF THE BUSH ADMINISTRATION'S LEGAL POSITION

### A. Consistency with the Time-Person-Offense-Place Framework

President Bush's law-of-war military commissions satisfy the traditional Time-Person-Offense-Place Framework, as modified by *Ex parte Quirin*.<sup>187</sup> First, the jurisdiction in time criterion is met because each of the three coordinate branches of government recognized that the September 11th attacks created a state of war between the United States and al-Qaeda, and between the United States and the Taliban regime.<sup>188</sup> This state of war continues because the United States still considers itself to be at war with al-Qaeda and the Taliban regime, which means the jurisdiction in time criterion remains satisfied.<sup>189</sup>

Second, President Bush's law-of-war military commissions satisfy the jurisdiction over persons criterion because all al-Qaeda detainees and certain Taliban detainees are not POWs but unlawful combatants.<sup>190</sup> Al-Qaeda is not a party to the Third Geneva Convention and thus cannot claim its protections.<sup>191</sup> Even if the Third Geneva Convention applied to al-Qaeda, al-Qaeda detainees would not meet its POW requirements because they fail to conform to the rigid requirements of Article 4(A)(2).<sup>192</sup> Moreover, al-Qaeda detainees would not qualify as POWs under Article 4(A)(1) or 4(A)(3) because they do not satisfy the four conditions for

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185. See Kaplan II, *supra* note 93, at 278-79 (explaining that *Quirin* modified "zone of operations" requirement of jurisdiction over place criterion); see also FAIRMAN, *supra* note 101, § 52 (noting that after *Quirin*, law of war violations can occur in places of "profound peace").

186. See SECOND PERIODIC REPORT, *supra* note 152, at 48 (declaring that "United States and its coalition partners are engaged in a war against al-Qaida, the Taliban, and their affiliates and supporters") (emphasis added).

187. For a discussion of how President Bush's law-of-war military commissions are consistent with the Time-Person-Offense-Place Framework, see *infra* notes 188-200 and accompanying text.

188. See *supra* notes 128-41 and accompanying text.

189. See SECOND PERIODIC REPORT, *supra* note 152, at 48 (declaring United States currently at war with al-Qaeda).

190. See *Hamdan v. Rumsfeld*, 415 F.3d 33, 41 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (U.S. Nov. 7, 2005) (No. 05-184) (finding that al-Qaeda detainees are not POWs).

191. See *id.* (noting al-Qaeda is not party to Third Geneva Convention).

192. See *id.* at 40-41 (holding al-Qaeda fails Article 4(A)(2) of Third Geneva Convention).



lawful belligerency.<sup>193</sup> Taliban detainees, on the other hand, are presumptively POWs under Article 4(A)(3) of the Third Geneva Convention because they are members of the “regular armed forces” of an authority not recognized by its detaining power and are therefore entitled to individual Article 5 hearings to determine their status.<sup>194</sup>

Third, President Bush’s law-of-war military commissions meet the jurisdiction over offense criterion because the list of offenses promulgated by the U.S. Department of Defense constitute generally recognized violations of the law of war.<sup>195</sup> Offenses against the law of war have not been

193. See February 7, 2002 OLC Opinion, *supra* note 121, at 4-7 (explaining four conditions of Article 4(A)(2) and applying them to al-Qaeda members). While the question of whether the four conditions of Article 4(A)(2) implicitly apply to Articles 4(A)(1) and 4(A)(3) is debatable, the better view is that the conditions do apply. See *id.* at 4 (determining that four conditions do apply). For example, the British government so interpreted Article 1 of the Hague Regulations, as did the International Committee of the Red Cross in discussing Article 4 of the Third Geneva Convention. See MANUAL OF MILITARY LAW, *supra* note 148, ¶ 28, at 240 (noting that “[i]t is taken for granted that all members of the army as a matter of course will comply with the four conditions [of Article 1 of the Hague Regulations]; should they, however, fail in this respect they are liable to lose their special privileges of armed forces”) (citations omitted); INT’L COMM. OF THE RED CROSS, THE GENEVA CONVENTIONS OF 12 AUGUST 1949: COMMENTARY III, GENEVA CONVENTION RELATIVE TO THE TREATMENT OF PRISONERS OF WAR 62-63 (Jean S. Pictet ed., 1960) (stating that “regular armed forces” of Article 4(A)(3) have all material characteristics and attributes of “armed forces” of Article 4(A)(1) and that drafters of Third Geneva Convention were “therefore fully justified in considering that there was no need to specify for such armed forces the requirements stated” in Article 4(A)(2)(a)-(d)).

194. See January 11, 2002 State Department Memorandum, *supra* note 121, at 11 (arguing Taliban militia presumptively qualifies for POW status under Article 4(A)(3) of Third Geneva Convention).

