

Working Draft

Precedents Lost: The Neglected History of the Military Commission

Forthcoming Virginia Journal of International Law

Vol. 46, No. 1

Fall 2005

**David Glazier
Center for National Security Law
University of Virginia School of Law
580 Massie Road
Charlottesville, VA 22903-1789
dwg4p@virginia.edu**

Precedents Lost: The Neglected History of the Military Commission

Abstract: Although both constitutional and statutory authority is invoked by the conduct of military commission trials, these tribunals are fundamentally common law institutions. Proper understanding of historical precedent is essential to the validity of any common law trial, and in the case of military commissions is also key to interpreting applicable constitutional and statutory mandates. Despite this, current historical knowledge about the commissions is both limited in scope and plagued with common misconceptions; even government participants routinely cite a trial that never happened as a precedent. The original Anglo-American understanding was that only the legislature could establish the personal jurisdiction of military trials. The military commission, the common law counterpart to the statutory court-martial, was not created until 1847, and was based closely on the procedural mandates and due process protections accorded by courts-martial. This commonality was maintained through thousands of cases in the Civil War and Philippine Insurrection, and the senior judge advocate in the Philippines actually drafted the modern statutory language. Departures from court-martial practice developed during World War II, but do not necessarily constitute valid grounds for continuing to do so today, particularly in light of the significant developments in both international and U.S. military law since that era. The constitutional authority invoked by U.S. trials for law of war violations is committed to Congress, so modern claims of significant executive authority in this field are misplaced, and courts should continue to hear and resolve challenges to commission jurisdiction and procedure.

Introduction	1
I. The Original Understanding About the Jurisdiction of Military Tribunals	6
A. British Practice From 1689 Through the American Revolution	6
B. The Colonial American Experience	11
C. American Tribunals During the Revolutionary War	14
II. Early Military Tribunals Under the Constitution	19
A. The War of 1812: Reinforcement of Congressional Authority	20
B. The Seminole War of 1818: Almost a Precedent	23
III. The Origin and Development of the Military Commission	27
A. The Creation of the Military Commission: The Mexican War of 1846-48	28
B. Further Development and Judicial Review During the American Civil War	37
C. Late 19th Century Developments	44
D. The Spanish-American War and the Philippine Insurrection	45
IV. The Origin of the Modern Statutory Language about Military Commissions	55
A. Article 21: Concurrent Court-martial and Military Commission Jurisdiction	55
B. Article 36: Presidential Authority to Prescribe Trial Procedure	59
C. Military Commissions in the Rhineland Conform to Court-Martial Practice	62
D. Interwar Developments	63
V. World War II and Deviation From Court-Martial Procedure	64
A. Hawai'i – The Military Commission Under Martial Law	65
B. Nazi Saboteurs and Spies – Military Commissions in the Continental U.S.	67
C. The Persistent Effect of the Quirin Trial in the Post-War Period	68
D. International and Foreign Tribunals in the Post-War Era	73
E. The Uniform Code of Military Justice and Subsequent Developments	76
Conclusion	79

*The history of what the law has been is necessary to the knowledge of what the law is.*¹
- Oliver Wendell Holmes, Jr.

Introduction

In November 2001, President George W. Bush resurrected the military commission from five decades of dormancy, authorizing their use to try suspected terrorists via a military order based on Franklin D. Roosevelt's 1942 directives for the trial of eight Nazi saboteurs.²

Although both presidents cited constitutional and statutory authority for their actions,³ and Congress has addressed military commissions in laws dating from 1862⁴ through the current Uniform Code of Military Justice (UCMJ),⁵ they are fundamentally a common law institution.⁶

As the government's brief defending FDR's 1942 commission in *Ex parte Quirin*⁷ noted:

some provisions of the law of war have been enacted into statutory form But the law of war, like civil law, has a great *lex non scripta*, its own common law. This 'common law of war [] is a centuries-old body of largely unwritten rules and principles of international law which governs the behavior of both soldiers and civilians during time of war []. The law of war has always been applied in this country.⁸

¹ OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 33 (2005)

² *Cf.* George W. Bush, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001) with Franklin D. Roosevelt, *Proclamation No. 2561*, 7 Fed. Reg. 5101 (July 7, 1942) and *Exec. Order No. 9185*, 7 Fed. Reg. 5103 (July 7, 1942) .

³ Bush *supra* note 2 cited the post-9/11 Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 155 Stat. 224) and "sections 821 and 836 of title 10, United States Code" (Uniform Code of Military Justice arts. 21 and 36). Roosevelt cited "statutes of the United States . . . more particularly the thirty-eighth article of war." *See* Roosevelt Proclamation and Order, *supra* note 2

⁴ Act of July 17, 1862, § 5. 12 Stat. 597, 598 (1863).

⁵ 10 U.S.C. §§ 821, 828, 836, 847-50, 104, 106 (2000).

⁶ *See, e.g.*, S. Rep 64-582 at 40 (1916) (testimony of Brig. Gen. Enoch Crowder).

⁷ 317 U.S. 1 (1942)

⁸ Respondent's Answer to Petitions, *Ex parte Quirin*, in 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 379, 429-30 (1975) (citations omitted). There is a distinct lack of precision in the use of terminology related to the law applicable to military commissions. Lawyers generally define "common law" as law derived from judicial decisions, or judge-made, yet comparatively few decisions on law of war issues have sufficient international stature that they could be construed as putting potential defendants on notice about proscribed conduct. The substantive law being applied in war crimes trials in general, and by military commissions in particular, should thus more accurately be identified as customary international law, which is generally binding on a global basis and for which constructive knowledge can arguably be assumed. While judicial decisions can be helpful in identifying these customary norms, common law per se is more likely to be applicable in the area of determining procedural standards for valid tribunals. Each nation's trials must comport with both the specific

Implicitly acknowledging the important role of precedents in the common law, the brief included an appendix identifying purported American law of war tribunals from the Revolution onward.⁹ A brief defending President Bush's military commissions similarly declared that "[t]he history of military practice is legally significant"¹⁰ before also identifying claimed historical military commission trials.¹¹ Yet while participants in any credible common law trial must be familiar with relevant precedents, this knowledge is largely absent from today's military commission process, as demonstrated by significant factual errors in both public statements and court filings by responsible officials.¹²

This shortcoming is at least partially structural; there are no formal reporters, comprehensive printed digests, or online databases of past military commission trials. Unfortunately the government's shortfalls have not been corrected by academic scholarship. To date, there is no complete military commission history providing the precision necessary to inform legal decision processes. Legal scholars that have written about the military commission have typically limited their focus to careful treatment of one or a few select cases.¹³ Even those accounts purporting to be more comprehensive histories¹⁴ generally discuss only a few well-known trials, although this article will argue several of these are not valid precedents and one

national rules of procedure as well as the due process floor established by international norms, and common law rules established by previous trials will typically be most relevant in identifying these due process standards.

⁹ *Id.*, Appendix II at 473-78,

¹⁰ Brief for Appellant at 10, *Hamdan v. Rumsfeld* (D.C. Cir. 2005) (No. 04-5393).

¹¹ *Id.* at 58-60.

¹² See e.g., John Altenburg, Jr., *Defense Department Briefing on Military Commissions Hearings*, Aug. 17, 2004, available at <http://www.dod.mil/transcripts/2004/tr20040817-1164.html>; Brief *supra* note 10 at 60. Among other errors, both assert the British trial of Nathan Hale as a military commission precedent, but it never happened. See note 53 *infra* and accompanying text.

¹³ See, e.g., Carol Chomsky, *The United State-Dakota War Trials: A Study in Military Injustice*, 43 Stan. L. Rev 13 (1990) (focusing on a single set of trials); Michal R. Belknap, *A Putrid Pedigree*, 38 CAL. W. L. REV. 433 (2002) (identifying problems with select examples).

¹⁴ See, e.g., Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAWYER, Mar. 2002 at 41. .

never took place at all.¹⁵ This narrow focus overlooks important legal principles established in the overall corpus juris of common law military tribunals. U.S. panels have tried over 10,000 serious violations under the law of war since the military commission's actual 1847 inception,¹⁶ and many foreign cases should be at least persuasive precedent. There are also scores of recent international agreements and U.N. resolutions that should properly factor into a customary law analysis.

Other common flaws in existing treatment includes failing to differentiate between types of military tribunals¹⁷ and imposing modern views on past events. It matters whether a trial is based upon statutory provisions, like the court martial, or the customary law of war. Actual *trials*, logically required to clear a higher due process bar, should also be distinguished from lesser proceedings carried out in lieu of the summary executions permitted in earlier times. Summary proceedings help define offenses punishable under the customary law of war, but should not legitimately establish procedural norms for modern trials. Some tribunals are claimed as precedents because a modern observer could justify them under common law authority although the actual participants did not, and events during the Revolution are frequently cited without considering either the Founder's understanding of the authority involved or the ramifications of the Constitution on their continuing relevance.

Accurate historical knowledge is also important to the correct analysis of the constitutional and statutory issues raised by the tribunals. As an instrument of the United States Government, the military commission is logically subject to any *procedural* constraints imposed by the Constitution, U.S. statutes, and the customary law of war. The *substantive* law being

¹⁵ See discussion of erroneous claim that American spy Nathan Hale was tried by the British, Part I.A. *infra*.

¹⁶ Supporting data on file with the author.

¹⁷ See LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER* xiii (2005) (using the blanket term "tribunal" because the author thinks "military commission" sounds like "a study body.")

applied may be statutory, where Congress has defined specific crimes, or more typically, the customary law of war. Although modern commission proponents seek to locate authority in the Commander in Chief clause,¹⁸ the Roosevelt administration acknowledged shared authority with Congress:

Military commissions in the United States derive their authority from the Constitution as well as statutes, military usage and the common law of war. Article I of the Constitution empowers Congress to ‘declare war . . . to ‘make Rules for the Government and Regulation of the land and naval Forces . . . to ‘define and punish * * * offences against the Law of Nations,’ and to ‘make all Laws which shall be necessary and proper for carrying into execution the foregoing Powers.’ By Article II, Section 2 (1) the President is made ‘Commander in Chief of the Army and Navy of the United States.’ These sections divide between Congress and the President control over all the many activities necessary to the effective prosecution of war.¹⁹

To accurately divine constitutional foundations, it is necessary to further distinguish among military commissions based on their four historic purposes. Today’s tribunals are trying law of war violations, invoking congressional authority “to define and punish . . . Offenses against the Law of Nations.”²⁰ But the commission’s original purpose was gaining criminal jurisdiction over U.S. soldiers for crimes beyond the reach of American civil justice.²¹ That use involved a mixture of Congress’s powers “To make Rules for the Government and Regulation of the land and naval forces”²² and to legislate for areas outside any state.²³ A closely related use, trying foreign inhabitants in territory under U.S. military occupation, logically invokes executive authority as Commander in Chief,²⁴ but may also implicate legislative authority over newly acquired territory or areas outside the jurisdiction of any state, and to define and punish under the

¹⁸ See, e.g., Brief supra note 10 at 10.

¹⁹ Respondent’s Answer to Petitions, Ex parte Quirin, in 39 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES 379, 435 (1975).

²⁰ U.S. Constitution, Art. I, § 8, cl. 10.

²¹ See part II.A. *infra*.

²² U.S. Constitution, Art. I, § 8, cl. 14.

²³ See *American Ins. Co. v. 356 Bales of Cotton*, 26 U.S. (1 Pet.) 511, 546 (1828) (holding Congress exercises “the combined powers of the general [federal] and of a state government” when legislating for new territory).

²⁴ U.S. Constitution, Art. II, § 2, cl. 1. .

law of nations. Finally, military commissions have been used in U.S. territory under martial law. As James Madison wished placed on record in 1815, this use arguably lacks any constitutional foundation at all.²⁵

This article will address gaps in current historical understanding in support of reaching informed judgments about which events constitute valid precedents, and the constitutional and statutory authority underlying the modern commission. Part I explores the Framers' original understanding of the proper boundary between executive and legislative authority over military trials, considering both contemporary British practice as well as early American approaches. Part II reviews U.S. history from the Constitution through the outbreak of the Mexican War, a period that might be called the pre-history of the military commission since it will be seen that no one then in authority coherently articulated claims of common law or executive authority. Part III considers the practice of military commissions from their actual inception during the Mexican War through the 1916 adoption of the modern statutory language on the subject. Part IV examines the history of that language, which is largely unchanged in the current UCMJ. Finally, Part V will briefly review the World War II era history, which saw important judicial decisions and departures from the previous practice of close conformity between courts-martial and military commissions.

Both precedent and a literal reading of U.S. statutes support trying some law of war violations by military commission. But this article will demonstrate that history does not support executive *carte blanche* to develop procedures that fail to provide due process protections essentially equivalent to those of courts-martial. Military commission employment, particularly for law of war violations, is not a core Commander in Chief function that should be entitled to significant judicial deference; the predominant constitutional authority at issue belongs to

²⁵ See note 125 and accompanying text *infra*.

Congress. Courts have considered a number of past challenges and should remain receptive to doing so. Military commission precedents establish a substantial portion of the overall corpus juris of the law of war and conducting “common law” military trials without the sound knowledge, and systematic application, of the legal principles they have established would be a miscarriage of justice. Moreover, based on World War II precedents and the 1949 Geneva Conventions, it could constitute a war crime in itself.

I. The Original Understanding About the Jurisdiction of Military Tribunals

Early American military justice borrowed directly from English law, and the first U.S. commander in chief had previously served under both British and colonial authority. It is thus necessary to consider these antecedents in order to understand both the validity of early precedents and the Framers’ understandings about military law.

A. British Practice From 1689 Through the American Revolution

The evolution of constitutional monarchy in Great Britain saw military law transformed from a field under the crown’s authority to one broadly controlled by Parliament. Initially the king unilaterally promulgated rules, known as the Articles of War, governing the conduct of servicemen and military justice procedures,²⁶ but over time parliament asserted authority over both these areas, an evolution well underway at the time of the American Revolution.

Despite British military law’s ancient roots, events since the 1689 English Bill of Rights shape its constitutional history.²⁷ Shortly after William and Mary assumed the throne, a Scottish regiment refused to obey their orders, creating a serious dilemma; the crown was held to lack

²⁶ The king could personally issue these rules or authorize subordinate commanders to do so. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 6-8 (2d. ed. 1920) (cites are to star paging of the 1886 original).

²⁷ See CHARLES M. CLODE, *THE MILITARY FORCES OF THE CROWN* iv (1869)

authority to conduct military trials within England yet civil courts could not punish mutiny.²⁸

Parliament's solution was to enact the first of what would become a long series of Mutiny Acts in 1689. After restating the Bill of Rights' provision that "raising or keeping a standing Army within this Kingdome in time of peace unlesse it be with consent of Parlyament is against Law,"²⁹ the Act declared that:

noe man may be forejudged of Life or Limbe, or subjected to any kinde of punishment by Martiall Law, or in any other manner than by the judgment of his Peeres, and according to the Knowne and Established Laws of this Realme. Yet, nevertheless, it being requisite for retaineing such Forces as are or shall be raised during this exigence of Affaires in the Duty an exact Discipline be observed. And that Soldiers who shall Mutiny or stir up Sedition, or shall desert Their Majestyes Service be brought to a more exemplary and speedy Punishment then the usuall Forms of Law will allow.³⁰

The comparatively brief statute authorized mutiny, sedition, and desertion to be punished by "death or such other punishment as by a Court Martiall shall be inflicted,"³¹ and specified some procedural requirements such as a trial panel of thirteen officers.³² It reinforced the standing of the common law courts since "nothing in this Act [] shall [] be construed to exempt any officer or soldier whatsoever from the ordinary processe of Law."³³ Parliament ensured its control over the army by limiting the authorization to seven-months.³⁴ Subsequent statutes were valid for a year; either new acts or extensions were in effect almost continuously through 1879.³⁵

Early acts left the sovereign's prerogative to promulgate rules governing the army abroad intact.³⁶ But Parliament gradually asserted authority to establish military law both in the country

²⁸ Desertion was a common law felony at the time but mutiny was not. FREDERICK BERNAYS WIENER, CIVILIANS UNDER MILITARY JUSTICE 3 (1967).

²⁹ The first British Mutiny Act (1689) in Winthrop, *supra* note 26 at 1446.

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ Apr. 12 – Nov 10, 1689. *Id.*

³⁵ WEINER, *supra* note 27 at 8; Winthrop, *supra* note 26 at 9.

³⁶ Clode, *supra* note 27 at 146, WINTHROP, *supra* note 26 at 8-9.

and overseas, and to control the personal as well as subject matter jurisdiction of military trials. Detailed Articles of War were still issued in the King's name, although they were actually promulgated by a minister who had to defend his actions before parliament, and were reissued annually to ensure conformance with the statutory provisions of each new Mutiny Act.³⁷

By the time George Washington served as aide-de-camp to British General Braddock in the disastrous 1755 campaign against Fort Duquesne,³⁸ the effective Mutiny Act ran more than fifty pages and applied to Great Britain and Ireland, Minorca, Gibraltar, and “any of his Majesty's Dominions beyond the Seas.”³⁹ More capital offenses were defined and punishments were specified for improprieties such as submitting false claims and musters,⁴⁰ but the Act gave courts-martial personal jurisdiction only over officers, soldiers, “Persons employed in the Trains of Artillery,”⁴¹ and American colonial forces which “join or act in Conjunction with His Majesty's British forces.”⁴² The monarch was notionally authorized to promulgate Articles of War effective at home and abroad while Parliament maintained exclusive authority to define capital crimes “within the Kingdom of Great Britain and Ireland.”⁴³ Since parliament generally defined only the most serious military offenses, it authorized courts-martial to “inflict corporal punishment, not extending to Life or Limb,” on soldiers for lesser crimes categorized as “Immoralities, Misbehaviour, or Neglect of Duty,” without geographic constraint.⁴⁴ Reinforcing

³⁷ See WEINER, *supra* note 27 at 7-11; Clode, *supra* note 27 at 144.

³⁸ JOSEPH J. ELLIS, *HIS EXCELLENCY: GEORGE WASHINGTON 19-22* (2004)

³⁹ An Act for Punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters 127-28 (1755) (hereinafter Mutiny Act 1755) (on file with the author).

⁴⁰ *See id.*

⁴¹ *Id.* at 128, 163

⁴² *Id.* Clerks and paymasters could be fined or banned from further dealings but only those subject to general personal jurisdiction could actually be court-martialled.

⁴³ *Id.* at 155.

⁴⁴ *Id.* at 129

the civil law's supremacy, anyone accused of a crime "punishable by the known Laws of the Land" had to be turned over to a magistrate for trial.⁴⁵

The Act in effect when America declared independence was largely unchanged save a statute of limitations and authority for quartering American prisoners.⁴⁶ Although the statutes had grown more detailed over time, the corresponding Articles of War still contained many essential details of military justice.⁴⁷ One significant feature was the interstitial grant of authority to courts-martial located "where there is no Form of Our Civil Judicature in Force" to:

try all Persons guilty of Wilful Murder, Theft, Robbery, Rapes, Coining or Clapping the Coin of Great Britain, or of any Foreign Coin current in the Country or Garrison, and all other Capital Crimes, or other Offences, and punish Offenders with Death, or otherwise, as the Nature of their Crimes shall deserve.⁴⁸

While the term "all Persons" seems to expand personal jurisdiction, Judge Advocate General decisions consistently held this term must actually be read as "all Persons subject to the Mutiny Act."⁴⁹ Some civilians were court-martialled in Canada in the early 1760s, but the Judge Advocate General unequivocally denied this had any legal foundation when called to his attention.⁵⁰ Thus even these senior crown officials faithfully acknowledged that military jurisdiction was exclusively limited to those persons Parliament subjected to it.

The Mutiny Act made it a capital crime for servicemen to engage in correspondence with the enemy or provide them "advice or intelligence,"⁵¹ while the Articles of War added a broadly

⁴⁵ *Id.* at 155-56.

⁴⁶ *See* An Act for Punishing Mutiny and Desertion; and for the better Payment of the Army and their Quarters (1776) (hereinafter Mutiny Act 1776).

⁴⁷ These included several capital offenses applicable only overseas such as § 14 art. 9, causing a false alarm in camp, and art. 17, forcing a safeguard. Rules and Articles for the Better Government of our Horse and Foot Guards, and all Other Our Forces in Our Kingdoms of Great Britain and Ireland, Dominions Beyond the Seas, and Foreign parts *in* WINTHROP, *supra* note 26 at 1448-1469 (hereinafter British Articles of War).

⁴⁸ British Articles of War, *supra* note 47, § 20, art. 2, at 1469.

⁴⁹ WEINER, *supra* note 27 at 23-24, 69-70.

⁵⁰ *Id.* at 44-63. The issue was mooted when civil tribunals were established. Occupation law now supports such trials even if not addressed by national law.

⁵¹ *See*, e.g., Mutiny Act 1776, *supra* note 46 at 53; §

defined crime of knowingly harboring or “reliev[ing] the enemy” with money or supplies.⁵² But neither document made any provision for trying enemy spies. Nevertheless, many modern accounts by both scholars and government officials cite the non-existent 1776 British court-martial of American spy Nathan Hale as a precedent.⁵³ Serious historical accounts, dating back over a century, all agree Hale was never tried.⁵⁴ Brought before General William Howe the evening of his capture, Hale candidly admitted his role when incriminating papers were found on his person. Howe ordered him hung without any pretense of trial, as permitted by the law of war until the 1899 Hague Conventions mandated that even a spy “taken in the act can not be punished without previous trial.”⁵⁵ It was thus unnecessary for eighteenth century British military law to provide for dealing with foreign spies, and as seen, it did not.⁵⁶ Even American patriots accepted Howe’s authority to order the execution, objecting only to his rigorous treatment; Hale was denied a bible or visit by clergy, and his final letters were destroyed.⁵⁷

The British example through the American Revolution thus fails to reveal any useful precedent for executive authority to conduct common law trials of persons not subject to military jurisdiction by act of Parliament. Moreover, it also suggests clear legislative supremacy over the

⁵² British Articles of War, *supra* note 47, § 14, arts. 18-19 at 1461.

⁵³ *See, e.g.*, Lacey, *supra* note 14 at 42; FISHER, *supra* note 17 at 9; Brief *supra* note 10 at 60.

⁵⁴ *See, e.g.*, ISSAC W. STUART, LIFE OF CAPTAIN NATHAN HALE 102-43 (1856), HENRY W. HALLECK, INTERNATIONAL LAW 407-08 (1861), DAVID McCULLOUGH, 1776 223 (2005).

