

MILITARY COMMISSION TRIALS

By Bob Harmon

Who could these men be? What were they talking about? What authority could they represent? K. lived in a country with a legal constitution, there was universal peace, all the laws were in force; who dared seize him in his own dwelling? He had always been inclined to take things easily, to believe in the worst only when the worst happened, to take no care for the morrow even when the outlook was threatening. But that struck him as not being the right policy here, one could certainly regard the whole thing as a joke, a rude joke which his colleagues in the Bank had concocted for some unknown reason ...

— Franz Kafka, *The Trial*¹

Questions considered:

What is the current state of military commissions, i.e., their current authorities, the various forms they have taken, the impact on due process, the constraints on defense counsel and discovery, their historical/legal context and how the Administration thinks it can “get away with it?”

Brief Answer:

Military commissions, re-established by Bush Administration decree after 9/11, are a type of extraordinary wartime tribunal, very unlike courts-martial – and with a flimsy basis in statutes and case law. Unlike courts-martial, which try soldiers, these military courts **can try anybody, anywhere** on this planet, for offenses created by military custom and Executive order, not statutory law; try them on rules of evidence and procedure they can make up as it suits them; and try them without judicial appeal – essentially, a latter-day Court of Star Chamber.

These military commissions are not yet fully operational but present a very real possibility of secret and arbitrary trials that mock due process and make judicial murder a real possibility. The accused are subject to this by being designated, on the President’s say-so, “enemy combatants” outside the protections of U.S. and international law. The tribunals are – so far – aimed at non-U.S. citizens, though U.S. citizens could very easily face these drumhead proceedings. Those who participate in these “trials” as court members, custodial personnel, or in the chain of command – up to the Secretary of Defense and the President – are committing a crime.

¹ Franz Kafka, *THE TRIAL* 7 (Borzoi, 10th ed., 1953).

Facts:

The definition; the differences

A special and hitherto unusual proceeding, military commissions were once similar to courts-martial, though courts-martial have since evolved into a formal court system, with rules of evidence, procedure and appeal, very much resembling civilian courts, particularly in General Courts-Martial.² Military commissions, as currently constituted, however, are special military tribunals³ by which the U.S. military may try *any* persons, particularly non-U.S. military (e.g., spies, “enemy combatants,” etc.); the authority for these courts is by executive order of the current Administration. As currently authorized, these courts may determine rules of evidence, may adjudge verdict and pass sentences of imprisonment or death, and appeals to any U.S. or international court are forbidden.⁴

Some of the differences from standard courts-martial:

Courts-Martial

Have jurisdiction over those persons, usually service members, who are subject to the Uniform Code of Military Justice (UCMJ),⁵ worldwide.⁶

Trial convened by court-martial Convening Authority (usually a field commander). Courts-martial are established and operate by authority of Acts of Congress – the UCMJ.⁹

Court-martial panel appointed per UCMJ; presiding judge and defense counsel from independent (outside chain of command) sources.¹¹ Defendant can retain civilian counsel who need only be licensed to practice in civilian jurisdiction.¹²

Military Commissions

Have jurisdiction over any person – not a U.S. citizen⁷ – deemed an “enemy combatant.” Tribunal can convene anywhere in the world, at least where U.S. forces control.

A single “Appointing Authority,” currently Maj. Gen. (retired) John G. Altenburg.⁸

Created by presidential decree.¹⁰ Congressional authorization construed from the war authorization and certain mentions of military commissions in 10 U.S.C.

Military commission president & members can be removed “for good cause.”¹³ Military defense counsel detailed to the accused by an Office of Chief Defense Counsel created under the President’s Order; civilian counsel must come from a security-cleared “pool.”¹⁴

² Maj. Timothy C. MacDonnell (Prof., Crim. Law), *Military Commissions and Courts-Martial: A brief Discussion of the Constitutional and Jurisdictional Distinctions between the two Courts*, 2002-MAR ARMY LAW. 19.

³ Hereinafter, the word “tribunal” is a synonym for military commissions.

⁴ Though habeas may still be available. See *ex parte Quirin*, 317 U.S. 1, 24 (1942).

⁵ Art. 2, 3 & 5, UCMJ (10 U.S.C. §§ 802-803, 805).

⁶ Art. 5, UCMJ.

⁷ *Military Order of November 13, 2001*, 66 F.R. 57833, 57834 (Nov. 16, 2001), § 2(a) defining “persons subject to this order.” Hereinafter, “President’s Military Order.” See also *id.*, § 7(b)(1).

⁸ Succeeding former Assistant Secretary of Defense Paul Wolfowitz. *Military Commission Order No. 5* (March 15, 2004). MG Altenburg was formerly Assistant Judge Advocate General, Dept. of the Army, until retiring in 2001. [Biography](#), online at Defenselink website www.defenselink.mil.

⁹ Art. 1-146 is the UCMJ (10 U.S.C. §§ 801-946 respectively). See esp. Arts. 16-29 on courts-martial composition and jurisdiction.

¹⁰ *President’s Military Order*, supra note 5.

¹¹ Art. 6a, 26, 27 UCMJ (10 U.S.C. §§ 806a, 826-827).

¹² Art. 26(b) UCMJ. See online www.nlg.org/mltf, click on “Military Law” and then “General” for qualification of civilian counsel.

¹³ *Military Commission Instruction No. 8*, “Administrative Procedures.”

¹⁴ *Military Commission Instruction No. 5*, “Qualification of Civilian Defense Counsel.”

Guided by the Manual for Courts-Martial (MCM) and the Rules for Courts-Martial (RCM) therein.

Must follow the Military Rules of Evidence in the MCM and evidentiary case law.

