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Essay

Waging War, Deciding Guilt: Trying the Military Tribunals

Neal K. Katyal* and Laurence H. Tribe**

A time of terror may not be the ideal moment to trifle with the most time-tested postulates of government under law. It is certainly not a good time to dispense lightly with bedrock principles of our constitutional system. Central among those principles is that great power must be held in check and that the body that defines what conduct to outlaw, the body that prosecutes violators, and the body that adjudicates guilt and dispenses punishment should be three distinct entities. To fuse those three functions under one man's ultimate rule, and to administer the resulting simulacrum of justice in a system of tribunals created by that very same authority, is to mock the very notion of constitutionalism and to make light of any aspiration to live by the rule of law.¹

In a time of declared war, or in a place where no other form of justice can be administered, institutional arrangements resembling that sketched above, reposing this extraordinary mix of powers in the President as Commander in Chief, might be tolerable. Short of such extreme circumstances, the Constitution at least requires, at a bare minimum, that offenses be defined in advance by positive legislation, that the judicial branch be open to test whether any given individual is properly subject to

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1. Ours is "a government of laws and not of men." MASS. CONST. of 1780, pt. I, art. XXX; *see also* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) ("The government of the United States has been emphatically termed a government of laws, and not of men.").

the jurisdiction of the tribunals at issue and whether the system of tribunals as a whole comports with constitutional commands, and that appeal to some body independent of the President as the convening and prosecuting authority be available to test whether any conviction and sentence handed down by one of the President's tribunals is supportable in law on the evidence presented.

The Constitution requires as well that, absent circumstances so exigent as demonstrably to rule out resort to Congress, that lawmaking body and not the Commander in Chief be the authorizing agent and the architect of the tribunals themselves. For the President to proceed on his own to alter the jurisdiction of the federal courts, redesigning the very architecture of justice, without any colorable claim that time is too short for Congress to act, is to succumb to an executive unilateralism all too familiar in recent days. As of this writing, to take a few examples, the President has evidently decided on his own that those detained at Guantanamo Bay, Cuba, are unlawful belligerents not entitled to prisoner-of-war status; he has suspended one of the oldest privileges in Anglo-American jurisprudence, the attorney-client privilege, for certain suspects; he has detained over a thousand people without ever publicly identifying all those who have been detained; and he has convinced American news networks not to carry full broadcasts of Osama bin Laden because the broadcasts may carry hidden messages.²

While some of these decisions are undoubtedly justified, in the pages that follow we show that the President's Order establishing military tribunals for the trial of terrorists is flatly unconstitutional. We argue that military tribunals are not necessarily unconstitutional under all circumstances; we examine and apply the relevant judicial precedents bearing on when such tribunals may properly be used; and we identify a few open questions that we think merit further consideration.

I. THE MILITARY ORDER

Without advance notice to either the congressional leadership or the public, President Bush issued a Military Order on November 13, 2001, which directed the Secretary of Defense to create military tribunals and to take into custody at once anyone the President names as subject to the

2. See Bruce Ackerman, *Don't Panic*, LONDON REV. BOOKS, Feb. 7, 2002, at 15 (describing many of these examples); William Safire, Editorial, *Colin Powell Dissents*, N.Y. TIMES, Jan. 28, 2002, at A15 (describing State Department opposition to the decision on detainee status); Katharine Q. Seelye, *Detainees Are Not P.O.W.'s Cheney and Rumsfeld Declare*, N.Y. TIMES, Jan. 28, 2002, at A6 (describing how the Bush Administration has decided to treat those detained at Guantanamo Bay, Cuba, as unlawful combatants).

Order.³ The range of people eligible to be so named is vast—potentially jeopardizing the rights and liberties of the approximately 20 million aliens in the United States, as well as any non-United States citizen anywhere in the world. The only cognizable standard for the tribunals’ jurisdiction is appreciably toothless: All it takes is the President’s unilateral written statement that he has “reason to believe” *either* that a particular noncitizen has at some point committed, or aided and abetted, what the President deems an act of “international terrorism,” *or* that a person is, or at any point was, a member of a named terrorist organization (al Qaeda).⁴ The Order’s terms sweep so broadly that they reach a Basque separatist who kills an American citizen in Madrid, or a member of the Irish Republican Army who threatens the American embassy in London.⁵

The Order explicitly permits the tribunals to “sit at any time and any place”—including the United States.⁶ While the Military Order’s procedural protections fall conspicuously short of those most Americans take for granted,⁷ the Secretary of Defense is authorized to provide further protections through regulation.⁸ Such regulations are necessary to cure

3. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism §§ 3(a), 4(b), 66 Fed. Reg. 57,833 (Nov. 13, 2001) [hereinafter Military Order].

4. The Order covers anyone who there is reason to believe

- (i) is or was a member of the organization known as al Qaida;
- (ii) has engaged in, aided or abetted, or conspired to commit, *acts of international terrorism*, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; *or*
- (iii) has knowingly harbored one or more individuals described [in the first two categories above].

Id. § 2(a)(1) (emphasis added).

5. *Id.* As the White House Counsel wrote, “Under the order, the president will refer to military commissions . . . noncitizens who are members or active supporters of Al Qaeda or other international terrorist organizations targeting the United States.” Alberto R. Gonzales, Editorial, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27.

6. Military Order, *supra* note 3, § 4(c)(1); *see also id.* §§ 3(a), 7(d).

7. Whenever and wherever the Constitution is applicable, it generally requires: (1) a trial by jury; (2) that the jury trial be a speedy and *public* one; (3) the right to confront witnesses and subpoena defense witnesses; (4) proof beyond a “reasonable doubt” for criminal convictions in general, and detailed procedural protections to ensure accuracy before the death penalty is imposed; and (5) indictment by a grand jury. *See* U.S. CONST. art. III, § 2 (providing the right to a jury trial); *id.* amend. VI (providing the “right to a speedy and public trial, by an impartial jury”); *id.* (requiring that an accused have the right “to be confronted with the witnesses against him; [and] to have compulsory process for obtaining witnesses in his favor”); *In re Winship*, 397 U.S. 358, 364 (1970) (requiring the “beyond a reasonable doubt” standard in state criminal trials); *Lockett v. Ohio*, 438 U.S. 586 (1978) (requiring individualized consideration of mitigating factors in sentencing individuals to death); U.S. CONST. amend. V (“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . .”); *see also* *Duncan v. Kahanamoku*, 327 U.S. 304, 307 (1946) (observing that “military tribunals . . . fail to afford” “established procedural safeguards” that “are prized privileges of our system”).

8. The Order states that, “at a minimum,” the Secretary of Defense is to issue regulations that “provide for . . . a full and fair trial, with the military commission sitting as the triers of both fact

some of the dramatic problems plaguing the Order, such as its authorization for the tribunals to operate in secret, without any publicity to check their abuses and with no threshold requirement of a showing that such secrecy is needed,⁹ and its grant of permission to impose the death penalty without a unanimous vote either on guilt or on the sentence.¹⁰ Even with regulations to plug those holes, however, the tribunals would by design eschew both grand jury presentment and jury trial, and would employ—as the triers of fact and law—military officers who lack the insulation of Article III judges, being wholly dependent on the discretion of their military superiors for promotions and indeed for their livelihood. Furthermore, the Order does not guarantee an appeal from any conviction or sentence to judges independent of the executive branch.¹¹ Rather, language in the Order strongly suggests a desire to eliminate even habeas corpus review of the legality of the entire scheme and of the tribunals' jurisdiction over particular individuals.¹²

and law," with admissibility of all evidence that has "probative value to a reasonable person," and with conviction and sentencing "only upon the concurrence of two-thirds of the members of the commission present." Military Order, *supra* note 3, § 4(c)(2)-(3), (6)-(7). We understand the words "at a minimum" to suggest that the Secretary may provide for procedural protections that go beyond those specified in the Military Order.

9. *Id.* § 4(c)(4).

10. *See id.* § 4(c)(6)-(7). The regulations being contemplated as of this writing would apparently require a unanimous verdict in order to sentence someone to death. *See* Neil A. Lewis, *Rules on Tribunal Require Unanimity on Death Penalty*, N.Y. TIMES, Dec. 28, 2001, at A1.

11. Those cases holding that no appeal need be provided as a matter of right, such as *McKane v. Durston*, 153 U.S. 684, 687 (1894), do not override the basic right to have someone other than one's accuser assess one's guilt. *Cf.* *Dr. Bonham's Case*, 77 Eng. Rep. 646, 652 (K.B. 1610) (stating that a person cannot be a judge in his own cause). An "appeal" to the chief prosecutor himself cannot satisfy due process where the judgment appealed from was rendered by a body "whose personnel are in the executive chain of command." *Reid v. Covert*, 354 U.S. 1, 36 (1957). Just as the Court has found some appeal to a neutral judge essential as a matter of due process even in certain cases involving only monetary penalties and no criminal punishment at all, *see* *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430-32 (1994), such an appeal is required by due process here given that the tribunals are determining guilt in the first instance. And it is, of course, settled that to the degree an appeal is provided, due process demands that it be an appeal to a disinterested body. *See, e.g., Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 821-25 (1986).

12. The Order states:

- (1) [M]ilitary tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and
- (2) the individual shall not be privileged 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 (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal.

Military Order, *supra* note 3, § 7(b). The Order also provides for submission of the trial record and any conviction "for review and final decision" by the President or Secretary of Defense. *Id.* § 4(c)(8).

The White House Counsel has nonetheless stated that the "[o]rder preserves judicial review in civilian courts. Under the order, anyone arrested, detained or tried *in the United States* by a military commission will be able to challenge the lawfulness of the commission's *jurisdiction* through a habeas corpus proceeding in a federal court." Gonzales, *supra* note 5 (emphasis added). When similar language was used during World War II, the Court construed it to permit certain habeas corpus actions. *See infra* text accompanying note 85.

The Order is so written that virtually *any* act by an alien, anywhere, could, in theory, give the President “reason to believe” the alien either has or once had some form of tribunal-triggering involvement with some international terrorist organization.¹³ The Order expressly covers all those who have ever “aid[ed] or abet[ted]” terrorists “or act[ed] in preparation [for]” terrorism.¹⁴ In contradistinction to its harboring provision, which covers only those who “knowingly harbored” terrorists or members of al Qaeda, this provision conspicuously contains no mens rea requirement at all.¹⁵ And if the Order is taken to supply the substantive definition of the offenses triable by, as well as to outline the jurisdiction of, the tribunals, then the absence of a mens rea requirement would bring within the Order’s sweep a vast sphere of entirely innocent conduct, such as hiring a car for a friend when the friend turns out to be a terrorist, or donating money to a charity when that charity turns out to be a front for terrorism. We hope the Order was not intended to try to criminalize such acts, but its words encourage the broadest of constructions, and its vagueness invites arbitrary and potentially discriminatory determinations as to which categories of persons, or indeed which specific individuals, are to submit to a military trial, and which are to be spared that burden.

The White House Counsel has promised that the Order would not reach any but “foreign enemy war criminals”—whatever that might mean.¹⁶ The Geneva Conventions limit the ways regular soldiers who surrender or are captured may be treated, and we take it as given that the tribunals contemplated by the Order would be vested with no authority to try soldiers recognizable as such. Only “unlawful combatants”—a category first recognized by the Supreme Court in 1942 but reflecting a long-standing distinction—may be tried in military tribunals.¹⁷ This limitation could pose

13. It is, for example, difficult to know, under the Order’s loose definition of covered activities, exactly what sort of act “threaten[s]” an “injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy.” Military Order, *supra* note 3, § 2(a)(1)(ii). Almost any offense involving money—from counterfeiting currency, to holding up a bank at gunpoint, to threatening to blow up the bank—could come under this description.

14. *Id.*

15. Compare *id.* § 2(a)(1)(iii) (covering those who “knowingly harbored one or more individuals” described in other sections of the Order), with *id.* § 2(a)(1)(ii) (covering all those who have “engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor”).

16. Gonzales, *supra* note 5. Mr. Gonzales has also stated that each military tribunal’s proceedings would be conducted in the open, with exceptions only for “the urgent needs of national security.” *Id.* It is, to be sure, nice to have the White House Counsel’s personal guarantee that this is so, but “trust me” has never been enough for the American people when their rights have been at stake. See *supra* note 1 and accompanying text.

17. *Ex parte Quirin*, 317 U.S. 1, 35 (1942). The difference between lawful and unlawful combatants is codified in several international conventions. See Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, *adopted* June 8, 1977, arts. 43-44, 1125 U.N.T.S. 3, 23-24 [hereinafter Protocol I to the Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, *adopted* Aug. 12, 1949, arts. 4-5, 6 U.S.T. 3317, 3320-22, 75 U.N.T.S. 134, 138-42; Fourth Hague

a problem in a case such as that of captured Taliban footsoldiers whom our military leaders suspect of harboring, or working in close concert with, al Qaeda. Unless such combatants happen to be among al Qaeda's leadership, they are unlikely to have been sufficiently responsible for that group's terrorist acts to count as unlawful belligerents.

To be considered lawful belligerents, soldiers must "carry arms openly," "have a fixed distinctive emblem recognizable at a distance," and "conduct their operations in accordance with the laws and customs of war."¹⁸ In circumstances in which persons "on the approach of the enemy spontaneously take up arms to resist the invading forces," however, the requirement of recognizable military uniforms is relaxed under international law.¹⁹ This would suggest that some of those fighting on behalf of the Taliban in Afghanistan—and thus some whose status the President has been unwilling to resolve on an individualized basis despite the Geneva Convention's requirement that "any doubt" about status be "determined by a competent tribunal"²⁰—might in fact qualify as lawful belligerents and be entitled to relief on habeas corpus from detention other than as prisoners of war with all of the protections that flow from that status. The September 11 hijackers and those reasonably believed to have conspired with them, in contrast, could not so qualify.²¹ Again, we assume that the Order reaches

Convention Respecting the Laws and Customs of War on Land, *done* Oct. 18, 1907, Annex, art. 1, 36 Stat. 2277, 2295-96. Like many legal rules, the distinction is not always clear. For example, Justice Black, joined by Justices Douglas and Burton, disagreed with the majority over what constituted unlawful belligerency in the *Eisenrager* case. *Johnson v. Eisenrager*, 339 U.S. 763, 793 (1950) (Black, J., dissenting) ("Whether obedience to commands of their Japanese superiors would in itself constitute 'unlawful' belligerency in violation of the laws of war is not so simple a question as the Court assumes.").

18. Fourth Hague Convention Respecting the Laws and Customs of War on Land, *supra* note 17, Annex, art. 1, 36 Stat. at 2296.

19. Geneva Convention Relative to the Treatment of Prisoners of War, *supra* note 17, art. 4(a), 6 U.S.T. at 3322, 75 U.N.T.S. at 138-40 (stating that such individuals qualify for protection "provided they carry arms openly and respect the laws and customs of war").

20. *Id.* art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 140-42 (emphasis added); *see also supra* note 2 and accompanying text (discussing the Bush Administration's unwillingness to provide individualized determinations of the status of those detained at Guantanamo Bay).

21. The Geneva Convention also affords rights to unlawful belligerents that the Military Order appears not to guarantee. Article 75 of Protocol I to the Geneva Convention declares, for instance, that anyone charged has the "right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him," is "presumed innocent until proven guilty according to law," cannot "be compelled to testify against himself or to confess guilt," and "shall have the right to have the judgment pronounced publicly." Protocol I to the Geneva Convention, *supra* note 17, art. 75, 1125 U.N.T.S. at 37-38. These rights apply to every combatant, even mercenaries. DOCUMENTS ON THE LAWS OF WAR 421 (Adam Roberts & Richard Guelff eds., 3d ed. 2000) (stating that unlawful combatants such as mercenaries "remain under the protection of the fundamental guarantees, applicable to all persons, as set forth in Article 75"); L.C. GREEN, THE CONTEMPORARY LAW OF ARMED CONFLICT 191, 226 (1993) (stating the same rule). Yet these Article 75 guarantees, particularly those requiring production of witnesses and public judgments, appear to be cut back in the Order.

only unlawful belligerents (despite the absence of language in the Order so restricting it), but its vagueness on that score is deeply troublesome.²²

As such ambiguities reveal, the next steps require legislation if the administration hopes to use military tribunals and defend them from judicial invalidation, especially when many of the acts made subject to their exclusive jurisdiction at the stroke of the President's pen would otherwise fall within the jurisdiction of civilian courts created by Congress and fully capable of adjudicating the cases the President would remove from their ambit. Surely, it is not within the President's power to detain, and to threaten with trial by a military tribunal, anyone who associates with agents of terror.²³ Yet the Order installs the executive branch as lawgiver as well as law-enforcer, law-interpreter, and law-applier,²⁴ asserting for the executive branch the prerogative to revise the jurisdictional design of the

22. One other aspect of the Military Order does not appear to be under consideration for administrative modification. The Military Order permits the indefinite detention of any alien the President suspects to be a member of al Qaeda, anyone he suspects of terrorism, or anyone who aids or abets such individuals. This detention power is in no way contingent on proving that the laws of war have been violated, and there is actually no requirement of an eventual trial or tribunal in the Order. *See* Military Order, *supra* note 3, § 2(b) (“[T]he Secretary of Defense shall take all necessary measures to ensure that any individual subject to this order is detained in accordance with section 3, and, *if the individual is to be tried*, that such individual is tried only in accordance with section 4.” (emphasis added)); *id.* § 3 (providing conditions for detention); *id.* § 4 (“Any individual subject to this order shall, *when tried*, be tried by military commission” (emphasis added)).

23. Such unbounded power flies in the face of decisions such as *City of Chicago v. Morales*, 527 U.S. 41 (1999), which held that the City of Chicago's response to street gangs—enacting legislation that allowed the police to arrest and prosecute anyone who, loitering near a known gang member, did not disperse upon police command—was facially unconstitutional in essentially delegating to those who enforce the law the vaguely bounded power to make it on the spot. Justice Thomas characterized the gangs as quasi-terrorists, describing them as “fill[ing] the daily lives of many of our poorest and most vulnerable citizens with . . . terror.” *Id.* at 99 (Thomas, J., dissenting). The Court struck down the Chicago ordinance on its face—without waiting until particular individuals were convicted or even charged. The judicial response to the Military Order, despite Bush Administration efforts to describe it as more like a mere press release than a real order, *see* Gonzales, *supra* note 5, could be harsher still. For at least the Chicago threat carried with it the guarantee that nobody would be arrested without first receiving a clear and individualized warning—and that anyone could avoid arrest and prosecution simply by heeding that warning and dispersing when ordered to do so. The Military Order carries no such corresponding assurance.

