Prosecuting Alleged Terrorists: Article III Courts, Military Tribunals, and Constitutional Checks and Balances

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PROSECUTING ALLEGED TERRORISTS: ARTICLE III COURTS, MILITARY TRIBUNALS, AND CONSTITUTIONAL CHECKS AND BALANCES

by

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A thesis submitted in partial fulfillment of the requirements for the University Honors Program

Department of Political Science
The University of South Dakota
December, 2013
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ABSTRACT

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This thesis concerns the executive military tribunals implemented after the tragic attack on September 11, 2001. It gives a brief overview of separation of powers and constitutional checks and balances. It next examines how military tribunals have been used in the past during wartime, but how the circumstances of the current tribunals are different. It will briefly discuss the differences between judiciary Article III courts and executive military tribunals. It discusses the lack of judicial review in the tribunals. Finally, it examines the way the lack of judicial review and Supreme Court decisions relates to constitutional checks and balances between the judicial and executive branches. The tribunals are organized in such a way that they are not subject to judicial review, which upsets the system of checks and balances between the judicial and executive branches.

KEYWORDS: terrorism, Article III Courts, military tribunals, checks, balances, constitution
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I.

INTRODUCTION

*Inter arma silent leges* is a Latin maxim that translates as: “In time of war the laws are silent”. The current war on terror has caused a number of policy changes within the United States federal justice system. Unfortunately, threats to the United States during wartime have caused some constitutional violations to be overlooked for the sake of national security. One particular policy change after September 11, 2001 was the use of executive military tribunals. These tribunals were created for the purpose of determining the detention status of enemy combatants and prosecuting suspected terrorists at Guantanamo Bay. These executive military tribunals, however, do not honor constitutional checks and balances. Executive and congressional actions concerning the tribunals have eliminated sufficient judicial review over the tribunals. The result is a unilateral appeals system within the executive branch. Because of this, the judicial branch is unable to properly check the executive branch through judicial review in court cases. This lack of judicial review leads to an indefinite imbalance of power among the three branches that violates the constitutional system of checks and balances. In order to remedy this violation of checks and balances, some form of judicial review must be implemented over the tribunals.
II.

GOVERNMENT POWERS

A. Checks and Balances

The United States Constitution contains the rules and procedures for the U.S. government that is composed of three separate branches: the legislative, the executive, and the judicial. Each branch of government has distinct power over certain areas of government, but they are still interrelated. Each branch affects the way that the others operate, but their specific powers are inherently separate within the Constitution (U.S. Const. Art. I, II and III). Separation of powers prevents one branch from overstepping its Constitutional boundaries. Separation of powers was not the only way the framers of the constitution ensured no single branch of government would gain too much power. After they had separated the government into three branches, they created procedural safeguards to prevent one branch from assuming the power of the other two branches. In order to do this, the writers included a system of check and balances to maintain the separation of powers. This system of checks and balances functions properly as long as the other branches respect that check. However, if checks and balances are not respected, it is possible for one branch of government to gain too much power and abuse that power.

The judicial branch is responsible for the federal Courts, referred to as Article III Courts because they are established by Article III of the Constitution, which establishes the authority and jurisdiction of the judicial branch (U.S. Const. Art. III). The Constitution provided for one federal Supreme Court which would oversee the operations...
of inferior appellate courts. In addition, the Supreme Court justices would be appointed by the President (U.S. Const. Art. III). This is one way the executive branch is able to check the judicial branch; however, the judicial branch also has power to check the executive branch primarily through the Court’s interpretation of its power of judicial review.

B. Judicial Review

After the Constitution was written, the Court interpreted its constitutional power to include judicial review in Marbury v. Madison in 1803. To establish judicial review, the majority in this case relied on common law in England where even the king himself, “never fails to comply with the judgment of his court” (Marbury v. Madison, 48). The Court defined judicial review as its authority to rule on constitutional questions in regards to government actions:

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conforms to the law, disregarding the constitution; or conforming to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty. If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply (Marbury v. Madison, 74)

Marbury v. Madison interpreted the power of the judicial branch to support both the necessity of judicial review and the judicial branch’s power to determine the constitutionality of executive and legislative actions. In practice, this meant that if
executive or legislative actions violated the Constitution, the judicial branch had the authority to check each branch through judicial review.

Prior to *Marbury v. Madison*, Alexander Hamilton, one of the Founding Fathers, made an argument in *Federalist* No. 78 in 1788 about the necessity of judicial review as a check over the other two branches of government. Hamilton argued that judicial review specifically allowed judges to serve as “the bulwarks of a limited constitution against legislative encroachments.” Hamilton then went on to write that constitutional limitations, “can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void” (qtd. in Harriger 1). Therefore, the only way that constitutional limitations on power can be preserved is when judicial checks are acknowledged and adhered to by the legislative and executive branches. This also applies to executive power during wartime.

C. Emergency Powers

In addition to designating the regular powers of the three branches, the framers of the Constitution included special provisions that gave the executive branch more power during times of war. According to Article II of the Constitution:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service Of the United States; he may require the opinion, in writing, of the principal Officer in each of the executive Departments, upon any Subject relating to the Duties of their respective Offices, and he shall have Power to Grant Reprieves and Pardons for Offences against the United States, except in Cases of Impeachment. *(U.S. Const. Art. I)*
Article I established the executive and legislative branches as war making branches, not the judicial branch (U.S. Const. Art. I). Executive wartime power allows for a temporary imbalance of power among the three branches during wartime when the court may defer to the executive branch and support an expansion of executive power.

Legal precedent has generally supported an expansion of executive power during wartime. For example, the Court in Korematsu v. United States ruled that both the executive and legislative branches should be given more deference over wartime matters (Korematsu v. United States, 198). Rulings like Korematsu, however, did not give the executive branch unlimited unchecked power over all wartime matters, nor did it allow the executive branch to completely disregard the check of judicial review whenever there is a threat to national security. For example, as the court said in Hamilton v. Kentucky Distilleries in 1919, "The war power of the United States, like its other powers… is subject to applicable constitutional limitations" (Hamilton v. Kentucky, 200). This language also applies to military action. Supreme Court Justice Frankfurter, concurring in Korematsu, referred to this very language from Hamilton when he argued that military authorities must still operate within the bounds of the Constitution (Korematsu v. United States, 204). As part of the executive branch, the military is still subject to constitutional principles, which includes separation of powers and checks and balances, in cases where military authority is taken too far, even with wartime deference. As the Court in Hamdan v. Rumsfeld noted, “The Founders envisioned the army as a necessary institution, but one dangerous to liberty if not confined within its essential bounds” (Hamdan v. Rumsfeld, 603). Despite allowing the executive to expand its power in some wartime cases, the legislative and judicial branches have retained the check of judicial review over the
executive branch when it has gone too far. In the current war on terror, executive power has gone beyond its essential bounds and, the executive branch must be checked in order to preserve constitutional checks and balances.

The availability of emergency powers has inherent problems. Emergency power has the potential to cause the executive branch to identify a situation as requiring wartime powers when the situation may not meet the requirements. Supreme Court Justice Jackson discussed potential problems with emergency powers in his dissent in *Korematsu v. United States*. He said:

> A military order, however unconstitutional, is not apt to last longer than the military emergency. Even during that period a succeeding commander may revoke it all. But once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that the Constitution sanctions such an order, the Court for all time has validated the principle of racial discrimination in criminal procedure and of transplanting American citizens. The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need. (*Korematsu v. United States*, 208)

The executive branch has the potential to justify a questionable emergency order under the pretext of emergency wartime powers. For example, the executive branch could label a permanent terrorism threat to the United States as an ongoing war, leading to a permanent use of expanded wartime powers. A permanent state of wartime power has the potential to become a threat to personal liberties when the executive branch abuses that power and violates Constitutional protections. That is why the judicial branch should be cautious about giving such great deference to the executive branch, as they did when they upheld the use of internment camps for Japanese-Americans during WWII (*Korematsu v. United States*, 202). In that instance, the judicial branch missed an opportunity to check the executive branch. Instead, they acquiesced to the executive
branch’s wartime powers when they should not have and allowed a blatant violation of personal liberties.

