

Maintaining Honor in Troubled Times: Defining the Rights of Terrorism Suspects Detained in Cuba

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I. INTRODUCTION

On September 11, 2001, members of an international terrorist organization conducted a coordinated attack on the United States.¹ Striking the World Trade Center and the Pentagon, the attacks killed thousands and wounded countless others. As American blood boiled over innocent blood spilled, the country struggled to balance its need for honor with its desire for justice.

In the wake of these attacks and the ensuing military campaign in Afghanistan, the United States incarcerated more than 564 suspected terrorists at a military base in Guantanamo Bay, Cuba.² Shrouded in secrecy, this extraterritorial detention appears aimed at keeping these individuals (Detainees) outside the rules and procedures of the American criminal justice system. But the United States is “a government of laws, and not of men.”³ It is a country founded on the notions of personal equality and inalienable rights. In order to do honor to those traditions, America must respect the rights of these Detainees, no matter how horrible their alleged crimes. Indeed, the dilemma over how to treat the Detainees is not really about who *they* are. It is about who *we* are – Americans! Will we flaunt our superpower status and trample these men in the name of expediency? Or will we stand on the principles that have made America distinct from other world powers in history, treating our prisoners with fundamental dignity, affording them an opportunity to be heard, and respecting all the relevant laws affecting their incarceration? While the former approach may be quite tantalizing in light of the devastating attacks on New York and Washington, D.C., the latter method is the more noble, and certainly the one that our heritage demands.

These principles notwithstanding, the Detainees hold a more limited set of rights than would a similarly situated American citizen. As alien enemies, the Detainees hold virtually no procedural rights under

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1. See Michael Grunwald, *Terrorists Hijack 4 Airliners, Destroy World Trade Center, Hit Pentagon; Hundreds Dead; Bush Promises Retribution; Military Put on Highest Alert*, WASH. POST, Sept. 12, 2001, at A1, 2001 WL 27731754.

2. See Jess Bravin, *Guantanamo Bay Detainees Seek Hearings*, WALL ST. J., July 3, 2002, at A4, 2002 WL-WSJ 3399732.

3. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

the United States Constitution. Most, if not all, of the procedural protections afforded accused criminals under the Fourth, Fifth, and Sixth Amendments have no force outside the United States and thus, will not be applied to those detained in Cuba. At most, the Detainees may hold the right to due process under the Fifth Amendment; however, when applied outside the United States, even due process encompasses only the process due an individual in a particular circumstance. In this case, it would mean only the process due an individual apprehended on a foreign battlefield and facing military trial as a war criminal.

On the other hand, some of the Detainees may qualify for substantial procedural rights under the various Geneva Conventions. And, at the very least, most of them hold basic humanitarian rights under the Geneva Conventions of 1949. Finally, and perhaps most importantly, all the Detainees are entitled to have their rights determined and enforced through habeas corpus proceedings in the federal courts.

II. BACKGROUND

On September 11, 2001, nineteen members of the al Qaeda terrorist network hijacked four commercial airliners and successfully crashed three of them, along with their passengers and crews, into the twin towers of the World Trade Center and the Pentagon.⁴ In all, the hijackers killed 3,063 people,⁵ completely destroyed both towers of the World Trade Center as well as several surrounding structures, caused substantial damage to the Pentagon, and destroyed four commercial airliners.⁶ In addition to the immediate carnage, the attacks either triggered or aggravated an economic recession,⁷ resulting in the loss of some 600,000 jobs⁸ and a \$15 billion government bailout of the airline industry.⁹ While the human costs of the attacks can never be

4. See Edward T. Pound et al., *Under Siege*, U.S. NEWS & WORLD REP., Sept. 24, 2001, at 6, 2001 WL 30365890. The fourth aircraft, United Airlines Flight 93, crashed in a rural area of western Pennsylvania. See *id.* Based on cellular telephone conversations between passengers on United Airlines Flight 93 and persons on the ground, the plane probably crashed while passengers attempted to retake the aircraft from the hijackers. See *id.*

5. See Colleen Carroll et al., *The United States: Six Months After the Attack*, ST. LOUIS POST-DISPATCH, Mar. 11, 2002, at A1, 2002 WL 2550940. In comparison, the Japanese attack on Pearl Harbor killed 2,403 people. See Bill Wolverton, *1940s?*, ROCKFORD REG. STAR, June 9, 2002, 2002 WL 22084078.

6. See Pound, *supra* note 4, at 6.

7. See Susan Strother Clarke, *Unemployment Hits 6-Year High; Some Economists Think Layoffs Will Continue Boosting Jobless Rate for Months*, ORLANDO SENTINEL, Dec. 8, 2001, at A1, 2001 WL 28427936.

8. See Diane E. Lewis, *Ex-Welfare Recipients Taking a Harder Hit*, BOSTON GLOBE, Dec. 30, 2001, at H2, 2001 WL 31235085. This figure is merely an approximation since it is impossible to determine exactly how many jobs were lost as a direct result of the terrorist attacks and how many were lost as a result of other economic factors.

9. See Rob Norton, *We'll Pay for All This Later, Okay?*, WASH. POST, Nov. 25, 2001, at B1, 2001 WL 30328092.

measured, insurers have estimated the economic costs at over \$40 billion.¹⁰ No attack of this magnitude has ever occurred on U.S. soil.¹¹

In response to these attacks, Congress issued a joint resolution on September 14, 2001, that authorized the President to use “all necessary and appropriate force” against those responsible for the attack.¹² Almost immediately, the U.S. government began to suggest that Osama bin Laden and his al Qaeda terrorist organization were responsible for the attack.¹³ Shortly thereafter, the United States started diplomatic efforts aimed at apprehending bin Laden and his associates, who were based in Afghan territory.¹⁴ However, it quickly became apparent that Afghanistan’s Taliban government was allied with bin Laden and would provide no assistance to the United States.¹⁵

Beginning October 7, 2001, the United States commenced a military operation aimed at dismantling al Qaeda, apprehending or killing its members, and toppling the Taliban regime that supported bin Laden.¹⁶ In furtherance of those objectives, President Bush issued an order (Presidential Order) directing the Secretary of Defense to detain any non-U.S. citizen whom the President reasonably believed had been associated with al Qaeda, involved in acts of international terrorism against the United States, or knowingly harbored persons so involved.¹⁷ Furthermore, the Presidential Order directed that if Detainees were tried, the trials were to be held before military commissions whenever permitted by law.¹⁸

In apparent compliance with the intent of the Presidential Order, the Department of Defense transferred more than 500 prisoners captured in Afghanistan to a United States military installation at Guantanamo Bay, Cuba.¹⁹ These Detainees are presently being held for interrogation and, perhaps, eventual trial before military commissions.

10. See *9/11 Property Loss Increases to \$20.3B*, *NEWSDAY*, June 19, 2002, at A14, 2002 WL 2749643.

11. See *For the Record*, *BUS. INS.*, June 24, 2002, at 23, 2002 WL 9517869.

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

13. See Grunwald, *supra* note 1, at A1.

14. See Molly Moore, *Pakistan to Seek Bin Laden’s Surrender; Delegation Going to Afghanistan Today to Demand Taliban Hand Over Fugitive*, *WASH. POST*, Sept. 17, 2001, at A8, 2001 WL 27733091.

15. See *id.*

16. See Dan Balz, *U.S., Britain Launch Airstrikes Against Targets in Afghanistan; ‘We Will Not Falter. And We Will Not Fail,’ Bush Pledges*, *WASH. POST*, Oct. 8, 2001, at A1, 2001 WL 28363139.

17. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism § 2(a), 66 Fed. Reg. 57,833, 57,834 (Nov. 13, 2001) [hereinafter Presidential Order].

18. *Id.* § 4(a).

19. See Barbara Crossette, *U.S. Fails in Effort to Block Vote on U.N. Convention on Torture*, *N.Y. TIMES*, July 25, 2002, at A7, LEXIS.

Although they are incarcerated outside U.S. territory, they still hold rights that the United States is bound to honor.

III. RIGHTS UNDER THE UNITED STATES CONSTITUTION

The Constitution provides criminal defendants with an extremely valuable set of rights, which has long shaped the foundations of our criminal justice system. The Fourth Amendment protects people and their belongings from unreasonable government searches and seizures.²⁰ Additionally, the Fifth Amendment prohibits federal criminal prosecutions unless preceded by grand jury indictment.²¹ The Fifth Amendment also proscribes double jeopardy, compulsory self-incrimination, and deprivation of “life, liberty or property, without due process of law.”²² Furthermore, both Article III of the Constitution and the Sixth Amendment proclaim the precious right to a jury trial.²³ Finally, the Sixth Amendment goes on to protect the criminal defendant’s right to assistance of counsel, to confront adverse witnesses, and to compel the attendance of witnesses in his defense.²⁴

Collectively, these provisions form the bedrock foundation of fair play in the American criminal justice system. Individuals accused of crimes historically cherished these rights to help ensure that they were not wrongly convicted, whether by mistake, for expediency, or for revenge. Indeed, the advent of the police drama in television and movies has helped further engrain the existence of some of these rights through such things as the familiar *Miranda* warnings — “you have the right to an attorney. If you cannot afford one” Thus, the

20. See U.S. CONST. amend. IV. The entire text of the Fourth Amendment states [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Id.

21. *Id.* amend. V.

22. *Id.* The full text of the Fifth Amendment states

[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a 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; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Id.

23. See *id.* art. III, § 2, cl. 3; *id.* amend. VI. Article III states “[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury.” *Id.* art. III, § 2, cl. 3.

24. See *id.* amend. VI. The entire text of the Sixth Amendment states

[i]n 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, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Id.

notion that these protections might not always be available to a criminal defendant seems foreign to many; the idea that the U.S. government could prosecute someone for a crime without the benefit of a public trial by an impartial jury seems simply inconceivable. Yet, that is precisely what will happen under the Presidential Order calling for trials by military commissions.²⁵

In order to understand whether the Executive Branch can place such limitations on criminal rights under the Constitution, one needs to recognize two unusual facts about the Detainees and their place of internment. First, the Detainees are not United States citizens.²⁶ Most are foreign nationals captured on a foreign battlefield, allegedly engaged in combat against American military forces.²⁷ As the following discussion will demonstrate, these facts impose serious limitations on the applicability of certain constitutional protections. Second, the U.S. military installation at Guantanamo Bay, Cuba, is outside U.S. territory.²⁸ The base does not lie within any federal district.²⁹ Thus, it is not within the territorial jurisdiction of any U.S. court.³⁰ Accordingly, no U.S. court appears to have jurisdiction to hear the Detainees' claims, even if the U.S. government chose to bring the cases in federal court.³¹ These special facts must be kept in mind when considering application of the relevant constitutional provisions.³²

A. *Fourth Amendment Rights*

The Fourth Amendment proscribes unlawful searches and seizures of both people and things.³³ However, in recent years the United States Supreme Court has severely limited the extraterritorial application of these protections. In *United States v. Verdugo-Urquidez*,³⁴ the Court held that the Fourth Amendment did not prohibit unreasonable searches and seizures conducted outside U.S. territory.³⁵ The case involved a Mexican citizen arrested in Mexico on suspicion

25. Presidential Order § 1(e), 66 Fed. Reg. 57,833, 57,833 (Nov. 13, 2001).

26. See Jess Bravin, *Hearing on 'American Taliban' is Scheduled to Begin Today*, WALL ST. J., July 15, 2002, at B8, 2002 WL-WSJ 3400531.

27. See Sue Anne Pressley, *At Guantanamo Bay, a Peaceful Night; Afghan War Detainees Sleep Soundly After 27-Hour, 8,000-Mile Trip*, WASH. POST, Jan. 13, 2002, at A13, 2002 WL 2520796.

28. The United States holds the base at Guantanamo Bay, Cuba, under a perpetual lease that began in 1903. See M. E. Murphy et al., THE HISTORY OF GUANTANAMO BAY: AN ONLINE EDITION, at <http://www.nsgtmo.navy.mil/history.htm> (last modified Aug. 27, 2002).