24. The Order confuses the role of legislator, policeman, prosecutor, judge, and court of appeal, concentrating all of these powers in the executive branch. For the role of the legislator, see Military Order, *supra* note 3, §§ 4(b), 6(a), which gives the power to promulgate “orders and regulations” necessary for commissions to the Secretary of Defense; *id.* § 2(a), which states that the President shall “determine from time to time in writing” who is a terrorist subject to the commissions; and *id.* § 4(c)(5), which provides that the Secretary of Defense should “designat[e]” persons to “conduct . . . prosecution.” For the role of the policeman, see *id.* § 3(a), which provides the power to “detain[] at an appropriate location.” For the role of the prosecutor, *see id.* § 4(a), which provides trial “for any and all offenses triable by military commission” and punishment including life imprisonment or death. For the role of the judge, see *id.* § 4(c)(2). For the role of the court of appeal, see *id.* § 4(c)(8), which provides for “review and final decision by [the President] or by the Secretary of Defense if so designated by [the President] for that purpose.” In fact, the President himself is empowered to take on both the role of prosecutor, in determining who is to be subject to the tribunal under section 2(a), and of ultimate court of appeal under section 4(c)(8).

system of criminal justice and leaving to the executive the specification, by substantive rules promulgated as it goes along, of what might constitute “terrorism” or a “terrorist” group and a host of other specifics left largely to the imagination. This “blending of executive, legislative, and judicial powers in one person or even in one branch of the government is ordinarily regarded as the very acme of absolutism.”²⁵

II. THE PRECONDITION OF LEGISLATIVE AUTHORIZATION

In brief, our position is that the Constitution sets up a structure whereby the concurrence of all three branches is normally needed in order to authorize a decisive departure from the legal status quo. Certainly, when a president is to take action that puts basic constitutional guarantees at risk, legislative authorization is presumptively required. Nothing in the Constitution, including the Commander-in-Chief Clause, alters this basic constitutional arrangement. Like any precept in constitutional discourse, this presumption may be overcome in circumstances where the President is manifestly unable to consult in a timely way with Congress before decisive action must be taken. But in the absence of an emergency that threatens truly irreparable damage to the nation or its Constitution, that Constitution’s text, structure, and logic demand approval by Congress if life, liberty, or property are to be significantly curtailed or abridged. Nothing less is meant by the Constitution’s simple but majestic command that no person “be deprived of life, liberty, or property, without due process of *law*.”²⁶ The military trial of “unlawful combatants” is no different: Congress at a minimum must clearly provide *by law* for the trial of such combatants by military commissions; it can do so either through a formal declaration of war or by specific authorizing legislation.²⁷

Throughout its history, there have been times when our nation has proceeded on the premise that civil trials and various other protections ordinarily entailed by due process need not, and in all fairness should not,

25. Reid v. Covert, 354 U.S. 1, 11 (1957).

26. U.S. CONST. amend. V (emphasis added). Hereinafter, “liberty” will be a synecdoche for the three categories of life, liberty, and property.

27. It is imperative that Congress not retroactively criminalize conduct that “was innocent when done; nor make more burdensome the punishment for a crime, after its commission; nor deprive one charged with crime of any defense available according to law at the time when the act was committed.” Collins v. Youngblood, 497 U.S. 37, 52 (1990). Provided a congressional act has none of these effects, and does not increase the defendant’s evidentiary burden, Carmell v. Texas, 529 U.S. 513, 531 (2000), its action will not violate the Ex Post Facto Clause. See also Thompson v. Missouri, 171 U.S. 380 (1898) (finding no violation where a statute permitted the introduction of expert handwriting testimony as competent evidence, despite the fact that the rule in place at the time of the offense did not permit such evidence to be introduced). However, “[a]pplication of a new jurisdictional rule usually ‘takes away no substantive right but simply changes the tribunal that is to hear the case.’” Landgraf v. USI Film Prods., 511 U.S. 244, 274 (1994) (citation omitted).

be demanded. Yet those circumstances have been rare, carefully circumscribed, and virtually never defined by a single person. Unacceptable danger lurks if power to define such extraordinary circumstances is left in the hands of any one individual, however earnestly he may believe the nation is in grave peril. The need for congressional authorization, while always important, is never more so than when the judiciary cannot be relied upon to enforce the Constitution with all due vigor. The requirement that the executive branch persuade Congress of the need for measures that jeopardize liberty dampens the tendency of the executive to undertake such measures without the clearest necessity. Formal involvement by Congress, through a joint resolution or bill, is the least that we ordinarily require in order to provide the transparency, perspective, and wisdom needed to authorize measures that might well be, but need not invariably be, unconstitutional even with such involvement.²⁸

In the Sections that follow, we outline a model of military action by the executive branch that we believe harmonizes two central ideas of our Constitution: that the President should possess broad military powers, and that government should strive mightily to avoid unwarranted deprivations of liberty. The Constitution commits several distinct tasks to the President—as the chief executive of the government, he serves as head of state in dealing with foreign governments, has responsibility for “tak[ing] Care that the Laws be faithfully executed,”²⁹ and functions as Commander in Chief of the armed forces. In performing each of these tasks, he (or, someday, she) has a broad set of implied powers that may be exercised without congressional authorization and a narrow set of powers that may be exercised even in the face of purported congressional prohibition. In the latter category, the President can veto bills, make recess appointments, remove purely executive officials at will, receive ambassadors, convene Congress “on extraordinary Occasions,” and adjourn Congress when there is internal disagreement about when to adjourn.³⁰ In each of these circumstances, even explicit disapproval by a majority in Congress cannot trump the structure of the Constitution. These occasions are marked with some specificity by the Constitution itself.³¹

28. *Cf.* WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* 219 (1998) (stating that a congressional directive gives the President power to do things he cannot otherwise do, but noting that “Congress may not always grant the President all of the authority for which he asks”).

29. U.S. CONST. art. II, § 3.

30. *Id.* art. II, §§ 2-3.

31. The Constitution does not make explicit the President’s power to remove at will purely executive officers whose subjection to the President’s political will is inherent in their role, but such a power is quite a plausible inference from the Constitution’s structure of separated powers. *Myers v. United States*, 272 U.S. 52, 117 (1926).

On each such occasion, the Constitution's structure notably makes it unusually difficult for the President unilaterally to change the legal status quo, at least when such a change is bound to generate broad "externalities" beyond the functioning of the executive department. To effect these broader changes, the Constitution specifies that Congress must first vest the executive with additional authority, just as it must first vest jurisdiction in the judicial branch or in other "Tribunals inferior to the supreme Court"³² to hear certain categories of cases. Against this broad backdrop, we turn to the specific issue of military tribunals.

A. *The Implications of the Constitution's Text and Structure*

Military tribunals implicate the oft-recognized tension in foreign affairs between Congress's power to "declare War"³³ and the President's "Commander in Chief"³⁴ power. They also crucially implicate several other congressional powers: "To define and punish . . . Offences against the Law of Nations,"³⁵ "To establish an uniform Rule of Naturalization,"³⁶ "To make Rules for the Government and Regulation of the land and naval Forces,"³⁷ "To constitute Tribunals inferior to the supreme Court,"³⁸ and, most generally, the power to make law.³⁹ Despite the more sweeping grant of power to the President in the opening Vesting Clause of Article II, these other texts create a framework that requires legislative approval for all significant deprivations of liberty.⁴⁰ This framework is itself a fractal of a larger order, for the Constitution's entire structure creates a "rights-protecting asymmetry" whereby the concurrence of all three branches is necessary before the government may decisively alter anyone's legal rights or entitlements: In a word, these rights may not be curtailed except pursuant to duly enacted *law*. Congress must pass a bill with the President's consent or by a two-thirds vote over his veto;⁴¹ the President must enforce the

32. U.S. CONST. art. I, § 8, cl. 9.

33. *Id.* art. I, § 8, cl. 11.

34. *Id.* art. II, § 2, cl. 1.

35. *Id.* art. I, § 8, cl. 10.

36. *Id.* art. I, § 8, cl. 4.

37. *Id.* art. I, § 8, cl. 14.

38. *Id.* art. I, § 8, cl. 9.

39. *Id.* art. I, § 7.

40. Compare *id.* art. II, § 1, cl. 1 ("The executive Power shall be vested in a President of the United States of America."), with *id.* art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress . . ."). See also *Myers v. United States*, 272 U.S. 52, 118 (1926) ("The executive power was given in general terms, strengthened by specific terms where emphasis was regarded as appropriate, and was limited by direct expressions where limitation was needed . . ."). Neither the text of the Vesting Clauses nor the cast given to them in *Myers* goes so far as to authorize presidential action in circumstances that trench on Congress's Article I, Section 8 powers.

41. U.S. CONST. art. I, § 7, cls. 1-2. See generally Neal Kumar Katyal, *Legislative Constitutional Interpretation*, 50 DUKE L.J. 1335, 1368-69 (2001) (discussing the Constitution's

resulting law (and can pardon anyone convicted under it),⁴² and the courts must be given an opportunity to rule on the constitutionality of the government's action.⁴³ Each branch has the power to block a change that alters the baseline of individual liberty, and in the case of the political branches, inaction alone cannot suffice to constitute assent. This design was no accident. The colonists who wrote our Declaration of Independence penned, among their charges against the King, that "He has affected to render the Military independent of and superior to the Civil Power";⁴⁴ "depriv[ed] us, in many Cases, of the Benefits of Trial by Jury";⁴⁵ and "made Judges dependent on his Will alone."⁴⁶

Against this structure, the Bush Administration has sought to convert the singular Commander-in-Chief Clause into a textual warrant for exceptional unilateralism.⁴⁷ Yet, as broad as the Commander-in-Chief power is, it is not unlimited. In particular, the Law-of-Nations Clause means that Congress must enact positive law if offenses are to be punished.⁴⁸ Even so strong a defender of executive power as Alexander

"rights-protecting asymmetry"). The President has the power to veto a law he thinks unconstitutional. U.S. CONST. art. I, § 7, cl. 2.

42. U.S. CONST. art. II, § 3; *id.* art. II, § 2, cl. 1.

43. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

44. THE DECLARATION OF INDEPENDENCE para. 14 (U.S. 1776); *see also* *Laird v. Tatum*, 408 U.S. 1, 19 (1972) (Douglas, J., dissenting) (finding that this clause restricts the power of the military); *Reid v. Covert*, 354 U.S. 1, 29 (1957) (discussing this clause).

45. THE DECLARATION OF INDEPENDENCE para. 20 (U.S. 1776).

46. *Id.* para. 11.

47. *E.g.*, *The Department of Justice and Terrorism: Hearing Before the S. Judiciary Comm.*, 107th Cong. (2001) (LEXIS, Nexis Library, Federal News Service File) [hereinafter *Terrorism Hearings*] (statement of John Ashcroft, Attorney General) (emphasizing that "the President's authority to establish war crimes commissions arises out of his power as commander-in-chief"); *id.* ("I believe, that's clearly the power of the president and his power to undertake that unilaterally. The Supreme Court did address in the *Quirin* case, 60 years ago, the issue of war crimes commissions. And in that case, it cited the authority of the congressional declaration of war as language recognizing the president's power to create war crimes commissions. But I don't believe that the court indicates or predicates its assumption and accordance of the president that power upon that particular authority."); *Preserving Freedoms While Defending Against Terrorism: Hearing Before the S. Judiciary Comm.*, 107th Cong. (2001) (LEXIS, Nexis Library, Federal News Service File) (statement of Sen. Orrin Hatch) ("Because the president's power to establish military commissions arises out of his constitutional authority as commander-in-chief, an act of Congress is unnecessary.").

48. *See infra* text accompanying notes 70-78. Offenses against the law of nations, Justice Story wrote, "cannot with any accuracy be said to be completely ascertained and defined, in any public code recognized by the common consent of nations," so that "there is a peculiar fitness in giving to Congress the power to define, as well as to punish." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1163, at 89 (Melville Bigelow ed., William S. Hein & Co. 5th ed. 1994) (1833). Case law recognizes a similar point for criminal law and military law. *See United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) ("The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence."); *Burns v. Wilson*, 346 U.S. 137, 140 (1953) ("Military law, like state law, is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment. This Court has played no role in its development; we have exerted no supervisory power over the courts which enforce it The Framers expressly entrusted that task to Congress." (citation omitted)). Indeed, without congressional guidance, military tribunals

Hamilton described the Commander-in-Chief Clause as “amount[ing] to nothing more than the supreme command and direction of the military and naval forces, as first General and Admiral of the confederacy; while that of the British King extends to the declaring of war.”⁴⁹ But ours is not so wooden an approach as to insist that this power does nothing more than confirm the President’s role as Congress’s chief puppet. In the theatre of a war, the President does not need congressional permission to decide how and when, within the laws of war and other applicable rules of international law, to take custody of enemy combatants upon their capture or surrender for the purpose of detention until the war ends and repatriation is possible. That much is implicit in the commander-in-chief function itself.

The moment the President moves beyond detaining enemy combatants as war prisoners to actually adjudicating their guilt and meting out punishment, however, he has moved outside the perimeter of his role as Commander in Chief of our armed forces and entered a zone that involves judging and punishing alleged violations of the laws, including the law of nations (which encompasses the laws of war). In that adjudicatory and punitive zone, the fact that the President entered wearing his military garb should not blind us to the fact that he is now pursuing a different goal—assessing guilt and meting out retrospective justice rather than waging war. Contrast, for example, a prisoner of war punished for infractions committed while detained in that capacity (such as killing prison guards or injuring fellow prisoners) with a captured combatant punished for wantonly slaughtering unarmed and wholly innocent civilians. The first case is ancillary to the commander-in-chief function; the second is logically, morally, and legally separable.

In our view, a president who sets out to put on trial and then to punish offenders against the laws of war in the course of a constitutionally directed military campaign must generally be regarded as no different from a president who sets out to try and punish those whom he regards as offenders against any other body of law, domestic or international, whom the officials, properly directed by the president in any of his other core functions, happen to encounter and detain in the course of carrying out presidential instructions. So, for instance, if a president is traveling down

can obviously stray far beyond the circumstances of whatever emergency might have initially justified them, sweeping up many unrelated investigations. “Mission creep” can infect not only military operations that employ force, but also those that involve prosecutors and judges.

49. THE FEDERALIST NO. 69, at 465 (Alexander Hamilton) (Jacob E. Cooke ed., 1961); see also *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring) (stating that the Clause is limited to “the command of the forces and the conduct of [military] campaigns”); JOHN HART ELY, *WAR AND RESPONSIBILITY* 53 (1993) (outlining the limited function of the Clause); William W. Van Alstyne, *Letting Slip the Dogs of War*, WASH. POST, Dec. 23, 1990, at C7 (stating that the President’s power is only “to pursue such war as Congress shall expressly authorize”).

Pennsylvania Avenue to give his State of the Union address (or is engaged in an exercise of his power to veto, pardon, make recess appointments, receive ambassadors, call out the militia to protect a state from invasion, or negotiate treaties), and a gang of thugs attempts to obstruct an exercise of any of these powers, whatever inherent power the President might possess to intercept and detain members of the gang so as to immobilize them from further interference or obstruction does not extend to the very different power to create and administer tribunals to adjudicate their guilt and to mete out punishment. This is so even if the tribunals provide the full panoply of Article III safeguards and Bill of Rights protections, for the Constitution explicitly gives to Congress, not the President, the power to make law, to define and punish offenses against the law of nations, and to create tribunals inferior to the Supreme Court.⁵⁰

The Constitution also vests in Congress the power to declare war and thereby to give the executive branch additional authority. As Justice Chase put it soon after the Founding, “If a general war is *declared*, its extent and operations are only restricted and regulated by the *jus belli*, . . . but if a partial war is *waged*, its extent and operation *depend on our municipal laws*.”⁵¹ Chief Justice Rehnquist has written:

Without question the government’s authority to engage in conduct that infringes civil liberty is greatest in time of declared war—the Schenck and Hirabayashi opinions make this clear. . . .

. . . .

. . . [F]rom the point of view of governmental authority under the Constitution, it is clear that the President may do many things in carrying out a congressional directive that he may not be able to do on his own.⁵²

50. As we explain in Section II.B, this analysis is confined by two functional exceptions: (1) circumstances in which enemy territory has been conquered, and the military is needed to provide law and order in that theatre, and (2) situations where the adjudication of guilt of those captured is immediately necessary, and Congress cannot act expeditiously enough given the exigency.

51. *Bas v. Tingy*, 4 U.S. (7 Dall.) 37, 43 (1800) (emphasis added). Justice Story’s *Commentaries* suggested a similar theme three decades later, claiming that war “never fails to impose upon the people the most burdensome taxes, and personal sufferings . . . It is sometimes fatal to public liberty itself, by introducing a spirit of military glory, which is ready to follow wherever a successful commander will lead.” STORY, *supra* note 48, § 1171, at 92. He concludes that it “should therefore be difficult in a republic to declare war.” *Id.*; see also J. Gregory Sidak, *To Declare War*, 41 DUKE L.J. 27, 33 (1991) (stating that only a “declaration of war fulfills Congress’s representative function because it is more immediately visible to the electorate, less susceptible to ambiguity and disagreement once it is made, and thus more conducive to effective monitoring of the performance of political actors”).

