

LEGALITY OF THE USE OF MILITARY COMMISSIONS TO TRY TERRORISTS

The President possesses inherent authority under the Constitution, as Chief Executive and Commander in Chief of the Armed Forces of the United States, to establish military commissions to try and punish terrorists captured in connection with the attacks of September 11 or in connection with U.S. military operations in response to those attacks.

November 6, 2001

MEMORANDUM OPINION FOR THE COUNSEL TO THE PRESIDENT

You have asked us to consider whether terrorists captured in connection with the attacks of September 11 or in connection with ongoing U.S. operations in response to those attacks could be subject to trial before a military court. The Uniform Code of Military Justice (“UCMJ”), 10 U.S.C. §§ 801-946, authorizes military commissions to try “offenders or offenses that by statute or by the law of war may be tried by military commissions.” 10 U.S.C. § 821 (2000). The Supreme Court has interpreted identical language (then included in Article 15 of the Articles of War in effect during World War II) to incorporate customary practice and to authorize trial by military commission¹ of any person subject to the laws of war for any offense under the laws of war. See *Ex parte Quirin*, 317 U.S. 1, 30 (1942).

We conclude that under 10 U.S.C. § 821 and his inherent powers as Commander in Chief, the President may establish military commissions to try and punish terrorists apprehended as part of the investigation into, or the military and intelligence operations in response to, the September 11 attacks.* As we outline in Part I, ample precedent establishes that military commissions may be used to try and punish (even with death) offenders under the laws of war. The President both has inherent authority as Commander in Chief to convene military commissions and has received authorization from Congress for their use to the full extent permitted by past executive practice. In Part II, we explain that determining whether the laws of war apply in this context is a political question for the President to determine in his role as Commander in Chief. In addition, we outline factors that may be considered, based on past precedents, in determining whether the laws of war are applicable in the present conflict with terrorist forces. We explain that a declaration of war is not required to create a state of war or to subject persons to the laws of war, nor is it required that the United States be engaged in armed conflict with another nation. The terrorists’ actions in this case are sufficient to create a state of war *de facto* that allows application of the laws of war.

¹ Section 821 refers to four forms of military tribunal: courts-martial, military commissions, provost courts, and “other military tribunals.” *Id.* § 821. In this memorandum, we address military commissions, because that is the form of tribunal suited to hearing the charges contemplated here.

* Editor’s Note: After this opinion was issued, the Supreme Court concluded in *Hamdan v. Rumsfeld*, 548 U.S. 557, 613 (2006), that military commissions established pursuant to a November 13, 2001 presidential order were inconsistent with the UCMJ. Following *Hamdan*, Congress expressly authorized a system of military commissions pursuant to the Military Commissions Act of 2006, Pub. L. No 109-366, 120 Stat. 2600.

Part III addresses briefly some representative offenses that might be charged under the laws of war. We will address more thoroughly the charges that could be brought before a military commission and the procedures that would be required before such a commission in a subsequent memorandum.

BACKGROUND

A military commission is a form of military tribunal typically used in three scenarios: (i) to try individuals (usually members of enemy forces) for violations of the laws of war; (ii) as a general court administering justice in occupied territory; and (iii) as a general court in an area where martial law has been declared and the civil courts are closed. *See generally* William Winthrop, *Military Law and Precedents* 836-40 (2d ed. 1920). The commission is convened by order of a commanding officer and consists of a board of officers who sit as adjudicators without a jury. *See id.* at 835. The commission's decision is subject to review by the convening authority and is not subject to direct judicial review.

Military commissions have been used throughout U.S. history to prosecute violators of the laws of war. "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts." *Madsen v. Kinsella*, 343 U.S. 341, 346-47 (1952). Military commissions have tried offenders drawn from the ranks of aliens and citizens alike charged with war crimes arising as early as the Revolutionary War, the Mexican-American War, and the Civil War, and as recently as World War II. *See Quirin*, 317 U.S. at 32 n.10, 42 n.14. President Lincoln's assassins and their accomplices were imprisoned and even executed pursuant to convictions rendered by military commissions. Their offenses were characterized not as criminal matters but rather as acts of rebellion against the government itself. *See Military Commissions*, 11 Op. Att'y Gen. 297 (1865); *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868) (No. 9899). Such use of military commissions has been repeatedly endorsed by federal courts, including as recently as this year. *See Mudd v. Caldera*, 134 F. Supp. 2d 138 (D.D.C. 2001).