29. See *Rasul v. Bush*, Civ. Action No. 02-299, slip op. at 23 (D.D.C. July 31, 2002).

30. See *id.* at 30. The *Rasul* court misinterpreted *Johnson v. Eisentrager*, 339 U.S. 763 (1950), to preclude federal court jurisdiction over aliens held abroad by the U.S. military. See *Rasul*, Civ. Action No. 02-299 at 22. For a proper reading of *Eisentrager*, see *infra* text accompanying notes 268-84.

31. See *Rasul*, Civ. Action No. 02-299 at 30.

32. See *supra* notes 20-24 and accompanying text.

33. See U.S. CONST. amend. IV.

34. 494 U.S. 259 (1990).

35. *Id.* at 261.

of narcotics smuggling.³⁶ He was apprehended by Mexican authorities and turned over to U.S. marshals for trial in the United States.³⁷ Shortly thereafter, agents of the U.S. Drug Enforcement Administration (DEA) obtained permission from Mexican authorities to search his residences in Mexico.³⁸ There, they seized evidence including documents to be used at trial.³⁹ The United States District Court presiding over the case granted defendant's motion to suppress that evidence, concluding that the DEA had failed to justify the warrantless search and had therefore violated the Fourth Amendment.⁴⁰

In reversing that decision, the United States Supreme Court placed substantial reliance on the fact that, by its own terms, the Fourth Amendment applies to "the people."⁴¹ Contrary to the Fifth and Sixth Amendments, which apply to "all persons"⁴² and "all criminal prosecutions"⁴³ respectively, the Court found that "the people" narrowed the scope of the Fourth Amendment to American citizens and aliens who had "developed sufficient connection with this country to be considered part of [our national] community."⁴⁴ Chief Justice Rehnquist went on to say "the purpose of the Fourth Amendment was to protect *the people of the United States* against arbitrary action by *their own Government*; it was never suggested that the provision was intended to restrain the actions of the Federal Government against aliens outside of the United States territory."⁴⁵ Although the matter before the Court in *Verdugo-Urquidez* was limited to the extraterritorial search and seizure of property, the opinion strongly suggested that the same rationale applied to extraterritorial searches and seizures of alien persons.⁴⁶

36. *Id.* at 262.

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 263.

41. *See id.* at 265-66.

42. U.S. CONST. amend. V.

43. *Id.* amend. VI.

44. *Verdugo-Urquidez*, 494 U.S. at 265.

45. *Id.* at 266 (emphasis added).

46. *Compare id.* at 264-68, with *United States v. Alvarez-Machain*, 504 U.S. 655, 657 (1992) (holding that the forcible kidnapping of a Mexican citizen from Mexico did not deprive a U.S. court of jurisdiction to try him for violations of U.S. law committed in Mexico). In *Alvarez-Machain*, the Court did not even discuss the Fourth Amendment, although the kidnapping was authorized by the United States government and was apparently conducted without a warrant. *See id.* at 659. For a similar rule, consider also *Ker v. Illinois*, 119 U.S. 436 (1886), where the Court upheld jurisdiction over an American forcibly kidnapped from Peru and returned to the United States to face a trial on criminal charges. *See id.* at 438-39. The main difference between *Ker* and *Alvarez-Machain* is that in the former, the abductor held a warrant issued by the United States, *id.* at 438; however, the abductor neglected to use the warrant, choosing instead to take the accused by force and without involving the Peruvian authorities. *Id.* In *Ker*, as in *Alvarez-Machain*, the Court completely ignored any discussion of the Fourth Amendment, stating instead that "forcible abduction is no sufficient reason why the party should not answer when brought within the jurisdiction of the court which has the right to try him for such an offense." *Id.* at 444.

Even more relevant to the plight of the Detainees is a bit of clairvoyant dictum indulged in by the *Verdugo-Urquidez* Court. The Court postulated that the extraterritorial application of the Fourth Amendment to non-U.S. citizens would pose serious problems to the use of American military forces in response to international situations involving our national interest.⁴⁷ Chief Justice Rehnquist stated

[s]ituations threatening to important American interests may arise half-way around the globe, situations which in the view of the political branches of our Government require an American response with armed force. If there are to be restrictions on searches and seizures which occur incident to such American action, they must be imposed by the political branches through diplomatic understanding, treaty, or legislation.⁴⁸

The conclusion seems inescapable that if the Fourth Amendment does not prohibit unreasonable searches and seizures by U.S. civilian law enforcement in Mexico, then the Fourth Amendment most certainly will not operate against searches and seizures by the U.S. military on an Asian battlefield. Indeed, to place such a heavy burden on American soldiers engaged in armed combat might well bring greater harm than protection to the rights of those whom the United States seeks to bring to justice – if the Fourth Amendment stands ready to frustrate the prosecution of international terrorists captured by American military forces, it may thereby create an incentive to kill suspected terrorists on the battlefield rather than risk having them released by the courts.⁴⁹ Accordingly, the courts have properly limited the Fourth Amendment to domestic law enforcement actions.

B. *Fifth Amendment Rights*

Under the Fifth Amendment, criminal defendants are generally entitled to indictment by grand jury prior to facing trial.⁵⁰ Furthermore, the Fifth Amendment protects criminal defendants from being tried twice for the same offense, from being forced to incriminate themselves, and from being “deprived of life, liberty, or property, without due process of law.”⁵¹ Like the Fourth Amendment, however, extraterritorial application of these rights has been severely limited.

47. *Verdugo-Urquidez*, 494 U.S. at 273-74.

48. *Id.* at 275.

49. This is not to suggest that U.S. military forces might be inclined to summarily execute enemy combatants who are surrendering under a white flag. However, there will certainly be situations when, in the heat of battle, reasonable persons might differ on whether enemy fighters are ready to give up or whether the fight must continue. The United States should simply avoid a constitutional interpretation that would require soldiers to consider warrant requirements before capturing enemy personnel.

50. U.S. CONST. amend. V.

51. *Id.*

1. Geographic Limitations

Early in the last century the United States Supreme Court recognized geographic limitations to the Fifth Amendment's procedural protections. In *Hawaii v. Mankichi*,⁵² the Court considered whether the Fifth and Sixth Amendments required indictment by grand jury and trial by petit jury in the newly acquired territory of Hawaii.⁵³ Finding that these rights were not "fundamental in their nature,"⁵⁴ the Court concluded that the Constitution did not automatically extend these protections to the Hawaiian territory, but that the right to indictment and jury trial could only be established by positive legislative enactment.⁵⁵ This view was affirmed a few years later in *Ocampo v. United States*.⁵⁶ There, the question was whether the Fifth Amendment required indictment by grand jury in the Philippines, a U.S. territory.⁵⁷ As in *Mankichi*, the Court again concluded that "the Constitution does not, of its own force, apply to the [Philippine] Islands."⁵⁸ The Court further concluded that, although Section 5 of the congressionally enacted Philippine Bill of Rights⁵⁹ echoed the Due Process Clause of the Fifth Amendment,⁶⁰ "the requirement of an indictment by grand jury is not included within the guaranty of 'due process of law.'"⁶¹

Although *Mankichi* and *Ocampo* address only the grand jury portion of the Fifth Amendment, the language of the opinions implies that any portions of the Fifth Amendment that are deemed procedural, rather than fundamental, will be limited in extraterritorial application.⁶² Taken collectively, these cases suggest that since the Fifth Amendment does not automatically extend to U.S. territories, it most certainly will not extend to trials on foreign soil. Thus, so long as the United States keeps the Detainees outside the United States and its territories, the procedural protections of the Fifth Amendment will not apply.

2. Limitations Based on Status

In addition to these geographic limitations on the Fifth Amendment, its application has also been limited based on the status of the person seeking its protections. In the leading case of *Johnson v.*

52. 190 U.S. 197 (1903).

53. *Id.* at 211.

54. *Id.* at 218.

55. *See id.* at 217-18.

56. 234 U.S. 91 (1914).

57. *See id.* at 98.

58. *Id.* (citations omitted).

59. Act of July 1, 1902, ch. 1369, § 5, 32 Stat. 691, 692.

60. *See Ocampo*, 234 U.S. at 94.

61. *Id.* at 98.

62. *See supra* notes 54-55, 61 and accompanying text.

Eisentrager,⁶³ German nationals attempted to invoke the Fifth Amendment to invalidate their war crimes convictions by military commissions.⁶⁴ A U.S. military court sitting in China convicted the defendants of violating the laws of war by continuing hostilities against the United States following the German surrender at the end of World War II.⁶⁵ The Germans argued, *inter alia*, that the Fifth Amendment prevented their trial without grand jury indictment.⁶⁶ As such, they could not be tried by military commission because military trials were never conducted with indictments.⁶⁷

The *Eisentrager* Court patently rejected these claims on the grounds that these men were enemy aliens accused of war crimes committed on foreign soil.⁶⁸ The Court construed their argument to imply that the Constitution granted them immunity from any trial — if the Fifth Amendment barred a military trial due to lack of indictment procedures, the Sixth Amendment would similarly preclude their trial by civilian courts since the Sixth Amendment specifically requires that civil trial be before “an impartial jury of the State and district wherein the crime shall have been committed.”⁶⁹ Since these crimes were committed in China,⁷⁰ they were not committed in any *state* or *district*. Accordingly, no trial by a civilian court could ever satisfy the Sixth Amendment. Therefore, extending the protection of the Fifth Amendment to enemy aliens accused of war crimes would effectively make them immune to trial under any circumstances.⁷¹ Since the laws of war clearly contemplate punishment for war crimes,⁷² such a broad application of the Fifth Amendment would lead to an absurd result — one neither seen nor commented upon in our constitutional history.⁷³

63. 339 U.S. 763 (1950).

64. *See id.* at 765-67.

65. *Id.* at 766.

66. *See id.* at 782-83.

67. *See id.*

68. *See id.* at 782-85.

69. *Id.* at 782-83 (quoting U.S. CONST. amend. VI) (emphasis added).

70. *Id.* at 765.

71. *See id.* at 782.

72. *See id.* at 786-87.

73. *See id.* at 784-85. The Court went on to discuss the irony of a contrary ruling. The Court observed that American citizens who are conscripted into the military are involuntarily stripped of their Fifth Amendment rights. *Id.* at 783. This occurs because the Fifth Amendment, by its own terms, withholds the protection of grand jury indictment from “cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger.” U.S. CONST. amend. V. Instead, these Americans become subject to military trial under the Uniform Code of Military Justice (UCMJ), 10 U.S.C. §§ 801-946 (1998). Under the UCMJ, American military personnel have neither the right to grand jury indictment, the right to a public trial by an impartial jury, nor a right of appeal to the civil courts. *See id.*; *see also* U.S. CONST. amend. V (excluding right to grand jury indictment from cases “arising in the land or naval forces”); *Ex parte Milligan*, 71 U.S. 2, 123 (1866) (stating that the Sixth Amendment right to jury trial extends only to those persons having a right to indictment under the Fifth Amendment). The Court found it too ironic that Americans defending this country might be involuntarily stripped of their Fifth Amendment rights while the enemy whom they were battling could invoke

Combining the territorial limitations of *Mankichi* and *Ocampo* with the status limitations of *Eisentrager* makes it extremely unlikely that the Detainees will be able to invoke any procedural protections under the Fifth Amendment. Even if the geographic limitations are removed (i.e. by bringing them into U.S. territory), their status as enemy aliens will still preclude application of the Fifth Amendment's grand jury requirements. Thus, whether interned in Cuba or brought to the United States, they will likely face trial by military commission for any offenses against the laws of war.