Historically, with the exception of Korematsu, the judicial branch has exercised the check of judicial review over the executive branch when the executive has violated the Constitution during times of war, such as in Ex Parte Milligan, when the Court did not uphold the use of military tribunals (Ex Parte Milligan, 298). As the Supreme Court pointed out in Ex Parte Milligan, the writers of the Constitution, “knew…the nation they were founding, be its existence short or long, would be involved in war; how often or how long continued, human foresight could not tell and that unlimited power, wherever lodged at such a time, was especially hazardous to freemen” (Ex Parte Milligan, 218). The Court acknowledged that while the country would face war, the country could not allow the executive branch to assume completely unchecked power during war because that could negatively affect personal liberties. This threat is even more dangerous when wartime power becomes permanent.

The Court has maintained the position they took in Milligan in recent cases. In 2004 the Court ruled in Hamdi v. Rumsfeld:

We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation’s citizens. Whatever power the United States Constitution envisions for the Executive in its exchanges with other nations or with enemy organizations in times of conflict, it most assuredly envisions a role for all three branches when individual liberties are at stake. (Hamdi v. Rumsfeld, 604)

Here, the judicial branch asserts that all three branches have power during times of war when it comes to individual liberties. Arguably, this does not mean that the three branches all have equal power during wartime, but it does mean that the executive branch does not have sole power over all government matters. It also means that even though
war may necessitate a temporary imbalance of power, it still allows the judicial branch to step in and check the executive branch through judicial review if the executive is using wartime powers to indefinitely violate constitutional rights. Unfortunately, an unchecked, indefinite expansion of executive power has occurred with the current war on terror.

III.
WAR ON TERROR

A. Terrorism Defined

After the September 11th attack on the World Trade Center in 2001, the government decided to take action against those responsible. Congress authorized the President to use all necessary and appropriate force against nations, organizations, or individuals responsible for the September 11 attacks in the Authorization for the Use of Military Force (AUMF) (Authorization, 1). The government’s actions in response to the AUMF have come to be known as the “war on terror”, but it is important to note that no official war was ever declared against a specific nation-state or country with the AUMF.

The federal government defined terrorism with the war on terror in President George W. Bush’s Military Order of November 13, 2001. In Section 1, the Military Order describes international terrorists as those who have, “carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces” (Military Order, 1). The Military
Order specifically labels al Qaeda as a terrorist organization and those associated with al Qaeda as terrorists, but it does not explicitly limit the definition of terrorists to al Qaeda (Military Order, 1).

One way the government has responded to terrorist attacks is through the detention, prosecution, and conviction of terrorists. As Supreme Court Chief Justice Stone noted in In re Yamashita 1946, a case concerning military tribunals during WWII, “The trial and punishment of enemy combatants who have committed violations of the law of war is ... a part of the conduct of war operating as a preventive measure against such violations” (In re Yamashita, 12). Trial and punishment of these enemy combatants is indeed crucial in defending the nation against violent terrorists and, according to separation of powers in the Constitution, the power to adjudicate and review the appeals of cases of individuals who violated federal laws was given to the judicial branch (U.S. Const. Art. III). However, the executive branch took over the judicial branch’s role shortly after 9/11 when it established executive military tribunals through the Military Order of November 13, 2001. While precedent has allowed for this action in the past (In re Yamashita, 26), precedent does not support the use of military tribunals today without some form of judicial review because of the indefinite nature of the war on terror.

B. Executive Order

The Bush Administration issued the Military Order of November 13, 2001, two months after 9/11 (Military Order, 1). The purpose of the Military Order was to create a system of military tribunals that would manage the detention, prosecution, and trial of suspected terrorists. The executive order assumed this authority because of exigent
circumstances relating to the war on terror (Military Order, 1). The Military Order noted that the creation of the tribunals was in response to President Bush declaring a national state of emergency on September 14, 2001 (Military Order, 1). It is important to note that this was still not an official declaration of war. Section 1 of the Military Order says that these terrorists are dangerous and must be prevented from engaging in terrorist behavior; therefore:

(e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals. (Military Order, 1)

With this Order, the executive branch implemented a system of military tribunals to prosecute terrorists under the procedural direction of the Secretary of Defense within the executive branch (Military Order, 2). It is worth noting that the procedures of the military tribunals are not identical to regular courts-martial procedures and can be altered at the discretion of the Secretary of Defense (Military Order, 2). This Military Order meant that enemy combatants would be tried according to the laws and procedures of executive military tribunals instead of Article III courts; they would be tried as enemies of war instead of criminals. While this thesis concedes that military tribunals are justified under some circumstances, the circumstances that prompted Bush’s Military Order did not justify the tribunals and are no longer present; the use of these military tribunals is no longer justified.

One concern about the circumstances of the current tribunals is their broad jurisdiction, which could apply to a wide range of individuals. Section 2 of the Military Order outlines which individuals may be tried by the military tribunals. It says that
individuals who will be subject to the order includes non-citizens whom the President determines “from time to time in writing” have been members of al Qaeda or who have:

(ii)…engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy; or

(iii)…knowingly harbored one or more individuals described in subparagraphs (i) or (ii) of subsection 2(a)(1) of this order (Military Order, 2)

This language covers a very broad scope of potential detainees. The Court in Hamdi found that this terrorist classification in the Military Order was “broad and malleable” (Hamdi v. Rumsfeld, 521). Essentially, it could apply to any non-citizen in the United States. However, the court in Hamdi also ruled that, “There is no bar to this Nation's holding one of its own citizens as an enemy combatant” (Hamdi v. Rumsfeld, 593). According to this ruling, should the executive branch decide to apply the military commissions to U.S. citizens, like they did in Ex Parte Quirin during WWII, they would be able to do so. The executive branch could try U.S. citizens in a military tribunal, which does not afford full constitutional due process protections, outside of the reach of the judicial branch (Ex Parte Quirin, 16). Still, the ruling in Hamdi only means that it would be appropriate to try U.S. citizens in tribunals if the use of tribunals is appropriate, but precedent does not support the use of the current tribunals.
IV.

PROSECUTING TERRORISTS

A. History of Military Tribunals

The United States has a history of using military tribunals during war prior to 9/11. The first time tribunals were used in the U.S. was during the revolutionary war, before the United States government was established, to try suspected British spy Thomas Shanks in 1778 and captured British Officer Major John Andre in 1780 (Military Commissions, Military Commissions History). The next time the United States used tribunals was in 1847 during the Mexican-American War. General Winfield Scott used tribunals to try certain Mexican citizens because the territory was under martial rule (Hollywood, 24). However, because the military was in Mexican territory and there were no federal U.S. courts available, Scott implemented military tribunals as a substitute (Military Commissions, Military Commissions History). This set a precedent for using executive military tribunals during times of war in territories that were under martial rule and where there was no federal court available.