Must comply with Art. 31 limitations on pretrial interrogations²⁰ Prisoners may not be subjected to punishment, or confinement “any more rigorous than the circumstances required to insure his presence” before trial.²¹

Tries accused for statutory offenses specified in the UCMJ punitive articles (Art. 77-134). Includes crimes of common-law nature, e.g., rape, murder, larceny.

Penalty specified by MCM; death penalty only where punitive statute²⁸ on the offense charged expressly provides for it.

2/3 vote for verdict and sentence; 3/4 vote for >10 years’ imprisonment; unanimous vote required for death sentence³⁰

Guided by Military Commission *Orders* and *Instructions* created by DoD;¹⁵ also a draft [trial guide](#). MCM doesn’t apply.¹⁶

Whatever tribunal president deems to “have probative value to a reasonable person”¹⁷ is admissible. Could include *ex parte*, *in camera* evidence.¹⁸ Majority of panel can overrule presiding officer.¹⁹

Whatever evidence has “probative value”. Accused must be “treated humanely” in detention, however the Administration defines it.²²

Tries “crimes triable by military commission”²³ named by DoD in the Instructions,²⁴ an Executive, not statutory, enactment. “Each element need not be specifically charged.”²⁵ “Terrorism” is one offense so named.²⁶ Much language from customary law of war, e.g., misusing a flag of truce, “pillaging,” “treachery or perfidy,” etc.²⁷

“[A] sentence that is appropriate to the offense or offenses ... may include death, imprisonment for life or for any lesser term, payment of a fine or restitution, or such other lawful punishment or condition of punishment as the Commission shall determine to be proper.”²⁹

2/3 vote for verdict and sentence, including 2/3 (possibly) for death sentences if the *President’s Military Order* prevails.³¹

¹⁵ See online DoD [Military Commissions webpage](#).

¹⁶ *President’s Military Order*, *supra* note 5, § 2(a)(2)(b).

¹⁷ *President’s Military Order*, *supra* note 5, § 4(c)(3).

¹⁸ *Military Commission Order No. 1* (March 21, 2002), §§ 6B(3); 6D(3)&(4).

¹⁹ *Id.*, § 6D(1); also *Military Order*, *supra* note 5, § 4(c)(3).

²⁰ Art. 31 (10 U.S.C. § 831). Military courts have construed Art. 31 to be broader than *Miranda*. *U.S. v. Baird*, 851 F.2d 376, 383 (D.C. Cir., 1988).

²¹ Art. 13 UCMJ.

²² *President’s Military Order*, *supra*, §§ 3 and 4(c)(3). “Treated humanely” may be an elastic definition, see the Bybee memo redefining “torture,” below.

²³ 32 C.F.R. § 11.3(c),

²⁴ 32 C.F.R. § 11.6.

²⁵ 32 C.F.R. § 11.6(a).

²⁶ *Military Commission Instruction No. 2*, ¶ 6B(2), albeit defining terrorism with less precision than 18 U.S.C. §§ 2331 *et seq.*, under which terrorism is already a Federal criminal offense, in a body of statutes (Chapter 113B, Title 18) with enactments in 1990 and 1996.

²⁷ That tribunals try customary law of war, and courts-martial the statutory offenses set by Congress, was a divergence noted as far back as the Civil War. Louis Fisher, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER* 48 (University Press of Kansas, 2005).

²⁸ Punitive statutes are Art. 77-134 (10 U.S.C. §§ 877-934).

²⁹ *Military Commission Order No. 1*, *supra*, ¶ 6G; 32 C.F.R. § 9.6(g).

³⁰ Art. 52(b); RCM 1006(d)(4).

³¹ *President’s Military Order*, *supra* note 5, § 4(a). Contrast with *Military Commission Order No. 1* (Aug. 31, 2005), ¶¶ 6F & 7B.

Findings and sentence appealed through military appellate system and (ultimately, via *cert.*) to U.S. Supreme Court

Executive review panel only; no judicial appeal.³² “Any sentence made final by action of the President or the Secretary of Defense shall be carried out promptly.”³³

“Enemy Combatants,” attaining of: Personal jurisdiction *para bellum*:

When reminded that, after all, a crime had to have been committed for there to be a criminal, Knarrpanti opined that once the criminal was identified, it was a simple matter to find out what his crime had been. Only a superficial and careless judge would ... not be able to slip into the inquest some small lapse or other on the defendant’s part that would justify the arrest.³⁴

The UCMJ and the military-commissions order create “status-based” jurisdiction over the people they will try: the former, to military servicemembers and those who in some way accompany them;³⁵ the latter, to non-U.S. citizens accused of complicity with al-Qaeda. Since the latter are not legal combatants as defined by the Administration’s notions about the Geneva Convention³⁶ these persons are, by their decree, illegal.

This labeling is important. “[T]he power of the executive branch to declare persons unlawful or enemy combatants, thereby denying them constitutional rights to due process and the rights afforded under the laws of war.”³⁷

Thus:

It is the government's position that once someone has been properly designated as such, that person can be held indefinitely until the end of America's war on terrorism or until the military determines on a case by case basis that the particular detainee no longer poses a threat to the United States or its allies. Within the general set of "enemy combatants" is a subset of individuals whom the administration decided to prosecute for war crimes before a military commission established pursuant to a Military Order issued by President Bush on November 13, 2001. ... Should individuals be prosecuted and convicted in accordance with the Military Order, they would be subject to sentences with fixed terms of incarceration or other specific penalties.³⁸ – Guantanamo Detainee Cases, 2005

The UCMJ does confer court-martial jurisdiction over prisoners of war.³⁹ A “prisoner of war” is a precise legal term, which, under the III Geneva Convention, are those who were captured while lawfully serving as members of enemy armed forces, or members of militias or resistance movements who are “(a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war,” or merchant ship crews or those accompanying an enemy force, e.g., journalists, contractors, etc. None of this appears to fit those accused under the President’s Order of being one of the extra-national groups affiliated with al-Qaeda, or, for that matter,

³² *President’s Military Order*, *supra* note 5, § 7(b)(2).

