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## NOTE

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### IN THE WAKE OF SEPTEMBER 11th: THE USE OF MILITARY TRIBUNALS TO TRY TERRORISTS

*Keith S. Alexander\**

At 5:43 A.M., on September 11, 2001, in the airport of Portland, Maine, an Egyptian man named Mohammed Atta bought a one-way ticket to Los Angeles, with a stopover in Boston.<sup>1</sup> Ten minutes later, Atta and another man walked through the security checkpoint, and by 6:00 A.M., they took off for Boston.<sup>2</sup> At 7:59 A.M., the men boarded American Airlines Flight 11 in Boston en route to Los Angeles with ninety-two passengers and crew on board.<sup>3</sup> Shortly after take off, Atta and four accomplices used knives and box cutters to commandeer the plane.<sup>4</sup> The hijackers diverted the jetliner and steered it south, along the Hudson River and over Manhattan.<sup>5</sup> At 8:46 A.M., Atta rammed the Boeing 767 into the north tower of the World Trade Center.<sup>6</sup>

Less than twenty minutes later, another plane crashed into the south tower of the World Trade Center.<sup>7</sup> The impact of both planes into the towers caused both towers to collapse, instantly killing more

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1 Edward T. Pound et al., *Under Siege*, U.S. NEWS & WORLD REP., Sept. 24, 2001, at 8.

2 *Id.*

3 *Id.* at 16.

4 *Id.* at 15.

5 *Id.*

6 *Id.*

7 *Id.* at 16.

than the Japanese had killed during the bombing of Pearl Harbor.<sup>8</sup> Two more planes were hijacked on the morning of September 11th. One crashed into the Pentagon.<sup>9</sup> The other crashed onto a field in Pennsylvania, never reaching its intended target.<sup>10</sup>

Less than two weeks after the attack, investigators were convinced that Osama bin Laden and his al Qaeda terrorist group conspired in the attack of September 11th.<sup>11</sup> When President George W. Bush was asked whether he wanted bin Laden dead, the President responded that bin Laden was “wanted: dead or alive.”<sup>12</sup> Indeed, the very morning of the attack, President Bush told his aides, “We’re at war.”<sup>13</sup>

Yet, was this an act of war? No foreign state has taken responsibility for these acts. Or were these acts of criminals who ought to be prosecuted and punished under domestic law? How would we treat bin Laden if he were captured alive? President Bush answered these questions directly on November 13, 2001, when he signed a military order declaring that non-citizens charged with terrorism, or who conspire with terrorists, will be tried before military commissions and “not be privileged to seek any remedy or maintain any proceeding . . . in any court of the United States.”<sup>14</sup>

Many in the academy and the media have decried President Bush’s military order as an illegal assault on civil liberties.<sup>15</sup> For example, the *New York Times* editorial board called the military order a

8 *Id.* at 10.

9 *Id.* at 18.

10 *See id.* at 14.

11 Kevin Whitelaw et al., *Friends of Bin Laden Lurk Behind Every Shadow*, U.S. NEWS & WORLD REP., Sept. 24, 2001, at 20.

12 David E. Sanger, *Bid Laden Is Wanted in Attacks, “Dead or Alive,” President Says*, N.Y. TIMES, Sept. 18, 2001, at A1.

13 Pound et al., *supra* note 1, at 22.

14 Military Order of Nov. 13, 2001: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 7(b), 66 Fed. Reg. 57,833, 57,835–36 (Nov. 16, 2001) [hereinafter Military Order].

15 *See, e.g.*, Michal R. Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433 (2002); George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL’Y 635 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259 (2002); Harold Hongju Koh, *The Case Against Military Commissions*, 96 AM. J. INT’L L. 337 (2002); Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J.L. & PUB. POL’Y 653 (2002); Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT’L L. 1 (2001); Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and the Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648 (2002).

“travesty of justice.”<sup>16</sup> The *Times* said that “[w]ith a flick of a pen . . . Mr. Bush has essentially discarded the rulebook of American justice painstakingly assembled over the course of more than two centuries. In the place of fair trials and due process he has substituted a crude and unaccountable system that any dictator would admire.”<sup>17</sup> In addition, Professor Jonathan Entin questioned the necessity of creating a new court system. He remarked, “It’s not clear to me why we’re doing this now. We tried the people who bombed the World Trade Center in 1993 in civilian court. Since we figured out a way to handle that trial, I guess my question is why this administration now sees civilian courts as inadequate.”<sup>18</sup>

This Note argues that these critics are wrong. Not only will I argue that President Bush’s military order is perfectly legal, but I also will argue that it is appropriate and necessary in the War on Terrorism that we are fighting after September 11th. In fact, I will take the position that military tribunals should have been used for terrorists *prior* to the attacks of September 11th. I will organize my argument into five sections. Part I will analyze and explore the historical and legal precedent of the use of military tribunals. Part II will argue that, despite not possessing the traditional aspects of war, the terrorist attacks on September 11, 2001, were indeed acts of war. Part III will analyze the military order issued by President Bush regarding the use of military tribunals and the laws that the President claims authorize his order. Part IV will then compare President Bush’s order to those used in history and argue that his order is consistent with the legal precedent. Finally, I will argue why the use of military tribunals is prudent and necessary in America’s war against terrorism.

## I. HISTORICAL AND LEGAL PRECEDENT

### A. *Ex Parte Quirin* & *In re Yamashita: War Criminals Have Limited Rights*

On July 7, 1942, President Franklin D. Roosevelt issued a proclamation appointing a military commission to try Nazi saboteurs for of-

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16 Editorial, *A Travesty of Justice*, N.Y. TIMES, Nov. 16, 2001, at A24; see also Chitra Ragavan, *Will Our Sense of Justice Be a Second Casualty of War?*, U.S. NEWS & WORLD REP., Nov. 26, 2001, at 22.

17 *A Travesty of Justice*, *supra* note 16.

18 Jessica Reaves, *War Is Hell (On Your Civil Liberties)*, TIME ONLINE ED., Nov. 15, 2001, at <http://www.time.com/time/nation/article/0,8599,184706,00.html> (last visited Feb. 11, 2003); see also Orentlicher & Goldman, *supra* note 15, at 662–63 (arguing that trials before federal courts are far more preferable than trials before military tribunals).

fenses against "the law of war and the Articles of War."<sup>19</sup> President Roosevelt also declared that enemy belligerents apprehended in the act of entering the United States "to commit sabotage, espionage or other hostile or warlike acts" were to be tried by military courts and denied access to the civil courts.<sup>20</sup> Roosevelt made this proclamation in response to the capture of eight German saboteurs (one of whom claimed to be an American citizen) that landed from a submarine in two groups. One group landed on Long Island on June 13; the other landed in Florida on June 17.<sup>21</sup> The eight men had plans to blow up assorted factories and bridges but were apprehended by the FBI before they executed their destructive plans.<sup>22</sup>

On July 8, 1942, the saboteurs' military trial began.<sup>23</sup> On July 28, with the case complete except for the closing arguments of the counsels, the saboteurs petitioned the District Court for the District of Columbia for a writ of habeas corpus, claiming a right to be tried in a civil court.<sup>24</sup> The writ was refused, but to the surprise of many, the Supreme Court announced that they would meet in special session on July 29 to hear the saboteurs' petitions for writs of habeas corpus.<sup>25</sup> The Supreme Court, in *Ex parte Quirin*,<sup>26</sup> unanimously rejected the

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19 Proclamation Denying Certain Enemies Access to the Courts of the United States, 7 Fed. Reg. 5101 (July 7, 1942), *quoted in* CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 113 (expanded ed. 1976).

20 *Id.* Roosevelt decided upon a military trial because he did not want to broadcast to the Germans that the saboteurs were apprehended largely by the good fortune of one of the saboteurs turning himself in and helping the FBI capture the others. The public and the Germans had the impression that FBI organizational skills had quickly uncovered the plot. By sending a message that the executive branch had the capacity to intercept enemy saboteurs quickly, the United States might discourage future attempts by Germany. Thus, Roosevelt wanted a secret, military trial. *See* Louis Fisher, *Military Tribunals: The Quirin Precedent*, CRS REP. FOR CONG. 2-4 (Mar. 26, 2002), at <http://fpc.state.gov/documents/organization/9188.pdf> (last visited Feb. 2, 2003); *see also* William H. Rehnquist, *Remarks of Chief Justice William H. Rehnquist*, 78 NOTRE DAME L. REV. 1, 5 (2002) (pointing out that one of the reasons Roosevelt decided upon a secret, military trial for the saboteurs was to hide from the Germans how easy the saboteurs landed upon American shores).

21 *See* CLINTON ROSSITER, *THE SUPREME COURT AND THE COMMANDER IN CHIEF* 113 (expanded ed. 1976).

