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## Life, Liberty, and the Pursuit of Terrorists: An In-Depth Analysis of the Government's Right to Classify United States Citizens Suspected of Terrorism as Enemy Combatants and Try those Enemy Combatants by Military Commission

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**LIFE, LIBERTY, AND THE  
PURSUIT OF TERRORISTS:  
AN IN-DEPTH ANALYSIS OF THE  
GOVERNMENT'S RIGHT TO CLASSIFY  
UNITED STATES CITIZENS SUSPECTED OF  
TERRORISM AS ENEMY COMBATANTS AND  
TRY THOSE ENEMY COMBATANTS BY  
MILITARY COMMISSION**

*Amanda Schaffer\**

**INTRODUCTION**

The September 11, 2001 terrorist attacks drastically changed attitudes about personal freedom.<sup>1</sup> Fear that a terrorist could strike at anytime, anyplace made individuals more willing to put up with inconveniences, such as longer lines at airport security and baggage checks in subway stations.<sup>2</sup> This fear drove the government to implement measures that it believed would help track down terrorists and prevent future attacks.<sup>3</sup> One such measure, promulgated by President George W. Bush, is the Military Order of November 13, 2001: "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism."<sup>4</sup> Those subject to the order can be "detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."<sup>5</sup>

Section two of the order defines the non-citizens subject to the order.<sup>6</sup> Any non-U.S. citizen is subject to the order where:

[T]here is reason to believe that such individual, at the relevant times, is or was a member of the organization known as al

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1. *Oyez! Oyez!*, N.Y. TIMES, Oct. 7, 2002, at A18.

2. Patrick Tyler & Elisabeth Bumiller, *A Nation Challenged: The White House; Bush Offers Taliban '2nd Chance' to Yield; Says He'd Welcome U.N. in Nation Building*; F.B.I. Issues Alert on Signs of New Terror, N.Y. TIMES, Oct. 12, 2001, at A1.

3. See discussion *infra* Part II.A.1.

4. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

5. *Id.*

6. *Id.* at 57,834.

Qaida; has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or has knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order.

This order details procedures for handling such non-citizens suspected of terrorism.<sup>7</sup>

While the order does not specifically give the government the right to try citizens by military commissions,<sup>8</sup> deeming a citizen an enemy combatant<sup>9</sup> gives the government the authority to try him in this manner.<sup>10</sup> An individual who is considered an enemy combatant can be detained for the duration of an armed conflict under the laws and customs of war,<sup>11</sup> not under the domestic criminal laws.<sup>12</sup> President Bush has declared that two U.S. citizens, Yaser Esam Hamdi and Jose Padilla, are enemy combatants, and they are currently being held in military prisons.<sup>13</sup> It has not yet been determined what the fate of Hamdi and Padilla will be.<sup>14</sup> They could be held and not tried at all, they could be tried by military commissions, like their non-citizen colleagues, or they could be tried in criminal court.<sup>15</sup> This Comment will explore the government's right to treat citizens as enemy combatants and whether their trials should be by military commissions or by the non-military criminal justice system.

Part I of this Comment gives background information and explains the source of the government's right to determine enemy

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7. *Id.*

8. *Id.*

9. See discussion *infra* Part I.

10. See *Ex parte Quirin*, 317 U.S. 1, 35 (1942) (holding that there is "a class of unlawful belligerents" not entitled to be treated as prisoners of war and who can be tried and punished by military commission).

11. See *id.* at 48. To determine the laws and customs of war, the Court looked to Article 15 of the Articles of War, 10 U.S.C. §§ 1471-1593 (repealed); LISZT, *Das Völkerrecht* § 58(B)4 (12 ed. 1925); 2 OPPENHEIM, *INTERNATIONAL LAW* § 225 (6th ed. 1940); COLEMAN PHILLIPSON, *INTERNATIONAL LAW AND THE GREAT WAR* 208 (1915); J.M. SPAIGHT, *AIR POWER AND WAR RIGHTS* 283 (1924); J.M. SPAIGHT, *WAR RIGHTS ON LAND* 110 (1911); WAR OFFICE, GR. BRIT., *MANUAL OF MILITARY LAW* §§ 445, 449 (1929); see *infra* Part I.B.

12. See *Quirin*, 317 U.S. at 48.

13. See Martha Neil, *Avoiding the 'Enemy Combatant' Label Some Say Plea by Taliban Fighter Shows Criminal Prosecutions Work in Terrorism Battle*, A.B.A. J. E-REPORT, July 19, 2002, at 2.

14. See discussion *infra* Part I.C.

15. See discussion *infra* Part II.

combatant status and to use military commissions. Part I also describes the distinctions between a military trial and a regular criminal trial and explains the status of the Hamdi and Padilla cases. Part II explains why the government wants to use military commissions to try terrorists and the advantages of these commissions over regular criminal proceedings. Additionally, Part II analyzes the distinctions between citizens and non-citizens and examines the constitutionality of declaring citizens enemy combatants. Part II also discusses how terrorists differ from other types of criminals and how those differences justify disparate treatment. Part III of this Comment proposes a solution and determines that the government does have the right to treat citizens as enemy combatants. Part III also argues that military commissions should try these enemy combatants, however, there must be a structured judicial proceeding to determine whether an individual is actually an enemy combatant.<sup>16</sup>

## **I. ORIGINS OF THE GOVERNMENT'S RIGHT TO USE MILITARY COMMISSIONS AND TO DETERMINE ENEMY COMBATANT STATUS**

### **A. Prior Use of Military Commissions**

The United States has made use of military tribunals since the country's inception.<sup>17</sup> The government used the commissions during the Revolutionary War, the Mexican Wars, and the Civil War.<sup>18</sup> The Supreme Court in *Ex parte Quirin* and *Application of Yamashita*, declared that it is constitutional to try foreign belligerents in military trials.<sup>19</sup>

Citizens also have been tried by military commissions in the past.<sup>20</sup> After the surrender and occupation of Germany and Japan in 1945, military tribunals tried U.S. citizens for ordinary criminal

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16. See discussion *infra* Part III.B.

