

**PROSECUTING AL QAEDA:
America's Foreign Policy Interests Are Best
Served By Trying Terrorists Under
International Tribunals**

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The basic proposition here is that somebody who comes into the United States of America illegally, who conducts a terrorist operation killing thousands of innocent Americans, men, women, and children, is not a lawful combatant. They don't deserve to be treated as a prisoner of war. They don't deserve the same guarantees and safeguards that would be used for an American citizen going through the normal judicial process . . . [T]hey will have a fair trial, but it'll be under the procedures of a military tribunal and rules and regulations to be established in connection with that . . . We think [it] guarantees that we'll have the kind of treatment of these individuals that we believe they deserve.¹

"Bush [has] undermined the anti-terrorist coalition, ceding to nations overseas the high moral and legal ground long held by U.S. justice. And on what leg does the U.S now stand when China sentences an American to death after a military trial devoid of counsel chosen by the defendant?"²

INTRODUCTION

In this paper, the competing reasons for prosecuting foreign terrorists under tribunals, be they domestic, foreign, international, military, or a combination of the above, are explored. A focus is specifically given to the efforts being taken against the al Qaeda militants detained in Guantanamo Bay, Cuba.³ U.S. foreign policy, and

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1. Vice President Dick Cheney, Remarks at the U.S. Chamber of Commerce (Nov. 14, 2001), *available at* <http://www.whitehouse.gov/vicepresident/news-speeches/speeches/vp20011114-1.html>.

2. William Safire, Editorial, *A Rush to Bogus Justice: The Bush Administration's Secret Military Tribunals Will Backfire in the Battle Against Terrorism*, PITT. POST-GAZETTE, Nov. 27, 2001, at A11.

3. According to President Bush, al Qaeda militants are responsible for the

specifically international human rights concerns, is juxtaposed against the public desire for retribution in the wake of the September 11th attacks, and the question of whether the U.S. is better served by prosecuting foreign terrorists under international tribunals is discussed.

Section I provides an introduction to military tribunal terminology and procedure. Section II describes the history of the international military tribunal as created in 1945, the use of foreign national tribunals, the International Court of Justice, and the rise of the International Criminal Court. Section III discusses both the history of domestic military tribunals and President Bush's military tribunals⁴ plan. Section IV discusses the arguments for and against applying either international legal or U.S. constitutional protections to al Qaeda. Section V addresses whether America's foreign policy interests are best served by prosecuting al Qaeda members in U.S. military tribunals or under an international tribunal. The conclusion follows in Section VI.

I. AN INTRODUCTION TO MILITARY TRIBUNAL TERMINOLOGY AND PROCEDURE

In its most traditional form, a military tribunal is a war-time judicial proceeding "used to try violations of the laws of war."⁵ According to the Bush Administration, the September 11th attacks on the World Trade Center complex, the Pentagon, and on Flight 93, grounded in Pennsylvania, constitute "acts of war,"⁶ and attacks on

September 11th attacks on the U.S. See George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), available at <http://www.whitehouse.gov/news/releases/2001/09/20010920-8.html> ("Who attacked our country? The evidence we have gathered all points to a collection of loosely affiliated terrorist organizations known as al Qaeda. They are the same murderers indicted for bombing American embassies in Tanzania and Kenya, and responsible for bombing the USS Cole.").

4. Much ado was made about the naming of these proceedings. Under President Bush's Military Order, see *infra* note 109, they were originally termed "military tribunals." Upon the Department of Justice's release of the procedural rules, the name was changed to "Military Commissions." See Order No. 1, *infra* note 125. This paper will refer to historical military tribunals, as well as the proceedings established following the mandate set forth in President Bush's Military Order, as "military tribunals."

5. See DEP'T OF DEFENSE, *Fact Sheet: Department of Defense Order on Military Commissions*, available at <http://www.defenselink.mil/news/Mar2002/d20020321fact.pdf> (last visited Mar. 21, 2002). See also *Tribunals Break Sharply From Civilian Courts*, at <http://www.cnn.com/2001/LAW/12/06/inv.tribunals.explainer/index.html> (last visited Jan. 13, 2002).

6. See *Remarks by the President In Photo Opportunity with the National Security Team*, available at <http://www.whitehouse.gov/news/releases/2001/09/20010912-4.html> (last visited Feb. 18, 2002) ("The deliberate and deadly attacks which were carried out yesterday against our country were more than acts of terror. They were acts of war."); George W. Bush, Address to a Joint Session of Congress and the American People, *supra*

innocent persons, a violation of the laws of war. The Bush Administration has determined that the culprits of those attacks are a “collection of loosely-associated terrorist organizations known as al Qaeda.”⁷

President Bush, under both his power and authority as the Commander-In-Chief of the military as provided by Article II of the U.S. Constitution, and under Article 21 of the Uniform Code of Military Justice, has the power to convene military tribunals.⁸ Under U.S. law, the Supreme Court permits the use of military tribunals against non-citizens unless, under the Geneva Convention, those defendants are considered “prisoners of war.”⁹ However, the Supreme Court does not limit military tribunals to use against non-citizens: in *Ex parte Milligan*, the Supreme Court held that U.S. citizens *may* be tried by military tribunals, but only if civilian courts are “not open.”¹⁰

Under the International Covenant on Civil and Political Rights, the United Nations requires that military tribunals be fundamentally fair.¹¹

note 3 (“On September the 11th, enemies of freedom committed an act of war against our country.”). See also Keith Johnson and Carlta Vitzthum, *Europeans Make Case Against Use of Military Tribunals*, WALL ST. J., Nov. 28, 2001, at A12.

7. George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *supra* note 3.

8. See *infra* text accompanying notes 109-114.

9. See *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950) (“We are not holding that these prisoners have no right which the military authorities are bound to respect. The United States, by the Geneva Convention of July 27, 1929, 47 Stat. 2021, concluded with forty-six other countries, including the German Reich, an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated only by Presidential intervention.”); see *id.* at 785 (“[T]he Constitution does not confer a right of personal security or an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States. . . . the Military Commission is a lawful tribunal to adjudge enemy offenses against the laws of war.”).

10. See *Ex parte Milligan*, 71 U.S. 2, 125-27 (1866) (“If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevail, there is a necessity to furnish a substitute for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course.” *Id.* at 127.). See also *Tribunals Break Sharply From Civilian Courts*, at <http://www.cnn.com/2001/LAW/12/06/inv.tribunals.explainer/index.html> (last visited Jan. 13, 2002).

11. See *International Covenant on Civil and Political Rights*, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No. 16) at 52, art. 14, U.N. Doc. A/6316 (1966) [hereinafter “Civil and Political Rights Covenant”]; *Universal Declaration of Human Rights*, at art. IX, G.A. Res. 217A(III), U.N. Doc. A/810 at 71 (1948) (“Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.”). See also *Tribunals Break*

Among the Civil and Political Rights Covenant's requirements, a military tribunal must ensure a "fair and public hearing by a competent, independent and impartial tribunal established by law,"¹² and provide the defendant with the presumption of innocence.¹³ The defendant must be informed "promptly and in detail in a language which he understands . . . the nature and cause of the charge against him."¹⁴ The provisions require that the defendant have counsel chosen by him,¹⁵ be able to face and challenge his accuser,¹⁶ have the right to remain silent,¹⁷ and have the right to appeal.¹⁸ President Bush's military tribunal plan, discussed in section III, below, substantially meets those criteria.¹⁹

Sharply from Civilian Courts, supra note 10.

12. *See* Civil and Political Rights Covenant, *supra* note 11, at art. 14(1).

13. *See id.* at art. 14(2).

14. *See id.* at art. 14(3)(a).

15. *See id.* at art. 14(3)(d).

16. *See id.* at art. 14(3)(e).

17. *See id.* at art. 14(3)(g).

18. *See id.* at art. 14(5).

19. *See infra* text accompanying notes 109-142.

II. FOREIGN AND INTERNATIONAL TRIBUNAL USAGE

A. A Brief History of Foreign and International Military Tribunal Usage

Military tribunals have an extensive history, having occurred over a span of time that ranges at least 2500 years.²⁰ With such an extensive history, one may wonder just what the attraction is. Perhaps the answer is that, historically, the military provided the only means to conduct such a proceeding. However, as discussed below, military tribunals offer one very attractive benefit: the ability to publicly bring an adversary war power's leaders to justice. Quite often, that application of justice involves employing the death penalty.²¹

The first known use of a military tribunal occurred in 405 B.C., after the destruction of the Athenian fleet at Aegospotamos.²² According to the ancient historian Xenophon, the Lacedaemonian admiral Lysander called a meeting of his allies to determine the fate of the vanquished Athenians.²³ The Athenians were accused of several war crimes, and were summarily executed.²⁴

A more modern use of the military tribunal was seen during the Middle Ages. These tribunals were distinguished from earlier ones because here, trials were actually held. In 1474, Sir Peter of Hagenbach, made Governor of Breisach by the conquering Duke Charles of Burgundy, was captured and tried for war crimes he committed in the town of Breisach.²⁵ Hagenbach argued that he was not to blame; he merely acted under the orders of his commanding officer. Hagenbach's "superior orders" defense fell upon deaf ears: he was sentenced to death and executed.²⁶

One popular nineteenth century example occurred when Napoleon Bonaparte, after his escape from exile in Elba, returned to France leading an army.²⁷ He was subsequently captured and tried. Under the terms of the prior Congress of Vienna's Declaration of March 13, 1815, Napoleon had been declared an outlaw and subject to any actions that the Allied powers deemed appropriate.²⁸ Placed in custody of the British

20. See *infra* text accompanying note 22.

21. See *infra* text accompanying notes 24-26.

22. See ROBERT K. WOETZEL, *THE NUREMBERG TRIALS IN INTERNATIONAL LAW* 17 (1962).

23. See *id.*

24. *Id.* See also PLUTARCH, *LIVES OF THE NOBLE GRECIANS AND ROMANS I* (John Dryden, trans.) (1992).

25. See WOETZEL, *supra* note 22, at 19-20.

26. See *id.*

27. See *id.* at 23.

28. See *id.*

Government, Napoleon was again exiled, this time to St. Helena.²⁹ While not an example employing execution, this does provide precedent for the applicability of a military tribunal's use to try an adversary's most senior leader.

B. The Rise of Foreign and International Military Tribunals

The use of international military tribunals has its genesis in the various peace treaties signed in 1919, at the end of World War I. Article 227 of the Treaty of Versailles provided for a special tribunal composed of judges from the U.S., Great Britain, France, Italy, and Japan, to try William II, the former German Emperor, for offenses "against international morality and the sanctity of treaties."³⁰ Under that Treaty's Article 228, provisions were included for military tribunals of German individuals accused of "having committed acts in violation of the laws and customs of war."³¹ The Treaty of Saint-Germain-En-Laye³² provided similarly for the Austrians, the Treaty of Neuilly-Sur-Seine³³ for the Bulgarians, the Treaty of Trianon³⁴ for the Hungarians, and the Treaty of Sevres³⁵ for the Turks. Pursuant to the Treaty of Versailles, the Allied powers submitted a list of 896 individuals to be handed over for trial.³⁶ Concerns over a renewed war between Germany and the Allies, or a civil war in Germany, however, led to the abandonment of the requirement that Germany surrender those accused for trial.³⁷

In 1945, following the end of World War II, international military tribunals again arose, now as a means created "in the interests of the United Nations,"³⁸ to try those responsible for both war crimes and crimes against humanity.³⁹ The Agreement . . . for the Prosecution and Punishment of the Major War Criminals of the European Axis [hereinafter the "London Agreement"],⁴⁰ signed by representatives from

29. *See id.*

30. *See* Treaty of Versailles, June 28, 1919, art. 227.

31. *Id.* at art. 228.