22 *See id.*

23 *Id.*

24 *Id.*

25 *See id.* at 113-14. Many people were surprised because the Supreme Court disregarded the specification in the executive order that the saboteurs could not have recourse in any civil courts. *See id.*

26 317 U.S. 1 (1942).

writ and upheld the authority of the military tribunals.<sup>27</sup> After the Court made its decision, the military trial resumed, the prisoners were found guilty, and on August 8, President Roosevelt announced that six of the men had been electrocuted and two sentenced to long prison terms.<sup>28</sup>

The Court's opinion, written by Chief Justice Stone, broadly interpreted the power of Congress and the President to set up and use military tribunals. Two points are relevant for our purposes: (1) the Court declared that military commissions are always appropriate for punishing enemy belligerents who violate the law of war; and (2) the procedural guarantees of the Fifth and Sixth Amendments do not apply to military trials.

First, Chief Justice Stone argued that violators of the law of war always can be tried before military trials. The Court first pointed out that Congress, by providing in the Articles of War that the President could set up military tribunals,<sup>29</sup> exercised its power "[t]o define and punish . . . Offenses against the Law of Nations."<sup>30</sup> Congress specified in its Articles of War that violators of the law of war can be tried before military commissions.<sup>31</sup> And instead of articulating every detail of the violations of the law of war, Congress chose, by declining to specify what the law of war entailed, to adopt "the system of *common law* applied by military tribunals so far as it should be recognized and deemed applicable by the courts."<sup>32</sup>

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27 *Id.* at 48. While the Court issued its ruling on July 30, 1942, in favor of the government, it did not issue its opinion until October, *after* six of the saboteurs were already executed. For this reason, Chief Justice Stone wanted a united front when issuing the Court's opinion. However, the Court nearly fragmented and issued several separate concurring opinions. Justice Robert Jackson, for instance, wrote a long draft arguing for broad authority for the President as Commander-in-Chief, writing that Congress could not restrict the President's duties as Commander-in-Chief with a statute. Justice Hugo Black also wrote a memo to Stone expressing his uneasiness with the vague realm of the law of war and the excessive scope given to military tribunals. The most bizarre memo was by Justice Frankfurter, for it presented a conversation between Frankfurter and the saboteurs, six of whom were dead. The Frankfurter memo appeared that it was meant to appeal to the Justices' patriotism in arguing that no one should issue a concurring opinion causing undue controversy over the Court's decision. See Fisher, *supra* note 20, at 30-33.

28 ROSSITER, *supra* note 21, at 114.

29 See *Quirin*, 317 U.S. at 26-27.

30 U.S. CONST. art. I, § 8, cl. 10; see *Quirin*, 317 U.S. at 27-28.

31 See *Quirin*, 317 U.S. at 30.

32 *Id.* (emphasis added). The fact that the Court recognized that it was applying the common law of war crimes will become important later in refuting present-day critics of military tribunals. See discussion *infra* Part I.B.

The Court then sought to decipher whether the acts committed by the eight saboteurs fell under the common law of war crimes. The Court looked at historical practices and examples in Anglo-American law, in addition to international treaties and conventions, to come to grasp with the parameters of the law of war.<sup>33</sup> Chief Justice Stone did not deem it necessary to “define with meticulous care” the specifics of the law of war because the actions of the eight belligerents were “plainly . . . against the law of war.”<sup>34</sup> Specifically, the Court did say that people who, without uniform, come onto American territory for the purposes of waging war are subject to the law of war:

an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.<sup>35</sup>

Thus, because the eight men entered the United States in order to cause destruction of life and property, they were properly tried before the military tribunal. Even the German saboteur who could claim U.S. citizenship was legitimately tried before a military tribunal: “[c]itizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of . . . the law of war.”<sup>36</sup>

The second point that is relevant from *Quirin* is that the Court determined that originally the framers of the Constitution did not intend the Fifth and Sixth Amendments to apply to defendants before a military court.<sup>37</sup> Chief Justice Stone asserted that the procedures provided for in the Fifth and Sixth Amendments—particularly presentment by a grand jury and trial by a jury—were familiar aspects of criminal trials at the time of the adoption of the Constitution.<sup>38</sup> At the time of the ratification of the Constitution, these procedural safeguards were unknown to military tribunals.<sup>39</sup> Furthermore, Chief Justice Stone pointed out that the Supreme Court long recognized that the purpose of the Fifth and Sixth Amendments, and the purpose of section two of Article III, was *not* to enlarge the existing right to a jury

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33 See *Quirin*, 317 U.S. at 30–36.

34 *Id.* at 45–46.

35 *Id.* at 31.

36 *Id.* at 37–38.

37 See *id.* at 38–46.

38 See *id.* at 39.

39 *Id.*

trial. Rather, the point was merely to establish what already was practiced:

[t]he object was to preserve unimpaired trial by jury in all those cases in which it had been recognized by the common law and in all cases of a like nature as they might arise in the future, but not to bring within the sweep of the guaranty those cases in which it was then well understood that a jury trial could not be demanded as of right.<sup>40</sup>

Thus, the Fifth and Sixth Amendments do not apply to trials before military commissions because at common law it was not the practice to do so. The President, due to the authority given to him by statute, can prescribe the procedures for military trial.<sup>41</sup>

A few years later, the Supreme Court heard a similar case entitled *In re Yamashita*.<sup>42</sup> *Yamashita* dealt with a military commission set up by an American general in the Pacific to try Japanese General Yamashita for allowing his troops to commit atrocities against Americans and Filipinos. The Court decided that Yamashita's actions were common-law war crimes, and thus could be tried before a military tribunal.<sup>43</sup> One of the key differences between *Yamashita* and *Quirin* is that in *Yamashita*, the military tribunal was set up by an American general, not directly by the President. The Court found this to be no problem because the general had been vested with that power by the President.<sup>44</sup> Furthermore, even though the hostilities between Japan and the United States had ceased, it was perfectly legitimate for the United States to punish war criminals "so long as a state of war exists."<sup>45</sup> The Court said that the war power, from which the military commission derives its existence, "is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced."<sup>46</sup>

The general principles of law regarding military tribunals that can be ascertained from these cases, therefore, are the following: (1) if Congress declares a war, the President is authorized, as Commander-in-Chief, to establish military tribunals; (2) defendants before the military tribunals are not afforded the procedural safeguards of the Fifth and Sixth Amendments, but rather are afforded the proce-

40 *Id.* (citation omitted).

41 *See id.* at 27.

42 327 U.S. 1 (1946).

43 *See id.* at 17.

44 *Id.* at 10-11.

45 *Id.* at 11-12.

46 *Id.* at 12.

dures defined by the President; and (3) the reasoning of *Yamashita* supports the idea that military tribunals are appropriate to remedy the evils produced by war crimes, *even if* there are no ongoing hostilities at the time of trial.<sup>47</sup>

B. *Rehnquist's Objection: There Are No Federal Common Law Crimes*

As established above, the use and legitimacy of military tribunals is firmly established precedent in American law and history. Indeed, the Court in *Quirin* cited and described several examples of the use of military tribunals both by General George Washington during the Revolutionary War and President Abraham Lincoln during the Civil War.<sup>48</sup> However, Chief Justice Rehnquist, in his book *All the Laws but One: Civil Liberties in Wartime*<sup>49</sup>, raises what appears to be a valid objection to the use of the military commission during the Civil War. He points out, especially in reference to the treason trial against Lambdin P. Milligan,<sup>50</sup> that the charges brought against the defendants in *Milligan* made no reference to any federal statute.<sup>51</sup> This violates the principle, according to Chief Justice Rehnquist, that the Constitution does not provide for federal common-law crimes.<sup>52</sup>

The Chief Justice seems to have a valid argument. He points out that in England, the decision as to what acts were crimes came from the courts, rather than from Parliament. After the federal govern-

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47 See Spencer J. Crona & Neal A. Richardson, *Justice for War Criminals of Invisible Armies: A New Legal and Military Approach to Terrorism*, 21 OKLA. CITY U. L. REV. 349, 371 (1996) (arguing that *Yamashita* lends support for the establishment of military tribunals to combat terrorism, even when there is no ongoing conflict occurring elsewhere).

48 *Ex parte Quirin*, 317 U.S. 1, 31 nn. 9–10 (1942).

49 WILLIAM H. REHNQUIST, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (1998).

50 See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866) (holding that the trial before a military tribunal of an Indiana citizen who was not associated with the enemy was unconstitutional). Chief Justice Rehnquist emphasizes that the Court in this case reasserts that a citizen cannot be prosecuted for common-law crimes. See REHNQUIST, *supra* note 49, at 85–88.