17. Byard Q. Clemmons, *The Case for Military Tribunals*, 49 FED. LAW. 27, 27 (2002).

18. *Id.* at 27-28. Military tribunals were used during the Civil War to try Confederate soldiers who were captured as saboteurs in civilian clothing or spies. *Id.* Tribunals were also used during the Mexican War and during the Revolutionary War for acts of treason. *Id.*

19. *In re Yamashita*, 327 U.S. 1, 9 (1946); *Ex parte Quirin*, 317 U.S. 1, 35 (1942); Clemmons, *supra* note 17, at 28.

20. See *infra* notes 21-24 and accompanying text.

activity in the occupied territories.<sup>21</sup> The Supreme Court upheld the jurisdiction of these tribunals.<sup>22</sup> Additionally, in *Madsen v. Kinsella*, the Supreme Court upheld the jurisdiction of a military commission to try a U.S. citizen for murdering her husband, a U.S. serviceman.<sup>23</sup> Finally, in *Quirin*, the Supreme Court upheld the trial by military commission of a person presumed to be a U.S. citizen.<sup>24</sup>

### 1. *Ex parte Quirin*

In *Ex Parte Quirin*, German saboteurs trained to use explosives, secret writings, and other terrorist tactics landed in the United States during World War II.<sup>25</sup> They came ashore while it was dark, got rid of their German uniforms and changed into civilian clothing with the intent to destroy U.S. facilities that contributed to the war effort.<sup>26</sup> President Franklin D. Roosevelt set up military commissions to try non-citizens during wartime who were charged with committing or attempting to commit, "sabotage, espionage, hostile or warlike acts, or violations of the laws of war."<sup>27</sup> The Supreme Court held that these military commissions were constitutional, stating:

[A]n 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>28</sup>

In *Quirin*, the defendants argued that their trial should be in civilian court because those courts were open and functioning and

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21. Am. Bar Ass'n Task Force on Terrorism & the Law, *Report and Recommendations on Military Commissions*, ARMY LAW., Mar. 2002, at 8, 10 [hereinafter Task Force Recommendations].

22. *Id.*

23. *Madsen v. Kinsella*, 343 U.S. 341, 362 (1952).

24. *Quirin*, 317 U.S. at 48.

25. *Id.* at 21.

26. *Id.*

27. Juan R. Torruella, *On the Slippery Slopes of Afghanistan: Military Commissions and Exercise of Presidential Power*, 4 U. PA. J. CONST. L. 648, 668 (2002).

28. *Quirin*, 317 U.S. at 31. Under the Geneva Convention, recognized prisoners of war have to be charged or repatriated at the end of a conflict, and they are expected to give only their name, rank, and number when questioned. Thom Shanker & Katharine Q. Seelye, *Word for Word/The Geneva Conventions; Who Is a Prisoner of War? You Could Look It Up. Maybe*, N.Y. TIMES, Mar. 10, 2002, § 4, at 9.

therefore not precluded from hearing their case; the Supreme Court rejected that claim.<sup>29</sup> The Court held:

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens 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 Hague Convention and the law of war.<sup>30</sup>

Citizenship, therefore, is not an escape from enemy combatant status or treatment.

## 2. *Application of Yamashita*

In *Application of Yamashita*, the Supreme Court again allowed the use of military tribunals to try the Japanese commander of the Philippines, General Tomoyuki Yamashita, who had massacred civilians and prisoners of war and destroyed property without cause or military necessity.<sup>31</sup> In *Yamashita*, the Court held that the military commission was lawful, despite its creation after the cessation of hostilities between the United States and Japan.<sup>32</sup>

The reasoning behind *Yamashita* helps support the constitutionality of Congress' authorization of military commissions to remedy the terror produced by war crimes, "regardless of whether there are ongoing hostilities at the time of trial."<sup>33</sup> This applies to terrorism because often the acts of war that a terrorist engages in are sporadic and do not necessarily occur in one triable offense.<sup>34</sup>

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29. *Quirin*, 317 U.S. at 24, 48; Task Force Recommendations, *supra* note 21, at 10.

30. *Quirin*, 317 U.S. at 37-38. The Hague Convention is one of a number of international conventions that address different legal issues and attempt to standardize procedures between nations. BLACK'S LAW DICTIONARY 717 (7th ed. 1999). The laws of war are the body of rules and principles observed by civilized nations for the regulation of matters inherent or incidental to the conduct of a public war, such as the relations of neutrals and belligerents, blockades, captures, prizes, truces and armistices, capitulations, prisoners, and declarations of war and peace. *Id.* at 895.

31. *In re Yamashita*, 327 U.S. 1, 14 (1946); Clemmons, *supra* note 17, at 28.

32. *Yamashita*, 327 U.S. at 11; Torruella, *supra* note 27, at 674.

33. 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).

34. *Id.*

### 3. *The Constitution and Other Sources of Authority*

The authority for military commissions comes mainly from Articles I and II of the Constitution.<sup>35</sup> Article I gives Congress the power to “provide for the common Defense”<sup>36</sup> and to “declare War . . . and make Rules concerning Captures on Land and Water.”<sup>37</sup> Article II gives the President “executive Power”<sup>38</sup> and makes him the “Commander in Chief of the Army and Navy.”<sup>39</sup> Additionally, Congress, in Article 15 of the Articles of War, provided that “military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases.”<sup>40</sup> Article 21 of the Uniform Code of Military Justice (which is materially identical to Article 15) provides:

[T]he provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commission, provost court, or other military tribunals.<sup>41</sup>

### **B. Differences Between a Military Trial and a Regular Criminal Trial**

A panel of military officers makes up a military tribunal and tries “both fact and law.”<sup>42</sup> In the military proceeding, there is no right to a trial by jury.<sup>43</sup> Military commissions do not use the traditional rules of evidence.<sup>44</sup> Instead, evidence is admitted if “in the opinion of the Presiding Officer,<sup>45</sup> the evidence would have probative value

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35. Task Force Recommendations, *supra* note 21, at 8-9.