⁵⁵ Hague Convention (II) with Respect to the Laws and Customs of War on Land, Annex art. 30, Jul. 29, 1899, 32 Stat. 1803, 1819. The commentary says trial is required “in espionage as in all other cases,” so consensus had apparently developed to outlaw all summary executions. See Edourad Rolin, *Report to the Conference*, Jul. 5, 1899, reprinted in CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE PROCEEDINGS OF THE HAGUE PEACE CONFERENCES 1899 60 (James Brown Scott, ed. 1920).

⁵⁶ FISHER, *supra* note 17 at 3 mistakenly says British *military* law provided for spy trials. But he quotes British *naval* law; separate statutes govern Britain’s services and Parliament always enacted naval Articles of War itself. *See* N.A.M. ROGER, ARTICLES OF WAR (1982).

⁵⁷ HALLECK, *supra* note 54. JEAN CHRISTIE ROOT, NATHAN HALE 88 (1915).

procedure of military trials. Common law trials in occupied territory would be a mid-nineteenth development, part of the evolution of what is now know as “the law of belligerent occupation.”⁵⁸

B. The Colonial American Experience

Militia units were found throughout the colonies, but Virginia’s legislature authorized a standing regiment in 1754 to combat French and Native American threats.⁵⁹ The regiment’s history provides evidence that the Framers, like their British forbears, recognized the preeminence of legislative authority over military justice while Colonial American commanders exercised limited interstitial authority, primarily in applying customary military law to lesser violations and to spying.

Virginia’s militia was subject to a very limited set of laws, defining so few offenses and providing such generally light punishments that George Washington described it as “the next of Kin” to being under no law at all.⁶⁰ But in response to Washington’s concerns,⁶¹ the legislature chose to regulate the standing regiment as Parliament did the king’s standing army, via statutes providing for severe discipline but limited in duration.⁶² Virginia’s initial law, loosely based on the Mutiny Acts, made a range of offenses, from mutiny and desertion to striking a superior, capital offenses.⁶³ Death sentences required an execution warrant issued by the governor or

⁵⁸ See e.g., WEINER, *supra* note 27 at 4-5, 73, 105-06; DORIS APPEL GRABER, DEVELOPMENT OF THE LAW OF BELLIGERENT OCCUPATION 1863-1914 (1949).

⁵⁹ See JOSEPH J. ELLIS, HIS EXCELLENCY: GEORGE WASHINGTON 13 (2004)

⁶⁰ Letter from George Washington to John Campbell, Jan. 10, 1757 in PAPERS OF GEORGE WASHINGTON, 4 COLONIAL SERIES 84 (W.W. Abbott, ed. 1984) (hereinafter 4 CP). For specific militia law provisions, *see, e.g.*, the 1755 statute, 6 Hening 530, 534-38 (1819). A separate statute, 6 Hening 544, 546-48 covered offenses when militia were “employed [] for suppressing any invasion or insurrection.”

⁶¹ Washington commanded the regiment from 1755-58. ELLIS, *supra* note 38 at 24, 39. He expressed concern both before and after taking command. *See* letter from George Washington to Robert Dinwiddie, Aug. 20, 1754 in PAPERS OF GEORGE WASHINGTON, 1 COLONIAL SERIES 190 (W.W. Abbott, ed. 1983) (hereinafter 1 CP); letter from George Washington to Robert Dinwiddie, Oct. 8, 1755 in PAPERS OF GEORGE WASHINGTON, 2 COLONIAL SERIES 84 (W.W. Abbott, ed. 1984) (hereinafter 2 CP).

⁶² *See* An Act to amend an act, intituled, An act for amending an act, intituled, An Act for making provision against invasions and insurrections, 6 Hening 559 (1819). Careful reading shows this statute applied to those “*inlisted* in the service of this colony;” militia were *enrolled* by local officials.

⁶³ *See id.* § 2 at 560.

commander in chief,⁶⁴ and the law provided some procedural mandates for a general court-martial.⁶⁵ The statute said nothing about inferior tribunals, but specifically used the term “general court-martial.” Commanders could thus infer interstitial authority to convene regimental or garrison courts-martial for lesser offenses. Following the British model, it did not address enemy spies.

Washington’s challenges out on the frontier, including rampant desertion, were exacerbated when the statute lapsed in 1756. He highlighted the issue to the speaker of the House of Burgesses, advocating adoption of actual articles of war instead of reenacting a limited mutiny act.⁶⁶

In the interim, Washington apparently resolved to bluff about desertion. After one deserter was recaptured under circumstances arguably qualifying him as a spy, Washington had him hung on that basis since he could not do so for desertion.⁶⁷ Several weeks later, Washington informed Dinwiddie that more men had deserted, and he asked for guidance for punishing those he might capture.⁶⁸ Nominally asking advice, the real intent was logically to prod legislative action because without waiting for a reply, Washington announced he would have the deserters pardoned. He knew, as they apparently did not, that “we have no law at present to punish them.”⁶⁹ Without citing any authority, Dinwiddie replied that Washington could try the deserters and shoot the ringleaders or have the group draw lots for one or two to be executed “for Example

⁶⁴ *Id.*, § 6 at 562. Several Virginia governors never resided in North America. Washington reported to Robert Dinwiddie, “his majesty’s lieutenant governor, and commander in chief of this colony.” *Id.* § 3 at 560.

⁶⁵ *Id.* §§ 4-5 at 560-61.

⁶⁶ See letter from George Washington to John Robinson, Nov. 9, 1756 in 4 CP *supra* note 60 at 16. .

⁶⁷ See letter from George Washington to Robert Dinwiddie, Nov. 9, 1756 in 4 CP *supra* note 66 at 6.

⁶⁸ Letter from George Washington to Robert Dinwiddie, Dec. 4, 1756 in 4 CP *supra* note 66 at 40-41.

⁶⁹ Letter from George Washington to Robert Dinwiddie, Dec. 10, 1756 in 4 CP *supra* note 66 at 40-41

& Terror to the others.”⁷⁰ While a British colonial executive might have been willing to overlook the legislature’s supremacy, the future first President of the United States was not. As Washington had noted in earlier correspondence, without statutory authorization he could not endorse the “judgment of the Martial Court that touches the life of a Soldier . . . [because] I am liable for all the proceedings.”⁷¹ Despite his more aggressive suggestion, Dinwiddie had the wisdom to approve Washington’s more legally sound course of action.⁷² A month later Washington was further challenged by a mutiny and wrote Dinwiddie:

We have held a General Court martial on the Ringleaders; flog’d several severely; and have some under Sentence of Death. The proceedings of the Court I thought it needless to send; or ask warrants for execution; as we have no Law to inflict punishments even of the smallest kind.

I shall keep those Criminals in irons, and if possible, under apprehensions of death, until some favourable opportunity may countenance a reprieve.⁷³

The legislature finally passed a new bill faithful to the actual British Mutiny Acts in the spring of 1757.⁷⁴ Rectifying a previous shortfall, it borrowed British language explicitly authorizing courts-martial “to inflict corporal punishment, not extending to life or limb, on any soldier for immoralities, misbehaviour, or neglect of duty.”⁷⁵ It did not mention authority to promulgate Articles of War. Nevertheless, Washington asked Dinwiddie to have copies of the British Articles printed for distribution to his men.⁷⁶ Washington clearly felt the legislature granted the executive implicit authority to establish supplemental Articles of War when it elected

⁷⁰ Letter from Robert Dinwiddie to George Washington, Dec. 10, 1756 in 4 CP *supra* note 66 at 52-53. Drawing lots dates from ancient Rome, giving the original meaning to “decimate.” It was used as late as 1813 by the Duke of Wellington. WEINER, *supra* note 27 at 20.

⁷¹ Letter from George Washington to Robert Dinwiddie, Aug. 20, 1754 in 1 CP, *supra* note 61 at 190.

⁷² Letter from Robert Dinwiddie to George Washington, Dec. 15, 1756 in 4 CP *supra* note 66 at 57.

⁷³ Letter from George Washington to Robert Dinwiddie, Jan. 12, 1757, 4 CP *supra* note 66 at 93.

⁷⁴ See An Act for preventing Mutiny and Desertion, 7 Henning 87 (1820). The House Speaker wrote Washington that “[t]he Mutiny Bill that we have passed is copied from the Act of Parliament.” Letter from John Robinson to George Washington, Jun. 21, 1757, 4 CP *supra* note 66 at 249.

⁷⁵ Compare *id.* § 4 at 87 with Mutiny Act 1755, *supra* note 39 at 129. This authority was taken generously; a June 1757 court martial awarded two sentences of 500 lashes and one of 1,500. Report of a Regimental Court martial, Jun. 19, 1757 in 4 CP, *supra* note 66 at 230-31.

⁷⁶ Letter from George Washington to Robert Dinwiddie, Aug. 3, 1757 in 4 CP *supra* note 66 at 361.

to define only the broad outlines of military justice and capital offenses. He had originally wanted a comprehensive statutory enactment, but had changed his request to one based on the Mutiny Act shortly before the Burgesses acted.⁷⁷ This change of mind could reflect his belief that he could enforce the Articles on a common law basis and did not need a detailed statute after all. If so, Washington might have brought this view of interstitial authority to his role as American commander in chief, but Congress mooted the issue by enacting detailed Articles of War itself.

C. American Tribunals During the Revolutionary War

Virtually all modern military commission justifications claim precedential U.S. military tribunals dating back to the Revolution.⁷⁸ Curiously, most focus on a single example from that war, the 1780 “trial” of British Major John André, captured in civilian clothes behind American lines while carrying documents from Benedict Arnold about capitulating West Point.⁷⁹ It is universally agreed that George Washington referred André to a “Board of General Officers,” and that he was hanged after the panel reported that “[he] ought to be considered as a spy from the enemy and [] agreeable to the Law and usage of nations it is their opinion he ought to suffer death.”⁸⁰ The realities of the case are more complex, however.

First, although Washington himself referred at least once to André as having been “tried”,⁸¹ the board was an advisory panel, not a “court” that legally determined guilt or imposed a sentence. This conclusion is supported by a variety of evidence, including close reading of the

⁷⁷ See text accompanying *supra* note 66 and letter from George Washington to Robert Dinwiddie, Apr. 29 1757, 4 CP *supra* note 66 at 144. .

⁷⁸ See, e.g., Brief *supra* note 10 at 58.

⁷⁹ See *Proceedings of A Board of General Officers Respecting Major John Andre* 5-6, 13, Sept. 29 1780 (Francis Bailey ed. 1780) (hereinafter *Proceedings*). A modern source debunking historic myths is JOHN E. WALSH, *THE EXECUTION OF MAJOR ANDRE* (2001).

⁸⁰ *Proceedings, supra* note 79 at XX.

⁸¹ Letter from George Washington to Thomas Jefferson, Oct. 10, 1780 in 20 WRITINGS OF GEORGE WASHINGTON 150 (John C. Fitzpatrick, ed. 1937) (hereinafter 20 WRITINGS)

original documents and the panel’s nomenclature. Washington wrote the Board that André would be brought before it for “examination,” not trial, and directs them to “report a precise state of his case, together with your *opinion* of the light in which he ought to be considered and the punishment that ought to be inflicted.”⁸² The Board’s report was explicitly couched in terms of “facts” and “opinion[s].”⁸³ Those familiar with military practice will recognize this as the language of a court of inquiry, not that of a court-martial. A nineteenth century treatise explains:

The court of inquiry, so called, is really not a court at all. No criminal issue is formed before it. It arraigns no prisoner, receives no pleas, makes no finding of guilty or innocence, awards no punishment. Its proceedings are not a trial; nor, is its opinion, when it expresses one, a judgment. It does not administer justice and is not sworn to do so, but simply to ‘examine and inquire.’ It is thus not a court, but rather a board—a board of investigation⁸⁴

The term “Board of General Officers” was a formal part of contemporary military vocabulary that would have been familiar to colonial officers. Very similar to courts of inquiry in many respects, they were “non-judiciary” and their findings were non-binding; they could be used to “decide a point of law, form estimates, or to deliver their opinion on any matter proposed to them.”⁸⁵ Washington used them during the war for advice on such other issues as soldiers’ rations,⁸⁶ officers’ seniority,⁸⁷ and prices sutlers should be allowed to charge for liquor.⁸⁸

As a matter of law, André was thus hanged following Washington’s receipt of an advisory opinion on the same basis Nathan Hale had been, the commander’s customary authority

⁸² *Proceedings*, supra note 79 at 5-6 (emphasis added).

⁸³ *Id.* at 13.

⁸⁴ WINTHROP, supra note 26 at 797.

⁸⁵ ROBERT B. SCOTT, *THE MILITARY LAW OF ENGLAND* 164-65 (1810).

⁸⁶ *See, e.g.*, George Washington, General Orders Dec. 24, 1775, in 4 *WRITINGS OF GEORGE WASHINGTON* 180 (John C. Fitzpatrick, ed. 1931)

⁸⁷ *See, e.g.*, George Washington, General Orders Jul. 19, 1777, in 8 *WRITINGS OF GEORGE WASHINGTON* 435 (John C. Fitzpatrick, ed. 1932) (hereinafter 8 *WRITINGS*) (convening a Board of General Officers for “settling the rank of all Pennsylvania Field Officers”) and General Orders Sep. 9, 1778, in 12 *WRITINGS OF GEORGE WASHINGTON* 413-15 (John C. Fitzpatrick, ed. 193?) (hereinafter 12 *Writings*) (reporting a congressional committee on Army rank had adopted a resolution based on a board of General Officers’ report.)

⁸⁸ George Washington, General Orders Jan. 26, 1778 in 10 *WRITINGS OF GEORGE WASHINGTON* 350 (John C. Fitzpatrick, ed. 1933)

to order a spy's summary execution.⁸⁹ In a letter to his British counterpart, Washington noted "Major André was taken under such circumstances as would have justified the most summary proceedings against him"⁹⁰ Washington describes the board's findings as further justification but makes no claim they are legal authority, and he denied André's request to be shot instead of hanged, noting that "the practice and usage of war . . . were against the indulgence."⁹¹

These circumstances could seemingly provide the basis for an executive claim of authority to try law of war violations. If a commander could order a summary execution, surely he could order a more formal trial. The Government made just this claim in its appellate brief in *Hamdan*, asserting "[a]t the time [of André's execution], there was no provision in the American Articles of War providing for jurisdiction in a court-martial to try an enemy for the offense of spying."⁹² And, the Government argued, "the drafters of the Constitution surely intended to give the President the same authority that General Washington possessed during the Revolutionary War to convene military tribunals to punish offenses against the laws of war."⁹³

But the assertion that Washington lacked congressional authority to court martial spies is simply wrong. While the initial American 1775 Articles of War⁹⁴ made no provision for trying spies, Congress quickly rectified this in a supplemental resolution:

[A]ll persons, not members of, nor owing allegiance to any of the United States of America . . . who shall be found lurking as spies in or about the fortifications or encampments of the armies of the United States . . . shall suffer death, according to the law and usage of nations, . . . by sentence of a court martial, or such other punishment as such court-martial shall direct."⁹⁵

⁸⁹ Government attorneys acknowledged this in arguing *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 99-100 (1866).

⁹⁰ Letter from George Washington to Sir Henry Clinton, Sep. 30, 1780 in 20 WRITINGS *supra* note 81 at 103.

⁹¹ Letter from George Washington to the President of Congress, Oct. 7, 1789 in 20 WRITINGS *supra* note 81 at 131.

⁹² Brief *supra* note 10 at 58

⁹³ *Id.* at 59.

⁹⁴ American Articles of War of 1775 in WINTHROP, *supra* note 26 at 1748-88.

⁹⁵ Resolution of the Continental Congress, August 21, 1776, 5 JOURNALS OF THE AMERICAN CONGRESS 1774 TO 1779 693 (Library of Congress 1906).

It is semantically correct that this resolution was not an article of war since it does not appear among the numbered articles, but because its text mandated that it be “printed at the end of the rules and articles of war,”⁹⁶ it is fallacious to assert that courts-martial lacked legislative authority to try spies. It is thus necessary to consider why Washington handled André’s case more summarily in 1780 than the actual court-martial Congress had called for.

It is tempting to postulate that Washington simply overlooked the enactment. But this is disproved by an earlier letter to Congress requesting clarification about the resolution’s definition of “spy,”⁹⁷ and Washington’s referral of André’s alleged co-conspirator, Joshua Hett Smith, to a court-martial on charges including spying the very day after André’s Board.⁹⁸

Despite its widespread citation as a precedent, it was André’s treatment, not Smith’s, that was the anomaly. The vast majority of accused British spies were court-martialed during the Revolution, as any military commission scholar should know, because the Supreme Court noted twenty such convictions in a *Quirin* footnote.⁹⁹ Washington’s papers reveal five more trials: four acquittals and one conviction he overturned because the convening officer lacked authority under the Articles of War.¹⁰⁰ Two other suspected spies were found at the seat of Congress, leading to

⁹⁶ *Id.*

⁹⁷ Letter from George Washington to Philip Livingston et al., Jul. 19, 1777 in 8 WRITINGS, *supra* note 87 at 444. Written after new Articles of War were adopted in Sept, 1776, it confirms Washington’s understanding that the resolution on spies was not superceded by the new law.

⁹⁸ RECORD OF THE TRIAL OF JOSHUA HETT SMITH, ESQ. 1-2 (Henry B. Dawson, ed. 1866). The panel held it lacked jurisdiction over spying since Smith was a citizen, not an issue with André.

⁹⁹ 317 U.S. at 42 n.14

¹⁰⁰ See George Washington, General Orders, May 2, 1778 in 11 WRITINGS OF GEORGE WASHINGTON 342 (John C. Fitzpatrick, ed. 1934) (hereinafter 11 WRITINGS) (reporting acquittal of Timothy Flood); George Washington, General Orders, Aug. 8, 1779 in 12 WRITINGS *supra* note 87 at 299 (reporting acquittal of William Cole); George Washington, letter to Colonel Peter Gansevoort, Aug. 13, 1778 in *id.* 319-20 (setting aside conviction of Samuel Gake due to convening officer’s lack of authority); George Washington, General Orders, Jul. 26, 1780 in 19 WRITINGS OF GEORGE WASHINGTON 252 (John C. Fitzpatrick, ed. 1937) (reporting acquittal of Robert Thomas Johnson Richards); George Washington, General Orders, Jul. 11, 1779 in 15 WRITINGS OF WASHINGTON 407 (John C. Fitzpatrick, ed. 1936) (reporting John Springer’s acquittal on spying but conviction of “seducing soldiers to enlist in the british Army”).

a further resolution authorizing the Board of War to convene courts-martial.¹⁰¹ In contrast to these two-dozen plus courts-martial, only one other suspected spy, Thomas Shanks, was referred to a Board of General Officers.¹⁰² One scholar suggested the Board of General Officers was simply a court-martial composed of senior officers,¹⁰³ but Washington's writings rebut this, explicitly declaring that he "sought to avoid the formality of a regular trial."¹⁰⁴

It thus seems Washington believed that he retained customary authority for the summary treatment of spies despite congressional provision for their court-martial. Washington did not believe that he had the same liberty with respect to state law. His correspondence demonstrates belief that a state enactment trumped both authority to apply customary international law and to try civilians under military law enacted by Congress.¹⁰⁵ The authority Washington derived from the law of nations must thus be considered in light of the unique status of the Continental Congress. State governments enjoyed a claim to sovereignty stemming first from royal charters and later from the adoption of their constitutions. But when Andre was executed in 1780, the Continental Congress enjoyed no similar legal foundation – even the limited Articles of Confederation were not ratified until March 1781. However strange it seems today, Washington

¹⁰¹ 21 JOURNALS OF THE CONTINENTAL CONGRESS 1109 (Library of Congress 1912). The author found no evidence a court-martial was ever convened.

¹⁰² Washington had Shanks hung. George Washington, General Orders, Jun. 3, 1779 in 12 WRITINGS *supra* note 87. The Orders used the term "conviction," but Washington's letter of referral asked they "examine him and report the result." Letter from George Washington to the Board of General Officers, Jun. 2, 1778 in *id.* at 11. Washington directed a third case, Thomas Lewis Woodward, be referred to a "court of inquiry." Letter from George Washington to Major General Israel Putnam, Feb. 20, 1777 in 7 WRITINGS OF GEORGE WASHINGTON 175 (John C. Fitzpatrick, ed. 1932). Woodward is not mentioned again in Washington's papers, so the allegations presumably proved unsubstantiated.

¹⁰³ See Charles F. Barber, *Trial of Unlawful Enemy Belligerents*, 29 CORNELL L. Q. 53, 68 (1943).

¹⁰⁴ Washington, letter to the Board of General Officers, *supra* note 102.

¹⁰⁵ See letter from George Washington to Brigadier General William Maxwell of May 19, 1780 in 18 WRITINGS OF GEORGE WASHINGTON 388-89 (John C. Fitzpatrick, ed. 1937) (instructing he investigate state law and conduct a spy trial only if no state statute applied), and letter from George Washington to Governor William Livingston, Apr. 15, 1778 in 11 WRITINGS *supra* note 100 at 262-63 (indicating belief State law criminalizing an offense barred its trial by court-martial).

thus had reason to consider both state law and customary international law capable of overriding congressional resolutions.

Any residual precedent from Washington's actions must be considered in the context of the Constitution, which repudiates claims of continuing executive authority to ignore statutory enactments. The supremacy clause explicitly makes statutes and treaties, but *not* customary international law, "the supreme Law of the Land."¹⁰⁶ Also clearly on point was the commitment to Congress of the authority to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations."¹⁰⁷ This gives Congress primary authority in the field, not the Executive. Taken together, these two clauses suggest that Washington's handling of the André affair does not survive the Constitution. Ironically the resolution on spying does, its language about "lurking as a spy" remains recognizable in the UCMJ to this day.¹⁰⁸

II. Early Military Tribunals Under the Constitution

Congress elected to continue the 1776 Articles of War in effect after the Constitution's ratification¹⁰⁹ although some changes were called for, such as substituting presidential review of court-martial proceedings for that of Congress. Updated Articles were therefore adopted in 1806¹¹⁰ with the 1776 language about spies retained as the final section of the new statute.¹¹¹

Existing scholarship identifies cases from 1815 and 1818 as precedents for executive authority to order common law military trials. Careful examination, however, shows that the first case actually supports the conclusion that such power is entirely lacking. The second

¹⁰⁶ U.S. CONST., Art. VI, cl 2.

¹⁰⁷ *Id.*, Art. I, § 8, cl. 10.

¹⁰⁸ *See* 10 U.S.C. § 906 (2000).

