THE PUBLIC'S RIGHT OF ACCESS TO THE MILITARY TRIBUNALS AND TRIALS OF ENEMY COMBATANTS

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I. INTRODUCTION

In response to the terrorist attacks of September 11, 2001, President George W. Bush issued a Military Order providing for military commission trials of non-citizens detained on suspicion of involvement in terrorist activities.[1] To implement this order, the Department of Defense issued Military Commission Order No. 1 ("Commission Order"), providing procedures for the trial of terror detainees before military commissions.[2] Under the terms of this order, non-citizen enemy combatants detained at the Guantanamo Bay military base are subject to this prosecution procedure.[3] Since 2002, more than 650 individuals have been detained at Guantanamo as enemy combatants.[4] Human rights advocates criticize the U.S. military for the indefinite detention of accused individuals without trial and for the treatment of detainees that allegedly amounts to torture.[5] Although the

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1. Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

2. 32 C.F.R. § 9 (2005).

3. DEP'T OF DEF., MILITARY COMMISSIONS FACT SHEET (2005), http://www.defenselink.mil/news/Sep2005/d20050915factsheet.pdf [hereinafter MILITARY COMMISSIONS FACT SHEET]. The Guantanamo Bay naval base is located in Cuba, about 400 miles off the coast of Miami, Florida. The Joint Task Force Guantanamo mission includes over 2000 U.S. service members and civilians, and "conducts detention and interrogation operations to collect and exploit intelligence in support of the Global War on Terrorism, coordinates and implements detainee screening operations, and supports law enforcement and war crimes investigations." Dep't of Def., Military Commissions Press Kit, (Jan. 9, 2006), http://www.defenselink.mil/news/Jan2006/d20060109Press_Kit.pdf [hereinafter Military Commissions Press Kit].

4. Erwin Chemerinsky & Stephan Yagman, *Listening Post*, NEWS & OBSERVER (Raleigh, N.C.), July 24, 2005, at A23.

5. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Situation of Detainees at Guantanamo Bay*, E/CN.4/2006/120 (Feb. 15, 2006).

military commissions were intended to allow swift and efficient justice close to active combat,[6] the process has been criticized as "mired in a combination of bureaucratic bumbling and litigation."[7]

In June 2006, the United States Supreme Court held that the military commission procedures for the trial of terror detainees had not been authorized by Congress and did not comply with either the Uniform Code of Military Justice ("UCMJ") or the Geneva Conventions.[8] The Supreme Court focused on the fact that the military commission procedures would not sufficiently protect the right of the accused to be present at trial proceedings and to have access to evidence used against him.[9] Although the Court did not explicitly address the public's First Amendment right of access to trial proceedings, this right of access would be better protected in a court-martial setting than under the military commission's grounds for closure.[10] In addition to not sufficiently protecting the right of the accused to be present during trial proceedings, the military commission procedures would not have fully protected the public's constitutional right of access to the trials of terror suspects.[11] As this Note was going to press, Congress approved a modified version of the procedures rejected by *Hamdan*.[12] This Note examines public access issues with reference to the 2001 Commission Order, but questions of public access must still be debated and resolved now, before the detainees' trials recommence under a set of procedures for public access that are similar to the flawed procedures of the 2001 Commission Order.

The public's constitutional right of access to trial proceedings is grounded in the First Amendment.[13] Ensuring appropriate public access to the trials of terror suspects is an issue of public importance.[14] The Military Commission Order procedures express a commitment to open proceedings,[15] yet the grounds for

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6. Benjamin Wittes, *Justice Delayed: Why We Still Don't Have a Way to Put Terrorists on Trial*, THE ATLANTIC, Mar. 2006, at 36.

7. *Id.*

8. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2793 (2006).

9. *Id*. at 2798 ("[V]arious provisions of Commission Order No. 1 dispense with the principles, articulated in Article 75 [of the UCMJ] and indisputably part of the customary international law, that an accused must, absent disruptive conduct or consent, be present for his trial and must be privy to the evidence against him.").

10. *See infra* Parts III.A, III.E.

11. *See infra* Parts III.E.

12. Military Commissions Act, S. 3930, 109th Cong., 2d Sess. (2006) (Enrolled as Agreed to or Passed by Both House and Senate). This legislation provides procedures governing the use of military commissions to try alien unlawful enemy combatants, including procedures for closure of the proceedings. The legislation also sets out procedures for the exclusion of the accused from the proceedings and the protection of classified information. Detainees are also stripped of the right to federal habeas corpus review of their detentions.

13. *See infra* Part III.A.

14. Edward J. Klaris et al., Ass'n of the Bar of the City of N.Y., *The Press and the Public's First Amendment Right of Access to Terrorism on Trial: A Position Paper*, 22 CARDOZO ARTS & ENT. L.J. 767, 770 (2005).

15. 32 C.F.R. § 9.6(b)(3) (2005) ("The Commission shall . . . [h]old open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this Part.").

closure of these proceedings are so open-ended that they threaten to result in closure in every instance. Closure under the Commission Order guidelines would result in the exclusion of media, the detainee, and civilian defense counsel from the proceedings.[16] In addition, there is no procedure for independent review of closure determinations.[17] Although military commission proceedings were stayed pending the *Hamdan* decision by the Supreme Court,[18] President Bush reacted to *Hamdan* by stating that he would seek congressional authorization to use military commissions to try detainees.[19] The *Hamdan* decision leaves open the possibility that Congress could provide specific statutory authorization for military commissions or modified trial procedures.[20]

Congressional hearings before the Senate Judiciary Committee and the Senate Armed Services Committee began in July 2006 to determine whether Congress would authorize procedures to try terror suspects that differ from the traditional court-martial procedures in the UCMJ.[21] At these hearings, presidential administration lawyers argued that Congress should ratify the military commissions with only "minor tweaking,"[22] and Attorney General Alberto Gonzales confirmed that the administration's position is that Congress should consider simply ratifying the Commission Order procedures that the Court rejected in *Hamdan*.[23] Legal scholars testified that while Congress "could come back and

16. *Id.*

17. *See id.*

18. Proceedings in the Hicks trial were stayed pending the outcome of the Supreme Court's decision in Hamdan v. Rumsfeld, 126 S. Ct. 2749 (2006). Hicks v. Bush, 397 F. Supp. 2d 36, 45 (D.D.C. 2005). On June 10, 2006, the Appointing Authority stayed "all sessions in all cases currently referred to trial by Military Commissions" until further notice. DEP'T OF DEFENSE, APPOINTING AUTHORITY FOR MILITARY COMMISSIONS (2006), http://www.defenselink.mil/news/Jun2006/d20060613commissions_stayed.pdf.

19. Sheryl Gay Stolberg, *Justices Tacitly Backed Use of Guantanamo, Bush Says*, N.Y. TIMES, July 8, 2006, at A14.

20. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2799 (2006) (Breyer, J., concurring) ("Nothing prevents the president from returning to Congress to seek the authority he believes necessary."). The Court conditioned several of its conclusions on the absence of specific congressional authorization, including its holding regarding the Executive's need to show military necessity for the establishment of the military commissions, *id*. at 2785, its holding that the UCMJ, the AUMF and the DTA authorize the President to convene military commissions only "where justified under the Constitution and laws, including the law of war," *id.* at 2755, and its holding that "information used to convict a person of a crime must be disclosed to him," *id.* at 2798.

21. Neil A. Lewis, *Military Lawyers Prepare To Speak on Guantanamo*, N.Y. TIMES, July 11, 2006, at A14.

22. Kate Zernike, *Administration Prods Congress to Curb the Rights of Detainees*, N.Y. TIMES, July 13, 2006, at A1.

23. David Stout, *Bush Said to Have Blocked Eavesdropping Inquiry*, N.Y. TIMES, July 18, 2006, *available at* http://www.nytimes.com/2006/07/18/washington/18cnd-gonzales.html.

write that blank check,"[24] it ought not to do so because defiance of the Geneva Conventions would be "a deeply damaging act."[25]

At a hearing before the Senate Judiciary Committee, lawyers for the Pentagon asked the Committee "to render its approval for the system as currently configured," because "[i]t would be a very expeditious way to move these trials forward."[26] The Bush administration recently proposed draft legislation that would authorize the military commission procedures rejected by *Hamdan*, including the introduction of hearsay evidence and the exclusion of the accused from his own trial.[27] Whether these trials commence in the form of a traditional court-martial, a modified court-martial, a modified military commission, or under the Commission Order procedures, there should be judicial review of closure determinations in order to ensure that the public's constitutional right of access to the trial proceedings is adequately protected.

The public's constitutional right of access to the trial of terror suspects before military commissions is a particularly pressing question because military commissions provide fewer procedural safeguards for the rights of the accused than either a criminal trial in an Article III court or a court-martial under the UCMJ.[28] Because detainees tried by military commission would enjoy fewer procedural safeguards against erroneous determinations of guilt, there is serious potential for unfair trial results and abuse of discretion by executive decision makers. The Detainee Treatment Act of 2005 ("DTA") limits federal courts' jurisdiction to hear detainees' habeas corpus petitions.[29] The DTA also limits review of the final decisions of both Combatant Status Review Tribunals and military commissions under the Commission Order.[30] This jurisdiction stripping could further eliminate judicial oversight of military commissions and judicial review of closure determinations.

