U.S. Department of Justice

Office of Legal Counsel

Office of the Deputy Assistant Attorney General

Washington, D.C. 20530

April 8, 2002

MEMORANDUM FOR DANIEL J. BRYANT
ASSISTANT ATTORNEY GENERAL
OFFICE OF LEGISLATIVE AFFAIRS

From: Patrick Philbin
Deputy Assistant Attorney General

Re: Swift Justice Authorization Act

This memorandum sets forth the views of the Office of Legal Counsel with regard to legislation proposed by Senator Patrick Leahy, entitled the Swift Justice Authorization Act ("SJAA"). The proposed legislation purports to vest the President with limited authority to order our Armed Forces to detain certain individuals involved in terrorist acts and to establish military commissions to try those individuals for violations of the laws of war. It also specifies procedural requirements that such military tribunals must meet.

As you know, the President has already contemplated seizing individuals involved in terrorist attacks and trying them by military commission under his Military Order of November 13, 2001. *See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001). That Order expressly relies on, among other things, the President's constitutional authority as Commander in Chief and Congress's September 15, 2001 joint resolution authorizing the use of military force. *See* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

The legislation suffers from a number of serious constitutional defects. First, the President's authority as Commander in Chief under Article II of the Constitution to engage the Armed Forces in hostile military operations includes the power both to detain enemy combatants and to convene military commissions to punish violators of the laws of war. Legislation expressly granting the President such powers is constitutionally unnecessary. The fundamental premise underpinning the first substantive objective of the legislation – namely, "authorizing" the President to convene military commissions – is thus mistaken. And to the extent the legislation, by purporting to authorize the President to convene commissions, may be taken to suggest that the President could not act without such authorization, it raises a serious constitutional issue because it would impermissibly encroach on the President's powers as Commander in Chief.

Second, Congress lacks authority under Article I to set the terms and conditions under which the President may exercise his constitutional authority as Commander in Chief to control the conduct of military operations during the course of a campaign. Congress cannot constitutionally restrict the President's authority to detain enemy combatants or to establish military commissions to enforce the laws of war. Indeed, Congress may no more regulate the President's ability to convene military commissions or to seize enemy belligerents than it may regulate his ability to direct troop movements on the battlefield. Accordingly, to the extent that the legislation purports to restrain the President's ability to exercise his core constitutional powers as Commander in Chief, it encroaches on authority committed by the Constitution solely to the Executive Branch and thus violates fundamental principles of separation of powers. Although the bill cites four provisions of Article I, Section 8 as sources of constitutional authority, none of those provisions authorizes Congress to encroach upon the President's constitutional power as Commander in Chief by restricting the President's ability to detain enemy combatants and to establish military commissions.

Finally, the bill states that it would provide a "clear and unambiguous legal foundation" for military tribunals. SJAA § 2(11). Again, such a foundation already exists in the Commander in Chief Clause of Article II and section 821 of title 10. As a result, it seems more likely that the legislation would confuse the legal framework for military commissions and open the door to meritless but nonetheless disruptive litigation.

Background

The proposed legislation recites that "[m]ilitary trials of certain terrorists are appropriate." SJAA § 2(9). It then proceeds from the initial premise, expressly stated in section 2, that "Congressional approval is necessary for the creation of extraordinary tribunals . . . to adjudicate and punish offenses arising from the September 11, 2001 attacks against the United States and to provide clear and unambiguous legal foundation for such trials." *Id.* § 2(11).

Section 3 of the bill provides that the "President is hereby authorized to establish tribunals" to try persons for "violations of the law of war, including international laws of armed conflict and crimes against humanity." *Id.* § 3(a), (b). Section 4 sets out a lengthy list of procedural requirements that must apply in such tribunals including, *inter alia*, a right to counsel for the accused, a right for the accused not to be compelled to testify, and a right "at a minimum" to review by the "United States Court of Military Appeals."[1]

Section 5 establishes certain standards to govern detention of "persons who are not U.S. persons

---

[1] This appears to be a drafting error in the legislation. The United States Court of Military Appeals no longer exists under that name. The court is known today as the United States Court of Appeals for the Armed Forces. *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924(a)(1), 108 Stat. 2663, 2831 (1994) ("The United States Court of Military Appeals shall hereafter be known and designated as the United States Court of Appeals for the Armed Forces.").

and are members of Al Qaeda, or of other terrorist organizations that planned, authorized, committed, or aided in the September 11 attacks or that harbored persons involved in those attacks." *Id.* § 5(a). It provides that "[t]he President may direct the Secretary of Defense to detain" such a person "upon a determination by a U.S. District Court that the person falls within the class described in this section." *Id.* Any determination to detain a person under the section "shall be appealable to the D.C. Circuit." *Id.* § 5(d).

The provisions of the bill would expire on December 31, 2005. *See id.* § 8.

Analysis

I.

The proposed legislation is premised on the express assumption that "Congressional approval is necessary" in order for the President to establish military commissions. SJAA § 2, cl. 11. A primary purpose of the legislation, therefore, appears to be providing such congressional authorization. The first operative clause of the statute provides that "[t]he President is hereby authorized to establish tribunals" to try violations of the law of war. *Id.* § 3(a). This purported authorization, however, reflects a mistaken premise of constitutional law. No statutory authorization is necessary for the President to convene military commissions because the President's *constitutional* power as Commander in Chief includes the authority to convene military commissions without any legislation from Congress. Indeed, the operative premise of the bill is particularly flawed because – even putting to one side the error of constitutional law – congressional authorization for military commissions already exists in section 821 of title 10.

A.

Article II of the Constitution vests the entirety of the "executive Power" of the United States government "in a President of the United States of America," and expressly provides that "[t]he President shall be Commander in Chief of the Army and Navy of the United States." U.S. Const. art. II, § 1, cl. 1; *id.* § 2, cl. 1. Because both "[t]he executive power and the command of the military and naval forces is vested in the President," the Supreme Court has unanimously stated that it is "*the President alone*[] who is constitutionally invested with the *entire charge of hostile operations*." *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 87 (1874) (emphasis added). As Commander in Chief, the President possesses the full powers necessary to prosecute successfully a military campaign. As the Supreme Court has recognized, "[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." *Johnson v. Eisentrager*, 339 U.S. 763, 788 (1950) (citation omitted). *See also* John C. Yoo, *The Continuation of Politics by Other Means: The Original Understanding of War Powers*, 84 Calif. L. Rev. 167, 252-54 (1996) (concluding that the "Commander in Chief" power was understood in Anglo-American constitutional thought as incorporating the fullest possible range of power available to a military commander). The measures to be taken in conducting a

military campaign are up to the President alone to determine. The nature of a military threat and the character of the response it requires "is a question to be decided *by him* .... 'He must determine what degree of force the crisis demands.'" *The Prize Cases*, 67 U.S. (2 Black) 635, 670 (1862).

