

UNITED STATES OF AMERICA)	
)	PROSECUTION
)	RESPONSE TO DEFENSE
)	MOTION TO DISMISS
v.)	
)	(LACK OF LEGISLATIVE
)	AUTHORITY TO
SALIM AHMED HAMDAN)	ESTABLISH MILITARY
)	COMMISSIONS)
)	
)	15 October 2004

1. Timeliness. This motion response is being filed within the timeline established by the Presiding Officer.

2. Prosecution Position on Defense Motion. The Defense motion to dismiss should be denied. The President’s Military Order to establish military commissions is based firmly on constitutional, legislative and judicial authorities.

3. Facts in Agreement. The Prosecution does not agree with or stipulate to any of the Defense’s facts as alleged except fact (l). The Prosecution will continue to work with the Defense to obtain a stipulation of fact.

4. Facts. The Prosecution alleges the following additional facts:

a. On 18 September, 2001, Congress enacted the *Authorization for the Use of Military Force Joint Resolution* (Public Law 107-40, 115 Stat. 224), which authorizes the President to “use all necessary and appropriate force against those nations, organizations or persons he determines planned, authorized, committed or aided the terrorist attacks that occurred on 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.”

b. The President’s Military Order (PMO) of 13 November 2001, concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism, authorizes the Secretary of Defense or his designee to convene military commissions for the trial of certain individuals “for any and all offenses triable by military commission.”

c. The Secretary of Defense promulgated implementing orders to establish procedures for the appointment of military commissions, setting forth various rules governing the appointment, jurisdiction, trial and review of military commission proceedings. Military Commission Order No. 1.

d. The Accused in this case was designated by the President for trial by military commission and a commission was appointed in accordance with commission orders and instructions.

5. Legal Authority.

- a. U.S. Constitution, Art. I, §8 and Art II, §2
- b. 10 U.S.C. §§ 821, 836, 850, 904 and 906
- c. *Authorization for Use of Military Force Joint Resolution*, Public Law 107-40, 115 Stat. 224.
- d. President's Military Order, *Detention, Treatment, and trial of Certain Non-Citizens in the War Against Terrorism*, November 13, 2001.
- e. *Ex parte Quirin*, 422 U.S. 806 (1975).
- f. *Madsen v. Kinsella*, 343 U.S. 341 (1952).
- g. *Ex parte Quirin*, 317 U.S. at 32 n.10, 42
- h. *Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868).
- i. *Mudd v. Caldera*, 134 F.Supp. 2d 138 (D.D.C. 2001).
- j. *Johnson v. Eisentrager*, 339 U.S. 763 (1950).
- k. *Hirota v. MacArthur*, 338 U.S. 197 (1948).
- l. *In re Yamashita*, 327 U.S. 1 (1946).
- m. *Loving v. United States*, 517 U.S. 748 (1996).
- n. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633 (2004).
- m. *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956)

6. Analysis.

Military commissions have been used throughout U.S. history to prosecute violators of the laws of war.¹ “Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have been called our common law war courts.” *Madsen v. Kinsella*, 343 U.S. 341, 346-47 (1952). Military commissions have tried offenders charged with war crimes as early as the Revolutionary War, the Mexican-American War, the Civil War, and as recently as WWII. *See Ex parte Quirin*, 317 U.S. at 32 n.10, 42 n.14. President Lincoln’s assassins and their accomplices were imprisoned and executed pursuant to convictions rendered by military commissions. Their offenses were characterized not as criminal matters, but rather as acts of rebellion against the government itself. *See Ex parte Mudd*, 17 F. Cas. 954 (S.D. Fla. 1868). Such use of military commissions has been repeatedly endorsed by federal courts, including as recently as 2001. *See Mudd v. Caldera*, 134 F.Supp. 2d 138 (D.D.C. 2001); *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir. 1956). The use of military commissions is firmly rooted in American military law and tradition.

¹ A military commission is a form of military tribunal recognized in American law and typically used in three scenarios: (i) to try individuals (usually members of enemy forces) for violations of the laws of war; (ii) as a general court administering justice in occupied territory; and (iii) as a general court in an area where martial law has been declared and the civil courts are closed. *See generally* William Winthrop, *Military Law and Precedents* 836-40 (2d ed. 1920). As the Supreme Court has observed: “In general...[Congress] has left it to the President, and the military commanders representing him, to employ the commission, as occasion may require, for the investigation and punishment of violations of the laws of war.” *Madsen v. Kinsella*, at 346 n. 9 (quoting Winthrop, *supra* at 831).

