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MILITARY COMMISSIONS AND TERRORISM

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President George W. Bush's Military Order of November 13, 2001, issued just thirty-two days after the terrorist atrocities of September 11, 2001, pointedly adopted the language of war and, almost by fiat, declared that terrorism was a war crime. As a result, under the Military Order the fight against terrorism became a "state of armed conflict"[1] and terrorist acts became "violations of the laws of war."[2]

These designations abruptly erased long-held distinctions between terrorism and war crimes and represented a signal departure from pre-9/11 practice. More specifically, the Military Order has provided the theoretical underpinning for allowing foreign terrorists to be subject to trial by American military commissions. The consequence has been the largest expansion of the jurisdiction of military commissions in American history.[3]

The novelty of using military commissions to try terrorists is apparent in several respects. First, unlike every other military commission ever created by the United States government, the Military Order, which is focused almost exclusively on terrorism, is designed to create tribunals not for war criminals but for terrorists. Next, terrorism and war crimes had been defined by different legal regimes. The Order, however, collapses their definitions and blurs longstanding distinctions. Finally, military commissions have never before been used to try terrorists. As a long line of U.S. Supreme Court and Attorney General Opinions demonstrate, military commissions had been restricted to members of an organized military force acting as an agent of a state or government.

Using military commissions to try terrorists, then, represents a stark departure previous practice and policy. As a result, because the commissions envisaged by the Order at last appear to be nearing realization (almost two years after the Order's issuance), the Supreme Court may have to decide the legality of this

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1. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 16, 2001).

2. *Id.*

3. *See* William H. Taft, Remarks at the OSCE Human Dimension Implementation Meeting (Sept. 10, 2002) ("The act of detaining enemy combatants is not an act of punishment. Rather, it is intended first and foremost to prevent enemy combatants from continuing to fight.") (transcript available at http://www.osce.org/odihr/hdim/2002/doc/speech_1.pdf).

approach. And while the government will emphasize its duty to protect national security in a time of "war," it should at least be recognized that permitting military commissions to try terrorists is a radically different approach. Indeed, supporters of the Military Order could more credibly argue that the exigencies of September 11th led to a cataclysmic transformation of international law legitimizing what had previously been illegitimate. Better to acknowledge an arguably necessary shift in the legal landscape than to assert a dubious consistency.

I. THE MILITARY ORDER CREATES A FORUM FOR TRYING TERRORISTS

In the immediate aftermath of September 11th, the rhetorical and symbolic purposes of the Military Order were paramount. To begin with, the Order departed starkly from prior orders creating military commissions by focusing unambiguously on terrorism rather than violations of the laws of war. This is apparent from the face of the Order, which repeatedly mentions terrorism and terrorists and clearly is directed at persons accused of terrorist acts rather than war crimes. In the "Findings" section, for example, the Order states that "international terrorists" have committed "grave acts of terrorism" and that there is a risk of "further terrorist attacks."[4] Individuals "involved in international terrorism" may "undertake further terrorist attacks."[5] Military commissions are needed due to "the nature of international terrorism" for the "prevention of terrorist attacks."[6]

The Military Order, therefore, introduced and formalized the militarization of America's response to terrorism. It repudiated the idea that terrorism is strictly a criminal justice problem and, more importantly, established the legal basis for a long-term military approach to the problem of terrorism. By embracing the notion that terrorist acts are war crimes, the Military Order provided a conceptual context that sought to legitimate overwhelming force in response. Moreover, the Order delivered this message of resolve at the outset of the military response to terrorism. As a result, those suspected of terrorism during the length of this unending war are subject to what no foreign terrorist has ever faced before: an American military tribunal staffed by U.S. soldiers as judges, no habeas corpus option and no right of appeal to civilian courts.