Because democratic self-governance depends on the free flow of information about government, there is a strong public interest in open government and open judicial proceedings.[31] Alexander Meiklejohn's First Amendment argument, focused on the concept of self-governance, underscores the importance of public observation of government functions: "We listen . . . because we need to hear. If there are arguments against . . . our policies in war or in peace, we the

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24. Adam Liptak, *Scholars Agree That Congress Could Reject Conventions, but Not That It Should*, N.Y. TIMES, July 15, 2006, at A10 (quoting Temple Univ. Law Professor Peter J. Spiro).

25. *Id.* (quoting Univ. of Tex. Law Professor Derek P. Jinks).

26. Mark Mazzetti & Kate Zernike, *White House Says Terror Detainees Hold Basic Rights*, N.Y. TIMES, July 12, 2006, at A1.

27. David S. Cloud & Sheryl Gay Stolberg, *White House Bill Proposes System to Try Detainees*, N.Y. TIMES, July 26, 2006, at A1.

28. Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L.J. 1259, 1261 (2002) ("[The Military Order's] procedural protections fall conspicuously short of those most Americans take for granted.").

29. 28 U.S.C.A. § 2241 (2006).

30. *Id.*

31. ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 65–66 (1948).

citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government."[32] If citizens cannot hear these arguments because the executive unduly shields its actions from public view, then the democratic process of self-government cannot function properly.[33]

In this context, public scrutiny of the trial of terror detainees provides a much needed check on potential governmental abuse. If the press does not have access to these trials, governmental abuse of the proceedings could go unreported and unnoticed by the public. In an influential concurring opinion, Justice Brennan noted that "open trials are bulwarks of our free and democratic government: public access to court proceedings is one of the numerous 'checks and balances' of our system . . . open trials are indispensable to First Amendment political and religious freedoms."[34] Therefore, judicial review of closure determinations is necessary to ensure that public access continues to act as a check on executive and judicial power.

Procedures like those in the Commission Order would not fully protect the public's First Amendment right of access. The Commission Order does not contain any procedure for the Presiding Officer's determinations regarding the extent of public access to the military commissions to be reviewed by the judiciary, in addition to other executive officers on the military Review Panel or the Secretary of Defense. The proper test for whether proceedings ought to be open must go beyond review of the discretionary decisions based on Military Commission Order guidelines. This inquiry must also incorporate concerns based on the public's First Amendment right of access to judicial proceedings. Though the Department of Defense has expressed a commitment to open proceedings where practicable,[35] the access actually provided pursuant to the Military Commission Order procedures would not satisfy the First Amendment interest in open proceedings. Whatever form the trials of terror suspects ultimately take, appropriate procedural mechanisms should be developed to ensure timely judicial review of decisions regarding closure of proceedings.

Part II of this Note discusses press access to the military commissions, including background on these procedures; the extent and nature of press access to preliminary hearings and Combatant Status Review Tribunals in 2004–2005; the guidelines provided by the Military Commission Order No. 1; and possible procedures for review of closure determinations for future trials of terror suspects.

Part III summarizes existing law on the public's constitutional right of access to judicial proceedings and courts-martial, the extent of enemy combatants' rights to a public trial, and judicial review of military proceedings. This Part also explores tensions between the Sixth Amendment right to a fair trial and the First

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32. *Id.*

33. There is concern that this executive, in particular, seeks to screen its actions from public view. *See* Edward J. Klaris et al., *supra* note 14, 769 ("[S]ecrecy seems to be an important goal in the Bush administration's legal strategy.").

34. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 592 (1980) (citation omitted).

35. Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9.6(b)(3) (2005).

Amendment right of access to judicial proceedings, as well as tensions between national security interests and the First Amendment right of access. In addition, this Part discusses ways in which the guidelines for closure outlined in the Commission Order would not in practice have fully protected the public's constitutional right of access.

Part IV proposes procedures for judicial review of closure determinations, which are necessary to check governmental abuse and to protect the public's right of access to terror trials.

II. THE PROBLEM OF PRESS ACCESS TO MILITARY COMMISSIONS

A. Military Commissions and Tribunals

In 2004, the United States Supreme Court held that the Authorization for Use of Military Force ("AUMF") authorizes the detention of an enemy combatant captured while fighting for the Taliban.[36] The Court also held that the AUMF authorizes military tribunals to determine whether the detainee was properly classified as an enemy combatant.[37] Because the enemy combatant in the *Hamdi* decision was also a U.S. citizen, the Court held that due process requires that a citizen enemy combatant be given a meaningful opportunity to contest the factual basis for his detention before a neutral decision maker, who could be a military officer.[38] In response to this decision, the military implemented a procedure to offer citizen and non-citizen enemy combatant detainees the opportunity to provide further information about their status and to challenge their status in a formal review.[39] This procedure is called a Combatant Status Review Tribunal.[40]

From August 2004 to January 2005, the military held 558 Combatant Status Review Tribunals at the Guantanamo Bay military base.[41] A Combatant Status Review Tribunal is a formal review of all information related to a detainee to determine whether he meets the criteria for designation as an enemy

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36. Hamdi v. Rumsfeld, 542 U.S. 507, 521 (2004). The AUMF was a congressional joint resolution that was signed into law on September 18, 2001. Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Under the AUMF,

> the President is authorized to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

Id. Congress also declared that "this section is intended to constitute specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution." *Id.*

37. *Hamdi*, 542 U.S. at 507.

38. *Id.*

39. MILITARY COMMISSIONS FACT SHEET, *supra* note 3.

40. Military Commissions Press Kit, *supra* note 3.

41. DEP'T OF DEFENSE, COMBATANT STATUS REVIEW TRIBUNAL SUMMARY (2005), http://www.dod.mil/news/Mar2005/d20050329csrt.pdf [hereinafter COMBATANT STATUS REVIEW TRIBUNAL SUMMARY]. The Combatant Status Review Tribunals found that out of 558 enemy combatants, thirty-eight were improperly classified. *Id.*

combatant.[42] An enemy combatant is defined as "an individual who was part of or supporting Taliban or al Qaeda forces, or associated forces that are engaged in hostilities against the United States or its coalition partners," including "any person who has committed a belligerent act or has directly supported hostilities in aid of enemy armed forces."[43] The press has been permitted limited access to some Combatant Status Review Tribunals held on the Guantanamo base and to some information regarding the factual basis for the detentions.[44]

Another procedure implemented to review the status of enemy combatants is the use of Administrative Review Boards. Administrative Review Boards provide an annual evaluation of whether a particular detainee should remain in detention, be transferred, or be released.[45] The purpose of the review is to "help ensure [that] no one is detained any longer than is necessary, and that no one is released who remains a threat to our nation's security."[46] The review process is overseen by the Secretary of the Navy, and each Board is composed of three military officers.[47] The detainee is provided the assistance of a military officer and has the opportunity to present factual data to support his release.[48] The Board's final recommendation is based on information provided by the detainee, written information from the family and national government of the detainee, and submissions from U.S. government agencies.[49] As of October 31, 2005, 346 Administrative Review Boards had been conducted, resulting in the release of ten detainees and the transfer of sixty-five.[50] As of October 1, 2005, there were 505 enemy combatant detainees in continuing detention at the Guantanamo facility.[51]

One of those enemy combatant detainees, Salim Ahmed Hamdan, challenged his trial by military commission in federal court, arguing that the military commissions were not authorized to try war crimes and that the Geneva Conventions required a court-martial rather than a military commission.[52] Following the D.C. Circuit's holding that the military commissions could proceed against enemy combatants detained on suspicion of terrorist activities in connection with al Qaeda,[53] the Department of Defense announced plans to resume

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42. Military Commissions Press Kit, *supra* note 3.

43. *Id.*

44. Special Defense Department Briefing with Secretary England (Oct. 1, 2004), http://www.defenselink.mil/transcripts/2004/tr20041001-1344.html.

45. DEP'T OF DEFENSE, ADMINISTRATIVE REVIEW BOARD SUMMARY (2005), http://www.dod.mil/news/Oct2005/d20051031arb.pdf [hereinafter ADMINISTRATIVE REVIEW BOARD SUMMARY].

46. Military Commissions Press Kit, *supra* note 3.

47. News Release, Dep't of Def., No. 593-04 (June 23, 2004), http://www.defenselink.mil/releases/2004/nr20040623-0932.html.

48. *Id.*

49. *Id.*

50. *Administrative Review Board Summary*, *supra* note 45.

51. News Release, Dep't of Def., No. 994-05 (Oct. 1, 2005), http://www.dod.mil/releases/2005/nr20051001-4826.html.

52. Hamdan v. Rumsfeld, 415 F.3d 33, 37–38 (D.C. Cir. 2005).

53. *Id.* at 38–40 (holding that the trial of enemy combatants before a military commission is authorized by the AUMF and that the Geneva Conventions are not judicially enforceable).

military commission proceedings against four enemy combatants detained at the Guantanamo Bay military base.[54]

The first military commission trial was planned to commence against Australian David Hicks in November 2005.[55] Since the United States Supreme Court granted certiorari in the *Hamdan* case,[56] military commission proceedings against David Hicks and nine other enemy combatants were stayed pending that decision.[57] However, defense officials' comments in response to the *Hamdan* decision have indicated that the ruling "will not affect the day-to-day detention operations at the base," which continues to hold about 450 detainees.[58]

B. Press Access to Military Proceedings under Military Commission Order No. 1

The Military Commission Order No. 1 provides for the military commission procedures to be followed at the Guantanamo Bay naval base.[59] The Commission Order lays out the procedures for the appointment, qualifications, and duties of Commission personnel, as well as for the prosecution, defense, and conduct of the trial.[60] Subsection 6(b)(3) of the Commission Order describes the degree of public and press access to the commission proceedings.[61] This subsection states that the commission shall "[h]old open proceedings except where otherwise decided by the Appointing Authority or the Presiding Officer in accordance with the President's Military Order and this part."[62] "Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time."[63]

The Appointing Authority also has discretion to close commission proceedings when necessary.[64] The Commission Order provides five grounds for closure: the protection of classified or classifiable information; information protected by law or rule from unauthorized disclosure; the physical safety of participants in the Commission proceedings; intelligence and law enforcement

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54. News Release, Dep't of Def., No. 728-05 (July 18, 2005), http://www.defenselink.mil/releases/2005/nr20050718-4063.html.

