ANALYSIS OF THE CONSTITUTIONALITY OF THE BUSH ADMINISTRATION'S MILITARY ORDER ON THE DETENTION, TREATMENT, AND TRIAL OF CERTAIN NON-CITIZENS IN THE WAR AGAINST TERRORISM

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Introduction

September 11, 2001, was the day that America lost its innocence. Gone was the notion that the United States and its impenetrable borders were immune from acts of terrorism on such a grand scale. The picture of airplanes slamming into the World Trade Center and the Pentagon will be forever burned in memory. While thousands paid the ultimate price with their lives, those who lived to face another day were constantly reminded of that dreadful day. Heightened security at airports and other high profile events took a psychological toll upon the people. Citizens watched as the Patriot Act whisked away their civil liberties in exchange for increased protection from terrorists and those who wished to do the country harm. Americans looked to their government for assurance that this was an aberration, an evil act that surely could never again be allowed to occur. That assurance would come less than twelve hours after the worst event of terror in United States history. In a solemn speech of less than five minutes, President George W. Bush vowed to direct the full forces of the intelligence and law enforcement communities
toward bringing those responsible to justice.\footnote{1} A new era in
domestic and international foreign policy had begun.

As promised, the Bush Administration and the
intelligence community acted swiftly in rounding up and
detaining hundreds of combatants accused of crimes against
the United States and its people. In the Military Order on
the Detention, Treatment, and Trial of Certain Non-Citizens
in the War against Terrorism issued on November 13, 2001,
President Bush laid out American policy for the treatment
of captured enemy combatants.\footnote{2} That policy is the basis of
this study. The initial hypothesis for this research was
that the Bush Administration’s policies were
unconstitutional. The American military rounded up foreign
citizens and threw them into detention camps without hope
of due process or representation. Was this type of
behavior illegal, unethical, and unconstitutional?
Contrary to the beginning hypothesis of this work, we
conclude that the Bush Administration was within the scope
of its Constitutional powers when it ordered the detainment
of unlawful enemy combatants.
Constitutional Analysis

The Executive Branch

Close inspection of the Constitution reveals a set of policies that empowered the President, as Commander in Chief, with the consent of Congress, to enact a set of military guidelines and procedures that would enable the Bush Administration to engage in what appears to be atypical behavior. In analyzing the role of the Executive and Legislative branches, as well as studying the interpretations of the Judicial branch via previous acts of judicial review, one can only conclude that, although the Bush Administration’s policies may be controversial concerning the detainment of enemy combatants, they were Constitutional.

Analysis of the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism is important to understanding the transitional landscape of American foreign policy since 2001. This paper will first analyze the policies contained therein and then explore their Constitutional validity. In Section 1 (a) of his military order, President Bush declared that the attack on America created a state of
armed conflict that required the full use of the United States Armed Forces to identify terrorists, those who support them, and to disrupt their activities.\(^3\) The order established the government’s right to detain accused individuals by stating, “To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.”\(^4\) In other words, the Armed Forces and the intelligence community were authorized to seek out and capture enemy combatants to be put on trial for crimes by the American government in military tribunals of their choosing.

The detention of individuals allegedly connected to acts of terrorism is commonplace throughout the world and is not controversial. However, the treatment of those detainees would become the linchpin for domestic, as well as worldwide, criticism of the Bush Administration’s policies in the War on Terror. President Bush wrote, “It is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the
Because of the timeliness of the situation, Bush was authorizing extraordinary leeway in the interrogation and trial of captured suspects. It was this latitude that led to allegations of numerous abuses of international law that included the torturing of detainees and indefinite detention of subjects. Many in academia, such as Professor Francis Boyle at the Illinois University School of Law, maintained that President Bush’s Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism contained provisions that blatantly disregarded International Law as well as the Geneva Convention. However, the purpose of this study is not to analyze international law, but rather to decide whether the President had the authority to issue such a set of guidelines. The first step in proving that the Bush Administration acted within the scope of executive authority is to examine the expressed powers of the Presidency outlined in Article II of the Constitution.

In the opening paragraph of the military order of November 13, 2001, President Bush acknowledged that his authority came from the Constitution. He stated that, “By the authority vested in me as President and as Commander in Chief... (The military order) is hereby ordered.” Since the
President acknowledged that his source of power was
delegated from his role as Commander-in-Chief, the research
will begin there.