36. U.S. CONST. art. I, § 8, cl. 1.

37. *Id.* art. I, § 8, cl. 11.

38. *Id.* art. II, § 1, cl. 1.

39. *Id.* art. II, § 2, cl. 1.

40. Task Force Recommendations, *supra* note 21, at 9.

41. 10 U.S.C. § 821 (2000).

42. Clemmons, *supra* note 17, at 29. Each commission consists of at least three, but no more than seven members, the number determined by the appointing authority. DEP'T OF DEF., MILITARY COMMISSION ORDER NO. 1, at 2 (2002), available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (last visited May 15, 2003).

43. DEP'T OF DEF., *supra* note 42, at 1-3.

44. *Id.* at 8-9.

45. *Id.* at 9. The presiding officer is designated by the appointing authority to preside over the proceedings of that commission. *Id.* at 3. The presiding officer is a military officer who is a judge advocate in any of the United States Armed Forces. *Id.* The primary responsibilities of the presiding officer are to admit or exclude evidence at trial, close proceedings, ensure the decorum of the proceedings, act upon any con-

to a reasonable person.”<sup>46</sup> This allows the commission to hear evidence that would be inadmissible as hearsay in a non-military criminal trial.<sup>47</sup>

Further, in a regular criminal court, the jury must unanimously agree to convict, whereas in a military proceeding two-thirds of the panel must agree to convict.<sup>48</sup>

An additional distinction between a military trial and a regular criminal proceeding is that in a military trial the accused is not free to select whomever he wants as his attorney.<sup>49</sup> He can:

[S]elect a Military Officer who is a judge advocate of any United States armed force . . . [t]he [a]ccused may also retain the services of a civilian attorney of the Accused’s own choosing . . . provided that attorney . . . has been determined to be eligible for access to information classified at the level SECRET or higher.<sup>50</sup>

This civilian attorney will not necessarily be present at closed commission proceedings.<sup>51</sup> A proceeding can be deemed closed by the presiding officer of the commission on his “own initiative or based upon a presentation . . . by either the prosecution or the defense.”<sup>52</sup> Closing a proceeding could “include a decision to exclude the Accused, Civilian Defense Counsel, or any other person . . . from any trial proceeding or portion thereof.”<sup>53</sup>

### C. The Accused Citizen Terrorists: Padilla, Hamdi, and Lindh

#### 1. *Jose Padilla*

Jose Padilla is thirty-one years old and was born in Brooklyn, New York.<sup>54</sup> Padilla, who converted to Islam in 1992, was arrested

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tempt, ensure the expeditious conduct of the trial, certify all interlocutory question. *Id.*

46. *Id.* at 9.

47. Clemmons, *supra* note 17, at 29.

48. DEP’T OF DEF., *supra* note 42, at 13. With the exception of cases where the death penalty would be imposed; in those cases a unanimous vote is needed to convict. *Id.*

49. *Id.* at 5.

50. *Id.*

51. *Id.*

52. *Id.* at 8. Grounds for closure include the protection of information classified or classifiable under Exec. Order No. 12,958, 60 Fed. Reg. 19,825 (Apr. 17, 1995) “Classified National Security Information”; the physical safety of participants in commission proceedings; safety of national security interests. DEP’T OF DEF., *supra* note 42, at 8.

53. DEP’T OF DEF., *supra* note 42, at 8.

54. Jodi Wilgoren, *Traces of Terror: The Bomb Suspect; From Chicago Gang to Possible al Qaeda Ties*, N.Y. TIMES, June 11, 2002, at A19.



in Chicago on May 8, 2002 after arriving on a flight from Pakistan via Zurich.<sup>55</sup> Padilla is currently being held in a military prison in Charleston, South Carolina.<sup>56</sup> He is known as the "dirty bomber" and is accused of planning to build and detonate a radioactive bomb in the United States.<sup>57</sup> Padilla had been under surveillance by U.S. intelligence for at least five weeks before being taken into custody.<sup>58</sup> Padilla allegedly lied to U.S. authorities, claiming he had never been to Afghanistan, and he did not give a clear explanation as to why he was carrying \$10,000 in cash in his suitcase.<sup>59</sup>

The "Mobbs Declaration," drafted by Michael Mobbs an official in the Department of Defense, states the reasons for Padilla's detention and enemy combatant status.<sup>60</sup> Only part of the declaration has been released to the public, however.<sup>61</sup> The government has declined to release the parts of the report it deemed to contain sensitive government information.<sup>62</sup> The released part of the declaration "describes Padilla's multiple contacts with senior al Qaeda officials while in Pakistan and Afghanistan and their alleged plan to have him return to the United States on a bombing mission."<sup>63</sup>

Attorneys for both Hamdi and Padilla filed petitions for a writ of habeas corpus, claiming that their detention is unlawful.<sup>64</sup> The government claims that neither individual has the right to file a habeas petition.<sup>65</sup> The government also contends that the President's authority as the Commander-in-Chief of the military to classify someone as an enemy combatant in wartime cannot be challenged.<sup>66</sup>

On December 4, 2002, a District Court for the Southern District of New York ruled that Padilla has a right to meet with his attorney and to offer evidence to contest the government's allegation that

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55. *Id.*

56. Mark Hamblett, *Padilla's 'Combatant' Status Challenged*, 228 N.Y. L.J., Oct. 30, 2002, at 1.

57. Stephanie Francis Cahill, *In the News: Citizen Held Without Charges as 'Enemy Combatant' Case of Suspected 'Dirty Bomber' Raises Constitutional Questions*, A.B.A. J. E-REPORT, June 14, 2002, at 2.