The text of the Military Order demonstrates its single-minded emphasis on terrorists rather than war criminals. Section 2 of the Order, describing the persons eligible for trial by military commissions, does not state that war criminals are to be subject to the commissions. Instead, the persons to be tried pursuant to the Military Order are any individual who "is or was a member of the organization known as al Qaida" and any individual who "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor" designed to harm "the United States, its citizens, national security, foreign policy, or economy."[7] The Military Order also permits trial by military

4. Military Order, *supra* note 1.
5. *Id.*
6. *Id.*
7. *Id.*

commission of any individual who has "knowingly harbored" current and former members of al Qaida or other persons that have engaged in, aided or abetted of conspired to commit terrorism.[8]

The Military Order's ideological purposes were further evidenced by the fact that at the time of its promulgation there was no apparent intent to actually create commissions. Although various rules and regulations regarding the operation of the commissions have been released in the twenty months after the issuance of the Order, there has been no urgency to try persons by the commissions authorized by the Order. This is unusual. Other Presidential orders resulted in the formation of panels within a short period of time. For example, the German saboteurs prosecuted pursuant to President Roosevelt's order in 1942 were already in custody when the order was issued.[9] Within a two-month period, the saboteurs were captured, the military commission was ordered and completed its proceedings, the U.S. Supreme Court heard oral arguments and upheld the legality of the trial, and the Germans were executed. In contrast, almost two years after the Order, only preliminary steps toward actually using the commissions have been taken, further suggesting that the rhetorical purposes of the Order, at least initially, were paramount.

II. ACTS OF TERRORISM HAVE NOT BEEN CONSIDERED OFFENSES TRIABLE BY MILITARY COMMISSIONS

Military tribunals, not being courts of general jurisdiction, may only adjudicate crimes to the extent authorized to do by an act of Congress or the common law of war. The legitimacy of terrorists being tried by military commissions according to the Military Order, therefore, depends on whether such authorization exists either in a federal statute or in the laws of war. If neither Congress nor the laws of war permits such trials, any commissions created pursuant to the Military Order may be perceived as lacking legitimacy.[10]

Regarding the first point, plainly Congress has never authorized military commissions to try terrorists. No U.S. statute permits military commissions to try terrorists. The statutory authority cited in the Military Order, Section 821 of the Uniform Code of Military Justice (UCMJ) does not state that military tribunals can be used to try terrorists. Instead, it simply preserves the well-established jurisdiction of military commissions over crimes as established by statute or by the laws of war. The statute itself states that it "do[es] not deprive military

8. Military Order, *supra* note 1.

9. Appointment of Military Commission, 7 Fed. Reg. 5103 (July 2, 1942).

10. The Military Order relies upon the President's authority as Commander in Chief and the Authorization for Use of Military Force Joint Resolution. 10 U.S.C. § 836 (1998); S.J. Res. 23 107th Cong. (2001). The President's authority as Commander in Chief to create military commissions, however, must be exercised consistently with the laws of war. As to the Joint Resolution, it authorized the use of force, not the creation of military commissions to try terrorists. It has been argued that authorizing military force against terrorism necessarily includes authorizing military trial of terrorists. There is no evidence, however, that Congress intended to approve military commissions, which had never been used previously to try terrorists.

commissions . . . of concurrent jurisdiction [with courts-martial] with respect to offenders or offenses that by statute or by the law of war may be tried by military commission."[11]

In the absence of statutory authorization, the question becomes whether the law of war, also known as international humanitarian law, permits such prosecutions. As the U.S. Attorney General opined in 1918, military courts cannot try individuals who are "not a member of the military forces" unless they are "subject to the jurisdiction of such court under the laws of war or martial law."[12] Thus, the issue is whether the laws of war, which traditionally has defined the jurisdiction of American military commissions, can be stretched to encompass terrorism. As shown below, while not entirely mutually exclusive, the acts of terrorism committed by al Qaida and other groups that are the focus of the Order cannot generally be fit into the definitional framework of international humanitarian law.

