

A “FULL AND FAIR” TRIAL: CAN THE EXECUTIVE ENSURE IT ALONE? THE CASE FOR JUDICIAL REVIEW OF TRIALS BY MILITARY COMMISSIONS AT GUANTANAMO BAY

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“If, as may be hoped, we are now to enter upon a new era of law in the world, it becomes more important than ever before for the nations creating that system to observe their greatest traditions of administering justice . . . both in their own judging and in their new creation.”

I. INTRODUCTION

In the aftermath of the terrorist attacks of September 11, 2001, Congress authorized the President to “use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks 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.”² Pursuant to this authorization, military operations were soon initiated in Afghanistan against al Qaeda and the Taliban.³ As most of the country and Congress were focused on repairing damaged landscapes and senses of security at home in addition to the impending conflict in Afghanistan, select members of the Executive Branch were involved in drafting a plan for bringing justice to those involved in terrorism against the

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1. In re Yamashita, 327 U.S. 1, 42 (1946) (Rutledge, J., dissenting).

2. Pub. L. No. 107-40, 115 Stat. 224 (2001) [hereinafter “Authorization for Use of Military Force”].

3. See, e.g., Vernon Loeb, *Second Day of Strikes Includes Searching For Mobile Targets; U.S. Seeks Taliban Troops on the Run*, WASH. POST, Oct. 9, 2001, at A8 (describing the first two days of military action in Afghanistan).

United States.⁴ This plan was outlined in the President's Military Order of November 13, 2001 [hereinafter "Military Order"].⁵

As early as January of 2002, individuals captured in Afghanistan and suspected of terrorist activities were brought to the detention facility set up by the Department of Defense at Guantanamo Bay Naval Base, Cuba.⁶ Just as quickly, the legality of the detentions and trials by commission were called into question both at home and abroad. Though many controversies and legal challenges have arisen concerning the detention and trial of suspected terrorists at Guantanamo Bay, an issue that has yet to be clearly addressed is what will happen at the end of a successful trial by Military Commission.

President Bush's Military Order precludes judicial review of any type for those individuals falling under the Military Order.⁷ However, the Supreme Court held in June of 2004 that statutory habeas review will be available in the federal courts to challenge detention in Guantanamo Bay.⁸ Further, even case law cited by the Government as precedent for the use of military tribunals or commissions shows implicit past support for the use of federal habeas actions to challenge the legality of the tribunals and their jurisdiction over the individuals subject to trial in territories within the jurisdiction of the United States.⁹ Although this case law purported to limit such review to jurisdictional questions only, the outer limit of federal court jurisdiction

4. See Tim Golden, *After Terror, a Secret Rewriting of Military Law*, N.Y. TIMES, Oct. 24, 2004, at A1 (discussing the "aggressive approach" developed in secrecy by a small group of White House officials which enabled the military to detain and prosecute foreign suspects, including those held at Guantanamo Bay).

5. Military Order, 66 Fed. Reg. 57833 (Nov. 13, 2001) (entitled, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism") [hereinafter "Military Order"].

6. Jim Garamone, *Joint Task Force Set Up in Cuba to Oversee Al Qaeda Detainees*, AMER. FORCES INFO. SERV., Jan. 11, 2002, available at http://www.defenselink.mil/news/Jan2002/n01112002_20020111.html.

7. Military Order, *supra* note 5, sec. 7(b).

8. Rasul v. Bush, 124 S. Ct. 2686, 2698 (2004).

9. See *Johnson v. Eisentrager*, 339 U.S. 763, 777-78, 785 (1950) (addressing the constitutionality of military trials of nonresident enemy aliens in Nanking, China, even while finding that such individuals had no constitutional right to assert a federal habeas challenge to the trials). Such habeas claims were also used to challenge the legality of World War II military trials taking place in the United States or its insular possessions. See generally *In re Yamashita*, 327 U.S. 1 (1946) (addressing trial of Japanese General by military commission in the Philippines); *Ex parte Quirin*, 317 U.S. 1 (1942) (addressing trial of Nazi saboteurs by military commission in the United States). Similarly, statutory habeas actions are now being used to challenge the legality of the current commissions and the designation of certain individuals for trial under their jurisdiction prior to the commencement of trial. See, e.g., *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004).

over the Guantanamo Bay detainees was left open by the Supreme Court in *Rasul*.¹⁰

This note seeks to address the level and type of judicial review that will be available after the completion of a Military Commission trial. For purposes of addressing this issue, the constitutionality of the use of commissions to try detainees will be assumed. It will be argued that, at a minimum, federal habeas jurisdiction must be available to satisfy both national and international law. However, ideally a more thorough form of judicial review should be available, to avoid separation of powers problems and to satisfy domestic and international due process guarantees. Further, from a normative perspective, allowing judicial review in the form of appellate jurisdiction over the procedure and legal findings of the Commissions would be desirable, as it would lend credibility and transparency to procedures that have thus far been wrought with controversy.

II. PROCEDURES FOR MILITARY COMMISSIONS AT GUANTANAMO BAY

The Military Order sets forth procedures for the detention and trial of individuals who are not citizens of the United States and who are determined by the President to be a member of al Qaeda, and have “engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore” or “knowingly harbored [such] individuals.”¹¹ Such individuals are to be detained in accordance with conditions prescribed by the Secretary of Defense,¹² and “when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed.”¹³

The Military Order delegates to the Secretary of Defense the responsibility to issue “such orders and regulations” necessary to govern the military commissions, including but not limited to “rules for the conduct of the proceedings of the military commissions, including pretrial, trial, and post-trial procedures, modes of proof, issuance of process, and qualifications of attorneys,” providing that at a minimum

10. *Rasul*, 124 S. Ct. at 2699.

11. Military Order, *supra* note 5, sec. 2(a)(1).

12. *Id.* at sec. 3.

13. *Id.* at sec. 4(a).

detainees would receive a “full and fair trial.”¹⁴ Review and final decision on any trial would be performed by the President or the Secretary of Defense.¹⁵ Finally, the Military Order provides that military commissions shall have exclusive jurisdiction with regard to offenses by individuals subject to the order, and that such individuals “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.”¹⁶

The Secretary of Defense issued regulations setting forth the procedures for commissions established pursuant to the Military Order.¹⁷ These regulations provide for appointment of the members of each Commission, including a Presiding Officer, by the Appointing Authority, a designee of the Secretary of Defense.¹⁸ The Presiding Officer heads the proceedings of the Commission.¹⁹ A record of the trial is to be made by the Commission and authenticated by the Presiding officer.²⁰ Upon completion of trial, this record is to be transmitted to the Appointing Authority or to a Review Panel if the Secretary of Defense is acting as the Appointing Authority.²¹ The Appointing Authority performs an administrative review of the record of trial, and, if satisfied that the proceedings were administra-

14. *Id.* at sec. 4(b)-(c). Authority for this provision is derived from section 836 of the Uniform Code of Military Justice (UCMJ), which allows the President to prescribe similar procedural rules and regulations for cases arising under the UCMJ which are triable in courts-martial, military commissions and other military tribunals. 10 U.S.C. § 836(a) (2000). Principles of law and the rules of evidence generally recognized in U.S. district courts shall be applied, in so far as considered practicable by the President. *Id.* However, regulations prescribed may not be contrary to or inconsistent with the UCMJ. *Id.*

15. Military Order, *supra* note 5, sec. 4(c)(8).

16. *Id.* at sec. 7(b).

