

## Sec. 2—Powers, Duties of the President

## Cl. 1—Commander-In-Chiefship

**Articles of War: World War II Crimes.**—As a matter of fact, in General Yamashita's case,<sup>223</sup> which was brought after the termination of hostilities for alleged "war crimes," the Court abandoned its restrictive conception altogether. In the words of Justice Rutledge's dissenting opinion in this case: "The difference between the Court's view of this proceeding and my own comes down in the end to the view, on the one hand, that there is no law restrictive upon these proceedings other than whatever rules and regulations may be prescribed for their government by the executive authority or the military and, on the other hand, that the provisions of the Articles of War, of the Geneva Convention and the Fifth Amendment apply."<sup>224</sup> And the adherence of the United States to the Charter of London in August 1945, under which the Nazi leaders were brought to trial, is explicable by the same theory. These individuals were charged with the crime of instigating aggressive war, which at the time of its commission was not a crime either under international law or under the laws of the prosecuting governments. It must be presumed that the President is not in his capacity as Supreme Commander bound by the prohibition in the Constitution of *ex post facto* laws, nor does international law forbid *ex post facto* laws.<sup>225</sup>

**Articles of War: Response to the Attacks of September 11, 2001.**—In response to the September 11, 2001, terrorist attacks on New York City's World Trade Center and the Pentagon in Washington, D.C., Congress passed the "Authorization for Use of Military Force,"<sup>226</sup> which provided that the President may use "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided the terrorist attacks [or] harbored such organizations or persons." During a military action in Afghanistan pursuant to this authorization, a United States citizen, Yaser Hamdi, was taken prisoner. The Executive Branch argued that it had plenary authority under Article II to hold such an "enemy combatant" for the duration of hostilities, and to deny him meaningful recourse to the federal courts. In *Hamdi v. Rumsfeld*, the Court agreed that the President was authorized to detain a United States citizen seized in Afghanistan, although a majority of the Court appeared to reject the notion that such power was inherent in the Presidency, relying instead on statu-

the meaning of the Hague Convention and the law of war."). See also *Colepaugh v. Looney*, 235 F.2d 429, 432 (10th Cir. 1956), *cert. denied*, 352 U.S. 1014 (1957) ("[T]he petitioner's citizenship in the United States does not . . . confer upon him any constitutional rights not accorded any other belligerent under the laws of war.").

<sup>223</sup> *In re Yamashita*, 327 U.S. 1 (1946).

<sup>224</sup> 327 U.S. at 81.

<sup>225</sup> See Gross, *The Criminality of Aggressive War*, 41 AM. POL. SCI. REV. 205 (1947).

<sup>226</sup> Pub. L. 107-40, 115 Stat. 224 (2001).