Military tribunals were later used during the Civil War to try both war crimes and ordinary crimes. However, in Ex Parte Milligan, the Court did not uphold the use of military tribunals when there were Article III Courts available. The Court found that, “Milligan’s trial and conviction by a military tribunal was illegal” (Ex Parte Milligan, 227). According to the Court:

There are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, then, on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substitute
for the civil authority, thus overthrown, to preserve the safety of the army and society; and as no power is left but the military, it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war. *(Ex Parte Milligan, 222)*

Here the court ruled that the only time the executive branch had the authority to implement military tribunals is in locations where actual war has been declared and the federal Article III Courts are not available, and only so long as the federal Article III Courts are not available. In addition, the Court explicitly stated that wartime powers are limited in duration; they are temporary. This means that as federal courts are open today, they have jurisdiction over federal cases.

The most recent use of executive military tribunals prior to 9/11 occurred during World War II. Franklin Delano Roosevelt announced that military commissions would be used to try eight alleged Nazis in U.S. occupied Germany. These trials took place in Nuremberg, Germany *(Hollywood, 5)*. Also during WWII, President Roosevelt instituted military tribunals in the Philippines in order to try Japanese commander Tomoyuki Yamashita in *In re Yamashita (In re Yamashita, 12)*. It is important to note that in each of these instances, the United States was in a state of declared war and there were no Article III Courts available in the territories where the tribunals took place. More importantly, however, the tribunals were used in territory that was under U.S. control, but not under federal judicial jurisdiction.

In addition, the primary purpose of past tribunals was to determine detention questions, not questions of substantive guilt. As the Court in *Hamdan* found, during WWII the tribunals were justified because it was necessary to immediately determine
whether enemy combatants had violated the laws of war in the territory where they had
been captured, which would determine whether or not they could continue to be detained
(Hamdan v. Rumsfeld, 2783). These circumstances are important to consider when
precedent is compared to the military tribunals today because current tribunals are being
used to essentially replace the judicial branch in terrorism-related cases. After detention
questions are answered, the cases remain in the hands of the military officials for
adjudication of guilt, sentencing, and appeals. These are powers that belong to the
judicial branch when the nation is not involved in actual, declared war and the federal
courts are functioning.

B. Military Tribunals Post 9/11

Recently the Court in Hamdan v. Rumsfeld discussed the three main reasons that
military tribunals have been implemented in the past. The first was in lieu of Article III
Courts when the state had declared martial law. The second was to bring individuals to
trial in U.S. occupied territories. The third reason, and the reason discussed here, was as
“an incident to the conduct of war” (Hamdan v. Rumsfeld, 757). This third reason has
been the crux of the argument in support of current military tribunals and executive
overreach for the sake of national security. This third reason does not, however, support
the government violating the check of judicial review with the current military tribunals
because of the indefinite nature of the war on terror.

Despite precedent, military tribunals have not been judicially supported in all
instances. The circumstances of previous cases involving tribunals do not parallel those
of the current military tribunals for a number of reasons. Previous tribunals were created
to function as a “temporary military government” where “civilian government cannot and does not function” (*Hamdan v. Rumsfeld*, 596). In contrast, current tribunals are not occurring in enemy occupied zones outside of U.S. territories. These tribunals are being used to try detainees from Guantanamo Bay, Cuba, and the Court in *Boumediene* stated that the laws of the United States do apply there (*Boumediene v. Bush*, 752). Therefore, Guantanamo Bay is not under martial law and it is not appropriate to use military tribunals there in lieu of federal court.

Guantanamo Bay is geographically part of Cuba, yet has been under the territorial jurisdiction of the U.S. since 1903 (Olesen, 724). The Court in *Boumediene* even acknowledged that the United States has had, “complete and uninterrupted control of the bay for over 100 years” (*Boumediene v. Bush*, 765). In February of 2001, the U.S. military began to use Guantanamo as a detention camp for terrorists captured abroad in the war on terror (Olesen, 720). Unlike circumstances in the previous cases mentioned, Guantanamo Bay is not in the middle of enemy territory. This makes the cases from Guantanamo distinct from cases in Afghanistan or Iraq where the exigency of war is present. The first military tribunal trial was not until six years after the Military Order was issued, and the terrorists from the 9/11 attacks were not brought to military trial until 2009 (Alexander, 1132). In the case of 9/11 terrorist Khaled Shaikh Mohammed, his case is still pending over twelve years later, long after the immediate danger of his crimes (*Military Commissions*, Cases).

The Supreme Court has found that the current tribunals do not have jurisdiction to try cases that occur outside the time of active hostilities (*Hamdan v. Rumsfeld*, 738). The detainees at Guantanamo Bay no longer present an active threat of engaging in
hostilities, but have violated federal law and are in U.S. territorial jurisdiction. The Court in *Hamdi* recognized this difference from precedent. While the Court noted that the WWII tribunals would be in use while the war was ongoing, they also pointed out that the current war on terror is unlikely to end with any formal cease-fire, which could cause some detainees to be in U.S. custody for life (*Hamdi v. Rumsfeld*, 521). While the Court did not support indefinite detention for the purposes of interrogation, it did support indefinite detention for the duration of hostilities and defined the end of hostilities (*Hamdi v. Rumsfeld*, 2642). However, with the military tribunals, indefinite detention essentially leads to a nearly permanent state of the executive branch having unilateral control over all judicial matters involving these detainees.

Furthermore, as of March of 2013, 779 people had been detained at Guantanamo Bay and 600 of them had been released. This means that (as of March, 2013) 179 enemy combatants were still being detained in Guantanamo Bay awaiting trial (Huq, 1439). Also 89 of these detainees were found to be non-enemy combatants but continue to be held in custody at Guantanamo (Alexander, 1127). This fact conflicts with the very purpose of the tribunals; they were created to deal with enemy combatants who have violated the laws of war. Instead, detainees who the tribunals have decided are not enemy combatants are being held in U.S. custody, are not being brought to trial and cannot address the factual basis of their detention through habeas corpus in Article III Courts because they have been denied that option through the military tribunals and do not have the option of transferring their cases to Article III Court. The Court in *Hamdi* said:

As critical as the Government's interest may be in detaining those who actually pose an immediate threat to the national security of the United
States during ongoing international conflict, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression and abuse of others who do not present that sort of threat. (*Hamdi v. Rumsfeld*, 531)

Lack of judicial review becomes an issue when the executive military tribunals are allowed to continue indefinitely with no judicial review over substantive issues of guilt and sentencing. This creates a troubling precedent for the future. The executive branch has authority to detain these individuals, but not authority to permanently serve as warden, adjudicator, and appellate board. This situation not only infringes upon constitutional checks and balances, but it also gives the executive branch too much unchecked authority. It allows the executive branch to move a step closer to becoming a unilateral government, which does not conform to constitutional separation of powers.

The concurring opinion found that the military tribunals raise “separation-of-powers concerns of the highest order” (*Hamdan v. Rumsfeld*, 593). The current military tribunals give the executive branch unilateral power over all judicial proceedings concerning foreign enemy combatants in the war on terror. However, the framers of the Constitution wrote the Constitution in such a way to prevent unilateral power in one branch of government when they included separation of power and the system of checks and balances (*U.S. Const. Art. I, II, III*).

In contrast to historical uses of military tribunals where the tribunals were used in lieu of an available federal court because of the immediacy of war (Hollywood, 24), these detainees are not an immediate threat in an actual, declared war. As a result, the executive branch is continuing to operate these tribunals and essentially take over judicial power in terrorism cases without legitimate reasoning. The Court in *Hamdan* even distinguished that precedent, writing that the Court, “did not view the authorization [in
Quirin] as a sweeping mandate for the President to invoke military commissions when he deems necessary” (Hamdan v. Rumsfeld, 752). Without legitimate reasons to implement the tribunals, they are a violation of constitutional emergency powers and a violation of the check of judicial review because the judicial branch is unable to review executive decisions in these tribunals that may be violating personal liberties.