The President’s powers as Commander-in-Chief were
expressly written in the Constitution in Article II,
Section 2, Clause 1. The Constitution states, “The
president shall be Commander in Chief of the army and navy
of the United States, and of the militia of the several
states, when called into that actual service of the United
States.” In exact words, the president is made the head of
the armed forces of the United States. Based upon this
clause of the Constitution, it could be argued that the
President should have the power to issue military orders to
a group over which he is the unquestioned leader.
Unfortunately, the answer is not that simple. Because the
Constitution gave Congress the power over a similar topic,
the power to declare war and make rules regarding prisoners
captured on land or at sea in Article I, Section 8, Clause
11, an overlap exists. To say that President Bush can
issue this type of military order without regard for the
role of Congress would be to overstate his power. This
unclear relationship between the executive and legislative
branches has been a source of contention concerning
warfare, declared or otherwise, since the inception of the Constitution. It would be prudent to look at the writings of the Framers themselves to see if they would have given the President this type of executive authority.

Even before the Constitution was adopted, the Framers intended for the President to be the unquestioned leader of the armed forces and to have power over military decisions. In *Federalist Paper No. 69*, Alexander Hamilton noted that the President would have power over the army, navy, and militias of the several states, as well as the power to recommend to Congress measures necessary during extraordinary occasions. When put into historic perspective, that many of the colonies would have been fearful of a strong executive because of the tyranny of King George III, *Federalist Paper No. 69* is quite significant. The President’s role as Commander-in-Chief was expressly written, an important aspect of the new government if ratified by the thirteen states.

The second half of Hamilton’s explanation concerning extraordinary occasions and presidential powers is even more important to our example. President Bush’s issuance of *Proclamation 7463– Declaration of National Emergency by Reason of Certain Terrorist Attacks* is proof of the
severity of the situation post 9/11. The proclamation also included Executive Order 13223, which vested increased authority in the Secretaries of Defense and Transportation. The situation of 9/11 was grave enough to warrant a state of emergency declared by George Bush. Therefore, since the President was expressly authorized to control the armed forces during such a state of affairs, it is logical that Alexander Hamilton would also have permitted the executive branch authority over the rules of engagement for the detainment of enemy combatants.

If the President's executive authority still seems objectionable because the Constitution is not transparent on the scope of executive powers that would fall under the auspices of Commander-in-Chief, including the right to issue certain military orders, then clarification can be found in the United States Code. The United States Code is the codification of the general and permanent laws of the United States. It is divided by broad subjects into 50 titles and published by the Office of the Law Revision Counsel of the U.S. House of Representatives every six years. Since Congress is given the power to legislate in Article I of the Constitution, many of the Framers' unclear intentions have been clarified over the past three
centuries with the passage of each law or resolution. Such is the case with the President's powers over military tribunals.

When Congress gives the President power, through its own legislation, can there be any doubt where the authority on such a matter lies? Such is the case with the President's power over the trial of enemy combatants. In article 36, of section 836, of chapter 47, of title 10 of the United States Code, Congress yields to the President the power to prescribe rules over military commissions and tribunals. The United States Code reads,

> Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions, and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or consistent with this chapter.\(^{13}\)

Analysis of this passage yields a couple of important points. First, the President is expressly identified as the entity that is given the power to develop the procedures for military tribunals and commissions. Related to the military order of November 13, 2001, the President has been empowered to create regulations for pretrial
procedures. Stated another way, the President has the right to create pretrial rules and regulations for detainees, authorized in section 836. Secondly, the US Code encourages the President to follow the principles of law and rules of evidence unless he does not consider it practicable. Congress expressly gave the President clearance to suspend the principles of law and chain of evidence when he deems them impractical. If that clearance from article 36, of section 836, were put together with Proclamation 7463 that states America was under a state of national emergency, and if the President perceived a clear authority to issue his Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism, there can be little doubt of the legality of the President's actions.

Although the President's legitimate right to issue military orders concerning the procedures of military tribunals and commissions appears to be clear, would the Constitution allow foreign nationals to be detained without representation? After all, the argument by civil liberties advocates is that America would not do this to its own citizens and is, therefore, committing grave injustices against these combatants. Although this argument would
appear to be a question of International Law and the tenets of the Geneva Convention, it is worth consideration as a question of American law and constitutionalism.