The broad Commander-in-Chief power includes not only the power to direct the Armed Forces in battle, but also – as a necessary adjunct to the military campaign – the authority to detain enemy combatants and to try them by military commissions for violations of the laws of war. At the time of the Founding it was well understood that one of the powers of a military commander included authority to subject members of enemy forces to trial and punishment for violations of the law of war. General George Washington exercised that authority during the Revolutionary War by convening a board of officers to try the British Major Andre as a spy in 1780, and British officers throughout the colonial period exercised a similar authority.

Today there is ample evidence from all three branches of the government that the power to convene military commissions is properly understood as part of the Commander-in-Chief power of the President.

Throughout the Nation's history, as a matter of practical implementation of constitutional powers, Presidents (and subordinate military commanders acting under the President's authority) have convened commissions based solely on the President's authority as Commander in Chief. It is well settled that on issues concerning the respective powers of the different branches of government, consistent governmental practice can play an important role in establishing the constitutional bounds of each branch's authority. As the Supreme Court has explained, "'a systematic, unbroken, executive practice, long pursued to the knowledge of the Congress but never before questioned . . . may be treated as a gloss on "Executive Power" vested in the President by § 1 of Art. II.'" *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (quoting *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 610-11 (1952) (Frankfurter, J., concurring)).[2]

In the case of military commissions, the historical record demonstrates that they have regularly been established under authority of the executive branch without any authorization from Congress. Andrew Jackson, for example, convened military commissions in 1818 in the war with the Creek Indians, and as one commentator has explained, he "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). *See also* George B. Davis, *A Treatise on the Military Law of the United States* 308 (1913) ("authority [of military commissions] is derived from the law of war"). In other words, there was no

---

[2] *See also Schick v. Reed*, 419 U.S. 256, 266 (1974) ("[T]he unbroken practice since 1790 compels the conclusion that the [pardon] power flows from the Constitution alone, not from any legislative enactments, and that it cannot be modified, abridged, or diminished by the Congress."); *Ludecke v Watkins*, 335 U.S. 160, 171 (1948) (explaining importance of historical practice in interpreting the Constitution and noting that "[t]he [Alien Enemy] Act is almost as old as the Constitution, and it would savor of doctrinaire audacity now to find the statute offensive to some emanation of the Bill of Rights").

legislation authorizing the action. Rather, under the laws and usages of war it was deemed part of the traditional authority of a military commander. And as noted above, by making the President Commander in Chief the Framers intended to convey to the Executive all such authority of a commander under established usages of war. Similarly, in the Mexican-American War in 1847-48, in the early years of the Civil War, and in the Indian wars of the 1870s, military commissions were convened based solely on the authority of the President, without any sanction from Congress. *See generally Ex parte Quirin*, 317 U.S. 1, 31-32 & nn.9 & 10 (1942) (cataloging the "practice of our own military authorities before the adoption of the Constitution, and during the Mexican and Civil Wars"); *see also The Modoc Indian Prisoners*, 14 Op. Att'y Gen. 249 (1873). In the Civil War, for example, military commissions were convened as early as 1861, *see, e.g.*, Davis, *supra*, at 308 n.2, but were not even mentioned in legislation until 1863, *see* Act of March 3, 1863, § 30, 12 Stat. 731, 736. This consistent practice is well documented in the leading treatises on American military law, and demonstrates that "[m]ilitary commissions may be appointed . . . under that clause of the Constitution vesting the power of commander-in-chief in the President." Berkhimer, *supra*, at 357. *Cf.* William Winthrop, *Military Law and Precedents* 57 (2d ed. 1920) (the "President is invested with a general and discretionary power to order statutory courts-martial for the army, *by virtue of his constitutional capacity as Commander-in-chief, independently of any article of war or other legislation of Congress*") (emphasis original).

In keeping with this longstanding practice, the Executive Branch has consistently recognized that the use of military commissions is no less a part of the powers of a commander – and thus no less a constitutional exercise of the Commander-in-Chief power – than the conduct of a battle itself. As Attorney General Speed explained at the close of the Civil War, "[t]he 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 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. 297, 305 (1865). William Whiting, the legal adviser to the War Department during the Civil War, similarly observed that "military commissions . . . were instituted *under the general war power of the Commander-in-Chief*, – a power which was fully conceded by the Supreme Court of the United States, – not under the authority of Congress." William Whiting, *War Powers under the Constitution of the United States* 282 (1864). They "constitute usual and necessary parts of the machinery of warfare, and are the essential instruments of that military government by which alone the permanency of conquest can be secured." *Id.* at 283.

Such commissions serve a particularly military function in controlling the conduct of a military campaign. They are the tool a commander can use to punish, and thereby deter, enemy violations of the laws that regulate the means of waging war. Thus, they are an integral part of the mechanisms a commander has at his disposal for bringing pressure to bear on the enemy and for shaping enemy behavior in the course of a conflict. As Justice Douglas observed, trials for war crimes are "a furtherance of the hostilities directed to a dilution of enemy power and involving retribution for wrongs done." *Hirota v. MacArthur*, 338 U.S. 197, 208 (1948) (Douglas, J., concurring). For example, an enemy's use of a particular weapon that may be deemed illegal under relevant conventions may threaten the success of military operations or may threaten to fatally undermine the morale of troops subjected to the illegal attacks.

A swift imposition of penalties on captured members of the enemy forces for use of the weapon may deter like conduct in the future and thus return the means of pursuing the conflict to terms more favorable to the commander. Likewise, the failure of enemy combatants to respect the distinction between civilians and military in their conduct of hostilities – for example, by using civilians and otherwise protected civilian structures (such as churches or mosques) to shield their troops and military equipment, or by targeting our civilians and civilian facilities for the use of force (as was done on September 11) – could also have effects on morale and frustrate our ability to minimize civilian casualties and focus our military campaign on actual combatants. The use of military commissions to punish such actions as violations of the laws of war would enhance our capacity to wage war effectively and to minimize civilian casualties by forcing enemy combatants to adhere to the strict distinction between civilians and combatants. Determining when and how such violations should be dealt with in a manner that best supports the overall conduct of a campaign requires assessment of numerous factors including the threat that the enemy conduct poses to the success of operations in the theater, the personnel and resources that can be spared for conducting war crimes trials, and the likelihood that pursuing such trials will have a beneficial result. All such decisions are quintessentially matters for the person charged with the conduct of military operations, which under the Constitution is the President in his role as Commander in Chief.