On November 13, 2001, the President of the United States issued a “Military Order” concerning the “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism.” President’s Military Order, 66 Fed. Reg. 57,833 (Nov. 13, 2001) (*hereinafter* PMO). This Order authorized the Secretary of Defense to appoint military commissions and to promulgate orders and regulations necessary to implement that purpose. This Military Commission has been appointed to try the Accused in this case pursuant to these orders. The Defense now challenges the President’s legal authority to establish this Military Commission and asks the Commission to rule that the PMO is an unlawful order.

a. Summary of the Prosecution Response.

The legal basis for the PMO is not a matter of speculation, but is forthrightly asserted in the first paragraph of the Order itself: “*By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for the Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat. 224) and sections 821 and 836 of title 10, United States Code, it is hereby ordered as follows....*”

The President has inherent constitutional power as the Commander in Chief to establish military commissions in this case. This constitutional power is at its apogee when the President is acting in his role as Commander in Chief of the Armed Forces pursuant to a congressional authorization for the use of force. The PMO is based on clear legislative authority for the use of military commissions in both the *Authorization for the Use of Military Force Joint Resolution* (AUMF) and the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §821 and 836 (Articles 21 and 36). Finally, the Supreme Court has clearly and definitively held that the President has authority to establish military commissions under the UCMJ and antecedent provisions in the Articles of War. The President’s Military Order of November 13, 2001, is based upon these authorities and is a lawful exercise of presidential powers.

b. Summary of the Defense Argument.

The Defense argues that the PMO is unlawful on the grounds that Congress alone has the constitutional authority to establish military commissions under the circumstances in this case and has not done so. Specifically, the Defense argues that existing statutory authority for the use of military commissions under UCMJ, Article 21, applies only in times of formally declared war and only for the purpose of trying offenses against the international law of war. The Defense denies that a state of war satisfying the threshold of Article 21 exists. The Defense argues that the charges referred to this Commission fall outside the subject matter jurisdiction of military commissions under Article 21. Thus, according to the Defense, the President has no constitutional or statutory authority to order the Secretary of Defense to convene this Commission. The PMO is therefore an unlawful exercise of executive power and violates the Separation of Powers doctrine.

The Defense argument is built on a faulty interpretation of Article 21 and on an unduly narrow view of the President’s powers as Commander in Chief under Article II, §2 of the Constitution. The Defense motion challenges the settled authority of the

President to perform a function that has been recognized by law and custom throughout the history of constitutional government in the United States. In so doing, the Defense asks the Commission to deny the President's constitutional powers, Congress's clear intent in the Uniform Code of Military Justice, and the Supreme Court's settled judgment that the President has firm authority to establish military commissions for the trial of war criminals, including unlawful belligerents. The Defense challenge must be denied as a matter of law.

c. The President has Inherent Constitutional Power to Establish This Military Commission

The legal foundation of the PMO consists of the interlocking elements of the President's constitutional power and the statutory recognition and approval of that power by Congress in the AUMF and the UCMJ. The President's constitutional powers are at their apogee when the nation's armed forces have been activated by Congress for the necessary defense of the nation. Thus the starting point for analysis must be the President's constitutional authority as Commander in Chief.

The Commander-in-Chief Clause, U.S. Const. art. II, §2, cl. 1, vests the President with full powers necessary to successfully prosecute a military campaign. It is a fundamental principle that the Constitution provides the federal government all powers necessary for the execution of the duties that the Constitution describes.² As the Supreme Court explained in *Johnson v. Eisentrager*, “[t]he first of the enumerated powers of the President is that he shall be Commander-in-Chief of the Army and Navy of the United States. And, of course, grant of war power includes all that is necessary and proper for carrying these powers into execution.” 339 U.S. 763, 788 (1950).

One of the necessary incidents of authority over the conduct of military operations in war is the power to punish enemy belligerents for violations of the laws of war. The laws of war exist in part to ensure that the brutality inherent in war is confined within some limits. It is essential for the conduct of a war, therefore, that the Army have the ability to enforce the laws of war by punishing transgressions by the enemy. As the Supreme Court recently stated in *Hamdi v. Rumsfeld*: “The capture and detention of lawful combatants, and the capture, detention and trial of unlawful combatants, by ‘universal agreement and practice’ are ‘important incidents of war.’ *Ex Parte Quirin*, 317 U.S. at 28.” 124 S. Ct. 2633, 2640 (2004) (plurality opinion).

