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Trial by Jury or by Military Tribunal for Accused Terrorist Detainees Facing the Death Penalty? An Examination of Principles that Transcend the U.S. Constitution

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TRIAL BY JURY OR BY MILITARY TRIBUNAL FOR ACCUSED TERRORIST DETAINEES FACING THE DEATH PENALTY? AN EXAMINATION OF PRINCIPLES THAT TRANSCEND THE U.S. CONSTITUTION

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I. INTRODUCTION

Justice Robert Jackson, about to serve as the chief prosecutor of Nazi officers charged with war crimes in the Nuremberg trials, calmly appealed to transcendent values amid the clamor for swift retribution.[1] With trials of accused conspirators in the September 11, 2001 attacks approaching, Justice Jackson's words bear repeating:

> [I]n all events the Judges must be above policy pressures by any nation . . . . We must not use the forms of judicial proceedings to carry out or rationalize previously settled political or military policy. Farcical judicial trials conducted by us will destroy confidence in the judicial process as quickly as those conducted by any other people. . . . Courts try cases, but cases also try courts.[2]

Cases try countries too. Perhaps for the first time since the Nuremberg trials, trials of persons accused of violating the laws of war will test our values in ways that ordinary trials cannot. The pressures on the military

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1. Associate Justice Robert H. Jackson, Address at the Washington Meeting of the American Society of International Law (Apr. 13, 1945), *in* 39 AM. SOC. INT'L L. PROC. 10, 15 (1945). For a discussion of Justice Jackson's crucial role in both the creation of the Nuremberg tribunals and the trials that followed, see Henry T. King, Jr., *Robert Jackson's Vision for Justice and Other Reflections of a Nuremberg Prosecutor*, 88 GEO. L.J. 2421 (2000) (book review).

2. *See supra* note 1.

tribunals appointed after 9/11 match those borne by the tribunals that heard the cases of Nazi and Japanese war criminals. Most observers believe that the post-World War II trials contained appropriate procedural safeguards to ensure those deciding the fate of the accused were shielded from the pressure to convict at all costs. The central question explored in this Article is whether the current military tribunal system similarly has sufficient checks against the fallibilities of human nature.

The controversy over the post-9/11 military tribunals highlights certain misconceptions about the U.S. Constitution and the role of courts in vindicating fundamental rights.[3] Many Americans have become accustomed to thinking of the Constitution as the repository of all transcendent truths; and of courts as the guardians of every right. Yet the Constitution neither codifies every fundamental right, nor pretends to address every scenario. Nor does it ask courts to intervene in every significant dispute. The Framers recognized the need to strike a balance between limitations on government to protect the rights of the governed, on one hand, and the flexibility needed for governing bodies to act for the "General Welfare," on the other. In times of threats to national security, the Framers designated Congress, not the judicial system, as the primary (if not exclusive) check on executive powers. If Congress enacts legislation setting limits that the executive branch proceeds to ignore, then courts may have a role to play—but not before.

This Article considers whether the current military tribunal system satisfies the U.S. Constitution, but nevertheless falls short of reflecting transcendent values rooted in objective truths. Prosecution of U.S. military personnel need not track the constitutional protections afforded to civilians, but no one contends that our armed forces should receive anything less than fair trials in a system accommodating the peculiar interests of our armed forces. Likewise, the trials of alleged unlawful combatants for crimes against the law of armed conflict follows its own set of rules. Yet, that does not mean the Framers intended prosecutions in military tribunals to provide second-class justice. The Framers simply recognized that, because of the peculiar status of military affairs, the same rules that applied in the civilian system cannot be superimposed on military commissions. Instead, by giving Congress the specific authority to promulgate rules in this area, the Constitution entrusts to Congress the job of ensuring that the trials of persons in these non-civilian systems are fair. In establishing the Uniform Code of Military Justice, Congress has

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3. The U.S. Supreme Court has used the terms "military commissions" and "military tribunals" synonymously. *See, e.g.*, Madsen v. Kinsella, 343 U.S. 341, 348 (1952). For purposes of consistency, this Article uses the term "military tribunal" throughout.

ensured that trials of members of the U.S. armed forces are fair. To the extent that Congress has fallen short of its obligation to serve as a check on the executive branch, it, until recently, has been in the realm of military tribunals outside the jurisdiction of the Uniform Code of Military Justice.

Specifically, this Article asks whether the current military tribunal system lacks sufficient checks to ensure just verdicts, especially where the charges are punishable by death or life imprisonment. The answer to this question requires not only a thorough analysis of the pertinent constitutional text and the U.S. Supreme Court precedent interpreting it, but also a review of theological and philosophical principles underlying the U.S. Constitution.

Identifying these underlying principles is critical. In the *9/11 Commission Report*, the National Commission on Terrorist Attacks Upon the United States stressed a number of issues that Americans must begin to understand about the threat we face.[4] The *Report* emphasizes that Americans must communicate with the Muslim community abroad about the values for which we stand.[5] Although the American message may be offered in many ways, one thing is certain: the world will pay closest attention to the message we send by what we do. Although we should not pander to other countries, we should search deeply within ourselves to determine the components we believe are essential to any procedural system designed to do justice. If we decide that impartiality of the decision-maker is essential to a judicial system, then we should find a way to provide procedural checks to serve as a buffer between the prosecutors and the judges. The lay jury perhaps offers the ideal procedural check, but alternative systems may advance the same goal as a jury.

This Article unfolds in four parts. Part II provides an overview of the current military tribunal system. Part III addresses the relevant constitutional provisions and precedent addressing both the right to a jury trial in capital cases and the government's power to try persons by military tribunal. Part IV explores the transcendent principles associated with the right to a jury trial. That discussion involves not only the historical roots of the jury system, but also how the jury implicates broader principles inherent in any system that seeks justice. Part IV also briefly compares the jury's role with systemic checks employed in systems outside the Anglo-American tradition to identify alternative ways of achieving the purpose that the jury fills in our criminal justice system. Then, Part IV continues by examining the foundations for the government's war powers and, in

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4. NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES, THE 9/11 COMMISSION REPORT 374-77 (2004) [hereinafter 9/11 COMMISSION REPORT].

5. *Id.*

particular, the power to order trial by military tribunal of persons deemed to have violated the laws of war. As with the analysis of the right to a jury trial, this section considers both the theological and philosophical underpinnings of war powers in general and military tribunals in particular. Finally, Part V analyzes whether the current military tribunal structure furthers the core principles that Congress should protect in its capacity as the sole check on the executive branch in this arena, even without a specific constitutional mandate to do so.

II. THE PROBLEM: CURRENT STRUCTURE OF MILITARY TRIBUNALS AND OVERVIEW OF THE PRINCIPLES AT STAKE

A. *Original Composition of Tribunals Under Department of Defense Order*

On March 21, 2002, the Department of Defense issued Military Commission Order No. 1 entitled "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism."[6] The Order dictated that the tribunals would be composed of three to seven "commissioned officers" of the U.S. armed forces.[7] A vote of two-thirds of the tribunal would suffice to convict or sentence the accused except for imposition of the death penalty, which had to have a unanimous vote.[8] The order allowed for review by a panel of military officers before final review by the Department of Defense and the President.[9]

Consistent with the Order, the only persons appointed to serve on the tribunals have been military officers.[10] Some civilians were selected to serve on the Review Panels—the bodies originally designed to review the

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6. Military Commission Order No. 1 (Mar. 21, 2002), http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf (last visited Oct. 3, 2006).

7. *Id.* § 4(A)(2).

8. *Id.* § 6(F).

9. *Id.* § 6(H)(4)-(6).

10. *See* U.S. Dep't of State, Defense Department Picks Officials for Military Tribunal Posts (Dec. 30, 2003), http:// usinfo.state.gov/dhr/Archive/2003/Dec/31-861825.html (last visited Oct. 3, 2006); Military Commission Instruction No. 9 (Dec. 26, 2003), http://www.defenselink.mil/news/Jan2004/d20040108milcominstno9.pdf (last visited Oct. 3, 2006) (detailing the procedures and responsibilities of the review panel for the military commissions). *Cf.* Press Release, Dep't of Defense, Military Commission Review Panel Members to be Designated and Instruction Issued (Dec. 30, 2003), http://www.defenselink.mil/ releases/2003/nr20031230-0822.html (last visited Oct. 3, 2006).

record of proceedings and judgment of a tribunal.[11] These persons, however, have become officers of the U.S. armed forces pursuant to a statute that permits the President to appoint persons to become military officers during national emergencies.[12]

In July 2004, the government began to issue charges against persons captured and held as "unlawful combatants."[13] The

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11. *See* 10 U.S.C. § 603 (2004); *see also* Exec. Order No. 13,321, 68 Fed. Reg. 74,465 (Dec. 17, 2003).

12. *See* 10 U.S.C. § 603 (2004); *see also* Exec. Order No. 13,321, 68 Fed. Reg. 74,465 (Dec. 17, 2003).

13. Under the laws of armed conflict, one who is a legal combatant may not be punished for the act of fighting on behalf of the nation-state with which it is identified. This principle is memorialized in the Fourth Geneva Convention on Treatment of Prisoners. Convention Relative to the Treatment of Prisoners of War, art. 4, Feb. 2, 1956, 6 U.S.T. 3316, 75 U.N.T.S. 135. Article 4 of this Convention provides four factors that must be satisfied for someone to qualify as a legal combatant:

1. The person must be commanded by a person responsible for his subordinates;
2. The person must have a fixed distinctive sign recognizable at a distance;
3. The person must be carrying arms openly; and
4. the person must be conducting their operations within the laws and customs of war.

Id. Commentators have expressed differing views on whether persons captured in Afghanistan are unlawful combatants. *Compare* Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97 (2004) (arguing that the President is bound and should do so for reasons of better national security and international relations); *and* David Sloss, *Availability of U.S. Court to Detainee at Guantanamo Bay Naval Base–Reach of Habeas Corpus–Executive Power in War on Terror*—Rasul v. Bush, *124 S. Ct. 2686*, 98 AM. J. INT'L L. 788, 796-97 n.85 (2004) (arguing that the Third and Fourth Geneva Conventions do apply to Taliban and al-Qaeda operatives), *with* Joseph P. Bialke, *Al-Qaeda and Taliban Unlawful Combatant Detainees, Unlawful Belligerency, and the International Laws of Armed Conflict*, 55 A.F. L. REV. 1 (2004). Some see a difference between al-Qaeda affiliates and Taliban members. *See, e.g.*, Luisa Vierucci, *Prisoners of War or Protected Persons qua Unlawful Combatants? The Judicial Safeguards to which Guantanamo Bay Detainees Are Entitled?*, 1 J. INT'L CRIM. JUST. 284, 291-92 (2003). In any event, the charges filed to date against those to be tried in the military tribunals assert conspiracy to commit war crimes before the fighting in Afghanistan. Under any interpretation of the laws of war, the accused can be tried for offenses separate from the fighting in which they were captured. *See* Yamashita v. Styer, 327 U.S. 1, 11-13 (1946). Furthermore, the U.S. District Court for the District of Columbia has ruled that, at least with regard to persons such as Salim Ahmed Hamdan, who allegedly supported al-Qaeda, the accused is an unlawful combatant that may be tried by military tribunal. *See* Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006) (holding that Hamdan could not be tried outside the Geneva Convention for conspiracy to commit offenses against the law of war, but suggesting that actual charges of violating laws of war as an unlawful combatant could be different). *See also infra* text accompanying notes 264-79.

charges filed to date assert numerous violations of the laws of armed conflict committed by "unlawful combatants."[14] The tribunals formed to try the initial cases included only members of the U.S. armed forces.[15] Although Review Panels include some civilians, these persons have been appointed by the President as officers of the United States armed forces to validly serve on these panels.[16]

B. *Composition of Tribunals Under New Legislation*

On June 29, 2006, the Supreme Court ruled in *Hamdan v. Rumsfeld*,[17] that trials before military tribunals on the charges in question were unconstitutional. The Court in *Hamdan* made clear, among other points discussed in more detail below,[18] that the lack of explicit congressional authorization for the tribunals was central to its holding.[19] Congress has since enacted the Military Commissions Act of 2006.[20]

As with the earlier procedures, the composition of military tribunals is limited to commissioned officers in the armed forces.[21] A military judge will be assigned to each tribunal but will not vote.[22] Each tribunal must have, except in cases in which the death penalty may be imposed, at least five members.[23] For any conviction and sentence of over ten years in prison, three-fourths of the tribunal must vote in favor of such

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14. *See, e.g.*, Hamdan Charge Sheet, http://www.defenselink.mil/news/Jul2004/d20040714hcc.pdf (last visited Oct. 3, 2006) (charging Salim Ahmed Hamdan with conspiracy to commit the offenses of attacking civilians, attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism); Hicks Charge Sheet, http://www.defenselink.mil/news/Jun2004/d20040610cs.pdf (last visited Oct. 3, 2006) (charging Australian David Matthew Hicks with conspiracy, attempted murder by an unprivileged belligerent, and aiding the enemy); al-Qosi Charge Sheet, http://www.defenselink.mil/news/Jun2004/d20040629AQCO.pdf (last visited Oct. 3, 2006) (charging Ibrahim Ahmed Mahmoud al-Qosi with conspiracy to commit the offenses of attacking civilians, attacking civilian objects; murder by an unprivileged belligerent; destruction of property by an unprivileged belligerent; and terrorism).

15. *See supra* text accompanying note 10.

16. Dep't of Defense, Military Commissions, http://www.defenselink.mil/news/Aug2004/commissions_biographies.html (last visited Oct. 3, 2006) (listing members of the review panel along with a short biography). As to the reason that these members of the Review Panels are nevertheless also now members of the U.S. Armed Forces, see *supra* text accompanying note 12.

17. 126 S. Ct. 2749 (2006).

18. *See infra* notes 264-93 and accompanying text.

19. *See Hamdan*, 126 S. Ct. at 2759.

20. S. 3930, 109th Cong. (2006).

21. *Id.* § 948i.

22. *Id.* § 948j.

23. *Id.* § 948m.

punishment.[24] For the death penalty to be imposed, the tribunal must have twelve members who vote unanimously in favor of death.[25]

Review of military tribunal proceedings begins with the convening authority and can be appealed to a newly created Court of Military Commission Review that will be composed of military judges.[26] Should the military court's judgment be appealed, then the case is appealable to the U.S. District Court for the District of Columbia Circuit.[27] The Supreme Court may then grant certiorari to review the case.[28]

III. NECESSARY BACKGROUND: RELEVANT CONSTITUTIONAL LAW CONCERNING AN INDIVIDUAL'S RIGHT TO A JURY AND THE GOVERNMENT'S WAR POWERS

This Article concentrates on the propriety of trying persons accused of crimes against the laws of armed conflict in a system that lacks a jury or alternative procedures to promote impartiality in deciding the fate of the accused. Tension arises between the rights of the individual to a just trial and the government's powers to protect national security by trying and punishing persons accused of violating the laws of armed conflict. Because the use of a lay jury is the primary means in the American criminal justice system to ensure the impartiality of the decision-maker, this Article explores that right in depth. The Article also explores the government's war powers. By exploring these rights and powers individually, and then discussing their interaction in times of threats to national security, we may better appreciate the values at stake in the military tribunals debate.

A. *Constitutional Provisions and Precedent on the Individual's Right to a Jury*

1. Pertinent Constitutional Provisions Concerning Jury Trials in Criminal Cases

The right to a trial by jury in criminal cases is guaranteed both in the Articles of the U.S. Constitution and in the Bill of Rights. Article III, section 2 provides that "[t]he trial of all crimes, except in cases of

24. *Id.* § 949m(b)(3).
25. S. 3930, 109 Cong. § 949m(b)(2).
26. *Id.* §§ 950a-f.
27. *Id.* § 950g.
28. *Id.*

impeachment, shall be by jury . . . ."[29] The Fifth Amendment provides as follows: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger . . . ."[30]

The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ."[31]

2. U.S. Supreme Court Precedent On the Scope of Criminal Jury Trials

The U.S. Supreme Court has on several occasions addressed the accused's right to a jury trial in cases involving trials before military tribunals. This Article reviews those cases at length in the following section.[32] An even greater body of case law addresses the right to a jury in non-military trials. These cases, which illustrate the central role of the jury in the American judicial system, can be grouped into four categories. The first category includes cases involving aliens accused of crimes within the United States. The second category represents the Supreme Court's jurisprudence on the extent of an accused's right to a jury when charged with serious crimes within the consular jurisdiction of the United States in other countries. The third category of cases, typically called the "insular cases," deals with an accused's jury right in island territories acquired by the United States in the late-eighteenth and early-nineteenth century. Finally, the fourth category includes cases where the Court considered whether the jury right was applicable to trials in state courts by incorporation of the Sixth Amendment into the Fourteenth Amendment's Due Process Clause. Although this last category is the best known, the other categories offer valuable insights into the principles at issue.

a. Aliens Within the United States

In the nineteenth century, the Supreme Court considered whether the right to a jury trial in criminal cases extended to aliens within the United States.[33] In *Wong Wing v. United States*, the petitioners were Chinese laborers arrested for being in the United States unlawfully.[34] At that time, Chinese laborers found to be in the United States unlawfully would be

29. U.S. CONST. art. III, § 2.
30. U.S. CONST. amend. V.
31. U.S. CONST. amend. VI.
32. *See infra* text accompanying notes 94-279.
33. Wong Wing v. United States, 163 U.S. 228, 238 (1896).
34. *Id.* at 239.

imprisoned and subjected to hard labor for up to a year before being deported.[35]

Although the Court acknowledged Congress's authority to deport such aliens, it held that subjecting them to hard labor without trial by jury denied them due process and equal protection.[36] The pertinent language of the Fourteenth Amendment states: "[Nor] shall any State deprive *any person* of life, liberty, or property, without due process of law; nor deny to *any person* within its jurisdiction the equal protection of the laws."[37]

The Court had already ruled that the term "person" in the Fourteenth Amendment extended constitutional safeguards not just to American citizens, but also to anyone located within the United States.[38] The Court in *Wong Wing* reasoned, therefore, that "no person can be held to answer, without presentment or indictment by a grand jury, for any crime for which an infamous punishment may be imposed by the court."[39] Because the Chinese laborers were subject to hard labor pending deportation, the Court held that the Sixth Amendment required the government to provide a jury trial to decide the legal immigration status of the laborers.

b. Consular Court Jurisdiction

In the same period as the alien cases, the U.S. Supreme Court faced a different question related to the scope of an accused's right to a jury trial when charged with serious crimes. At that time, the United States tried foreign nationals who had been charged with crimes committed overseas under U.S. jurisdiction in consular courts rather than the courts of the other country. A British national, Ross, enlisted in the crew of an American merchant vessel and was tried and convicted in a consular court for a crime committed when the vessel was docked in Yokohama harbor.[40] The Supreme Court rejected Ross's argument that he was entitled to a jury trial by holding that the U.S. Constitution has effect "within the United States" only.[41] The rights under the Constitution "apply only to citizens and others within the United States, or who are brought there for trial for alleged offenses committed elsewhere, and not to residents or temporary sojourners abroad."[42] Furthermore, the Court noted the impracticality of

35. *Id.* at 235.

36. *Id.* at 238.

37. U.S. CONST. amend. XIV (emphasis added).

38. *Wong Wing*, 163 U.S. at 238 (quoting Yick Wo v. Hopkins, 118 U.S. 356, 369 (1886)).

39. *Id.* at 234 (citing *Ex parte* Wilson, 114 U.S. 417, 428 (1885), in which the Court declared that hard labor is infamous punishment and requires a trial before a person can be sentenced to hard labor).

40. Ross v. McIntyre, 140 U.S. 453, 454 (1891).

41. *Id.*

42. *Id.* The petitioner argued that the deck of an American vessel is constructively considered

requiring every criminal trial abroad to undergo a presentment to the grand jury followed by a trial by a petit jury.[43]

c. The *Insular Cases*

Like *Ross*, the insular[44] cases presented another opportunity for the Court to examine whether the right to a jury trial had to be applied extraterritorially.[45] In deciding that defendants in criminal jury trials in the U.S. island territories had no right to a jury, the Court discussed two reasons for distinguishing between those tried in admitted states and those tried in new territories. First, the courts created to administer justice in the territories arose not from Article III but rather from Article IV, § 3 of the U.S. Constitution, that empowers Congress to make "Rules and Regulations respecting the Territory or other Property belonging to the United States."[46] Second, Congress's power under Article IV, § 3 to administer the territories is subject to limitations.[47] In *Dorr v. United States*,[48] plaintiffs sought a jury trial in the Philippines, which had just been ceded to the United States after the end of the Spanish-American War in 1898.[49] The plaintiffs argued that wherever the power and jurisdiction of the United States extends, the laws of the United States must also extend.[50] However, the Philippines had not been incorporated into the United States by congressional action.[51] The Court stated that until Congress incorporated the Philippines as a territory, rights under the U.S. Constitution are applicable only as Congress sees fit to apply them.[52]

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territory of the United States. However, the Court noted the limits to this argument: the protections of the U.S. Constitution cannot be invoked until the ship is in territorial waters of the United States. *See id.*

43. *Id.* The holding in *Ross* has now been superseded by later treaties. *See* RESTATEMENT OF FOREIGN RELATIONS § 422 (1987); *see also* Reid v. Covert, 354 U.S. 1 (1957).