52. REHNQUIST, *supra* note 28, at 218-19; see also U.S. CONST. amend. III (permitting the government to quarter troops in private homes without the consent of owners “in time of war,” but

Several statutes reflect the Chief Justice's constitutional vision—most notably the still-surviving 1798 Alien Enemy Act, which gives the President the power to “secure[] and remove[]” any “citizens . . . or subjects of the hostile nation” in the event of “a declared war.”⁵³

While a declaration of war usefully confines the circumstances in which military tribunals may be used and limits their jurisdiction to a finite period of time, sometimes the exigencies of the threat may require immediate action without waiting for Congress. Indeed, earlier military tribunals—in the Revolutionary War, the War of 1812, the Civil War, and World War II—occurred during “total wars,” to use Corwin's evocative phrase—wars in which there was a real danger that America might lose its Constitution and its way of life.⁵⁴ If these uses were defensible, the reason is that the Constitution is not a “suicide pact.”⁵⁵ President Lincoln assumed

even then confined to circumstances “prescribed by law”); 50 U.S.C. § 1829 (1994) (“[T]he President, through the Attorney General, may authorize physical searches without a court order . . . to acquire foreign intelligence information for a period not to exceed 15 calendar days following a declaration of war by the Congress.”); *Campbell v. Clinton*, 203 F.3d 19, 29-30 (D.C. Cir. 2000) (Randolph, J., concurring) (stating that a “congressional declaration of war carries with it profound consequences” and describing how a “declaration of war may also have the effect of decreasing commercial choices and curtailing civil liberties”); Introduction and Summary to Opinions of the Office of Legal Counsel Relating to the Iranian Hostage Crisis, 4A Op. Off. Legal Counsel 71, 91-92 (1984) (stating, in an opinion written by then-Assistant Attorney General Theodore Olson, that certain statutes trigger power “only in the event of a declared war”). We do not necessarily endorse all the activities that have been taken and upheld during declared wars, but simply observe that a declaration of war confers additional, though not unbounded, powers to the government. *Cf. Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948) (“[I]f the war power can be used in days of peace to treat all the wounds which war inflicts on our society, it may not only swallow up all other powers of Congress but largely obliterate the Ninth and the Tenth Amendments as well.”).

53. Act of July 6, 1798, ch. 66, § 1, 1 Stat. 577, 577. The current version of the Act is found at 50 U.S.C. § 21, and in both the original form and the present version it is also triggered by a threatened or actual “invasion or predatory incursion . . . by any foreign nation or government.” *Id.*; see also *United States ex rel. Jaeger v. Carusi*, 342 U.S. 347, 348 (1952) (“The statutory power of the Attorney General to remove petitioner as an enemy alien ended when Congress terminated the war with Germany. Thus petitioner is no longer removable under the Alien Enemy Act.”); *Johnson v. Eisentrager*, 339 U.S. 763, 775 (1950) (describing how the Alien Enemy Act is triggered only by a declaration of war and opining that, when such a state of war exists, “courts will not inquire into any other issue as to [an alien enemy's] internment”); *Ludecke v. Watkins*, 335 U.S. 160, 166 n.11 (1948) (rejecting the view that the legislative history of the Alien Enemy Act shows that “declared war” meant “state of actual hostilities”); J. Gregory Sidak, *War, Liberty, and Enemy Aliens*, 67 N.Y.U. L. REV. 1402, 1402 (1992) (describing the Alien Enemy Act and stating that “a formal declaration of war” is “valuable” because it “forces Congress to acknowledge publicly, and to accept, that one cost of waging war is that individual liberty in the United States might have to suffer”).

54. EDWARD S. CORWIN, *TOTAL WAR AND THE CONSTITUTION* (1947). Corwin described total war as “the politically ordered participation in the war effort of all personal and social forces, the scientific, the mechanical, the commercial, the economic, the moral, the literary and artistic, and the psychological.” *Id.* at 4.

55. *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963). Chief Justice Marshall surely had it right in the most important structural analysis of our Constitution to be found in the pages of the *United States Reports*, *McCulloch v. Maryland*: The Constitution is “intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs.” 17 U.S. (4 Wheat.) 316, 415 (1819).

as much in his unilateral decisions at the outset of the Civil War and in his jolting question respecting his suspension of the law guaranteeing access to the writ of habeas corpus: “[A]re all the laws but one to go unexecuted, and the government itself go to pieces lest that one be violated?”⁵⁶ Importantly, however, Lincoln then asked Congress for, and obtained, retroactive approval of his extraordinary exercises of power.⁵⁷

Plainly, the President’s emergency power to save the Constitution and country must be most sparingly used, for without the sturdiest limits that power could eclipse all our constitutional guarantees. Constitutional doctrine has recognized this basic proposition—most dramatically in the *Steel Seizure Case*,⁵⁸ which is perhaps the Court’s most important attempt to fit the needs of executive branch decisionmaking at times of crisis within our constitutional tradition. Then, as now, the country was embroiled in military conflict but not a declared war; President Truman claimed the emergency (the threatened disruption of arms shipments to our troops fighting in Korea) to be so grave that, under his commander-in-chief power, he had to take temporary control of the steel mills through an executive order.

The Court rejected President Truman’s claim, holding that the President could not take such action unilaterally when war had not been declared. Justice Black’s majority opinion found the Order unconstitutional because seizing the mills was “a job for the Nation’s lawmakers, not for its military authorities. . . . In the framework of our Constitution, the President’s power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker.”⁵⁹

56. Abraham Lincoln, Message to Congress in Special Session (July 4, 1861), in 6 COMPLETE WORKS OF ABRAHAM LINCOLN 297, 309 (John G. Nicolay & John Hay eds., n.p., Lincoln Mem’l Univ. 1894).

57. See *infra* note 186 and accompanying text.

58. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

59. *Id.* at 587 (Black, J.). For Justice Douglas, President Truman’s decision not to seek congressional approval *in advance* violated the Constitution because the seizure triggered the Just Compensation Clause of the Fifth Amendment. *Id.* at 631 (Douglas, J., concurring). The seizure, Justice Douglas argued, presented Congress with a *fait accompli*—a circumstance where it was bound to raise revenues that it might have chosen not to raise—in order to satisfy just compensation obligations that it might have chosen *ex ante* not to incur. *Id.* at 631-32. Even though legislative action might “often be cumbersome, time-consuming, and apparently inefficient,” Justice Douglas wrote, such action was the process our Constitution envisioned. *Id.* at 629; see also LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 36-37 (1985) (describing Douglas’s views on legislative silence). While the various concurrences in the case make it difficult to draw a coherent rule, many, perhaps a majority, of the Justices believed that the President can act when Congress is silent in a particularly grave emergency. See *Youngstown Sheet & Tube Co.*, 343 U.S. at 637 (Jackson, J., concurring); *id.* at 662 (Clark, J., concurring); *id.* at 683-84 (Vinson, C.J., dissenting).

We believe that, in cases where individual rights are put at risk by executive action, Congress’s silence should not be construed as a green light for the executive absent extremely rare circumstances. See TRIBE, *supra*, at 39-40 (outlining the view that “there must be a heavy burden on anyone seeking to find a yes in Congress’ silence” and that due process principles would

Justice Jackson's concurrence outlined the three now-canonical categories that guide modern analysis of separation of powers—the first, where the President acts pursuant to express or implied authorization by Congress; the second, where the President acts in the absence of congressional approval or disapproval of his action; and the third, where the President takes measures incompatible with the express or implied will of Congress. In discussing the limits of the President's power within these three zones, Justice Jackson leveled a forceful warning against unilateral assertions of the commander-in-chief power in the name of national security:

Nothing in our Constitution is plainer than that a declaration of a war is entrusted only to Congress. Of course, a state of war may in fact exist without a formal declaration. But no doctrine that the Court could promulgate would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge his mastery over the internal affairs of the country by his own commitment of the Nation's armed forces to some foreign venture.⁶⁰

Proceeding from the premise that a formal declaration of war gives the President fearsome powers, Justice Jackson read in the Constitution's text and design, as illuminated by relevant history, a prohibition against giving the President the unilateral power to define such a state of war or to act as though he had.⁶¹ Thus, the President's commander-in-chief power

generally require affirmative congressional action); Neal Kumar Katyal, *Judges as Advicegivers*, 50 STAN. L. REV. 1709, 1716, 1757-67 (1998) (describing the virtues of clear-statement rules when government action is close to the constitutional line).

60. *Youngstown Sheet & Tube Co.*, 343 U.S. at 642 (Jackson, J., concurring). Justice Jackson also stated:

Aside from suspension of the privilege of the writ of habeas corpus . . . [the Founders] made no express provision for exercise of extraordinary authority because of a crisis. I do not think we rightfully may so amend their work, and, if we could, I am not convinced it would be wise to do so . . . [T]he President of the [German] Republic, without concurrence of the Reichstag, was empowered temporarily to suspend any or all individual rights if public safety and order were seriously disturbed or endangered. This proved a temptation to every government, whatever its shade of opinion, and in 13 years suspension of rights was invoked on more than 250 occasions. Finally, Hitler persuaded President Von Hindenberg to suspend all such rights, and they were never restored.

Id. at 650-51 (footnote omitted).

61. The fact that a formal war was not declared also gave Justice Frankfurter pause. *See id.* at 613 (Frankfurter, J., concurring) ("In this case, reliance on the powers that flow from declared war has been commendably disclaimed by the Solicitor General."). Similarly, in the *Pentagon Papers Case*, *N.Y. Times Co. v. United States*, 403 U.S. 713 (1971), Justice Douglas rejected the executive branch's claim that "the power to wage war successfully" justifies a prior restraint, reasoning that "the war power stems from a declaration of war" and that it was therefore

is not such an absolute as might be implied from that office in a militaristic system but is subject to limitations consistent with a constitutional Republic whose law and policy-making branch is a representative Congress. . . . No penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role.⁶²

Justice Jackson's articulation of the constitutional limits upon the commander-in-chief power makes good structural sense: Congress alone can see the problem whole; the Chief Executive tends to be blinded by the single-minded requirements of his military mission, and courts necessarily see but one case at a time and in wartime tend to defer to the executive's assumed greater knowledge and expertise, coupled with the executive's electoral legitimacy.⁶³ For such reasons, the President should not be permitted, simply by donning his military garb, to do in this country what he could never do in merely executive dress.

Needless to say, this principle loses much if not all of its force when waiting for Congress to act would manifestly be a prescription for exposing the nation to a devastating military defeat or to some grave and irreparable harm.⁶⁴ In declaring war, Congress for all practical purposes determines that we should deem conclusive the President's unilateral judgment as

unnecessary to decide "what leveling effect the war power of Congress might have." *Id.* at 722 (Douglas, J., concurring).

62. *Youngstown Sheet & Tube Co.*, 343 U.S. at 645-46 (Jackson, J., concurring); *see also id.* at 655 ("The Executive, except for recommendation and veto, has no legislative power. The executive action we have here originates in the individual will of the President and represents an exercise of authority without law.").

63. Consider Justice Jackson's thoughts in his *Korematsu* dissent, explaining that if courts defer to the executive and uphold these unilaterally created tribunals, Americans will then be left with a dangerous precedent that can be used to undermine constitutional guarantees in other situations:

[A] judicial construction of the due process clause that will sustain this order is a far more subtle blow to liberty than the promulgation of the order itself. A military order, however unconstitutional, is not apt to last longer than the military emergency. . . . But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, . . . the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon Every repetition embeds that principle more deeply in our law and thinking and expands it to new purposes. . . . A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image.

Korematsu v. United States, 323 U.S. 214, 245-46 (1944) (Jackson, J., dissenting).

64. *See* 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 4-6, at 668-69 (3d ed. 2000) (noting that even an undeclared war can have a "dramatic effect . . . on the civil liberties of Americans" and concluding that "the President should not be entitled to rely upon his augmented wartime powers when, without peculiar difficulty, he could have submitted his proposals to Congress for consideration as would have been required in peacetime").

Commander in Chief that a given wartime measure must be taken without further congressional authorization. And when America is engulfed in total war, as it was in the Civil War, the absence of any nation against which war might be declared should not disable the President from invoking a presumption to the effect that waiting for Congress would unacceptably risk the nation's future. But even on the gravest view of the threat posed to the United States by the events of September 11 and by the even more devastating attacks about which the President has recently warned the nation,⁶⁵ nothing said by the President or by anyone speaking on his behalf remotely supports the proposition that circumstances are too exigent to make timely congressional action a realistic option. Without that crucial proposition, the most that might be established is the magnitude of the peril the nation faces—not the necessity for unilateral executive action responding to that peril with institutional measures that are ordinarily impermissible without authorization from Congress.

However perilous the times, the fact is that Congress has responded expeditiously. It is functioning with much more than all deliberate speed. In record time, it considered and enacted a broad array of laws, many of them in almost precisely the form sought by the President.⁶⁶ The very passage of not days but months between the initial promulgation of the Order

65. *Text of President Bush's State of the Union Address to Congress*, N.Y. TIMES, Jan. 30, 2002, at A22 ("Thousands of dangerous killers, schooled in the methods of murder, often supported by outlaw regimes, are now spread throughout the world like ticking time bombs, set to go off without warning.").

66. *E.g.*, Afghan Women and Children Relief Act of 2001, Pub. L. No. 107-81, 115 Stat. 811 (Dec. 12, 2001) (authorizing the provision of educational and health care assistance to the women and children of Afghanistan); Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597 (Nov. 19, 2001) (enhancing aviation security); An Act To Authorize the President To Exercise Waivers of Foreign Assistance Restrictions with Respect to Pakistan, Pub. L. No. 107-57, 115 Stat. 403 (Oct. 27, 2001); Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (Oct. 26, 2001); Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (Sept. 22, 2001) (providing funds for airlines, victims of the September 11 plane crashes, and additional airline security); 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States, Pub. L. No. 107-38, 115 Stat. 220 (Sept. 18, 2001) (making emergency supplemental appropriations of up to \$40 billion for additional disaster assistance, for antiterrorism initiatives, and for post-September 11 recovery); Expedited Payment for Heroic Public Safety Officers, Pub. L. No. 107-37, 115 Stat. 219 (Sept. 18, 2001) (providing expedited payment of certain benefits for public safety officers who were killed or injured due to the September 11 attacks); Joint Resolution: To Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224 (Sept. 18, 2001).

We do not question the claim that "the President alone has the power to speak or listen as a representative of the nation." *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). Rather, we believe that this power over foreign affairs does not extend so far as to encompass the broad Order. *Curtiss-Wright* merely permitted broader-than-usual delegations of power from Congress to the President in the realm of foreign affairs; it did not go so far as to make such delegation superfluous. *See Youngstown Sheet & Tube Co.*, 343 U.S. at 635-36 n.2 (Jackson, J., concurring); Alexander M. Bickel, *Congress, the President, and the Power To Wage War*, 48 CHI.-KENT L. REV. 131, 137 (1971).

establishing the military tribunals and the final promulgation of Defense Department regulations setting out the details of their jurisdiction and operation—a step not yet taken as of this writing—obviously belies any suggestion that there would not have been time in the interim, or indeed that there is not time now, for the President to ask Congress to enact legislation that would give the tribunals a solid statutory footing and provide them with the appellate and habeas review apparatus required for their even arguably constitutional functioning. Indeed, we do not understand the President even to have made such a suggestion, or to be claiming that his unilateralism on this front is excused by the need to act without the delay that recourse to Congress would entail. Unlike a sudden presidential deployment of troops or firing of missiles, the very nature of the step at issue here—the creation of an entire adjudicatory apparatus for the orderly processing of persons who, upon capture, are within the control of the Commander in Chief and aren't about to go anywhere before Congress has had time to act—would render utterly incredible any claim that it is for want of time that the President has had to circumvent the legislative process. And yet the Military Order spectacularly bypassed that process. In doing so, it usurped the legislative powers vested by the Constitution exclusively in Congress and threatened the Constitution's rights-protecting asymmetry.

Under the Order, the executive branch acts as lawmaker, law-enforcer, and judge. That is what James Madison warned against when he wrote: “The accumulation of all powers legislative, executive, and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.”⁶⁷

B. *Constitutional Precedent for Military Tribunals*

1. Milligan

In the Civil War-era *Milligan* case, a group of men had been detained in Indiana and tried before a military commission in Indianapolis for conspiracy against the United States. The men were accused of planning an armed uprising that would seize Union weapons, liberate Confederate prisoners of war, and kidnap the Governor of Indiana. Milligan filed a habeas petition in federal circuit court challenging the jurisdiction of the commission to hear the case against him, and the lower court then certified the petition to the Supreme Court, which in turn granted it.⁶⁸ “No graver question was ever considered by this court, nor one which more nearly

67. THE FEDERALIST NO. 47, *supra* note 49, at 324 (James Madison).

68. *Ex parte Milligan*, 71 U.S. (1 Wall.) 2, 109-10 (1866).

concerns the rights of the whole people,” the Court intoned, than whether a military “tribunal [had] the *legal* power and authority” to punish Milligan.⁶⁹

The Court then announced its holding that the military trial was unconstitutional: “Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction,” for the “Constitution of the United States is the law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances.”⁷⁰ While this language might, as the partial dissenters in *Milligan* suggested, be overly broad in the context of a total war in which Congress cannot act in time, it establishes a general presumption in favor of civil trial.⁷¹ The Court specifically rejected the claim that military “jurisdiction is complete under the ‘laws and usages of war,’” repeating that martial law cannot be applied when “the courts are open and their process unobstructed.”⁷² To the Court, “[o]ne of the plainest constitutional provisions was, therefore, infringed when Milligan was tried by a court not ordained and established by Congress.”⁷³ The President could not unilaterally create such a tribunal:

[F]rom what source did the military commission that tried [Milligan] derive their authority? Certainly no part of the judicial power of the country was conferred on them; because the Constitution expressly vests it “in one supreme court and such inferior courts as the Congress may from time to time ordain and establish,” and it is not pretended that the commission was a court ordained and established by Congress. They cannot justify on the mandate of the President; because he is controlled by law, and has his appropriate sphere of duty, which is to execute, not to make, the laws; and there is no unwritten criminal code to which resort can be had as a source of jurisdiction.⁷⁴

This was true “no matter how great an offender the individual may be, or how much his crimes may have shocked the sense of justice of the country, or endangered its safety.”⁷⁵

69. *Id.* at 118-19. This is precisely the issue presented by the Military Order, which contemplates detention and “tri[al] by military commission . . . and . . . punish[ment] . . . including life imprisonment or death.” Military Order, *supra* note 3, §§ 3(a), 4(a).

70. *Milligan*, 71 U.S. at 120-21, 127.