³³ *Military Commission Order No. 1* (August 31, 2005), ¶ 6(H)(2); 32 C.F.R. § 9.6(h)(2).

³⁴ German Judge E.T.A. Hoffman, in his satire *The Flea*, quoted by Ingo Müller, *HITLER’S JUSTICE: THE COURTS OF THE THIRD REICH* 3 (Harvard University Press, 1991).

³⁵ Art. 2, 3, and 5 UCMJ (10 U.S.C. §§ 802, 803, 805). Art. 5 makes this status worldwide.

³⁶ Convention (No. III) *Relative to the Treatment of Prisoners of War*, Concluded at Geneva, 12 August 1949, T.I.A.S. 3362.

³⁷ 185 A.L.R. Fed. 475, *Designation as Unlawful or Enemy Combatant*.

³⁸ *In re Guantanamo Detainee Cases*, 355 F.Supp. 2d 443, 447 (Jan. 31, 2005).

³⁹ Art. 2(a)(9) (10 U.S.C. § 802(a)(9)).

those continuing to fight in Afghanistan and Iraq after the removal of their pre-9/11 governments.⁴⁰

U.S. military commissions: how they mutated

The legal mind has a lazy habit of looking for “precedents” to justify what has been done of is about to be done. Little effort is made to scrutinize the precedent to determine whether it was acceptable then or worth repeating. The fact that something has been done before does not mean it should be done again. There is nothing “apt” about the *Quirin* decision. As Justice Frankfurter later remarked, it “was not a happy precedent.” The American legal system would do well not to see its like again. —Louis Fisher⁴¹

Counsel with clients facing such military commissions should review their U.S. history, not least because the case history (key cases in **bold**) is the major, perhaps primary, basis for the Administration’s current pleadings on detention and military tribunals. The case history – bizarre as it is – is what the Administration relies on, more than does the meager statutory basis for them.⁴²

The military commission, as now understood, originated in the Civil War, though similar courts, termed as commissions, councils of war, or provost courts did convene in wartime from the Revolution to the 1845-1848 war with Mexico. This was against the inclinations of the Framers whose itemized “abuses and usurpations”, in the Declaration of Independence, noted that King George III “has affected to render the Military Independent of and superior to the Civil Power, ... [and] depriving us in many cases, of the benefits of Trial by Jury.”⁴³

The Lincoln Administration systematized these informal military courts at the start of the Civil War.⁴⁴ Executive Order No. 1, Relating to Political Prisoners provided for arrest, detention, parole or trial, by military authorities, of persons suspected of disloyalty or spying; the legal justification being the rebellion of half the country and the subsequent suspension of habeas corpus.⁴⁵ As in 2001, the military would supplement the Order with its instructions, in this case General Order 100 (1862) establishing not only military trials but martial law: virtually unlimited jurisdiction anywhere in the presence of the enemy.⁴⁶

“Tribunals were instruments to enforce not so much the Articles of War⁴⁷ enacted by Congress and delegated to courts-martial, but rather the customary international standards known as the ‘laws of war.’ It was a well-established principle, said [Army Chief-of-Staff] Gen. Halleck, that ‘insurgents and marauding predatory and guerrilla bands are not entitled’ to an exemption from military tribunals.”⁴⁸ Thus a pattern that would echo in later such military

⁴⁰ Article 4(a)(2) of III Geneva Convention, *supra*.

⁴¹ Louis Fisher, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 161 (University Press of Kansas, 2nd ed., Landmark Law Cases and American Society, 2005)

⁴² Michael Belknap, *A Putrid Pedigree: The Bush Administration’s Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 441-442 (Spring 2002).

⁴³ Declaration of Independence *quoted in* Henry Steele Commager, DOCUMENTS OF AMERICAN HISTORY 100-101 (Crofts & Co., 3rd ed., 1944). For the evolution of U.S. military tribunals from Revolutionary times to 1862, see Louis Fisher, MILITARY TRIBUNALS 1-40, *supra*.

⁴⁴ This history is recounted, and argued, in *Application of Yamashita*, 327 U.S. 1, 66-72 (Rutledge, J., dissenting).

⁴⁵ Executive Order No. 1 (Feb. 14, 1862), 115 O.R. 221-223, Series II, Vol. 2.

⁴⁶ General Orders No. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD: PREPARED BY FRANCIS LIEBER, PROMULGATED AS GENERAL ORDERS NO. 100 BY PRESIDENT LINCOLN, 24 APRIL 1863 (Gov’t Printing Office, 1898), [available online](#). Rationale: “To save the country is paramount in all other considerations.”—Art. 5, G.O. 100.

⁴⁷ Predecessor to the Uniform Code of Military Justice.

⁴⁸ Louis Fisher, MILITARY TRIBUNALS 48, *supra*, quoting from THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (hereinafter “O.R.”) 242-243, Series II, Vol. 1 (Government Printing Office, 1880).

commissions to the present day: exclusion of a class of combatants from statutory law and due process, on the say-so of military officials, to be tried on notional military customs of offenses and tradition.