195. See *Crimes and Elements*, *supra* note 181, at 32 C.F.R. §§ 11.1-11.6 (enumerating law of war offenses triable by President Bush’s law-of-war military commissions). Five types of charges have been referred to military commissions. See generally U.S. Dep’t of Defense, Military Commissions—Charge Sheets, available at [http://www.dod.mil/news/Nov2004/charge\\_sheets.html](http://www.dod.mil/news/Nov2004/charge_sheets.html) (last visited May 26, 2006) (collecting charges preferred against detainees). The five charged offenses are (1) conspiracy to commit the following offenses triable by military commission: attacking civilians, attacking civilian objects, murder by an unprivileged belligerent, destruction of property by an unprivileged belligerent and terrorism; (2) murder by an unprivileged belligerent; (3) attempted murder by an unprivileged belligerent; (4) aiding the enemy; and (5) attacking civilians. See *id.* The Army appears to recognize conspiracy as an offense against the law of war triable by military commission. See FM 27-10, *supra* note 18, ¶ 82 (noting persons who conspired to commit hostile or belligerent acts are subject to death penalty); *id.* ¶ 500 (stating that conspiracy to commit war crimes is punishable). This is consistent with historic Army practice. See U.S. DEP’T OF THE ARMY, A DIGEST OF OPINIONS OF THE JUDGE ADVOCATES GENERAL OF THE ARMY: 1912, at 1071 (1912) (listing “conspiracy by two or more to violate the laws of war by destroying life or property in aid of the enemy” as violation of law of war punished during Civil War); see also WINTHROP, *supra* note 15, at 839 (recognizing that “criminal conspiracies” were punishable by military commission during Civil War and citing examples). One prominent Civil War precedent involved a conspiracy to release Confederate POWs confined near Chicago, Ill. and lay waste to the city. See generally GEORGE ST.

codified definitively by Congress and therefore “need not be stated with the precision of a common law indictment.”<sup>196</sup> Deliberately attacking civilians and fighting out of uniform, however, are well-known offenses against the law of war, traditionally punishable by military tribunals.<sup>197</sup>

Finally, President Bush’s law-of-war military commissions satisfy the jurisdiction over place criterion because both the United States and Afghanistan constitute “zones of operations.”<sup>198</sup> The U.S. Supreme Court, in *Quirin*, found that the United States qualified as a zone of operations during World War II, and the Court concluded similarly that Afghanistan is a theatre of military operations by virtue of the September 11th attacks.<sup>199</sup> Further, after *Quirin* and *Hamdan*, it appears that law of war offenses can occur in locations of profound peace, not just in a theatre or zone of operations.<sup>200</sup>

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LEGER GRENFEL, H.R. EXEC. DOC. NO. 39-50 (2d Sess. 1867) (printing transcript of military commission proceedings and related orders). The military commission found the defendants guilty of conspiracy to violate the law of war, and both the Judge Advocate General of the Army and the President of the United States upheld this finding. See Letter from Joseph Holt, J. Advoc. Gen., to the President (June 29, 1865), reprinted in 8 WAR OF THE REBELLION, *supra* note 48, ser. 2, at 684 (opining that military commission trial was lawful); General Court-Martial Orders, No. 452, War Department, Adjutant-General’s Office, Washington, Aug. 22, 1865, reprinted in *id.* at 724 (confirming and commuting sentence of George St. Leger Grenfel). In addition to the Civil War, it appears that conspiracy to violate the law of war was triable by military commission during the Philippine Insurrection, World War II and the Korean War. See, e.g., Maj. Gen. Adna R. Chaffee, General Orders, No. 339, Headquarters Division of the Philippines, Manila, P.I., Nov. 6, 1901, at 4 (on file with author) (setting forth “a few of the well-established principles of law and procedure in cases of conspiracy” for “the future guidance of military commissions”); Gen. Douglas MacArthur, Letter Order, File AG 000.5 (24 Sep 45) JA, General Headquarters, United States Army Forces, Pacific, Subject: Regulations Governing the Trial of War Criminals, Sept. 24, 1945, ¶ 5(a) (on file with author) (making “all other offenses against the laws or customs of war” and “participation in a common plan or conspiracy to accomplish any of the foregoing” punishable by military commission); U.N. Command, Rules of Criminal Procedure for Military Commissions of the United Nations Command (Oct. 22, 1950) (on file with author), and reprinted in 60 U.S. NAVAL WAR COLLEGE, INTERNATIONAL LAW STUDIES 564, 565 (Howard S. Levie ed., 1979) (granting military commissions jurisdiction over “all attempts to commit, or conspiracies and agreements to commit, as well as inciting, encouraging, aiding, abetting, or permitting violations of the laws and customs of war of general application”).