¹⁰⁹ *See* Act of Sep. 29, 1789, 1 Stat. 95, 96 (1845).

¹¹⁰ An Act for establishing Rules and Articles for the government of the Armies of the United States, Apr. 10, 1806 2 Stat. 359 (1845) (hereinafter 1806 Articles of War).

¹¹¹ *Id.*, § 2 at 371.

example is more convoluted, but ultimately seems also to fail as a useful precedent for establishing executive authority.

A. The War of 1812: Reinforcement of Congressional Authority

The War of 1812 saw several more military trials of individuals not part of the armed forces, but close analysis shows the results conformed to laws enacted by Congress with no reliance upon inherent executive authority. Often overlooked, three persons were court-martialed for spying as documented in another *Quirin* footnote.¹¹² One was hanged, one was acquitted, and one had his conviction overturned by President Madison because he was American and the statute still only applied to aliens.¹¹³

More widely known, and far more controversial, was the New Orleans court-martial of Louis Louaillier ordered by Andrew Jackson in March 1815. Jackson arrived in Louisiana in December 1814 to defend against imminent British attack and found New Orleans threatened with panic.¹¹⁴ He responded by proclaiming “the city and environs . . . under strict martial law.”¹¹⁵ On January 8, 1815, his forces scored a stunning victory, decisively repulsing the British and inflicting almost 2,000 casualties at a cost of seven American dead. Jackson became an immediate national hero. Nevertheless, he insisted on maintaining martial law even after the invaders sailed away. As local discontent grew, Jackson ordered a prominent legislator, Louis Louaillier, arrested for his anonymously published call for ending martial law. When federal district judge Dominick Hall issued a writ of habeas corpus on Louaillier’s behalf, Jackson had

¹¹² 317 U.S. at 42 n14.

¹¹³ *Id.*

¹¹⁴ MARQUIS JAMES, ANDREW JACKSON: THE BORDER CAPTAIN 226-27 (1933)

¹¹⁵ Headquarters 7th Military District General Orders of December 16, 1814, in 3 THE PAPERS OF ANDREW JACKSON 206-207 (Harold D. Moser, ed., 1991) (Hereinafter 3 JACKSON PAPERS).

the judge arrested as well.¹¹⁶

Jackson's second in command, Brigadier General Edmund Gaines, advised that authority to try citizens was significantly constrained by Congress:

[T]he commanding officer has a right to chalk out the proper limits of his camp, in time of war, to enforce obedience within those limits; and to confine any and every disorderly person found therein, there can be no doubt. He is held responsible for the defence of the place, and the good order & discipline of the forces under his command—Hence the right to enforce obedience, and to confine disorderly persons not of the army It is a matter of regret that that power to *try* and *punish* such persons, under present circumstances, does not also exist. But the tribunal constituted by law to *try* and *punish*, are precluded from the authority of [the] common law—they are sworn to “try and determine the matter between the united states and the accused according to the provisions of ‘an act establishing rules and articles for the government of the armies of the united states’ & c. The national legislature always regardful of the civil rights of citizens and habitually opposed to the growth of military power; have restricted the jurisdiction of courts martial, as regards our own citizens, to persons belonging to or serving with the army—excepting only the offenses embraced in the 56th & 57th. articles.¹¹⁷

Gaines tactfully suggested that “a majority of the court may, however, think differently with me . . . [and] I hold myself ready therefore to attend the court.”¹¹⁸ Jackson promptly convened a court-martial and directed Gaines to preside.¹¹⁹ Louallier initially faced seven charges including mutiny, being a spy, and violation of the 56th and 57th articles of war.¹²⁰ He challenged the court's jurisdiction and the panel agreed with Gaines assessment that it had jurisdiction only over those charges “founded on the 56th and 57th Articles of War.”¹²¹ Louallier then stood mute to

¹¹⁶ See, e.g., BURKE DAVIS, OLD HICKORY 138-54 (1977). Jackson's orders for the arrests of Louallier and Judge Hall appear in 2 THE CORRESPONDENCE OF ANDREW JACKSON 183 (John Spencer Bassett, ed., 1927) (hereinafter JACKSON CORRESPONDENCE).

¹¹⁷ Letter from Edmund P. Gaines to Andrew Jackson, Mar. 6, 1815 in 3 JACKSON PAPERS, *supra* note 115 at 301-02. Art. 56 covered relieving, harboring, or protecting an enemy; art. 57 applied to holding correspondence or giving intelligence. Both say “whosoever;” other punitive articles use words like “any officer or soldier.” See 1806 Articles of War, *supra* note 110 at 366.

¹¹⁸ Gaines letter *supra* note 117 at 302-03.

¹¹⁹ Headquarters, Seventh M. District General Orders, Mar. 6, 1815 in House Doc. 69, 27th Cong., 3d Sess. at 2 (hereinafter Louallier Trial).

¹²⁰ Louallier Trial, *supra* note 119 at 5-10.

¹²¹ See *id.* at 5.

protest what he still insisted was an unconstitutional trial, but was acquitted anyway.¹²²

Jackson “disapproved” the results, contending the charges were proper, but he dissolved the court and the acquittal was not reconsidered.¹²³ The precedent established should thus be considered to be the decision by the trial panel, sitting as trier of both law and fact, that the authority of a court martial was limited to that expressly prescribed by statute, not the unilateral opinion expressed by Jackson about his authority. Although his party reaped huge benefits from public enthusiasm over Jackson’s victory,¹²⁴ President Madison had his Secretary of War write Jackson a rebuke closely echoing Gaines’ previous sentiments:

In the United States there is no authority to declare and impose Martial law, beyond the positive sanction of the Acts of Congress. To enforce the discipline and to ensure the safety, of his garrison, or his camp, an American Commander possesses indeed, high and necessary powers; but all his powers are compatible with the rights of the citizens, and the independence of the judicial authority. If, therefore, he undertakes to suspend the writ of Habeas Corpus, to restrain the liberty of the Press, to inflict military punishments, upon citizens who are not military men, and generally to supercede the functions of the civil magistrate, he may be justified by the law of necessity, while he has the merit of saving of his country, but he cannot resort to the established law of the land, for the means of vindication.¹²⁵

A President of the United States considered to have unique insights about the Constitution, Jackson’s own subordinates who tried the case, and a federal judge called upon to consider the issue all rejected the General’s unilateral claim of authority to conduct military trials not specifically authorized by Congress. It is thus difficult to fathom how this example could provide meaningful precedent for executive authority to conduct common law military trials, but

¹²² *Id.* at 5, 10-12.

¹²³ *See* Headquarters, Seventh M. District General Orders, Mar. 14, 1815 in Louallier Trial *supra* note 119 at 13-18.

¹²⁴ Popular enthusiasm over the victory marked the effective end of the Federalist Party which opposed the war, assuring election of Madison’s preferred successor, James Monroe.

¹²⁵ Letter of Secretary of War Dallas to Andrew Jackson, July 1, 1815, in 2 JACKSON CORRESPONDENCE *supra* note 116 at 212-13. Judge Hall subsequently fined Jackson \$1,000 for contempt, which he paid. Congress eventually reimbursed it with interest. Jackson wanted the repayment to constitute vindication. *See* DAVIS, *supra* note 116 at 372-73. But evidence indicates public sympathy for the impoverished old hero motivated Congress; letters to Jackson cite congressional reluctance to buck public sentiment, not the conviction Jackson was correct. *See* Francis Blair’s letters to Jackson of Jan. 9 and Feb. 11, 1844 in 4 JACKSON CORRESPONDENCE *supra* note 116 at 254, 259.

the claim is nevertheless still made that this trial constitutes a commission precedent.¹²⁶

B. The Seminole War of 1818: Almost a Precedent

Unchastened, Jackson was back in action, and back in controversy, during the first Seminole War in 1818. Determined to deny the enemy refuge in Florida, then neutral Spanish territory, Jackson crossed the border in pursuit of Red Stick (Creek) and Seminole warriors.¹²⁷ Jackson summarily hanged two Red Stick leaders captured early in the campaign.¹²⁸ Evidence was subsequently discovered that two British citizens, Alexander Arbuthnot, a Scottish merchant, and Robert Ambrister, a former Marine officer, were assisting the enemy.¹²⁹ It was these men's treatment that is cited as military commission precedent today,¹³⁰ although the legal foundation for their trials was never clearly established.

Following their capture, Jackson convened "a special court" of thirteen officers headed by Brevet Major General Edmund P. Gaines.¹³¹ Jackson's only articulation of how a "special court" differed from a court-martial was directing it to "record all the documents and testimony in the several cases, and their *opinion* as to the guilt or innocence of the prisoners, and what punishment (if any) should be inflicted."¹³² This suggests he intended it to be advisory, reminiscent of Washington's Board of General Officers. But unlike André's panel, these

¹²⁶ See, e.g., Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, ARMY LAW. Mar. 2002 at 19, 27 ("A military commission tried Louallier . . .")

¹²⁷ Dispute exists as to what extent Jackson's actions were approved by the President. See, e.g., ROBERT V. REMINI, ANDREW JACKSON AND HIS INDIAN WARS 137-40 (2001). Jackson justified his conduct based on international law, not superior orders. See, e.g., letter from Andrew Jackson to Secretary of War John C. Calhoun, Jun. 2, 1818 in MESSAGE FROM THE PRESIDENT OF THE UNITED STATES TRANSMITTING COPIES OF DOCUMENTS IN RELATION TO THE SEMINOLE WAR 88-89 (1818) (hereinafter SEMINOLE DOCUMENTS). But the President informed Congress that Jackson had been authorized to enter Florida. See James Monroe, Message from the President of the United States at the Commencement of the Second Session of the Fifteenth Congress 6 (1818)

¹²⁸ See REMINI, *supra* note 127 at 150.

¹²⁹ REMINI, *supra* note 127 at 145-46, 153-54.

¹³⁰ See, e.g., Brief *supra* note 10 at 59.

¹³¹ Head Quarters division of the South, General Order, Apr. 26, 1818 in SEMINOLE DOCUMENTS, *supra* note 127 at 123-24. Gaines had also presided over Louallier's trial.

¹³² *Id.* at 124 (emphasis added).

proceedings actually conformed to court-martial procedure, including specific findings of guilt and sentences.¹³³ Further, Jackson reported to the Secretary of War that “These individuals were tried under my orders by a Special Court of Select Officers—legally convicted . . . legally condemned, and most justly punished.”¹³⁴

Arbuthnot pled not guilty to the three charges he faced:

Charge 1st. Exciting and stirring up the Creek Indians to war against the United States

Charge 2d. Acting as a spy, and aiding, abetting, and comforting the enemy, supplying them with the means of war.

Charge 3d. Exciting the Indians to murder and destroy William Hambly and Edmund Doyle¹³⁵

In this era court-martial charges were not required to specify their statutory basis.¹³⁶ Failure to reference specific articles is thus insufficient to establish whether Jackson relied upon the common law of war or an aggressive interpretation of the Articles of War as the foundation for these offenses. The court found Arbuthnot guilty of the first and second charges, except for the words “acting as a spy,” and sentenced him to hang.¹³⁷ It held *sua sponte*, but unfortunately without elaboration, that it was “incompetent to take cognizance of the offences alleged” in the third charge.¹³⁸

Ambrister then faced two charges:

Charge 1st. Aiding, abetting, and comforting the enemy, supplying them with means of war, he being a subject of Great Britain, at peace with the United States, and lately an officer in the British colonial marines.

¹³³ Minutes of the proceedings of a special court in SEMINOLE DOCUMENTS, *supra* note 127 at 123-63 (Hereinafter Minutes).

¹³⁴ Letter from Andrew Jackson to John C. Calhoun, May 5, 1818, in 4 Papers of Andrew Jackson 197, 199 (1994).

¹³⁵ Head Quarters division of the South , General Order, Apr. 29, 1818 in SEMINOLE DOCUMENTS, *supra* note 127 at 164. (Hereinafter Order).

¹³⁶ See ALEXANDER MACOMB, THE PRACTICE OF COURTS MARTIAL 26 (1841).

¹³⁷ Minutes *supra* note 133 at 152.

¹³⁸ *Id.* at 127.

Charge 2d. Leading and commanding the Lower Creeks, in carrying on a war against the United States.¹³⁹

He pled not guilty to the first and “guilty [with] justification” to the second,¹⁴⁰ but was convicted of both.¹⁴¹ After initially voting that Ambrister be shot, one member requested reconsideration and the sentence was changed to fifty lashes and a year at hard labor before being forwarded for Jackson’s review.¹⁴² Jackson approved Arbuthnot’s sentence but ignored Ambrister’s reconsideration, noting:

It appears from the evidence and pleading of the prisoner, that he did lead and command within the territory of Spain, (being a subject of Great Britain,) the Indians in war against the United States; those nations being at peace. It is an established principle of the laws of nations, that any individual of a nation, making war against the citizens of another nation, they being at peace, forfeits his allegiance, and becomes an outlaw and pirate. This is the case of Robert C. Ambrister

The commanding General orders . . . [he] be shot to death agreeably to the sentence of the court.¹⁴³

Jackson’s acts caused a stir. Many approved his aggressive response to the Seminole threat, but others were concerned about damaging relations with Britain and Spain.¹⁴⁴ The House Committee on Military Affairs conducted an inquiry, calling upon the full House to formally express its disapproval because “a court martial is a tribunal erected with limited jurisdiction”¹⁴⁵ and “had no cognizance or jurisdiction over the offenses charged.”¹⁴⁶ The Committee criticized departures from proper court-martial practice including Jackson’s disregard

¹³⁹ Minutes, *supra* note 137 at 154 (specifications omitted).

¹⁴⁰ *Id.* at 155.

¹⁴¹ *See* Order, *supra* note 131 at 164.

¹⁴² Continuation of the Minutes of the Proceedings of a Special Court, 27 Apr. 1818 in SEMINOLE DOCUMENTS, *supra* note 127 at 163.

¹⁴³ *See* Order, *supra* note 131 at 165. WINTHROP, *supra* note 26 at 464-65 calls Jackson’s actions “wholly arbitrary and illegal.”

¹⁴⁴ *See* DAVID YANCEY THOMAS, A HISTORY OF MILITARY GOVERNMENT IN NEWLY ACQUIRED TERRITORY OF THE UNITED STATES 60-61 (1904).

¹⁴⁵ *Id.* at 3.

¹⁴⁶ House Committee on Military Affairs, 15th Cong., Report of the Committee on Military Affairs, to whom was referred so much of the President’s Message, of 17th November last, as relates to the proceeding of the Court Martial, in the trial of Arbuthnot and Ambrister, and the conduct of the Seminole war 2 (1819).

of Ambrister's sentence, the court's refusal to allow Arbuthnot to call Ambrister as a defense witness, and evidentiary violations such as admission of hearsay.¹⁴⁷ It also expressed concern that under Jackson's interpretation, both the Frenchman Lafayette, who fought for America in the Revolution, and U.S. citizens aiding Latin American independence movements, were liable to execution.¹⁴⁸ The Committee did not seem bothered by Jackson's summary execution of the two Native Americans, however, presumably because:

It is admitted, as a maxim of the law of nations, that, "where the war is with a savage nation, which observes no rules, and never gives quarter, we may punish them in the persons of any of their people whom we may take, (these belonging to the number of the guilty,) and endeavor, by this rigorous proceeding, to force them to respect the laws of humanity."¹⁴⁹

Ambrister's and Arbuthnot's cases would certainly establish precedent for common law of war tribunals *if* they had been consistently asserted as such. But in response to criticism, Jackson and his advocates quickly retreated from claims that they constituted valid trials. Instead his supporters on the House committee submitted a minority report contending the Brits could have been summarily executed in reprisal for their roles, making any tribunal superfluous.¹⁵⁰ Ignoring his own report of legal convictions,¹⁵¹ Jackson recharacterized it as a "court of inquiry," also citing law of war authority "to retaliate and punish," not the verdict, as his justification.¹⁵² Jackson was still an immensely popular hero,¹⁵³ so not surprisingly, Congress ultimately took no adverse action. Sitting as a Committee of the Whole, the House declined to

¹⁴⁷ *Id.* at 3-4. Congress had never prescribed court-martial rules of evidence; military officers unilaterally adopted Anglo-American common law rules. The Committee cited ALEXANDER MACOMB, A TREATISE ON MARTIAL LAW AND COURTS-MARTIAL 99 (1809), a privately printed book by a serving officer stating courts-martial rules were those applicable "to the trial of crimes before the civil courts." *Id.* at 99.

¹⁴⁸ House Committee on Military Affairs, *supra* note 146 at 2-3.

¹⁴⁹ *Id.* at 2.

¹⁵⁰ See House Committee on Military Affairs, 15th Cong., Views of the Minority of the Committee on Military Affairs, on the subject of the Seminole War, and the trial and execution of Arbuthnot and Ambrister (1819).

¹⁵¹ See note 134 *supra* and accompanying text.

¹⁵² Memorial of Major General Andrew Jackson 13 (1820).

¹⁵³ Even while criticizing his recent conduct, both House and Senate committees noted Jackson's previous achievements. See House Comm. on Military Affairs, *supra* note 146 at 3; S. Doc. No. 15-100 3 (1819).

adopt the Military Affairs Committee's disapproval of Jackson's actions,¹⁵⁴ and the full House per se then concurred.¹⁵⁵ It is a fine, but significant, distinction that the House did *not* vote to ratify Jackson's actions; it declined to disapprove them. Although a Senate committee found even broader constitutional problems with Jackson's actions,¹⁵⁶ the upper chamber let the matter die without formal vote.

It is difficult to find precedent in these events for modern military commissions. Neither President Monroe or Congress, nor even Jackson himself, ultimately asserted any common law authority to try law of war violations. At best there may have been consensus that "savages" not following western laws of war, their co-belligerents, and instigators, could be summarily executed to deter further offenses.

Responding to a question about trying military cadets, the Attorney General explicitly noted a year later that U.S. military jurisdiction had never been expanded "without a positive provision to that effect [by Congress]."¹⁵⁷ Neither military justice treatise published between the Seminole and Mexican Wars identified any common law or executive authority, or recognized the existence of "special" tribunals, not mentioned in the Articles of War. Written by serving officers who would be expected to take a broad view of military jurisdiction (one was the Army's commanding general), both books specifically declared that military courts derived *all* their authority from legislative mandate.¹⁵⁸

III. The Origin and Development of the Military Commission

¹⁵⁴ Annals of Cong. 1132 (1819).

¹⁵⁵ See *id.* at 1135-36. The full House declined to disapprove Jackson's conduct in Arbuthnot's case 108-62, and in Ambrister's 107-63.

¹⁵⁶ See S. Doc. 15-100 (1819). The Senate report found constitutional violations in Jackson's raising troops and warring against Spain without congressional authorization, *id.* at 8-10.

¹⁵⁷ 1 U.S. Op. Atty. Gen. 276, 277 (1819).

¹⁵⁸ See MACOMB, *supra* note 136 AT 10-19 (1841), WILLIAM C. DEHART, OBSERVATIONS ON MILITARY LAW AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 36 (1846). Macomb, now a Major General commanding the Army, also authored the 1809 work cited by the House Committee. See note 147 *supra*.

A. The Creation of the Military Commission: The Mexican War of 1846-48

While the precedential value of events prior to 1846 now seems dubious, there is no dispute that the U.S. Army's commander, General Winfield Scott, both instituted military commissions and coined the term during the war with Mexico. But the factual circumstances are frequently misrepresented.¹⁵⁹

The British Articles of War let commanders try soldiers committing common law crimes “where there is no Form of Our Civil Judicature in Force,”¹⁶⁰ but Congress omitted this provision in copying them, limiting initial U.S. military jurisdiction to military offenses. American soldiers accused of common law crimes had to be turned over to civil magistrates for trial.¹⁶¹ When General Zachary Taylor entered Mexico, launching America's first war fought entirely outside U.S. borders, he thus had no practical means to maintain order over non-military offenses. Back in Washington, Scott received “reliable information . . . that the wild volunteers as soon as beyond the Rio Grande, committed, with impunity, all sorts of atrocities on the persons and property of Mexicans.”¹⁶² Taylor himself reported that “the undisciplined character of a large portion of the forces has led to the commission of many petty depredations and occasional acts of violence towards the Mexicans. With scarcely an exception. . . these have been confined to the volunteer troops.”¹⁶³ First hand accounts by two Pennsylvania volunteers bear this out, describing violating orders to hunt for cows and their apparent toleration of plundering;¹⁶⁴ ironically both men were lawyers and one a district attorney.¹⁶⁵

¹⁵⁹ See David Glazier, Note, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 at 2027, 2046 (2003).

¹⁶⁰ See *supra* note 48 and accompanying text.

¹⁶¹ 1806 Articles of War, *supra* note 110 at 364.

¹⁶² WINFIELD SCOTT, 2 MEMOIRS OF LIEUT-GENERAL SCOTT 392-93 (1864).

¹⁶³ Letter from Zachary Taylor to The Adjutant General of the Army, May 23, 1847 in H. Exec. Doc. 56, 30th Cong. 1st Sess. 328 (1848)

¹⁶⁴ THE MEXICAN WAR JOURNALS OF PRIVATE RICHARD COULTER AND SERGEANT THOMAS BARCLAY, COMPANY E, SECOND PENNSYLVANIA INFANTRY 74-75, 83-84,138 (Allan Peskin, ed. 1991)

Concern for preventing depredations was not new.¹⁶⁶ But Scott faced unique challenges, intending to personally march an army from the Mexican coast to the capital while confronting a much larger enemy force. This feat would have been impossible without the local population, from whom subsistence requirements had to be purchased, acquiescing to the American presence.¹⁶⁷ So before departing Washington, Scott drew up a “*martial law order*—to be issued and enforced in Mexico, until Congress could be stimulated to legislate on the subject.”¹⁶⁸ Despite modern assertions of broad executive authority, neither Secretary of War William Marcy nor the Attorney General would approve Scott’s proposal, returning it “silently . . . as too explosive for safe handling,”¹⁶⁹ and being “stricken with legal dumbness,”¹⁷⁰ respectively.

Scott’s directive, first promulgated as General Orders (G.O.) No. 20 at Tampico on February 19, 1847, made common criminal offenses, committed by or upon U.S. soldiers, triable by military commissions.¹⁷¹ The order thus also applied to offenses committed by Mexicans against Americans, but both the original text and Scott’s writings show that the primary focus was disciplining the American forces.¹⁷² The first iteration was issued only in English and directed simply that it “be read at the head of every company of the United States’ forces.”¹⁷³ Only later would it also call for publication in Spanish to the local populace.¹⁷⁴

¹⁶⁵ *Id.* at 2-3.

