

# WHEN JUSTICE GOES TO WAR: PROSECUTING TERRORISTS BEFORE MILITARY COMMISSIONS

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## I. INTRODUCTION

The terrorist attacks of September 11, 2001 triggered an intense debate that continues to the present day: were they monstrous crimes—or acts of war? Should the U.S. response be shaped by a military or criminal justice paradigm? Framed this way, the debate poses a classic false dichotomy. The international community has strongly supported the United States in its claim that the September 11 attacks constituted an armed attack justifying military action against the Al Qaeda network and its Taliban sponsors in Afghanistan. At the same time, other countries are working hand in hand with U.S. law enforcement agencies in a criminal investigation of global sweep.

But if crimes of terrorism can also be acts of war, it is a mistake to conflate the two. President Bush's November 13, 2001 Military Order authorizing military commissions to prosecute suspected terrorists does just that, treating virtually any foreign national whom the President suspects of terrorist-related activity as an enemy belligerent, regardless of whether the United States is engaged in armed conflict. In doing so, the Military Order exceeds the President's constitutional authority to establish military commissions and imperils core constitutional values.

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Even when legally permissible, military commissions are generally an unwise choice among the options available for trying those believed to be responsible for the attacks of September 11 and other crimes of terrorism. Far better to try them before federal courts, as the United States has successfully done as recently as this year in connection with two other horrific crimes committed by members of Al Qaeda—the 1998 terrorist attacks on U.S. embassies in Kenya and Tanzania.

## II. THE LEGALITY OF THE MILITARY ORDER

A fundamental feature of the Military Order is that it invokes presidential war powers to support the prosecution of suspected terrorists before military commissions. Citing the President's constitutional authority as Commander in Chief of the armed forces,<sup>1</sup> the Order provides that the President may order certain individuals to be detained by the Secretary of Defense and to be prosecuted exclusively before military commissions "for violations of the laws of war and other applicable laws by military tribunals."<sup>2</sup> But in a legal and conceptual non-sequitur, the Order defines its field of application in terms of individuals whom the President suspects of participation in international terrorism, a term the Order nowhere defines, against the United States.<sup>3</sup> Thus the President seeks to detain suspected *terrorists* on the basis of his authority to prosecute *war criminals*. Like the figures in M.C. Escher's lithograph "Verbum" that morph from frogs into birds and then fishes, the President's order shifts from one legal paradigm to another.

For reasons we explain in the next section, this aspect of the Military Order renders much of the Order constitutionally flawed. More particularly, the Military Order exceeds the province of presidential war powers when it purports to

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1. Military Order, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism preamble, 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001), [hereinafter Military Order].

2. *Id.*, §§ 1(e), 2(b), at 57,833-34.

3. The Military Order provides for the exclusive jurisdiction of military commissions over any non-U.S. citizen who, in the President's estimation, there is reason to believe (1) "is or was a member of . . . al Qaida," (2) has criminally participated in "acts of international terrorism" that have injured or adversely affected the United States or may do so, or (3) has "knowingly harbored" someone included in either of the first two categories, when "it is in the interest of the United States that such individual be subject to this order." *Id.*, § 2, at 57,834.

subject civilians in the United States to trial before military commissions because they may have supported Al Qaeda operatives or other individuals suspected of participation in international terrorism. When acts of terrorism take place in peacetime, as they frequently do, they are not triable as war crimes under international law and the President cannot make them so by the stroke of a pen.

#### A. Legal Authority for Military Commissions

The principal federal law cited in support of the Military Order contemplates the possibility of convening military commissions "with respect to offenders or offenses that by statute or by the law of war may be tried by military commission."<sup>4</sup> In U.S. law and practice, military commissions, courts, and tribunals have four distinct types of jurisdiction, of which only two are relevant here—"martial law" and "law of war" jurisdiction.<sup>5</sup>

Although the scope of martial law jurisdiction is contested, it generally applies when the President directs the military to exercise judicial authority in parts of the country where the civilian court system is no longer functioning due to war, insurrection, or a comparable disaster. The Military Order is carefully scored with this theme, asserting, for example, that future terrorist attacks "may place at risk the continuity of the operations of the United States government."<sup>6</sup>

But the leading case on martial law jurisdiction, *Ex parte Milligan*,<sup>7</sup> makes clear that this risk would not justify the exercise of military jurisdiction over U.S. citizens, and indeed the Military Order explicitly applies only to non-citizens.<sup>8</sup> In

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4. 10 U.S.C. § 821 (1994), cited in Military Order, *supra* note 1, preamble, at 57,833. The other statutory provision relied upon by President Bush, 10 U.S.C. § 836 (1994), authorizes the President to prescribe procedures for trials before various types of military tribunals.