196. *In re Yamashita*, 327 U.S. 1, 17 (1946) (discussing law of war offenses).

197. See *Ex parte Quirin*, 317 U.S. 1, 30-37 (1942) (enumerating certain law of war offenses).

198. See Kaplan II, *supra* note 93, 281-86 (examining jurisdiction over place criterion).

199. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 521 (2004) (plurality opinion) (indicating that military operations are ongoing in Afghanistan); FAIRMAN, *supra* note 101, § 52 (noting law of war offenses can occur in location of “profound peace” such as United States).

200. See Kaplan II, *supra* note 93, at 279 (noting effect of *Quirin* on jurisdiction over place criterion).

B. *Consistency with Judicial Military Commission Precedent*

In addition to satisfying the Time-Person-Offense-Place Framework, President Bush's law-of-war military commissions are consistent with U.S. Supreme Court precedent.<sup>201</sup> Opponents of President Bush's military commissions offer a two-prong constitutional law assault.<sup>202</sup> First, they argue that *Milligan* holds that it is unconstitutional to conduct military trials of civilians in the United States while the civil courts are open and functioning, thus precluding the trial of members of al-Qaeda and the Taliban militia.<sup>203</sup> Second, opponents contend that *Quirin*, which would appear to support the Bush administration's position, does not control because it is distinguishable from the "War on Terrorism" in three material respects: (1) Congress formally declared war during World War II, but in the "War on Terrorism" Congress has merely authorized the use of force;<sup>204</sup> (2) the UCMJ superseded the Articles of War, which governed the *Quirin* military commission;<sup>205</sup> and (3) the United States, since *Quirin*, has ratified the Geneva Conventions of 1949, which preclude military commission jurisdiction.<sup>206</sup>

Neither *Milligan* nor *Quirin*, however, preclude trial by a law-of-war military commission.<sup>207</sup> *Milligan* is inapposite here for three reasons.<sup>208</sup> First, *Milligan* was a U.S. citizen detained and tried in the United States.<sup>209</sup> The Military Order, however, applies only to non-citizens.<sup>210</sup> Second, *Milligan* was not a belligerent and was therefore not amenable to law of war

201. For an analysis of the case-law and international law ramifications on the legality of President Bush's law-of-war military commissions, see *infra* notes 202-47 and accompanying text.

202. See Bickers, *supra* note 114, at 902-06 (analyzing challenges to military commission jurisdiction).

203. See *id.* at 904-05 (noting some commentators argue *Milligan* prohibits use of military commissions when civil courts are open).

204. See Katyal & Tribe, *supra* note 108, at 1284-85 (arguing that lack of declaration of war distinguishes *Quirin* military commission from Military Order's law-of-war military commissions). *But cf.* Curtis A. Bradley & Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2d 249, 254-55 (2002) (contending declaration of war distinction is immaterial).

205. See Jack Goldsmith & Cass R. Sunstein, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 274-76 (2002) (analyzing UCMJ statutory objections to President Bush's law-of-war military commissions).

206. See *id.* at 277-78 (noting international law objections to President Bush's law-of-war military commissions).

207. See Bickers, *supra* note 114, at 906, 910-12 (arguing *Milligan* was irrelevant to "War on Terrorism" and *Quirin* supports President Bush's law-of-war military commissions).

208. For a discussion of *Milligan's* inapplicability to President Bush's law-of-war military commissions, see *infra* notes 209-17 and accompanying text.

209. See *Ex parte Quirin*, 317 U.S. 1, 45 (1942) (recognizing *Milligan's* status as U.S. citizen).

210. See Military Order, *supra* note 5, § 2(a), 3 C.F.R. at 919 (excluding U.S. citizens from Military Order's ambit).

jurisdiction.<sup>211</sup> In contrast, members of al-Qaeda and the Taliban militia are belligerents because they are engaged in armed conflict against the United States.<sup>212</sup> In fact, the *Quirin* Court distinguished *Milligan* primarily on this ground.<sup>213</sup> Further, the Court in *Hamdi v. Rumsfeld* reaffirmed this distinction, noting that *Quirin* both “postdates and clarifies” *Milligan*.<sup>214</sup> Third, *Milligan*’s military commission acted without statutory recognition and directly contravened then-existing law placing it under Category Three of *Youngstown*.<sup>215</sup>

President Bush, however, is acting pursuant to UCMJ Article 21, which provides explicit statutory recognition of military commissions, in addition to UCMJ Article 36 and the AUMF.<sup>216</sup> Therefore, like the *Quirin* military commission, President Bush’s law-of-war military commissions have ample statutory support, placing them under the rubric of Category One of *Youngstown*.<sup>217</sup> Thus, President Bush’s military commissions are consistent with judicial military commission precedent.