Military commissions are not courts within Article III of the Constitution, nor are they subject to the jury trial requirements of the Fifth and Sixth Amendments of the Constitution. *See Quirin*, 317 U.S. at 40. Unlike Article III courts, the powers of military commissions are derived not from statute, but from the laws of war. *See Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 249-53 (1863). That is, their authority derives from the Constitution's vesting of the power of Commander in Chief in the President. "Neither their procedure nor their jurisdiction has been prescribed by statute. [Instead,] [i]t has been adapted in each instance to the need that called it forth." *Madsen*, 343 U.S. at 347-48. "In general ... [Congress] has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war." *Id.* at 346 n.9 (quoting Winthrop, *supra* at 831).

I. Military Commissions May Be Used To Try All Offenses Against the Laws of War.

The Uniform Code of Military Justice (UCMJ) expressly addresses the use of military commissions in article 21. *See* 10 U.S.C. § 821. Because that provision contains an explicit congressional authorization for military commissions, we begin by examining in Part A the scope of that authorization. We conclude that section 821 is quite broad and, by endorsing the customary uses of military commissions in U.S. military practice, authorizes military commission jurisdiction to try all offenses against the laws of war. Next, in Part B, we explain that even if Congress had not sanctioned the use of military commissions to try all offenses against the laws of war, the President, exercising his authority as Commander in Chief, could order the creation of military commissions to try such offenses. Indeed, military commissions were created under presidential authority before they had any sanction in statutory law. Finally, in Part C, we examine constitutional objections that might be raised against the use of military commissions, particularly potential claims that they violate constitutional guarantees for trial by jury and a grand jury indictment. We conclude, as has the Supreme Court, that offenses charged under the laws of war before military commissions are outside the provisions of Article III and the Fifth and Sixth Amendments and thus that the rights to grand jury indictment and jury trial do not apply to such offenses.

A. Congress Has Sanctioned the Broad Jurisdiction of Military Commissions To Try All Offenses Against the Laws of War.

The UCMJ addresses the jurisdiction of military commissions in article 21, which is section 821 of title 10 of the United States Code. Section 821 is phrased somewhat unusually, because it does not *create* military commissions and define their functions and jurisdiction. Instead, it refers to military commissions primarily to acknowledge their existence and to *preserve* their existing jurisdiction. As explained more fully below, military commissions had been created under the authority of the President as Commander in Chief and used to try offenses against the laws of war before there was any explicit statutory sanction for their use. *See infra* at 7-8. Section 821, which is entitled “Jurisdiction of courts-martial not exclusive,” thus states that “[t]he provisions of this chapter conferring jurisdiction upon courts-martial do not *deprive* military commissions . . . of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions.” 10 U.S.C. § 821 (emphasis added). The jurisdictional provision for courts-martial that is cross-referenced is 10 U.S.C. § 818 (2000), which defines the jurisdiction of general courts-martial to include “jurisdiction to try any person who by the law of war is subject to trial by a military tribunal.” By its terms, section 821 takes the existence of military commissions as a given and clarifies that the establishment of broad jurisdiction in courts-martial will not curtail the powers of military commissions.

By expressly preserving the jurisdiction of military commissions, section 821 necessarily provides a congressional authorization and sanction for their use. Indeed, the Supreme Court has concluded that identical language in the predecessor provision to section 821—article 15 of the

Articles of War—“*authorized* trial of offenses against the laws of war before such commissions.” *Quirin*, 317 U.S. at 29 (emphasis added). *See also id.* at 28 (“By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war . . .”).

The fact that section 821 acknowledges and endorses the jurisdiction of an existing tribunal is important for properly understanding the scope of the authorization it contains. By its terms, the provision incorporates by reference the role of military commissions under the customary “law of war.” Thus, the section states that military commissions have jurisdiction over all “offenders or offenses that by statute or by the law of war may be tried by military commissions.” The apparent circularity of the language is explained by the fact that the section is endorsing the existing use of military commissions under military practice.