The Supreme Court has also acknowledged that the use of military commissions is fundamentally a part of prosecuting a military campaign. And although the Court has not expressly resolved the question, its reasoning in addressing military commissions strongly suggests that the authority for their creation must be found in the President's power as Chief Executive and Commander in Chief. During World War II, for example, the Court unanimously held that "[a]n important incident to the conduct of war is the adoption of measures by the military command 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." *Quirin*, 317 U.S. at 28-29; *see also Application of Yamashita*, 327 U.S. 1, 11 (1946) (same). Indeed, the Court even recognized that "[t]he trial and punishment of enemy combatants who have committed violations of the law of war" is "a *part of the conduct of war* operating as a preventive measure against such violations." *Yamashita*, 327 U.S. at 11 (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 also extends to convening military commissions). The power to use commissions as a mechanism for deterring enemy conduct properly belongs to the President as Commander in Chief. As Justice Douglas recognized, the President's power as Commander in Chief "is vastly greater than that of 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*, 338 U.S. at 208 (Douglas, J., concurring) (citation omitted). In Justice Douglas's view, this power properly extended even to trying enemy prisoners before an international tribunal created solely by the Executive through agreement with allies without any sanction from Congress – a power that would include *a fortiori* the ability to convene American military commissions. As Justice Douglas put it: "[T]he capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had *the final say*." *Id.* at 215 (emphasis added).

It is true that in *Quirin*, the Court reserved the question whether the President, acting solely under his own constitutional authority and without congressional authorization, could convene military commissions for trying violations of the law of war. *See* 317 U.S. at 29. But at the same time, as the passages noted above make clear, the Court recognized that the military commission is a mechanism that is an integral part of the conduct of military operations in war, the complete control over which the Constitution assigns to the President as Commander in Chief. *See also Hirota*, 338 U.S. at 208 (Douglas, J., concurring) (noting that the creation of war crimes tribunals "is a furtherance of the hostilities directed to a dilution of enemy power and involving retribution for wrongs done"). The Court, moreover, indicated that serious questions would be raised if military commissions were treated as anything other than creatures of the President's authority as Commander in Chief, as it pointedly declined to address the question "whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents" by imposing procedures for military commissions. *Quirin*, 317 U.S. at 47. Indeed, the President's plenary authority over enemy belligerents in an armed conflict is sufficiently great that the Court even reserved the question "whether the President is compelled by the Articles of War to afford unlawful enemy belligerents a trial before subjecting them to disciplinary measures." *Id.*

In its subsequent decision in *Yamashita*, the Court even more clearly suggested that military commissions could be convened by the President without reliance on authorization from Congress. In responding to claims that the commission at issue there had failed to adhere to procedures required by the Articles of War, the Court made clear that commissions convened to try enemy belligerents for violations of the law of war were not subject to those provisions at all. The Court explained that such a commission, "though sanctioned, and its jurisdiction saved, by Article 15, *was not convened by virtue of the Articles of War*, but pursuant to the common law of war." *Yamashita*, 327 U.S. at 20 (emphasis added). In other words, the authority for convening the commission did not derive from statute (the Articles of War), but from the traditional powers of the military commander – which the Constitution explicitly assigns to the President. Thus, while the Court may not have resolved the issue explicitly, its reasoning in cases such as *Quirin* and *Yamashita* plainly suggests that the authority to convene military commissions for trying violations of the law of war falls within the President's constitutional powers.

The Court has expressly held, moreover, that the President has the authority as Commander in Chief, without any sanction or authorization from Congress, to establish military commissions and other military tribunals to administer the law in occupied territory. In *Santiago v. Nogueras*, 214 U.S. 260 (1909), for example, the Court addressed the "provisional court" in Puerto Rico "established by military authority, with the approval of the President," *id.* at 264, during the occupation immediately following the Spanish-American War. The Court rejected the claim that "the military power, acting by the authority of the President as Commander in Chief, does not warrant the creation of the United States provisional court" and upheld the President's power to create the court. *Id.* at 265. *See also Mechanics' & Traders' Bank v. Union Bank*, 89 U.S. (22 Wall.) 276, 296 (1874) (stating, of military courts established in occupied territory in the South after the Civil War, that "though these courts and this judicial system were established by the military authority of the United States, without any legislation of Congress, this court ruled that they were lawfully established"); *The Grapeshot*, 76 U.S. (9 Wall.) 129, 132 (1869) (stating that creation of

provisional court in Louisiana "was a military duty, to be performed by the President as commander-in-chief"); *Leitensdorfer v. Webb*, 61 U.S. (20 How.) 176 (1857). *See also United States v. Tiede*, 86 F.R.D. 227, 237 (U.S. Ct. Berlin 1979) ("As a matter of United States law, [the United States occupation court of Berlin] is a court established pursuant to the powers granted to the President by Article II of the United States Constitution."). If the President's inherent power as Commander in Chief extends to the creation of military commissions as occupation courts, there is no logical reason to conclude that it does not equally extend to the creation of military commissions as courts for enforcing the laws of war. If anything, the latter function is more inextricably involved in the President's role as military commander in supervising the actual conduct of hostilities.

Lastly, the Legislative Branch has also previously acknowledged that the President has independent authority to create military commissions without the aid of enabling legislation. As explained above, in numerous instances throughout the Nation's history Presidents exercised the authority to convene commissions absent any legislation, a practice that to our knowledge has never been contested by Congress. Moreover, at the beginning of the 20th century when Congress expanded the statutory jurisdiction of courts martial to reach violations of the law of war, it expressly acknowledged and left unimpaired the President's preexisting authority to convene military commissions to try the same offenses. In 1916, a new Article 15 was introduced into the Articles of War and provided that "[t]he 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. The provision was phrased as a form of savings clause. It did not *create* military commissions, nor did it purport to *confer* jurisdiction upon them. Rather, it assumed their existence entirely apart from any statute and provided merely that the expansion of court martial jurisdiction did not "depriv[e]" commissions of their jurisdiction.

The Supreme Court, indeed, has explained that this provision demonstrates a congressional recognition of a preexisting authority in the Executive to convene military commissions to try violations of the laws of war. Thus, the Court has held that, by enacting Article 15, Congress "*recognized* the 'military commission' appointed by military command, *as it had previously existed in United States Army practice*, as an appropriate tribunal for the trial and punishment of offenses against the law of war." *Yamashita*, 327 U.S. at 7 (emphasis added). Similarly, the Court noted that Article 15 "incorporated, by reference, as within the *preexisting jurisdiction of military commissions* created by appropriate military command, all offenses which are defined as such by the law of war . . . . By thus *recognizing* military commissions in order to *preserve their traditional jurisdiction* over enemy combatants unimpaired . . . Congress gave sanction . . . to any use of the military commission contemplated by the common law of war." *Id.* at 7-8, 20 (emphases added).[3] The Court has also explained that the testimony of Judge

[3] *See also Yamashita*, 327 U.S. at 10 ("The congressional recognition of military commissions and its sanction of their use in trying offenses against the law of war . . . sanctioned their creation by military command in conformity to long-established American precedents.").

Advocate General Crowder in the legislative history preceding the enactment of Article 15 is "authoritative" concerning the provision's meaning. *Madsen v. Kinsella*, 343 U.S. 341, 353 (1952). In proposing the adoption of Article 15, General Crowder explained to Congress that the military commission is a common law tribunal that "has no statutory existence, though it is recognized by statute law," and that the purpose of Article 15 was to "save[] to these war courts the jurisdiction they now have and make[] it a concurrent jurisdiction with courts-martial." S. Rep. No. 64-130, at 40 (1916).[4]

The same statutory language recognizing the pre-existing authority to convene military commissions under the common law of war is still preserved in Article 21 of the Uniform Code of Military Justice, 10 U.S.C. § 821 (2000), which is simply a recodification of the former Article 15 of the Articles of War. *See Madsen*, 343 U.S. at 351 n.17 ("Article of War 15 . . . was again reenacted May 5, 1950, as the present Article 21 of the Uniform Code of Military Justice.").

