

Article:

Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War

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Abstract

The War on Terror has provoked much discussion on the proper role of law in war. A considerable amount of this debate has centered on the idea of lawfare: the use of international law as a weapon of war—usually by weaker states or unconventional combatants, and usually to America’s disadvantage. This Note examines this theory of lawfare through our experience with military tribunals in the Mexican War; it provides the most extensive study to date of the use of military commissions and councils of war during that conflict. Other articles have surveyed the history of American military tribunals from the Revolutionary period to the present, primarily focusing on the balance of power between the legislative and executive branches over military tribunals in the absence of specific legislation. Few, however, have devoted any significant attention to the Mexican War, and none have thoroughly explored how the Mexican War tribunals functioned as part of the American occupation strategy. This Note argues that General Scott used military tribunals as part of a counterinsurgency strategy, developing innovations tailored to the needs of his occupation yet exceeding the requirements of international law, and that this strategy worked to hamper public support for and decrease the effectiveness of unconventional enemy combatants. This Note is also the first to relate this history to the idea of lawfare, using it to challenge the common perception that lawfare is a strategy of America’s enemies, by showing how Scott used lawfare to American advantage in the occupation of Mexico.

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Introduction

In November 2001, as part of the ongoing War on Terror, President George W. Bush authorized the trial of noncitizen terrorists by military commission.¹ The ensuing struggle over the legality and wisdom of these tribunals suggests that the War on Terror “does not cleanly fall within preexisting models of warfare”² or crime-fighting and that an adequate new model has not emerged. Meanwhile, the military commission system has failed to gain public acceptance or to process the cases of detainees while the President, Congress, and the Supreme Court, as well as academics and the media, have disputed the legal status of the detainees, the level of process they are due,³ and which branch of government should be making these determinations.³

Underlying these disputes is a more basic issue: the proper role of law in war. Advocates of international humanitarian law, or the law of armed conflict, hope that it can “prevent conflict altogether or... make the conduct of war as humane as possible,” particularly for noncombatants.⁴ Others, most prominently Major General Charles Dunlap, Deputy Judge Advocate General of the Air Force, are skeptical of this hope, believing that “the growing importance of international law”⁵ has instead resulted in lawfare. Dunlap defines lawfare, a concept he popularized, as “the strategy of using – or misusing – law as a substitute for traditional military means to achieve an operational objective.”⁶ Lawfare can also be defined, more simply, as “the use of law as a weapon of war.”⁷

Most theorists make two assumptions about lawfare: first, that it is a “new phenomenon,”⁸ and second, that it disadvantages the United States.

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

2. Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1842 (2007).

3. See *Military Commissions to Try Enemy Combatants: Hearing Before the H. Comm. on Armed Services*, 109th Cong., (2006) (statement of Charles J. Dunlap, Jr., Deputy Judge Advocate General, United States Air Force), 2006 WL 2568895; see also Morris D. Davis, *In Defense of Guantanamo Bay*, 117 YALE L.J. POCKET PART 21 (2007).

4. Major General Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts*, (Nov. 29, 2001) (Carr Center for Human Rights, John F. Kennedy School of Government, Harvard University, Working Paper), <http://www.ksg.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>.

5. Major General Charles J. Dunlap, Jr., Commentary, *Lawfare Today: A Perspective*, 3 YALE J. INT’L AFF. 146, 147 (2008); see Dunlap, *Law and Military Interventions*, *supra* note 4.

6. Dunlap, *Lawfare Today*, *supra* note 5, at 146.

7. Colonel Kelly D. Wheaton, *Strategic Lawyering: Realizing the Potential of Military Lawyers at the Strategic Level*, 2006-SEP ARMY LAW. 1, 5 (2006); see Dunlap, *Lawfare Today*, *supra* note 5, at 146.

8. Council on Foreign Relations, National Security Roundtable Discussion, *Lawfare, The Latest in*

Yoo and Sulmasy, as well as Dunlap, regard lawfare as a post-World War II strategy; their discussions do not cover conflicts before Vietnam, and concentrate on the War on Terror and other recent conflicts.⁹ These conflicts, they argue, show a “new relationship between law and war,” characterized by an increasing legalization of warfare.¹⁰ Domestic and international courts have become more involved in reviewing military actions, while government lawyers, both military and civilian, have taken a greater role in approving military decisions, such as what targets to strike and what interrogation and detention practices to adopt.¹¹ The theorists attribute this change to the globalization of the economy¹² and to “twenty-four hour media coverage”¹³ driving higher levels of public knowledge and concern about the humanity of foreign wars.

While some have argued that the United States can make positive use of lawfare, it is generally seen as an enemy weapon.¹⁴ Lawfare is often thought of as a type of asymmetric warfare, a tactic that the weak use against the strong.¹⁵ The 2005 National Defense Strategy displays this view, noting the vulnerability of the United States to “those who employ a strategy of the weak using international fora, judicial processes, and terrorism.”¹⁶ Opponents are thought to use lawfare against the United States in two basic ways. The first is using courts to impede quick military action.¹⁷ The second, more common method is “undermining the public support that is indispensable when democracies like the U.S. conduct military interventions” by creating the perception “that the U.S. is waging war in violation” of international law.¹⁸ Enemies can create this perception by, for instance, publicizing civilian deaths or even by “orchestrating situations that deliberately endanger noncombatants.”¹⁹ The American public’s deep concern with the rule of law is thought to make the country especially vulnerable to lawfare; opponents can exploit this concern by alleging specious violations to make the use of successful military tactics

Asymmetries (Mar. 18, 2003).

9. *Id.* at 11-12; see also Dunlap, *Law and Military Interventions*, *supra* note 4, at 4-5.

10. Dunlap, *Lawfare Today*, *supra* note 5, at 146; see *Lawfare: The Latest in Asymmetries*, *supra* note 8.

11. Dunlap, *Law and Military Interventions*, *supra* note 4.

12. Dunlap, *Lawfare Today*, *supra* note 5, at 146-47; see *Lawfare: The Latest in Asymmetries*, *supra* note 8.

13. Sulmasy, *supra* note 2, at 1836.

14. *Lawfare: The Latest in Asymmetries*, *supra* note 8; see Dunlap, *Lawfare Today*, *supra* note 5, at 147; see William George Eckhardt, *Lawyering for Uncle Sam When He Draws His Sword*, 4 CHI. J. INT’L L. 431, 441 (2003).

15. See *Lawfare: The Latest in Asymmetries*, *supra* note 128.

16. DEPARTMENT OF DEFENSE, THE NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA 5 (2005).

17. See *Lawfare: The Latest in Asymmetries*, *supra* note 8 (“[T]he legal costs of fighting these [human rights] suits can effectively remove a particular commander from active duty for years”)

18. Dunlap, *Law and Military Interventions*, *supra* note 4, at 4.

19. *Id.* at 5.

politically difficult.²⁰ This view of lawfare invites the conclusion that international law is an impediment to the United States. Yoo and Sulmasy, for instance, have suggested that “[o]ur adherence to law and process within warfare... [arguably] interferes with the efforts of military commanders to achieve victory on the battlefield.”²¹

Both assumptions — that lawfare is a new phenomenon, and that it works against the United States — are costly oversimplifications. The assumption that lawfare hurts America discourages attempts to use it to American benefit, and encourages disregard for international law. The assumption that lawfare is new prevents learning successful strategies for dealing with lawfare from history. A counterexample to both assumptions is the Mexican War experience with military tribunals. Like the War on Terror, the Mexican War was a new type of war for the United States—the first extensive occupation of a foreign country²²—requiring new strategies and attitudes towards international law in order to succeed. The Mexican War is also a useful precedent to examine in this period of controversy over the use of military commissions because it is the first conflict where the United States systematically used such tribunals.²³ And in contrast to the War on Terror military commissions, the Mexican War tribunals “worked like a charm”: they helped suppress insurgent violence, hastened the end of the war, and provided an influential model for future conflicts.²⁴

Despite the opportunity presented by these parallels to study how lawfare can be used to America’s advantage, the use of military tribunals in the Mexican War has not been extensively examined, covered mostly in surveys of the history of military commissions.²⁵ This Note attempts a

20. Dunlap, *Lawfare Today*, *supra* note 5, at 148; Sulmasy, *supra* note 2, at 1836; Eckhardt, *supra* note 14, at 441-42.

21. Sulmasy, *supra* note 2, at 1836.

22. The United States had invaded and briefly occupied Canada during the Revolutionary War and the War of 1812, and was involved in conflicts in Florida when it was under Spanish control. STEPHEN A. CARNEY, U.S. ARMY CENTER OF MILITARY HISTORY, THE OCCUPATION OF MEXICO, MAY 1846-JULY 1848, 12-13 (2006), <http://www.army.mil/cmh-pg/brochures/Occupation/Occupation.htm>.

23. Major Michael O. Lacey, *Military Commissions: A Historical Survey*, 2002 ARMY LAW. 41, Mar. 2002, at 41-42, 43. Many scholars begin the history of military commissions with the Revolutionary War. However, while commanders have always had ways of dealing with unconventional enemy combatants, the pre-Mexican War precedents cited for military commissions generally involve either the statutory power of courts-martial to try spies, or isolated uses of “special court[s]” or advisory “court[s] of inquiry” to handle particular cases. *Id.* at 42. *Also see* David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5, 18-32 (2005) [hereinafter Glazier, *Precedents Lost*]. The Mexican War was indisputably the first time a separate military court system was created to hear cases not cognizable by courts-martial. *Id.*; *see also id.* at 32-40 (describing General Scott’s new system); 2 WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 1297 (Boston, Little, Brown, and Co. 1896).

24. WILLIAM E. BIRKHIMER, MILITARY GOVERNMENT AND MARTIAL LAW ¶¶ 121-22, at 138-39 (3d ed. 1914); *see also* CARNEY, *supra* note 22, at 29-30. (1892).

25. *See, e.g.*, Glazier, *Precedents Lost*, *supra* note 23; David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005 (2003) [hereinafter Glazier, *Kangaroo Court*]; Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT’L L.J. 15 (2006); Haridimos V. Thralalos, Comment, *The Military Commission in*

more comprehensive study than these previous works of the development and operation of military commissions and councils of war in the Mexican War. It includes an examination of primary materials that have not previously been studied, such as transcripts of cases before the tribunals.

At the beginning of the Mexican War, the only American military tribunal was the court-martial, authorized by the Articles of War, the statutory predecessor to the Uniform Code of Military Justice. Courts-martial had jurisdiction only over members of the American military, persons accompanying the military, and spies,²⁶ and only over military offenses, such as desertion or neglect of duty. During the war, General Winfield Scott created two additional tribunals, the military commission and the council of war, to fill jurisdictional gaps left by the Articles of War. He gave military commissions jurisdiction over common law offenses, such as murder, rape, and theft, committed by American soldiers and Mexican civilians. Councils of war filled the remaining gap, with jurisdiction over Mexican unconventional combatants for military offenses, such as engaging in guerrilla warfare and recruiting deserters.

Scott's new tribunals were part of what would now be called a counter-insurgency strategy. Scott needed to prevent a popular insurgency and defeat serious opposition from guerrilla fighters in order to end a stagnating war and "conquer peace with Mexico," the officially stated objective of the campaign.²⁷ His strategy had two prongs, "presenting at once the olive branch and the sword": conciliating the general population and destroying the guerrillas.²⁸ The military commissions were an instrument of conciliation and offered the same procedural protections as courts-martial for American and Mexican defendants. Their purpose was to improve relations between American soldiers and the Mexican population, lessening support for guerrillas. While they faced bias and backlash, the commissions were extremely successful at achieving these aims. The second type of tribunal, the council of war, was designed to suppress guerrillas and stop the recruiting of American deserters. Some of the councils seem to have been essentially battlefield courts and, in line with their aggressive function, offered few procedural protections. The others, like the commissions, generally mirrored court-martial procedures. The

the War on Terrorism, 51 VILL. L. REV. 737 (2006). Historians as well "have failed to notice the significance of Scott's martial law policy in Mexico." TIMOTHY D. JOHNSON, WINFIELD SCOTT: THE QUEST FOR MILITARY GLORY 166 (Univ. Press of Kansas 1998).

26. Articles 56 and 57 of the Articles of War, which covered aiding the enemy and holding correspondence with or giving intelligence to the enemy, covered all offenders, not just members of the American military. See ISAAC MALTBY, A TREATISE ON COURTS MARTIAL AND MILITARY LAW, app. 1, at 183 (Lawbook Exchange 2005) (1813).

27. *War for a 'Piece' of Mexico*, 70 NILES' NAT'L REG., 323 (July 25, 1846), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesb1846MayJuly.htm>; see CARNEY, *supra* note 22, at 26.

28. JOHNSON, *supra* note 25, at 180-81; *Messages of the President on the subject of the Mexican War*, H. EXEC. DOC. NO.60, at 909 (1848) [hereinafter H. EXEC. DOC. NO.60].

Mexican War tribunals succeeded because of their combination of flexibility, allowing innovations to meet military exigencies, and high procedural protections, legitimating the innovations. The tribunals were able to find this balance because of Scott's extensive knowledge of law, military strategy, and the Mexican occupation.