¹⁶⁶ *See, e.g.*, George Washington, General Orders, Oct 23, 1778 in 13 THE WRITINGS OF GEORGE WASHINGTON 135, 138-39 (John C. Fitzpatrick, ed. 1935)

¹⁶⁷ *See, e.g.*, JOHN S. D. EISENHOWER, SO FAR FROM GOD 266, 297-98 (1989).

¹⁶⁸ *See* SCOTT, *supra* note 162 at 393.

¹⁶⁹ SCOTT, *supra* note 162 at 393-94.

¹⁷⁰ *Id.*

¹⁷¹ General Winfield Scott, General Orders (G.O.) No. 20 in Orders and Special Orders, Headquarters of the Army, War with Mexico, 1847-48 139-40, Vol. 41 1/2 at 140, Records Group 94, National Archives, Washington D.C. (Hereinafter NARA).

¹⁷² *See* SCOTT, *supra* note 162 at 393-94; Scott *supra* note 171 at 139.

¹⁷³ Scott *supra* note 171 at 140

¹⁷⁴ For the initial version, *see* Scott, *supra* note 171 at 139-40. An intermediate version “republished with important additions” was Winfield Scott, G.O No. 190, Jun. 26, 1847, in NARA *supra* note 171 at 380-83. The final version, calling for Spanish translation, was Winfield Scott, G.O. No. 287, Sept. 16, 1847 in NARA *supra* note 171 at 506-

Scott, a lawyer before entering the army, established two due process checks upon these tribunals. First, he based their operation upon established court martial procedure:

Every military commission under this order, will be appointed, governed and limited as prescribed by the 65th, 66th, 67th, and 97th, of the said rules and articles of war, and the proceedings of such commissions will be duly recorded, in writing, reviewed, revised, disapproved or approved, and the sentences executed—all as in the cases of the proceedings and sentences of courts-martial; provided, that no military commission shall try any case clearly cognizable by any court martial.¹⁷⁵

Second, he limited penalties to “known punishments in like cases, in . . . one of the States of the United States of America.”¹⁷⁶

Scott issued orders convening the first military commissions on March 31, 1847 at Vera Cruz. G.O. 81 established a panel of seven officers to try regular soldiers¹⁷⁷ and G.O. 83 a like-sized panel for volunteers.¹⁷⁸ This made sense only if Scott believed military commissions must follow statutory mandates for the court martial because it was counterproductive to his goal of reining in the volunteers. Captain George Davis, assigned to prosecute under G.O. 83, observed:

The accused soldiers confined for trial were citizens of the States of Illinois, Pennsylvania, Georgia and Tennessee . . . volunteers with but a few months to serve before they would again return to the walks of private life. The members of the military commission by whom they were about to be tried were also civilians, who, in a like limited time, would lay aside the sword. And more than all, most of the triers of the accused had been, and would again become, active and prominent politicians. And I seriously doubted whether a tribunal so constituted, could or would exercise the moral courage to discard all political consideration, whether of the past or in the future, in determining the guilt or innocence of an accused offender from the same State . . . so as to do strict and equal justice to those who were to be tried.¹⁷⁹

10. Modern scholarship *discusses* “G.O. 20” but almost always *cites* G.O. 287, reprinted in SCOTT, *supra* note 162 at 540-48.

¹⁷⁵ Scott *supra* note 171 at 140. Article 65 defined authority to convene and review general courts-martial, article 66 did the same for regimental and garrison courts, article 67 limited punishments by lesser tribunals, while article 97 required separate courts for regular and volunteer soldiers. 1806 Articles of War, *supra* note 110 at 367, 371.

¹⁷⁶ *Id.*, § 11 at 140.

¹⁷⁷ General Winfield Scott, General Orders No. 81 in NARA, *supra* note 175 at 245-46.

¹⁷⁸ General Winfield Scott, General Orders No. 83 in NARA, *supra* note 175 at 244.

¹⁷⁹ GEORGE T. M. DAVIS, AUTOBIOGRAPHY 132-33 (1891)

Davis reports he tried his best to deal with this concern, having soldiers from his state, Illinois, tried first to establish his impartiality and get sentences providing precedents for later trials.¹⁸⁰ He succeeded only in the former. The first individual ever tried by military commission, Sergeant J. J. Adams of the Third Illinois Regiment, was convicted of theft, reduced to private, fined two months pay, and imprisoned for two months.¹⁸¹ But volunteers from other states received half the punishment for identical offenses.¹⁸² Two months would elapse before the first Mexican was tried,¹⁸³ and five months until the first Mexican conviction.¹⁸⁴

U.S. forces in California experienced similar problems, but the American commander, Colonel R. B. Mason, followed the Articles of War literally and turned offenders over to local officials until chancing upon a newspaper account of G.O. 20.¹⁸⁵ Scott's order was not facially applicable to California, so Mason promulgated it locally under cover of his own.¹⁸⁶ When misunderstanding surfaced about use of state law as a check on sentencing, Mason had First Lieutenant William T. Sherman issue a clarification. Sherman noted military commissions were a "novel" tribunal created by General Scott and that:

[t]he Commission is strictly military in its composition, in its form of trial, mode of passing sentence, and executing punishment, and has powers to try in an enemy's country, for atrocities beyond reach of the rules and articles of war, which in the United States, would be punished by the ordinary or civil courts of the land In awarding sentences the Commission is not required to follow the statutes of any one state, but is merely required not to exceed in severity the punishment for like cases, in any one of the states of the United States of America. This you will see is a limit, not a rule The Commission should try

¹⁸⁰ See *id.* at 133-34.

¹⁸¹ *Id.* at 133.

¹⁸² See *id.* at 135

¹⁸³ See Winfield Scott, G.O. 171, Jun 9, 1847 in NARA *supra* note 171 at 364-65 (reporting acquittal of Ignacio Muvena).

¹⁸⁴ The first was either Winfield Scott, G.O. 275, Sep. 2, 1847 in NARA *supra* note 171 at 491-92 (Francisco Sanchez, nationality unspecified) or Winfield Scott, G.O. 277, Sep. 5, 1847 in NARA *supra* note 171 at 493 (Mexican Augustin Prieda).

¹⁸⁵ VIOLA LOCKHART WARREN, DRAGOONS ON TRIAL 1, 6-9 (1965).

¹⁸⁶ Tenth Military District, G.O. 36, Jul. 27, 1847 in National Archives and Records Administration, Records of the Tenth Military Department, Microfilm M210, roll 7, (hereinafter M210).

a prisoner by the law of war, the unwritten supplemental code, as it is termed by General Scott—and not by the statutes of any particular state, and should merely limit the amount of punishment by that which would be inflicted for a like case in any one of the states of the Union.¹⁸⁷

The defendants undoubtedly appreciated this provision. Courts-martial in the 1840s were constrained in the imposition of corporal punishment only by the Articles of War limitation on whipping to fifty lashes.¹⁸⁸ Other physical punishment, such as “riding the wooden horse,”¹⁸⁹ branding, tattooing, and even tarring and feathering were freely awarded.¹⁹⁰ Mexican War military commissions sentences included whippings (allowed in some U.S. states well into the twentieth century),¹⁹¹ but other draconian punishments not part of U.S. state criminal codes were disallowed.¹⁹²

Scott established a separate tribunal he called Councils of War¹⁹³ for trying law of war violations that would be known as “war crimes” today. The first Councils featured trial panels of five officers and the leading military law authority of the day, Capt. W.C. DeHart, as judge advocate or recorder.¹⁹⁴ They thus differed from the military commission (and court-martial) primarily in terms of subject matter jurisdiction. Six months later Scott issued a new G.O. 372 providing more summary procedures for trying “guerillas and rancheros.”¹⁹⁵ Scott later explained that “the outlaws, denounced in the order, never made a prisoner, but invariably put to

¹⁸⁷ Letter from William T. Sherman to J. S. Griffin, Oct. 20, 1847 in Warren, *supra* note 185 at 46-49.

¹⁸⁸ 1806 Articles of War, art. 87, *supra* note 110 at 369. (Congress outlawed Army flogging in 1812, but reinstated it for desertion in 1833; WINTHROP *supra* note 26 at 438).

¹⁸⁹ This punishment is first mentioned in George Washington, General Orders Jul. 10, 1775 in THE WRITINGS OF GEORGE WASHINGTON (John C. Fitzpatrick, ed.).

¹⁹⁰ See ROBERT R. MILLER, SHAMROCK AND SWORD (1989); WINTHROP *supra* note 26 at 437-42 (describing Army corporal punishments).

¹⁹¹ See LARRY CHARLES BERKSEN, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 55-56 (1975)

¹⁹² See, e.g., Tenth Military Department, G.O. 83, Dec. 24, 1847 in M210. *supra* note 186 (remitting sentence imposing tattooing on belief no state law authorized such punishment).

¹⁹³ The “Councell of Warre” was an early 17th century English court-martial antecedent. See G. NORMAN LIEBER, OBSERVATIONS ON THE ORIGIN OF THE TRIAL BY COUNCIL OF WAR 6-7 (1876).

¹⁹⁴ See Winfield Scott, G.O. 181, June 19, 1847 in NARA *supra* note 171 at 367 and G.O. 184, June 24, 1847 in NARA *supra* note 171 at 380. DeHart had authored the most recent American military justice treatise. See DEHART, *supra* note 158.

¹⁹⁵ Winfield Scott, G.O. 372, Dec. 12, 1847 in NARA *supra* note 171.

death every accidental American straggler, wounded or sick man, that fell into their hands.”¹⁹⁶ Since it was “a universal right of war, not to give quarter to an enemy that puts to death all who fall into his hands,”¹⁹⁷ Scott could have had them shot on the spot, so logically *any* procedural due process provided exceeded international requirements. G.O. 372 authorized panels of as few as three officers and permitted subordinate commanders to both convene and review them whereas Scott did both for military commissions in conformance with court-martial norms.¹⁹⁸ It is unclear how many guerillas were tried under these provisions. The order required that “all punishments . . . , will be duly reported to headquarters,”¹⁹⁹ but there is no mention of guerilla trials in any Headquarters G.O.²⁰⁰ even though Scott would logically have wanted convictions widely publicized. Scott’s successor, Major General Butler, revoked the delegation of approval authority just four months later,²⁰¹ so he would have had to publish results of his reviews from that point through the end of the war. Overall twenty-one individuals are documented in General Orders as having been tried by Councils of War (eighteen Mexicans, one American, one Belgian, and one Mexican resident of unspecified nationality), with eleven convicted.²⁰² Military commissions, by comparison, tried at least 406 persons in Mexico and California, including 300 Americans, eighty-eight Mexicans, and eighteen of unspecified nationality, convicting 231.²⁰³

Scott did not articulate his view of the military commission’s constitutional foundation

¹⁹⁶ SCOTT, *supra* note 162 at 575.

¹⁹⁷ *Id.*

¹⁹⁸ *Cf.* G.O. 372 *supra* note 194 with G.O. 20 *supra* note 171.

¹⁹⁹ G.O. 372 *supra* note 194.

²⁰⁰ *See* NARA *supra* note 171 and Glazier, *supra* note 159 at 2033, The only council found not involving encouraging desertion was a Mexican officer acquitted of remaining under arms after Mexico City fell. *See* G.O. 291, Sep. 19, 1947 in NARA *supra* note 171 at 575.

²⁰¹ *See* Headquarters, Army of Mexico G.O. 37, Mar. 23, 1848, in Nat’l Archives and Records Service, Orders and Special Orders Issued by Maj. Gen. William O. Butler and Maj. Gen. William J. Worth to the Army in Mexico in 1848, *microfilmed on* T-1114 (Nat’l Archives Microfilm Publ’ns) (1969) (hereinafter NARS).

²⁰² *See* NARA *supra* note 171 and NARS *supra* note 201.

²⁰³ *See* NARA *supra* note 171, NARS *supra* note 201, and M210 *supra* note 186. These numbers are probably a few low; several pages are missing from the Archive’s collections, including part of G.O. 315 of Oct. 14, 1847 reporting trial results. Seventeen trials are documented in California; the rest (including all Councils of War) were in Mexico.

beyond asserting they were an interim measure until Congress acted.²⁰⁴ But his focus on maintaining order among American forces, his acknowledgment of congressional supremacy, and insistence on conforming to court-martial practice all suggest he viewed them primarily as an exercise of Article I authority “To make Rules for the Government and Regulation of the land and naval Forces.”²⁰⁵ Once in Mexico, Scott received a letter from Secretary Marcy reporting he had raised the issue with a Senate committee chairman who “did not consider legislation necessary, as the right to punish in such cases necessarily resulted from the condition of things when an army is prosecuting hostilities in an enemy’s country.”²⁰⁶ Marcy thus advised him not to expect any legislative action.²⁰⁷ It is impossible to know how widely this position, expressed as the view of one senator, was held. It would seem to locate authority for military commissions in that portion of the law of war now called the Law of Belligerent Occupation,²⁰⁸ where the executive logically enjoys greater, albeit not exclusive, authority. This view of military commissions as part of occupation law seems reinforced by dicta in a subsequent Supreme Court decision, *Jecker v. Montgomery*,²⁰⁹ considering presidential authority to establish prize courts in occupied Mexican territory. Chief Justice Taney noted for an apparently unanimous court that:

neither the President nor any military officer can establish a court in a conquered country, and authorize it to decide upon the rights of the United States, or of individuals in prize cases, nor to administer the laws of nations.

The courts, established or sanctioned in Mexico during the war by the commanders of the American forces, were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory, and to protect the inhabitants in their persons and property while it was occupied by the American arms They were not courts of the United States and had no right to adjudicate upon a question of prize”²¹⁰

²⁰⁴ See note 169 *supra* and accompanying text.

²⁰⁵ U.S. Const., Art. I, § 8, cl. 14.

²⁰⁶ Letter from W. L. Marcy to Winfield Scott, Feb. 15, 1863 *in* H. Exec. Doc., *supra* note 163 at 64.

²⁰⁷ *Id.* at 63-64

²⁰⁸ A modern account of this field is EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* (2004).

²⁰⁹ 54 U.S. (13 How.) 498 (1851).

²¹⁰ *Id.* at 515.

Another decision stemming from the war, *Fleming v. Page*, confirmed that only Congress, either via statute or through its role in the treaty process, could approve the addition of territory to the United States, or could extend U.S. laws and institutions to it.²¹¹ Zachary Taylor, elected President in 1848,²¹² also stressed that his administration had made no changes to California's territorial government, established during the war under his predecessor, since acquisition of U.S. sovereignty gave Congress exclusive authority in that field.²¹³

Like the military commission, Scott's Councils of War could also have dual legal roots. Since the offenses charged were traced to the customary laws of war, they logically implicate authority committed to Congress to "define and punish . . . Offenses against the Law of Nations"²¹⁴ and *Jecker* can be read to deny executive authority in this area. But offenses related to the maintenance of order and protecting the security of U.S. forces could credibly be claimed to fall within executive authority under occupation law as subsequently codified.²¹⁵ Of course this probable mixture of authority is not an issue with the Bush military commissions. Since the trials are being conducted for violations of the law of war in territory the U.S. occupies under treaty rights rather than the force of military occupation, they clearly fall within congressional authority to define and punish violations of international law and do not implicate any significant power under the Commander in Chief clause.

In any event, it is only *after* the Mexican War experience that commentators first assert the existence of common law military tribunals.²¹⁶ The Council of War, with its more limited procedural protections, ceased to exist as a separate instrument after 1848, being subsumed into

²¹¹ 50 U.S. (9 How.) 603, 615-16 (1850)

²¹² See EISENHOWER, *supra* note 167 at 372.

²¹³ S. Exec. Doc. 31-1 No. 18 at 1 (1850).

²¹⁴ U.S. Const., Art. I, § 8, cl. 10.

²¹⁵ See, e.g., Benvenisti, *supra* note 58 at 7-31 (describing the content of modern occupation law).

²¹⁶ See e.g., HENRY W. HALLECK, INTERNATIONAL LAW 782-85 (1861); S. V. BENÉT, A TREATISE ON MILITARY LAW (1861).

the military commission during the Civil War.²¹⁷ This merger seems logical given the concurrent, but largely unnoticed, U.S. retreat from the idea of summary executions for law of war violations. By 1858 the Army would refuse local requests to participate in the execution of the Nisqually chief Leschi who had been convicted in a territorial court, believing he was entitled to belligerent immunity even though atrocities had been committed during the war.²¹⁸ In 1862 the Army gave 393 members of the Dakota tribe military commission trials for their involvement in hostilities that featured significant savagery, including rapes and the killing of women and children.²¹⁹ Legitimate concerns have been documented about the fairness of those proceedings and whether they conformed to procedural requirements for military commissions.²²⁰ But arguably more significant was the insistence on providing trials at all given previous views that “savages” could be summarily executed. Although the trials included overbroad charges, President Lincoln ultimately limited executions to those shown to have personally violated the laws of war.²²¹ So in practice, the U.S. Government rejected the idea that law of war violators were due no process well before the end of the nineteenth century. An 1865 Attorney General opinion noted:

One enemy in the power of another, whether he be an open or secret one, should not be punished or executed without trial. . . . The love of law, of justice, and the wish to save life and suffering, should impel all good men in time of war to uphold and sustain the existence and action of such tribunals.²²²

²¹⁷ See WINTHROP, *supra* note 26 at 832-33.

²¹⁸ See, e.g., Gregory Roberts, *Historical Court Clears Chief Leschi's Name*, SEATTLE POST-INTELLIGENCER, Dec. 11, 2004, available at http://seattlepi.nwsource.com/local/203382_leschi11.html.

²¹⁹ Douglas Linder, *The Dakota Conflict Trials*, available at http://www.law.umkc.edu/faculty/projects/ftrials/dakota/Dak_account.html (last visited June 17, 2005).

²²⁰ See, e.g., Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 (1990).

²²¹ See *id.* at 29-33.

²²² 11 U.S. Op. Atty. Gen. 297, 315 (1865).

B. Further Development and Judicial Review During the American Civil War

The Civil War saw widespread use of the military commission with 4,271 trials documented during the war and another 1,435 during Reconstruction.²²³ Individual examples from this period must be treated with caution. The massive influx of volunteers, including officers, meant that men lacking the professional soldier's traditional knowledge of military and international law directed many courts-martial and military commissions. Not surprisingly, an Army post-war review found significant improprieties even in cases where Union soldiers were actually put to death, including summary executions and sentences carried out following judgments by tribunals statutorily prohibited from imposing capital punishment.²²⁴

The first comprehensive articulation of the law of war prepared for military use, the "Lieber Code,"²²⁵ was also promulgated during the conflict because the Army was "composed, in great part, of men taken from civilian pursuits; most of whom were unfamiliar with military affairs, and so utterly unacquainted with the usages of war."²²⁶ Among its contributions, Lieber's work is acknowledged as the first articulation of modern occupation law.²²⁷ Restating norms applicable both to the conduct of hostilities and the administration of occupied territory, it noted:

Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war. Military offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried under the common law of war. . . .

In the armies of the United States, the first is exercised by courts-martial, while cases which do not come within the "Rules and Articles of War," or the

²²³ MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 168-73, 176-77* (1991).

²²⁴ See List of U.S. Soldiers Executed by United States Military Authorities During the Late War (c. 1885) in National Archives Microfiche Publication M1523, Proceedings of U.S. Army Courts-Martial and Military Commissions of Union Soldiers Executed by U.S. Military Authorities, 1861-66.

²²⁵ FRANCIS LIEBER, *INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD* (1863)

²²⁶ George B. Davis quoted in LEWIS R. HARLEY, *FRANCIS LIEBER* (1899) at 148-49.

²²⁷ See, e.g., GRABER, *supra* note 58 at 5.

jurisdiction conferred by statute on courts-martial, are tried by military commission.²²⁸

Although individual trials may reflect anomalies stemming from shortfalls in the participants' professional knowledge, several significant conclusions can still be drawn about the overall Civil War military commission process.

First, properly constituted military commissions continued the practice of close conformance to court-martial procedures. General Henry W. Halleck, a lawyer and leading international law scholar,²²⁹ issued guidance on the subject in 1862²³⁰ shortly before he became the General in Chief of the Union Army, noting that:

it is the usage and custom of war among all civilized nations to refer [crimes in occupied or threatened territory] to a duly constituted military tribunal consisting of reliable officers, who acting under the solemnity of an oath and the responsibility always attached to a court of record will examine witnesses, determine the guilt or innocence of parties accused and fix the punishment. This is usually done by courts-martial; but in our country these courts have a very limited jurisdiction both in regard to persons and offenses. Many classes of person cannot be arraigned before such courts for any offense whatsoever, and many crimes committed even by military officers, enlisted men or camp retainers cannot be tried under the "Rules and Articles of War." Military commissions must be resorted to for such cases and these commissions should be ordered by the same authority, be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial in order to prevent abuses which might otherwise arise.²³¹

The order enumerated specific examples of the required correlation between the military commission and court-martial while clearly explaining the difference between the former's jurisdiction over charges based upon the "violation of the laws of war" and the latter's over violations of the statutory "Rules and Articles of War."²³² The one departure from court-martial

²²⁸ Lieber, *supra* note 225, § 1, art. 13.

²²⁹ See HENRY W. HALLECK, *INTERNATIONAL LAW* (1861)

²³⁰ Henry W. Halleck, Headquarters Department of the Missouri, General Orders No. 1, Jan. 1. 1862 in 1 *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES SERIES II* 247-249 (1894) (hereinafter 1. O.R. II).

²³¹ *Id.* at 248

²³² *Id.*

mandates Halleck endorsed was letting military commission panels consist of three officers, but since he directed that “[a] larger number will be detailed where the public service will permit,”²³³ this deviation should have had little practical significance. Halleck’s guidance is noteworthy because the Secretary of War subsequently endorsed his military commission employment²³⁴ and he became General in Chief of the Union Army later that year.²³⁵ Military justice commentators during and after the war also continued to consider conformity between the two tribunals as the norm, and generally continued to assert that military commissions were an exercise of constitutional authority committed to the legislature.²³⁶ Attorney General Speed specifically agreed while upholding the post-war trial of the Lincoln assassination conspirators:

A military tribunal exists under [] the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare.²³⁷

It seems logical that the interstitial exercise of authority constitutionally committed to Congress should follow existing statutory guidance to the full extent possible.