58. *Id.*

59. *Id.*

60. Hamblett, *supra* note 56, at 1.

61. *Id.*

62. *Id.*

63. *Id.*

64. Mark Hamblett, *Scope of Judicial Review in Terror Cases Debated*, 228 N.Y. L.J., Nov. 1, 2002, at 1.

65. *Id.*

66. *Id.* at 1.

he is associated with al Qaeda.<sup>67</sup> The court also stated that the President does have the right to detain unlawful combatants, regardless of U.S. citizenship.<sup>68</sup> This ruling is being challenged by the government, which does not want Padilla to have access to his attorney.<sup>69</sup>

## 2. *Yaser Esam Hamdi*

Yaser Esam Hamdi, a twenty-two-year-old Louisiana-born citizen who moved to Saudi Arabia when he was a toddler, was arrested in Afghanistan while allegedly armed and fighting for the Taliban.<sup>70</sup> The government initially transferred Hamdi to Guantanamo Bay, Cuba.<sup>71</sup> After the government realized Hamdi was a citizen, however, it sent him to a naval brig in Norfolk, Virginia.<sup>72</sup>

On January 8, 2003 the United States Court of Appeals for the Fourth Circuit in Richmond, Virginia, said that it was improper for courts to probe too deeply into the detention of Hamdi.<sup>73</sup> The court held that a wartime president can indefinitely detain a United States citizen captured as an enemy combatant on the battlefield and deny that person access to a lawyer.<sup>74</sup> The court additionally held, "[t]he safeguards that all Americans have come to expect in criminal prosecutions do not translate neatly to the arena of armed conflict. In fact, if deference is not exercised with respect to military judgments in the field, it is difficult to see where deference would ever obtain."<sup>75</sup> Since Hamdi was undisputedly present in a zone of active combat operations, he does not have the right to an in depth review of the facts underlying his seizure.<sup>76</sup>

## 3. *John Walker Lindh*

The third U.S. citizen captured as a terrorist suspect is John Walker Lindh, twenty-one, who served as a Taliban militia member

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67. Benjamin Weiser, *Threats and Responses: The Courts; Judge Says Man Can Meet With Lawyer to Challenge Detention as Enemy Plotter*, N.Y. TIMES, Dec. 5, 2002, at A1.

68. *Id.*

69. Benjamin Weiser, *Threats and Responses: The Courts; Judge is Angered by U.S. Stance in Case of 'Dirty Bomb' Suspect*, N.Y. TIMES, Jan. 16, 2003, at A5.

70. Frederick N. Egler, Jr., *Terrorism and the Rule of Law*, 18 LAW. J. 4, 4 (2002).

71. Hamblett, *supra* note 56, at 1.

72. Egler, *supra* note 70, at 4.

73. Neil A. Lewis, *Threats and Responses: The Courts; Detention Upheld in Combatant Case*, N.Y. TIMES, Jan. 9, 2003, at A1.

74. *Id.*

75. *Id.*

76. *Id.*

in Afghanistan from August to November 2001.<sup>77</sup> He pled guilty to supplying services to the Taliban and carrying an explosive during the commission of a felony.<sup>78</sup> Despite his terrorist activities, he has not been declared an enemy combatant.<sup>79</sup> The government has not offered a concrete reason as to why Lindh is not an enemy combatant, while Padilla and Hamdi are. As part of Lindh's plea bargain, however, he agreed to cooperate in the government's al Qaeda investigation;<sup>80</sup> critics suggest that his cooperation is the reason for his non-enemy combatant status.<sup>81</sup>

## II. ADVANTAGES OF A MILITARY TRIAL, PROBLEMS WITH A CRIMINAL TRIAL

### A. Arguments Against Trying Accused Terrorists in Non-Military Courts

Trying suspected terrorists in civilian courts raises various concerns. These include the physical security of the courthouse and the participants in the trial, and the ability to protect classified information, including "intelligence sources and methods whose compromise could facilitate future terrorist acts."<sup>82</sup> Even if a trial were kept confidential and closed to the press and public, the government could not risk a defendant passing classified information to other terrorists, or risk the defendant later using the information himself.<sup>83</sup>

Additionally, in a non-military court, the accused could escape conviction on a technicality or a jurisdictional issue.<sup>84</sup> The relaxed evidentiary rules of military courts are more likely to prevent this from happening. According to some prosecutors, the government is also concerned that allowing a terrorist suspect to have un-

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77. Neil, *supra* note 13, at 2. Lindh was captured in Afghanistan on December 2 or 3, 2001. He was interrogated by the FBI on December 9th and 10th, 2001. During questioning, Lindh said that he had trained in explosives and firearms at a terrorist camp run by al Qaeda, had fought shoulder-to-shoulder with the Taliban before he was captured, had met with Osama bin Laden, and knew that bin Laden had ordered suicide attacks against the United States. Katharine Q. Seelye, *A Nation Challenged: The American Captive American Charged as a Terrorist Makes First Appearance in Court*, N.Y. TIMES, Jan. 25, 2002, at A1.

78. Neil, *supra* note 13, at 2.

79. *Id.*

80. *Id.*

81. *Id.*

82. Task Force Recommendations, *supra* note 21, at 15.

83. *Id.* at 14-15.