The history of the provision also makes it abundantly clear that its purpose was to express congressional approval for the traditional use of military commissions under past practice. When the language now codified in section 821 was first included in the Articles of War in 1916, it was explicitly intended to acknowledge and sanction the pre-existing jurisdiction of military commissions. The language was introduced as article 15 of the Articles of War at the same time that the jurisdiction of general courts-martial was expanded to include all offenses against the laws of war. The new article 15 stated (like current section 821) that the “provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions . . . of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions.” Act of August 29, 1916, 39 Stat. 619, 653. Judge Advocate General of the Army Crowder, the proponent of the new article, explained in testimony before the Senate that the military commission “is our common-law war court,” and that “[i]t has no statutory existence.” S. Rep. No. 64-130, at 40 (1916). The new article 15 thus was not *establishing* military commissions and defining their jurisdiction. Rather, as General Crowder explained, it was recognizing their existence and preserving their authority: “It just saves to these war courts the jurisdiction they now have and makes it concurrent with courts-martial . . .” *Id.*; *see also* S. Rep. No. 63-229, at 53 (1914) (Testimony of Judge Advocate General Crowder before the House Committee on Military Affairs) (noting that the military commission “has not been formally authorized by statute” and explaining that the new article 15 was designed to make clear that, through the expansion of the jurisdiction of courts-martial, the military commissions’ “common law of war jurisdiction was not ousted”).

In explaining the history of the provision now codified in section 821, the Supreme Court has described the testimony of Judge Advocate General Crowder as “authoritative.” *Madsen*, 343 U.S. at 353. The Court thus determined that the effect of this language was to preserve for such commissions “the *existing* jurisdiction which they had over such offenders and offenses” under the laws of war. *Id.* at 352 (emphasis added). As the Court noted, because the statute simply *recognized* the existence of military commissions, “[n]either their procedure nor their

Legality of the Use of Military Commissions to Try Terrorists

jurisdiction has been prescribed by statute.” *Id.* at 347. As explained below, the fact that military commissions were used long before any reference to them appeared in the Articles of War demonstrates that the President has authority as Commander in Chief to create them without authorization (and free from any restriction) of Congress. *See infra* at 7-8.

Given the text and history of section 821, the provision must be read as preserving the broadest possible sweep for the traditional jurisdiction exercised by military commissions before they were expressly mentioned in statutory law. The statute, in other words, simply endorses and incorporates by reference executive branch practice. The Supreme Court has adopted precisely this understanding of the section and has thus explained that “[b]y . . . recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction . . . to *any* use of the military commission contemplated by the common law of war.” *In re Yamashita*, 327 U.S. 1, 20 (1946) (emphasis added); *see also id.* at 7 (stating 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”). Similarly, the Court has explained that “Congress has incorporated by reference, as within the jurisdiction of military commissions, *all* offenses which are defined as such by the law of war.” *Quirin*, 317 U.S. at 30 (emphasis added); *see also id.* at 35 (relying on the “long course of practical administrative construction by [the] military authorities”).² Congress did not “attempt[] to codify the law of war or to mark its precise boundaries.” *Yamashita*, 327 U.S. at 7. Instead, it simply adopted by reference “the system of military common law.” *Id.* at 8.

Indeed, if section 821 were read as restricting the use of military commissions and prohibiting practices traditionally followed, it would infringe on the President’s express constitutional powers as Commander in Chief. *Cf. Quirin*, 317 U.S. at 47 (declining to “inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents” by restricting use of military commissions); *id.* (declining also to “consider the question whether the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to disciplinary measures”). A clear statement of congressional intent would be required before a statute could be read to effect such an infringement on core executive powers. *See, e.g., Public Citizen v. Department of Justice*, 491 U.S. 440, 466 (1989).