Civil War military commissions received exactly the same post-trial review as courts-martial, and reviewing authorities overturned convictions on “technicalities” for departing from court-martial procedures.²³⁸ This practice dates from Scott’s G.O. 20 and seems to have been at least implicitly adopted by Congress in the first statute mentioning military commissions, the 1862 Act formalizing the post of Judge Advocate General and specifying that his duties included

²³³ *Id.*

²³⁴ See letter from L. Thomas to Major General J. C. Fremont, Apr. 9, 1862 in 2 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES SERIES II 282 (1894) (hereinafter 2 O.R. II).

²³⁵ *Obituary, Henry Wager Halleck*, N.Y. TIMES, Jan. 10, 1872 at 1

²³⁶ See, e.g., HENRY COPPÉE, FIELD MANUAL OF COURTS-MARTIAL, at iii–iv (1863); ROLLIN A. IVES, A TREATISE ON MILITARY LAW AND THE JURISDICTION, CONSTITUTION, AND PROCEDURE OF MILITARY COURTS 278–86 (D. Van Nostrand ed., 2d ed. 1881).

²³⁷ 11 U.S. Op. Atty. Gen 297, 298 (1865).

²³⁸ See NEELY, *supra* note 223 at 162-74.

reviewing both types of trial.²³⁹ Federal courts also accorded military commissions review on the same terms as courts-martial, refusing direct review but considering questions of jurisdiction under petitions for habeas corpus.

While most Civil War military commissions seem to have been legitimate applications of the law of war, both wartime tribunal cases heard by the Supreme Court were political trials unsanctioned by the President. The first, the trial of Ohio Democrat Clement Vallandigham,²⁴⁰ was unilaterally initiated by General Ambrose Burnside but considered “arbitrary and injudicious” by Lincoln’s cabinet.²⁴¹ Ex parte Vallandigham endorsed the military commission as a common law war court, but held that Congress had statutory jurisdiction over the Court’s direct appellate review and had not granted it such authority over military commissions, which were not “courts” under Article III or the Judiciary Act of 1789.²⁴² The Court thus held it had no authority for direct review of military commissions via petitions for certiorari, *exactly* as it had held for the court-martial five years earlier in *Dynes v. Hoover*.²⁴³ Congressional authority to control the Court’s appellate review of military commissions was reconfirmed in the Reconstruction era case, *Ex parte McCardle*.²⁴⁴

The second case the Court heard involved the trial of Indiana Democrat Lambden P. Milligan which had been orchestrated by the Governor of Indiana.²⁴⁵ Unlike Vallandigham, Milligan sought relief via habeas petition, thus succeeding in getting judicial review of the commission’s jurisdiction. Confirming the holdings of Dyne and Vallandigham, the majority

²³⁹ Act of July 17, 1862, ch. 201, § 5, 12 Stat. 597, 598 (1862).

²⁴⁰ *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243 (1863).

²⁴¹ GIDEON WELLES, 1 *DIARY OF GIDEON WELLES* 321–22 (1911), *quoted in* Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 117–24 (1998).

²⁴² 68 U.S. at 251.

²⁴³ 61 U.S. (20 How.) 65 (1857).

²⁴⁴ 74 U.S. (7 Wall.) 506 (1868).

²⁴⁵ Frank L. Klement, *The Indianapolis Treason Trials and Ex Parte Milligan in AMERICAN POLITICAL TRIALS* 108–21 (Michal R. Belknap ed. 1981).

noted that “if there was law to justify this military trial, it is not our province to interfere; [but] if there was not, it is our duty to declare the nullity of the whole proceedings.”²⁴⁶ The court unanimously agreed there was not, with discussion focused on congressional, not executive authority. The majority held Congress could not have authorized Milligan’s trial²⁴⁷ while four concurring justices felt that the legislature could have done so but nevertheless agreed that it clearly had not.²⁴⁸ All nine justices thus believed that the authority underlying the use of military commissions, at least within the United States, belonged to Congress. In an 1869 case the Court did find that presidential authority was invoked in convening tribunals in occupied territory because a duty “devolves upon the government of a regular belligerent occupying, during war, the territory of another belligerent” to provide “for the security of persons and property, and for the administration of justice.”²⁴⁹ Since this “was a military duty,” the Court noted, it was “to be performed by the President as commander-in-chief.”²⁵⁰

President Lincoln never seems to have questioned congressional authority to limit military commission employment during the war. In 1862, for example, he promulgated an executive order subjecting persons interfering with the draft to trial by military commission,²⁵¹ but apparently voiced no objection to a statute passed the following year repudiating that order by mandating civil trials.²⁵² In the same law, Congress belatedly endorsed General Scott’s original use of the military commission, granting jurisdiction to both the court martial and military commission to try a broad spectrum of soldiers’ common law crimes during “time of

²⁴⁶ Ex parte Milligan, 71 U.S. (4 Wall.) 2, 119 (1866).

²⁴⁷ *Id.* at 122.

²⁴⁸ *Id.* at 136-141 (C.J. Chase, concurring).

²⁴⁹ The Grapeshot, 76 U.S. (9 Wall.) 129, 132 (1869).

²⁵⁰ *Id.*

²⁵¹ Proclamation Suspending the Writ of Habeas Corpus Because of Resistance to Draft (Sept. 24, 1862), in 6 LIFE AND WORKS OF ABRAHAM LINCOLN 203 (Marion Mills Miller ed. 1907).

²⁵² An Act for enrolling and calling out the national Forces, and for other Purposes, §§ 25, 12 Stat. 731, 735 (1863).

war, insurrection, or rebellion.”²⁵³ It seems ironic that advocates of presidential power now claim substantial executive authority in this field when Congress enacted the most significant statutory expansion of military commission jurisdiction, the comparatively short-lived 1867 Reconstruction Act, over the President’s veto.²⁵⁴

Civil War military commissions did establish useful precedents for the application of the law of war to the trial of modern terrorists. A number of cases were prosecuted as offenses under the law of war that have come to be thought of as civil crimes in the twentieth century, such as the hijacking of passenger vessels and attempts to derail trains.²⁵⁵ These precedents arguably lend support to the idea that military tribunals could prosecute such offenses again today, *provided* that it is proven the acts constituted part of a formal belligerency. As Attorney General Speed noted while upholding military commission jurisdiction over the Lincoln assassination conspirators when regular criminal statutes could also have been applied, “[military] jurisdiction is confined to offences against the laws of war.”²⁵⁶ In order to return convictions, it was necessary for the trial panel to determine that the accused “committed the deed as public enemies.”²⁵⁷ So while the trial of some terrorist acts may be supported under the law of war, doing so opens the door to a defense that even if the accused committed the act charged, he cannot properly be convicted by a military tribunal unless it is also shown that the act was part of an actual armed conflict.

²⁵³ *Id.*, § 30 at 736.

²⁵⁴ An Act to Provide for the More Efficient Government of the Rebel States, ch. 153 § 3, 14 Stat. 428, 428 (1867). *See also*, An Act relating to Habeas Corpus and regulating Judicial Proceedings in Certain Cases, ch. 81, 12 Stat. 755 (1863) (ratifying the suspension of habeas corpus but requiring detainees be freed if not indicted by grand jury).

²⁵⁵ *See, e.g.*, Headquarters, Department of the East, G.O. 17, Feb. 21, 1865 in 8 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES SERIES II 279 (1894) (hereinafter 8 O.R. II); Headquarters, Department of the Pacific, G.O. 52, June 27, 1865 in 8 O.R. II, 674.

²⁵⁶ *See* 11 U.S. at 315

²⁵⁷ *See id.* at 317. Speed’s view was as far as *any* member of the Administration was willing to go; most of the cabinet believed a military trial of the conspirators was improper. *See* Trial of the Conspirators at <http://www.spartacus.schoolnet.co.uk/USACWtrial.htm> (last visited Aug. 20, 2005)

Civil War experience also demonstrates that military commissions must have a thorough knowledge of the laws of war. As trier of law and fact, commissions must determine whether offenses charged properly constitute punishable violations of the law of war. One commission, for example, found it necessary to repudiate government efforts to prosecute individual blockade runners, finding international law supported only *in rem*, rather than *in personam*, jurisdiction, for this type of act, with no criminal liability on the part of violators.²⁵⁸ Although criticized by some officers at the time,²⁵⁹ the Attorney General subsequently endorsed this decision.²⁶⁰ When exercising interstitial authority to punish offenses against the law of war, the executive thus cannot unilaterally define and prosecute offenses, but must establish to the tribunal's satisfaction both the common law foundation of the crime as well as proof that the accused committed the conduct charged.

The Civil War history thus contains a number of salient lessons. It confirms, through literally thousands of examples, the close conformance of the court-martial and the military commission including identical post-trial review, and establishes federal judicial review of both these tribunals on exactly the same terms. And while conventional wisdom holds that Lincoln significantly expanded (or exceeded) wartime executive authority during the conflict, he at most exercised authority to conduct military tribunals on an interstitial basis, accepting any subsequent limits Congress imposed upon them, and overturning results failing to comply with statutory court-martial procedures.

²⁵⁸ See, e.g., letter from Judge Advocate L.C. Turner to Inspector General James A. Hardie, June 4, 1864 in 7 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES SERIES II 194 (1894) (hereinafter 7 O.R. II).

²⁵⁹ See *id.* at 195.

²⁶⁰ 11 U.S. Op. Atty. Gen. at 312.

C. Late 19th Century Developments

The military commission was used at least once between Reconstruction and the Spanish-American War. In 1873 six Modoc Indians were tried for killing under a flag of truce.²⁶¹ This example seems consistent with previous developments; belligerent immunity was accorded for killing public enemies in battle and only offenders personally violating the law of war were tried.²⁶² Although combat had ended, the tribunal had jurisdiction because “there [was] no agreement for peace” at the time of the trial.²⁶³

Congress exerted further control over military commission jurisdiction the next year when passing restructured Articles of War.²⁶⁴ The final section retained concurrent jurisdiction for the military commission and court-martial over spies,²⁶⁵ but mention of military commission jurisdiction over soldiers’ common law offenses was eliminated.²⁶⁶ The statute thus implicitly now confined servicemen’s trials to the court-martial for both military offenses defined by the Articles and traditional common law crimes. This left commissions with jurisdiction to try violations of the law of war (including spying), crimes committed in territory under U.S. military occupation, and perhaps to try persons in areas under martial law although serious question remains as to whether this has any constitutional foundation.

Occupation law also underwent significant maturation during this period, with commentators now distinguishing between “military government,” the exercise of military authority over foreign territory, and “martial law,” the exercise of military authority over disturbed regions of the nation’s own territory.²⁶⁷ The idea that the President necessarily has

²⁶¹ See 14 U.S. Op. Atty. Gen. 249 (1873).

²⁶² See *id.* at 250.

²⁶³ *Id.* at 253.

²⁶⁴ Articles of War, tit. XIV, ch. 5, 18 Stat. 229, 229–42 (1878) (hereinafter 1874 Articles of War).

²⁶⁵ See *id.*, § 1343 at 242.

²⁶⁶ See *id.*, art. 58 at 235.

²⁶⁷ See WINTHROP, *supra* note 26 at 1245.

significant authority as Commander in Chief over occupied foreign territory seems reasonably well established, subject to the understanding that only Congress can approve the actual acquisition of new territory or make laws for its administration.²⁶⁸

D. The Spanish-American War and the Philippine Insurrection

Largely overlooked by today's scholarship, military commissions were extensively employed following the Spanish-American war as the United States found itself the military occupier of Cuba, the Philippines, and Puerto Rico.²⁶⁹ Some commissions were held in Cuba and Puerto Rico prior to restoration of civilian government following Scott's practice of trying offenses involving servicemen as either victim or perpetrator by military tribunals;²⁷⁰ commissions were used for cases outside courts-martial jurisdiction.²⁷¹ Authority to "use the military commission as an instrumentality for administering the laws of war" was traditionally considered to terminate with the formalization of a peace treaty.²⁷² But when Congress failed to provide for Puerto Rican civil government by the April 11, 1899 ratification of peace with Spain, military authorities created "provisional courts" bridging the gap until a congressionally authorized territorial government was implemented on May 1, 1900. The Supreme Court upheld this interim authority in two cases,²⁷³ and reaffirmed that it "was not empowered to review the proceedings of military tribunals by certiorari" in another.²⁷⁴

²⁶⁸ See, e.g., *Cross v. Harrison*,

²⁶⁹ Lacey, *supra* note 14 at 45, mentions a single case, while FISHER, *supra* note 17 at 80, just says "Gen. Arthur MacArthur placed the Philippines under martial law and relied on a mix of military commissions and Army provost courts to discipline the local population."

²⁷⁰ See, e.g., War Department, Report of the Military Governor of Porto Rico, H. Doc. 56-2 No. 2 (1902) at 98.

²⁷¹ See *id.* at 21.

²⁷² *Id.* at 28. The Attorney General agreed, holding military jurisdiction ended in Cuba by 1900. See 23 U.S. Op. Atty. Gen. 120 (1900), a view upheld by *Ex parte Ortiz*, 100 Fed. 955 (1900) (refusing to release prisoner convicted after peace treaty signed but before ratification).

²⁷³ *Dooley v. U.S.*, 182 U.S. 222, 234 (1901); *Santiago v. Nogueras*, 214 U.S. 260 (1909).

²⁷⁴ *In re Vidal*, 179 U.S. 126 (1900) (denying *cert.*)

By far the most significant military commission use came in the Philippines. General Orders (G.O.) No. 8, issued in Manila in August 1898, defined the military commission's jurisdiction in terms very similar to those used by Scott a half-century earlier. The order denied local jurisdiction over cases involving Army personnel as perpetrator or victim; military commissions would try serious offenses while provost courts, initially limited to a maximum punishment of six months imprisonment, later two years, heard minor cases.²⁷⁵ The Spanish had also used military tribunals for serious cases, so the practice was not unfamiliar to the locals.²⁷⁶ The U.S. commander reported to Washington that the only military commission trials in the first year of the occupation were "Spanish officials continued in office . . . and [] the editor of a Manila Spanish newspaper."²⁷⁷ But he inexplicably overlooked other trials documented in his orders, including a "citizen" tried for rape,²⁷⁸ a "native" tried for murder,²⁷⁹ and three "Chinam[e]n" tried for looting.²⁸⁰

While military commissions were used intermittently beginning in mid-1898, most cases resulted from the armed insurrection opposing U.S. annexation, running from February 1899 until July 1902.²⁸¹ Headquarters General Orders document trial of 828 individuals for serious offenses between 1898 and 1902²⁸² with the vast majority of these (769) included in documents

²⁷⁵ Headquarters, Department of the Pacific and Eighth Army Corps, G.O. 8, Aug. 23, 1898. General Orders of the U.S. Commander in the Philippines are found in found in NARA Records Group 395 (hereafter RG 395). Early orders are found in Department of the Pacific and 8th Corps: General Orders and Circulars, 1898-1900; later ones in Division of the Philippines, General & Special Orders and Circulars, 1900-1902. *See*, Headquarters, Division of the Philippines, G.O. 64, Aug. 10, 1900 (increasing maximum to two years imprisonment).

²⁷⁶ Report of Major-General E.S. Otis, U.S. Army May 14, 1900 at 469-70 (hereinafter Otis Report).

²⁷⁷ *Id.* at 469.

²⁷⁸ Headquarters, Department of the Pacific G.O. 35, Nov. 30, 1898 in RG 395 *supra* note 275.

²⁷⁹ Headquarters, Department of the Pacific G.O. 35, Nov. 30, 1898 in RG 395 *supra* note 275.

²⁸⁰ Headquarters, Department of the Pacific G.O. 20, Apr. 11, 1899 in RG 395. *supra* note 275.

²⁸¹ *See* JOHN MORGAN GATES, *SCHOOLBOOKS AND KRAGS* 85-86 (1973). BRIAN MCALLISTER LINN, *THE U.S. ARMY AND COUNTERINSURGENCY IN THE PHILIPPINE WAR, 1899-1902* xii (1989).

²⁸² Data on file with the author.

submitted to Congress covering just 1900-1901.²⁸³ Most (721 of 769) were trials for offenses involving Filipino victims;²⁸⁴ forty-eight cases had American victims.²⁸⁵ The remaining fifty-nine cases are described in records held by the National Archives, and include two spies tried under the Articles of War provision allowing either a military commission or court-martial to hear that charge.²⁸⁶

General Scott's check on military commission sentencing was preserved in a modified fashion, "The punishment awarded by Military Commission shall conform, as far as possible, to the laws of the United States, or of either of the States, or the custom of war. Its sentence is subject to the approval of the Commanding General."²⁸⁷ The latter provision provided more due process to many military commission defendants than court-martialled soldiers received. Under the Army organization in the Philippines, officers commanding departments and independent brigades had statutory authority to convene general courts-martial²⁸⁸ and customary authority to convene military commissions. But only courts-martial sentences of death, cashiering an officer, or trying a general, had to be reviewed by the commanding general.²⁸⁹ The threshold for military commissions receiving this review was later raised to sentences of first five,²⁹⁰ and

²⁸³ Charges of Cruelty, Etc. to the Natives of the Philippines, S. Doc. 57-1 No. 205 Pt. 2 at 93 (hereinafter 2 S. Doc. 205) (1902).

²⁸⁴ See 2 S. Doc. 205, *supra* note 283. 661 of the 721 were convicted (91.7%); death sentences were confirmed for 211 (31.9% of those convicted).

²⁸⁵ See Exhibit G (Part 3) Trials of Filipinos by military commission for cruelty against soldiers, Jan. 1, 1900- Dec. 31, 1901 in 2 S. Doc. 205, *supra* note 283. Forty-six of the forty-eight accused of crimes against U.S. soldiers were convicted (95.8%); death sentences were upheld for twenty-one (45.6%). Death sentences were awarded at a substantially greater rate for offenses against Americans (thirty-three of forty-six; 71.7%), but reviewing authorities overturned convictions or commuted sentences in twelve cases.

²⁸⁶ Headquarters, Division of the Philippines G.O. 50, July 10, 1900 in Headquarters, Division of the Philippines G.O. 18, Jan. 25, 1901 in 2 S. Doc. 205, *supra* note 283 at 100-101.

²⁸⁷ G.O. 8, *supra* note 275.

²⁸⁸ See Headquarters, Division of the Philippines, G.O. 1, Apr. 7, 1900 in RG 395 *supra* note 275 (specifying organization of the Army in the Philippines); 1874 Articles of War Art. 73, 18 Stat. Pt. 1 237 (specifying wartime general court-martial appointing authority).

²⁸⁹ 1874 Articles of War Art. 105, 107, 18 Stat. Pt. 1 240.

²⁹⁰ Headquarters, Division of the Philippines, G.O. 36, June 26, 1900 in RG 395 *supra* note 276.

subsequently ten, years or more.²⁹¹ Nevertheless, many more military commission defendants qualified for this additional level of review, and it resulted in many mitigated sentences or overturned convictions.²⁹² The order ultimately raising the review threshold to ten years specified additional protections including a requirement for trial “without unnecessary delay” and an explicit ban on cruel or unusual punishment.²⁹³

Some cases tried by Philippine military commissions involved common crimes prosecuted under the occupier’s responsibility to maintain public order. Many could have occurred anywhere, such as killings over monetary disputes,²⁹⁴ domestic quarrels,²⁹⁵ or personal vendettas.²⁹⁶ Others reflect the primitive state of the islands at that time, such as the killing of a suspected witch out of “gross ignorance and superstition.”²⁹⁷ The majority, however, reflect the insurgents’ cruelty towards fellow Filipinos, known as “Americanistas,” who cooperated with the occupation or refused to support the guerillas.²⁹⁸ It is difficult to precisely quantify insurgency cases per se because authorities tended to brand any armed group “outlaws,”²⁹⁹ and motives were not specified in some cases that could have been either common crimes or efforts at intimidation.³⁰⁰

In any event, Philippine trial results logically constitute important precedents for subsequent law of war tribunals, contributing to the development of both substantive law and

²⁹¹ Headquarters, Division of the Philippines, G.O. 64 at 2, Aug 10, 1900 in RG 395 *supra* note 276.

²⁹² *See* 2. S. Doc. 205 *supra* note 283.

²⁹³ G.O. 64, *supra* note 291 at 2.

²⁹⁴ *See, e.g.*, Headquarters, Division of the Philippines, G.O. 13, Jan. 23, 1901, in 2 S. Doc. 205, *supra* note 283.

²⁹⁵ *See, e.g.*, Headquarters, Division of the Philippines, G.O. 342, Sep. 20, 1901 in 2 S. Doc 205, *supra* note 283 at 297-98.

²⁹⁶ *See, e.g.*, Headquarters, Division of the Philippines, G.O. 286, Sep. 20, 1901 in 2 S. Doc 205, *supra* note 283 at 272-73.

²⁹⁷ Headquarters, Division of the Philippines, G.O. 378, Dec. 6, 1901 in 2 S. Doc 205, *supra* note 283 at 310-11.

²⁹⁸ *See* 2. S. Doc. 205 *supra* note 283.

²⁹⁹ *See, e.g.*, Headquarters, Division of the Philippines, G.O. 180, Jul. 20, 1901 in 2 S. Doc 205, *supra* note 283 at 219 (describing perpetrators as “outlaws” although victims were suspected Americanistas).

³⁰⁰ *See, e.g.*, Headquarters, Division of the Philippines, G.O. 152, Jun. 29, 1901 in 2 S. Doc 205, *supra* note 283 at 204 (describing perpetrators as “outlaws” but giving no motive). A civil official called those tried “outside the pale” of legitimate revolution activity. *See* JAMES A. LEROY, 2 THE AMERICANS IN THE PHILIPPINES 211 (1914).

procedural norms. Among the important issues that commissions confronted were the definition of crimes triable under the laws of war,³⁰¹ liability of lesser participants under conspiracy³⁰² and felony murder doctrines,³⁰³ and defenses of duress³⁰⁴ and superior orders.³⁰⁵ Commissions were also called upon to distinguish between privileged killings by a lawful belligerent and those violating the law of war.³⁰⁶

While military commissions tried Filipino law of war violations, more than three-dozen Americans were court-martialled for alleged war crimes.³⁰⁷ Offenses not specifically defined by statute were charged as “conduct to the prejudice of good order and military discipline, in violation of the 62d Article of War,”³⁰⁸ commonly known as the “general article.”³⁰⁹ These U.S. cases addressed such important issues as liability for subordinates’ actions (command responsibility),³¹⁰ for following an unlawful order,³¹¹ for issuing an unlawful but unexecuted order,³¹² for turning prisoners over to third parties who mistreated or killed them,³¹³ and for

³⁰¹ See, e.g., Headquarters, Division of the Philippines, G.O. 66, Sep. 20, 1901 *in 2 S. Doc 205, supra* note 283 at 19 (rejecting “lawlessness” as a valid offense); Headquarters, Division of the Philippines, G.O. 359, Nov. 18, 1901 *in 2 S. Doc 205, supra* note 283 at 304 (holding “abduction” limited to carrying off a woman for carnal purposes).