84. See Crona & Richardson, *supra* note 33, at 371-74.

restricted contact with a lawyer could impede an investigation.<sup>85</sup> For example, a lawyer could tell his client to remain silent and not give information to the government.<sup>86</sup> This information could be vital to the war effort and prevent future terrorist activities.<sup>87</sup> Frequently, prisoners relent over time; the longer they go without access to counsel the more likely they are to reveal information and cooperate.<sup>88</sup> The interest in preventing mass murder by terrorists, some argue, is more important than the interest in applying the *Miranda* rule to the questioning of terrorist suspects.<sup>89</sup>

### 1. *The President's Rationale*

The President's order to try al Qaeda suspects with military commissions explains:

[T]he September 11 attacks created a state of armed conflict between the United States and al Qaeda, that al Qaeda has both the capability and intention to undertake further terrorist attacks against the United States that could result in mass deaths and injuries . . . and that al Qaeda's actions may place at risk the continuity of the operations of the U.S. government.<sup>90</sup>

The President, therefore, has decided to use military commissions to try non-citizen al Qaeda suspects; to allow for the effective conduct of military operations and as a means to prevent future terrorist attacks.<sup>91</sup>

#### a. *Support for the Presidential Order*

Several military and legal scholars support the President's order.<sup>92</sup> Major General Michael J. Nardotti, a retired Judge Advocate General of the Army, stated that military commissions were needed to address "legitimate concerns for public and individual safety, the compromise of sensitive intelligence, and due regard for the practical necessity to use as evidence information obtained in

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85. Joseph Bianco, United States Attorney for the Southern District of New York & Eric Seidel, Manhattan District Attorney's Rackets Bureau Deputy Chief, Class Discussion in Terrorism and the Law, Fordham University School of Law (Nov. 20, 2002).

86. See Crona & Richardson, *supra* note 33, at 386-87.

87. *Id.*

88. *Id.*

89. *Id.* at 386.

90. Robert C. O'Brien, *Trying Circumstances: The Military Commissions that Will Try the Cases of the Detainees Have Been Established with Appropriate Due Process Guarantees*, 25 L.A. LAW. 48, 51 (2002).

91. *Id.*

92. *Id.*

the course of military operation rather than through traditional law enforcement means.”<sup>93</sup> Ruth Wedgwood, a professor of law at Yale University and member of the United Nations Human Rights Committee, stated that an “open trial would permit al Qaeda members to scrutinize the trial record to see what the government knows about their operating methods.”<sup>94</sup>

## **B. Constitutional Rights: Citizens, Non-Citizens, and Enemy Combatants**

### *1. The Fifth Amendment*

Citizens normally are afforded all the rights guaranteed in the United States Constitution.<sup>95</sup> Included in the Constitution, the Fifth Amendment requires due process of law and states:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . nor be deprived of life, liberty, or property, without due process of law . . .<sup>96</sup>

A terrorist act is potentially a capital offense, and a military trial would not include a presentment or indictment to a grand jury.<sup>97</sup> Therefore, a citizen could argue that trial by a military commission would violate Fifth Amendment rights.<sup>98</sup>

Further, a citizen could claim that a determination of enemy combatant status, without any sort of trial, deprives him of due process, because enemy combatants are held in prison until the government decides to release them.<sup>99</sup>

The government can respond by asserting that because this is a time of public danger, the lack of presentment or indictment to a grand jury is acceptable.<sup>100</sup> The government can also argue that due process is not violated because enemy combatant status is factually based.<sup>101</sup> Additionally, the government could argue that a

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93. *Id.* (quoting Major General Michael J. Nardotti, *Military Commissions*, reprinted in *ARMY LAW*, Mar. 2002, at 4 (remarks Before the Senate Judiciary Subcommittee on Administrative Oversight and the Courts (Dec. 4, 2001))).

94. *Id.*

95. See *infra* notes 96-114 and accompanying text.

96. U.S. CONST. amend. V.

97. See Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

98. See *supra* note 96 and accompanying text.

99. See *infra* Part II.B.3.b.

100. See *infra* Part II.B.3.b.

101. See *supra* Part I.C.

military commission would not necessarily deprive an individual of due process because there are numerous procedures in place to ensure that the proceeding is fair.<sup>102</sup> These procedures include a presumption of innocence and proof beyond a reasonable doubt.<sup>103</sup>

## 2. *The Sixth Amendment*

The Sixth Amendment describes the rights of the accused and states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.<sup>104</sup>

As an enemy combatant, an individual may be held for extended periods of time without access to counsel.<sup>105</sup> If a military commission tries an enemy combatant, he will not be tried by an impartial jury.<sup>106</sup> Additionally, the presiding officer of the commission has the right to close the proceeding at any time, removing it from public view.<sup>107</sup> A military commission also places a restriction on whom the accused may choose to represent him.<sup>108</sup>

## 3. *Case Law and Commentary*

Case law and the Supreme Court's interpretation favor the government's position. In *Quirin*, the Supreme Court allowed the use of military commissions to try enemy combatants, and held that these commissions did not violate the Fifth and Sixth Amendments.<sup>109</sup> The Supreme Court held:

The Fifth and Sixth Amendments, while guaranteeing the continuance of certain incidents of trial by jury which Article III, § 2 had left unmentioned, did not enlarge the right to jury trial as it had been established by that Article . . . § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have

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102. See *infra* note 103 and accompanying text.

103. DEP'T OF DEF., *supra* note 42, at 2.

104. U.S. CONST. amend. VI.

105. See *supra* text accompanying note 74.

106. See Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

107. DEP'T OF DEF., *supra* note 42, at 2.

108. *Id.*; see *supra* Part I.B.