51 REHNQUIST, *supra* note 49, at 85.

52 See *id.* The German saboteurs in *Quirin* also raised this argument. Their defense attorney called the law of war “a sort of common international law,” and thus he argued that “there is a serious question as to whether there is any such offense as the violation of the Law of War.” Fisher, *supra* note 20, at 23 (quoting *Brief in Support of Petitions for Writ of Habeas Corpus*, reprinted in 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 535–36 (Philip B. Kurland & Gerhard Casper eds., 1975)). Indeed, Justice Hugo Black expressed similar concerns prior to the issuance of the Court’s opinion in *Quirin*. See Fisher, *supra* note 20, at 30–31. However, as I point out, the Court explicitly rejected this argument.

ment was created by the Constitution, there was a question whether to continue that practice by prosecuting common-law crimes in federal courts without an express act of Congress.<sup>53</sup> The Supreme Court, in *United States v. Hudson*,<sup>54</sup> responded with a resounding “no.” The Court declared “the legislative authority of the Union must first make an act a crime, affix a punishment to it and declare the court that shall have jurisdiction of the offense,” before such a crime might be prosecuted in federal court.<sup>55</sup> Because the government brought charges against Milligan that were not specified by a congressional statute (for example, charging him for “violations of the laws of war”<sup>56</sup>), the trial was invalid.<sup>57</sup>

According to Chief Justice Rehnquist, this not only violated the principle set forth in *Hudson* that there are no federal common-law crimes, but it also violated the Ex Post Facto Clause of the Constitution and an analogous Roman legal maxim: *nulla poena sine lege*—no punishment except pursuant to established law.<sup>58</sup> Because Congress had not established the specific crimes, the military commission allowing charges to be brought based on the “law of war” clearly violated this principle.

While the Chief Justice’s arguments seem compelling, they ultimately fail. First, Chief Justice Rehnquist fails to acknowledge that despite the Court’s holding in *Hudson*, the Court on other occasions has recognized the existence of federal common-law crimes. A prime and relevant example is *Quirin*. As mentioned above, the Court specifically recognized and applied the common law of war.<sup>59</sup> The language quoted above is worth quoting again. The Court said that Congress, by remaining silent on the specifics of the law of war, adopted “the system of *common law* applied by military tribunals so far

53 REHNQUIST, *supra* note 49, at 85.

54 11 U.S. (7 Cranch) 32 (1812), *cited in* REHNQUIST, *supra* note 49, at 85.

55 *Id.* at 34, *quoted in* REHNQUIST, *supra* note 49, at 85.

56 REHNQUIST, *supra* note 49, at 85.

57 *See id.* at 85–88. Chief Justice Rehnquist reinforces his argument by pointing out that statutes were passed by Congress criminalizing many of the acts that Milligan committed, but the government refused to use them in its charges against Milligan. The government refused to prosecute Milligan under statutory crimes because the maximum sentence for the statutory violation was only ten years, whereas the military was authorized to impose the death sentence. *See id.* at 88.

58 *Id.* at 86. The German saboteurs also raised this defense in *Quirin*, arguing that the Ex Post Facto Clause was violated because Roosevelt issued his proclamation after the commission of the acts charged against the defendants. *See* Fisher, *supra* note 20, at 17.

59 *See Ex parte Quirin*, 317 U.S. 1, 30 (1942).

as it should be recognized and deemed applicable by the courts.”<sup>60</sup> This should not be surprising, though, because the Constitution gives Congress the power to “define and punish . . . Offenses against the Law of Nations.”<sup>61</sup> What is this “Law of Nations” that Congress is empowered to punish? While consisting of treaties and conventions in which the United States is a signatory, it also is common law “cognizable by [military] tribunals.”<sup>62</sup> Thus, Chief Justice Rehnquist’s assertion that there are absolutely no federal common-law crimes is inaccurate. The law of nations, of which the law of war is a part, is common law that has been developed over time and applied by courts countless times in American history.

Chief Justice Rehnquist’s second assertion that the charges brought against Milligan violates *ex post facto* and the Roman legal maxim identified above also is not persuasive. If the military tribunals are applying the common law of war, the law *is* established through precedent and history. Much like prosecutions under traditional English common-law crimes,<sup>63</sup> the federal government is prosecuting war criminals in military tribunals using the common law of war. There is no *ex post facto* violation here, unless Chief Justice Rehnquist is willing to say *all* uses of the common law in criminal matters violates the *ex post facto* provision.

Chief Justice Rehnquist’s argument, therefore, ultimately is not convincing. While he refers to precedent by citing *Hudson’s* claim that there are no federal common-law crimes, he ignores other precedent, particularly *Quirin*, holding that there is a common law of war that can be prosecuted by the federal government in military courts.

Was the Court wrong, then, in *Milligan*? No, because the common law of war applies to unlawful combatants, *not* traitorous citizens. *Milligan* dealt with the conviction of a U.S. citizen by a military tribunal. The Indiana citizen was accused of conspiring to aid the Confederacy, then at war with the United States. The Court ruled that the law of war *did not* apply to the U.S. citizen because he was *not* an unlawful combatant. The distinction between unlawful combatants and traitorous citizens is that the former is connected with and working for the military of the enemy. However, traitorous citizens, while perhaps aiding and abetting the enemy, are not connected with and directly working for the military services of the enemy. The citizen is not a combatant out of uniform, but rather an aider of the enemy,

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60 *Id.* (emphasis added).

61 U.S. CONST. art. I, § 8, cl. 10.

62 *Quirin*, 317 U.S. at 28.

63 *See generally* WILLIAM R. LAFAYE, SUBSTANTIVE CRIMINAL LAW § 2.1 (1986).

and thus is guilty of treason. Chief Justice Rehnquist is correct in saying that traitorous citizens are subject to the jurisdiction of traditional, federal law enforcement authority, which cannot include federal common-law crimes. However, if the Indiana citizen would have been found to be an enemy belligerent, he could have been convicted by the common law of war.<sup>64</sup>

## II. IS TERRORISM WAR?

While there is legal and historical precedent allowing for the use of military tribunals to punish those who commit war crimes, the question naturally arises regarding our situation today: are terrorist attacks, such as the ones on September 11th, acts of war?

Before one can answer this question, one must first provide a definition of war. Historically, war has only been between states. For instance, the Supreme Court in 1800 defined war as "every contention by force between two nations, in external matters, under the authority of their respective governments."<sup>65</sup> Indeed, Americans' experiences with war have almost entirely been in situations where there is conflict between traditional nation-states. The enemy has been clearly identified as states with borders and organized military forces, and success has been measured by the capture of geographical objectives.<sup>66</sup> However our experience and the limited definition provided by the Supreme Court in 1800 do not contain the only possible characteristics of war. Count Carl von Clausewitz, a Prussian general staff officer turned philosopher, provided a broader definition of war. Clausewitz, in his famous book, *On War*, began his chapter "What Is War?" by asserting, "War is thus an act of force to compel our enemy to do our will."<sup>67</sup> According to Clausewitz, "War is nothing but a continuation of political intercourse . . . [by] other means."<sup>68</sup> What makes violence in war different than criminal violence, therefore, is that violence in war is an attempt to force one's enemy politically to act according to

64 See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 121–22 (1866) (stating "no usage of war could sanction a military trial there for any offence whatever of a citizen in civil life, *in no wise connected with the military service*" (emphasis added)); see also *Quirin*, 317 U.S. at 45 (pointing out that Milligan was a "non-belligerent, not subject to the law of war").

65 *Bas v. Tingy*, 4 U.S. (4 Dall.) 37, 40 (1800).

66 See Crona & Richardson, *supra* note 47, at 359.

67 CARL VON CLAUSEWITZ, *ON WAR* 75 (Michael Howard & Peter Paret ed., Princeton University Press 1984 (1832)).

68 Crona & Richardson, *supra* note 47, at 358 (quoting CARL VON CLAUSEWITZ, *ON WAR* 402 (Anatol Rapoport & J.J. Graham eds., Penguin Books 1968) (1832)).

the enforcer's will, a characteristic not present in ordinary criminal acts.

The common definition of terrorism provided by government officials and academics seems to fit the definition of war provided by Clausewitz. The FBI, for instance, defines terrorism as "the unlawful use of force or violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."<sup>69</sup> Also, law professors, based on their study of customary international law, identify a similar definition. For instance, Christopher Blakesley identified five elements of what constitutes terrorism. They are

- (1) the perpetration of violence by whatever means;
- (2) against "innocents";
- (3) with intent to cause the consequences of the conduct or with wanton disregard for its consequences;
- (4) for the purpose of coercing or intimidating an enemy (government or group) or otherwise to obtain some political, military, or religious benefit;
- [and] (5) without justification.<sup>70</sup>

It is the fourth element that distinguishes terrorism from domestic crimes, just as acts of war similarly are distinguished from domestic crimes by the perpetrator's political intentions.

Were the acts of September 11th, then, acts of war? Using these common definitions, they most certainly were. They were terrorist attacks motivated to coerce and intimidate the United States to obtain a political benefit. Indeed, the Supreme Court's articulation of the status of the eight German saboteurs in *Quirin* precisely fits the description of those who participated in the attacks of September 11th. The Court, as mentioned above, described their status as follows:

an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunals.<sup>71</sup>

Similar to the German saboteurs in World War II, those who attacked the World Trade Center and the Pentagon are enemy combatants who came onto American territory without uniform for the purpose of

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69 *Id.* (quoting TERRORIST RESEARCH AND ANALYTICAL CENTER, U.S. DEPT. OF JUSTICE, TERRORISM IN THE UNITED STATES 1982-1992, at 20 (1992)).