71. The Court described the importance of the jury trial provisions in the Constitution, as well as the Fourth, Fifth, and Sixth Amendments, stating that “so strong was the sense of the country of their importance, and so jealous were the people that these rights, highly prized, might be denied them by implication” that the original Constitution “encountered severe opposition; and, but for the belief that it would be so amended as to embrace them, it would never have been ratified.” *Id.* at 119-20.

72. *Id.* at 121.

73. *Id.* at 122.

74. *Id.* at 121 (internal quotation marks deleted).

75. *Id.* at 119.

The Court's broad statement that "it was not in the power of Congress to authorize"⁷⁶ military tribunals in places where civilian law was functioning, was, of course, dictum on the facts of *Milligan*, and it prompted sharp disagreement by four Justices, led by Chief Justice Chase:

We think that Congress had power, though not exercised, to authorize the military commission which was held in Indiana.

....

Congress has the power not only to raise and support and govern armies but to declare war. It has, therefore, the power to provide by law for carrying on war. This power necessarily extends to all legislation essential to the prosecution of war with vigor and success

. . . Congress cannot direct the conduct of campaigns, nor can the President, or any commander under him, *without the sanction of Congress*, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity

....

We cannot doubt that, in such a time of public danger, Congress had power, under the Constitution, to provide for the organization of a military commission [Civilian] courts might be open and undisturbed in the execution of their functions, and yet wholly incompetent to avert threatened danger, or to punish, with adequate promptitude and certainty, the guilty conspirators.⁷⁷

Both the majority opinion and the Chase concurrence in *Milligan* hold congressional authorization to be at least a necessary requirement for such tribunals. This general principle of *Milligan*—a principle never repudiated in subsequent cases—leaves the President little unilateral freedom to craft an order to detain people on his own suspicion for indefinite warehousing or trial at his pleasure in a system of military justice.⁷⁸

76. *Id.* at 136 (Chase, C.J., concurring and dissenting).

77. *Id.* at 137, 139-41 (emphasis added). The four Justices made clear that they "by no means assert[ed] that Congress can establish and apply the laws of war where no war has been declared or exists"; rather, their opinion was confined to situations "when the nation is involved in war, and some portions of the country are invaded, and all are exposed to invasion." *Id.* at 140.

78. These limits on executive power were made clear by Attorney General Thomas Gregory's construction of *Milligan*'s holding in 1918 in the case of Pable Waberski. Waberski was a German agent who had come to the United States during World War I. He had evidently admitted to plans to demolish various targets and to having previously demolished "munition barges, powder magazines, and other war utilities in the United States." Trial of Spies by Military Tribunals, 31

2. Quirin

Quirin concerned the military trial of eight Nazi saboteurs who landed on American soil in the midst of World War II carrying explosives and wearing uniforms that they promptly buried.⁷⁹ One of them, George Dasch, had apparently been planning to turn himself in to the authorities from the start and promptly informed the FBI of the plan for sabotage (the FBI mistakenly dismissed his story as a “crank call”).⁸⁰ Later, Dasch went to Washington, D.C., checked into the Mayflower Hotel, and again told his story to the FBI. The FBI did not believe him until he pulled \$80,000 in cash out of his briefcase—the equivalent of about \$875,000 today. With Dasch’s help, the FBI arrested the other saboteurs and issued misleading press releases suggesting that the Bureau’s diligence resulted in the arrests.⁸¹ “This was the beginning of government control on information about the Saboteurs’ Case and the government’s successful use of the case for propaganda purposes.”⁸²

Op. Att’y Gen. 356, 357 (1918). Nevertheless, the Attorney General opined that a military trial would be unconstitutional:

Milligan was a citizen of the United States. But the provisions of the Constitution upon which the decision was based are not limited to citizens

. . . [Even] if there were no Milligan case to furnish us with an authoritative precedent, the provisions of the Constitution would themselves plainly bring us to the same conclusions as those set forth in the opinion of the court in that case, namely, that in this country, military tribunals, whether courts-martial or military commissions, can not constitutionally be granted jurisdiction to try persons charged with acts or offences committed outside of the field of military operations or territory under martial law or other peculiarly military territory, except members of the military or naval forces or those immediately attached to the forces such as camp followers. Were this not the correct conclusion, then any person accused of espionage, for instance, wherever apprehended and wherever the act charged may have been committed, would immediately become subject to the jurisdiction of a military court, and [the Fourth, Fifth, and Sixth Amendments] would be rendered nugatory in the cases of the most grave class of crimes, generally carrying the death penalty. Any other conclusion would be tantamount to applying martial law, where no justification for martial law exists and none had been declared, and would be a suspension of the Constitution during war times.

Id. at 361-62. Attorney General Gregory then explained why he believed that Article III also “precludes the jurisdiction of a military court.” *Id.* at 362. Just in case there was any doubt, the Attorney General then reproduced the passage from the *Milligan* majority quoted above, *supra* text accompanying note 74, that it was “not pretended that the commission was a court ordained and established by Congress,” and that the President could not unilaterally create the tribunals because he “has his appropriate sphere of duty, which [is] to execute, not to make, the laws.” 31 Op. Att’y Gen. at 361-62.

79. *Ex parte Quirin*, 317 U.S. 1 (1942).

80. David J. Danelski, *The Saboteurs’ Case*, 1 J. SUP. CT. HIST. 61, 64 (1996).

81. Attorney General Francis Biddle later wrote that, as a result of this deception, “it was generally concluded that a particularly brilliant FBI agent, probably attending the school in sabotage where the eight had been trained, had been able to get on the inside.” *Id.* at 65. Biddle also wanted trial secrecy to avoid making public certain information, including the fact of Dasch’s cooperation, the FBI’s ignoring of Dasch’s phone call, and the delay in reporting discovery of the saboteurs’ landing. *Id.* at 66.

82. *Id.* at 65.

President Roosevelt shortly thereafter issued an Executive Order and Proclamation authorizing military trials for the saboteurs. They were charged with four offenses:

1. Violation of the law of war.
2. Violation of [an Act of Congress,] Article 81 of the Articles of War, defining the offense of relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy.
3. Violation of [an Act of Congress,] Article 82, defining the offense of spying.
4. Conspiracy to commit the offenses alleged in charges 1, 2, and 3.⁸³

Before the trials had concluded, the saboteurs filed habeas corpus petitions in the District Court in Washington, D.C., and an original habeas corpus petition in the U.S. Supreme Court.⁸⁴

Despite language in President Roosevelt's Order that attempted to foreclose all access to civilian courts for the saboteurs, the Supreme Court permitted review on habeas.⁸⁵ The *Quirin* Court then upheld the constitutionality of the military tribunals, making much of the fact that war had been declared,⁸⁶ and reserving the question of the President's unilateral

83. *Quirin*, 317 U.S. at 23.

84. After the district court denied their habeas petitions, they filed their original petitions in the U.S. Supreme Court. After the first day of oral argument, they also filed petitions for certiorari before judgment under 28 U.S.C. § 347(a) (1940), based on the initial district court decision. *See infra* note 180 (explaining how the Supreme Court has original jurisdiction over such petitions).

85. *Quirin*, 317 U.S. at 24-25; *see also In re Yamashita*, 327 U.S. 1, 9 (1946) (stating that Congress "has not withdrawn [jurisdiction], and the Executive branch of the Government could not, unless there was suspension of the writ [of] . . . habeas corpus"); *id.* at 30 (Murphy, J., dissenting) (stating that the majority "fortunately has taken the first and most important step toward insuring the supremacy of law and justice in the treatment of an enemy belligerent" by affording rights of habeas corpus and rejecting the "obnoxious doctrine asserted by the Government").

86. *E.g.*, *Quirin*, 317 U.S. at 26 (stating that "[t]he Constitution thus invests the President, as Commander in Chief, with the power to *wage war which Congress has declared*" (emphasis added)). In other places, the Court used the formulation "time of war," a formulation that, for reasons we explain, *infra* text accompanying notes 106-113, should be construed narrowly. *See, e.g.*, *Quirin*, 317 U.S. at 25 ("But the detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army *in time of war* and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution *or laws of Congress* constitutionally enacted." (emphasis added)); *id.* at 35 (stating that "those who *during time of war* pass surreptitiously from enemy territory into our own . . . have the status of unlawful combatants punishable as such by military commission" (emphasis added)); *id.* at 42 ("[I]t has never been suggested in the very extensive literature of the subject that an alien spy, *in time of war*, could not be tried by military tribunal without a jury." (emphasis added)). President Roosevelt's Proclamation itself stated that

power.⁸⁷ Indeed, some, perhaps even all, of the four *charges* brought against the saboteurs—and not merely the *tribunals* before which such charges could be heard—were explicitly authorized by Congress. Charges 2 and 3, essentially mirroring parts of the United States Code, accused the defendants of committing specifically defined capital wartime offenses; those federal statutes explicitly authorized trial of such crimes by military commission.⁸⁸ Charges 1 and 4 might have been either pendant to or derivations of these specific authorizations. The Court’s language hints at the latter, for in discussing the first charge, the Court looked to the language of a federal statute, Article 82, and emphasized that the provision had been part of the United States Code since the Founding.⁸⁹ In fact, the government’s two specifications of the first charge each tracked the statutory language of Articles 81 and 82. Its first specification was based on Article 82:

The gravamen of the specification [of the first charge] is that, contrary to the law of war, each of the accused persons, acting for and on behalf of the German Reich, a foreign state with which the United States is at war . . . secretly passed through coastal military or naval lines or defenses of the United States and, in civilian dress, *went within zones of military operations or elsewhere* behind one or more of those lines or defenses.⁹⁰

“all persons who are subjects, citizens or residents of any nation at war with the United States . . . and who *during time of war* enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.”

Id. at 22-23 (emphasis added).

87. *Id.* at 29 (“It is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions.”).

88. See Act of Aug. 29, 1916, ch. 418, § 3, art. 82, 39 Stat. 619, 663 (“Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be tried by general court-martial *or by a military commission*, and shall, on conviction thereof, suffer death.” (emphasis added)); *id.* § 3, art. 81, 39 Stat. at 663 (“Whosoever relieves the enemy with arms, ammunition, supplies, money, or other thing . . . shall suffer death, or such other punishment as a court-martial *or military commission* may direct.” (emphasis added)).

89. *Quirin*, 317 U.S. at 41. In support of a reading that treats the Court as having found adequate statutory authorization in Article 82, consider also the Court’s later description that, in *Quirin*, “the military commission’s conviction of saboteurs . . . was upheld on charges of violating the law of war *as defined by statute*.” Madsen v. Kinsella, 343 U.S. 341, 355 n.22 (1952) (emphasis added). The language “defined by statute” may of course have been imprecise, as other language about *Quirin* upholding “conviction[s]” certainly was.

90. Brief of the Respondent app. III, at 78, *Quirin* (Orig. Nos. 1-7), reprinted in 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES:

The second specification was based on Article 81, for it charged that “each of the accused persons, acting for and on behalf of the German Reich . . . appeared within zones of military operations or elsewhere . . . and there . . . assembled together *explosives or money or other supplies*.”⁹¹ To be sure, the Court also described in detail—and read as jurisdiction-conferring rather than merely as jurisdiction-preserving—another (still-extant) provision, Article 15, which recognized that the jurisdiction of military tribunals over violations of the laws of war was *concurrent* with the jurisdiction of courts-martial.⁹² While *Quirin* did not say which statute—Article 15, Article 81, Article 82, or perhaps a combination of all three—was necessary to confer jurisdiction, on the record in *Quirin* Congress had in fact specifically authorized the use of military tribunals for at least some, and perhaps all, of the charges against the saboteurs.

Regrettably, the Court’s hurried after-the-fact opinion did not expressly rely on the language of Articles 81 or 82. Perhaps the obvious similarity between the first specification and the statutory Article 82 prompted the Court to uphold the first specification without pointing to that Article as the clear basis for the military commission’s jurisdiction or ruling on the second and third charges. That the Court adverted to Article 15, rather than to Articles 81 or 82, in its jurisdictional analysis cannot negate the fact that Article 15 by its terms merely removes any inference that the jurisdiction of courts-martial is exclusive of military commissions.⁹³ Because *Quirin*’s language contains the principal decisional support that the defenders of the current Military Order tend to cite,⁹⁴ it is worth considering the differences between the two circumstances—past and present—in some detail.

CONSTITUTIONAL LAW 397, 479 (Philip B. Kurland & Gerhard Casper eds., 1975) [hereinafter LANDMARK BRIEFS] (emphasis added).

91. *Id.* at 79, reprinted in 39 LANDMARK BRIEFS, *supra* note 90, at 480 (emphasis added).

92. *Quirin*, 317 U.S. at 27. This provision now reads: “The provisions of this chapter conferring jurisdiction upon courts-martial *do not deprive military commissions*, provost courts, or other military tribunals of *concurrent jurisdiction* with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.” 10 U.S.C. § 821 (1994) (emphasis added).

93. *Quirin*, 317 U.S. at 35, 46. At the time the Supreme Court rendered its decision (but not its opinion), the saboteurs had not yet been found guilty of any offenses. See Danelski, *supra* note 80, at 71.

94. Indeed, President Bush recently stated, “I would remind those who don’t understand the decision I made that Franklin Roosevelt made the same decision in World War II. Those were extraordinary times, as well.” Mike Allen, *Bush Defends Order for Military Tribunals*, WASH. POST, Nov. 20, 2001, at A14.

In another World War II case, the Court faced the issue of the executive’s authority to order military tribunals in the Philippines to try violators of the law of war. In *In re Yamashita*, 327 U.S. 1 (1946), General Yamashita of the Imperial Japanese Army was tried and convicted by a military commission ordered under the President’s authority. The Court pointed to three executive announcements about the need for such military tribunals and three treaties that were ratified and codified in the United States Code that made what Yamashita did a crime. *Id.* at 10-11, 15-16. *Yamashita* read *Quirin* to permit military tribunals to try offenses against the law of war, but it explicitly tethered its view to a declaration of war. The *Yamashita* Court held that the trial and

3. *The Differences Between the Roosevelt and Bush Orders*

Our general argument is that Congress must specifically authorize the use of military tribunals before their use is allowed, even for unlawful combatants charged with violations of the laws of war. In *Quirin*, this authorization was the result of several legislative decisions stitched together. *First*, Congress had declared war and had underscored the government's total commitment to the war effort:

[T]he state of war between the United States and the Government of Germany . . . is hereby formally declared; and the President is hereby authorized and directed to employ the *entire* naval and military forces of the United States and the *resources of the government* to carry on war against the Government of Germany; and, to bring the conflict to a successful termination, *all of the resources of the country* are hereby pledged by the Congress of the United States.⁹⁵

Nothing even close to that World War II authorization, or a wartime emergency in which Congress's consent cannot be obtained, is present today. Significantly, the Resolution passed by Congress several days after the September 11 terrorist attacks permits only the use of "force"; applies only to persons or other entities involved in some way in the September 11 attacks; and then extends only to the "prevent[ion of] . . . future acts of international terrorism against the United States by such nations, organizations or persons."⁹⁶ In this Resolution, Congress studiously

punishment of enemies who violate the law of war is "an exercise of the authority *sanctioned by Congress* to administer the system of military justice recognized by the law of war. That sanction is without qualification as to the exercise of this authority so long as a state of war exists—from its *declaration* until peace is proclaimed." *Id.* at 11-12 (emphasis added); *see also id.* at 12 ("The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power . . . to remedy, *at least in ways Congress has recognized*, the evils which the military operations have produced." (emphasis added)). The Court went on to note that its constitutional holding was limited to that circumstance only, and that "it is unnecessary to consider what, in other situations, the Fifth Amendment might require, and as to that no intimation one way or the other is to be implied." *Id.* at 23.

95. Joint Resolution of Dec. 11, 1941, Pub. L. No. 77-331, 55 Stat. 796, 796 (emphasis added). In *Quirin*, total war was involved, for the Nazi saboteurs "were *invaders*, their penetration of the boundary of the country, projected from the units of a hostile fleet, was in the circumstances of total war *a military operation*, and their capture, followed by their surrender to the military arm of the government, was a continuance of the same operation." CORWIN, *supra* note 54, at 120.

96. The Resolution states:

[T]he President is authorized 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 September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

avoided use of the word “war.” Representative Conyers, for example, stated that “[b]y not declaring war, the resolution preserves our precious civil liberties” and that “[t]his is important because declarations of war trigger broad statutes that not only criminalize interference with troops and recruitment but also authorize the President to apprehend ‘alien enemies.’”⁹⁷ But the Order, unlike Congress’s Resolution, in no way confines its reach to those involved in the September 11 attacks: It explicitly asserts the power to try *any* “international terroris[t]” anywhere in the world.⁹⁸ No matter how broadly the statutes and precedents are stretched, there is no constitutional warrant for expanding the military tribunals’ authority in just the way Congress refused to expand presidential power—to cover individuals completely unconnected to the September 11 attacks.

Second, there was a pair of statutes (Articles 81 and 82) explicitly authorizing trial by military commission for spying and providing aid to the enemy in *Quirin*, and the eight defendants were tried for, among other things, these violations. By contrast, the Order promulgated by President Bush, and the legal claims he has made about the commander-in-chief power, are in no way tethered to any similarly explicit legislative authorization. Rather, the President’s Order extends the range of offenses that it makes subject to military tribunals to include “any and all offenses triable by military commission”—not just acts of unlawful combatants that offend the laws of war, but also “violations of . . . *other applicable laws*.”⁹⁹ Unlike the specific laws in *Quirin*, neither the terrorism statutes on the books as of September 11, nor the ones that Congress enacted afterward, provide for a military trial for acts of terrorism.¹⁰⁰

Joint Resolution: To Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Launched Against the United States, Pub. L. No. 107-40, 115 Stat. 224, 224 (2001).