The use of military tribunals leads to an imbalance of power because judicial power was not constitutionally given to the executive branch; it was given to the judicial branch (U.S. Const. Art. III). As the Court in Hamdan noted, “Certainly no part of the judicial power of the country was conferred on [military commissions]” (Hamdan v. Rumsfeld, 752). This is a problem because it leads to the executive branch taking on the role of warden, prosecutor, and appellate judge indefinitely, and possibly permanently, but that is not the kind of wartime power that the constitution authorizes. The constitution authorizes a temporary imbalance of power during wartime by allowing the executive branch to expand its authority during war and allowing the other two branches to defer to the executive branch (U.S. Const. Art. I). The Constitution does not say, however, that the imbalance of power during wartime should ever become permanent. The imbalance of power because of military tribunals has the potential to become permanent with the indefinite war on terror, and it must be remedied in order to protect personal liberties.
V. JUDICIAL REVIEW

A. Lack of Judicial Review

The main problem with the current tribunals is that they are set up in a way that does not allow for proper judicial review through Article III Courts of Appeals. The Military Order that implemented the tribunals explicitly states that suspected terrorists will be under the control of the Secretary of Defense as an extension of the executive branch (Military Order). Under the Military Order the Secretary of Defense (or those under the same command) has the authority to carry out all judicial matters relating to enemy combatants in the war on terror including bringing suspected terrorists to trial, admitting evidence, determining guilt, sentencing, and review (Military Order, 2). This last part, review, is the main point of issue with the military tribunals when it comes to constitutional checks and balances.

The Military Order of November 13, 2001 explicitly stated that no one tried in a military tribunal would be able to seek review of the tribunal’s decision in a federal court under control of the judicial branch. According to the Military Order:

(1) military tribunals shall have exclusive jurisdiction with respect to offenses by the individual; and

(2) the individual shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual’s behalf, in (i) any court of the United States, or any State thereof, (ii) any court of any foreign nation, or (iii) any international tribunal. (Military Order, 2)

This part of the Military Order effectively stripped the judicial branch of jurisdiction over federal cases dealing with enemy combatant guilt and sentencing, and it prevented enemy combatants from having any part of their case decided in the federal court system. Where
the regular courts-martial system does allow for appellate judicial review, the Military Order exempted military tribunals from similar review, and the court in *Hamdan* interpreted the Military Order to say that individuals being tried in the tribunals could not appeal to the military courts review board whose appeals do ultimately reach Article III Courts (*Hamdan v. Rumsfeld*, 588). While the use of tribunals this way has been upheld in the past, it has not been upheld indefinitely in areas where federal courts are still available to try criminals. It sets a concerning precedent.

The Military Order eliminated the option of judicial review, and the following Detainee Treatment Act of 2005 (DTA) further specified that review of cases at Guantanamo Bay would not go to the judicial branch. The Bush Administration tried to create an institution to review tribunal decisions in lieu of habeas corpus. As part of the DTA, the Administration clarified procedures for the Combatant Status Review Tribunals (DTA 62). The CSRTs would review the factual basis for a detainee’s detention (DTA 62). They essentially performed the same role as the federal court would when reviewing cases, but they are under the direction of the executive branch instead of the judicial branch. In addition, the DTA specified that executive review would only be automatically granted if the detainee was sentenced to incarceration for over ten years or death (DTA 65). The CSRTs did not go far enough to resolve the lack of judicial review in the tribunals.

The following year, the court in *Hamdan* ruled that the DTA was an inadequate response to their decisions in *Hamdi* because it did not resolve the lack of review being afforded to the detainees (*Hamdan v. Rumsfeld*, 588). The Court said that these detainees deserve to have their detention reviewed by a neutral decision maker (*Hamdi v. Rumsfeld*, 588).
Though the court in *Hamdi* said that a military tribunal could operate as a neutral decision maker in some cases, the court in *Hamdan* later expressed concern that the tribunal’s decision making was not as neutral as it should be because that review was solely at the discretion of military officials. According to the Court in *Hamdan*:

> We have no doubt that the various individuals assigned review power under Commission Order No. 1 would strive to act impartially and ensure that Hamdan receive all protections to which he is entitled. Nonetheless, these review bodies clearly lack the structural insulation from military influence that characterizes the Court of Appeals for the Armed Forces. (*Hamdan v. Rumsfeld*, 588)

The CSRTs do not provide for a proper neutral decision maker at the appellate level because the personnel operating them are military executives, who are an extension of the executive branch. In fact, the highest level of appeal that a detainee may reach is the President (Military Order, 2). That is not how the framers wrote the Constitution. This creates a completely unilateral appeals process through the executive branch, and nowhere does the Constitution grant the executive branch sole authority over all areas of adjudication, even in times of war (*U.S. Const. Art. I*). A more appropriate and neutral forum of review would be the Supreme Court. Article III Courts would provide for a more neutral decision maker and would allow the judicial branch to exercise its appropriate method of checking the executive branch, restoring separation of powers and allowing for the check of judicial review over the executive branch.

After *Hamdan*, the government attempted to revise the military tribunals to satisfy the court, but did not revise the tribunal procedures enough in regards to judicial review. Some progress was made with Military Commissions Act of 2006 in regards to constitutional due process during trial themselves, but the MCA of 2006 did not resolve the issue of judicial review. The MCA of 2006 again explicitly sought to strip the
judicial branch of any authority over enemy combatants in the war on terror. According to the MCA of 2006:

No court, justice, or judge shall have jurisdiction to hear or consider any claim or cause of action whatsoever, including any action pending on or filed after the date of the enactment of the Military Commissions Act of 2006, relating to the prosecution, trial, or judgment of a military commission under this chapter, including challenges to the lawfulness of procedures of military commissions under this chapter. (Military Commissions Act of 2006, 25)

This language again sought to deny the judicial branch any authority to check executive decisions when it comes to prosecuting terrorists. Even though Congress has power to regulate the Supreme Court’s appellate jurisdiction in some circumstances (U.S. Const. Art. III) that does not mean that stripping the judicial branch of appellate review over the tribunals is always constitutional. The MCA of 2006 is not constitutional in this instance because the judicial branch should have judicial review over the tribunals in order to ensure that personal liberties are being constitutionally protected. Currently, they are not being protected because of the current imbalance of power. This imbalance of power is giving the executive branch indefinite and unchecked power to use these military tribunals that violate constitutional due process protections. If the legislature does make an unconstitutional decision, such as stripping the judicial branch of appellate jurisdiction in this instance, the judicial branch still has the authority to point out the unconstitutionality of the decision and check the legislative branch.

B. Supreme Court Cases

Some cases, such as Hamdi v. Rumsfeld, Hamdan v. Rumsfeld, and Boumediene v. Bush were brought to the Supreme Court when the petitioners tried to bring constitutional questions about the right to habeas corpus to the judicial branch. There is a very
important distinction between these cases brought in Article III courts and the cases brought in military tribunals, however. The cases brought in Article III courts only concern the right of habeas corpus petitions (Hamdi v. Rumsfeld 588; Hamdan v. Rumsfeld, 724; Boumediene v. Bush, 42). None of these cases addresses the substantive issue of the terrorist’s guilt, sentencing, of the factual basis for detention. The question of factual guilt through due process is still reserved for the military tribunals, with no sufficient avenue for judicial review (Military Order, 2). The executive branch is basically taking on a seemingly permanent adjudicative and appellate jurisdiction over these cases, but that authority should be given to the judicial branch in order to limit the executive wartime power that is currently being used indefinitely.