70 Christopher L. Blakesley, *Terrorism, Law, and Our Constitutional Order*, 60 COLO. L. REV. 471, 480 (1989).

71 *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

waging war by the destruction of life and property.<sup>72</sup> Thus, President Bush was correct when he said, "Non-U.S. citizens who plan and-or commit mass murder are more than criminal suspects. They are unlawful combatants who seek to destroy our country and our way of life."<sup>73</sup> Acts of terrorism are more than acts of war; they are crimes of war and legitimately can be treated as such.

Who has authority to declare someone an unlawful combatant and thus give the American government the right to try the accused before a military tribunal? As will be seen below, the President claims that authority for himself. And the courts, thus far, have supported the President's contention. Most significantly, the Fourth Circuit, in *Hamdi v. Rumsfeld*,<sup>74</sup> gave great deference to the executive branch in determining whether one is an unlawful combatant. The court said that in the context of foreign relations and national security, "a court's deference to the political branches of our national government is considerable."<sup>75</sup> This deference, according to the court, "extends to military designations of individuals as enemy combatants in times of active hostilities, as well as to their detention after capture on the field of battle. The authority to capture those who take up arms against America belongs to the Commander in Chief under Article II, Section 2."<sup>76</sup>

### III. THE SPECIFICS OF PRESIDENT BUSH'S MILITARY ORDER AND THE PROCEDURES PROMULGATED BY THE DEPARTMENT OF DEFENSE

On November 13, 2001, President George W. Bush signed a military order allowing for military trials for terrorists.<sup>77</sup> This Part will de-

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72 See Christopher M. Evans, Note, *Terrorism on Trial: The President's Constitutional Authority To Order the Prosecution of Suspected Terrorists by Military Commission*, 51 DUKE L.J. 1831, 1848 (2002) ("Applying this framework [of *Ex parte Quirin*] to the events of September 11, it would appear that once the terrorists boarded their respective planes with the intent to commit hostile, warlike acts, they similarly acquired the status of unlawful belligerents.").

73 *Bush Defends Investigation Tactics, Says America Is Free but at War*, ASSOCIATED PRESS WIRE, Nov. 30, 2001, at <http://ca.news.yahoo.com/011130/6/f0pf.html> (last visited Feb. 11, 2003).

74 296 F.3d 278 (4th Cir. 2002).

75 *Id.* at 281.

76 *Id.* at 281-82. Incidentally, the court's reliance on the President's constitutional authority as Commander-in-Chief foreshadows my argument later that the President can set up military tribunals without congressional authorization. See *infra* Part IV.A.3.

77 Military Order, *supra* note 14, § 7(b), 66 Fed. Reg. at 57,835-36.

scribe the specifics of the order and the laws that the President cites that authorize him to set up the tribunals.

### A. *President Bush's Order*

In his military order, President Bush declared the following:

Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with the penalties provided under applicable law, including life imprisonment or death.<sup>78</sup>

I will examine (1) what the “applicable law” provided for in the President’s order is; (2) the procedures that the order declares is appropriate for military trials; (3) the definition of “individual subject to this order”; and (4) the jurisdiction of the military courts.

#### 1. The “Applicable Law”

The “applicable law” that is “triable by military commission” simply is the customary law of nations, particularly “the laws of war.”<sup>79</sup> The order does not have to be specific on the charges that can be brought against war criminals, because as discussed in Part I, there is a common law of war that is applicable in military courts.<sup>80</sup>

#### 2. The Procedures of the Military Trials

The order is not specific regarding the procedures that will be used at trial, but it certainly sets some important conditions. The order finds that the principles of law and rules of evidence generally used in the trial of criminal cases in the U.S. district courts are “not practicable” given “the danger to the safety of the United States and the nature of international terrorism.”<sup>81</sup> Because these trials are a military function, the Secretary of Defense has the authority to issue all the procedures and regulations of the military trial.<sup>82</sup>

On March 21, 2002, the Secretary of Defense did just that, issuing the procedures for trials by military commissions.<sup>83</sup> The commissions

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78 *Id.* § 4(a), 66 Fed. Reg. at 57,834.

79 *Id.* § 1(e), 66 Fed. Reg. at 57,833.

80 *See Ex parte Quirin*, 317 U.S. 1, 30 (1942).

81 Military Order, *supra* note 14, § 1(f), 66 Fed. Reg. at 57,833. For further discussion on why the normal rules of procedure used in criminal cases are not practicable, see *infra* Part V.

82 Military Order, *supra* note 14, §4(b), 66 Fed. Reg. at 57,834.

83 Department of Defense, Military Commission Order No. 1 (Mar. 21, 2002), in 41 INT’L LEGAL MATERIALS 725 (2002).

will be composed of three to seven military officers, who will preside over the trial and render the verdict and sentence.<sup>84</sup> From among the members of the commission, one Presiding Officer will supervise the proceedings.<sup>85</sup> The proceedings will be open to the public, unless the Presiding Officer decides otherwise.<sup>86</sup> A Presiding Officer may close a trial to safeguard classified or sensitive information, the physical safety of the participants, intelligence or law enforcement methods, and national security interests.<sup>87</sup> Additionally, the Presiding Officer is instructed to admit all evidence that has a "probative value to a reasonable person."<sup>88</sup>

A defendant before a military tribunal will enjoy many of the due process rights familiar to criminal defendants in the American civil courts. For instance, the defendant will be presumed innocent until proven guilty, and the standard of proof for a conviction is "beyond a reasonable doubt."<sup>89</sup> The defendant has the right not to testify at trial, and the members of the commission are instructed not to draw an "adverse inference" from the defendant's decision to exercise this right.<sup>90</sup> The defendant also has a right to counsel, which will be made available to the defendant by the commission.<sup>91</sup>

After trial, the commission members will deliberate and vote on findings of guilt and sentencing in a closed conference.<sup>92</sup> A conviction requires a vote of two-thirds of the commission.<sup>93</sup> A death sentence requires a unanimous vote.<sup>94</sup>

Appeals can be taken to a three-member Review Panel, which the Secretary of Defense will appoint and which will review the trial findings within thirty days and either provide a recommendation to the Secretary of Defense or return the case for further proceedings.<sup>95</sup>

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84 *Id.* § 4(A)(2), in 41 INT'L LEGAL MATERIALS 725, 726 (2002).

85 *Id.* § 4(A)(4), in 41 INT'L LEGAL MATERIALS 725, 726 (2002).

86 *Id.* § 5(O), in 41 INT'L LEGAL MATERIALS 725, 729 (2002).

87 *Id.* § 6(B)(3), in 41 INT'L LEGAL MATERIALS 725, 731 (2002).

88 *Id.* § 6(D)(1), in 41 INT'L LEGAL MATERIALS 725, 731 (2002).

89 *Id.* § 5(C), in 41 INT'L LEGAL MATERIALS 725, 728 (2002).

90 *Id.* § 5(F), in 41 INT'L LEGAL MATERIALS 725, 729 (2002).

91 *Id.* § 5(D), in 41 INT'L LEGAL MATERIALS 725, 729 (2002).

92 *Id.* § 6(E)(9), in 41 INT'L LEGAL MATERIALS 725, 734 (2002).

93 *Id.* § 6(F), in 41 INT'L LEGAL MATERIALS 725, 734 (2002).

94 *Id.* § 6(G), in 41 INT'L LEGAL MATERIALS 725, 734 (2002).

95 *Id.* § 6(H)(4), in 41 INT'L LEGAL MATERIALS 725, 735 (2002). This procedure undoubtedly is a result of the concerns from the military trial of the eight German saboteurs in 1942. Indeed, when the Roosevelt administration tried two other German saboteurs in 1945 before a military tribunal, many of the procedures were changed. Specifically, the President was not the appointing official, and review of the trial record was performed by experts within the Office of Judge Advocate General

Findings and sentences are not final until the President or the Secretary of Defense approve.<sup>96</sup> However, findings of "Not Guilty" cannot be changed.<sup>97</sup>

### 3. "Individual Subject to This Order"

The order is clear that individuals who are subject to a military trial are *not* U.S. citizens.<sup>98</sup> The President will determine whether a non-citizen fits into one of three categories.<sup>99</sup> First, if the President has reason to believe that an individual "is or was a member of the organization known as al Quida," he will be subject to a military trial.<sup>100</sup> Second, if an individual "has engaged in, aided or abetted, or conspired to commit, acts of international terrorism . . . that have caused . . . or have as their aim to cause, injury to . . . the United States, its citizens, national security, foreign policy, or economy," he also will be a subject of President Bush's military order.<sup>101</sup> Finally, if any non-citizen "knowingly harbored" an individual that fits either of the descriptions mentioned above, he also will be subject to trial before a military commission.<sup>102</sup>

### 4. The Jurisdiction of the Military Courts

The order is quite clear that non-citizens whom the President believes fit one of the three descriptions mentioned above will not have recourse in any civil court. The order asserts that the military tribunals will have "exclusive jurisdiction" over the offenses of individuals subject to the order.<sup>103</sup> This means that the individual will "not be privileged to seek any remedy or maintain any proceeding" in "any

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prior to going before the President. They made these changes to avoid publicity and give the impression to the German government that they were conducting a fair trial to avoid abuse of American prisoners that the Germans held. See Fisher, *supra* note 20, at 42-44.