Congress intentionally rejected proposed White House language that would have authorized the use of force against all nations that harbor terrorists, whether or not connected to September 11. See John Lancaster & Helen Dewar, *Congress Clears Use of Force, \$40 Billion in Emergency Aid*, WASH. POST, Sept. 15, 2001, at A4; see also 147 CONG. REC. S9949 (daily ed. Oct. 1, 2001) (statement of Sen. Byrd) (“[T]he use of force authority granted to the President extends only to the perpetrators of the September 11 attack. It was not the intent of Congress to give the President unbridled authority . . . to wage war against terrorism writ large”); *id.* at S9951 (statement of Sen. Levin) (making a similar point). The proposed White House resolution evidently stated that the President was authorized to use force not only against those countries and entities responsible for the September 11 attacks, but also “to deter and pre-empt any future acts of terrorism or aggression against the United States.” 147 CONG. REC. S9951 (daily ed. Oct. 1, 2001) (reprinting the text of the proposed White House resolution).

97. 147 CONG. REC. H5638, H5680 (daily ed. Sept. 14, 2001) (statement of Rep. Conyers); see also *id.* at H5653 (statement of Rep. Barr) (arguing that “[w]e need a declaration of war” from Congress to “[g]ive the President the tools, the absolute flexibility he needs”).

98. Military Order, *supra* note 3, § 1(a).

99. *Id.* §§ 1(e), 4(a) (emphasis added).

100. See 18 U.S.C. § 2339 (1994) (providing felony punishments for acts of terrorism).

These differences are exacerbated by an important distinction between the Nazi saboteurs and members of al Qaeda. Unlike the status of the eight Nazis who abandoned their uniforms, that of al Qaeda members as “unlawful belligerents” is incapable of being ascertained apart from their ultimate guilt of planning and executing acts that massacre unarmed civilians and thereby violate the laws of war. The result is that any determination today, either by the President or by an Article III court on habeas review, of the jurisdiction of the military tribunals is necessarily bound up with the merits of the substantive charges against a particular defendant. At least in *Quirin* it was possible for the Court to say, from the undisputed fact that it had before it Nazi soldiers who had deliberately abandoned their military garb to pass unnoticed among the civilian population, that the defendants—being analogous to the spies prosecuted by tribunals at the time of the Founding—had no historically grounded right to the usual protections of jury trial and the like, even if ultimately innocent of the charges against them. The present Order, by contrast, makes the jurisdictional question (whether someone is subject to a military trial at all) the very same one as the question on the merits (whether the person is guilty of a war crime).¹⁰¹

These distinctions—that *Quirin* involved a total, declared war, with unlawful belligerents identifiable in terms distinct from the merits and with charges that were coupled to statutes that explicitly authorized a military trial—should be viewed against the backdrop of the language in the opinion going out of its way to say that the Court’s holding was extremely limited.¹⁰² At most, *Quirin* provides a narrow exception to the general rule announced in the earlier *Milligan* case, which found congressional authorization to be a necessary, although by no means sufficient, requirement.¹⁰³

101. Even conceding that military tribunals are permissible for the narrow category of unlawful belligerents, the Order is much too broad. Attorney General Ashcroft has said, for example, that “members of al Qaeda are unlawful belligerents under the law of war.” *Terrorism Hearings*, *supra* note 47 (statement of John Ashcroft, Attorney General). While it may be relatively easy to demonstrate that an al Qaeda member was present in America without a uniform or identifying mark, it may be harder to prove that such an individual had a “hostile purpose” of the type contemplated in *Quirin*: that of “destroying property used or useful in prosecuting the war . . . [or] directed at the destruction of enemy war supplies and the implements of their production and transportation, quite as much as at the armed forces.” *Ex parte Quirin*, 317 U.S. 1, 37 (1942).

102. The Court said that it had “no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals” and that “[w]e hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.” *Quirin*, 317 U.S. at 45-46. Indeed, *Quirin* recognized that the use of tribunals may be conditioned by the Sixth Amendment. *See id.* at 29 (assuming that some offenses against the law of war are “constitutionally triable only by a jury,” as *Milligan* held).

103. *Quirin* insisted that the *Milligan* majority’s dictum that not even Congress had power to establish military tribunals when civilian courts were open applied only to a defendant who, like *Milligan* but unlike the Nazi saboteurs, had not been “a part of or associated with the armed forces

As we have noted, however, *Quirin* relied upon a third congressional act to show Congress's assent: the aforementioned Article 15 of the Articles of War. Unlike the first two forms of authorization, which are not applicable to justify President Bush's Order, Article 15 continues in force today without material change as 10 U.S.C. § 821, part of the Uniform Code of Military Justice (UCMJ).¹⁰⁴ The strongest case for the current Order's statutory authorization, therefore, is not the point made by President Bush, that President Roosevelt used military tribunals to try unlawful belligerents in World War II, but rather that § 821, whose broad language might appear to recognize only the concurrent jurisdiction of military commissions, was authoritatively interpreted in *Quirin* as an affirmative authorization and therefore furnishes a statutory precedent triggered by Congress's Use-of-Force Resolution.¹⁰⁵

We have already explained why we believe this argument moves far too quickly given the distinctive facts of *Quirin*.¹⁰⁶ The argument also ignores

of the enemy," had never even "been a resident [and thus a citizen] of any of the states" at war with the Union, and hence "was a non-belligerent, not subject to the law of war." *Id.* at 45. But the *Quirin* implication that Congress might well have constitutional power to establish military tribunals even where civilian courts were available to try unlawful enemy belligerents—who, like the Nazi saboteurs (and seemingly the al Qaeda terrorists), had indeed been members of an enemy armed force before going under cover to attack American targets—never went so far as to suggest that the President might have the power to create such tribunals for unlawful enemy belligerents on his own, even after a declaration of war and, a fortiori, without any such declaration. *See supra* note 87 (discussing *Quirin*'s express disclaimer regarding unilateral presidential authority). And language in *Milligan*—language whose reach the *Quirin* Court said nothing to question or restrict—highlighted the fact that the nineteenth-century Congress had vested civilian courts with jurisdiction to try the precise offenses of which *Milligan* stood accused. *Milligan* evidently read Congress's silence about whether such charges could be tried in military tribunals to constitute a lack of the requisite affirmative authorization. *See Milligan*, 71 U.S. at 122 ("Why was he not delivered to the Circuit Court of Indiana to be proceeded against according to law? No reason of necessity could be urged against it; because Congress had declared penalties against the offences charged, provided for their punishment, and directed that court to hear and determine them.").

104. *See* 10 U.S.C. § 821 (1994).

105. *See Hohn v. United States*, 524 U.S. 236, 251 (1998) (stating that "[c]onsiderations of *stare decisis* have special force in the area of statutory interpretation" (citation omitted)); *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."); *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-06 (1932) (Brandeis, J., dissenting) (outlining why heightened rules of *stare decisis* apply in statutory settings); 1 TRIBE, *supra* note 64, §§ 1-16, 3-3, at 84 & n.42, 251-54.

106. *See* Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 88 n.413 (1996) (stating that neither "the history of military tribunals in United States jurisprudence [nor] the rules of international law warrant such a broad and ambiguous interpretation of the phrase" and that the "better approach . . . is for Congress to amend [§ 821] and make the jurisdictional basis absolutely clear to both potential criminals and their defense attorneys"). It is also notable that some of the main proponents of military tribunals for terrorists have suggested that affirmative congressional authorization is necessary. *See* Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 398-99 (1996) (stating that the tension between *Quirin* and *Milligan* "can be resolved simply by Congress declaring terrorism to be a form of unlawful belligerency, from which ordinary law

independent evidence that § 821 did not absorb constructions its predecessor, Article 15, had been given during declared wars: When the UCMJ was codified in 1950, Congress deleted the words “in time of war” from another provision, Article of War 78, to make clear that *that* provision, evidently in contrast to such others as Article 15, permitted a court-martial to impose death or other punishment for certain forms of trespass in circumstances “amounting to a state of belligerency, but where a formal state of war does not exist.”¹⁰⁷

In general, the UCMJ has been read narrowly to avoid military trials, in the absence of a formal declaration of war, of those who do not serve in our armed forces. For example, when a civilian employee of the Army was charged with criminal violations in Vietnam and tried by court-martial, the United States Court of Military Appeals decided that, in determining the applicability of the UCMJ, “the words ‘in time of war’ mean . . . a war formally declared by Congress.”¹⁰⁸ The court believed that “a strict and literal construction of the phrase ‘in time of war’ should” confine the jurisdiction of military courts.¹⁰⁹

The UCMJ’s term “in a time of war” thus requires a congressionally declared war to provide jurisdiction over civilians for courts-martial or military tribunals. This strict reading provides an answer to those who treat *Quirin* as giving a definitive gloss to § 821, for it explains why the Court’s

no longer secures either public safety or private rights, and further declaring terrorists to be enemy armed forces”).

107. *Hearings on H.R. 2498 Before the Subcomm. of the House Comm. on Armed Services*, 81st Cong. 1229 (1949).

108. *United States v. Averette*, 19 C.M.A. 363, 365 (1970) (emphasis added). The same court followed this line of reasoning in *Zamora v. Woodson*, 19 C.M.A. 403 (1970), holding that the term “in time of war” means “a war formally declared by Congress,” and that the military effort in Vietnam could not qualify as such. *Id.* at 404; *see also* *Robb v. United States*, 456 F.2d 768, 771 (Ct. Cl. 1972) (holding that “short of a declared war,” a court-martial did not possess jurisdiction over a civilian employee of the Armed Forces).

In a rather different setting during the Korean War, the military courts have found that a special court-martial had jurisdiction over a substantive offense by a soldier, that of sleeping at one’s post during time of war. *United States v. Bancroft*, 3 C.M.A. 3 (1953). The court pointed to many indicia of a wartime situation, including special “national emergency legislation.” *Id.* at 5; *see also* *United States v. Ayers*, 4 C.M.A. 220 (1954) (following *Bancroft*). While members of our military might be subject to additional punishment based on statutes that aggravate penalties during wartime, to apply the jurisdiction of the UCMJ to those not ordinarily subject to it requires an affirmative act of Congress. As the *Averette* court wrote:

We emphasize our awareness that the fighting in Vietnam qualifies as a war as that word is generally used and understood. By almost any standard of comparison—the number of persons involved, the level of casualties, the ferocity of the combat, the extent of the suffering, and the impact on our nation—the Vietnamese armed conflict is a major military action. But such a recognition should not serve as a shortcut for a formal declaration of war, at least in the sensitive area of subjecting civilians to military jurisdiction.

Averette, 19 C.M.A. at 365-66.

109. *Averette*, 19 C.M.A. at 365.

“in time of war” language should be read narrowly.¹¹⁰ Standard “clear statement” principles—that if the legislature wants to curtail a constitutional right, it should say so clearly or its legislation will be construed to avoid the constitutional difficulty—support this strict reading.¹¹¹ Without a clear statement by this Congress about the need for military tribunals,¹¹² it will be difficult for a civilian court, on habeas

110. *E.g.*, *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) (relying on the fact that tribunals were used “in time of war”); *see also* *Madsen v. Kinsella*, 343 U.S. 341, 348-49 (1952) (using a similar formulation).

111. *E.g.*, *Kent v. Dulles*, 357 U.S. 116, 129-30 (1958) (holding that the Secretary of State could not deny passports on the basis of Communist Party membership without a clear delegation from Congress, and that this permission could not be “silently granted” (emphasis added)); *see also* *Valentine v. United States ex rel Neidecker*, 299 U.S. 5, 9 (1936) (preventing an extradition where the treaty did not provide for it, out of a concern for liberty, stating that “the Constitution creates no executive prerogative to dispose of the liberty of the individual. Proceedings against [an individual] must be authorized by law. . . . [T]he legal authority does not exist save as it is given by an act of Congress”). *Dames & Moore v. Regan*, 453 U.S. 654, 668-69 (1981), applied a looser definition of “implied authorization from Congress,” but did not find that lack of congressional voice would constitute implicit authorization. *See* 1 TRIBE, *supra* note 64, § 4-7, at 674-75. In *Dames & Moore*, a case in which a constitutional right was probably not at stake in any event, *see* LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9-7, at 612-13 (2d ed. 1988), the Court approved an executive order that terminated all litigation between United States nationals and Iran in return for the establishment of a claims tribunal to arbitrate the disputes. *See* 1 TRIBE, *supra* note 64, § 4-7, at 674-75. The Court did not find explicit authorization by Congress to extinguish pending claims but grounded a finding of implied authorization in Congress’s passage of the International Claims Settlement Act of 1949, which approved a different executive claims settlement action and provided a procedure to implement future settlement agreements. *See* *Dames & Moore*, 453 U.S. at 680. Even so, *Dames & Moore* provides little support for the Military Order. In the current case, Congress has passed no such legislation that recognizes or ratifies the President’s authority to convene military tribunals without a declaration of war, and, unlike the questionable property right at issue in *Dames & Moore*, the constitutional rights now at stake—life and liberty—are anything but dubious. As such, Congress’s implicit approval cannot be found here as it was (perhaps questionably) in *Dames & Moore*. And in any event, the *Dames & Moore* decision expressly disclaimed attempts to use its precedent in very different cases: “We attempt to lay down no general ‘guidelines’ covering other situations not involved here, and attempt to confine the opinion only to the very questions necessary to decision of the case.” *Id.* at 661.

112. Even the freedoms of speech and the press may be contingent at times on congressional authorization to curtail them when national security is at stake. In *New York Times Co. v. United States*, 403 U.S. 713 (1971), the Court, in a per curiam opinion, denied the President an injunction to block the *New York Times* and the *Washington Post* from publishing certain documents which the administration claimed would damage the military effort in Vietnam. Justice Black observed:

The Government does not even attempt to rely on any act of Congress. Instead it makes the bold and dangerously far-reaching contention that the courts should take it upon themselves to “make” a law abridging freedom of the press . . . even when the representatives of the people in Congress have adhered to the command of the First Amendment and refused to make such a law.

Id. at 718 (Black, J., concurring). Justice Marshall observed that Congress had considered legislation that would have made such disclosure criminal and “[i]f the proposal . . . had been enacted, the publication of the documents involved here would certainly have been a crime.” *Id.* at 747 (Marshall, J., concurring); *see also id.* at 740 (White, J., concurring) (noting that Congress “ha[d] not, however, authorized the injunctive remedy against threatened publication”). Justice White’s reluctance to defer to the executive, “[a]t least in the absence of legislation by Congress,” *id.* at 732 (White, J., concurring), was echoed by Justice Douglas’s indication that the case might have been different with specific congressional authorization or a declaration of war, *id.* at 722 (Douglas, J., concurring); *see also supra* note 61; *cf.* DAVID RUDENSTINE, *THE DAY THE PRESSES*

review, to assess the exigencies of the situation and to determine whether the circumstances truly justify dispensing with jury trials, grand juries, and the rules of evidence.¹¹³

Indeed, if the UCMJ were stretched to give the President the power to create the tribunals purportedly authorized by this Order, then it would risk making the statute an unconstitutional delegation of power.¹¹⁴ Such an interpretation would leave the President free to define a “time of war,” grant him the discretion to set up military tribunals at will, bestow upon him the power to prosecute whomever he selects in a military tribunal, vest him with the authority to label something an offense and to try an offender for it, give him the power to try those cases before military judges that serve as part of the executive branch, and perhaps even empower him to dispense with habeas corpus review by an Article III court.

Finally, to the extent that *Quirin* did provide the President with broad authority in interpreting Article of War 15, there are reasons to discount the case itself as statutory precedent. After all, just two years after *Quirin*, the same Supreme Court upheld government orders that imposed severe curtailments of liberty on Japanese Americans during World War II in the infamous *Korematsu* case.¹¹⁵ Justice Frankfurter, with characteristic understatement, called *Quirin* “not a happy precedent.”¹¹⁶ As David Danelski has shown, a principal reason for authorization of these military tribunals was the government’s wish to cover up the evidence of the FBI’s bungling of the case.¹¹⁷ And it also appears that some highly questionable

STOPPED 106 (1996) (quoting Alexander Bickel’s argument in the case that “any plausible conception of the separation of powers doctrine barred the government from suing the *Times* . . . [T]he suit could go forward only if Congress had passed a statute authorizing it”).

113. While some war powers, such as rights of prize, have been found to exist even when Congress has not formally declared war, in such cases individual rights were not as severely threatened, and Congress had spoken. See, e.g., *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 39 (1800) (opinion of Moore, J.) (stating that the “case depends on the construction of the act” providing for taking “enemy” ships); *id.* at 42 (opinion of Washington, J.) (examining “the true construction of the act” and “evidence of legislative will”); *id.* at 44-45 (opinion of Chase, J.) (analyzing the “acts of congress . . . to show” that Congress intended France to be an “enemy” under the relevant Acts); *id.* at 46 (opinion of Paterson, J.) (making a similar point).

114. See *Clinton v. City of New York*, 524 U.S. 417, 449-53 (1998) (Kennedy, J., concurring); *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490, 545 (1981) (Rehnquist, J., dissenting); *Indus. Union Dep’t v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring); *Cal. Bankers Ass’n v. Schultz*, 416 U.S. 21, 91-93 (1974) (Brennan, J., dissenting); see also 1 TRIBE, *supra* note 64, § 5-19, at 977-1011. But see *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457 (2001) (finding no violation of the nondelegation doctrine); *Loving v. United States*, 517 U.S. 748 (1996).

115. *Korematsu v. United States*, 323 U.S. 214 (1944). The *Korematsu* decision did not “decide the serious constitutional issues . . . when an assembly or relocation order is applied or is certain to be applied” but instead only upheld the order excluding Fred Korematsu from a “military area.” *Id.* at 222; see also *Ex parte Endo*, 323 U.S. 283, 308-10 (1944) (Roberts, J., concurring in the judgment) (stating that in *Endo*, as in *Korematsu*, the Court should have decided the constitutionality of the detention program).