The congressional sanction for the use of military commissions is a permissible exercise of Congress’s powers under the Constitution. Congress has authority not only to “declare War,” but also to “raise and support Armies,” and “make Rules for the Government and Regulation of the land and naval Forces.” U.S. Const. art. I, § 8, cl. 11, 12, 14. To the extent military

² The use of military commissions for members of the U.S. armed forces may be restricted by separate provisions in the UCMJ, and we do not address that issue here.

commissions are used for enforcing discipline within the armed forces of the United States, Congress has authority to sanction their use. In addition, Congress has authority to “define and punish . . . Offences against the Law of Nations.” *Id.* art. I, § 8, cl. 10. Authorizing the use of military commissions to enforce the laws of war—which are considered a part of the “Law of Nations”—is certainly a permissible exercise of these authorities. *See, e.g., Yamashita*, 327 U.S. at 7 (explaining that congressional sanction for military commissions was an “exercise of the power conferred upon it by Article I, § 8, Cl. 10 of the Constitution to ‘define and punish . . . Offenses against the Law of Nations . . .’ of which the law of war is a part”) (alteration in original); *id.* at 16 (“Congress in the exercise of its constitutional power to define and punish offenses against the law of nations, of which the law of war is a part, has 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.”).³ Or, to be more precise, it is permissible at least so long as any congressional regulations do not interfere with the President’s authority as Commander in Chief. *Cf. Quirin*, 317 U.S. at 47 (declining to address “whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents” through regulations on military commissions); *cf. also Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (stating that the “President alone” is “constitutionally invested with the entire charge of hostile operations”). Given that section 821 simply gives sanction to the existing practice of the Executive in making use of military commissions, it does not on its face place any such restriction on the use of commissions.

B. Even if Congress Had Not Authorized Creation of Military Commissions, the President Would Have Authority as Commander in Chief To Convene Them.

The congressional authorization for military commissions in 10 U.S.C. § 821 endorses sufficiently broad jurisdiction for the commissions that there will likely be no need to rely solely on the President’s inherent authority as Commander in Chief to convene commissions in the present circumstances. As noted above, Congress has endorsed the pre-existing practice of permitting military commissions to try “all offenses which are defined as such by the law of war.” *Quirin*, 317 U.S. at 30. It is important, nevertheless, to note that the President has inherent authority as Commander in Chief to convene such tribunals even without authorization from Congress.

³ *See also Quirin*, 317 U.S. at 28 (“Congress, in addition to making rules for the government of our Armed Forces, has thus exercised its authority to define and punish offenses against the law of nations by sanctioning . . . the jurisdiction of military commissions to try persons for offenses which, according to the rules and precepts of the law of nations, and more particularly the law of war, are cognizable by such tribunals.”); *cf. Madsen*, 343 U.S. at 346 n.9 (“[I]t is those provisions of the Constitution which empower Congress to ‘declare war’ and ‘raise armies,’ and which, in authorizing the initiation of war, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. . . . The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war.”) (emphasis in original) (quoting Winthrop, *supra* at 831).

Legality of the Use of Military Commissions to Try Terrorists

The Commander in Chief Clause, U.S. Const. art. II, § 2, cl. 1, vests in the President the full powers necessary to prosecute successfully a military campaign. It has long been understood that the Constitution provides the federal government all powers necessary for the execution of the duties the Constitution describes. As the Supreme Court explained in *Johnson v. Eisentrager*, “[t]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution.” 339 U.S. 763, 788 (1950) (citation omitted); see also *Lichter v. United States*, 334 U.S. 742, 780 (1948) (“The powers of Congress and the President are only those which are to be derived from the Constitution but . . . the primary implication of a war power is that it shall be an effective power to wage the war successfully.”); *Home Building & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 426 (1934) (stating that “the war power of the federal government” is “a power to wage war successfully”). One of the necessary incidents of authority over the conduct of military operations in war is the power to punish enemy belligerents for violations of the laws of war. The laws of war exist in part to ensure that the brutality inherent in war is confined within some limits. It is essential for the conduct of a war, therefore, that an army have the ability to enforce the laws of war by punishing transgressions by the enemy.⁴