3. Due Process: A Fundamental Right

Notwithstanding this conclusion, however, the Detainees may find some glimmer of hope in the Fifth Amendment's Due Process Clause.⁷⁴ As its name implies, the Due Process Clause is inherently concerned with procedural matters; yet, the Due Process Clause does not define any particular procedure. Instead, it merely requires that no person be "deprived of life, liberty, or property,"⁷⁵ without the process due to him in his particular circumstance.⁷⁶

Applying that standard to criminal proceedings in federal court against American citizens certainly requires adherence to the specific procedures for indictment and jury trial set forth in the Fifth and Sixth Amendments.⁷⁷ Those procedures do not, however, automatically extend outside the United States. Indeed, *Balzac v. Porto Rico*,⁷⁸ *Dorr v. United States*,⁷⁹ *Mankichi*, and *Ocampo (Insular Cases)* demonstrated that the right to indictment and jury trial do not even extend to U.S. territories without congressional action.⁸⁰ Yet, while those decisions limited the application of these particular procedural rights outside the United States, the *Insular Cases* never suggested that the Due Process Clause itself was inoperative in those unincorporated territories.⁸¹

those same rights to completely avoid prosecution for war crimes committed in the same conflict. See *Eisentrager*, 339 U.S. at 783.

74. See U.S. CONST. amend. V.

75. *Id.*

76. See *id.*

77. See *id.* amends. V-VI.

78. 258 U.S. 298 (1922).

79. 195 U.S. 138 (1904).

80. See, e.g., *Balzac*, 258 U.S. 304-05. The term *Insular Cases* has generally been used to refer to these four cases. See *United States v. Verdugo-Urquidez*, 494 U.S. 259, 291 (1990) (Brennan, J., dissenting). Sometimes, however, the term *Insular Cases* is also used to encompass additional cases, such as *Downes v. Bidwell*, 182 U.S. 244 (1901), and *Armstrong v. United States*, 182 U.S. 243 (1901). See *Verdugo-Urquidez*, 494 U.S. at 277; *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 601 n.30 (1976). For the purposes of this note, the term *Insular Cases* means only the four cases designated in the text.

81. See generally *Balzac*, 258 U.S. 298; *Ocampo v. United States*, 234 U.S. 91 (1914); *Dorr*, 195 U.S. 138 (1904); *Hawaii v. Mankichi*, 190 U.S. 197 (1903).

Quite to the contrary, *Mankichi* stated “most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply [to the territory of Hawaii] from the moment of annexation.”⁸² Furthermore, the *Mankichi* Court held that the determinative factor in whether a constitutional provision automatically applied to the newly ceded territory was whether the right was procedural or fundamental in nature.⁸³ Reflecting on that distinction, *Balzac* stated “[t]he guaranties of certain *fundamental personal rights* declared in the Constitution, as, for instance, that no person could be deprived of life, liberty, or property without due process of law, had from the beginning full application in the Philippines and Porto Rico”⁸⁴ Thus, *Balzac* specifically concluded that due process was a fundamental right and that the Due Process Clause operated in the unincorporated territories from the moment of annexation. In other words, the Fifth Amendment limitations from *Mankichi* and *Ocampo* did not foreclose application of the Due Process Clause in these territorial holdings. In summary, while the *Insular Cases* limited the extraterritorial application of specific procedural rights under the Fifth and Sixth Amendments, they failed to establish any limits on the Due Process Clause.

In the post-World War II era case of *Reid v. Covert*,⁸⁵ Justice Harlan offered one method of applying the Due Process Clause overseas.⁸⁶ *Reid* involved a habeas corpus challenge where the defendant, an American citizen, was convicted of murdering her husband in England.⁸⁷ The victim was a member of the United States Air Force, and the defendant was tried by military court martial under jurisdiction granted in the Uniform Code of Military Justice.⁸⁸ In concurring with the plurality opinion, Justice Harlan stated

we have before us a question analogous, ultimately, to issues of due process; . . . the question of which specific safeguards of the Constitution are appropriately to be applied in a particular context overseas can be reduced to the issue of *what process is “due” a defendant in the particular circumstances of a particular case.*⁸⁹

Thus, according to Justice Harlan, due process is not a static concept, but a guiding principle that simply mandates similar procedures

82. *Mankichi*, 190 U.S. at 217-18.

83. *See id.*; *see also Verdugo-Urquidez*, 494 U.S. at 268.

84. *Balzac*, 258 U.S. at 312-13 (emphasis added).

85. 354 U.S. 1 (1957).

86. This Justice Harlan should not be confused with his grandfather, who was the first Justice Harlan on the United States Supreme Court. The first Justice Harlan was a frequent dissenter in the *Insular Cases*, generally advocating for broader application of the Fifth and Sixth Amendments in the insular territories. *See, e.g., Dorr*, 195 U.S. at 154 (Harlan, J., dissenting); *Mankichi*, 190 U.S. at 236 (Harlan, J., dissenting).

87. *See Reid*, 354 U.S. at 3.

88. *See id.*

89. *Id.* at 75 (Harlan, J., concurring) (emphasis added).

in similar circumstances. Hence, if the Due Process Clause applies to the Detainees, it assures them of criminal process commensurate with their circumstances. In this case, due process would include a requirement to follow the procedures generally recognized as appropriate for persons properly before a military tribunal and accused of violating the laws of war. Yet, despite Justice Harlan's suggestion in *Reid*, the question of whether the Due Process Clause even applies to the Detainees remains unanswered.

The territorial limits of the Constitution still remain poorly defined. Even the few United States Supreme Court cases that provide some guidance on the breadth of constitutional power are readily distinguishable from the circumstances surrounding the Detainees. In *Ex parte Milligan*,⁹⁰ the Court said "[t]he Constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances."⁹¹ Yet, that was a Civil War case involving an American citizen within the United States.⁹² Similarly, in his dissent in *Dorr*, the first Justice Harlan said the Constitution was "supreme everywhere, at all times, and over all persons who are subject to the authority of the United States."⁹³ However, that case involved a right to jury trial in the newly acquired U.S. territory of the Philippines. Finally, the second Justice Harlan's argument for extraterritorial application of due process in *Reid* involved an accused American citizen.⁹⁴ In all these cases, the circumstances involved some connection with American citizens or American territory, both of which are lacking for the Detainees.

Further recognizing these types of distinctions, *United States v. Verdugo-Urquidez*⁹⁵ refused to apply the Fourth Amendment to federal law enforcement action against an alien outside the United States.⁹⁶ Indeed, in *Verdugo-Urquidez*, Chief Justice Rehnquist specifically quoted Justice Harlan's suggestion in *Reid* that due process means whatever process is due in the particular situation.⁹⁷ However, Chief Justice Rehnquist went on to state that *Reid* was inapposite where the defendant was an alien.⁹⁸

Further complicating the analysis is the fact that *Verdugo-Urquidez* interpreted *Johnson v. Eisentrager*⁹⁹ as denying all Fifth

90. 71 U.S. 2 (1866).

91. *Id.* at 120-21.

92. *See id.* at 107.

93. *Dorr v. United States*, 195 U.S. 138, 156 (1904) (Harlan, J., dissenting).

94. *See Reid v. Covert*, 354 U.S. 1, 4-5 (1957).

95. 494 U.S. 259 (1990).

96. *See supra* notes 41-45 and accompanying text.

97. *Verdugo-Urquidez*, 494 U.S. at 270.

98. *See id.*

99. 339 U.S. 763 (1950).

Amendment rights to alien enemies held abroad.¹⁰⁰ As explained *infra*,¹⁰¹ *Eisentrager* stands for no such proposition. In fact, *Eisentrager* fully supports the proposition that federal courts will entertain allegations that the United States has unlawfully incarcerated aliens abroad.¹⁰²

The net result of all these decisions is a morass of confusion on whether the Due Process Clause has any extraterritorial effect. As a matter of principle, it seems improper for the United States to deprive the liberty of any person without due process of law. That is a principle on which this country was founded,¹⁰³ and upon which our government firmly rests.¹⁰⁴ Yet affording the Detainees due process protections may provide them little comfort. Even applying the second Justice Harlan's expansive view of extraterritorial due process,¹⁰⁵ the Detainees hold only a promise of procedures appropriate in a military trial for violating the laws of war.

C. Sixth Amendment Rights and the Right to Jury Trial under Article III

Under the Sixth Amendment, criminal defendants obtain the right to jury trial, to confront witnesses, to compel attendance of their own witnesses, and to be assisted by counsel.¹⁰⁶ The Sixth Amendment, however, has met a fate similar to the Fifth Amendment in its extraterritorial application.

1. Geographic Limitations

In *Dorr v. United States*,¹⁰⁷ the United States Supreme Court considered whether the right to jury trial extended automatically into all territory acquired by the United States.¹⁰⁸ Using rationale almost identical to the later case of *Ocampo v. United States*,¹⁰⁹ the Court concluded that Congress was not obligated to enact laws establishing a system of trial by jury in every territorial possession, and that "the Constitution does not, without legislation, and of its own force, carry such right to territory so situated."¹¹⁰

100. See *Verdugo-Urquidez*, 494 U.S. at 269.

101. See *infra* text accompanying notes 268-84.

102. See *Eisentrager*, 339 U.S. at 780-81.

103. See The Declaration of Independence para. 2 (U.S. 1776).

104. See U.S. CONST. amend. V ("No person shall be . . . deprived of life, liberty, or property, without due process of law.").

105. See *supra* text accompanying note 89.

106. U.S. CONST. amend. VI.

107. 195 U.S. 138 (1904).

108. *Id.* at 139.

109. 234 U.S. 91 (1914) (discussed *supra* text accompanying notes 56-61).

110. *Dorr*, 195 U.S. at 149.

The *Balzac v. Porto Rico* Court reached a similar result.¹¹¹ There, the Court had occasion to consider whether the right to jury trial under both the Sixth Amendment and Article III applied in the territorial possession of Puerto Rico.¹¹² Following the precedent of *Dorr* and *Hawaii v. Mankichi*,¹¹³ the Court held that the right to jury trial did not apply to territorial possessions that had “not been incorporated into the Union.”¹¹⁴ Strikingly, the defendant in *Balzac* was an American citizen.¹¹⁵ In rejecting the defendant’s claim that his citizenship entitled him to a jury trial, the Court stated “[i]t is locality that is determinative of the application of the Constitution, in such matters as judicial procedure, and not the status of the people who live in it.”¹¹⁶ Thus, not only is the Sixth Amendment limited in extra-territorial application to aliens, but apparently not even U.S. citizenship can trigger its application outside the Union.

Applying this rule to the Detainees, it seems apparent that most of them have no right to a jury trial. If that right does not attach in U.S. territorial possessions, it certainly cannot be mandated on foreign soil. So long as they are interned outside the United States, the Sixth Amendment’s jury provision will not apply, and a challenge based thereon will not be effective to prevent their trial by military commission.

The answer to whether the remaining rights granted under the Sixth Amendment apply outside the United States is murkier.¹¹⁷ *Balzac* and *Dorr* only addressed the right to jury trial. Similarly, *Mankichi* also refused to extend the right to jury trials to the territorial possession of Hawaii.¹¹⁸ However, *Mankichi* explained that the determinative factor in deciding which constitutional rights extended automatically to U.S. territory was whether the right was fundamental or procedural.¹¹⁹ That question is a topic unto itself and resolving it is beyond the scope of this note. On its face, however, all the provisions of the Sixth Amendment appear at least as procedural in nature as the cherished right to trial by an impartial jury. Additionally, the Presidential Order specifically states that anyone tried by military commis-

111. 258 U.S. 298 (1922).

112. *Id.* at 304-05.

113. 190 U.S. 197 (1903).

114. *See Balzac*, 258 U.S. at 304-05.

115. *See id.* at 304.

116. *Id.* at 309. *Contra Reid v. Covert*, 354 U.S. 1, 5-9 (1957) (rejecting the distinction between procedural and fundamental rights, and holding that the United States must abide by the procedural protections of the Fifth and Sixth Amendments whenever acting against its citizens abroad).

117. Besides the right to a public jury trial, the Sixth Amendment also establishes the right to assistance of counsel, right to confront witnesses, and the right to compel the attendance of witnesses for the defense. U.S. CONST. amend. VI.