I. Left in Darkness: The Development of Military Commissions

A. A Horrible Guerrilla Aspect

On February 10, 1847, a young Arkansas volunteer named Colquitt, the nephew of a senator, went missing after leaving camp near Agua Nueva, Mexico.²⁹ The next day, his comrades found his mutilated body; guerrillas had strangled him and dragged him through the brush, then left him tied to a shrub with a lasso around his neck.³⁰ "The Arkansas men vowed vengeance, deep and sure," and commenced their work on February 12th with "an indiscriminate and bloody massacre" of the nearest Mexican civilians.³¹ In a letter to the *St. Louis Republican*, a soldier who had witnessed the affair lamented, "Let us no longer complain of Mexican barbarity....No act of inhuman cruelty, perpetrated by her most desperate robbers, can excel the work of yesterday, committed by our soldiery. God knows how many of the unarmed peasantry have been sacrificed to atone for the blood of poor Colquitt."³²

As the Supreme Court has recently remarked, the military commission "was born of military necessity."³³ The military necessity, for tribunals to restrain both American soldiers and unconventional enemy combatants, was born of disasters like the Colquitt affair. In General Zachary Taylor's occupation of Northern Mexico, at the beginning of the Mexican War, such incidents followed a familiar pattern. Mexican guerrillas kidnapped and assassinated stray soldiers, leaving their mutilated bodies for their comrades to find. American soldiers, usually undisciplined volunteers, retaliated by killing Mexicans at random. The Mexicans used the massacres to recruit more guerrillas, and the cycle began again.³⁴ In one remarkably bloody feud, termed "[t]he war between the Kentuckeyians and Mexicans," Kentucky volunteers retaliating for assassinations killed forty

29. ABIEL ABBOT LIVERMORE, *THE WAR WITH MEXICO REVIEWED* 145 (Boston: American Peace Society 1850).

30. *Id.*

31. *Id.* at 145-46

32. *Id.*

33. *Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006).

34. See, e.g., *Gen. Antonio Canales' Proclamation of No Quarter*, 72 NILES' NAT'L REG. 199 (May 29, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesg1847MayJun.htm>.

Mexicans within five days.³⁵ The soldiers were not overly precise in their vengeance; whenever an American was assassinated, the “compliment has been invariably returned generally two for one, and... without regard to the Scriptures, giving out that it is ‘better to let ninety-nine guilty go than punish one innocent man.’”³⁶ The conquests of Monterey and Matamoras in the fall of 1846 provided occasions for yet more indiscriminate violence, where “murder, robbery, and rape were committed in the broad light of day....”³⁷

While some of the soldiers believed that these disproportionate retaliations had the “salutary” effect of terrorizing the population into submission,³⁸ the atrocities actually worked to the guerrillas’ advantage. Popular support is an “absolutely critical asset” for guerrillas: “It is their main source of recruits, funds, supply and of vital intelligence.”³⁹ And as General Taylor himself recognized, “no more effectual plan could be devised” to increase popular support for guerrillas than the frequent “depredations and outrages upon the peaceful inhabitants.”⁴⁰ The guerrillas, indeed, seem to have been pursuing something very similar to a modern lawfare strategy, attempting to provoke attacks upon civilians in order to turn popular opinion against the occupation force and towards the insurgency.

This strategy worked extremely well. Before the occupation, much of the population of northeastern Mexico favored seceding and joining the United States.⁴¹ In May 1846, the citizens of Matamoras were friendly towards the occupation, hoping that American rule “would guarantee them a liberal and stable government.”⁴² The town was full of men who had dodged the press gangs of the Mexican Army because, they told the

35. *Further Details of the Guerrilla War at Monterey Between Kentucky Volunteers and Mexican*, 71 NILES’ NAT’L REG. 290-91 (Jan. 9, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilese1847JanFeb.htm>.

36. *Id.*

37. *Affairs at Monterey*, 71 NILES’ NAT’L REG. 180 (Nov. 21, 1846), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesd1846NovDec.htm>.

38. *Guerrilla Warfare*, 73 NILES’ NAT’L REG. 154 (Nov. 6, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesj1847NovDec.htm>; CARNEY, *supra* note 22, at 18-20. *But see* Justin H. Smith, *American Rule in Mexico*, 23 AM. HIST. REV. 287, 295 (1918) [hereinafter Smith, *American Rule*] (arguing that “probably such barbarous reprisals exerted a wholesome effect on the bad Mexicans”).

39. Douglas S. Blaufarb & George K. Tanham, *Fourteen Points: A Framework for the Analysis of Counterinsurgency*, ch. 1, at 8 (July 31, 1984) (discussing guerillas in general in the context of twentieth century conflicts between countries) (unpublished technical report) (on file with Defense Technical Information Center), available at <http://handle.dtic.mil/100.2/ADA368093>.

40. LIVERMORE, *supra* note 29, at 149.

41. 2 JUSTIN H. SMITH, *THE WAR WITH MEXICO* 215 (New York: Macmillan Co. 1919) [hereinafter SMITH, *WAR WITH MEXICO*]; *Affairs at Monterey*, 71 NILES’ NAT’L REG. 180 (Nov. 21, 1846), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesd1846NovDec.htm>.

42. *Letters from “The Corporal” at Matamoras*, 70 NILES’ NAT’L REG. 262-63 (May 26, 1846), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesb1846MayJuly.htm>.

Americans, it was “not their disposition to play the soldier.”⁴³ But by the fall of 1846, the massacres had given this friendly attitude “a shock from which it never recovered.”⁴⁴ “Now,” one soldier reported, “there is no portion of the country so bitterly hostile to us....”⁴⁵ This hostility seriously hampered Taylor’s campaign, as the necessity of providing security from guerrillas left him unable to advance and force a negotiation for peace.⁴⁶

Taylor did not respond effectively to the guerrillas’ lawfare tactics. Instead, both his leadership and his soldiers’ dispositions contributed to the war “rapidly assuming a most horrible guerrilla aspect, at which humanity cannot but shudder.”⁴⁷ At the end of 1846, approximately two thirds of the American soldiers in Mexico belonged not to the regular army, but to volunteer regiments raised by the states and led by elected volunteer officers.⁴⁸ The volunteers, a rough set of “loafers and rowdies,” had no experience with military discipline and did not like it when they met it.⁴⁹ And General Taylor, nicknamed “Old Rough and Ready,”⁵⁰ was not the man to impose order.⁵¹ Taylor, though a “born fighter,”⁵² was a poor disciplinarian.⁵³ His response to the discipline problems was “chastising entire units and publicly lamenting atrocities.”⁵⁴ Since he “took no measures to bring the perpetrators to condign punishment,”⁵⁵ this approach created deniability for him, but it did little to prevent atrocities.⁵⁶

Unlike in recent conflicts, where “hyperlegalism” is thought to

43. *Id.*

44. SMITH, WAR WITH MEXICO, *supra* note 41, at 212-13, 216.

45. *Affairs at Monterey*, *supra* note 41.

46. CARNEY, *supra* note 22, at 43.

47. *War Assuming a Horrid Guerrilla Aspect*, 71 NILES’ NAT’L REG. 401 (Feb. 27, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilese1847JanFeb.htm>.

48. *Adjutant General’s Report of Conditions, Numbers, and Distribution in Campaign of the US Army*, 71 NILES’ NAT’L REG. 279-80 (Jan. 2, 1847) (reporting an aggregate force of 24,984 men, 16,511 of which are volunteers); CARNEY, *supra* note 22, at 11-12.

49. *Complaints About Gen. Edmund Pendleton Gaines’ Efforts to Enlist Volunteers*, 69 NILES’ NAT’L REG. 620-21 (Sept. 13, 1845), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesa18441846.htm>; CARNEY, *supra* note 22, at 11-12.

50. *Gen. Zachary Taylor’s Interview with a Gentleman’s Son Among the Volunteers*, 70 NILES’ NAT’L REG. 311-12 (July 18, 1846), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesb1846MayJuly.htm>; CARNEY, *supra* note 22, at 16.

51. CARNEY, *supra* note 22, at 11-12.

52. Smith, *American Rule*, *supra* note 38, at 293-94.

53. CARNEY, *supra* note 22, at 17.

54. Ian B. Lyles, *Mixed Blessing: The Role of the Texas Rangers in the Mexican War, 1846-1848*, at 99 (June 6, 2003) (unpublished Master of Military Art and Science thesis, U.S. Army Command and General Staff College) (on file with Defense Technical Information Center), available at <http://handle.dtic.mil/100.2/ADA416963>.

55. *Review of the Campaign from the ‘Southern Quarterly Review,’* 70 NILES’ NAT’L REG. 266-68 (June 27, 1846), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesb1846MayJuly.htm>.

56. See Lyles, *supra* note 54, at 99.

impede the American military,⁵⁷ Taylor was hampered by a lack of law. The occupied area of Mexico was literally lawless. The Articles of War, the only statute that applied to soldiers outside of the United States, did not authorize courts-martial for common law crimes, such as murder, assault, rape, and theft.⁵⁸ American criminal courts also had no jurisdiction, as the crimes were not committed on American soil.⁵⁹ The Mexican courts, where they were functioning, were an impractical forum to try offenses committed by or against the occupying army. Even aside from problems of bias, the judges “dared not” act.⁶⁰ This “perfect impunity” created an atmosphere where soldiers felt “exempted [] from every law, both civil and moral...Crime followed in their footsteps, and wherever they trod, they left indelible traces of infamy.”⁶¹ The corresponding lack of a forum to try Mexican criminals exacerbated the problem, providing an excuse for the soldiers’ violence. “[N]o Mexican... has been punished for outrages committed on the persons and property of American soldiers,” explained one soldier, repeating the common excuse for the killings: “Shall we rest quietly in our tents whilst the enemy is lying in ambush murdering our comrades... ?”⁶²

B. Too Explosive for Safe Handling

Congress and the President proved unwilling to address this politically dangerous problem, leaving the pressing need for a new military tribunal to the one person who could not afford to ignore it: Winfield Scott. As President James K. Polk realized that Mexico could disregard Taylor’s occupation indefinitely and that he was as far from conquering a peace as ever, he decided on a strike to the capital.⁶³ Polk had snubbed Scott, a political rival and personal enemy, for the Northern Mexico campaign, but, as General-in-Chief, Scott was an unavoidable choice for the new expedition.⁶⁴ The plan called for the army to land at Vera Cruz, march 280 miles, and capture Mexico City.⁶⁵ Scott knew that he would need an effective counter-insurgency strategy for this plan to succeed; he could not afford to make Taylor’s mistakes.⁶⁶ Without a large enough force to protect its supply lines and to advance, Scott’s army would be dependent on the

57. See Dunlap, *Law and Military Interventions*, *supra* note 4, at 1.

58. H. EXEC. DOC. NO.60, *supra* note 28, at 1264-65.

59. SMITH, WAR WITH MEXICO, *supra* note 41, at 211.

60. *Id.*; see also H. EXEC. DOC. NO.60, *supra* note 28, at 1265.

61. SMITH, WAR WITH MEXICO, *supra* note 41, at 211.

62. *Further Details of the Guerrilla War at Monterey Between Kentucky Volunteers and Mexicans*, *supra* note 35.

63. JOHNSON, *supra* note 25, at 156-57.

64. CHARLES WINSLOW ELLIOTT, WINFIELD SCOTT: THE SOLDIER AND THE MAN 427-39 (New York: Macmillan Co. 1937).

65. CARNEY, *supra* note 22, at 25.

66. *Id.* at 26.

local population for supplies.⁶⁷ Moreover, Scott would be marching into a heavily populated area where an uprising could overwhelm his army.⁶⁸ To “conquer a peace,”⁶⁹ he needed to conciliate the population—and, consequently, to improve the behavior of the troops.

Scott, nicknamed “Old Fuss and Feathers” by his soldiers, was well qualified for this task.⁷⁰ A stickler for rules and regulations,⁷¹ Scott was also a member of the bar, having spent four years of his youth vacillating between the military and the law.⁷² As he waited in Washington to begin the Vera Cruz expedition, he fumed at accounts pouring in “almost daily” of soldiers committing serious crimes with impunity.⁷³ This lack of discipline was galling to his legal and military instincts alike, and he was determined to remedy it.⁷⁴

He first turned to Congress in May 1846, hoping for an amendment to the Articles of War extending court-martial jurisdiction to soldiers’ common law crimes.⁷⁵ Congress did nothing—slowly. Although it had a vigorous debate about the laws of war in December 1846, it enacted no legislation on the subject.⁷⁶ In February 1847, after Scott had landed in Mexico, the Secretary of War, William Marcy, finally told him not to expect an amendment, writing “I have had a conversation on the subject with the chairman of the committee of the Senate, and understand from him that he...did not consider legislation necessary, as the right to punish in such cases necessarily resulted from the condition of things....”⁷⁷

Scott next attempted to get executive authorization. He wrote a proposal to declare martial law in Mexico and to create a court system to try

67. See G.O. 128 (1847), reprinted in 72 NILES’ NAT’L REG. 199 (May 29, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Niles1847MayJun.htm>; see also Article from the Baltimore ‘American’ about the Inadequacy of Troops in the Field, 72 NILES’ NAT’L REG. 328 (July 24, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Niles1847JulAug.htm>; See H. EXEC. DOC. NO.60, *supra* note 28, at 871.

68. CARNEY, *supra* note 22, at 26.

69. Jacob W. Miller Opposes the Three Million Bill (Feb. 2, 1847), in ISSUES OF WAR AND PEACE, at 89 (Nancy Gentile Ford ed., 2001).

70. CARNEY, *supra* note 22, at 16.

71. *Id.*

72. WINFIELD SCOTT, MEMOIRS OF LIEUT.-GENERAL SCOTT, LL.D. 11-48 (New York: Sheldon & Co. 1864). Scott’s experiences as a lawyer included watching the trial of Aaron Burr for high treason, and participating in a successful pro bono action to free several of his brother’s slaves, on the grounds that their ancestor, a Native American woman, had been enslaved illegally. *Id.* at 12-16, 27-29.

73. *Id.* at 392-93. Scott was particularly concerned with reports of murders and other capital offenses. The Articles of War had a catch-all provision, “disorders . . . to the prejudice of good order and military discipline,” that could have been used to prosecute minor offenses, but it was not a capital charge. H. EXEC. DOC. NO.60, *supra* note 28, at 1264-65.

74. See SCOTT, *supra* note 72, at 392-93 (describing Scott’s writing his martial law order).

75. K. JACK BAUER, THE MEXICAN WAR, 1846-1848, at 101 (Macmillan Co. 1974); Ralph H. Gabriel, *American Experience with Military Government*, 49 AM. HIST. REV. 630, 634 (1944).