5. By far the most significant use of military courts by the United States relates to prosecutions of members of the U.S. armed forces. Sometimes called "military justice," this type of jurisdiction is exercised by courts martial. The fourth type of military jurisdiction, "military government" jurisdiction, would come into play if the United States occupied part or all of a foreign country at the end of a war, as it did in the American zone of Germany after World War II.

6. Military Order, *supra* note 1, § 1(c), at 57,833.

7. 71 U.S. 2 (1866).

8. Military Order, *supra* note 1, § 2(c), at 57,834. It is unclear whether the constitutional protections upheld in *Milligan* would now be limited to U.S. citizens. Cf. *Zadvydas v. Davis*, 533 U.S. 678 (2001) (finding that the indefinite and

*Milligan*, the Supreme Court held unconstitutional the trial of a citizen of Indiana by a military commission convened in Indianapolis during the Civil War. In the words of the Court majority, military jurisdiction that is founded on the "laws and usages of war . . . can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed,"<sup>9</sup> unless the citizens are members of the armed forces.

The Court recognized that there are circumstances in which martial rule can be imposed, but the contemporary threat of terrorism does not meet the Court's stringent test:

If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.<sup>10</sup>

But, the Court continued, "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."<sup>11</sup>

It is not hard to see why the right to trial by jury was jealously guarded by the Supreme Court, even in respect to a defendant charged with conspiring to overthrow federal authority by force of arms when the nation was at war. Against the claim that recourse to martial law was justified by the imperatives of security in war time, the Court replied: "Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish."<sup>12</sup>

At the proverbial first blush, President Bush's order finds stronger support in *Ex parte Quirin*,<sup>13</sup> a leading U.S. case on

potentially permanent detention of even unlawful aliens who have entered the United States would raise a serious constitutional problem).

9. *Milligan*, 71 U.S. at 121.

10. *Id.* at 127.

11. *Id.*

12. *Id.* at 124-25. See also *id.* at 126 ("If this [claim] were true, it could well be said that a country, preserved at the sacrifice of all the cardinal principles of liberty, is not worth the cost of preservation. Happily, it is not so.").

13. 317 U.S. 1 (1942).

"laws of war" jurisdiction of military commissions. This 1942 Supreme Court decision arose out of the surreptitious entry into the United States of eight German saboteurs (one of whom may have possessed U.S. citizenship) bearing explosives and incendiary devices. Acting under instruction from the German High Command, the eight apparently intended to destroy war industries and facilities in the United States. Soon after their arrival and capture, President Roosevelt issued an order authorizing the trial of the saboteurs before a military tribunal.

Upholding the lawfulness of the saboteurs' trial, the Supreme Court distinguished *Milligan* on the ground that the defendants "were charged with an offense against the law of war which the Constitution does not require to be tried by jury."<sup>14</sup> Crucial to this conclusion was the Court's finding that the petitioners were "unlawful combatants" since they operated as enemy combatants "without uniform or other appropriate means of identification."<sup>15</sup> Under international law, the Court reasoned, unlawful combatants "are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."<sup>16</sup> In the Court's view, constitutional guarantees of trial by jury and presentment to a grand jury were not intended to enlarge the scope of these rights as they existed at common law, and unlawful belligerents had long been subject to military jurisdiction.<sup>17</sup>

Much like the Supreme Court's validation of President Roosevelt's decision to intern American citizens of Japanese descent during World War II, *Quirin* has long been criticized as an abdication of independent judicial judgment during war time and an unwarranted surrender of constitutional rights. Even the author of the Court's opinion, Chief Justice Stone, reportedly had grave misgivings about the judgment he penned.<sup>18</sup>

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14. *Id.* at 29.

15. *Id.* at 38.