The proposed legislation purporting to authorize the President to convene military commissions thus proceeds from a flawed premise to the extent it suggests that the President cannot act without such authorization. No statutory approval is necessary because the President possesses constitutional power under the Commander-in-Chief Clause to establish such tribunals himself, and presidents have exercised that authority throughout the nation's history.

B.

The recodification of former Article 15 of the Articles of War as Article 21 of the current UCMJ also highlights another flaw in the fundamental premise underpinning this legislation. Even putting to one side the fact that as a matter of constitutional law there is no need for congressional authorization for military commissions, the proposed legislation is unnecessary because 10 U.S.C. § 821 already provides congressional approval for such commissions. As is apparent from the passages quoted above, the Supreme Court has authoritatively interpreted section 821 as both a recognition of the pre-existing jurisdiction of military commissions and as an express sanction for continued exercise of that jurisdiction. The Court has thus stated that, by the same language that is currently codified in section 821, Congress has given "sanction . . . to any use of the military commission contemplated by the common law of war." *Yamashita*, 327 U.S. at 20. Similarly, the Court has explained that "[b]y the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war." *Quirin*, 317 U.S. at 28. The Supreme Court's interpretation of this language is definitive.[5]

---

[4] Even in 1952, when the substance of Article 15 had been law for over 30 years, the Supreme Court could still say of military commissions that "[n]either their procedure nor their jurisdiction has been prescribed by statute." *Madsen*, 343 U.S. at 347.

[5] Indeed, Congress is ordinarily presumed to act with knowledge of the Court's interpretation of statutory language, and reenactment of the same language is thus deemed a congressional endorsement of the Court's reading. *See, e.g., Davis v. United States*, 495 U.S. 472, 482 (1990) (reenactment of same language "indicates [Congress's] apparent satisfaction

Thus, as a mechanism for "authorizing" military commissions, the proposed legislation is redundant. As a result, it misstates the law to suggest that this legislation is legally necessary to support the President's Military Order.

II.

The proposed legislation suffers from further flaws in that it purports to circumscribe the President's authority to detain enemies suspected of war crimes and to establish military commissions to try them for violations of the law of war. To the extent that the legislation is intended to suggest that the President may operate *only* within the confines of the legislation, it is unconstitutional as an encroachment on the President's powers as Commander in Chief. We are aware of no other legislation that similarly attempts to interfere in the manner in which the Commander in Chief deals with enemy combatants.

The President's Article II authority as Commander in Chief includes, as demonstrated above, the power to detain enemy combatants and to establish military commissions to punish violations of the law of war. As explained in Part A below, fundamental principles of separation of powers forbid Congress from interfering with the President's exercise of his core constitutionally assigned duties, absent "exceptions and qualifications . . . expressed" in Article I. *Myers v. United States*, 272 U.S. 52, 139 (1926). Indeed, the structure of the Constitution demonstrates that any ambiguity in the allocation of a power that is executive in nature, such as the prosecution of war, must be resolved in favor of the Executive Branch. Article II, Section 1 of the Constitution states broadly that "the executive Power shall be vested in a President of the United States of America." It thus assigns the President an unenumerated "executive Power." U.S. Const. art. II, § 1. By contrast, Article I's Vesting Clause limits Congress to those "legislative Powers *herein granted*." U.S. Const. art. I, § 1 (emphasis added). Article I thus limits Congress to the specific powers identified in the text of the Constitution. Article II, in contrast, vests the President with the entire executive power of the government without limitation, and the subsequent enumeration of executive powers within Article II should be understood as an illustration of some of those powers, but not an exhaustive catalogue of the President's authorities. As Alexander Hamilton wrote, Article II "ought . . . to be considered as intended . . . to specify and regulate the principal articles implied in the definition of Executive Power; leaving the rest to flow from the general grant of that power." Alexander Hamilton, *Pacificus* No. 1 (1793), *reprinted in* 15 *The Papers of Alexander Hamilton* 33, 39 (Harold C. Syrett et al. eds., 1969).[6]

---

with the prevailing interpretation of the statute"). Here, Congress must be presumed to have endorsed interpretation established in *Quirin* and *Yamashita* of the terms now codified in section 821. That conclusion is further buttressed in this case because the legislative history of the UCMJ indicates that the "language of [Article] 15 has been preserved" in 10 U.S.C. § 821 precisely "because it has been construed by the Supreme Court. *See Ex parte Quirin*, 317 U.S. 1 (1942)." *Uniform Code of Military Justice: Text, References and Commentary based on the Report of the Committee on a Uniform Code of Military Justice to the Secretary of Defense ("Morgan Draft")* (1950), *reprinted in* 2 Index and Legislative History to the Uniform Code of Military Justice, 1950, at 1367 (1985).

[6] *See also The Examination No. 1* (Dec. 17, 1801), *reprinted in* 25 *The Papers of Alexander Hamilton* 444, 455 (Harold C. Syrett et al. eds, 1977) ("[T]he Constitution of a particular country may limit the Organ charged with the direction of

As explained in Part B, nothing in Article I vests in Congress the authority to restrict the President's ability to prosecute war successfully by detaining enemy combatants and establishing military commissions.

A.

The constitutional principle of separation of powers forbids one branch of government from usurping or controlling the exercise of powers assigned by the Constitution to another branch. As the Supreme Court has explained, the "Constitution sought to divide the delegated powers of the new Federal Government into three defined categories, Legislative, Executive and Judicial, to assure, as nearly as possible, that each branch of government would confine itself to its assigned responsibility." *INS v. Chadha*, 462 U.S. 919, 951 (1983). The structural separation of roles in the Constitution means that Congress may not "intrude[] into the executive function" by arrogating to itself control over duties assigned to the Executive. *Bowsher v. Synar*, 478 U.S. 714, 734 (1986). This prohibition on congressional encroachment is especially strict with respect to the President's express constitutional powers under Article II. *See, e.g., Schick v. Reed*, 419 U.S. 256 (1974) (addressing the pardon power). As Justice Kennedy has observed, "where the Constitution by explicit text commits the power at issue to the exclusive control of the President, we have refused to tolerate *any* intrusion by the Legislative Branch." *Public Citizen v. United States Dep't of Justice*, 491 U.S. 440, 485 (1989) (Kennedy, J., concurring). *See also id.* at 486 ("Where a power has been committed to a particular Branch of the Government in the text of the Constitution, the balance already has been struck by the Constitution itself. It is improper for this Court to arrogate to itself the power to adjust a balance settled by the explicit terms of the Constitution.").