Many of the military commissions sat in occupied (Southern) territory, in war zones with few functioning civil courts.⁴⁹ However, military arrests and, later, military-commission trials also snared Northern citizens expressing pro-rebel or anti-war sentiment.⁵⁰ The most decisive, in legal terms, were the Indianapolis trials of late 1864, the basis for *ex parte Milligan*⁵¹, in which a U.S. military court tried several suspected members of a rebel fifth-column group. Despite the fact that Indiana had functioning civil courts, the tribunal still tried and condemned the men. Lamdin Milligan brought a habeas corpus action before the Federal district court, and in 1866 the U.S. Supreme Court ruled that civilian courts did not give up their right to review habeas corpus, that “[m]artial rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction,” and that the military could not try a “citizen in civil life, not connected with the [U.S.] military or naval service, by a military tribunal, for any offense whatever.”⁵² Although it addressed the wrongs to a U.S. citizen, it was silent on the issue of foreign nationals.

While *Milligan* was pending, military commissions tried two high-visibility 1865 cases, of the Lincoln assassination conspirators and of Capt. Henri Wirz, commandant of the Confederate prison camp at Andersonville, Ga.⁵³ The Lincoln trial, before a Union Army panel with little legal experience, and marked by irregularities in evidence and procedure, ended in the hanging of four of the conspirators, including the first woman executed by U.S. jurisprudence,⁵⁴ -- and it only emerged, much later, that a majority of the court recommended clemency for Mrs. Surratt, who was hanged anyway.⁵⁵ The trial’s notoriety and *Milligan* notwithstanding, a descendant of Dr. Samuel Mudd was unable to get a post-9/11 court to change the trial verdict.⁵⁶ Except for this 2002 case, U.S. courts apparently never got to review the Wirz or Lincoln-conspirator defendants before they were hanged.

The military commissions were also used in the judicial murder of Native Americans taken in battle with U.S. forces. After a major Dakota (eastern Sioux) uprising in Minnesota in 1862, 38 of the Dakota were convicted on charges of rape, robbery and murder of Minnesota settlers, and were hanged *en masse*.⁵⁷

The death penalty was not unusual in 1862, and other American Indians have been tried and convicted in American courts. But the Dakota trials and executions were different. The Dakota were tried, not in a state or federal criminal court, but before a military commission. They were convicted, not for the crime of murder, but for killings committed in warfare. The official review was conducted, not by an appellate court, but by the President of the United States. Many wars

⁴⁹ Belknap, *supra*, 38 CAL. W. L. REV. at 448-449.

⁵⁰ Mark E. Neely, Jr., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 51-68 (New York: Oxford Univ. Press, 1991, paperback).

⁵¹ 71 U.S. (4 Wall.) 2 (1866).

⁵² *Id.* at 60.

⁵³ J. Holt, Adjutant-General, Bureau of Military Justice report to Secretary of War Edwin Stanton, Nov. 13, 1865, 126 O.R. 489-494, Series III, Vol. 5.

⁵⁴ Belknap, *supra*, 38 CAL. W. L. REV. at 462-467.

⁵⁵ Louis Fisher, MILITARY TRIBUNALS, *supra*, at 68-69.

⁵⁶ Mudd v. White, 309 F.3d 819 (D.C. Cir., 2002).

⁵⁷ See 43 STAN. L. REV. 13, Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*

took place between Americans and members of the Indian nations, but in no others did the United States apply criminal sanctions to punish those defeated in war.⁵⁸

In the winter of 1872-3, Kientpoos (“Captain Jack”) with about 150 other Modoc men, women and children, withstood over 1,000 U.S. Army troops in what is now the Lava Beds National Monument in far northern California. During the six-month siege, a peace parley between the Modocs and Gen. E. R. S. Canby ended with the death of Canby and another negotiator⁵⁹.

The Army charged Kientpoos and several other Modoc leaders with the Canby killings as well as killings of local ranchers at the start of the war. Washington instructed Canby’s replacement, Gen. Jefferson C. Davis, to convene a military commission at Ft. Klamath, Oregon, the nearest post. The Modocs did not have counsel, though Kientpoos did attempt to cross-examine witnesses. He noted, “I hardly know how to talk here. I do not know how white people talk in a place such as this, but I will do the best I can.”

The chief prosecution witness, a Modoc warrior named “Hooker Jim,” turned state evidence and avoided serious penalty, even though Hooker Jim was the one who shamed Kientpoos into ambushing the negotiators, and who led the initial attacks on local farms without Kientpoos’ knowledge. Kientpoos and five other Modocs were sentenced to hang; President Grant spared two but ordered that they be informed only at the foot of the scaffold. After the hanging, the heads of Kientpoos and the other three were cut off and sent to Washington as part of an ongoing “craniology” study of native skulls, ending up in the Smithsonian.⁶⁰ He deserved better.⁶¹

The Wilson Administration avoided military commissions in the First World War, even given the spy hysteria of the day. The Administration doubted the legality of such a tribunal, and the Espionage and Sabotage Acts were draconian enough.⁶²

The next major military commission trials were in World War II; indeed, except for *ex parte Milligan*, the major case law dates from this conflict, *Quirin*, *Yamashita* and *Eisentrager* being particularly oft-cited now, the former two arising on U.S. territory.

ex parte Quirin.⁶³ In June 1942, eight German saboteurs, landed by submarines on the U.S. coast, were quickly captured by the FBI. (None of the agents were particularly bright, and several had reasons to defect). FDR insisted on a quick trial and execution, so, by executive order, created a military commission to do so. The case, although mostly *in camera*, was fully publicized (J. Edgar Hoover wanted publicity for the FBI) and U.S. Attorney-General Francis Biddle was prosecutor.⁶⁴ The defense was vigorous but somewhat irregular (i.e., the eight

⁵⁸ Id. at 13

⁵⁹ The Modocs guessed wrongly that the deaths of such dignitaries would end the war. It may not be the last time that enemies of the U.S. find themselves on trial for violating Western concepts that they might not have understood before the event. Cultural misunderstandings can cut both ways. For further thoughts and references on cultural relativism see Steven R. Ratner and Jason S. Abrams, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 24 (2nd edition, Oxford University Press, 2001).