The Constitution is actually quite clear on the rights of the accused and the limits of habeas corpus for American citizens. Habeas corpus, from the Latin to produce the body, is a concept that defines the rights of the detained to be produced before the governing body so the legality of the detention can be determined.\textsuperscript{16} The concept of habeas corpus was of grave importance to the Framers of the Constitution. In \textit{Federalist Paper No. 84} Alexander Hamilton wrote, "The establishments of the writ of habeas corpus, the prohibition of ex post facto laws and of titles of nobility, to which we have no corresponding provisions in our constitution, are perhaps greater securities to liberty and republicanism than any it contains."\textsuperscript{17} Hamilton believed that one of the three great securities of liberty for citizens was the right of habeas corpus, and yet the Constitution is clear about its limitations.

In Article I, Section 9, Clause 2 of the Constitution the right of habeas corpus can be suspended for American citizens in times of great peril. The Constitution notes, "The privilege of the writ of habeas corpus shall not be
suspended, unless when, in cases of rebellion or invasion, the public safety may require it." 18 If one were to consider the terrorist attacks of 9/11 as an invasion on American soil where public safety was at risk, then the right of habeas corpus could certainly be suspended for American citizens. If the terrorist attacks were not proof enough of the gravity of the situation, then the aforementioned Proclamation 7463 by the Bush Administration should be. In answer to those civil liberties advocates who would argue that enemy combatants are being detained unlawfully, one could conclude that, if American citizens can lose their habeas corpus right to appear before the governing body in times of emergency, then why would foreign nationals be accorded that extraordinary right? Put another way, if the Framers of the Constitution saw this right as paramount to our liberty, but expressly wrote that it could be suspended from American citizens in times of danger, then why should those rights be accorded to accused combatants during this War on Terror? The accusation that the Bush Administration was overstepping its power by unlawfully detaining enemy combatants seems flawed next to Constitutional interpretation of the limited habeas corpus rights of American citizens.
When combined, the President's powers as Commander-in-Chief, the writings of the Framers in the Federalist Papers, and the United States Code solidify the Bush Administration's right to issue military orders on the detention of enemy combatants. Proclamation 7463 acknowledged a state of emergency by reason of terrorist attacks in America, which would give the United States government the power to suspend habeas corpus rights for American citizens, not to mention alleged foreign combatants. However, proof of executive authority only paints part of the picture of the soundness of the Bush Administration's military order. Analysis of the concurrent powers of the executive and legislative branches in their actions concerning the War on Terror only enhanced the legitimacy of the President's actions.

The Legislative Branch

The Constitution’s duality concerning the powers of war, which the Framers inadvertently created, has created an overlap between the executive and legislative branches. The major conflict over matters of military power and the use of the Armed Forces comes from the incongruence of Articles I and II of the Constitution. As mentioned above,
the President is recognized as Commander-in-Chief of the
Armed Forces in Article II, Section 2, Clause 1, while
Congress is given the power to declare war and make rules
concerning captured prisoners in Article I, Section 8,
Clause 11. Other clauses from Section 8 of Article I in
the Constitution empower Congress as well. While the
President can justifiably imply various powers from his
role as Commander-in-Chief, Congress has expressed powers
in Section 8, Clauses 12-14 to raise, support, and
financially maintain the army and navy of the United
States, as well as the power to create regulations for both
groups.¹⁹ According to the Framers of the Constitution, the
President was identified as the leader of the Armed Forces,
while Congress was given the power to provide for and
maintain the same group. Related to President Bush’s
military order, the Constitution would seem to give
Congress the power to set rules for prisoners of war and
detainees, while the President is empowered to use the
Armed Forces to enforce his policies. This was not the
first time that the Constitution was unclear about which
branch holds the power over military decisions. This
seemingly overlapping set of rules has created numerous
confrontations between former Presidents and Congress over the power to use the Armed Forces in undeclared wars.