44. "Insular" derives from the Latin "insula" (fem. nom. sg.), a noun meaning island. AMERICAN HERITAGE DICTIONARY (4th ed. 2000), *available at* http://dictionary.reference.com/search?q=insular.

45. *See* Balzac v. People of Porto Rico, 258 U.S. 298 (1922); Ocampo v. United States, 234 U.S. 91 (1914); Dorr v. United States, 195 U.S. 138 (1904); Kepner v. United States, 190 U.S. 100 (1904); Hawaii v. Mankichi, 190 U.S. 197 (1903); Huus v. New York & Porto Rico S.S. Co., 182 U.S. 392 (1901); The Diamond Rings, 183 U.S. 176 (1901); Downes v. Bidwell, 182 U.S. 244 (1901); Goetze v. United States, 182 U.S. 221 (1901); De Lima v. Bidwell, 182 U.S. 1 (1901).

46. U.S. CONST. art. IV, § 3.

47. *Dorr*, 195 U.S. at 142.

48. *Id.* at 138.

49. *Id.* at 139.

50. *Id.* at 142.

51. *Id.* at 143.

52. *Dorr*, 195 U.S. at 143. The Court noted, moreover, that the treaty between the United States and Spain ending the hostilities refrained from incorporation, and a federal statute expressly

The Court in *Dorr* emphasized that a reliable system of jurisprudence and criminal procedure already existed in the Philippines, namely the civil law tradition imported from the Spanish.[53] The system of trial by jury was uniquely part of the common law of England and not part of the civil law tradition of other European countries.[54] As the Court observed:

> If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends . . . it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice.[55]

The Court concluded that the Sixth Amendment right to a jury trial does not automatically extend to the territories under Congress's power under Article IV, § 3 of the U.S. Constitution.[56] Therefore, the right to a jury trial could be limited by Congress in territories and possessions.

d. Applicability of Jury Right to States Through the Fourteenth Amendment

In a series of decisions, the U.S. Supreme Court considered the applicability of the jury provisions in the Bill of Rights to the States through the Fourteenth Amendment's due process clause. Below is a selection of the key decisions, beginning with *Palko v. Connecticut*,[57] where the Court in dicta suggested that the right to a jury trial would not be incorporated into the Fourteenth Amendment's Due Process Clause. The Court followed *Palko* with *Duncan v. Louisiana*,[58] where the Court held that the right to a jury trial did apply to the states, and concluded with the more recent decisions dealing with sentencing.

(1) *Palko v. Connecticut*

In *Palko v. Connecticut*[59] the Court directly faced the question whether the Fifth Amendment's Double Jeopardy Clause applied to state

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excluded the application of the Constitution and laws of United States to the Philippines. *Id.* at 148.

53. *Id.* at 148.

54. *See generally* MAXIMUS LESSER, HISTORY OF THE JURY SYSTEM 100-62 (1894).

55. *Dorr*, 195 U.S. at 148.

56. *Id.* at 149.

57. Palko v. Connecticut, 302 U.S. 319 (1937).

58. Duncan v. Louisiana, 391 U.S. 145 (1968).

59. *Palko*, 302 U.S. at 319.

prosecutions by way of the Fourteenth Amendment. In answering the question, the Court addressed other rights of the accused, including the right to a jury trial. Thus, the case provides a useful reference point in the evolution of the Court's view of the right to jury trial.

The defendant in *Palko* had been indicted for first degree murder.[60] A jury found him guilty of second degree murder.[61] The state appealed and the Connecticut Supreme Court reversed the judgment and remanded for a new trial.[62] On remand, the defendant objected to the new trial on the grounds of double jeopardy under the Fifth and Fourteenth Amendments. The trial court overruled the objection, and a jury found the defendant guilty of first degree murder. The U.S. Supreme Court upheld the conviction despite the defendant's argument that the entire Bill of Rights applied to states by virtue of the Fourteenth Amendment.[63] In ruling, the Court observed:

> The right to trial by jury and immunity from prosecution except as a result of an indictment may have value and importance. Even so they are not of the very essence of a scheme of ordered liberty. To abolish them is not to violate a "principle of justice so rooted in the traditions and consciences of our people as to be ranked as fundamental." Few would be so narrow or provincial as to maintain that a fair and enlightened system of justice would be impossible without them.[64]

(2) *Duncan v. Louisiana*

Three decades after the *Palko* decision foreshadowed a contrary result, the Court in *Duncan v. Louisiana*[65] decided that the right to a jury was indeed applicable to states through the Fourteenth Amendment.[66] The defendant in *Duncan* had been charged with simple battery, a charge that carried a maximum penalty of two years in prison. Duncan's request for

60. *Id.* at 320.

61. *Id.* at 321.

62. *Id.*

63. *Id.* at 322.

64. *Palko*, 302 U.S. at 325 (citations omitted). In 1937, this decision followed the generation of cases that had limited the application of the Fourteenth Amendment. *See, e.g.*, The Slaughterhouse Cases, 83 U.S. 36 (1872) (addressing the Privileges and Immunities Clause only). The doctrine of incorporation had not yet been applied broadly to encompass the Fourth, Fifth, and Sixth Amendments. However, the *Palko* Court did recognize one area where state statutes may not abridge the Fourteenth Amendment's Due Process Clause: First Amendment rights. *Palko*, 302 U.S. at 324.

65. Duncan v. Louisiana, 391 U.S. 145 (1968).

66. *Id.* at 149.

a jury trial had been denied on the ground that the Louisiana Constitution did not permit a jury trial under such circumstances. The trial court found Duncan guilty and sentenced him to six months in prison. He appealed the verdict, arguing that he had been deprived of his Sixth Amendment right to a jury.

Reversing the conviction, the Court in *Duncan* held the Sixth Amendment was fundamental to the American scheme of criminal justice and, as such, essential in state prosecutions[67] despite that the Court in *Palko* had refrained from holding that juries were essential to all criminal justice systems.[68] The Court acknowledged that same criminal justice systems, such as the civil law nations in Europe, can administer justice without a jury.[69] In such systems, other procedures and safeguards serve the same function as the jury does in the American system.[70] The *Duncan* Court recognized, however, that the American system is one predicated on the role of the jury in serious criminal cases.[71] In other words, one cannot simply ask in the abstract whether jury trials are essential to a criminal justice system.[72] Instead, one must ask whether, in light of this country's system as it has evolved, jury trials are essential.[73] Framing the issue in the latter manner, the Court had little trouble answering that jury trials[74] are essential in the American criminal justice system.[75] A system of criminal justice without the right to a jury trial for serious offenses had never been applied in the Anglo-American tradition.[76]

(3) Decisions on a Jury's Role in Sentencing

The most recent U.S. Supreme Court decisions concerning the accused's right to a jury trial address the ability of judges to sentence persons following jury verdicts. In *Apprendi v. New Jersey*,[77] the Court addressed the constitutionality of a judge's imposition of a sentence based

67. *Id.* at 150 n.14. In so ruling, *Duncan* rejected the previous incorporation analysis typified by *Palko* concerning the constitutional procedural safeguards under the Fifth and Sixth Amendments and advocated a new analysis.

68. *Palko*, 302 U.S. at 323-24.

69. *See id.* at 326 n.3.

70. *See Duncan*, 391 U.S. at 151-52.

71. *See id.*

72. *Id.* at 149.

73. *Id.* at 150 n.14.

74. For serious offenses–generally considered those carrying a potential sentence over six months. *See infra* text accompanying note 92.

75. *See Duncan*, 391 U.S. at 150 n.14.

76. *See id.* at 153. The Court has commented on the role of the criminal jury in a number of decisions decided after *Duncan*.

77. Apprendi v. New Jersey, 530 U.S. 466 (2000).

on factual determinations made without a jury trial.[78] Holding such a practice unconstitutional, the Court expounded at length on the crucial role of the jury in providing a necessary buffer between the government and the accused.[79] The Court has reaffirmed *Apprendi* twice in the last three years, first in *Ring v. Arizona*,[80] and then in *Blakely v. Washington*.[81] The Court in each instance has emphasized the role of the jury in the American scheme of justice.[82] As it stated in *Blakely*, "[T]he right to a jury trial . . . is no mere procedural formality, but a fundamental reservation of power in our constitutional structure. Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary."[83]

e. Synthesis of Precedent on Jury Trial Right

As the previous sections demonstrate, the right to a jury trial in serious criminal cases is among the broadest of constitutional rights. If the right were essential in all criminal prosecutions, however, one would have expected the Supreme Court to have held in all scenarios that the accused has an absolute right to a jury. Yet the Court has in fact concluded otherwise. The Court recognized in the *Consular Cases* and the *Insular Cases* that a jury may not be required.[84] The *Insular Cases*, in particular,

78. *Id.* at 469-77.

79. *Id.* at 476-81.

80. Ring v. Arizona, 536 U.S. 584 (2002).

81. Blakely v. Washington, 542 U.S. 296 (2004).

82. *See id.* at 305-06; *Ring*, 536 U.S. at 614-19 (Breyer, J., concurring).

83. *Blakely*, 542 U.S. at 304-07.

84. Some have questioned the continuing vitality of the *Consular Cases*. In *Reid v. Covert*, the U.S. Supreme Court upheld challenges by civilian spouses of active members of U.S. armed forces to life sentences imposed by courts-martial on charges of murder. Reid v. Covert, 354 U.S. 1 (1957). The plurality opinion, rejecting the government's argument that the consular courts upheld in *In re Ross* supported the use of courts-martial overseas to try the civilian spouses, dismissed *Ross* as "a relic from a different era." *Id.* at 12. The *Insular Cases* likewise have been criticized. In *United States v. Pollard*, an airline passenger traveling from the U.S. Virgin Islands to the continental United States was arrested for falsely representing herself as a U.S. citizen in violation of the Immigration and Naturalization Act. United States v. Pollard, 209 F. Supp. 2d 525, 529 (2002). At trial, the defendant moved to suppress her confession. *Id.* at 529-30. The trial court held that her Fourteenth Amendment equal protection rights had been violated and that her detention violated the Fourth Amendment. *Id.* However, in dicta, the trial court criticized the *Insular Cases* as they related to how Congress had justified their denial of constitutional guarantees to island possessions acquired shortly after the Spanish-American War. *Id.* at 540. The *Insular Cases* had spawned what was known as the "unincorporation" doctrine. *Id.* "[S]imply put, [the unincorporation doctrine] holds that the Territorial Clause confers on Congress plenary power over territories that have not yet been 'incorporated' into the United States." *Id.* The rationale was racism. "By 1922, this racist reasoning had been fully adopted by the Court so that it is the locality that is determinative of the application of the Constitution . . . and not the status of the people who

provide important guidance on the rationale for requiring a jury. The Court there observed that the island territories followed a form of criminal justice modeled on the European civil law systems. By recognizing such systems as legitimate alternatives to the Anglo-American model of criminal justice, the Court thus accepted that a jury trial is not essential to a scheme of justice so long as the system has alternative procedures to ensure a fair trial.

Moreover, a careful review of the Court's Fourteenth Amendment incorporation jurisprudence further indicates that the Court does not view the right to a jury trial as an exclusive means to justice. In *Palko*, the Court observed, as it had in the *Insular Cases*,[85] that criminal justice systems in countries other than those that follow the Anglo-American model eschew a jury in favor of other procedural protections.[86] The Court thus suggested that the right to a jury trial was not so fundamental as to be within the "very essence of a scheme of ordered liberty."[87] Later, the Court in *Duncan* held that in the American scheme of criminal justice, a jury was essential to provide justice in prosecutions involving the potential for serious punishment.[88] But one should not overlook the subtlety of the Court's reasoning.[89] The Court, in fact, was not abandoning the recognition that other civilized systems of criminal justice could operate without a jury.[90] The Court was merely insisting that, in a system such as

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live in it." *Id.* (quoting Balzac v. Porto Rico, 258 U.S. 298, 309 (1922)). As the *Pollard* court continued:

> We are also of the opinion that the power to acquire territories by treaty implies not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American Empire." There seems to be no middle ground between this position and the doctrine that if these inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, *whether savages or civilized*, are such, and entitled to all the rights, privileges and immunity of citizens. If such be their *status*, the consequences will be extremely serious.

Pollard, 209 F. Supp. 2d at 541 (quoting *Downes*, 182 U.S. at 279). *Pollard* was subsequently reversed by the U.S. Court of Appeals for the Third Circuit on other grounds. *See* United States v. Pollard, 326 F.3d 397 (2003). The Third Circuit did not address the review of the history of the *Insular Cases*. While the *Insular Cases* remain precedent, they may well be viewed as an embarrassing chapter in American jurisprudence.

85. *See supra* note 44-55 and accompanying text.
86. Palko v. Connecticut, 302 U.S. 319, 324-25 (1937).
87. *Id.* at 325.
88. Duncan v. Louisiana, 391 U.S. 145, 148-49 (1968).
89. *Id.* at 160-61.
90. *Id.* at 154-57.

the American system which is built with the assumption that the jury will provide a buffer between the State and the accused, a jury must remain part of the system.[91]

Therefore, the right to a jury is broad so long as the prosecution is within the realm of ordinary criminal prosecutions. It extends to anyone, citizen or alien, accused of a crime carrying more than six months in jail. The clearest exception to this broad right applies to petty crimes, for which potential sentences are less than six months.[92] Yet it is clear that the rationale for dispensing with the jury trial applies in certain scenarios in which the accused has alternate protections ensuring a fair trial.

The next section of this Article addresses the constitutional basis for the government's war powers. Implicit in the government's power to act in matters of national security is the power to charge and try persons accused of violating the laws of armed conflict. Those accused of such charges often challenge the prosecution on, among other bases, the deprivation of the right to a jury trial. Although the Court seemed receptive to such arguments in one of the earliest of such challenges, the current state of precedent suggests that an accused will have difficulty challenging a military tribunal on constitutional grounds. Nevertheless, as this Article contends,[93] the last word on the procedures for trying persons in military tribunals should not come from the Supreme Court. The Framers left to Congress the job of checking the executive branch in matters of national security. Although a jury may not be the optimal means of ensuring just trials of persons accused of violating the laws of armed conflict, Congress should ensure that some procedures are in place to ensure fair trials.

B. *Constitutional Provisions and Precedent Concerning the Government's Power to Order Trial by Military Tribunal*

1. Pertinent Constitutional Provisions on Government's War Powers

The U.S. Constitution allocates powers in matters of war and national security both to the President and to Congress. The President's powers in matters of war derive from Article II, section 2 of the Constitution, which provides that "[t]he President shall be Commander in Chief of the Army

91. *Id.* at 155-58.

92. *See* Blanton v. City of North Las Vegas, 489 U.S. 538 (1984) (stating that a sentence of less than six months creates presumption that the offense is a petty offense, but the presumption can be overcome by other evidence, such as stiff fines, showing that the government does not consider the offense to be petty).

93. *See infra* text accompanying notes 443-566.

and Navy of the United States, and of the Militia of the several States, when called into actual Service of the United States."[94] In addition, Article II, section 3 enumerates, among other powers of the President, that "he shall take Care that the Laws be faithfully executed."[95] Among the laws that the President shall execute are laws enacted by Congress concerning war. Thus, one must examine separately the areas in which the Constitution empowers Congress to make laws.

Article I, section 8 includes, among the subjects on which Congress is authorized to make laws, the power "[t]o lay and collect Taxes, Duties, Imposts and Excises . . . and provide for the Common Defence and general Welfare of the United States." In addition, Congress has the power

> To define and punish Piracies and Felonies committed on the High Seas, and Offences against the Law of Nations;
>
> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces.[96]

Article I, section 9 further recognizes that Congress has the power to suspend the writ of habeas corpus but only "when in cases of rebellion or invasion the public safety may require it."[97]

2. U.S. Supreme Court Precedent Concerning the Government's War Powers, Especially as They Relate to Military Tribunals

Precedent on the constitutionality of the government's ordering trials by military tribunal falls into three eras—(1) the Civil War era, (2) the World War II era, and (3) the post-9/11 era. As will be shown, each era's precedent builds on the previous one. Nevertheless, the precedential patterns may appear inharmonious—even on a purely constitutional level—unless one searches deeply for a basis on which to reconcile them. Hence, this section of the Article will conclude with a synthesis of the U.S. Supreme Court precedent spanning each era. The remainder of the Article

94. U.S. CONST. art. II, § 2.
95. U.S. CONST. art. II, § 3.
96. U.S. CONST. art. I, § 8, cls. 10-14
97. U.S. CONST. art. I, § 9, cl. 2.

will explore whether, even if the military tribunals are constitutional, these tribunals—as currently comprised—fall short of transcendent values.

a. Civil War Era

(1) *Ex Parte Merryman*

The first decision of this era is Chief Justice Roger Taney's decision, as circuit justice, in *Ex Parte Merryman*.[98] During the Civil War, President Lincoln declared that military officers seeking to put down the insurrection, if they encountered "resistance which renders it necessary to suspend the writ of habeas corpus for the public safety . . . [were] authorized to suspend the writ."[99] In *Merryman*, Chief Justice Taney, sitting as circuit justice for the territory in which the writ was brought, considered the legality of the military imprisonment of Secessionist John Merryman on suspicion of treason.[100] When the military officer holding Merryman refused to produce him based on Lincoln's suspension of habeas corpus, the Chief Justice issued an opinion that he directed to be delivered to the President.[101] In this opinion, Chief Justice Taney ruled that the President lacked authority to suspend habeas.[102] In addition, Chief Justice Taney offered the opinion that, regardless of whether the writ of habeas could be suspended, Merryman could not be tried before a military tribunal due to the Sixth Amendment's guarantee of a jury trial.[103] In response, President Lincoln ordered the release of Merryman, although he continued to have persons arrested and detained without the benefit of habeas until Congress reconvened.[104]

(2) *Ex Parte Milligan*

Subsequently, the entire U.S. Supreme Court addressed the legality of military tribunals in *Ex Parte Milligan*.[105] On May 10, 1865, Lambdin Milligan was arrested by military authorities and, pursuant to the same authorization at issue in *Merryman*, imprisoned to await trial before a

98. *Ex parte* Merryman, 17 F. Cas. 144 (D. Md. 1861) (No. 9487).

99. Letter from Abraham Lincoln, President of the United States, to Winfield Scott, Commanding General of the U.S. Army (April 27, 1861), http://teachingamericanhistory.org/library/index.asp?document=414 (last visited Oct. 3, 2006).

100. *Ex Parte* Merryman, 17 F. Cas. 144 (D. Md. 1861) (No. 9487).

101. *Id.* at 153.

102. *Id.* at 152-53.

103. *Id.* at 149.

104. *Id.* at 153.

105. *Ex parte* Milligan, 71 U.S. 2 (1866).

military tribunal.[106] Milligan was charged with conspiring against the United States by planning to seize weapons, free Confederate prisoners, and kidnap Indiana's governor.[107] On October 21, 1864, Milligan was tried before a military tribunal, found guilty, and sentenced to be hanged.[108] Afterward, a federal grand jury inquired into whether Milligan had violated the laws of the United States.[109] The grand jury refused to return an indictment.[110] Subsequently, Milligan brought a habeas petition challenging the jurisdiction of the military tribunal and, by extension, the validity of its death sentence.[111]

After the end of the Civil War and the death of President Lincoln,[112] the habeas petition made its way to the U.S. Supreme Court. The Court addressed the constitutionality of trying a citizen before a military tribunal without a jury.[113] The Court held that, even in time of war and threats to national security, citizens could not be tried before military tribunals if the courts remained open.[114] The Court suggested that civil authority in the state where the person was charged would have to have been overthrown for trial by military tribunals to be legitimate.[115]

The right that the Court deemed most precious, among those that a military tribunal would deprive a defendant, was the right to a jury trial.[116] The Fifth Amendment guarantees the right of a grand jury indictment as a prerequisite for prosecution of a serious crime.[117] The Court observed,

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106. *Id.* at 6.

107. *Id.* at 6-7.

108. *Id.*

109. *Id.* at 7.

110. *Milligan*, 71 U.S. at 7.

111. *Id.* at 8.

112. Lee's surrender at Appomattox Courthouse occurred on April 8, 1865, and President Lincoln died on April 15, 1865. Milligan filed his petition for writ of habeas corpus on May 10, 1865 in the Circuit Court of the U.S. for the District of Indiana. *Id.* at 7. The circuit court was divided on whether to grant the petition and, pursuant to an applicable statute existing at the time, certified such disagreement to the Supreme Court. *Id.* at 8-9. Pursuant to this statute, the Court could take up the matter, during its next session, in light of the certification of disagreement among the circuit court on the proper response to the petition. *Id.* at 9. The matter thus came before the Court during the term following the one in which the petition had been filed, i.e., during the 1866 term.