32. *See* Treaty of Saint-Germain-En-Laye, Sept. 10, 1919, art. 173 *et seq.*

33. *See* Treaty of Neuilly-Sur-Seine, Nov. 27, 1919, art. 118 *et seq.*

34. *See* Treaty of Trianon, June 4, 1920, art. 157 *et seq.*

35. *See* Treaty of Sevres, Aug. 10, 1920, art. 226 *et seq.*

36. *See* WOETZEL, *supra* note 22, at 31.

37. *See* JAMES F. WILLIS, PROLOGUE TO NUREMBERG 113 (1982).

38. London Agreement, *infra* note 40, at preambular paragraphs.

39. *See* V.N. Kudriavtsev, *The Nuremberg Trial and Problems of Strengthening the International Legal Order*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW*, at 4 (George Ginsburgs & V.N. Kudriavtsev, eds. 1990). War crimes are "violations of the law and customs of war, and criminal acts against the civilian population of occupied countries . . . crimes against peace and conspiracy to wage aggressive war." *See* WOETZEL, *supra* note 22, at 6.

40. *See* Agreement by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet

the U.S., the United Kingdom, the U.S.S.R. and France, formed the foundation for conducting the Nuremberg Trials. These trials were the first actual historical precedent for the *international* trial and punishment of war criminals.⁴¹ Nearly one year later, the first Nuremberg trial concluded.⁴² Twelve defendants, including the Nazi's second-in-command,⁴³ Herman Göering, were sentenced to death.⁴⁴ The defendants were executed two weeks later.⁴⁵ That same year, international military tribunals were used to try Japanese for war crimes.⁴⁶ Twenty-four of twenty-five defendants were convicted, including the Japanese Prime Minister General Hideki Tojo, who was condemned to death and hung.⁴⁷

While the London Agreement permitted domestic trials,⁴⁸ they were not so limited. The U.S. tried many foreign defendants under U.S. military commissions conducted in the defendants' own countries. According to Deputy Defense Secretary Paul Wolfowitz, these foreign military tribunals were very successful: "[I]n Germany, we prosecuted 1,672 individuals for war crimes before U.S. military commissions. Convictions were obtained in 1,416 cases. In Japan, we tried 996 suspected war criminals before military commissions . . . 856 were

Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945 [hereinafter the "London Agreement"], *available at* <http://www.yale.edu/lawweb/avalon/imt/proc/imtchart.htm> (last visited Jan. 27, 2002).

41. See WOETZEL, *supra* note 22, at 15.

42. See *The Nuremberg Trials Chronology*, at <http://www.law.umkc.edu/faculty/projects/ftrials/nuremberg/NurembergChronology.html> (last visited Mar. 30, 2002).

43. See *Herman Göering the Reichmarshall*, at <http://auschwitz.dk/Goering.htm> (last visited Mar. 30, 2002).

44. The twelve defendants were Herman Wilhelm Göering, Joachim Von Ribbentrop, Wilhelm Keitel, Ernst Kaltenbrunner, Alfred Rosenberg, Hans Frank, Wilhem Frick, Julius Streicher, Fritz Sauckel, Alfred Jodl, Arthur Seyss-Inquart, and Martin Bormann. See WOETZEL, *supra* note 22, at 7-12.

45. See *id.* at 15. Herman Göering committed suicide in his jail cell on October 15, 1946, the day before the executions. *Id.*

46. See *Key Tribunals*, at <http://www.cnn.com/2001/LAW/12/06/inv.tribunals.timeline/index.html> (last visited Jan 13, 2002).

47. *Id.*

48. While the international military tribunal was created to communally address the atrocities committed against all nations, by war criminals "whose offenses have no particular geographic location, whether they be accused individually or in their capacity as members of organizations or groups," both the London Agreement's preamble and Article 6 allowed for trial by a single nation's courts. See London Agreement, *supra* note 40, at art. 1. The London Agreement's preamble provides that parties who have "been responsible for or have taken a consenting part in atrocities and crimes will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished . . ." *Id.* at preambular paragraphs. Article 6 provides that the Agreement does not "prejudice the jurisdiction or powers" of an individual nation to try war criminals in their own courts. *Id.* at art. 6.

convicted.⁴⁹

Although the use of international tribunals was nearly dormant for the fifty ensuing years, the 1990's again saw the convening of international tribunals.⁵⁰ This time they were non-military tribunals, created under the auspices of the United Nations Security Council, and were used to try defendants accused of genocide in Yugoslavia and Rwanda.⁵¹ The next section describes their creation and use.

C. The International Court of Justice and the Rise of the International Criminal Court

The International Court of Justice is the "principal judicial organ" of the United Nations.⁵² It was created in 1945 under the Charter of the United Nations,⁵³ with the primary aim of resolving disputes between U.N. member states.⁵⁴ Accordingly, this "principal judicial organ" has no jurisdiction over matters involving individual criminal responsibility.⁵⁵ However, on an ad hoc basis, the United Nations has created tribunals to deal with individual responsibility for the crime of genocide, and other war crimes.⁵⁶

In 1993, the United Nations' Security Council established the International Crimes Tribunal for the Former Yugoslavia.⁵⁷ That tribunal was established with the mandate of trying individuals accused of genocide and crimes against humanity.⁵⁸ The tribunal's primary defendant is the former Yugoslavian president Slobodan Milosevic, whose trial began in February, 2002.⁵⁹ While charged with both genocide and lesser crimes against humanity, in accordance with the United Nations' stance on human rights,⁶⁰ even were Milosevic

49. See Jim Garamone, *Wolfowitz Discusses Military Commissions Trying Terrorists*, ARMED FORCES PRESS SERV., available at http://www.defenselink.mil/news/Dec2001/n12132001_200112133.html (last visited Feb. 18, 2002).

50. See *infra* text accompanying note 58.

51. See *id.*

52. COALITION FOR THE INTERNATIONAL CRIMINAL COURT, *Questions and Answers on the International Criminal Court* at 1, available at <http://www.icc.org/icc/html/pressqandaicc.pdf> (last visited Feb. 18, 2002).

53. See *International Court of Justice 1946-1996*, at [http://www.icj-cij.org/icjwww/igeneral information/ibook/Bbookframepage.htm](http://www.icj-cij.org/icjwww/igeneral%20information/ibook/Bbookframepage.htm) (last visited Mar. 30, 2002).

54. See COALITION FOR THE INTERNATIONAL CRIMINAL COURT, *supra* note 52, at 1.

55. See *id.*

56. See *id.* at 2.

57. See *Key Tribunals*, *supra* note 46.

58. See *id.*

59. See Blaine Harden, *The Family Milosevic: The Unrepentant*, Jan. 20, 2002, available at <http://www.nytimes.com/2002/01/20/magazine/20MILO.html> (last visited Jan. 27, 2002).

60. See *Universal Declaration of Human Rights*, *supra* note 11, at art. 3.

convicted on all counts, the most severe sentence he could receive is life imprisonment.⁶¹ In 1994, the United Nations Security Council again formed an international tribunal, this time to try 35 defendants accused of the genocide of Tutsis and Hutus in Rwanda.⁶² The first defendant convicted in this continuing trial was a Rwandan mayor, Jean-Peal Akayesu.⁶³ By Security Council mandate, both of these ad hoc tribunals dealt only with crimes committed in those two areas during “specific periods of time.”⁶⁴ As such, the ad hoc tribunals have been specifically empowered to deal with specific crimes during defined time periods, and are not provided the power to try all such crimes occurring at any point in time.

In response to the large numbers of horrific war crimes occurring in the recent past,⁶⁵ coupled with the understanding that there is no continuously-serving international body specifically charged with the jurisdiction over individuals committing such crimes, there has been a recent push to create an International Criminal Court.⁶⁶ The International Criminal Court [hereinafter the “ICC”] has just recently passed the ratification process.⁶⁷

The ICC is designed as “a permanent, independent institution capable of addressing the crimes identified in [its founding document] on an ongoing basis”⁶⁸ The ICC, however, is not designed to supplant domestic judicial bodies. Rather “the Court can exercise its jurisdiction if national courts are unwilling or unable to investigate or prosecute such crimes.”⁶⁹ The ICC is specifically designed to hold individuals criminally responsible for acts of genocide, crimes against humanity, war crimes and “aggression.”⁷⁰ Due to an inability to agree

61. See Helena Cobban, *Milosevic on Trial: Big Test for the Hague Court*, CHRISTIAN SCI. MONITOR, Jul. 9, 2001, available at <http://www.csmonitor.com/2001/0709/p13s1-coop.html> (last visited Mar. 30, 2002).

62. See *Key Tribunals*, *supra* note 46.

63. *Id.*

64. See COALITION FOR THE INTERNATIONAL CRIMINAL COURT, *supra* note 52, at 2.

65. See *id.* at 1 (“In the past 50 years alone, more than 250 conflicts have erupted around the world; more than 86 million civilians, mostly women and children died in these conflicts; and over 170 million people were stripped of their rights, property and dignity.”).

66. The framework for the ICC, the Rome Statute of the International Criminal Court [hereinafter the “Rome Statute”], was created during the United Nations Diplomatic Conference held in Rome during July, 1998, and adopted on July 17, 1998. 139 nations have signed the Rome Statute, including the United States, which signed the Rome Statute on December 31, 2000. See *id.* at 2.

67. According to its provisions, the Rome Statute will enter into force, thus creating the ICC, after its 60th ratification. See *id.* at 2. On May 15, 2002, Greece became the 67th State to ratify the Rome Statute. See *Rome Statute Signature and Ratification Chart*, at <http://www.icc.org/rome/html/ratify.html> (last visited May 15, 2002).

68. See COALITION FOR THE INTERNATIONAL CRIMINAL COURT, *supra* note 52, at 2.

69. *Id.*

70. The crimes are thus defined:

on a definition, terrorism was not included among that list.⁷¹ Because the ICC has just passed the ratification process and its founding members have failed as of yet to agree on a definition of terrorism, were the United Nations to convene an international tribunal to address the terrorist acts of September 11th, it would likely be convened in one of two forms: either as an ad hoc tribunal under a Security Council Resolution, or as an international trial under the ICC following the creation of a working definition of terrorism.

III. U.S. MILITARY TRIBUNALS

A. A Brief History of U.S. Military Tribunal Usage

U.S. history is punctuated by several military tribunals.⁷² It is believed that the first such use may have come as early as 1780,⁷³ when Major John Andre, Adjutant-General to the British Army, was tried as a spy before a "Board of General Officers" and was hung.⁷⁴ The first *official* U.S. military tribunals are traced to 1847, during the U.S.-Mexican War, where General Winfield Scott ordered that U.S. forces committing violations of the law of war be punished by military

Genocide covers those specifically listed prohibited acts (e.g. killing, causing serious harm) committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group.

Crimes against humanity cover those specifically listed prohibited acts when committed as part of a widespread or systematic attack directed against any civilian population. Such acts include murder, extermination, rape, sexual slavery, the enforced disappearance of persons and the crime of apartheid, among others.

Genocide and crimes against humanity are punishable irrespective of whether they are committed in time of "peace" or of war.

War crimes cover grave breaches of the Geneva Conventions of 1949 and other serious violations of the laws of war, committed on a large scale in international as well as internal armed conflicts. The inclusion of internal conflicts is consistent with customary international law and reflects the reality that in the past 50 years, the most serious violations of human rights have occurred, not in international conflicts, but within States.

The crime of aggression will be dealt with by the Court when the Assembly of States Parties has agreed on the definition, elements and conditions under which the Court will exercise jurisdiction; this cannot happen until a review conference has been held, seven years after entry into force of the treaty.

Id. at 3.

71. *See id.* at 4.

72. *See, e.g. Key Tribunals, supra* note 46.