⁶⁰ See RICHARD DILLON, *BURNT-OUT FIRES: CALIFORNIA’S MODOC INDIAN WAR* (Prentice-Hall, Inc., 1973) for an authoritative account of the war and the trial, the latter beginning at 305. See also DEE BROWN, *BURY MY HEART AT WOUNDED KNEE* (Holt, Rinehart and Winston, 1970), the chapter “The Ordeal of Captain Jack” being a concise account of the whole sorry episode.

⁶¹ The Dakota and Modoc cases here extracted from Robert D. Harmon, *General Yamashita’s Revenge: A Judicial Murder and its Implications for U.S. Military Commissions in Current Warfare*, 4 N.C.C. L.REV. 13, 32 (May 2003)

⁶² Jack Goldsmith and Cass R. Sunstein, *Military Tribunals and Legal Culture: What A Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 285 (Spring 2002).

⁶³ 317 U.S. 1 (1942).

⁶⁴ Michael Dobbs, *SABOTEURS : THE NAZI RAID ON AMERICA* 207-229 (Knopf, February 2004).

defendants had two (Government-appointed) defense counsel between them, despite conflict-of-interest problems, including two defendants turning state's evidence against the others.⁶⁵

The defendants (Richard Quirin et al) appealed on a habeas petition to the U.S. Supreme Court, who ruled in *ex parte Quirin*⁶⁶ that FDR's executive order, the trial, the verdict, and the statutory authority were all valid, even given two naturalized American citizens among the German defendants, nor did their prosecution as "unlawful belligerents" (i.e., spies) contravene Art. III § 2 (treason) or the Fifth and Sixth Amendments.⁶⁷ However, the Court retained "the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty." The courts' right of review with or without habeas corpus, and access to the courts by the accused, drew on *Milligan*, "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."⁶⁸ However, it's worth noting that the Court published the decision almost three months *after* six of the defendants⁶⁹ were electrocuted and the rest sent to prison.⁷⁰

The *Quirin* ruling, exhumed after 9/11, is proving a particularly nasty weapon in Bush Administration pleadings. At least one expert on the *Quirin* case, Louis Fisher, has stated that the *Quirin* defendants' rights, truncated as they were, may be far more than George Bush will accord those tried under his *Military Order*, even though the Bush tribunals derive from the 1942 model.⁷¹

Colepaugh.⁷² A second spy case echoed *Quirin*. Two German agents, one of them a defector, William C. Colepaugh (born in Connecticut), landed on the Maine coast in November 1944. They were quickly picked up by the FBI, tried by a military commission as spies,⁷³ and sentenced to death (FDR died before their execution; the two were subsequently commuted to life). Colepaugh filed for habeas corpus from Leavenworth in 1956 and was turned down. The Federal court ruled that, as a spy, he was subject to a military commission under the *Quirin* precedent, with no right to a civilian treason trial.⁷⁴

Duncan v. Kahanamoku.⁷⁵ The WWII-period Court did overturn one type of military commission, those trying U.S. citizens on U.S. soil for non-military offenses. On December 7, 1941, U.S. authorities declared martial law in the territory of Hawaii. The U.S. military fortunes recovered after Midway but military commissions remained in business in Hawaii for the rest of the war. Two defendants – both of them civilians, both convicted by tribunals for non-military offenses (embezzlement and brawling) – were vindicated, albeit on narrow grounds. "Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, ... those directly connected with such forces, ...

⁶⁵ *Id.* at 229.

⁶⁶ 317 U.S. 1 (1942).

⁶⁷ *Id.* at 18 *et seq.* Since it was not treason, their offense was espionage, not a capital offense till FDR made it so, *ex post facto*.

⁶⁸ All *id.* at 9

⁶⁹ Including one of the two U.S. citizens, Herbert Haupt.

⁷⁰ 19 CONST. COMMENT, *supra*, at 270

⁷¹ Fisher, MILITARY TRIBUNALS *supra*, at 258 on *Quirin*'s impact; at 168-9 on the FDR/Bush comparison.

⁷² *Colepaugh v. Looney*, 235 F.2d 429 (10th Cir., Kansas, 1956); *cert. denied*, 77 S.Ct. 568 (1957)

⁷³ With none of the PR horn-tooting of the 1942 trial; FDR and the Secretary of War seem to have opted for a more discreet trial than 1942. Louis Fisher, NAZI SABOTEURS, *supra*, at 116-120; *see also* Louis Fisher, MILITARY TRIBUNALS xi, *supra*.

⁷⁴ *Colepaugh*, 235 F.2d at 432.

⁷⁵ *Duncan v. Kahanamoku*, 327 U.S. 304 (1946), gov't rejected. The Kahanamoku here is Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu.

or enemy belligerents, prisoners of war, or others charged with violating the laws of war... We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function.”⁷⁶

Overseas, U.S. field commands also used military commissions, in the more traditional battlefield settings, for drumhead trials of 67 foreign nationals (usually accused as spies), of whom they executed 32.⁷⁷ One such trial became another important Court case—

Eisentrager.⁷⁸ Twenty-one German nationals continued to serve in Japanese-occupied China after the surrender of Nazi Germany on 8 May 1945. Captured after the Japanese surrender in September of that year, they were not repatriated as prisoners of war. Rather, as “unlawful combatants” on the *Quirin* pattern, they faced a U.S. military commission in Nanking and drew prison terms. The Court refused habeas corpus, inasmuch as they were not U.S. citizens and were captured in another country – a decision that may haunt current detainees held outside the U.S.