Accordingly, the Supreme Court has protected the express constitutional prerogatives of the executive from impairment by Congress on a number of occasions. For example, because the President's pardon power, U.S. Const. art. II, § 2, cl. 1, "flows from the Constitution alone, not from any legislative enactments," the Court has held that that power "cannot be modified, abridged, or diminished by the Congress." *Schick v. Reed*, 419 U.S. at 266. *See also United States v. Klein*, 80 U.S. (13 Wall.) 128, 148 (1871) ("[T]he legislature cannot change the effect of . . . a pardon any more than the executive can change a law."). The President's constitutional duty to "take Care that the Laws be faithfully executed," U.S. Const. art. II, § 3, similarly vests him with a broad range of prosecutorial discretion with which Congress may not interfere. *See Buckley v. Valeo*, 424 U.S. 1, 138 (1976) ("A lawsuit is the ultimate remedy for a breach of the law, and it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to 'take Care that the Laws be faithfully executed.'"); *Springer v. Philippine Islands*, 277 U.S. 189, 202 (1928) ("Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such

---

the public force, in the use or application of that force, even in time of actual war: but nothing short of the strongest negative words, of the most express prohibitions, can be admitted to restrain that Organ from so employing it, as to derive the fruits of actual victory, by making prisoners of the persons and detaining the property of a vanquished enemy. Our Constitution happily is not chargeable with so great an absurdity. The framers of it would have blushed at a provision, so repugnant to good sense, so inconsistent with national safety and inconvenience [sic].").

enforcement. The latter are executive functions."); *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 136 (1810) ("It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.").[7]

Particularly where the Constitution expressly assigns a duty to the Executive, the Supreme Court has recognized grave constitutional flaws with attempts by Congress to effect encroachments upon subjects within the Executive's control. In *Public Citizen v. United States Department of Justice*, for example, the Court concluded that there would be "formidable constitutional difficulties" with applying the Federal Advisory Committee Act ("FACA") to the American Bar Association's ("ABA") former practice of advising the President with respect to judicial nominations. 491 U.S. at 466. FACA merely regulates the manner in which executive branch officials obtain information from private individuals and organizations. Nevertheless, the Court concluded that applying FACA to the ABA might "infringe[] unduly on the President's Article II power to nominate federal judges" and thereby "violate[] the doctrine of separation of powers." *Id.*; *see also id.* at 488-89 (Kennedy, J., concurring) ("The mere fact that FACA would regulate so as to interfere with the manner in which the President obtains information necessary to discharge his duty assigned under the Constitution to nominate federal judges is enough to invalidate the Act.").

These principles apply with equal if not greater force with regard to the President's express constitutional war powers as Commander in Chief. As the Supreme Court has made clear, by virtue of the Commander-in-Chief Clause, it is "the President alone[] who is constitutionally invested with the entire charge of hostile operations." *Hamilton*, 88 U.S. at 87. As explained above, military commissions are an instrumentality of the commander used in carrying out military operations against enemy forces. They are "[a]n important incident to the conduct of war," *Quirin*, 317 U.S. at 28-29, and "operat[e] as a preventive measure against" violations of the law of war, *Yamashita*, 327 U.S. at 11.

The proposed legislation thus would unconstitutionally infringe on the President's powers as Commander in Chief in at least two ways. First, it would dictate the procedures for military commissions and impose – in some instances – requirements that have never before applied to military commissions as convened in the past under the President's authority. Precisely because commissions are an instrument used as part and parcel of the conduct of a military campaign, congressional attempts to dictate their precise modes of operation interfere with the means of conducting warfare no less than if Congress were to attempt to dictate the tactics to be used in an engagement against hostile forces. As explained above, the Supreme Court has indicated that such efforts to impose congressional control in this field would raise grave constitutional questions, as the Court has pointedly declined to decide "whether Congress may restrict the

---

[7] *See also Prosecution for Contempt of Congress of an Executive Branch Official Who Has Asserted a Claim of Executive Privilege*, 8 Op. O.L.C. 101, 126 (1984) ("the decision not to prosecute an individual may not be controlled [by Congress] because it is fundamental to the Executive's prerogative"); *id.* at 142 ("If the President is to preserve, protect, and defend the Constitution, if he is faithfully to execute the laws, there may come a time when it is necessary for him . . . to refuse to prosecute those who assist him in the exercise of his duty. . . . To seek criminal punishment for those who have acted to aid the President's performance of his duty would be . . . inconsistent with the Constitution.").

power of the Commander in Chief to deal with enemy belligerents" by imposing procedures for military commissions. *Quirin*, 317 U.S. at 47. It bears noting, moreover, that in over 225 years, Congress has never before attempted to dictate the procedures used by military commissions to try enemy combatants. To the contrary, as the Supreme Court has made clear, the purpose of the provision now codified in 10 U.S.C. § 821 was to preserve "unimpaired" the jurisdiction of military commissions, *Yamashita*, 327 U.S. at 20, and to give "sanction" to the existing practice of convening commissions under military command "*without qualification* as to the exercise of this authority so long as a state of war exists," *id.* at 11-12 (emphasis added). Thus, the statutory provisions currently addressing military commissions "left the control over the procedure in such a case where it had previously been, with the military command." *Id.* at 20. As the Supreme Court has noted in another context, an "utter lack of statutes" over the course of American history "suggests an assumed *absence* of such power." *Printz v. United States*, 521 U.S. 898, 907-08 (1997).[8]

Second, beyond regulating the procedures for military commissions, the legislation apparently purports to restrict the President's ability even to detain enemy combatants with a view to bringing them before military commissions. Section 5 provides that the President "may direct the Secretary of Defense to detain persons who are not U.S. persons and are members of Al Qaeda . . . upon a determination by a U.S. District Court that the person falls within the class described in this section." SJAA § 5(a). Although the bill does not make entirely clear how this provision would operate, it seems to apply even to the detention of persons captured in the midst of the armed conflict in Afghanistan who are suspected of having engaged in terrorist activities with al Qaeda. The bill makes it express, after all, that it addresses treatment of persons "who are apprehended in Afghanistan, fleeing therefrom, or engaged outside the United States in terrorist activities directed against the United States." *Id.* § 3(a)(2). If the legislation is intended to apply in this manner, it is a flatly unconstitutional encroachment on the President's powers as Commander in Chief to conduct a military campaign. It is no exaggeration to say that, since time immemorial, it has been an inherent power of a military commander to take prisoners and to detain enemy forces seized in combat. Presidents have exercised this authority in virtually every armed conflict in the Nation's history. *See generally* Lt. Col. George G. Lewis & Capt. John Mewha, *History of Prisoner of War Utilization by the United States Army 1776-1945*, Dep't of the Army Pamphlet No. 20-213 (1955); Major General George S. Prugh, *Law at War: Vietnam 1964-1973* (Dep't of the Army 1975). The apparent effort in this proposed legislation to require civilian court approval before the Commander in Chief can hold enemy combatants for purposes of pursuing war crimes trials would thus be a wholly unprecedented and unconstitutional effort to interfere with the President's constitutionally assigned powers.

