No. 3 November 5, 2001

BRINGING AL-QAEDA TO JUSTICE

The accompanying legal memorandum explores the question of whether it is constitutional to try members of the al-Qaeda terrorist network, who may have been involved in the September 11 attacks, under the U.S. military justice system rather than in federal district court. As many as 1,000 individuals have been detained by law enforcement authorities in this country in response to the attacks. Though many of these detainees may be released or deported, reports suggest that some were directly involved in the September 11 terrorist conspiracy. With respect to this last group, the United States may be forced to decide soon what charges to file against them and in what court system.

The Use of a Military Tribunal. The use of the military justice system in wartime to try such terrorists offers the government several advantages. In particular, trials before military tribunals need not be open to the general public and they may be conducted on an expedited basis, permitting the quick resolution of cases and avoiding the disclosure of highly sensitive information on intelligence sources and methods.

Constitutional rules limit what can be done to protect classified information during trials in the ordinary federal courts. In the federal district courts, the government has an obligation under Article III and the Sixth Amendment to conduct a "public trial" and present to the jury, in open court, the facts on which it is relying to establish a defendant's guilt.

Pursuant to Article I, § 8, Clause 14 of the U.S. Constitution, Congress is authorized to establish a military justice system distinct from that created under Article III. In the Uniform Code of Military Justice (UCMJ), Congress created a three-tier court system to try the thousands of cases that involve military personnel. The UCMJ also authorizes the President to constitute special military "commissions" to try important cases that are not within the jurisdiction of normal courts martial. Under the UCMJ, the accused enjoy extensive due process protections, but their rights are not coextensive with the protections civilians enjoy in normal criminal trials.

Produced by
The Center for Legal and Judicial Studies

Published by
The Heritage Foundation
214 Massachusetts Ave., N.E.
Washington, D.C.
20002–4999
(202) 546-4400
http://www.heritage.org

This paper, in its entirety, can be found at: *www.heritage.org/library/legalmemo/lm3.html*

Under the governing statute, it is possible for the President to incorporate all or most of the UCMJ's due process protections into any specially constituted military commission. Nevertheless, al-Qaeda defendants would likely still object to the jurisdiction of a military tribunal and the unique charges that can be brought there. In essence, they would argue that—according to our Constitution—the justice system that is good enough for

U.S. military personnel (which exceeds the due process protections of almost every other nation) is not good enough for them.

Such is our love of liberty that their invocation of the U.S. Constitution would be taken seriously; and as a result, the constitutional basis for the use of military commissions to try members of al-Qaeda must be carefully considered. The use of military commissions with respect to individuals not regularly enrolled in a military force represents a clear departure from normal legal processes and some of America's most fundamental judicial traditions. In addition to the legal issues, there might be diplomatic difficulties and other costs associated with trying al-Qaeda terrorists by military tribunal.

The accompanying legal memorandum is not intended to present an argument for or against the use of such tribunals, but instead to present an analysis of whether that option is legally available to the President. In the end, only the President would possess the necessary information to weigh the potential intelligence and other risks of a long public trial against the foreign policy or other potential harms of a military trial.

Conclusion. As Chief Justice William Rehnquist recently observed: "In wartime, reason and history both suggest that th[e] balance [between freedom and order] shifts in favor of … the government's ability to deal with conditions that threaten the national well-being." Even so, limiting the due process rights of individuals accused of capital crimes is a serious measure the Supreme Court has approved in only very limited circumstances. The two Supreme Court cases that have directly addressed the use of military tribunals to try civilians in the United States reached different results and remain in tension with one another to this day.

The only case in which the Supreme Court explicitly upheld the constitutionality of using military tribunals in America to try individuals who were not in the military, *Ex parte Quirin*, was decided in 1942. At that time, the United States was engaged in a formally declared war. The persons who were tried, who entered the country clandestinely, were declared to be "illegal combatants" in the war. To date, Congress has not declared war with respect to the armed conflict between the United States and al-Qaeda or its primary state sponsor, Afghanistan's Taliban. If Congress does declare war, we concur with the conclusion in this memorandum that the Supreme Court would uphold the military trial of saboteurs and spies, like those in *Quirin*, who violate the laws of war on behalf of a hostile foreign power.

Whether individuals associated with al-Qaeda can constitutionally be subjected to military trial in this country in the absence of a formally declared war is less clear. The Court would have to resolve whether we nevertheless are in a state of war for certain constitutional purposes, and if so, with whom we are at war. Based on the applicable law, a strong argument can be made that a formal declaration of war by Congress would be unnecessary because a "state of war" between the United States and Afghanistan nevertheless exists. Much of *Quirin*'s reasoning does not turn on a formal declaration of war, and there are other historical precedents that would support the creation of military tribunals to try al-Qaeda terrorists.

At the same time, it has long been recognized that the authority of the government in time of an "undeclared" war is less expansive than that available during a declared war. In addition, the Supreme Court has been more protective of civil liberties in the past 50 years, and it is less likely to defer to the political branches in time of war or national emergency as it once did. Thus, historical examples from the 19th century and the *Quirin* decision may be of limited value today.

Reasonable scholars may disagree about the exact strength of the government's position absent a declaration of war. Nevertheless, we believe the accompanying memorandum is correct that, without a formal declaration, no one can predict with a high degree of certainty which way the High Court would rule. If the President wishes to remove serious legal doubt regarding the use of military tribunals, he should seek a formal declaration of war.