17. 32 C.F.R. §§ 9–17.

18. *Id.* at §§ 9.2, 9.4. Each Commission is to have between three and seven members. *Id.* at § 9.4(a)(2). Each member is to be a commissioned officer of the United States armed forces (“Military Officers”). *Id.* at § 9.4(a)(3). The Presiding Officer is to be a judge advocate of any United States armed force. *Id.* at § 9.4(a)(4). Members may be removed by the Appointing Authority for good cause. *Id.* at § 9.4(a)(3).

19. *Id.* at § 9.4(a)(4). *See also id.* at § 9.4(a)(5) (listing duties of the Presiding Officer).

20. *Id.* at § 9.6(h)(1).

21. *Id.* The Review Panel shall consist of three Military Officers, at least one of whom shall have experience as a judge, appointed by the Secretary of Defense. *Id.* at § 9.6(h)(4).

tively complete, transmits the record of trial to the Review Panel.²² The Review Panel then reviews the record of trial and within thirty days either forwards the case to the Secretary of Defense with a recommendation as to disposition or returns the case to the Appointing Authority for further proceedings.²³ The Secretary of Defense then performs a similar review of the record, either returning the case for further proceedings, forwarding it to the President with a recommendation as to disposition, or making the final determination if designated by the President to perform this function.²⁴

Trial by the Commission commences when the Appointing Authority refers the charges of an individual who is subject to the Military Order to the Commission.²⁵ On July 3, 2003, the President determined that six detainees would be eligible for trial by Military Commission.²⁶ At the date of this note, four detainees have been designated for trial by the Appointing Authority, although fifteen have now been determined eligible by the President.²⁷ The progress of the trials has been delayed by motions to the Commissions themselves, as well as challenges in the United States Federal Courts. In November of 2004, the decision by the United States District Court of the District of Columbia in the case of *Hamdan v. Rumsfeld*²⁸ brought into question further progress by the Commissions.²⁹ For purposes of this note, which seeks only to address post-trial review of the Military

22. *Id.* at § 9.6(h)(3). If the Appointing Authority is not satisfied that the proceedings of the Commission were administratively complete, the case shall be returned for any necessary supplementary proceedings. *Id.*

23. *Id.* at § 9.6(h)(4). During this review, the Review Panel may, in its discretion, review any written submissions from the Prosecution and the Defense. *Id.* Deliberations are to take place in closed conference. *Id.* Any variance from the procedures spelled out in the Department of Defense’s regulations shall be disregarded where they “would not materially have affected the outcome of the trial before the Commission.” *Id.*

24. *Id.* at § 9.6(h)(5)–(6).

25. *Id.* at § 9.2.

26. News Release, U.S. Dep’t of Defense, President Determines Enemy Combatants Subject to His Military Order (July 3, 2003), available at <http://www.defenselink.mil/releases/2003/nr20030703-0173.html>.

27. *Guantanamo Bay Detainees Legal Update*, GLOBALSECURITY.ORG, at http://www.globalsecurity.org/military/facility/guantanamo-bay_legal.htm (last modified Nov. 9, 2004).

28. 344 F.Supp. 2d 152 (D.D.C. 2004).

29. The four cases designated for trial are currently in abeyance, pending the outcome of the federal litigation. Kathleen Rhem, *Parties Still Working Behind the Scenes on Military Commissions*, AMER. FORCES INFO. SERV., Mar. 8, 2005, available at [http://www.defenselink.mil/cgi-bin/dlprint.cgi? http://www.defenselink.mil/news/Mar2005/20050308_118.html](http://www.defenselink.mil/cgi-bin/dlprint.cgi?http://www.defenselink.mil/news/Mar2005/20050308_118.html).

Commissions, the ongoing challenges to the constitutionality of the Military Commissions will be illustrative of considerations that will be important in determining the availability and scope of post-trial judicial review.

III. HISTORICAL USE OF JUDICIAL OVERSIGHT OF MILITARY COMMISSIONS

Historically, the United States has used military commissions while in the battlefield to try spies, saboteurs, and other violations of the laws of war.³⁰ Additionally, military commissions have been used in occupied territories to try common crimes where local courts may be insufficient, or to fill a legal vacuum where armed conflict disables the civil courts.³¹ The use of military commissions as an “exception to the ‘preferred’ method of civilian trial [was] thus justified by necessity” and often consisted of impromptu proceedings to distribute justice on the battlefield.³² The use of military commissions by the United States in recent times has been limited, and the key cases dealing with the constitutionality of military commissions arose in regards to their use during the Civil War and World War II.

In *Ex parte Milligan*,³³ the Supreme Court held that military commissions organized during the civil war, in a state not invaded or engaged in rebellion, in which the federal courts were open and exercising their jurisdiction, had no jurisdiction to try, convict, or sentence a citizen who was neither a resident of a rebellious state, a prisoner of war, nor a person in the military.³⁴ Thus, while *Milligan*'s holding was limited to the trial of citizens by military commissions, it also provided precedent for judicial inquiry into the legality of the authority and jurisdiction of military commissions,³⁵ an inquiry that is evident in the following cases dealing with World War II military commissions.

During World War II, the Court had several opportunities to deal with the military commissions. First, in 1942 the Court held con-

30. STEPHEN DYCUS, ET. AL, NATIONAL SECURITY LAW, 889 (3d ed. 2002).

31. *Id.* at 889, 901. See Henry J. Fletcher, *The Civilian and the War Power*, 2 MINN. L. REV. 110, 123 (1918) (describing “time of war” as meaning “when the ordinary courts are not in the usual and open exercise of their functions”).

32. DYCUS, *supra* note 30, at 901. See also Fletcher, *supra* note 31, at 116–17 (stating that the majority in *Milligan* took the view that war powers used to conduct military commissions were founded upon necessity, and therefore were justified in front of the judiciary only by necessity).

33. 71 U.S. (4 Wall) 2 (1866).

34. *Id.* at 118, 121–22.

35. *Id.* at 118; Fletcher, *supra* note 31, at 115–17.

stitutional President Roosevelt’s military order establishing military commissions to try eight Nazi saboteurs captured on U.S. soil, in *Ex parte Quirin*.³⁶ While the 1942 Military Order was directed specifically at the eight Nazi defendants,³⁷ on the same day, President Roosevelt issued a Proclamation subjecting to the jurisdiction of military tribunals all “subjects, citizens or residents of any nation at war with the United States” who entered or attempted to enter United States territory during a time of war and were charged with violations of war.³⁸ It is also notable that the President’s Proclamation stated “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 federal or state courts.³⁹

In hearing petitioners’ post-conviction habeas claim, even while acknowledging the general prohibition of judicial review contained in the Proclamation, the Court rejected the Government’s claim that it could not consider whether the application of the Proclamation to the defendants in question was proper or whether their trial by military commission was unconstitutional.⁴⁰ However, finding that the military commissions were constitutional and had exercised proper jurisdiction over the defendants, the Court stated that it would not consider other unrelated issues and was unconcerned with “any question of the guilt or innocence” of the defendants.⁴¹ Further,

[T]he detention and trial of petitioners—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.⁴²

Therefore, while offering support for a review of the propriety of military commissions and their jurisdiction over defendants, *Quirin*

36. *Ex parte Quirin*, 317 U.S. 1, 48 (1942).