73. *See id.*

74. *See Ex parte Quirin*, 317 U.S. 1, 31 n.9 (1942).

tribunal.⁷⁵ One notable occurrence is the 1865 military tribunal used to sentence four individuals to death for the conspiracy resulting in the assassination of President Abraham Lincoln.⁷⁶

In 1942, in what is arguably the most famous military tribunal use, President Franklin D. Roosevelt ordered military tribunals to try eight German saboteurs caught sneaking ashore in New York and Florida.⁷⁷ In *Ex parte Quirin*, a habeas corpus proceeding brought appurtenant to that case, the U.S. Supreme Court held that military tribunals may be used to try “unlawful combatants.”⁷⁸ The significance of that determination is discussed below.

B. U.S. Military Tribunals as Applied in Ex Parte Quirin

*“I want one thing clearly understood . . . I won’t hand them over to any United States Marshal armed with a writ of habeas corpus.”*⁷⁹

The story behind *Ex parte Quirin* is a wild tale of international intrigue.⁸⁰ Each of the eight German-born saboteurs had spent time living and working in the U.S.⁸¹ Each returned to Germany between 1933 and 1941,⁸² under a plan which offered any German citizen a free one-way ticket home.⁸³ Each was subsequently recruited and trained under Operation Pastorius,⁸⁴ and given the goal of targeting both war-important sites and creating generalized terror in the U.S.⁸⁵

The eight saboteurs arrived by U-boat between June 13 and 17, 1942,⁸⁶ landing in New York and Florida.⁸⁷ The saboteurs, fortunately, never achieved their destructive goals: within two weeks, the F.B.I. had captured them all.⁸⁸ On July 2, 1942, President Roosevelt appointed a Military Commission, directing it to try the saboteurs for violations of

75. See, *Key Tribunals*, *supra* note 46.

76. See Lawrence L. Knutson, *Response to Terror*, L.A. TIMES, Jan. 13, 2002, at A9.

77. See *Key Tribunals*, *supra* note 46.

78. See *infra* text accompanying note 98.

79. President Franklin D. Roosevelt, as quoted in a memo to Attorney General Francis Biddle. See Gary Cohen, *The Keystone Kommandos*, ATLANTIC MONTHLY, Feb. 2002, at 53.

80. For an engaging account of the events, see *id.*

81. See *Ex parte Quirin*, 317 U.S. 1, 20 (1942).

82. See *id.*

83. See Cohen, *supra* note 79, at 47.

84. Operation Pastorius was named after Franz Daniel Pastorius, the leader of the first group of Germans to land in Germantown, Pennsylvania. See *id.*

85. The target sites included factories involved in the aluminum industry, hydro-electric plants, waterways, railroads, bridges, and Jewish-owned department stores. See *id.* at 46.

86. See *Ex parte Quirin*, 317 U.S. at 21.

87. See *id.*

88. See *id.*

the Articles of War.⁸⁹ The same day, the President declared that:

all persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States . . . through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals; and that such persons shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on their behalf, in the courts of the United States.⁹⁰

The military tribunal began July 8, 1942,⁹¹ in room 5235 of the Department of Justice.⁹² The eight saboteurs were tried before a tribunal of seven, which consisted of four Major Generals and three Brigadier Generals.⁹³ The defense rested nineteen days later.⁹⁴ Defense counsel then filed a writ of habeas corpus to the Supreme Court, arguing that the President's order was "invalid and unconstitutional,"⁹⁵ and that civilian courts, not military courts, were the proper forum for this trial.⁹⁶

The Supreme Court, meeting in special session, denied those arguments,⁹⁷ stating that:

an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, [is among several] 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.⁹⁸

The Court continued, "[u]nlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."⁹⁹

With the legality of the proceedings assured, President Roosevelt

89. *See id.* at 22.

90. *See* 7 C.F.R. § 5101 (1942), quoted in *Ex parte Quirin*, 317 U.S. at 22-23.

91. *See* Cohen, *supra* note 79, at 55.

92. *See id.*

93. *See id.* at 54.

94. *See id.* at 58.

95. *See id.* at 55.

96. *See id.*

97. *See id.* at 59.

98. *See Ex parte Quirin*, 317 U.S. at 31.

99. *Id.*

sentenced six of the eight saboteurs to death by electrocution.¹⁰⁰ The sentence was carried out the next day.¹⁰¹ The six were buried in a pauper's cemetery, in the District of Columbia,¹⁰² their graves marked only with numbers 276 through 281.¹⁰³ The other two saboteurs received prison sentences; one for thirty years, the other for life.¹⁰⁴ Six years later, the two were deported to Germany.¹⁰⁵

C. President Bush's Military Tribunal¹⁰⁶ Plan

*"From the territory of Afghanistan, the Al-Qaeda organization continues to train and support agents of terror who attack innocent people throughout the world and target United States nationals and interests in the United States and abroad."*¹⁰⁷

*"[T]ens of thousands of trained terrorists are still at large. These enemies view the entire world as a battlefield, and we must pursue them wherever they are."*¹⁰⁸

The power and authority underlying President Bush's ability to both issue his Military Order, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,"¹⁰⁹ and to convene military tribunals, stems initially from his constitutional authority as Commander-in-Chief of the Armed Forces, and from the powers thus vested by Articles 21 and 36 of the Uniform Code of Military Justice.¹¹⁰

100. See Cohen, *supra* note 79, at 59.

101. See *id.*

102. See *id.*

103. See *id.*

104. See *id.*

105. See *id.*

106. This paper will refer to historical military tribunals, as well as the proceedings established following the mandate included in President Bush's Military Order, as "military tribunals." See *supra* note 4.

107. See Letter Dated 7 October 2001 from the Permanent Representative of the United States of America to the United Nations Addressed to the President of the Security Council, U.N. Doc. S/2001/946 (2001), available at <http://www.un.int/usa/s-2001-946.htm> (last visited Feb. 18, 2002).

108. See *President Delivers State of the Union Address*, available at <http://www.whitehouse.gov/news/releases/2002/01/20020129-11.html> (last visited Feb. 18, 2002).

109. See Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, [hereinafter "Military Order"], available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (last visited Nov. 13, 2001).

110. See U.S. CONST., art. II, § 2 ("The President shall be Commander-in-Chief of the Army and Navy of the United States."); UCMJ, art. 21 (codified at 10 U.S.C. § 821 (2001)) ("The 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 commissions, provost courts, or other military tribunals."); UCMJ, art. 36 (codified at 10 U.S.C. § 836 (2001)) ("pretrial, trial, and post-trial procedures, including

Additional authority comes from section 3 of the Manual for Courts-Martial,¹¹¹ and federal case law.¹¹² President Bush did not consult Congress when drafting his Military Order.¹¹³ However, Congress did authorize President Bush to use military force against al Qaeda militants.¹¹⁴

The President's Military Order states that due to the "magnitude of potential deaths, injuries and property destruction"¹¹⁵ that may result from terrorist attacks, "and the probability that such attacks will occur . . . an extraordinary emergency exists for national defense purposes, that this emergency constitutes an urgent and compelling interest, and that issuance of this order is necessary to meet the emergency."¹¹⁶ In his Military Order, President Bush authorized the use of military tribunals against international terrorists, stating that they are "to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals."¹¹⁷

The scope of the Military Order's term "international terrorist" is

modes of proof, for cases arising under [chapter 10], triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with [chapter 10]."). *See generally*, Robert J. Delahunty & John C. Yoo, *The President's Constitutional Authority to Conduct Operations Against Terrorist Organizations and the Nations that Harbor or Support Them*, 25 HARV. J.L. & PUB. POL'Y 487 (2002); Robert F. Turner, *The War on Terrorism and the Modern Relevance of the Congressional Power to "Declare War,"* 25 HARV. J.L. & PUB. POL'Y 519 (2002). *But see* 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); George P. Fletcher, *On Justice and War: Contradictions in the Proposed Military Tribunals*, 25 HARV. J.L. & PUB. POL'Y 635 (2002).

111. JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL UNITED STATES I-1 at § 3 (2000) [hereinafter "Manual for Courts-Martial"] (stating that the agencies through which military jurisdiction is exercised includes courts-martial), available at <http://www.jag.navy.mil/documents/mcm2000.pdf> (last visited Mar. 30, 2002).

112. *See e.g.*, *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942) ("An important incident to the conduct of war is the adoption of measures by the military command not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who . . . have violated the law of war.").

113. *See* Jess Bravin, *Deputy to Ashcroft and Senators Clash on Tribunal Policy*, WALL ST. J., Nov. 29, 2001, at A4.

114. "[T]he 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." *See* Joint Resolution to Authorize the Use of United States Armed Forces Against Those Responsible for the Recent Attacks Against the United States § 2, Public Law 107-40, 115 Stat. 224 (2001).

115. Military Order, *supra* note 109, at § (1)(g).

116. *Id.*

117. *Id.* at § (1)(e).

wide: it encompasses al Qaeda members, any individual who has “engaged in, aided or abetted, or conspired to commit, acts of international terrorism” or acts that have threatened injury to United States “citizens, national security, foreign policy, or economy,” as well as any individual who has knowingly harbored an international terrorist.¹¹⁸ Under the later-adopted Patriot Act,¹¹⁹ the definition of engaging in “terrorist activity” includes any foreigner who uses “dangerous devices” or knowingly or unknowingly raises money for any terrorist group.¹²⁰ While not applicable to U.S. citizens, President Bush’s Military Order does allow for the military trial of U.S. permanent residents.¹²¹

In his Military Order, President Bush, for reasons of “danger to the safety of the United States and the nature of international terrorism,”¹²² found it “not practicable” to apply the principles of law and the rules of evidence as recognized in criminal courts.¹²³ According to Phillip Lacovara, former Deputy Solicitor General, “[p]eople charged with violations of the laws of war are not entitled to the same level of guarantees as civilians charged with crimes, as long as the proceedings are fundamentally fair.”¹²⁴

Accordingly, President Bush’s military tribunals have their own rules of procedure. These procedural rules markedly differ from “traditional” procedural rules as applied in civilian courts.¹²⁵ Among these differences: military tribunals may be closed proceedings, even to

118. *Id.* at § (2)(a)(1)(iii). The Military Order does not provide for the trial of U.S. citizens. *See id.* at § (2)(a). The Supreme Court, however, does not limit military tribunal use to non-citizens: in *Ex parte Milligan*, the Court held that U.S. citizens may be tried by military tribunals, but only if civilian courts are “actually closed.” *See Ex parte Milligan*, 71 U.S. 2, 127 (1866). *See also Tribunals Break Sharply from Civilian Courts, supra* note 10.

119. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 [hereinafter the “Patriot Act”], available at http://www.eff.org/Privacy/Surveillance/Terrorism_militias/20011025_hr3162_usa_patriot_bill.html (last visited Jan. 27, 2002).

120. *See* Matthew Purdy, *Legal Powers Are Expanded in Bush Plan*, N.Y. TIMES NEWS SERV., Nov. 26, 2001.

121. *See generally* Military Order, *supra* note 109. *See also supra* note 118.

122. *See* Military Order, *supra* note 109, at § (1)(f).

123. *Id.* at § (1)(f).

124. *See* Purdy, *supra* note 120.