The Court majority seemed to find less privilege in non-citizens than U.S. citizens, as JJ. Black, Douglas and Burton noted in partial dissent:

As the Court points out, Paul was fortunate enough to be a Roman citizen when he was made the victim of prejudicial charges; that privileged status afforded him an appeal to Rome, with a right to meet his ‘accusers face to face.’⁷⁹ But other martyred disciples were not so fortunate. Our Constitution has led people everywhere to hope and believe that wherever our laws control, all people, whether our citizens or not, would have an equal chance before the bar of criminal justice.⁸⁰

Another important trial and judicial murder, that of Japanese Gen. **Yamashita**,⁸¹ convened in Manila at the same time, albeit on what was then U.S. territory, the Philippines. The case⁸² is important in that it established the doctrine of a commander’s responsibility for his/her subordinate’s actions (subsequently echoed as an offense in Bush’s Military Commission *Instructions*),⁸³ permitted verdict and punishment on that responsibility though it was an offense not in the statute-books,⁸⁴ and established the legality of a military-commission trial even where denial of Fifth Amendment due process was an issue. None of five tribunal members were lawyers; they were subject to heavy lobbying by Gen. MacArthur, they admitted *ex parte* and hearsay evidence as they saw fit and they condemned the defendant for simply being in command – not an offense until then – not for committing war crimes himself, which the Prosecution never alleged and which he may not have done. None of this bothered the Supreme Court majority. As a dissenting Justice noted,

Wholly apart from the violation of the Articles of War and of the Geneva Convention, I am completely unable to *79 accept or to understand the Court’s ruling concerning the applicability

⁷⁶ *Id.* at 313-314.

⁷⁷ DoD news article, “Long History Behind Military Commissions,” *online at* [\[site\]](#).

⁷⁸ *Johnson v. Eisentrager*, 339 U.S. 763 (1950).

⁷⁹ Acts 25:16.

⁸⁰ *Eisentrager* at 798.

⁸¹ Application of Yamashita, 327 U.S. 1 (1946).

⁸² Recounted elsewhere; see, e.g., Robert D. Harmon, *General Yamashita’s Revenge: A Judicial Murder and its Implications for U.S. Military Commissions in Current Warfare*, 4 *NEW COLL. OF CAL. L.REV.* 13 (May 2003).

⁸³ *Military Commission Instruction No. 2, Crimes and Elements for Trial by Military Commission*, ¶¶ 6B(c)(3) and (4), which classes command responsibility as a collateral offense along with aiding & abetting and conspiracy.

⁸⁴ Breaching the maxim *nulla crimen et nulla poena sin lege*, no crime or punishment without a pre-existing statute.

of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.

... I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.

It was a great patriot who said:

'He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.'⁸⁵

The Court thus denied Gen. Yamashita's *habeas* appeal on Feb. 1, 1946 and he was promptly hanged.

The United States participated, at war's end, in international tribunals in Germany and Japan of war criminals: enemy commanders, cabinet members, jurists. These differed from U.S. military commissions in that these proceedings were on the basis of international charters and with different rules of procedure, including full Anglo-American rights of evidence, due process and counsel; indeed, the treatment meted out to the likes of Hermann Göring was far more considerate than what Gen. Yamashita suffered.⁸⁶

Between the end of WWII and 9/11, the U.S. military tried only a handful of cases, usually of U.S. dependents (see Appendix 1 under "U.S. Trials Overseas"). While not usually discussed in this context they may be useful to counsel in a 9/11 tribunal or detention case.

Military commissions: creation by decree

It was all very regrettable, but not wholly without justification. K. must remember that the proceedings were not public; they could certainly, if the Court considered it necessary, become public, but the Law did not prescribe that they must be made public. Naturally, therefore, the legal records of the case, and above all the actual charge-sheets, were inaccessible to the accused and his counsel, and consequently one did not know in general, or at least not know with any precision, what charges to meet in the first plea...⁸⁷ — Franz Kafka

Counsel should study the rules of the game – as the Administration has rigged it – both to try and save the client even on that tilted playing field, and to find in those rules an argument, something, that might in a *habeas* hearing cause a Federal court to condemn the military commissions, at long last, as un-Constitutional and unlawful.

The Administration, as statutory authority for the military commissions,⁸⁸ cites 10 U.S.C. § 113(d), 140(b), 821, 836, along with Congress' Sept. 2001 Authorization for the Use of Military Force,⁸⁹ specifically against "all necessary and appropriate force against those

⁸⁵ Application of Yamashita, 327 U.S. 1, 78-81 (Rutledge, J., dissenting).

⁸⁶ Noted in *Hirota v. MacArthur*, 69 S.Ct. 197 (majority decision)(1948); concurring and dissenting opinions at 69 S.Ct. 1238. For an example of the post-WWII charters and safeguards see also Charter of the International Military Tribunal, London, 8 August 1945, 82 U.N.T.S. 279.

⁸⁷ Kafka, *supra* note 1, at 146.

⁸⁸ UCMJ provisions mentioning military tribunals are at 10 U.S.C. §§ 818, 821, 836 (Art. 18, 21, 36). But see 8 U.S.C. § 1226a (orig. § 412 of the USA-Patriot Act). Detained aliens subject to the Patriot Act must be criminally charged, or removal proceedings begun, within seven days of detention. Provision for *habeas corpus*.

⁸⁹ Authorization for Use of Military Force Joint Resolution (Sept. 18, 2001), Pub.L. 107-40, S.J.Res. 23, 115 Stat. 224, 50 U.S.C. § 1541, see online at The [Avalon Project website](#).

nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons.”⁹⁰ The Administration cites that AUMF language, such that it is, as personal jurisdiction over those they would thus try. The Title 10 statutes tend only to mention in passing – not create – the tribunals, and not with the specificity of the UCMJ⁹¹.