The confrontation over expressed and implied war powers in the Constitution has been manifest since the beginning of the Republic itself. While none of the previous Presidents has had the Constitutional authority to declare war, that has not stopped them from using American troops to fight their battles. In 1794, President Washington used the militia without consent from Congress to suppress the Whiskey Rebellion. In the undeclared Quasi-War with France from 1798 to 1800, President Adams used the navy American ships began to be seized. President William McKinley sent troops to China in 1901 to help suppress the Boxer Rebellion. Woodrow Wilson sent troops to Mexico to pursue Pancho Villa. Most recently, President George HW Bush dispatched army battalions to topple a dictator at the Panama Canal and President Bill Clinton sent troops to Kosovo.

Although Congress has at times supported the actions of Presidents in undeclared wars, its willingness to allow each President the power to use the troops in altercations throughout history has given subsequent Presidents confidence that they will have the authority to do so as
well. If George HW Bush and Bill Clinton were allowed to use the military in undeclared conflicts, why would members of the Bush Administration not think they could too? Thus, not surprisingly, when the events of September 11th unfolded, Congress acted quickly to empower the President to action.

With a swiftness rarely seen on the part of the legislative branch, Congress passed, by joint resolution, the *Authorization for Use of United States Armed Forces* on September 18, 2001.\(^{21}\) Analysis of Public Law 107-40 shows an apprehensive Congress yielding its power to make decisions over enemy combatants to the Bush Administration. The resolution began by acknowledging the imminent threat to national security and foreign policy posed by the terrorist attacks. Because of that impending threat, both houses of Congress recognized that, under the Constitution, the President had the authority to deter and prevent acts of international terrorism as Commander-in-Chief and would, therefore, be authorized to use force.\(^ {22}\) This is an important point that cannot be overlooked. In its own words, the 107\(^{th}\) Congress acknowledged that the President was more qualified to deal with the situation more expeditiously than the Legislative branch. Examination of
the joint resolution shows a document that empowered the 
President even beyond the scope of his expressed powers 
from Article II of the Constitution.

Congress’s Authorization for Use of United States 
Armed Forces, issued on November 13, 2001, is a key factor 
in deeming the Bush Administration’s actions 
constitutional. While constitutional scholars debate the 
legitimacy of former Presidents’ actions in armed 
conflicts, a Congressional resolution that authorizes force 
leaves little room for discussion of legality. Analysis of 
the 2001 resolution finds a Congress desperate to empower 
their Commander-in-Chief to action. The joint resolution 
read,

The President is authorized to use all necessary and 
appropriate force against those nations, 
organizations, or persons he determines planned, 
authorized, committed, or aided the terrorist attacks 
that occurred in 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.23

The wording of this resolution is significant. Although 
the passage of time since 9/11 has taken some of the 
urgency out of the written words of this resolution, it 
must be remembered that members of Congress, like most 
American citizens, were reeling from the fresh wounds of
thousands of dead innocents. Acting on the feelings of dread, fear, and fury, this was a Congress that was strongly behind the President and any actions he deemed necessary in bringing those responsible to justice.

Secondly, the ambiguity of Congress’s phraseology that entitled the President to use all necessary and appropriate force left the Bush Administration’s policymakers extensive leeway in their actions. Under such wording, the development of detainment policies would not seem controversial compared with the task of keeping Americans safe from future actions of terrorism.

Additionally, Congress’s Authorization for Use of United States Armed Forces authorized the President to use all necessary force to prevent future acts of international terrorism. In only a few words, the Bush Administration received a directive from Congress to use extreme preventative measures to keep the country safe. Not only did this act give the President authority to seek out, detain, and then try suspected terrorists; it also gave the executive branch the power to use the Armed Forces to take on entire organizations, such as the Taliban and Al-Qaeda, as well as any nations accused of harboring terrorists. If the President were authorized to seek out persons,
organizations, and nations related to the terrorist acts of 9/11 or the prevention of future acts, then it is possible to conclude that it was justified in creating rules for the detention and treatment of those individuals.

Although the joint resolution of Congress authorized the President’s use of military powers, it is conceivable that the War Powers Resolution would have justified his use of the Armed Forces immediately following 9/11 anyway. In a continued effort to try to clarify the Founding Fathers’ intentions concerning military powers, the 93rd Congress issued Public Law 93-148 in 1973. The resolution stated,

> It is the purpose of this joint resolution to fulfill the intent of the Framers of the Constitution of the United States and insure that the collective judgment of both the Congress and the President will apply to the introduction of United States Armed Forces into hostilities, or into situations where imminent involvement of hostilities is clearly indicated by circumstances, and to the continued use of such forces in hostilities or in such situations.²⁴

Congress passed this Vietnam Era resolution to lessen the Commander-in-Chief's war powers. Because Presidents had been sending advisers and troops to Vietnam for nearly two decades without a declaration of war, Congress lamented its loss of power over warfare altogether. Representatives and Senators sought to clarify that imperfect, or undeclared wars, required the input of Congress as well. Although
this resolution produced a shift in power in the 1970s, its wording today has actually reallocated power to the Presidents of the 21st Century.