113. *See id.* at 115-16. The Court concluded that, notwithstanding Congress's legislation authorizing the President's suspension of the writ, federal courts had jurisdiction to hear a writ of habeas corpus challenging the jurisdiction of a military commission. *Id.* Essentially, the Court held that any other result would permit an intolerable catch-22 in which a person unlawfully deprived of liberty would have no recourse. *See id.*

114. *Id.* at 136.

115. *See Milligan*, 71 U.S. at 136.

116. *Id.* at 137.

117. *Id.* at 137-38.

however, that the Fifth Amendment specifically excludes from its protection "cases arising in land or naval forces, or in the Militia, when in actual service in time of war or public danger."[118] The Sixth Amendment's guarantee of a jury trial, the Court believed, was meant to extend to everyone protected by the Fifth Amendment.[119] Thus, the Court reasoned, those in military service had no right to a speedy and public jury trial.[120] But, beyond that exception, the Court was not willing to go further: "All other persons, citizens of states where the courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury."[121]

(3) Synthesis of Key Civil War Era Precedent on Military Tribunals

After the Civil War cases on military tribunals, an accused charged by a military tribunal would likely be sanguine about the chances of successfully challenging the constitutionality of the proceedings. Both *Merryman* and *Milligan* suggested that the accused's jury rights would fully apply in prosecutions by military tribunals.[122] Indeed, an accused could not have asked for more sweeping language favoring an accused's rights in criminal prosecution—and, in particular, the significance of the jury to the criminal justice system—than the Court provided in *Milligan*.[123] Nevertheless, when such challenges arose during World War II, the accused met responses far different from those received by Merryman and Milligan.

b. World War II Era

The constitutionality of military tribunals arose again during World War II and its aftermath. In three decisions—*Ex Parte Quirin*,[124]

118. *Id.* at 123.

119. *Id.*

120. *See Milligan*, 71 U.S. at 123.

> The discipline necessary to the efficiency of the army and navy, required other and swifter modes of trial than are furnished by the common law courts; and, in pursuance of the power conferred by the Constitution, Congress has declared the kinds of trial, and the manner in which they shall be conducted, for offences committed while the party is in the military or naval service.

Id.

121. *Id.*

122. *See supra* text accompanying notes 100-21.

123. *See supra* text accompanying notes 100-21.

124. 317 U.S. 1 (1942).

Application of Yamashita,[125] and *Madsen v. Kinsella*[126]—the U.S. Supreme Court provided a framework within which to judge the validity of military tribunals.[127]

(1) *Ex Parte Quirin*

Approximately six months after the bombing of Pearl Harbor, eight men entered the United States after being delivered by Nazi submarines in two groups at separate points on the East Coast—one group near Long Island, New York, and the other group at Ponte Vedra, Florida.[128] They brought with them explosives sufficient to destroy plants and facilities critical to the Allied war effort.[129] All of the men had lived in the United States for extended periods before returning to Germany where they were trained for this mission.[130] At least one of the men was an American citizen.[131]

On July 2, 1942, President Roosevelt signed an executive order creating a military tribunal before which the men were to be tried "for offenses against the law of war and the Articles of War."[132] The same order set forth regulations on the manner in which the trials were to be conducted and in which a judgment of the tribunal would be reviewed.[133] These procedures were bare-bones: evidence was to be admitted if, in the estimation of the tribunal's President, it would "be probative to a reasonable man," and a conviction or sentence required a two-thirds vote of the tribunal's members.[134] A proclamation issued by President Roosevelt on the same date declared that anyone entering the United States

125. 327 U.S. 1 (1946).

126. 342 U.S. 341 (1952).

127. Another U.S. Supreme Court decision from this era addresses the validity of military tribunals, *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), but is less significant than *Quirin*, *Yamashita*, and *Madsen* because, unlike those cases, the holdings are peculiar to scenarios that are either unlikely to arise again or otherwise have limited precedential value. In *Kahanamoku*, the Court held convictions by military tribunals set up in the wake of the Pearl Harbor bombings unconstitutional. *Kahanamoku*, 327 U.S. at 324. Although the Court waxes eloquently on the role of the jury, it does so in the context of determining Congress's intent under the Organic Act by which it provided for the governance of Hawaii during the period in which it was a territory. *See id.* at 319. In other words, the Court's ruling did not rest on a constitutional basis, but instead on an interpretation of whether the Act permitted military tribunals indefinitely in the territory. *See id.* at 324.

128. *Quirin*, 317 U.S. at 21.

129. *Id.*

130. *Id.* at 20.

131. *Id.*

132. Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 7, 1942).

133. *Id.*

134. *Id.*

during wartime who was charged with committing, attempting, or assisting with acts of sabotage, espionage, hostile acts, or violations of the law of war would be subject to the law of war and tried by military tribunals.[135]

President Roosevelt appointed four major generals and three brigadier generals to serve as the judges for the tribunal,[136] and appointed military lawyers to represent the accused.[137] The trial took place at the Justice Department building in Washington, D.C.[138] For reasons of national security, the proceedings before the tribunal were closed and any reports on the proceedings were censored.[139] After three weeks of proceedings in the trial before the military tribunal, but before the tribunal had heard closing arguments of counsel, seven of the accused filed a petition for a writ of habeas corpus.[140] In a one-paragraph decision, the U.S. District Court for the District of Columbia denied the petitions on the grounds that, based on the facts asserted in the petitions and pursuant to the July 2, 1942 proclamation, they were "not privileged to seek any remedy or maintain any proceeding in the courts of the United States."[141]

The petitioners then filed a petition for writ of habeas corpus in the U.S. Supreme Court.[142] The Court, within days of the filing, scheduled oral arguments on the request.[143] Each of the men also appealed and sought a writ of certiorari from the U.S. Supreme Court, which the Court granted and heard at the scheduled hearing.[144]

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135. Proclamation No. 2561, 7 Fed. Reg. 5101 (July 2, 1942), *available at* http://www.heinonline.org/HOL/Page?handle=hein.fedreg/007132&collection=fedreg&id=1&size=2. The text of the July 2, 1942, proclamation states:

> [A]ll 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. . . .

Id.

136. Exec. Order No. 9185, 7 Fed. Reg. at 5103.

137. MICHAEL DOBBS, SABOTEURS 207 (Alfred A. Knopf ed., 2004).

138. *Id.* at 205.

139. *Id.* at 215-19.

140. *Ex parte* Quirin, 317 U.S. 1, 19, 23 (1942).

141. *Ex parte* Quirin, 47 F. Supp. 431 (1942).

142. *Quirin*, 317 U.S. at 19.

143. *Id.*

144. *Id.* at 19-20.

On July 31, 1942, the Court issued a terse per curiam opinion affirming the district court.[145] The Court's per curiam opinion stated that the charges against the petitioners were charges for which the President was authorized to order trial before a military tribunal, that the tribunal had been lawfully constituted, and that the petitioners were in lawful custody and thus failed to show a basis for a writ of habeas corpus.[146] The Court noted that it was issuing its decision "in advance of the preparation of a full opinion which necessarily will require a considerable period of time."[147]

On August 2, 1942, the military tribunal sent its sealed decision to President Roosevelt.[148] The tribunal sentenced each of the eight men to death.[149] However, the tribunal recommended clemency for two members of the group because they had cooperated in the capture and arrest of the others.[150] Roosevelt granted clemency for the two, imposing lengthy prison terms rather than the death sentence, but ordered the six remaining men to be executed by electrocution.[151] Although their military lawyers argued that trial by a special military tribunal authorized by the President violated the Articles of War (now known as the Uniform Code of Military Justice), President Roosevelt dismissed these arguments.[152] As provided by the terms of the executive order, the President served as the sole reviewing authority of the sentences.[153] Less than ten days after President Roosevelt received the record of the tribunal's proceedings, he issued the order to execute the six men whose sentences were not commuted.[154]

On October 29, 1942, the U.S. Supreme Court filed an "extended opinion" in *Quirin*. The Court began by emphasizing the limits of its review.[155] The Court held that when the President detains and orders trials of persons in his role as Commander-in-Chief "in times of war and of grave public danger," such decisions could "not be set aside by the courts without the clear conviction that they are in conflict with the Constitution and laws of Congress constitutionally enacted."[156] The Court proceeded to review the constitutional war-making powers of the President and of

145. *Id.* at 1.
146. *Id.* at 18-19, 48.
147. *Quirin*, 317 U.S. at 18.
148. DOBBS, *supra* note 137, at 253.
149. *Id.*
150. *Id.*
151. *Id.* at 254, 260-65.
152. *Id.* at 251-55.
153. DOBBS, *supra* note 137, at 251-55.
154. *Id.*
155. *Ex parte* Quirin, 317 U.S. 1, 28 (1942).
156. *Id.* at 25.

Congress.[157] In so doing, the Court specifically acknowledged the significance of the President's powers relating to trial by military tribunals:

> 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 in their attempt to thwart or impede our military effort have violated the law of war.[158]

With this background, the Court defined its task as not to determine whether the petitioners were guilty, but solely whether trial of the petitioners before military tribunals on charges of violation of the laws of war was constitutional.[159] In addressing this overarching issue, the Court also engaged several subsidiary issues. These included (1) the difference between persons accused of domestic crimes and "unlawful combatants"[160] accused of violating the laws of war; (2) the extent to which the *Milligan* decision controlled; and (3) the effect, if any, of an accused's American citizenship.[161]

The Court cited the Articles of War as Congress's authorization of military tribunals for the trial of those who violate the laws of war.[162] The Court then discussed whether the laws of war encompassed the conduct with which the petitioners had been charged.[163] Unlike lawful combatants or prisoners of war, unlawful combatants were subject to trial before a military tribunal for the "acts which render their belligerency unlawful."[164] Among such unlawful acts, the Court observed, was the act of being in an enemy's territory for the purpose of waging war by destroying life or property without uniform identifying one as an enemy.[165]

The Court then turned to the question of whether the right to a jury trial had been violated.[166] It first recognized the principle that the U.S. Constitution had not enlarged the right to a jury trial, but instead had merely preserved the right as it existed when the U.S. Constitution was

157. *See id.* at 25-29.

158. *Id.* at 28-29.

159. *Id.* at 29.

160. The Court alternately used the terms "unlawful combatants" and "unlawful belligerents" to refer to the same category of persons.

161. *Quirin*, 317 U.S. at 14-20.

162. *Id.* at 26-27.

163. *Id.* at 30-37.

164. *Id.* at 31.

165. *Id.* at 31, 37.

166. *Quirin*, 317 U.S. at 38.

enacted.[167] As the Court noted, trials of petty crimes and certain criminal contempt charges were examples of instances in which the Sixth Amendment was not implicated.[168] A jury trial was not available for these offenses at common law before the U.S. Constitution's ratification.[169] Likewise, the Court found that ample precedent supported the use of military tribunals to try persons for violations of the laws of war in colonial America.[170]

The Court then turned to a nagging question arising from the text of the Fifth and Sixth Amendments. The Fifth Amendment explicitly excludes from its application those serving in the United States armed and naval forces.[171] The Court recognized that this exception, though not repeated in the Sixth Amendment, also excluded members of the United States Army and Navy from enjoying the right to a jury trial.[172] Because the Constitution's text contained an explicit exception, the petitioners in *Quirin* argued that this textual exception was the only one that could apply.[173] Rejecting the argument, the Court held that explicit textual exceptions are not necessary "to exclude from the operation of these provisions cases never deemed to be within their terms."[174] The Court found anomalous the suggestion that the Fifth and Sixth Amendments withdrew the benefits of grand and petit juries from members of the U.S. armed forces but extended them to unlawful combatants who violated the laws of war.[175]

The Court then confronted *Milligan*'s statement that trial by military tribunal of a citizen would never be proper if conducted in a state where the courts were open. Rather than overruling *Milligan*, as the government invited in briefing *Quirin*,[176] the Court limited that decision "as having particular reference to the facts before it."[177] The Court read *Milligan* as dealing with an American citizen who was not an unlawful combatant.[178]

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167. *Id.* at 39.
168. *Id.* at 39-40.
169. *Id.*
170. *Id.* at 41-43.
171. *See supra* text accompanying note 30.
172. *Quirin*, 317 U.S. at 40.
173. *Id.* at 40-41.
174. *Id.* at 41.
175. *Id.*
176. *See Brief for the Respondent, Ex Parte* Quirin, *in* 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 446-53 (1975).
177. *Quirin*, 317 U.S. at 45.
178. *Id.*

As such, the Court believed that the decision had no bearing on the legality of trying unlawful combatants by military tribunal.[179]

The Court also rejected the notion that the citizenship of an unlawful combatant would provide any greater rights than to an alien unlawful combatant.[180] One of the petitioners claimed to be an American citizen.[181] The Court found the issue to be irrelevant.[182] If an American citizen assists an enemy government by entering the United States with the intent to commit hostile acts, then such a person is an unlawful combatant.[183] Such acts violated the laws of war and, regardless of one's citizenship, one could be tried by a military tribunal for violations of the laws of war.[184]

(2) *Yamashita v. Styer*

The next U.S. Supreme Court decision concerning military tribunals[185] was *Yamashita v. Styer*.[186] *Yamashita* was decided after the end of World War II hostilities, but before a formal declaration of peace. During the decisive battles for control of the Pacific theater, Yamashita was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army which was headquartered in the Philippines.[187] After surrendering, Yamashita was held in U.S. custody and charged with war crimes resulting from atrocities committed by his troops.[188] The military commander of the Philippines ordered the trial of Yamashita before a military tribunal.[189] The tribunal found him guilty and sentenced him to death by hanging.[190]

Yamashita sought a writ of habeas corpus, which the Supreme Court of the Philippine Islands denied.[191] Yamashita then sought habeas relief in

179. *Id.*

180. *Id.* at 37-38.

181. *Id.* at 20. Herbert Hans Haupt came to the United States when he was five years old. *Id.* He contended that he became an American citizen by the naturalization of his parents during his minority. *Id.* The government contended that, on attaining his majority, Haupt elected German citizenship and, even if he had not, his conduct resulted in abandonment of his citizenship. *Id.*

182. *Quirin*, 317 U.S. at 20.

183. *Id.* at 37-38.

184. *Id.*

185. The Court had, however, dealt with related subjects between *Quirin* and *Yamashita*, including the highly controversial ruling upholding the President's decision to inter American citizens of Japanese descent and Japanese aliens in prison camps. *See infra* text accompanying notes 469-92 (discussing Korematasu v. United States, 323 U.S. 214 (1944)).

186. Yamashita v. Styer, 327 U.S. 1 (1946).

187. *Id.* at 31-33 (Murphy, J., dissenting).

188. *Id.* at 13-14.

189. *Id.* at 5.

190. *Id.*

191. *Yamashita*, 327 U.S. at 6.

the Supreme Court.[192] The Court upheld the validity of trial by military tribunal. Citing *Quirin*, the Court observed that the U.S. Constitution and Congress recognized the ongoing authority of military tribunals to try offenders of the laws of war.[193] The Court repeated its statement from *Quirin* that use of the military tribunal was an "important incident to the conduct of war" by allowing seizure and punishment of those impeding "our military effort" who violated the laws of war.[194] Expanding on this view of the usefulness of military tribunals in the war effort, the Court added:

> The war power, from which the [military tribunal] derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced. . . .[195]

(3) *Madsen v. Kinsella*

Like *Yamashita*, the U.S. Supreme Court's decision in *Madsen v. Kinsella*[196] followed the end of World War II hostilities and addressed the constitutionality of military tribunals. *Madsen* involved the trial of a military spouse by military tribunal in the area of Germany under U.S. control in 1949.[197] The wife of an Air Force Lieutenant moved to the American Zone of Occupied Germany in 1947 and lived there on a military base.[198] She fatally shot her husband in 1949 and was charged

192. *Id.* at 4.

193. *Id.* at 7-8.

194. *Id.* at 11.

195. *Id.* at 12. The Court proceeded to reject Yamashita's specific arguments. He had argued, for instance, that the military tribunal lacked jurisdiction because it had been formed after hostilities had ended. *Id.* at 12-14. Rejecting this argument, the Court held that military tribunals had traditionally conducted trials for war crimes committed during hostilities after cessation of the hostilities but before a formal declaration of peace. *Id.* The Court further rejected the argument that Yamashita could not be relieved of culpability because it was his troops, not he personally, who committed the atrocities. *Id.* at 14-17. In addition, the Court rebuffed the challenges to the widespread use of hearsay testimony in the trial as evidence on which Yamashita was convicted. *Yamashita*, 327 U.S. at 18-20. By authorizing military tribunals in the Articles of War, Congress had sanctioned "any use of the military [tribunal] contemplated by the common law of war[,]" including trial without the evidentiary safeguards imposed in the traditional system of criminal justice. *Id.* at 20.

196. 343 U.S. 341 (1952).

197. *Id.* at 343.

198. *Id.* at 343-44.

with murder and brought to trial before a military tribunal.[199] In 1945, the President had established a U.S. Military Government for Germany within the territory controlled by America after the end of World War II and before return of sovereignty to Germany.[200] Military tribunals were the arm of the military government that administered the judicial system.[201] These tribunals had authority to enforce the German Criminal Code against civilians, including dependents of members of the U.S. forces, in this territory.[202]

Having been found guilty of murder by the military tribunal of civilian judges, and having had that conviction affirmed on appeal, the petitioner in *Madsen* was transferred to a prison in West Virginia to serve her sentence.[203] From there she petitioned for a writ of habeas corpus.[204] She argued that *Quirin* and *Yamashita* were not controlling on the congressional authorization of the tribunals in question because, unlike the tribunals in those cases, the tribunals in *Madsen* were post-war tribunals in territory governed by military authorities and not contemplated by the Articles of War.[205] In its analysis, the Court recognized that the *Madsen* tribunals did not appear to be implicitly authorized by the Articles of War.[206] Accordingly, the Court faced a question that it had not faced in previous cases: Does the President have authority, independent of Congress, to establish military tribunals?

The Court found that implicit in the President's powers as Commander-in-Chief was the power to establish military tribunals.[207] Significantly, however, the Court observed that Congress, in light of the broader constitutional grant of powers to make laws on matters of war, could place

199. *Id.*

200. *Id.* at 356.

201. *See generally* Duncan v. Kahanamoku, 327 U.S. 304 (1946); Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 ARMY LAW. 19, 34.

202. *Madsen*, 343 U.S. at 356. The judges on these military tribunals, unlike traditional military tribunals, were civilians appointed by the U.S. Military Governor for Germany. Appeals were to another set of civilian judges appointed by the U.S. Military Governor. As the Court observed, tribunals "of a nonmilitary character" had been established for a variety of reasons, including the "volume of business, the size of the area, the number of civilians affected, the duration of the occupation and the need for establishing confidence in civilian procedure." *Id.* at 358. A code of procedure protected the accused, regardless of whether they were Americans or not, and by thus subjecting "German and United States civilians to the same procedures[,]" the military-tribunal system "exhibited confidence in . . . [these] procedures." *Id.* at 359-60.

203. *Id.* at 344-45.

204. *Id.* at 343-46.

205. *Id.* at 345.

206. *See id.* at 345-48.

207. *Madsen*, 343 U.S. at 348.

limits on such military tribunals.[208] Because Congress had not limited the President in this situation, the tribunals were legitimately formed.[209]

(4) Synthesis of World War II Era Precedent on Military Tribunals

The key decisions from the World War II are *Quirin* and *Madsen*. In *Quirin*, the Court established that for those accused of violating the laws of war (so-called "unlawful combatants"), trials held before military tribunals are presumptively constitutional. Contrary to the suggestion of the Civil War decisions in *Merryman* and *Milligan*, the Court's World War II decisions narrowly circumscribed the rights of an accused. The analysis by which the Court upheld the constitutionality of military tribunals focused on the practices at the time of the U.S. Constitution's ratification.[210] During that time there were individuals accused who were tried without a jury in some criminal proceedings; those accused of violating the laws of war, such as by acting as an unlawful combatant, were among this group. Nevertheless, *Madsen* provided an important qualification on the government's ability to try persons by military tribunal. The Court in *Madsen* recognized that Congress could limit the executive branch by enacting legislation limiting the circumstances or means by which persons were tried in military tribunals.

In its analysis of the balance of war powers, *Madsen* illustrates the approach of the Court in a more famous decision announced within the same year—*Youngstown Sheet & Tube Co. v. Sawyer*.[211] In *Youngstown*, President Truman seized steel mills on the brink of a labor strike, contending that the continued operation of the mills was essential to supply troops fighting in the Korean War.[212] Previously, Congress had considered and expressly rejected an amendment to the Taft-Hartley Act that would have allowed such a seizure in times of national crisis.[213] Affirming an injunction prohibiting the President from taking control of the mills, the U.S. Supreme Court explained that Congress's express rejection of the seizures effectively limited the President's war powers.[214] In his celebrated concurring opinion, Justice Jackson summarized the balance of powers as follows:

208. *Id.* at 348-54.
209. *Id.*
210. *See supra* text accompanying notes 156-84.
211. 343 U.S. 579 (1952).
212. *Id.* at 583.
213. *Id.* at 586.
214. *Id.* at 587.