37. Appointment of a Military Commission, Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 2, 1942) [hereinafter 1942 Military Order].

38. Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942) [hereinafter 1942 Proclamation].

39. *Id.*

40. *Quirin*, 317 U.S. at 24–25.

41. *Id.* at 25.

42. *Id.* The court rejected petitioners’ argument that *Milligan* stood for the rule that the law of war could not be applied to citizens in states in which “the courts are open and their process unobstructed,” finding that that ruling was limited to the particular facts of that case. *Id.* at 45 (citing *Milligan*, 71 U.S. at 121).

also represents support for deference to the authority of the President to create military tribunals in a time of war.⁴³

Four years later, the Court denied a habeas petition from the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army in the Philippine Islands, who had been tried and convicted for violation of the laws of war by a military commission in the Philippines, in *In re Yamashita*.⁴⁴ There, the petitioner sought habeas review claiming that the military commission was without lawful authority or jurisdiction because it was convened after hostilities between the United States and Japan had ended, failed to charge petitioner with a violation of the law of war, and did not provide a fair trial in violation of the laws of war, the Geneva Convention, and the Fifth Amendment.⁴⁵ As in *Quirin*, the Court emphasized that on application for habeas corpus concern was not with the guilt or innocence of the petitioner, but only with the lawful power of the commission to try the petitioner for the offense charged.⁴⁶ So long as the authority of the commission was lawful, correction of any errors of decision was not for the Court to perform, but rather for the military authorities who alone had been authorized to review the decisions.⁴⁷ Regardless, as in *Quirin*, the Court went on to address the substantive nature of the petitioner's claims, though holding against him.⁴⁸

Finally, in *Johnson v. Eisentrager*,⁴⁹ the Court addressed the “jurisdiction of civil courts of the United States *vis-à-vis* military authori-

43. It should be noted that the Court in *Quirin* repeatedly cited Congressional authority for creating commissions, 317 U.S. at 26–30, and that many scholars have used this point, in addition to the formal declaration of war, to distinguish the *Quirin* commissions from the current commissions. Additionally, consideration of additional factors such as the public reaction to the capture of the saboteurs, as well as executive pressure on the court, provide an interesting lens from which to view the *Quirin* Court's decision. See Jack Goldsmith & Cass R. Sunstein, Comment, *Military Tribunals and Legal Culture: What a Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 271 (2002) (listing examples of public and media outcry over judicial intervention into military commissions and finding that “[i]n the context of the events of late 1942, the decision in *Quirin* to limit *Milligan* and to uphold the validity of Roosevelt's Military Commission was not viewed as a big deal”). See *infra* note 92 and accompanying text for discussion of these issues in regards to the current commissions.

44. *In re Yamashita*, 327 U.S. 1, 5 (1946).

45. *Id.* at 5–6.

46. *Id.* at 8.

47. *Id.*

48. See *id.* at 25 (concluding that “the order convening the commission was a lawful order, that the commission was lawfully constituted, that petitioner was charged with violation of the law of war, and that the commission had authority to proceed with the trial, and in doing so did not violate any military, statutory, or constitutional command”).

49. 339 U.S. 763 (1950).

ties in dealing with enemy aliens overseas.”⁵⁰ Petitioners in this case were twenty-one German nationals who were captured while engaging in the service of German armed forces in China after the surrender of Germany and convicted of violating laws of war by a military commission constituted by the U.S. Commanding General at Nanking, China.⁵¹ After the conviction, the sentences were duly reviewed and approved by military approving authority, upon which time the prisoners were repatriated to serve their sentences at Landsberg Prison in Germany.⁵² The prisoners then petitioned for writs of habeas corpus, claiming that their trial, conviction, and imprisonment were unconstitutional and violated the Geneva Convention governing treatment of prisoners of war.⁵³

In denying the petitions, the court stated that “the nonresident enemy alien . . . does not have even . . . qualified access to our courts, for he neither has . . . claims upon our institutions nor could his use of them fail to be helpful to the enemy.”⁵⁴ Yet, even while denying habeas, the court acknowledged that “the doors of our courts have not been summarily closed upon these prisoners.”⁵⁵ First, hearings had been provided to determine whether the right to habeas existed for the petitioners.⁵⁶ Additionally, although the Court denied that petitioners had the right to challenge the constitutionality of the military commissions, it went on to evaluate the legality of the commissions under the constitution and the Geneva Conventions, finding the commissions proper under both.⁵⁷

50. *Id.* at 765.

51. *Id.* at 765–66.

52. *Id.* at 766.

53. *Id.* at 767. Specifically, the petitioners claimed violations of Articles I and III, and the Fifth Amendment of the Constitution. *Id.*

54. *Johnson v. Eisentrager*, 339 U.S. 763, 776 (1950). The Court went on to find six factors important to the finding that petitioners had no constitutional right to habeas review: that they were enemy aliens; had never been or resided in the U. S.; were captured outside of U.S. territory and held there in military custody as prisoners of war; were tried and convicted by a military commission sitting outside of the U.S.; were charged with and tried for offenses against laws of war committed outside the U.S.; and were at all times imprisoned outside of the U.S. *Id.* at 777.

55. *Id.* at 780.

56. *Id.* at 781.

57. *See id.* at 782–90. *See also id.* at 794 (Black, J., dissenting) (reading *Quirin* and *Yamashita* to stand for the proposition that enemy aliens can at least challenge the legality of their commissions in federal court).

IV. JUDICIAL OVERSIGHT OF DETENTIONS AND PROCEEDINGS AT GUANTANAMO BAY

As discussed, *supra* Part III, military tribunals have not been subject to judicial review throughout history, for both legal and practical reasons. However, just as the legal landscape has changed in the sixty-plus years since *Ex parte Quirin* and *Johnson v. Eisentrager*, so has the nature of warfare and national security changed from a practical standpoint. From a legal perspective, changes in international law such as the worldwide ratification of the Geneva Conventions in 1949, and the International Convention on Civil and Political Rights ratified by the United States in 1994, as well as the domestic adoption of the Uniform Code of Military Justice in 1950 and domestic extensions of criminal law, are all factors that narrow the relevance of decisions limiting judicial review of military commissions during World War II.⁵⁸ From a practical standpoint, the United States has not been involved in a formally declared war since World War II. The current conflicts in Afghanistan and Iraq involve both enemy armed forces and unlawful enemy combatants or insurgents.⁵⁹ Finally, the greater “War on Terror” has no definable boundaries, making the world its battlefield with no likelihood of a definitive conclusion.⁶⁰ Given these changes, it is difficult to apply the traditional justifications for, as well as limitations on, military commissions when questions arise about the constitutionality of detention and trial of detainees in Guantanamo Bay.