125. *Compare The Avalon Project: Uniform Rules of Procedure, Military Tribunals, Nuernberg, Revised to 8 January 1948, at* <http://www.yale.edu/lawweb/Avalon.imt.rules5.htm> (last visited Feb. 14, 2002), *with* Military Order, *supra* note 109, Dep’t of Defense Fact Sheet, *supra* note 5, at 2-3, and DEPT OF DEFENSE, *Military Commission Order No. 1* [hereinafter “Order No. 1”], available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (last visited March 21, 2002).

the accused himself;¹²⁶ there are no juries,¹²⁷ defendants are judged instead by a group consisting of between three and seven members,¹²⁸ where each member is a commissioned officer of the United States military;¹²⁹ U.S. military tribunals may be held extraterritorially, e.g. in foreign countries or upon U.S. naval ships;¹³⁰ defendants have no right to counsel while being interrogated,¹³¹ and will not have the benefit of receiving exculpatory evidence in possession of the prosecution, as they would if prosecuted in a non-tribunal setting;¹³² and guilt need only "have probative value to a reasonable person,"¹³³ it need not be established beyond a reasonable doubt. Indeed, guilt may be established by as little as a two-thirds vote of its judges.¹³⁴ Under Bush's military tribunal plan, the sentences meted out may be severe, up to and including life imprisonment or even death.¹³⁵ The Department of Defense's Military Commission Order No. 1, which established the tribunals' actual procedural rules, provides that a death sentence may be imposed only upon a unanimous verdict.¹³⁶

While Bush's original plan made no provision for terrorists to appeal the tribunal's decision,¹³⁷ his released plan included the provision that guilty verdicts may be appealed to the Secretary of Defense and to the President.¹³⁸ There is, however, no provision for

126. See *Tribunals Break Sharply from Civilian Courts*, *supra* note 10; Order No. 1, *supra* note 125, at § 6(B)(3) (stating that the decision to close a proceeding or portion thereof may include a decision to exclude the accused).

127. See *Tribunals Break Sharply from Civilian Courts*, *supra* note 10.

128. See Order No. 1, *supra* note 125, at § 4(A)(2).

129. See *id.*, at § 4(A)(3).

130. See *Tribunals Break Sharply from Civilian Courts*, *supra* note 10; Order No. 1, *supra* note 125, at § 6(B)(4).

131. Serge Schmemmann, *Prisoners, Surely. But POWs?*, N.Y. TIMES NEWS SERV., Jan. 27, 2002.

132. See Purdy, *supra* note 120.

133. See *id.*

134. See *id.* See also Military Order, *supra* note 109, at § (4)(a).

135. See Military Order, *supra* note 109, at § (4)(a). It is widely known that President Bush, former governor of Texas, a state which has executed 257 prisoners since 1976, is a proponent of the death penalty. See DEATH PENALTY INFORMATION CENTER, *Number of Executions By State Since 1976*, at <http://www.deathpenaltyinfo.org/dpicreg.html> (last visited Jan. 14, 2002); *Bush Takes Case for Military Tribunals to Spain's PM*, DOW JONES INT'L NEWS, Nov. 28, 2001.

136. See Order No. 1, *supra* note 125, at § 6(F). For the corresponding rule applying to military courts-martial, see Manual for Courts-Martial, *supra* note 8, at Rule 1006(d)(4)(A).

137. The Military Order states that "the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal." Military Order, *supra* note 109, at §7(b)(2). See also Jess Bravin, *Deputy to Ashcroft And Senators Clash On Tribunal Policy*, WALL ST. J., Nov. 29, 2001, at A4.

138. See *id.* See also Order No. 1, *supra* note 125, at § 6(H)(5)-(6).

appeal to any U.S. court.¹³⁹ The analysis underlying support of this position is based on the fact that the detainees are being held outside of the sovereign territory of the U.S., see Section IV(C), below. Habeas corpus review is similarly stymied. Because the right to federal habeas corpus review only applies if the trials are conducted on U.S. sovereign territory,¹⁴⁰ the fact that most of the al Qaeda militants are imprisoned in Guantanamo Bay, Cuba will effectively preclude federal review if the detainees are tried extraterritorially.¹⁴¹

Amnesty International has raised concerns over the procedure outlined in Bush's Military Order. Among the concerns the organization raises are that the Military Order is discriminatory, because it affords foreign nationals "a lower standard of justice than U.S. nationals," that there is no separation between the executive branch's role and that of the judiciary because it "gives unfettered and unchallengeable discretionary power to the executive to decide whom will be prosecuted and under what rules," that the Military Order "bypasses the normal principles of law and rules of evidence in the trials of people charged with criminal offenses in the U.S. courts," and that there was no right to appeal.¹⁴² The applicability of U.S. constitutional and international legal protections to the instant situation are discussed below.

IV. THE APPLICABILITY OF INTERNATIONAL LEGAL AND U.S. CONSTITUTIONAL PROTECTIONS TO AL QAEDA MILITANTS

A. *Why Aren't al Qaeda Militants Protected under the Geneva Convention As Prisoners of War?*

*"If a U.S. Serviceman were captured by Taliban forces, we – and the U.S. – would be fighting to ensure that he be entitled to protection as a prisoner of war Captured combatants should have this presumption and any doubt should be decided by a competent tribunal."*¹⁴³

Historically, the U.S. viewed terrorists as "common criminals, to be tried in civil courts."¹⁴⁴ Now, the White House considers the captured al

139. See Military Order, *supra* note 109, at §7(b)(2).

140. See generally *Coalition of Clergy v. George Walker Bush*, 2002 U.S. Dist. LEXIS 2748 (C.D. Cal. 2002).

141. See *infra* text accompanying notes 162-171.

142. See AMNESTY INT'L, *USA: Presidential Order on Military Tribunals Threatens Fundamental Principles of Justice*, available at <http://web.amnesty.org/ai.nsf/Index/AMR511652001> (last visited Feb. 18, 2002).

143. Darcy Christen, spokesperson for the Red Cross' Geneva headquarters, quoted in Chip Cummins and Laurie P. Cohen, *Legal Limbo of U.S. Afghan-War Prisoners Touches Off a Storm of Criticism Overseas*, WALL ST. J., Jan. 22, 2002, at A22.

144. Schmemmann, *supra* note 131.

Qaeda members, housed at Camp X-Ray,¹⁴⁵ neither common criminals nor prisoners of war, but rather unlawful combatants.¹⁴⁶ According to Donald Rumsfeld, U.S. Secretary of Defense, “the detainees are not being labeled as prisoners of war because they did not engage in warfare according to the precepts of the Geneva Convention—they hide weapons, do not wear uniforms and try to blur the line between combatant and noncombatant.”¹⁴⁷

Making such a distinction materially affects the detainees’ rights. Because they are not prisoners of war, the detainees are not afforded the same procedural and evidentiary rights that a prisoner of war receives.¹⁴⁸ Again turning to the words of Secretary Rumsfeld, “[t]echnically, unlawful combatants do not have any rights under the Geneva convention [*sic*]. We have indicated that we do plan to, for the most part, treat them in a manner that is reasonably consistent with the Geneva conventions to the extent they are appropriate.”¹⁴⁹ Under that extraordinarily ambiguous statement, Secretary Rumsfeld apparently, while nodding to the Geneva Convention, has apparently left wide open the possibility of radical departures from conventional protections afforded prisoners of war facing military tribunals.¹⁵⁰

Secretary Rumsfeld’s argument that al Qaeda members are not prisoners of war is supported by the text of the Geneva Convention. Certainly, a prisoner of war must necessarily come from a military group.¹⁵¹ Under the Geneva Convention, the armed forces of a signatory State are automatically protected.¹⁵² However, when captured prisoners hale from “other militias” or “other volunteer corps,” they must meet several criteria to qualify for protection.¹⁵³ Among the criteria is the requirement that they report to a commanding authority, have a

145. Camp X-Ray is the name given to the detention center recently built at the U.S. naval base in Guantanamo Bay, Cuba. The Guantanamo Bay naval base is perhaps best known for its role during the mid-1990s, when it was used to sequester “thousands of Cuban and Haitian refugees.” See Cummins & Cohen, *supra* note 143.

146. *Tribunals Break Sharply from Civilian Courts*, *supra* note 10.

147. See Jim Garamone, *Mistreatment Allegations ‘Just Plain False,’* AM. FORCES PRESS SERV., Jan. 22, 2002, available at http://www.defenselink.mil/news/Jan2002/n01222002_200201223.html (last visited Jan. 25, 2002).

148. See Tim Collie, *Tribunals Would Be Models For Future Terrorist Trials*, S. FLA. SUN SENTINEL, Jan. 12, 2002, at 1A. See also *Convention (No. III) Relative to the Treatment of Prisoners of War*, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter the “Geneva Convention”], available at <http://www.unhchr.ch/html/menu3/b/91.htm> (last visited Jan. 27, 2002).

149. See Collie, *supra* note 148.

150. All rights, however, have not been lost. Under the Military Order, al Qaeda militants housed at Camp X-Ray are to be provided with humane treatment, adequate food, water, shelter, clothing, medical treatment, and are allowed the free exercise of religion. See Military Order, *supra* note 109, at § (3)(b)-(d).

151. See Geneva Convention, *supra* note 148, at art. 4, § 1.

152. *Id.*

153. See *id.* at art. 4, § 2.

recognized military insignia, openly carry their arms, and conduct their operations “in accordance with the laws and customs of war.”¹⁵⁴ According to Ruth Wedgewood, a former federal prosecutor and current professor of law and international diplomacy at Johns Hopkins University, al Qaeda does not meet that criteria.¹⁵⁵ “Al-Qaida defines itself as a group solely to make jihad, to make war and to use terrorism to do it. It doesn’t have a recognizable charitable function like Hamas or Hezbollah, it doesn’t have recognizable insignias.”¹⁵⁶ On that basis, the Geneva Convention affords no protection to the detainees. The next section examines what protection the U.S. Constitution may afford.

B. Are Al Qaeda Militants Protected by the U.S. Constitution?

While the Supreme Court has developed a “rich, complex, and seemingly incoherent jurisprudence of the non-citizen,”¹⁵⁷ resulting in at least five different standards of review,¹⁵⁸ a general policy has emerged: outside of the immigration context, non-citizens residing in the U.S. are protected by the Constitution.¹⁵⁹ For the most part, the

154. See *id.* at art. 4, § 2(a)-(d). See also Michael C. Dorf, *Findlaw Forum: What is an ‘Unlawful’ Combatant, and Why Does it Matter?*, available at <http://www.cnn.com/2002/LAW/01/columns/fl.dorf.combatants.01.23/index.htm> (last visited Jan 27, 2002). The Geneva Convention’s criteria extends at least as far back as 1899. See Convention With Respect to the Laws and Customs of War on Land, Jul. 29, 1899, Annex, art. 1, 32 Stat. 1803, available at <http://www.yale.edu/lawweb/avalon/lawofwar/hague02.htm> (last visited Mar. 30, 2002).

155. See Collie, *supra* note 148.

156. *Id.*

157. Michael Scaperlanda, *Partial Membership: Aliens and the Constitutional Community*, 81 IOWA L. REV. 707, 711 (1996).

158. The standards of review range from strict scrutiny, based on a determination that aliens are a “discrete and insular minority,” see, e.g. *Graham v. Richardson*, 403 U.S. 365, 372 (1971) (“[A]liens as a class are a prime example of a discrete and insular minority for whom such heightened judicial solicitude is appropriate”), to nonjusticiability, which considers this issue to fall under the political questions doctrine, such that aliens’ status should be determined by the legislative, not the judicial branch. See Scaperlanda, *supra* note 157, at 711. These two poles represent the two broad categories into which the five standards fall: “one marked by extreme deference to the political branches of government, and the other, in stark contrast, marked by heightened suspicion of invidious governmental action.” *Id.* at 712.