> 1. When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum . . . . In these circumstances, and in these only, may he be said . . . to personify the federal sovereignty. . . .
>
> 2. When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain. Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. . . .
>
> 3. When the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb . . . . Presidential claim to a power at once so conclusive and preclusive must be scrutinized with caution, for what is at stake is the equilibrium established by our constitutional system.[215]

Thus, the Court in both *Youngstown* and *Madsen* reached the same conclusion—that Congress can effectively limit the President's powers in matters of national security. In *Madsen*, Congress had not enacted legislation limiting the President's powers.[216] Thus, the system of military justice prescribed for occupied Germany withstood constitutional scrutiny.[217] Because in *Youngstown* Congress had rejected the very action the President undertook, his action was unconstitutional even though he acted to promote national security. Therefore, legislation can make a crucial difference in whether the executive branch's actions can be challenged.

215. *Id.* at 635-38 (Jackson, J., concurring).

216. *See supra* text accompanying notes 202-15.

217. *See supra* text accompanying notes 202-15.

c. 9/11 Era Decisions

(1) September 11, 2001 Attacks, Governmental Response, and Creation of Military Tribunals for Trials of Those Accused of Taking Part in the Attacks

On September 11, 2001, al-Qaeda terrorists hijacked four jets and used three of them as missiles to attack the World Trade Center in New York City and the Pentagon.[218] The passengers of the fourth jet overtook the terrorists and forced a crash that killed all aboard.[219] Approximately three thousand persons were killed[220] in the most intense attack on American soil since Pearl Harbor. In the minds of many, these terrorist attacks represented a greater threat than the attack sixty years before.[221]

On September 18, 2001, Congress passed a resolution called Authorization for Use of Military Force.[222] The authorization empowered the President to "use all necessary and appropriate force against those nations, organizations, or persons he determined planned, authorized, committed, or aided the terrorist attacks" or those who "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."[223] Relying in part on Congress's authorization, on November 13, 2001, President Bush ordered certain procedures for the detention, treatment, and trial of non-citizen terrorists suspected of having ties to terrorist organizations.[224]

On March 21, 2002, the Department of Defense issued Military Commission Order No. 1 entitled "Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War against Terrorism."[225] This order provided a number of procedural safeguards to the accused.[226] Simultaneously, the order provided mechanisms by which classified information could be protected from disclosure, including

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218. 9/11 COMMISSION REPORT, *supra* note 4, at 7, 8, 10.

219. *Id.* at 14.

220. *Id.* at 316.

221. *See, e.g.*, Nathan Watanabe, *Internment, Civil Liberties, and a Nation in Crisis*, 13 S. CAL. INTERDISC. L.J. 167, 169-70 (2003) (greater number of Americans killed in 9/11 attacks than Pearl Harbor).

222. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001).

223. *Id.*

224. Military Order of Nov. 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 Fed. Reg. 57833 (Nov. 13, 2001), *available at* 2001 WL 34773797.

225. Military Commission Order No. 1, *supra* note 6.

226. *Id.* § 5.

prevention of the release of names of covert operatives in the field whose lives would be endangered by such release.[227] The order dictated that the tribunals be composed of three to seven "commissioned officers" of the U.S. armed forces.[228] A vote of two-thirds of the tribunal would suffice to convict or sentence the accused except for imposition of the death penalty, which would require a unanimous vote.[229] The order allowed for review by a panel of officers before final review by the Department of Defense and the President.[230]

To date, the only persons appointed to serve on the tribunals have been military officers.[231] Nevertheless, the government appointed several civilians as members to serve on the review panels under a statute permitting the President to appoint civilians to temporary positions as officers of the armed forces during national emergencies.[232]

In July 2004, the government began to issue charges against persons captured and held as "unlawful combatants."[233] The charges filed to date assert a variety of violations of the law of armed conflict, including offenses committed as unlawful combatants.[234] Tribunals have been formed to try these initial cases and include only members of the U.S. armed forces.[235] Some civilians were selected to serve on the Review Panels, the bodies that were supposed to be review the record of the proceedings and judgment of a tribunal.[236] These persons, however, were appointed as temporary military officers.[237] Consequently, all persons appointed to serve on the military tribunals and on the Review Panels would ultimately answer to the President in his capacity as Commander-in-Chief.

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227. *Id.* § 6(D)(5)(a).

228. *Id.* § 4(A)(2).

229. *Id.* § 6(F).

230. Military Commission Order No. 1, *supra* note 6, § 6(H)(4)-(6).

231. *See supra* text accompanying note 10.

232. 10 U.S.C. § 603 (2004). *See also* Exec. Order No. 13,321, 68 Fed. Reg. 74,465 (Dec. 17, 2003).

233. Under the laws of war, one who is a legal combatant may not be punished for the act of fighting on behalf of the nation-state with which it is identified. For a discussion of the debate concerning the distinction between lawful and unlawful combatants and those who fall within these categories at the present, see *supra* text accompanying note 13.

234. *See supra* text accompanying note 14.

235. *See supra* notes 10-12, 231-32 and accompanying text.

236. 10 U.S.C. § 603 (2004). *See also* Exec. Order No. 13,321, 68 Fed. Reg. 74,465 (Dec. 17, 2003).

237. *See* 10 U.S.C. § 603 (2004); *see also* Exec. Order No. 13,321, 68 Fed. Reg. 74,465 (Dec. 17, 2003).

(2) U.S. Supreme Court's Recent Decisions on Detainees

The Supreme Court has issued two recent opinions of note concerning military tribunals. The U.S. Supreme Court's 2004 decision in *Hamdi v. Rumsfeld*[238] did not specifically address the legality of military tribunals. Nevertheless, the plurality decision in *Hamdi* dealt with the President's power to detain illegal combatants as one of the incidents of the executive's war powers. Because the plurality relied on *Quirin* as controlling precedent, and because the power to detain is an analogue to the power to charge, try, and punish persons for violating the laws of war,[239] the decision in *Hamdi* requires some discussion. After discussing *Hamdi*, the focus will turn to *Hamdan v. Rumsfeld*[240] in which the Court directly addressed the validity of military tribunals.

a. Hamdi v. Rumsfeld

Yasser Hamdi was born in the United States and lived in Saudi Arabia.[241] The government asserted that he was captured in Afghanistan, without a uniform but brandishing an AK-47 rifle and fighting for the al-Qaeda/Taliban forces.[242] On this basis, the government deemed Hamdi an "unlawful combatant" and not a prisoner of war.[243] Hamdi denied fighting for the al-Qaeda/Taliban forces.[244] The plurality in *Hamdi* recognized the President's power to detain illegal combatants, but ruled that the accused "must receive notice of the factual basis for his classification, and a fair opportunity to rebut the Government's factual assertions before a neutral decisionmaker."[245]

In upholding Hamdi's detention, the plurality rejected Hamdi's argument that the Non-Detention Act precluded his detention.[246] The Court

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238. 542 U.S. 507 (2004).

239. *Id.* at 509.

240. 126 S. Ct. 2749 (2006).

241. *Hamdi*, 542 U.S. at 510.

242. *Id.* at 510, 513.

243. *Id.* at 516. The Court found that despite the lack of a precise definition of the term "enemy combatant" (used as a synonym for "unlawful combatant") the government has

> made clear, however, that, for purposes of this case, the "enemy combatant" that it is seeking to detain is an individual who, it alleges, was "part of or supporting forces hostile to the United States or coalition partners" in Afghanistan and who are "engaged in an armed conflict against the United States."

Id.

244. *Id.* at 511-12.

245. *Id.* at 533.

246. *Hamdi*, 542 U.S. at 517-18. The Non-Detention Act provides as follows: "No citizen shall

held that the requirement in any detention is to have congressional authorization be satisfied.[247] "There can be no doubt that individuals who fought against the United States as part of the Taliban . . . are individuals Congress sought to target in passing the [Authorization for Use of Military Force (AUMF)]."[248] Significantly, the Court relied on *Quirin*'s expression of the "incidents of war" that are implicit within the government's war powers.[249] "The capture and detention of lawful combatants and the capture, detention, and trial of unlawful combatants, by 'universal agreement and practice,' are important incident[s] of war."[250]

The plurality then addressed Hamdi's argument that Congress had not authorized an indefinite detention.[251] The Court rejected this argument first by stating that it is "an established principle of the law of war that detention may last no longer than active hostilities."[252] Examining the AUMF's "necessary and appropriate force" clause, the plurality reasoned that this clause includes detention of enemy combatants.[253] Furthermore, the plurality noted that because "United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of 'necessary and appropriate force,' and therefore are authorized by the AUMF."[254] Accordingly, the plurality found that Hamdi's detention was justified by the AUMF.

Finally, the plurality addressed the due process implications of Hamdi's inability to have a court rule on the disputed contention of whether he was an unlawful combatant.[255] Here, the plurality analyzed Hamdi's individual liberty interest and the risk of unchecked detention becoming a means of oppression.[256] In contrast, the plurality acknowledged the government's strong interests in prosecuting a war and

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be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." 18 U.S.C. § 4001(a) (2004).

247. *Hamdi*, 542 U.S. at 517. The Court thus held that it was unnecessary to address the separate question whether the Act applied solely to non-military detentions. *Id.*

248. *Id.* at 518.

249. *Id.*

250. *Id.* (quoting *Quirin*, 317 U.S. at 28).

251. *Id.* at 519.

252. *Hamdi*, 542 U.S. at 520 (citing Geneva Convention Relative to the Treatment of Prisoners of War art. 118, Aug. 12, 1949, 6 U.S.T. 3316).

253. *Id.* at 521.

254. *Id.*

255. *Id.* at 528-29. For its analytical framework, the plurality relied on calculus set forth in *Mathews v. Eldridge*, which "dictates that the process due in any given instance is determined by weighing 'the private interest that will be affected by the official action' against the Government's asserted interest, 'including the function involved' and the burdens the Government would face in providing greater process." *Id.* at 529 (quoting Mathews v. Eldridge, 424 U.S. 319, 335 (1976)).

256. *Id.* at 529-30.

ensuring that those captured do not return to battle, while also reducing "process available to alleged enemy combatants" and the "practical difficulties that would accompany a system of trial-like process."[257] Military officers ought not be distracted "by litigation half a world away, and discovery into military operations would both intrude on the sensitive secrets of national defense and result in a futile search for evidence buried under the rubble of war."[258]

In light of these competing interests, the plurality held Hamdi had the right to challenge his illegal combatant status but that the proceedings could be fitted to recognize governmental interests.[259] A "citizen-detainee seeking to challenge his classification as an enemy combatant must receive . . . a fair opportunity to rebut the Government's factual assertions before a neutral decision maker."[260] "Any process in which the Executive's factual assertions go wholly unchallenged or are simply presumed correct without any opportunity for the alleged combatant to demonstrate otherwise falls constitutionally short."[261] At the same time, the plurality recognized "the exigencies of the circumstances may demand that . . . enemy combatant proceedings may be tailored to alleviate their uncommon potential to burden the Executive."[262] The opinion suggested procedural accomodations such as the relaxation of hearsay rules, rebuttable presumptions in favor of the government's evidence, and burden-shifting schemes.[263]

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257. *Hamdi*, 542 U.S. at 531-32.

258. *Id.*

259. *Id.* at 533.

260. *Id.*

261. *Id.* at 537.

262. *Hamdi*, 542 U.S. at 533. Justice Thomas in dissent contended that the notion of placing burdens on the executive branch in matters of national security was presumptuous and the Court should refrain from attempting a different result from the plurality. *Id.* at 582 (Thomas, J., dissenting). Justice Thomas argued that the plurality failed to "consider basic principles of constitutional structure as it relates to national security and foreign affairs and by using the balancing scheme of *Mathews v. Eldridge*." *Id.* at 579 (internal citation omitted). Justice Thomas believed that balancing was inappropriate: the Executive's war powers cannot be "balanced away by this Court." *Id.* He criticized the plurality for failing to "account for the Government's compelling interests and for our own institutional inability to weigh competing concerns correctly." *Id.* at 579.

263. *Id.* at 533-34. The Court's other 2004 decisions in cases brought by accused terrorists are not helpful in evaluating the legitimacy of military tribunals because they were decided on grounds having to do solely with procedural aspects of habeas corpus jurisprudence. In *Padilla v. Rumsfeld*, the Court held that the proper defendant in a habeas proceeding is the immediate custodian of the petitioner, not the Secretary of Defense. Padilla v. Rumsfeld, 542 U.S. 426, 440 (2004). In *Rasul v. Bush*, the Court held that persons detained by the executive at Guantanamo Bay had the right to judicial review of their detention under the habeas statute, even though the United States does not exercise ultimate sovereignty there. Rasul v. Bush, 542 U.S. 466, 483 (2004).

b. Hamdan v. Rumsfeld

In *Hamdan v. Rumsfeld*,[264] the Supreme Court faced a direct challenge to the constitutionality of the military tribunals created by the Department of Defense at the President's direction. Hamdan, a Yemeni national, reportedly supported al-Qaeda by, among other things, serving as Osama bin Laden's bodyguard and chauffeur.[265] After being captured in Afghanistan and transported to the detention center at Guantanamo Bay, Cuba, the government ultimately charged Hamdan with conspiracy to commit offenses against the laws of armed conflict including "attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism."[266] The following overt acts were listed in the charging document as having been committed by Hamdan in furtherance of the conspiracy:

> (1) he acted as Osama bin Laden's "bodyguard and personal driver," "believ[ing]" all the while that bin Laden "and his associates were involved in" terrorist acts prior to and including the attacks of September 11, 2001; (2) he arranged for transportation of, and actually transported, weapons used by al Qaeda members and by bin Laden's bodyguards (Hamdan among them); (3) he "drove or accompanied [O]sama bin Laden to various al Qaida-sponsored [sic] training camps, press conferences, or lectures," at which bin Laden encouraged attacks against Americans; and (4) he received weapons training at al Qaeda-sponsored camps.[267]

After the military tribunal proceedings began, the U.S. District Court for the District of Columbia Circuit granted Hamdan's petition for a writ of habeas corpus and stayed the tribunal proceedings.[268] Reversing, the U.S. District Court for the District of Columbia, the District of Columbia Circuit held that the military tribunals formed after the 9/11 attacks were constitutional in light of the Court's *Quirin* decision and Congress's Authorization for Use of Military Force.[269]

Disagreeing with the D.C. Circuit, the Supreme Court struck down the military tribunal proceedings. Characterizing *Quirin* as the "high-water

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264. 126 S. Ct. 2749 (2006).

265. Hamdan v. Rumsfeld, 415 F.3d 33, 35-36 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006).

266. *Hamdan*, 126 S. Ct. at 2761.

267. *Id.* at 2761.

268. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152 (D.C. 2004), *rev'd*,415 F.3d 33 (D.C. Cir. 2005), *rev'd*,126 S. Ct. 2749 (2006).

269. *Hamdan*, 415 F.3d at 36-38, *rev'd*, 126 S. Ct. 2749 (2006).

mark of military power to try enemy combatants for war crimes,"[270] the Court believed it unnecessary "to revisit *Quirin*'s controversial characterization of Article of War 15 as congressional authorization for military commissions."[271] The Court thus refused to rely on the post-9/11 Authorization for Use of Military Force, as it had suggested in dicta it would do in the plurality opinion in *Hamdi* and as the D.C. Circuit's opinion did in upholding the government's right to try Hamdan in military commissions.[272]

Having thus limited its holding in *Quirin*, the Court proceeded to treat the military tribunals in *Hamdan* as outside congressional authorization.[273] The Court observed the basis for trying persons by military tribunal had to fall within one of the following narrow categories resting on the common law of war: (1) when martial law has been declared, (2) when a temporary military government has been established in occupied enemy territory, or (3) when an illegal combatant is seized while impeding the prosecution of war and is charged with violating "'the laws and usages of war cognizable by military tribunals only.'"[274] The Court held that none of these grounds existed—the first two categories being clearly inapplicable, and the last being inapplicable because conspiracy (the charge against Hamdan) was not an offense clearly recognized as one of "the laws and usages of war cognizable by military tribunals only."[275]

The Court in *Hamdan* nevertheless recognized Congress's ability to authorize military tribunal proceedings, beyond the common law categories, based on its authority to "'declare War . . . and make Rules concerning Captures on Land and Water' . . . 'to raise and support

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270. *Hamdan*, 126 S. Ct. at 2777.

271. *Id.* at 2775.

272. *Compare id.* at 2774-87, *with* Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004), *and* Hamdan v. Rumsfeld, 415 F.3d 33, 36-38 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006).

273. *See Hamdan*, 126 S. Ct. at 2774-98.

274. *Id.* at 2777. The Court recognized that an enemy combatant could also conceivably be charged and tried with "'[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of war.'" *Id.* Moreover, the Court emphasized that the charges of conspiracy against Hamdan did not fall within any laws in which Congress, exercising its constitutional authority to define offense against the laws of war, had legislated. *Id.* Thus, to charge and try Hamdan by military commission, the Court had to see whether the offenses with which he was charged were clearly recognized by the common law of war as offenses against the laws of war. *See id.* at 2766-77. If so, then he could be tried by military commission proceedings because Congress has incorporated in the Uniform Code of Military Justice the common law of war to try persons by military commissions for "certain offenses not defined by statute." *Id.* at 2780. However, for such offenses, the Court set a high standard: "When . . . neither the elements of the offense nor the range of permissible punishments is defined by statute or treaty, the precedent must be plain and unambiguous." *Id.*

275. *Id.* at 2775-79.

Armies,' to 'define and punish . . . Offences against the Law of Nations,' . . . and 'To make Rules for the Government and Regulation of the land and naval Forces . . . .'"[276] Here, Congress had not authorized the military commissions at issue.[277] Because Hamdan could not be tried by military tribunal, the Court reasoned that he had to be treated as a prisoner of war entitled to trial procedures consistent with the Geneva Convention relative to treatment of prisoners.[278] As such, the Court held that Hamdan had to be tried by court martial procedures consistent with the Uniform Code of Military Justice.[279]

(3) Implications of Post-9/11 Decisions

The plurality opinion in *Hamdi* seems to suggest guidance on the criteria by which the current military tribunals would be judged, but the Court's decision in *Hamdan* went in a different direction. The Court in *Hamdi* did not directly address challenges to the validity of the tribunals because the government had essentially argued that the detainees were not even entitled to civilian court review of their detentions. The plurality rejected the government's position but, in so doing, offered encouragement to those supporting military tribunals. This encouragement came in at least two ways. First, the plurality relied on *Quirin* as governing precedent.[280] Second, the plurality found that Congress's September 18, 2004, Authorization for Use of Military Force expressly authorized the President not only to conduct military engagements, but also to perform other actions implicit in the carrying out of such engagements.[281] The plurality further observed that "[t]he capture and detention of lawful combatants and the capture, detention, *and trial* of unlawful combatants, by 'universal agreement and practice,' are important incident[s] of war."[282] Thus, the plurality appeared to recognize that congressional authorization to use military force—that is, to engage in war-making efforts—necessarily included all of the normal incidents of war. The plurality specifically included within this implicit authorization not only

276. *Id.* at 2773 (quoting U.S. CONST. art. I, § 8).

277. *Id.* at 2774-75.

278. *Hamdan*, 126 S. Ct. at 2789-99.

279. *Id.* at 2786-93. Having concluded that the grounds for military commission proceedings were lacking, the Court proceeded to examine how the current military orders differed with the requirements of the UCMJ. *See id.* at 2786-92. The Court further reasoned that the applicable Geneva Convention required that Hamdan be tried, if at all, in a court martial with the protections afforded by the UCMJ. *See id.* at 2793-97.

280. *Id.* at 2759.

281. *Id.* at 2760.

282. Hamdi v. Rumsfeld, 542 U.S. 507, 518 (2004) (emphasis added).

the detention of unlawful combatants, but also the trial of such combatants.

Yet the Court in *Hamdan* departed from the path that the plurality's dicta in *Hamdi* suggested it would follow. The Court explicitly held that the post-9/11 Authorization for Use of Military Force was insufficient to represent the kind of congressional authorization necessary to try persons in military tribunals under Congress's delegated power to make rules for such trials.[283] Moreover, the Court appeared to limit (or abandon) *Quirin* where the Court had found authorization for military tribunals in the Articles of War (now Uniform Code of Military Justice).[284] This left President Bush with two realistic alternatives for seeking trial of the alleged enemy combatants detained at Guantanamo Bay: (1) seek more explicit congressional authorization for trials by military tribunal; and (2) charge the accused with offenses against the laws of war that clearly fit within the parameters established by the Court and that could be tried in military tribunals under the common law of war. As explained below, President Bush chose the first alternative, and has successfully achieved legislation providing explicit authorization for the trials under detailed procedures established by Congress.[285]

4. Synthesis of Civil War, World War II, and Modern Precedent on Constitutionality of Military Tribunals

The Civil War cases are difficult to reconcile with later precedent. In particular, *Milligan* suggested that as long as the civilian courts are open, military tribunals in which the accused faces trials without a lay jury are constitutionally suspect. The World War II era decisions in *Quirin* and *Yamashita*, however, circumscribed the sweeping language of *Milligan*. Although the Court did not expressly overrule *Milligan*, it effectively limited that case to its narrow factual context. Especially in *Quirin*, the Court made clear that unlawful combatants being tried before military tribunals for violating the law of armed conflict would have great difficulty mounting any constitutional challenge to such trials.[286] The Court, moreover, specifically rejected the claim that trials in that manner violated an accused's right to a jury trial.[287] The 2004 plurality opinion in *Hamdi* appeared to reaffirm the validity of *Quirin*. But the Court's

283. *See supra* notes 280-82 and accompanying text.
284. *See supra* notes 286-93 and accompanying text.
285. *See* discussion *infra* Part V.
286. *Ex parte* Quirin, 317 U.S. 1, 28-39 (1942).
287. *Id.* at 35-36.