—Edwin Meese III is the Chairman, and Todd Gaziano is the Director, of the Center for Legal and Judicial Studies at The Heritage Foundation.

NOTE: Nothing written here is to be construed as legal advice on any matter, as an attempt to create an attorney-client relationship, or as an attempt to aid or hinder the passage of any matter pending before Congress.

No. 3 November 5, 2001

BRINGING AL-QAEDA TO JUSTICE THE CONSTITUTIONALITY OF TRYING AL-QAEDA TERRORISTS IN THE MILITARY JUSTICE SYSTEM

DAVID B. RIVKIN, JR., LEE A. CASEY, AND DARIN R. BARTRAM

As the United States and its coalition partners execute diplomatic, financial, and military responses to the September 11 terrorist attacks, the legal options regarding the trial of members of the al-Qaeda terrorist organization are being increasingly discussed. [1] As many as 1,000 individuals have been detained by law enforcement authorities in this country in response to the attacks.[2] Reports that some of them may have been directly involved in the September 11 conspiracy or were planning to carry out similar terrorist acts add a particular urgency to the discussion.[3] Attorneys have been appointed for, or employed by, those who have been detained, and legal proceedings likely have begun with respect to their detention. At some point in the near future, the executive branch will likely have to decide whether to release them, deport those that are subject to deportation, or charge them with a crime. With respect to the last option, the government will have to decide what charges to bring against them and in what court system.

Some commentators have suggested that members of al-Qaeda apprehended in or extradited to the United States should not be treated as ordinary criminal defendants, but instead tried in military courts, either by regular courts martial or by specially constituted military commissions. Media reports indicate that this

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1. Osama bin Laden, the acknowledged leader of the al-Qaeda network, may be killed in the fighting. If he is captured, the United States and other countries involved have several legal options available to them regarding his trial. *See infra.* But the legal analysis in this memorandum would apply to bin Laden if he were extradited to and tried within the United States.
2. Neil A. Lewis, "Detentions After Attacks Pass 1,000, U.S. Says," *The New York Times,* October 30, 2001.
3. Philip Shennon and Don Van Natta, Jr., "U.S. Says 3 Detainees May Be Tied to Hijackings," *The New York Times*, November 1, 2001.

issue is already being considered by, among others, the staff of the Senate Committee on the Judiciary.[4]

From the government's perspective, the use of the military justice system to try al-Qaeda members involved in terrorist acts on behalf of a hostile foreign power offers several advantages. In particular, trials before military tribunals need not be open to the general public and they may be conducted on an expedited basis, permitting the quick resolution of individual cases and avoiding the disclosure of highly sensitive intelligence material, which would have to be made public in an ordinary criminal trial. A number of government officials have indicated that the previous trials of terrorist defendants, including the 1993 bombers of the World Trade Center, resulted in damaging disclosure of information on intelligence sources and methods, investigative techniques, and other matters that have made it more difficult for the United States government to uncover and prevent such plots in the future.[5]

Under the Uniform Code of Military Justice (UCMJ), and military court decisions interpreting it, the accused enjoy extensive due process protections, but their rights are not coextensive with the protections civilians enjoy in normal criminal trials held in the United States. Military tribunals are not required to offer the same due process rights guaranteed by the Constitution in Article III, the Fourth, Fifth, Sixth, and Fourteenth Amendments, as well as those articulated in various judicial decisions interpreting those constitutional provisions. For example, the precise contours of the Fourth Amendment exclusionary rule that flowed from *Mapp* v. *Ohio*, 367 U.S. 643 (1961), and later cases do not apply in military courts, although military court decisions have imposed an analogous exclusionary rule in courts martial. It is, of course, possible for the President to incorporate all of the due process protections of the UCMJ and related legal precedents, or a great number of them, into any specially constituted military tribunal. Nevertheless, any al-Qaeda defendant will almost certainly object to the jurisdiction of a military commission and argue that he is entitled to trial in a non-military court with exactly the same protections as other civilians.

As a result, the constitutional basis for the use of military commissions, or even of regular courts martial, to try members of al-Qaeda must be carefully considered. Although the practical benefits of military trials may be obvious, their use with respect to individuals not regularly enrolled in a military force represents a clear departure from normal legal processes in the United States and from some of its most fundamental judicial traditions. In addition, there could be diplomatic difficulties and other costs associated with trying al-Qaeda terrorists by military tribunal. If intelligence sources and methods would not be compromised by a public trial and the risk of additional terrorist actions were not substantial, the United States might prefer a public trial so that the rest of the world can evaluate the strength of the evidence against each defendant.

For the foregoing reasons, this memorandum is not intended to present an argument for or against the use of military tribunals to try al-Qaeda terrorists; instead, it merely presents an analysis of the constitutionality of that option. In the end, only the executive branch will possess the necessary information to weigh the potential harm to America's intelligence apparatus and other risks of a long public trial against the foreign policy ramifications or other potential effects of a military trial.