Thirty-five years have come and gone since passage of the War Powers Resolution. A law that was created to inform Richard Nixon and future Presidents that Congress would not simply allow the executive branch to control matters of war, the War Powers Resolution has actually increased executive authority due to an expansion of military technology. The War Powers Resolution had three basic tenets. First, if the President intended to use the Armed Forces in a military conflict, then Congress had to be notified via a written report within 48 hours. Second, if Congress did not declare an act of war or pass an act of authorization for the President’s use of force, then the President would have 60 days to remove the troops from battle. Finally, if the President determined it was unsafe to remove the troops in a timely fashion, 30 additional days would be granted by Congress to end the conflict.25 With this 1973 Act, Congress assumed that it had finally corralled the President and reined in his growing powers as Commander-in-Chief. However, modern interpretation and
improved technology has made the War Powers Resolution anything but a reduction in executive authority.

In an era of smart bombs and laser-guided missiles, full use of the United States Armed Forces could end a conflict in a matter of weeks. During the Second Iraq War, although fighting and insurrection still continue today, the initial phase that saw the full services of the Armed Forces engaging the Iraqi Army was over in less than three weeks. Admittedly, President Bush's actions were sanctioned by Congress in the Authorization for Use of Military Force Against Iraq Resolution of 2002.26 However, President Bush had already made it clear to Congress that he intended to enact his War Powers privileges if Congress did not pass a resolution of support. The War Powers Resolution has become so powerful that Presidents can threaten Congress that if they do not approve a specific armed conflict, then the President will act unilaterally.

The War Powers Resolution is an important part of understanding any President’s Commander-in-Chief powers. If Congress had not authorized the President’s use of force in the War on Terror, the legitimacy of the Bush Administration’s actions would certainly be less transparent. However, although the War Powers Resolution
would not have given the President an endless timeframe to seek and punish combatants, it is evident that he would have been allowed to employ the full forces of the military for a time period of at least 90 days. The United States Armed Forces would have had at least 90 days to engage the enemy, and that is assuming the Congress would not have supported that action, which was not the case. If needed, the President could have enacted the War Powers Resolution to begin the War on Terror. This action was not necessary because of Congress's support of the President's actions.

Although the Constitution is not transparent regarding the powers of war in Articles I and II, Congress’s Authorization for Use of United States Armed Forces left no doubt of the permissibility of the Executive Branch’s actions in the Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism. Even without Congress’s express written consent, the historic actions of previous Presidents in undeclared wars and the War Powers Resolution of 1973 taken together would have empowered the President to protect the country.
The Judicial Branch

The Judicial Branch receives its powers from Article III of the Constitution. The Constitution expressly states that the judicial powers of the United States shall be given to the Supreme Court and any inferior courts created by Congress. However, the Supreme Court's real power was not written into the Constitution at the time of its adoption in 1789. The power of judicial review was not realized until the landmark court case *Marbury v. Madison* was delivered in 1803. As the fledgling nation was trying out its powers and each branch of the government was testing its authority over the others, this landmark decision was delivered by Chief Justice John Marshall.

In the case *Marbury v. Madison*, petitioner William Marbury sued Secretary of State James Madison for refusing to deliver his Federal Judgeship appointed by outgoing President John Adams. Chief Justice Marshall understood the quandary that this case represented for the adolescent court. If the court enforced the appointment of Marbury, the new administration was likely to ignore it, thereby weakening its authority. On the other hand, if the Court
denied the appointment, it would look as if it had kowtowed to the new President. The Supreme Court decided to do neither. Instead, Justice Marshall recognized that the Supreme Court lacked a set of powers given to it by Congress in the Judiciary Act of 1789. Although this decision initially appeared to declare that the Supreme Court’s powers were limited, it actually greatly enhanced the Court’s powers by setting a precedent that the Judicial Branch could declare Congressional and Presidential acts unconstitutional. Considered to be one of the most important cases in establishing the Judicial Branch as the equal of the Executive and Legislative Branches, the Supreme Court became the final arbiter and authority on questions of constitutionality. Thus, the Supreme Court’s power of judicial review is important in analyzing the constitutionality of the detainment of enemy combatants. Analysis of previous landmark Supreme Court decisions shows that the Bush Administration acted in a constitutional manner when it detained unlawful enemy combatants and refused them their habeas corpus rights.