118. *See Mankichi*, 190 U.S. at 217-18.

119. *See id.* at 218.

sions under that order shall be represented by counsel.¹²⁰ So long as that part of the Presidential Order remains unchanged, the only rights in question will be the right to confront and obtain witnesses.¹²¹ Given the resistance toward extending the Fifth and Sixth Amendments to U.S. territorial possessions, it seems extremely unlikely that any of those protections will be held to apply in Guantanamo Bay, Cuba, or anywhere else outside the United States.

2. Limitations Based on Status

Finally, any attempt to apply the Sixth Amendment to the Detainees will be further frustrated by their status as enemy aliens.¹²² Although the *Johnson v. Eisentrager* Court faced only a Fifth Amendment challenge to extraterritorial military tribunals, that Court went out of its way to make clear that “the Constitution does not confer . . . an immunity from military trial and punishment upon an alien enemy engaged in the hostile service of a government at war with the United States.”¹²³ Consequently, enemy aliens would not be heard to invoke the Sixth Amendment in order to obtain a jury trial.¹²⁴

As a result, the Sixth Amendment will not render unlawful any military trials of the Detainees. Neither lack of a jury nor deficiencies in confronting or obtaining witnesses are likely to be viewed as invalidating such military proceedings. To the extent that any reviewing court may feel that Sixth Amendment irregularities warrant overturning the results of a military trial, any constitutional basis for such a ruling must almost certainly be grounded in due process, rather than any provision of the Sixth Amendment itself.

In summary, the Detainees may expect virtually none of the procedural protections afforded under Article III of the Constitution or the Fourth, Fifth, and Sixth Amendments thereto. The extraterritorial nature of their potential offenses, their capture, and their internment renders the Fourth Amendment a nullity and eviscerates all procedural protections under the Fifth and Sixth Amendments. Their lack of rights is further reinforced by the Detainees’ alleged status as alien enemies. Virtually the only relevant constitutional protection they may possess is embodied in the Due Process Clause of the Fifth Amendment. Even under the second Justice Harlan’s expansive view,¹²⁵ due process will be defined by the laws of war as whatever

120. See Presidential Order § 4(c)(5), 66 Fed. Reg. 57,833, 57,835 (Nov. 13, 2001).

121. See U.S. CONST. amend. VI.

122. See *Johnson v. Eisentrager*, 339 U.S. 763, 785 (1950).

123. *Id.*

124. See *id.* at 782-83; see also *Ex parte Quirin*, 317 U.S. 1, 44 (1942) (denying alien enemies a right to jury trial based not on their status as aliens, but on the fact that they were charged with war crimes – offenses “constitutionally triable by military tribunal”).

125. See *supra* text accompanying note 89.

process is due an alien enemy captured on a foreign battlefield and incarcerated on foreign soil, and not the process that is due an American citizen facing criminal trial in federal district court.

IV. RIGHTS UNDER INTERNATIONAL LAW

Although the Detainees can claim virtually no protections under the United States Constitution, many of them may obtain substantial rights under international law. While additional bodies of law may apply to these prisoners, at a minimum the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 (Geneva III)¹²⁶ and the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (Geneva IV)¹²⁷ may afford them a generous body of rights particularly relevant to their incarceration and potential trials before military commissions. Included among these are the right to representation by counsel, the right to confront witnesses, and the right to present witnesses and evidence favorable to the individual Detainee.

A. General Applicability of Geneva III and IV

The provisions of both Geneva III and Geneva IV became binding on the parties to the treaties six months after they gave notice of ratification to the Swiss Federal Council.¹²⁸ Both the United States and Afghanistan were signatories to the original treaties;¹²⁹ Geneva III and Geneva IV came into force with respect to the United States on February 2, 1956.¹³⁰ Afghanistan ratified and came under the treaties on September 26, 1956.¹³¹

In addition to their application during declared wars, Geneva III and Geneva IV apply during *any armed conflict* between parties to the treaties (High Contracting Parties).¹³² Thus, regardless of whether the U.S. military incursion into Afghanistan amounts to a declared war, the provisions of these treaties apply.

126. Geneva Convention Relative to the Treatment of Prisoners of War, *done* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III].

127. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, *done* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV].

128. Geneva III, *supra* note 126, art. 138, 6 U.S.T. at 3422, 75 U.N.T.S. at 240; Geneva IV, *supra* note 127, art. 153, 6 U.S.T. at 3620, 75 U.N.T.S. at 390.

129. *See* Geneva III, *supra* note 126, art. 143, 6 U.S.T. at 3426, 3428, 75 U.N.T.S. at 242, 246; Geneva IV, *supra* note 127, art. 159, 6 U.S.T. at 3624, 3626, 75 U.N.T.S. at 392, 396.

130. *See* INTERNATIONAL COMMITTEE OF THE RED CROSS, GENEVA CONVENTIONS OF 12 AUGUST 1949 AND ADDITIONAL PROTOCOLS OF 8 JUNE 1977: RATIFICATIONS, ACCESSIONS AND SUCCESSIONS, at <http://www.icrc.org/eng> (last visited Oct. 25, 2002) [hereinafter GENEVA RATIFICATIONS].

131. *See id.*

132. Geneva III, *supra* note 126, art. 2, 6 U.S.T. at 3318, 75 U.N.T.S. at 136; Geneva IV, *supra* note 127, art. 2, 6 U.S.T. at 3518, 75 U.N.T.S. at 288. Geneva III and Geneva IV use the term "High Contracting Parties" to refer to parties bound by the particular treaty. *See generally* Geneva III, *supra* note 126; Geneva IV, *supra* note 127.

B. Prisoners of War

In order to obtain protection under Geneva III, an individual must qualify as a prisoner of war (POW).¹³³ Geneva III Article 4(A) defines a POW as one who has fallen into enemy hands and meets the following relevant criteria:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict . . . provided that [they] fulfil [sic] the following conditions:
 - a. that of being commanded by a person responsible for his subordinates;
 - b. that of having a fixed distinctive sign recognizable at a distance;
 - c. that of carrying arms openly; [and]
 - d. that of conducting their operations in accordance with the laws and customs of war.¹³⁴

Additionally, Geneva III provides that “[i]nhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units” when captured are considered POWs, “provided they carry arms openly and respect the laws and customs of war.”¹³⁵ Finally, all doubts as to whether an individual qualifies as a POW are to be resolved in favor of that person until his status “has been determined by a competent tribunal.”¹³⁶

Once a person obtains POW status, he acquires a substantial body of rights under Geneva III, including the right to protection against torture and inhumane treatment;¹³⁷ free food and medical treatment;¹³⁸ right to similar living conditions as troops of the detaining power;¹³⁹ right to be “tried only by a military court”;¹⁴⁰ protection from being “punished more than once for the same act or on the same charge”;¹⁴¹ protection from coerced confessions;¹⁴² right to counsel, right to present his defense, and right to call witnesses;¹⁴³ and finally,

133. *See generally* Geneva III, *supra* note 126.

134. *Id.* art. 4(A), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

135. *Id.* art. 4(A)(6), 6 U.S.T. at 3322, 75 U.N.T.S. at 140.

136. *Id.* art. 5, 6 U.S.T. at 3324, 75 U.N.T.S. at 140-42.

137. *Id.* arts. 13, 17, 6 U.S.T. at 3328, 3332, 75 U.N.T.S. at 146, 150.

138. *See id.* art. 15, 6 U.S.T. at 3330, 75 U.N.T.S. at 148.

139. *Id.* art. 25, 6 U.S.T. at 3338, 75 U.N.T.S. at 156.

140. *Id.* art. 84, 6 U.S.T. at 3382, 75 U.N.T.S. at 200. This rule is subject to the exception that POWs may be tried by civilian courts if existing laws of the detaining power “expressly permit the civil courts to try a member of the armed forces” of the detaining power for the offense alleged to have been committed by the POW. *See id.*

141. *Id.* art. 86, 6 U.S.T. at 3384, 75 U.N.T.S. at 202.

142. *Id.* art. 99, 6 U.S.T. at 3392, 75 U.N.T.S. at 210.

143. *Id.* arts. 99, 105, 6 U.S.T. at 3392, 3396, 75 U.N.T.S. at 210, 214.

the right to appeal as do “members of the armed forces of the Detaining Power.”¹⁴⁴

As this list demonstrates, the POW acquires not only humanitarian rights, but a significant number of procedural rights related to trial and punishment.¹⁴⁵ Many of these rights parallel protections under the United States Constitution, which would otherwise be unavailable to alien enemies.¹⁴⁶ Although the rights defined in Geneva III have not been explored and refined by the same abundance of case law as their constitutional counterparts, the similarity in language suggests at least some parallels in application. Given the gravity of their situation, any Detainee who could successfully claim rights under Geneva III would appear far better off than his unsuccessful counterpart, who may cling to nothing but the mercy of the United States government.

1. Geneva III Applied to the Detainees

Even though Geneva III was specifically written to protect captured combatants in armed conflict, obtaining its protections may not be easy. Geneva III was written to address conventional conflicts. This purpose becomes manifest when examining the nature of combatants who qualify for POW status.¹⁴⁷ Article 4(A)(1) describes members of the *armed forces* of a belligerent as potential POWs.¹⁴⁸ In this sense, it seems to describe members of an organized, uniformed service – traditional troops on the battlefield. This view is reinforced by the descriptions of “other militias” under Article 4(A)(2), where even these less formal military units are required to be “commanded by a person responsible for his subordinates,”¹⁴⁹ to have “a fixed distinctive sign recognizable at a distance,”¹⁵⁰ to “carry arms openly,”¹⁵¹ and to conduct their operations “in accordance with the laws and customs of war.”¹⁵² In sum, these provisions seem to paint a picture of formal military units and volunteer groups who conduct themselves in at least some semblance of a traditional military manner. Conversely, they do not describe clandestine groups who hide among civilian populations with no distinctive insignia.

Overcoming these qualification hurdles will not be easy for the Detainees. Al Qaeda members who are not otherwise associated with

144. *Id.* art. 106, 6 U.S.T. at 3398, 75 U.N.T.S. at 216.

145. *See supra* text accompanying notes 140-44.

146. *Compare* Geneva III, *supra* note 126, arts. 86, 99, 105, 6 U.S.T. at 3384, 3392, 3396, 75 U.N.T.S. at 202, 210, 214, *with* U.S. CONST. amends. V, VI.

147. *See* Geneva III, *supra* note 126, art. 4, 6 U.S.T. at 3320-22, 75 U.N.T.S. at 138-40.

148. *See id.* art. 4(A)(1), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

149. *Id.* art. 4(A)(2)(a).

150. *Id.* art. 4(A)(2)(b).

151. *Id.* art. 4(A)(2)(c).

152. *Id.* art. 4(A)(2)(d).

Afghanistan face the biggest challenge. First, the question arises whether al Qaeda can be considered a “Party to the conflict.”¹⁵³ Generally speaking, Geneva III appears to be directed at governments or similar political entities.¹⁵⁴ It speaks in terms of Governments,¹⁵⁵ Powers,¹⁵⁶ Parties,¹⁵⁷ and High Contracting Parties.¹⁵⁸ The treaty makes reference to a Party’s territory.¹⁵⁹ Since holding territory is an inherently political endeavor, suggesting conquest and sovereignty, this example further supports the conclusion that Geneva III is concerned with political entities and not private organizations. Therefore, although al Qaeda appears to be a private terrorist organization pursuing political objectives, the fact that al Qaeda claims no territory and does not seek to establish its own sovereignty strongly suggests that al Qaeda will not be considered a Party to the conflict under Geneva III. Accordingly, its members will not qualify as POWs under Article 4(A)(1) because they are not part of the armed forces of a Party to the conflict.¹⁶⁰

Similarly, al Qaeda members face insurmountable criteria under Article 4(A)(2). Assuming Afghanistan’s Taliban government does qualify as a “Party to the conflict,”¹⁶¹ al Qaeda’s association with the Taliban may qualify the former as a militia “belonging to a Party to the conflict.”¹⁶² Thus, al Qaeda members might meet the threshold criteria for POW status under Article 4(A)(2). However, the typical al Qaeda member would appear to fall short on the requirement to wear “a fixed distinctive sign recognizable at a distance.”¹⁶³ Moreover, even if some part of the al Qaeda garb were sufficiently recognizable to satisfy this requirement, the real Achilles’ heel for al Qaeda is the requirement to conduct its operations “in accordance with the laws and customs of war.”¹⁶⁴

One of the bedrock principles of conduct under the laws and customs of war is that belligerents must not attack civilian targets without a compelling military necessity.¹⁶⁵ Conversely, while modern interna-

153. *Id.* art. 4(A)(1).