Hamdan decision not only breathed new life into the seemingly defunct *Milligan* decision,[288] but sharply limited *Quirin*.[289]

The Court's decision in *Madsen* offered an early clue as to the most likely basis on which the current military tribunals could be limited by procedures other than those currently in effect. The Court in *Madsen* recognized that, in light of the shared powers between Congress and the President in matters of war, military tribunal procedures created by the executive branch would be more susceptible to challenge if they conflicted with Congress's position.[290] Some commentators have argued that the Geneva Convention Relating to the Treatment of Prisoners of War—which was entered into after the *Quirin* decision—requires the United States to try persons imprisoned at Guantanamo Bay according to court-martial procedures.[291] The Court in *Hamdan* agreed with this argument to the extent that Congress had not explicitly authorized trial by military tribunal and where one of the grounds for common-law trial by military tribunal was lacking.[292]

The point of *Hamdan* is clear: if Congress believes that the military tribunal structure should be different from the one the executive branch has developed, then Congress should enact legislation setting forth the minimum procedural protections it deems appropriate. The U.S. Constitution leaves to Congress, not the courts, the job of providing a check on the executive in this realm.[293] The remainder of this Article explores whether any values are implicated in the tribunals' proceedings that would warrant congressional intervention. This Article also considers whether the recently enacted Military Commission Act of 2006 protects any such values.

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288. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2773 (2006) (relying on *Milligan*); *id.* at 2775 n.25.

289. *See supra* text accompanying notes 196-217.

290. *See, e.g.*, Jinks & Sloss, *supra* note 13, at 97 (arguing that the President is bound by the Conventions and should follow them for reasons of better national security and international relations); Sloss, *supra* note 13, at 796 (arguing that the Third and Fourth Geneva Conventions do apply to Taliban and al-Qaeda operatives).

291. *Hamdan*, 126 S. Ct. at 2762-65.

292. *See supra* text accompanying notes 264-79.

293. *See supra* text accompanying notes 264-79.

IV. DIGGING DEEPER: EXPLORING THE PRINCIPLES AT STAKE IN THIS DEBATE

A major premise of this Article is that not every significant right is one that courts can or should enforce—at least not without Congress acting first. The Framers of the U.S. Constitution knew that the best interests of the country would not be served by hamstringing the two branches of government (executive and legislative) responsible for national security. Nevertheless, the Constitution does contemplate Congress serving as a check on the executive branch in such matters. Enacting legislation to deal with particular circumstances is far easier than having rules set in constitutional stone.

None of this suggests that individual rights in times of war are any less weighty than in times of peace. It does mean, however, that protections for enemy combatants tried by authorized military tribunals on charges carrying serious penalties will have to come from congressional action, not from the Bill of Rights. If Congress passes legislation and the executive branch ignores it, then courts could properly play a role in this arena.

The remainder of this Article seeks to uncover the transcendent principles at issue in the debate over military tribunals of persons charged as illegal combatants. These are the principles that existed before the U.S. Constitution itself. By considering the principles upon which the Framers based the constitutional right to a jury and the government's war powers, we may better appreciate the stakes in the current debate. Even more importantly, we may find in this process a way to accommodate these principles even if it takes a form other than the procedures with which we are most familiar.

First, this section will address the transcendent principles underlying the right to a jury trial; and will show, the right itself is one manifestation of a deeper set of values that can be protected in different ways. In other words, although the jury is the preferred mechanism for protecting these values in the Anglo-American tradition, other procedural schemes can vindicate the same values.

The principles underlying the government's war powers are then explored in detail. Again, the purpose is to appreciate the values and principles the Framers sought to promote by granting extraordinary powers to the President and to Congress in times of threats to national security. Moreover, this section introduces the philosophical and theological principle known as the "common good." This principle—represented in the U.S. Constitution by the phrase "General Welfare"—becomes important in understanding not only the war powers

but also the manner in which tension between individual and societal values may be resolved by governmental authority.

Finally, with these principles in mind, Part V of this article seeks to reconcile the tension between the values underlying the individual's right to a jury trial and the government's war powers. That part concludes with a proposal seeking to vindicate the values underlying both sets of constitutional provisions.

A. *Transcendent Principles Underlying the Right to a Jury Trial*

1. The Jury as Part of Governmental Checks and Balances

The Founding Fathers undoubtedly were familiar with the historical roots of the jury in the English legal system.[294] They would have known that the genesis of the *Magna Carta* in 1215 was a controversy involving the king's power.[295] English barons led by Archbishop Stephen Langton forced King John to sign the famous document by which he recognized limits on the king's powers.[296] Chief among these limits was the right of the barons to be free from imprisonment without a judgment of their peers.[297] The key provision of *Magna Carta* states:

> No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any other way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals . . . .[298]

Likewise, many of the Framers of the U.S. Constitution would have studied Sir William Blackstone's *Commentaries on the Laws of England* and thereby learned that the right to jury, with its genesis in *Magna Carta*, developed in the common law as a right of each person regardless of social station.[299] Blackstone placed the right to a jury trial among the chief protections of free persons: "The trial by jury, or the country, per patriam, is also that trial by the peers, of every Englishman, which, as the grand bulwark of his liberties, is secured to him by the great charter [*i.e.*, *Magna*

294. *See* Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 AM. POL. SCI. REV. 189, 189-97 (1984).

295. *See* JOHN C.H. WU, FOUNTAINS OF JUSTICE 68-70 (1959).

296. *See id.*

297. *See id.* at 68.

298. Magna Carta § 39.

299. Lutz, *supra* note 294, at 189-97.

Carta]."[300] Furthermore, Blackstone emphasized this right to a trial by jury in capital cases:

> But the founders of the English laws have with excellent forecast contrived, that no man should be called to answer to the king for any capital crime, unless upon the preparatory accusation of twelve or more of his fellow subjects, the grand jury: and that the truth of every accusation, whether preferred in the shape of indictment, information, or appeal, should afterwards be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.[301]

Juries served as a buffer between the king and the people. Blackstone continued:

> [I]n times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown.[302]

The Framers' enthusiasm for the jury system resulted in part from the trial in 1735 of John Peter Zenger, an editor and printer of a New York newspaper.[303] Zenger had criticized the Royal Governor of New York for removing a chief justice.[304] Zenger was charged with seditious libel.[305] Three grand juries refused to indict.[306] The Attorney General of New York then charged Zenger by information and thus bypassed the grand jury.[307] Andrew Hamilton, Zenger's defense counsel at trial, argued that the jury had a right to challenge both law and fact.[308] A jury acquitted Zenger and his trial became a symbol of the power of the jury to protect individuals

300. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, ch. 27 (1765-1769).

301. *Id.*

302. *Id.*

303. *See generally* Albert Alschuler & Andrew Deiss, *A Brief History of the Criminal Jury in the United States*, 61 U. CHI. L. REV. 867 (1994).

304. *Id.* at 871-72.

305. *Id.* at 872.

306. *Id.*

307. *Id.*

308. *Id.* at 873.

from the power of the king and his agents.[309] To circumvent similar verdicts, the British extended the jurisdiction of the admiralty courts—which lacked juries—to enforce English revenue laws.[310] Such executive manipulation is precisely what the Declaration of Independence decried in complaining that King George III was "depriving us . . . of the benefits of trial by jury."[311]

From the genesis of the U.S. system, the jury has served as the primary means of protecting individuals from being unjustly imprisoned or executed. *The Federal Farmer*, Anti-Federalist writings published at the time of *The Federalist Papers*, asserted that the people secured through the jury "their just and rightful control in the judicial department."[312] *The Federal Farmer* also asserted that the jury "enables them [the jurors] to acquire information and knowledge in the affairs and government of the society; and to come forward, in turn, as sentinels and guardians of each other."[313] Another Anti-Federalist writing called the jury the "democratic lower branch of the judiciary power."[314] A recent decision by the U.S. Supreme Court echoed the words of the *Federal Farmer* and reiterated that the jury serves as an important check on the government.[315]

In the Anglo-American tradition, therefore, persons of all political stripes have agreed on at least one thing: the jury system serves justice by allowing average citizens to serve as a check within the broader scheme of governmental checks and balances. This broad support—based on the intuitive awareness that the jury serves a crucial role in administering justice—derives from the fact that the jury system is actually tapping into a number of transcendent principles.[316] A deeper exploration of those principles is thus in order.

309. Alschuler & Deiss, *supra* note 303, at 873.

310. *Id.*

311. *Id.* at 875.

312. Letters from Federal Farmer XV, *reprinted in* 2 THE COMPLETE ANTI-FEDERALIST 320 (Herbert J. Storing ed., 1981).

313. *Id.*

314. Essays by a Farmer IV, *reprinted in* 5 THE COMPLETE ANTI-FEDERALIST 38 (Herbert J. Storing ed., 1981).

315. *See* Blakely v. Washington, 124 S. Ct. 2531, 2539 (2004) (citing *Federal Farmer* and emphasizing the jury's role as a check on the judicial branch contemplated by the Framers).

316. *See supra* notes 294-315 and accompanying text; *infra* notes 316-362 and accompanying text.

2. Principles Underlying the Jury as Part of Governmental Checks and Balances

The Framers were not only well versed in English law—they knew both the truths revealed in Scripture and their own experience of human nature.[317] In this respect, John Calvin significantly influenced the Framers' perspective.[318] Likewise, the political theorist who most influenced the Framers—Baron de Montesquieu[319]—shared a keen awareness of the vulnerabilities of human nature. In the opening to *The Spirit of Laws*, Montesquieu states:

> Man, as a physical being . . . incessessantly transgresses the laws established by God, and changes those of his own instituting. He is left to his private direction, though a limited being, like all finite intelligences, to ignorance and error; even his imperfect knowledge he loses; and a sensible creature he is hurried away by a thousand impetuous passions.[320]

Although Calvin and Montesquieu held a stark view of human nature, the two thinkers shared the hope that properly devised institutions could offset the effects of the vulnerability of human nature to bias, prejudice, and self-interest.[321] At the Philadelphia Convention, the Founding Fathers examined each institution with the assumption that it could be corrupted, but carried a "steadfast, if wary, optimism that they might craft a governmental structure that would preserve liberty."[322] They knew the weaknesses of a monarchy, having experienced them first-hand under King George III.[323] They also, however, knew all too well the limitations of a democracy lacking institutional leadership, such as that which existed under the Articles of Confederation.[324] Hence, the Framers developed a republican form of government, with defined institutional limits and

317. JOHN EIDSMOE, CHRISTIANITY AND THE CONSTITUTION: THE FAITH OF OUR FOUNDING FATHERS 20-21 (1995).

318. *Id.* at 18-20; Marci A Hamilton, *The Calvinist Paradox of Distrust and Hope at the Constitutional Convention*, *in* CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 293, 295-96 (Michael W. McConnell et al. eds., 2001) [hereinafter Hamilton, *Calvinist Paradox*].

319. Charles Louis Joseph de Secondat, the Baron Montesquieu of France (1689-1755), whose Spirit of Laws was the source most cited by the Framers other than the Bible. *See* Lutz, *supra* note 294, at 189-97.

320. 1 MONTESQUIEU, THE SPIRIT OF LAWS 3 (Fred B. Rothman & Co. ed. 1991).

321. Hamilton, *Calvinist Paradox*, *supra* note 318, at 296, 303-04; 11 MONTESQUIEU THE SPIRIT OF LAWS ch. 6 (Fred B. Rothman & Co. ed. 1991).

322. Hamilton, *Calvinist Paradox*, *supra* note 318, at 297-98.

323. RUSSELL KIRK, THE ROOTS OF AMERICAN ORDER 395 (2004).

324. *Id.* at 418

delegated powers, and an intricate series of checks and balances designed to minimize the effects of human frailties and self-interest.[325]

The institutions most often identified as providing constitutional checks are the Judiciary, the Congress, and the President. Yet the People represent another important check within the system. The People may, of course, serve as a check by speaking at the polls, by exercising their right to free speech, and by other means. A more subtle way in which the People may actually become part of the governmental system is through service on a jury. The jury represents one of the checks on the judicial power in which average laypersons can actively participate.[326]

The jury is the favored Anglo-American procedural mechanism for limiting the vulnerabilities of human nature to bias, prejudice, and self-interest in the judicial system. In other words, it is the mechanism traditionally favored in England and America to promote impartial decision-making. This root desire for impartiality in the judicial process is universal.[327] It is a central tenet of Christianity.[328] In Leviticus, for instance, the Torah states: "Do not pervert justice, do not show partiality to the poor or favoritism to the great, but judge your neighbor fairly."[329] And in Deuteronomy we again hear the same injunction: "And I charged your judges at that time: Hear the disputes between your brothers and judge fairly, whether the case is between brother Israelites or between one of them and an alien. Do not show partiality in judging: hear both small and great alike."[330] Scripture elsewhere explains that human judges, in doing their job, are emulating the divine judge:

> Consider carefully what you do, because you are not judging for man but for the Lord, who is with you whenever you give a verdict. Now let the fear of the Lord be upon you. Judge carefully, for with the Lord our God there is no injustice or partiality or bribery.[331]

This insistence of impartiality as the sine qua non of a judicial system is a tenet not only of Christianity but also of other leading world religions.[332]

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325. *See id.* at 415-39.

326. *See supra* text accompanying notes 312-15.

327. *See generally* THE ISLAMIC CRIMINAL JUSTICE SYSTEM (M. Cherif Bassiouni ed., 1982); Allen N. Sultan, *Judicial Autonomy Under International Law*, 21 U. DAYTON L. REV. 585 (1996).

328. *See, e.g.*, CATECHISM OF THE CATHOLIC CHURCH 1807 (1994) (equating justice with impartial judging, among other things).

329. *Leviticus* 19:15 (NIV).

330. *Deuteronomy* 1:16-17 (NIV).

331. *2 Chronicles* 19:6-7.

332. *See* authorities cited *supra* note 327.

As Calvin, Montesquieu, and the Framers recognized, the problem in achieving the principle of impartial decision-making arises from the nature of mankind. Human nature is imperfect and, as a result, we must have checks on individual decision-makers to avoid the bias and prejudice that impede justice.[333] James Madison, the architect of the intricate system of checks and balances in the Constitution, put it best in *Federalist No. 51*:

> But what is government itself but the greatest of all reflections on human nature? If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controuls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to controul itself. . . .[334]

One could argue that adding together a number of individuals carries the risk of multiplying human frailties as opposed to limiting them.[335] Such an argument is unpersuasive, however, because it rests on an overly pessimistic view of human nature. Every person has flaws, but their moral compass helps in sorting out right and wrong. Aristotle conceived of a sense of natural justice within each person that, though imperfect, helped the person toward virtue.[336] The natural law tradition, perhaps best stated by Thomas Aquinas, contemplates this inherent ability to move toward truth as "right reason."[337] Great legal minds like Coke and Blackstone reiterated the principal that all persons, though limited by human vulnerabilities, have the inherent capacity through "right reason" (conscience) to get to the true or just answer to a human situation.[338] By

333. *See generally* Benjamin V. Madison, III, *RICO, Judicial Activism, and the Roots of Separation of Powers*, 43 BRANDEIS L.J. 29 (2005).

334. THE FEDERALIST NO. 51, at 262 (James Madison) (Buccaneer Books 1992).

335. *See generally* Jerome Frank, *Courts on Trial*, *in* IS HIGHER LAW COMMON LAW? 185 (Jeffrey A Brauch ed., 1999).

336. ARISTOTLE, THE NICHOMACHEAN ETHICS Book V, § 7 (William David Ross trans., Oxford University Press 1998).

337. THOMAS AQUINAS, SUMMA THEOLOGICA Quest. 91, Art. 4 (Fathers of English Dominican Province trans., Univ. of Chicago Press 1952) (1273).

338. *See, e.g.*, HENRICI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE, Ch. IV (1990) ("For a just man has the will of awarding to each his right, and so his will is termed justice, and it is said to be the will to award each his right, not as regards the result, but as regards the intention . . . ."); 1 BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, Book I (1765-1769) (mankind created "and endued . . . [with] certain immutable laws of human nature, whereby . . . freewill is in some degree regulated and restrained, and gave [mankind] also the faculty of reason to discover the purport of those laws").

bringing together a number of moral compasses, one in each jury member, a jury is more likely to get to a correct or just result by having several moral compasses at work on a problem (the case). If one person's moral compass is weak due to greater human vulnerability (or perhaps even a life crisis distracting that person), the other jury members' moral compasses may work to offset that individual's weakness.

Nevertheless, no one should hold out the jury as a perfect means of limiting the biases and prejudices of human beings. At the least, the jury serves as one means of seeking the goal of providing a check within the judicial system on such prejudices. Madison refers not only to "dependence on the People," but also to "auxiliary precautions" as being essential to controlling government.[339] He then explains more fully the rationale behind such auxiliary precautions:

> This policy of supplying, by opposite and rival interests, the defect of better motives, might be traced through the whole system of human affairs, private as well as public. We see it particularly displayed in all the subordinate distributions of power; where the constant aim is to divide and arrange the several offices in such a manner as that each may be a check on the other; that the private interest of every individual, may be a Sentinel over the public rights.[340]

The jury certainly fits within this concept of a check on other branches of government, especially on judges (appointed by the executive in the federal system) in criminal matters. The lesson of centuries of English experience was that the jury filled this role well.[341] Thus, whether a jury as a whole checks the vulnerabilities of the individual members of the jury, experience suggests that the jury at least serves as a check on judges.

In the Anglo-American system, the jury has proven to be the favorite method of limiting the effect of human bias and prejudice in decision-making.[342] Nevertheless, the jury is not the sole procedural approach to this problem. As the next section shows, many sophisticated legal systems have developed alternative means of minimizing human prejudice and self-interest and promoting impartial decision-making.

339. THE FEDERALIST NO. 51, at 262 (James Madison) (Buccaneer Books 1992).

340. *Id.* at 263.

341. *See supra* notes 294-315 and accompanying text.

342. *See supra* notes 294-315 and accompanying text.

3. Alternative Procedural Approaches to Ensuring Impartiality in Decision-Making

Comparative law scholars highlight the differences between Anglo-American and continental legal systems. Nevertheless, each system seeks the same goal of impartial decision-making through systemic protections. The common law system relies heavily on the lay jury. Other judicial systems throughout history have found the jury to be an effective method of promoting impartiality.[343] Nevertheless, the civil law tradition followed in many European countries takes a different approach while including mechanisms to mediate between the prosecuting government and the individual accused.[344]

In the civil law tradition, different procedural safeguards exist with the same goal as the Anglo-American jury: creating a buffer between the accusing state and the individual accused.[345] The civil law tradition offers no lay jury, or even a specific day dedicated to hearing all the evidence. Rather, the parties hold a series of conferences with the judge to present the evidence and for the judge to decide the merits of the case.[346] Although this is analogous to an American or English bench trial, there are differences. In civil law countries, the judge plays a more active role in evidence gathering, instead of being merely a referee or umpire as in the United States.[347] For example, in Germany, the trial judge determines the order of proof, examines the witnesses, creates the record of testimony,

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343. In Athens, citizens were chosen by lot to sit in judgment over civil or criminal matters. LESSER, supra note 54, at 21. Known as dikasts and sitting as a dikastery, they were a "simple and plenary manifestation of a jury trial. . . . They insured a decision at once uncorrupt, public-minded, and imposing—together with the best security which the case admitted against illegal violence on the part of the rich and the great." *Id.* In Athens, the plaintiff went before the magistrate to issue a summons for the defendant to appear. *Id.* at 24. Following the summons, the magistrate held a preliminary hearing to determine whether plaintiff had made a prima facie case. If he had, then depositions were taken before the magistrate. The dikastery heard the evidence again and cast their verdict. *Id.* Because of the small size of the Athenian state, "many of these who sat as dikasts must have been cognizant beforehand of the facts of the case . . . in this respect [the diskastery] bears a striking resemblance to the English jury in olden times." *Id.* at 25-26. The Roman criminal system also provided a trial by jury. LESSER, *supra* note 54, at 41. "Every criminal trial was . . . conducted before a legal magistrate and a body of judices, or, in modern phrase, before a judge and jury." *Id.* The magistrate, like the modern judge, was the authority on the law and managed the trial, but the judices determined the guilt or innocence of the accused. *Id.*

344. As explored below, the United States has developed its own alternative to the lay jury in the Uniform Code of Military Justice. *See infra* text accompanying notes 494-559.

345. *See* Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals*, 48 ALA. L. REV. 441, 457 (1997).