76. CONG. GLOBE, 29th Cong., 2nd Sess. 13-28 (1846); see Gabriel, *supra* note 75, at 632-33.

77. H. EXEC. DOC. NO.60, *supra* note 28, at 874.

American soldiers and Mexicans for common law crimes.⁷⁸ The authority for this system, the proposal asserted, was the international common law of war, particularly as derived from British law, upon which the Articles of War were based.⁷⁹ But when Scott gave this proposal to Marcy for approval “a startle at the title was the only comment he then, or ever made on the subject. It was soon silently returned, as too explosive for safe handling.”⁸⁰ The Attorney General was similarly “stricken with legal dumbness [and] [a]ll the authorities were evidently alarmed at the proposition.... Hence they touched the subject as daintily as a ‘terrier mumbles a hedgehog,’” Scott concluded.⁸¹

The Administration’s alarm was not without cause; Scott’s proposal itself admitted that it “present[ed] grave topics for consideration.”⁸² The proposal was politically risky; the war was already widely regarded, both in America and abroad, as an act of unjust aggression against a weaker country, motivated by greed for land.⁸³ A perception that the United States was employing legally questionable tactics against the Mexican population could have worsened Polk’s problems with public support. And given Congress’s inaction, the legality of such a tribunal was doubtful. No statute or American precedent established the authority of a military commander to create tribunals with power over foreign citizens on foreign soil; indeed, the Mexican War was the first time the American military had engaged in an extensive occupation of a foreign country.⁸⁴

Scott, however, had strong authority under the law of war for his proposal to try Mexican civilians. Under the traditional view of the law of war, espoused by such seventeenth and eighteenth century authorities as Cornelius van Bynkershoek and Hugo Grotius,⁸⁵ the powers of a military commander over enemies—including citizens of a hostile nation as well as anyone engaged in hostilities⁸⁶—were absolute. As Bynkershoek explained, “[E]very force is lawful in war. Thus it is lawful to *destroy* an

78. *Id.* at 1263-66.

79. *Id.*

80. SCOTT, *supra* note 72, at 393 (emphasis omitted).

81. *Id.* at 393-94.

82. H. EXEC. DOC. NO.60, *supra* note 28, at 1263.

83. *War for a ‘Piece’ of Mexico*, *supra* note 27 (remarking that while the official goal of the war was to “conquer peace with Mexico,” its true goal was to “conquer a piece of Mexico”); *US War in Mexico*, LONDON TIMES, Dec. 2, 1847, at 4C, available at <http://www.history.vt.edu/MxAmWar/Newspapers/Times/Times1847AugDec.htm#LT47AD1847-12-2-4ca>.

84. Gabriel, *supra* note 75, at 631-34. During conflicts within America, state tribunals were expected to handle criminal cases involving soldiers. *Id.* at 634.

85. Albert De Lapradelle, *Introduction* to 3 E. DE Vattel, *THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE* iii, at xlviii-xlix (Charles G. Fenwick trans., Carnegie Institution of Washington 1916) (1758).

86. JOSEPH CHITTY, *A PRACTICAL TREATISE ON THE LAW OF NATIONS* 30-31 (Boston, Bradford and Read 1812); CORNELIUS VAN BYNKERSHOEK, *A TREATISE ON THE LAW OF WAR* 22, 25 (Philadelphia, Farrand and Nicholas 1810).

enemy, though he be unarmed and defenceless . . . in short, every thing is lawful against an enemy.”⁸⁷ Although commanders often refrained from crueler practices, such as enslaving or summarily executing captured soldiers and civilians,⁸⁸ this restraint was a matter of the commander’s “generosity,” not the captives’ rights.⁸⁹ The 1846 Congressional debate on the laws of war shows that this view was passing out of favor, but was not entirely obsolete. At least one Congressman still maintained the position that “so far as the law of nations was concerned, the President had a legal right to do his pleasure,”⁹⁰ “he wielded his power over [the occupied population] by the sword, and enforced it by the sword alone.”⁹¹

However, the leading authority on the laws of war was another eighteenth century writer, Emmerich de Vattel, who had a more limited view of an occupying commander’s powers.⁹² Vattel also held that “all the subjects of [an occupied] Nation are enemies.”⁹³ However, he maintained that noncombatants and those who had surrendered should generally not be put to death or otherwise punished unless they had “personally incurred the guilt of some crime”⁹⁴ or “some grave violation of the Law of Nations” against the occupying force.⁹⁵ Most of the Congressmen in the 1846 debate seemed to take this view, arguing that the law of nations required a commander to secure the civil rights of the occupied population “so far as compatible with the safety of his conquest and army.”⁹⁶ A few even suggested that the conquered areas—particularly California and New Mexico, soon to be annexed—should be treated as part of the United States, and their inhabitants as citizens, leading others to mock “[A]re we to be quarrelling for [the Mexicans’] rights in their territory, and that under the Constitution[?]”⁹⁷

None of these standards were concrete enough to provide Scott with much guidance. The international law governing occupations was far from

87. BYNKERSHOEK, *supra* note 86, at 2.

88. *Id.* at 18-23; *see also* LETTER FROM THE SECRETARY OF WAR, TRANSMITTING A SYSTEM OF FIELD SERVICE & POLICE, AND A SYSTEM OF MARTIAL LAW FOR THE GOVERNMENT OF THE ARMY OF THE UNITED STATES 103 (Washington: Gales and Seaton 1820) (requiring that prisoners of war “be treated at all times with every indulgence not inconsistent with their safe-keeping. . . . [C]ourage is honored by generosity; and it is expected that the American army will always be slow to retaliate on the unarmed acts of rigor or cruelty committed by the enemy . . .”).

89. BYNKERSHOEK, *supra* note 86, at 4, 18-23.

90. CONG. GLOBE, 29th Cong., 2nd Sess. 15 (1846).

91. *Id.*

92. Lapradelle, *supra* note 85, at xxxvi-xxxviii; CONG. GLOBE, 29th Cong., 2nd Sess. 15, 17, 18 (1846) (several Congressman quote Vattel and he is referred to as “an acknowledged authority on the law of nations.”).

93. 3 E. DE VATTEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE 259 (Charles G. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758).

94. *Id.* at 309.

95. *Id.* at 280.

96. CONG. GLOBE, 29th Cong., 2nd Sess. 24 (1846)

97. *Id.* at 15.

specific, resembling a set of moral principles more than a code of legal precepts. For this reason, the Bynkershoek and Vattel positions were not as far apart as they seemed. The Congressman arguing for the absolute power of an occupying commander, for example, qualified that the commander was bound by the laws of “morality.”⁹⁸ In a similar vein, the Congressman arguing that the law of nations protected civil rights described it as “founded in part on the practices of nations, but more correctly binding, as deduced from the most sacred principles of justice.”⁹⁹ He even remarked that the former Congressman’s “errors... may be rather in hasty and unguarded expression, than in meaning.”¹⁰⁰ Vattel himself described the law governing occupations as a type of natural law, equating it with the “laws of conscience.”¹⁰¹ At any rate, neither the treatise writers nor the Congressmen provided specifics as to the appropriate tribunals for offenses against an occupying force. But under most views of Scott’s power as the commander of an occupying army, he could create a tribunal with jurisdiction over Mexicans. Certainly as a practical matter, and arguably as a legal matter, his powers were bounded by little more than his own discretion.

The proposal to give the tribunal jurisdiction over American soldiers was legally and politically riskier. The Articles of War laid out the procedures for trying American soldiers, and the offenses for which they could be tried. Scott had attempted, and failed, to secure an amendment to this statute. Now he was asserting common law authority to create a new tribunal that would punish offenses not covered by the Articles of War. The proposal was also politically dangerous: subjecting American soldiers, particularly the volunteers, to new and legally dubious tribunals could outrage the public, and infuriate the army.¹⁰² But the alternative was to follow Taylor’s strategy of inaction, and endure the same crippling cycle of guerrilla violence.

The Administration’s response to this difficult situation was the same as Congress’s: it “refused to take responsibility,” neither authorizing nor rejecting Scott’s proposal.¹⁰³ Its lack of a viable response to the discipline problem was demonstrated in October 1846, when an American soldier murdered a Mexican in broad daylight on the streets of Monterey, in front of American officers.¹⁰⁴ The audacity of the crime stirred even Taylor, who sent to Marcy for instructions, remarking, “In reply to a communication from the Mexican general, desiring that the man might be brought to merited punishment, I was obliged to answer that the case must

98. *Id.*

99. *Id.* at 23.

100. *Id.*

101. VATTEL, *supra* note 95, at 5.

102. CARNEY, *supra* note 242, at 28-29.

103. Gabriel, *supra* note 75, at 634.

104. H. EXEC. DOC. NO.60, *supra* note 28, at 431.

be submitted to my government before any action could be taken [].”¹⁰⁵ Marcy responded that, in light of Congress’s failure to amend the Articles of War, he was “not prepared to say that, under the peculiar circumstances of the case...a military court could not rightfully act thereon; yet very serious doubts are entertained upon that point, and the government do not advise that course.”¹⁰⁶ Instead, he advised, “[R]elease him from confinement, and send him away from the army....”¹⁰⁷ Taylor apparently took this advice, sending home “a select lot of murderers, thieves, and villains of every dye.”¹⁰⁸

Scott, however, was disgusted, fuming that “Taylor was advised to send the monster home—that is, to reward him with a discharge!”¹⁰⁹ Accepting that he would be “left in [his] own darkness on the subject,”¹¹⁰ Scott resolved to institute his martial law proposal without express authorization from Polk. Congress’s and the President’s inaction left him, in *Steel Seizure* terms, in a twilight zone of a twilight zone.¹¹¹ He must have known that he was risking his career.¹¹² If his martial law order were successful, no one would question his authority—but if it failed, Polk would be more than willing to leave his old political enemy to “shoulder the public displeasure.”¹¹³

II. Fuss and Feathers: The Operation of Military Commissions

A. Procedural and Substantive Law

Scott’s military commissions, created by General Orders 20 in February 1847,¹¹⁴ combined a close adherence to court-martial procedures with a flexible approach to jurisdiction and substantive law. The tribunal had jurisdiction over common law crimes committed “in, by, or upon the

105. *Id.*

106. *Id.* at 370.

107. *Id.*

108. WILLIAM JAY, A REVIEW OF THE CAUSES AND CONSEQUENCES OF THE MEXICAN WAR 216 (Boston, Benjamin B. Mussey and Co., 1849) (quoting the *New Orleans Delta*).

109. SCOTT, *supra* note 72, at 393 n.17.

110. *Id.* at 394.

111. *Youngstown Sheet & Tube Co. v. Sawyer (Steel Seizure)*, 343 U.S. 637 (1952) (Jackson, J., concurring) (“When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain.”). Scott was without a grant or denial of authority from the President to declare martial law, and the President was likewise without a grant or denial of authority from Congress.

112. Gabriel, *supra* note 585, at 634.

113. *Id.* at 634.

114. *California and New Mexico; Message from the President of the United States*, H. EXEC. DOC. 17, at 353 (1850) [hereinafter H. EXEC. DOC. 17].

army.”¹¹⁵ Commissions could thus try American soldiers, retainers, and camp followers, and any inhabitant of Mexico.¹¹⁶ Offenses between Mexicans, however, were left to Mexican criminal courts.¹¹⁷ As Scott had explained in his proposal, the order “place[d] all necessary limitations on *martial law*,” by “restricting it to a foreign hostile country,” “assimilating [military commissions] to court martials,” and “restricting punishments to the known laws of some one of the States.”¹¹⁸ The commissions, indeed, were an ingenious hybrid: an entirely novel tribunal without a single new element. In procedure, they were “strictly military,”¹¹⁹ nearly identical to courts-martial. In substance, they were entirely criminal, limited to offenses and punishments existing within the United States.¹²⁰

The purpose of these limits differed for American and Mexican defendants. For American soldiers, given Scott’s questionable authority for departing from the Articles of War, he likely felt that modeling the tribunals as closely as possible on existing American law was necessary to establish their legality. Neither the laws of war nor American law seemed to require that Scott use the same or a parallel tribunal for Mexicans. But whatever the laws required, Scott had strong policy reasons for applying “the sacred principles of justice”; the purpose of the new tribunal was to conciliate the Mexican population, and any perception that it was biased against Mexicans would be counterproductive. By using the same tribunal for American soldiers and Mexican civilians, and by assimilating it to existing American law, Scott was demonstrating a commitment to fair treatment for both groups.

Procedurally, the new military commissions were almost completely assimilated to courts-martial.¹²¹ In Scott’s proposal, he specified that the commissions “will, as far as practicable, be governed by the same limitations, rules, principles and procedure[s]” as courts-martial.¹²² In practice the procedures seem to have been close to identical.¹²³ The commander in chief or the commander of a department ordered the tribunals, composed of five to thirteen officers who acted as a combination

115. *Id.*

116. *See id.*

117. *See id.* at 353-54

118. H. EXEC. DOC. NO.60, *supra* note 28, at 1263-64.

119. H. EXEC. DOC. 17, *supra* note 114, at 402.

120. *Id.* at 353.

121. *Id.* at 354. General Order 20 specifically mentions four Articles of War, dealing with the powers of the different types of courts-martial. These were probably cited to show that a military commission should follow the procedures of the analogous court-martial for each situation, and to emphasize that volunteers would be subject to military commissions. Rules and Articles of War, *reprinted in* ALEXANDER MACOMB, THE PRACTICE OF COURTS MARTIAL, 125-26, 133 (New York, Harper and Brothers, 1841) *and in* CAPT. S.V. BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL, app. at 349-50, 357 (3rd ed., New York, D Van Nostrand 1863).