109. *Ex parte Quirin*, 317 U.S. 1, 39-40 (1942).

extended the right to demand a jury to trials by military commission . . . .<sup>110</sup>

Additionally, not all crimes must be tried by a jury. For example, “petty offenses triable at common law without a jury” need not receive a jury trial, and criminal contempt cases where at common law a jury was not required also do not need to be tried by a jury.<sup>111</sup>

The mere fact that an individual is tried by the military does not mean that his trial will be unfair.<sup>112</sup> Professor Lawrence Tribe, a constitutional law expert, argues, “there is nothing to suggest that civilian juries in wartime will be any more fair than military tribunals,” and that military tribunals could be “less vulnerable to the emotional pressures and prejudices which could tempt a civilian jury to convict a person who was factually innocent.”<sup>113</sup> Individuals tried before tribunals are still represented by counsel, are still presumed innocent, and still must be proven guilty beyond a reasonable doubt.<sup>114</sup>

*a. “War” Absent a Formal Declaration by Congress*

A citizen could argue that because the war on terrorism is not a declared war,<sup>115</sup> military commissions should not be used. Both Congress and the Supreme Court have recognized, however, that a formal declaration of war is not necessary for a state of war to exist.<sup>116</sup> The government has argued that “whether a state of armed conflict exists to which the laws of war apply is a political question for the President, not the courts to decide.”<sup>117</sup> These tribunals have been used in other situations where there was no declared war, such as the Civil War and the Indian Wars.<sup>118</sup>

Further, the Fourth Circuit, in *Hamdi v. Rumsfeld*, has recently held that “[t]he unconventional aspects of the present struggle do not make its stakes any less grave” or lessen the military’s author-

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110. *Id.*

111. *See id.*

112. *See infra* notes 113-114 and accompanying text.

113. Clemmons, *supra* note 17, at 30.

114. DEP’T OF DEF., *supra* note 42, at 2.

115. A declared war defines the enemy as another state and its nationals, and marks a clear beginning and end to the conflict with a legal act or instrument marking its conclusion. Task Force Recommendations, *supra* note 21, at 10.

116. *Id.* at 11; *see infra* text accompanying notes 117-121.

117. Respondent’s Reply in Support of Motion to Dismiss the Amended Petition for a Writ of Habeas Corpus at 8, Padilla *ex rel.* Newman v. Bush, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02 Civ. 4445) (referring to the holding in *The Prize Cases*, 67 U.S. 635 (1862)).

118. Task Force Recommendations, *supra* note 21, at 11.

ity to hold enemy combatants.<sup>119</sup> Additionally, Article 21 does not specify that there must be a declared war in order for military commissions to be used.<sup>120</sup> Finally, in *Talbot v. Seeman*, the Supreme Court recognized the ability of Congress to declare a “partial war” targeted at a specific type of enemy aggression even if we are not at war with an enemy nation in the traditional sense.<sup>121</sup>

*b. Extrapolation of the President’s Order to Citizens*

A citizen can point out that the President’s order is directed at non-citizens, and, therefore, citizens should not be tried by military commissions and should not be declared enemy combatants.<sup>122</sup> A joint Congressional resolution, enacted on September 18, 2001, however, authorized the President “to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks on September 11, 2001. . . .”<sup>123</sup> The President could, therefore, include military commissions under “necessary and appropriate force.”<sup>124</sup>

Additionally, Congress has accepted that the President’s Commander-in-Chief powers during wartime include authorizing the detention of enemy belligerents.<sup>125</sup> The provisions of 10 U.S.C. § 956(5) support the “expenditure of funds for the detention of ‘prisoners of war’ and persons—such as enemy combatants—‘similar to prisoners of war,’” indicating Congress’ understanding that the military can capture and hold enemy combatants, including citizens, during wartime.<sup>126</sup>

A citizen could argue that a declaration that he is an enemy combatant violates 18 U.S.C. § 4001(a).<sup>127</sup> This statute “prohibits the detention of a United States citizen without a specific authorization

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119. *Id.* at 9 (citing *Hamdi v. Rumsfeld*, 296 F.3d 278, 283 (4th Cir. 2002)).

120. See Respondent’s Reply Brief at 9, *Padilla* (No. 02 Civ. 4445).

121. *Talbot v. Seeman*, 5 U.S. 1, 28 (1801). *Talbot* involved a ship that was taken during 1799 when the United States and France were in a state of partial war. The Court deliberated over whether it was lawful to take a ship at this time. *Id.*; see *Crona & Richardson*, *supra* note 33, at 360.

122. Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

123. Task Force Recommendations, *supra* note 21, at 11 (citing Pub. L. No. 107-40, 115 Stat. 224 (2001)).

124. *Id.* at 11.

125. Respondent’s Reply Brief at 16, *Padilla* (No. 02 Civ. 4445).

126. *Id.* at 17.

127. See *infra* notes 128-130 and accompanying text.



by an act of Congress.”<sup>128</sup> The legislative history of this statute indicates Congress’ intention to repeal the Emergency Detention Act, which allowed the “detention of each person as to whom there is reasonable ground to believe that such persons will engage in, or probably will conspire with others to engage in acts of espionage or of sabotage.”<sup>129</sup> This suggests that the government does not have the right to detain citizens like the two that are currently being considered enemy combatants.<sup>130</sup>

The government can counter this argument by claiming that § 4001(a) does not apply to enemy combatants during times of war.<sup>131</sup> This statute was specifically placed in Title 18, which pertains to “Crimes and Criminal Procedure,” instead of Title 10 or 50, which govern the “Armed Forces” and “War and National Defense.”<sup>132</sup> Additionally, if this statute did apply in wartime, a citizen could never be classified as an enemy combatant regardless of his actions.<sup>133</sup> This would directly contradict the holding in *Quirin*, declaring that citizens can be considered enemy combatants.<sup>134</sup> Also, § 4001(a) does not apply to detentions “pursuant to an Act of Congress,” and in this case, Congress has given the President support for “all necessary and appropriate force.”<sup>135</sup>

Another way for a citizen to challenge the government’s authority to declare him an enemy combatant is to rely upon the Posse Comitatus Act, 18 U.S.C. § 1385.<sup>136</sup> This Act, created to prevent abuses by the military,<sup>137</sup> prohibits the military from involvement in civilian law enforcement.<sup>138</sup> Declaring a suspected terrorist an enemy combatant and holding him in a military prison seemingly violates this Act.<sup>139</sup> The government can argue, however, that the

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128. Petitioners’ Brief in Support of the Amended Petition for Writ of Habeas Corpus and in Response to Respondent’s Motion to Dismiss at 6, *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02 Civ. 445).