### C. Consistency with Domestic and International Law

President Bush asserts that the Constitution, the AUMF and UCMJ Articles 21 and 36 authorize him to employ law-of-war military commissions in the “War on Terrorism.”<sup>218</sup> Significantly, the Bush administration appears to contend that the President has inherent constitutional power to try violations of the law of war by military commission.<sup>219</sup> Historically,

211. See December 2, 1969 Department of the Army Memorandum, *supra* note 97, at 3 (noting that *Milligan* dealt with martial law, not law of war, jurisdiction).

212. See Military Order, *supra* note 5, § 1(a), 3 C.F.R. at 918 (recognizing existence of state of armed conflict).

213. See *Quirin*, 317 U.S. at 45 (distinguishing *Milligan*).

214. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 522-24 (2004) (plurality opinion) (discussing relevance of *Quirin* and accepting *Quirin* as good authority “on the question of whether citizens may be detained” as enemy combatants).

215. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 140 (1866) (finding military commission violated Habeas Corpus Act).

216. See *Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (U.S. Nov. 7, 2005) (No. 05-184) (holding Congress authorized military commissions via UCMJ Article 21).

217. See *id.* (finding same statutory authority exists today as existed when *Quirin* decided).

218. See Military Order, *supra* note 5, 3 C.F.R. at 918 (citing President’s constitutional power, AUMF and UCMJ as authority for convening law-of-war military commissions).

219. See February 26, 2002 OLC Opinion, *supra* note 121, at 5 (stating that military commissions are “entirely creatures of the President’s authority as Commander in Chief under Article II and are part and parcel of the conduct of a military campaign”). Historically, the executive branch has construed the Commander-in-Chief Clause as a substantive grant of authority to the President. See Memorandum Opinion from William H. Rehnquist, Assistant Att’y Gen., Office of Legal Counsel, to Charles W. Colson, Special Counsel to the President, *The President and the War Power: South Vietnam and the Cambodian Sanctuaries* 5 (May 22, 1970), in White House Special Files: Staff Member & Office Files: Charles W. Col-

numerous commentators have supported this view.<sup>220</sup> The Supreme Court, however, is unlikely to determine the inherent authority issue presented in *Hamdan v. Rumsfeld*, much like it declined to answer this issue in *Quirin*.<sup>221</sup> Rather, the Court will likely decide *Hamdan* based on the AUMF, the UCMJ and international law.<sup>222</sup>

The AUMF authorizes the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the September 11th attacks.<sup>223</sup> Unlike in World War II, the United States is not fighting a war that formally has been declared by Congress against a nation-state.<sup>224</sup> The weight of authority, however, suggests that distinctions between declarations of war and authorizations for the use of force are immaterial.<sup>225</sup> Moreover, the trial of enemy combatants who have violated the law of war is "part of

son; Box 43; Folder 1 of 2: Cambodia; Nixon Presidential Materials Staff, Nat'l Archives & Records Admin., College Park, Md. (opining that it is "reasonably clear that the designation of the President as Commander-in-Chief of the Armed Forces is a substantive grant of power, and not merely a commission which entitles him to precedence in a reviewing stand").

220. See, e.g., CLARENCE A. BERDAHL, WAR POWERS OF THE EXECUTIVE IN THE UNITED STATES 147 (1921) ("Military commissions, deriving their authority and jurisdiction from military usage and the common law of war, and their creation, composition, procedure, and decisions being subject to the complete control of the Executive, are therefore, even more than courts-martial, merely agencies of the Executive in his capacity as Commander-in-Chief."); EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS, 1787-1957, at 258 (4th rev. ed. 1957) ("Punishment of the [*Quirin*] saboteurs was therefore within the President's power as Commander-in-Chief in the most elementary, the purely martial, sense of that power."); CLINTON ROSSITER, THE SUPREME COURT AND THE COMMANDER IN CHIEF 109 (Richard P. Longaker ed., expanded ed. 1976) (1951) ("[T]he military commission is wholly the creature of the commander in chief or of one of his ranking officers in the field. . . . Their jurisdiction, composition, procedure, and powers are for the President alone to determine and supervise.").

221. See *Ex parte Quirin*, 317 U.S. 1, 29 (1942) ("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.").

222. See *id.* (stating that issue was whether President and Congress, acting together, could try persons by military commission).

223. See AUMF, *supra* note 84, § 2(a) (authorizing use of force against al-Qaeda).

224. Compare J. Res. of Dec. 11, 1941, ch. 564, 55 Stat. 796 (declaring war on Germany in World War II), with AUMF, *supra* note 84, § 2(a) (authorizing use of force against al-Qaeda).