346. *See id.*

347. *Id.* at 458.

and secures expert witnesses.[348] In France, the presiding judge calls the witnesses.[349] Under the former Italian "Rocco" Code of 1930, a presiding judge at an *instruzione formale* (formal investigation) assembled evidence both for and against the accused.[350] The Italian preliminary hearing is meant to be nonpartisan; in some ways, it is akin to the grand jury in the common law tradition.[351] The Italian system thus erects a barrier between the state and the individual such as Blackstone documented in England, but the barrier is built differently.[352] Instead of a body of citizens drawn from the local community, a nonpartisan judge, during a preliminary hearing, decides whether to proceed against the accused or dismiss the charges for lack of evidence.[353]

The civil law tradition also differs from the common law tradition in the composition of a court.[354] Nevertheless, a court in civil law countries provides a safeguard similar to that of a common law jury. Cases in the civil law tradition are often tried by a "mixed court" where both professional and lay judges sit.[355] In Germany, lay judges sit on courts for specialized labor, social, commercial, administrative, and tax courts.[356] They are also used for cases of serious crimes.[357] German lay judges participate in discussing issues of both law and fact, unlike common law juries that sit only as triers-of-fact.[358] Furthermore, lay judges tend to be more experienced than common law jurors for two reasons. First, lay judges sitting on specialized courts are chosen from the industry.[359] Second, lay judges sit for four years and hear many cases and thus become knowledgeable in trial procedure.[360]

In short, a variety of procedural systems have developed, even in countries predominantly influenced by the Christian tradition.[361] Although the jury system has proved to be the paramount means of achieving

348. *Id.*

349. *Id.*

350. *See* Elisabetta Grande, *Italian Criminal Justice: Borrowing and Resistance*, 48 AM. J. COMP. L. 227, 229 (2000).

351. *See id.*

352. *See id.*

353. *Id.*

354. *See id.*

355. Smith, *supra* note 345, at 461.

356. *Id.*

357. *Id.*

358. *Id.* at 467.

359. *Id.* at 462.

360. Smith, *supra* note 345, at 462; *see also* John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 1981 AM. B. FOUND. RES. J. 195 (1981).

361. *See supra* text accompanying notes 343-60; *infra* text accompanying note 362.

impartial decision-making in the Anglo-American system, other systems have developed mechanisms to approximate the effect of the jury. Indeed, even in the American justice system, such alternative methods have been developed where the traditional jury is not available.[362]

B. *Transcendent Principles Underlying the President's Power to Order Trial by Military Tribunals*

The immediately preceding section offers insight into the values underlying the individual rights typically associated with a jury but achieved in alternate ways in various justice systems. This section turns to the collective rights and powers exercised in times of serious threats to national security. These include a host of items categorized under the broad umbrella known as "war powers." The trial and punishment of persons captured in military engagements falls within the government's war powers.

Implicit within the concept of war powers is that they are not the norm.[363] If no threat to national security existed, the government would not have these exceptional powers.[364] For persons to be tried by military tribunals as "unlawful combatants," as the term suggests, they will have somehow taken steps to threaten national security—either by active fighting or by espionage.[365] In other words, the broader justification supporting the military action will be implicit in any scenario giving rise to a military tribunal proceeding. Accordingly, examination of the justifications for permitting the government to engage in military actions in the first place is necessary. The rationale of any such justifications should likewise provide the foundational framework supporting trials by military tribunal, along with the other incidents of war such as detention of prisoners, heightened security measures, and the like.

For any discussion of the rationale for the government's military actions, consideration of just war doctrine is a logical starting point. After all, this doctrine has for centuries served as the theological and philosophical foundation of war powers.[366] The Framers were undoubtedly

362. Primarily, this refers to the Uniform Code of Military Justice in which a variety of protections promote impartial justice, though without a jury. *See infra* text accompanying notes 494-559.

363. *See generally* Henry P. Monaghan, *Presidential War-Making*, 50 B.U. L. Rev. 19 (1970).

364. *See id.*

365. *See, e.g.*, Michael O. Lacey, *Military Commissions: A Historical Perspective*, 2002 ARMY LAW. 41, 45.

366. *Id.*

aware of the doctrine, at least through political theorists such as John Locke.[367]

1. Synopsis of Just War Doctrine

Philosophers have long argued that war can be just.[368] Just war theory provides an ethical framework for determining when it is just to wage war and for the constraints of conducting the war.[369] Christian theologian and philosopher St. Augustine is largely regarded as the originator of the just war theory.[370] He relied on the Bible to persuade the Christian community that war can be just.[371] Augustine wrote:

> It is therefore with the desire for peace that wars are waged, even by those who take pleasure in exercising their warlike nature in command and battle. And hence it is obvious that peace is the end sought for by war. . . . For even they who intentionally interrupt the peace in which they are living have no hatred of peace, but only wish it changed into a peace that suits them better. They do not, therefore, wish to have no peace, but only one more to their mind.[372]

In some cases, Augustine thought war was not only just, but virtuous.[373] When war is fought to replace evil with good, war is commendable.[374]

Centuries later, Thomas Aquinas echoed Augustine's work and clarified much of the just war doctrine. As with most subjects on which he wrote, Aquinas relied as much on natural law—that law revealed in the nature of the created order, as determined by reason—as scriptures.[375]

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367. *See, e.g.*, JEREMY WALDRON, GOD, LOCKE, AND EQUALITY: CHRISTIAN FOUNDATIONS IN LOCKE'S POLITICAL THOUGHT 147 (2002).

368. Aristotle said: "We make war so we can live in peace." 10 ARISTOTLE, THE NICOMACHEAN ETHICS, ch. 7 (David Ross trans., Oxford University Press rev. ed. 1984).

369. MICHAEL M. UHLMANN, THE USE AND ABUSE OF JUST-WAR THEORY 10 (2003).

370. R.A. McCormick, *Morality of War*, *in* 14 NEW CATHOLIC ENCYCLOPEDIA 802, 803 (1967). For more than three centuries, the Christian church was essentially pacifistic, before the influence of Ambrose, Augustine's mentor, and even more significantly, Augustine himself. *See generally* G. NUTTALL, CHRISTIAN PACIFISM IN HISTORY (1971).

371. *See, e.g.*, *Luke* 3:14 (NIV) (ordering soldiers to be content with their pay, not to stop soldiering).

372. 19 SAINT AUGUSTINE, THE CITY OF GOD, ch. 12, at 425 (Marcus Dods trans., Modern Library ed., Random House 1993).

373. *Id.*

374. *Id.* BOOK IV, ch. 14, at 123.

375. *See, e.g.*, CHARLES RICE, 50 QUESTIONS ON NATURAL LAW 39-40, 49-56 (1999) (on Aquinas's use of natural law and scriptures). *See* THOMAS AQUINAS, SUMMA THEOLOGICA, pt. II-II, question 40, art. 1 (The Fathers of the English Dominican Province trans., Benziger Brothers 1947)

Under what is known as the first prong of the just war theory, "jus ad bellum," Aquinas identified three criteria necessary for war to be justly undertaken. First, war must be waged by a sovereign authority.[376] It is the responsibility of the sovereign, the authority in charge, to care for the "common good."[377] The sovereign has the moral authority to punish evil-doers who threaten internal disturbances, and the moral authority to wage war to protect the common good from external enemies.[378] Aquinas relied on St. Paul's Epistle to the Romans as evidence of his belief that only public authority can exercise force for the good of the community.[379] Aquinas agreed with Augustine that "[t]he natural order conducive to peace among mortals demands that the power to declare and counsel war should be in the hands of those who hold the supreme authority."[380]

Second, Aquinas said, a reason for the attack must exist based on a fault of the external enemy.[381] According to Aquinas, a just war is one that "avenges wrongs, when a nation or state has to be punished, for refusing to make amends for the wrongs inflicted by its subjects, or to restore what it has seized unjustly."[382] Sufficient reasons include self-defense, punishment for wrongdoing, and the need to save others.[383] Third, in order for war to be just it must be waged with a just intention.[384] An example of a just intention is protecting the common good against evil.[385] The intention of going to war should be to gain peace.[386]

Thus, Aquinas and Augustine agree that war is justifiable when waged by a sovereign authority for the common good against a deserving enemy for the purposes of protecting peace. Their work provided the foundation for later scholars to form modern-day international law concerning war.[387] For instance, Francisco Suarez and Francisco de Vitoria added two additional requirements to a non-defensive war (a war waged on a basis

(1273) (relying not only on scripture to support his position that war may be lawful but also on natural law concepts such as "natural order" in the section introduced by "I answer that" (formally called "Respondeo dicens") where Aquinas gives his own position and in his Reply to Objection 2 (where Aquinas relies on the common good, is inherently a natural law concept)).

376. AQUINAS, *supra* note 375, pt. II-II, question 40, art. 1.

377. *Id.*

378. *Id.*

379. *See Romans* 13:1-6 (NIV).

380. AQUINAS, *supra* note 375, pt. II, question 40, art. 1.

381. *Id.*

382. *Id.*

383. *Id.*

384. *Id.* at 502.

385. AQUINAS, *supra* note 375, pt. II, question 40, art. 1, at 502.

386. *Id.* at 502.

387. *See, e.g.*, Rupert Ticehurst, *The Martens Clause and the Laws of Armed Conflict*, 317 INT'L REV. RED CROSS 125, 132 (1997).

other than purely self-defense). They argued that the military action must be of last resort and it must be fought in a proportionate manner.[388] This proportionality requirement became known as the second prong of the just war theory, "jus in bello."[389] Thus, the just war doctrine evolved into a framework for waging war (jus ad bellum) and for the manner in which war must be conducted (jus in bello).[390]

Jus in bello, the second category of just war principles, came to focus on two aspects: proportionality and discrimination. Proportionality weighed the total evil against the total good.[391] A proportional response is one that does not involve excessive force; force cannot be used in excess of what is needed to accomplish the goal.[392] For instance, weapons of mass destruction are generally thought to be outside the levels of proportionality when dealing with war.[393] Discrimination means war must be waged in a selective manner, most notably by distinguishing between enemy combatants and non-combatants.[394] The chief focus of this element is to emphasize that a government should not attack civilians.[395] Hostilities should be advanced against combatants only.[396]

Hugo Grotius, considered by some to be the father of international law, referred to war as a necessary evil and identified criteria for a just war that addressed both jus ad bellum and jus in bello.[397] His work led to international law incorporating these principles. For instance, we need look no further than Article 51 of the United Nations Charter (recognizing the right of a nation to use force for self-defense)[398] for a modern

388. McCormick, *supra* note 370, at 803.

389. *See id.*

390. *See id.*

391. JAMES TURNER JOHNSON, JUST WAR TRADITION AND THE RESTRAINT OF WAR 203 (1981) (reiterating Vitoria's analysis that proportionality to subdue the enemy is weighed under the jus ad bellum notion instead of the jus in bello).

392. *See id.*

393. *See id.*

394. ADAM ROBERTS & RICHARD GUELFF, DOCUMENTS ON THE LAWS OF WAR 1, 14 (2000).

395. JOHNSON, *supra* note 391, at 299-303 (creating classes of "enemy" as combatant and noncombatant and thus protecting the latter class from attack).

396. *Id.*

397. *See* 2 HUGO GROTIUS, ON THE LAW OF WAR AND PEACE, ch. 1 (Liberty Fund ed. 1984) (1625).

398. Article 51 U.N. Charter provides as follows:

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council

codification of the jus ad bellum prong.[399] In addition, Protocol I of the Geneva Convention (prohibiting certain military actions)[400] conforms to the principle of discrimination and may be traced directly to the work of Grotius.[401]

2. The Common Good as the Root of Just War Doctrine and Appointed Authority's Role in Balancing Interests

The just war doctrine rests on the notion that the best interests of everyone in a society depend at times on use of force.[402] The concept relies heavily on the sometimes amorphous, but nevertheless crucial, concept of the "common good." Who bears the all-important job of balancing these interests and making decisions that sacrifice some interests in favor of the ultimate security of the state? The answer depends on the kind of government—the appointed authority—that the state in question has adopted. For purposes of simplicity, the governing authority will be referred to here as "authority."

In order to appreciate the significance of the role of the "common good," one must review the development of the doctrine and understand the role of authority in securing the common good.

> under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

U.N. Charter art. 51, *available at* http://www.un.org/ aboutun/charter/chapter7.htm.

399. *See id.*

400. Article 51, para. 4 of the Protocol Additional to the Geneva Conventions of August 12, 1949 (adopted June 8, 1977, entry into force December 7, 1979) provides:

> 4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:
> (a) those which are not directed at a specific military objective;
> (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
> (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol 1), June 8, 1977, 1125 U.N.T.S 3, 16 I.L.M. 1391.

401. *See* 3 HUGO GROTIUS, ON THE LAW OF WAR AND PEACE, ch. 13 (Gryphon Editions 1984) (1625).

402. *See supra* notes 368-96 and accompanying text.

a. Evolution of "Common Good" Doctrine

The concept of the common good dates back to Ancient Greece and Rome when Aristotle expressed his concern with the "transformation of a community of people working together for a common good (the family) into a community of people self-consciously working together for a common good (a political community)."[403] Aristotle discussed the common good as it pertains to a partnership in a good life.[404] This partnership involves the individuals supporting each other in a variety of ways so as to form a community.[405]

Over a hundred years later, Cicero echoed Aristotle's thoughts in speaking of the "partnership for the common good" and of reconciling factional interests for the common good.[406] Augustine built on the classical tradition in explicating the concept of the common good. Augustine, for instance, observed that people "should be bound together by a kind of tie of kinship to form a harmonious unity, linked together by the 'bond of peace.'"[407]

Later, the concept of common good dominated much of the philosophical writings of Aquinas. His interpretation of law was that which regards "first and foremost the order to the common good."[408] Like Aristotle, Aquinas understood the common good as involving partnership in a good life.[409] As Aquinas noted:

> As one man is a part of the household, so a household is a part of the state: and the state is a perfect community . . . and therefore, as the good of one man is not the last end, but is ordained to the common good; so too the good of one household is ordained to the good of a single state, which is a perfect community.[410]

b. Role of Authority in Securing the Common Good

If the common good of a state is the goal, one must ask who within the state determines what course best achieves that goal in any set of circumstances. Aristotle, and later Aquinas, referred to the proper

403. MICHAEL DAVIS, THE POLITICS OF PHILOSOPHY: A COMMENTARY ON ARISTOTLE'S POLITICS (1996).

404. *See, e.g.*, ARISTOTLE, *supra* note 336, Book VIII.

405. *See* J. BUDZISZEWSKI, WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW 18 (1997).

406. CICERO, DE RE PUBLICA DE LEGIBUS 65 (Clinton Walker Keyes trans., Harvard University Press 1928) (54 B.C.).

407. AUGUSTINE, *supra* note 372, at 547.

408. AQUINAS, *supra* note 375, pt. II-II, question 94, art. 1.

409. *See id.*

410. *Id.*

"authority" within a state as the one who determines the course designed to achieve the common good.[411] Yves Simon, a philosopher who explored the implications of Aquinas's teachings, devoted a great deal of his thought to the proper role of authority in achieving the common good.[412] The common good, Simon explained, must have a unity of action which "cannot be taken for granted; it must be caused."[413] First, Simon states that "[o]nly the union of many can remedy the failure of each."[414] Quoting Aristotle, Simon wrote:

> "The common good is greater and more divine than the private good." "Greater" expresses a higher degree of perfection with regard both to duration and to diversity. "Divine" . . . does not designate so much a godlike essence as a participation in the privilege of imperishability. In this world of change, individuals come and go . . . . The masterpiece of the natural world cannot be found in the transient individual. Nor can it be found in the species, which is not imperishable . . . . Human communities are the highest attainment of nature, for they are virtually unlimited with regard to the diversity of perfections, and virtually immortal. Beyond the satisfaction of individual needs the association of men serves a good unique in plentitude and duration, the common good of the community.[415]

Simon maintained that to achieve this common good and unity of action, "the power in charge of unifying common action through rules binding for all is what everyone calls authority."[416] One modern scholar summed up the concept as follows:

> [A]uthority, though often abused and always characterized by human faults, is a natural and moral good. It does not result solely from human sinfulness (to restrain the worst in us). It springs from human virtue and human need. Authority is needed, for example, not only to secure individual rights, but also to give effective unity

411. *See id.*

412. YVES SIMON, A GENERAL THEORY OF AUTHORITY 32 (Univ. of Notre Dame Press 1980) (1962).

413. *See id.* at 32.

414. *Id.* at 28.

415. *Id.* at 28-29 (explaining Aristotle's statement that the common good is greater than the private good).

416. *Id.* at 48.

> in the pursuit of common purposes as are mentioned in the preamble to the U.S. Constitution.[417]

Both the common good and authority are essential to an ordered society. Aquinas held that the common good ultimately is the fulfillment of each of its citizens, and that government and the law should therefore promote that fulfillment.[418] In American government, the government's war powers are consistent with the very foundations of the common good.[419] Under Article II of the U.S. Constitution, the executive power is vested in the President of the United States.[420] As "Commander-in-chief of the Army and Navy of the United States,"[421] the President has broad powers in protecting the nation. Such powers include the power to conduct a war, although only Congress may declare war.[422] Supreme Court decisions have acknowledged that the potential limits of this power are broad indeed.[423] It is clear that the executive is within the concept of "proper authority" as Aristotle and Aquinas conceived of the concept.[424]

The more subtle point is that authority, in American government, is shared. As explained above,[425] the U.S. Constitution delegates war powers to both the President and to Congress. Thus, authority cannot be neatly ascribed solely to the President. Indeed, although circumstances may require the decisive action that only the executive branch could provide, the President's authority is harder to defend when exercised solely on the executive's powers.[426] Did the Framers carefully provide for shared powers in this arena due to their keen awareness of the danger to individual liberties of a powerful executive? As the final section of this Article explains, Congress has a significant role in the realm of national security to ensure that the government achieves a proper balance between

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417. MICHAEL NOVAK, FREE PERSONS AND THE COMMON GOOD 184 (1989).

418. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 222 (1980).

419. *See generally* JEAN B. ELSHTAIN, JUST WAR AGAINST TERROR 46-70 (2003) (arguing that using armed force is an appropriate means to serve the general welfare).

420. U.S. CONST. art. II, § 1, cl. 1.

421. U.S. CONST. art. II, § 2, cl. 1.

422. U.S. CONST. art. I, § 8, cl. 11.

423. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 320 (1936) (dicta indicating that the powers of the President "as the sole organ of the federal government in the field of international relations" rose not from a constitutional grant but cessation of sovereignty by Great Britain and the immediate assumption of power by the colonies collectively); *see also* Dames & Moore v. Regan, 453 U.S. 654, 686 (1981) (holding that the President's power from a congressional authorization to seize assets and terminate all private litigation and claims in favor of a specially established tribunal was constitutional).

424. *See supra* text accompanying notes 411-15.

425. *See supra* text accompanying notes 94-97, 419-23.

426. *See supra* text accompanying notes 211-15.

protecting national security and securing fundamental human rights. Before turning to that final section, however, it is important to revisit the question of whether the persons accused in the military tribunal proceedings can insist on any human rights. If illegal combatants somehow forfeit these most fundamental of rights, then the need for balancing does not exist. If, however, the accused's status as a human being means that he cannot forfeit certain rights, then the balancing process is a crucial one.

3. Whether Illegal Combatants Forfeits are Entitled to Fundamental Human Rights

Some contend that the illegal combatants are entitled to no rights at all.[427] By engaging in conduct against the laws of armed conflict, so this argument goes, the person forfeits rights that he or she would have under international law. In engaging this argument, it is critical to distinguish what is meant by "international law."

Grotius and other fathers of modern international law recognized different types of international law. Certain international law arises from treaties between sovereigns.[428] Other international law, however, derives from the natural law.[429] This latter type of law is an immutable law that no nation can change.[430] It is the law Aristotle, Augustine, and Aquinas recognized as principles that are part of the God-given order of the universe. This distinction between treaties, or conventions, and immutable natural laws is crucial. Courts and commentators are correct in observing that persons who engage in war without, for instance, satisfying the required criteria specified in the Third Geneva Convention cannot claim the protections of that convention.[431] Nevertheless, these persons *always* can appeal to immutable natural laws.

Grotius's treatment of pirates offers an excellent example of this distinction. Grotius explains that pirates, by not associating with a legitimate nation state, cannot be categorized neatly as an "enemy" for

427. *See, e.g.*, Ruth Wedgwood, *The Rules of War Can't Protect Al Qaeda*, N.Y. TIMES, Dec. 31, 2001, at A11 (claiming that members of al-Qaeda are unprivileged combatants who do not have a right to "claim protection of the law").

428. *See* 2 HUGO GROTIUS, THE RIGHTS OF WAR AND PEACE, ch. 15 (Liberty Fund ed. 2005) (1625).

429. The primary roots of the just war theory developed by Grotius in Book I of the Rights of War and Peace are in natural law, immutable principles that exist regardless of treaties between nation-states. *See id.* Book I (discussing just war principles).