BRIEF SUMMARY

It has long been recognized that the Constitution, in Justice Arthur Goldberg's much-quoted

4. Richard Willing, "Feds Explore How to Try Terrorism Suspects," *USA Today,* October 15, 2001, at 13A.

5. Although some measures can be, and have been, taken to protect classified evidence in the context of criminal trials, *e.g.,* the Classified Information Procedures Act of 1980 (CIPA), 18 U.S.C. App. §§ 1–16, constitutional imperatives ensure that the judicial proceedings in the ordinary federal courts cannot go too far down this path. The CIPA primarily constrains pre-trial "discovery" opportunities. In the normal federal courts, the CIPA does not substantially alter the government's obligation under Article III of the U.S. Constitution and the Sixth Amendment to conduct a "public trial" and present to the jury, in open court, the facts on which it is relying to establish a defendant's guilt.

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phrase, "is not a suicide pact,"[6] and that the government enjoys extraordinary power during wartime. As Chief Justice William Rehnquist has noted:

> In any civilized society the most important task is achieving a proper balance between freedom and order. In wartime, reason and history both suggest that this balance shifts in favor of order—in favor of the government's ability to deal with conditions that threaten the national well-being.[7]

At the same time, limiting the due process rights, particularly the right of public trial by jury, of individuals accused of capital crimes is a grave and extraordinary measure involving procedures that the Supreme Court has approved in only very limited circumstances. In particular, the only case in which the Supreme Court explicitly upheld the constitutionality of trying individuals, who were apprehended in the United States and who were not regularly enlisted in the armed forces of the United States or some other power by military commission, was decided during the summer of 1942—a time soon after the entry of the United States into the World War II.

When the Supreme Court rendered this decision, *Ex parte Quirin*,[8] the United States was engaged in a formally declared war, a point noted by the Court. To date, Congress has not declared war with respect to the armed conflict between the United States and al-Qaeda's primary state sponsor, Afghanistan's ruling Taliban; and there appears to be no immediate plan to do so. This raises difficult questions regarding whether America is nevertheless in a state of war for certain constitutional purposes, and if so, with whom it is at war. We believe the Supreme Court would defer to Congress's determination of those issues in a formal declaration of war and uphold the trial of saboteurs and spies, like those in *Quirin*, who violate the laws of war on behalf of a hostile foreign power.

Although our focus in the rest of this memorandum is on the question of whether al-Qaeda members apprehended in the United States, or extradited to the United States, can be tried by military commission in the absence of a declaration of war, it is likely that the Supreme Court would allow the trial overseas by military commission of al-Qaeda members captured in Afghanistan, regardless of how it would treat defendants in this country. As discussed more fully later in this memorandum, international law would permit such treatment. Moreover, the Supreme Court has approved the use of military commissions to try enemies captured overseas for violations of the laws of war.[9] In addition, the Court has suggested that a broad range of individuals (including "civilians") may be subject to military justice in an actual theater of operations.[10]

Whether the United States may constitutionally subject individuals associated with the al-Qaeda network to trial by military commission in the United States in the absence of a formally declared war is far less clear. There certainly is some support, based upon the applicable rules of international and constitutional law, for the proposition that a formal declaration of war by Congress would, in the current situation, be unnecessary to such proceedings, because a "state of war" between the United States and Afghanistan can nevertheless be said to exist. Much of *Quirin*'s reasoning does not depend on a formal declaration of war, and there are other historical precedents that would

6. *Kennedy v. Mendoza-Martinez, 372* U.S. 144, 159–160 (1963).

7. William Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (New York: Alfred A. Knopf, 1998), p. 222.

8. 317 U.S. 1 (1942).

9. *See In re Yamashita, 327* U.S. 1 (1946) (Japanese general Tomoyuki Yamashita could be tried by military commission).

10. *See Reid v. Covert*, 354 U.S. 1, 33 (1957) ("In the face of an actively hostile enemy, military commanders necessarily have broad power over persons on the battlefront. From a time prior to the Constitution the extraordinary circumstances present in the area of actual fighting have been considered sufficient to permit punishment of some civilians in that area by military courts under military rules.").

support the creation of military tribunals to try al-Qaeda terrorists.

At the same time, it has long been recognized that the authority available to the government in time of an "undeclared" or "limited" war is less expansive than that available during a declared war. Moreover, in the past 50 years, the Supreme Court has become more protective of civil liberties, and it is less likely to defer as extensively to the political branches in time of war or national emergency as it once did. Thus, heavy reliance on historical examples from the 19th century or one decision from the mid-20th century is ill advised.

In the absence of a formal declaration of war, we simply cannot predict with a high degree of certainty which way the Supreme Court would rule. Because the matter is in doubt, we believe that Congress should formally declare war before the United States resorts to the use of military commissions, so as to place the use of such extraordinary measures on the best possible legal footing.

LEGAL PRECEDENTS REGARDING THE TRIAL OF CIVILIANS IN MILITARY COURTS

In the past, the United States has treated individuals accused of terrorism as civilians, subject to trial in the federal courts established under Article III of the Constitution, with the full application of the Bill of Rights, including the right to a public trial by jury and the Federal Rules of Criminal Procedure. This was the case, for example, following the first attack on the World Trade Center in 1993. A total of 15 terrorists, including Sheikh Omar Abdel Rahman, an Egyptian cleric and leader of the radical group al-Gama'a al-Islamiya, were tried and convicted in the course of three trials in federal court in New York. Moreover, such treatment may have been constitutionally mandated, since civilians are not ordinarily subject to military justice and must be tried for federal crimes in Article III courts.