159. See e.g. *Fong Yue Ting v. United States*, 149 U.S. 698, 754 (1893) (“Aliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property which are secured to native-born citizens. . . . Arbitrary and despotic power can no more be exercised over them with reference to their persons and property, than over the persons and property of native-born citizens. They differ only from citizens in that they cannot vote or hold any public office. As men having our common humanity, they are protected by all the guaranties of the Constitution.”); *Yick Wo v. Hopkins*, 118 U.S. 356, 368-69 (1886) (“The rights of petitioners. . . are not less because they are aliens and subjects of the Emperor of China. . . . The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. . . . [Its] provisions are universal in their application, to all persons

detainees are non-citizens. Therefore, the question of whether constitutional protections extend to al Qaeda detainees must necessarily be decided upon whether Guantanamo Bay, Cuba's Camp X-Ray is within the U.S.' sovereign territory.¹⁶⁰ Such analysis has legal precedent: in 1950, the Supreme Court held that German nationals captured in China at the end of World War II had no right to file habeas corpus petitions in any U.S. court, because the nationals were seized and held at all times outside the U.S.' sovereign territory.¹⁶¹

In the instant case, the U.S. government argues that no federal court has authority over al Qaeda militants being held at Camp X-Ray.¹⁶² In a recent brief filed in the U.S. District Court for the Central District of California,¹⁶³ government lawyers argued that Camp X-Ray is not sovereign territory because Cuba retained sovereignty when it leased the base to the U.S. in 1903.¹⁶⁴ The Cuban government agrees with that assessment. In a statement deriding the U.S.' use of Guantanamo Bay for detention facilities, Cuba states that "[t]he American Naval Base at Guantanamo is a facility located in an area of 117.6 square kilometers of the national territory of Cuba . . ." ¹⁶⁵ In *Coalition of Clergy v. George Walker Bush*, the United States District

within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality. . . ."); *Mathews v. Diaz*, 426 U.S. 67, 78-80 (1976) ("The fact that all persons, aliens and citizens alike, are protected by the Due Process Clause does not lead to the further conclusion that all aliens are entitled to enjoy all the advantages of citizenship or, indeed, to the conclusion that all aliens must be placed in a single homogeneous legal classification. For a host of constitutional and statutory provisions rest on the premise that a legitimate distinction between citizens and aliens may justify attributes and benefits for one class not accorded to the other. . . . In the exercise of its broad power over naturalization and immigration, Congress regularly makes rules that would be unacceptable if applied to citizens.").

160. See e.g. *United States v. Verdugo-Urquidez*, 494 U.S. 259, 260 (1990) (holding that "those cases in which aliens have been determined to enjoy certain constitutional rights establish only that aliens receive such protections when they have come within the territory of, and have developed substantial connections with, this country.").

161. See *Johnson v. Eisentrager*, 339 U.S. 763, 778 (1950) ("We have pointed out that the privilege of litigation has been extended to aliens, whether friendly or enemy, only because permitting their presence in the country implied protection. No such basis can be invoked here, for these prisoners at no relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States.").

162. See David Rosenzweig, *Response to Terror: U.S. Asks Judge to Reject Claim Over Detainee Prisoners*, L.A. TIMES, Feb. 1, 2002, at A5.

163. See *id.*

164. See *id.*

165. See Declaración del Gobierno de la República de Cuba a la Opinión Pública Nacional e Internacional, 11 de enero del 2002 [Statement by the Government of Cuba to the National and International Public Opinion January 11, 2002], available at <http://www.cuba.cu/gobierno/documentos/2002/ing/d110102i.html> (last visited Apr. 5, 2002).

Court for the Central District of California agrees with both Cuba's and the U.S. government's assertion: Camp X-Ray is not within U.S. sovereign territory.¹⁶⁶

The federal district court's conclusion stems from the language of the lease agreement itself.¹⁶⁷ According to the Lease Agreement:

While on the one hand the United States recognizes the continuance of the ultimate sovereignty of the Republic of Cuba over the above described areas of land and water, on the other hand the Republic of Cuba consents that during the period of occupation by the United States of said areas under the terms of this agreement the United States shall exercise complete jurisdiction and control over and within said areas.¹⁶⁸

Coalition of Clergy is dispositive on this issue, stating that the Lease Agreement's assignation of "jurisdiction and control" to the U.S. does not arise to "sovereignty," because the lease itself distinguished between the two.¹⁶⁹ At least two other federal court cases have dealt with this issue, and agree with this determination.¹⁷⁰ Therefore, while the U.S. retains jurisdiction and control over the immediate area, Cuba retains sovereignty, established by international treaty, and judicially recognized by U.S. courts. Accordingly, because the detainees are not held in U.S. sovereign territory, constitutional protections are not afforded them.¹⁷¹

The determination that Camp X-Ray does not lie within U.S. territory broaches another question, whether *any* U.S. court has jurisdiction over the detainees. *Coalition of Clergy v. George Walker Bush* addresses that issue when analyzing whether al Qaeda militants are being illegally detained in Guantanamo Bay.

C. The Applicability of the Writ of Habeas Corpus ad Subjiciendum:

166. See *Coalition of Clergy v. George Walker Bush*, 2002 U.S. Dist. LEXIS 2748 at *41 (C.D. Cal. 2002).

167. See *Lease to the United States of Lands in Cuba for Coaling and Naval Stations*, Feb. 23, 1903, U.S.-Cuba, T.S. No. 418 [hereinafter the "Lease Agreement"], as modified by *Treaty Between the United States of America and Cuba Defining their Relations*, May 29, 1934, art. III, 48 Stat. 1682, 1683.

168. *Lease Agreement*, *supra* note 167, at art. III.

169. See *Coalition of Clergy*, 2002 U.S. Dist. LEXIS 2748, at *38 ("The agreement explicitly distinguishes the two in providing that Cuba retains 'sovereignty' whereas 'jurisdiction and control' are exercised by the United States.").

170. See *Cuban American Bar Assoc. v. Christopher*, 43 F.3d 1412, 1425 (11th Cir. 1995) ("[T]he district court erred in concluding that Guantanamo Bay was a 'United States territory.' We disagree that control and jurisdiction is equivalent to sovereignty."); *Bird v. Unites States*, 923 F.Supp. 338, 342-43 (D. Conn. 1996) (holding that sovereignty over Guantanamo Bay remained with Cuba).

171. This does not address the possibility of extending jurisdiction over the detainees' captors, as detailed below. See *infra* section IV(C).

Coalition of Clergy v. George Walker Bush

Under our law, the alien in several respects stands on an equal footing with citizens, but in others has never been conceded legal parity with the citizen. . .he may invoke the writ of habeas corpus to protect his personal liberty; in criminal proceedings against him, he must be accorded the protections of the Fifth and Sixth Amendments¹⁷²

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.¹⁷³

The writ of habeas corpus ad subjiciendum, Latin for “you should have the body to submit to,”¹⁷⁴ has been applied for and ordered for nearly eight hundred years.¹⁷⁵ The writ is issued in order to bring a party before the court, “to test the legality of the detention or imprisonment.”¹⁷⁶ Use of the writ is protected under the U.S. Constitution, which states the “privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.”¹⁷⁷ Federal judges are empowered to issue writs of habeas corpus.¹⁷⁸

On January 20, 2002, a group of journalists, lawyers, and clergy filed a writ of habeas corpus ad subjiciendum in the U.S. District Court for the Central District of California. Their petition, *Coalition of Clergy v. George Walker Bush*, alleges that the detainees are being held “against their will and in violation of the United States Constitution and the Geneva Convention.”¹⁷⁹ The petition seeks the “identification of the persons involuntarily detained, that each of them be brought physically before the court for a determination of their statuses”¹⁸⁰ and the prevention of any transfer of the detainees from Camp X-Ray.¹⁸¹ In

172. *Harisiades v. Shaughnessy*, 342 US 580, 586 & n.9 (1952).

173. *Johnson v. Eisentrager*, 339 U.S. 763, 768 (1950).

174. BLACK'S LAW DICTIONARY, 284 (Pocket Ed. 1996).

175. In 1220, the words habeas corpora appeared on an “order directing an English sheriff to produce parties to a trespass action before the Court of Common pleas.” See *Coalition of Clergy v. George Walker Bush*, 2002 U.S. Dist. LEXIS 2748 at *6 (C.D. Cal. 2002).

176. BLACK'S LAW DICTIONARY, 709 (6th Ed. 1990).

177. U.S. CONST., art. I, § 9.

178. See 28 U.S.C. § 2241 (2001).

179. See Verified Petition for Writ of Habeas Corpus at 2, *Coalition of Clergy v. George Walker Bush*, 2002 U.S. Dist. LEXIS 2748 (C.D. Cal. 2002) (No. CV 02-570 AHM), available at <http://www.cacd.uscourts.gov> (last visited Feb. 23, 2002).

180. *Id.* at 5.

181. See *id.* at 9.

response, the District Court issued a show cause order, and, expressing “strong doubts that it has jurisdiction,”¹⁸² ordered written briefs addressing several questions centering on both the petitioners’ standing and the court’s jurisdiction.¹⁸³

An application for a writ of habeas corpus “shall be in writing signed and verified by the person for whose relief it is intended or by someone acting in his behalf.”¹⁸⁴ Under the *Whitmore-Massie* “next friend” test,¹⁸⁵ a third party has standing to ask a court to issue a writ of habeas corpus, provided that: “(1) . . . the petitioner is unable to litigate his own cause due to mental incapacity, lack of access to court, or other similar disability; and (2) the next friend has some significant relationship with, and is truly dedicated to the best interests of, petitioner.”¹⁸⁶ Quite simply, the *Whitmore-Massie* test was inapplicable because the petitioners had no next-friend standing. According to the District Court, the petitioners lacked a significant relationship, “indeed, any relationship,”¹⁸⁷ with the detainees.¹⁸⁸ That lack of standing thus precluded the instant court from hearing the case.¹⁸⁹ The granting of a writ of habeas corpus is controlled by 28 U.S.C. § 2241.¹⁹⁰ Under Section 2241, a writ of habeas corpus “may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions.”¹⁹¹

In *Carbo v. United States*, the Supreme Court discussed the meaning of the phrase “within their respective jurisdictions.” According to the Supreme Court,

the phrase . . . acts as an obvious limitation upon the action of individual judges’ because it reflects the conclusion of Congress that it would be “inconvenient, potentially embarrassing, certainly expensive and on the whole quite unnecessary to provide every judge anywhere with the authority to issue the [writ] on behalf of applicants far distantly removed from the courts whereon they sat.”¹⁹²

182. See *Coalition of Clergy*, 2002 U.S. Dist. LEXIS 2748 at *4.

183. See 2002 U.S. Dist. LEXIS 907 at *1 (“RESPONDENTS ARE HEREBY ORDERED TO SHOW CAUSE WHY they should not be subject to the jurisdiction of this Court in a habeas corpus persons allegedly held by them at the U.S. Naval Station, Guantanamo Bay, Cuba.”).

184. 28 U.S.C. § 2242 (2001).

185. See *Coalition of Clergy*, 2002 U.S. Dist. LEXIS 2748 at *12. See also *Massie v. Woodford*, 244 F.3d 1192 (9th Cir. 2001).

186. *Massie*, 244 F.3d at 1194.

187. See *Coalition of Clergy*, 2002 U.S. Dist. LEXIS 2748 at *22.

188. See *id.*

189. See *id.* at *23.

190. See 28 U.S.C.S. § 2241 (2001).

191. See *id.* at § 2241(a).

192. See *Coalition of Clergy*, 2002 U.S. Dist. LEXIS 2748 at *25, quoting *Carbo v. United States*, 362 U.S. 611, 617 (1961).

The court may, however, retain jurisdiction when the “custodian of the petitioner” is within the district.¹⁹³ While 28 U.S.C. § 1391(e) provides for nationwide service of process on “officers or employees of the United States,”¹⁹⁴ the Ninth Circuit holds that this “does not extend habeas corpus jurisdiction to persons outside the territorial limits of the district court.”¹⁹⁵ Incorporating the discussion above,¹⁹⁶ the District Court determined that there was “no showing or allegation that any named respondent is within the territorial jurisdiction of the Central District of California.”¹⁹⁷ Thus, the District Court concluded that it lacked jurisdiction, and denied issuing a writ of habeas corpus.¹⁹⁸

While the District Court noted that it lacked jurisdiction over the detainees or their custodians, that determination does not directly dispose of the case. The District Court noted that a means of continuing the action is to transfer the case to another court, one having jurisdiction over the detainees’ custodian or anyone else in the “chain of command.”¹⁹⁹ In order to transfer the instant case to the U.S. District Court for the District of Columbia, three conditions must be met: “(1) the transferring court lacks jurisdiction; (2) the transferee court could have exercised jurisdiction at the time the action was filed; and (3) the transfer is in the interest of justice.”²⁰⁰ According to federal law as applied in the Ninth Circuit, if another federal court can exercise jurisdiction, then the law “mandates not dismissal, but transfer to that court.”²⁰¹ The analysis here focuses upon that requirement.