129. *Id.* at 7.

130. *Id.*

131. See Respondent’s Reply Brief at 18, *Padilla* (No. 02 Civ. 4445).

132. *Id.*

133. *Id.* at 19.

134. *Id.*

135. *Id.* at 20.

136. Petitioners’ Brief in Support of the Amended Petition for Writ of Habeas Corpus and in Response to Respondent’s Motion to Dismiss at 6, *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02 Civ. 445).

137. *Id.*

138. *Id.* The Act is intended to prevent the military from taking over civilian government and suspending constitutional liberties. *Bissonette v. Haig*, 485 U.S. 264, 264 (1988).

139. See *supra* notes 136-138 and accompanying text.

act is directed at civilian law enforcement and, therefore, should not apply to the military matter of detention of enemy combatants.<sup>140</sup> It is “the exercise of a core military function to safeguard the national security in a time of war.”<sup>141</sup>

Citizens can also argue that the U.S. government has protested the use of military tribunals to try its citizens in other countries, yet they are considering the use of these tribunals within their own country.<sup>142</sup> The government can respond, however, that as long as reasonable procedural safeguards are in place, military commissions can be mechanisms for a fair trial and do not violate due process, and that the foreign commissions they oppose are not as fairly constructed.<sup>143</sup>

### **C. Treating Terrorists Differently from Other Types of Criminals**

Terrorists involved with al Qaeda could have information that, if exposed in a regular criminal proceeding, could threaten national security.<sup>144</sup> The Pentagon and other intelligence agencies are unwilling to allow suspects access to certain witnesses and evidence that could compromise this security.<sup>145</sup> The government argues that it has a justified interest in keeping terrorists in isolation and under interrogation.<sup>146</sup> Without access to witnesses, however, a suspect in the regular criminal justice system would be deprived of his Sixth Amendment right to seek witnesses that could exonerate him.<sup>147</sup>

The criminal justice system is designed to “err on the side of letting the guilty go free rather than convicting the innocent.”<sup>148</sup> Arguably, this is not a good method for dealing with a terrorist linked to a network such as al Qaeda and the September 11th attacks.

Another problem with a criminal trial is that potential jurors could fear that conviction of the suspect would place their lives in

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140. See Respondent's Reply Brief at 21, *Padilla* (No. 02 Civ. 4445).

141. *Id.*

142. Task Force Recommendations, *supra* note 21, at 15.

143. *Id.*

144. See *supra* Part II.A.

145. See *supra* Part II.A.

146. Philip Shenon & Eric Schmitt, *Threats and Responses: the 9/11 Suspect; White House Weighs Letting Military Tribunal Try Moussaoui, Officials Say*, N.Y. TIMES, Nov. 10, 2002, at A17.

147. *Id.*

148. Clemmons, *supra* note 17, at 31 (citing Crona & Richardson, *supra* note 33, at 379).

danger.<sup>149</sup> Additionally, a public trial would not keep sensitive information secure and could “disclose methods and sources to the enemy.”<sup>150</sup>

As to the different evidence rules, the normal rules of evidence could make it difficult for the court to learn the truth.<sup>151</sup> The introduction of hearsay gives the tribunal more information, and the more information the tribunal has, the more credible its decision will be.<sup>152</sup>

Another advantage of military tribunals is that the proceedings take less time.<sup>153</sup> This faster process is necessary because terrorism is an ongoing threat.<sup>154</sup> “Trials to the court are shorter than jury trials by at least one-half.”<sup>155</sup> This speed is exemplified by the difference in trial length between the first World Trade Center bombing trial and the *Yamashita* case. The World Trade Center case involving 207 witnesses took over five months (from November 1993 to March 1994) while the *Yamashita* case heard 286 witnesses and 3,000 pages of testimony in a little more than five weeks.<sup>156</sup>

Citizens accused of terrorism are not being tried by military tribunals for ordinary criminal activity.<sup>157</sup> Their behavior can be construed as violations of the laws of war, therefore, it is legitimate to try them by military commissions.<sup>158</sup> They acted under the direction of al Qaeda while in civilian clothing, and they committed acts of aggression against innocent, noncombatant civilians and their property, thus violating the laws of war.<sup>159</sup> While al Qaeda is not an independent state, the laws of war also apply to non-state actors, such as insurgents.<sup>160</sup> In fact, al Qaeda itself claims they are waging a *jihad* against the United States.<sup>161</sup>

Further, terrorist acts transcend ordinary criminal acts and, therefore, terrorists should not be tried by the criminal justice system.<sup>162</sup> Spencer Crona, a Denver attorney and writer of an award-

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149. *Id.*

150. *Id.*

151. *Id.*

152. *See id.*

153. *See infra* notes 155-156 and accompanying text.

154. *See supra* Introduction.

155. Crona & Richardson, *supra* note 33, at 387.

156. Clemmons, *supra* note 17, at 31.

157. *See* Military Order of Nov. 13, 2001, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

158. Task Force Recommendations, *supra* note 21, at 11.

159. *See id.* at 12.

160. *Id.*

161. *See* Crona & Richardson, *supra* note 33, at 351.

162. *Id.* at 354.

winning essay on international law, and Neal Richardson, a Deputy District Attorney for Denver who has written about constitutional issues, feel that “terrorism is not a social problem susceptible to civilian intervention and law enforcement, but a military threat and menace to our civilization appropriate for military repulsion.”<sup>163</sup>

Finally, as noted above, some believe that terrorists need to be detained as enemy combatants for the duration of the armed conflict to ensure that they do not aid the enemy and gather additional intelligence that would hurt the U.S. war effort.<sup>164</sup> They are not being held for punishment purposes.<sup>165</sup> Therefore, they are not being punished without due process merely because they are being detained in a military prison.<sup>166</sup>

### **III. MILITARY TRIBUNALS: IF THEY ARE FAIR, THEY ARE APPROPRIATE**

#### **A. Specific Steps to Ensure Fairness**

The United States must take into account the implications of its actions on future circumstances. If we try our own citizens with military commissions, what is to prevent other countries from trying U.S. citizens this way? The government must therefore ensure that these commissions are fair and give defendants a presumption of innocence.

