

107<sup>TH</sup> CONGRESS  
2<sup>D</sup> SESSION

# S. 1941

To authorize the President to establish military tribunals to try the terrorists responsible for the September 11, 2001 attacks against the United States, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

FEBRUARY 13, 2002

Mr. LEAHY (for himself and Mr. DURBIN) introduced the following bill; which was read twice and referred to the Committee on Armed Services

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## A BILL

To authorize the President to establish military tribunals to try the terrorists responsible for the September 11, 2001 attacks against the United States, and for other purposes.

1       *Be it enacted by the Senate and House of Representa-*  
2       *tives of the United States of America in Congress assembled,*

3       **SECTION 1. SHORT TITLE.**

4       This Act may be cited as the “Military Tribunal Au-  
5       thorization Act of 2002”.

6       **SEC. 2. FINDINGS.**

7       Congress makes the following findings:

1           (1) The al Qaeda terrorist organization and its  
2 leaders have committed unlawful attacks against the  
3 United States, including the August 7, 1998 bomb-  
4 ings of the United States embassies in Nairobi,  
5 Kenya, and Dar es Salaam, Tanzania, the October  
6 12, 2000 attack on the USS COLE and the Sep-  
7 tember 11, 2001 attacks on the United States.

8           (2) The al Qaeda terrorist organization and its  
9 leaders have threatened renewed attacks on the  
10 United States and have threatened the use of weap-  
11 ons of mass destruction.

12           (3) In violation of the resolutions of the United  
13 Nations, the Taliban of Afghanistan provided a safe  
14 haven to the al Qaeda terrorist organization and its  
15 leaders and allowed the territory of that country to  
16 be used as a base from which to sponsor inter-  
17 national terrorist operations.

18           (4) The United Nations Security Council, in  
19 Resolution 1267, declared in 1999 that the actions  
20 of the Taliban constitute a threat to international  
21 peace and security.

22           (5) The United Nations Security Council, in  
23 Resolutions 1368 and 1373, declared in September  
24 2001 that the September 11 attacks against the

1 United States constitute a threat to international  
2 peace and security.

3 (6) The United States is justified in exercising  
4 its right of self-defense pursuant to international law  
5 and the United Nations Charter.

6 (7) Congress authorized the President on Sep-  
7 tember 18, 2001, to use all necessary and appro-  
8 priate force against those nations, organizations, or  
9 persons that he determines to have planned, author-  
10 ized, committed, or aided the September 11 terrorist  
11 attacks or harbored such organizations or persons,  
12 in order to prevent any future acts of international  
13 terrorism against the United States, within the  
14 meaning of section 5(b) of the War Powers Resolu-  
15 tion.

16 (8) The United States and its allies are en-  
17 gaged in armed conflict with al Qaeda and the  
18 Taliban.

19 (9) Military trials of the terrorists may be ap-  
20 propriate to protect the safety of the public and  
21 those involved in the investigation and prosecution,  
22 to facilitate the use of classified information as evi-  
23 dence without compromising intelligence or military  
24 efforts, and otherwise to protect national security in-  
25 terests.

1           (10) Military trials that provide basic proce-  
2           dural guarantees of fairness, consistent with the  
3           international law of armed conflict and the Inter-  
4           national Covenant on Civil and Political Rights  
5           (opened for signature December 16, 1966), would  
6           garner the support of the community of nations.

7           (11) Article I, section 8, of the Constitution  
8           provides that the Congress, not the President, has  
9           the power to “constitute Tribunals inferior to the  
10          Supreme Court; ... define and punish ... Offenses  
11          against the Law of Nations; ... make Rules con-  
12          cerning Captures on Land and Water; ... make all  
13          Laws which shall be necessary and proper for car-  
14          rying into Execution the foregoing Powers and all  
15          other Powers vested by this Constitution in the Gov-  
16          ernment of the United States, or in any Department  
17          or Officer thereof.”.

18          (12) Congressional authorization is necessary  
19          for the establishment of extraordinary tribunals to  
20          adjudicate and punish offenses arising from the Sep-  
21          tember 11, 2001 attacks against the United States  
22          and to provide a clear and unambiguous legal foun-  
23          dation for such trials.

1 **SEC. 3. ESTABLISHMENT OF EXTRAORDINARY TRIBUNALS.**

2 (a) **AUTHORITY.**—The President is hereby authorized  
3 to establish tribunals for the trial of individuals who—

4 (1) are not United States persons;

5 (2) are members of al Qaeda or members of  
6 other terrorist organizations knowingly cooperating  
7 with members of al Qaeda in planning, authorizing,  
8 committing, or aiding in the September 11, 2001 at-  
9 tacks against the United States, or, although not  
10 members of any such organization, knowingly aided  
11 and abetted members of al Qaeda in such terrorist  
12 activities against the United States;

13 (3) are apprehended in Afghanistan, fleeing  
14 from Afghanistan, or in or fleeing from any other  
15 place outside the United States where there is armed  
16 conflict involving the Armed Forces of the United  
17 States; and

18 (4) are not prisoners of war within the meaning  
19 of the Geneva Convention Relative to the Treatment  
20 of Prisoners of War, done on August 12, 1949, or  
21 any protocol relating thereto.