The question of whether terrorism can be defined as a war crimes and therefore come within the jurisdiction of military commissions, largely depends on whether terrorism can be defined as an "international armed conflict." The most universally accepted definition of war crimes, recognized in federal statutes[13] and elsewhere, is the "grave breaches" provisions of the four Geneva Conventions of 1949.[14] The Geneva Conventions require an "armed conflict which may arise between two or more of the High Contracting Parties" as a threshold requirement.[15] Isolated attacks over a period of years by persons associated with freelance terrorist networks unaffiliated with any government, however, generally have not been defined as an armed conflict. Thus, the threshold requirement for application of the Geneva Conventions – an "armed conflict" – is not satisfied by a conflict between one High Contracting Party (the United States) and a transnational network of terrorists (al Qaeda).

Violations of Common Article 3 of the Geneva Conventions, which apply to non-international armed conflicts taking place within the territory of a High Contracting Party, might be considered war crimes and therefore subject to military commissions.[16] However, Common Article 3 has traditionally been viewed as applying to an armed conflict between rebel or insurgent groups and a

11. 10 U.S.C. § 821 (2003). *See also Ex Parte Vallandigham*, 68 U.S. 243, 249 (1863) ("[M]ilitary jurisdiction is of two kinds. First, that which is conferred and defined by statute; second, that which is derived from the common law of war").

12. Trial of Spies by Military Tribunals, 31 U.S. Op. Att. Gen. 356, 364.

13. *See* War Crimes Act of 1996, 18 U.S.C. § 2441 (defining war crimes to mean, *inter alia*, any conduct (1) defined as a grave breach under the Geneva Conventions; (2) prohibited by Hague Convention IV; (3) that violates common Article 3 of the Geneva Conventions; or (4) willfully kills or seriously injures civilians through mines or booby-traps).

14. Protection of War Victims: Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316; Protection of War Victims: Civilian Persons, Aug. 12, 1949, 6 U.S.T. 3516; Protection of War Victims: Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114; Protection of War Victims: Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217.

15. *Id.* at art. 2.

16. *Id.* at art. 3.

government. The Military Order, moreover, focuses on international rather than domestic crimes. The disconnect between terrorism and the armed conflict requirement is also underscored by the unending nature of the "war on terrorism," its worldwide geographic scope and its applicability to a limitless number of parties.

These problems are compounded by the indeterminacy and controversy over the definition of terrorism. Although multilateral treaties have been concluded defining terrorism largely in terms of specific actions such as airline hijacking, hostage-taking and bombings,[17] a comprehensive treaty definition remains elusive. The notorious subjectivity of defining terrorism, therefore, further suggests an incompatibility between the scope of war crimes and terrorism.

Yet another distinction relates to the fora in which the two crimes are prosecuted. Terrorism prosecutions largely remain a prerogative of domestic courts, while war crimes are prosecuted by both domestic courts (including military courts) and international tribunals. The United States, for example, while applying an assortment of anti-terrorism provisions in the United States Code to convict foreign terrorists in federal district courts, also supports war crime prosecutions by the international criminal tribunals in The Hague and elsewhere.[18] In addition, during the drafting of the Rome Treaty on the International Criminal Court in 1996-1998, the United States vigorously opposed the inclusion of terrorism within the ICC's jurisdiction because of the lack of a consensus definition of terrorism and because domestic courts had typically tried terrorism cases.

This dichotomy is apparent in the fact that military tribunals have never before been used to try terrorists unaffiliated with an enemy government. Indeed, as discussed in Part III below, Supreme Court precedent endorses military jurisdiction over soldiers and agents of enemy states, but not over civilians. The President's Military Order departs from this precedent by authorizing the military trial of foreign civilians suspected of engaging in, or conspiring to commit, acts of international terrorism.

III. THE SUPREME COURT HAS NEVER APPROVED THE USE OF MILITARY COMMISSIONS TO TRY FOREIGN TERRORISTS

Prior to 9/11, the United States had not used military commissions to try foreign civilians unconnected to enemy armies. Instead, military commissions

17. *See* Suppression of Unlawful Seizure of Aircraft (Hijacking), Dec. 16, 1970, 22 U.S.T 1641; Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Feb. 24, 1988, treaty doc. 100-19.