122. H. EXEC. DOC. NO.60, *supra* note 28, at 1266.

123. Court Martial Case Files, National Archives, Record Group 153 [hereinafter Case Files] (on file with author) *compare* EE-512 (general court-martial) *with* FF-28 (military commission).

of judge and jury, with the most senior commission member presiding.¹²⁴ Although the Articles of War provided that courts-martial should have thirteen members where practical, the commissions more commonly had around seven.¹²⁵ Mexican War courts-martial seem to have usually had more members, though often fewer than thirteen.¹²⁶ For less serious offenses, lower-ranking commanders could call tribunals, which could consist of three members.¹²⁷ Soldiers from the regular army could only be tried by regular officers, and soldiers from volunteer regiments could only be tried by volunteer officers.¹²⁸ Either volunteer or regular officers could try Mexicans.¹²⁹

The procedures for courts-martial, which also seem to have been followed by military commissions, were similar to criminal trials. The main departures from criminal procedure were the expansive role of the judge advocate and the limitations on defense counsel. Although the members of the court were both judge and jury, the judge advocate had an even more extensive role. Each commission had one judge advocate, who acted as the “official prosecutor of the United States,”¹³⁰ the “legal adviser of the court,”¹³¹ the “recorder or clerk of the Court,”¹³² and the “counsel for the prisoner.”¹³³ As the legal advisor to the court, the judge advocate of a military commission was expected to be familiar with both military and criminal law. He was also responsible for summoning witnesses.¹³⁴ Primarily a prosecutor, the judge advocate also had duties to the accused, including objecting to leading questions and questions asking the accused to incriminate himself.¹³⁵ In carrying out this touchy set of duties, the judge

124. MACOMB, *supra* note 121, at 13-14; BENET, *supra* note 121, at 22-23.

125. BENET, *supra* note 121, at 22-23; *see, e.g.*, Orders and Special Orders Issued by Maj. Gen. William O. Butler and Maj. Gen. W.J. Worth to the Army in Mexico, 1848, National Archives, Record Group 94, Microfilm Number T-1114 [hereinafter Butler and Worth Orders] (on file with author), G.O. 67 (listing five members), G.O. 57 (listing seven members), G.O. 53 (listing seven members). *See also* Case Files, *supra* note 123, EE-534, at 5 (listing seven members).

126. *See, e.g.*, Case Files, *supra* note 123, EE-512, at 64-65 (recording an eleven-member court-martial); Butler and Worth Orders, *supra* note 125, G.O. 16 (five member court-martial).

127. BENET, *supra* note 121, at 18, 24, art. 66 at app. 349-50 (describing regimental courts-martials).

128. *See* BENET, *supra* note 121, at art. 97 at app. 357; GEORGE T.M. DAVIS, AUTOBIOGRAPHY OF THE LATE COL. GEO. T. M. DAVIS 131 (New York, Jenkins & McCowan 1891).

129. *See* Case Files, *supra* note 123, FF-28 (describing trial of Mexican by a regular commission); EE-657, at 1 (describing trial of Mexican by a volunteer commission).

130. BENET, *supra* note 121, at 194; *see also* MACOMB, *supra* note 121, at 79-84. Macomb and Benet were both describing courts-martial procedures, but identical procedures seem to have been used in military commissions. Case Files, *supra* note 123, *compare* EE-512 (general court-martial) with FF-28 (military commission).

131. BENET, *supra* note 121, at 193; *see also* MACOMB, *supra* note 121, §§ 174-175, at 80.

132. MACOMB, *supra* note 121, § 181 at 83.

133. BENET, *supra* note 121, at 195; *see also* MACOMB, *supra* note 121, § 176 at 80-81.

134. MACOMB, *supra* note 121, §§ 179-180 at 82-83.

135. *Id.* §§ 175-176 at 80-81.

advocate was required to be “thoroughly impartial”;¹³⁶ to “bring [exculpatory evidence] fairly and completely into the view of the Court”; and to refrain from “avail[ing] himself of any advantage which superior knowledge or ability, or his influence with the Court may give him” in obtaining a conviction.¹³⁷ At least by the Civil War, many authorities thought these duties unreasonable, objecting that “the judge advocate, being both prosecutor and counsel for the prisoner, can, nine times out of ten, make the latter appear innocent or guilty at his pleasure: he is like a man playing a game of chess with himself[.]”¹³⁸ Small wonder that the judge advocate of the first military commission found it a “most unwelcome and troublesome task,”¹³⁹ and nervously wished that it could “be managed by an officer of much more experience and talents.”¹⁴⁰

Though the judge advocate was officially the counsel for the prisoner, the prisoner was allowed to have separate counsel, “or at least an *amicus curiae*... to assist him in conducting his defence.”¹⁴¹ But if the judge advocate’s powers were remarkably broad, the defense counsel’s powers were remarkably limited: he could “assist [the prisoner] by advice in preparing questions for witnesses, in taking notes, and shaping his defence.”¹⁴² The defense counsel could also write for the commission members “a concise statement of his defence, and observations on the general import of the evidence.”¹⁴³ He was “not to address the court, or interfere in any manner in the proceedings; his presence is only tolerated as a friend of the prisoner.”¹⁴⁴ Often, the defense counsel was literally a friend of the prisoner, a fellow soldier rather than an attorney, although judge advocates were often not attorneys either.¹⁴⁵ Some of the accused seem to have proceeded without counsel,¹⁴⁶ as many criminal defendants did,¹⁴⁷ but

136. BENET, *supra* note 121, at 195.

137. MACOMB, *supra* note 121, § 176 at 81.

138. BENET, *supra* note 121, at 196.

139. ROBERT ANDERSON, AN ARTILLERY OFFICER IN THE MEXICAN WAR, 1846-7: LETTERS OF ROBERT ANDERSON 57 (Knickerbocker Press 1911).

140. *Id.* at 54. Anderson’s wishes were granted; he informed the commission that the charge of spying was cognizable by court-martial, and it was dissolved on jurisdictional grounds without a trial being held. *Id.* at 57.

141. BENET, *supra* note 121, at 65.

142. MACOMB, *supra* note 121, § 93 at 47. Benet cites the Sixth Amendment for the proposition that a prisoner should be allowed counsel, suggesting that constitutional protections were seen as at least loosely applicable to courts-martial. BENET, *supra* note 121, at 65.

143. ISAAC MALTBY, A TREATISE ON COURTS MARTIAL AND MILITARY LAW 75 (Thomas B. Wait and Co. 1813); *see* Case Files, *supra* note 123, FF-19.

144. BENET, *supra* note 121, at 65; *see also* MALTBY, *supra* note 143, at 74 (“[L]awyers shall not interfere in the proceedings of courts martial by pleading or argument.”).

145. BENET, *supra* note 121, at 65; *See, e.g.*, VIOLA LOCKHART WARREN, DRAGOONS ON TRIAL: LOS ANGELES, 1847, at 17-21 (Dawson’s Book Shop 1965) (judge advocate with no legal training).

146. *See, e.g., Id.* at 16-20 (no indication that soldiers tried for burglary had defense counsel).

147. LAWRENCE FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 237 (BasicBooks 1993) [hereinafter FRIEDMAN, CRIME AND PUNISHMENT].

some were represented.¹⁴⁸ Scott seems to have regularly appointed officers to serve as defenders: an officer from the defendant's unit represented the defendant soldier, and regular officers represented American and Mexican defendant civilians.¹⁴⁹

Proceedings before a military commission ran similarly to a criminal trial. The prisoner was formally charged, and entered a plea.¹⁵⁰ The prisoner and the judge advocate were both allowed to challenge commission members for cause, such as prejudice or malice.¹⁵¹ Witnesses for the prosecution and defense were questioned through a complicated procedure, whereby each question had to be presented in writing to the president for approval before it could be read aloud.¹⁵² Because the Articles of War included no rules of evidence, the tribunals used common law rules, the same as criminal courts.¹⁵³ As in a criminal trial, the burden of proof was beyond a reasonable doubt.¹⁵⁴ After deliberating, the commission members voted on a finding and sentence.¹⁵⁵ Only a simple majority was required to convict or acquit, except in capital cases, which required a majority of two thirds.¹⁵⁶ While there were no appeals, every sentence had to be approved by the commander who had ordered the commission.¹⁵⁷ He had the power to disapprove a charge, to remit cases back to the commission, to pardon, and to mitigate sentences, although he could not increase sentences or order an acquitted prisoner to be re-tried.¹⁵⁸

Substantively, military commissions were assimilated to state criminal law. General Order 20 included a list of crimes that military commissions could hear: “[a]ssassination, murder, malicious stabbing or maiming, rape, malicious assault and battery, robbery, theft... desecration of... religious edifices,” and destruction of property.¹⁵⁹ Although both the order and Scott's martial law proposal suggest that only “enumerated” crimes were triable,¹⁶⁰ commanders never treated the list as exclusive. Instead, they understood the military commission to “embrace[] all crimes of magnitude not otherwise provided for,” and interpreted the list as

148. DAVIS, *supra* note 128, at 136 (American charged with rape had defense counsel); *see also* Case Files, *supra* note 123, EE-534 (describing the defense of an American charged with murder).

149. CARNEY, *supra* note 242, at 28.

150. BENET, *supra* note 121, at 89, 94-95.

151. MACOMB, *supra* note 121, § 45 at 30-31.

152. *Id.* § 78 at 42-43.

153. BENET, *supra* note 121, at 224.

154. *Id.* at 281; *see also* DAVIS, *supra* note 128, at 132.

155. BENET, *supra* note 121, at 126-29.

156. *Id.* at 128.

157. *Id.* at 146; *see* H. EXEC. DOC. 17, *supra* note 114, at 354.

158. BENET, *supra* note 121, at 146, 152, art. 89 at app. at 354; *see* MACOMB, *supra* note 121, § 71 at 41.

159. H. EXEC. DOC. 17, *supra* note 114, at 353.

160. *Id.*; H. EXEC. DOC. NO.60, *supra* note 28, at 1263 (stating that Scott meant to limit martial law to “offences enumerated with some accuracy”).

“enumerat[ing] many crimes, by way of illustrating this class.”¹⁶¹ Finally, sentences of military commissions had to be “in conformity with known punishments in like cases in some one of the States....”¹⁶²

B. The Military Commission in Practice

The military commission was born of necessity, and necessity often dictated its operation. Those responsible for running the trials—the commanders, commission members, and judge advocates—were all officers, some educated and most committed to Scott’s policy of restraint and conciliation towards civilians.¹⁶³ On the other hand, the majority had little or no legal training; many volunteer officers in particular probably had scant experience with either criminal or military trials.¹⁶⁴ And, faced with a need for quick and practical discipline, most were more concerned with “substantial justice” than with the fuss and feathers details of Scott’s scheme.¹⁶⁵ Unsurprisingly then, General Orders 20 functioned more as a set of guidelines than as an inviolable code; the officers adapted Scott’s framework to their circumstances, at times stretching their jurisdiction and blurring the dichotomy between military procedure and criminal substance.

The most dramatic examples of jurisdiction-stretching are the Honorable Military Commissions of Matamoras. Still following court-martial procedures, the commissions began hearing civil cases in 1848.¹⁶⁶ The cases seem to have been mostly matters of debt, and the commissions awarded damages to successful plaintiffs.¹⁶⁷ They had no evident grounds of jurisdiction over civil matters: General Orders 20 certainly did not authorize them to hear such cases. But the Mexican justice system in the area, if functioning at all, was likely an impractical forum to try civil cases involving Americans, and the military commissions filled the need.

A similar focus on practical needs, rather than legal technicalities, governed charges. Whether its list of offenses was exclusive or not, General Orders 20 was quite clear that military commissions could only

161. H. EXEC. DOC. 17, *supra* note 114, at 402; *see also* WINTHROP, *supra* note 23, at 1298 (listing G.O. 20 enumerated crimes but stating, “[O]ffences . . . were not always confined to those specified in the Orders . . .”).

162. H. EXEC. DOC. 17, *supra* note 114, at 354.

163. Smith, *American Rule*, *supra* note 38, at 293.

164. At an early military commission in California, only one of the members, a twenty-two year old, had any training in law. The judge advocate, though “well-educated,” had none. WARREN, *supra* note 145, at 17-21. *See also* DAVIS, *supra* note 128, at 132-33.

165. H. EXEC. DOC. 17, *supra* note 114, at 403.

166. *See, e.g.,* Benthall v. Villaneal and Bloomicorn v. Samson, National Archives, Record Group 94, Records of the Adjutant General’s Office 1780s-1917, Mexican War, 1845-50, Proceedings of Military Commissions, Matamoras, Mexico, 1847-48 [hereinafter *Matamoras Commissions*] (on file with author).

167. *Id.*

hear offenses that were crimes in some one of the United States.¹⁶⁸ Nonetheless, quite a few soldiers were charged with offenses that, it seems safe to assume, were not crimes in any state: highly unsoldierlike conduct,¹⁶⁹ aiding and abetting soldiers to desert,¹⁷⁰ and allowing a Mexican prisoner to escape,¹⁷¹ to give examples. Most of these charges were clearly cognizable by court-martial and were disapproved.¹⁷² Charging soldiers in front of military commissions instead of courts-martial was simply sloppiness, understandable as the same officers sometimes served in both courts,¹⁷³ but indicative of the commissions' non-technical approach to justice. Many other charges, while doubtless within some criminal law, were expressed in terms that could not have been found in any statute-book: such as "buying liquor without paying for it"¹⁷⁴ and "killing a calf belonging to a Mexican without the permission of the owner."¹⁷⁵ The bounds of courts-martial were not always strict either. Several soldiers were court-martialed for "utter worthlessness," an offense mentioned nowhere in the Articles of War.¹⁷⁶

Military commission sentences were likewise governed by the circumstances of the war. The sentences, supposed to be criminal, assimilated themselves to military justice. Corporal and shaming punishments, such as whipping and branding, were common criminal sentences in the colonial period, but by the Mexican War they were twenty to forty years out of fashion in most states and replaced by the prison system.¹⁷⁷ Shaming and physical punishments were still relatively common in the military, however. One soldier, for habitual drunkenness, was sentenced to "be marked on his hip with the letters H.D., to have his head shaved, and to be drummed out of Service."¹⁷⁸ Another, for desertion, was sentenced in part "to ride a wooden horse for twenty days from reveille

168. See H. EXEC. DOC. 17, *supra* note 114, at 354.

169. Butler and Worth Orders, *supra* note 125, G.O. 84, 89 (listing charges for unsoldierlike conduct, absence without leave, and gross neglect of duty).