22 (b) **JURISDICTION.**—Tribunals established under  
23 subsection (a) may adjudicate violations of the law of war,  
24 international laws of armed conflict, and crimes against  
25 humanity targeted against United States persons.

1           (c) **AUTHORITY TO ESTABLISH PROCEDURAL**  
2 **RULES.**—The Secretary of Defense, in consultation with  
3 the Secretary of State and the Attorney General, shall pre-  
4 scribe and publish in the Federal Register, and report to  
5 the Committees on the Judiciary of the Senate and the  
6 House of Representatives, the rules of evidence and proce-  
7 dure that are to apply to tribunals established under sub-  
8 section (a).

9 **SEC. 4. PROCEDURAL REQUIREMENTS.**

10           (a) **IN GENERAL.**—The rules prescribed for a tri-  
11 bunal under section 3(c) shall be designed to ensure a full  
12 and fair hearing of the charges against the accused. The  
13 rules shall require the following:

14           (1) That the tribunal be independent and im-  
15           partial.

16           (2) That the accused be notified of the particu-  
17           lars of the offense charged or alleged without delay.

18           (3) That the proceedings be made simulta-  
19           neously intelligible for participants not conversant in  
20           the English language by including translation or in-  
21           terpretation.

22           (4) That the evidence supporting each alleged  
23           offense be given to the accused.

24           (5) That the accused have the opportunity to be  
25           present at trial.

1           (6) That the accused have a right to be rep-  
2           resented by counsel.

3           (7) That the accused have the opportunity—  
4                 (A) to respond to the evidence supporting  
5                 each alleged offense;  
6                 (B) to obtain exculpatory evidence from  
7                 the prosecution; and  
8                 (C) to present exculpatory evidence.

9           (8) That the accused have the opportunity to  
10           confront and cross-examine adverse witnesses and to  
11           offer witnesses.

12           (9) That the proceeding and disposition be ex-  
13           peditious.

14           (10) That the tribunal apply reasonable rules of  
15           evidence designed to ensure admission only of reli-  
16           able information or material with probative value.

17           (11) That the accused be afforded all necessary  
18           means of defense before and after the trial.

19           (12) That conviction of an alleged offense be  
20           based only upon proof of individual responsibility for  
21           the offense.

22           (13) That conviction of an alleged offense not  
23           be based upon an act, offense, or omission that was  
24           not an offense under law when it was committed.

1           (14) That the penalty for an offense not be  
2           greater than it was when the offense was committed.

3           (15) That the accused—

4                 (A) be presumed innocent until proven  
5                 guilty, and

6                 (B) not be found guilty except upon proof  
7                 beyond a reasonable doubt.

8           (16) That the accused not be compelled to con-  
9           fess guilt or testify against himself.

10           (17) That, subject to subsections (c) and (d),  
11           the trial be open and public and include public avail-  
12           ability of the transcripts of the trial and the pro-  
13           nouncement of judgment.

14           (18) That a convicted person be informed of  
15           remedies and appeals and the time limits for the ex-  
16           ercise of the person's rights to the remedies and ap-  
17           peals under the rules.

18           (b) IMPOSITION OF THE DEATH PENALTY.—The re-  
19           quirements of the Uniform Code of Military Justice for  
20           the imposition of the death penalty shall apply in any case  
21           in which a tribunal established under section 3 is re-  
22           quested to adjudge the death penalty.

23           (c) PUBLIC PROCEEDINGS.—Any proceedings con-  
24           ducted by a tribunal established under section 3, and the  
25           proceedings on any appeal of an action of the tribunal,

1 shall be accessible to the public consistent with any de-  
2 monstrable necessity to secure the safety of observers, wit-  
3 nesses, tribunal judges, counsel, or other persons.

4 (d) CONFIDENTIALITY OF EVIDENCE.—Evidence  
5 available from an agency of the Federal Government that  
6 is offered in a trial by a tribunal established under section  
7 3 may be kept secret from the public only when the head  
8 of the agency personally certifies in writing that disclosure  
9 will cause—

10 (1) identifiable harm to the prosecution of mili-  
11 tary objectives or interfere with the capture of mem-  
12 bers of al Qaeda anywhere;

13 (2) significant, identifiable harm to intelligence  
14 sources or methods; or

15 (3) substantial risk that such evidence could be  
16 used for planning future terrorist attacks.

17 (e) REVIEW.—

18 (1) PROCEDURES REQUIRED.—The Secretary of  
19 Defense shall provide for prompt review of convic-  
20 tions by tribunals established under section 3 to en-  
21 sure that the procedural requirements of a full and  
22 fair hearing have been met and that the evidence  
23 reasonably supports the convictions.