55. Kathleen T. Rhem, *Judge Orders Military Trial at Guantanamo Bay Halted*, AM. FORCES PRESS SERVICE, Nov. 15, 2005, http://www.defenselink.mil/news/Nov2005/20051115_3356.html [hereinafter *Judge Orders Military Trial*].

56. Hamdan v. Rumsfeld, 126 S.Ct. 622 (2005).

57. Hicks v. Bush, 397 F. Supp. 2d. 36 (D.D.C. 2005); DEP'T OF DEFENSE, APPOINTING AUTHORITY FOR MILITARY COMMISSIONS (2006), http://www.defenselink.mil/news/Jun2006/d20060613commissions_stayed.pdf.

58. Sara Wood, *Detainee Operations Will Continue at Guantanamo, Officials Say*, AM. FORCES PRESS SERVICE, June 29, 2006, http://www.defenselink.mil/news/Jun2006/20060629_5549.html.

59. Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, 32 C.F.R. § 9 (2005).

60. 32 C.F.R. §§ 9.4 to 9.6 (2005).

61. 32 C.F.R. § 9.6(b)(3).

62. *Id.*

63. *Id.*

64. *Id.*

sources, methods, or activities; and other national security interests.[65] The determination of which information is classified or classifiable is governed by Executive Order 12958.[66] If information is found to be classified, it is not available to the accused, to civilian defense counsel, or to detailed defense counsel.[67]

If the Commission is closed for one of the enumerated grounds, that decision could lead to the exclusion of the public, the press, the accused detainee, or civilian defense counsel, but not of the Detailed Defense Counsel.[68] The *Hamdan* court found it objectionable that the Detailed Defense Counsel, even if privy to the closed session, could be forbidden to reveal to his or her client what took place therein at the Presiding Officer's discretion.[69] The Commission Order notes that proceedings "should be open to the maximum extent practicable."[70] Photography, video, or audio broadcasting or recording is prohibited, except where the Presiding Officer decides it is necessary for preservation of the trial record.[71] These procedures have been applied during commissions' preliminary hearings, as discussed in Part II.E.

C. Procedures for Review of Closure Determinations

The Commission Order does not detail procedures for review of the Appointing Authority or Presiding Officer's decision to close Commission proceedings for a certain portion of the trial, or for certain individuals or personnel.[72] The procedure for appeal of the Commission's decision on the merits of the war crimes charges includes review of the trial record by the Appointing Authority and review by a Military Review Panel, the Secretary of Defense, and the President.[73] The Commission Order itself contains no procedure for judicial review of the Commission decision.[74]

The Commission Order does not provide for review, outside of the executive branch, of decisions regarding the closure of the Commission proceedings; one possibility would be for this determination to be reviewed by the Review Panel, the Secretary of Defense, and the President.[75] If a Commission

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65. *Id.*

66. *Id.* (referencing Executive Order 12958, 60 Fed. Reg. 19825 (Apr. 17, 1995)).

67. 32 C.F.R. § 9.6(d)(5)(ii)(A).

68. *Id.* Detailed Defense Counsel is selected by the military to represent the accused. 32 C.F.R. § 9.4(C)(2).

69. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2786 (2006).

70. 32 C.F.R. § 9.6(b)(3).

71. *Id.*

72. *See* 32 C.F.R. § 9.

73. MILITARY COMMISSIONS FACT SHEET, *supra* note 3.

74. *See* 32 C.F.R. § 9. The DTA now limits judicial review of final decisions of the military commissions to the United States Court of Appeals for the District of Columbia Circuit. Detainee Treatment Act of 2005 § 1005(e), 28 U.S.C. § 2241 (2006); *see infra* Part III.B.

75. This review process would parallel the procedure for review of substantive decisions by the Commission. Substantive decisions would be reviewed by the Appointing Authority, who reviews the trial record. A Review Panel, appointed by the Secretary of Defense and consisting of Military Officers, would provide a further review and

proceeding were closed to civilian defense counsel, the accused, the public, or the press, it is also unclear what procedural mechanism would be used to contest this determination. With respect to a court-martial, at least one military appeals court has sua sponte brought up the issue of closure of the trial record during appeal on the merits.[76] In the setting of a military investigative hearing, the press has petitioned the Military Court of Appeals for a writ of mandamus to order the proceedings opened to the public.[77] These procedures would be appropriate in the context of trials of terror suspects by courts-martial or military commissions, and would allow the public to assert its right of access.

While the grounds for closure appear to be aimed at protecting the public interest in national security and the personal security of those involved in the proceedings, the Commission Order's commitment to open proceedings where practicable seems to be aimed at protecting the public interest in open judicial proceedings.[78] In the context of judicial proceedings and courts-martial, the public enjoys a First Amendment right of access.[79] Because of the strong public interest in open governmental proceedings, arguments have been made that this right of access extends to military commissions.[80]

It is likely that the public access to military commissions provided pursuant to military discretion under the Military Commission Order would not adequately protect the public's First Amendment interest in open proceedings. Because the military commissions were stayed pending the *Hamdan* decision,[81] we can only speculate as to the possibility that First Amendment interests would have been infringed under these procedures. But in light of the recent passage of the Military Commissions Act,[82] detainees may well face trial procedures not unlike those rejected by the *Hamdan* decision, including provisions for public access that echo the Commission Order. Whether the ten detainees who have been charged with crimes are tried by courts-martial or the new procedures authorized by Congress, appropriate procedural mechanisms should be developed for review of closure decisions.

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recommendation. The Secretary of Defense and the President would then conduct the final review and order. *See* 32 C.F.R. § 9.6(h).

76. United States v. Scott, 48 M.J. 663 (A. Ct. Crim. App. 1998) (holding that military judge abused discretion in ordering that entire stipulation of fact be sealed in trial record).

77. ABC, Inc. v. Powell, 47 M.J. 363 (C.A.A.F. 1997) (broadcasters asked the Court of Appeals for the Armed Forces to issue a writ of mandamus to open an investigation of military official misconduct).

78. *See* 32 C.F.R. § 9.6(b)(3).

79. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580 (1980) (recognizing the public's First Amendment right of access to judicial proceedings); United States v. Hershey, 20 M.J. 433, 436 (C.M.A. 1985) (recognizing the public's First Amendment right of access to courts-martial).

80. Klaris et al., *supra* note 14.

81. Hicks v. Bush, 397 F. Supp. 2d. 36 (D.D.C. 2005); DEP'T OF DEFENSE, APPOINTING AUTHORITY FOR MILITARY COMMISSIONS (2006), http://www.defenselink.mil/news/Jun2006/d20060613commissions_stayed.pdf.

82. S. 3930, 109th Cong., 2d Sess. (2006) (enrolled as agreed to or passed by both House and Senate).

D. Extent and Nature of Press Access to Military Tribunals in 2004–2005

Between August 2004 and January 2005, the military conducted 558 Combatant Status Review Tribunals at Guantanamo Bay.[83] The purpose of these proceedings was to determine whether each detainee had been properly classified as an enemy combatant.[84] Out of the 558, thirty-eight were found to be improperly classified and were released.[85] Once a detainee was found to be properly designated as an enemy combatant, he was subject to prosecution before a military commission.[86] Following the Combatant Status Review Tribunals, ten enemy combatants were charged for trial before a military commission.[87]

According to the American Forces Press Service, the press was permitted limited access to observe the Combatant Status Review Tribunals at Guantanamo Bay and to report observations.[88] In August 2004, the military invited a group of sixty-five media representatives to observe the tribunals.[89] Because of physical limitations, the military determined which press organizations and reporters would be invited to the military base.[90]

The military extended an invitation to international news organizations, including several Arabic language news networks.[91] Eight media members were chosen by lottery to be present at the tribunal, while the rest observed by closed-circuit cameras from a conference room.[92] The closed-circuit broadcast was set on a two- to three-minute delay to protect against the accidental disclosure of classified information to the full group of media members.[93]

There was no recording of any kind permitted, and the only images allowed out of the courtroom were made by a sketch artist, who was instructed not to depict the faces of the detainees, prosecuting attorneys, or panel members.[94] All sketches made by the media were reviewed by a government security official before their release,[95] and it was forbidden to identify any participants by name.[96]

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83. *Combatant Status Review Tribunal Summary*, *supra* note 41.

84. *See* MILITARY COMMISSIONS FACT SHEET, *supra* note 3.

85. *Combatant Status Review Tribunal Summary*, *supra* note 41.