These tribunals should only be used when there is a compelling security interest at stake.<sup>167</sup> It is important to ensure that those tried by military commissions are given a “full and fair trial.”<sup>168</sup> Some principles that could ensure fairness include an independent and impartial tribunal with proceedings open to the press and the public, except for specific and compelling reasons,<sup>169</sup> and the following rights for the defendant: presumption of innocence; prompt notice of charges; trial without undue delay; to be present; to examine, or have examined, the witnesses against him; to the free

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163. *Id.* at 357.

164. See Respondent’s Reply in Support of Motion to Dismiss the Amended Petition for a Writ of Habeas Corpus at 22, *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02 Civ. 4445).

165. *Id.*

166. See *supra* notes 164-165 and accompanying text.

167. Task Force Recommendations, *supra* note 21, at 17.

168. *Id.* at 18.

169. *Id.*

assistance of an interpreter; and not to be compelled to testify against himself or confess guilt.<sup>170</sup>

**B. A Better System to Determine if a Citizen is an Enemy Combatant**

While the courts have traditionally given great deference to "the President's wartime detention decisions," there must be some system of review to determine enemy combatant status.<sup>171</sup> Otherwise, certain citizens will live in fear that they could be picked up off the street and declared an enemy combatant at the whim of the President.<sup>172</sup> While the country is in a state of increased fear and anger and is more willing to accept the detention of citizens, there must be a fair system of review to ensure that the government has good cause in declaring that an individual is an enemy combatant.<sup>173</sup>

Because of national security issues, the government should have the right to declare someone an enemy combatant and detain him for the duration of the armed conflict.<sup>174</sup> If a citizen is legitimately declared an enemy combatant, the President's Executive Order should apply and a military commission should try him. The current standard of review to determine enemy combatant status, however, is not enough.<sup>175</sup> A procedural system needs to be in place to make certain that individuals are not unfairly deemed enemy combatants. A set standard of review to determine enemy combatant status will give U.S. citizens fair warning of the consequences of terrorist acts.

The process for determining enemy combatant status will need to be top secret to guarantee that sensitive information is not released.<sup>176</sup> It could be comprised of a panel of three to five judges nominated by the President and approved with the advice and consent of the Senate, similar to the way in which Supreme Court justices are appointed.<sup>177</sup> The defendant will have the right to have the attorney of his choice, as long as the attorney can pass security

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170. *Id.* Principles taken from Article 14 of the International Covenant on Civil and Political Rights. *Id.*

171. See Respondent's Reply in Support of Motion to Dismiss the Amended Petition for a Writ of Habeas Corpus at 24, *Padilla ex rel. Newman v. Bush*, 233 F. Supp. 2d 564 (S.D.N.Y. 2002) (No. 02 Civ. 4445).

172. See discussion *supra* Part III.A.

173. See discussion *supra* Part III.A.

174. See *supra* Part I.A.1.

175. See discussion *supra* Part I.C.

176. See discussion *supra* Part I.C.

177. U.S. CONST. art. II, § 2, cl. 2.

clearance. The standard of review will be probable cause and the evidentiary rules will be similar to that of a grand jury proceeding, where hearsay is admissible. This is necessary because of the difficulty in establishing these cases, and because witnesses may also be terrorists who are unlikely to cooperate or who are out of the country. The standard of "beyond a reasonable doubt" is too high for cases such as these. Although it should be ensured that civil rights of the accused are not violated, the standard cannot be so high that it is impossible for the government to make its case. The decision of this special court will be final and will not be subject to review, ensuring that the case is not held up by way of lengthy and expensive appeals.<sup>178</sup>

Claiming that someone is an enemy combatant when he is innocent could destroy that person's life, and contravenes the constitutional principles we hold dear. The approach suggested in this Comment would decrease the chances of that happening. While it is possible that some innocent people could slip through cracks in the system and be declared enemy combatants without merit, the minimal risk is warranted considering the large-scale destruction of life and property that terrorists affect.<sup>179</sup> Blackstone, in a commentary on the terrorists of his era, said:

Lastly, the crime of piracy, or robbery and depredation upon the high seas, is an offence [sic] against the universal law of society; a pirate being, according to Sir Edward Coke, *hostis humani generis*. As therefore he has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind, all mankind must declare war against him: so that every community hath a right, by the rule of self-defense, to inflict that punishment upon him, which every individual would in a state of nature have been otherwise entitled to do, for any invasion of his person or personal property.<sup>180</sup>

The United States must defend itself against terrorism. One of our best defense mechanisms is the ability to detain terrorists, minimizing their ability to harm innocent civilians. Another important defense mechanism is the capacity to try terrorists by military commissions so they have swift trials designed to extract fact and are

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178. Crona & Richardson, *supra* note 33, at 395. This is in line with the Charter of the International Military Tribunal at Nuremberg which stated that the judgment of the tribunal was final and not reviewable. *Id.*

179. *Id.* at 406.

180. *Id.* at 406-07 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES \*71).

less likely to create a situation in which a terrorist is released on a technicality. These commissions are a much more effective and legally appropriate way to try and punish terrorists.<sup>181</sup> Just as the U.S. military would not hand over our guns and tanks on the battlefield, so too should the legal system refuse to hand over our legal defense mechanisms and allow terrorists to roam the streets of our country while it is under attack.

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181. *Id.* at 349.

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