96 Department of Defense, Military Commission Order No. 1, § 6(H)(6) (Mar. 21, 2002), in 41 INT'L LEGAL MATERIALS 725, 735 (2002).

97 *Id.* § 6(H)(6), in 41 INT'L LEGAL MATERIALS 725, 734 (2002).

98 Military Order, *supra* note 14, § 2(a), 66 Fed. Reg. at 57,834. The use of this military tribunal, therefore, will be even more limited than the one used by President Roosevelt against the eight saboteurs because one of the men was a U.S. citizen. See *Ex parte Quirin*, 317 U.S. 1, 37 (1942).

99 Military Order, *supra* note 14, § 2(a)(1), 66 Fed. Reg. at 57,834.

100 *Id.* § 2(a)(1)(i), 66 Fed. Reg. at 57,834.

101 *Id.* § 2(a)(1)(ii), 66 Fed. Reg. at 57,834.

102 *Id.* § 2(a)(1)(iii), 66 Fed. Reg. at 57,834.

103 *Id.* § 7(b)(1), 66 Fed. Reg. at 57,835.

court of the United States, or any State . . . , (or of) any court of any foreign nation, (or of) any international tribunal."<sup>104</sup>

### B. *Laws That Authorize the President's Order*

President Bush, in the preamble of his military order, cited three authorities that allow him to create military tribunals: (1) the Authorization for Use of Military Force;<sup>105</sup> (2) §§ 821 and 836 of Title 10 of the United States Code;<sup>106</sup> and (3) the President's power as Commander-in-Chief.<sup>107</sup> I will briefly examine the statutory authorization that the President claims here, and later examine his authorization as Commander-in-Chief.

#### 1. Authorization for Use of Military Force

Exactly one week after the attack of September 11th, Congress passed a joint resolution authorizing the President to use military force in response to the attack. The relevant language is the following:

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 on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.<sup>108</sup>

Not only does this language confer upon the President the authorization to use military force against the Taliban regime in Afghanistan, for instance, but it also allows him to use "all necessary and appropriate force" against "*persons he determines*" planned or conspired in the attacks of September 11th.<sup>109</sup> Because the President has determined that the al Qaeda organization conspired in the September 11th attacks, he included them as individuals subject to military

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104 *Id.* § 7(b)(2), 66 Fed. Reg. at 57,835. However, White House Counsel Alberto Gonzalez admitted that suspects could seek a writ of habeas corpus. See Alberto Gonzalez, *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A25.

105 Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

106 10 U.S.C. §§ 821, 836 (2000).

107 See U.S. CONST. art. II, § 2 ("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 the actual Service of the United States.").

108 Authorization for Use of Military Force § 2(a).

109 *Id.* (emphasis added).

trial.<sup>110</sup> However, the President does not limit the use of the tribunals against those who conspired in the September 11th attacks. He also ordered that military tribunals will be used against anyone who partakes in acts of international terrorism.<sup>111</sup> This is one of the grounds that people may argue makes the President's military order illegal.<sup>112</sup>

## 2. 10 U.S.C. §§ 821 & 836

The President also cited two sections in Title 10 of the United States Code authorizing him to establish military tribunals. Title 10 generally deals with the governance of the armed forces. Section 821 simply states that the conferring of jurisdiction upon courts-martial do not deprive military tribunals jurisdiction over offenders of "statute . . . (or) the law of war."<sup>113</sup> Section 836 specifically authorizes the President to prescribe the regulations and procedures of military trials. Congress ordered the President to, "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."<sup>114</sup> The President thus exercised his power to prescribe the procedures by setting the parameters and by ordering the Secretary of Defense to issue the specific rules.<sup>115</sup> The President also asserted that he did not find it "practicable" given the dangers of the current situation to use the principles of law and rules of evidence normally used in criminal cases.<sup>116</sup> The President had to make such a finding given the language of § 836 of Title 10.

### IV. IS PRESIDENT BUSH'S MILITARY ORDER LEGAL?

#### A. *The Military Order Is Pursuant to Both Congressional Law and the Constitution*

Some legal scholars claim that President Bush's military order is not pursuant to any congressional law or constitutional provision. For example, Professor Christopher Pyle believes President Bush is not acting within the rights of his office. He argues,

Where does the President get the right to do this? He claims the right to do this as President, as commander in chief, pursuant to the

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110 See Military Order, *supra* note 14, § 2(a)(1)(i), 66 Fed. Reg. at 57,834.

111 See *id.* § 2(a)(1)(ii), 66 Fed. Reg. at 57,834.

112 For a response to this argument, see *infra* Part IV.

113 10 U.S.C. § 821 (2000).

114 *Id.* § 836.

115 Military Order, *supra* note 14, § 4(b), 66 Fed. Reg. at 57,834.

116 *Id.* § 1(f), 66 Fed. Reg. at 57,833.

resolution passed in Congress after the September 11 attacks and pursuant to several statutes in the U.S. code. But there's nothing in either the congressional resolution or federal law that allows the President to override the legislative process.<sup>117</sup>

Critics like Pyle claim that while there may be precedent to support the use of military tribunals against people who acted like the eight German saboteurs in *Quirin*, the President must be given authority first. During World War II, for example, Congress *specifically* provided that the President may set up military tribunals to try war criminals during the course of the war.<sup>118</sup> However, Congress's authorization to use military force after the September 11th attack did not specify the use of military tribunals. Also, unlike World War II, there is not a formal declaration of war today. Thus, the argument goes, President Bush does not have the same authority that President Roosevelt possessed to set up military tribunals.

My response to such arguments is threefold: (1) Congress has declared a "partial war," which is legal and is supported by legal and historical precedent; (2) the language of the Authorization for Use of Military Force passed by Congress after the September 11th attack allows for the use of military tribunals; and (3) the President has the power to enforce the laws of war, even absent the specific authorization of Congress, pursuant to his power to be Commander-in-Chief of the armed services.

### 1. "Partial" War Has Been Declared

It is true that, unlike in World War II, Congress has not formally declared war. Rather, as mentioned above, it only has passed a resolution authorizing the use of military force against those who partook in the attacks of September 11th. It does not follow, though, that President Bush needs a formal declaration of war to set up military tribunals. From the earliest days of the republic, the power Congress has to declare war also has been understood as including the power to define war.<sup>119</sup> In *Talbot v. Seeman*, Chief Justice John Marshall, speaking for the Court, recognized the power of Congress to declare a "partial" war targeted at a particular form of enemy aggression, without declaring a formal war against a particular nation.<sup>120</sup> In *Talbot*, the Court dealt with measures Congress adopted to address French pri-

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117 Reaves, *supra* note 18.

118 See *Ex parte Quirin*, 317 U.S. 1, 26-27 (1942).

119 *Talbot v. Seeman*, 5 U.S. (1 Cranch) 1, 28 (1801).

120 See *id.* at 29.

vateers who were preying on American commercial vessels.<sup>121</sup> Describing Congress's war power, Chief Justice Marshall asserted,

The whole powers of war being, by the constitution of the United States, vested in [C]ongress . . . [C]ongress may authorize general hostilities, in which case the general laws of war apply to our situation; or *partial* hostilities, in which case the laws of war, so far as they actually apply to our situation, must be noticed.<sup>122</sup>

One can reasonably infer from Chief Justice Marshall's analysis that Congress can authorize the use of force against a particular kind of predatory military activity without formally declaring a full-scale war on a nation.<sup>123</sup> This inference is further supported by Congress's authorization of a retaliatory naval expedition against the Barbary Pirates in 1794.<sup>124</sup> Thus, Congress was within its power to declare war on a particular predatory military activity (i.e., terrorism), and the President can act pursuant to that. The key question, of course, is whether the language of the "partial" declaration of war on terrorism allows President Bush to set up military tribunals.<sup>125</sup>

## 2. The Language of Congress's Authorization for Use of Military Force

While the text of the authorization does not specifically authorize the President to use military tribunals to prosecute war criminals, it certainly is implied in the language. Congress declared that the President can use "all necessary and appropriate force against . . . *persons*" he believed aided or conspired in the terrorist attacks of September 11th.<sup>126</sup> The President is not only allowed to use force against nations (e.g., Afghanistan) and organizations (e.g., al Quida), but also against *persons* (e.g., Osama bin Laden). In other words, if President Bush thinks it is "necessary and appropriate," he is authorized to kill Osama bin Laden or anyone else who conspired in the attacks of September 11th. Conceivably, under the language of the statute, even if bin Laden surrendered himself, if Bush thought it was "necessary and appropriate," he would have the authority to use "force" against him

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121 See *id.* at 26–27.