This point was made clear by the Supreme Court shortly after the Civil War (during which civilians were subjected to trial by "military commission" in certain cases) in the landmark case of *Ex parte Milligan.*[11] There, the Court ruled that military justice "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."[12]

The *Quirin* Case represents a narrow exception to the rule adopted by the *Milligan* Court that would permit individuals who are not enlisted in a regular military force to nevertheless be subjected to military law, and to be tried by military commissions. In that case, the Supreme Court ruled that eight Nazi agents, who had secretly entered the United States to undertake acts of sabotage, could be tried by a military commission established, pursuant to statute, by President Franklin D. Roosevelt.[13] The Court carefully distinguished *Milligan*, noting that the defendant there was "a non-belligerent, not subject to the law of war." In *Quirin*, by contrast, the individuals were considered to be "belligerents" or "combatants,"[14] although not formally enlisted in the German Wehrmacht. Thus, they were classified as "unlawful belligerents," subject to trial in military commissions for violations of the laws of war.

It is this authority under which Osama bin Laden and his associates could be subjected to trial by military commission. There are, however, two conditions that must be satisfied before such proceedings can be employed. First, the accused individuals must be properly classifiable as "unlawful combatants," a status that only arises in the context of an "armed conflict." Second, the United States must itself be in a "state of war."

11. 71 U.S. 2 (1866).

12. *Id.* at 121.

ARE MEMBERS OF AL-QAEDA "UNLAWFUL COMBATANTS"?

Under the traditional rules of international law, individuals who engage in warlike activity, but who do not enjoy the immunities associated with enlistment in a lawful military organization, are treated harshly. As explained by Emmerich de Vattel, a leading 18th century scholar of international law who had a profound influence on the Framers of the U.S. Constitution:

> When a nation or a sovereign has declared war against another sovereign by reason of a difference arising between them, their war is what among nations is called a lawful war, and in form; and as we shall more particularly shew the effects by the voluntary law of nations, are the same on both sides, independently of the justice of the cause. Nothing of all this takes place in a war void of form, and unlawful, more properly called robbery, being undertaken without right, without so much as an apparent cause. It can be productive of no lawful effect, nor give any right to the author of it. A nation attacked by such sort of enemies is not under any obligation to observe towards them the rules of wars in form. It may treat them as robbers. The city of Geneva, after defeating the attempt of the famous Escalde hung up the Savoyards, whom they had made prisoners, as robbers who had attacked them without any cause, or declaration of war. Nobody offered to censure this proceeding, which would have been detested in a formal war.[15]

13. There is no military tribunal or commission established at this time to try any captured terrorists. However, the President arguably could establish one without seeking additional authority from Congress if the constitutional prerequisites exist. In *Quirin*, the Supreme Court recognized that the Constitution "invests the President, as Commander in Chief, with the power to wage war which Congress has declared, and to carry into effect . . . all laws defining and punishing offenses against the law of nations, including those which pertain to the conduct of war." 317 U.S. at 26. At that time, the Court found it unnecessary to determine whether the President had inherent authority to constitute a military tribunal to try the saboteurs, because he had been expressly given this authority by Congress through the Articles of War. *See 317 U.S. at 27* (citing Articles of War 12, 15). The same relevant provisions of the Articles of War have been carried over into the Uniform Code of Military Justice (UCMJ). *See* 10 U.S.C. §§ 818, 821; *see also* Michael A. Newton, Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes, 153 *Mil. L. Rev.* 1, 4 (1996) ("American commanders have authority to convene a general court-martial or a military commission to punish foreign nationals who violate the laws of war during an international armed conflict."); Marc L. Warren, Operational Law: A Concept Matures, 152 *Mil. L. Rev.* 232, 305 (1996) ("The United States refrained from trying any of the [Somali] detainees (many of whom were unlawful combatants or common criminals) by military commission or general court-martial as it could have under Articles 18 and 21 of the UCMJ and under the law of armed conflict."). While the use of the existing military court martial system to try al-Qaeda members would not present any constitutional issues that are different from those implicated by the use of military commissions, UCMJ strictures specifically define categories of persons who may be tried by courts martial, and unlawful combatants do not appear to fit into any of the current categories. *See 10 U.S.C. § 802.* Congress could, of course, amend the UCMJ to remove this obstacle. Moreover, nothing prevents the President, having created a specialized military commission to deal with unlawful combatants, to instruct it to operate in accordance with the standard procedures followed by courts martial.
14. For the purposes of this discussion, the terms "belligerents" and "combatants" are interchangeable. "Belligerents" was more in vogue during an earlier era, but carries no different meaning in the authorities cited herein.
15. Emmerich de Vattel, *The Law of Nations,* 481 (Luke White ed., Dublin 1792). The *Quirin* Court noted a number of later authorities supporting the general proposition that "unlawful" combatants are generally considered to be subject to summary disposition. *See* 317 U.S. at 35–36 & n.12. *See also* Instructions for the Government of Armies of the United States in the Field, General Orders, No. 100, April 24, 1863, *reprinted in* 7 John Moore, *A Digest of International Law* §174 (1906) ("[m]en, or squads of men, who commit hostilities . . . without being part and portion of the organized hostile army, and without sharing continuously in the war, if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.").