430. *See id.*

431. *See supra* text accompanying note 13.

purposes of determining the treatment owed to them.[432] As Grotius explains: "Indeed such Sort of People have not with others that particular Community, which the Law of Nations hath introduced between Enemies engaged in a solemn and compleat War. But yet, as Men, they are to enjoy the common Benefits of the Law of Nature . . . ."[433]

The notion that all men have certain "inherent" or "inalienable" rights is of course one recognized by America's Founding Fathers.[434] The principle was first expressed in the Virginia Declaration of Rights, drafted before the Declaration of Independence.[435] The notion that every human being has certain basic rights "endowed by their Creator" was perhaps best expressed in the U.S. Declaration of Independence.[436] More recently, the International Covenant on Civil and Political Rights, echoing Grotius's recognition that even pirates are "men," acknowledges in its preamble "that these rights derive from the inherent dignity of the human person."[437] This Covenant, widely adopted by a growing number of signatories,[438] recognizes in its substantive provisions the dignity owed by states to all human beings, even when the states are seeking to enforce their laws.[439] Although persons can waive certain rights, these principles establish that human beings cannot forfeit their inalienable rights to life and liberty.

V. EXAMINING THE CONSTITUTIONAL CONFLICT BY EVALUATING THE PRINCIPLES UNDERLYING THE CONSTITUTIONAL PROVISIONS

The above sections have described transcendent principles underlying both the right to a jury trial and the government's power to conduct military tribunals. One subject that merits further exploration is the extent to which common principles underlie both sets of rights. This section begins with that exploration. The section continues by considering whether the current military tribunal structure fails to provide sufficient checks to

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432. *See* 2 GROTIUS, *supra* note 428, ch. III.

433. *Id.* Book III, ch. XIX.

434. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

435. Final Draft of the Virginia Declaration of Rights, preface (June 12, 1776), *in* 1 ROBERT RUTLAND, THE PAPERS OF GEORGE MASON 287 (1970) (1776).

436. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

437. International Covenant on Civil and Political Rights, Dec. 19, 1966, pmbl., 999 U.N.T.S. 171, 173 [hereinafter ICCPR].

438. *See* Office of the United Nations Commissioner on Human Rights, Status of Ratification: International Covenant on Civil and Political Rights, http://www.ohchr.org/english/law/ccpr-ratify.htm (last visited Oct. 3, 2006).

439. *See, e.g.*, ICCPR, *supra* note 437, at 176 ("All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.").

promote impartial decision-making, especially where the death penalty is available. The section also addresses the role that Congress should play in achieving a system that balances the competing interests in a manner more consistent with the common good.

A. *Exploring the Extent to Which Common Principles and Ideals Underlie Both the Individual's Right to an Impartial Decision-Maker and the Government's War Powers, Including that of Trying Persons by Military Tribunal*

Does the individual's right to an impartial decision-maker have implications for everyone in the state? If so, we may say that it affects the common good. Likewise, anything related to war powers, if supported by just war doctrine, will also relate to the common good. Thus, the two sets of rights here—one viewed primarily as individual but having broader implications, and the other viewed by nature as collective—overlap in some sense. The Framers referred to the "General Welfare," and seemed to recognize that the concept would require a recalibration as circumstances change.[440] This section revisits the concept of the common good to see whether it helps to better elucidate the constitutional conflict presented here.

Although he carried the discussion of the common good quite far, Aquinas left to others the job of working out the tension between the rights of the individual and the rights of the state. In the twentieth century, philosopher Jacques Maritain brought the concept of the common good in step with the development of modern nation-states.[441] While appreciating the Aristotelian and Thomistic teachings on common good, Maritain integrated those teachings with concepts of individual human rights.[442] Maritain participated in developing the Universal Declaration of Human Rights and was an astute observer of the social problems of his time.[443] He maintained that the rights of the society must reflect individual rights because the interests of both society and the individual are strongly

440. *Cf.* Alvin L. Goldman, *Resorting to External Norms and Principles in Constitutional Decision-Making*, 92 KY. L.J. 703, 766 (2003-04) (arguing that the general welfare clause needs to be used more to ensure that the purposes of the Constitution are honored).

441. JACQUES MARITAIN, THE PERSON AND THE COMMON GOOD (John J. Fitzgerald trans., 1947).

442. *See id.*

443. The report, questionnaire, and collected responses of the U.N. Committee charged with drafting the Universal Declaration of Human Rights are collected in JACQUES MARITAIN, HUMAN RIGHTS: COMMENTS AND INTERPRETATIONS (1949).

intertwined.[444] Their interests are not in conflict because they affect each other: what affects the individual affects the community and vice versa.

The innovation in the American scheme of government was to seek the common good—referred to as the "General Welfare"[445]—while also protecting individual liberties.[446] To achieve this goal, James Madison:

> sought to check the less than honorable (or even honorable, but one-sided) instincts of free persons in order to protect the public good. And he also sought to check public power, so as to protect private rights. For him, these two are not irreconcilable. On the contrary, private rights are an indispensable component of the public good.[447]

Among individual liberties, the right to a jury trial perhaps best illustrates the interrelationship of individual rights and the common good. As explained above, this right developed as a protection of individuals against a powerful executive.[448] Fully aware of English history and their own experience of the abuse of power at the hands of King George III, the Framers keenly appreciated the need to protect persons from the executive. An individual accused of a crime, immediately benefits from the right to a jury trial.

The Framers, moreover, saw fit to conceive of this right as one that every individual—regardless of citizenship—should enjoy.[449] The right is guaranteed to an "accused," not just to citizens.[450] As explained earlier, the U.S. Supreme Court correctly interpreted this constitutional language to mean that all persons accused of a serious crime have the right to a jury trial.[451] If any person is tried, convicted, and sentenced for a serious crime in a system that lacks procedures to protect against bias and prejudice, the common good suffers. In some incremental way, perhaps not appreciated at the moment but inevitably felt in the long term, the general welfare is diminished in such cases.

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444. MARITAIN, *supra* note 441, at 19. Likewise, contemporary English philosopher John Finnis defines the natural law concept of the "common good" as "a set of conditions which enables the members of the community to attain for themselves reasonable objectives, or to realize reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other . . . in a community." FINNIS, *supra* note 418, at 155.

445. *See* U.S. CONST. pmbl.

446. NOVAK, *supra* note 417, at 43.

447. *Id.* at 51.

448. *See supra* text accompanying notes 294-311.

449. *See supra* text accompanying notes 445-48.

450. *See supra* text accompanying notes 445-48.

451. *See supra* text accompanying notes 33-39.

A dilemma arises, however, when one introduces national security threats into the equation. Systems and practices that serve the common good in times of peace may have to be altered or abandoned. The rationale for the change hinges on an altered conception of the common good. Indeed, the U.S. Constitution's preamble highlights the inextricable link between national security and the general welfare:

> We the people of the United States, in Order to form a more perfect Union, establish Justice, insure *domestic Tranquility*, provide for the *common defence*, promote the *general Welfare*, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[452]

Having thus explored the transcendent principles underlying a jury trial and underlying the power to try persons by military tribunal, the remainder of this Article analyzes the difficult question of whether these principles can be reconciled. In other words, the remainder of this Article will discuss whether the collective rights, represented by the government exercising its war powers, can be honored while still accommodating the principle underlying the right to jury trial, even if in a different form.

B. *Whether the Current Military Tribunal System Already Properly Balances the Interests at Stake*

In the military tribunal system enacted by the Military Commission Act of 2006, Congress has attempted to strike a balance that serves the common good.[453] The procedures in the Act allow for efficiently streamlining the judicial process and protecting classified information and sources.[454] The host of problems the government encountered in prosecuting alleged terrorist Zacarias Moussaoui illustrates the problem of using the civilian criminal justice system to prosecute enemy combatants.[455] In the civilian criminal justice system, all trials are presumed to be open "[a]bsent an overriding interest articulated in findings."[456] By contrast, the presumption in prosecutions conducted by military tribunals is that the proceedings are closed but that the tribunal

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452. U.S. CONST. pmbl. (emphasis added).

453. S. 3980, 109th Cong. (2006).

454. *See id.* §§ 948q-948s, 949a-949o.

455. *See* United States v. Moussaoui, 382 F.3d 453, 457 (4th Cir. 2004). For a discussion of some of the problems presented by prosecuting Moussaoui in the civilian criminal justice system, see A. John Rasdan, The Moussaoui Case: *The Mess from Minnesota*, 31 WM. MITCHELL L. REV. 1417 (2005).

456. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980).

may, in its discretion, open parts of the proceedings in which the tribunal determines no risk of compromising classified information or sources.[457]

Military tribunals thus serve the interest of protecting national security, but do they also provide a system that ensures a just result? Although the military tribunal procedures as currently promulgated achieve admirable systemic protections of accused,[458] they lack one essential component: independent and impartial decision-makers. The current military tribunal procedures lack any systemic protections to eliminate bias and prejudice in the decision-making process. As explained below, they offer at best a symbolic buffer between the executive as prosecutor and the executive as judge.

The composition of each military tribunal includes only commissioned military officers.[459] Representatives of the executive branch are thus not only bringing the charges but also prosecuting the accused even in cases involving the death penalty.[460] Those charged with determining the guilt of the accused and appropriateness of the death penalty are employed by, and answer to, the executive. The *Magna Carta*, and the evolution of the lay jury in the common law system, arose to prevent exactly this dangerous scenario.[461] In civil code systems, other protections arose to prevent unchecked influence between the prosecuting authority and the judges.[462] Even in trials of U.S. armed forces members, the Uniform Code of Military Justice provides some buffers between the prosecuting authorities and the judges.[463]

This is not to say that the military officers serving on the tribunals lack integrity, or that the executive branch has less than admirable ulterior motives. Simply put, the executive should not be expected to intervene and ensure that the proper balance of transcendent values is honored. One of

457. *See generally* Note, *Secret Evidence in the War on Terror*, 118 HARV. L. REV. 1962 (2005).

458. *See* Military Commission Act of 2006, S. 3980, 109th Cong. § 948k (2006) (requiring well qualified defense counsel); *id.* § 948*l* (providing for reporters and interpreters); *id.* § 948q (requiring charging documents); *id.* § 948r (prohibiting self-incrimination and excluding statements obtained by prohibited interrogation techniques); *id.* § 949a (placing limits on use of hearsay greater than those typical in military tribunal proceedings); Military Commission Act of 2006, § 949d (limiting exclusion of accused from proceedings); *id.* 949f (permitting challenges to military judge and tribunal members); *id.* § 949h (imposing double jeopardy rule); *id.* § 949j (allowing accused ability to obtain witnesses and other evidence); *id.* § 949k (allowing defense of lack of mental responsibility); Military Commission Act of 2006, § 949m (requiring three-quarters vote for sentence of more than ten years and unanimous vote for death sentence).

459. *See id.* § 948.

460. *See id.*

461. *See supra* text accompanying notes 294-311.

462. *See supra* text accompanying notes 343-62.

463. *See infra* text accompanying notes 494-559.

the executive branch's primary duties is ensuring national security; arguably, the executive should err on the side of protecting national security. To the extent the executive—even before Congress acted—imposed on itself a number of procedural limitations, one can argue that it has gone beyond what one may expect of the branch charged with ensuring national security.[464] In any event, Congress is the institution that is best able to achieve the balance of interests most aligned with the common good. The U.S. Constitution clearly delegates to Congress power "[t]o define and punish felonies committed on the high seas and offences against the law of nations," and "to make rules concerning captures on land and water."[465] As the next section of this Article demonstrates, Congress has previously fulfilled this role in situations analogous to the present one.

C. *Congress's Role in Achieving Balance in Military Tribunal Proceedings*

The U.S. Constitution delegates war powers to Congress as well as the President.[466] Congress therefore shares in the authority necessary to determine the common good or general welfare in matters implicating national security. An alternative constitutional arrangement could have allocated to the executive full, or nearly full, authority in national security matters. But the Framers recognized that the general welfare is too complex to confidently place it entirely in the executive's hands.[467] Although, as Commander-in-Chief, the President can be expected to act in the nation's defense, the President may not fully appreciate other values encompassed by the concept of the general welfare.[468]

Historically Congress has acted, in areas affecting national security, to promote values that it recognized as serving the common good. Two examples illustrate the role that Congress has played in the past and may play again. First, Congress enacted legislation after World War II that prohibited detentions such as those of Japanese-Americans found constitutional in *Korematsu v. United States*.[469] Second, the Uniform Code

464. *See supra* text accompanying notes 425-26.

465. U.S. CONST. art. I, § 8.

466. *See supra* text accompanying notes 94-97.

467. THE FEDERALIST NO. 75, at 380 (Alexander Hamilton) (Buccaneer Books 1992). Hamilton stated that "[h]owever proper or safe it may be in governments where the executive magistrate is an hereditary monarch, to commit to him the entire power of making treaties, it would be utterly unsafe and improper to entrust that power to an elective magistrate of four years duration."

468. *See generally* THE FEDERALIST NOS. 23-25 (Alexander Hamilton).

469. 323 U.S. 214 (1944).

of Military Justice designates procedures for the trial of members of the U.S. armed forces. These procedures assist in developing ways to remedy a primary deficiency in the current military tribunal system.

1. A Response to Detention Camps for Persons of Japanese Descent: Emergency Detention Act Legislation

In February 1942, President Roosevelt issued Executive Order No. 9066 which authorized the military to create and promulgate rules for the protection of certain military and strategic non-military facilities.[470] Pursuant to this Order, the military authorities excluded Americans of Japanese descent from certain areas and created detention centers to house them.[471] In *Korematsu*, the U.S. Supreme Court held that the executive and Congress possessed the authority to establish the detention camps.[472] This opinion was inherently suspect on several grounds. First, the Court purported to engage in strict scrutiny when, in reality, it effectively deferred to the executive branch.[473] Second, the government treated persons of Japanese descent differently from those persons whose ancestry traced to the other two countries allied with Japan—Italy and Germany.[474] Third, the government failed to show why individual loyalty hearings could not be held as a less restrictive alternative.[475] The opinion smacks of blatant anti-Japanese racism.[476] Indeed, the United States acknowledged

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470. *Id.* at 219-20.

471. *Id.*

472. *Id.* at 223. The Court noted that, in hindsight, although the actions might have been unjustified, in the interests of national security the executive and Congress had the power to authorize those camps. *Id.* at 224.

473. The Court stated at the beginning of its opinion that, because racial discrimination was involved, it was applying "rigid scrutiny." *See id.* at 216. Nevertheless, the opinion proceeded to justify its holding that the detention camps were constitutional primarily "because the properly constituted military authorities feared an invasion of our West Coast . . . [and] because they decided that all citizens of Japanese ancestry be segregated from the West Coast temporarily." *Id.* at 223.

474. *See Korematsu*, 323 U.S. at 243 (Jackson, J., dissenting).

475. *See id.* at 241 (Murphy, J., dissenting).

476. In his dissent, Justice Murphy detailed the contents of the military reports leading up to the detention order. These reports contained many assertions aimed at all persons of Japanese descent, such as the one "refer[ring] to all individuals of Japanese descent as 'subversive,' as belonging to 'an enemy race' whose 'racial strains are undiluted.'" *Id.* at 203 (Murphy, J., dissenting). Justice Murphy concluded that the reasons for the military order were "largely an accumulation of much of the misinformation, half-truths and insinuations that for years have been directed against Japanese Americans by people with racial and economic prejudices." *Id.* at 239. Justice Murphy believes that "[a] military judgment based upon such racial and sociological considerations is not entitled to the great weight ordinarily given the judgments based upon strictly military considerations." *Id.* at 239-40.

as much when it granted reparations to Japanese-American citizens who suffered interment.[477]

At the beginning of the Korean War, Congress enacted the Emergency Detention Act of 1950 over President Truman's veto.[478] The ostensible purpose of the Act was to protect the nation in a time of national emergency by exercising the war powers of the U.S. Constitution.[479] People who posed a serious internal-security threat could be "rendered harmless" before they had an opportunity to do damage to the United States.[480] In doing this, Congress concluded that "the precedents afforded by court decisions sustaining the validity of the Japanese relocation program in effect during World War II provide[d] ample authority for the enactment of legislation [to create detention camps during national emergencies]."[481]

This Act granted authority to establish detention camps and set forth procedures for apprehending and detaining, during domestic security emergencies, individuals "deemed likely to engage in espionage or sabotage."[482] No camps were ever created and no President attempted to use the authority granted under the Act.[483] However, many Americans and members of Congress were concerned that the Act could "become an instrumentality for apprehending and detaining citizens who hold unpopular beliefs and views."[484] Many people also feared a recurrence of the detention camps for Japanese-Americans in World War II.[485]

In 1971, Congress amended 18 U.S.C. § 4001 by adding the following language: "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress."[486] This amendment had two purposes: first, to prohibit the establishment of detention camps, and second, to repeal the Emergency Detention Act of 1950, which granted authority for the establishment of detention camps.[487]

During the debate on the House floor, many Representatives likened the Emergency Detention Act to the executive order in World War II that

477. *See* Civil Liberties Act of 1988, 50 U.S.C.A. app. § 1989 (West Supp. 1989) (recognizing the "fundamental injustice" of the internment camps and promising to make restitution to "those individuals of Japanese ancestry who were interned").

478. 1971 U.S.C.C.A.N. 1435.

479. Conf. Rep. 81-3112, 1950 U.S.C.C.A.N. 3899.

480. *Id.*

481. *Id.* at 3917.

482. 1971 U.S.C.C.A.N. 1435.

483. *Id.*

484. *Id.*

485. *Id.*

486. 18 U.S.C. § 4001(a) (2004).

487. 1971 U.S.C.C.A.N. 1435, 1436.

created the detention camps for Japanese Americans.[488] For instance, Representative Giaimo of Connecticut stated:

> I hope that we are not ever going to repeat historically the dastardly act which we committed in World War II of rounding up well over 100,000 Americans. They were American citizens who were rounded up and put in detention camps and without justification . . . I understand the present bill . . . will prohibit a President from doing that in the future.[489]

Others thought that mere repeal of the Emergency Detention Act was not enough and believed that the President needed to be restrained.[490] President Roosevelt had effectively created the detention camps challenged in *Korematsu* without statutory or congressional authorization. After the amendment to 18 U.S.C. § 4001, the President needed congressional authorization before he could detain a citizen. It was seen as both a moral and legal imperative to repeal the Emergency Detention Act and restrain the President from repeating the use of detention camps. Representative Railsback of Illinois, a supporter of the amendment, stated:

> [I]f Congress is to go on record as against detention camps, simple repeal is not sufficient. The committee bill provides an affirmative prohibition against detention camps except as authorized pursuant to an act of Congress. It was the opinion of the committee that the absence of a Supreme Court decision on the constitutionality of detention camps might permit a return to pre-1950 status if repeal was the only action. Thus, in order to prohibit arbitrary executive action, H.R. 234 assures that no detention of citizens can be undertaken by the Executive without the prior consent of the Congress.[491]

Emphasizing the atrocities of the World War II detention camps and the need to repeal the Emergency Detention Act, Rep. Railsback concluded with these words: "Neither modification nor repeal can remove what amounts to a national disgrace. There can be no justification for detention camps on constitutional, national security, moral or other grounds."[492]

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488. 117 CONG. REC. 31539, 31549 (1971).
489. *Id.*
490. *Id.*
491. *Id.* at 31551.
492. *Id.*

Therefore, the 1971 legislation shows Congress taking a stand in an area related to national security because it believed that the principles involved were too great to compromise. Although enabling the executive to detain certain citizens to limit threats may provide some benefit to the general welfare, certain rights are so fundamental that they require protection even in times of threatened national security.

2. The Uniform Code of Military Justice

a. Background for, and Key Provisions of, the Uniform Code of Military Justice

Another example of Congress's intervention in the realm of national security is its legislation on the procedures under which members of the U.S. armed forces may be tried. The U.S. Constitution excludes military personnel from the protections afforded civilians accused of crimes.[493] Congress, in its shared role in matters of war and national security, has a duty to enact legislation that fosters fundamental values (like justice and fairness) in the judicial system of the armed forces.[494] The original legislation was known as "The Articles of War."[495]

During World War II, the military prosecuted approximately two million courts-martial under the version of the Articles of War then in effect.[496] Many returning veterans and the American public perceived those proceedings as arbitrary and rife abuses.[497] These concerns led to congressional hearings and the eventual drafting and adoption of the Uniform Code of Military Justice (UCMJ).[498] The UCMJ, created in 1951,

493. *See supra* text accompanying note 172.

494. *See, e.g., Ex Parte* Quirin, 317 U.S. 10-12 (1942).

495. Articles of War, 10 U.S.C. §§ 1471-1593 (repealed 1949). The Articles of War were later reenacted as the Uniform Code of Military Justice (UMCJ), 10 U.S.C. § 801 (2004).

496. *See* William A. Moorman, *Fifty Years of Military Justice: Does the Uniform Code of Military Justice Need to be Changed?*, 48 A.F. L. REV. 185, 187 (2000).