---

[8] *But see Madsen*, 343 U.S. at 348-49 (stating in dicta that "[t]he policy of Congress to refrain from legislating in this . . . area does not imply its lack of power to legislate"). In fact, members of Congress have explicitly acknowledged the President's plenary constitutional power as Commander in Chief to deal with prisoners of war. In 1865, the Senate debated a resolution merely urging – without requiring – President Lincoln to retaliate against captured Confederate soldiers in an effort to secure better treatment for Union soldiers then held by the South. The resolution expressly disclaimed that "Congress do[es] not . . . intend by this resolution to limit or restrict the power of the President to the modes or principles of retaliation herein mentioned, but only to advise a resort to them as demanded by the occasion." Cong. Globe, 38th Cong., 2d sess. 364 (1865) (statement of Sen. Wade).

The Supreme Court, indeed, has expressly addressed the encroachment on the President's powers as Commander in Chief that would result from even permitting – far less *requiring* – a recourse to the courts to review or approve the detention of enemies captured abroad in battle:

> It would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home. Nor is it unlikely that the result of such enemy litigiousness would be a conflict between judicial and military opinion highly comforting to enemies of the United States.

Eisentrager, 339 U.S. at 779. This passage could have been written with the provisions of this bill in mind, and it amply demonstrates the unconstitutional infringement on the President's powers that the bill would effect.

B.

Nor can the restrictions the bill purports to impose on the President be justified by any grant of power to Congress in the Constitution. To be sure, the Constitution does assign Congress certain specific powers that relate to war. Congress has the power to declare war. U.S. Const. art. I, § 8, cl. 11. It can also deprive the Executive Branch of the funds necessary to prosecute war successfully. *Id.* § 8, cls. 12-13; *id.* § 9, cl. 7. But Congress's war-related powers "extend[] to all legislation essential to the prosecution of war with vigor and success, except such as interferes with the command of the forces and the conduct of campaigns. That power and duty belong to the President as commander-in-chief." *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 139 (1866) (Chase, C.J., concurring). Congress thus may not use its express Article I war powers to restrict or regulate directly the President's ability to exercise his constitutional powers as Commander in Chief, absent an express assignment of authority in the Constitution related to a specific matter. As explained below, none of the four provisions of Article I, Section 8 cited in the proposed legislation, *see* SJAA, § 2(10), authorizes Congress to restrict the President's ability to detain enemy combatants and to bring them for trial before military commissions.

1.

The proposed legislation is plainly not a valid exercise of Congress's power to "constitute Tribunals inferior to the supreme Court." U.S. Const. art. I, § 8, cl. 9 ("Inferior Tribunals Clause"). For purposes of that clause, it is long settled that the term "Tribunals" includes only certain kinds of courts – namely, only those courts that are established pursuant to Article III of the Constitution. It cannot plausibly be contended that the term "Tribunals" covers every arm of the United States government authorized to conduct proceedings that might be described as judicial in nature. Indeed, the text and structure of the Constitution itself indicate a contrary interpretation. The Inferior Tribunals Clause tracks closely the language in Article III, which provides that "[t]he judicial Power of the United States, shall be vested in one

supreme Court, and in *such inferior Courts as the Congress may from time to time ordain and establish.*" U.S. Const. art. III, § 1 (emphasis added). Accordingly, it has long been established by decisions of the Supreme Court that Congress's authority under the Inferior Tribunals Clause is limited *solely* to the establishment of Article III courts. As the Supreme Court explained in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), "[t]he power given Congress in Art. I, § 8, cl. 9, 'To constitute Tribunals inferior to the supreme Court,' plainly relates to the 'inferior Courts' provided for in Art. III, § 1; *it has never been relied on for establishment of any other tribunals.*" *Id.* at 543 (emphasis added). *See also Freytag v. Commissioner*, 501 U.S. 868, 902 (1991) (Scalia, J., concurring) (same); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1573, at 437 (reprinted 1991) (1833) (Congress's power under the Inferior Tribunals Clause "is but a mere repetition" of its Article III power to ordain and establish inferior courts).

Thus, the Inferior Tribunals Clause has not been relied upon as a source of authority for courts created by Congress other than Article III courts. In *American Insurance Co. v. Canter*, 26 U.S. (1 Pet.) 511 (1828), for example, the Supreme Court held that Congress's power to establish territorial courts is found not in the Inferior Tribunals Clause, but rather in its power under Article IV of the Constitution to "make all needful Rules and Regulations respecting the Territory . . . belonging to the United States." U.S. Const. art. IV, § 3, cl. 2. The Inferior Tribunals Clause is not the basis on which Congress is authorized to create territorial courts, because they are not courts within the meaning of Article III of the Constitution. *See Am. Ins.*, 26 U.S. at 546 ("territorial Courts" of Florida "are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited," but instead "are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States"); *see also Williams v. United States*, 289 U.S. 553, 565-66 (1933) (same); *Freytag*, 501 U.S. at 913 (Scalia, J., concurring) (referring to territorial courts as "Article IV courts").

Similarly, Congress's authority to establish local courts for the District of Columbia arises out of its Article I power to "exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States." U.S. Const. art. I, § 8, cl. 17. *See Palmore v. United States*, 411 U.S. 389, 398 (1973); *Capital Traction Co. v. Hof*, 174 U.S. 1, 5 (1899). And other so-called "Article I courts" have likewise been created under provisions of Article I, Section 8 other than the Inferior Tribunals Clause. Congress established the United States Court of Federal Claims (formerly known as the Court of Claims) as "a court established under article I of the Constitution of the United States," 28 U.S.C. § 171, pursuant to its Article I power "to pay the Debts . . . of the United States," U.S. Const. art. I, § 8, cl. 1, and not its power under the Inferior Tribunals Clause. *See Ex parte Bakelite Corp.*, 279 U.S. 438, 452 (1929) ("The Court of Claims . . . was created, and has been maintained, as a special tribunal to examine and determine claims for money against the United States. This is a function which belongs primarily to Congress as an incident of its power to pay the debts of the United States."). Article I courts have also been established to consider certain questions arising out of the customs laws, pursuant to Congress's "Power To lay and collect . . . Duties." U.S. Const. art. I, § 8, cl.

1. *See, e.g., Bakelite Corp.*, 279 U.S. at 458 ("The Court of Customs Appeals was created by Congress in virtue of its power to lay and collect duties on imports . . . ."). Likewise, Congress has long established the United States Tax Court as a court of record "under article I of the Constitution of the United States," 26 U.S.C. § 7441, on the basis of its "Power To lay and collect Taxes," U.S. Const. art. I, § 8, cl. 1. *See Burns, Stix Friedman & Co., Inc. v. Commissioner*, 57 T.C. 392, 394-95 (1971) ("In article I, section 8, clause 1, Congress is given the power to lay and collect taxes . . . [and] [i]t was in the exercise of that power that Congress . . . created . . . the Tax Court of the United States").