122 *Id.* at 28 (emphasis added).

123 See Crona & Richardson, *supra* note 47, at 361.

124 See FRANCIS D. WORMUTH & EDWIN B. FIRMAGE, *TO CHAIN THE DOG OF WAR: THE WAR POWER OF CONGRESS IN HISTORY AND LAW* 57–58 (1986).

125 Judge Juan Torruella, for one, argues that there is no statutory authorization for President Bush's Military Order. See Torruella, *supra* note 15, at 663–64.

126 Authorization for Use of Military Force § 2(a), Pub. L. No. 107-40, 115 Stat. 224 (2001) (emphasis added).

(i.e., kill him) *without a trial*. If President Bush has authority to kill any *person* who conspired or aided in the attacks of September 11th, it seems perfectly legitimate for the President to set up a military trial, which has been used countless times throughout our history, before he kills a terrorist. Indeed, looking at it from this perspective, the President is affording the terrorists *more* protection than the language of Congress affords them.<sup>127</sup>

The American Bar Association (ABA) would respond to this argument by saying that while the President, based on the language of the statute, may set up procedures to protect a terrorist before the President uses “force” upon him, the language also *limits* the use of force against those who contributed to “the terrorist attacks that occurred on September 11th, 2001.”<sup>128</sup> In other words, the ABA argues, the President can only use force against those who conspired in the attacks of September 11th, not other terrorists who participated in other attacks or who pose a threat to the United States.

To this textual argument, I have two responses. First, Congress also states in the authorization that the *purpose* of allowing the President to use force against those responsible for the attacks on September 11th is to “prevent any future acts of international terrorism against the United States.”<sup>129</sup> Thus, using force against other terrorists *besides* those who were responsible for the attacks of September 11th is pursuant to the purpose of the authorization of force.

Indeed, at least one court has interpreted the Joint Resolution this way. In *Padilla v. Bush*,<sup>130</sup> the federal district court of New York considered the government’s detention of Jose Padilla, an American citizen who is a member of al Quida and who is believed to have been in a conspiracy to use a radioactive “dirty” bomb in an American city. He is being detained indefinitely as an unlawful combatant. Padilla argued that the President’s detention of him is illegal because the Joint Resolution only gave the President authority to use force against those who conspired in the attacks of September 11th, of which he was not a part. The court rejected this interpretation, stating,

[The] language [of the Joint Resolution] authorizes action against not only those connected to the subject organizations who are di-

127 This legal argument foreshadows the policy argument I will make with respect to William Safire. See *infra* Part V.

128 Authorization for Use of Military Force § 2(a); see also American Bar Association, *ARMY LAW*, Mar. 2002, at 8, 13 (arguing that the congressional authorization to use force limits President Bush’s military order creating military tribunals to apply only to those who were involved in the attacks of September 11th).

129 Authorization for Use of Military Force § 2(a).

130 233 F. Supp. 2d 564 (S.D.N.Y. 2002).

rectly responsible for the September 11 attacks, but also against those who would engage in "future acts of international terrorism" as part of "such . . . organizations."<sup>131</sup>

Therefore, at least one court has rejected the argument made by the ABA and has interpreted the Joint Resolution to apply to all those engaged in international terrorism.

An additional argument in support of using military tribunals against terrorists not involved in the September 11th attack is that the President can set up military tribunals *without* the authorization of Congress pursuant to his constitutional position as Commander-in-Chief of the armed forces.

### 3. The President's Power as Commander-in-Chief

The Supreme Court on numerous occasions has asserted that when the U.S. Constitution declared the President to be the "Commander in Chief" of the armed forces, it not only gave him the duty to conduct a declared war and perform duties imposed by Congress, but also it gave him "the authority of a Commander in Chief at the common law of war."<sup>132</sup>

Several Supreme Court cases illustrate this point. First, in *Swaim v. United States*, the Court held that the President, as Commander-in-Chief, can validly convene a court-martial without statutory authorization.<sup>133</sup> As long as Congress does not pass a statute *prohibiting* the convening of the court-martials, the President has the power to do so.<sup>134</sup>

Using similar reasoning, the Court in *Hirota v. MacArthur* ruled that it had no authority to review convictions of Japanese war criminals tried in international courts.<sup>135</sup> Justice Douglas, in his concurrence, argued that the Court did not have jurisdiction because the decision was a political one within the realm of the powers of the President.<sup>136</sup> Justice Douglas noted that the power of the President as Commander-in-Chief "is vastly greater than that of a troop commander. He not only has full power to repel and defeat the enemy; he has the power to occupy the conquered country . . . and to punish the enemies who violated the law of war."<sup>137</sup> Francis Wormuth and Edwin Firmage, in their book, *To Chain the Dog of War*, commented

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131 *Id.* at 598-99 (citations omitted).

132 WORMUTH & FIRMAGE, *supra* note 124, at 123.

133 165 U.S. 553, 557-58 (1897).

134 *Id.* at 557.

135 338 U.S. 197, 198 (1948).

136 *Id.* at 208 (Douglas, J., concurring).

137 *Id.* (Douglas, J., concurring) (citation omitted).

that these powers “are the powers of any troop commander at the common law of war.”<sup>138</sup>

Yet, one may retort that the Court in *Quirin*, which is the seminal case supporting the President’s military order, found it “unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.”<sup>139</sup> The Court, though, also suggested that President Roosevelt’s order to try the saboteurs before a military tribunal rested at least in part on an exercise of the President’s constitutional authority as Commander-in-Chief:

By his Order creating the present Commission [the President] has undertaken to exercise the authority conferred upon him by Congress, and also such authority as the Constitution itself gives the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.<sup>140</sup>

Indeed, the court in *Padilla* also cited this language in supporting a broad interpretation of the President’s power as Commander-in-Chief.<sup>141</sup>

The President does not need congressional approval to punish the violators of the law of war because it is a power that he possesses in the common law of war as the Commander-in-Chief of the military. It follows, then, that President Bush can set up military tribunals, “by the authority vested in (him) as President and as Commander in Chief of the Armed Forces.”<sup>142</sup> The possible limitation in the language of the congressional authorization is not a legal obstacle to the President prosecuting terrorists who were not involved in the September 11th attack.

### *B. The Confusion over Habeas Corpus*

Much of the recent literature in response to President Bush’s order has commented on the confusion the Bush administration has created regarding whether defendants before a military commission

138 WORMUTH & FIRMAGE, *supra* note 124, at 111.

139 *Ex parte Quirin*, 317 U.S. 1, 29 (1942).

140 *Id.* at 28.

141 *Padilla v. Bush*, 233 F. Supp. 2d 564, 595–96 (S.D.N.Y. 2002). The Fourth Circuit also ruled that the President has broad authority as Commander-in-Chief to declare someone an unlawful combatant. See *Hamdi v. Rumsfeld*, 296 F.3d 278, 281–82 (4th Cir. 2002).

142 Military Order, *supra* note 14, pmb., 66 Fed. Reg. at 57,833.

would have access to habeas corpus review in civil court. As mentioned above, the Military Order is clear that no habeas review will be available. The Order states that those tried before military commissions shall "not be privileged to seek any remedy or maintain any proceeding . . . in any court of the United States."<sup>143</sup> However, White House Counsel Alberto Gonzalez said, contrary to the text of the Order, that the "Order preserves judicial review in civilian courts. Under the [O]rder, anyone arrested, detained or tried in the United States by a military commission will be able to challenge the lawfulness of the commission's jurisdiction through habeas corpus proceeding in a federal court."<sup>144</sup> To further complicate matters, the Department of Defense's procedures allows for appeal before an executive review board that only offers a recommendation to the President or the Secretary of Defense.<sup>145</sup> These seemingly contradictory rules and statements coming from the Bush administration understandably have led to criticism by some commentators.<sup>146</sup> Additionally, others argue that the Department of Defense's allowance for appeal only before an executive review panel denies defendants the right to a review by an independent and impartial court.<sup>147</sup>

The Bush administration's seemingly contradictory statements regarding habeas and appellate review make sense in light of *Johnson v. Eisentrager*.<sup>148</sup> The petitioners in *Eisentrager* were German nationals convicted of war crimes by a U.S. military commission conducted in China.<sup>149</sup> The issue presented before the Court was whether nonresident enemy aliens enjoyed the protections of the Constitution, including access to U.S. courts.<sup>150</sup> The Court ruled that they did not have the right of review in an American court.<sup>151</sup> The Court reasoned that because the petitioners were nonresident enemy aliens whose crimes, trial, and confinement all occurred outside of the United States, none of the traditional heads of jurisdiction were present.<sup>152</sup>

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143 *Id.* § 7(b)(2), 66 Fed. Reg. at 57,835–36.