18. *See* United States v. Bin Laden, 92 F. Supp.2d 189 (S.D.N.Y. 2000) (upholding extraterritorial reach of U.S. criminal statutes to persons accused of bombing U.S. Embassies in Kenya and Tanzania); United States v. Rahman, 189 F.3d 88, 160 (2d Cir. 1999) (affirming convictions following nine-month jury trial of ten defendants for "seditious conspiracy and other offenses arising out of a wide-ranging plot to conduct a campaign of urban terrorism"); United States v. Salameh, 152 F.3d 88 (2d Cir. 1998) (affirming convictions of four defendants who assisted in bombing of World Trade Center).

have tried persons acting on behalf of, or at the direction of, a foreign government.[19] The Military Order does not require that defendants have any governmental connection. Quite to the contrary, the Order permits the prosecution of persons acting wholly independent of any government or conventional military group. Its very purpose is to provide a forum for a wide range of persons that have never before been prosecuted by military tribunals: foreign terrorists unaffiliated with any government.

Although the Military Order is *sui generis*, its advocates argue that the precedent approving military commissions in other contexts justifies the trial of terrorists by military commissions. As the White House Counsel argued shortly after the issuance of the Military Order, "[t]he use of such [military] commissions has been consistently upheld by the Supreme Court."[20] In fact, the Supreme Court has never upheld the use of military commissions to try foreign terrorists. The Court's jurisprudence only holds that military commissions may try foreign citizens that act on behalf of a country at war with the United States.[21] The Court has also been suspicious of overly broad jurisdiction for military tribunals.

The *Quirin* and *Yamashita* cases are frequently cited for the proposition that foreign terrorists may be properly tried by military tribunals. Neither case, however, involved a foreign terrorist, and both involved persons acting as agents of an enemy government in a declared war against the United States. In *Quirin*, the defendants were agents of a foreign government during a declared war against the United States. They landed on the American coast wearing German military uniforms, and "received instructions in Germany from an officer of the German High Command."[22] They were paid by the German government, and trained at a German "sabotage school."[23] The charging document stated that the defendants were "enemies of the United States and acting for . . . the German Reich, a belligerent enemy nation."[24]

Quirin variously refers to the defendants as "unlawful belligerents," "enemy belligerents," "unlawful combatants," and "enemy combatants." Nothing in *Quirin*, however, supports the argument that these categories can be expanded to include foreign terrorists who are not organized as a military force, and who operate independent of any government. The defendants in *Quirin* themselves were, of course, agents of an enemy government during a declared war. Moreover, of the "familiar examples" of enemy combatants referenced by the Court in *dicta*, such as "the spy" or one who "comes secretly through the [military] lines," none encompass foreign terrorists.[25] The Court cites examples of enemy combatants

19. *E.g.*, Johnson v. Eisentrager, 339 U.S. 763, 765 (1950) (German citizens acting "in the service of German armed forces in China" were properly convicted of violating the laws of war following trial by military commission).

20. Alberto R. Gonzales, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

21. Johnson v. Eisentrager, 339 U.S. 763 (1950); *Ex Parte Quirin*, 317 U.S. 1; *In re* Yamashita, 327 U.S. 1.

22. *Ex Parte Quirin*, 317 U.S. 1, 7-8 (1942).

23. *Id.*

24. *Id.* at 15.