154. *See generally* Geneva III, *supra* note 126.

155. *See id.* pmbll., 6 U.S.T. at 3318, 75 U.N.T.S. at 136.

156. *See, e.g., id.* art. 2.

157. *See, e.g., id.* art. 4, 6 U.S.T. at 3320-22, 75 U.N.T.S. at 138-40.

158. *See, e.g., id.* art. 1, 6 U.S.T. at 3318, 75 U.N.T.S. at 136.

159. *See, e.g., id.* art. 4(A)(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

160. *See id.* art. 4(A)(1).

161. *Id.* art. 4(A)(2).

162. *Id.*

163. *Id.* art. 4(A)(2)(b).

164. *Id.* art. 4(A)(2)(d).

165. *See* Convention Respecting the Laws and Customs of War on Land, *done* Oct. 18, 1907, Annex, art. 25, 36 Stat. 2277; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *adopted* June 8, 1977, art. 13(2), 1125 U.N.T.S. 609; Rome Statute of the International Criminal Court, *adopted* July 17, 1998, art. 8(2)(b)(i), 37 I.L.M. 999, 1006; 2 WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 778 (Legal Classics Library ed. 1988) (1886).

tional law faced a dilemma in the inability to define terrorism,¹⁶⁶ the very essence of this crime seems to involve attacks on unsuspecting civilians.¹⁶⁷ Accordingly, given the general conduct of al Qaeda's operations, punctuated by the burning image of civilian carnage from the World Trade Center, there is simply no way that al Qaeda will ever satisfy the criteria for operating according to the laws of war.¹⁶⁸ Thus, its members will not qualify for POW status under Article 4(A)(2).

Finally, POW status will elude most al Qaeda members under Article 4(A)(6). That provision affords POW status to inhabitants who spontaneously arm themselves to repel invaders, requiring only that they "carry arms openly and respect the laws and customs of war."¹⁶⁹ Al Qaeda members fail to satisfy this provision on several counts.

First, al Qaeda members did not spontaneously arm themselves to repel the U.S. forces. Instead, they were already an armed paramilitary terrorist group. Furthermore, Geneva III states that individuals under this provision must not have "had time to form themselves into regular armed units."¹⁷⁰ By contrast, this description does not fit al Qaeda, which appears to have had a definite organizational structure consisting of at least a senior leadership group overseeing individual terrorist groups or cells in various countries throughout the world.¹⁷¹ Moreover, this structure was well established prior to the onset of armed conflict.¹⁷² Consequently, al Qaeda members will not obtain POW status under Article 4(A)(6). Indeed, the language of this provision paints a picture of the civilian resident who simply takes up arms to defend his homeland from surprise attack by marauding invaders. It was not intended to protect international terrorists or similar paramilitary groups from the consequences of their unlawful activities.

In summary, al Qaeda members captured as a result of the American military operation in Afghanistan should not be considered POWs under Geneva III. Virtually the only chance they have to obtain POW status is if America recognizes al Qaeda as a Party to the conflict. Given Geneva III's focus on governments and political entities, a private terrorist organization not affiliated with any governing body should not qualify as a Party under that treaty. Thus, captured

166. See KRIANGSAK KITTICHAISAREE, *INTERNATIONAL CRIMINAL LAW* 227 (2001).

167. See *id.*

168. See Geneva III, *supra* note 126, art. 4(A)(2)(d), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

169. See *id.* art. 4(A)(6), 6 U.S.T. at 3322, 75 U.N.T.S. at 140.

170. *Id.*

171. See David Ignatius, *The 'Sleepers' Among Us*, *WASH. POST*, Nov. 18, 2001, at B7, 2001 WL 30326540.

172. See *id.*

al Qaeda members are left without the protection afforded by Geneva III.¹⁷³

By contrast, Detainees who are members of Afghanistan's Taliban militia stand in a somewhat more favorable position under Geneva III. Since the Taliban was the ruling party of a signatory to the Geneva Conventions, the Taliban certainly appear to qualify as a "Party to the conflict."¹⁷⁴ Although the United States tried to deny the legitimacy of the Taliban forces by labeling them as "unlawful combatants,"¹⁷⁵ that argument seems tenuous. Though the Taliban may lack the military formality implied under Article 4(A)(1), it certainly appears to meet the threshold criteria of "other militia . . . belonging to a Party to the conflict" embodied in Article 4(A)(2).¹⁷⁶ It follows that the primary hurdles the group must clear in order to qualify its captured members as POWs are that of wearing a "fixed distinctive sign recognizable at a distance,"¹⁷⁷ and conducting its operations "in accordance with the laws and customs of war."¹⁷⁸

The requirement of a fixed distinctive sign may be easier to satisfy than first appears. Although the Taliban never appeared in a modern military uniform, numerous news reports repeatedly made reference to the distinctive garb they wore.¹⁷⁹ The black turban seemed to be a primary Taliban symbol.¹⁸⁰ Therefore, so long as the evidence continues to support the distinctive nature of their attire, the Taliban may be able to satisfy that element of Article 4.

The real question to be answered regarding the Taliban is whether it followed the laws of war. Initially, one might think that the brutal nature of Taliban rule in Afghanistan would militate against them on this issue. However, while the Taliban mistreatment of other Afghan people might constitute crimes against humanity or similar of-

173. For a similar conclusion, see *Respect for Human Rights in Armed Conflicts: Report of the Secretary-General*, U.N. GAOR, 25th Sess., Agenda Item 47, at 57, U.N. Doc. A/8052 (1970); *Respect for Human Rights in Armed Conflicts: Report of the Secretary-General*, U.N. GAOR, 24th Sess., Agenda Item 61, at 53-55, U.N. Doc. A/7720 (1969). In both these reports, the United Nations lamented the fact that guerrillas almost never qualify for POW status under Geneva III. Assuming that terrorism is simply a narrower subset of guerrilla warfare, these United Nations reports make clear that groups like al Qaeda will never qualify as POWs in an international armed conflict.

174. See Geneva III, *supra* note 126, art. 4(A)(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

175. See *The Laws of War, They Aren't POWs*, WASH. POST, Mar. 3, 2002, at B3, 2002 WL 15842375; Tom Jackman, *Judge Turns Down Lindh's Challenges*, WASH. POST, June 18, 2002, at B5, 2002 WL 22781836.

176. Geneva III, *supra* note 126, art. 4(A)(2), 6 U.S.T. at 3320, 75 U.N.T.S. at 138.

177. *Id.* art. 4(A)(2)(b).

178. *Id.* art. 4(A)(2)(d).

179. See, e.g., Pamela Constable, *Kandahar Recovers Its Pre-Taliban Personality; Birds, Kites and Opium Again for Sale; Even Prisoners Feel a Sense of Freedom*, WASH. POST, Jan. 24, 2002, at A15, 2002 WL 10942829; Karl Vick, *Rout in Desert Marked Turning Point of War; U.S. Firepower Decimated Taliban at Tarin Kot*, WASH. POST, Dec. 31, 2001, at A1, 2001 WL 32202247.

180. See, e.g., Mary Beth Sheridan, *Looking Dapper is Old Hat For Kabul's Power Players*, WASH. POST, May 20, 2002, at A13, 2002 WL 20710780.

fenses against international law,¹⁸¹ this conduct probably does not constitute an offense against the narrower laws of war.¹⁸² The laws of war have historically applied to armed conflicts between warring factions,¹⁸³ not to oppressive conduct by a government toward its own people.¹⁸⁴ Therefore, unless the United States can point to specific, unlawful Taliban policies or conduct that occurred during the American military campaign, the Taliban should qualify as a militia that followed the laws of war. As a result, captured Taliban members should qualify for POW status under Geneva III.

To summarize, Geneva III defines the rights and qualifications of POWs under international law. Detainees associated with the terrorist organization al Qaeda should not qualify as POWs because they fail to satisfy several of the elements under Geneva III Article 4. On the other hand, captured members of the Taliban militia probably will obtain POW status, due largely to the relationship between that militia and the government of Afghanistan at the beginning of the conflict. In so qualifying, they will obtain the right to counsel, to confront and compel witnesses, and to appeal results of military trials, as well as protection from torture and coerced confessions, along with many other valuable humanitarian and procedural rights that may have a significant effect on their internment and any future military trials they may face.

C. *Protecting Terrorists as Civilians*

Geneva IV provides rules for protecting civilians during armed conflict.¹⁸⁵ This convention generally applies to persons who, “at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict . . . of which they are not nationals.”¹⁸⁶ While these words are broad enough to encompass all persons, even combatants, who are captured in armed conflict, Geneva IV goes on to exempt from its provisions anyone who qualifies for protection under the other Geneva Conventions of 1949.¹⁸⁷ Furthermore, Geneva IV Article 4 excludes “[n]ationals of a State which is not bound by [Geneva IV],”¹⁸⁸ as well as “[n]ationals

181. See generally KITTICHAISAREE, *supra* note 166, at 85-126.

182. See *id.* at 129.

183. See 2 WINTHROP, *supra* note 165, at 773.

184. See KITTICHAISAREE, *supra* note 166, at 129. On the other hand, some internal conflicts can rise to a level where the laws of war will apply. See *id.* at 131. However, that level requires something akin to a civil war or similar, non-trivial state of internal hostilities. See *id.* Thus, the laws of war may well have applied to the Taliban’s conflict with the Northern Alliance, but not to the Taliban’s oppression of its female population.

185. See generally Geneva IV, *supra* note 127.

186. *Id.* art. 4, 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

187. See *id.*

188. *Id.*

of a neutral State who find themselves in the territory of a belligerent State,”¹⁸⁹ so long as the neutral State maintains normal diplomatic relations with the Detaining Power.¹⁹⁰ Finally, Geneva IV Part II provides a special subset of basic humanitarian rights that apply to “the whole of the populations of the countries in conflict,”¹⁹¹ regardless of nationality, thus providing a limited exception to the exclusions discussed above.¹⁹²

Anyone who qualifies as a protected person under Geneva IV acquires a substantial body of rights. Aside from the abundant humanitarian rights, the procedural rights that may be particularly important to the Detainees include various limitations on capital punishment;¹⁹³ immunity from prosecution for any offense committed prior to occupation of the defeated State, except for violations “of the laws and customs of war”;¹⁹⁴ right to a formal trial;¹⁹⁵ right to counsel, to present evidence and to call witnesses;¹⁹⁶ right to appeal;¹⁹⁷ and finally, the right to be detained *only* in the occupied country and, if convicted, to be imprisoned there.¹⁹⁸

In an attempt to secure these rights for guerrilla combatants, the United Nations issued reports in 1969 and 1970 suggesting that guerrillas qualified as protected persons under Geneva IV.¹⁹⁹ In further support of the conclusion that terrorist groups such as al Qaeda will not qualify as POWs under Geneva III, these United Nations reports lamented the fact that guerrillas failed to satisfy the requirements for POWs articulated in Geneva III.²⁰⁰ Given that the Detainees have virtually no relevant rights under the Constitution, and most will not find protection under Geneva III, their last hope may lie in Geneva IV.