170. Butler and Worth Orders, *supra* note 125, G.O. 26.

171. Metamoras Commissions, *supra* note 166, Military Commission of A. Pettee.

172. Butler and Worth Orders, *supra* note 125, G.O. 89.

173. See Orders of General Zachary Taylor to the Army of Occupation in the Mexican War, 1845-1847, National Archives, Record Group 94, Microfilm M29 Roll 3 [hereinafter Taylor Orders] (on file with author), G.O. 111 (1847). The reverse also occasionally happened, and soldiers were court-martialed for offenses cognizable only by military commission. Butler and Worth Orders, *supra* note 125, G.O. 108.

174. Butler and Worth Orders, *supra* note 125, G.O. 86.

175. Orders and Special Orders, Headquarters of the Army, War with Mexico, 1847-48, Vol. 41 ½, National Archives [hereinafter Orders and Special Orders] (on file with author), G.O. 141 (1847).

176. Butler and Worth Orders, *supra* note 125, G.O. 44, 73, 107. The punishment sometimes involved being tattooed with the letter W. G.O. 44, 107. For copies of the Articles of War, see MACOMB, *supra* note 121, at app. at 111, and BENET, *supra* note 121, at app. at 336.

177. FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 147, at 36-41, 74-75.

178. Butler and Worth Orders, *supra* note 125, G.O. 8.

until retreat allowing half an hour for each meal.”¹⁷⁹ These penalties were likely popular in the military for the same reasons that they had been popular in the colonial period; publicly shaming offenders makes sense in a small, isolated community that needs to strongly enforce its norms.¹⁸⁰ Besides, imprisonment is not the most efficient punishment for an army.¹⁸¹

With the same incentives, military commissions likewise gave corporal and shaming sentences. In fact, whipping was a far more common punishment for commissions than for courts-martial: courts-martial could sentence to lashes only for desertion¹⁸² while commissions used lashes for everything from picking pockets to assault with a deadly weapon.¹⁸³ Shaming punishments, such as branding and carrying weights, also appeared.¹⁸⁴ General Order 20’s limitation to criminal punishments did function as a backstop to this tendency. The sentences to lashes were approved, but most complied with the order, since lashes were still used as a criminal penalty in a few states.¹⁸⁵ The more creative shaming penalties, however, such as branding a horse thief “with the letter L on the cheek of his face,” were often disapproved out of doubt that such penalties were allowed in the United States.¹⁸⁶ The Articles of War, although their provisions on penalties did not actually apply, also acted as a backstop. The Articles disallowed whipping sentences by courts-martial of more than fifty lashes,¹⁸⁷ and commanders tended to reduce commission sentences of over fifty lashes to fifty.¹⁸⁸ Law books and learned technicalities were not the primary guide. Instead, the commission members gave, and the

179. Butler and Worth Orders, *supra* note 125, G.O. 56. *See also* Case Files, *supra* note 123, EE-512, at 67 (soldier sentenced for mutinous conduct “to carry a weight of thirty pounds under charge of the guard from reveille until tattoo for thirty days.”); Taylor Orders, *supra* note 173, G.O. 25 (1847) (soldier, for desertion, sentenced in part to receive thirty lashes). Fines and hard labor were the most frequent punishments. *See* Butler and Worth Orders, *supra* note 125, G.O. 8.

180. FRIEDMAN, CRIME AND PUNISHMENT, *supra* note 147, at 36-41, 74-75.

181. *Id.* at 75.

182. BENET, *supra* note 121, note to art. 87 at app. at 354.

183. *See* Butler and Worth Orders, *supra* note 125, G.O. 33, 84. While Glazier thinks that “defendants undoubtedly appreciated” the limitation to criminal punishments, most probably would have preferred court-martial punishments to the whippings. Glazier, *Precedents Lost*, *supra* note 23, at 35. The limitation did, however, save them from the more bizarre punishments, such as “branding” and “the wooden horse.” *See id.*

184. *See, e.g.*, WARREN, *supra* note 145, at 67 (soldier sentenced in part “to have the word Thief pricked in his right hip, with indelible ink”); Butler and Worth Orders, *supra* note 125, G.O. 62 (Mexican sentenced in part to be branded on cheek); Butler and Worth Orders, *supra* note 125, G.O. 84 (soldier sentenced in part to be branded on the left hip with the letter A); Butler and Worth Orders, *supra* note 125, G.O. 19 (soldier sentenced to carry a twenty-five pound weight for twenty days).

185. *See* WARREN, *supra* note 145, at 49 (noting that in Texas lashes were included in the punishment for grand larceny). A sentence of 500 lashes for manslaughter was disapproved, on the grounds that whipping was not a punishment for manslaughter in any state. Butler and Worth Orders, *supra* note 125, G.O. 33.

186. WARREN, *supra* note 145, at 73; Butler and Worth Orders, *supra* note 125, G.O. 62, 84.

187. BENET, *supra* note 121, at app. at 354.

188. *See* Butler and Worth Orders, *supra* note 125, G.O. 62 (sentences reduced from branding and 100 lashes, to 50 lashes only).

commanders approved, punishments that felt appropriate from their background experience with military and criminal law—applying, with as much fuss and feathers as they could muster, those sacred principles of justice.

C. Effects on Civilian Relations

By modern notions, Scott's military commissions might seem to be slapdash justice. However, considering the era and the circumstances, they provided the highest practical degree of process. This lawfare strategy was rewarded with remarkable success. Compared with Taylor, who instituted the commissions later and less enthusiastically, Scott had far fewer problems with atrocities. By helping to change the culture of the army and decreasing offenses against civilians, Scott's commissions destroyed the guerrilla's most effective recruiting tool, helping him avoid an insurgency that could have been fatal to his campaign. The tribunals' high level of process also kept them from becoming a grievance used to recruit insurgents. In Scott's self-promoting assessment, accepted by historians, his martial law order "worked like a charm... it conciliated Mexicans; intimidated the vicious of the several races, and being executed with impartial rigor, gave the highest moral deportment and discipline ever known in an invading army."¹⁸⁹

Scott's first use of military commissions¹⁹⁰ came within a week of the first victory of his campaign: the surrender of Vera Cruz.¹⁹¹ The timing was not coincidental; by reminding his soldiers that they were no longer fighting for Taylor, Scott was aiming to avoid the atrocities plaguing Taylor's occupation. Three days into the occupation of Vera Cruz, Scott issued an order complaining "cruel have been the disappointments of the general-in-chief, and all the good officers and soldiers of this army" that witnesses had not denounced the "few worthless soldiers" committing atrocities.¹⁹² Within three days, either Scott's stirring rhetoric or his order restricting soldiers to camp until they ceased disappointing him had borne fruit: the commissions had their first conviction.¹⁹³ Within a week, several volunteers were sentenced to fines and imprisonment for theft, and one

189. SCOTT, *supra* note 72, at 396; *see, e.g.*, BIRKHIMER, *supra* note 24, para. 122, at 139 (paraphrasing Scott's Autobiography); *see* CARNEY, *supra* note 242, at 45 (discussing how the Order "has influenced generations of military thinkers.").

190. The commissions at Vera Cruz were the first apart from an abortive proceeding at Tampico, dissolved on jurisdictional grounds, as the charge of spying was cognizable by court-martial. ANDERSON, *supra* note 139, at 55-57.

191. *See* JOHNSON, *supra* note 25, at 178 (Vera Cruz surrenders March 29) and EE-363, Case Files, *supra* note 123 (convening a military commission April 3).

192. H. EXEC. DOC. NO.60, *supra* note 28, at 914.

193. *Id.* According to Scott, the order "rallied thousands of good soldiers to the support of authority." *Id.*

officer's servant was sentenced to death for rape.¹⁹⁴

The reactions to these first convictions show the influence commissions had on both American and Mexican behavior. The convictions succeeded in catching the soldiers' attention, creating "a good deal of excitement... in all of the camps."¹⁹⁵ Shortly afterwards, the judge advocate received "certain unofficial communications" about another theft, asking his advice on behalf of the unnamed transgressors.¹⁹⁶ At his recommendation, "some three hundred dollars" worth of jewelry and silver stolen from Mexicans was surrendered "to the custody of the court," which returned it to its "amazed [and] grateful" owners.¹⁹⁷ They later wrote "most beautiful and touching letters of acknowledgment to General Scott."¹⁹⁸ Scott's plan of changing the army's culture and improving its civilian relations was off to a promising start.

The commissions continued to function well throughout Scott's campaign. His occupations were largely free of the massacres and atrocities that destabilized Northern Mexico. Scott's campaign was not without its ugly incidents of assassinations and reprisals,¹⁹⁹ but he almost completely avoided the feuds between volunteer regiments and the population that so plagued Taylor.²⁰⁰ Scott mainly succeeded in controlling his troops; the closest most got to "reveling in the halls of Montezumas" was "sleeping on two blankets on a hard table."²⁰¹ According to one judge advocate, "[i]n no City of the same size... is private property, or are private rights, more secure and better guarded" than in Mexico City under Scott's occupation.²⁰² The tribunals also reduced Mexican violence, by giving Mexicans a fair and peaceful forum to adjudicate their complaints against Americans.²⁰³ As a

194. Case Files, *supra* note 123, EE-363, at 3, 14-15; DAVIS, *supra* note 128, at 132-34. The servant, hung for raping a Mexican woman, was African-American. Case Files, *supra* note 123, EE-363, at 3. While he may have been guilty of the crime—he was convicted on the testimony of two purported eyewitnesses, the victim and an American officer—his race doubtless made him a convenient scapegoat. *Id.*; see JAY, *supra* note 108, at 234.

195. DAVIS, *supra* note 128, at 134.

196. *Id.*

197. *Id.* at 134, 135.

198. *Id.* at 135

199. See *Reveling in the Halls of the Montezumas*, 73 NILES' NAT'L REG. 256 (Dec. 18, 1847) ("Our men are assassinated here in the city nightly by the Mexican renegadoes . . . [L]ast night one of our men was stabbed at the theatre, and the 2d dragoons turned out and killed about twenty Mexicans before they could be stopped."), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesj1847NovDec.htm>. In the worst incident of Scott's campaign, a band of Texas Rangers avenging the death of their captain "murdered dozens of Mexicans, raped scores of women, and burned many homes." CARNEY, *supra* note 242, at 37.

200. CARNEY, *supra* note 242, at 29, 42; Smith, *American Rule*, *supra* note 38, at 301.

201. *Reveling in the Halls of the Montezumas*, 73 NILES' NAT'L REG. 214 (Dec. 4, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesj1847NovDec.htm>; see also SMITH, WAR WITH MEXICO, *supra* note 41, at 224-25.

202. ANDERSON, *supra* note 139, at 272.

203. Eric Knapp, "War Without Pity": Guerrilla Conflict in the Mexican War 82 (Sept. 10, 1995) (unpublished M.A. thesis, University of Nebraska) (on file with Defense Technical Information Center),

judge advocate wrote, “[t]he policy pursued by Genl. Scott is, I think, producing a favorable result on the common people.... [A]s far as I can see the laboring Mexicans care very little about the War....”²⁰⁴

Given that Scott’s army often numbered fewer than ten thousand,²⁰⁵ this neutrality was crucial to his success. He was able to continue his advance “even as he lost a third of his army” whose enlistments had expired,²⁰⁶ and to purchase supplies when his lines were cut.²⁰⁷ Mexican civilians “were usually glad, or at least willing, to exchange produce and services for round, yellow dollars.”²⁰⁸ Although many predicted that Scott’s risky advance would leave him stranded in central Mexico with no way to progress or retreat, Scott instead reached and captured the capital city.²⁰⁹ Meanwhile, the guerrillas had their own public relations problems. Many had been bandits before the war, and “they continued to prey on the civilian population as well as the American [soldiers].”²¹⁰ Instead of turning to the guerrillas to drive out the Americans, the population began turning to the Americans to protect them from the guerrillas.²¹¹

And contrary to the fears of the Polk administration, Scott’s imposition of martial law produced little outcry in the United States. The administration had evidently misjudged the public’s mood; Americans were more upset about the atrocities than about the new tribunals trying the offenders.²¹² Taylor was criticized more for not declaring martial law than Scott was for declaring it.²¹³ Apparently, the only one to “object to the

available at <http://handle.dtic.mil/100.2/ADA299904>.

204. ANDERSON, *supra* note 139, at 147.

205. Knapp, *supra* note 203, at 69; see *Article from the New York ‘Herald’ about Forces in the Field*, 72 NILES’ NAT’L REG. 327 (July 24, 1847) (describing the locations of Scott’s 8,000 men and their need for reinforcements), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Niles1847JulAug.htm>; *Article from the Baltimore ‘American’ about the Inadequacy of Troops in the Field*, *supra* note 67 (talking about inadequate numbers of men and inability to advance).

206. Gabriel, *supra* note 585, at 636.

207. G.O. 128 (1847), reprinted in *Gen. Winfield Scott’s General Order on Advancing from Jalapa*, 72 NILES’ NAT’L REG. 199 (May 29, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Niles1847MayJun.htm>; *Gen. Winfield Scott’s Design to Relinquish the Line of Communication*, 72 NILES’ NAT’L REG. 186 (May 22, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Niles1847MayJun.htm>; *Communication to Gen. Winfield Scott Cut Off*, 72 NILES’ NAT’L REG. 272 (July 3, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Niles1847JulAug.htm>.

208. Smith, *American Rule*, *supra* note 38, at 292.

209. *Id.* at 287; Knapp, *supra* note 203, at 36-37; see *Article from the New York ‘Herald’ About Forces in the Field*, *supra* note 205.