16. *Id.* at 31. This feature of the Court's reasoning has been faulted as a mistaken interpretation of international law. At the time *Quirin* was rendered, a combatant who failed to distinguish himself as required by customary law did not thereby violate the laws of war, although his specific hostile acts may have. See Maj. Richard R. Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas, and Saboteurs*, 28 BRIT. Y.B. INT'L L. 323, 339-40 (1951).

17. *Quirin*, 317 U.S. at 38-40.

18. See Tony Mauro, *A Mixed Precedent for Military Tribunals: 1942 Case of Nazis on U.S. Soil Gives Administration the Authority for Terrorist Trials, but Leaves Room for*

But even if the authority of *Quirin* were beyond question, it would provide only limited support for President Bush's Order. At most, *Quirin* supports the use of military commissions to try those responsible for the September 11 attacks and others suspected of violating the laws of war that, by definition, can occur only in the course of armed conflict. Like the German saboteurs of 1942, the men who hijacked four civilian aircraft and transformed them into human missiles can fairly be regarded as unprivileged combatants.<sup>19</sup> In the context of the armed conflict in Afghanistan, the United States could treat Al Qaeda as a paramilitary organization and its members as unprivileged combatants who do not observe the basic rules of warfare as required by Article 4A(2) of the Third Geneva Convention of 1949.<sup>20</sup> As unprivileged combatants, *Quirin* holds, these individuals are not entitled to the constitutional protections of presentment to a grand jury and trial by jury.

But President Bush's Military Order reaches far beyond the authority sustained in *Quirin*, authorizing the detention and trial before military commissions of any alien whom the President determines at his sole discretion has "aided or abetted" terrorism that has injured or potentially could injure U.S. citizens or a broad class of U.S. interests or who the President believes may have "harbored" a terrorist. Moreover the Order imposes no temporal limit on conduct that can be lawfully scrutinized and judged by these tribunals. Thus, for example, a long-term resident alien who in 1998 gave money, directly or indirectly, to Al Qaeda but had no involvement in the September 11 attacks could be deemed an aider and abetter and thus detained on the authority of the Military Order. But these individuals cannot be tried for violations of the laws of

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*Doubt*, LEGAL TIMES, Nov. 19, 2001, at 15.

19. Unprivileged combatants include civilians who actively engage in hostilities, as well as irregular combatants who fail to distinguish themselves from the civilian population or otherwise fail to meet the requirements of privileged combatant status. Robert Kogod Goldman, *Irregular Combatants and Prisoner of War Status*, in LIBER AMICORUM HÉCTOR FIX-ZAMUDIO 767, 769-79 (1998). The 19 individuals who hijacked four civilian aircraft on September 11 entered the United States with the apparent intention of carrying out attacks and held themselves out as civilians. As noted in the text, members of Al Qaeda engaged in armed conflict with U.S. forces in Afghanistan could also be deemed unprivileged combatants. Accordingly, upon capture they would not be entitled to prisoner of war status and could be tried for all their hostile acts, including pre-capture offenses.

20. Convention (No. III) Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135.

war when no state of hostilities, de facto or de jure, existed as between the U.S. and Al Qaeda before September 11.

It remains to be noted that the Military Order, which finds its principal support in the precedent of *Quirin*, defies *Quirin* itself by purporting to deny persons detained pursuant to the Order the right "to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in . . . any court of the United States."<sup>21</sup> This provision substantially tracks language in the presidential proclamation underlying the trial of German saboteurs during World War II.<sup>22</sup> Yet the Supreme Court had no trouble concluding that the saboteurs could have recourse to federal court to challenge the lawfulness of their prosecution before a military commission.<sup>23</sup>

### B. Procedural Protections

Our discussion in the previous section focused on whether the Military Order exceeds the President's authority to convene military commissions. An equally important question is whether individuals prosecuted under the authority of the Order will be afforded procedural safeguards required by international law.

#### 1. Jurisdiction Over Civilians

Insofar as it permits civilians to be tried by such commissions, the Military Order is utterly inconsistent with the international legal obligations of the United States. Human rights instruments binding on the United States mandate that criminal defendants, whatever their offenses, be tried by independent and impartial courts that afford generally recognized due process guarantees. By their very nature, military commissions do not satisfy this basic test. The military justice system in the U.S. and elsewhere is not part of the independent civilian judiciary, but rather is part of the

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21. Military Order, *supra* note 1, § 7(b)(2), at 57,835.