189. *Id.*

190. *See id.*; *see also* INTERNATIONAL COMMITTEE OF THE RED CROSS, COMMENTARIES: CONVENTION (IV) RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR. GENEVA, 12, AUGUST 1949, ARTICLE 4 at <http://www.icrc.org/eng> (“[N]ationals of a neutral State in the territory of a Party to the conflict are only protected persons if their State has no normal diplomatic representation in the State in whose hands they are.”) (last visited Oct. 25, 2002).

191. Geneva IV, *supra* note 127, art. 13, 6 U.S.T. at 3526, 75 U.N.T.S. at 296.

192. *See id.*, pt. II, 6 U.S.T. at 3526-36, 75 U.N.T.S. at 296-306; *supra* text accompanying notes 187-90.

193. *See* Geneva IV, *supra* note 127, arts. 68, 75, 6 U.S.T. at 3560, 3564-66, 75 U.N.T.S. at 330, 334-36.

194. *See id.* art. 70, 6 U.S.T. at 3562, 75 U.N.T.S. at 332.

195. *See id.* art. 71.

196. *See id.* art. 72, 6 U.S.T. at 3562-64, 75 U.N.T.S. at 332-34.

197. *See id.* art. 73, 6 U.S.T. at 3564, 75 U.N.T.S. at 334.

198. *See id.* art. 76, 6 U.S.T. at 3566, 75 U.N.T.S. at 336.

199. *See Respect for Human Rights in Armed Conflicts: Report of the Secretary-General*, U.N. GAOR, 25th Sess., Agenda Item 47, at 57, U.N. Doc. A/8052 (1970); *Respect for Human Rights in Armed Conflicts: Report of the Secretary-General*, U.N. GAOR, 24th Sess., Agenda Item 61, at 54, U.N. Doc. A/7720 (1969).

200. *See Respect for Human Rights in Armed Conflicts: Report of the Secretary-General*, U.N. GAOR, 25th Sess., Agenda Item 47, at 53, U.N. Doc. A/8052 (1970); *Respect for Human Rights in Armed Conflicts: Report of the Secretary-General*, U.N. GAOR, 24th Sess., Agenda Item 61, at 54, U.N. Doc. A/7720 (1969).

1. Geneva IV Applied to the Detainees

Unfortunately for al Qaeda members, whatever the glimmer of hope they may find in Geneva IV, that hope will most likely elude them. Geneva IV provides protection almost exclusively to nationals of a *state* involved in the conflict.²⁰¹ Since Afghanistan was the only state engaged against the United States, Geneva IV generally excludes non-Afghan members of al Qaeda. In order to qualify for an exception to this general rule, a detained al Qaeda member must belong to a State which is bound by Geneva IV, but which does not maintain normal diplomatic relations with the United States.²⁰² Ironically, both Iran and Iraq fit that description.²⁰³ Thus, Iraqi or Iranian al Qaeda members appear to qualify for protection under the express terms of Geneva IV, even if they were actively engaged in combat operations against U.S. forces.²⁰⁴ Most other non-Afghan members of al Qaeda fail to qualify for the general protections of Geneva IV; however, they do hold the basic humanitarian rights guaranteed to all persons under Geneva IV Part II.²⁰⁵

On the other hand, Afghan nationals should easily find protection under either Geneva III or IV. Whether an Afghan Detainee is Taliban, al Qaeda or otherwise, any who fail to qualify under Geneva III should fall squarely within the framework provided by Geneva IV Article 4, since none of the exceptions discussed therein apply.²⁰⁶

In conclusion, Geneva III and IV provide valuable humanitarian and procedural rights that would greatly benefit any Detainee faced with military trial. Preeminent among these are the right to assistance of counsel, to call and confront witnesses, and to appeal the outcome of military trials. Obtaining these rights should be relatively easy for Afghan nationals, who fall well within the broad scope of Geneva IV, even if they fail to qualify as POWs under Geneva III. Conversely, most non-Afghans who are associated with al Qaeda will almost cer-

201. See Geneva IV, *supra* note 127, art. 4, 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

202. See *id.*; see also *supra* note 190.

203. See GENEVA RATIFICATIONS, *supra* note 130 (showing that both Iran and Iraq have come under the Geneva Conventions); U.S. DEP'T OF STATE, INDEPENDENT STATES IN THE WORLD, at http://www.state.gov/www/regions/independent_states.html (last visited Oct. 25, 2002) (showing that neither Iran nor Iraq maintain diplomatic relations with the United States). Other countries that are bound by Geneva IV, but that do not maintain normal diplomatic relations with the United States, include Cuba, North Korea, and Bhutan. See GENEVA RATIFICATIONS, *supra* note 130; U.S. DEP'T OF STATE, INDEPENDENT STATES IN THE WORLD, *supra*.

204. See Geneva IV, *supra* note 127, art. 4, 6 U.S.T. at 3520, 75 U.N.T.S. at 290. Although the United States may limit some of the rights that Geneva IV purports to grant to spies and others who pose security risks, Geneva IV expressly states that trial rights may not be limited. See *id.* art. 5, 6 U.S.T. at 3520-22, 75 U.N.T.S. at 290-92.

205. See *id.* art. 13, 6 U.S.T. at 3526-28, 75 U.N.T.S. at 296-98.

206. See *id.* art. 4, 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

tainly fail to qualify under Geneva III or Geneva IV.²⁰⁷ Finally, in order to determine which Detainees qualify for protection under the Geneva conventions, the United States must consider each Detainee individually. The criteria for protection under Geneva III and IV are *individual requirements*;²⁰⁸ therefore, the United States may not decide the applicability of the conventions on a group basis. Fundamental fairness suggests that these determinations should include formal hearings whereby the American military compiles a defensible record on which the status of each Detainee is based. Only by these or similar formal methods may the United States maintain the credibility of these detentions and, potentially, future military trials. And only in this manner may the United States maintain its honor and fulfill its creed to administer justice through due process.

V. HABEAS CORPUS: ENFORCING RIGHTS IN THE FEDERAL COURTS

While the rights held by the Guantanamo Detainees may be limited, they are not non-existent. They may possess some right to due process under the United States Constitution, as well as substantial rights under international law. Thus, the question arises as to how these rights may be enforced.

Some violations are addressed through the appellate process; but in military law, that process is almost exclusively an executive function²⁰⁹ with no appellate review by civilian courts.²¹⁰ Additionally, the Geneva Conventions contemplate oversight by neutral third parties called "Protecting Powers,"²¹¹ as well as by humanitarian groups such as the International Committee of the Red Cross.²¹² But the ability of these groups to influence the conduct of an international superpower like the United States must be considered quite limited.

On the other hand, the Detainees do have one extremely potent enforcement mechanism, one that they must invoke if they hope to protect the precious few rights that they may hold: the writ of habeas corpus.²¹³ Historically known as "the Great Writ,"²¹⁴ habeas corpus

207. However, they should qualify for the basic human rights provided under Geneva IV Part II; but, these provisions contain no procedural rights applicable to military trials. *See generally* Geneva IV, *supra* note 127, pt. II, 6 U.S.T. at 3526-36, 75 U.N.T.S. at 296-306.

208. *See, e.g.*, Geneva III, *supra* note 126, art. 4, 6 U.S.T. at 3320-22, 75 U.N.T.S. at 138-40; Geneva IV, *supra* note 127, art. 4, 6 U.S.T. at 3520, 75 U.N.T.S. at 290.

209. *See, e.g.*, Presidential Order § 7(b) 66 Fed. Reg. 57,833, 57,835-36 (Nov. 13, 2001); *cf.* UCMJ arts. 16-21, 10 U.S.C. §§ 816-21 (1998).

210. *See Burns v. Wilson*, 346 U.S. 137, 140 (1953); *Hiatt v. Brown*, 339 U.S. 103, 111 (1950); *Duncan v. Kahanamoku*, 327 U.S. 304, 309 (1946); *United States v. Grimley*, 137 U.S. 147, 150 (1890).

211. Geneva III, *supra* note 126, art. 10, 6 U.S.T. at 3326, 75 U.N.T.S. at 144.

212. *See id.* art. 9, 6 U.S.T. at 3324-26, 75 U.N.T.S. at 142-44.

213. *See* 28 U.S.C. § 2241 (1994).

214. *Scaggs v. Larsen*, 396 U.S. 1206, 1208 (Douglas, Circuit Justice 1969).

ad subjiciendum has served for centuries as a key tool to challenge unlawful incarcerations and to enforce prisoners' rights.²¹⁵

Unfortunately for the Detainees, however, American courts have appeared reluctant to flex their habeas muscle in proceedings involving alien enemies.²¹⁶ One reason is because the scope of review in military cases is necessarily narrow.²¹⁷ In considering a petition for writ of habeas corpus arising in a military case, the reviewing court considers only whether the military court has jurisdiction over the person and whether it has the authority to try the offense charged.²¹⁸ Once these elements are satisfied, the federal court goes no further; questions regarding whether the outcome of the military proceeding was correct are beyond the federal court's scope of review.²¹⁹ In the leading cases,²²⁰ the fact that petitioners were alien enemies charged with war crimes was not seriously in dispute. Accordingly, they were squarely within the purview of military tribunals and the federal court's inquiry was complete.²²¹ Issues of unconstitutional procedures were generally dismissed on grounds of extraterritoriality²²² or inapplicability to alien enemies.²²³ Attempts to enforce provisions of the Geneva Convention of 1929 were rejected on the grounds that the cited provisions were not applicable to war crimes,²²⁴ and that enforcement of the treaty's terms was a foreign relations matter not within the authority of the federal courts.²²⁵ Still, even with all this precedent apparently weighing against habeas review, significant opportunities exist, and indeed should exist, for the federal courts to perform their part of the checks and balances function and ensure that justice is administered properly to all people, even alien enemies.²²⁶

215. *See id.*

216. *See, e.g.,* Johnson v. Eisentrager, 339 U.S. 763, 780 (1950); Hirota v. MacArthur, 338 U.S. 197, 198 (1948); Application of Yamashita, 327 U.S. 1, 26 (1946); *Ex parte* Quirin, 317 U.S. 1, 48 (1942).

217. Burns v. Wilson, 346 U.S. 137, 139 (1953).

218. *See Eisentrager*, 339 U.S. at 786-87; *Quirin*, 317 U.S. at 29; United States v. Grimley, 137 U.S. 147, 150 (1890).

219. *See Burns*, 346 U.S. at 144.

220. *See supra* note 216.

221. *See, e.g., Eisentrager*, 339 U.S. at 786-87.

222. *See, e.g., id.* at 778.

223. *See, e.g., id.* at 785.

224. *See id.* at 790; Application of Yamashita, 327 U.S. 1, 24 (1946).

225. *See Eisentrager*, 339 U.S. at 789 n.14.

226. For a basis that may support a contrary viewpoint, consider *Yamashita*, 327 U.S. at 11, where the Court observed "[t]he trial and punishment of enemy combatants who have committed violations of the law of war is . . . a part of the conduct of war." Since the Constitution declares the President as Commander-in-Chief of the armed forces, waging war is almost exclusively an executive function. *See* U.S. CONST. art. II, § 2, cl. 1; *see also Eisentrager*, 339 U.S. at 789 ("Certainly it is not the function of the Judiciary to entertain private litigation . . . which challenges the legality, the wisdom, or the propriety of the Commander-in-Chief in sending our armed forces abroad."). Combining the constitutional provision with the *Yamashita* quote, one may argue that the President holds plenary authority to try enemy aliens accused of war crimes. Thus, the federal courts have no authority to review the actions of military tribunals, not even on petition for writ of habeas corpus. However, even *Eisentrager* and *Yamashita* reject that notion.

A. Scope of Habeas Review

Under 28 U.S.C. § 2241, federal courts have authority to issue writs of habeas corpus on behalf of prisoners who are in custody “in violation of the Constitution or laws or treaties of the United States.”²²⁷ Furthermore, federal courts have consistently extended habeas corpus to consider the jurisdiction of military proceedings.²²⁸ Review is generally limited to ensuring that the person is one properly subject to trial by military courts and that the charge is one cognizable by military tribunal.²²⁹ However, under certain circumstances, a federal court can expand the scope of habeas review beyond these traditional boundaries.