The first set of issues was decided by the Supreme Court in June of 2004, when it held that both citizen and alien detainees had a statutory right to petition for habeas review of the legality of their detention and classification as enemy combatants.⁶¹ The Court’s holding in

58. See Brief of Amicus Curiae Military Attorneys Assigned to the Defense in the Office of Military Commissions as Amicus Curiae in Support of Neither Party, at 21–29, *Al Odah v. United States*, 2004 WL 96765 (2004) [hereinafter Amicus Brief of Military Commission Defense Attorneys].

59. See Joan Fitzpatrick, *Jurisdiction of Military Commissions and the Ambiguous War on Terrorism*, 96 AM. J. INT’L L. 345, 346 (2002) (suggesting four possibilities for characterizing the post-September 11 “war” and its parties: (1) a metaphorical “war on terrorism,” of worldwide scope and indefinite duration; (2) an international armed conflict against Al Qaeda as a quasi-state; (3) an international armed conflict in Afghanistan, though not against Afghanistan; and (4) a proxy war “in the context of the quarter-century-old internal armed conflict in Afghanistan”).

60. *Id.* at 346–47.

61. *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2635 (2004) (“[D]ue process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decisionmaker.”); *Rasul v. Bush*, 124 S. Ct.

Rasul v. Bush, which left open “[w]hether and what further proceedings may become necessary” after the Government responds to claims that detainees are being held illegally,⁶² will have important impacts upon the availability of judicial review for alien detainees determined to be eligible for trial by military commission.

In rejecting the Government’s claim that, under *Eisentrager*, the Court could not review the claims of foreign nationals held in Guantanamo Bay, the majority distinguished the situation of the current detainees to those in *Eisentrager*. Important to the Court was the distinction that those detained in Guantanamo Bay pursuant to the Military Order were not nationals of countries at war with the United States, were never charged or convicted of wrong, were never afforded access to any tribunal, and in fact denied engaging in or plotting acts of aggression against the United States.⁶³ Further, the Court distinguished Guantanamo Bay from the Landsberg prison in Germany, finding that the detainees were imprisoned in territory under the exclusive jurisdiction and control of the United States.⁶⁴ Ultimately, however, the Court based its decision on the fact that the *Eisentrager* court addressed whether detainees had a constitutional right to habeas, while in this case “subsequent decisions of [the] Court have filled the statutory gap that had occasioned *Eisentrager’s* resort to ‘fundamentals,’” thus allowing for a statutory right to habeas review extending to Guantanamo Bay.⁶⁵

Justice Kennedy concurred in the judgment, expressing concern that the majority’s approach failed to follow the framework of *Eisentrager*, and that the habeas petition “was not within the proper realm of the judicial power,” but rather “concerned matters within the exclusive province of the Executive, or the Executive and Congress, to determine.”⁶⁶ Thus, from *Eisentrager* comes the indication “that there is a realm of political authority over military affairs where the judiciary may not enter.”⁶⁷ However, a “necessary corollary” to this principle is that circumstances will exist in which courts maintain the power

2686, 2696 (2004) (“Application of the habeas statute to persons detained at [Guantanamo Bay] is consistent with the historical reach of the writ of habeas corpus.”).

62. *Rasul*, 124 S. Ct. at 2699.

63. *Id.* at 2693.

64. *Id.*

65. *Id.* at 2695.

66. *Rasul*, 124 S. Ct. at 2699 (Kennedy, J., concurring).

67. *Id.* at 2700.

and responsibility to protect persons from unlawful detention even where military affairs are implicated.⁶⁸

Therefore, the court must perform an initial inquiry into the general circumstances of the detention to determine whether to entertain a habeas petition.⁶⁹ In this case, two critical facts distinguished Guantanamo detainees from the situation in *Eisentrager*. First, the fact that “Guantanamo Bay is in every practical respect a United States territory, and . . . one far removed from any hostilities,” supported the claim of the detainees.⁷⁰ Second, unlike the prisoners in *Eisentrager*, who were already determined to be enemy combatants through military commission procedures, the Guantanamo detainees were being held indefinitely, with no procedure to determine their status.⁷¹ For those reasons, Justice Kennedy supported federal court jurisdiction to determine the legality of detentions in this case, while stopping short of supporting “automatic statutory authority” for habeas claims brought by persons located outside of the United States.⁷²

Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, dissented, disagreeing with the Court’s analysis of habeas case law subsequent to *Eisentrager* and finding that the Court’s ruling contradicted *Eisentrager*, “a half-century-old precedent on which the military undoubtedly relied.”⁷³ The dissent further warned that the Court’s decision would have breathtaking consequences, permitting any alien captured in a foreign theatre of war to bring a habeas petition against the Secretary of Defense.⁷⁴

The ramifications of the *Rasul* decision on the treatment of detainees at Guantanamo were almost immediately seen. While the Government set up a Combatant Status Review Tribunal to provide the procedure and legal classification that the Court had found lacking,⁷⁵ attorneys for the detainees brought forth habeas petitions in regards to the detentions.⁷⁶ For some detainees who faced trial by mili-

68. *Id.*

69. *Id.*

70. *Id.*

71. *Rasul*, 124 S. Ct. at 2700 (Kennedy, J., concurring)

72. *Id.* at 2701.

73. *Rasul*, 124 S. Ct. at 2701 (Scalia, J., dissenting).

74. *Id.* at 2706.

75. See News Release, U.S. Dep’t of Defense, First Combatant Status Tribunal Conducted at Guantanamo Today (July 30, 2004), at <http://www.defenselink.mil/releases/2004/nr20040730-1076.html>.

76. The Ninth Circuit decided that the proper venue for such proceedings is the District Court for the District of Columbia. *Gherebi v. Bush*, 374 F.3d 727, 739 (9th Cir. 2004). As of

tary commission, habeas petitions were used to preemptively challenge the constitutionality of the commissions in addition to their detention.⁷⁷ In November, the District Court for the District of Columbia issued a ruling that “shot several major holes in the administration’s anti-terrorism positions,”⁷⁸ most notably by holding that the President does not have “untrammelled power” to establish military commissions.⁷⁹

Perhaps the biggest hurdle created for the Government by the decision was the ruling that Salim Ahmed Hamdan, a detainee who was captured in Afghanistan during hostilities and who had asserted his entitlement to prisoner-of-war status under the Third Geneva Convention must have the benefit of a competent tribunal to determine whether he was entitled to such status.⁸⁰ Determination that an individual was an enemy combatant made unilaterally by the President, pursuant to the Military Order, was insufficient to meet this requirement.⁸¹ Likewise, the Combatant Status Review Tribunal did not meet the “competent tribunal” requirement because it was established not to address detainees’ status under the Geneva Conventions, but to comply with the Supreme Court’s mandate in *Hamdi* that, in order to continue detention, determination must be made that a detainee is properly detained as an enemy combatant.⁸² Thus, Hamdan would be presumed to have prisoner-of-war status, unless or until it was shown to be otherwise.⁸³

However, even if Hamdan did not have prisoner-of-war status, the procedures used by Military Commissions may not be “contrary to or inconsistent with” the Uniform Code of Military Justice

early 2005, two federal judges in the District of Columbia have issued conflicting opinions on the issue of whether detainees can substantively challenge their confinement as enemy combatants. *Compare* *In re Guantanamo Detainee Cases*, 355 F. Supp. 2d 443, 445 (D.D.C. 2005) (concluding that petitioners had stated valid claims under the Fifth Amendment and that the procedures set up by the government to make determinations regarding enemy combatant status violated petitioners’ due process rights) *with* *Khalid v. Bush*, 355 F. Supp. 2d 311, 314 (D.D.C. 2005) (concluding no viable theory exists under which habeas may be issued and dismissing petitioners’ claims as a matter of law).