The first Supreme Court case addressing questions about the military tribunals was Hamdi v. Rumsfeld in 2004. In Hamdi v. Rumsfeld, Yaser Esam Hamdi was arrested while living in Afghanistan in 2001. He was arrested by U.S. military groups for being associated with the Taliban. He was detained and interrogated in Afghanistan, transferred to Guantanamo Bay, then brought to Charleston, South Carolina. He petitioned for a writ of habeas corpus in the Supreme Court, arguing that it was his constitutional right. It is important to note here that the Court found there was no official suspension of the writ at that time, and without an official suspension, they ruled that enemy combatants who were U.S. citizens still had the right to review their detention through the writ of habeas corpus (Hamdi v. Rumsfeld, 2649). The Court in Hamdan later held that all the detainees at Guantanamo Bay, including non-citizens had to right to the writ of habeas corpus (Hamdan v. Rumsfeld, 586). The government, in response to the defense in Hamdi, argued that Hamdi was an enemy combatant in accordance with
the language of the Military Act of November 13, 2001; therefore, the government was justified in holding him indefinitely without judicial review (Hamdi v. Rumsfeld, 511).

The Supreme Court disagreed (Hamdi v. Rumsfeld, 587).

The Court had no qualms about life-long detention of enemy combatants if they were found to be an enemy combatant through a trial and conviction. The concern in *Hamdi* was indefinite detention of persons for the purpose of interrogation without bringing formal charges. According to the Court interpreting the Geneva Convention:

> Prisoners of war can be detained during an armed conflict, but the detaining country must release and repatriate them without delay after the cessation of active hostilities, unless they are being lawfully prosecuting or have been lawfully convicted of crimes and are serving sentences. (*Hamdi v. Rumsfeld*, 594)

The Court’s concern was that some detainees who should be released would not be because of the ambiguous nature of hostilities in the war on terror (*Hamdi v. Rumsfeld*, 592). As pointed out earlier, many of the detainees at Guantanamo Bay and in the war on terror are never being brought to trial and are still being held indefinitely without being charged with any crime or violation of the law of war (Alexander, 1132). The indefinite nature of the war on terror coupled with the number of detainees not being brought to trial creates a legal limbo for detainees who are continuing to be detained with no charges brought, and the judicial branch is unable to remedy the situation and protect individual liberties without proper judicial review.

The Court in *Hamdi* supported a functioning system of checks and balances where the judicial branch has the power to check the executive branch. The majority rejected the government’s claim that separation of powers actually limited judicial power (*Hamdi v. Rumsfeld*, 536). Instead, they adamantly ruled that a national emergency does not afford the executive branch a blank check for wartime powers (*Hamdi v. Rumsfeld*, 537).
The Court ultimately ruled in a 6-3 decision that enemy combatants must receive notice of the factual basis of their detention and a fair opportunity to challenge that detention before a neutral decision maker (Hamdi v. Rumsfeld, 2649). Later, the Court expressed concern in Hamdan that the executive military tribunals did not provide that neutral decision maker, and that could affect the deliberative process (Hamdan v. Rumsfeld, 651).

The lack of a neutral decision maker in the tribunals means that the unilateral executive appeals process is not appropriate for these cases. The judicial branch was correct to check the executive branch on that issue, but neither the executive nor legislative branches properly responded with the Detainee Treatment Act or the Military Commissions Act of 2006 because neither of these acts created sufficient means of judicial review.

The next major case concerning enemy combatants in the war on terror was Hamdan v. Rumsfeld in 2006. This case directly addressed the structural and procedural constitutionality of the military tribunals. In Hamdan, Salim Hamdan was a non-citizen in custody at Guantanamo Bay and had been labelled as an enemy combatant. He was challenging both his detention and the constitutionality of the military tribunals before the Supreme Court (Hamdan v. Rumsfeld, 739). Hamdan contended that he had not violated the laws of war, that he had the right to judicial review through habeas corpus, and that the executive did not have the authority to institute the military tribunals under the circumstances (Hamdan, 741). The charges against Hamdan were serious. They consisted of conspiracy to commit terrorist acts by, “attacking civilians; attacking civilian objects; murder by an unprivileged belligerent; and terrorism” (Hamdan v Rumsfeld, 741). There is no doubt that if a person is guilty of these crimes, they should be held
responsible for them. However, as the Court ruled, the prosecution of the dangerous individual must be done legally. The process must conform to the U.S. Constitution and procedural codes.

The charges against Hamdan were conspiracy, but the Court found that Hamdan’s crimes did not violate the laws of war; therefore, his case did not fall under the jurisdiction of executive military tribunals (*Hamdan v. Rumsfeld*, 2786). The Court pointed out that the crime of conspiracy itself has “rarely if ever” been tried as an offense against the laws of war (*Hamdan v. Rumsfeld*, 738). The Court ruled that the procedures of the military tribunals are “illegal” because they did not follow proper military court procedure (*Hamdan v. Rumsfeld*, 626). Hamdan’s defense attorney, Lt. Comdr. Charles Swift criticized the procedures of the tribunals, arguing that the tribunals were, “an administrative proceeding with less due process than what is afforded to someone who is about to lose their job [in a courts-martial]…I was disturbed by it” (Goodman, 13).

When asked what was missing from the proceedings in terms of due process, Swift responded:

> Everything...Prosecution assets outweigh defense assets by three or four to one. The ‘Appointing Authority,’ who is appointed by the Secretary of Defense to conduct the commissions, functions as both the judge and the prosecutor. He decides who is going to be charged, what the charges are, who is on the jury, what resources and discovery the defense gets, and then he rules on the legality of his own decisions. (Goodman, 13)

Allowing such proceedings to continue indefinitely under the pretext of emergency powers violates due process and individual liberties. Denying the courts jurisdiction to review these decisions violates the check of judicial review.

The Court also ruled that Hamdan had the right to challenge the factual basis of his detention if charges were not being brought (*Hamdan v. Rumsfeld*, 626).
Furthermore, they said Hamdan’s situation could no longer be characterized as an exigent war emergency on the battlefield and there was no precedent supporting the use of the tribunals. They argued:

The charge's shortcomings are not merely formal, but are indicative of a broader inability on the Executive's part here to satisfy the most basic precondition—at least in the absence of specific congressional authorization—for establishment of military commissions: military necessity. Hamdan's tribunal was appointed not by a military commander in the field of battle, but by a retired major general stationed away from any active hostilities...These simply are not the circumstances in which, by any stretch of historical evidence or this Court’s precedents, a military commission established by Executive Order...may lawfully try a person and subject him to punishment (Hamdan v. Rumsfeld, 738)

The Court ruled in Hamdan v. Rumsfeld in a 5-3 decision that the tribunals were unconstitutional, that Hamdan did have the right to habeas corpus, and that he had not violated the laws of war and was, therefore, not under the jurisdiction of tribunals in the first place (Hamdan v. Rumsfeld, 2799).