497. *Id.*

498. *Id.* The Uniform Code of Military Justice provides many protections of individual rights that do not exist in the civilian criminal practice. For example, warnings against self-incrimination are given to a person suspected of an offense, even if not in custody. This protection was afforded to military personnel sixteen years before *Arizona v. Miranda*. Arizona v. Miranda, 384 U.S. 436 (1965) (requiring warning of any kind against self-incrimination be given to persons in police custody). Also, military personnel accused of an offense are entitled to free military defense counsel regardless of their economic status. To ensure that defense counsel is not pressured by his commanding officer, service regulations promulgated by the President provide that the defense counsel is not subject to the chain of command at the installation where he is stationed. Finally, in stark contrast to civilian criminal defendants, military personnel who are defendants in a court-martial are entitled to all evidence the prosecution is going to present at trial, a list of the

has since served as the model for many systems of justice throughout the world.[499]

There are three types of courts-martial: general, special, and summary. The jurisdiction of these courts-martial is dependent on the type of offense, the type of punishment that can be given, and the rank of the serviceman being tried.[500] The jurisdiction of general courts-martial is of particular relevance because it has the power over "any person who by the law of war is subject to trial by a military tribunal."[501] The general courts-martial have the broadest range of jurisdiction and power, while the summary courts-martial have the most limited.[502] As a result of this broad jurisdiction, the general courts-martial hear the most serious offenses arising under the UCMJ.[503] For example, the general courts-martial are the only type of courts-martial that can hear capital cases, administer the punishment of death, give a dishonorable discharge, or require confinement for a term longer than six months. A general court-martial consists of one judge and a five member panel much like a jury, or the serviceman can choose to be tried by only a judge.[504] If the trial is a capital trial, the number of panel members is twelve,[505] and any conviction must be unanimous.[506] The members of a panel cannot be ranked lower than the serviceman on trial.[507] The serviceman on trial can challenge the members of the court—similar to challenging jury members during *voir dire*—and can even challenge the appointment of the particular judge presiding over his case.[508]

Finally, the UCMJ explicitly provides that judges serving in proceedings under the Code shall not be unduly influenced "in reaching the findings or sentence in any case, or the action of any convening, approving, or reviewing authority with respect to his judicial acts."[509]

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prosecution's witnesses, and copies of any statements made by those witnesses to the prosecution. 10 U.S.C. § 807 (2004).

499. Theodore Essex & Leslea Tate Pickle, *A Reply to the Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice*, 52 A.F. L. REV. 233, 234 (2002) (discussing the Cox Commission's recommendations for modification of the UCMJ).

500. 10 U.S.C. §§ 818–820 (2004).

501. *Id.* § 818.

502. *Id.*

503. *Id.* § 819.

504. *Id.* § 816.

505. 10 U.S.C. § 825a.

506. *Id.* § 852

507. *Id.* § 825.

508. *Id.* § 841.

509. *Id.* § 837.

b. Decisions Comparing Fairness of Jury Trial with Proceedings Under the UCMJ

Several U.S. Supreme Court decisions have compared trial by jury with proceedings by courts-martial under the UCMJ.[510] The Court's observations in these cases, however, must be tempered with the knowledge that the UCMJ has since been amended. The amendments affect many of the aspects of courts-martial proceedings that the Court found lacking. Accordingly, an analysis of subsequent amendments will follow a summary of the cases.

In *United States ex rel. Toth v. Quarles*,[511] an Air Force serviceman who served in Korea was discharged,[512] arrested, and charged with committing murder in Korea.[513] He returned to Korea to stand trial before a court-martial.[514] In response to a habeas petition, the U.S. District Court for the District of Columbia ordered his release on the basis that trying a civilian by court-martial was unconstitutional.[515] The U.S. Court of Appeals for the District of Columbia Circuit reversed[516] reasoning that military jurisdiction was appropriate because the alleged offense occurred while the accused was in the armed forces.[517]

Disagreeing with the D.C. Circuit, the U.S. Supreme Court held that one who is no longer in the armed forces must be charged and tried in a civilian court, even if the offenses occurred while the accused was in the military.[518] Stressing fundamental differences between civilian courts and military tribunals, the Court stated that the job of trying persons for violations of the law "is merely incidental to an army's fighting function."[519] For this reason, military tribunals are designed to streamline the litigation process: "To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served."[520] However, having members of the military, rather than juries, serve as the decision-makers also has a significant cost.[521] As the Court observed:

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510. *See infra* text accompanying notes 511-45.

511. 350 U.S. 11 (1955).

512. *Id.* at 13.

513. *Id.*

514. *Id.*

515. Toth v. Talbot, 114 F. Supp. 468 (D.D.C. 1953).

516. Talbot v. United States *ex rel.* Toth, 215 F.2d 22 (D.C. Cir. 1954), *rev'd*, 350 U.S. 11 (1955).

517. *See id.*

518. *See* United States *ex rel.* Toth v. Quarles, 350 U.S. 11, 13-23 (1955).

519. *Id.* at 15.

520. *Id.*

521. *See id.* at 18.

"Whether right or wrong, the premise underlying the constitutional method for determining guilt or innocence . . . is that laymen are better than specialists to perform this task."[522] The Court recognized progress in "making courts-martial less subject to the will of the executive department which appoints, supervises and ultimately controls them."[523] Nevertheless, in trial of civilians for non-military offenses, the Court concluded that a military tribunal would not provide a constitutionally sufficient method for trial.[524]

The Court addressed a similar scenario two years later in *Reid v. Covert*.[525] Two companion cases presented the question of whether spouses of active members of the U.S. armed forces could be tried by courts-martial on charges of murdering their spouses.[526] Both spouses were convicted and sentenced to life imprisonment at their courts-martial.[527]

In one of the cases, the lower court ordered the spouse released pursuant to the writ of habeas corpus, but, in the other, the lower courts refused to grant the writ.[528] After the U.S. Supreme Court initially affirmed the convictions,[529] a plurality of the Court on rehearing ordered the spouses released on the ground that they could not be tried pursuant to military jurisdiction.[530]

The plurality maintained that it is "the duty of courts to be watchful for the constitutional rights of the citizen and against any stealthy encroachments thereon."[531] The plurality also examined the role and procedures of the military courts and noted that military courts, while tribunals, are part of an organization interested primarily in discipline and efficiency.[532]

Although the plurality recognized that reforms had achieved more protections for those accused in military trials, it also noted that such protections were inferior to those of a civilian trial with mandatory presentment by a grand jury and trial by a petit jury.[533] Furthermore, the President and Congress have broad discretion in determining the rules of

522. *Id.*
523. *Toth*, 350 U.S. at 17.
524. *See id.* at 15-23.
525. 354 U.S. 1 (1957).
526. *See id.* at 3-5.
527. *See id.*
528. *See id.*
529. *See id.* at 5.
530. *See Reid*, 354 U.S. at 5-41.
531. *Id.* at 40.
532. *Id.* at 36.
533. *Id.* at 37.

procedure and evidence in military courts.[534] Following its examination of the traditions and history behind military tribunals, the plurality concluded that they allowed more potential arbitrariness and unfairness than ordinarily countenanced by the U.S. Constitution.[535] The plurality emphasized the traditional subservience of the military to civilian authorities.[536] Therefore, to protect the rights of the defendants, the plurality affirmed the grant of writ of habeas corpus.[537]

In *O'Callahan v. Parker*,[538] the Court again evaluated the procedural protections afforded to the accused in the military realm as opposed to civilian trials. In *O'Callahan*, the Court set forth the test for determining whether an accused was subject to the jurisdiction of military courts in terms of whether there was a "service connection" in the offense charged.[539] Although *O'Callahan* was later overruled because the "service connection" test proved to be unworkable,[540] the critique of the military justice system in *O'Callahan* still provides a useful barometer of degree to which military justice differs from civilian criminal justice. The Court in *O'Callahan* started from the premise that the military and civilian systems have "fundamental differences."[541] The Court found the most striking difference in the distinction between the civilian system, with a lay jury as its bedrock, and the military system composed of military personnel.[542] The Court observed that the presiding officer at courts-martial was not a professional judge, much less a judge with any independence.[543] Indeed, the Court stated that "the possibility of influence on the actions of the courts-martial by the officer who convenes it, selects its members and the counsel on both sides, and who usually has direct command authority over its members is a pervasive one in military law, despite strenuous efforts to eliminate the danger."[544] In short, the Court concluded that a "civilian trial . . . is held in an atmosphere conducive to

534. *Id.* at 38.

535. *Reid*, 354 U.S. at 39-40.

536. *Id.*

537. *See id.*

538. 395 U.S. 258 (1969), *overruled by* Solorio v. United States, 483 U.S. 435 (1987).

539. *See id.*

540. *See* Solorio v. United States, 483 U.S. 435, 440-51 (1987) (abandoning "service connection" and ruling that the test would hinge on the status of the accused—i.e., whether he or she was in the armed forces when tried—as opposed to the connection of the conduct to service functions).

541. *O'Callahan*, 395 U.S. at 262.

542. *Id.* at 263.

543. *Id.* at 264

544. *Id.*

the protection of individual rights, while a military trial is marked by the age-old manifest destiny of retributive justice."[545]

c. Legislative Efforts to Address Unlawful Command Influence in Military Proceedings

Unlawful command influence has been called the "mortal enemy of military justice."[546] It involves the improper interference by a higher-ranking officer who has authority over the persons responsible for making the judicial decision.[547] It deprives persons tried under court-martial proceedings of their constitutional rights—including the deprivation of the right to favorable evidence, the deprivation of effective assistance of counsel, and the deprivation of an impartial forum.[548] Because it creates substantial problems of unfairness, unlawful command influence is prohibited by the UCMJ.[549] Furthermore, the 1968 Military Justice Act placed additional prohibitions on unlawful command influence.[550]

In an attempt to reduce unlawful command influence and thus make court-martial proceedings more fundamentally fair, Congress enacted at least three safeguards.[551] First, commanding officers are forbidden from attempting to influence judicial proceedings.[552] Following is the language with which the UCMJ expresses the desired independence of the decision-makers:

> No authority convening a general, special, or summary court-martial, nor any other commanding officer, may censure, reprimand, or admonish the court or any member, military judge, or counsel thereof, with respect to findings or sentence adjudged by the court, or with respect to any other exercise of its or his functions in the conduct of the proceeding. . . .[553]

Second, Congress allowed disciplinary action against anyone who obstructs court-martial proceedings.[554] Third, Congress has made it clear that "defense counsel may not receive less favorable reports because of

545. *Id.* at 266.
546. United States v. Thomas, 22 M.J. 388, 393 (1986).
547. CHARLES A. SHANOR & L. LYNN HOGUE, MILITARY LAW 117 (1996).
548. *Thomas*, 22 M.J. at 393.
549. 10 U.S.C. § 837 (2004).
550. *Thomas*, 22 M.J. at 393.
551. SHANOR & HOGUE, *supra* note 547, at 117.
552. 10 U.S.C. § 837.
553. *Id.*
554. *Id.* § 898.

zealous advocacy."[555] In addition to the procedural safeguards provided by Congress, the courts have also taken a stand against unlawful command influence. For example, even though a defendant can waive almost any error, unlawful command influence can never be waived.[556] Furthermore, the burden is on the prosecution to prove beyond a reasonable doubt that unlawful command influence has not occurred.[557] Finally, the Military Justice Act of 1968 created professional military judges[558] in order to ensure that the judge assigned to court-martial proceedings is not under the command of the convening authority.[559]

D. *A Modest Proposal*

Perhaps the only remaining deficiency in the current military tribunal procedures is the lack of an effective buffer between the prosecuting authority and the judges deciding the fate of the accused. In the Military Commission Act of 2006, Congress included a section prohibiting members of tribunals from suffering ill-treatment for their participation or decisions.[560] By including such a provision, Congress implicitly recognizes that the problem exists of pressures on military tribunal proceedings that inject a factor into deliberations that should not be there. We would be naive to think that a commissioned officer who acquits an alleged enemy combatant will feel uninhibited in doing so solely because a section of the Act says that he or she will suffer no consequences.

Perhaps in classic military tribunals, it was worth sacrificing the full protection of an accused from subtle influences on the tribunal members affecting their judgment. The reality that Congress has now created an entirely new justice system—tailored for alleged enemy combatants being tried away from the theater of war—is a tacit recognition that these military tribunal proceedings are essentially a hybrid system. One need only review the lengthy procedures now in place to see that one is dealing with a different form of military tribunal from those in the past. While applauding Congress for stepping into its proper role, this Article must still take note of the weaknesses of the system—the lack of an effective buffer between the military and the accused.

This weakness is most acute in cases in which the death penalty can be imposed. The current procedures require unanimity among the military

555. *Id.* § 837.

556. United States v. Osburn, 33 M.J. 810, 812 (1991).

557. *Id.*

558. 82 Stat. 1335 (1968).

559. *Id.*

560. S. 3980, 109th Cong. § 949b (prohibiting command from influencing, and members from being ill-treated for participation in tribunals).

tribunal members in any case imposing capital punishment.[561] However, even the unanimity requirement is insufficient because military officials are the only members of the tribunals. Consequently, the decision-maker remains a part of the branch of government prosecuting the accused. Blackstone's warning is as timely today as it was when issued over two centuries ago:

> [I]n times of difficulty and danger, more is to be apprehended from the violence and partiality of judges appointed by the crown, in suits between the king and the subject, than in disputes between one individual and another, to settle the metes and boundaries of private property. Our law has therefore wisely placed this strong and two-fold barrier, of a presentment and a trial by jury, between the liberties of the people, and the prerogative of the crown."[562]

If the accused faces danger from judges appointed by the executive, he still clearly faces as much or more danger from military officers appointed by the executive. Yet, legitimate reasons support trying accused unlawful combatants before military tribunals, as opposed to the civilian courts.[563] Nor is a lay jury an ideal alternative to these tribunals. For example, in terrorism cases, Ireland has tried and abandoned the use of lay juries, in part because of the potential danger to the jurors themselves.[564] Simply because a classic lay jury may prove impractical, however, does not negate the propriety of utilizing an alternative somewhere between the all-

561. *Id.* § 949m (2006).

562. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND ch. 27 (1765-1769).

563. A chief advantage of military tribunals is the ability to protect classified information and sources. Although the impact of the Classified Information Procedures Act (CIPA), 18 U.S.C.A. app. 3 §§ 1-16 (2004), on military tribunals is outside the scope of this Article, it should be noted that two particular scenarios arise under the CIPA. The first is when the criminal defendant seeks to disclose classified information in his defense. The second is when the criminal defendant seeks the information for his defense and exoneration. The CIPA applies only to the former. *Id.* §§ 5-6. In a recent D.C. Circuit case, Judge Hens Green specified the rules and procedures for discovery by civilian defense attorneys representing Guantanamo Bay detainees. *In re* Guantanamo Bay Cases, 344 F. Supp. 2d 174 (D.D.C. 2004).

564. As part of what is known as the "Diplock system," named after the English jurist who chaired a commission to deal with terrorism in Northern Ireland in 1972, the UK Parliament passed the Northern Ireland (Emergency Provisions) Act, 1996, c. 22 (Eng.) which abolished lay juries for terrorism trials. The Diplock rationale claimed to: (1) prevent intimidation of jurors and (2) prevent jurors from voting according to their political aspirations. LEGISLATION AGAINST TERRORISM, 1998, Cm 4178, *available at* http://www.archive.official-documents.co.uk/document/cm41/4178/4178.htm; SUBMISSION BY THE COMMITTEE ON THE ADMINISTRATION OF JUSTICE TO THE DIPLOCK REVIEW, *available at* http://www.caj.org.uk/keydocs/ DiplockReview.html.

military tribunal and the full-layperson jury. Countries employing a civil code system already use procedures ensuring some independence between the prosecuting authority and the bench.[565] The UCMJ effectively does so as well, though perhaps to a lesser extent.

In other words, the inclusion of some civilian members in the military tribunals provides some balance to the procedures. Indeed, the trial of Nazi war criminals in the celebrated Nuremberg trials occurred before tribunals that were composed of prominent civilian jurists from Allied countries.[566] Notably, those from the United States were active or retired judges who served on state supreme and appellate courts.[567]

If but one civilian judge served on each military tribunal, the accused would at least have a minimum level of protection against imposition of the death penalty by a tribunal composed solely of persons appointed by, and answerable to, the President. The requirement of unanimity before imposition of the death penalty would then prove crucial. A single civilian member could prevent imposition of the death penalty by refusing to vote for capital punishment. In addition, Congress should borrow some of the provisions in the UCMJ designed to promote independence of those military personnel serving on the tribunals. Just as members of a court-martial under the UCMJ should have some assurance of insulation from the repercussions of their decisions, Congress could add provisions that provide meaningful penalties for anyone to "censure, reprimand, or admonish . . . with respect to the findings or sentence adjudged . . . or with respect to any other exercise of its or his functions in the conduct of the proceedings."[568]

Congress has now—to a great extent—filled its role of determining appropriate procedures for trial of persons captured in military engagements. It has recognized, and vindicated, the necessity for fair trails. However, Congress should now finish the task it started in the Military Commission Act of 2006. It may do so by enacting an amendment prescribing that at least one member in each military tribunal be a civilian when the changes carry the potential for the death penalty. Indeed, Congress could take the approach that the Department of Defense took in

565. *See supra* text accompanying notes 343-62.

566. *See, e.g.*, WHITNEY R. HARRIS, TYRANNY ON TRIAL 34 (1999); JOSEPH E. PERSICO, NUREMBERG: INFAMY ON TRIAL, 132-33 (1994). Actually, only the Soviet judges at the trial of the top 22 Nazis carried military ranks. The American, British, and French judges were civilian jurists.

567. PERSICO, *supra* note 566, at 60-62 (discussing the appointment of Francis Biddle, former attorney general under Franklin Roosevelt, to represent the United States as a Justice on the International Military Tribunal; *see also* TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10; NUREMBERG, OCTOBER 1946-APRIL 1949 (1997).

568. *See* 10 U.S.C. § 837 (2004).

appointing civilians to the Review Panels under the original procedures now displaced by the Military Commission Act of 2006.[569] Under a statute allowing these civilians to temporarily become part of the Armed Forces,[570] any obligations to ensure confidentiality could be protected.

Any amended legislation should take care to specify that it shall not apply to military tribunals employed on battlefields. None of the trials currently scheduled of accused terrorists would occur in such a situation. However, one can envision future scenarios in which the military authorities might conduct trials on the field of combat. The prospect of such trials in the future should not, however, prevent Congress from acting now to ensure basic fairness in present-day trials.

VI. CONCLUSION

One of the challenging messages conveyed to our country in the 9/11 Commission Report was that we must educate the world of that for which our Nation stands. This message is not the one of the fanatic who suggests we summarily execute terrorists so as to deter terrorism.[571] Rather, the message is one that recognizes the unique contribution of America–the recognition that the common good or general welfare depends in part on the protection of fundamental individual rights. Although the U.S. Constitution gives the government flexibility in areas of national security, it does not reject the fundamental rights routinely enforced in times of peace. The job of protecting such rights, however, shifts largely to Congress. Therefore, those who criticize the executive branch for failing to protect those subject to trial in the military tribunals are pointing their fingers in the wrong direction. In the past, Congress has exercised its delegated function under Article I, section 8 to legislate systems and procedures that ensure fundamental fairness in trials not covered by constitutional guarantees. The question that this Article has explored is whether Congress has intervened sufficiently in its recent legislation. The answer is that, though Congress has gone far in that direction, one last critical step should be taken. Ironically it is a step already shown to be

569. *See supra* notes 11-12, 231-32 and accompanying text.

570. *See supra* notes 11-12, 231-32 and accompanying text.

571. One can find such an approach urged in messages posted at various Internet web sites, such as www.asininity.com or www.libertypost.org. The advocacy of summary executions approaches Nazism. Hitler's October 18, 1942 Commando Order provided, for instance: "From now on all men operating against German troops in so-called Commando raids . . . are to be annihilated to the last man. . . . Even if these individuals on discovery . . . give themselves up as prisoners, no pardon is on any account to be given." *See* http://www.combinedops.com/Hitlers_Commando_Order.htm (last visited Oct. 3, 2006).

practicable by the Department of Defense's own appointment of civilians to now-defunct Review Panels.[572]

The principle on which the right to a jury trial rests—the essential need for impartiality in the decision-maker—is essential to any system seeking to do justice. In other words, while a system may omit certain other rights that ordinarily would apply in the civilian criminal justice system, this principle is one that cannot be omitted. However, it may be respected in some form other than by providing a lay jury. Although, there are certain instances, such as trials in theaters of active combat, in which trials before military officers are the only alternative, the upcoming trials of enemy combatants do not rise to the same level. Make no mistake about it, though, the trials of the accused terrorists will themselves be extraordinary. The accused terrorists are not the only ones who will be on trial. "Courts try cases," as Associate Justice (and Nuremberg prosecutor) Jackson said, "but cases also try courts."[573] Cases try countries, too. May ours do as well in these upcoming trials as we and the Allied Forces did in Nuremberg. The more unsympathetic the defendants, the more important it is to provide just tribunals and just procedures. With modest adjustments, the current military tribunals can provide trials consistent with the transcendent values on which our nation was founded.

572. *See supra* notes 11-12, 231-32 and accompanying text.

573. *See* Jackson, *supra* note 1, at 15.