As the Supreme Court has unanimously and repeatedly recognized, military commissions are not "courts" established under Article III. *See Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 253 (1863) (military commissions are not "judicial" in the "sense in which judicial power is granted to the courts of the United States"); *Quirin*, 317 U.S. at 39 ("military tribunals . . . are not courts in the sense of the Judiciary Article"). *See also Mechanics' & Traders' Bank*, 89 U.S. at 295 (holding, in the context of military courts created for the governance of occupied territory, that they are not created under Article III because that provision "refers only to courts of the United States, which military courts are not"). The power to create military commissions derives from the President's Article II power as Commander in Chief. As the Supreme Court explained in *Yamashita*, although military commissions have been sanctioned by Congress, they are "not convened by virtue of the Articles of War, but pursuant to the common law of war." 327 U.S. at 20. They are Article II courts, not Article III courts. Accordingly, there is no basis for contending that the Inferior Tribunals Clause empowers Congress to establish or regulate military commissions.

2.

Nor is the legislation a valid exercise of Congress's power to "make Rules concerning Captures on Land and Water." U.S. Const. art. I, § 8, cl. 11 ("Captures Clause"). That provision has never been applied by the courts or by Congress to captured *persons*. Rather, it has consistently been understood as pertaining to captured *property* only.

The roots of the Captures Clause can be traced to Article IX of the Articles of Confederation, which vested in Congress the power "of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated." Articles of Confederation, art. IX, *reprinted in Encyclopedia of the American Constitution* app. 2, at 2094 (Leonard W. Levy ed., 1986). Read as a unit, this provision vested with the Confederation Congress the power to establish rules governing the circumstances under which wartime "captures" would be adjudged lawful "prizes," to which the captors are entitled at least partial title. This construction is supported by the fact that, during the Revolution, captors could not claim lawful title to captured property until after a prize court had granted it. *See generally* C. Kevin Marshall, *Putting Privateers in Their Place: The Applicability of the Marque and Reprisal Clause to Undeclared Wars*, 64 U. Chi. L. Rev. 953, 963, 974-77 (1997). Article IX therefore could not have been meant to apply to captured enemy soldiers, an interpretation that is bolstered by the fact that persons can neither be "divided" nor "appropriated" as the provision expressly contemplates. Moreover, the term

"capture," which is used both in the Articles of Confederation and in the Constitution, is defined by international law as "[t]he taking of property by one belligerent from another or from an offending neutral." 1 Bouvier's Law Dictionary 422 (Rawle's 3d rev. 1914). Thus, in his exhaustive commentaries on the Constitution, Justice Story noted that Article 1, Section 8, Clause 11 confers on Congress the power to "authorize the seizure and condemnation of the property of the enemy within, or without the territory of the United States." 3 Story, *supra*, § 1172, at 64. He made no mention of any authority being vested in Congress over captured persons.

This contextual understanding of the Captures Clause, buttressed by the absence in the historical record of any invocations of the clause by Congress or the courts in support of legislation applying to captured persons, leaves no doubt that Congress's power to "make Rules concerning Captures on Land and Water" applies only to captured property.

3.

The legislation also cites Congress's Article I authority to "define and punish . . . Offenses against the Law of Nations" as a basis for restricting the President's authority to punish violators of the laws of war. U.S. Const. art. I, § 8, cl. 10 ("Define and Punish Clause"). But nothing in this generalized grant of authority relating to offenses against the law of nations constitutes a specific grant of power that would permit Congress to interfere with the President's constitutional authority as Commander in Chief to establish, and conduct trials before, military commissions.

The Constitution authorizes Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." U.S. Const. art. I, § 8, cl. 10.[9] As the records of the Philadelphia Constitutional Convention of 1787 make clear, the delegates understood that the purpose of the Clause was simply to correct a particular inadequacy in the power of the national government under the Articles of Confederation. Federal remedies against acts of piracy, felonies on the high seas, and other violations of the laws of nations under the Articles were inadequate. Thus, Edmund Randolph argued in favor of the new provision on the ground that the Articles of Confederation were deficient in that Congress "could not cause infractions of treaties or of the law of nations, to be punished." 1 Farrand, *supra* note 10, at 19. As a result, claims based on the law of nations – such as claims of wrongs by ambassadors – were relegated to state courts, not all of which provided any protections. That system also ensured that no stable and consistent federal law was developed. *See id.* at 25 (statement by Randolph that "[i]f the rights of an ambassador be invaded by any citizen it is only in a few States that any laws exist to punish the offender"). *See also* 2 Farrand, *supra* note 10, at 316 (Aug. 17, 1787) (statement of James Madison); *see also The Federalist No. 42* (James Madison); 3 Story, *supra*, §§ 1153, 1158, at 52, 56. These defects were to be remedied by the power granted to Congress in the Constitution.

---

[9] The records of the Philadelphia Constitutional Convention make clear that the delegates treated this entire provision as a unit. *See, e.g.*, 2 *The Records of the Federal Convention of 1787* at 315-16 (Max Farrand ed., rev. ed 1966) (1911) (proceedings of Aug. 17, 1787); *id.* at 614-15 (Sep. 14, 1787).

The debates about the Clause, moreover, centered wholly on Congress's power to create federal law defining and criminalizing offenses against the law of nations. They demonstrate that including the power to "punish" offenses was not meant in any way to give Congress a distinct power to interfere with the machinery of enforcement – such as by creating special tribunals. The original phrasing of the provision assigned Congress the power "To declare the law and punishment of piracies and felonies &c." 2 Farrand, *supra* note 10, 315. That phrasing clearly indicates that the provision was intended to assign Congress nothing more than the ordinary power to set the punishment for violations of criminal laws. The debate that produced the current phrasing of the clause demonstrates that the changes in wording were not intended to alter the substance of the provision at all. Instead, they were prompted largely in response to a concern raised by Edmund Randolph about the "efficacy of the word 'declare.'" *Id.* The same powers to "declare the law and punishment" for offenses against the law of nations were thus conveyed by more active verb forms allowing Congress to "define" and "punish" such offenses. *See id.* at 316. The change in no way reflected an attempt to give Congress a greater role in the enforcement mechanisms used for addressing such offenses. It bears noting that other provisions of the Constitution that gave Congress powers such as the power to create inferior tribunals to the Supreme Court generated extensive debate. The absence of any similar discussion in relation to the Define and Punish Clause suggests that the Framers did not understand the provision as creating any new power in Congress to create additional tribunals or otherwise to embark on forays into the enforcement of the laws that had been assigned to the Executive.