The most important part of the Court’s decision addressed the lack of judicial review inherent in the military tribunals. The Court outlined a number of reasons that the tribunals were not fit to provide adequate and impartial review. The Court pointed out that the tribunals created by the Bush Administration, “are not part of the integrated system of military courts, complete with independent review panels” (Hamdan v. Rumsfeld, 588). As the court in Hamdi said, “the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core rights to challenge meaningfully the Government's case and to be heard by an impartial adjudicator” (Hamdi v. Rumsfeld, 536). Tying this concern back to separation of powers, the concurring opinion stated that:

Trial by military commission raises separation-of-powers concerns of the highest order. Located within a single branch, these courts carry the risk that offenses will
be defined, prosecuted, and adjudicated by executive officials without independent review. Concentration of power puts personal liberty in peril of arbitrary action by officials in an incursion the Constitution’s three-part system is designed to avoid. \((\text{Hamdan v. Rumsfeld, 782})\)

The Court found that the executive branch set up the chain of review in such a way that in order to appeal an executive panel’s decision, an individual could only appeal within the executive branch, leading to insufficient judicial review because of potential bias \((\text{Hamdan v. Rumsfeld, 588})\).

The government responded with the MCA of 2006. Unfortunately, this still prevented petitioners from filing any questions of judicial review in Article III Courts \((\text{Military Commissions Act of 2006, 25})\). The judicial branch should provide an impartial review board, and Article III Courts have the power to handle federal court cases \((\text{U.S. Const. Art. III})\). Deciding constitutional questions in the courts is how the judicial branch is able to check the executive branch. When the executive branch ignores rulings about judicial review like \text{Hamdan}, it does not honor the check of judicial review. In regards to the current military tribunals, the result is an executive branch who has indefinitely assumed the role of the judicial branch and an imbalance of power among the three branches that continues indefinitely.

A third case that dealt with Guantanamo Bay, the military tribunals, and judicial review was \text{Boumediene v. Bush} in 2008. The petitioners in \text{Boumediene} were detainees at Guantanamo Bay seeking to challenge their detention \((\text{Boumediene v Bush, 42})\). The Court in \text{Boumediene} did not address the question of whether or not the executive branch had authority to detain enemy combatants in the first place, but it is worth noting that none of the petitioners were citizens of any nation that the United States was at war with at the time the case was decided because there was no official declaration of war.
(Authorization, 1). It is also important to recall that the executive implemented the military tribunals because of the exigency of war (Military Order, 1). Rather than questioning the detention of the individuals in *Boumediene*, the court looked at judicial review of the tribunals, specifically through habeas corpus review and stated that the Constitution did apply at Guantanamo Bay as it was part of U.S. territory (*Boumediene v. Bush*, 758). The petitioners in *Boumediene* specifically cited the language of the Military Commissions Act of 2006 that seeks to strip the federal courts of jurisdiction over matters involving enemy combatants. The Court ruled that habeas corpus was meant to be a check on the executive branch by allowing courts to review the executive detention of individuals. (*Boumediene v. Bush*, 2241). This review was important because, as the Court said, “The DTA review proceeding falls short of being a constitutionally adequate substitute [for habeas corpus]” (*Boumediene v. Bush*, 31). The Court not only ruled that there was insufficient judicial review; they also stated that it was necessary to have sufficient review when an individual was detained by an executive order. According to the majority:

> Where a person is detained by executive order, rather than, say, after being tried and convicted in a court, the need for collateral review is most pressing. A criminal conviction in the usual course occurs after a judicial hearing before a tribunal disinterested in the outcome and committed to procedures designed to ensure its own independence. These dynamics are not inherent in executive detention orders or executive review procedures. (*Boumediene v. Bush*, 21)

This language explains the critical need for collateral review in tribunals, but as the Court points out, there is not sufficient collateral review in the tribunals. Echoing *Hamdan*, the Court again expresses concern about the impartiality of the tribunals. If the Court is concerned about inherent bias during review of detention, there is arguably a similar risk
of bias in guilt, sentencing, and appellate decisions, which is why the Court should be
allowed to step in as a neutral review board. The Court ruled in a 5-4 decision that
ultimately the opportunity for judicial review is necessary, but that neither the MCA of
2006 nor the Detainee Treatment Act of 2005 provided sufficient judicial review for
detainees (Boumediene v. Bush, 2241).

The majority in all of these cases found that the executive branch had erred in
taking judicial review in the form of habeas corpus away from detainees. The dissent in
all of these cases disagreed. The main basis for their dissent, however, was not based on
constitutional questions. The basis for dissent focused on the dangerous nature of the
enemy combatants if they were to be released. The dissent in Boumediene argued that the
U.S. is at war with radical Islamists, and that giving judicial review to the courts would
only make the war harder on our country (Boumediene v. Bush, 828). The dissent pointed
out that (as of 2008) thirty detainees had been released from Guantanamo Bay and
returned from the battlefield. They also acknowledged, however, that these detainees
were released because the military decided that these detainees were not dangerous
enemy combatants (Boumediene v. Bush, 829).

This dissent does not support the idea that the military tribunals are protecting our
country, nor does it support an argument that the judicial branch would be less equipped
to review the detention of enemy combatants. Rather, it suggests that perhaps cases
should be appealed to the judicial branch, which may even be stricter on these dangerous
terrorists. As the majority in Hamdan stated:

We have assumed, as we must, that the allegations made in the Government’s
charge against Hamdan are true. We have assumed, moreover, the thrust of the
message implicit in that charge – viz., that Hamdan is a dangerous individual
whose beliefs, if acted upon, would cause great harm and even death to innocent
civilians, and who would act on those beliefs if given the opportunity. It bears emphasizing that Hamdan does not challenge, and we do not today address the Government’s power to detain him for the duration of active hostilities in order to prevent such harm. But in undertaking to try Hamdan and subject him to criminal punishment, the Executive is bound to comply with the rule of law that prevails in this jurisdiction. (Hamdan v. Rumsfeld, 2799)

The judicial branch agrees that dangerous terrorists should be prevented from returning to the battlefield. They should be prevented from harming citizens. They should be punished for their crimes. However, it should be done legally in accordance with constitutional provisions of due process and in line with separation of powers and constitutional checks and balances. This thesis does not argue that detainees who have committed terrorist acts should be released, but there is a difference between a life sentence and indefinite detention. The first would be a legal avenue through federal court, the second would be a standing violation of checks and balances and constitutional rights with no foreseeable end.

VI.
REVISIONS AND SOLUTIONS

A. Military Tribunal Revisions

The military tribunals were implemented by the Bush Administration, and the current Obama Administration has continued to use the tribunals. Both administrations took small steps to remedy the tribunals, but their efforts did not remedy the issue of a lack of judicial review. Instead, Article III Courts are still stripped of jurisdiction over the tribunals, resulting in a lack of judicial review and an indefinite imbalance of power that the judicial branch cannot check through judicial review.
The most significant revision of the military tribunals came with the Military Commissions Act of 2009 (MCA of 2009). On January 22, 2009, President Obama suspended all military commissions through Executive Order 13492 until the tribunals could be amended through the MCA of 2009 (Executive Order 13492, 1). At that point, the executive branch acknowledged that after seven years, the commissions had only led to three convictions (Executive Order 13492, 1). The changes instituted by the MCA improved the due process procedures of the military commissions by reinstating some constitutional protections of the accused. The MCA, “bans the use of evidence obtained by ‘cruel, inhuman, or degrading treatment’ and reverses the burden of proof with regards to the admissibility of hearsay evidence so that the accused no longer has to prove such evidence is unreliable” (Title XVIII, 388). The MCA of 2009 also outlined a review system called the United States Court of Military Commission Review that basically modified the CRSTs created with the Detainee Treatment Act of 2005. The review board is still composed of a three member review board all appointed by the Secretary of Defense (Title XVIII, 415). These procedural revisions were a step towards better constitutional due process for the tribunals and detainee rights, but they did not remedy the issue of judicial review because the hierarchy of the appeals process is still unilateral within the executive branch.