77. *See, e.g., Hamdan v. Rumsfeld*, 344 F.Supp. 2d 152 (D.D.C. 2004).

78. Marcia Coyle, *Judging the Tribunals: Circuit to Weigh President’s Powers over Detainees*, NAT’L LAW J. Vol. 27, 1 (Nov. 22, 2004).

79. *Hamdan*, 344 F. Supp. 2d at 158.

80. *Id.* at 156.

81. *Id.* at 162 (“The President is not a ‘tribunal,’ however.”).

82. *Id.*

83. *Id.*

(UCMJ).⁸⁴ The District Court addressed the differences between the Military Commissions and the court-martial proceedings afforded under the UCMJ, finding remarkable differences in two important respects.⁸⁵ First, the Court briefly addressed the structure of the reviewing authority after trial, finding that the lack of review provided by the judicial branch was not contrary to or inconsistent with the UCMJ.⁸⁶ Further, the Court did not find problematic the fact that the President or Secretary of Defense are the final reviewing authority, as “that, after all, is what a military commission is.”⁸⁷

However, the second difference, the power to exclude the accused from hearings and deny access to evidence presented against him if it is deemed classified or otherwise protected, was found much more problematic.⁸⁸ The Court identified contradictions between this procedural rule and the confrontation clause in American law,⁸⁹ as well as the right to trial “in [one’s] presence” established by the Geneva Convention and the International Covenant on Civil and Political Rights and the Geneva Convention (ICCPR).⁹⁰ Because of these inconsistencies, the Court found the rules of the Military Commission unlawful, as they were “fatally ‘contrary to or inconsistent with’” the statutory requirements of the UCMJ.⁹¹

Not surprisingly, this judgment caused outcry among members of the executive branch, who immediately sought expedited review of an appeal of the district court decision.⁹² It remains to be seen whether

84. See 10 U.S.C. § 836(a) (allowing the President to prescribe pretrial, trial, and post-trial procedures for military commissions, so long as they are not “contrary to or inconsistent with” the UCMJ).

85. *Id.* at 166.

86. *Hamdan*, 344 F. Supp. 2d at 167. The Court justified this, in part, based upon the panel of “some of the most distinguished civilian lawyers in the country” that have been appointed by the President as members of the Review Panel. *Id.* See also Dep’t of Defense, Military Commission Biographies, at http://www.defenselink.mil/news/Aug2004/commissions_biographies.html (listing members of the Review Panel).

87. *Hamdan*, 344 F.Supp. 2d at 167.

88. *Id.*

89. *Id.* at 168 (“It is obvious beyond the need for citation that such a dramatic deviation from the confrontation clause could not be countenanced in any American court . . .”).

90. International Covenant on Civil and Political Rights, Dec. 16, 1966, art. 14.3(d), 999 U.N.T.S. 171 [hereinafter ICCPR]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 75.4(e), 1125 U.N.T.S. 3 [hereinafter Protocol I].

91. *Hamdan*, 344 F. Supp. 2d at 168.

92. See Coyle, *supra* note 78 (quoting Assistant Attorney General Peter Keisler as saying the rulings “represent an unprecedented judicial intrusion into the prerogatives of the president” and have “potentially very broad and dangerous ramifications”); Dan Eggen, *Ashcroft*

the district court decision will withstand appellate scrutiny. Counsel for Hamdan sought expedited review of petition for certiorari in the Supreme Court before judgment of the Court of Appeals, citing the extraordinary circumstances of the case, the importance of Military Commissions, and the tremendous significance of the decision of the District Court on other cases dealing with trial of detainees.⁹³ The motion for expedited review was denied by the Supreme Court on December 6, 2004,⁹⁴ and Hamdan’s petition for certiorari was denied on January 18, 2005.⁹⁵ Oral arguments in front of the D.C. Circuit took place on April 7, 2005.⁹⁶

V. POST-TRIAL JUDICIAL REVIEW OF GUANTANAMO COMMISSIONS

The question of post-trial judicial review of the current Military Commissions is one that has not yet been addressed, most likely due to the delay in proceedings for the few detainees actually designated as eligible for trial. As discussed, *supra* Part IV, case law dealing with the use of military commissions provides limited help in addressing the question of whether and how the courts may review decisions by the current Military Commissions, as those cases were decided in times of a declared war and when Congressional approval of the commissions more clearly existed.

Furthermore, even the legal principles that may be taken from the World War II cases seem contradictory at times. Often, even while professing that petitioners had no right to judicial review of their claims, the Court then went on to analyze and to rule on those claims nonetheless. Because the Court held in favor of the Government’s use of military commissions, the decision to review the governmental action was non-controversial. It is arguable that the Court

Denies Court Rulings; ‘Second-Guessing’ Bush on Security Raises Risks, He Says, WASH. POST, Nov. 13, 2004, at A6 (quoting former Attorney General John Ashcroft as describing court decisions limiting President Bush’s powers “a profoundly disturbing trend”).

93. See generally *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *petition for cert. filed*, 2004 WL 2678664 (U.S. Nov. 22, 2004) (No. 04-702).

94. *Hamdan v. Rumsfeld*, 344 F. Supp. 2d 152 (D.D.C. 2004), *motion of petitioner to expedite review*, 73 USLW 3336 (Dec. 6, 2004) (No. 04-702).

95. *Certiorari – Summary Dispositions (Order List: 543 U.S.)*, SUPREME COURT COURT ORDERS, Jan. 18, 2005, at <http://www.supremecourtus.gov/orders/courtorders/011805pzor.pdf>.