86. MILITARY COMMISSIONS FACT SHEET, *supra* note 3.

87. Dep't of Def., Military Commissions, http://www.defenselink.mil/news/commissions.html (last visited Sept. 4, 2006).

88. Kathleen T. Rhem, *DoD 'Plowing New Ground' in Military Commissions, Media Coverage*, AM. FORCES PRESS SERVICE, Aug. 23, 2004, http://www.defenselink.mil/news/Aug2004/n08232004_2004082301.html [hereinafter *DoD Plowing New Ground*].

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. Kathleen T. Rhem, *Reporters Offered Look Inside Combatant Status Review Tribunals*, AM. FORCES PRESS SERVICE, Aug. 29, 2004, http://www.defenselink.mil/news/Aug2004/n08292004_2004082902.html [hereinafter *Reporters Offered Look Inside*].

Media members were also escorted by military personnel at all times, and the naval base was put on a heightened state of alert.[97]

In response to a suit by the Associated Press under the Freedom of Information Act ("FOIA"), the Department of Defense released transcripts of the Combatant Status Review Tribunals.[98] However, the DOD redacted portions of the transcripts based on an asserted interest in protecting detainees' privacy rights.[99] Because most detainees did not object to the release of their identifying information to the press, and because even those detainees who did object did not have a reasonable expectation of confidentiality with respect to a formal legal proceeding, the court held that the information was not exempt from FOIA.[100]

E. Preliminary Hearings of Military Commissions in January 2006

Four commission proceedings were initiated in August 2004, and then halted in December 2004 after the D.C. District Court issued its ruling in *Hamdan*.[101] Following the D.C. Circuit Court decision in July 2005, the commissions were anticipated to resume proceedings in the fall of 2005, and the trial of Australian David Hicks was scheduled for November 2005.[102] However, this commission was stayed pending the resolution of the legal issues in *Hamdan* relating to whether the commissions were properly authorized and whether the Geneva Conventions are judicially enforceable.[103]

Although proceedings against other charged detainees were also stayed, preliminary hearings were held in January 2006 as military commission proceedings resumed against two detainees.[104] One of the detainees, Ali Hamza Ahmad Sulayman al Bahlul, has been charged with conspiracy.[105] During the January pre-trial hearing, al Bahlul boycotted the proceedings by refusing to speak

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97. *DoD Plowing New Ground*, *supra* note 88.

98. Associated Press v. U.S. Dep't of Def., 2006 WL 13042 (S.D.N.Y.).

99. *Id*.

100. *Id*.

101. Kathleen T. Rhem, *Military Commission Proceedings to Resume for 'Australian Taliban,'* AM. FORCES PRESS SERVICE, Sept. 21, 2005, http://www.defenselink.mil/news/Sep2005/20050921_2807.html [hereinafter *Proceedings to Resume for 'Australian Taliban'*].

102. *Judge Orders Military Trial*, *supra* note 55.

103. Hicks v. Bush, 397 F. Supp. 2d 36, 45 (D.D.C. 2005). Hamdan contended that the Geneva Conventions are judicially enforceable and would entitle him to trial before a court-martial rather than a military commission. Hamdan v. Rumsfeld, 415 F.3d 33, 37–38 (D.C. Cir. 2005).

104. Kathleen T. Rhem, *Military Commissions Proceedings to Resume This Week at Guantanamo Bay*, AM. FORCES PRESS SERVICE, Jan. 9, 2006, http://www.defenselink.mil/news/Jan2006/20060109_3878.html [hereinafter *Military Commissions Proceedings to Resume*].

105. Charge Sheet at 2–4, United States v. Ali Hamza Sulayman al Bahlul, (Military Comm'n No. 040003), *available at* http://www.defenselink.mil/news/Jun2004/d20040629ABCO.pdf (last visited Sept. 4, 2006).

with his appointed military attorney.[106] In July 2005, the appointing authority had ruled that al Bahlul could not represent himself in a military commission, because he was confined, unable to access classified information, unfamiliar with substantive and procedural law, and unable to attend closed hearings.[107]

At the January 2006 hearing, the presiding officer denied Bahlul's request to represent himself because of Bahlul's refusal to participate in the proceedings and because the military commission rules require that all defendants be appointed a U.S. military detailed defense counsel.[108] The presiding officer also denied a request from Bahlul's military defense attorney to withdraw based on the ethical dilemma presented by his client's desire to refuse his representation, or to delay the case pending ethics advisory opinions from State Bar Associations.[109] Following the hearing, the presiding officer set the trial date for May 2006,[110] but this trial never took place and commission proceedings were stayed in June 2006.[111]

The other detainee who faced an upcoming military commission trial, Omar Ahmed Khadr, had been charged with conspiracy, murder by an unprivileged belligerent, attempted murder by an unprivileged belligerent, and aiding the enemy.[112] A pretrial hearing on legal motions was scheduled for June 2006,[113] but all commission proceedings were stayed in June 2006.[114]

Although Khadr was only fifteen years old at the time of his capture by U.S. forces in Afghanistan, the military planned to try him before the military

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106. Kathleen T. Rhem, *Guantanamo Hearing Opens Amid Legal Issues*, AM. FORCES PRESS SERVICE, Jan. 12, 2006, http://www.defenselink.mil/news/Jan2006/20060112_3906.html [hereinafter *Guantanamo Hearing Opens*].

107. Kathleen T. Rhem, *Guantanamo Proceedings Deal with Unique Legal Challenges*, AM. FORCES PRESS SERVICE, Jan. 13, 2006, http://www.defenselink.mil/news/Jan2006/20060113_3920.html.

108. *Guantanamo Hearing Opens*, *supra* note 106. Defense teams generally have fewer personnel than prosecution teams; military attorneys working for the prosecution outnumbered the military attorneys assigned to work for the defense by a ratio of four-to-one during one week in January 2006. Kathleen T. Rhem, *Added Guantanamo Hearing Deals with Pre-trial Publicity*, AM. FORCES PRESS SERVICE, Jan. 13, 2006, http://www.defenselink.mil/news/Jan2006/20060113_3918.html [hereinafter *Added Guantanamo Hearing*].

109. *Guantanamo Hearing Opens*, *supra* note 106.

110. *Id.*

111. DEP'T OF DEF., APPOINTING AUTHORITY FOR MILITARY COMMISSIONS (2006), http://www.defenselink.mil/news/Jun2006/d20060613commissions_stayed.pdf.

112. Charge Sheet at 3–4, United States v. Omar Ahmed Khadr, (Military Comm'n No. 050008), *available at* http://www.defenselink.mil/news/Nov2005/d20051104khadr.pdf.

113. DEP'T OF DEF., TRIAL TERMS OF THE MILITARY COMMISSION, GUANTANAMO NAVAL BASE, CUBA (2006), http://www.defenselink.mil/news/Apr2006/d20060417Schedules.pdf.

114. DEP'T OF DEF., *supra* note 111. Defense counsel for Khadr had petitioned the D.C. District Court for a stay in proceedings pending the U.S. Supreme Court's decision in *Hamdan*. Petitioner O.K.'s Motion to Stay Military Commission Proceedings and for Expedited Briefing Schedule, O.K. v. Bush, No. 1:04-CV-01136 (D.D.C. Dec. 29, 2005).

commission as an adult without consideration of his age at the time of his alleged crimes.[115] At his hearing in January 2006, the presiding officer ruled that public comments made by the prosecution that the accused was a "terrorist" and "guilty of murder" did not damage Khadr's case.[116] The presiding officer noted that the prosecutor was entitled to counter inflammatory statements made to the media by defense counsel that the process was a "sham" and that his client could not get "a full and fair trial."[117]

More commission hearings were held in April 2006 in the cases of detainees Ghassan Abdullah Al Sharbi, Sufyian Barhoumi, and Jabran Said Bin Al Qahtani.[118] Sharbi's hearing was delayed because he refused to be represented by Detailed Defense Counsel, as required by the Commission Order, and Sharbi's defense counsel refused to proceed on the grounds that it was unethical to represent a client refusing his services.[119] Barhoumi's commission proceedings were delayed because he did not wish to proceed without his civilian defense attorney present, but his lawyer had not been granted security clearance in order to attend the hearings.[120]

More than thirty media representatives were flown to Guantanamo Bay to cover Khadr's preliminary hearings in January.[121] Members of the media who attended the hearings were required to sign "ground rules" and "hold harmless" agreements, similar to the requirements of embedded media covering active military operations.[122] A public affairs officer commented that facilitating media coverage is important because "[i]f you're not as open as you can be it's going to look like you're trying to hide things."[123] Despite this expressed commitment to facilitating media access to the Guantanamo facilities, the remote and nonpublic nature of the location presents unique difficulties for members of the media seeking access.

F. A Challenge to the Military's Criteria for Media Invitations to Guantanamo Bay

In 2002, the D.C. District Court rejected a press organization's suit for injunctive relief requiring the Department of Defense to set up media pools and treat members of the press equally with regard to the allocation of media slots on

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115. *Military Commissions Proceedings to Resume*, *supra* note 104.

116. *Added Guantanamo Hearing*, *supra* note 108.

117. *Id.*

118. Sara Wood, *Commissions Hearings Delayed by Detainee's Refusal of Defense*, AM. FORCES PRESS SERVICE, Apr. 27, 2006, http://www.defenselink.mil/news/Apr2006/20060427_4949.html.

119. *Id*.

120. Sara Wood, *U.S. Military Commissions to Resume This Week at Guantanamo*, AM. FORCES PRESS SERVICE, Apr. 24, 2006, http://www.defenselink.mil/news/Apr2006/20060424_4914.html.