210. Knapp, *supra* note 203, at 71.

211. *Id.* at 71-74; see SMITH, *WAR WITH MEXICO*, *supra* note 41, at 173.

212. See *Gen. Scott General Order No. 20 Respecting Atrocities*, 72 NILES’ NAT’L REG. 49 (Mar. 27, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Niles1847MarApr.htm>; JAY, *supra* note 108, at 233-34 (criticizing the military commissions for not punishing soldiers severely enough).

213. See *Review of the Campaign from the ‘Southern Quarterly Review’*, 70 NILES’ NAT’L REG. 266-68 (June 27, 1846) (“Many censured [Taylor], and all were deeply pained at his refusing to

legality of the court and deny the authority of Gen. Scott to constitute it” was an accused murderer charged before a commission, who understandably wanted to be sent home.²¹⁴

As Taylor did not institute military commissions until September 1847,²¹⁵ almost nine months after Scott, his campaign makes a convenient control study. Although Scott sent Taylor a copy of General Orders 20 in February, Taylor apparently only glanced at it before throwing it aside as “another of *Scott’s Lessons*.”²¹⁶ Over the spring and summer of 1847, after he rejected military commissions, Taylor’s troubles with guerrillas drastically worsened. Guerrilla fighters, recruited from “nearly every ranch and village” of an infuriated population, cut his supply lines, ambushed his wagon trains, massacred teamsters, and assassinated soldiers.²¹⁷ The soldiers, in reprisal, continued to massacre civilians, further fanning the insurgency.²¹⁸ Only in the last months of the war, when Taylor finally adopted Scott’s counterinsurgency methods, including the military commissions, did his troubles with guerrillas abate.²¹⁹

Though the military commissions were clearly successful, they suffered from problems of bias and backlash. Volunteer commission members, many of them “active and prominent [state] politicians” in civilian life, tended to be biased towards defendants from their home states.²²⁰ One commission gave half the punishment, for the same offense, to defendants from the court members’ regiments.²²¹ While Glazier suggests that Scott would have avoided this problem by having regular officers try volunteers, had he not felt compelled to use court-martial procedures,²²² this arrangement would likely have been far worse: some volunteer regiments would have preferred rebelling to accepting punishments from regulars.²²³ Even as it was, commissions exacerbated the

proclaim martial law, thereby permitting theft and murder to go unpunished.”), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesb1846MayJuly.htm>; SCOTT, *supra* note 72, at 395-96 (“Notwithstanding the cowardice of certain high functionaries on the subject [of martial law], there has been no pursuit of the author.”)

214. Letter from J.H. Forster to Col. Hunt (May 2, 1848), National Archives, Record Group 94, Records of the Adjutant General’s Office, Letters Received Mar. 13, 1848–July 3, 1848 (on file with author).

215. Taylor Orders, *supra* note 173, G.O. 106, 109 (1847). Scott had apparently never given up on getting Taylor to adopt military commissions; the order setting up Taylor’s first military commission noted dryly, “[T]here is no lack of copies of “G.O.” No. 20 at Matamoras—6 having been furnished by Genl. Scott’s staff officer to that port.” Taylor Orders, *supra* note 173, G.O. 106 (1847). See also CARNEY, *supra* note 242, at 23.

216. SCOTT, *supra* note 72, at 394.

217. Knapp, *supra* note 203, at 30-34.

218. See *Mexicans Massacred*, 72 NILES’ NAT’L REG. 184 (May 22, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesg1847MayJun.htm>.

219. Knapp, *supra* note 203, at 34, 81; CARNEY, *supra* note 242, at 23-25.

220. DAVIS, *supra* note 128, at 132-33.

221. *Id.* at 134-36.

222. Glazier, *Precedents Lost*, *supra* note 23, at 34.

223. GENERAL WALTER P. LANE, THE ADVENTURES AND RECOLLECTIONS OF GENERAL WALTER

tensions between regulars and volunteers. The regulars believed that their officers gave “extremely harsh punishments for comparatively minor crimes,” while volunteer officers let their soldiers “[get] away with murder.”²²⁴ And since volunteers were the worst offenders,²²⁵ harsher punishments for regulars were unhelpful. However, the commissions do not seem to have been biased against Mexicans: far fewer Mexicans than Americans were charged, and Mexican defendants had lower rates of conviction.²²⁶ There was also no apparent disparity in punishments between Mexicans and Americans.²²⁷ The commission members seem to have grasped Scott’s conciliation strategy, and realized that bias against Mexicans would be counterproductive.

The commissions, particularly Taylor’s, also struggled to find reliable witnesses. Many soldiers believed, fairly or not, that Mexican witnesses would perjure themselves to acquit their countrymen and convict Americans.²²⁸ A worse problem, particularly for massacres by Americans, was that Mexican witnesses were too intimidated to bring claims at all.²²⁹ Commanders also found it difficult to convince American soldiers to accuse their comrades,²³⁰ and American witnesses sometimes had their own problems with perjury. In one egregious incident, a volunteer on trial for theft used the proceeds of his crime to bribe witnesses and his defense counsel.²³¹ He was acquitted.²³²

Both Taylor and Scott confronted backlashes to the tribunals, though again Taylor’s problems were worse. His soldiers had an unfortunate habit of murdering acquitted Mexican defendants, believing the Mexicans had escaped condign punishment through perjury or technicalities.²³³ Scott apparently avoided that problem, but his soldiers occasionally murdered Mexican civilians in retaliation when a commission sentenced an American to death.²³⁴ If these practices had been widespread, they would have completely undermined the conciliatory purpose of the

P. LANE, A SAN JACINTO VETERAN 70-71 (News Messenger Pub. Co. 1928) (describing how, after Col. Clark, a volunteer officer from Mississippi, was arrested by regulars “[Lane] met the Second Mississippi regiment and [his] battalion in full march for Monterey, to whip the regular regiment at that place and rescue Col. Clark, at all hazards.”)

224. CARNEY, *supra* note 242, at 29.

225. See Smith, *American Rule*, *supra* note 38, at 294.

226. Glazier, *Kangaroo Court*, *supra* note 25, at 2031-32.

227. Compare Case Files, *supra* note 123, FF-28 (Mexican sentenced to 39 lashes for theft) with Butler and Worth Orders, *supra* note 125, G.O. 84 (soldier sentenced to 39 lashes and a fine for theft).

228. Smith, *American Rule*, *supra* note 38, at 298; SMITH, WAR WITH MEXICO, *supra* note 41, at 213, 224.

229. H. EXEC. DOC. NO.60, *supra* note 28, at 1138; see, e.g., Lyles, *supra* note 54, at 74.

230. H. EXEC. DOC. NO.60, *supra* note 28, at 914, 1138-41. Taylor found it “next to impossible” to get witnesses against Americans, but one wonders how hard he tried. *Id.* at 1178.

231. CARNEY, *supra* note 242, at 28.

232. *Id.*

233. Smith, *American Rule*, *supra* note 38, at 295.

234. See, e.g., ANDERSON, *supra* note 139, at 128.

commissions. Fortunately, the majority of soldiers were “honorable men” who opposed the mistreatment of civilians, and the backlashes never reached large proportions.²³⁵

Finally, while military commissions were meant to avoid retributive violence like the Colquitt affair, they were more effective at changing attitudes to prevent such incidents than in punishing those that occurred. Even “Old Fuss and Feathers” was not willing to charge dozens of soldiers, sometimes entire regiments, for taking part in melees or massacres. The perpetrators of the worst excesses of his campaign went unpunished.²³⁶

III. Due Solemnity: The Councils of War

The second tribunal Scott created, the “council of war,” is the more direct precedent of modern military commissions. While Scott’s commissions mainly tried soldiers and civilians, the councils, like modern commissions, mainly tried enemy combatants for crimes against the laws of war.²³⁷ Unfortunately, the councils of war left a sparse paper trail, and have been little studied and much misunderstood. While the councils are sometimes discussed as though frustration with guerrillas caused Scott to deviate from his usually enlightened policies,²³⁸ the tribunals were in line with Scott’s “olive branch and sword” strategy.²³⁹ Scott wanted to conciliate the general population, but had no interest in conciliating guerrillas.²⁴⁰

The practice, as well as the purpose, of the councils has been misunderstood. While some scholars claim councils used the same procedures as military commission to try different offenses,²⁴¹ others stress their procedural differences.²⁴² In part, this is the problem of the blind men

235. H. EXEC. DOC. NO.60, *supra* note 28, at 914; *see also* Smith, *American Rule*, *supra* note 38, at 295-97.

236. *See* CARNEY, *supra* note 242, at 37 (discussing the Texas Rangers' revenge following the death of Captain Walker); Lyles, *supra* note 54, at 86-87. Unfortunately, the Texas Rangers, often the worst offenders, were also among Scott’s most effective fighting forces. Lyles, *supra* note 54, at 86-89, 94.

237. *Affairs in the Philippine Islands*, S. DOC. NO. 331 pt. 3, at 2820 (1902) [hereinafter S. DOC. NO. 331 pt. 3]. They may also have occasionally been used in “extreme cases,” when few officers were available, to try soldiers for crimes “of too serious a character to be tried by a military commission of three members.” *Message from the President of the United States*, S. EXEC. DOC. 18, at 598 (1850) [hereinafter S. EXEC. DOC. 18].

238. Glazier, *Precedents Lost*, *supra* note 23, at 36-37; Glazier, *Kangaroo Court*, *supra* note 25, at 2033.

239. JOHNSON, *supra* note 25, at 180-81.

240. CARNEY, *supra* note 242, at 37 (stating that Scott adopted a “scorched-earth” policy towards guerillas after he was “ordered to destroy the Light Corps’ [meeting places]”).

241. *See* Thravalos, *supra* note 25, at 746; Major Timothy McDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 ARMY LAW. 19, 28 (Mar, 2002).

242. *See* Glazier, *Kangaroo Court*, *supra* note 25, at 2033.

and the elephant: councils of war were characterized by flexibility. They were used in two distinct ways: with court-martial procedures, to try Mexicans recruiters for enticing American soldiers to desert, and with summary procedures, to try guerrillas.

A. Trials of Recruiters

Virtually all recorded uses of councils of war involve charges for a single offense, enticing American soldiers to desert.²⁴³ From the beginning of the war, Mexico tried to foment American desertion, targeting recent immigrants from Catholic countries and offering 320 acres to each deserter to the enemy.²⁴⁴ Quite a few soldiers took up this offer, many joining the San Patricio battalion, named for its Irish contingent.²⁴⁵ Scott eventually captured the battalion, court-martialed its members, and hanged fifty.²⁴⁶ But while courts-martial could handle deserters, recruiters were outside the jurisdiction of both courts-martial and military commissions, as enticing desertion was neither in the Articles of War nor a common law crime.

Scott solved this jurisdictional difficulty as he had solved his earlier problem with common law offenses: by creating a new tribunal. He authorized this tribunal, the council of war, to try recruiters “under the laws of war.”²⁴⁷ The councils were “governed by no written code, nor limited by any fixed boundaries, but derive[d] their powers from necessity, the customs of war, and good sense of the members.”²⁴⁸ Unlike the commissions, councils of war began quietly, with Scott’s first order to hold one in June 1847.²⁴⁹ Scott did not issue an order explaining his new tribunal to soldiers or civilians for months, and apparently did not ask for legislative or executive authorization.²⁵⁰ Given his earlier experiences, Scott may simply have realized the futility of asking Congress or the President for support, but he likely believed that no authorization was necessary. The councils were designed to try supporters of the enemy’s army, not American soldiers. Enticing desertion to the enemy was well-recognized as a violation of the laws of war, so Scott may well have felt that his position as the commander of an occupying army gave him all the authority he needed.²⁵¹

243. Butler and Worth Orders, *supra* note 125, G.O. 31, 35, 71, 99, 111; Orders and Special Orders, *supra* note 175, G.O. 195 (1847). The only exception is a Mexican soldier charged with a “[v]iolation of the laws of war” for carrying arms after the capitulation of Mexico City. Orders and Special Orders, *supra* note 175, G.O. 291 (1847).

244. BAUER, *supra* note 75, at 41-42.

245. *Id.* at 296, 304-05 n.37; LIVERMORE, *supra* note 29, at 159-61.

246. BAUER, *supra* note 75, at 296, 304-05 n.37; LIVERMORE, *supra* note 29, at 159-61.

247. Orders and Special Orders, *supra* note 175, G.O. 181 (1847).

248. S. DOC. NO. 18, (1850), *supra* note 237, at 598.

249. *Id.*

250. See S. DOC. NO. 331 pt. 3, *supra* note 237, at 2820.

251. See BYNKERSHOEK, *supra* note 86, at 2, 18-23, 174-75 (discussing how every act against an

Although Scott never set out extensive procedural requirements for the councils, they followed commission and court-martial procedure.²⁵² The only significant departure was the use of three to five members, rather than five to thirteen.²⁵³ Otherwise, they had all the procedural protections of commissions, and sometimes more. One Mexican prisoner, for instance, “was allowed an attorney as his counsel, who was present during the whole proceedings,”²⁵⁴ and spared no rhetorical flourishes in his defense statement. His entreaty to the “descendants of the land of the immortal Washington” not to let the sword of Justice “discharge its blow on the head of the innocent,” was apparently effective, as the prisoner was acquitted.²⁵⁵ The conviction rates for councils scarcely broke fifty percent, slightly lower than the rate for commissions.²⁵⁶

If the councils’ procedural law was generous, their substantive law was quite harsh; it was meant to suppress, not conciliate. Those convicted of enticing desertion were almost always sentenced to death,²⁵⁷ although the punishment for desertion was sometimes lighter.²⁵⁸ However, this penalty, too, was well within the laws of war. Even the comparatively mild Vattel remarks that “[f]oreign recruiters are hanged without mercy, and justly so,” even if they “used no other means than enticement”; and he considers enticing desertion to the enemy an even worse offense.²⁵⁹

B. Trials of Guerrillas

The second use of councils was to try charges of “Guerilla warfare.”²⁶⁰ Although most scholars have stressed the “law of war” jurisdiction as the reason for creating councils of war,²⁶¹ their purpose was to allow for summary trials as well as to close a jurisdictional gap. The order explaining the councils’ composition and purpose, General Orders 372 of 1847, provides that captured guerrillas shall “not [be] put to death

enemy is lawful and transfer of allegiance is allowed where no law prohibits it); VATTEL, *supra* note 93, at 240-41 (discussing enticing desertion to the enemy).