It was well recognized at the time of the Founding that one of the powers inherent in military command was the authority to institute tribunals for punishing violations of the laws of war by the enemy. In 1780, during the Revolutionary War, General Washington as Commander in Chief of the Continental Army appointed a “Board of General Officers” to try the British Major Andre as a spy. See *Quirin*, at 31, n. 9. At the time, there was no provision in the American Articles of War providing jurisdiction in a court-martial to try an enemy soldier for the offense of spying. In vesting the President

² Cf. *Request of the Senate for an Opinion as to the Powers of the President “In Emergency or State of War,”* 39 Op. Att’y Gen. 343, 347-48 (1939)(“It is universally recognized that the constitutional duties of the Executive carry with them the constitutional powers necessary for their proper performance.”)

with full authority as Commander in Chief, the drafters of the Constitution surely intended to give the President the same authority that General Washington possessed during the Revolutionary War to convene military tribunals to punish offenses against the laws of war.

The history of military commissions in the United States supports this conclusion, because as a matter of practice military commissions have been created under the President's inherent authority as Commander in Chief without any authorization from Congress. In April 1818, for example, General Andrew Jackson convened military tribunals to try two English subjects, Arbuthnot and Armbrister, for inciting the Creek Indians to war with the United States. *See* Winthrop, *supra*, at 464, 832. As one author explained, General Jackson "did not find his authority to convene [these tribunals] in the statutory law, but in the laws of war." William E. Birkhimer, *Military Government and Martial Law* 353 (3d ed. 1914).³ Similarly, in the Mexican American War in 1847, General Winfield Scott appointed tribunals called "councils of war" to try offenses under the laws of war and tribunals called "military commissions" to serve essentially as occupation courts. *See* Winthrop, *supra* at 832-33. There was no statutory authority for these tribunals; rather, they were instituted by military command, derived from the President's ultimate authority, and without express sanction from Congress.⁴

In later practice, these various functions were all performed by tribunals known as "military commissions," while courts-martial were the accepted statutory means by which U.S. military personnel were punished for crimes and breaches of discipline. After the outbreak of the Civil War, general orders for the governance of the Army in 1862, authorized commanders to convene military commissions to try enemy soldiers for offenses against the laws of war. *See* Winthrop at 833. It was not until 1863 that military commissions were even mentioned in a federal statute, which authorized the use of military commissions to try members of the military for certain offenses committed during times of war. *See* Act of March 3, 1863, §30, 12 Stat. 731, 736. That statute, moreover, did not purport to create military commissions; rather, it acknowledged that they could be used as alternatives to courts-martial in certain cases.

In 1865, Attorney General Speed addressed the use of military commissions to try those accused in the plot to assassinate President Lincoln. Speed found that even if Congress had not provided for the creation of military commissions, they could be used by military commanders as an inherent incident of their authority to wage a military campaign: "[M]ilitary tribunals exist under and according to the laws and usages of war in the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible. The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his

³ Birkhimer further observed that the President's authority to convene military commissions was derived directly from the constitution itself: "Military commissions may be appointed either under provisions of law in certain instances, or under that clause of the Constitution vesting the power of commander-in-chief in the President, who may exercise it directly or through subordinate commanders." At 357.

⁴ *See* George B. Davis, *A Treatise on the Military Law of the United States* 308 (1913) (explaining that military commissions "are simply criminal war-courts, resorted to for the reason that the jurisdiction of courts-martial, created as they are by statute, is restricted by law..., which in war would go unpunished in the absence of a provisional forum for the trial of offenders.")

squadrons in the field and fight battles. His authority in each case is from the law and usage of war.” *Military Commissions*, 11 Op. Att’y Gen. at 305.

Following WWII, the United States and the Allied powers used military commissions extensively to try Nazi and Japanese officials for violations of the law of war and crimes against humanity. In reviewing the legal status of enemy prisoners before these commissions, the Supreme Court endorsed the view that use of military commissions is a necessary part of the tools of a commander conducting a military campaign. As the Court explained in *In re Yamashita*, “[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war.” 327 U.S. at 11.