121. *Military Commissions Proceedings to Resume*, *supra* note 104.

122. Military Commissions Press Kit, *supra* note 3.

123. *Military Commissions Proceedings to Resume*, *supra* note 104.

flights to Guantanamo Bay.[124] The First Amendment interest asserted was the press's newsgathering right, rather than the First Amendment right of access to judicial proceedings;[125] at the time of suit, the Combatant Status Review Tribunals and Administrative Review Boards had not yet been implemented.[126] The court first acknowledged that although "DOD has deemed it appropriate to allow press access for independent coverage at Guantanamo Bay, access is necessarily limited by the logistical support and resources that the military can provide."[127]

Although the court was "reluctant to interfere significantly in the military's conduct of its affairs" and declined to issue a preliminary injunction to create press pools, the court stressed that "the First and Fifth Amendments seem to require, at a minimum, that before determining which media organizations receive the limited access available, DOD must not only have some criteria to guide its determinations, but must have a reasonable way of assessing whether the criteria are met."[128] During this suit, the DOD asserted four guidelines used in selecting media organizations for flights to Guantanamo Bay: need for a mix of media; preference for media organizations that consistently reach a large audience; interest in participation by international news media; and interest in participation by regional news media.[129]

While these criteria seemed reasonable, the court was troubled that the criteria were "not written or published in any way made known to the media organizations seeking access," and that there were "no procedures in place for gathering or receiving information that might be relevant in determining how particular media organizations measure up to its criteria."[130] Yet because the court did not issue an injunction, it declined to "elaborate on the precise parameters of equal access standards and procedures that may be required by the Constitution."[131]

Because the issue in *Getty Images* was equal access standards for press travel to a military base, the court did not consider the public's First Amendment right of access to judicial proceedings. The constitutional dimensions of the press's access to the military tribunals and commissions change when one considers not only the First Amendment newsgathering right to equal access standards, but also the public's right of access to judicial proceedings and courts-martial.

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124. Getty Images News Servs. Corp. v. Dep't of Def., 193 F. Supp. 2d 112, 125 (D.D.C. 2002).

125. *Id*. at 119.

126. COMBATANT STATUS REVIEW TRIBUNAL SUMMARY, *supra* note 41; ADMINISTRATIVE REVIEW BOARD SUMMARY, *supra* note 45.

127. *Getty Images*, 193 F. Supp. 2d at 120.

128. *Id*. at 121.

129. *Id*. at 120.

130. *Id*. at 120–21.

131. *Id*. at 122.

III. THE PUBLIC RIGHT OF ACCESS TO MILITARY COMMISSION PROCEEDINGS

The military commission procedures that the Pentagon would prefer to use to try terrorist detainees at Guantanamo Bay are unique and different from those of Article III courts or courts-martial. However, the public has the same interest in observing the trials of terror suspects no matter what the format of the proceedings, and the rationales underlying the public's First Amendment right of access to judicial proceedings and courts-martial apply with the same force in the context of military commissions. Meiklejohn's self-governance notion that First Amendment freedoms are critical to an informed public citizenry supports public access to the trials of terror detainees.[132]

The rationales for a presumption of openness in judicial proceedings which the Supreme Court approved in *Richmond Newspapers*[133] would apply with equal or greater force in the context of military commissions involving less judicial oversight and fewer procedural safeguards. For instance, the *Richmond Newspapers* Court stressed avoiding the appearance of corruption and injustice, the therapeutic value of public observation and "community catharsis,"[134] the greater likelihood that witnesses will tell the truth,[135] and the need for free communications on "matters relating to the functioning of government."[136] These rationales are just as relevant to a high-profile quasi-judicial proceeding of great public interest taking place in a military setting that is physically inaccessible and otherwise not open to the public.

A. Public Right of Access to Judicial Proceedings and Courts-Martial

The public's right of access to judicial proceedings and courts-martial is well established, and the same balancing tests for open proceedings apply to both Article III courts and military tribunals. In *Richmond Newspapers*, the United States Supreme Court held that "the right to attend criminal trials is implicit in the guarantees of the First Amendment,"[137] and that "absent an overriding interest articulated in findings, the trial of a criminal case must be open to the public."[138] Brennan's concurring opinion stressed that the determination of whether a particular proceeding should be closed depends on "the weight of the historical practice" and "an assessment of the specific structural value of public access in the circumstances."[139]

The *Richmond Newspapers* test was applied to strike down a statute that mandated closure of rape trials during the testimony of minor victims because the First Amendment requires a case-by-case determination of whether closure is

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132. MEIKLEJOHN, *supra* note 31.
133. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980).
134. *Id*. at 571.
135. *Id*. at 597.
136. *Id*. at 575.
137. *Id.* at 580.
138. *Id*. at 581.
139. *Id*. at 598.

necessary.[140] The Court also extended the First Amendment right of access doctrine to apply to pretrial proceedings, such as voir dire examinations of jurors.[141]

Brennan's discussion in *Richmond Newspapers* of the historical practice and structural value factors was approved by the Court in *Press Enterprise II*.[142] In that case, the Court refined the *Richmond Newspapers* test for determining whether a qualified First Amendment right of access applies to a particular proceeding, articulating a two-prong test based on both "experience" and "logic."[143] The experience prong involves a historical analysis of the tradition of openness for a given proceeding,[144] and the logic prong involves an analysis of whether public access to the proceeding "plays a particularly significant positive role in the actual functioning of the process."[145]

Where the court finds that there is a qualified right of access based on experience and logic, the presumption of openness may be overcome "only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[146] In addition, the interest must be "articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered."[147] Examples of such an overriding interest include a criminal defendant's right to a fair trial or protecting sex crime victims from the embarrassment of public scrutiny.[148]

In the military justice context, military courts have also recognized that the Sixth Amendment right to a public trial, while not absolute, requires that exclusion of the public from a court-martial be used "sparingly."[149] In *United States v. Grunden*, the United States Court of Military Appeals balanced the right to a public trial against the government's national security concerns; the court required a compelling showing that closure was necessary to prevent disclosure of classified information.[150] Similarly, the court applied the *Richmond Newspapers* test in *United States v. Hershey* to determine the extent of the public's right of access to courts-martial.[151] The *Hershey* court acknowledged that in addition to the Sixth Amendment right of the accused to a public trial, the public enjoys a First Amendment right to attend the court-martial.[152] The public right of access was then

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140. Globe Newspaper Co. v. Norfolk County Sup. Ct., 457 U.S. 596 (1982) (holding that under the First Amendment, closures must be based on a compelling state interest and narrowly tailored to serve that interest).
141. Press-Enterprise Co. v. Superior Court (I), 464 U.S. 501, 510, 513 (1984).
142. Press-Enterprise Co. v. Superior Court (II), 478 U.S. 1, 9 (1986).
143. *Id*.
144. *Id*. at 10–11.
145. *Id*. at 11–12.
146. *Id*. at 9.
147. *Id*. at 9–10.
148. *Id.* at 9.
149. United States v. Grunden, 2 M.J. 116, 120 (C.M.A. 1977).
150. *Id*. at 121.
151. United States v. Hershey, 20 M.J. 433, 436 (C.M.A. 1985).
152. *Id*.

extended in *ABC, Inc. v. Powell* to apply to an investigation of official misconduct.[153]

B. Extent of Enemy Combatants' Rights to a Public Trial and Judicial Review of Military Proceedings

The public's First Amendment right of access is analytically distinct from the Sixth Amendment right to a public trial, which is a right personal to a criminal defendant.[154] The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."[155] However, because military commissions may not fall within the definition of "criminal prosecutions," it is far from certain whether the Sixth Amendment right to a public trial would apply to military commissions. Moreover, the law is currently unclear on the extent to which enemy combatants held and tried on foreign soil enjoy constitutional rights included in the Bill of Rights.[156]

One recent case suggests that citizens and non-citizens may enjoy different degrees of constitutional protection while detained and tried on foreign soil before military commissions, such as at the Guantanamo facility.[157] Citizens may be detained as enemy combatants, and military tribunals have the authority to determine enemy combatant status.[158] The U.S. Supreme Court has held that citizens' due process rights are adequately protected by this procedure, so long as there is a neutral decision-maker and the accused has the chance to contest the factual basis for his classification as an enemy combatant.[159] During the tribunal proceedings, the traditional procedural safeguards may be altered, the burden of proof may shift to the accused, and hearsay may be admissible.[160]

The Court also held that the AUMF gives the President the authority to detain citizens captured within the United States as enemy combatants, where the citizen is associated with al Qaeda, took up arms against the United States, and entered this country for the purpose of attacking citizens and civilian targets.[161]

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153. 47 M.J. 363 (C.A.A.F. 1997).

154. Gannett Co. v. DePasquale, 443 U.S. 368, 379–80 (1979).

155. U.S. CONST. amend. VI.

156. The U.S. Supreme Court held in *Hamdan* that absent specific congressional authorization, a detainee is entitled to the right to be present at trial and to have access to the evidence against him. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2798 (2006). This holding was based on the Geneva Conventions and the Uniform Code of Military Justice, rather than any rights the accused might enjoy under the U.S. Constitution. *Id*. The extent of detainees' constitutional rights was not addressed in the *Hamdan* decision.

157. Khalid v. Bush, 355 F. Supp. 2d 311, 314 (D.D.C. 2005) (holding that non-citizens detained outside the United States do not enjoy any constitutional rights).