Whether, under current international norms, an unlawful combatant may be killed out of hand, as Vattel suggests, is highly debatable.[16] Nevertheless, it is clear that such individuals—both substantively and as a procedural matter—are not entitled to the same rights as lawful combatants (who must be treated as prisoners of war), or of non-combatants.

"Lawful Combatants." The question of who is an "unlawful combatant" depends, in the first instance, on who qualifies as a "lawful combatant." Although irregular or "guerrilla" forces are not automatically excluded from this category, in order to be treated as "lawful combatants" or "lawful belligerents" (entitled to be treated as such under the laws and customs of war), a group must meet the following basic requirements according to the governing Hague Convention:

1. They must operate under a recognizable command structure;
2. Their members must wear a uniform or other "fixed distinctive emblem recognizable at a distance";
3. Their members must carry arms openly; and
4. They must conduct their operations in accordance with the laws and customs of war.[17]

The al-Qaeda organization, although it may or may not satisfy the first requirement, obviously fails to meet the last three. As a result, its members may be treated as "unlawful combatants" under international law.

Similarly, under United States domestic law, al-Qaeda's members also may be considered to be "unlawful combatants." The United States became a party to the Hague Convention (IV) on January 26, 1910, and the definitions contained in that instrument are fully applicable under U.S. law. They also are entirely consistent with the working definition of "unlawful combatant" adopted by the Supreme Court in *Quirin.* There, the Court explained that "unlawful combatants" are individuals who associate themselves with an enemy of the United States and who:

> [d]uring time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for the commission of hostile acts involving destruction of life or property.[18]

The members of al-Qaeda who carried out the September 11 attacks, and their surviving compatriots, clearly entered the United States out of uniform and for the purpose of committing hostile acts involving the destruction of life and property here.[19] The critical question, however, is whether

16. Protocol I Additional to the Geneva Conventions of 1949, which the United States has never ratified, but which embodies norms of customary international law in at least some respects, suggests that even unlawful combatants must be treated "humanely" and provided with certain basic due process guarantees. *See* Protocol I Additional to the Geneva Conventions of 1949, Art. 75(1) (4). This instrument does not, however, suggest that the use of a military tribunal or commission to try unlawful combatants would be impermissible.

17. *See* Annex to Hague Convention (IV) Respecting the Laws and Customs of War on Land (1907), Art. 1. It should be noted that this requirement refers to the actions and institutional policy of the group involved, rather than to the acts of individuals. An individual may qualify as a lawful combatant, being associated with an armed force with a recognizable command structure, wearing distinctive emblems, carrying arms openly, and conducting its operations in accordance with the laws of war, and still be subject to prosecution for "war crimes" based on individual actions.

18. 317 U.S. at 36.

19. Some authors have suggested that, given the gravity of offenses committed by terrorists of various stripes and the serious threat they pose to the security of the United States, all such persons should be tried by military commissions. *See* Spencer J. Crona, "Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism," 21 *Okla. City U. L. Rev.* 349 (1996). However, there is no support, either in the Constitution or in the Supreme Court's precedents, for subjecting individuals, who do not otherwise qualify as unlawful combatants on behalf of a hostile foreign power, to such proceedings. Civilians, even those accused of "terrorism," like Timothy McVeigh or Theodore Kaczynski, who do not fall within the category of unlawful combatant as defined by international law, must be tried in Article III courts.

they acted as enemies of the United States during "time of war."

DOES A STATE OF WAR EXIST?

International Law

Under both international and domestic law, the laws of war apply from the beginning of an international armed conflict until its conclusion.[20] There is little doubt that, as an international law matter, an armed conflict now exists between the United States and, at a minimum, the Taliban regime in Afghanistan, and that this conflict has existed at least since September 11, 2001.

This assessment is true even though the actual individuals who carried out the September 11 attacks appear to have been members of the al-Qaeda terrorist network. Al-Qaeda operates freely in Afghanistan with the knowledge, blessing, and support of the Taliban authorities. It controls a number of military bases in that country, and recent reports suggest that al-Qaeda may actually be the senior partner, *vis-à-vis* the Taliban, in controlling Afghanistan.[21] Significantly, al-Qaeda forces are engaged together with Taliban forces in fighting the Northern Alliance, a loose coalition of resistance fighters. Moreover, the Taliban's most elite military unit, the 55th Brigade, is said to be comprised mostly of al-Qaeda members.[22]

There clearly is an identity of interest and action between al-Qaeda and the Taliban sufficient to justify the United States in characterizing the attacks of September 11 as an "act of war" and to justify a military response. Here, an analogy may be drawn to the response of the United States to the depredations of the Barbary pirates, operating out of Tripoli, in 1802. At that time Congress, on February 6, 1802, authorized the President to use force, including all "acts of precaution or hostility as the state of war will justify, and may, in his opinion require." Moreover, America's NATO allies have accepted this characterization and have, accordingly, taken action to "operationalise" Article 5 of the North Atlantic Treaty, which requires that an "armed attack" against one member of the alliance is to be considered an attack on all.[23]

The fact that the United States has not chosen to declare war on Afghanistan, the Taliban, or al-Qaeda does not change the conclusion under international law that a state of war exists. International law has long recognized that "a formal declaration is not necessary to constitute a state of war,"[24] and, in particular, that an armed attack creates a state of war without the necessity of the defending state declaring war. Again, to quote Vattel: "[h]e who is attacked and makes only a defensive war, need not declare it, the state of war being

20. *See Yamashita*, 327 U.S. at 11–12. The issue here is more complex when a non-international, or "internal" armed conflict, such as a civil war, is at issue. In such cases, the conflict must reach a certain level of intensity and duration before the laws of war will apply. *See* Antonio Cassese, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law," 3 *Pac. Basin L. J.* 55, 105, 112 (1984); "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts," *Current Problems of International Law: Essays on United Nations Law and the Law of Armed Conflict* 288 (A. Cassese ed., 1975).