225. See, e.g., *Hamdan v. Rumsfeld*, 415 F.3d 33, 37-38 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (U.S. Nov. 7, 2005) (No. 05-184) (dismissing argument that declaration of war is necessary); accord Bradley & Goldsmith, *Congressional Authorization*, *supra* note 132, at 2128 ("[A] declaration of war is not required in order for Congress to authorize the President to fully prosecute a war; a broadly worded authorization of force is sufficient.").

the conduct of war," which Congress may be assumed to have authorized via the AUMF.<sup>226</sup>

Under UCMJ Article 21, military commissions have "concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions."<sup>227</sup> The *Quirin* Court interpreted UCMJ Article 21's predecessor statute, Article of War 15, to "authorize"—not merely recognize—the use of military commissions.<sup>228</sup> Thus, subject to the limitations imposed by the law of war, Congress has sanctioned the use of military commissions to try enemy combatants.<sup>229</sup>

President Bush's law-of-war military commissions are also consistent with the international law of war, as incorporated into U.S. law by UCMJ Article 21.<sup>230</sup> "Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land."<sup>231</sup> Thus, international law—specifically, the Third Geneva Convention—may limit the use of military commissions.<sup>232</sup> The Third Geneva Convention, however, does not create judicially enforceable rights.<sup>233</sup> Nevertheless, even if the Third Geneva Convention is judicially enforceable, al-Qaeda detainees and certain members of the Taliban militia could not claim its protection because they are not POWs but unlawful combatants.<sup>234</sup> Thus, the Third Geneva Convention's prohibitions do not apply to the trial of al-Qaeda members or certain members of the Taliban militia found not to be POWs.<sup>235</sup> Accordingly, President Bush's law-of-war military commissions are also consistent with the Third Geneva Convention and the international law of war.<sup>236</sup>

226. See *Hamdan*, 415 F.3d at 37-38 (noting trial of enemy combatants for law of war violations is incident to waging war).

227. 10 U.S.C. § 821 (giving military commissions concurrent jurisdiction over law of war offenses).

228. See Bradley & Goldsmith, *Congressional Authorization*, *supra* note 132, at 2130 (noting *Quirin* Court held Congress "authorized" military commissions to try law of war offenses, not merely "recognizing" their historical use by President).

229. See *id.* (suggesting that international law may limit use of law-of-war military commissions).

230. For a discussion of how international law limits the use of President Bush's law-of-war military commissions, see *infra* notes 231-36 and accompanying text.

231. U.S. CONST. art. VI, cl. 2 (making treaties supreme law of land).

232. See Bickers, *supra* note 114, at 922 (noting that international law limits jurisdiction of law-of-war military commissions).

233. See *Hamdan v. Rumsfeld*, 415 F.3d 33, 40 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 622 (U.S. Nov. 7, 2005) (No. 05-184) (holding Third Geneva Convention is not judicially enforceable).

234. See *id.* at 40-42 (holding al-Qaeda detainees are not POWs).

235. See *id.* at 41 (finding Third Geneva Convention inapplicable to al-Qaeda); *United States v. Lindh*, 212 F. Supp. 2d 541, 557-58 (E.D. Va. 2002) (holding Taliban militia and Taliban detainees do not qualify as POWs).

236. See *Hamdan*, 415 F.3d at 40-42 (upholding lawfulness of particular law-of-war military commission despite international law challenge).

UCMJ Article 36 allows the President to prescribe trial procedures for military commissions, which must apply the principles of law and rules of evidence generally recognized in criminal trials before the U.S. district courts, unless the President does not consider it “practicable” to do so.<sup>237</sup> In the Military Order, President Bush concluded it was “not practicable to apply in military commissions . . . the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.”<sup>238</sup> Despite this finding, military commission procedures “may not be contrary to or inconsistent with” the UCMJ.<sup>239</sup> Here, two schools of thought have emerged.<sup>240</sup> Under the first school of thought, military commissions must comply with all procedural requirements applicable to courts-martial under the UCMJ.<sup>241</sup> Under the second school of thought, however, military commissions only must comply with those few provisions of the UCMJ that Congress expressly made applicable to military commissions.<sup>242</sup>

The second school of thought is the better view for three reasons. First, Congress took pains to distinguish between courts-martial and military commissions throughout the UCMJ, and Congress’s will should be respected.<sup>243</sup> Second, the U.S. Supreme Court in *Madsen v. Kinsella*,<sup>244</sup> which was decided two years after the UCMJ was adopted, found that military commission procedures were not prescribed by statute.<sup>245</sup> Third, if the same procedural requirements were applicable to both courts-martial and military commissions, there would be no need for military commissions, as the two species of tribunals would be identical.<sup>246</sup> Thus, military commissions need only comply with the procedural requirements that the UCMJ expressly makes applicable to military commissions.<sup>247</sup>

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237. See 10 U.S.C. § 836(a) (permitting President authority to use discretion in applying rules of U.S. district courts to military tribunals as long as rules are not “contrary to or inconsistent with” UCMJ).