158. Hamdi v. Rumsfeld, 542 U.S. 507, 538 (2004) (holding that military tribunals have congressional authority under the AUMF to determine the enemy combatant status of detainees).

159. *Id*.

160. *Id*.

161. Padilla v. Hanft, 423 F.3d 386 (4th Cir. 2005). Following this decision, the government transferred Padilla from military custody to a federal detention center, and charged him as a criminal defendant in federal court. The United States Supreme Court

However, the Commission Order explicitly applies only to non-citizens.[162] In *Rasul*, the Supreme Court held that the federal habeas corpus statute[163] confers a right to judicial review of the legality of indefinite detention of alien enemy combatants at the military base at Guantanamo Bay, an area over which the United States exercises plenary and exclusive jurisdiction, but not ultimate sovereignty.[164] After *Rasul*, non-citizen detainees have challenged the legality of their detention in federal court using federal habeas corpus review.[165]

The Detainee Treatment Act limits detainees' ability to access federal courts by seeking habeas corpus relief, as was permitted under *Rasul*.[166] This measure also limits federal court review of final decisions of the Combatant Status Review Tribunals and final decisions by the Military Commissions; the scope of review of military commission decisions is limited to the consideration of whether the procedural provisions in the Military Commission Order No. 1 had been followed and whether subjecting an enemy combatant to the final order was consistent with U.S. laws and the Constitution.[167] In addition, the United States Court of Appeals for the District of Columbia Circuit has exclusive jurisdiction to review decisions by the Combatant Status Review Tribunals or the Military Commissions.[168] This would preclude the use of writs of habeas corpus by detainees held at Guantanamo Bay; a Guantanamo detainee would be entitled to an appeal only upon the rendering of a final order.[169] Review of final decisions of military commissions by the D.C. Circuit Court would be as of right only in capital

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allowed this transfer, while also considering Padilla's petition for certiorari. Hanft v. Padilla, 126 S.Ct. 978 (2006).

162. 32 C.F.R. §§ 9.1, 9.3(a) (2005).

163. 28 U.S.C. § 2241(a)–(c) (2006) ("Writs of habeas corpus may be granted . . . by the district courts . . . . The writ of habeas corpus shall not extend to a prisoner unless . . . [h]e is in custody in violation of the Constitution or laws or treaties of the United States . . . .").

164. Rasul v. Bush, 542 U.S. 466, 483-84 (2004). The detainee in that case, Shafiq Rasul, was also among a group of plaintiffs who sued the Secretary of Defense and military officers for alleged violations of international law, the Geneva Conventions, the Fifth and Eighth amendments, and the Religious Freedom Restoration Act. Rasul v. Rumsfeld, 414 F. Supp. 2d 26 (D.D.C. 2006). The court dismissed the international and constitutional claims, and deferred its decision on the RFRA claim. *Id.*

165. Khalid v. Bush, 355 F. Supp. 2d 311, 314 (D.D.C. 2005).

166. 28 U.S.C. § 2241 (2006) (referencing Detainee Treatment Act of 2005, Pub. L. No. 109-163, §1405, 119 Stat. 3476–79 (2006)). This legislation also provides that Combatant Status Review Tribunals and Administrative Review Boards must assess "whether any statement derived from or relating to such detainee was obtained as a result of coercion" and "the probative value, if any, of any such statement." Detainee Treatment Act of 2005, Pub. L. No. 109-163, § 1405(b)(1)(A)–(B), 119 Stat. 3476–77 (2006). The Secretary of Defense is also required to submit to the Judiciary Committees and the congressional defense committees a report on the procedures used by the Tribunals and Boards. § 1405(a)(1)(A), 119 Stat. at 3477.

167. § 1405, 119 Stat. at 3478.

168. § 1405, 119 Stat. at 3477–78.

169. *Id.*

cases or cases in which the sentence was imprisonment for a term of at least ten years; review in other cases would be discretionary.[170]

The effect of the DTA may be to further insulate the decisions of the military commissions from review by federal courts.[171] The purpose of the measure, according to its sponsor, Sen. Lindsey O. Graham, is to reduce the amount of "frivolous" habeas corpus petitions filed by Guantanamo detainees.[172] This measure could also undermine the validity of the *Rasul* decision, leaving the extent of detainees' constitutional rights yet more unclear.[173] The United States Supreme Court has noted that the DTA does not remove the Court's jurisdiction to review appeals from the D.C. Circuit Court's decision under the DTA.[174]

There is a conflict in the D.C. District Court over the extent to which non-resident aliens captured and detained outside the United States have constitutional rights. In *Khalid*, Judge Leon held that *Rasul*'s recognition of a statutory right to habeas review did not imply that non-citizens detained outside the United States are entitled to any substantive constitutional rights.[175] The *Khalid* court held that non-resident aliens captured and detained outside the United States have no cognizable constitutional rights.[176]

However, in *In re Guantanamo Detainee Cases*, Judge Green interpreted the *Rasul* decision to mean that Guantanamo Bay "must be considered the equivalent of a U.S. territory in which fundamental constitutional rights apply."[177] Therefore, the court held that non-resident enemy combatant detainees held at Guantanamo Bay do enjoy fundamental Fifth Amendment due process rights.[178] This conflict may be resolved in the future, but for the time being it remains unclear whether enemy combatants captured and held outside the United States enjoy any constitutional rights, including the Sixth Amendment right to a fair and public trial.

C. Tensions Between the Sixth Amendment Right to a Fair Trial and the First Amendment Right of Access to Judicial Proceedings

There has been a historical conflict between a criminal defendant's due process and Sixth Amendment trial rights and the public's First Amendment right of access to judicial proceedings. The Sixth Amendment guarantees both the right

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170. § 1405, 119 Stat. at 3478.

171. An alternative proposal, aimed at avoiding inconsistent decisions by the district courts, is the creation of a separate federal court system to hear only habeas petitions filed by alleged enemy combatants. Christopher A. Chrisman, *Article III Goes to War: A Case for a Separate Federal Circuit for Enemy Combatant Habeas Cases*, 21 J.L. & POL. 31, 101–102 (2005).

172. Josh White, *Detainees Face Limited Access to Courts*, WASH. POST, Dec. 24, 2005, at A4.

173. *Id.*

174. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2768 n.11 (2006).

175. Khalid v. Bush, 355 F. Supp. 2d 311, 322–23 (D.D.C. 2005).

176. *Id*. at 320.

177. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005).

178. *Id*.

to a "speedy and public trial,"[179] and the right to "trial, by an impartial jury."[180] A criminal defendant's right to due process also includes the right to an impartial jury.[181]

In certain circumstances, the opening of a judicial proceeding to the public could cause such disturbance that the presence of the press and press coverage of the trial would prevent a criminal defendant from receiving a fair trial.[182] The Court has noted that tensions "develop between the right of the accused to trial by an impartial jury and the rights guaranteed others by the First Amendment" where a sensational trial attracts significant press attention.[183]

In addition to the danger that publicity could prejudice the jury, press coverage of a trial could disrupt the courtroom proceedings.[184] For instance, in a highly publicized murder case, the Court concluded that the defendant was entitled to a new trial because "bedlam reigned at the courthouse," and the press had caused "frequent confusion and disruption" of the trial.[185] As a result of the trial judge's failure to control press behavior within the courtroom and press coverage of the trial outside the courtroom, the Court found that the defendant had not received a fair trial consistent with due process.[186]

For the reasons above, restrictions on press access to criminal trials have been justified based on the defendant's due process and Sixth Amendment fair trial rights. In situations where these interests are at odds, the courts must consider both the public's First Amendment concerns and the defendant's trial rights.[187] In some circumstances, this balance has come out differently, leading courts to require press access to trials based on the public's right of access under the First Amendment. For instance, in *Richmond Newspapers*, the Court held that criminal trials must be open to the public, absent an overriding interest articulated in findings.[188] To determine whether closure of the proceeding is permitted by the First Amendment, courts will analyze the historical practice of closure and assess the structural value of public access.[189]

Because an enemy combatant may not enjoy the same due process rights or Sixth Amendment fair trial rights as a citizen,[190] the balance of competing interests in the military commission context could be different than in the context of criminal judicial proceedings or military courts-martial. The defendant's due process rights and Sixth Amendment rights could favor either opening or closing proceedings, depending on whether the defendant's interests would be helped or

179. U.S. CONST. amend. VI.
180. *Id*.
181. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences.").
182. *Id*. at 335.
183. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 551 (1976).
184. Sheppard, 384 U.S. at 355.
185. *Id*.
186. *Id*. at 335.
187. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 564 (1980).
188. *Id*. at 581.
189. *Id*. at 598 (Brennan, J., concurring).
190. *See* Khalid v. Bush, 355 F. Supp. 2d 311, 322–23 (D.D.C. 2005).

harmed by media attention. Therefore, the absence of these interests in the military commission context would not definitely tilt in one direction or the other.

D. Tensions Between National Security Interests and the First Amendment Right of Access

A common rationale underlying the closure of judicial proceedings is the interest in protecting national security. Tension exists between the public right of access to judicial proceedings and the risk that such access will endanger national security interests.[191] The protection of national security is one of the explicit grounds for closure in the Commission Order.[192] The Court has addressed rationales for limiting First Amendment rights in the interest of national security in cases addressing prior restraints on publication.[193] The Court's discussion of the balance between First Amendment rights and national security interests in this context is instructive because a proper balance must be struck between these competing interests in the context of the trial of terror detainees as well.