252. WINTHROP, *supra* note 23, at 1298-99 (stating council of war did not “materially [differ] from the military commission except in the class of cases referred to it.”).

253. *See* Orders and Special Orders, *supra* note 175, G.O. 181, 184 (1847); *see e.g.*, Butler and Worth Orders, *supra* note 125, G.O. 34, 35.

254. Case Files, *supra* note 123, FF-19, at 55.

255. *Id.*

256. Glazier, *Precedents Lost*, *supra* note 23, at 37.

257. *See* Butler and Worth Orders, *supra* note 125, G.O. 31, 35, 111 (convicted recruiters sentenced to death); *but see* Orders and Special Orders, *supra* note 175, G.O. 195 (1847) (convicted recruiter sentenced to confinement for the duration of the war).

258. *See* Butler and Worth Orders, *supra* note 125, G.O. 44, 107 (deserters sentenced to fifty lashes); BAUER, *supra* note 75, at 304-05 n.37 (ten of San Patricio deserters sentenced to fifty lashes; fifty-one sentenced to death).

259. VATTEL, *supra* note 93, at 240-41.

260. WINTHROP, *supra* note 23, at 1299.

261. *See, e.g.*, Thravalos, *supra* note 25, at 746.

without due solemnity,” but given “a council of war for the summary trial of the offenders under the known laws of war....”²⁶² Unlike the councils for enticing desertion, in these councils the substantive law sometimes overlapped with commissions, while the procedural law sharply differed.

Because of Scott’s successful conciliation strategies, he never faced the popular resistance that Taylor did. His primary problem with guerrillas was the Light Corps, units of irregular fighters organized and commissioned by the Mexican government.²⁶³ These highly trained groups worked as assassins and highway robbers to disrupt Scott’s lines of supply and communication.²⁶⁴ While they failed to affect the course of the war, they were a serious nuisance, and Scott reserved his harshest tactics for exterminating “those atrocious bands.”²⁶⁵ His methods included the creation of a “special antiguerrilla brigade,” made up largely of Texas Rangers under the command of Brigadier General Lane.²⁶⁶ This brigade operated as a flexible strike force, using guerrilla tactics on “search and destroy missions”²⁶⁷ intended to “carry[] the war” to the guerrillas.²⁶⁸ Scott may have had Lane’s brigade in mind when he issued General Orders 372; he issued the order from Mexico City just as Lane moved his base of operations to the capital.²⁶⁹ At any rate, the order seems clearly designed for use by antiguerrilla detachments. It begins by commanding all posts to “daily push detachments... to disinfest the neighborhood” of guerrillas, and ends by authorizing commanders of detached brigades to order the councils.²⁷⁰ If the councils were meant for use by these detachments, the need for summary procedures is obvious. The antiguerrilla detachments were often small and depended on speed and flexibility for their success.²⁷¹ It would have been impracticable for them to hold lengthy tribunals, and transporting prisoners could have seriously hampered their effectiveness.

The councils may have been essentially battlefield courts, explaining their loose procedural requirements. Though only a “general officer commanding an army, or colonel commanding a separate department” could order courts-martial and military commissions for serious offenses,²⁷² “commanders of detached divisions or brigades,” such

262. S. DOC. NO. 331 pt. 3, *supra* note 237, at 2820.

263. CARNEY, *supra* note 242, at 14-15, 30-31.

264. Knapp, *supra* note 203, at 18-21

265. S. DOC. NO. 331 pt. 3, *supra* note 234, at 2820; *see also* CARNEY, *supra* note 242, at 36-38 (describing extensive efforts to suppress the corps, including a forty-five minute cannonade).

266. CARNEY, *supra* note 242, at 36.

267. Knapp, *supra* note 203, at 51.

268. CARNEY, *supra* note 242, at 36.

269. *See* Knapp, *supra* note 203, at 53.

270. S. DOC. NO. 331 pt. 3, *supra* note 237, at 2820.

271. *See* JOHN SALMON FORD, RIP FORD’S TEXAS 86-98 (Stephen B. Oates ed., Univ. of Tex. Press 1963) (describing “hunting Guerrilleros”); LANE, *supra* note 223, at 64-66 (describing an anti-guerrilla operation).

272. BENET, *supra* note 121, at Appendix 349. Until 1861, commanders of detached brigades had

as Lane, could order councils of war, and approve and execute even capital sentences without review by a higher authority.²⁷³ Commanders with even lower ranks could order councils “in extreme cases.”²⁷⁴ Councils could consist of three officers, rather than the usual minimum of five, and need not have a judge advocate or defense counsel.²⁷⁵ The rules of evidence were also suspended; a council could convict on any “satisfactory proof” of guilt.²⁷⁶ The councils had jurisdiction over any “‘flagrant’ violations of the laws of war,” and could condemn a prisoner who “belonged to any party or group of known robbers or murderers or had actually committed murder or robbery upon any American officer or soldier” to death or lashes.²⁷⁷

The intent of G.O. 372 may have been less to improvise a new type of tribunal than to formalize the practice of the antiguerrilla detachments. The order itself suggests that such tribunals were already occurring, stating “[I]t has become necessary, in order to insure vigor and uniformity in the pursuit of the evil, to announce to all the views and instructions of general headquarters on the subject.”²⁷⁸ Tribunals like Scott’s councils were colloquially known as drumhead courts-martial, and had been used throughout the war.²⁷⁹ Lane, while fighting under Taylor, ordered a drumhead court-martial to try a suspected guerrilla leader. On the identification of the guerrilla by Lane’s Mexican guides, Lane’s brigade took him prisoner one day, tried him the next, and shot him the day after, so that “as many Mexicans [could] witness the execution as possible.”²⁸⁰ General Taylor “expressed himself well pleased with [the] mission, stating it would be a death blow to guerrillas in that part of the country.”²⁸¹ Similar

to report cases to “the commanding officer of the department,” who would order the court-martial. *Id.* at 17, Appendix 353.

273. S. DOC. NO. 331 pt. 3, *supra* note 237, at 2820.

274. *Id.*

275. *Id.*

276. *Id.*

277. Although Chomsky claims that “it is [] not possible to learn what the army considered to be . . . a ‘flagrant’ violation of the laws of war,” Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13, 65 n.326 (1990), it is most likely that belonging to a band of robbers or murderers was the flagrant violation. The bands were unconventional combatants who paid little attention, as Scott said, to the “rule[s] of warfare observed by civilized nations,” S. DOC. NO. 331 pt. 3, *supra* note 234, at 2820. This interpretation of Scott’s order supports Justice Thomas’ dissenting position in *Hamdan*, that “unlawful combatants . . . violate the law of war merely by joining an organization” that is against the laws of war, but likely does not qualify as the “plain and unambiguous” precedent that the plurality requires. *Hamdan v. Rumsfeld*, 548 U.S. 557, 694 (2006) (Thomas, J., dissenting); *id.* at 603-04 (majority opinion).

278. S. DOC. NO. 331 pt. 3, *supra* note 237, at 2820.

279. “Drumhead court-martial” was also a colloquial name for the regimental courts-martial, which was authorized by the Articles of War. However, the drum-head courts-martial that tried guerrillas did not follow the jurisdictional limits of regimental courts-martial, as they were trying unconventional combatants, and also did not follow their limits on punishments, as they awarded capital sentences.

280. LANE, *supra* note 223, at 54.

281. *Id.* at 55.

drumhead courts-martial were used in New Mexico.²⁸² The purpose of formalizing the tribunals—apart from Scott’s love of formality—was probably in part to intimidate the guerrillas, and in part to restrain the Texas Rangers by instituting some official requirements.

While the purpose of these councils seems clear, their use under the order is not. No official records or transcripts of such councils seem to be extant, and it is possible that none, or very few, were ever held. Councils ordered by detached divisions and brigades would not appear in the general orders, as tribunals ordered by higher-ranking commanders do, though the general orders could have been used to publicize successes. General Orders 372 does require that punishments by councils “be duly reported to general headquarters,”²⁸³ but if such reports were written, no known collection of them exists. One captain, however, was arrested for executing two prisoners “without the sanction of a council of war” when “a council of war could easily have been assembled,” suggesting that councils were used under such circumstances, or at least recognized as the proper procedure.²⁸⁴ Given the Texas Rangers’ “one-slug-fits-all-crimes” approach to justice, Lane’s brigade probably did not follow Scott’s procedures to the letter when dealing with their prisoners,²⁸⁵ but the order could have encouraged some review of prisoners. Unlike the commissions, however, the councils do not seem to have been widely used or to have had a pronounced effect on the war; in Carney’s estimation, they “failed to diminish the Light Corps’ effect[s].”²⁸⁶

As well as being the least effective of the tribunals Scott created, the councils for guerrillas also had the shakiest grounding under the law of war. According to Bynkershoek, while it is not clear when unconventional combatants violate the law of war, it is not a violation of the law of war to summarily execute untraditional combatants, much less to try them in

282. *Santa Fe, murder of Lieut. Brown; Indian Attack, Disease*, 73 NILES REG. 76 (Oct. 2, 1847) (six prisoners hung under sentence of drumhead court martial for murdering American officer), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesi1847SepOct.htm>; *Trials for Treason in New Mexico*, 72 NILES’ NAT’L REG. 172-173 (May 15, 1847), available at <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Niles1847MayJun.htm>.

283. S. DOC. NO. 331 pt. 3, *supra* note 237, at 2820.

284. S. EXEC. DOC. 18, *supra* note 237, at 488.

285. Lyles, *supra* note 54, at 85-86. See also FORD, *supra* note 271, at 81-83, 90-91.

286. CARNEY, *supra* note 242, at 37. Glazier’s assertion that Butler “revoked the delegation of approval authority just four months” after Scott issued G.O. 372 is not entirely accurate. Butler did not revoke the ability of detached brigades to hold councils, and required approval by the Commanding General only for death sentences. Butler and Worth Orders, *supra* note 125, G.O. 37. Of course, removing the approval authority for death sentences would have seriously hampered the council’s effectiveness in antiguerrilla operations, but, as active hostilities had ended before the order was issued, such operations were far less necessary. See CARNEY, *supra* note 242, at 39 (noting the Treaty of Guadalupe Hidalgo signed February 1848); Butler and Worth Orders, *supra* note 125, G.O. 37 (Butler’s order issued March 1848). Butler’s revocation of detached brigades’ death sentence authority is another indication that such brigades were holding councils of war.

summary tribunals.²⁸⁷ But under the view of Vattel, the prevailing authority, the councils of guerrillas were problematic. G.O. 372 authorizes the same type of tribunal, for the same offenses under the laws of war, whether the offenders were “serving under Mexican commissions or not.”²⁸⁸ However, guerrillas commissioned by the Mexican government were legal combatants, while guerrillas acting on their own behalf were not.²⁸⁹ This distinction created a similar jurisdictional problem to one plaguing current military commissions: guerrillas who were not legally combatants could not violate the law of war, and guerrillas who were legally combatants would not violate it by killing the enemy or destroying his property.²⁹⁰

Military commissions could, and did, try guerrillas who were not authorized combatants, as robbery and murder violated the criminal law.²⁹¹ Indeed, as Scott and Butler’s councils never tried charges of guerrilla activity, the higher-ranking commanders seem to have used commissions in preference to councils, supporting the theory that the councils were primarily designed for use by antiguerrilla detachments. Using the councils to try such unauthorized combatants was permissible under the law of war, although the guerrillas’ offenses were not technically law of war violations. As Vattel explains, subjects “may not commit any acts of hostility without the order of the sovereign.”²⁹² A violation of this rule is not against the law of nations “strictly so called,” as the combatants have no duty to the enemy nation, but a commander may treat violators “without mercy, and hang[] them as he would robbers or brigands.”²⁹³

The problem with this justification was that most of the guerrillas plaguing Scott’s line were in the Light Corps, and were authorized as combatants by the Mexican government.²⁹⁴ Probably for this reason, Scott relies on a second justification given by Vattel, that when enemy forces ignore the laws of war, as the guerrillas generally did by refusing to give quarter, a commander “may punish the Nation in the person of those whom

287. BYNKERSHOEK, *supra* note 86, at 131, 127-146 (discussing pirates and privateers).

288. S. DOC. NO. 331 pt. 3, *supra* note 237, at 2820.

289. *See generally* VATTEL, *supra* note 93, at 318-319.

290. *Id.* at 287-88, 293, 318-319; *see* David Glazier, *A Self-Inflicted Wound: A Half-Dozen Years of Turmoil over the Guantanamo Military Commissions* 12 LEWIS & CLARK L. REV. 131, 186-87 (2008) (distinguishing between treatment of combatants and non-combatants).

291. Case Files, *supra* note 123, EE-657, at 3-6 (Mexican charged before military commission with belonging to a band of guerrillas); Butler and Worth Orders, *supra* note 125, G.O. 89 (Mexicans charged before military commission with murder and robbery on the highway). Highway robbers were not necessarily guerrillas, *see* Butler and Worth Orders, *supra* note 125, G.O. 86 (describing an American charged with highway robbery), but highway robbery and murder were the quintessential guerrilla activities. *See* S. DOC. NO. 331 pt. 3, *supra* note 237, at 2820.