Dating back to the American Civil War, the Supreme Court has recognized a President's ability to suspend habeas corpus rights and to commission military tribunals
for American citizens. The court case *Ex Parte Milligan*, 71 US 2 (1866), reiterated the President's constitutional right to authorize the suspension of the writ of *habeas corpus* during rebellion or time of war. Writing for the Court, Justice Davis penned, "In every war there are men of previously good character wicked enough to counsel their fellow citizens to resist the measures deemed necessary by a good government...in the emergency of the times, an immediate public investigation according to law may not be possible." Milligan was an Indiana citizen who claimed that his rights were infringed when he was tried for treason in a military tribunal, rather than in an Indiana Circuit Court. In *Ex Parte Milligan*, Justice Davis confirmed the President's Constitutional right to suspend *habeas corpus* from Article I, Section 9, Clause 2. Although this case occurred over a century ago, it is still very relevant today. As mentioned above, if Presidents can suspend the rights of American citizens during times of rebellion or war, then why would unlawful enemy combatants not be treated the same way? Stated another way, if American citizens were robbed of their right to appear in civilian courts during the Civil War, then why should foreign combatants be accorded the right to appear in our
Federal District Courts? The Supreme Court's decision in *Ex Parte Milligan* is only the beginning of a body of decisions that have historically supported detention policies such as those created by the Bush Administration.

During World War II, the United States arrested a group of eight German citizens on American soil and accused them of plotting acts of sabotage against the United States government and its people. Each of the accused had lived in America at various times but had returned to Germany between 1933 and 1941. President Franklin Roosevelt convened a military commission to try the men on July 2, 1942; each was found guilty of sabotage and sentenced to death.\(^{31}\) In *Ex Parte Quirin*, 317 US 1, (1942), representatives for the eight men took the case to the Supreme Court claiming their right of *habeas corpus* should have caused their case to be tried at the United States District Court level. The men also claimed that President Roosevelt lacked the authority to create the military commission and that it was therefore unconstitutional. The Supreme Court did not concur. Writing for the Court, Justice Stone stated,
These nonresident enemy aliens, captured and imprisoned, have no right to a writ of *habeas corpus* in a court of the United States... by his (the President) order creating the present Commission, he has undertaken to exercise the authority conferred to 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."^{32}

Justice Stone's majority opinion in *Ex Parte Quirin* raises three important points related to our evaluation of the Bush Administration’s actions after 9/11. First, the Justices set the precedent that nonresident enemy citizens had no Constitutional right to use the American court system. Second, the President was authorized to create military commissions to try the eight German citizens who were defined as unlawful enemy combatants. Finally, the *Quirin* decision was one of the first opinions to articulate the strength of decisions collectively created by the Legislative and Executive Branches.

The Supreme Court's decision in *Ex Parte Quirin* would be corroborated less than a decade later in *Johnson v. Eisentrager*, 339 US 763 (1950). At the end of World War II, a group of German soldiers was captured by American troops in China and transported back to the American occupied zone in Germany. Upon their return, an American
military commission tried the soldiers for violations of the laws of war. Claiming that their trial, conviction, and imprisonment violated Articles I and III of the Constitution, as well as the 5th Amendment, the German soldiers appealed their case to the Supreme Court. Similar to the *Ex Parte Quirin* case, the Supreme Court had to decide in *Johnson v. Eisentrager*, 339 US 763 (1950) if President Roosevelt could empower the military to set up a military commission to try the German soldiers. The case was slightly different, however, because the military commission was located in Germany, not in the United States. The Justices also had to decide if foreign citizens had the right to the due process that American citizens held under the 5th Amendment of the Constitution. The German soldiers would be disappointed with the Supreme Court's decision.