It is worth noting that there is a distinction between imposing a prior restraint on the press, which prevents the publication of information, and preventing the press from accessing the information in the first place. In *Pentagon Papers*, the issue was whether it is appropriate for the government to prevent publication of information the press already managed to obtain; the Court held that the government had not met the "heavy burden" of showing justification for the imposition of a prior restraint.[194] *The New York Times* did not argue that the public had a right to access the information; rather the argument was that once the press managed to obtain the information, it had the right to publish the information free from government restraint.[195]

Justice Stewart's concurring opinion noted that the Executive is responsible for determining the "degree of internal security necessary" to exercise the foreign affairs and national defense powers successfully, and that Congress is responsible for enacting criminal laws to protect government secrets.[196] The implication is that while the government may keep certain information confidential, it may not restrain publication without sufficient justification.

A key analytical distinction is that in prior restraint national security cases, the public does not necessarily have a constitutional right to access the information; the issue is rather the right to publish the information free from government restraint.[197] In the context of the public's First Amendment right of

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191. *See* United States v. Anderson, 46 M.J. 728, 729 (A. Ct. Crim. App. 1997) ("Absent national security concerns or other adequate justification clearly set forth on the record, trials in the United States military justice system are to be open to the public.").

192. 32 C.F.R. § 9.6(b)(3) (2005).

193. *See* N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 715–17 (1971).

194. *Id.*

195. Brief for Petitioner–Appellant at 2, *Pentagon Papers*, 403 U.S. 713 (No. 1873).

196. *Pentagon Papers*, 403 U.S. at 729–30.

197. *Id*.

access to judicial proceedings, it is inappropriate for the government to prevent access to information to which the public is constitutionally entitled.[198] Perhaps the First Amendment interest is stronger in the detainee trial context than it is in prior restraint cases because the right of access to judicial proceedings implies a kind of newsgathering right, which is not implicated where the public does not have a right of access to the information in the first place.

The Commission Order authorizes closure based on the protection of national security.[199] This issue could come up in a context where the evidence that is necessary to prove the alleged charges would have a detrimental effect on national security interests if disclosed in public. There is concern that the disclosure of detailed evidence would alert terrorists to weaknesses in the country's homeland security efforts or provide terrorists with valuable information about the government's law enforcement and war efforts.[200]

These concerns are legitimate, and a real threat to national security could justify the closure of a portion of a trial of a terror suspect. However, there is also a risk that the national security grounds could be used as a pretext to improperly close a proceeding or an excessive portion of the proceeding. Critics of the military commissions distrust the government's assertions of threats to national security and compare the current situation to Japanese relocation during World War II based on "false evidence" and "a misapprehension of the extent of the danger."[201] They also criticize the "irresponsibility" of "overstating the facts and then, as the executive does, hiding behind secrecy to prevent judicial review."[202] This concern about erroneous perceptions of the threat presented by a given individual or piece of evidence requires careful review of closure determinations in order to ensure that guidelines for the handling of classified or national security information, such as the Classified Information Procedures Act ("CIPA"),[203] are followed. This review is necessary to make certain that the presumption of openness is only overcome based on sufficient evidence of a threat to national security.

E. The Commission Order Procedures for Public Access Would Have Violated the First Amendment as Applied

As discussed above, the articulated grounds for closure in the Commission Order include protection of classified information, the physical safety of commission participants, "intelligence and law enforcement sources, methods, or activities," and "other national security interests."[204] It is conceivable that there could be situations where the commission proceedings would have been properly

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

199. 32 C.F.R. § 9.6(b)(3) (2005).

200. Bill Keller, *Trials and Tribulations*, N.Y. TIMES, Dec. 15, 2001, at A31.

201. Panel Debate, *Judges in the Cultural Wars Crossfire*, 91 A.B.A. J. 44, 49 (2005). Michael Tigar commented that "the advocate for the United States in the Supreme Court said Hamdi was a dangerous terrorist; . . . the court then holds [that Hamdi is entitled to a lawyer and to challenge his detention], and the next thing we know he's on an airplane to Saudi Arabia." *Id.*

202. *Id.*

203. Classified Information Procedures Act, 18 U.S.C. app. § 3 (2000).

204. 32 C.F.R. § 9.6(b)(3).

closed based on these grounds, consistent with the First Amendment right of access to judicial proceedings. It is also possible that these grounds for closure would have required that the public be allowed access to the commission proceedings, for example, in a situation that did not involve classifiable or confidential information, or a threat to participant safety or national security.

However, situations may have also arisen where the Commission Order's grounds would require closure even though an analysis of the First Amendment right of access would require opening the proceedings to the public. For example, any case involving an alleged enemy combatant would likely involve "law enforcement sources, methods, or activities," yet public access to this information might not rise to the level of causing "imminent and irreparable harm" to national security interests or participant safety.[205]

It is also possible that information that is not properly classifiable under CIPA[206] would be improperly labeled as classifiable, and the proceeding closed based on the "classifiable information" grounds for closure. There is also the risk that a blanket closure would be premised on the protection of classified information, even where only a portion of the proceeding involves classified information.[207] A recent case from the military justice context exemplifies the risk of erroneous closure based on the protection of classified information; the Army Court of Criminal Appeals held that a blanket closure of testimonial proceedings where much of the testimony did not touch on classified information was prejudicial error.[208] This kind of error could occur both in the military justice system and in the context of military commissions.

Advocates of a presumption of openness in military commissions have noted that CIPA already provides a workable "framework to overcome the government's primary justification for closure—protection of classified and national security information."[209] CIPA defines what type of information is classified or national security information, and it provides procedures to protect confidentiality and ensure that classified information is disclosed only when constitutionally required.[210] Commentators have also argued that this mechanism strikes the appropriate balance to ensure the protection of both classified information in the interest of national security and the rights of criminal defendants or others (such as accused detainees or the public).[211] Although CIPA provides for closed proceedings in certain limited circumstances to protect classified information, these guidelines have also allowed the public prosecution of

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205. *But cf.* Hamdi v. Rumsfeld, 542 U.S. 507, 583 (2004) (Thomas, J., dissenting) ("[W]ith respect to certain decisions relating to national security and foreign affairs, the courts simply lack the relevant information and expertise to second-guess determinations made by the President based on information properly withheld.").

206. 18 U.S.C. app. § 3 (2000).

207. *See* Denver Post Corp. v. United States, Army Misc. 20041215 (A.C.C.A. Feb. 23, 2005), *available at* http://www.jagcnet.army.mil/acca.

208. *Id*. (holding that it was error to close based on a fear of releasing classified information).

209. Klaris et al., *supra* note 14, at 827.

210. *Id*. at 829.

211. *Id*.

"hijackers, drug dealers, mobsters, spies and terrorists."[212] Therefore, these guidelines could also serve in the terror trial context to differentiate a closure justified on national security grounds from an improperly broad or arbitrary closure.

Under the Commission Order procedures, it is possible that defense counsel would have been improperly excluded from a closed session or denied access to evidence, or that the Appointing Authority would have withheld transcripts for an undue period of time. These situations would violate the First Amendment right of access, and yet not run afoul of the Commission Order guidelines. For this reason, and especially if Congress approves a military commission system in which even the accused could be excluded from proceedings at the presiding officer's discretion, some judicial review based on the *Richmond Newspapers* doctrine, rather than a review of whether the Commission Order grounds for closure were complied with, is necessary to fully protect the public's right of access to the commission proceedings.

IV. THE NEED FOR JUDICIAL REVIEW OF CLOSURE DETERMINATIONS

A. Common Rationales for Denying Public Access to Judicial Proceedings Would Have Applied Differently in the Context of Military Commissions

One common rationale for the closure of judicial proceedings is the protection of trial participants' safety and privacy by keeping the identities of witnesses or jurors secret.[213] The military had expressed concern over terrorist retaliation against commission members and for that reason required sketch artists covering the Combatant Status Review Tribunals to omit the faces of commission participants.[214] However, this concern for participant safety would not have required exclusion of the public from the commission proceedings. The tribunal participants were adequately protected by the measures put in place to protect participant anonymity, such as the prohibition on recording of any kind and the omission of names and faces from press coverage.[215]

Furthermore, the anonymity of witnesses and commission participants may be protected while allowing the press access to the proceedings. In addition to the measures put in place by the military during the Combatant Status Review Tribunals, other steps could be taken to protect the physical safety of participants short of entirely closing the proceedings. Under the *Richmond Newspapers* doctrine, alternatives to closure ought to be fully considered before any trial of terror detainees, whether by court-martial, military commission or otherwise, is closed on the grounds of protecting participant safety.

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212. *Id*. at 835.

213. *See* United States v. Barnes, 604 F.2d 121, 140–41 (2d Cir. 1979) (denying access to names and addresses of potential jurors based on court's fear of threats of retaliation against jury).

214. *DoD Plowing New Ground*, *supra* note 88.

215. 32 C.F.R. § 9.6(b)(3) (2005); *DoD Plowing New Ground*, *supra* note 88.