238. Military Order, *supra* note 5, § 1(f), 3 C.F.R. at 918 (making UCMJ Article 36 findings).

239. 10 U.S.C. § 836(a).

240. See *Hamdan*, 415 F.3d at 42 (noting differing interpretations of UCMJ Article 36).

241. See *id.* (summarizing first school of thought regarding UCMJ Article 36).

242. See *id.* at 42-43 (explaining second school of thought vis-à-vis UCMJ Article 36).

243. See *id.* at 42 (acknowledging differences in UCMJ between courts-martial and military commissions).

244. 343 U.S. 341 (1952).

245. See *Hamdan*, 415 F.3d at 43 (discussing *Madsen*).

246. See *id.* at 42 (theorizing that first school of thought would “obliterate” any distinction between courts-martial and military commissions).

247. See *id.* at 43 (stating conclusion regarding UCMJ Article 36). The UCMJ refers to military commissions in nine instances. See 10 U.S.C. §§ 821, 828, 836, 847-850, 904 and 906. A UCMJ Article 36 separation of powers objection may be raised that the President is usurping Congress’s Article I power to “define and punish . . . Offences against the Law of Nations” by promulgating substantive crimes triable by military commission. See *Crimes and Elements*, *supra* note 181, at 32

D. *Youngstown and Constitutional Limitations*

Although President Bush's law-of-war military commissions satisfy the Time-Person-Offense-Place Framework and are consistent with Supreme Court precedent and domestic and international law, the issue remains whether Congress and the President can try persons by military commission after *Youngstown*, without regard to Article III, Section 2 of the Constitution and the Fifth and Sixth Amendments.<sup>248</sup> In the Military Order, President Bush is acting pursuant to both his constitutional power as Commander-in-Chief of the Armed Forces and the congressional power delegated to him through the AUMF and UCMJ.<sup>249</sup> Because the President and Congress are acting in concert, President Bush's law-of-war military commissions should be analyzed under Category One of *Youngstown*.<sup>250</sup>

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C.F.R. §§ 11.1-11.6 (enumerating law of war offenses triable by President Bush's law-of-war military commissions). Opponents contend that UCMJ Article 36 gives the President the power to establish "procedures," not the power to define offenses against the law of war. Nevertheless military commissions have always operated based on the common law of war which, by definition, is not precisely codified. Surely, the Bush administration cannot be penalized for attempting to provide clarification of what the United States considers to be violations of the law of war. In contrast to its opponents, the Bush administration contends that the law of war offenses enumerated "constitute violations of the law of [war] or offenses that, consistent with that body of law, are triable by military commission," which are also "declarative of existing law." *Id.* at 32 C.F.R. § 11.3(a). This practice appears to be consistent with historical Army custom. See FM 27-10, *supra* note 18, ¶ 505(e) ("[D]irectives declaratory of international law may be promulgated to assist [military] tribunals in the performance of their function.").

248. See Kaplan I, *supra* note 33, at 143 (noting Constitution may limit trials by military commission).

249. See Military Order, *supra* note 5, 3 C.F.R. at 918 (listing legal authority for establishing President Bush's law-of-war military commissions).

250. See Bradley & Goldsmith, *Congressional Authorization*, *supra* note 132, at 2130 (indicating *Quirin* Court held Congress authorized military commissions to try law of war offenses). Congress, moreover, has not passed legislation circumscribing President Bush's authority, but generally has tried to augment that authority. See, e.g., DTA, *supra* note 84, § 1005(e)(3) (providing judicial review of military commissions); Military Commissions Act of 2005, H.R. 3044, 109th Cong. (2005) (amending UCMJ to provide standards for use of military commissions for trial of offenses under law of war); Guantanamo Detainees Procedures Act of 2005, H.R. 3038, 109th Cong. (2005) (affirming authority of executive branch to detain foreign nationals as unlawful combatants and providing for President to establish military tribunals to try such persons); Detention of Enemy Combatants Act, H.R. 1076, 109th Cong. (2005) (authorizing President to detain enemy combatant who is U.S. person or resident, and who is member of al-Qaeda or knowingly cooperated with members of al-Qaeda); Targeting Terrorists More Effectively Act of 2005, S. 12, 109th Cong. (2005) (reciting U.S. policy of providing individualized hearings for all detainees for purpose of expeditiously holding them accountable for violations of law of war); Military Commissions Act of 2004, H.R. 5222, 108th Cong. (2004) (amending UCMJ to provide standards for use of military commissions for trial of offenses under law of war or in furtherance of international terrorism); H.R. Con. Res. 472, 108th Cong. (2004) (expressing sense of Congress that apprehension, detention and interrogation of terrorists are fundamental elements in successful prosecution of global "War on Terrorism" and protection of lives of United States citizens at home and abroad); Military Tribunal Regulations Review