116. Danelski, *supra* note 80, at 80 (quoting a memorandum from Justice Frankfurter).

117. *Id.* at 65-68.

ex parte arm-twisting by the executive may have spurred the Supreme Court's unanimous decision.¹¹⁸ Despite the Court's sometime-adherence to a strong *stare decisis* rule for its own prior legislative interpretations, the Court does at times overrule them—over eighty times in twenty-seven years, according to one incisive analysis.¹¹⁹ *Quirin* plainly fits the criteria typically offered for judicial confinement or reconsideration: It was a decision rendered under extreme time pressure,¹²⁰ with respect to which there are virtually no reliance interests at stake,¹²¹ and where the statute itself has constitutional dimensions suggesting that its construction should be guided by relevant developments in constitutional law.¹²²

Indeed, despite a strong statutory precedent, when the Governor of Hawaii and President Roosevelt created military tribunals in Hawaii in the wake of the bombing of Pearl Harbor, the Supreme Court in *Duncan v. Kahanamoku* struck them down.¹²³ An Act of Congress called the Organic Act permitted the Governor of Hawaii, with the concurrence of the President, to declare “martial law” when the public safety required it, but the Court construed the Organic Act not to permit military tribunals for the trial of garden-variety offenses coming within the jurisdiction of the civilian courts, even though Hawaii was “under fire” and a “battle field.”¹²⁴ The Court reached this conclusion in the face of a powerful statutory precedent to the contrary: The Hawaii Constitution had a similar martial-law

118. See HOWARD BALL & PHILLIP J. COOPER, *OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION* 118 (1992) (quoting WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939-1975* (1980)).

119. William N. Eskridge, Jr., *Overruling Statutory Precedents*, 76 *GEO. L.J.* 1361, 1363 (1988); see also, e.g., *Johnson v. Transp. Agency*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting); 1 *TRIBE*, *supra* note 64, § 3-3, at 252-53 (detailing the factors considered and the justifications provided when the Court decides to overrule statutory precedents). There are good reasons, generally speaking, to weigh statutory precedents less heavily than the conventional wisdom might suggest. See Eskridge, *supra*, at 1403-08 (describing why Congress might not be able to correct a judicial error and outlining other reasons).

120. Justice Frankfurter argued:

[T]he relevant demands of *stare decisis* do not preclude considering, for the first time thoroughly and in the light of the best available evidence of congressional purpose, a statutory interpretation which started as an unexamined assumption on the basis of inapplicable citations and has the claim of a dogma solely through reiteration.

Monroe v. Pape, 365 U.S. 167, 220-21 (1961) (Frankfurter, J., dissenting).

121. See, e.g., *Planned Parenthood v. Casey*, 505 U.S. 833, 854 (1992) (noting that, when reexamining a prior holding, the Court considers, among other things, “whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation”).

122. See, e.g., *Monroe*, 365 U.S. at 221-22 (Frankfurter, J., dissenting); Eskridge, *supra* note 119, at 1376 & n.78 (arguing that this “exception helps explain many of the Court's overrulings of statutory precedents” and providing a useful list of examples). Contemporary congressional authorization is particularly needed for the military tribunals in the present circumstances, given how the Constitution's interpretation has evolved since World War II. See Katyal, *supra* note 41, at 1346-59 (discussing how Congress can “update” constitutional guarantees).

123. 327 U.S. 304 (1946).

124. *Id.* at 344 (Burton, J., dissenting).

provision that its supreme court had construed to permit the Governor to create military tribunals, and Congress had enacted the Organic Act following the state court decision.¹²⁵ The Court found the argument from statutory precedent to be unconvincing. Reasoning that Congress “did not specifically state” or “explicitly declare” that the military could close the civil courts,¹²⁶ the Court construed Congress’s statute in light of “our political traditions and our institutions of jury trials in courts of law”—traditions that “can hardly suffice to persuade us that Congress was willing to enact a Hawaiian supreme court decision permitting such a radical departure from our steadfast beliefs.”¹²⁷ Instead, the Justices wrapped themselves firmly in the language of *Milligan*:

[The Founders] were opposed to governments that placed in the hands of one man the power to make, interpret and enforce the laws. Their philosophy has been the people’s throughout our history. For that reason we have maintained legislatures chosen by citizens or their representatives and courts and juries to try those who violate legislative enactments. We have always been especially concerned about the potential evils of summary criminal trials and have guarded against them by provisions embodied in the constitution itself. See *Ex parte Milligan*. Legislatures and courts are not merely cherished American institutions; they are indispensable to our Government

. . . [T]he only [other] time this Court had ever discussed the supplanting of courts by military tribunals in a situation other than that involving the establishment of a military government over recently occupied enemy territory, it had emphatically declared that “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.” *Ex parte Milligan*.¹²⁸

To be sure, *Duncan* involved a circumstance in which civilian law was replaced wholesale by military rule, not one in which military rule was made applicable solely to unlawful belligerents. Nevertheless, the case makes clear that, under the *Milligan* principle, when military tribunals are substituted for available civil alternatives, specific authorization is necessary even when Congress has supposedly codified judicial precedent purporting to discern authority in preexisting statutes.

125. See *id.* at 316 (majority opinion) (rejecting the government’s argument that “[w]hen Congress passed the Organic Act it simply enacted the applicable language of the Hawaiian Constitution and with it the interpretation of that language by the Hawaiian supreme court”).

126. *Id.* at 315.

127. *Id.* at 317.

128. *Id.* at 322, 324 (citations omitted).

4. *The Constitutionally Stronger Case of Military Trials in Conquered Territory*

While the prospect of military tribunals that can try, in America, virtually any act of terrorism strays far beyond any extant statutory authorization and falls well outside the powers of the President as Commander in Chief and well beyond the penumbra of his full powers, the possibility of military tribunals functioning abroad presents a stronger case, for at least three reasons. First, the Constitution gives the President far wider latitude when he is acting abroad in his military capacity. Second, for those who regard the Constitution as having little or no force overseas, the use of tribunals abroad will, of course, seem less problematic.¹²⁹ And third, in a theatre of war abroad there may be an immediate military need for the adjudication of guilt or innocence that the civilian federal courts are unavailable to meet.¹³⁰

While the defenders of the Military Order seem thus far not to have mentioned it, there is in fact an entire line of Supreme Court cases permitting the use of military tribunals for the full panoply of offenses when enemy territory is taken and our civilian courts do not furnish an available option. For example, the Supreme Court in *Madsen v. Kinsella* permitted a military commission to try for murder the dependent wife of an American serviceman in Germany following World War II.¹³¹ The *Madsen*

129. See, e.g., *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (describing how the text of the Fourth Amendment, unlike the texts of the Fifth and Sixth Amendments, secures only rights of “the people,” itself a term that seemingly precludes extraterritorial application); *id.* at 268-69 (describing precedent with respect to the *Insular Cases*, such as *Balzac v. Porto Rico*, 258 U.S. 298 (1922)); *Johnson v. Eisentrager*, 339 U.S. 763, 784-85 (1950) (expressing serious doubts about the extraterritorial application of the Constitution to “enemy elements”). Several Justices, however, have suggested that parts of the Constitution do have extraterritorial reach. See, e.g., *Verdugo-Urquidez*, 494 U.S. at 281-85 (Brennan, J., dissenting) (arguing that government action abroad can have a sufficient nexus with domestic action to justify extraterritorial application); *Burns v. Wilson*, 346 U.S. 137, 152 (1953) (Douglas, J., dissenting) (observing that *Quirin*’s ruling that “military tribunals are not governed by the procedure for trials prescribed in the Fifth and Sixth Amendments” does not entail the proposition “that all the rights covered by the Fifth and the Sixth Amendments were abrogated by Art. I, § 8, cl. 14 of the Constitution, empowering Congress to make rules for the armed forces,” for it is “plain from the text of the Fifth Amendment that that position is untenable,” and the Court has “never . . . held” otherwise); *Johnson v. Eisentrager*, 339 U.S. 763, 797-98 (1950) (Black, J., dissenting) (arguing that the Constitution does apply extraterritorially).

130. There may be circumstances in which this third reason, as its obvious derivation from *Milligan* suggests, is applicable domestically as well. For example, on this rationale military tribunals might have been appropriate in at least part of New York City in the days immediately following the World Trade Center attacks, when Foley Square was closed and the Southern District of New York was not fully operating. Such tribunals could not be used in other areas, however, and would have had to cease operating in New York City once the federal courts became operational.

131. *Madsen v. Kinsella*, 343 U.S. 341 (1952). *Madsen* contained broad language about Article 15 of the Articles of War, reading it to establish that “Congress has not deprived [military] commissions or tribunals of the existing jurisdiction which they had over such offenders and offenses.” *Id.* at 351-52. But that judicial language, which could (but need not) permit

Court mentioned an earlier case, decided by a provisional federal court in Louisiana during the Civil War, in which that tribunal declared itself competent to hear cases unrelated to the war (involving a man's alleged murder of his wife and another man's arson of a building), despite the fact that the court was put into existence by Executive Order of President Lincoln.¹³² Both in this Civil War decision and in *Madsen*, however, no regularly constituted American courts existed in the relevant venues, and the executive tribunals were deemed necessary to secure order during the United States's occupation of formerly enemy territory.¹³³ These cases thus affirmed a long-standing rule about rights of conquest in places where civilian justice was unavailable, for in those circumstances the same power the President exercised in subjecting territory to the military domination of the United States entailed an ancillary power to create tribunals to secure

congressional silence to constitute assent, must be construed in light of the fact that the trial in *Madsen* occurred outside the United States following a declared war, and in circumstances in which enemy territory was conquered and there was a need for some sort of legal authority. Indeed, *Madsen* stated that military commissions "have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war," *id.* at 346, and noted that these tribunals derive their authority from Congress's power to declare war, *id.* at 346 n.9 (quoting WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 831 (2d ed. 1920)), and from the occupation of Germany and the recent "cessation of hostilities" after a "time of war," *id.* at 348.

132. *United States v. Reiter*, 27 F. Cas. 768 (1865) (No. 16,146), *discussed in Madsen*, 343 U.S. at 347 n.9, 360 n.25. There were two acts of Congress that appeared to grant the President the power to establish military tribunals, and Lincoln had invoked them both in the *Milligan* case, but the provisional court did not mention them. The first, the Act of February 28, 1795, provided:

[W]henever the laws of the United States shall be opposed, or the execution thereof obstructed, in any state, by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, . . . it shall be lawful for the President of the United States, to call forth the militia . . . to suppress such combinations, and to cause the laws to be duly executed.

Act of Feb. 28, 1795, ch. 36, § 2, 1 Stat. 424, 424 (current version at 10 U.S.C. § 332 (1994)). The second, the Act of March 3, 1807, stated:

[I]n all cases of insurrection, or obstruction to the laws . . . where it is lawful for the President of the United States to call forth the militia for the purpose of suppressing such insurrection, or of causing the laws to be duly executed, it shall be lawful for him to employ, for the same purposes, such part of the land or naval force of the United States, as shall be judged necessary

Act of Mar. 3, 1807, ch. 39, 2 Stat. 443, 443 (current version at 10 U.S.C. § 331).

133. *Madsen*, 343 U.S. at 345 n.7 ("There was no nonmilitary court of the United States in Germany."); *id.* at 356-60 (describing need for military tribunals in Germany given the absence of civilian authority); *Reiter*, 27 F. Cas. at 771 (stating that President Lincoln's courts "were the only institutions found there at the time the military authority of the United States was by force of its arms established there" and that "[n]o country can exist without a government of some kind . . . [because] order must be preserved and security to person and estate assured"). *Reiter* went on to state that, if Louisiana was to be called "domestic" land, as opposed to being "deemed foreign territory," then the President could be without power to establish such tribunals. *Reiter*, 27 F. Cas. at 775. Indeed, President Lincoln's Order itself recognized the distinction between assuring punishment for past acts and preserving order and selected the latter rationale, stating that the Civil War had "temporarily subverted and swept away the civil institutions of [Louisiana], including the judiciary and the judicial authorities of the Union," so it was "indispensably necessary that there shall be some judicial tribunal existing there capable of administering justice." *Id.* at 770.

order there.¹³⁴ These cases thus provide some limited support for military tribunals that operate abroad, although in doing so they also reaffirm the core proposition of *Milligan*.¹³⁵

The problem today, however, is that the United States does not claim that it has conquered territory or that it is the source of order in Afghanistan or elsewhere abroad. Instead, it has helped to create an indigenous interim government in Afghanistan. Furthermore, while this is perhaps not fatal, the Order differs from the circumstances in *Madsen* in that it focuses on punishing the perpetrators of past acts rather than on providing order prospectively in conquered territory.

5. *The Possibility of Legislative Revision*

The President's legal claim—reflecting an ambitious stretching of the Commander-in-Chief Clause, a dramatic disregard of *Youngstown* in the name of homeland security, and a risky overreading of *Quirin*—thus sets a novel and dangerous course. Following a logic not easy to distinguish from that needed to square President Bush's Order with the Constitution, a future president might unilaterally declare that America is engaged in a “War on Drugs”—with some justification given the annual death toll from narcoterrorism—and decide to subject certain narcotics traffickers to military trials in tribunals of his own creation.¹³⁶ Imagine another president

134. See *Mechs.' & Traders' Bank v. Union Bank*, 89 U.S. (22 Wall.) 276, 296 (1874) (holding that “the power to establish by military authority courts for the administration of civil as well as criminal justice in portions of the insurgent States occupied by the National forces, is precisely the same as that which exists when foreign territory has been conquered and is occupied by the conquerors”); *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132-33 (1869). In the latter case, the Court stated:

[I]t became the duty of the National government, wherever the insurgent power was overthrown, . . . to provide as far as possible, so long as the war continued, for the security of persons and property and for the administration of justice We have no doubt that the Provisional Court of Louisiana was properly established by the President in the exercise of his constitutional authority during war; or that Congress had power, upon the close of the war, and the dissolution of the Provisional Court, to provide for the transfer of cases pending in that court, and of its judgments and decrees, to the proper courts of the United States.

The Grapeshot, 76 U.S. (9 Wall.) at 132-33.

135. See *Reid v. Covert*, 354 U.S. 1, 35 nn.62-63 (1957) (stating that *Madsen* was not “controlling” in a case involving the military trials of dependent wives of American servicemen abroad in times of peace because *Madsen* “concerned trials in enemy territory which had been conquered and held by force” and that in “such areas the Army commander can establish military or civilian commissions as an arm of the occupation to try everyone in the occupied area, whether they are connected with the Army or not” and quoting *Milligan*'s formulation that the Constitution “is a law . . . equally in war and peace”).

136. Indeed, recent modifications to the Posse Comitatus Act—an Act passed to prevent the military from becoming part of civilian affairs in the wake of the martial law of the Civil War—suggest precisely this possibility. See 18 U.S.C. § 1385 (1994) (“Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall

who sees the private possession of guns as an outrage rather than a right. That president might proclaim that, because handguns and rifles kill thousands of Americans a year, military tribunals are necessary to try dealers in (and perhaps even buyers of) illegal guns, particularly those who ship such firearms from abroad.¹³⁷ These examples may seem far afield, but they represent smaller steps, in legal logic if not in political plausibility, than the one the administration has had to take in moving from what previous administrations have done (the Nazi saboteurs, the Civil War tribunals) to what President Bush claims authority to do today.¹³⁸ And, of course, the very precedent the President seeks to revitalize, *Quirin*, explicitly permits military tribunals to be used against American citizens who are “unlawful belligerents” within our own borders.¹³⁹ We must be extraordinarily careful when revitalizing an old and troubling court decision in this way, for doing so will set new precedent for future presidents.¹⁴⁰

For these reasons, the possibility that Congress might supersede the President’s Order with legislation of its own even before anyone is

be fined under this title or imprisoned not more than two years, or both.”). That cornerstone statute reflects an underlying presumption against blurring military and civilian life unless Congress clearly authorizes otherwise or the Constitution so demands, but it has been modified recently with respect to narcotics and immigration laws. Department of Defense Authorization Act, Pub. L. No. 97-86, § 905, 95 Stat. 1099, 1114-16 (1982) (codified as amended at 10 U.S.C. §§ 371-380) (authorizing the Secretary of Defense to furnish equipment and personnel to assist civilian agencies in enforcing drug and immigration laws, but preventing the military, with the exception of the Coast Guard, from conducting “a search and seizure, an arrest, or other similar activity”).

137. Consider also the following statement, made in the context of the international enslavement of women through forced prostitution: “The United States has declared war on organized crime figures who rape and exploit women.” 147 CONG. REC. H9111 (daily ed. Dec. 11, 2001) (statement of Rep. Smith).

138. There is, to be sure, a clear difference between trying and punishing drug dealers who kill, and waging a war against an international organization that has itself declared war on the United States; has vowed to kill our citizens wherever it might find them; and has launched a devastating attack on a major city and against the center of our defense establishment. Just as Kristallnacht went beyond the crime of breaking Jewish shopkeepers’ windows precisely because it was part of a systematic assault on the Jewish people, so the recent terrorist attacks differ even from the killings associated with narcoterrorism and firearms because they are part of a lethal jihad against the American people. Even so, giving the President the ability to decide on his own what constitutes a “war” and to constitute his own tribunals to adjudicate the guilt of those who are said to have launched illegal warfare against us—authority that President Bush evidently claims—could well set a dangerous precedent, particularly because today’s lack of a formal declaration of war is exacerbated by the lack of a well-defined enemy nation to defeat and by circumstances in which there cannot be anything like an authoritative victory marked by an act of surrender and followed by terms of peace.

139. *Ex parte Quirin*, 317 U.S. 1, 37-38 (1942).

140. *See In re Yamashita*, 327 U.S. 1, 79 (1945) (Rutledge, J., dissenting). Justice Rutledge wrote:

Not heretofore has it been held that any human being is beyond [the Fifth Amendment’s] universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.

Id.

convicted by no means renders the Order, and the claim underlying it, harmless. Because the executive branch has acted *ultra vires* in even issuing the Order, the Order lacks the constitutional basis necessary to survive separation-of-powers scrutiny.¹⁴¹ The fact that President Truman's Executive Order to seize the steel mills, an order jeopardizing little beyond property, could have been promptly reversed by Congress (a possibility explicitly invoked by President Truman, who—unlike President Bush—sent messages to Congress stating that he would abide by a legislative determination to overrule his Executive Order), was deemed irrelevant by the *Steel Seizure* Court.¹⁴²

In any event, President Bush's very issuance of the Order has indelibly altered the status quo, creating numerous barriers to congressional reversal if and when Congress might be inclined to act: Military trials might by then be underway, in which case a congressional reversal might create double jeopardy problems; or Congress might simply be disinclined to set up a dangerous confrontation between the branches in a time of crisis. Moreover, reversal by Congress would require not a simple majority but a two-thirds vote (because of presidential power to veto the legislation proposing the reversal), so that requiring Congress to reverse the executive decision would significantly shift power from Congress to the President. A future president could set up military tribunals in a crisis—say, the “War on Drugs” tribunals we have posited for narcotics traffickers—and essentially dare Congress to attain that two-thirds majority. The separation of powers is designed precisely to guard against such transfers of constitutional authority.