22. See Proclamation No. 2561, 3 C.F.R. § 309 (1938-1943), reprinted in 10 U.S.C. § 906 (1994).

23. See *Quirin*, 317 U.S. at 25. See also *In re Yamashita*, 327 U.S. 1, 9 (1946) (the Executive Branch could not "withdraw from the courts the duty and power to make such inquiry into the authority of the [military] commission as may be made by habeas corpus" unless "there was suspension of the writ").

Executive Branch. Under the Military Order, the U.S. military, which is also charged with the destruction of terrorists on the battlefield, would become the prosecutor and judge of its alleged adversaries.

When active duty military officers assume the role of judges, they remain subordinate to their superiors in keeping with the established military hierarchy. The manner by which they fulfill their assigned task might well play a role in their future promotions, assignments, and professional rewards. It is because of this inherent dependence that these tribunals are not suited to try civilians. And where, as here, the putative defendants before these military commissions are the military's avowed enemies, these tribunals cannot reasonably be expected to be, nor will they be seen as, objective finders of fact and dispensers of impartial justice.

Similar considerations have led the Inter-American Commission and Court of Human Rights, as well as the U.N. Human Rights Committee, to find that the use of military courts to try civilians in Guatemala,<sup>24</sup> Peru,<sup>25</sup> Chile,<sup>26</sup> Uruguay<sup>27</sup> and elsewhere violated fundamental due process rights. Moreover, no human rights supervisory body has yet found the exigencies of a genuine emergency situation, such as that now faced by the U.S., to justify suspending basic fair trial safeguards even on a temporary basis.

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24. See Inter-American Commission on Human Rights, Report on the Situation of Human Rights in the Republic of Guatemala, OEA/Ser.L./V/II. 61, doc. 47, at 96 (1983).

25. See Inter-American Commission on Human Rights, Second Report on the Situation of Human Rights in Peru, OEA/Ser.L./V/II.106, doc. 59 (2000); see also Castillo Petruzzi et al. Case, Inter-Am. Ct. H.R. (1999) (judgment), in ANNUAL REPORT OF THE INTER-AMERICAN COURT OF HUMAN RIGHTS 1999, OEA/Ser.L./V/III.47, doc. 6, at app. IX, 211-300 (2000).

26. See Comisión Inter-Americana de Derechos Humanos; Segundo Informe sobre la Situación de los Derechos Humanos en Chile, OEA/Ser.L./V/II.37, doc. 19 (1976).

27. See Inter-American Commission on Human Rights, Report on the Situation of Human Rights in Uruguay, OEA/Ser.L./V/II.43, doc. 19 (1978); see also Moriana Hernandez Valentini de Bazzano v. Uruguay (Comm. No. 5/1977), Views of the Human Rights Committee of August 15, 1979, Selected Decisions Under the Optional Protocol, at 40-43, U.N.Doc. CCPR/C/OP/1 (1985). See generally Comment 13: Equality Before the Courts and the Right to a Fair and Public Hearing by an Independent Court Established by Law, U.N. Human Rights Committee, U.N. Doc. 13/04/84 CCPR (1984).

## 2. Jurisdiction Over Unprivileged Combatants

The rights that must be accorded to unprivileged combatants in criminal proceedings have evolved substantially since World War II. Any doubts concerning the scope and content of these rights were put to rest with the elaboration of Article 75 of Protocol I Additional to the 1949 Geneva Conventions.<sup>28</sup> Although the United States has not ratified the Protocol, it accepts many of its provisions as being declaratory of customary law; Article 75 is such a provision par excellence.<sup>29</sup> Largely inspired by human rights law, this article requires that unprivileged combatants be accorded in all circumstances trials by impartial and regularly constituted courts that, at a minimum, afford inter alia the presumption of innocence, the right to counsel before and during trial, the right of defendants to call witnesses and to examine witnesses against them, freedom from ex post facto laws, and the right of defendants not to testify against themselves or to confess their guilt.

President Bush's Military Order does not even purport to provide these safeguards.<sup>30</sup> Although the Order states that defendants before military commissions shall be granted a full and fair trial, it does not expressly guarantee the presumption of innocence or the right of defendants to counsel of their

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28. Protocol I: Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 37-78.