Justice Douglas advanced the same reasoning in support of the President’s authority to establish *international* war crimes tribunals after WWII without any authorization from Congress. “The Constitution makes the President the “Commander in Chief of the Army and Navy of the United States...” Art. II, §2, Cl. 1. His power as such is vastly greater than that of a troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered country, and to punish those enemies who violated the law of war.” *Hirota v. MacArthur*, 338 U.S. 197, 207-08 (1948) (Douglas, concurring). As the Supreme Court recognized, the President’s power extended to the creation of novel, multinational tribunals to try the enemy for war crimes. Given that broad authority, *a fortiori*, the President’s power must extend to the appointment of military commissions consisting solely of his own commissioned officers.

During and after WWII the Supreme Court has consistently and repeatedly upheld the use of military commissions by the president and his subordinate officers. Because the Articles of War authorized the use of military commissions, the Court was not required to decide whether the President may convene military commissions wholly without congressional authorization. In *Quirin*, the Court expressly declined to decide “to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.” 317 U.S. at 29. However, the Court has strongly suggested that the President does possess constitutional power to establish commissions, though it may be subject to statutory limitation by Congress. Thus in *Madsen*, the Court stated, “In the absence of attempts by Congress to limit the President’s power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions.” 343 U.S. at 348.

d. Congress Has Authorized the President to Establish This Military Commission in The Uniform Code of Military Justice.

While the Supreme Court has never decided whether the President needs congressional authorization to establish military commissions, it has clearly held that in Article 15 of the Articles of War Congress gave authority for the use of military commissions during and after WWII. See *Ex parte Quirin*, 317 U.S. 1 (1942); *In re Yamashita*, 327 U.S. 1 (1946); *Johnson v. Eisentrager*, 339 U.S. 763 (1950). When

Congress enacted the UCMJ in 1951, it incorporated the general authorization for military commissions from the Articles of War into 10 U.S.C. §821, using identical language and explicitly relying on the Supreme Court's decision in *Quirin*. See H.R. REP. NO. 81-491 at 17 (1951); S. REP. 81-486 at 13 (1951).⁵ Thus it is beyond dispute that military commissions continue to fill a vital purpose in military justice in the modern era. The defense suggestion that the enactment of the UCMJ undermines the holding of *Quirin* and other Supreme Court precedents in favor of military commissions is clearly untenable.

The power to bring unlawful enemy combatants to justice, is shared by both Congress and the President under the Constitution. Under Article I, §8, Congress has authority to “declare War,” “raise and support Armies,” and “make Rules for the Government and Regulation of the Land and naval Forces.” U.S. Const. art. I, §8, cl. 11, 12, 14. In addition, Congress has authority to “define and punish...Offenses against the Law of Nations.” *Id.* art. I, §8, cl. 10. The authorization in 10 U.S.C. §821 to use military commissions to enforce the laws of war is certainly a permissible exercise of these legislative powers. The Court in *Yamashita* affirmed this understanding by explaining that congressional authorization of military commissions was an “exercise of the power conferred upon it by Article I, §8, cl. 10 of the Constitution to ‘define and punish...Offenses against the Law of Nations...’ of which the law of war is a part.” 327 U.S. at 7.

A proper understanding of 10 U.S.C. §821 begins with its text. Section 821 is entitled “Jurisdiction of courts-martial not exclusive,” and states: “The provisions of this chapter conferring jurisdiction upon courts-martial do not *deprive* military commissions...of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions.” 10 U.S.C. §821 (emphasis added). This provision is necessary because 10 U.S.C. §818 defines the jurisdiction of general courts-martial to include “jurisdiction to try any person who by the law of war is subject to trial by military tribunal.” By its terms, §821 assumes the existence of military commissions and declares that the broad jurisdiction of general courts-martial does not curtail the use of military commissions to the full extent permitted by past executive practice. By affirmatively preserving the jurisdiction of military commissions, §821 necessarily expresses congressional approval and sanction for their use. Indeed the Supreme Court concluded that identical language found in the Articles of War “*authorized* trial of offenses against the laws of war before such commissions.” *Quirin*, 317 U.S. at 29 (emphasis added).⁶

The legislative history of §821 confirms legislative intent to approve the traditional uses of military commissions under past practice. When the language now codified in §821 was first included in the Articles of War in 1916, it was intended for the

⁵ The House and Senate reports on H.R. 4080, which became the UCMJ, contain the same comment on Article 21: “This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts -martial. The language of AW 15 [Articles of War, Art. 15] has been preserved because it has been construed by the Supreme Court (*Ex parte Quirin*, 317 U.S. 1 (1942)).”