Hence, under *Youngstown*, the Constitution itself must preclude trial by military commission in order for President Bush's law-of-war military commissions to be found unconstitutional.<sup>251</sup>

Neither Article III, Section 2 of the Constitution nor the Fifth and Sixth Amendments preclude trial by military commission.<sup>252</sup> The Fifth Amendment applies to "all persons" and prohibits the trial of non-military persons outside of the civilian court system.<sup>253</sup> There are two theories for excluding violations of the law of war from the Fifth Amendment's ambit.<sup>254</sup> Under the first view, "trials for offences against the laws of war are not embraced or intended to be embraced" by the Fifth Amendment, thereby making the Fifth Amendment inapplicable to military commission trials.<sup>255</sup> Under the second view, because the Fifth Amendment excludes "cases arising in"—as opposed to "persons in"—the land or naval forces, persons who violate the law of war are not entitled to the protections of the Fifth Amendment.<sup>256</sup> In *Quirin*, the Court endorsed the first view, holding the Fifth Amendment inapplicable to military commissions be-

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Act, H.R. 2428, 108th Cong. (2003) (providing for congressional review of regulations relating to military tribunals); Military Tribunals Act of 2003, H.R. 1290, 108th Cong. (2003) (authorizing President to establish military tribunals to try terrorists responsible for September 11th attacks); Detention of Enemy Combatants Act, H.R. 1029, 108th Cong. (2003) (granting President power to detain enemy combatant who is U.S. person, or resident who is member of al-Qaeda, or knowingly cooperated with members of al-Qaeda); Justice Enhancement and Domestic Security Act of 2003, S. 22, 108th Cong. (2003) (permitting President to establish tribunals to try members of al-Qaeda who have violated law of war); Military Tribunal Authorization Act of 2002, H.R. 4035, 107th Cong. (2002) (authorizing President to establish military tribunals to try terrorists responsible for September 11th attacks); Military Tribunal Authorization Act of 2002, S. 1941, 107th Cong. (2002) (same); Military Commission Procedures Act of 2002, S. 1937, 107th Cong. (2002) (setting forth certain requirements for trials and sentencing by military commissions); Foreign Terrorist Military Tribunal Authorization Act of 2001, H.R. 3468, 107th Cong. (2001) (authorizing President to convene military tribunals for trial of persons other than U.S. citizens and lawful resident aliens who are apprehended in connection with September 11th attacks).

251. See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-37 (1952) (Jackson, J., concurring) (explaining method of analyzing actions taken by President and Congress acting in concert under Category One).

252. See *Ex parte Quirin*, 317 U.S. 1, 45 (1942) (concluding Fifth and Sixth Amendments do not apply to military commissions).

253. See U.S. CONST. amend. V (guaranteeing that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces" and that no person shall be deprived of "life, liberty, or property, without due process of law").

254. See Morgan, *supra* note 184, at 90-107 (setting forth competing schools of thought regarding Fifth Amendment).

255. See Speed Opinion, *supra* note 16, at 313 (advancing first species of Fifth Amendment argument).

256. See Halleck, *supra* note 26, at 963-67 (setting forth argument based on Fifth Amendment's excepting clause); Morgan, *supra* note 184, at 97-107 (evaluating excepting clause argument).

cause the civil courts, at common law, did not try war-related offenses.<sup>257</sup> Thus, under Supreme Court precedent, the Fifth Amendment provides no constitutional bar to trial by military commission.<sup>258</sup>

Similarly, the Sixth Amendment does not preclude trial by military commission.<sup>259</sup> The Sixth Amendment requires a jury trial in all criminal prosecutions; yet, unlike the Fifth Amendment, the Sixth Amendment does not except members of the Armed Forces.<sup>260</sup> The *Milligan* Court held the Sixth Amendment does not apply to the Armed Forces.<sup>261</sup> Thus, because the Fifth Amendment does not apply to trials by military commission, the Sixth Amendment is also inapplicable. Consequently, military commission trials are consistent with the Constitution and Supreme Court precedent.<sup>262</sup>

## VI. CONCLUSION

Historically, law-of-war military commissions have been considered appropriate tribunals for adjudicating offenses against the law of war com-