³⁰² Headquarters, Division of the Philippines, G.O. 339, Sep. 20, 1901 *in 2 S. Doc 205, supra* note 283 at 291-92.

³⁰³ Headquarters, Division of the Philippines, G.O. 108, Sep. 20, 1901 *in 2 S. Doc 205, supra* note 283 at 342.

³⁰⁴ Duress was generally rejected as a defense, see, e.g., Headquarters, Division of the Philippines, G.O. 108, Sep. 20, 1901 *in 2 S. Doc 205, supra* note 283 at 342, but was allowed in Headquarters, Division of the Philippines, G.O. 198, Sep. 20, 1901 *in 2 S. Doc 205, supra* note 283 at 359.

³⁰⁵ See, e.g., Headquarters, Division of the Philippines, G.O. 22, Feb. 1, 1901 *in 2 S. Doc 205, supra* note 283 at 102-03.

³⁰⁶ Compare Headquarters, Division of the Philippines, G.O. 187, Jul. 22, 1901 *in 2 S. Doc 205, supra* note 283 at 358 (rejecting immunity for insurgent “within the American lines ununiformed and disguised as a pacifico”) with Headquarters, Division of the Philippines, G.O. 171, Jul. 13, 1901 *in 2 S. Doc 205, supra* note 283 at 357 (overturning conviction for killing a soldier “in an engagement with a regular detachment of a public enemy”).

³⁰⁷ A partial list is in Exhibit F of Charges of Cruelty, Etc. to the Natives of the Philippines, S. Doc. 57-1 No. 205 Pt. 1 at 42-44 (1902).

³⁰⁸ See, e.g., Headquarters, Division of the Philippines, G.O. 40, June 30, 1900 *in RG 395 supra* note 275.

³⁰⁹ See WINTHROP, *supra* note 26 at 1118-19.

³¹⁰ Headquarters, Division of the Philippines, G.O. 119, June 10, 1902 *in RG 395 supra* note 275

³¹¹ Headquarters, Division of the Philippines, G.O. 93, May 7, 1902 *in RG 395 supra* note 275

³¹² Headquarters of the Army, G.O. 80, Jul. 16, 1902 *in Trials or Courts-Martial in the Philippine Islands in Consequence of Certain Instructions*, S. Doc. 57-2 No. 218 at 2-3. (1903).

³¹³ G.O. 40, *supra* note 308.

torture and lesser maltreatment.³¹⁴ Although tried before statutory rather than common law tribunals, these cases logically constitute precedents defining the scope of the customary law of war.

Buried among the military commission cases were three trials of Americans who deserted to the enemy.³¹⁵ Desertion per se was a court-martial offense under the Articles of War,³¹⁶ but these cases charged the subsequent voluntary affiliation with the enemy “in violation of the laws of war” instead.³¹⁷ Each accused was convicted and sentenced to hard labor.³¹⁸ These decisions suggest that military commissions relying upon the common law of war can still try U.S. personnel, at least for law of war violations not specifically defined by Congress and made punishable by statute.

Lessons to be extracted from the Philippine Insurrection, or any other, military commission practice require an understanding of contemporary court-martial procedures. One military commission review, responding to a counsel’s numerous technical objections, suggested, for example, that “failure to observe details of practice commonly observed before civil courts, and even before courts-martial, will not ordinarily be fatal to the validity of the[] proceedings.”³¹⁹ The review went on to note “admission of counsel . . . is a privilege which should be accorded an accused when practicable, but when counsel utilizes his position . . . to interpose technical objections and obstruct and delay procedure, he may, and should, be debarred

³¹⁴ See, e.g., Headquarters, Division of the Philippines, G.O. 63, Aug. 8, 1900 in RG 395 *supra* note 275

³¹⁵ Headquarters, Division of the Philippines, G.O. 35, Feb. 19, 1902 in RG 395 *supra* note 276 (reporting the trial of “late Private” John W. Nicodemus); Headquarters, Division of the Philippines, G.O. 103, May 23, 1902 in RG 395 *supra* note 276 (reporting the trial of Private Will Denton); Headquarters, Division of the Philippines, G.O. 108, May 26, 1902 in RG 395 *supra* note 276 (reporting the trial of “late artificer” James H. Kearney).

³¹⁶ 1874 Articles of War, art. 47, 18 Stat. Pt 1 234.

³¹⁷ See *supra* note 315.

³¹⁸ *Id.*

³¹⁹ Headquarters, Department of the Pacific, G.O. 24, Apr. 5, 1900 in 2 S. Doc 205, *supra* note 283 at 338.

from the privilege of further representing his client.”³²⁰ These positions were consistent with court-martial practice of the day, however, and do not represent a lower bar for the military commission. Procedural errors were typically not fatal to the validity of courts-martial,³²¹ and representation by counsel was a privilege at that point, not a right. They could be denied permission to speak even in courts-martial if “by their prolixity, captiousness, disrespectful manner, or other objectionable trait, [they] fatigue or displeasure the court.”³²²

There is significant evidence of the close procedural conformity between Philippine insurrection military commissions and courts-martial, particularly in the faithful application of the common law rules of evidence. Although U.S. courts-martial had been conducted for 125 years at this point, rules of evidence still had never been formally mandated. By customary practice, reinforced by two Attorney General opinions, they employed the common law rules “recognized and followed by the criminal courts of the country.”³²³ Although trying individuals for barbaric acts in an undeveloped country before panels of non-lawyers, these common law rules were scrupulously applied to the Philippine military commissions. Where hearsay was admitted, convictions were upheld only if proven by untainted evidence;³²⁴ otherwise they were disapproved.³²⁵ Even where five U.S. soldiers had been savagely murdered, the review noted:

In th[is] case the surprising error occurs of admitting as evidence the report of a board of officers, which had investigated the cause of disappearance of the soldiers Every officer, even of a year’s service should be presumed to know that mere written *ex parte* statements are wholly inadmissible as evidence, and grossly irregular in a capital case.³²⁶

³²⁰ *Id.*

³²¹ GEORGE B. DAVIS, A TREATISE ON THE MILITARY LAW OF THE UNITED STATES 202 (2d ed. 1901)

³²² See WINTHROP, *supra* note 26 at 240-43.

³²³ See *id.* at 472; 2 Op. Att’y Gen. 344 (1830) (noting English military adherence to common law rules); 17 Op. Att’y Gen 310 (1882) (holding absent congressional guidance, military courts are governed by the same rules of evidence as “ordinary courts of criminal jurisdiction”).

³²⁴ See, e.g., Headquarters, Division of the Philippines, G.O. 179, Jul. 19, 1901 in 2 S. Doc 205, *supra* note 283 at 218.

³²⁵ See, e.g., Headquarters, Division of the Philippines, G.O. 31, Jun. 11, 1900 in 2 S. Doc 205, *supra* note 283 at 9.

³²⁶ Headquarters, Division of the Philippines, G.O. 36, Feb. 19, 1902 at 3-4 in RG 395 *supra* note 276

Introduction of confessions was disallowed without a showing of voluntariness and independent evidence, or *corpus delicti*, of the crime³²⁷ Improper application of protections against self-incrimination and an erroneous ruling that a witness was incompetent to answer a question to the detriment of the accused were sufficient to overturn a murder conviction.³²⁸

Admission of spousal testimony was disapproved in a series of cases:

Notwithstanding the unbroken practice of the federal courts and of courts-martial and the absence of any conditions bringing this case within any statutory modification of the rule that neither a husband nor a wife may testify in any cause where the other is a party, the commission against the proper advice and objection of the judge advocate, admitted the testimony of the wives of these two accused. Aside from the disregard of the weighty principles of public policy underlying the rules so willfully disregarded . . . the commission wasted valuable time and increased expense merely to encumber its otherwise voluminous records with this incompetent and inherently valueless testimony.³²⁹

Generally accepted principles of justice were also applied, with convictions overturned for failure to hear all available evidence³³⁰ or from double jeopardy concerns.³³¹ Reviewing authority comments from a November 1901 case sum up the philosophy guiding the Army's administration of justice in the Philippines:

"[The conviction is overturned for] failure to establish the alleged crime by competent evidence That it is better that many guilty men should escape punishment than an innocent one suffer is too well grounded in the administration of justice to pass unheeded by military commissions. So, too, it is better that no person, innocent or guilty, should be convicted unfairly, in violation of his legal rights and privileges, or in defiance of the well-established and equitable laws of evidence without which the evolution of [our] system of law and justice would be impossible. While a strong presumption of the guilt of the accused arises from

³²⁷ Headquarters, Division of the Philippines, G.O. 232, Aug 22, 1901 *in 2 S. Doc 205, supra* note 283 at 363.

³²⁸ Headquarters, Division of the Philippines, G.O. 44, Mar. 7, 1901 *in 2 S. Doc 205, supra* note 283 at 120

³²⁹ Headquarters, Division of the Philippines, G.O. 13, Jan 13, 1902 *in RG 395 supra* note 276

³³⁰ Headquarters, Division of the Philippines, G.O. 232, Aug 22, 1901 *in 2 S. Doc 205, supra* note 283 at 363.

Headquarters, Division of the Philippines, G.O. 39, Feb. 27, 1901 *in 2 S. Doc 205, supra* note 283 at 116.

³³¹ *Compare* Headquarters, Division of the Philippines, G.O. 24, Feb 1, 1901 *in 2 S. Doc 205, supra* note 283 at 104 (overturning conviction for double jeopardy) and Headquarters, Division of the Philippines, G.O. 100, May 21, 1901 *in 2 S. Doc 205, supra* note 283 at 163 (rejecting similar claim for lack of evidence of a former trial).

the record, the illegalities and irregularities pointed out are too great to receive further official sanction."³³²

The Philippine cases remain important for several reasons. First, of course, they provide early, albeit often overlooked, precedents addressing important substantive issues about the law of war that remain relevant today. Procedurally, they convincingly demonstrate that the military commission continued Scott's practice of providing exemplary due process, fully equivalent to the court-martial even when conducted under the most adverse circumstances. Of particular note is the fact that the author of the modern statutory language, Army Judge Advocate General Enoch H. Crowder, was the senior military lawyer and legal advisor to U.S. commanders in the Philippines from July 1898 – July 1901,³³³ and would have played a leading role in trial reviews. These cases are thus important demonstrations of his understanding of the military commission process, and they comprised the most recent experience when the current statutory language was first enacted in 1916. And given their extensive publication in Senate documents, it would seem fair to ascribe some legislative familiarity with them during the subsequent consideration of the Articles of War language on the subject.

E. *McClaghry v. Deming* on Military Jurisdiction

Shortly after his return to the United States, the Army had Crowder represent the government in contesting a habeas petition from a convicted military embezzler, Captain P. C. Deming, a Volunteer sentenced by a panel of regular officers after declining to challenge the court and pleading guilty.³³⁴ In a subsequently federal court challenge to his conviction, Deming claimed the regular officers lacked jurisdiction while Crowder contested Deming's statutory interpretation, contended defects in composition were procedural rather than

³³² Headquarters, Division of the Philippines, G.O. 365, Nov. 25, 1901 in 2 S. Doc 205, *supra* note 283 at 305.

³³³ See DAVID A. LOCKMILLER, ENOCH H. CROWDER 66-84 (1955);

³³⁴ *Id.* at 87.

jurisdictional and thus failed to qualify for habeas relief, and argued failure to object at trial waived the claim.³³⁵ Ultimately both the Eighth Circuit³³⁶ and Supreme Court disagreed, ordering Deming's release.³³⁷

The defeat did not harm Crowder's reputation but undoubtedly influenced his actions following his appointment as Army Judge Advocate General in February 1911.³³⁸ One of his top priorities was "a thorough revision of the Articles of War."³³⁹ Predictably, his draft eliminated mandatory restrictions about court-martial panel composition, but did permit a volunteer to object to being judged by regular officers at trial.³⁴⁰ More significant provisions relating to the military commission are discussed in Part IV below. Crowder's revised Articles were introduced in Congress in 1912 and the House held hearings, but except for minor statutory changes in 1913,³⁴¹ full enactment was delayed until 1916 when they were appended to the Army appropriations bill.³⁴² Ironically in the midst of this legislative process, military commissions would be used during the 1914 U.S. intervention in Vera Cruz (the site of Scott's original military commissions) to try three Mexicans for common crimes including aggravated criminal homicide and murder.³⁴³ This use seemed to attract little interest, however, and was apparently never mentioned in the congressional debate.

³³⁵ *McLaughry v. Deming*, 186 U.S. 49, 49-55, 66 (1902).

³³⁶ *McLaughry v. Deming*, 113 F. 639 (1902).

³³⁷ 186 U.S. at 70.

³³⁸ See LOCKMILLER *supra* note 333 at 88-89; letter from Enoch H. Crowder to the Secretary of War, Apr. 12, 1912 in S. Rep. 63-229 at 28, 30 (1914)

³³⁹ See LOCKMILLER *supra* note 333 at 132, 137.

³⁴⁰ S. Rep. 63-229 at 2, 22 (1912).

³⁴¹ See Act of Mar. 2, 1913, 37 Stat. 721-22 (1913)

³⁴² See LOCKMILLER *supra* note 333 at 138-40; S-Rep. 63-229 at 19-20 (providing legislative history through 1914); and An Act Making appropriations for the support of the Army for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and for other purposes, 39 Stat. Part I, 619, 650-70 (1916) (enacting the new Articles).

³⁴³ War Department, Annual Reports, 1915, House Doc. 64-1 No. 92 at 247 (1916).

IV. The Origin of the Modern Statutory Language about Military Commissions

The Uniform Code of Military Justice, enacted in 1950, is generally considered a watershed development, unifying the armed forces under a single body of law for the first time, and providing formal appellate review for courts-martial, including the creation of a civilian Court of Military Appeals (now the Court of Appeals for the Armed Forces).³⁴⁴ Despite these advances, the UCMJ as a whole was evolutionary rather than revolutionary; most of its provisions originate in previous iterations of the Articles of War³⁴⁵ and many can be traced to the earliest American military laws.³⁴⁶ The two UCMJ provisions cited by President Bush's military commission order, Title 10 sections 821 and 836,³⁴⁷ originated in General Crowder's revision of the Articles of War, where they appeared as articles 15 and 38, respectively. The history of their adoption is thus directly relevant today.

A. Article 21: Concurrent Court-martial and Military Commission Jurisdiction

The executive branch, courts, and scholars have all contended that presidential authority to convene military commissions received broad congressional recognition in language now codified as Article 21 of the UCMJ:³⁴⁸

The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.³⁴⁹

To make sense of this provision, it is first necessary to understand why the language about concurrency was considered necessary. Article 2 of the Articles of War delineated persons

³⁴⁴ See, e.g., Francis A. Gilligan & Fredric I. Lederer, 1 *Court-Martial Procedure* § 1-45.00 (1991)

³⁴⁵ See H. Rep. 81-491, at 10-64 (1949) (comparing UCMJ provisions with previous Articles of War).

³⁴⁶ See *id.*, also, *compare, e.g.*, 10 U.S.C. § 899 with Articles of War, § XIII, art. 12-14, Sep. 20, 1776, 5 *JOURNALS OF THE AMERICAN CONGRESS 1774 TO 1779* 798-99 (Library of Congress 1906).

³⁴⁷ Bush, *supra* note 2.

³⁴⁸ See *id.*; Brief *supra* note 10 at 33-36; *Ex parte Quirin*, 317 U.S. 1, 28-29 (1942); Curtis Bradley and Jack Goldsmith, *The Constitutional Validity of Military Commissions*, 5 *Green Bag* 2d 249, 252-53 (2002).

³⁴⁹ 10 U.S.C. § 821 (2000)

statutorily subject to military jurisdiction. General Crowder's 1912 draft added additional persons, such as those accompanying the Army overseas, and incorporated new article 12 wording subjecting "any other person who by statute or the law of war is subject to trial by military tribunal" to general court-martial jurisdiction as well.³⁵⁰ (Article 12 was amended by the interim 1913 changes,³⁵¹ while the changes to article 2 were adopted in 1916).³⁵²

As Crowder first noted in 1912 House testimony, the statutory grant of court-martial jurisdiction could logically be construed as ousting the common law military commission of jurisdiction over those persons.³⁵³ Hence he drafted the "saving" provision of article 15 (now UCMJ art. 21) to make the jurisdiction concurrent, telling the Senate in 1916 testimony deemed "authoritative" by the Supreme Court.³⁵⁴

We have included in article 2 as subject to military law a number of persons who are also subject to trial by military commission. A military commission is our common-law war court. It has no statutory existence, though it is recognized by statute law. As long as the articles embraced them in the designation 'persons subject to military law,' and provided that they might be tried by court-martial, I was afraid that . . . it might be held that the provision operated to exclude trials by military commission . . . [article 15] just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that the military commander in the field in time of war will be at liberty to employ either form of court that happens to be convenient. Both classes of courts have the same procedure.³⁵⁵

Those familiar only with modern U.S. military justice may misread this testimony as implying broad authority for the convening authority to selectively employ either type of tribunal.

Ignoring Crowder's further declaration that the two types of tribunal "have the same procedure," the government recently asserted:

³⁵⁰ See S. Rep. 63-229 at 3.

³⁵¹ See S. Rep. 37 S62-1182 at 2-3; 37 Stat. 722 (1913).

³⁵² 39 Stat. Pt. I at 651.

³⁵³ S. Rep. 63-229 at 53 (testimony of General Crowder).

³⁵⁴ *Madsen v. Kinsella*, 343 U.S. 341, 353 (1952).

³⁵⁵ S. Rep. 64-130 at 40-41.

if military commissions must follow the same procedure as courts-martial, there is no point in having a military commission, whose jurisdiction the UCMJ recognizes precisely because of the historic authority and flexibility the President has had to administer justice to enemy fighters who commit offenses against the laws of war.³⁵⁶

This erroneous belief that military commissions have traditionally been elected over the court-martial based on procedural flexibility overlooks two important historical factors. One is the original conformity between military commission and court-martial procedure. This is born out most clearly by the demonstrated practices of the military commission's creator, General Scott in the Mexican War, the results of Judge Advocate General and presidential review of Civil War military commission convictions, and the detailed comments of Philippine Insurrection reviewing authorities. Prior to the enactment of the 1916 language, the military commission and court-martial were clearly differentiated on the basis of *jurisdiction*, not *procedure*.³⁵⁷

The other was the actual practice of convening military tribunals. Today the convening authority plays an active role in individual cases, reviewing preliminary investigation results and deciding whether to refer an accused to trial.³⁵⁸ But original practice, still commonplace in Crowder's day, was for convening authorities to simply establish a trial panel to sit at a specific time and place "for the trial of such persons as may be brought before it."³⁵⁹ Field commanders decided who would be tried and were responsible for getting them before the proper tribunal. Typically convening authorities learned details of individual cases only when receiving trial records for review, at which point they would legally have to void convictions if the tribunal lacked jurisdiction, something Crowder would have been particularly sensitive to after losing

³⁵⁶ Brief *supra* note 10 at 16.

³⁵⁷ Commissions were historically enjoined from trying any case subject to court-martial jurisdiction. *See* text accompanying notes 175 and 231-232 *supra* .

³⁵⁸ This procedure is followed for courts-martial per articles 22, 25, and 30-35 of the UCMJ, 10 U.S.C. §§ 822, 825, 830-35. A similar process has been spelled out for the post-9/11 military commissions by Department of Defense, Military Commission Order No. 1, Mar. 21, 2002 with the role of the court-martial convening authority filled by the designated military commission "appointing authority."

³⁵⁹ *See, e.g.,* Headquarters of the Army, G.O. 81, Mar. 31, 1847 in NARA, *supra* note 171.

Deming. Subordinate commanders had incentive to dispose of cases as quickly as possible to maintain order via the prompt administration of justice, to minimize the burden of maintaining pretrial restraint for serious offenders, and to comply with implied speedy trial mandates.³⁶⁰

With the 1916 Articles' creation of concurrent jurisdiction, they could now select a tribunal, at least for law of war violations, based on *convenience*, that is, geographic proximity and timing. Their choice would not logically be motivated by forum shopping over procedural differences in the conduct of trials, because as a rule there weren't any. As the Philippine Insurrection showed, the military commission even enforced the common law rules of evidence used in U.S. federal courts and courts-martial while trying savage violations of the laws of war in a primitive land.³⁶¹

The history of this saving language also bears directly on the question of the military commission's constitutional authority. The *statutory* expansion of court-martial jurisdiction could not deprive a military commission of concurrent jurisdiction if the source of the latter was rooted in the President's *constitutional* authority as Commander in Chief. The determination by senior executive branch authorities that congressional enactment of the saving provision of article 15/21 was necessary to preserve the commissions' jurisdiction proves that previous administrations recognized legislative supremacy in the field and did not believe the Commander in Chief power had the breadth its proponents now claim.³⁶²

³⁶⁰ The Articles of War always reflected implicit congressional intent for prompt trials, with pretrial confinement initially limited to no "more than eight days, or such time as a court-martial can be conveniently assembled." Act of June 30, 1775, art. XLII. "Conveniently assembled" provided wiggle room, but Macomb suggested extended detention was grounds for redress. MACOMB, *supra* note 136 at 20-21. A Civil War amendment created an explicit 60-day limit on trial delays when pretrial confinement was involved. S. Rep. 64-130 at 44 (1916).

³⁶¹ See part III *infra*.

³⁶² Drafted by the Judge Advocate General, the new Articles were approved by the Secretary of War and Chief of Staff of the Army. Both the Taft and Wilson administrations endorsed them over the four years between first introduction and enactment. *See, e.g.*, S. Rep. 63-229 at 24 (1914).

B. Article 36: Presidential Authority to Prescribe Trial Procedure

The second statutory provision cited as a legal foundation for the executive's military commission orders was originally enacted as article 38 of the 1916 Articles of War³⁶³ and is now UCMJ article 36. It currently reads:

(a) Pretrial, trial, and post-trial procedures, including modes of proof, for cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry, may be prescribed by the President by regulations which shall, so far as he considers practicable, apply the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts, but which may not be contrary to or inconsistent with this chapter.