One such expansion of review may occur when the petition for habeas corpus alleges that petitioner’s trial or incarceration violated the Constitution.²³⁰ Yet this expansion does not occur as a matter of course.²³¹ In a manner similar to exhaustion of administrative remedies, petitioner must first make his claims for review within the military justice system.²³² Once that process is complete, federal courts may consider petitioner’s claims, *but only if* the military courts have refused to provide fair consideration of the allegations.²³³ Under those circumstances, the federal court can perform a *de novo* review of petitioner’s claims.²³⁴ If, on the other hand, the military courts have given claimant a fair hearing on the allegations presented, the federal court may not re-examine the evidence to consider whether the outcome was correct.²³⁵ Thus, given the great deference afforded military proceedings by our federal courts, coupled with the narrow grounds for *de novo* review described here, expanding federal review beyond ensuring the jurisdiction of the military tribunals seems problematic.

Yet, 28 U.S.C. § 2241 grants federal courts the authority to issue writs of habeas corpus when prisoners allege violations of *treaties*.²³⁶ While the Constitution may afford these Detainees nothing more than

In both those cases the Court considered whether any basis existed for the writ. Accordingly, the fact that the Court even went through the exercise of considering the writ of habeas corpus demonstrates that habeas requests should not be rejected simply on the mistaken notion that the military holds absolute authority to try accused war criminals.

227. 28 U.S.C. § 2241(c)(3) (1994).

228. See generally *Hiatt v. Brown*, 339 U.S. 103 (1950); *Eisentrager*, 339 U.S. 763; *Yamashita*, 327 U.S. 1; *Duncan v. Kahanamoku*, 327 U.S. 304 (1946); *Ex parte Quirin*, 317 U.S. 1 (1942).

229. See *Hiatt*, 339 U.S. at 111; *Yamashita*, 327 U.S. at 8; *United States v. Grimley*, 137 U.S. 147, 150 (1890); see also *Kahanamoku*, 327 U.S. at 313-14; *Quirin*, 317 U.S. at 25, 29, 31.

230. See *Burns v. Wilson*, 346 U.S. 137, 139 (1953).

231. See *id.* at 144.

232. See *id.* at 140-42.

233. See *id.* at 142.

234. *Id.*

235. *Id.* at 144.

236. 28 U.S.C. § 2241(c)(3) (1994).

a promise of due process,²³⁷ the Geneva Conventions may provide some of them with significant rights that could substantially influence their incarceration and military trials.²³⁸ Thus, the Detainees covered by these treaties must focus on securing the writ of habeas corpus in order to have their status as POWs or protected persons determined, as well as to enforce any rights that may attach as a result of that status.

B. *Overcoming Obstacles to Habeas Review*

The Detainees' first obstacle in obtaining habeas review is the United States Supreme Court, which has historically held that the Geneva Conventions were not enforceable by federal courts, but only by the political branches of the various governments involved.²³⁹ However, that conclusion stands on extremely shaky ground. First, 28 U.S.C. § 2241 expressly grants federal courts the authority to consider habeas petitions based on treaty violations.²⁴⁰ This authority dates back to 1867 when treaties were first added as a basis for habeas review.²⁴¹ Furthermore, the Geneva Convention of 1929 is clearly a treaty, else why would it have been ratified by the United States Senate?²⁴² Treaties are the only international agreement that the Constitution authorizes the Senate to ratify.²⁴³ Thus, the Court's decision to avoid enforcing the Geneva Convention of 1929 must have been based on some other factor.

Indeed, the Court concluded that the primary reason it would not enforce the Geneva Convention of 1929 was that the treaty *itself* contemplated enforcement by the political branches of the various parties involved.²⁴⁴ To the extent that was an accurate assessment of the treaty, and not an abdication of responsibility, the conclusion fails under Geneva III. There, new provisions were added that imply greater responsibility upon the Parties to police themselves.²⁴⁵

First, Geneva III Article 1 states "[t]he High Contracting Parties undertake to respect and *to ensure respect* for the present Convention in all circumstances."²⁴⁶ While the obligation "to respect" the Convention may operate as a simple pledge to abide by its terms, the obli-

237. See *supra* text accompanying notes 74-105.

238. See *supra* text accompanying notes 137-44 and 193-98.

239. See *Johnson v. Eisentrager*, 339 U.S. 763, 789 n.14 (1950).

240. 28 U.S.C. § 2241(c)(3).

241. See Act of Feb. 5, 1867, ch. 28, 14 Stat. 385.

242. See Geneva Convention Relative to the Treatment of Prisoners of War, *done* July 27, 1929, 47 Stat. 2021 [hereinafter Geneva Convention of 1929].

243. See U.S. CONST. art. II, § 2, cl. 2.

244. See *Eisentrager*, 339 U.S. at 789 n.14.

245. See Geneva III, *supra* note 126, art. 1, 129, 6 U.S.T. at 3318, 3418, 75 U.N.T.S. at 136, 236.

246. *Id.* art. 1, 6 U.S.T. at 3318, 75 U.N.T.S. at 136 (emphasis added).

gation “to ensure respect” implies something more: a duty to take actions necessary to ensure that your own nation abides by the agreement. Congress did precisely that in 28 U.S.C. § 2241, which authorizes the federal courts to prohibit incarcerations that violate treaties.²⁴⁷

Furthermore, Geneva III Article 129 requires that “[e]ach High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention.”²⁴⁸ Thus, in even more explicit terms than Article 1, this article places an affirmative duty on the United States government to enforce the terms of Geneva III. Which branch of the United States government is normally charged with ensuring incarcerations do not violate *treaties*? Again, 28 U.S.C. § 2241 lays that responsibility squarely at the feet of the federal courts.²⁴⁹ Therefore, based on the plain text of 28 U.S.C. § 2241, as well as new provisions added under Geneva III, federal courts do have both the authority and the responsibility to ensure that the United States does not violate Geneva III.²⁵⁰

The next obstacle to obtaining habeas review for the Detainees is that prior Supreme Court cases have interpreted similar provisions of the older Geneva Convention of 1929²⁵¹ to be inapplicable to trials for war crimes.²⁵² These cases held that the Geneva provisions affecting military trial of POWs pertained only to trials for offenses committed *while they were POWs*.²⁵³ Thus, those provisions were inapplicable to trials for war crimes committed prior to capture.²⁵⁴

247. See 28 U.S.C. § 2241(c)(3) (1994).

248. Geneva III, *supra* note 126, art. 129, 6 U.S.T. at 3418, 75 U.N.T.S. at 236.

249. 28 U.S.C. § 2241(c)(3).

250. See *United States v. Noriega*, 808 F. Supp. 791, 802-03 (S.D. Fla. 1992) (enforcing Geneva III regarding conditions of incarceration for former Panamanian dictator, General Manuel Noriega). With resounding clarity, the court stated “this Court believes Geneva III is self-executing and provides General Noriega with a right of action in a U.S. court for violation of its provisions.” *Id.* at 794. *But see* *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 809 (D.C. Cir. 1984) (Bork, Circuit J., concurring) (concluding that Geneva III and IV are not self-executing). *Tel-Oren* contained a per curiam opinion, followed by an individual concurrence from each of the three judges on the panel. The per curiam opinion did not address the self-executing nature of the Geneva Conventions. See *generally id.* Unlike *Noriega*, where a prisoner was seeking to assert individual rights under Geneva III, *Tel-Oren* involved plaintiffs seeking damages for acts of terrorism conducted by the Palestinian Liberation Organization. See *id.* at 776. In that context, Judge Bork found that Geneva III and IV did not create private rights of action for damages against foreign governments. See *id.* at 809. In so concluding, Judge Bork reasoned that the relevant provisions did not “speak in terms of individual rights but impose[d] obligations on nations.” *Id.* However, in the context of the Detainees, Geneva III and IV expressly deal with individual rights of POWs and detained civilians. See *generally* Geneva III, *supra* note 126; Geneva IV, *supra* note 127. Based on Judge Bork’s reasoning, both Geneva III and IV would be self-executing relative to Detainees seeking protection of their individual rights. Thus, the conclusion in *Noriega* that Geneva III is self-executing appears consistent with Judge Bork’s reasoning in *Tel-Oren*.

251. Geneva Convention of 1929, *supra* note 242, at 2021.

252. See *Johnson v. Eisentrager*, 339 U.S. 763, 790 (1950); *Application of Yamashita*, 327 U.S. 1, 24 (1946).

253. See *Eisentrager*, 339 U.S. at 790; *Yamashita*, 327 U.S. at 24.

254. See *Eisentrager*, 339 U.S. at 790; *Yamashita*, 327 U.S. at 24.

While those interpretations may have been reasonable for the Geneva Convention of 1929, they are manifestly incorrect under Geneva III. Geneva III Article 85 makes this clear by declaring, “[p]risoners of war prosecuted . . . for acts *committed prior to capture* shall retain, even if convicted, the benefits of the present Convention.”²⁵⁵ This provision was inserted in the midst of the articles covering rights and procedures that apply when a POW is subjected to military trial. It establishes that Geneva III intends these rules to apply in all cases, whether the trial is for offenses committed while a POW *or* for war crimes committed prior to capture. No such provision existed in the Geneva Convention of 1929, under which *Johnson v. Eisentrager*²⁵⁶ and *Application of Yamashita*²⁵⁷ were decided.²⁵⁸ Hence, even assuming that *Eisentrager* and *Yamashita* properly concluded that the 1929 Geneva Convention did not apply to trials for war crimes committed prior to capture, those decisions become inapposite under Geneva III Article 85, which expressly includes pre-capture offenses within the purview of the Convention. It follows that if any Detainee can obtain POW status, he should be able to enforce rights and procedures under Geneva III through the mechanism of habeas corpus.

Finally, perhaps the biggest hurdle to obtaining habeas review is the fact that the Detainees are held outside the territorial jurisdiction of all U.S. courts.²⁵⁹ The proper rule to apply in such cases has been hotly debated over the last century.²⁶⁰ With virtually no clear guidance from the United States Supreme Court, lower federal courts have been inconsistent in resolving this perplexing question.²⁶¹

The general rule for determining jurisdiction in habeas cases is that jurisdiction lies in the district where the prisoner is in custody.²⁶²

255. Geneva III, *supra* note 126, art. 85, 6 U.S.T. at 3384, 75 U.N.T.S. at 202 (emphasis added).

256. 339 U.S. 763 (1950).

257. 327 U.S. 1 (1946). Yamashita was a Japanese general in the Philippines during World War II. *Id.* at 5. Following conviction for war crimes, Yamashita sought habeas review of his military trial. *Id.* at 4. Among other things, the United States Supreme Court rejected Yamashita's contention that the Geneva Convention of 1929 applied to his military trial, concluding that the relevant parts of the convention applied only to crimes committed while a POW. *Id.* at 24.

258. *See generally* Geneva Convention of 1929, *supra* note 242.

259. *See* Rasul v. Bush, Civ. Action No. 02-299, slip op. at 30 (D.D.C. July 31, 2002).

260. *See, e.g., Eisentrager*, 339 U.S. at 778; *Hirota v. MacArthur*, 338 U.S. 197, 200-07 (1949) (Douglas, J., concurring).

261. *Compare* White v. Tennessee, 447 F.2d 1354, 1354 (6th Cir. 1971) (requiring that petitioner be physically present within the territorial jurisdiction of the court), *and* Whiting v. Chew, 273 F.2d 885, 886 (4th Cir. 1960) (requiring that petitioner be physically present within the territorial jurisdiction of the court when the petition is filed), *with* Word v. North Carolina, 406 F.2d 352, 359 (4th Cir. 1960) (holding that petitioner need not be physically present in the district so long as custodian is present), *and* Kinnell v. Warner, 356 F. Supp 779, 781 (D. Haw. 1973) (concluding that requirement of having petitioner physically present within the district gives way to concerns of fundamental fairness and convenience).