96. See Transcript of Proceedings (Apr. 7, 2005), *Hamdan v. Rumsfeld*, No. 04-5393, (D.C. Cir. 2005) [hereinafter Court of Appeals Transcript], available at <http://www.law.georgetown.edu/faculty/nkk/documents/HamdanDCCircuitTranscript.PDF> (last visited May 9, 2005).

addressed petitioner's claims in each case merely to bolster its decision that judicial review was unnecessary and improper.⁹⁷

Thus, application of these cases and their principles to the current commissions will not provide clear answers as to the Court's proper jurisdiction in regards to post-trial review of the Guantanamo Commissions. Already the Court has distinguished these cases, based on the geographical locations of the commissions and differences in the type of armed conflicts, to allow for habeas review for detention and pretrial proceedings. Most recently, in *Hamdan*, the District Court of the District of Columbia has shown itself willing to take more than a perfunctory look at whether the authority and procedures of the Military Commissions are proper under the constitution and under the UCMJ.⁹⁸

Therefore, at a minimum the level of judicial review that must be provided after the completion of a trial by the Military Commissions will consist of habeas review as to the legality of the authority and jurisdiction of the commission. Based on the recent detainee cases, it seems likely that the federal courts will go further in their inquiry of the constitutionality of the commissions, to include the procedures used to reach final judgments. Of course, legitimate concerns still exist in regards to allowing too much judicial oversight into the trial of suspected terrorists, the most compelling of which are the classified nature of much of the evidence and the security of judges and juries.⁹⁹ Such concerns provide support for judicial deference to military fact-finding, yet courts should still retain authority to examine the validity of the commission procedures and decisions.¹⁰⁰

Such heightened inquiry into the constitutionality of both the jurisdiction and proceedings of the Guantanamo Military Commissions is not only permissible, but is also desirable, based upon the need to uphold separation of powers, to follow domestic and international laws of war and human rights, and for general policy reasons. Each of these reasons will be discussed in detail below.

97. However, this approval based upon a review deferential to the Government was problematic in that it ignored glaring problems with the procedures employed by the commissions, as discussed *infra* at notes 125-128.

98. See *supra* notes 84-91.

99. See Ruth Wedgwood, *Tribunals and the Events of September 11*, ASIL INSIGHT, Dec. 2001, available at <http://www.asil.org/insights/insigh80.htm>.

100. Similar arguments support the judicial review of detainee classification procedures. See generally David A. Martin, *Offshore Detainees and the Role of Courts After Rasul v. Bush: The Underappreciated Virtues of Deferential Review*, 25 B. C. THIRD WORLD L. J. 125 (2005) (examining the level of judicial review that should be afforded to enemy combatant classifications).

A. Separation of Powers

The bounds of the President’s commander-in-chief powers are still being tested in regards to the current war on terror. On one side, members of the Executive have stood by the position that the President’s discretion to act in protection of national security in the aftermath of September 11 must not be hampered.¹⁰¹ On the other side, many in the legal community as well as Congress have decried the President’s actions as circumventing the constitutional civil liberties and separation of powers.¹⁰²

Military Commissions have traditionally gained their legitimacy from Congressional grants of authority or, at least, from Congressional approval of presidential action.¹⁰³ Though a thorough evaluation is not presented within this note, it is notable that the authority behind the current Military Commissions remains unclear. While the Authorization for Use of Military Force in Afghanistan provides the President latitude to take action in response to September 11, it contains no authorization of the use of military commissions to try suspected terrorists.¹⁰⁴ Likewise sections 821 and 836 of the UCMJ establish the jurisdiction of military tribunals in general but do not give clear authorization for the establishment of the Guantanamo Bay Military Commissions.¹⁰⁵

Even assuming Congressional authorization, the Military Commissions, like other Article I tribunals, are necessarily inferior to the

101. See, e.g., Eggen, *supra* note 92 (detailing former Attorney General Ashcroft’s comments that judicial review of presidential action in the area of national security creates even greater security risks). See also Robert H. Bork & David B. Rivkin, Jr., *A War the Courts Shouldn’t Manage*, WASH. POST, Jan. 21, 2005, at A17 (stating that, rather than fostering “the false impression that the executive branch is trampling on constitutional liberties,” the judiciary should defer to the executive branch’s “extensive prerogatives in foreign affairs [which] are grounded in its unique expertise, information and unitary nature”).

102. See Kate Martin, *More Power for Bush: Alberto Gonzales Ordered Deference to the President*, LEGAL TIMES, Dec. 23, 2002, at 45 (criticizing the President’s policy in Guantanamo Bay as having “engineered an extraordinary assumption of presidential power over the lives of individuals, unchecked by the separation of powers”); Goldsmith & Sunstein, *supra* note 43, at 271–73 (comparing the reactions of Congress, the mainstream press and members of the legal academy to the current commissions with reactions to the 1942 commissions and finding the current reaction by these institutions to be “vehement, and sometimes strident, opposition”). For further examples of both viewpoints, see Peter Slevin & George Lardner, Jr., *Bush Plan for Terrorism Trials Defended; Military Tribunals Appropriate in War, Ashcroft Says; Critics Cite Constitution*, WASH. POST, Nov. 15, 2001, at A28.

103. See *Hamdan v. Rumsfeld*, 344 F.Supp. 2d 152, 158–60 (detailing Congressional authority for World War II military commissions).

104. See *Authorization for Use of Military Force*, *supra* note 2.

105. See 10 U.S.C. §§ 821, 836 (2000).

head of the judiciary, the Supreme Court.¹⁰⁶ A comparison can be drawn to the review provided by the Supreme Court to decisions by the Court of Appeals for the Armed Forces, the Article I tribunal established by the UCMJ to hear appeals from courts-martial decisions.¹⁰⁷ Decisions are reviewed on a discretionary basis, on certiorari in the Supreme Court.¹⁰⁸ Such review is consistent with the view that all tribunals established by Congress or the President, insofar as they perform adjudicatory functions, must be subject to review by the head of the judicial branch.¹⁰⁹ Similar discretionary review for decisions of the Military Commissions by the Supreme Court, once all review within the chain of command has been exhausted, will provide necessary balancing of powers.

In addition to citing Acts of Congress as sources of authority, the Military Order also purports to derive authority from the President's Article II commander-in-chief powers.¹¹⁰ Although it is clear that the President has the power and discretion to respond to the terrorist acts against the United States by apprehending those who would continue to threaten the nation, even in the most serious times of war executive commander-in-chief powers are not limitless.¹¹¹ Most importantly, when the President acts in such a way that is "incompatible with the express or implied will of Congress, his power is at its lowest ebb."¹¹² In such a situation, Presidential claims to power must be "scrutinized with caution" to prevent disruption of the balance of powers set out by the constitution.¹¹³

As the President's actions move from apprehending terrorists to adjudicating guilt and meting out punishment, it becomes more diffi-

106. James E. Pfander, *Article I Tribunals, Article III Courts, and the Judicial Power of the United States*, 118 HARV. L. REV. 643, 757 (2004).

107. 10 U.S.C. § 867(a) (2000); *see also* 10 U.S.C. § 817(a) (2000) (establishing jurisdiction of courts-martial over members of the armed forces). The Court of Appeals for the Armed Forces has jurisdiction to review all cases carrying a death sentence, all cases reviewed by a Court of Criminal Appeals and has been referred for review by the Judge Advocate General, and those which it granted review upon petition of the accused and showing of good cause. *Id.*

108. Pfander, *supra* note 106, at 754–55.

109. *Id.* at 722, 724.