And Congress hasn’t bothered to support Bush in the four years since 9/11:

Congress has not recognized a unilateral presidential authority to create these tribunals, and the Supreme Court has repeatedly held that Congress has the constitutional authority to create tribunals, decide their authorities and jurisdiction, and limit the President if he acts unilaterally by military order or proclamation to establish these tribunals. * * *

Lawmakers introduced bills to authorize the President [after 9/11] ... However, Congress never acted on these bills or any other form of legislation to give the administration firm legal backing for military tribunals.⁹²

The Administration, then, has made up the rules themselves, beginning with the [Military Order of November 13, 2001](#), Federal Register Nov. 16, 2001 (Vol. 66, No. 222) at 57831-57836 (also listed as [66 F.R. 57833](#) (Nov. 16, 2001)).⁹³ DoD has supplemented this with:

- DoD Military Commission Order No. 1, March 21, 2002; updated [August 31, 2005](#).⁹⁴ Rules of procedure and evidence. Differs from the President’s Nov. 13, 2001 Order in that death sentences require unanimous vote, not 2/3⁹⁵ (but 2/3 still suffices for a guilty verdict).
- DoD Military Commission [Order No. 3](#), Feb. 5, 2004. Provides for the monitoring of the accused and their counsel.
- [Appointing Authority Regulations and Orders](#), including material on monitoring defense counsel. See also Appointing Authority [Decisions](#). DoD Military Commission Order [No. 5](#) names the current Appointing Authority.
- [Presiding Officer Memoranda](#).
- Military Commission Instructions [Nos. 1-9](#). Proceedings, crimes & elements, qualification of court members and defense counsel, sentencing, review. Given the constraints on counsel (e.g., SECRET clearance),⁹⁶ the limitations on due process and evidentiary rules, and the exclusion of sentence from judicial review, these are critical. The post-sentencing “review” process here is strictly administrative.
- The Code of Federal Regulations, [32 CFR](#) §§ 9.1-18.6, includes the above and is worth comparing, esp. for updates. 32 C.F.R. §§ 9.1-9.12 appears to mirror *Military*

⁹⁰ *Id.*, § 2, apparently a form of jurisdiction *in personam* as well as an authorization for the President to wage battle.

⁹¹ Contrast Uniform Code of Military Justice, 10 U.S.C. §§ 801-876 (Art. 1-76) on courts-martial jurisdiction, composition, procedure etc. *with* the authorities cited in this Paper for military commissions.

⁹² Louis Fisher, *MILITARY TRIBUNALS*, *supra* at 175-177.

⁹³ Online [here](#).

⁹⁴ See also [News Release](#), Dept. of Defense (Aug. 31, 2005) for schematic of changes between March 2002 and August 2005 Orders.

⁹⁵ But Order No. 1 also provides that, in the event of any inconsistencies, the *President’s Military Order* governs. *Military Commission Order No. 1* (Aug. 31, 2005), ¶¶ 6F & 7B, providing for unanimous death vote and *President’s Military Order* supremacy in any dispute, respectively.

⁹⁶ See DoD Directive [5200.2R](#), *Personnel Security Program*, stipulated for civilian counsel by *Military Commission Instruction No. 5*, ¶ 3A(2)(d). See also DoD Directive 5200.2, *Personnel Security Program*, April 9, 1999, for the overall program ([HTML](#)).

Commission Order No. 1, ¶¶ 1-13. The other 32 C.F.R. references, where comparable to an Order or Instruction, appear to mirror them in wording and paragraph order, i.e.—

| DoD order/directive— | Mirrored in C.F.R.— |
|--|---|
| Military Commission Order No. 1, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism (March 21, 2002) | 32 C.F.R. §§ 9.1-9.12, Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism |
| Military Commission Instruction No. 1, Military Commission Instructions | 32 C.F.R. §§ 10.1-8, Military Commission Instructions |
| Military Commission Instruction No. 2, Crimes and Elements for Trial by Military Commission | 32 C.F.R. §§ 11.1-6, Crimes and Elements for Trials by Military Commission |
| Military Commission Instruction No. 3, Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors | 32 C.F.R. §§ 12.1-5, Responsibilities of the Chief Prosecutor, Prosecutors, and Assistant Prosecutors |
| Military Commission Instruction No. 4, Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel | 32 C.F.R. §§ 13.1-5, Responsibilities of the Chief Defense Counsel, Detailed Defense Counsel, and Civilian Defense Counsel |
| Military Commission Instruction No. 5, Qualification of Civilian Defense Counsel | 32 C.F.R. §§ 14.1-3, Qualification of Civilian Defense Counsel |
| Military Commission Instruction No. 6, Reporting Relationships for Military Commission Personnel | 32 C.F.R. §§ 15.1-3, Reporting Relationships for Military Commission Personnel |
| Military Commission Instruction No. 7, Sentencing | 32 C.F.R. §§ 16.1-4, Sentencing |
| Military Commission Instruction No. 8, Administrative Procedures | 32 C.F.R. §§ 17.1-6, Administrative Procedures |
| Military Commission Instruction No. 9, Review of Military Commission Proceedings | - |
| DoD Directive 5105.70, Appointing Authority for Military Commissions [Military Commission Order Nos. 2 & 4 were appointment orders revoked by Nos. 5 & 6 respectively.] | 32 C.F.R. §§ 18.1-6, Appointing Authority for Military Commissions ⁹⁷ N/A |
| Military Commission Order No. 3, Special Administrative Measures for Certain Communications Subject to Monitoring - Issued by Appointing Authority (February 5, 2004) | - |

Note: the D.C. Circuit ruled in July 2005, in the *Hamdan*⁹⁸ case, that the **separation of powers doctrine is not violated by President’s designation of a military commission to try an Al Qaeda suspect. Further, they ruled, the Geneva Convention of 1949 is not enforceable in court by an enemy combatant, and even if it was, a military-commission trial does not violate it.**⁹⁹ As of *Hamdan*, the case law says the tribunals can proceed. (DoD pending cases [listed here](#).)