24 (2) UNITED STATES COURT OF APPEALS FOR  
25 THE ARMED FORCES.—The procedures established

1 under paragraph (1) shall, at a minimum, allow for  
2 review of the proceedings of the tribunals by the  
3 United States Court of Appeals for the Armed  
4 Forces established under the Uniform Code of Mili-  
5 tary Justice.

6 (3) SUPREME COURT.—The decisions of the  
7 United States Court of Appeals for the Armed  
8 Forces regarding proceedings of tribunals estab-  
9 lished under section 3 shall be subject to review by  
10 the Supreme Court by writ of certiorari.

11 **SEC. 5. DETENTION.**

12 (a) IN GENERAL.—The President may direct the Sec-  
13 retary of Defense to detain any person who is subject to  
14 a tribunal established under section 3 pursuant to rules  
15 and regulations that are promulgated by the Secretary and  
16 are consistent with the rules of international law.

17 (b) DURATION OF DETENTION.—

18 (1) LIMITATION.—A person may be detained  
19 under subsection (a) only while—

20 (A) there is in effect for the purposes of  
21 this section a certification by the President that  
22 the United States Armed Forces are engaged in  
23 a state of armed conflict with al Qaeda or  
24 Taliban forces in the region of Afghanistan or  
25 with al Qaeda forces elsewhere; or

1           (B) an investigation with a view toward  
2           prosecution, a prosecution, or a post-trial pro-  
3           ceeding in the case of such person, pursuant to  
4           the provisions of this Act, is ongoing.

5           (2) CERTIFICATION AND RECERTIFICATION.—A  
6           certification of circumstances made under paragraph  
7           (1) shall be effective for 180 days. The President  
8           may make successive certifications of the cir-  
9           cumstances.

10          (c) DISCLOSURE OF EVIDENCE.—Evidence that may  
11          establish that an accused is not a person described in sub-  
12          section (a) shall be disclosed to the accused and his coun-  
13          sel, except that a summary of such evidence shall be pro-  
14          vided to the accused and his counsel when the Attorney  
15          General personally certifies that disclosure of the evidence  
16          would cause identifiable harm to the prosecution of mili-  
17          tary objectives in Afghanistan, to the capture of other per-  
18          sons who are subject to this Act or reside outside the  
19          United States, or to the prevention of future terrorist acts  
20          directed against Americans. A summary of evidence shall  
21          be as complete as is possible in order to provide the ac-  
22          cused with an evidentiary basis to seek release from deten-  
23          tion.

24          (d) DETENTION REVIEW.—The United States Court  
25          of Appeals for the District of Columbia Circuit shall have

1 exclusive jurisdiction to review any determination under  
2 this section that the requirements of this section for de-  
3 taining an accused are satisfied.

4 (e) CONDITIONS OF DETENTION.—A person detained  
5 under this section shall be—

6 (1) detained at an appropriate location des-  
7 igned by the Secretary of Defense;

8 (2) treated humanely, without any adverse dis-  
9 tinction based on race, color, religion, gender, birth,  
10 wealth, or any similar criteria;

11 (3) afforded adequate food, drinking water,  
12 shelter, clothing, and medical treatment;

13 (4) sheltered under hygienic conditions and pro-  
14 vided necessary means of personal hygiene; and

15 (5) allowed the free exercise of religion con-  
16 sistent with the requirements of such detention.

17 **SEC. 6. SENSE OF CONGRESS.**

18 It is the sense of Congress that the President should  
19 seek the cooperation of United States allies and other na-  
20 tions in conducting the investigations and prosecutions, in-  
21 cluding extraditions, of the persons who are responsible  
22 for the September 11, 2001 attacks on the United States,  
23 and use to the fullest extent possible multilateral institu-  
24 tions and mechanisms for carrying out such investigations  
25 and prosecutions.

1 **SEC. 7. DEFINITIONS.**

2 In this Act:

3 (1) **SEPTEMBER 11, 2001 ATTACKS ON THE**  
4 **UNITED STATES.**—The term “September 11, 2001  
5 attacks on the United States” means the attacks on  
6 the Pentagon in the metropolitan area of Wash-  
7 ington, District of Columbia, and the World Trade  
8 Center, New York, New York, on September 11,  
9 2001, and includes the hijackings of American Air-  
10 lines flights 77 and 11 and United Airlines flights  
11 175 and 93 on that date.

12 (2) **UNITED STATES PERSON.**—The term  
13 “United States person” has the meaning given that  
14 term in section 101(i) of the Foreign Intelligence  
15 Surveillance Act of 1978 (50 U.S.C. 1801(i)).

16 **SEC. 8. TERMINATION OF AUTHORITY.**

17 The authority under this Act shall terminate at the  
18 end of December 31, 2005.

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