⁶ See also *Quirin* at 28: “By the Articles of War, and especially Article 15, See also *Quirin* at 28: “By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals have jurisdiction to try offenders against the law of war...”

purpose of preserving the pre-existing jurisdiction of military commissions. The language was introduced as Article 15 of the Articles of War⁷ at the same time that the jurisdiction of general courts-martial was expanded to include all offenses against the laws of war. The Judge Advocate General of the Army testified before the Senate as the proponent of the new article. He explained that the purpose of Article 15 was not to create military commissions, but was intended to recognize them and preserve their authority: “It just saves to these war courts the jurisdiction they now have...” S.Rep. No. 64-130, at 40 (1916).

Given the text and history of §821, the provision must be read as preserving the broad sweep of the traditional jurisdiction exercised by military commissions throughout American military history. The statute, in other words, endorses and incorporates executive branch practice. The Supreme Court has adopted precisely this understanding: “By...recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles [of War], Congress gave sanction...to any use of the military commission contemplated by the law of war.” *In re Yamashita*, 327 U.S. 1, 20 (1946). In sanctioning the historic use of military commissions by the executive branch, Congress did not “attempt to codify the law of war or to mark its precise boundaries.” *Yamashita*, 327 U.S. at 7. Instead, it simply adopted by reference “the system of military common law.” *Id.* at 8. Similarly, in *Madsen v. Kinsella*, the Supreme Court determined that the effect of Article 15 was to preserve for military commissions “the existing jurisdiction which they had over such offenders and offenses” under the laws of war. 343 U.S. at 352. The Court summed up the constitutional origins of military commissions: “Since our nation’s earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war. They have taken many forms and borne many names. Neither their procedure nor their jurisdiction has been prescribed by statute. It has been adapted in each instance to the need that called it forth.” *Id.* at 346-47.

Indeed, if §821 were read as restricting the use of military commissions and prohibiting practices traditionally followed, it would infringe on the President’s express constitutional powers as Commander in Chief. The *Quirin* Court expressly declined “to inquire whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents” by military commissions. 317 U.S. at 47. Under Separation of Powers principles, a clear statement of congressional intent would be required before a statute could be read to effect such an infringement on core executive powers. *See, e.g., Public Citizen v. Department of Justice*, 491 U.S. 440, 446 (1989).

Other references to military commissions in the UCMJ only serve to buttress the conclusion that Congress contemplated the continued active use of these tribunals as the exigencies of national defense required. Article 36 authorizes the President to promulgate rules of procedure and evidence for “courts-martial, commissions and other military tribunals.” 10 U.S.C. §836. Section 836 supplements §821 by recognizing that the

⁷ The new Article 15 stated, like the current §821, that the “provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions...of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions.” Act of August 29, 1916, 39 Stat. 619, 653.

President shall determine the rules of procedure that will govern military commissions. Section 850 authorizes the use of records from courts of inquiry in certain cases before courts-martial and military commissions. Finally, 10 U.S.C. §§904 and 906 specify two particular war-related offenses triable by courts-martial, that are also commonly tried by military commission. Read in conjunction with §821, these two particular references in the punitive articles cannot reasonably be read to restrict the subject matter jurisdiction of military commissions; rather they are given as cases in which Congress fully expected the use of military commissions for the trial of “any person” including U.S. servicemen.

Any question about the continued vitality of §821 is dispelled by Congress’s use of identical language in the “Military Extraterritorial Jurisdiction Act.” 18 U.S.C. §3261 (2004). This law was enacted in 2000 for the purpose of extending federal court jurisdiction over “persons employed by or accompanying the Armed Forces outside the United States.” In so expanding the jurisdiction of Article III courts, Congress recognized the continuing role of military commissions and was careful to preserve their traditional jurisdiction and historic place in American law using the same operative language found in 10 U.S.C. §821.⁸

The Defense insistence that military commissions must be authorized by Congress and not the President acting alone is fully answered by 10 U.S.C. §821. Congress has authorized the President to establish commissions when required in the exercise of his powers as Commander in Chief. In 1942, President Roosevelt invoked this same statutory authority to establish a military commission to try eight Nazi saboteurs captured in the United States and charged with conspiracy, spying, and other violations of the law of war. The defendants sought habeas corpus relief in the federal courts arguing *inter alia* that the President’s order establishing the commission was unlawful and that commissions could not exercise jurisdiction over the defendants while the federal courts were open and functioning.