It was well recognized at the time of the Founding, moreover, that one of the powers inherent in military command was the authority to institute tribunals for punishing violations of the laws of war by the enemy. In 1780, during the Revolutionary War, General Washington as Commander in Chief of the Continental Army appointed a “Board of General Officers” to try the British Major Andre as a spy. See *Quirin*, 317 U.S. at 31 n.9; *Proceedings of a Board of General Officers Respecting Major John Andre, Sept. 29, 1780* (Francis Bailey ed. 1780). At the time, there was no provision in the American Articles of War providing for jurisdiction in a court-martial to try an enemy for the offense of spying. See George B. Davis, *A Treatise on the Military Law of the United States* 308 n.1 (1913) (explaining that the tribunal used to try Andre cannot properly be considered a court-martial, because under the then-existing Articles of War, courts-martial could not try members of the enemy forces for the offense of spying); Winthrop, *supra* at 961 (reprinting American Articles of War of 1776). The term “Commander in Chief” was understood in Anglo-American constitutional thought as incorporating the fullest possible range of power available to a military commander. See John Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Calif. L. Rev. 167, 252-54 (1996). In investing the President with full authority as Commander in Chief, the drafters of the Constitution surely intended to give the President the same authority that General Washington possessed during the Revolutionary War to convene military tribunals to punish offenses against the laws of war.

⁴ Cf. *Request of the Senate for an Opinion as to the Powers of the President “In Emergency or State of War,”* 39 Op. Att’y Gen. 343, 347-48 (1939) (“It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance.”).

The history of military commissions bears out this conclusion, because as a matter of practice military commissions have been created under the President's inherent authority as Commander in Chief without any authorization from Congress. In April, 1818, for example, General Andrew Jackson convened military tribunals to try two English subjects, Arbuthnot and Ambrister, for inciting the Creek Indians to war with the United States. *See* Winthrop, *supra* at 464, 832. The subjects were convicted and executed accordingly. *Id.* As one author explained, General Jackson "did not find his authority to convene [these tribunals] in the statutory law, but in the laws of war." William E. Birkhimer, *Military Government and Martial Law* 353 (3d ed. 1914). Similarly, in the Mexican American War in 1847, General Winfield Scott appointed tribunals called "council[s] of war" to try offenses under the laws of war and tribunals called "military commission[s]" to serve essentially as occupation courts administering justice for occupied territory. *See, e.g.,* Winthrop, *supra* at 832-33; Davis, *supra* at 308. There was no statutory authorization for these tribunals, and they were thus instituted by military command (necessarily under authority derived from the President's authority as Commander in Chief) without sanction from Congress.⁵ In later practice, both functions (that is, the role of war courts and courts of occupation) were performed by tribunals known as "military commission[s]." Thus, after the outbreak of the Civil War, military commissions were convened to try offenses against the laws of war, *see* Davis, *supra* at 308 n.2, and under the general orders drafted for the governance of the Army in 1862, commanders were authorized to convene military commissions to try offenses against the laws of war, *see* Winthrop, *supra* at 833. It was not until 1863 that military commissions were even mentioned in a statute enacted by Congress. In that year, Congress authorized the use of military commissions to try members of the military for certain offenses committed during time of war. *See* Act of March 3, 1863, § 30, 12 Stat. 731, 736. The statute, moreover, did not purport to *create* military commissions. Rather, it acknowledged that they could be used as alternatives to courts martial in some cases.

As explained above, the current provision in section 821 of the UCMJ also does not *create* military commissions or define exhaustively their authority. Instead, its history shows that it was adopted to preserve the jurisdiction of what was recognized as a pre-existing tribunal. *See supra* at 4. Precisely because it confirms that military commissions existed before any express congressional authorization, the history of section 821 also supports the conclusion that the President has constitutional authority to convene commissions even without legislation authorizing them.

Subsequent discussions of the use of military commissions by the Supreme Court reflect the same understanding that the use of military tribunals is a necessary part of the tools of a commander conducting a military campaign. For example, as the Court explained in *Yamashita*,

⁵ *See* Davis, *supra* at 308 (explaining that military commissions "are simply criminal war-courts, resorted to for the reason that the jurisdiction of courts-martial, created as they are by statute, is restricted by law, and cannot be extended to include certain classes of offenses, which in war would go unpunished in the absence of a provisional forum for the trial of the offenders").