262. *See* Ahrens v. Clark, 335 U.S. 188, 192 (1948).

However, the rule becomes more confusing when the prisoner is not held within *any* district. Under such circumstances, some courts have held that no court has jurisdiction to consider a petition for habeas corpus.²⁶³ On the other hand, some courts have held that when a prisoner is incarcerated outside U.S. territory, jurisdiction for habeas corpus lies in the district where a respondent may be found who can compel the prisoner's release.²⁶⁴ That may be the district where the custodian can be found,²⁶⁵ or, if the custodian is also outside U.S. territory, then it may be a district where someone in the custodian's chain-of-command may be found.²⁶⁶ In cases of extra-territorial imprisonment by the U.S. military, some courts have found that jurisdiction lies in the District of Columbia since both the military and civilian heads of the various services may be found there.²⁶⁷

Similarly, jurisdiction to hear the Detainees' petitions for writ of habeas corpus should properly lie in the District of Columbia. Since the Detainees are being held at a U.S. naval installation in Cuba, it would seem that proper respondents to be named in the petition might include the Chief of Naval Operations, the Secretary of the Navy, or even the Secretary of Defense. Yet, as simple as this sounds, getting a federal court to consider a habeas petition under these circumstances will likely be far from simple.

The leading case of *Johnson v. Eisentrager* creates the most trouble for the Detainees. In *Eisentrager*, a group of German soldiers convicted of war crimes by a military tribunal sought habeas corpus review in the District of Columbia.²⁶⁸ The prisoners were incarcerated in Germany, and neither their offenses nor the military proceedings occurred within U.S. territory.²⁶⁹ In its disdainful rejection of their petition, the United States Supreme Court appeared to slam the door in the face of alien enemies held abroad by the U.S. military. The Court found that in order to issue the requested writ,

we must hold that a prisoner of our military authorities is constitutionally entitled to the writ, even though he (a) is an enemy alien; (b) has never been or resided in the United States; (c) was captured outside of our territory and there held in military custody as a prisoner of war; (d) was tried and convicted by a Military Commission sitting outside the United States; (e) for offenses against the laws of

263. See, e.g., *Duncan v. Maine*, 195 F. Supp. 199, 200 (D. Me. 1961) (finding that the mere presence of the jailer or custodian was not sufficient to convey jurisdiction when the prisoner was not held within the district).

264. See, e.g., *Braden v. 30th Judicial Circuit Court of Ky.*, 410 U.S. 484, 500 (1973); *Ex parte Hayes*, 414 U.S. 1327, 1328 (Douglas, Circuit Justice 1973); *King v. Lynaugh*, 729 F. Supp. 57, 59 (W.D. Tex. 1990).

265. See *Ex parte Endo*, 323 U.S. 283, 306 (1944).

266. See *Hayes*, 414 U.S. at 1328.

267. See *id.*

268. *Johnson v. Eisentrager*, 339 U.S. 763, 765 (1950).

269. See *id.* at 765-66.

war committed outside the United States; (f) and is at all times imprisoned outside the United States.²⁷⁰

In other words, the Court seemed to take comfort in the idea that the extra-territorial nature of the case, a characteristic shared by the Guantanamo Detainees, made its decision easier. Indeed, the circumstances in *Eisentrager* at first sound remarkably similar to those of the Detainees. However, a deeper look shows that location was an ancillary fact. The real problem was that the petitioners failed to state a genuine reason why their incarceration was unlawful.

First, the prisoners claimed that the military lacked jurisdiction because they were not charged with an offense that violated the laws of war.²⁷¹ The Court quickly rejected that allegation because these men had continued military activities in violation of the terms of surrender between Germany and the Allies.²⁷² Thus, the petitioners were clearly charged with war crimes.²⁷³ Additionally, the petitioners challenged the military's jurisdiction over them "[i]n the absence of hostilities, martial law, or . . . military occupation."²⁷⁴ The Court summarily dismissed this challenge to personal jurisdiction based on agreements between the United States and China (the situs of the offenses and the trial).²⁷⁵ In other words, the petitioners failed in challenging the two fundamental issues that a federal court may review in a military habeas proceeding – jurisdiction over the person and jurisdiction over the charges.

On the other hand, the petitioners did allege that the proceedings violated their rights under the Fifth Amendment.²⁷⁶ Though the petition merely alleged a general violation of that Amendment,²⁷⁷ the Court's discussion indicated that the complaint focused on lack of grand jury indictment in military proceedings.²⁷⁸ The petitioners seemed to insist that their military trials were void because they were tried without grand jury indictment;²⁷⁹ however, that challenge was nullified when petitioners failed to successfully challenge the military's jurisdiction to try them. Since the common law applicable to military trials had never required either indictment or jury trial,²⁸⁰ the right to grand jury indictment did not attach if the case was properly before a military commission.²⁸¹

270. *Id.* at 777.

271. *See id.* at 785.

272. *See id.* at 765-66, 787.

273. *See id.* at 786.

274. *Id.* at 785-86.

275. *See id.* at 789.

276. *See id.* at 785.

277. *See id.* at 786.

278. *See generally id.* at 781-85.

279. *See generally id.*

280. *See Ex parte Quirin*, 317 U.S. 1, 39 (1942).

281. *See id.* at 39-41.

Furthermore, their only other claim of unlawful detention was based on the Geneva Convention of 1929.²⁸² The federal courts had already decided that those provisions were only applicable to trials for offenses committed while defendants were POWs.²⁸³ That argument was thus a dead letter incapable of invalidating military proceedings for war crimes committed prior to capture.

Thus, although the *Eisentrager* Court seemed to make much of the fact that the prisoners were held outside the United States, location proved largely irrelevant as their petition failed to allege any facts that, if true, could have affected their release. Indeed, the Court intimated that, had the prisoners made some colorable claim about the unlawfulness of their detention, they would have been heard.²⁸⁴

Notwithstanding the *Eisentrager* dictum on extraterritoriality, Justice Douglas described the proper rule for handling habeas proceedings involving extraterritorial detention in his concurring opinion in *Hirota v. MacArthur*.²⁸⁵ In rejecting the idea that incarceration abroad was a basis for withholding habeas jurisdiction from federal courts, Justice Douglas warned that such a ruling would create an incentive for extra-territorial incarceration whereby the Executive Branch might circumvent judicial review of its actions.²⁸⁶ He concluded that to avoid such ominous implications, jurisdiction in cases of military detention abroad should lie in the District of Columbia, with the military and civilian leaders of the relevant service being proper respondents.²⁸⁷

Justice Douglas precisely navigated the narrow and treacherous path between proper judicial review of executive actions and judicial usurpation of presidential authority. After all, the President need not fear judicial scrutiny if his actions are lawful. If the military treats the Detainees in accordance with the relevant Geneva Conventions, the courts can order no more. Similarly, if a military court acts within its jurisdiction, no civilian court can overturn the decision. The writ of habeas corpus will not free alien terrorists charged with war crimes.

282. See *Eisentrager*, 339 U.S. at 785.

283. See *Application of Yamashita*, 327 U.S. 1, 24 (1946).

284. *Eisentrager*, 339 U.S. at 780-81. The Court stated

[d]espite this, the doors of our courts have not been summarily closed upon these prisoners. Three courts have considered their application and have provided their counsel opportunity to show some reason . . . why they should not be subject to the usual disabilities of non-resident enemy aliens. . . . After hearing all contentions they have seen fit to advance and considering every contention we can base on their application and the holdings below, we arrive at [the conclusion] . . . that no right to the writ of habeas corpus appears.

Id.; accord *Quirin*, 317 U.S. at 25 (“[T]he fact that [petitioners] are enemy aliens [does not foreclose] consideration by the courts of petitioners’ contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission.”).

285. 338 U.S. 197 (1949).

286. See *id.* at 201-02 (Douglas, J., concurring).

287. See *id.* at 202-03 (Douglas, J., concurring).

On the other hand, the writ will permit independent review of the military's jurisdiction over the person. This may help Detainees who are identified as American citizens, or those who were not arrested on the battlefield, or who for any other reason may not be subject to military trial.²⁸⁸ Moreover, the writ may facilitate review of the military's jurisdiction over the alleged crimes. While the military may readily consider allegations of war crimes, its authority to consider other crimes varies depending on numerous circumstances.²⁸⁹ Succinctly put, judicial review provides an important backup to prevent improper assertion of military authority.

In sum, the writ of habeas corpus provides a valuable check against executive lawlessness. Even if this administration acts honorably throughout the process, America must guard against dangerous precedent that legitimizes plenary executive power to try and punish human beings. What one generation indulges in moderation, the next may indulge in excess. Perhaps all the Detainees *are* terrorists who may be tried by military tribunal. If so, habeas review will not change a thing. But if the federal courts abdicate their responsibility to review executive action for lawlessness, the day may come when less scrupulous people assert executive authority in increasingly questionable ways. To avoid this slippery slope, the federal judiciary must properly fulfill its responsibility to review these detentions and military trials through the writ of habeas corpus.

VI. CONCLUSION

The Detainees hold few, if any, rights under the Constitution. At most, they enjoy the Fifth Amendment's promise of due process. However, that right simply entails the process due an alien enemy charged with war crimes in a military trial. Furthermore, most non-Afghan al Qaeda members hold nothing more than basic humanita-

288. See, e.g., John Mintz, *Detainees Say They Were Charity Workers; Attorneys for 11 Kuwaitis Held in Cuba Offer Documents to Back Up Lawsuit*, WASH. POST, May 26, 2002, at A12, 2002 WL 21747127 (reporting that several Detainees claimed to be aid workers, not combatants).

289. See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304, 313 (1946) (acknowledging military jurisdiction over members of the armed forces); *id.* at 313-14 (observing military authority to try civilians for violating laws of war); *id.* at 314 (recognizing military authority to try civilians in occupied territory where no civil government is functioning); *id.* at 324 (rejecting military authority to try civilians in the U.S. Territory of Hawaii, under a declaration of martial law, when the civilian courts were capable of functioning); *Reid v. Covert*, 354 U.S. 1, 35 n.63 (1957) (observing military's jurisdiction to try both civilians and military personnel in occupied territory). These authorities describe a spectrum of military authority to try civilians. This authority is at its weakest during times of peace, when military jurisdiction is generally limited to members of the armed forces. On the other hand, military authority over civilians reaches its peak during occupation of enemy territory, where military courts may enforce all laws against all people within the occupied area. Between the two extremes, military authority over civilians appears to vary with the ability of civilian courts to operate properly. Even under conditions of martial law, the military may not usurp the authority of civilian courts to try non-military personnel, unless the individual is charged with violating the laws of war.

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rian rights under the Geneva Conventions. On the other hand, Taliban militia members may qualify for substantial procedural rights under Geneva III. Similarly, both Taliban and Afghan al Qaeda members may obtain procedural rights under Geneva IV.

Finally, in order to effectively enforce those rights, the Detainees must be entitled to seek writs of habeas corpus in the federal courts. The judicial branch abdicates its responsibility if it refuses to hear their petitions. While the executive branch may hold near-plenary power to wage war on foreign soil, the judiciary must police post-war criminal proceedings. Such cases necessarily give rise to questions involving international treaties. Since Congress has specifically charged the federal judiciary with enforcing treaty rights through the mechanism of habeas corpus, the courts cannot refuse to hear these claims.

The trials and tribulations of international armed conflict pose intriguing legal questions. America must not retreat from principle when answering them. In this era of globalization, the world community constantly scrutinizes the United States. Will America lead because might makes right, or will other nations follow because the United States sets the example for principled democracy? By affording the Detainees an opportunity to enforce their limited rights, America remains true to the fundamental principles on which this nation was founded: that all people are created equal, that individual liberty should be jealously guarded, and that our government may neither deprive liberty nor impose punishment without the fundamental fairness embodied in due process of law.