21. *See* Bob Woodward, "Bin Laden Said to 'Own' the Taliban," *The Washington Post,* October 11, 2001, at A1.

22. In addition, since 1996, al-Qaeda has carried out a number of armed attacks against the United States, including the destruction of U.S. embassies in East Africa; assaulting an American warship, the *U.S.S. Cole,* in the harbor of Aden, Yemen; and the bombing of the Khobar Towers in Dhahran, Saudi Arabia, which housed hundreds of U.S. service members. The Taliban was fully aware of each of these actions and yet failed to take action against al-Qaeda. Although a high level of control and coordination may generally be necessary in order to attribute the actions of a "client" organization to a supporting state, *see Nicaragua v. United States* 1986 I.C.J. 14 (Merits) (Jun. 27, 1986) (suggesting the need for a high level of dependence and control before acts of irregular forces may be attributable to supporting state), that level appears to be fully present in this case.

23. *See* Statement by NATO Secretary General, Lord Robertson, on the North Atlantic Council Decision on Implementation of Article 5 of the Washington Treaty following the 11 September Attacks against the United States, October 4, 2001.

24. 7 Moore, *supra* note 14, at 171.

sufficiently determined by the declaration of the enemy, or his open hostilities."[25]

Consequently, as a matter of international law, the United States is at war and would be fully justified in treating the al-Qaeda members it encounters (and any Taliban forces who do not behave in a manner so as to qualify as lawful combatants) as "unlawful combatants," subject to proceedings before a military court.

U.S. Domestic Law

Whether a "state of war" can be said to exist between the United States and the Taliban/al-Qaeda as a matter of U.S. domestic law, however, is a more difficult question.

Although the *Quirin* Court made clear that a "state of war" was necessary before individuals arrested in the United States could be subjected to trial by military commission, it did not specifically address the question of how this state of war was to be brought about. The text of the Constitution, however, does specifically address this issue—it grants to Congress the power to "declare war."[26] By that phrase, the Constitution's Framers understood the power to create a state of war between the United States and another power, for they carefully distinguished this power from the power to "make" war, *i.e.*, to use military force, which is vested in the President as Chief Executive and Commander in Chief of the armed forces.[27] This division of authority made eminent sense, since, unlike the use of armed force, a formal declaration of war worked a number of important legal changes (permitting, for example, the expulsion or internment of enemy aliens and the seizure of their property) more appropriate to the legislative, rather than the executive, branch.

The actual meaning of this constitutional provision, however, became a matter of dispute almost immediately among the Founding generation itself. For example, in 1793 James Madison and Alexander Hamilton clashed, in the "Helvidius/Pacificus" debate, over whether President Washington had the power, on his own authority, to issue a proclamation of neutrality with respect to the war between Britain, her allies, and Jacobin France. These early disagreements included the question of whether a declaration of war was necessary for any U.S. military action. During the conflict between the United States and the Barbary Pirates, for instance, the Jefferson Administration evidently took the position that a declaration by Congress was necessary before the United States could seize Algerian vessels on the high seas. Alexander Hamilton took particular umbrage at this view, writing that a state of war "between two nations is completely produced by the act of one—it requires no concurrent act of the other." He further noted that the Constitution did not incorporate such a rule, claiming that "[t]he framers of it would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and inconvenience. . . . [W]hen a foreign nation declares, or openly and avowedly makes war upon the United States, they are then by the very fact, already at war, and any declaration on the part of Congress is nugatory: it is at least unnecessary."[28]

Hamilton's view, at least for certain purposes, prevailed. The Supreme Court recognized very early that some form of a "state of war" could exist without a formal declaration by the United States.[29] Barely 10 years after the Constitutional Convention, a naval war erupted between France and the United States—the so-called Quasi-War. In two cases involving the disposition of ships cap-

25. Vattel, *supra*, at 478. At the same time, a formal declaration offers a number of tangible legal and practical benefits. In particular, it removes all doubt regarding the rights and obligations of both the belligerents and neutral states—which are far more ambiguous, or at least open to contest, in the context of an undeclared war.

26. U.S. Const., Art. I, § 8, cl. 11.

27. *See* James Madison, *Notes of Debates in the Federal Convention* 476–77 (Koch ed., 1966).