(b) All rules and regulations made under this article shall be uniform insofar as practicable.³⁶⁴

Facially, this language seems to give the President broad authority to promulgate rules for military trials. But the actual intent was quite different. General Crowder first testified in 1912 that its purpose was to permit the President, then the ultimate appellate authority for military trials, to articulate rules of procedure, specifically technical rules of evidence, so that the Army could provide definitive guidance in an official manual for use in the field by officers lacking legal libraries.³⁶⁵ Noting that existing executive guidance went “as far as we can in this regard without trespassing upon the functions of Congress,” Crowder wanted legislative authorization like that Congress had given the Supreme Court to make rules for equity and admiralty cases.³⁶⁶ But he made clear that the issues on which presidential guidance was envisioned were quite limited in scope, such as “how documents should be proved and what a court-martial should take judicial cognizance [of]”³⁶⁷ and what technical deviations from common law rules of evidence

³⁶³ 39 Stat. 656 (1916).

³⁶⁴ 10 U.S.C. § 836 (2000).

³⁶⁵ See S. Rep. 63-229 at 63 (1914).

³⁶⁶ *Id.*

³⁶⁷ *Id.*

were “of necessity created by the nature of the service.”³⁶⁸ He reconfirmed this view the next day, explaining:

[I]n the matter of introducing documentary evidence officers of the Army are rarely sufficiently familiar with the rules, and we want an opportunity to promulgate definite rules so that the judge advocate trying a case or the counsel for the defense will know just what formalities to comply with in order to get a document before the court. The rules to be promulgated will cover mainly military record evidence.³⁶⁹

This narrow view was reiterated in 1916 testimony shortly before the new Articles were finally enacted.³⁷⁰ The Army General Staff’s War College Division actually opposed the inclusion of this article, fearing the language could be read broadly enough to allow “the President the power to alter the more essential rules of evidence.”³⁷¹ It was therefore deleted from a draft of the bill edited by a General Staff committee, because as one member noted in his attached minority report, “Under such a law it would seem possible for courts-martial to be required by regulations to receive in evidence opinions, affidavits, questionable records, hearsay, etc.”³⁷² Secretary of War Garrison favored Crowder’s language, believing it would be understood that the correct interpretation of the language was the narrow one.³⁷³ But, he said, “[s]hould there be doubt in the minds of the committee as to the proper construction of this phrase, I recommend that it be amended so as to exclude the construction of the General Staff.”³⁷⁴ Thus even the Secretary of War wanted the language read to preclude the President from authorizing significant deviations from standard rules of evidence. A 1916 comparative print produced for the Senate Committee on Military Affairs by the Government Printing Office confirms the Secretary of War’s

³⁶⁸ *Id.* at 63-64.

³⁶⁹ *Id.* at 66-67.

³⁷⁰ S. Rep. 64-130 at 96-97 (1916).

³⁷¹ S. Rep. 64-130 at 22 (1916) (quoting letter from the Secretary of the War to the Chairman of the Senate Committee on Military Affairs of Jan. 3, 1916).

³⁷² Report of a committee on the proposed revision of the Articles of War at 21, 24 *in* A project of revision of the Articles of War, Judge Advocate General’s School (JAGS) microfilm 0012, roll 1.

³⁷³ S. Rep. 64-130 at 21.

³⁷⁴ *Id.*

interpretation (and the Army staff's concerns), noting "It is not believed that the phrase to 'prescribe rules of procedure, including modes of proof' admits of [the General Staff's] construction. Should there be doubt about this, it is recommend that it be amended so as to exclude the objectionable construction and then be reinserted"³⁷⁵ So both the Senate and the Army were in agreement that the statutory grant of military tribunal rulemaking authority to the President was a very narrow one, intended only to permit the definitive promulgation of technical evidentiary rules in a court-martial manual, freeing officers in the field from having to know, and follow changes in, common law rules of evidence.

The resulting 1917 Manual for Court-Martial, issued under Crowder's oversight to provide the newly authorized presidential guidance to the Army when the new Articles took effect, was "done with a haste which in a work of such importance it would have desirable to avoid."³⁷⁶ One necessary consequence seems to have been that the manual covered only statutory military law per se, limiting military commission treatment to a single sentence acknowledging their use "for the trial of offenders against the laws of war and under martial law."³⁷⁷

But it did provide a coherent explanation of military evidence rules, noting:

Prior to the act of August 29, 1916 (A.W. 38), courts-martial followed in general the rules of evidence, including the rules as to competency of witnesses to testify, that are applied by Federal courts in criminal cases. These consisted of the rules of the common law as they existed in the several states at the adoption of the Federal Constitution in 1789, as modified from time to time by subsequent acts of Congress. But courts-martial were, however, not required by express statute to follow these rules

The modes of proof [], including the rules of admissibility for witnesses and other evidence, are now by express congressional enactment placed under the

³⁷⁵ Comparative Print Showing S. 3191 with The Present Articles of War 72 (1916), in JAGS *supra* note 372.

³⁷⁶ War Department, A Manual for Courts-Martial xiv (1917)

³⁷⁷ *Id.* at xiiii-xiv, 2.

authority of executive regulation; and the rules laid down in this Manual have the force of such regulation.³⁷⁸

The actual “new” rules were still those familiar to any student of Anglo-American law, and the chapter was written by “Prof. Wigmore of Northwestern University . . . [who] has leant the authority of his name to what appears therein.”³⁷⁹ To this day courts-martial closely conform to the federal rules; the current Military Rules of Evidence (MRE) are almost verbatim copies of the Federal Rules applicable to criminal trials with one important improvement; while the Federal Rules rely on common law tenets about witness privileges, the Military Rules explicitly spell them out.³⁸⁰ In this respect the current Manual for Court-Martial³⁸¹ still conforms precisely to Crowder’s vision of presidential authority used to provide a comprehensive stand-alone reference for military trials. But the commonly expressed view that this article provides broad presidential rulemaking authority is flatly contradicted by the initial legislative history.

C. Military Commissions in the Rhineland Conform to Court-Martial Practice

The military commission was employed once between the adoption of the 1916 articles and the Second World War, during the post-World War I U.S. military occupation of the Rhineland. The U.S. commander, General Pershing, issued the Anordnungen, “rules and regulations . . . for the guidance of the inhabitants,”³⁸² serving notice that violating rules issued by the occupation government or committing any of a list of offenses against the occupying forces would subject them to “be punished as a military court may direct.”³⁸³ The first general order issued to the U.S. forces then authorized officers statutorily entitled to convene general courts-martial (Army, corps and division commanders) to convene military commissions, and directed the appointment of

³⁷⁸ *Id.* at 96-97.

³⁷⁹ *Id.* at xiv, 91-138.

³⁸⁰ *Cf.* Mil. R. Evid. and Fed. R Evid.; see Mil R. Evid. § 5.

³⁸¹ MANUAL FOR COURTS MARTIAL (2002)

³⁸² General Pershing, Anordnungen, Dec. 9, 1918 in U.S. Army, 3 American Military Government of Occupied Germany 5-8 (1920) (hereinafter Am Mil. Gov.)

³⁸³ *Id.* at 7-8.

two levels of provost courts for trying lesser offenses.³⁸⁴ A supplemental letter of instruction provided six paragraphs amplifying provost court procedures, directing that “hearings before provost courts will be conducted summarily . . . with the utmost dispatch consistent with the administration of justice.”³⁸⁵ Despite this emphasis on expediency, the instructions directed that even at these summary proceedings defendants were to be accorded substantive rights, including “to be informed of the charges upon which they are to be tried, to be present in person at their trial, to be confronted with the witnesses against them and to be heard in person or by counsel.”³⁸⁶ Instead of providing similar detail for military commissions, a single paragraph simply noted that their procedure “will be in substance the same as in trial by General Court-Martial”³⁸⁷ Those procedures were of course now spelled out authoritatively in the 1917 Manual for Courts-Martial; clearly the more formal military commission was intended to accord the accused rights and protections at least as favorable as those provided by the more summary provost court.

D. Interwar Developments

There were few significant developments impacting the military commission between the two world wars, despite the prominent debates over military justice following WWI.³⁸⁸ A new version of the Articles of War was adopted in 1920,³⁸⁹ making a number of modest improvements to military justice procedures, including a more formal review process under Article 50 1/2, and Crowder oversaw a revised Manual for Courts-Martial addressing these

³⁸⁴ See Advance G.H.Q. Third Army, Orders. No. 1, Dec. 13, 1918 in Am. Mil. Gov., *supra* note 382 at 10-12.

³⁸⁵ Headquarters Third Army, Letter of Instruction No. 5., Dec. 24 1918, in Am. Mil. Gov., *supra* note 382 at 50.

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ See, e.g., Jonathan Lurie, 1 *Arming Military Justice* 46–126 (1992)

³⁸⁹ Act of June 4, 1920, ch. 227, 41 Stat. 759, 787–812 (1921) (amending an Act entitled “An Act for making further and more effectual provision for the national defense, and for other purposes,” approved June 3, 1916).

changes.³⁹⁰ The military commission received only minimal additional treatment in this version; two new notes discussed concurrent jurisdiction with courts-martial while the paragraph explaining new statutory requirements for pre-trial investigation explicitly made them applicable to the military commission as well.³⁹¹

A streamlined MCM was published in 1928, five years after Crowder retired,³⁹² and was effective with only minor corrections throughout the WWII era.³⁹³ The previous sentence about military commissions and provost courts was now followed by another, “These tribunals are summary in their nature, but so far as not otherwise provided have usually been guided by the applicable rules of procedure and of evidence prescribed for courts-martial.”³⁹⁴ The note on concurrent jurisdiction was incorporated into the text of section 11,³⁹⁵ and the words “military commission” were removed from the article about investigations which now read simply “trial.” Taking these changes together, it is uncertain how much of the manual was intended to apply to military commissions, although it is important to note that the leading mid-twentieth century military justice commentator specifically called for continued conformity between the military commission and the updated Articles of War.³⁹⁶

V. World War II and Deviation From Court-Martial Procedure

Military commissions were last used prior to President Bush’s 2001 order during and after the Second World War, and there is a wealth of substantive precedent in the results of the

³⁹⁰ U.S. Army, Manual for Courts-Martial 1921. Pages VIII-X describe the statutory changes.

³⁹¹ *Id.* at 2, nn. 1-2 and § 76b at 66-68.

³⁹² Lockmiller, *supra* note 333 at 241.

³⁹³ A “corrected” version was issued in 1943, reflecting minor changes promulgated via five executive orders between 1941-43. See U.S. Army, Manual for Courts Martial 1928 ix (1943) (listing corrections by date and paragraph). The limited language about military commissions was unchanged from the original.

³⁹⁴ U.S. Army, Manual for Courts-Martial 1928 at 1.

³⁹⁵ *Id.* at 9.

³⁹⁶ FREDERICK BERNAYS WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 123-25 (1940).

thousands of common law military tribunals of several types conducted during this era.³⁹⁷ Many examples from this period departed from the historic practice of close conformance between military commission and court-martial practice, however. But there are a number of factors that must be considered in any credible legal analysis of potential precedents, including the type of tribunal at issue, the authority under which it was conducted, and whether the rules established for it would subsequently be modified. Whether the departures from court-martial practice provide a valid basis for military commissions to do so today may be an open question, but it is one that cannot be intelligently decided without a far more profound understanding of the issues involved than is currently available.

A. Hawai'i – The Military Commission Under Martial Law

The first U.S. military commission of World War II was appointed even before Congress declared war. Just hours after Pearl Harbor, Hawai'i's territorial governor was “persuaded” to declare martial law and Lieutenant General Walter C. Short declared himself “military governor.”³⁹⁸ Short promptly issued orders detailing the authority of provost courts and military commissions and convening the first panel, consisting of three officers and two civilians³⁹⁹ with a civilian federal prosecutor.⁴⁰⁰ When these non-military participants inquired into the authority for their appointments and potential liability should the commissions be judged illegal, Short substituted an all-military court.⁴⁰¹ Provost courts did the actual heavy lifting in Hawai'i despite

³⁹⁷ For war crimes alone, the U.S. Army tried 1,672 German defendants, FRANK M. BUSCHER, *THE U.S. WAR CRIMES TRIAL PROGRAM IN GERMANY* 51 (1989) and the U.S. services jointly tried 1,409 Japanese. PHILIP R. PICCIGALLO, *THE JAPANESE ON TRIAL* 48 (1979).

³⁹⁸ J. GARNER ANTHONY, *HAWAII UNDER ARMY RULE* 5-9.

³⁹⁹ Curiously the commission was convened *before* its authority was delineated. See Office of the Military Governor, G.O. 3, Dec. 7, 1941 (appointing the first commission) and G.O. 3 of the same day (specifying military commission and provost court authority). Both are reprinted in ANTHONY, *supra* note 398 at 137.

⁴⁰⁰ ANTHONY, *supra* note 398 at 11.

⁴⁰¹ See Harry N. Scheiber and Jane L. Scheiber, *Bayonets in Paradise* 19 *U. Haw. L. Rev.* 477, 510 (1997); ANTHONY, *supra* note 398 at 11-12

significant legal and procedural shortcomings as actually employed;⁴⁰² military commissions “tried only a handful of cases during the entire war period.”⁴⁰³

Although Congress had authorized martial law “in case of rebellion or invasion or imminent danger thereof” in Hawai’i’s Organic Act,⁴⁰⁴ the Army’s rule was highly problematic. First, its administration was organized and styled as a “military government” although this was the accepted form employed in occupied *enemy* territory.⁴⁰⁵ Second, martial law was kept in force long after any credible threat of invasion had passed⁴⁰⁶ despite initial assurances to the Governor that it would be a short-term measure.⁴⁰⁷ Finally, civilian courts were fully capable of hearing cases at most, if not all, times.⁴⁰⁸

The Supreme Court finally heard a challenge to the military trials, *Duncan v. Kahanamoku*,⁴⁰⁹ in 1946. The government did not assert a constitutional foundation for its actions, arguing that the Organic Act provided the necessary authorization and that Congress intended that “‘martial law’ in Hawaii should not be limited by the United States Constitution or by established Constitutional practice.”⁴¹⁰ The Court disagreed, reviewing the history of martial law in the U.S. as well as past court decisions before holding:

The phrase ‘martial law’ as employed in [the] Act, while intended to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the island against actual or threatened rebellion or invasion, was not intended to authorize the supplanting of courts by military tribunals.⁴¹¹

⁴⁰² See *id.* at 512-15.

⁴⁰³ Scheiber and Scheiber, *supra* note 401 at 510.

⁴⁰⁴ 31 Stat. 141, 153 (1901).

⁴⁰⁵ Garner Anthony, *Martial Law, Military Government and the Writ of Habeas Corpus in Hawaii*, 31 CAL. L. REV. 477, 480 (1943)

⁴⁰⁶ ANTHONY, *supra* note 398 at 19-20.

⁴⁰⁷ *Id.* at 22.

⁴⁰⁸ See, e.g., *Duncan v. Kahanamoku*, 327 U.S. 304, 336-37 (C.J. Stone concurring).

⁴⁰⁹ *Id.*

⁴¹⁰ *Id.* at 317.

⁴¹¹ *Id.* at 324.

B. Nazi Saboteurs and Spies – Military Commissions in the Continental U.S.

Probably the best-known U.S. military commission today was the one convened by President Roosevelt in July 1942 to try eight Nazi saboteurs who had landed on the East Coast.⁴¹² Although U.S. courts were open, Congress had not defined any crime that both fit the saboteurs' conduct up to the time of their arrest and could result in sufficient punishment to reasonably deter follow-on landings.⁴¹³ The application of the common law of war in a military commission trial was thus logically consistent with its historic role as a legal gap-filler, used to try cases not falling within either the personal or subject matter jurisdiction of existing tribunals. What was *not* consistent with historic practice were departures from court-martial procedure and rules of evidence advocated by Attorney General Francis Biddle to facilitate obtaining convictions and included in the President's order.⁴¹⁴ The most significant of these were authority for the tribunal to adopt its own rules of procedure, deviation from court-martial post trial review, and the substitution of a simplistic "probative to a reasonable man" standard that did not even require weighing prejudicial effect for the traditional rules of evidence.⁴¹⁵

Although the President's order purported to foreclose judicial review, the Supreme Court agreed to the defense attorneys' request to assemble in a special July term to hear this single case.⁴¹⁶ While the government argued for broad executive authority both to preclude judicial review and to order military trials, the Court politely rejected the idea that it was foreclosed from considering "contentions that the Constitution and laws of the United States constitutionally enacted forbid [this] trial by military commission."⁴¹⁷ The justices found it unnecessary to reach

⁴¹² For a comprehensive history of these events, *see e.g.*, PIERCE O'DONNELL, IN TIME OF WAR (2005).

⁴¹³ Glazier, *supra* note 159 at 2054-56.

⁴¹⁴ Memorandum from Francis Biddle to Franklin D. Roosevelt, Jun. 30, 1942 (Franklin D. Roosevelt Library). Glazier, *supra* note 159 at 2056-58 describes these departures.

⁴¹⁵ Exec. Order No. 9185, *supra* note 2.

⁴¹⁶ DOBBS, *supra* note 412 at 234-36.

⁴¹⁷ *Ex parte Quirin*, 317 U.S. 1, 25 (1942).

a decision about executive authority.⁴¹⁸ After discussing at length the authority committed to Congress, the Court held that in “the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals have jurisdiction to try offenders or offenses against the law of war in appropriate cases.”⁴¹⁹ This military commission was then upheld as one of those appropriate cases.⁴²⁰

A second, less well-known, military commission was convened in February 1945 after the apprehension of two would-be spies. Once again President Roosevelt issued a military order authorizing their trial by military commission.⁴²¹ This order, however, restored some, but not all, of the historic conformity between the military commission and the court-martial, including most importantly re-applying the same post-trial review process.⁴²² In basing his 2001 military order on President Roosevelt’s 1942 order, President Bush is thus curiously relying on provisions that were partially rescinded by the very executive who issued it on his first occasion to revisit it.

C. The Persistent Effect of the Quirin Trial in the Post-War Period

Judge Evan J. Wallach has demonstrated that procedural departures incorporated in the 1942 order influenced many of the post-World War II war crimes tribunals which the U.S. either conducted or participated in.⁴²³ These trials took a number of forms. The first judgments were returned by U.S. military commissions sitting in Rome,⁴²⁴ Dachau,⁴²⁵ Weisbaden,⁴²⁶ Kwajalein

⁴¹⁸ *Id.* at 29

⁴¹⁹ *Id.* at 25-28.

⁴²⁰ *See id.* at 48.

⁴²¹ Military Order, 10 Fed. Reg. 549 (Jan. 16, 1945)

⁴²² *See* Glazier, *supra* note 159 at 2059-60.

⁴²³ *See* Evan J. Wallach, *The Procedural and Evidentiary Rules of the Post-World War II War Crimes Trials: Did They Provide an Outline For International Legal Procedure?* 17 Colum. J. Transnat’l L. 851, 854-66 (1999).

⁴²⁴ United Nations War Crimes Commission (UNWCC), 1 Law Reports of Trials of War Criminals 22-34 (1947) (reporting trial of General Anton Dostler).

⁴²⁵ UNWCC, 3 Law Reports of Trials of War Criminals 65-75 (1948) (reporting trial of Anton Schosser and two others).

⁴²⁶ *Id.* at 46-54 (reporting the trial of Alfons Klein and six others).

Atoll,⁴²⁷ and Manila⁴²⁸ that were conducted under regulations issued by American theater commanders.⁴²⁹

The best known of these early cases was the trial of Japanese General Tomoyuki Yamashita in the Philippines for failing to exercise his responsibilities to ensure subordinates' compliance with the law of war. The proceedings were, and remain, controversial⁴³⁰ but the Supreme Court upheld the commission's jurisdiction.⁴³¹ It echoed Quirin's reliance on congressional authority, held that mandates in the 1929 Geneva Convention concerning Prisoner of War trials applied only to post-capture offenses, and that Articles of War provisions applied only to trials of persons explicitly subject to the Articles per article 2.⁴³² The Court found the commission's departures from court-martial practice insufficient grounds to deny its jurisdiction, which was still all habeas review of military trials considered.⁴³³

After December 1945, U.S. war crimes trials were largely conducted under the authority of Allied, rather than national, directives. In Germany this was Control Council Law no. 10⁴³⁴ and in the Pacific it was regulations issued by the Supreme Commander Allied Powers (SCAP).⁴³⁵ The Control Council directive focused on defining the crimes to be punished, penalties, and rules for multinational cooperation, allowing national Zone Commanders to determine the "rules and procedures" to be followed.⁴³⁶ The SCAP rules, in contrast, explicitly provided for trial by military commission and provided a number of specific procedural

⁴²⁷ *Id.* at 71-80 (reporting trial of Rear Admiral Nisuke Masuda and four others).

⁴²⁸ UNWCC, 4 Law Reports of Trials of War Criminals 1-96 (1948) (reporting trial of General Tomoyuki Yamashita).

⁴²⁹ *See* UNWCC, *supra* note 424 at 112-14.

⁴³⁰ *See e.g.*, A. Frank Reel, The Case of General Yamashita (1949).

⁴³¹ *In re Yamashita*, 327 U.S. 1 (1946).

⁴³² *Id.* at 7-26.

⁴³³ *Id.* at 8.

⁴³⁴ Allied Control Council for Germany, Law no. 10, Dec. 20, 1945, available at <http://www.yale.edu/lawweb/Avalon/imt/imt10.htm> (Jul. 15, 2005)

⁴³⁵ Supreme Commander for the Allied Powers (SCAP), Regulations Governing the Trials of Accused War Criminals, Dec. 5, 1945 (on file with the author).

⁴³⁶ Allied Control Council, *supra* note 434.

mandates before concluding that for anything not covered in the directive, “[e]ach commission shall adopt rules and forms to govern its procedure, not inconsistent with the provisions hereof”⁴³⁷ The procedures they did specify departed significantly in several respects from the previous American practice of conforming the military commission to court-martial practice, going so far as provide that “purported confessions or statements of the accused shall be admissible without prior proof that they were voluntarily given”⁴³⁸ These provisions were challenged by the defense following the first case in which the SCAP order was employed, the Manila trial of retired Japanese General Masaharu Homma in December 1945. Although Justices Murphy and Rutledge objected to several aspects of the trial in blistering dissents, including specifically the rules of evidence, the majority rejected the application for habeas in just one paragraph that simply declared Yamashita to be determinative.⁴³⁹

These SCAP rules cannot automatically be presumed to establish precedent for modern American military commissions, however. Commissions themselves held that the SCAP directive made them international, not American, tribunals.⁴⁴⁰ The Supreme Court reached the same conclusion with respect to the International Military Tribunal for the Far East (IMTFE) after several of the Tokyo defendants sought judicial review in the United States. The Court issued a brief *per curiam* opinion holding that although American General Douglas MacArthur had established the tribunal, he did so under his SCAP hat “as the agent of the Allied Powers” and “the courts of the United States have no power [] to review, to affirm, set aside or annul the judgments”⁴⁴¹

⁴³⁷ SCAP, *supra* note 435 at 7.