Rejecting these challenges, the Supreme Court in *Ex parte Quirin* held that the President had legislative authority to establish and use military commissions to try unlawful enemy combatants. After reviewing the meaning and scope of AW 15, the Court concluded: “By his Order creating the present Commission, [the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.” 317 U.S. 1, 28 (1942).

The Defense reliance on *Ex parte Milligan* is also patently misplaced. *Milligan* was a Civil War era case that held that a military commission lacked statutory jurisdiction to try an American civilian in Indiana for conspiring to commit acts of rebellion against the United States. The Court made it clear that it would not countenance the trial of citizens in military courts within the territorial jurisdiction of the United States unless

⁸ “Nothing in this chapter [18 U.S.C. § 3261 et seq.] may be construed to deprive a court-martial, military commission, provost court, or other military tribunal of concurrent jurisdiction with respect to offenders or offenses that by statute or the law of war may be tried by a court-martial, military commission, provost court, or other military tribunal.” 18 U.S.C. §3261.

Congress expressly authorized such trials. Recently, the Court noted in *Hamdi v. Rumsfeld*, that if Milligan had been “captured while he was assisting Confederate soldiers by carrying a rifle against Union troops on a Confederate battlefield, the holding of the Court might well have been different.” 124 S. Ct. 2633, 2642. In *Quirin*, the Supreme Court made it clear that the congressional authorization for the use of military commissions permitted the trial of unlawful enemy combatants for violations of the law of war, even within the territorial jurisdiction of the United States when the civil courts were open and had concurrent jurisdiction over the offenses.

The Defense does not deny that the UCMJ contains legislative authorization for the use of military commissions; rather, they argue that 10 U.S.C. §821 limits the subject matter jurisdiction of military commissions to violations of the law of war. As the statutory text makes abundantly clear, the jurisdiction of military commissions under the UCMJ is as broad as the law of war—and broader. In addition to subject matter jurisdiction over law of war offenses §821 states that military commissions have jurisdiction over offenders or offenses *that by statute or by the law of war* may be tried by military commission...” The PMO defines the jurisdictional reach of military commissions under that Order as extending to “any and all offenses triable by military commission.” The apparent circularity of this language is explained by the fact that the President was authorizing the use of commissions to the full extent permitted by customary practice and 10 U.S.C. §821.

Defense attempts to undermine the plain meaning of 10 U.S.C. §821 and the holding of *Quirin* are unpersuasive. Both remain vital and active sources of authority today and provide a clear basis for the PMO at issue in this case. In *Quirin*, the Supreme Court cautioned that courts must approach any challenge to the military orders of the President in time of war with great care: “[T]he 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 and laws of Congress constitutionally enacted.” 317 U.S. 1, 25 (1942).

e. A Formal Declaration of War Is Not Required Under Article 21, UCMJ.

The Defense contends that the legislative authorization for the use of military commissions found in 10 U.S.C. §821 is operative only in time of congressionally declared wars. Nothing in the text or history of this law supports that view. A formal declaration of war by Congress is not required for the laws of war to be applicable to an armed conflict or enforceable by military commission under §821. Clearly, offenses triable by military commission must occur under factual circumstances of armed conflict where the laws and customs of war are in operation. But if that condition is met, then §821 authorizes the use of military commissions.

The president based the PMO on the specific finding that such a state of armed conflict exists: “International terrorists, including members of al Qaida, have carried out attacks on the United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.” PMO, §1(a). The

The President in this case has not relied solely on his own constitutional authority in establishing military commissions. Rather, he has invoked the general congressional authorization in §821 and also the specific authority to of the AUMF to use “all necessary and appropriate force” to defend the nation and prosecute the war on terrorists and those “nations, organizations and individuals” who have aided and abetted them. The Supreme Court has construed this authorization to empower the President to exercise all of the powers incident to the prosecution of war by the Commander in Chief:

There can be no doubt that the individuals who fought against the United States in Afghanistan as part of the Taliban, an organization known to have supported the al Qaeda terrorist network responsible for those attacks, are individuals Congress sought to target in passing the AUMF. We conclude that the detention of individuals falling into the limited category we are considering, for the duration of the particular conflict in which they were captured, is so fundamental and accepted an incident of war as to be an exercise of the “necessary and appropriate force” Congress has authorized the president to use.

Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2640 (2004) (plurality opinion). The Court went on to say that AUMF gave the President authority to fight the war, and the “capture and detention of lawful combatants, and *the capture, detention and trial of unlawful combatants, by ‘universal agreement and practice’ are ‘important incidents of war.’” Hamdi*, at 2640 (quoting *Quirin*).

Since both the President and Supreme Court have found that a state of armed conflict exists, it is entirely lawful for the President to establish military commissions for the trial of those enemy combatants who violate the laws of war. Although there is not a formal declaration of war, as there was at the time that *Quirin* was decided, there is a state of great national peril and a congressional authorization for the President to exercise all necessary powers to prosecute a war against al Qaeda and those who assist them. The AUMF is an appropriate and functional equivalent to a declaration of war for purposes of §821. Under the Defense view, the President would be denied essential war powers authoritatively recognized by the Supreme Court.

f. The President’s Order to Establish Military Commissions Does Not Violate Separation of Powers Doctrine.

The Defense contends that the President’s Military Order violates the Separation of Powers doctrine by encroaching on legislative and judicial functions reserved to the other coordinate branches of government under the Constitution. This contention lacks merit because no separation of powers principle is violated where the President is exercising the very powers granted to him in Article II of the Constitution as discussed above.

In *Loving v. United States*, 517 U.S. 748 (1996) , the Supreme Court considered a Separation of Powers challenge to the President’s Article 36 powers. The petitioner in that case argued that the President’s promulgation of aggravating factors for the death penalty in R.C.M. 1004 was an unconstitutional exercise of legislative powers. According

to the petitioner, Article 36 was an improper delegation of legislative power to the executive branch, lacking in any intelligible principle to guide the president's rule-making function. In rejecting this contention and affirming the petitioner's death sentence, the Court noted that the delegation under Article 36 was different in kind than delegations to ordinary administrative agencies of the executive branch. The Court explained: "[T]he delegation here was to the President in his role as Commander in Chief. Perhaps more explicit guidance as to how to select aggravating factors would be necessary if delegation were made to a newly created entity without independent authority in the area." *Id.* at 772.

In *Loving*, the Court emphatically endorsed the President's independent constitutional powers in the area of military law. "The President's duties as Commander in Chief...require him to take responsible and continuing action to superintend the military, including courts-martial. The delegated duty, then, is interlinked with duties already assigned to the President by the express terms of the Constitution, and the same limitations on delegation do not apply 'where the entity exercising the delegated authority itself possesses independent authority over the subject matter.'" *Id.* The Court declined to consider "whether the President would have inherent power as Commander in Chief to prescribe aggravating factors in capital cases." But readily held that "Once delegated that power by Congress, the President, acting in his constitutional office of Commander in Chief, had undoubted competency to prescribe those factors without further guidance." *Id.* at 773.

Congress's longstanding decision both to recognize and approve the exercise of the President's wartime authority to convene military commissions to try violations of the laws of war reflects Congress's understanding that military exigencies require giving the President flexibility rather than detailed procedures in dealing with enemy fighters. That decision is entitled to just as much deference as Congress's decision to legislate detailed rules for the military's use of courts-martial in the UCMJ. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635-636 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate.") In these circumstances, the President's action is "supported by the strongest presumption and the widest latitude of judicial interpretation, and the burden of persuasion would rest heavily upon any who might attack it." *Dames & Moore v. Regan*, 453 U.S. 654, 674 (1981) (quoting *Youngstown*, 343 U.S. at 637 (Jackson, J., concurring)). Hamdan could not possibly meet his burden in attacking the lawfulness of the military commissions because, as explained above, the Supreme Court has already squarely rejected the arguments he advances here.

7. Resolution of Motion. The Defense Motion to Dismiss should be denied.

8. Oral Argument. The Prosecution is prepared to provide oral argument if desired.

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Commander, JAGC, USN
Prosecutor