28. *See* Alexander Hamilton, "The Examination, No. 1, 17 Dec. 1801," *reprinted in*, 3 *The Founder's Constitution* (Kurland & Lerner eds. 1987).

tured by the U.S. Navy during this conflict, the Supreme Court acknowledged that the United States could wage a limited war, which was not based on a formal declaration, but was instead governed by several federal statutes. It made clear, however, that a limited war brought only restricted war-related powers into play. As explained by Justice Chase in *Bas v. Tingy*:

> Congress is empowered to declare a general war, or congress may wage a limited war; limited in place, in objects and in time. If a general war is declared, its extent and operation are only restricted and regulated by the jus belli, forming a part of the law of nations; but if a partial war is waged, its extent and operation depend on our municipal [domestic] laws.[30]

Similarly, as Justice John Marshall explained in *Talbot v. Seeman*:

> The whole powers of war being, by the constitution of the United States, vested in congress, the acts of that body can alone be resorted to as our guides in this enquiry. It is not denied, nor in the course of the argument has it been denied, that congress may authorize general hostilities, in which case the general laws of war apply to our situation; *or partial hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.*[31]

Thus, although the United States government can only obtain all of the potential "war powers" available to it under the Constitution through a formal declaration of war, it may nevertheless exercise some lesser measure of that power during a partial or limited war.[32] With respect to any particular power, the test articulated by the Supreme Court is whether it is necessary or "actually applicable" to the level of hostilities Congress has authorized. A reasonable argument can be made that this lesser measure includes the right to subject unlawful combatants to trial by military courts, because the laws of war dealing with unlawful combatants are so basic to any level of hostilities—dealing with the questions of who may lawfully take part in a conflict, and how they must be treated upon capture or defeat—that they always apply when the United States is engaged in an armed struggle. This would support the legality of subjecting unlawful combatants, such as the members of al-Qaeda, to trial by military courts where Congress has authorized hostilities, even though it has not formally declared war.[33]

Nevertheless, subjecting civilians—even as unlawful combatants—to military justice, and particularly to the type of military commission at issue in *Quirin,* is an extraordinary measure in recent times. Military commissions were used in such conflicts during the early- to mid-19th century. In 1862, for example, 37 Dakota Sioux Indians were executed in Minnesota. These individuals were tried before a five-member military commission for the massacre of settlers along Minnesota's

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29. The Supreme Court also has recognized that a "state of war" could be created by the actions of another power. *See The Pedro*, 175 U.S. 354, 363 (1899) (recognizing that war with Spain began prior to actual declaration by Congress based upon declaration of Spanish government).

30. 4 U.S. 37, 43 (1800).

31. 5 U.S. 1, 28 (1801) (emphasis added).

32. The Court has indicated, however, that during the limited war the relevant limitations must be scrupulously respected. In *Little v. Barreme*, 6 U.S. 170, 177 (1804), for example, the Supreme Court struck down a presidential proclamation authorizing the interception of vessels sailing from or to France, reasoning that Congress had, by statute, allowed only the interception of vessels sailing *to* French ports.

33. It should also be noted that the Supreme Court has ruled that the United States could be considered to be "at war" without a formal declaration in the case of undeclared or "limited" wars with the Indian Tribes. *See Montoya v. United States*, 180 U.S. 261, 267 (1901) ("We recall no instance where Congress has made a formal declaration of war against an Indian nation or tribe; but the fact that Indians are engaged in acts of general hostility to settlers, especially if the Government has deemed it necessary to dispatch a military force for their subjugation, is sufficient to constitute a state of war.").

western borderlands.[34] Yet, there are relatively few instances of such proceedings since the 1860s. *Quirin* represents the only instance in which the Supreme Court specifically approved, in the face of a constitutional attack, the use of military commissions in the United States to try individuals not otherwise subject to military justice. Moreover, in the years after *Quirin* was decided, the Court returned to a far more circumspect attitude toward the government's ability to employ military justice *vis-à-vis* individuals not actually enrolled in military service. In *Reid v. Covert* (1952),[35] for example, the Court ruled that the civilian dependents of armed service members, even when overseas, could not be subjected to military courts, noting that:

> the jurisdiction of military tribunals is a very limited and extraordinary jurisdiction derived from the cryptic language of Art. I, § 8, and, at most, was intended to be only a narrow exception to the normal and preferred method of trial in courts of law. Every extension of military jurisdiction is an encroachment on the jurisdiction of the civil courts, and, more important, acts as a deprivation of the right to jury trial and of other treasured constitutional protections.

Moreover, the fact remains that the *Quirin* Court itself addressed a situation that involved a formally declared state of war. Following Hitler's declaration of war on the United States on December 11, 1941, Congress immediately declared that a state of war existed between the United States of America and the government of Germany, in addition to authorizing the President to use "the entire naval and military forces of the government to carry on war against the Government of Germany." This fact was noted by the *Quirin* Court in its decision, in particular with respect to its discussion of the constitutional issues presented by that case:

> The Constitution thus invests the President as Commander in Chief with the power to wage war *which Congress has declared,* and to carry into effect all laws passed by Congress for the conduct of war and for the government and regulation of the Armed Forces, and all laws defining and punishing offences against the law of nations, including those which pertain to the conduct of war.[36]

Citing other opinions from World War I and II, Chief Justice Rehnquist recently wrote that "[w]ithout question the government's authority to engage in conduct that infringes civil liberties is greatest in time of declared war."[37] Thus, it is possible that the Court would have reached a different conclusion in 1942 if Congress had not invoked the full war powers available to the United States, under the Constitution as well as the law of nations, through a formal declaration of war. Although Congress, in its Joint Resolution of September 18, 2001, has invoked a broad range of the war powers of the United States, authorizing the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on Sept. 11, 2001," it has not formally declared a state of war to exist.