29. See THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 64-65 (1989).

30. That the Military Order denies fundamental rights is not surprising in light of statements by senior officials of the Bush Administration at the time the Order was adopted. Vice President Richard Cheney, for example, defended the Military Order on the asserted ground that individuals behind the September 11 attacks "don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process." Peter Slevin and George Lardner, Jr., *Bush Plan for Terrorism Trials Defended; Military Tribunals Appropriate in War, Ashcroft Says; Critics Cite Constitution*, WASH. POST, Nov. 15, 2001, at A28 (quoting Vice President Richard Cheney). Of course this statement presumes what must be proved at trial—that the suspects were in fact responsible for the September 11 attacks. Yet the President need only suspect individuals of participation in terrorism (conduct the Military Order does not even define) to consign them to detention and, if tried, to trial before a military commission. The Military Order does not prescribe a standard of suspicion that must be met before the President can order individuals detained. Instead, the Order authorizes the President to order individuals detained if, in his view, "there is reason to believe" that they have been members of Al Qaeda or have either supported terrorist activity or knowingly harbored terrorists. Military Order, *supra* note 1, §2 (a)(1), at 57,834.

choice; it denies defendants any remedy, including appeal and habeas corpus, to either a U.S. or international court; and it potentially bars defendants from seeing the evidence against them. In light of these deficiencies, Spain has indicated that it may not extradite to the United States individuals it has charged with complicity in the September 11 attacks without assurances that they will be tried by civilian courts and not be subject to the death penalty.<sup>31</sup> Other EU member states, which are parties to European human rights treaties, are expected to follow suit.

The problematic features of the Military Order could be addressed through procedural rules governing the conduct of trials before military commissions. Yet draft regulations described in media accounts in late December go only part of the way toward addressing these concerns.<sup>32</sup>

### III. CIVILIAN JUSTICE

The thrust of the international fair trial standards addressed in Part II.B is to ensure that all persons charged with criminal offenses, including unprivileged combatants, not be tried in a rush to judgment in the kind of summary proceedings contemplated in the Military Order. Thus even where military commissions might be lawfully available, such as in respect to unprivileged combatants, defendants must be afforded the safeguards recognized in Article 75 of Additional Protocol 1. If the Bush administration insists on using military commissions to try some unprivileged combatants, the Military Order should be amended to allow civilian review of convictions and sentences. This would provide a crucial check against the inherent risk of partiality of military judges who are charged with evaluating the guilt of their avowed enemies.<sup>33</sup>

But another approach, trial before federal courts, is far

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31. See Elisabeth Bumiller, *Spain to Study U.S. Requests to Extradite Terror Suspects*, N.Y. TIMES, Nov. 28, 2001, at B4.

32. See Charles Lane, *Terrorism Tribunal Rights Are Expanded; Draft Specifies Appeals, Unanimity on Death Penalty*, WASH. POST, Dec. 28, 2001, at A1; Charles Lane, *Bush Calls Draft on Tribunals "Preliminary,"* WASH. POST, Dec. 29, 2001, at A8.

33. As described in various media accounts, draft regulations circulating within the Bush administration in late December provide for review of military commission judgments, but the review apparently would be before a military body. See Lane, *Bush Calls Draft on Tribunals "Preliminary,"* *supra* note 32.

preferable. Recent convictions of members of the Al Qaeda network show that U.S. courts are fully capable of meeting the challenges presented by cases involving terrorism, including those relating to the use of classified evidence.<sup>34</sup> Some commentators have argued, however, that trying terrorists in federal court may unfairly expose jurors to intimidation. To the extent this is a valid concern, *Quirin* points the way to a solution. Since, according to *Quirin*, unprivileged combatants are not constitutionally entitled to trial by jury, they could be tried before a federal judge if the risk of juror intimidation were substantial. Above all, the deepest interests of this nation counsel us to stay the hand of military justice: to renounce federal court jurisdiction over crimes of terror is to concede a powerful victory to those bent on destroying cherished symbols of our national life.

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34. While these trials have generally been based on statutes involving crimes of terrorism and other offenses against life and property, unprivileged combatants could also be prosecuted in federal court for war crimes. See 18 U.S.C. § 2441 (Supp. 1997).