110. Military Order, *supra* note 5, at pmbl.

111. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952) (stating that "Even though 'theatre of war' be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production.").

112. *Id.* at 637 (Jackson, J., concurring).

113. *Id.* at 638.

cult to argue that these actions are within the perimeter of the commander-in-chief powers.¹¹⁴ Further, with justice issued at a manipulated locale and key decisions most likely being made in the United States rather than on the spur of the moment in the midst of hostilities, the Executive's claim for power to act without judicial review cannot be justified by claims of battlefield necessities.¹¹⁵ Thus, the federal courts should continue the practice of performing inquiry into the procedures taking place at Guantanamo Bay, especially in situations involving the trial, conviction, and sentencing of detained individuals. Allowing for a more searching judicial review provides another branch of government with some level of oversight of a process that has thus far, by most appearances, been controlled solely by a few within the executive branch.¹¹⁶ Given the uncertain nature of the balance of powers involved in the current Military Order and Commissions, a higher level of judicial review is thus needed to ensure the constitutionality of the proceedings.

B. Rights of the Individual Under International Law

Even if the constitutional system of separation of powers is not offended by the preclusion of all but the most limited judicial review, final reviewing authority placed solely in the hands of the President or the Secretary of Defense arguably violates trial rights protected by international humanitarian law. Recognition and protection of individual rights has evolved considerably since the decisions in the World War II commission cases,¹¹⁷ creating additional reasons to distinguish them from the current Commissions.

114. Neal K. Katyal, *Executive and Judicial Overreaction in the Guantanamo Cases*, 2003-2004 CATO SUP. CT. REV. 49, 56 (2004).

115. Amicus Brief of Military Commission Defense Attorneys, *supra* note 58, at 17-18.

116. Further, the possibility of this post-trial judicial review has been used by the government as an argument in favor of allowing the Military Commission trials proceed without interruption by litigation in the federal courts. Court of Appeals Transcript, *supra* note 96, at 5.

117. See *supra* note 58 and accompanying text. While beyond the scope of this note, it is also notable that some have argued cases such as *Reid v. Covert*, 354 U.S. 1 (1957) and *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990), provide support for the view that analysis should not focus on whether enemy aliens detained abroad have rights, but whether the U.S. government has any power to act inconsistently with the constitution. Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1, 19-20 (2001). However, not all view such an interpretation positively. See Katyal, *supra* 114, at 54-55, citing *Rasul*, 124 S. Ct. at 2698 n.15 (calling the *Rasul* majority's application of statutory habeas and reference to *Verdugo-Urquidez* without qualification the "coup de grâce" of an overreaching opinion that may even go so far as to apply the Constitution to detainees).

Under Article 75 of Additional Protocol 1 to the 1949 Geneva Conventions, individuals outside the scope of protection of the Geneva Conventions shall enjoy certain minimum protections, including conviction and sentence only by an “impartial and regularly constituted court” following “generalized recognized principles of regular judicial procedure.”¹¹⁸ Likewise, Article 14 of the ICCPR guarantees fair trial rights including hearing before a competent, independent, and impartial tribunal as well as review of convictions by “a higher tribunal according to law.”¹¹⁹

Although the treaty provisions may be derogated, Article 4 of the ICCPR limits situations in which signatories may derogate their responsibilities under the treaty to emergency situations, where notice is given, and where derogation is proportional to the emergency.¹²⁰ The guaranty of trial rights could not be derogated to carry out trials by Military Commissions in this case, however, as Article 4 requires that an emergency and the corresponding derogation must be temporary in nature, and thus is not satisfied by a “permanent risk of international terrorism.”¹²¹

Therefore, under international law, the United States is required to provide an independent and regularly constituted tribunal, even to unprivileged combatants, if it seeks to try those individuals for offenses related to an armed conflict. From a technical standpoint, as military tribunals are ad hoc and set up only for a specific purpose, it is questionable whether they would be considered “regularly constituted” tribunals.¹²² Further, the procedures set up to try detainees by the Military Commission involve adjudication and post-trial review by the same military authority that captured and labeled them as enemy combatants, thus utilizing a tribunal that is seemingly not very independent at all.¹²³ This lack of independence is most poignant in re-

118. Protocol I, *supra* note 90, art. 75(4). The United States has not ratified the Protocol, however it accepts many of its provisions, including Article 75, as declaratory of customary law. Diane F. Orentlicher & Robert Kogod Goldman, *When Justice Goes to War: Prosecuting Terrorists Before Military Commissions*, 25 HARV. J. L. & PUB. POL’Y 653, 661 (2001).

119. ICCPR, *supra* note 90, art. 14.5.

120. *Id.* at art. 4.

121. Fitzpatrick, *supra* note 59, at 350–51.

122. Michael Ratner, *Moving Away From the Rule of Law: Military Tribunals, Executive Detentions and Torture*, 24 CARDOZO L. REV. 1513, 1516 (2003).

123. See Orentlicher & Goldman, *supra* note 118, at 659–60. See also Neil A. Lewis, *General Takes Three Officers Off Tribunal At Cuba Base*, N.Y. TIMES, Oct. 22, 2004, at A21 (listing conflicts of interest which led to dismissal of judges from Commission, such as the supervision of an operation which sent suspected terrorists from Afghanistan to Guantanamo Bay and service as an intelligence officer in Iraq, while noting that a Marine Colonel who had lost one of his reserv-

gards to the authority of the President or Secretary of Defense to perform final review of all decisions, especially in light of the power given to the President to determine likely membership in al Qaeda, enemy combatant status, and eligibility for trial by commission pursuant to the Military Order.

Thus, assuming that the trials continue before the Military Commissions at Guantanamo Bay, judicial review by an independent court, whether Article I or Article III, could act to satisfy international requirements for independent and regularly constituted tribunals. Such review would provide a check against any partiality on the part of military judges,¹²⁴ as well as fulfill both the letter and spirit of the nation’s international obligations.

C. General Policy Concerns

Finally, other general policy arguments support a greater role for the courts in reviewing the military tribunals. First, providing judicial review offers a way to legitimize a process that has thus far been controversial both at home and abroad. Such legitimacy would be valuable not only for the commissions themselves, but for the convictions and sentences that may be handed out at trial. Court approval – after a thorough inquiry, rather than a perfunctory glance – that full and fair trials were provided can go a long way in providing this legitimacy.

History has shown that allowing only superficial review by the judicial branch will not guaranty that military commissions operate according to proper judicial principles. Whether or not justice was served by the final outcomes of *Quirin* and *Yamashita*, deference to the procedures followed by the Government was later a source of regret for members the Court.¹²⁵ Especially in *Yamashita* and its com-

ists in the attack on the World Trade Center and an Army Colonel who was a “longtime close friend” of the Appointing Authority were challenged but not dismissed); *but see Hamdan*, 344 F. Supp. 2d at 167 & n.13 (pointing to the fact that “some of the most distinguished civilian lawyers in the country” had been appointed to constitute the Review Panel).