The Supreme Court supports the transferring of cases between district courts when jurisdiction over another “in the chain of command” can be established in the new court.²⁰² For example, in *Ex parte Hayes*, a U.S. Army private stationed in Germany sought habeas corpus relief, asserting that the Army failed to fulfill his enlistment commitment and thus his “continued retention by the Army [was] . . . in violation of law and army regulations.”²⁰³ The Supreme Court noted that while “the applicant’s commanding officer is in Germany, outside the territorial

193. See Coalition of Clergy, 2002 U.S. Dist. LEXIS 2748 at *25.

194. 28 U.S.C. § 1391(e) (2001).

195. See Coalition of Clergy, 2002 U.S. Dist. LEXIS 2748 at *25.

196. See *supra* section IV(B).

197. See Coalition of Clergy, 2002 U.S. Dist. LEXIS 2748 at *26.

198. See *id.*

199. *Ex parte Hayes*, 414 U.S. 1327, 1328 (1973).

200. Coalition of Clergy, 2002 U.S. Dist. LEXIS 907 at *28, quoting *Cruz-Aguilera v. INS*, 245 F.3d 1070, 1073-74 (9th Cir. 2001).

201. See Coalition of Clergy, 2002 U.S. Dist. LEXIS 2748 at *27; see also 28 U.S.C. § 1631 (2001) (“Whenever a civil action is filed in a court. . . and that court finds that there is a want of jurisdiction, the court shall, if it is in the interest of justice, transfer such action. . . to any other such court in which the action or appeal could have been brought at the time it was filed or noticed . . .”).

202. *Ex parte Hayes*, 414 U.S. at 1328.

203. *Id.* at 1327.

limits of any district court . . . others in the chain of command . . . are in the District of Columbia.”²⁰⁴ As such, the Supreme Court determined that the Army was subject to the jurisdiction of the District of Columbia, to where the case was then transferred.²⁰⁵

In *Coalition of Clergy*, the District Court for the Central District of California determined that no jurisdiction could be transferred, because no jurisdiction could be established in that court. As determined above, the petitioners lacked next-friend status.²⁰⁶ Additionally, because the detainees are being held outside the sovereign territory of the U.S., no transfer could be executed because no District Court does, or could, have jurisdiction over the detainees.²⁰⁷ The District Court based that determination on the Supreme Court’s holding in *Johnson v. Eisentrager*.²⁰⁸

In *Eisentrager*, the U.S. Army captured twenty-one German nationals in China after Germany’s surrender to the Allied forces.²⁰⁹ The prisoners were accused of spying for Japan by providing intelligence on American troop movements.²¹⁰ They were tried and convicted by a military commission created by the U.S. Commanding General in Nanking, China.²¹¹ In that case, the authority for convening the Military Commission came from the U.S. Joint Chiefs of Staff, acting through the Commanding General of the U.S. Forces, China Theatre.²¹² The military commission was convened in China, under the express consent of the Chinese government,²¹³ yet involved no international participants.²¹⁴ The prisoners were convicted, their sentences were reviewed by military authorities, and they were repatriated to Germany for service of sentence.²¹⁵

Subsequent to that decision, an appeal was brought in federal district court. In circumstances similar to the *Coalition of Clergy* case, the direct custodians of the prisoners could not be served due to lack of personal jurisdiction. The Supreme Court agreed that while the “prisoners are in immediate physical custody of an officer or officers not parties to the proceeding, respondents named in the petition have lawful authority to effect that release.”²¹⁶ The case proceeded against

204. *See id.* at 1328.

205. *See id.* at 1329.

206. *See supra* text accompanying note 187.

207. *See Coalition of Clergy*, 2002 U.S. Dist. LEXIS 2748 at *27.

208. *See id.* at *29.

209. *See Johnson v. Eisentrager*, 339 U.S. 763, 765-66 (1950).

210. *See id.* at 766.

211. *See id.*

212. *See id.*

213. *See id.*

214. *See id.*

215. *See id.*

216. *Id.* at 766-67.

the Secretary of Defense, Secretary of the Army, Chief of Staff of the Army, and the Joint Chiefs of Staff of the U.S.²¹⁷ Among the allegations were complaints that the conviction and imprisonment violated “the Geneva Convention’s provisions governing the treatment of prisoners of war.”²¹⁸ The District Court issued a rule to show cause, and dismissed the case for lack of jurisdiction.²¹⁹

The District Court’s ruling was reversed by the Court of Appeals for the D.C. Circuit, which concluded that “any person deprived of his liberty *anywhere* under any purported authority of the United States is entitled to the writ if he can show that extension to his case of any constitutional rights or limitations would show his imprisonment illegal.”²²⁰ That statutory jurisdiction must be held “as part of the judicial power of the United States,”²²¹ and “where deprivation of liberty by an official act occurs outside the territorial jurisdiction of any District Court, the petition will lie in the District Court which has territorial jurisdiction over officials who have directive power over the immediate jailer.”²²² Thus, under the Court of Appeals analysis, an extraterritorial violation is indistinguishable from a territorial violation, provided that jurisdiction can be established over anyone in the chain of command.

The Supreme Court disagreed with the Court of Appeals argument that “[t]he answers stem directly from fundamentals [and] cannot be found by causal reference to statutes or cases.”²²³ Instead, the Supreme Court, while acknowledging that no statute directly addressed the issues, held that the answer does not stem from abstract fundamentals, rather, it comes from the Constitution itself. Indeed, “[n]othing in the text of the Constitution extends such a right.”²²⁴

Discussing what rights the Constitution does afford, the Supreme Court reasoned that the Constitution does not abolish distinctions between resident enemy aliens and nonresident enemy aliens.²²⁵ That is, there appears to be a sliding scale of protections afforded aliens, such protections enlarging as the alien “increases his identity with our society.”²²⁶ According to the Supreme Court, “[m]ere lawful presence in the country creates an implied assurance of safe conduct and gives [the alien] certain rights; they become more extensive and secure when he

217. *Id.* at 767.

218. *Id.*

219. *See id.*

220. *Id.* (emphasis added).

221. *Id.*

222. *Id.*

223. *Id.* at 768.

224. *Id.*

225. *See id.*

226. *Id.* at 770.

makes [a] preliminary declaration of intention to become a citizen, and they expand to those of full citizenship upon naturalization.”²²⁷

These constitutional protections, however, do not extend to aliens outside the territorial jurisdiction of the U.S.²²⁸ The Supreme Court noted that the founding fathers were the authors of the Bill of Rights, they wrote three Acts²²⁹ which, by denying enemy aliens “the constitutional immunities of citizens, it seems not then to have been supposed that a nation’s obligations to its foes could ever be put on a parity with those to its defenders.”²³⁰ Continuing that historical analysis, the Supreme Court noted that the executive branch’s power over enemy aliens, “undelayed and unhampered by litigation, has been deemed throughout our history, [to be] essential to war-time security.”²³¹ In *Eisentrager*, the Supreme Court determined that the prisoners were enemy aliens, had neither been to nor resided in the U.S., were both captured and held outside U.S. territory, were tried and convicted by a Military Commission sitting outside the U.S. for violations of the laws of war committed outside the U.S., and were imprisoned outside the U.S. at all times.²³² The Supreme Court thus overturned the Court of Appeals’ holding which had found jurisdiction.²³³ Instead, the Supreme Court denied the writ of habeas corpus, in a holding which stated:

We are cited to no instance where a court, in this or any other country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.²³⁴

In *Coalition of Clergy*, the District Court determined that the *Eisentrager* holding was controlling. The District Court concluded that no court, including the United States District Court for the District of

227. *Id.*

228. *See id.* *See also* *Yick Wo v. Hopkins*, 118 U.S. 356, 369 (1886) (holding that the Fourth Amendment’s provisions are universal in their application, to all persons within the territorial jurisdiction of the United States).

229. *See* An Act concerning Aliens, Jun. 25, 1798, 1 Stat. 570; An Act respecting Alien Enemies, Jul. 6, 1798, 1 Stat. 577; and An Act in addition to the act, entitled “An act for the punishment of certain crimes against the United States,” Jul. 14, 1798, 1 Stat. 596.

230. *Eisentrager*, 339 U.S. at 775. Founding father James Madison drew a distinction between enemy and non-enemy aliens: “With respect to alien enemies, no doubt has been intimated as to the federal authority over them; the Constitution having expressly delegated to Congress the power to declare war against any nation, and of course to treat it and all its members as enemies.” *See id.* at 775 n.6, *quoting* Madison’s Report, 4 Elliot’s Deb. 546, 554 (1800).

231. *Eisentrager*, 339 U.S. at 774.

232. *See id.* at 777.

233. *See id.* at 790.

234. *Coalition of Clergy*, 2002 U.S. Dist. LEXIS 2748 at *31.

Columbia, could have jurisdiction over the detainees because:

[t]hey are aliens; they were enemy combatants; they were captured in combat; they were abroad when captured; they are abroad now; since their capture, they have been under the control of only the military; they have not stepped foot on American soil; and there are no legal or judicial precedents entitling them to pursue a writ of habeas corpus in an American civil court.²³⁵

The District Court therefore dismissed the suit with prejudice.²³⁶

The above analysis establishes that according to U.S. law, the detention and military trial of the al Qaeda detainees is proper. However, while "proper," America's foreign policy interests may still be best served by trying al Qaeda internationally. The next section analyzes that argument.

V. THE ARGUMENTS SUPPORTING AND DISFAVORING PROSECUTING AL QAEDA UNDER INTERNATIONAL TRIBUNALS

The spectrum of arguments supporting and disfavoring prosecuting al Qaeda under international tribunals fall into three broad categories: the desire for retribution, security concerns, and fairness and human rights issues. The arguments for international prosecution tend to fall under the latter category, while the arguments for domestic military tribunals generally fall under the first two.

A. The Arguments Supporting the Prosecution of al Qaeda Under International Tribunals

1. The International Community has Provided Only Qualified Support of U.S. Actions

Foreign nations were quick to support the U.S.'s initial anti-terrorism response following the events of September 11th. According to a U.S. State Department report, 136 countries offered military support, 46 multilateral organizations "declared their support," and 142 countries worked with the U.S. by freezing financial assets.²³⁷ Saudi Arabia and the Middle Eastern states were "supportive" and "ready to cooperate."²³⁸ This foreign cooperation, however, did not extend to the unequivocal support for using military tribunals to prosecute al Qaeda

²³⁵. See *id.* at *34.

²³⁶. See *id.* at *41.

²³⁷. See COALITION INFO. CENTERS, *The Global War on Terrorism: The First 100 Days*, available at <http://www.state.gov/s/ct/rls/rpt/6947.htm> (last visited Feb. 18, 2002).

²³⁸. *Id.*

members. That hesitancy may be explained by Article 2 of the European Convention of Human Rights.

Under the European Convention of Human Rights, no European country may extradite to a country where the death penalty will be used.²³⁹ Accordingly, the 43-nation Council of Europe “urged European governments to ensure the death penalty would not be sought before permitting any suspects to be extradited to the United States.”²⁴⁰ Apparently acceding to that request, Spain refused to extradite suspected al Qaeda members to the U.S. unless assurances would be made that their cases would be tried in civilian courts,²⁴¹ or in a setting where the death penalty would not be used.²⁴² As succinctly stated by Luis Jordana, an international criminal lawyer, “harsher measures can end up being counterproductive.”²⁴³

Were the tribunals conducted as an ad hoc tribunal of the type created by the United Nations Security Council in the 1990s, prosecuting the detainees in such a forum may eliminate that hesitation and concern. Due to the particular constraints imposed upon tribunals formed by the United Nations Security Council, the death penalty would be unavailable.²⁴⁴ Because at least some al Qaeda militants have been detained in foreign countries, eliminating that bar to extradition may thus mean that more al Qaeda militants are prosecuted and held accountable for their crimes. However, such prosecution would necessarily fall under a non-capital sentencing scheme.