Responding to the soldiers' complaints that they were not given their 5th Amendment right to due process; the Supreme Court clarified the status of the captured German soldiers. As the soldiers were not American citizens, the Supreme Court saw no need to apply to them the provisions of the Constitution. Justice Jackson wrote, "The nonresident enemy alien, especially one who has remained in
the service of the enemy, does not have qualified access to our courts, for he neither has comparable claims upon our institutions nor could his use of them fail to be helpful to the enemy." In other words, unlawful enemy combatants cannot claim to possess the same Constitutional rights that American citizens hold. Jackson even went on to postulate that giving enemy combatants equal rights could become advantageous to our enemies. Is the Bush Administration wrong in detaining unlawful combatants and disallowing them access to our American court systems? Justice Jackson did not think so in Johnson v. Eisentrager. On the contrary, Justice Jackson warned that enemy aliens could gain an unfair advantage if they were treated as equals to American citizens and given their rights.

The Supreme Court's delivered opinion in the Johnson case also clarified the military's right to try foreign fighters in commissions. Although the Supreme Court had already established that the soldiers had no right to Constitutional claims, it still clarified the American government's right to use military commissions. Justice Jackson wrote, "We hold that the Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged
in the hostile service of a government at war with the United States." What gives enemy combatants who were engaged in hostilities against the United States any right to claim the freedoms and liberties of the people they were trying to do harm? We thus return to the question posed in this study: why should the United States government allow suspected members of Al-Qaeda or the Taliban the same freedoms and liberties Americans enjoy, when the former are being accused of plotting to destroy the system based upon those liberties?

In reviewing the Constitutional powers of the Presidency and Congress in the cases of *Ex Parte Milligan*, *Ex Parte Quirin*, and *Johnson v. Eisentrager*, the Supreme Court utilized its judicial review powers to determine that the acting Presidents had the authority to detain and try unlawful enemy combatants in military tribunals and commissions. The Supreme Court repeatedly acknowledged the President's expressed powers from Article II to make sure that the laws were faithfully executed and to direct the military as the Commander-in-Chief. The Court also recognized Congress's powers from Article I to make rules and laws for the Armed Forces of the United States. When these legislative and executive prerogatives are combined,
the Supreme Court found it constitutional that Presidents could suspend the habeas corpus rights of foreign combatants, detain them without due process, and try them in military commissions without access to American courts. Accordingly, President Bush's detention policies would seem to be congruent with the Supreme Court's understanding of Constitutional Law.

Historical precedents were not enough to vindicate initially the Bush Administration's unpopular detainment policies, however, because the Supreme Court agreed to hear the case *Hamdi v. Rumsfeld*, 542 US 507, in 2004. After three years of complaints, from organizations like the American Civil Liberties Union, the Supreme Court finally agreed to hear a case to decide the legality of the Bush Administration's detainment policies. In *Hamdi v. Rumsfeld*, the Supreme Court had two major issues to consider. First, the Court had to decide if the petitioner, Yaser Hamdi, could be tried by military commission since he was an American citizen. Hamdi had been indefinitely detained since he was captured in Afghanistan and accused of aiding the Taliban. Second, the Supreme Court had to decide if it was constitutional to detain unlawful enemy combatants. As the final arbiter,
and authority on the Constitution, the Supreme Court's decision in the Hamdi case would decide once and for all if the Bush Administration's policies were constitutional.

Related to the first question involving detainees with US citizenship, the Supreme Court agreed that habeas corpus rights could be removed in times of rebellion; however, US citizens had the right to challenge their detention before an impartial judge in a United States Court. Although the Bush Administration had argued that citizens in arms against the United States should be treated no differently than foreign unlawful combatants, the Supreme Court disagreed. With regard to the second question, the Bush Administration won a victory. The Supreme Court ruled that the detainment of alleged combatants and the use of military commissions were Constitutional. Following the logic already addressed above, the Supreme Court quoted Articles I and II of the Constitution in substantiating the President's detainment policies.