124. Orentlicher & Goldman, *supra* note 118, at 662.

125. See Tony Mauro, *A Mixed Precedent for Military Tribunals: 1942 Case of Nazis on U.S. Soil Gives Administration the Authority for Terrorist Trials, but Leaves Room for Doubt*, LEGAL TIMES, Nov. 19, 2001, at 15. See also *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2669 (2004) (Scalia, J., dissenting) (referring to *Quirin* as “not this Court’s finest hour”); Orentlicher & Goldman, *supra* note 118, at 657 (“Much like [*Korematsu*], *Quirin* has long been criticized as an abdication of independent judicial judgment during war time and an unwarranted surrender of constitutional rights.”).

panion case, *In re Homma*,¹²⁶ the trial procedures used to convict and sentence defendants to death were antithetical to even the most basic principles of our justice system,¹²⁷ and it is perhaps telling that criticisms of these procedures were often espoused by those justices who dissented from the holding that the Supreme Court lacked authority to review the quality of justice in military tribunals.¹²⁸

As the recent detainee cases have shown, today's federal courts seem unlikely to follow the "virtual hands-off" approach of *Yamashita* and *Homma*.¹²⁹ Even the performance of deferential review of the procedures and decisions of military commissions can have the effect of compelling the commissions to honor the trial rights of detainees,¹³⁰ as the procedures followed and the level of protections afforded to detainees are not only scrutinized by the courts but evaluated for all to read in published judicial opinions.

Second, and undoubtedly a more important issue in the minds of many Americans, is the protection of the nation's own citizens and troops abroad by upholding international standards for fair trials of

126. 327 U.S. 759 (1946).

127. In *Yamashita*, the Commander was charged with failing to control the atrocities committed by his troops, a charge which left the commission "free to establish whatever standard of duty on petitioner's part it desired." 327 U.S. at 40 (Murphy, J., dissenting). Further, "the sole proof of knowledge introduced at trial was in the form of ex parte affidavits and depositions" which allowed no opportunity for cross-examination. *Id.* at 53 (Rutledge, J., dissenting). In *Homma*, the commission allowed forced confessions to be received into evidence and required that findings made in a group trial for mass offenses be given full faith and credit in any subsequent trial of an individual member of the group. 327 U.S. at 761-62 (Rutledge, J., dissenting). In both cases, the time allowed for preparation of the defense was less than a month between arraignment and beginning of trial, and defense attorneys' motions for continuance for more preparation were denied. *Id.* at 762.

128. See Warren Richey, *Tribunals on Trial*, CHRISTIAN SCI. MONITOR, Dec. 14, 2001, at 1.

129. See Martin, *supra* note 100, at 146-47 (stating that unlike the *Yamashita* court's refusal to address tribunal decisions regarding disputed facts, today's courts "will rather plainly preserve some judicial role in considering the validity of the factual findings," in regards to proceedings that determine enemy combatant status).

130. See *id.* at 135-36 (finding that judicial review of enemy combatant status determinations would provide "significant incentives" for those making such determinations, as well as "provid[e] a genuine check on improper executive action"). Professor Martin acknowledges that judicial review of military tribunals "is hardly a tidy system," *id.* at 159, yet finds this beneficial for the process of establishing procedures to determine enemy combatant status:

[A] portion of the stimulus for the military to develop and sustain the right kind of administrative process, with serious internal checks and balances, depends at least in part on the military's risk, in any given case, of encountering a cowboy district judge whose intrusions are supposedly precluded by the deferential standards that are to govern review.

Id. A similar argument can be made for the establishment and execution of trial procedures in the Military Commissions.

foreign combatants. In the past, even where not legally required to, adherence to the Geneva Conventions and other human rights protections has benefited the United States by impacting the treatment its own soldiers received from the enemy in armed conflicts.¹³¹ On the other hand, the failure of the United States to offer protections in regards to fair trial and other human rights issues will act as encouragement and justification for other nations to follow suit.¹³²

Finally, for each of these goals, it is “not only crucial that the tribunals meet both American and international standards of justice . . . it is also essential that they are perceived to do so.”¹³³ Thus, it may not matter whether the Military Commissions are legally authorized and exercising their jurisdiction, nor whether members constitute biased military officers seeking only to eradicate their enemies or distinguished attorneys from the civilian and military fields. Rather, the mere appearance of impropriety, secrecy, or sham victor’s justice – whether accurate or not – will be enough to condemn the use of Military Commissions in the eyes of the world. For these policy reasons, thorough judicial review in an independent, civilian court is desirable and necessary. “[T]he United States has told the world that it is fighting terrorism for democratic values and freedom. Certain forms of military commissions appear to be most inappropriate in view of what the United States stands for and what it has told the world it is fighting for and against.”¹³⁴

VI. CONCLUSION

The current detention and prosecution of foreign combatants by the United States in the War on Terror raises innumerable legal issues about our constitutional system of separation of powers, individ-

131. See Brief of Amicus of General David M. Brahms (ret.), Admiral Lee F. Gunn (ret.), Admiral John D. Hutson (ret.), and General Richard O’Meara (ret.) at 2–7, *Hamdan v. Rumsfeld*, 125 S. Ct. 972 (2004) (No. 04-702) (providing evidence that adherence to the Geneva Convention resulted in lower U.S. casualties during past armed conflicts).

132. See *id.* at 8 (listing examples of nations who have cited United States policy to justify their own repressive policies since September 11, 2001). In fact, the very term “Guantanamo” has become a “metonym for the treatment of captives” during the war on terror, now encompassing “not only U.S. treatment of suspected enemies overseas and at home, but also U.S. concern about others’ treatment of American’s abroad.” Diane Marie Amann, *Guantánamo*, 42 COLUM. J. TRANSNAT’L L. 263, 265 (2004).

133. Nyier Abdou, *What’s Good for the Goose . . .*, AL-AHRAM WEEKLY, July 31, 2003 (quoting Kevin Barry, a legal expert at the National Institute of Military Justice), available at <http://weekly.ahram.org.eg/2003/649/in5.htm>.

134. Paust, *supra* note 117, at 10.

ual rights, and role of the nation in acting as a protector of democratic values and freedoms. Key to the War on Terror, as well as the conflicts in Afghanistan and Iraq, is the apprehension of suspected terrorists. Further, in the aftermath of September 11, bringing such terrorists to justice is an important goal in maintaining peace and safety within the nation.

Given this changing landscape, it is not surprising that old cases and norms no longer provide the same clarity in regards to the legality of adjudicating the guilt of enemy combatants and meting just punishments. Though the President may exercise discretion in dealing with the threat and prosecution of terrorists, it must not be done at the expense of constitutional separation of powers, individual rights, or international norms. Thus the Judicial Branch must play a role in evaluating and reviewing the proceedings of the Military Commissions and ensuring detainees receive the proper protections under the law.

While the future of the Military Commissions and other procedures at Guantanamo Bay remain unclear, one thing is certain. In creating policies for handling terrorism and national security, the United States changes not only its own practices, but creates norms for other nations to follow. Thus, at a time in which new democracies hope to emerge in Afghanistan and Iraq, it is crucial that the United States maintain its position as a nation guided by the rule of law.