2. The U.S.’ Steps Towards Investigating Suspected al Qaeda Have Caused a Weakening of Traditional Constitutional Protections

“Amnesty International believes that the Military Order threatens to

239. Under Article 2 of the Charter of Fundamental Rights of the European Union, “1. Everyone has the right to life. 2. No one shall be condemned to the death penalty, or executed.” See COUNCIL OF THE EU, *Charter of Fundamental Rights of the European Union*, art. 2, Doc. No. 1023 (2001), available at http://ue.eu.int/df/docs/en/EN_2001_1023.pdf. (last visited Jan. 23, 2002). See also Keith Johnson & Carla Vitzthum, *Europeans Make Case Against Use of Military Tribunals*, WALL ST. J., Nov. 28, 2001, at A12.

240. See AP, *International Concern Over US Detainees At Guantanamo Bay*, WASH. POST, Jan. 24, 2002, at A17.

241. See Matthew Purdy, *Legal Powers Are Expanded in Bush Plan*, N.Y. TIMES NEWS SERV., Nov. 26, 2001.

242. See *Bush to Seek Spain’s Backing for Holding Military Tribunals*, DESERET NEWS, Nov. 26, 2001, at A8.

243. Luis Jordana is a lawyer for Barcelona-based Cuatrecasas. See Keith Johaon and Carla Vitzthum, *Europeans Make Case Against Use of Military Tribunals*, WALL ST. J., Nov. 28, 2001, at A12.

244. See *supra* text accompanying note 61.

severely undermine, rather than reinforce, confidence in the administration of justice and maintenance of the rule of law. The organization considers that in proceedings undertaken pursuant to this order, justice will neither be done, nor seen to be done."²⁴⁵

*"[I]f the president can suspend one constitutional principle today, the danger is he can suspend others tomorrow."*²⁴⁶

While the al Qaeda detainees are not afforded the protections of the U.S. Constitution, the weakening of traditional constitutional rights is a subject of much concern. According to Nadine Strossen, president of the American Civil Liberties Union, President Bush "bypasses Congress and the people by issuing executive orders that essentially violate separation of powers and the checks and balances system we have in this country."²⁴⁷ This weakening of traditional constitutional privileges and protections has taken on many forms.

In a Justice Department memo penned during the late fall of 2001, the Honorable Judge Michael J. Creppy, the U.S.' chief immigration judge, imposed a rule requiring that immigration hearings be conducted in secret.²⁴⁸ Under that rule, immigration courts were required "to close the hearings to the public, and to avoid discussing the case or otherwise disclosing any information about the case."²⁴⁹ While ostensibly made to protect the security of the involved parties, both prosecution and defense, such proceedings have typically been open. While it may be simplistic to state that procedural openness promotes constitutionality, the closed nature of the proceedings eliminates one of the normally-present factors enforcing the propriety of the system; that is, public observance of the judicial process.

Several other positions taken at both the federal and local level may impinge the constitutional right against unlawful search and seizure. The federal government has decided to conduct interviews of 5,000 Middle Eastern men who have entered the U.S. during the last two years.²⁵⁰ In New York City, police searched their records for old petty crime warrants issued to those having Middle Eastern-sounding names.²⁵¹ Over 100 people were found and interviewed, "with the

245. AMNESTY INT'L, *supra* note 142.

246. Timothy Lynch, Director of the criminal justice project of the Cato Institute, *quoted in* William Glaberson, *Liberal and Conservative Groups to Challenge Bush on Expansion of Powers*, N.Y. TIMES NEWS SERV., Nov. 30, 2001.

247. Karen E. Crummy, *War takes toll on liberty - Feds wielding 'extraordinary' powers*, BOSTON GLOBE, Nov. 25, 2001.

248. *See* William Glaberson, *Groups Criticize Recent Order on Secret Court Hearings for Immigrants*, N.Y. TIMES NEWS SERV., Dec. 7, 2001.

249. *Id.*

250. *See* Purdy, *supra* note 120.

251. *See id.*

warrants used to encourage full cooperation.”²⁵² Investigators have even searched records on over 200 college campuses, seeking information on Middle Eastern students, their studies, and their addresses.²⁵³ Investigators made unannounced visits “asking about anything from their views on Osama bin Laden to their educational plans.”²⁵⁴ While the first group may have reason to be stopped because warrants exist, and while the questions posed to the second group may fall under “investigatory stop” procedures,²⁵⁵ the pretextual reasons underlying the stops should cause one to pause and consider the propriety of such actions. While clear and convincing reasons may exist for such intrusion in the instant case, caution should be exercised when large-scale detention and questioning stems from hunches based upon simplistic connections like the sound of ones’ name.

Several Bush Administration moves have signaled further reductions in privileges afforded both the al Qaeda detainees and other terrorist defendants. According to Marine Brigadier General Mike Lenhart, head of the task force in charge of the detention facility, the detainees have been prevented from having lawyers present during the interrogations taking place at Camp X-Ray.²⁵⁶ Additionally, even if counsel were afforded, a recent decision by the U.S. Justice Department permits the listening in on conversations between lawyers and jailed defendants.²⁵⁷ This “special administrative measure”²⁵⁸ “permits the monitoring of attorney-client communications for these detainees only if the Attorney General . . . makes the additional finding that reasonable suspicion exists to believe that a particular detainee may use communications with attorneys to further or facilitate acts of terrorism.”²⁵⁹ Safeguards, however, have been provided. Among the

252. *Id.*

253. *See id.*

254. *Id.*

255. *See generally* Terry v. Ohio, 392 U.S. 1, 20 n.16 (1968) (holding that not all personal intercourse between policemen and citizens involves ‘seizures’ of persons; only when the officer, by means of physical force or show of authority has in some way restrained the liberty of a citizen has a ‘seizure’ occurred).

256. *See* Tony Winton, *Guards at Guantanamo Say Apparent Command Structure Growing Among Prisoners*, AP, Jan. 27, 2002, available at http://dailynewslosangeles.com/socal/terrorist/0102/27/terror_09.asp (last visited Apr. 7, 2002).

257. *See* 28 C.F.R. § 501.3 (2001). *See also* David E. Sanger, *Bush Defends Secret Tribunals in Terrorist Cases*, N.Y. TIMES NEWS SERV., Nov. 30, 2001; Jess Bravin, *Deputy to Ashcroft and Senators Clash on Tribunal Policy*, WALL ST. J., Nov. 29, 2001, at A4.

258. *See* 28 C.F.R. § 501.3(a).

259. Dinh, *infra* note 301, at 404. *See also* 28 C.F.R. § 501.3(d) (“In any case where the Attorney General specifically so orders, based on information from the head of a federal law enforcement or intelligence agency that reasonable suspicion exists to believe that a particular inmate may use communications with attorneys or their agents to further or facilitate acts of terrorism, the Director, Bureau of Prisons, shall, in addition to the special administrative measures imposed under paragraph (a) of this section, provide

requirements: there must be written advanced notice that communication will be monitored; there can be no access between the monitoring team and any prosecution effort; absent "imminent violence or terrorism," a court order is required; and no privileged information will be retained.²⁶⁰ While this decision was ostensibly made to "prevent prisoners from directing terrorist operations from prison by using their lawyers to convey instructions to at-large confederates,"²⁶¹ the destruction of the attorney-client privilege is a serious violation of the legal right to counsel, and as such should not be disposed of lightly. Additionally, were counsel afforded the al Qaeda detainees, the extraterritorial nature of their detention provides no surety that any U.S. law applies to them. In that case, there may be no bar to listening in on attorney-client communications.

While this weakening of traditional constitutional privileges and protections has taken on many forms, they have but a single overriding effect. The Bush Administration is providing little room for captured al Qaeda militants to mount a defense: procedurally, their rights are stymied; their access to counsel befuddled, and their right to privileged communication with counsel eviscerated.

3. Prosecuting the Detainees Internationally Preserves the U.S.' Human Rights Stance

The worldwide promotion of human rights is in keeping with America's most deeply held values. It is also strongly in our interests. Freedom fights terrorism, instability and conflict. Time and again, experience has shown that countries which demonstrate high degrees of respect for human rights also are the most secure and the most successful. Indeed, respect for human rights is essential to lasting peace and sustained economic growth, goals which Americans share with people all over the world.²⁶²

Over the last few months, I have heard the worry that the war on terrorism will sideline America's interest in human rights. This is far from true. In fact, the protection of human rights is even more important now than ever. The U.S. Government is deeply committed to the promotion of universal human rights and the development of

appropriate procedures for the monitoring or review of communications between that inmate and attorneys or attorneys' agents who are traditionally covered by the attorney-client privilege, for the purpose of deterring future acts that could result in death or serious bodily injury to persons, or substantial damage to property that would entail the risk of death or serious bodily injury to persons.").

260. Dinh, *infra* note 301, at 404-05.

261. See Jess Bravin, *Deputy to Ashcroft and Senators Clash on Tribunal Policy*, WALL ST. J., Nov. 29, 2001, at A4.

262. U.S. Sec'y of State Colin Powell, Remarks to the Press (Mar. 4, 2002), available at <http://www.state.gov/secretary/rm/2002/8635.htm> (last visited Mar. 4, 2002).

pluralistic, accountable governments.²⁶³

One benefit of trying terrorists in international military tribunals is the preservation of the U.S.' ability to censure other nations for human-rights abuses; as William Safire puts it, the preservation of the "moral high ground."²⁶⁴ This position will likely become untenable if military tribunals are used to violate basic human and legal rights. Understandably, the importance of this argument depends upon one's view of the need to protect human rights on the international scene, whether the U.S. has any ability to truly influence international human rights, and whether such interest outweighs the natural desire for retribution in the wake of the events of September 11th. The view here is that it does.

For many years, the U.S. State Department has held that moral high ground by fighting against foreign nations' use of military tribunals and secret courts.²⁶⁵ In the 2000 edition of its annual human rights report, the State Department criticized several foreign countries for using the very type of tribunals proposed by President Bush.²⁶⁶ In that report, the State Department criticized Egypt's use of military courts to try terrorist defendants, stating that the military courts have "deprived hundreds of civilian defendants of their constitutional right to be tried by a civilian judge."²⁶⁷ The report also criticized the military courts' lack of independence:

the military courts do not ensure civilian defendants due process before an independent tribunal. While military judges are lawyers, they are also military officers appointed by the Minister of Defense and subject to military discipline. They are neither as independent nor as qualified as civilian judges in applying the civilian Penal Code.²⁶⁸

The State Department's criticism is at least partially applicable to President Bush's military tribunals, as here there is no provision for civilian judges, and no judicial independence from the military. As its detractors have pointed out, "it is hard to see how the State Department will be able to preserve this language [critical of other nations' use of such tribunals] without opening itself to a charge of hypocrisy."²⁶⁹

263. Assistant Secretary, Bureau of Democracy, Human Rights, and Labor, Lorne Craner, Remarks to the Press (Mar. 4, 2002), available at <http://www.state.gov/secretary/rm/2002/8635.htm> (last visited Mar. 4, 2002).

264. See Safire, *supra* note 2.

265. See Neil King Jr., *Bush's Plan to Use Tribunal Will Hurt U.S. in Human-Rights Arena, Some Say*, WALL ST. J., Nov. 27, 2001.

266. See *id.*

267. U.S. STATE DEP'T, *Egypt: Country Reports on Human Rights Practices 2000*, available at <http://www.state.gov/g/drl/rls/hrrpt/2000/nea/784.htm> (last visited Apr. 7, 2002).