If trials are conducted at the Guantanamo Bay naval base, safety measures can be taken that will prevent the need for closure. During the commission pretrial proceedings and media visits, the naval base was on a state of heightened alert and access to the base was limited.[216] Any specific threat of physical violence at the proceedings could likely be countered by normal security procedures followed for media, humanitarian, and defense counsel visits to the naval base.[217] In addition, Article III courts are experienced at taking measures to protect the safety of jurors, witnesses, or judges from threats by organized crime and terrorists, short of closing the trial to the public.[218]

The Commission Order also expressly forbids recording of any kind, except as is necessary to preserve the trial record.[219] In the criminal context, television cameras or recording devices have been excluded from the courtroom in the interest of witness and juror privacy and the defendant's due process rights.[220] This rationale applies somewhat differently in the detainee trial context, because the extent of an alien enemy combatant's due process and constitutional rights are still unclear.[221] However, the government has expressed an interest in protecting the anonymity of the commission participants.[222] Because the First Amendment right of access does not necessarily include a right to record judicial proceedings, the Commission Order's prohibition on recording would not have violated the First Amendment.

B. The Proper Test for Whether the Press Should Have Access to a Particular Trial Proceeding

The proper test for whether there are sufficient grounds to close a particular detainee trial proceeding should incorporate concerns for national security, participant privacy, the strong public interest in open proceedings, and the public's right of access to judicial proceedings under the First Amendment. The grounds for closure in the Commission Order guidelines would have provided insufficient protection for the public's right of access.[223] A trial by court-martial would require application of the doctrine of public access to judicial proceedings as articulated in *Richmond Newspapers* and *Press-Enterprise I* and *Press-Enterprise II*.[224]

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216. Military Commissions Press Kit, *supra* note 3.

217. Military Commissions Press Kit, *supra* note 3.

218. Klaris et al., *supra* note 14, at 835–36.

219. 32 C.F.R. § 9.6(b)(3).

220. Estes v. Texas, 381 U.S. 532 (1965).

221. Khalid v. Bush, 355 F. Supp. 2d 311, 314 (D.D.C. 2005) (holding that non-citizens detained outside the United States do not enjoy any constitutional rights). One court rejected recognition of detainees' privacy interest in information brought out during a Combatant Status Review Tribunal. Associated Press v. U.S. Dep't of Def., 410 F. Supp. 2d 147, 151 (S.D.N.Y. 2006).

222. *DoD Plowing New Ground*, *supra* note 88.

223. *See supra* Part III.E.

224. Press-Enterprise Co. v. Superior Court (II), 478 U.S. 1, 9 (1986); Press-Enterprise Co. v. Superior Court (I), 464 U.S. 501, 510 (1984); Richmond Newspapers, Inc.

Analysis of the public access doctrine would require the judge to consider alternative measures (aside from closure of the commission) that would adequately address concerns related to participant privacy and national security. To provide for meaningful judicial review of the closure determination, the judge should also be required to make sufficient factual findings on the consideration of alternatives to closure.

The appropriate balance of interests must weigh both the First Amendment interest in public access to the trial proceedings and also the fair trial rights of the accused. While the extent and nature of these rights is still unclear, at least one federal judge has found that accused enemy combatant detainees are entitled to due process.[225] In addition, the Supreme Court has held that absent specific congressional authorization, the accused has the right to be present and to have access to evidence against him.[226] The analysis of the closure determination should also incorporate concerns based on the national security interest, such as the *Pentagon Papers* test.[227] Although preventing access to the trial proceedings is different from a prior restraint on publication, there could be a qualified right of access to some commission proceedings. Therefore, the tests articulated in *Pentagon Papers* probably would serve well in the context of evaluating the threat to national security posed by public access to the trials of terror detainees.

C. Standard of Review of Closure Determinations

Military courts have used an abuse of discretion standard to review the determination of whether a proceeding was properly closed to the public;[228] it is possible that this standard would also be used in the trials of terror detainees, whether by court-martial or military commission. However, federal courts have used a different standard of review when reviewing the factual findings concerning the First Amendment right of access to judicial proceedings.[229] The Third Circuit Court of Appeals has noted that when the First Amendment right of access is at issue, the scope of review of factual findings related to closure is broader than abuse of discretion.[230] Although under the Commission Order the Presiding Officer would have enjoyed the discretion to exclude the press based on the grounds for

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v. Virginia, 448 U.S. 555, 580–81 (1980); United States v. Hershey, 20 M.J. 433, 436 (C.M.A. 1985); *see supra* Part III.A.

225. *In re* Guantanamo Detainee Cases, 355 F. Supp. 2d 443, 464 (D.D.C. 2005).

226. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2798 (2006).

227. N.Y. Times Co. v. United States (*Pentagon Papers*), 403 U.S. 713, 715–17 (1971). *See supra* Part III.D.

228. United States v. Scott, 48 M.J. 663, 666 (A. Ct. Crim. App. 1998) ("The abuse of discretion standard generally applies to reviewing trial judge decisions on the issue of public access.").

229. United States v. Smith, 123 F.3d 140, 146–47 (3d Cir. 1997).

> [W]hen we deal with a First Amendment right of access claim, our scope of review of factual findings "is substantially broader than that for abuse of discretion." With respect to the newspapers' common law right of access to judicial proceedings and papers, we review the district court's order for abuse of discretion.

Id. (citation omitted).

230. *Id*.

closure in the Commission Order, where the First Amendment right of access is at stake there should be a more searching review of the factual findings supporting the closure decision.

D. The Judiciary Is Best Suited to Review Closure Determinations

The judiciary is better suited than members of the executive branch to review determinations of what portions of commission proceedings should be closed or open in order to prevent the abuse of executive discretion and to protect the public's right of access. The judiciary can draw on a significant body of caselaw related to the right of access in which it has already considered and explored the various issues at stake.[231] The judiciary is also equipped to properly protect classified or sensitive national security information.[232] A number of enemy combatants have submitted habeas petitions in federal court, and the courts have handled classified information related to the capture and detention of these enemy combatants.[233] Therefore, the judiciary is capable of properly handling whatever information is necessary to evaluate the risks to participant safety, classified information, national security, or law enforcement. The issues related to the confidentiality of law enforcement sources and methods are not new to the judiciary. The judiciary already has experience with procedures and measures to control the information only so much as is necessary to prevent safety risks, while also permitting the fullest public access possible.[234]

Because the right of access to the trials of terror detainees does not inhere in the defendant but rather the public,[235] there should be judicial review of closure determinations regardless of the extent of an alien detainee's constitutional rights. Whether or not the enemy combatant detainee enjoys cognizable constitutional rights (such as the right to a public trial), and whether or not Congress authorizes military commission procedures that limit the rights of the accused under the Geneva Conventions, the public still enjoys a right of access,[236] which would require adequate protection through a thorough review of the closure determination.

The findings made by a military judge presiding over a detainee trial with respect to the asserted grounds for closure should be at least as specific as those required in the criminal context.[237] This specificity need not interfere with proper handling of classified or confidential information. The protection of classified information and the national security interest may call for in camera review of certain information, but the judiciary has experience with in camera review of classified information in other contexts, and CIPA provides additional guidance.[238]

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231. *See supra* Part III.A.
232. *See supra* Part III.E.
233. *See, e.g.*, Hamdi v. Rumsfeld, 542 U.S. 507 (2004).
234. *See supra* Part III.E (discussing CIPA).
235. *See* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 580–81 (1980).
236. *Id.*
237. Press-Enterprise Co. v. Superior Court (II), 478 U.S. 1, 9–10 (1986) (overriding interest in closure must be articulated "along with findings specific enough that a reviewing court can determine whether the closure order was properly entered").
238. *See supra* Part III.E.

For example, in the *Hamdi* case, the United States Supreme Court reviewed classified information in camera for the purpose of determining the jurisdictional issues at stake in the case.[239] In this context, the same procedures could be used to determine the propriety of closing the detainee's trial, while still protecting the classified information.

V. CONCLUSION

The *Hamdan* decision requires that the Executive obtain specific congressional authorization for trial procedures that deviate from what the UCMJ and the Geneva Conventions demand.[240] The public's First Amendment right of access clearly extends to courts-martial, and military judges presiding over courts-martial have taken care to protect that right by not allowing the improper closure of court-martial proceedings.[241] However, the Commission Order procedures would not have adequately protected the public's right of access without additional judicial review based on the *Richmond Newspapers* doctrine.[242] Therefore, the public's right of access to trials of terror detainees will be implicated if trials proceed under the recently enacted modified military commission procedures.[243]

There is strong public interest in the methods used to detain and prosecute terror suspects held at Guantanamo Bay, not only for the legal and humanitarian issues involved, but also insofar as these methods reflect on the effectiveness of the executive branch.[244] Appropriate public access to the trials of terror suspects serves an essential role in democratic self-governance, by providing citizens with the information necessary to make informed political decisions and check governmental abuse. A constitutional analysis of closure determinations consistent with the approach used in Article III courts and courts-martial will ensure that the public is allowed to see as much as is appropriate, while also giving due consideration to legitimate threats to national security, classified information, and the safety of commission participants.[245] Judicial review of closure determinations serves as a needed check on executive power and ensures the protection of the public's constitutional rights under the First Amendment. If closure determinations are improperly made and then left uncorrected, shrouded in secrecy, our democratic system of self-government will not function as it should, and the just prosecution of terror suspects could be undermined by corruption and abuse.

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239. Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

240. Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2798 (2006).

241. *See supra* Part III.A.

242. *See supra* Part IV.

243. Military Commissions Act, S. 3930, 109th Cong., 2d Sess. (2006) (enrolled as agreed to or passed by both House and Senate).

244. Wittes, *supra* note 6.

245. *See supra* Parts III.A, III.D.