⁴³⁸ *Id.* at 5.

⁴³⁹ *In re Homma*, 327 U.S. 759 (1946).

⁴⁴⁰ *See, e.g.*, *United States v. Yamanaka*, Jul. 14, 1947 at 5 in *Reviews of Yokohama Class B and C War Crimes Trials by the U.S. Eighth Army Judge Advocate, 1946-1949*, National Archives Microfilm Publication M1112 (1980) (hereinafter *Yokohama Reviews*) Roll 5.

⁴⁴¹ *Hirota v. MacArthur*, 338 U.S. 197 (1948).

As egregious as some aspects of SCAP procedure were, there was a limit below which even they would not go. One such intolerable procedure was denying the accused access to all the evidence against him. The initial conviction and death sentence of Japanese Lieutenant Tetsutaro Kato was overturned by SCAP, for example, because a single classified document was viewed by the commission but not provided to the defendant.⁴⁴² On the one hand, the international status of these trials means that procedural rules they employed cannot necessarily serve as direct precedent for U.S. trials, which must conform to any higher American constitutional and statutory requirements that might be applicable, as well as the customary law of war. But on the other hand, SCAP and other international tribunal cases do establish evidence of procedural floors under the customary law of war, below which *any* war crimes trial, U.S. or otherwise, could not lawfully fall.

Military commissions continued to be used in the Pacific, where *Johnson v. Eisentrager* would uphold their employment even in Chinese territory where the U.S. was not an occupying power⁴⁴³. But subsequent U.S. trials in Germany were generally heard by various military government courts⁴⁴⁴ which were an Anglo-American development during the course of the war.⁴⁴⁵ While they took several forms, one of the rationales for their development was to provide procedure more familiar to the native populations than the court-martial based military commissions and commentators generally now accept this as an accepted practice under occupation law.⁴⁴⁶

⁴⁴² *United States v. Kato*, Aug. 2, 1949 at 24 in *Yokohama Reviews*, supra note 440, Roll 5.

⁴⁴³ 339 U.S. 763, 788-89.

⁴⁴⁴ A description of the authority for these tribunals can be found at UNWCC supra note 425 at 113-20.

⁴⁴⁵ See ELI E. NOBLEMAN, *AMERICAN MILITARY GOVERNMENT COURTS IN GERMANY* 43-47 (1950).

⁴⁴⁶ GERHARD VON GLAHN, *THE OCCUPATION OF ENEMY TERRITORY* 113 (1957).

The Supreme Court considered the military government court in *Madsen v. Kinsella*,⁴⁴⁷ a habeas petition from a military spouse tried for killing her husband in their quarters in Germany. Convicted by a U.S. civilian three-judge panel applying German criminal law, she subsequently sought habeas review from prison in West Virginia, contending she should have been tried only by general court-martial since persons accompanying the armed forces overseas were included in the Articles of War jurisdiction set forth in article 2.⁴⁴⁸ The Court denied her petition, upholding the validity of the military government court as a valid exercise of authority under the common law of war that fell within the concurrent jurisdiction provision of Crowder's article 15.⁴⁴⁹ Interestingly the Court did *not* endorse the broad view of executive authority over occupied territory it had articulated in *Jecker*⁴⁵⁰ a century earlier, holding here that:

*In the absence of attempts by Congress to limit the President's power, it appears that, as Commander-in-Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions, and of tribunals in the nature of such commissions, in territory occupied by Armed Forces of the United States. His authority to do this sometimes survives cessation of hostilities. The President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms. The policy of Congress to refrain from legislating in this uncharted area does not imply its lack of power to legislate.*⁴⁵¹

The most consistent theme in the Court's military commission jurisprudence is thus the clear recognition of congressional preeminence over this entire field; even if it has not chosen to fully exercise it in the past, it may elect to do so in the future. And again, while the President may still have relatively greater authority in the area of occupation law, that is not a factor in today's military commissions trying law of war violations.

⁴⁴⁷ 343 U.S. 341 (1952).

⁴⁴⁸ *Id.* at 342-46.

⁴⁴⁹ *Id.* at 346-48.

⁴⁵⁰ *See supra* notes 209-210 and accompanying text.

⁴⁵¹ 343 U.S. at 348 (emphasis added).

D. International and Foreign Tribunals in the Post-War Era

There were a variety of other tribunals engaged in interpreting and enforcing the law of war during this era, the most famous being the International Military Tribunal (IMT) at Nuremberg and the IMTFE. Other nations conducted war crimes trials before a wide variety of courts. These included standard civilian courts (Norway),⁴⁵² permanent military tribunals (France),⁴⁵³ ad hoc “military courts” (Australia,⁴⁵⁴ Britain,⁴⁵⁵ Canada⁴⁵⁶), “military tribunals for the trials of war crimes” (China),⁴⁵⁷ special mixed civil-military courts at home and courts-martial overseas (Netherlands),⁴⁵⁸ or a mixture of special, civilian, and military courts (Poland).⁴⁵⁹

The composition of the court and the authority under which it operated logically impact the precedential weight it should be given as far as determining procedural mandates for U.S. tribunals. At a minimum, however, the practices of each court should contribute evidence of customary international law with respect to basic requirements for fairness and due process. Of more importance is the light the decisions of both these national tribunals, as well as the more prominent verdicts of the IMT and IMTFE, shed on the substantive law of war and the nature and scope of conduct for which individuals may be tried. This information is voluminous to say the least. Judgments from Nuremberg and Tokyo together run several thousand pages.⁴⁶⁰ And the fifteen volumes of reports issued by the United Nations War Crimes Commission between

⁴⁵² UNWCC, *supra* note 425 at 85-86 (1948).

⁴⁵³ *Id.* at 93-94 (1948).

⁴⁵⁴ UNWCC, 5 Law Reports of Trials of War Criminals 94-101 (1948).

⁴⁵⁵ UNWCC *supra* note 423 at 105-10.

⁴⁵⁶ UNWCC *supra* note 428 at 125-30.

⁴⁵⁷ UNWCC 13 Law Reports of Trials of War Criminals 159-60 (1949).

⁴⁵⁸ UNWCC 11 Law Reports of Trials of War Criminals 86-110 (1949).

⁴⁵⁹ UNWCC 7 Reports of Trials of War Criminals 82-97 (1948).

⁴⁶⁰ The official version of the Nuremberg judgment runs 590 pages. International Military Tribunal, 22 Trial of the Major War Criminals (1948). The Tokyo judgment itself runs 1,218 typed pages with another 130 pages of annexes. International Military Tribunal for the Far East, Judgment (1948). The separate opinions filed by members of the court add an additional 1,563 typed pages. *See* 21 The Tokyo War Crimes Trial (R. John Rotichard & Sonia M. Zaide, ed. 1981).

1946 and 1949 endeavoring to capture the key “legal points discussed and adjudicated”⁴⁶¹ in selected cases run almost 2,000 more pages⁴⁶² although detailing the results of only eighty-nine of the 1,911 cases reported to them.⁴⁶³ A number of other national trials deciding questions related to the law of war can be found in international law digests.⁴⁶⁴

One point this case law clearly emphasizes is that regardless of the type of tribunal, the substantive law being applied is international law, “[w]hich must not be confused with the municipal law of the convening Government. It is the law of nations, which cannot be created by the enactment of any particular national legislature.”⁴⁶⁵ This was highlighted in the general rejection of the Anglo-American concept of conspiracy as a war crime. The 1942 U.S. trial of the Nazi saboteurs, had included conspiracy among the charges.⁴⁶⁶ But the International Military Tribunal’s judgment at Nuremberg limited conspiracy to the planning for waging aggressive war, i.e., crimes against peace, rejecting its application as a substantive offense to war crimes or crimes against humanity.⁴⁶⁷ The judges of five follow-on United States Military Tribunals subsequently held a joint session to consider defense challenges to conspiracy charges after which individual trial panels ruled that they had no jurisdiction over this offense.⁴⁶⁸ While the specific wording of the IMT’s Charter and Control Council Law No. 10 may have influenced this result, *no* subsequent international tribunal has applied Anglo-American conspiracy doctrine.⁴⁶⁹

⁴⁶¹ UNWCC, *supra* note 424 x (1946).

⁴⁶² *See* UNWCC, 1-15 Law Reports of Trials of War Criminals (1946-49)

⁴⁶³ UNWCC, 15 Law Reports of Trials of War Criminals xvi (1949). Results of an additional 93 cases are cited although they are not reported in full.

⁴⁶⁴ *See, e.g.*, 10-16 Annual Digest and Reports of Public International Law Cases (H. Lauterpacht, ed. 1945-55) .

⁴⁶⁵ UNWCC, *supra* note 463 at viii (foreword by Lord Wright of Durley).

⁴⁶⁶ 317 U.S. at 23.

⁴⁶⁷ UNWCC, *supra* note 463 at

⁴⁶⁸ *Id.* at 90

⁴⁶⁹ *See* Alison Marston Danner & Jennifer Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law* 93 CAL. L. REV. 114-20 (2005); Brief of Amici Curiae Professors Allison Marston Danner and Jenny S. Martinez at 7-19, *Hamdan v. Rumsfeld* (D.C. Cir. 2005) (No. 04-5393).

The various cases holding that denial of a fair trial constitutes a war crime, and perhaps a crime against humanity as well, should also be of particular relevance to today's military commissions. This case law includes trials conducted after WWII by Australia, France, the Netherlands, Norway, and the United States.⁴⁷⁰ Those held liable to punishment included judges, prosecutors, and superiors involved with convening and reviewing the trials.⁴⁷¹ Proof that a trial comported with national laws was *not* accepted as a defense to the charge of failure to comply with standards required by international law.⁴⁷² Denying the accused access to the evidence against him was one factor that could lead to conviction,⁴⁷³ and fair trial standards were held applicable to prisoners of war, inhabitants of occupied territory, and illegal combatants alike.⁴⁷⁴ The Supreme Court's holding in *Yamashita* that protections accorded prisoners of war by the 1929 Geneva Convention applied only to post-capture offenses meant that even cases concerning unfair trials of Allied POWs for pre-capture offenses had to be decided based on customary international law provisions, not treaty law.⁴⁷⁵ This means they would be fully applicable to U.S. military commission trials even where the administration denies the defendants are covered by any provision of the Geneva Conventions.⁴⁷⁶ Precedents also suggest that the offense of denying a fair trial does not require that the defendant actually suffer punishment to be complete.⁴⁷⁷

⁴⁷⁰ See UNWCC, *supra* note 463 at 113, 164.

⁴⁷¹ *Id.* at 60-61; see also UNWCC *supra* note 454 at 1.

⁴⁷² See e.g., UNWCC *supra* note 454 at 62-64.

⁴⁷³ UNWCC, 6 Law Reports of Trials of War Criminals 103 (1948).

⁴⁷⁴ UNWCC, *supra* note 463 at 99, 112.

⁴⁷⁵ See *id.* at 99-100.

⁴⁷⁶ See Evan J. Wallach, *Afghanistan, Quirin, and Uchiyama: Does the Sauce Suit the Gander?* ARMY LAW. Nov. 2003 at 18, 45-47. (noting Uchiyama trial convictions were not dependent on Geneva Convention status).

⁴⁷⁷ See UNWCC, *supra* note 473 at 102-03.

E. The Uniform Code of Military Justice and Other Recent Developments

In 1950 Congress replaced the Articles of War governing the Army with the UCMJ⁴⁷⁸ covering all the services. The language dealing with military commissions was largely unchanged during the legislative process and discussion of the two key articles was quite limited, leaving the 1912-16 legislative history generally relevant. The most significant points made about Crowder's article 15 (establishing concurrent court-martial and military commission jurisdiction) was recognition that *Quirin* held it to constitute congressional endorsement of commission use,⁴⁷⁹ and that it was being used to permit military government court trials of American citizens in Germany.⁴⁸⁰ Its re-enactment as UCMJ article 21 thus gives real credence to modern claims that it constitutes congressional authorization for further commission employment.⁴⁸¹

Concern was also expressed during UCMJ hearings that the concurrency provision might permit trial of the same offense before both a court-martial and a military commission.⁴⁸² This issue was addressed by testimony of Felix Larkin, Department of Defense Assistant General Counsel and Executive Secretary of the UCMJ drafting committee, that the UCMJ's statutory double jeopardy protections would preclude this.⁴⁸³ Since the "former jeopardy" provision⁴⁸⁴ does not specifically mention military commissions, this important testimony suggests the drafters believed UCMJ articles need not do so to apply to them.

⁴⁷⁸ Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (1950).

⁴⁷⁹ H. Rep. 81-1 No. 491 at 17 (1949); Uniform Code of Military Justice, Hearings Before a Subcomm. Of the Senate Comm. on Armed Services, 81st Cong., 1st Sess. (1949) at 106; S. Rep. 81-1 No. 486 at 13 (1949).

⁴⁸⁰ See Uniform Code of Military Justice, Hearings Before a Subcomm. of the House Comm. on Armed Services, 81st Cong., 1st Sess. (1949) at 875-76.

⁴⁸¹ See, e.g., Curtis Bradley & Jack Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2047, 2129-30 (2005).

⁴⁸² Id. at 711, 975-76.

⁴⁸³ Id. at 846, 976. The "former jeopardy" provision, 10 U.S.C. § 844, does not mention military commissions, suggesting the drafters believed UCMJ articles need not do so to apply to them.

⁴⁸⁴ 10 U.S.C. § 844.

The former article 38 granting the President authority to make rules for courts-martial and military commissions was reenacted as UCMJ article 36. One minor change was new language calling for such rules “to be uniform insofar as practicable.”⁴⁸⁵ These words were added by a House committee to call for a single joint manual for courts-martial.⁴⁸⁶ The record does not show that presidential rulemaking authority was intended to be significantly broader under the UCMJ than it was under the Articles of War, and it seems clear from the hearings and the text of Article 36 that Congress expected that the common law rules of evidence would continue to provide the basic rules for military trials.⁴⁸⁷ While a House staffer with no formal role in the legislative drafting process opined “We are not making rules for military commissions here,”⁴⁸⁸ Larkin, the Executive Secretary, testified that the rules were relevant and it also seems clear that those present believed (erroneously) that the Quirin trial had been conducted under the actual Articles of War.⁴⁸⁹ Larkin’s main concern seemed to be that language requiring rigid adherence to common law rules of evidence would require the MCM to be redone every time a court reinterpreted a rule and thus some flexibility was desired.⁴⁹⁰ Given the minor changes enacted and the limited discussion of the issues, it seems fair to conclude that the UCMJ leaves the 1916 understanding of the Articles of War language largely intact.

A number of other developments in U.S. military law, such as the creation of a dedicated appellate court, the creation of formal military judges to preside over trials, and the congressional

⁴⁸⁵ 10 U.S.C. § 836 (2000).

⁴⁸⁶ Subcomm., *supra* note 480 at 1014-15.

⁴⁸⁷ *See id.* at 993, 1016-18, 1061-64.

⁴⁸⁸ *Id.* at 1017 (comment by Mr. Smart). Smart had attended drafting committee sessions as an observer. *See id.* at 846.

⁴⁸⁹ *See id.* at 1017.

⁴⁹⁰ *Id.* at 1017.

grant of direct Supreme Court review over at least some military trials, all potentially impact the continuing validity of mid-twentieth century precedents.⁴⁹¹

Developments of potentially equal, if not greater, significance for the military commission's validity have taken place in international law. First is the large number of treaties dealing with various aspects of the law of war, particularly the Geneva Conventions of 1949 and the Additional Geneva Protocols of 1979, as well as various human rights accords that may apply additional international justice standards.⁴⁹² One or more of several hundred resolutions of the United Nations Security Council or General Assembly may also be relevant to common law trials depending upon the location of the conflict and legal issues involved.⁴⁹³ And of course, war crimes trials have been conducted following several recent conflicts, mostly in the past decade and most prominently by ad hoc international tribunals such as the International Criminal Tribunals for Yugoslavia and Rwanda (ICTY and ICTR respectively).⁴⁹⁴ The statutes of the ad hoc tribunals as well as the new standing International Criminal Court (ICC) are also important indicators of the currently recognized scope of the law of war.

The result of all these developments has been a huge increase in the volume of legal source material potentially relevant to the common law application of the law of war. It must be remembered, after all, that common law is much more than the rote application of past decisions.⁴⁹⁵ If that were the case it would still be permissible to employ the procedures of the Star Chamber or the Spanish Inquisition. A sound working knowledge of precedent is essential, but so is a comprehensive understanding of the evolution of legal norms, evidenced by recent

⁴⁹¹ These issues are discussed more fully in Glazier, *supra* note 159 at 2074-77.

⁴⁹² An appendix to The International Committee of the Red Cross (ICRC) compilation of Customary International Humanitarian Law lists 140 potentially relevant agreements concluded since 1950. ICRC, 2 Customary International Humanitarian Law Pt. 2 at 4139-52 (2005). Of these, 28 are deemed sufficiently important to break out which nations had ratified them. *Id.* at 4153-80.

⁴⁹³ See *id.* at 4335-82.

⁴⁹⁴ Completed cases from both the ICTY and ICTR are listed in *id.* at 4324-28.

⁴⁹⁵ See Holmes, *supra* note 1 at 1.

treaties, U.N. resolutions, and the evolving practices of both national and international tribunals, which impact the continuing validity of those precedents. Unfortunately there is little evidence that the U.S. military, once the leading force behind the development of the law of war, is institutionally making the effort necessary to keep up with these developments. The current Army “bible” on the law of war, FM 27-10, for example, was last updated in 1976⁴⁹⁶ and thus fails to address such critical developments as the 1977 Additional Geneva Protocols, recent weapons treaties such as the ban on landmines, and decisions handed down by the several international war crimes tribunals now in session.⁴⁹⁷ Non-governmental organizations are attempting to fill the vacuum, digesting results of contemporary war crimes trials⁴⁹⁸ and attempting to report the full scope of customary International Humanitarian Law norms.⁴⁹⁹ But the government’s neglect of this issue provides significant cause for concern that it is unable to conduct a common law of trial on a sound legal footing today.

Conclusion

History offers important lessons for the continuing application of the law of war by common law tribunals. The Anglo-American experience suggests that by the time of the U.S. Constitution, legislative control over the jurisdiction of military tribunals was clearly acknowledged. While British practice allowed commanders to summarily execute spies, the American Congress chose to require their trial by the same tribunal trying U.S. servicemen. There may have been a time in the first half of the 19th century in which American authorities generally accepted summary execution of persons who were essentially illegal combatants, but

⁴⁹⁶ DEPARTMENT OF THE ARMY, THE LAW OF LAND WARFARE (FM 27-10) (1976).

⁴⁹⁷ See. e.g., DOCUMENTS ON THE LAW OF WAR 169-337 (Adam Roberts & Richard Guelff ed., 3d ed.2004) (reproducing relevant documents on the law of war in chronological sequence)

⁴⁹⁸ HUMAN RIGHTS WATCH, GENOCIDE, WAR CRIMES, AND CRIMES AGAINST HUMANITY (2004) (digesting ICTY and ICTR case law).

⁴⁹⁹ ICRC, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW (2005).

this was short-lived and the United States accorded formal trial for all law of war violations by the Civil War, anticipating changes to international law by several decades.

The military commission was specifically developed during the Mexican War to maintain discipline among U.S. personnel in foreign lands and subsequently to maintain order among the local populace and protect American forces. The authority being exercised, particularly for the former purpose, was generally acknowledged to belong to Congress, and in its interstitial exercise commanders were careful to provide at least as much due process protection as provided by congressional mandates for courts-martial. Commentators such as William Winthrop are often cited for the proposition that military commissions were more summary than courts-martial and not legally obligated to follow the latter's statutory mandates.⁵⁰⁰ Yet Winthrop also includes several pages implicitly demonstrating how closely the tribunals have conformed in practice,⁵⁰¹ and fifteen years after he wrote, the Philippine Insurrection commissions demonstrated remarkable fidelity to court-martial norms, including rigorous compliance with U.S. common law rules of evidence. And it was the leading judge advocate from that experience who both authored the modern statutory language and gave "authoritative" testimony to Congress that the two tribunals "have the same procedure."

The use of military commissions to try violations of the law of war that Congress has not statutorily "defined and punished" seems well established. *Quirin*, which is still formally law, holds this can apply even within the United States when conflict touches American shores. But precedent shows there are nevertheless real constraints on this authority imposing additional burdens of proof upon the prosecution and it is insufficient just to show that the accused committed the conduct charged. First it must be established that at the time it was committed,

⁵⁰⁰ WINTHROP, *supra* note 26 at 1312-13.

⁵⁰¹ *See id.* at 1313-14, 1321.

the alleged offense constituted a recognized violation of the international law of war for which individuals may be punished. Second, it must be shown that the violation took place as part of an actual armed conflict. Finally, it must be demonstrated that the perpetrator was not entitled to belligerent immunity for his actions. The tribunal called upon to reach this judgment must procedurally conform with both applicable national rules as well as international fair trial norms. Since the military commission is grounded in common law, procedural compliance cannot be achieved without a sound understanding of both U.S. precedents and the wide range of international judgments and agreements constituting, or providing evidence of, applicable international fair trial norms. The challenge seems even more daunting with respect to the substantive law defining the crimes at issue, since a much wider range of national and international tribunal decisions come into play as at least persuasive influences. Logically it would be rare that international norms could be definitively determined from individual national court cases. But the overall body of this jurisprudence can certainly support such determinations, while even individual decisions can potentially provide evidence that a practice does *not* qualify as customary law.

To conduct legally sound trials based upon the common law of war thus requires a significant effort at collecting, analyzing, and applying the massive amounts of relevant legal source material. The huge number of war crimes cases heard around the world since 1945, the proliferation of international treaties and tribunals in the past half-century, and the extensive volume of resolutions passed by the United Nations make this challenge exponentially more difficult than it was when military commissions were last employed by the United States.

Whether or not the World War II era departures from court-martial practice are sufficient to rewrite the common law is an open question. It seems likely at this point that U.S. federal courts

will be called upon to resolve it unless the executive branch elects to unilaterally restore the commonality based on earlier precedents or Congress chooses to exercise its authority to enact clear statutory mandates on military commission procedure. But given the scope and rapidity of legal developments in recent decades, it would be naïve to *assume* that half-century old precedents would still comport with international standards, even *if* they were valid at the time.