25. *Id.* at 12.

tried by military commissions from the Revolutionary War, the Mexican War, and the Civil War. In every instance, the enemy combatant was a member or agent of a conventional military force during a recognized armed conflict between two such military forces.[26]

In *Yamashita*, the defendant was a Commanding General of the Imperial Japanese Army.[27] After Yamashita surrendered to the United States Army, General MacArthur ordered a military commission be convened to try him. The Supreme Court held that Yamashita was an "enemy combatant" and that the military commission was properly convened "pursuant to the common law of war."[28] The term "enemy combatant," however, was plainly used in *Yamashita* to connote a member of the organized military in a declared war against the United States.[29] Nothing in *Yamashita* supports the extension of the enemy combatant label to cover foreign terrorists. Indeed, the Court appears to limit it's holding to violations of the laws of war during declared wartime:

> The trial and punishment of enemy combatants who have committed violations of the law of war . . . is an exercise of the authority sanctioned by Congress to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists – *from its declaration until peace is proclaimed.*[30]

In *Quirin* and *Yamashita*, the Court used narrow language to uphold the jurisdiction of military commissions to try captured enemy soldiers during a declared war. These decisions nowhere provide direct support for the contention that military commissions may try terrorists. In contrast, Supreme Court decisions such as *Milligan*, *Duncan* and *Reid* (described below), limiting the authority of military commissions outside of the *Quirin/Yamashita* context, adopt broad language to restrict and limit the authority of military commissions to try civilians.

In *Ex Parte Milligan*, the Supreme Court held that a United States citizen could not be detained or imprisoned by the military absent a declaration of martial law. In granting Milligan's habeas corpus application, the Court held that "[m]artial law, established on such a basis, destroys every guarantee of the Constitution and effectively renders the 'military independent of and superior to the civil power.'"[31] Similarly, in *Duncan v. Kahanamoku*, the Court ruled that a civilian held by the military, when the civilian courts were open and functioning,

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26. *Quirin* lists the following persons as "familiar examples" of "offenders against the law of war subject to trial and punishment by military tribunals": Major Andre, an officer of the British Army; T.E. Hogg, who had been "commissioned, enrolled, enlisted or engaged" by the Confederate Army; John Y. Beall, who held a commission in the Confederate Navy; Robert C. Kennedy, a Captain of the Confederate Army; William Murphy, a "rebel emissary"; and other "[s]oldiers and officers 'now or late of the Confederate Army.'" *Id.* at n. 9, n. 10.

27. *In re Yamashita*, 327 U.S. 1, 4 (1946).

28. *Id.* at 19.

29. *Id.*

30. *Id.* at 11 (emphasis added).

31. *Ex Parte Milligan*, 71 U.S. 2, 124 (1866).

cannot be tried by a military tribunal.[32]

The Court again articulated the principle that military jurisdiction over civilians should be limited, not expanded, in *Reid v. Covert*.[33] In *Reid*, the Court held that the military could not exercise criminal jurisdiction over civilian defendants accused of murdering soldiers stationed overseas. The Court stated that "[t]he Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds."[34] *Reid*, moreover, puts to rest the argument that *Milligan* is no longer good law in view of *Quirin*.[35] In *Reid*, the Supreme Court, fifteen years after *Quirin*, described *Milligan* as "one of the great landmarks in this Court's history."[36]

In addition, prior Opinions of the United States Attorney General do not approve military commissions in the absence of a declaration of martial law, or when the accused is a civilian not charged with war crimes.[37] For example, in 1918 the U.S. Attorney General opined on the status of Pable Waberski, an agent of the German government sent to the United States to "blow things up."[38] Applying *Milligan*, the Attorney General distinguished between an "act of war" and a "crime," and concluded that the acts of espionage of which Waberski was accused did not qualify as violations of the laws of war.[39] As a result, Waberski could not be tried by a military tribunal:

> [I]n this country, military tribunals, whether courts-martial or military commissions, can not [sic] constitutionally be granted jurisdiction to try persons charged with acts or offences [sic] committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers.[40]

The issue of international personality informed another Attorney General Opinion approving trial by military commissions over the Mood Indian tribe.[41] The Attorney General found it appropriate to apply the rules of war to such conflicts because the Indian tribes "have been recognized as independent communities for treaty-making purposes" and are capable of engaging in "a negotiation for peace after hostilities."[42] Al Qaida, in contrast, is not recognized as

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32. Duncan v. Kahanamoku, 327 U.S. 304 (1946).