D. *Three Post-Quirin Reasons for Further Congressional Involvement*

1. *Equality*

Unlike *Quirin*, where President Roosevelt applied the tribunals symmetrically to the saboteurs who claimed to be American citizens and those who were indisputably German nationals, President Bush's Military Order singles out aliens for this special disfavor. The Administration and

141. If President Clinton during a budget deadlock in his administration had grown frustrated and had decided to proclaim his budget proposal the law of the land, directing his Secretary of the Treasury to begin disbursements, Congress would of course have had the power to trump that “budget” at once with one of its own, but the existence of such trumping power would not have sufficed to make the President's initial action constitutional.

142. The Court so held, over the dissenters' contrary view. *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 676-77 (1952) (Vinson, C.J., dissenting) (quoting Truman's first message to Congress that “[i]t may be that the Congress will deem some other course to be wiser. . . . I do not believe the Congress will favor any of these courses of action, but that is a matter for the Congress to determine,” and his second message that “[t]he Congress can, if it wishes, reject the course of action I have followed in this matter”).

other defenders of this Order invoke the sparing of United States citizens in *defense* of the Order, but that very asymmetry seems to us one of its constitutional defects. To our knowledge, the Military Order is the first of its kind to make this sort of citizen/alien distinction. There are two equal protection problems here. The first concerns treatment of persons in the United States: Why should a hacker from Montana who launches a computer virus that infects terminals in hospitals and government facilities be subject to trial in a military tribunal if he is a green-card holder,¹⁴³ but accorded a civilian trial if he is a citizen, when the relevant provisions of the Bill of Rights, and the separation of powers, apply without regard to citizenship? The second problem concerns treatment abroad: Why should the government treat American citizens captured fighting with al Qaeda or with the Taliban against American forces more favorably than native Afghans who believe they are fighting to protect their country against invaders?¹⁴⁴ For reasons we explain in a moment, the first problem poses a more serious difficulty than does the second.

The Framers of the Equal Protection Clause understood that discrimination against aliens was pervasive and problematic and intentionally extended the reach of the Clause to “persons,” rather than confining it to “citizens.”¹⁴⁵ Foremost in their minds was the language of *Dred Scott v. Sandford*, which had limited due process guarantees by framing them as nothing more than the “privileges of the citizen.”¹⁴⁶ This

143. While the Order does not purport to define what constitutes “international terrorism,” a recent definition of the term by Congress states that it covers “activities that,” when two other conditions are met, “involve violent acts or acts dangerous to human life that are a violation of the criminal laws of the United States or of any State.” 18 U.S.C. § 2331 (1994), *incorporated by reference in* Uniting and Strengthening America by Providing Appropriate Tools Required To Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-37, § 802, 115 Stat. 272, 802. The two other conditions are that the activities “appear to be intended to intimidate or coerce a civilian population” or otherwise influence or affect the conduct of the government, and that the activities “occur primarily outside the territorial jurisdiction of the United States, or transcend national boundaries in terms of the means by which they are accomplished.” *Id.* The Military Order apparently modifies the first condition to say that the intent to cause adverse effects to the United States “economy” is enough, *see* Military Order, *supra* note 3, § 2(a)(1)(ii). The second condition would probably be met by someone using the “means” of the Internet—a mechanism that by definition transcends national boundaries.

144. Because all of the facts about John Walker Lindh have not yet come to light, we do not mean to discuss his particular circumstances.

145. U.S. CONST. amend. XIV, § 1; *see also* *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (“The Fourteenth Amendment to the Constitution is not confined to the protection of citizens.”). The language of the Equal Protection Clause, which protects “persons,” intentionally differs from that of the Privileges or Immunities Clause in the same Amendment, which protects only “citizens.” *See* John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 YALE L.J. 1385, 1442-47 (1992) (providing evidence that the Equal Protection Clause was intentionally written as it was specifically in order to extend certain rights to aliens).

146. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 449 (1857). *See generally* AKHIL REED AMAR, *THE BILL OF RIGHTS* 170-72 (1998) (tracing the historical origins of the Equal Protection Clause and its use of the word “persons” to *Dred Scott*); *id.* at 217-18 n.* (stating that the Equal Protection Clause is “paradigmatically” concerned with “nonvoting aliens”).

language was repeatedly mentioned in the Senate debates on the Fourteenth Amendment, with the very first draft of the Amendment distinguishing between persons and citizens: “Congress shall have power to . . . secure to *all citizens* . . . the same political rights and privileges; and to *all persons in every State* equal protection in the enjoyment of life, liberty, and property.”¹⁴⁷ The Amendment’s principal author, Representative John Bingham, asked: “Is it not essential to the unity of the people that the citizens of each State shall be entitled to all the privileges and immunities of citizens? Is it not essential . . . that all persons, whether citizens or strangers, within this land, shall have equal protection . . . ?”¹⁴⁸

Indeed, an important federal statute, originally part of the Voting Rights Act of 1870 and now codified at 42 U.S.C. § 1981, appears to forbid exactly the type of distinction made by the President’s Order establishing military tribunals:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, *give evidence*, and to the *full and equal benefit of all laws and proceedings for the security of persons and property* as is enjoyed by *white citizens*, and shall be subject to *like punishment*, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.¹⁴⁹

What we have said thus far might seem insufficient to establish that the President’s Order violates either federal statutes or the Constitution. Recent modifications to § 1981 may make it difficult to apply the statute to the federal government.¹⁵⁰ As for the constitutional claim, the strong

147. AMAR, *supra* note 146, at 173 (quoting a draft of the Fourteenth Amendment) (emphasis added).

148. CONG. GLOBE, 39th Cong., 1st Sess. 1090 (1866). Similarly, Senator Howard stated that the Amendment was necessary to “disable a State from depriving not merely a citizen of the United States, but any person, whoever he may be, of life, liberty, or property without due process of law, or from denying to him the equal protection of the laws of the State.” *Id.* at 2765-66.

149. 42 U.S.C. § 1981(a) (1994) (emphasis added). The law began as part of the Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27, 27, but was later modified in 1870 to protect not only “citizens,” but *all* “persons.” See Voting Rights Act of May 31, 1870, ch. 114, § 16, 16 Stat. 140, 144; *Yick Wo*, 118 U.S. at 369 (stating that the provisions of the Equal Protection Clause “are universal in their application, to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws,” and that the predecessor statute to § 1981 was “accordingly enacted”); Harrison, *supra* note 145, at 1442-47 (describing the genesis of § 1981).

150. Before 1991, courts had read § 1981 to apply to the federal government. *E.g.*, *Bowers v. Campbell*, 505 F.2d 1155, 1157 (9th Cir. 1974) (holding that “section 1981 applies to employment discrimination by federal officials; it is not confined to state or private action”). In 1991, however, Congress added a new subsection with the following language: “The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.” Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1072 (codified as amended at 42 U.S.C. § 1981(c)). Accordingly, some courts have found that § 1981 does not apply to the federal government. *E.g.*, *Lee v. Hughes*, 145 F.3d 1272, 1277 (11th Cir.

presumption of “congruence” under which “[e]qual protection analysis in the Fifth Amendment area is the same as that under the Fourteenth Amendment,”¹⁵¹ has not invariably been applied to federal, as opposed to state, lines drawn on the basis of citizenship.¹⁵² This suggests that the strict judicial scrutiny to which state classifications based on citizenship are ordinarily subjected¹⁵³ might be inapplicable to the Military Order’s stark discrimination between citizens and aliens.

On closer examination, however, a different conclusion emerges. To begin with, deferential review of federal distinctions between citizens and aliens, or between aliens who are nationals of one country and those who are nationals of another, has its roots in the wide berth accorded the political branches “in the area of immigration and naturalization,”¹⁵⁴ particularly when the withholding of such benefits as employment opportunities from aliens provides a possible bargaining chip in seeking reciprocal concessions in foreign trade and labor negotiations.¹⁵⁵ When a categorical preference for American citizens cannot be justified in terms of immigration and naturalization policy or as an adjunct to our international bargaining posture, the basis for relaxing the scrutiny otherwise applicable to discrimination against aliens as a class evaporates, and the level of scrutiny becomes correspondingly more searching—as the invalidation of the Federal Civil Service Commission’s attempt to restrict civil service employment to United States citizens reflects.¹⁵⁶ Plainly, subjecting aliens who are unlawful enemy combatants to military tribunals while guaranteeing otherwise indistinguishable United States citizens civilian

1998). The holding in *Lee* is quite odd, however, for the 1991 language is expansive rather than restrictive in thrust, and Congress did not delete the word “territory” from the existing statute. It thus seems plain that Congress did not intend to limit, but only to supplement, existing civil rights laws by confirming their applicability to nonstate as well as state actors. *See La Compania Ocho, Inc. v. U.S. Forest Serv.*, 874 F. Supp. 1242, 1251 (D.N.M. 1995) (arguing that the 1991 amendments did not undercut the applicability of § 1981 to the federal government because the amendments were “intended to expand the scope of civil rights protection, not limit it”). In any event, § 1981 may make it difficult for states to comply with the Military Order. *See Military Order*, *supra* note 3, § 2(c) (requiring states to turn over “individual[s] subject to this Order” to the “Secretary of Defense”); *id.* § 7(d) (defining “state”).

151. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995) (quoting *Buckley v. Valeo*, 424 U.S. 1, 93 (1976)); *Bolling v. Sharpe*, 347 U.S. 497 (1954).

152. *See, e.g., Fiallo v. Bell*, 430 U.S. 787, 796 (1977); *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102, 104, 114-16 (1976); *Mathews v. Diaz*, 426 U.S. 67, 81-84 (1976).

153. *See, e.g., In re Griffiths*, 413 U.S. 717, 721-22 (1973) (finding alienage to be a suspect classification); *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (stating that state “classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny” and that “[a]liens as a class are a prime example of a ‘discrete and insular’ minority” (citations omitted)).

154. *Mathews*, 426 U.S. at 81-82.

155. *See Hampton*, 426 U.S. at 104-05, 115 (holding such foreign policy options to be beyond the mandate of the Civil Service Commission, whose blanket exclusion of all aliens from the federal civil service was accordingly held to violate Fifth Amendment due process).

156. *Id.* at 104, 115.

justice cannot be understood in immigration or international bargaining terms.

Even more important, the decisions manifesting relaxed rather than heightened scrutiny of federal discriminations that categorically favor United States citizens have involved nothing beyond the preferential availability to our own citizens of government employment or other socioeconomic benefits that do not touch the raw nerve of equal justice under law—benefits whose distribution on an unequal basis accordingly does not trigger strict scrutiny. Crucially, the Military Order curtails rights that, at least when made available to others similarly situated, have long been deemed too fundamental to be dispensed with on a merely rational basis.¹⁵⁷ If trial by jury, in cases where it is not independently mandatory, were, for example, made available to those who could afford to pay a certain fee (to defray the marginal costs to government of actually putting on a jury trial, protecting jurors, and the like), but not to those too poor to afford that fee, strict scrutiny, or something very close to it, would be mandatory,¹⁵⁸ despite the mantra that poverty is not a suspect or even a semisuspect classification.¹⁵⁹

The same follows when rights as basic as the jury trial are dispensed to citizens but not to aliens who are charged with identical offenses and who have exactly the same relationship to the *very same* international terrorist organizations with which we are at war.¹⁶⁰ In short, although we might

157. While the Court has not adopted a formula for heightened scrutiny when quasi-fundamental rights are at stake for quasi-suspect classes, several decisions essentially suggest such a principle. *See, e.g., Plyler v. Doe*, 457 U.S. 202, 221, 230 (1982) (stating that, because education plays a “fundamental role in maintaining the fabric of our society,” a Texas statute denying free public schooling to children who were not legally admitted into the United States must be justified by a “substantial” state interest and finding no such justification); *Craig v. Boren*, 429 U.S. 190, 210-11 n.* (1976) (Powell, J., concurring) (suggesting that the cases reveal more than two tiers of equal protection analysis).

158. *See, e.g., M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that due process and equal protection combine to prevent states from limiting appeals from custody-termination decisions to those parents who can afford record preparation fees); *Douglas v. California*, 372 U.S. 353, 355 (1963) (deciding similarly that criminal defendants cannot be denied assistance of the appellate counsel permitted to less indigent defendants because of inability to pay); *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (finding on similar grounds, despite the absence of any constitutional right to appeal a criminal conviction, that states must provide free trial transcripts on appeal for indigent defendants when a defendant with resources could purchase such a transcript to facilitate his appeal).

159. *See, e.g., Harris v. McRae*, 448 U.S. 297, 323 (1980) (“[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 24 (1973) (rejecting strict scrutiny of Texas’s reliance on local property taxation in school system financing and stating that “where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages”).

160. This latter point is especially significant, and quite easy to overlook. A situation like that in *Quirin*, in which we are at war with a particular nation, is one in which citizens of that nation who are soldiers (albeit not visibly) of its armed forces are distinguishable in principle from American citizens who join in their clandestine and hostile effort to injure Americans but are not members of any enemy nation or other organization with which we are at war. To be sure, the

afford considerable deference to the President in treating aliens less favorably than citizens in the distribution of Medicare, social security, or other similar benefits, or even in matters of employment, there is little or no room for government by approximation when it puts people on one side or another of a crude line that makes the difference between giving them access to the fundamental protections of civilian justice—from indictment to a jury trial presided over by a judge not answerable to the prosecutor, not to mention access to an appeal before a tribunal independent of the prosecuting authority—and relegating them to a distinctly less protective, and frankly inferior, brand of adjudication.¹⁶¹ If the President may ever take such a step, shunting aliens into a procedure from which all U.S. citizens are spared, he may do so only upon a convincing showing of necessity, one that matches the claims of threat to the fact of alienage.

It has been well said that “[t]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally” and that “nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected.”¹⁶² When defenders of the line being drawn can, in truth, invoke little beyond the obvious political convenience of stilling the voices that might otherwise rise

Quirin Court saw no justification for regarding such citizen turncoats as less eligible for trial by military tribunals than their noncitizen counterparts. But a distinction in that context between the two categories of unlawful belligerents would hardly have been irrational. In contrast, in a situation like the one we confront vis-à-vis al Qaeda, where we are at war with a supranational terrorist organization drawing support from many nations but being identifiable with none of them, it seems irrational to distinguish among unlawful belligerents—all of whom are members of the same terrorist group and with all of whom we are thus at war—on the basis of whether or not they happen also to be citizens of the United States as opposed to being citizens of, say, Saudi Arabia, France, or some other nation that may or may not be among the sponsors of terror but with which we are not, in any event, at war. In other words, it is one thing to give preferential treatment to U.S. citizens over their alien counterparts when that means giving less favorable treatment to citizens of a nation with which we are at war (and members of that enemy nation’s military), and quite another thing to give preferential treatment to U.S. citizens when noncitizenship, rather than being a proxy for membership in the armed forces of the enemy, simply means that one is merely an unlawful belligerent rather than being a traitor as well—hardly a reason to be treated *more* harshly.

161. To be sure, if America is at war with one or more sovereign states, as it was in World War II with Germany, Japan, and Italy (the now-old “axis” powers), the federal government’s decision to treat citizens of those enemy states in a harsher manner than it treats American citizens, and indeed even American citizens who might have taken up with the enemy, at least has a long-standing statutory tradition. See *supra* text accompanying note 53 (describing the still-existing Alien Enemy Act of 1798, which authorizes the government to detain and deport nationals of a nation against which Congress has declared war).

162. *Ry. Express Agency v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring); see also *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring) (“Our salvation is the Equal Protection Clause, which requires the democratic majority to accept for themselves and their loved ones what they impose on you and me.”).

up in protest were American citizens exposed to this distinctly inferior brand of justice along with their alien counterparts, due process of law demands more evenhanded treatment by the government. The singling out of aliens residing in this country for such fundamental disfavor might be justified in rare circumstances, but it is hard to imagine—and, absent congressional action, impossible to assume—that such circumstances are present today.

Somewhat less likely to prove constitutionally vulnerable are trials outside the United States—for the territorial limits of the Equal Protection Clause will suggest to many that neither it, nor presumably the embodiment of its central precepts in the Due Process Clause of the Fifth Amendment, can invalidate government action abroad. (So too, the words of § 1981 are confined to “the jurisdiction of the United States” and to “State[s]” and “Territor[ies].”)¹⁶³ Nevertheless, pressure for the extraterritorial application of the Constitution generally is bound to mount as globalization continues to unfold. Far more than at the Founding, American military and law enforcement officials have the ability to project their will without regard to national boundaries, creating a continuous and virtually instantaneous web of communication between the lowest field officers abroad and their superiors in Washington, D.C., with the result that legal process served against those within the United States has the potential to prevent or remedy actions taken in their name abroad. Even if courts do not revisit precedents like *Verdugo-Urquidez*¹⁶⁴ in light of such changes, judicial attention to the links between domestic cause and extraterritorial effect is likely to be increasingly common. Action by Congress to remedy the equal protection problems with the Military Order might well avoid what could be a prematurely broad ruling on extraterritoriality in the context of military trials.