257. See *Quirin*, 317 U.S. at 40-41 (finding Fifth Amendment not intended to apply to trials by military commission). Here, the Court noted that spies have long been amenable to trial by Army court-martial. See *id.* at 41-42. In addition to this Army practice, Congress also provided for the trial of spies by U.S. Navy courts-martial. See Act of Mar. 2, 1799, ch. 24, art. 35, 1 Stat. 709, 712 (making spies amenable to trial by court-martial); Act of Apr. 23, 1800, ch. 33, art. 12, 2 Stat. 45, 47 (same); Act of July 17, 1862, ch. 204, art. 4, 12 Stat. 600, 602 (same); Rev. Stat. § 1624, art. 5 (2d ed. 1878) (same); 34 U.S.C. § 1200, art. 5 (1926) (same). Today, spies are no longer considered violators of the law of war, but are punished severely in order “to render that method of obtaining information as dangerous, difficult, and ineffective as possible.” FM 27-10, *supra* note 18, ¶ 77 (stating Army position vis-à-vis spies). See generally David A. Anderson, *Spying in Violation of Article 106, UCMJ: The Offense and the Constitutionality of Its Mandatory Death Penalty*, 127 MIL. L. REV. 1, 4-36 (1990) (tracing history of spying offense).

258. See *Quirin*, 317 U.S. at 45 (holding Fifth Amendment inapplicable to trials by military commission). In *Hamdan*, however, the Supreme Court may conclude that the Fifth Amendment’s due process clause does apply to trials by military commission, “particularly in view of the expanded scope which the Supreme Court has given . . . to those fundamental rights which the due process clause guarantees to all criminal defendants.” Office of the Gen. Counsel, U.S. Dep’t of Defense & U.S. Dep’t of the Army, OTJAG, Military Justice, *Military Commissions* 14 (1970) (on file with author) (analyzing lawfulness of using military commissions to try law of war offenses); *accord* *Hamdi v. Rumsfeld*, 542 U.S. 507, 509 (2004) (plurality opinion) (holding due process clause applicable to detention of U.S. citizen held as enemy combatant).

259. See *Quirin*, 317 U.S. at 45 (holding Sixth Amendment inapplicable to trials by military commission).

260. See U.S. CONST. amend. VI (guaranteeing accused jury trial in criminal cases).

261. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866) (“[T]he framers of the Constitution, doubtless, meant to limit the right of trial by jury, in the sixth amendment, to those persons who were subject to indictment or presentment in the fifth.”).

262. See *Quirin*, 317 U.S. at 45 (holding Sixth Amendment inapplicable to trials by military commission).

mitted by nation-state enemies.<sup>263</sup> Congress, the President and the U.S. Supreme Court consistently have upheld the military commission's jurisdiction.<sup>264</sup> The changes in domestic and international law that have occurred since World War II have limited—but not eliminated—military commission jurisdiction over offenders against the law of war.<sup>265</sup>

In keeping with the American tradition, any extension of military jurisdiction over non-military persons must be strictly construed, and the Constitution and laws obeyed.<sup>266</sup> In this unconventional war with both the al-Qaeda terrorist network and the Taliban regime, President Bush complied with both the Constitution and the laws by basing his Military Order on the President's inherent constitutional power and the power Congress delegated to him under the UCMJ and the AUMF.<sup>267</sup> Because today's military commissions are consistent with Colonel Winthrop's Time-Person-Offense-Place Framework, and because they comport with the Constitution, U.S. Supreme Court precedent and domestic and international law, military commissions remain *an* appropriate forum to try law of war violations in the ongoing "War on Terrorism."<sup>268</sup> In brief, the military commission has once again answered its nation's call to duty and, if endorsed again by the U.S. Supreme Court, undoubtedly will be a valuable tool for the United States in its battle against global terrorism. In the process, the military commission also reaffirms the fact that the "*maxim inter armis silent leges* is never wholly true."<sup>269</sup>

*Haridimos V. Thravalos*

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263. See WINTHROP, *supra* note 15, at 832-34 (discussing traditional use of military commissions).

264. See Kaplan I, *supra* note 33, at 125 (noting all three branches of federal government have recognized propriety of using military commissions to try law of war violations).

265. For a discussion of the effects of post-World War II changes in military commission jurisdiction, see *supra* notes 201-25 and accompanying text.

266. See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (lodging grievance against King George III for rendering "Military independent of and superior to the Civil Power").

267. See Military Order, *supra* note 5, 3 C.F.R. at 918 (reciting bases of authority for establishing President Bush's law-of-war military commissions).

268. For a discussion of President Bush's law-of-war military commissions vis-à-vis the Time-Person-Offense-Place Framework, the Constitution, U.S. Supreme Court precedent and domestic and international law, see *supra* notes 187-240 and accompanying text.

269. Speed Opinion, *supra* note 16, at 301. The maxim, often attributed to Cicero, means "in war the law is silent." DOCUMENTS ON THE LAWS OF WAR, *supra* note 18, at 31.

IN LOVING MEMORY



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1940-2004

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