292. VATTEL, *supra* note 93, at 318.

293. *Id.*

294. *See Gen. Jose Mariano de Salas’ Guerrilla Proclamation*, 72 NILES’ NAT’L REG. 185 (May 22, 1847), *available at* <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesg1847MayJun.htm>.

he captures.”²⁹⁵ As Scott put it, “it is a universal right of war, not to give quarter to an enemy that puts to death all who fall into his hands.”²⁹⁶ According to this rule, Scott still provided more process than mandated, as he could have had the guerrillas summarily executed.

However, while the councils were probably within the law of nations, they were not, like the commissions and councils of deserters, at the forefront of it, and were not as accepted or successful. As well as being less effective as a military strategy, the councils also faced more contemporary criticism than the commissions. One critic, arguing that guerrillas should have been treated as prisoners of war, attacked the councils as “palpably unjust,” and displaying “a painful disregard for human life.”²⁹⁷ However, given that other Mexican War commanders had suspected guerrillas summarily executed,²⁹⁸ few involved in the war effort would have seen Scott’s order as surprisingly harsh. More likely, they would have seen the formalization of drumhead courts-martial as another example of Old Fuss and Feathers’ fondness for legal process.

IV. Subsequent Influence of Scott’s Tribunals

After the Mexican War, Scott’s tribunals served as an influential model in the development of domestic and international occupation law. At the war’s end, while no one was denouncing the tribunals as illegal,²⁹⁹ they had not been officially recognized as valid. The first official responses, in an 1851 Attorney General opinion and Supreme Court dicta, were somewhat tepid endorsements. Both suggested that the tribunals had been valid for the duration of the war, as part of “the temporary government established under the law of nations by the rights of war” or “the rules and articles for the government of the army.”³⁰⁰

The Civil War, re-establishing the necessity for the tribunals, finally provided them with a firm legal footing. Early in the war, needing a way to try criminal and law of war offenses in rebel states, commanders turned to Scott’s tribunals as models. The Secretary of the Treasury, reporting an 1861 conversation with Judge Advocate General Lee, remarked that he “seemed to favor Military Commissions for the trial of

295. VATEL, *supra* note 293, at 280.

296. SCOTT, *supra* note 72, at 575.

297. JAY, *supra* note 108, at 205-07; *see also Money Discovered, and Guerrilla Activity*, 73 NILES’ NAT’L REG. 280 (Jan. 1, 1848), *available at* <http://www.history.vt.edu/MxAmWar/Newspapers/Niles/Nilesk1848.htm>.

298. JAY, *supra* note 108, at 205-07; SMITH, WAR WITH MEXICO, *supra* note 41, at 170 (Wool, in Northern Mexico, issued an order in July 1847 “that any guerillas caught by him would be executed.”).

299. *See* SCOTT, *supra* note 72, at 395-96.

300. *Opinions of Attorneys General*, Vol. II, H. EXEC. DOC. NO. 55, at 1988 (1851); *see* Jecker v. Montgomery, 54 U.S. 498, 515 (1851).

questions not cognizable by Courts Martial. He promised to send an order of Gen. Scott, issued in Mexico, which might serve as a precedent."³⁰¹ Commissions were established, "convened as early as in 1861,"³⁰² and tried "upwards of two thousand cases" during the war.³⁰³ These military commissions, with a few jurisdictional changes from Scott's practice, "soon came to be generally adopted as authorized and established tribunals for time of war...."³⁰⁴ Such tribunals continued to be used throughout the nineteenth and twentieth centuries, and Scott's tribunals are still looked to as "the foundation for contemporary military commissions."³⁰⁵

Scott's practices in the Mexican War also had a significant influence on the development of international law. The second half of the nineteenth century was a time of drastic change in the laws of war. Before the Mexican War, international law offered few specific precepts on the conduct of occupying forces; authorities either provided virtually no restrictions on the powers of occupiers, or gave little more than general rules that noncombatants should not be unnecessarily harmed. Scott, by far exceeding these rules, made his occupation of Mexico both successful and relatively humane. After the Mexican War, international law entered a period of codification, becoming much more specific and much more restrictive. The influence of Scott's practices in this development "can clearly be seen in the specific provisions of occupation law as subsequently codified...[S]pecific measures taken by the Americans in Mexico will be seen to now generally be the actual rule."³⁰⁶ This influence can be seen in both prominent domestic authorities, such as the Lieber Code and Winthrop's Military Law and Precedents, and in the early international codes such as the Brussels Declaration of 1874 and the Hague Conventions of 1899.³⁰⁷ Scott's lawfare not only helped him win his campaign; it put the United States at the forefront of international law.

301. 1 The Salmon P. Chase Papers: Journals, 1829-1872, at 316-17 (John Niven, ed., Kent State Univ. Press 1993).

302. WINTHROP, *supra* note 23, at 1299.

303. *Id.* at 1302.

304. *Id.* at 1299. The jurisdictions of Scott's military commission and council of war, over common criminal law and law of war offenses, were united in a single court, called a military commission. *Id.* While the combined tribunal appeared much like Scott's commission, it also retained the flexibility of his council of war: the minimum was three members, not five, and the tribunals were not required to have a separate judge advocate, one member simply took on the role. *Id.* at 1304. Congress also finally amended the Articles of War to allow courts-martial for common law offenses by soldiers. LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER 50-51 (Univ. Press of Kan. 2005).

305. Major Scott R. Morris, *The Laws of War: Rules by Warriors for Warriors*, 1997 ARMY LAW. 4, 8 (1997).

306. David Glazier, *Ignorance is Not Bliss: The Law of Belligerent Occupation and the U.S. Invasion of Iraq*, 58 RUTGERS L. REV. 121, 146 (2005).

307. *Id.* at 131-32, 135.

Conclusion: Scott's Lessons

Scott's careful innovations in the Mexican War were the first, and also one of the most successful, uses of military commissions. While the war itself is generally remembered as unjust, Scott's handling of the occupation was both humane and effective. His tribunals' combination of conciliatory and aggressive elements helped Scott to conquer a peace, bringing a quick and relatively bloodless end to what could have been a brutal and protracted occupation. They were an effective lawfare strategy, neutralizing guerrillas' attempts to provoke reprisals and improving civilian relations. By his own estimation, without the military commissions, Scott "could not have maintained the discipline and honor of the army, or have reached the capital of Mexico."³⁰⁸ The tribunals were a success because they managed to combine flexibility to respond to military exigencies with process to legitimate the innovations. Scott's expertise in both law and military strategy greatly aided him in striking this balance. Modern military commissions have not combined these factors, and have not replicated this success. The commission system has been mainly designed by civilians, and, while it is an innovative strategy, its level of process has not proven high enough for widespread acceptance.

Both the Mexican War and the War on Terror were new types of conflict for the United States, necessitating new legal strategies. At the beginning of the Mexican War, United States law was not designed to handle an occupation of a foreign country. While Taylor's response to the problem of soldiers' crimes, discharging the offenders, was legally unobjectionable, it was ineffectual. Scott's response, creating the military commission system, was legally riskier, but functioned far better as a military strategy. Scott maintained a flexible approach to tribunals throughout his campaign, making them responsive to the military situation; when recruitment or desertion became a problem, he created a new tribunal to handle it, and innovated yet again to make the tribunals suitable for antiguerrilla detachments.

Along with the need to innovate comes the need to legitimize the innovations, by applying as high a degree of procedure as practicable. Scott's practice of adopting high procedural protections was key to his commissions' acceptance as fair tribunals by the military, the occupied nation, and the American public. While the commissions trying American soldiers had little precedent and were legally questionable, Scott shielded them from criticism by making them as protective of defendants as the existing systems, borrowing the procedural law from courts-martial and the substantive law from the states. In the tribunals of Mexicans, aside from the councils of guerrillas, Scott went even farther, providing a much higher

308. SCOTT, *supra* note 72, at 394-95.

level of process than the period's law of war mandated. Indeed, the law of war as it then existed provided few clear legal constraints for a commander dealing with an occupied population. Scott had, as a practical matter at least, nearly unlimited discretion, and could have ordered suspects to be summarily executed. Instead, by designing the tribunal system to be equally protective of Mexican and American defendants, Scott ensured that the system would be an asset in his civilian relations campaign, and would not become a recruiting tool for insurgents.

Scott's expertise in both law and military strategy were key to maintaining the tribunals' balance between flexibility and process. The Mexican War commissions and councils were entirely designed and executed by the military. Scott himself designed the system, employing his training as both a lawyer and a strategist, and, as the commander of the occupying army, his extensive knowledge of the occupation. The tribunals would have benefited from a greater availability of officers with legal training, but overall they both comported with international and domestic law and contributed to the success of the campaign. While the military's autonomy in designing and implementing the tribunals was a result of the Polk Administration's political cowardice, not of its foresight, it proved to be very effective.

The War on Terror military commission system has not implemented this balance of flexibility and process, has not taken full advantage of military expertise, and has not been successful. The military commission system is innovative, designed for the current conflict and substantially revised in response to Supreme Court decisions and public criticism. Much of the academic debate over the commissions has advocated strategies that fit into pre-existing legal models, either arguing that detainees should be treated as criminals and tried in federal district courts, or that they should be treated as military prisoners and detained with little process.³⁰⁹ Both models are problematic. Criminal prosecutions of detainees would raise complications with obtaining intelligence and handling classified material.³¹⁰ Traditional military detentions do not address the increased risk of erroneous classification when detaining suspected terrorists rather than members of an enemy army.³¹¹ Adequate solutions to the legal problems of dealing with suspected terrorists are likely to require substantial innovations.

However, those who designed the military commission system did not provide a high level of process to legitimate the new tribunal; the military commissions are generally seen as having a lower level of process

309. See Robert Chesney & Jack Goldsmith, *Terrorism and the Convergence of Criminal and Military Detention Models*, 60 STAN. L. REV. 1079 (2008).

310. *Id.* at 1087-92; See *Military Commissions to Try Enemy Combatants: Hearing Before the H. Comm. on Armed Services*, 109th Cong., (2006) (Statement of Daniel J. Dell'Orto, Principal Deputy General Counsel, Department of Defense), 2006 WL 1903607.

311. Chesney, *supra* note 309.

than alternative criminal or military courts.³¹² As a result, the commissions have not been an effective strategy. They are widely regarded as unfair, and have served to divert public attention from the terrorists' offenses to America's detention practices, helping to undermine public support for the conflict.³¹³ While some of the procedural departures may be necessary to protect national security, the Bush Administration does not seem to have adequately weighed the cost in domestic and international support. Instead, the Administration's lawyers seemed to have a tendency to "view the law as a barrier to executive action"³¹⁴ and to assume that a lower level of legal process would correlate with a higher level of military success.

Finally, unlike the Mexican War tribunal system, designed by the military, the War on Terror commission system was designed by civilian government lawyers, not the military. Many of the military's lawyers argued against the establishment of military commissions, on the ground that courts-martial were adequate to try detainees.³¹⁵ After the commissions were established, the top-ranking lawyers of both the Army and the Marines argued in Congressional hearings that commission procedures should be more protective of defendants, taking positions that "directly conflicted with the position of the civilians in the Bush Administration."³¹⁶ Sulmasy and Yoo argue that military lawyers have had too much influence over modern military commissions—harming civilian control over the military—and that "[c]laims of deference to military expertise" are not as compelling "when the rules of warfare are being adapted to a new situation."³¹⁷ However, the Mexican War experience suggests otherwise, showing that the ability of military lawyers to combine knowledge of international law with knowledge of the military situation and strategy can be extremely helpful in adapting the rules of warfare to new situations.

The Bush Administration's tendency to see lawfare as a weapon against America, rather than a strategy it can employ, caused it to fail to design effective legal strategies for the War on Terror. While the Administration favored minimizing the United States' international

312. Compare 10 U.S.C. § 949d with MILITARY R. EVID. 505; compare 10 U.S.C. § 949a(a)(2) with MILITARY R. EVID. 505; see *Military Commissions to Try Enemy Combatants: Hearing Before the H. Comm. on Armed Services*, 109th Cong., (2006) (Statement of Steven Bradbury, Acting Assistant Attorney General, Department of Justice), 2006 WL 2568898; *Military Commissions to Try Enemy Combatants: Hearing Before the H. Comm. on Armed Services*, 109th Cong., (2006) (Statement of Daniel J. Dell'Orto, Principal Deputy General Counsel, Department of Defense), 2006 WL 1903607; see also James Nicholas Boeving, *The Right to be Present Before Military Commissions and Federal Courts: Protecting National Security in an Age of Classified Information*, 30 HARV. J.L. & PUB. POL'Y 463, 506-12 (2007).

313. See David Glazier, *supra* note 283.

314. Richard Shragger, *Cooler Heads: The Difference Between the President's Lawyers and the Military's*, SLATE, Sept. 20, 2006, <http://www.slate.com/id/2150050/>; see Sulmasy, *supra* note 2, at 1833, 1838.

315. See Shragger, *supra* note 314; Sulmasy, *supra* note 2, at 1820, 1832-33.

316. Sulmasy, *supra* note 2, at 1820, 1832-33.

317. *Id.* at 1835.

obligations, Scott's experience shows that exceeding these obligations, particularly when legal innovations are necessary, can be a far more effective lawfare strategy. Exceeding international obligations may not always be an effective strategy, especially since the requirements of international law are far more demanding today than they were during the Mexican War. However, lawfare now, as in the Mexican War, is essentially about changing public perceptions of a conflict. The more permissive an interpretation of international law the United States adopts, the more easily enemies can use lawfare to create the perception that the country is acting unjustly. While the benefits of permissive interpretations may sometimes be worth the harm to public perceptions, the government should not disregard this cost.

The military commission system, as well as other legal strategies in the War on Terror, is likely to undergo substantial revision in response to litigation and public pressures. The beginning of a new administration offers an opportunity for the government to redesign its legal strategy and distance itself from the current problems. In their attempts to develop an effective and fair system for dealing with suspected unlawful enemy combatants, those who shape the modern tribunals should look back to the first use of military commissions, and to the combination of flexibility and process that made them successful. They should not, like Taylor, lightly throw aside Scott's lessons.