144 Gonzalez, *supra* note 104.

145 See Department of Defense, Military Commission Order No. 1, § 6(H)(4) (Mar. 21, 2002), in 41 INT'L LEGAL MATERIALS 725, 735 (2002).

146 See, e.g., Katyal & Tribe, *supra* note 15, at 1304.

147 See Jordan J. Paust, *Antiterrorism Military Commissions*, 23 MICH. J. INT'L L. 677, 685–86 (2002); Torruella, *supra* note 15, at 722–24.

148 339 U.S. 763 (1950).

149 *Id.* at 765–66.

150 *Id.* at 765.

151 See *id.* at 767–68.

152 See *id.* Incidentally, this is probably why the United States is detaining terrorist suspects in Guantanamo Bay, Cuba. These potential defendants before a military tribunal were never detained in the United States, thus the United States would be able

The rule from *Eisentrager* clarifies the Bush administration's policy regarding habeas and appellate review. Those whose crimes, trial, and confinement all take place outside the United States, will have no review whatsoever in any American court.<sup>153</sup> This is legal under *Eisentrager*. However, they will have the possibility of review before the executive review panel created by the Department of Defense's procedures for military commissions.<sup>154</sup> Thus, the Bush administration is giving these sort of detainees a right to appeal when it has no legal obligation to do so under *Eisentrager*. In other words, these sort of defendants are being afforded more rights than the Constitution affords them.

Those who are captured, detained, or tried in the United States will have a right to habeas review, consistent with Gonzalez's statement. As mentioned above, in *Quirin*, the Court heard the petitions for writs of habeas corpus despite the fact that Roosevelt's executive order said they could not have recourse in any civil courts.<sup>155</sup> Notably, unlike the petitioners in *Eisentrager*, the petitioners in *Quirin* were captured, detained, and tried in the United States. That is probably why, despite the text in Bush's military order, Gonzalez said that "anyone arrested, detained, or tried *in the United States*," will have habeas review. Thus, there is no contradiction in the statements and orders issued by the Bush administration once one understands the distinction between those detained and tried in the United States and those detained and tried outside America's borders.

### C. Does the Military Order Violate the Equal Protection Clause?

Neal Katyal and Laurence Tribe, in their essay appearing in the *Yale Law Journal*, make a novel and intriguing argument that Bush's Military Order may violate the Equal Protection Clause of the Fourteenth Amendment.<sup>156</sup> They argue that applying the military order

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to rely on *Eisentrager* in arguing that they do not have any type of review in an American court. Indeed, a district court recently made that exact ruling. See *Rasul v. Bush*, 215 F. Supp. 2d 55, 68–69 (D.D.C. 2002) (ruling that Guantanamo Bay is not part of the sovereign territory of the United States and that *Eisentrager* applies to the aliens presently detained there).

153 Military Order, *supra* note 14, § 7(b)(2), 66 Fed. Reg. at 57,835–56.

154 See *supra* note 95.

155 See *supra* note 27.

156 See Katyal & Tribe, *supra* note 15, at 1298–302. George Fletcher makes a similar argument as well. See Fletcher, *supra* note 15, at 646 ("Not only does the lumping together of all foreigners vastly exceed standards of relevance, but it also invokes a method of classification—citizen versus foreigner—that has no reasonable bearing on

only to non-citizens, and not American citizens, is an invalid discrimination under the Equal Protection Clause. Specifically, they say,

When a categorical preference for American citizens cannot be justified in terms of immigration and naturalization policy or as an adjunct to our international bargaining posture, the basis for relaxing the scrutiny otherwise applicable to discrimination against aliens as a class evaporates, and the level of scrutiny becomes correspondingly more searching . . . . Plainly, subjecting aliens who are unlawful enemy combatants to military tribunals while guaranteeing otherwise indistinguishable United States citizens civilian justice cannot be understood in immigration or international bargaining terms.<sup>157</sup>

At first glance, this argument seems convincing. On what grounds can the government grant an American citizen, who commits the same terrorist acts as a non-citizen, the heightened procedural protections of civil court, while the non-citizen potentially faces a military trial?

The Court's decision in *Milligan* probably provides the best answer to that question, yet ultimately this answer is not satisfactory.<sup>158</sup> As mentioned above, the Court in *Milligan* dealt with the issue of whether a citizen of Indiana could be tried by a military commission for crimes that could be punishable in the civil courts. The Court ruled that as long a civil court is open, the citizen should be tried there instead of before a military tribunal.<sup>159</sup> Significantly, the Court's language and the facts of the case were limited to an American *citizen*. The Court stated,

Every one connected with these branches of the [military] service is amenable to the jurisdiction which Congress has created for their government, and, while thus serving, surrenders his right to be tried by the civil courts. *All other persons*, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury.<sup>160</sup>

The Bush administration may have thought it would violate the rule in *Milligan* if it applied its Military Order to citizens as well as non-citizens. Thus, the administration may argue, discriminating against aliens by ordering that military tribunals can only be used for non-citizens does not violate the Equal Protection Clause because the Pres-

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the supposed objective of protecting the United States against international terrorism.").

157 Katyal & Tribe, *supra* note 15, at 1300.

158 *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 123 (1866).

159 *Id.*

160 *Id.*

ident has a compelling reason to do so, namely following Supreme Court precedent interpreting the Constitution.

Yet, this argument ultimately is not persuasive in light of *Quirin* and recent lower court decisions. As argued above, *Quirin* limited *Milligan* to its facts.<sup>161</sup> In *Milligan*, the Indiana citizen never was deemed an unlawful combatant<sup>162</sup> and thus was not subject to the laws of war. In *Quirin*, though, the alleged American citizen was an unlawful combatant and so could be tried by a military tribunal.<sup>163</sup> Additionally, recent lower court decisions have made it clear that the President can deem American citizens unlawful combatants and, by so doing, detain them indefinitely and presumably try them before a military tribunal.<sup>164</sup> Why, then, does President Bush's military order only apply to non-citizens if it could equally apply to citizens deemed unlawful combatants? Citing *Milligan* in light of *Quirin* and recent lower court decisions probably would not be a compelling reason. It may be that President Bush's order, then, violates the Equal Protection Clause, and thus ultimately would have to apply to both citizens and non-citizens. Indeed, given the successful use of military tribunals against citizens who were unlawful combatants in World War II, President Bush's order probably should apply to citizens as well.<sup>165</sup>

## V. IS PRESIDENT BUSH'S MILITARY ORDER GOOD POLICY?

As mentioned in the introduction of this Note, many people in the academy and the media have vehemently criticized President Bush's military order allowing for military trial of terrorists, not only on legal grounds, but also for policy reasons. Such objections are

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161 See *supra* Part I.B.

162 *Milligan*, 71 U.S. at 118. The Court, in arguing why *Milligan* was not an unlawful combatant, stated,

*Milligan*, not a resident of one of the rebellious states, or a prisoner of war, but a citizen of Indiana for twenty years past, and never in the military or naval service, is, while at his home, arrested by the military power of the United States, imprisoned, and, on certain criminal charges preferred against him, tried, convicted, and sentenced to be hanged by a military commission, organized under the direction of the military commander of the military district of Indiana.

*Id.*

163 See *Ex parte Quirin*, 317 U.S. 1, 37–38 (1942).

164 See *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002); *Padilla v. Bush*, 233 F. Supp. 2d 564, 597 (D.D.C. 2002).

165 Ironically, though, Katyal and Tribe also argue that *Quirin*'s value as precedent is weak, which, if true, would undermine their equal protection argument. See Katyal & Tribe, *supra* note 15, at 1304.

based simply on a misunderstanding of what the order actually says.<sup>166</sup> Other people understand what the order says, but still think it is giving up too many liberties or that it sends the wrong message. It is in refuting these arguments that I will provide reasons why the use of military tribunals to try terrorists is good public policy.

William Safire, who is known as a conservative opinion writer for the *New York Times*, described Bush's military order as "seizing dictatorial power."<sup>167</sup> Safire argues that despite the legal precedent supporting them, the use of military tribunals destroys the checks and balances central to our American system. He says, "[N]on-citizens face an executive that is now investigator, prosecutor, judge, jury and jailor or executioner."<sup>168</sup> So what does Safire offer as an alternative proposal of how we should handle terrorists, such as bin Laden for instance, if we cannot try them before a military tribunal? Safire says, "The solution is to turn [bin Laden's] cave into his crypt . . . our bombers should promptly bid him farewell with 15,000-pound daisy-cutters and 5,000-pound rock-penetrators."<sup>169</sup> This solution, of course, refutes his argument against military tribunals. If we kill suspected terrorists by targeting their caves in our bombing raids, is this not the executive acting as "prosecutor, judge, jury . . . and executioner" against non-citizens? If it is legitimate for people such as Safire—and Congress for that matter—to allow the executive to use force and to kill suspected terrorists, why not allow the executive to set up procedures to make sure that the United States kills the right people? Inadvertently, Safire admits that President Bush is affording suspected terrorists more protections than even Safire is willing to allow.