B. No Check Left?

The executive branch went so far to make the military tribunals immune from judicial review, that even when the executive attempted to suspend the tribunals, it was unable to do so. President Obama promised to abolish the tribunals and close
Guantanamo Bay with Executive Order 13492 of January 22, 2009, but did not carry through with his promise because Guantanamo Bay is still in operation and the military tribunals are still being used today (Guiora, 619). Furthermore, that month, Congress passed National Defense Authorization Act for Fiscal Year 2011 (NDAA) that explicitly eliminated federal court as an option for enemy combatants.

With the NDAA, Congress implemented funding restrictions on all Department of Defense detainees being held abroad. The funding restrictions prohibited any of these foreign detainees from being transferred to U.S. Territories where they could be tried in Article III Courts. This included Guantanamo Bay (NDAA, 364).

The Obama Administration tried to transfer five of the 9/11 terrorist cases to Article III Courts, but Congress prevented that from happening. In November of 2009, President Obama announced that the 9/11 terrorists would not be tried in military tribunals; they would be tried in New York. Unfortunately, in June of that year, Congress passed the NDAA (NDAA, 364). According to Solow, the Attorney General at the time then withdrew the pending indictments against the alleged terrorists and authorized their trial by military commission (Solow, 1491). Now, over twelve years later, Khalid Shaikh Mohammed, one of the terrorists involved in the 9/11 attack, still has motions hearings pending in military tribunal court in December of 2013 (Military Commissions, Cases). If there are any questions about his case, they will be appealed within the executive branch, not the judicial branch, even though it has been over twelve years since his crime. This does not indicate an exigency of war and the need for military tribunals. However, because the tribunals at Guantanamo Bay have become an easy place to detain and
prosecute terrorists, it is easy for Congress to deny funds to transfer terrorists away from there.

According to Alexander, President Obama was hesitant about signing the congressional bills that included the funding restrictions, but gave “grudging assent” (Alexander, 1140). Even President Obama, however, acknowledged that the bill, “would, under certain circumstances, violate constitutional separation of powers principles” because the legislative branch was infringing upon the executive branch’s discretion in regards to enemy combatants (Alexander, 1141). By signing the bill anyway, the President disregarded the constitutional separation of powers issues with the bill. With the NDAA, Congress disregarded judicial review by preventing the executive branch from redacting its error. This again is a violation of constitutional checks and balances. In the case of the military tribunals, the judicial branch has been disregarded as it has attempted to check the executive branch’s decision to indefinitely implement the tribunals.

The executive branch overstepped its jurisdictional boundaries in such a way that violated checks and balances because of the indefinite nature of the war on terror. When the executive branch attempted to abolish the tribunals, the legislative branch stepped in and supported the initial executive decision. The executive branch has disregarded the judicial branch’s check, and Congress supported that decision. As a result, all judicial power over the tribunals and these detainees is now in the hands of the executive and legislative branches. While precedent has allowed deference to these branches during wartime, the current war on terror does not support such great deference. The executive military tribunals have escalated so far that it would be extremely difficult to abolish
them now in deference to the judicial rulings against them. At this point, it would be easier for the government to continue to allow these tribunals to function and violate personal liberties instead of allowing for proper judicial review.

C. Solutions

At this point, the only way to restore constitutional checks and balances is to restore judicial authority over federal terrorism cases. This can happen one of two ways. One option is to transfer jurisdiction of all cases concerning guilt and sentencing from military tribunals to Article III Courts. A second option is to rewrite the procedures of the executive military tribunals in a way that allows for appellate judicial review by Article III courts of all tribunal cases concerning guilt and sentencing. Either way, the executive branch must not have unilateral power over federal terrorism cases in order to preserve personal liberties and allow the judicial branch to exercise judicial review. In order to restore constitutional checks and balances, the judicial branch must be allowed to exercise the check of judicial review over these terrorism cases. Neither option would completely abolish the military tribunals. Abolishing the current tribunals is not necessary if there is judicial review over the proceedings. Rather than abolishing the tribunals, these options would restore the check of judicial review.

The first possible solution, transferring jurisdiction of cases from tribunals to Article III Courts, would treat all terrorism related cases as criminal cases to be tried in federal court. It would allow the executive branch to retain ultimate authority over the detention and treatment of terrorists, but Article III Courts would have complete jurisdiction over adjudication and appeals. The military does have authority over enemy
combatants, but not indefinite authority to adjudicate and review the appeals of their criminal cases. For this solution to become a reality, Congress would need to repeal the provision in the NDAA prohibiting the use of funds to transfer detainees from Guantanamo Bay, revise the MCA of 2009, and write legislation allowing the jurisdiction of cases to be transferred. Then the executive branch would need to conform to Congressional legislation, ceding authority to both the legislative and judicial branches. At that point the judicial branch would have authority to adjudicate terrorists as criminals. After a detainee was labelled as a criminal instead of an enemy combatant who has violated federal law, the case would go to a district Article III Court for adjudication, and any and all appeals would be through the Article III appellate courts.

This first option would restore constitutional checks and balances between the judicial and executive branches. It would allow the judicial branch to serve as both adjudicator and impartial appeal board over cases. This would also alleviate the Supreme Court’s concerns about the impartiality of the tribunal review boards while affording the detainees a proper impartial review board. Allowing the courts to take on a judicial role over these cases would restore a balance of power among the branches because the process would no longer be unilateral within the executive branch; the executive branch would no longer be acting as prosecutor, judge, and Supreme Court.

There are limitations to this first possible solution. It would be inconvenient and expensive to transfer all detainees to the states for trial. In addition, if the process was long, the detainees would need to be housed in an appropriate high-security prison for the duration of the hearings process. Also, because of public pressure to ensure national security, the NDAA is not likely to be repealed soon. Without the funds to transfer
detainees into the United States, it would be difficult to transfer jurisdiction of the tribunal cases to Article III Courts. The first option would restore checks and balances in concept, but its feasibility would be limited in practice.

The second possible solution, appellate review of all tribunal cases, would have Article III Courts serve as appellate courts, not trial courts. Military tribunals would still prosecute terrorists and handle all detention, guilt, and sentencing questions, but jurisdiction of all appeals would transfer to Article III Courts. This option would change so that the Supreme Court was the highest level of appeal instead. This would end the unilateral executive appeals process that violates constitutional checks and balances by allowing Article III Courts to review the decisions made in the tribunal courts.

This second option is more feasible than the first. A mandatory appeals process would not require the government to transfer detainees from Guantanamo Bay into a federal courtroom. With the first option, detainees would need to be transferred so they could be present for their hearings. With this second option, they could also remain in detention at Guantanamo Bay while their appeal is heard in an Article III Court. This would be more convenient and more cost-effective than transferring the detainees out of Guantanamo for trial and, if the NDAA is any indication, it is more likely to be supported by Congress. This second option would also restore constitutional checks and balances between the three branches. It would allow the judicial branch to review tribunal decisions, and check the executive branch if any of the decisions are not constitutional. Also, unlike the first option, it would not respond to the problem by completely stripping the executive branch of all power in regards to the detainees at Guantanamo Bay. It would only restore appropriate judicial authority to the judicial branch.
Both of these options are constitutionally feasible and would remedy the indefinite imbalance of power among the branches. Article III Courts have constitutional authority over terrorism cases like the ones being tried in the tribunals. The Constitution gives Article III Courts authority to decide a number of federal constitutional issues arising between public and private parties. In regards to which issues the courts have authority over, the Constitution says:

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects. (U.S. Const. Art. III)

Article III Courts have jurisdiction to decide cases involving terrorists who have broken U.S. laws because the judicial branch has power over cases where the United States is a party and cases where the constitution has been violated. In cases dealing with terrorists who are being detained in U.S. territory who have attacked U.S. territory, the United States is clearly a party and federal laws have been violated. Therefore, it is appropriate for enemy combatants in cases that fall under the aforementioned circumstances to be prosecuted in Article III Courts, or at the very least for some level of appellate review to be present.