The records of the Convention certainly in no way suggest that the Framers understood the Define and Punish Clause as having anything to do with empowering Congress to control the Executive Branch's ability to enforce the laws and customs of war during a military campaign. Instead, as noted above, the provision was intended simply to ensure adequate federal enforcement mechanisms for prosecuting violations of the law of nations, such as offenses against ambassadors, diplomats, and other foreign subjects,[10] piracy, and felonies on the high seas. Indeed, unlike debates over other Congressional powers under Article I (such as the "declare War" clause, U.S. Const. art. I, § 8, cl. 11), nothing in the convention discussion about the Define and Punish Clause suggests that it was intended to confer a war-related power upon Congress at the expense of the President's power as Commander in Chief.[11]

---

[10] *See, e.g., Boos v. Barry*, 485 U.S. 312, 316, 323-24 (1988) (Congress authorized under Define and Punish Clause to enact laws protecting foreign officers and governments); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 436 (1989) (Congress authorized under Define and Punish Clause to enact Foreign Sovereign Immunities Act); *United States v. Arjona*, 120 U.S. 479, 483-84 (1887) (Congress authorized under Define and Punish Clause to criminalize counterfeiting of foreign currency).

[11] Similarly, the Supreme Court has declined to include the Define and Punish Clause as among Congress's war powers on a number of occasions. *See Eisentrager*, 339 U.S. at 788 (listing Congress's Article I war powers without mentioning Define and Punish Clause); *Stewart v. Kahn*, 78 U.S. (11 Wall.) 493, 506 (1870) (same); *New York Times Co. v. United States*, 403 U.S. 713, 727 & n.1 (1971) (Stewart, J., concurring) (noting the Executive's "largely unchecked" war power, notwithstanding list of various war powers enumerated in Article I, without mentioning Define and Punish Clause); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 212 & n.15 (1963) (Stewart, J., dissenting on other grounds) (noting that "the Framers expressly conferred upon Congress a compendium of powers which have come to be called the 'war

Given the express textual commitment of the Commander-in-Chief power to the president, the Constitution should not be read to permit Congress to encroach on the Commander's traditional functions unless there is an equally express assignment of particular functions to Congress. The Framers clearly knew how to make such an assignment of power to the Legislative Branch when it was intended. For example, in the absence of further direction in the Constitution, the authority to establish mechanisms for enforcing discipline within the armed forces would likely have been included in the grant of the Commander-in-Chief power to the President. The Constitution, however, makes it express that Congress has the power "To make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8, cl. 14.[12] Absent an equally express grant of power to Congress over the task of enforcing the laws of war against the enemy, the Constitution should be understood as leaving that function with the Commander in Chief.

It is true that the Supreme Court has pointed to the Define and Punish Clause as the authority for the provision now codified at 10 U.S.C. § 821, which gives congressional sanction, without limitation or restriction, to the President's use of military commissions to enforce the laws of war (which are a part of the "Law of Nations"). *See, e.g., Yamashita*, 327 U.S. at 7. But that in no way suggests that the Clause provides Congress power to dictate to the President the manner in which he may operate military commissions to enforce the laws of war. The Court has definitively determined that section 821 acknowledges and sanctions the existing practice of convening military commissions under the authority of military command "without qualification." *Id.* at 11. Thus, military commissions convened to punish enemy violations of the law of war are not convened under a congressional grant of power, but rather "pursuant to the common law of war." *Id.* at 20. The Court's suggestion that Congress may properly express its unqualified approval of Executive practice in this field in no way suggests that Congress possesses the far different power to *curtail* the President's ability as Commander in Chief to prescribe the procedures for such commissions. To the contrary, the Court has acknowledged that assertion of such a power would raise a serious constitutional issue and has expressly declined to address whether Congress has any such power to *restrict* the President's use of military commissions. *See, e.g., Quirin*, 317 U.S. at 47 (declining to address "whether Congress may restrict the power of the Commander in Chief to deal with enemy belligerents" through regulations on military commissions).

Nothing in the text or the history of Article I's general grant of authority to incorporate international law into federal law authorizes Congress to interfere with the President's specific authority as Commander in Chief to convene military commissions to punish violators of the laws of war.

---

power,'" and listing a number of Article I war powers, without mentioning Define and Punish Clause); *Yakus v. United States*, 321 U.S. 414, 459 (1944) (Roberts, J., dissenting) (describing "the 'War Power' of Congress . . . [as] the powers embodied in Article I, § 8, of the Constitution" without mentioning Define and Punish Clause).

[12] The proposed legislation here does not rely on this clause as a source of authority, and with good reason. This provision refers solely to rules for the regulation of the forces of the United States. The military commissions being considered, however, would be designed to try and punish enemy belligerents.

4.

Lastly, the legislation relies on the Necessary and Proper Clause as its constitutional basis. U.S. Const. art. I, § 8, cl. 18. But nothing in that provision – which the Supreme Court recently described as "the last, best hope of those who defend ultra vires congressional action," *Printz*, 521 U.S. at 923 – authorizes Congress to enact legislation that would infringe upon the core constitutional powers of the Executive Branch. *See, e.g., Chadha*, 462 U.S. 919 (invalidating legislative veto provision, holding that Necessary and Proper Clause does not authorize Congress to usurp President's legislative role under Article I, Section 7); *Buckley*, 424 U.S. at 138-39 (Necessary and Proper Clause does not authorize Congress to violate Presidential powers under the Appointments Clause); *cf. also Printz*, 521 U.S. at 923-24 ("When a 'La[w] . . . for carrying into Execution' the Commerce Clause violates the principle of state sovereignty reflected in . . . various constitutional provisions . . . , it is not a 'La[w] . . . proper for carrying into Execution the Commerce Clause,' and is thus, in the words of The Federalist, 'merely [an] ac[t] of usurpation' which 'deserve[s] to be treated as such.'"); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) (Necessary and Proper Clause confers upon Congress authority only to legislate through "means . . . which are not prohibited, but consist with the letter and spirit of the constitution . . . .").

III.

The bill recites that the proposed legislation would "provide a clear and unambiguous legal foundation for such trials" by military commission. SJAA § 2(11). This finding implies that, without this legislation, the "legal foundation" for military commissions would be uncertain or suspect. For the reasons outlined above, we believe that suggestion is incorrect. There is no need for additional statutory authorization for the President to establish military commissions. The authority both to detain enemy combatants and to try them for violations of the laws of war by military commission falls squarely within the President's constitutional power as Commander in Chief. Moreover, statutory authorization already exists in 10 U.S.C. § 821.

If the legislation merely reaffirmed the President's existing authority, it would likely do no harm. As drafted, however, the proposed legislation attempts to impose substantive limits on the President's authority that, as explained above, are unconstitutional. Moreover, the legislation might even *undermine* the President's ability to proceed expeditiously with military commissions, because it would likely trigger meritless but nonetheless burdensome and disruptive litigation. Some defendants undoubtedly would argue that the legislation provides them rights that they may seek to enforce through actions (including petitions for writs of habeas corpus) in the federal courts. Although we believe that such assertions would be meritless, even frivolous litigation would impose substantial costs and delays on the President's efforts to prosecute the campaign against terrorism. Baseless lawsuits would unnecessarily distract the Executive from devoting attention and resources to the successful prosecution of the war.