In addition, many people argue that by providing for military tribunals, we are admitting that we do not trust our civil courts and do

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166 A perfect example of this is a recent *Washington Post* story reporting the wide public support that the use of military tribunals has among Americans. The first sentence of the story reads, "Most Americans broadly endorse steps taken by the Bush administration to investigate and prosecute suspected terrorists and express little concern that these measures *may violate the rights of U.S. citizens.*" Richard Morin & Claudia Deane, *Most Americans Back U.S. Tactics*, WASH. POST, Nov. 29, 2001, at A1 (emphasis added). If the journalists who wrote this story would have simply read President Bush's military order, they would realize the "concern" they raise is merely a fabrication. The order specifically says that individuals who are subject to this order "shall mean any individual who is *not a United States citizen.*" Military Order, *supra* note 14, § 2(a), 66 Fed. Reg. at 57,834 (emphasis added).

167 William Safire, Editorial, *Seizing Dictatorial Power*, N.Y. TIMES, Nov. 15, 2001, at A31.

168 *Id.*

169 *Id.*

not properly value our freedoms.<sup>170</sup> Indeed, Philip B. Heymann, a former deputy attorney general for the Clinton administration thinks the limitation that the military tribunals puts on non-citizens' freedoms is unpatriotic. He asserts, "I think it's the most reckless, unpatriotic indifference to a source of American pride that I can imagine."<sup>171</sup> Robert Reich, Secretary of Labor under President Clinton, made a slippery-slope argument against military tribunals: "The president is by emergency decree getting rid of rights that we assumed that anyone within our borders legally would have. We can find ourselves in a police state step by step without realizing that we have made these compromises along the way."<sup>172</sup> What concerns these critics is that individuals can be convicted with much more relaxed rules of evidence and procedure that makes prosecuting defendants much easier. Another concern is that the military trials could possibly be held in secret.

However, arguments against relaxed procedures ultimately fail. The recent attempt to prosecute Zacarias Moussaoui, who is accused of being a co-conspirator in the September 11th attacks, in civil courts is a prime example why the relaxed procedures of military tribunals are necessary. At the time of this writing, the Justice Department was in a quandary regarding how to treat Moussaoui. The government brought charges against Moussaoui in civil court, but subsequently the United States captured key al Qaeda operatives whose testimony could be valuable to Moussaoui.<sup>173</sup> Moussaoui's defense attorneys requested access to the captured terrorists for interviews and trial testimony, especially Ramzi bin al-Shibh, who is thought to be the ringleader of the September 11th attacks.<sup>174</sup> The Central Intelligence Agency (CIA) and the Defense Department refused for national security reasons, and thus the defense attorneys are invoking Moussaoui's Sixth Amendment right to seek out witnesses who can bolster his defense.<sup>175</sup> This has created quite a dilemma for prosecutors.

Why the Bush administration decided to prosecute Moussaoui in civil court remains a mystery. Due to the dilemma facing prosecutors, the White House at the time of this writing was weighing whether to

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170 See William Glaberson, *Use of Military Court Divides Legal Experts*, N.Y. TIMES, Nov. 14, 2001, at B8.

171 Pam Belluck, *Hue and Murrer over Curbed Rights*, N.Y. TIMES, Nov. 17, 2001, at B8.

172 *Id.*

173 Philip Shenon, *Legal Maneuvers: U.S. Sees Threat to Terror Trial*, N.Y. TIMES, Oct. 23, 2002, at A1.

174 *Id.*

175 *Id.*

let a military tribunal try Moussaoui instead of trying him in civil court.<sup>176</sup> However, prior to these complications, the problems of trying Moussaoui in civil court were foreseeable. For instance, Sen. Joseph Lieberman, Democrat of Connecticut and member of the Armed Services Committee, argued in December 2001, "Moussaoui is a war criminal . . . . What greater violation of the laws of war could there be than to have been a co-conspirator in the attacks that resulted in the death of 4,000 Americans here on our soil?"<sup>177</sup> Senator Lieberman called Moussaoui a "big fish" who might "get away" under the heightened evidence requirements in federal court.<sup>178</sup> The circumstances that developed certainly made Lieberman's concern in December 2001 legitimate, and they refute the argument that the relaxed rules of military tribunals are not necessary to prosecute terrorists.

This point is made even stronger by the decisions made by the Clinton administration in 1996 when it had a chance to arrest bin Laden. The *Washington Post* reported that in the early spring of 1996 the government of Sudan, where Osama bin Laden then resided, offered to arrest and place bin Laden in Saudi custody for extradition to the United States.<sup>179</sup> The Clinton administration decided it was "lacking a case to indict him in U.S. courts."<sup>180</sup> Sandy Berger, Clinton's national security advisor, told the *Washington Post*, "The FBI did not believe we had enough evidence to indict bin Laden."<sup>181</sup> However, if President Clinton would have set up a military tribunal to try bin Laden by deeming him an unlawful combatant, the United States would have been able to accept the Sudan's offer of arresting bin Laden because they would have a much better chance of prosecuting him before a military tribunal.<sup>182</sup> Not only does this illustrate the importance of having military tribunals with relaxed rules of evidence

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176 Philip Senon & Eric Schmitt, *The 9/11 Suspect; White House Weighs Letting Military Tribunal Try Moussaoui, Officials Say*, N.Y. TIMES, NOV. 10, 2002, at A1. Ronald Seivert also is perplexed on why the Bush administration did not initially use a military tribunal to try Moussaoui. See Ronald J. Sievert, *Are We Engaged in a War on Terrorism or a Global Law Enforcement Operation?*, 78 NOTRE DAME L. REV. 307, 343 (2003).

177 Katharine Q. Seelye, *Justice Department Decision To Forego Tribunal Bypasses Pentagon*, N.Y. TIMES, DEC. 13, 2001, at B6.

178 *Id.*

179 Barton Gellman, *U.S. Was Foiled Multiple Times in Efforts To Capture Bin Laden or Have Him Killed*, WASH. POST, OCT. 3, 2001, at A1.

180 *Id.*

181 *Id.*

182 Or, at the very least, the United States could have detained him indefinitely like the United States is doing now with the unlawful combatants held in Guantanamo Bay.

when fighting war criminals such as bin Laden, it also makes one wonder why the critics are targeting President Bush rather than President Clinton, who could have apprehended bin Laden if he would have set up military courts sooner. If Clinton would have taken this action, the attacks of September 11th might never have occurred.

Charles Krauthammer also provides an excellent example of why the military trial may often have to be held in secret in order to protect American intelligence operations.<sup>183</sup> Krauthammer reports that bin Laden, prior to January 2000, used to communicate with other members of al Qaeda via satellite telephone. However, in the New York City trial of the bombers of the U.S. embassies in Africa, a January 2000 release of the documents revealed that communications that bin Laden had over his satellite telephone were intercepted by U.S. intelligence. As soon as that testimony was published, bin Laden stopped using the satellite system. The CIA lost him until he acted again on September 11th.<sup>184</sup>

Critics' policy arguments against military tribunals claiming that they restrict the freedoms of accused terrorists seem hollow after the incidents reported above. If secret military tribunals would have been used in the past against terrorists,<sup>185</sup> not only would the CIA still have access to the conversations of Osama bin Laden over satellite telephone, but also the United States might already have arrested and executed him. After the tragic, but not surprising,<sup>186</sup> events of September 11th, the real scandal is why military tribunals were not set up *before* September 11th, not after it.

## VI. CONCLUSION

In the aftermath of the terrorist attacks of September 11, 2001, Americans should not need another demonstration so tragic to realize that it is illogical and unjust to bring the criminal justice system to bear on the awful war crimes that terrorists commit. I have argued that pursuant to the federal common law of war, both Congress and

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183 See Charles Krauthammer, *In Defense of Secret Tribunals*, TIME, Nov. 26, 2001, at 104.

184 See *id.*

185 This was an idea that Spencer Crona and Neal Richardson advocated in 1996, in response to the first bombing of the World Trade Center in 1993 and the bombing of the federal building in Oklahoma City. See generally Crona & Richardson, *supra* note 47 (suggesting, in 1996, the military tribunal system as an alternative to civilian criminal trials for accused terrorists).

186 The September 11th attack was not surprising because the terrorists who bombed the World Trade Center in 1993 also intended to destroy both towers. See *id.* at 351-52.

the President have the authority to prosecute and try war criminals in military tribunals. History is replete with examples of the federal government doing just that: bringing war criminals to justice in secret, military courts. George W. Bush joins George Washington, Abraham Lincoln, and Franklin Roosevelt in establishing military tribunals to try war criminals. President Bush is well advised to draw upon the wisdom of these honored, former presidents rather than the critics in the media and the academy who do not now, nor ever will, have the heavy duty of directing a war in defense of the United States of America.