The Court has asserted since *Milligan* that the judicial branch is a more appropriate forum for adjudicative and appellate review than the tribunals. According to the Court in *Milligan*, “Surely an ordained and established court was better able to judge
of this [sufficient legal evidence] than a military tribunal composed of gentlemen not trained to the profession of the law” *(Ex Parte Milligan, 221)*.

The Supreme Court and government officials have expressed confidence that the federal courts are an appropriate forum to capably handle the appeals of these cases. According to the majority in *Hamdan*, “[Supreme Court] review of the procedures in advance of a ‘final decision’ is appropriate” (*Hamdan v. Rumsfeld*, 736). Precedent, the Constitution, and judicial opinion all support one of these two solutions that would allow Article III Courts to have judicial review of terrorist cases that are currently under the jurisdiction of the military tribunals. Furthermore, U.S Attorney General Eric Holder even pointed out that terrorists have traditionally been tried in Article III Courts as criminals. He said, “’The practice of the U.S. government followed by prior and current administrations, without a single exception, has been to arrest and detain under federal criminal law all terrorist suspects who are apprehended inside the United States” (qtd. in Kennedy, 417). If the government were to respond to this language properly, Article III Courts would at least have appellate jurisdiction over the tribunals and would serve as an impartial review board.

Both of these options are constitutionally feasible for legislative purposes. For either of these solutions to work, Congress would need to repeal current legislation refusing Article III jurisdiction over tribunal cases. The Constitution gives the legislative branch the power to regulate Article III Court appellate jurisdiction as a check over the judicial branch (*U.S. Const. Art. III*). Congress abused that power when they stripped the judicial branch of jurisdiction over the tribunal cases in the first place because the use of tribunals is not appropriate under the indefinite circumstances of the war on terror.
Congress is within constitutional bounds to write legislation allowing for judicial appeal of the military tribunals. Restoring judicial appeal would restore balance among the branches because the executive branch would not have unilateral authority over all judicial proceedings.

A solution is necessary to restore checks and balances among the branches. While Article I of the constitution does authorize the executive branch to take more aggressive actions during times of war, Article I is not written to permanently transfer all judicial power to the executive branch. As the tribunals stand now, the executive branch has permanent authority of all judicial decisions concerning the detainees at Guantanamo Bay. This results in an indefinite violation of checks and balances. The circumstances of the war on terror do not support permanent executive jurisdiction over terrorism-related judicial proceedings. The Constitution still applies during time of war. The Court in *Boumediene* argued:

> Our basic charter cannot be contracted away like this. The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply. Even when the United States acts outside its borders, its powers are not absolute and unlimited but are subject to such restrictions as are expressed in the Constitution. Abstaining from questions involving formal sovereignty and territorial governance is one thing. To hold the political branches have the power to switch the Constitution on or off at will is quite another…The latter would permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say what the law is. (*Boumediene v. Bush*, 766)

The Court contends that the constitution still applies at Guantanamo Bay, and the government cannot operate there outside of the constitutional bounds of separation of powers because it is still under U.S. territorial jurisdiction (*Boumediene v. Bush*, 2259). The way the executive branch has taken over judicial matters in the war on terrorism does not honor the system of checks and balances in the Constitution. If the situation is not
remedied, the executive branch’s current emergency powers may become permanent. These powers are not meant to be permanent, though. However, because of the indefinite nature of the war on terror, that emergency state is becoming a permanent state of the nation, resulting in a permanent use of executive wartime powers and a permanent violation of Constitutional checks and balances.

VII. CONCLUSION

The recent rise in public attention about terrorist attacks in the United States is putting extreme pressure on executives, legislatures, and judges to disregard constitutional regulations that limit policy makers’ powers during wartime. There is public criticism of policy makers and a demand that something must be done to protect the security of the United States from foreign threats. The nation’s leaders are compelled to adopt emergency procedures, like executive military tribunals, to preserve national defense, yet they overlook the constitutional violations of these procedures. Government figures, especially the President, are under tremendous public pressure to always make the right decisions when it comes to balancing safety and liberty. As a result, the President has deferred to emergency wartime powers. However, the nation is not in an emergency state of war at this time.

This unchecked executive power can have consequences. In Milligan, the Court ruled, “…unlimited power, wherever lodged at such a time, is especially hazardous to freemen” (Ex Parte Milligan, 218). The framers of the Constitution feared an executive that was too powerful, so they included a system of checks and balances in the
Constitution to ensure that no single branch, including the executive, would become too powerful. Unfortunately, the executive branch has overstepped its bounds with the current military tribunals. This is a serious problem if that executive overreach continues indefinitely and becomes permanent, as could happen with the current war on terror.

In addition, if the executive branch of government violates the system of constitutional checks and balances, there are serious long term implications. With the DTA, MCAs and NDAA, the executive and legislative branches made steps towards mitigating the issue of the military tribunals. However, these acts did not resolve the issue of a lack of judicial review. Regardless of their limited influence, they still did not remedy the fact that the judiciary was being excluded from the process. This matters because over time it will weaken faith in the judicial branch’s check of the executive branch and support indefinite executive overreach. In addition, it sets a troubling precedent of the executive disregarding the judicial branch’s check when the executive branch is overstepping its boundaries while using emergency wartime powers. If the judicial branch is unable to check the executive, it opens the floodgates to similar problems in the future where the executive branch has overstepped its constitutional bounds and needs to be checked. This has the potential to be very problematic if the executive branch oversteps its boundaries in a way that infringes on the constitutional rights of citizens and the judicial branch is unable to check the executive branch.

Currently, the war on terror raises important constitutional questions about the executive military tribunals, but the judicial branch has not been given adequate authority to review these constitutional questions. The judicial branch exercises judicial review on the other two branches of government and within its own structural system. However, as
an extension of the executive branch, the executive military tribunals do not adhere to the system of judicial review that the tiered Article III Court system was created for, nor does it adhere to the broader system of inter-branch checks and balances established in the U.S. Constitution.

There is no question that dangerous terrorists should be detained and prohibited from engaging in any more terrorist actions that threaten the safety of the United States. Violent terrorists should be captured, detained, prosecuted, and incarcerated for their crimes against the United States. Enemy combatants who present a continued threat to the U.S. should be detained and prohibited from returning to the battlefield. The U.S. should enforce strict penalties for terrorists and their supporters. However, the federal government should not sacrifice constitutional protections and individual liberties in order to do so. The United States may have a history of deferring to the executive branch during times of war, but as was seen in Korematsu, sometimes the executive branch needs to be checked. The Court should be more aggressive in exercising that check now. It is time to start treating these terrorists as criminals, not prisoners of war. As the Court in Hamdi said, “It is during our most challenging and uncertain moments that our Nation’s commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad” (Hamdi v. Rumsfeld, 535). The United States was founded on a system of ideals, if the country loses those ideals, there is nothing left. The executive branch must be checked before these executive military tribunals become a permanent violation of checks and balances causing the United States to lose the Constitutional ideals upon which this government was founded.
Works Cited