In analyzing its justification for military commissions, the majority side in Hamdi noted that the President's powers as Commander-in-Chief from Article 2, Section 2, Clause 1 combined with Congress's Authorization for the Use of Military Force together created
Constitutional authorization. Justice O'Connor wrote, "Because capturing and detaining enemy combatants is an inherent part of warfare, the 'necessary and appropriate force' referenced in the Authorization for Use of Military Force necessarily includes the capture and detention of any and all hostile forces arrayed against our troops." If the President only had his power as Commander-in-Chief to rely on, then the authenticity of his military order might not have passed judicial review by the Supreme Court. However, Justice O'Connor expressed that Congress's support of the Executive Branch's actions empowered it to a level of unquestioned constitutionalism. For further clarification of this relationship between the Executive and Legislative Branch, it is important to look at another Supreme Court decision in Youngstown Sheet Tube v. Sawyer, 343 US 579 (1952).

In Youngstown v. Sawyer, the Supreme Court had to decide if President Harry Truman had the constitutional power to issue an Executive Order to seize the nation's steel mills that had gone on strike. Truman claimed that the steel was necessary to the defense of the United States. The Supreme Court ruled that the President did not have statutory or constitutional power to issue the order.
The importance of this case over the years has not come from the majority opinion issued by Justice Black, but by a concurring opinion written by Justice Jackson. In his concurring opinion, Jackson outlined three levels of Presidential power that are often used as the measuring stick for Presidential actions today. Jackson wrote, "Presidential actions supported by a grant of Congressional authority fall into the highest category of Presidential powers. Presidential actions neither supported by a Congressional grant of authority nor contrary to a Congressional denial fall into an intermediate category. [Finally] when the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest." In Justice Jackson's own words, President Bush's military order fell into the highest category of Presidential power because it was supported by Congress's joint resolution of force.

In the landmark case Marbury v. Madison, the Supreme Court gained the right to scrutinize the actions of the Legislative and Executive Branches, to decide if those actions are constitutional. Since 1803, the Supreme Court has been the arbiter, or final authority, on the ambiguous provisions of the Constitution. Because of this role,
analysis of previous court cases that dealt with the detention of enemy combatants was important in declaring the Bush Administration's actions acceptable. In *Ex Parte Milligan*, *Ex Parte Quirin*, and *Johnson v. Eisentrager*, the Supreme Court historically sided with the executive branch in its quest to detain foreign enemy combatants and try them in military commissions. In *Youngstown Sheet Tube v. Sawyer*, Justice Jackson laid out the three levels of Presidential power. Most importantly, in *Hamdi v. Rumsfeld* the Supreme Court ruled that the Bush Administration's military commissions were Constitutional.

**Conclusion**

The purpose of this research paper was to analyze the constitutionality of the Bush Administration's *Military Order on the Detention, Treatment, and Trial of Certain Non-Citizens in the War against Terrorism*. The initial hypothesis was that the Bush Administration was oversetting its boundaries in detaining enemy combatants for an undetermined amount of time. In determining the validity of the hypothesis, we examined the role of the Executive, Legislative, and Judicial branches to evaluate its constitutionalism. It became obvious, however, that
the words of the Framers in the Federalist Papers and the Constitution quickly drew another picture. Article II of the Constitution empowered the President as Commander-in-Chief, while Article I, Section 9, Clause 2 gave him the power in extreme circumstances to suspend the writ of habeas corpus. United States history is full of examples of Presidents who, as Commander-in-Chief, used the Armed Forces in undeclared conflicts. Although Article I of the Constitution gave to Congress the power to declare war, it became evident that the legislative branch empowered the President to action post 9/11.

With passage of the Authorization for the Use of Military Force, Congress gave to the President extraordinary power to maintain the safety of America's borders. When viewed through the principles laid down by the Supreme Court's Youngstown Sheet Tube decision, little doubt can remain that the Bush Administration acted with the highest of executive authority when it issued its directive on the detention of enemy combatants. The most important proof, however, of the validity of detaining unlawful military combatants came from the court case Hamdi v. Rumsfeld where the Supreme Court found the Bush Administration's actions constitutional.
George Bush, “Presidential Address to the Nation, 10.7.01.”

George Bush, “President Issues Military Order, 11.13.01.”

Ibid.

Ibid.

Ibid.


George Bush, “President Issues Military Order, 11.13.01.”


Ibid.


Ibid.

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William McLenaghan, 730.


William McLenaghan, 730.

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Ibid.

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“War Powers Resolution of 1973.”

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William McLenaghan, 733.


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37 Ibid.


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