Perhaps even more important than the precise differences between the current situation and that in 1942 is that the Supreme Court has become far more protective of civil rights and civil liberties in the past 50 years. It can even be said that it views the protection of civil rights and civil liberties as its special and unique role in the national government and the federal scheme. The *Pentagon Papers* case is an example of how much more protective

34. *See generally*, Carol Chomsky, "The United States-Dakota War Trials: A Study in Military Injustice," 43 *Stan. L. Rev.* 13 (1990) (criticizing the practice of using military tribunals for this purpose).

35. 354 U.S. at 21.

36. 317 U.S. at 26 (emphasis added).

37. Rehnquist, *All the Laws But One, supra* at 218.

of civil liberties the Court was in 1971 than it was earlier in the century. The national security risk posed by the disclosure of a classified history of America's involvement in Vietnam was probably far greater than that posed by journalists and pamphleteers opposed to World War I. Nevertheless, the Court refused to defer to the judgment of the executive branch in 1971 and created a standard that was either impossible for the government to meet (in the case of two concurring justices) or was at least much more difficult to meet.[38]

Indeed, Chief Justice Rehnquist ends his book on civil liberties in wartime by contrasting the modern Court with earlier judges who seemed to adopt the Latin maxim, *Inter arma silent leges*: In time of war the laws are silent. His concluding remarks have an independent significance given his role on the High Court.

> [T]here is every reason to think that the historic trend against the least justified of the curtailments of civil liberty in wartime will continue in the future. It is neither desirable nor is it remotely likely that civil liberty will occupy as favored a position in wartime as it does in peacetime. But it is both desirable and likely that more careful attention will be paid by the court on the basis for the government's claims of necessity as a basis for curtailing civil liberties. The laws will thus not be silent in time of war, but they will speak with a somewhat different voice.[39]

Given the evolution of the Supreme Court's exercise of authority, we believe some justices of the Supreme Court today might not reaffirm *Quirin* even if the facts were identical to that in 1942. This may also render earlier historical precedents of limited value in predicting which way the modern Court would rule.

Despite this evolution in the Supreme Court's independent role, we believe a majority of the Court today would feel constrained to follow its decision in *Quirin* if Congress declared war on the Taliban/al-Qaeda. But the absence of a formal declaration of war might lead several justices to distinguish *Quirin,* even if we believe the distinction is not constitutionally significant. Modern judicial activists have discarded far more established and well-reasoned cases than *Quirin*. Thus, in the absence of a formal declaration of war, we simply cannot say with a high degree of certainty which way the Court would rule.

CONCLUSION

Although Congress has not yet issued a formal declaration of war, there is no doubt that, as a matter of international law, an armed conflict currently exists between the United States and the Taliban/al-Qaeda regime in Afghanistan. It also is clear that members of al-Qaeda have acted as "unlawful combatants." Whether they can be treated as unlawful combatants under the domestic law of the United States, and be subjected to trial by military courts or commission, however, depends upon whether a "state of war" exists pursuant to the United States Constitution.

There is very early support in the judicial precedents of the Supreme Court, actually decided during the active political careers of the Constitution's Framers, suggesting that a "state of war" *can* exist between the United States and a foreign power without a formal declaration of war by Congress, albeit of a limited character. Since the question of who is a lawful and unlawful combatant is central to the law of war, whenever it is applicable, it can reasonably be argued that an undeclared war is sufficient, as a matter of constitutional law, to justify the use of military commissions to try such individuals in the United States.

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38. *New York Times Co. v. United States*, 403 U.S. 713 (1971). It is true that the *Pentagon Papers* case involved a prior restraint of speech, and this does distinguish it somewhat from the facts of the World War I cases, but the majority that ruled against the United States in 1971 would not have likely upheld the conviction of Jacob Abrams in 1919. A simple comparison of the majority's discussion of the issues in *Abrams* v. *United States*, 250 U.S. 616 (1919) with that in the *Pentagon Papers* case will reveal a marked difference in the deference the Court accords the executive branch.

39. Rehnquist, *All the Laws But One, supra* at 224–25.

At the same time, the use of military courts to try non-military personnel is an extraordinary process that has been used in only very limited circumstances during U.S. history. The only direct and definitive authority permitting such trials remains the Supreme Court's decision in *Ex parte Quirin.* That case involved a state of formally declared war, and this point was noted by the Court as part of its ruling. Other practical questions might arise in the absence of a formal declaration of war, including with whom the United States is at war. A formal declaration of war would resolve such questions and allow the President to try al-Qaeda terrorists who have violated the law of wars in military tribunals.

In the absence of a formal declaration, we believe the correct constitutional answer is less clear, and that it is even less obvious how the Supreme Court would rule. Thus, we believe a formal declaration of war should be sought before the United States employs military courts to try al-Qaeda members.[40] This would place such tribunals, which clearly represent a departure from this country's normal legal processes and traditions, on the best possible constitutional basis.

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40. It should be noted, however, that once a state of war is formally declared, there appears to be no requirement that Congress declare war against each state in which al-Qaeda operatives may be discovered. Once Congress has invoked the full range of war powers by a formal declaration, those powers would continue to apply until the armed conflict is concluded. During this period, under *Quirin's* teaching, anyone who actually qualifies as an unlawful combatant in the context of that conflict could be subjected to trial by military commission.