33. Reid v. Covert, 354 U.S. 1 (1957).

34. *Id.* at 23-24.

35. In *Quirin*, Attorney General Biddle disparaged *Milligan* by arguing that "[t]he English courts have . . . long since rejected the doctrine of Ex parte Milligan." Quirin, 317. U.S. at 26.

36. Reid v. Covert, 354 U.S. 1 at 30.

37. *See* Military Commissions, 11 Op. Att'y Gen. 297 (1865) (approving trial by military tribunal of assassins of President Lincoln because at "time of the assassination a civil war was flagrant . . .[and] Martial law had been declared").

38. Trial of Spies by Military Tribunals, 31 Op. Att'y Gen. 356 (1918).

39. *Id.*

40. Trial of Spies by Military Tribunals, 31 Op. Att'y Gen. 356 (1918).

41. The Modoc Indian Prisoners, 14 Op. Att'y Gen. 249 (1873).

42. *Id.*

having the ability to engage in international treaties or peace talks.

The clarity of *Milligan*, *Duncan* and the Attorney General Opinions underscores the fact that, before 9/11, members of al Qaida were not considered "enemy combatants" and the United States was claimed to be in an "armed conflict" with al Qaida. This consensus existed even though it was known that al Qaida and bin Laden had planned and executed a series of deadly terrorist attacks against American targets; that bin Laden had issued a religious edict calling for Americans to be murdered; and that al Qaida planned future attacks against the United States.[43] Moreover, even absent the "enemy combatant" or "armed conflict" designations, the U.S. was not been prevented from undertaking military strikes against terrorist targets when necessary. The United States did so against Libya in 1985, against Iraq in 1993, and against Sudan and Afghanistan in 1998.

After September 11th, however, *Quirin* and *Yamashita* were resurrected in support of the U.S. government's argument that the response to 9/11 qualifies as a "time of war" and that foreign terrorists are "enemy combatants." These designations were intended to legitimize not only the use of military tribunals against foreign terrorists, but also the indefinite detention by military authorities of U.S. and foreign citizens in the United States and in Guantanamo Bay.

IV. CONCLUSION

Certainly the laws of war should to some extent conform to changing circumstances and not remain static. It is also true, however, that international humanitarian law should not be infinitely malleable to suit any circumstance and that our commitment to the rule of law should not be self-serving. As the Supreme Court stated in *Yamashita*, "[w]e do not make the laws of war but we respect them."[44] Before September 11th, the United States regularly lambasted other countries for trying terrorists before military tribunals. Now, however, this is described as criticism of "the process and not the forum."[45] If the United States is to embark now on military trials of foreign civilians, the legal justification for this unprecedented step needs to be clearer. Continuing to justify such trials as consistent with "internationally accepted practice with deep historical roots"[46] will undermine their legitimacy. Absent a greater degree of consensus on the legality of such measures, the United States should not champion military trials of civilians as an acceptable international norm.

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43. *See generally* Exec. Order No. 13,129, (July 4, 1999) (declaring a national emergency due to finding that Afghanistan was being "used as a safe haven and base operations for Usama bin Ladin and the Al-Qaida organization who have committed and threaten to continue to commit acts of violence against the United States and its nationals"); Mark E. Kosnik, The Military Response to Terrorism, NWC Rev. (Spring 2000) *available at* http://www.nwc.navy.mil/press/review/2000/spring/art1-sp0.htm (last visited Mar. 3, 2003).

44. Yamashita, 327 U.S. at 15.

45. Pierre-Richard Prosper, *DOJ Oversight: Preserving Our Freedoms While Defending Against Terrorism*, Statement Before the Senate Judiciary Committee (Dec. 4, 2001).

46. *Id.*