268. *Id.*

269. See King, *supra* note 265, quoting Kenneth Roth, executive director of Human

Several foreign nations have voiced concerns over the treatment of the detainees. Malaysia has publicly voiced that they consider the treatment of the al Qaeda members at Camp X-Ray to be "inhumane."²⁷⁰ Germany has "expressed human rights concerns and said Washington was jeopardizing support for the war on terrorism."²⁷¹ In Great Britain, protests in Parliament and the press have led the British Prime Minister Tony Blair to state that his government "would prefer to have [the] three British detainees returned home to stand trial."²⁷² Britain's Foreign Secretary Jack Straw agrees, stating that it is "far preferable" for British suspects "to come to the United Kingdom and face justice here."²⁷³

Defense Secretary Rumsfeld has been forced to counter the notion of inhumane treatment, stating "[l]et there be no doubt the treatment of the detainees in Guantanamo Bay is proper, it's humane, it's appropriate and it is fully consistent with international conventions."²⁷⁴ Those provisions include:

8-by-8-by-7.5-foot holding units . . . warm showers, toilets, water, clean clothes, blankets, regular and culturally appropriate meals, prayer mats and the right to practice their religion, modern medical attention, exercise, writing materials and visits by the International Committee of the Red Cross.²⁷⁵

According to Secretary Rumsfeld, "the United States is treating them—all detainees—consistently with the principles of the Geneva Convention."²⁷⁶

4. Prosecuting the Detainees Internationally May Preserve the U.S.' Ability to Protect U.S. Citizens Detained Abroad

*"[T]here is a real question about whether this doesn't expose U.S. citizens to greater risk of secret trials overseas. . . It will be very hard for the U.S. to argue that defendants in all countries should be treated as they are in the U.S."*²⁷⁷

Another concern is that the existence of this alternate judicial

Rights Watch.

270. See AP, *International Concern Over US Detainees At Guantanamo Bay*, DOW JONES ASIAN EQUITIES REPORT, Jan. 24, 2002.

271. *Id.*

272. See AP, *Britain Asks for Return of Terror Suspect as Europe and Malaysia Voice Concerns*, Jan. 24, 2002.

273. *Id.*

274. See Jim Garamone, *supra* note 147.

275. *Id.*

276. *Id.*

277. Elisa Massimino, Washington director for the Lawyers Committee for Human Rights, *quoted in* King, *supra* note 265.

system itself may impact the U.S.' ability to protect U.S. citizens arrested and tried abroad.²⁷⁸ That is, applying here what amounts to a bifurcated legal system may eliminate protections currently afforded U.S. citizens abroad. The State Department's criticism of such military tribunals in countries like Russia, China, Egypt, Peru and Columbia, while not causing legal reform, has provided "leverage" in assisting Americans facing such trials in foreign lands.²⁷⁹ U.S. citizen Lori Berenson is currently appealing a 20-year sentence handed down by a Peruvian court for collaborating with leftist rebels in a plot to attack Peru's Congress.²⁸⁰ Berenson was convicted by military tribunal in 1996.²⁸¹ Were the U.S. to back her arguments that her rights were "violated in a sham trial that relied on shoddy evidence,"²⁸² it is likely those arguments would create little leverage as the U.S. itself has put forth procedures for conducting similar trials.

5. Domestic Pressures Militate Against the Use of Domestic Military Tribunals

Some cracks may be developing in high-level U.S. support for prosecuting al Qaeda members at Camp X-Ray. The U.S. State Department has recommended that President Bush consider reclassifying the al Qaeda militants as prisoners of war.²⁸³ In a remarkable turn of events, Secretary of State Colin Powell asked President Bush to reverse his stance on the status of the al Qaeda members.²⁸⁴ Powell argued that the Geneva Convention "does apply to both al-Qaida and the Taliban . . . however [the] fighters could be determined not to be prisoners of war . . . but only on a case-by-case basis following individual hearings before a military board."²⁸⁵ However, White House Counsel Alberto Gonzales has flatly rejected such argument, stating that "the arguments for reconsideration and reversal are unpersuasive."²⁸⁶ Secretary of State Powell later retracted his statement, stating "all of us in the administration are united in the view that they are not deserving of prisoner of war status."²⁸⁷ He did,

278. *Id.*

279. See King, *supra* note 265.

280. See *The World*, L.A. TIMES., Jan. 23, 2002, at A5.

281. See *id.*

282. *Id.*

283. See Kelly Wallace & Andrea Koppell, *Bush Advisors Debate Detainees Status*, CNN, Jan. 26, 2002, at <http://www.cnn.com/2002/US/01/26/ret.powell.detainees/index.html> (last visited Jan. 27, 2002).

284. See Katharine Q. Seelye, *Powell Asks Bush to Reverse Stand on War Captives*, N.Y. TIMES NEWS SERVICE, Jan. 27, 2002.

285. *Id.*

286. Seelye, *supra* note 284.

287. See Colin L. Powell, Statement on President Bush's Budget Request for FY 2003,

however, state that a final determination was yet to be made:

There is a question that we are examining, and it is a difficult question, and that is the legal application of the Geneva Convention. This is a new kind of conflict. It is a new world, but at the same time, we want to make sure that everybody understands we are a nation of law, abiding by our international obligations. And so we are examining very carefully and have been for a number of days now, the exact applicability or lack of applicability to the Geneva Convention to the detainees.²⁸⁸

Thus, the current political view leaves the detainees' status indeterminate, and the political forces remain divided even at the highest levels. This author submits that such discord points to a fundamental rift in the current Administration, between those who find that the human rights value outweighs the desire for retribution, and those who do not.

available at <http://www.state.gov/secretary/rm/2002/7806pf.htm> (last visited Feb. 18, 2002).

288. *Id.*

B. The Arguments Disfavoring Prosecuting al Qaeda Under International Tribunals

1. The Death Penalty

Military tribunals have a long history of imposing the death penalty.²⁸⁹ In the instant situation, the emotional desire to impose the death penalty as a means of retribution is obvious. However, were the detainees to be prosecuted under ad hoc international tribunals of the type formed by the United Nations Security Council in the mid-1990s, the death penalty would not be a sentencing option.²⁹⁰ The reasons underlying that restriction also apply to prosecution by the ICC.²⁹¹

Historically, however, the death penalty was used in the international *military* tribunals formed after World War II.²⁹² Following that precedent, the death penalty therefore becomes an option only if the detainees are tried under a military tribunal. International military tribunals are unlikely to be formed because foreign nations were not specifically targeted in the attacks, even though al Qaeda militants have been arrested internationally. Additionally, were the forming of international military tribunals raised, it can be surmised that the U.S. would not participate because the death penalty would not be a likely sentencing option. Thus, the death penalty only becomes a realistic option if the al Qaeda militants are prosecuted by “domestic” military tribunals.²⁹³

2. Ensuring a High Conviction Rate

The possibility that relinquishing control of the detainees to an international military tribunal may result in low conviction rates, may provide support for the domestic military trial of al Qaeda militants. Following World War I, the difficulties that surrounded the Allied attempts to try Germans for war crimes led to the Supreme Court of the Reich at Leipzig becoming authorized to conduct military trials.²⁹⁴ Of forty-five cases submitted, twelve individuals were tried, and six convicted.²⁹⁵

289. See *supra* text accompanying notes 22-26.

290. See *supra* text accompanying note 244.

291. See *id.*

292. See *supra* text accompanying notes 44-47.

293. The term domestic as used in this latter argument encompasses both military tribunals conducted upon U.S. sovereign territory, and extraterritorial locations like Camp X-Ray.

294. See *supra* text accompanying note 37; see also WOETZEL, *supra* note 22, at 32.

295. See WOETZEL, *supra* note 22, at 32.

While the low conviction rate may have been due to the empowering of a German court to try Germans, this low conviction rate left the Allied powers unsatisfied. The end result was that the Allies decided to conduct the trials themselves under Articles 228 through 230 of the Versailles Treaty.²⁹⁶ The conviction rates resulting from these post World War II domestic military tribunals bespeak the benefit of their use. According to Deputy Secretary of Defense Paul Wolfowitz, convictions were found in roughly eighty-five percent of cases.²⁹⁷

3. The Protection of America, and the American Psyche

Another argument supporting the use of domestic military tribunals is that tribunals “are extensions of the military campaign,”²⁹⁸ and as such, may prevent future attacks by either imprisoning terrorism leaders, or by the attendant fear of prosecution or of the death penalty. Some argue that this extension of the military campaign will preserve the American psyche:

Farming out our judicial interests for the ‘global good’ would set the terrible precedent that we do not have the sovereign right as a nation to capture and try people who have murdered or plan to murder our innocent citizens. Whatever damage military tribunals do to our international reputation, we risk far greater damage to our national psyche if non-citizen terrorists are allowed to exploit our system and our national pain in prolonged and costly courtroom dramas.²⁹⁹

In counterargument, a nation of law chooses to live by that rule. Once such a nation crosses the threshold into possessing a mindset which selectively provides for that rule of law, the very definition of a nation ruled by law becomes weakened. A slippery slope may develop, one in which it becomes difficult to determine when the rule of law applies, and when it doesn't. We have already seen the waffling that has occurred over whether the international definition of a prisoner of war applies to al Qaeda. While the definition may not strictly apply, the penumbra of debate surrounding the issue suggests validity in the public's notion that it clearly should apply.

4. The Protection of Classified Information and Court Personnel

Prosecuting terrorists in any forum may bring danger to involved parties. One argument is that the security inherent to a military tribunal mitigates any such worry: “ordinary criminal trials would

296. *Id.*

297. *See supra* text accompanying note 49.

298. Douglas Kmiec, Dean of Catholic University Law School, *quoted in* Laura Ingraham, *Military Tribunals Provide Streamlined Justice*, USA TODAY, Nov. 26, 2001.

299. *See* Ingraham, *supra* note 298.

subject court personnel, jurors, and other civilians to the threat of terrorist reprisals; the military is better suited to coping with these dangers.”³⁰⁰ Additionally, prosecuting the detainees in front of a military tribunal will protect classified information or informants involved in that prosecution effort, as “[c]ommissions enable the government to protect classified and other sensitive national-security information that would have to be disclosed publicly before an Article III court.”³⁰¹ Also, the U.S. may have a fundamental interest in protecting sources, methods of interdiction, observation and the like, which would be on public display were such trials moved into an international venue.

VI. CONCLUSION

*“These individuals were brought out of their county in shackles, drugged, gagged and blindfolded, and are being held in open-air cages in Cuba . . . Someone should be asserting their rights under international law.”*³⁰²

These are trying times. Both logically and emotionally, the reasons behind the desire to conduct military tribunals are understandable—many, many lives were lost as a result of the tragic events surrounding September 11th. However, by conducting such trials, the U.S. may be ceding the moral high ground, and materially limiting its future foreign policy stance and the ability to curtail foreign human rights abuses.

The tribunals empowered under President Bush’s Military Order are the exact types of trials that the U.S. openly condemns in the international community. Under President Bush’s military tribunal plan, there is no right to counsel during interrogation, defendants may be convicted based upon a “probative value” not a “beyond a reasonable doubt” standard, unanimous verdicts are not required, and the sentences meted out may be severe, up to and including life imprisonment or even death. Conducting trials as approved by the Military Order and under procedures established by Order No. 1 will preclude the U.S. from arguing against the use of such trials by other nations. The U.S. should preserve the moral high ground by moving these trials into the international arena.

300. Viet D. Dinh, *Foreword: Freedom and Security After September 11*, 25 HARV. J.L. & PUB. POL’Y 399, 405 (2002).

301. *Id.*

302. Erwin Chemerinsky, *quoted in AP, Court Petition Challenges U.S. Detention of Terror Suspects*, available at <http://www.cnn.com/2002/LAW/01/21/attacks.detention.ap/index.html> (last visited Jan. 23, 2002).