2. *Due Process*

The procedural protections of the Due Process Clause of the Fifth Amendment, as well as the criminal procedure protections of the Fourth, Fifth, and Sixth Amendments, have received far greater attention and development in the half-century or so after *Quirin* than in the century and a half before it. A description of the “due process revolution” is obviously well beyond the scope of this Essay, but such major shifts in constitutional law may call into question the *Quirin* precedent itself, and suggest the need for greater congressional specificity with respect to military tribunals. For example, the Supreme Court has held that due process requires certain

163. See *supra* text accompanying note 149.

164. 494 U.S. 259 (1990); see *supra* note 129.

procedural protections in many civil matters—including a right to a hearing¹⁶⁵—and has held that, during custodial interrogations in criminal cases, certain warnings must be given.¹⁶⁶ We do not believe these decisions necessarily have full applicability in otherwise constitutional military tribunals, particularly those operating abroad, but they do suggest that the constitutional landscape has changed so significantly since World War II that a precedent like *Quirin*, weakened as well by recent revelations of the questionable circumstances surrounding the decision itself,¹⁶⁷ is more plausibly classified with those decisions like *Korematsu*, whose force as precedent has been diminished by subsequent events, rather than with those whose undiminished momentum counsels maintenance under principles of stare decisis (like *Roe v. Wade*).¹⁶⁸

In short, congressional involvement is essential not only to supply the rationale, if one exists, for according aliens less protection in this context than similarly situated citizens, but also to ameliorate by statute the Order's procedural inequities and curtailment of rights that otherwise lack an adequate rationale. Most crucially, legislation can supply constitutionally indispensable safeguards, such as appeal to an entity independent of the executive, that the executive branch is inherently incapable of creating and supervising on its own. Perhaps the most basic such safeguard concerns the writ of habeas corpus.

3. *Habeas Corpus*

The need for effective habeas corpus review should independently drive Congress to act even if political inertia would otherwise lead it to remain inactive. The Bush Administration has argued that, despite its textual prohibition of any judicial relief whatsoever, the Order does not mean what it says, so that habeas petitions may be considered (although the administration would limit such petitions to challenges to a tribunal's jurisdiction, in cases where persons are detained or tried domestically).¹⁶⁹ Congress will need to establish fair procedures for habeas review and to vest lower courts with jurisdiction to hear these cases.

If habeas corpus review is to have any independently protective bite at all, Article III courts will somehow have to police the line between lawful and unlawful belligerents. But doing so will prove to be exceedingly

165. *Goldberg v. Kelly*, 397 U.S. 254 (1970) (requiring a hearing prior to the termination of welfare benefits).

166. *Miranda v. Arizona*, 384 U.S. 436, 467-68 (1966); *see also* *Dickerson v. United States*, 530 U.S. 428 (2000) (reaffirming *Miranda*).

167. *See supra* notes 80-82, 117-118, and accompanying text.

168. *See supra* notes 119-122 and accompanying text (discussing the circumstances in which statutory precedents have been overruled in light of subsequent constitutional developments).

169. *See supra* note 12.

difficult, both substantively and procedurally. Substantively, a broad definition will sweep in persons who have done nothing more than voice political support for al Qaeda; a narrow one might exclude those likely to engage in future acts of terrorism. In the end, courts will be called upon to posit some meta-rule assuring, at the very least, that not every imaginable individual—including each United States citizen—will be triable militarily merely upon the unilateral assertion of our Chief Executive that he has reason to believe the individual is part of an ongoing, and perhaps never-ending, war crime.

This substantive difficulty is exacerbated by the fact that noncitizens can protect their right to a civilian trial (and the right to be free of detention pending trial by military tribunal) only by *disproving* the *merits* of the underlying allegation of criminal activity.¹⁷⁰ More remarkable still, because the present circumstance involves an entirely protean and amorphous organization or set of organizations whose membership and, indeed, whose very existence may be impossible to define fully without reference to the specific terrorist acts they are accused of plotting or carrying out—witness the very terms of Congress’s Resolution authorizing the use of force—the attempt to address the issue of military jurisdiction *ex ante*, and in a relatively antiseptic way distinct from the proceedings on the merits, may fail altogether.¹⁷¹

Procedurally, civilian courts will have to decide these habeas cases on the basis of information most of which is likely to be classified and highly sensitive, so that many of the problems that have been invoked to explain the need for the Order in the first place—such as the risk of releasing classified information in open court—may come back to haunt us in habeas proceedings. Although Congress has passed legislation permitting the closure of civilian criminal trials when classified evidence is at issue, it has never extended such laws to the habeas context.¹⁷² It was thus no accident that Congress, in the Antiterrorism and Effective Death Penalty Act of 1996, specifically established a “terrorist removal” court, armed with the

170. *See supra* text accompanying note 101 (discussing how the Order fuses the jurisdictional question of unlawful belligerency with the underlying substantive offense).

171. Such failure seems particularly likely because the Military Order includes not only members of such organizations, but also all those who assist them (perhaps even unwittingly).

172. The Classified Information Procedures Act (CIPA), to name the primary piece of relevant legislation, applies only to *criminal trials*. For example, the “notice by defendant” provision of CIPA covers “the disclosure of classified information in any manner in connection with *any trial or pretrial proceeding* involving the criminal prosecution of such defendant”—notably excluding postconviction proceedings. 18 U.S.C. app. § 5(a) (1994) (emphasis added); *see also id.* § 3 (“Upon motion of the United States, the court shall issue an order to protect against the disclosure of any classified information disclosed by the United States *to any defendant in any criminal case* in a district court of the United States.” (emphasis added)); *id.* § 2 (“At any time *after the filing of the indictment or information*, any party may move for a pretrial conference to consider matters relating to classified information that may arise in connection with the prosecution.” (emphasis added)).

special power to remove terrorist aliens from the United States on the basis of classified evidence.¹⁷³ The absence of congressional authorization for the Order's military tribunals thus perversely winds up harming the administration's purported goal: to permit individuals to be brought to justice without disclosure of sources and methods in open court.

Moreover, without appropriate legislation, many habeas corpus petitions would face hurdles so substantial that, without close congressional attention, habeas review would provide little beyond a fig leaf.¹⁷⁴ Under current law, writs of habeas corpus can be "granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*."¹⁷⁵ While this rule is not rigidly applied,¹⁷⁶ it may prevent a defendant from bringing a habeas claim in any district court, as it is not clear *which* district court would be an appropriate venue when the petitioner's custodian is outside the territorial United States and when the petitioner's "body" is outside the country as well. Yet giving the defendant the capacity to bring suit in any district court could lead to damaging forum-shopping. Indeed, the precursor to the present habeas statute included the phrase "within their respective jurisdictions" precisely to avoid

173. See 8 U.S.C. § 1534(e)(3)(A) (Supp. V 1999); see also TERRORISM PREVENTION ACT, H.R. CONF. REP. NO. 104-518, at 116 (1996) (emphasizing the need to protect classified sources in deportation proceedings).

174. *Johnson v. Eisentrager* could be read to indicate that at least some individuals abroad do not have any right to habeas:

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.

339 U.S. 763, 768 (1950). Of course, if *Johnson* precludes habeas actions for all those detained overseas, then the overall threat posed to civil liberties is that much greater. But the *Johnson* decision probably does not extend quite so far. The opinion is unclear about which of two rationales justified its holding that no habeas review was permissible: (1) that the petitioners were enemies in a declared war, or (2) that they were imprisoned outside the United States on the basis of conduct committed outside the United States. The Court mentioned both factors and did not get into the tricky business of which was doing the work. *E.g., id.* at 777-78 (mentioning both factors repeatedly). Obviously, the Court was deeply influenced by the language and structure of the 1798 Alien Enemy Act, which stripped alien enemies of nearly all judicial review; that Act is not applicable on the facts here. In favor of the narrower interpretation, the majority in *Johnson* conceded that those claiming citizenship were entitled to a writ of habeas corpus to "assure fair hearing of [their] claims to citizenship." *Id.* at 769. If person *A* is entitled to habeas to decide whether she is a citizen (because being a citizen is presumably so jurisdictionally important), why shouldn't person *B* get a habeas hearing to decide whether she is an enemy belligerent (since that status is of obvious jurisdictional importance, too)?

175. 28 U.S.C. § 2241(a) (1994) (emphasis added).

176. Compare *Ahrens v. Clark*, 335 U.S. 188 (1948) (holding that the District Court for the District of Columbia cannot issue the writ for those detained on Ellis Island because Ellis Island is outside of the court's jurisdiction), with *Braden v. 30th Judicial Circuit Court*, 410 U.S. 484, 495-98 (1973) (breaking away from earlier precedent such as that established by *Ahrens*). In *Burns v. Wilson*, 346 U.S. 137 (1953), the Court permitted the district court in Washington, D.C., to hear a habeas petition filed by United States citizens found guilty of rape and murder in Guam, a territory under supervision of the United States Navy.

such shopping.¹⁷⁷ However, there are cases suggesting that, despite these concerns, jurisdiction may lie in lower courts to hear habeas petitions from citizens who are abroad.¹⁷⁸ The language of the Military Order cannot by itself restrict habeas review, given the “longstanding rule requiring a clear statement of congressional intent to repeal habeas jurisdiction.”¹⁷⁹ In any event, legislation expressly providing that lower courts may entertain habeas corpus petitions from those detained abroad would clarify the issue considerably while affording additional safeguards against abuse.

Such safeguards are needed especially because jurisdictional problems will likely prevent the Supreme Court from hearing habeas corpus petitions if they are not first filed in lower courts.¹⁸⁰ And even if some creative way to surmount those jurisdictional problems can be found, Supreme Court Rules say that “[t]o justify the granting of a writ of habeas corpus, the petitioner must show that exceptional circumstances warrant the exercise of the Court’s discretionary powers.”¹⁸¹ In many post-World War II cases, the Supreme Court rejected leave to file petitions for such original writs.¹⁸²

177. CONG. GLOBE, 39th Cong., 2d Sess. 730 (1867) (statement of Sen. Johnson) (stating that the phrase was necessary to avoid letting “[a]ny man who may be imprisoned in any part of the United States” seek a “writ issued by a district judge of the United States farthest from the place of imprisonment”). In addition, the precursor statute also rejected an early proposal to exempt those in military custody from access to writs of habeas corpus. See Charles Fairman, *Some New Problems of the Constitution Following the Flag*, 1 STAN. L. REV. 587, 635-37 (1949) (describing the history).

178. *Ex parte Hayes*, 414 U.S. 1327, 1327 (Douglas, Circuit Justice 1973) (permitting a United States Army private to file a habeas corpus petition in District Court for the District of Columbia, despite the fact that the “applicant and his commanding officer [were] located in Germany, outside the territorial jurisdiction of any district court”); *Kinnell v. Warner*, 356 F. Supp. 779 (D. Haw. 1973) (applying *Hayes* to permit a United States Navy officer in the South China Sea to file a habeas petition in the District Court for the District of Hawaii).

179. *INS v. St. Cyr*, 121 S. Ct. 2271, 2278 (2001).

180. While *Marbury v. Madison* famously limited the Court’s original jurisdiction to the few categories enumerated in Article III, Section 2, the Court shortly thereafter decided *Ex parte Bollman*, 8 U.S. (4 Cranch) 75 (1807), holding that a writ of habeas corpus was to be treated as an instance of the Court’s appellate jurisdiction in that it sought correction of the decision of a circuit court. But *Bollman* and its progeny have not been read to confer jurisdiction on the Supreme Court to hear habeas petitions challenging the decisions of military tribunals when the petitions have not first been ruled upon by an inferior court. See *infra* note 182.

181. SUP. CT. R. 20.4(a). In earlier times, the Court believed that “it is not only within the authority of the Supreme Court, but it is its duty to inquire into the cause of commitment . . . , and if found to be as charged, a matter of which such a court had no jurisdiction, to discharge a prisoner from confinement.” *Ex parte Yarbrough*, 110 U.S. 651, 653 (1884).

182. See *Everett v. Truman*, 334 U.S. 824 (1948) (denying leave to file a motion seeking an original writ for relief from sentences imposed by the Military Government Court at Dachau on the basis of an evenly divided Court); *Milch v. United States*, 332 U.S. 789 (1947) (denying leave to file a motion seeking an original writ by an evenly divided Court); *Ex parte Betz*, 329 U.S. 672, 672 (1946) (denying leave to file “for want of original jurisdiction” over the dissent of Justice Murphy and the view of Justices Black and Rutledge that the Court should deny leave to file without prejudice to the filing of the petitions “in the appropriate District Court”). These cases were apparently decided on the view that it takes five votes to grant such leave, not four as it does for certiorari.

In *In re Yamashita*, by contrast, both an appeal from the Philippine Supreme Court and an original writ of habeas corpus were filed, and the United States Supreme Court did not clearly

These decisions were rendered in spite of the fact that, in some of the cases, there was cause for grave concern about the integrity of the proceedings. Consider *Everett v. Truman*,¹⁸³ where seventy-four Germans on trial at Dachau sought relief because unbeknownst to them, the prosecutors had been conducting mock trials with them, complete with fake judges, prosecutors, and defense counsel. Fake witnesses provided evidence against the prisoners in order to get them to write confessions. The prisoners were brought to the “courtroom” covered with black hoods, and the “room where these proceedings was held contained a table covered with a black cloth on which stood a crucifix and burning candles.”¹⁸⁴ Nevertheless, the Court dismissed the case.¹⁸⁵

In the end, even if courts hear habeas cases, without suitably sculpted legislation the prospect of habeas review could require the disclosure of intelligence information in such proceedings—a prospect that could lead courts to water habeas review down to nothing more than a hollow formality.

III. CONCLUSION

President Bush has claimed the power to create and operate a system for adjudicating guilt and dispensing justice through military tribunals without explicit congressional authorization—threatening to establish a precedent that future presidents may seek to invoke to circumvent the need for legislative involvement in other unilaterally defined emergencies. It is our hope that Congress will avert that danger through appropriate legislation. But President Bush’s constitutional claims will remain even if Congress acts. While those claims deserve careful and respectful consideration, we believe they do not comport with our Constitution’s structure, designed in large measure to secure individual rights by resisting the centralization of unchecked power. Even those presidents who tested the constitutional waters, like Abraham Lincoln and Harry Truman, asked Congress to ratify their actions and promised obedience to whatever

indicate which petition provided its jurisdiction. See 327 U.S. 1, 5-7 (1946); see also *In re Yamashita*, 326 U.S. 693 (1945) (deferring consideration on the original petition until the petition for certiorari was received). In *Hirota v. MacArthur*, 338 U.S. 197 (1948), the Court denied several Japanese nationals, including former Premier Hirota, leave to file a petition for an original writ, but it did so on the ground that the convicting body was “not a tribunal of the United States,” but rather one “of the Allied Powers.” *Id.* at 197.

183. 334 U.S. 824.

184. Press Release, National Military Establishment (Jan. 6, 1949), quoted in Fairman, *supra* note 177, at 598 n.37. This report was written by three military officers who went to Germany to investigate, presided over by Colonel Gordon Simpson, then a justice of the Supreme Court of Texas. See Fairman, *supra* note 177, at 597-98 (discussing the *Everett* case).

185. *Everett*, 334 U.S. 824.

decision Congress made.¹⁸⁶ The present Military Order lacks this basic promise.

An executive decree, in today's circumstances, that purports to authorize the trial of unlawful belligerents in military tribunals for terrorism in the United States is unconstitutional. In such a trial, the government is not acting to preserve stability and establish the rule of law in conquered territory, nor is it maintaining order at home in a declared war. There is, furthermore, no emergency such that approval by Congress would be impossible to obtain in the immediate future; rather, Congress has proven itself capable of responding quickly to a wide array of legislative requests by the administration. In this context, reading the Commander-in-Chief Clause to authorize the creation of military tribunals would eviscerate structural constitutional protections.

A closer question would be presented by military trials outside the United States in a theatre of war. Even if the Constitution's guarantees were deemed inapplicable to such trials despite their close connection to government planning and direction from within the United States, those trials would be unprecedented absent either an authorizing statute or a declaration of war. Before we embark on so legally uncharted a course, we should strive for the enactment of appropriate legislation—both to help insulate the resulting convictions from judicial invalidation (or at least international condemnation) and to provide essential legislative elaboration, through provisions such as those governing appeals and habeas corpus.

Whether or not Congress enacts such legislation, by extending to all "persons" within the Constitution's reach such guarantees as equal protection and due process of law, the Constitution constrains how our government may conduct itself in bringing terrorists to justice. Those guarantees, in our view, require at least an assured opportunity to appeal a conviction to an authority independent of the prosecuting military power, as well as meaningful access to habeas review. These constitutional principles, in conjunction with the provisions for a divided government, *are* our security, and to assert them here is to win at home the war we are waging so effectively abroad. Terrorists have attacked the Federal Building in

186. See Lincoln, *supra* note 56, at 308-10 (stating that certain measures, such as the blockade of the South and the increased size of the militia, "whether strictly legal or not, were ventured upon, under what appeared to be a popular demand, and a public necessity; trusting then, as now, that Congress would readily ratify them" and that it was "believed that nothing has been done beyond the constitutional competency of Congress" and that the suspension of habeas "is submitted entirely to the better judgment of Congress"); MAEVA MARCUS, TRUMAN AND THE STEEL SEIZURE CASE 95 (1977) (stating that President Truman's message "seemed designed to show respect for Congress' prerogative to pass legislation"). Acceding to Lincoln's request, the 1861 Congress passed a statute stating that it "hereby approve[d] and in all respects legalize[d] and ma[d]e valid" the previous unilateral acts done by the President "as if they had been issued and done under the previous express authority and direction of the Congress of the United States." Act of Aug. 6, 1861, ch. 63, 12 Stat. 326, 326.

Oklahoma and the Pentagon and have toppled the towers of the World Trade Center, massacring thousands of innocent civilians in the process. We must not allow them to tear down as well the structure of government, constituted by the separation of powers, that makes our legal and political system—and the liberties it embodies and protects—unique. Thomas Paine’s great words are those to live by: “He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach to himself.”¹⁸⁷

187. *In re Yamashita*, 327 U.S. at 81 (Rutledge, J., dissenting) (quoting Thomas Paine, *Dissertation on First Principles of Government* (July 1795), in 2 *THE COMPLETE WRITINGS OF THOMAS PAINE* 570, 588 (Philip S. Foner ed., 1945)). Justice Murphy stated:

At a time like this when emotions are understandably high it is difficult to adopt a dispassionate attitude toward a case of this nature. Yet now is precisely the time when that attitude is most essential. While peoples in other lands may not share our beliefs as to due process and the dignity of the individual, we are not free to give effect to our emotions in reckless disregard of the rights of others. We live under the Constitution, which is the embodiment of all the high hopes and aspirations of the new world. And it is applicable in both war and peace. We must act accordingly. Indeed, an uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit.

Id. at 40-41 (Murphy, J., dissenting).