⁹⁷ [Military Commission Order No. 5, Designation of Appointing Authority \(March 15, 2004\)](#) named Maj. Gen. Altenburg as the current Appointing Authority. 32 C.F.R. §§ 18.1-6 describes the functions of the Appointing Authority’s office.

⁹⁸ *Hamdan v. Rumsfeld*, 415 F.3d 33, 2005 WL 1653046 (D.C. Cir., July 15, 2005). Current Chief Justice John Roberts was part of the Circuit’s majority, which does not bode well for future Court reviews of the tribunal issues.

⁹⁹ Note: a full list of historic and current military-commission and detention cases is at Appendix 1. Case law is evolving rapidly and this Briefing Paper can make no this-is-final conclusion.

Military/national-security proceedings parallel to, or auxiliary to, military commissions.

[W]e reject the idea that when the United States acts against citizens abroad it can do so free of the Bill of Rights. The United States is entirely a creature of the Constitution. Its power and authority have no other source. It can only act in accordance with all the limitations imposed by the Constitution. When the Government reaches out to punish a citizen who is abroad, the shield which the Bill of Rights and other parts of the Constitution provide to protect his life and liberty should not be stripped away just because he happens to be in another land. This is not a novel concept. To the contrary, it is as old as government.¹⁰⁰ — D.C. District Ct., Jan. 2005

As of October 2005, these other proceedings include:

- Combatant Status Review Tribunals.¹⁰¹ Created subsequent to the 2004 *Rasul* and *Hamdi* Supreme Court rulings, DoD set up Combatant Status tribunals to permit detainees to contest their designation as an enemy combatant. DoD conducted the hearings in the latter part of 2004 to Jan. 2005. Of the cases, 520 detainees were determined to be enemy combatants; 38 were exonerated.¹⁰² DoD must obtain detainees' permission, by questionnaire, to detainees to release their names and get those questionnaires back to the court not later than Oct. 26, 2005.¹⁰³ Whether the information used by this panel, to make its determinations, was elicited by torture was an issue in *In re Guantanamo Detainee Cases*, along with the validity of this panel itself and the very designation of "enemy combatant."¹⁰⁴
- Administrative Review Boards. DoD has created "Administrative Review Procedures" for prisoners at Guantánamo; this process is an administrative panel to determine individual detainees' status on the recommendation of the custodial authorities, and whether the U.S. should continue to detain them. It does *not* review those who are designated for military commission trials. It is an administrative panel but does guarantee counsel – to the review board, not those it reviews.¹⁰⁵
- FISA Court. The Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. §§ 1801 et seq, provides for a FISA court, of judges appointed by the Chief Justice, to meet in secret (if need be) and approve Government applications for surveillance where espionage, terrorism or other national-security threats are involved. While not a component of the President's military commissions, intelligence developed by FISA can lend itself to determining a prisoner's capture, enemy-combatant designation, detainment or tribunal, and the evidence might be admissible in the latter, perhaps *ex parte* or *in camera*.
- Terrorist Removal Court. 8 U.S.C. §§ 1531-1537 provides for the removal of aliens found to be terrorists, after public hearings before a court created for that purpose, under the same rules as FISA.¹⁰⁶ This court does not seem to have been convened, at least since 9/11.

¹⁰⁰ *In re Guantanamo Detainee Cases*, 355 F.Supp.2d 443, 456 (U.S.D.C., D.C., Jan. 31, 2005).

¹⁰¹ [Deputy Secretary of Defense Order of July 7, 2004](#); see also [Combatant Status Implementation Guidelines, July 30, 2004](#).

¹⁰² *Associated Press v. U.S. Department of Defense*, --- F.Supp.2d ----, 2005 WL 2065171 (S.D.N.Y., Aug. 29, 2005).

¹⁰³ *Press v. U.S. Dept. of Defense*, --- F.Supp.2d ----, 2005 WL 2348477 (S.D.N.Y., Sept. 26, 2005).

¹⁰⁴ *In re Guantanamo Detainee Cases*, *supra*, 355 F.Supp.2d at 468-472 .

¹⁰⁵ "[Administrative Review Procedures for Enemy Combatants in the Custody of the Department of Defense at Guantanamo Bay Naval Base, Cuba](#)," DOD Order, May 11, 2004. See also online "Making Sense of the Guantanamo Bay Tribunals," Human Rights Watch's summaries of the different panels at Gitmo, at <http://hrw.org/english/docs/2004/08/16/usdom9235.htm>

¹⁰⁶ Per 8 U.S.C. § 1532.

Problems with Military-Commission Defense Counsel

In such circumstances the Defence was naturally in a very ticklish and difficult position. Yet that, too, was intentional. For the Defence was not actually countenanced by the Law, but only tolerated, and there differences of opinion even on that point, whether the Law could be interpreted to admit such tolerance at all. Strictly speaking, therefore, none of the Advocates was recognized by the Court, all who appeared before the Court as Advocates being in reality merely in the position of hole-and-corner Advocates. That naturally had a very humiliating effect on the whole profession ...¹⁰⁷ —Kafka

Military Commission *Instruction No. 4* creates three levels of defense counsel; an office of the Chief Defense Counsel, defense counsel detailed to actual trials (both categories JAG officers) and a “pool” (but not a guarantee) of civilian defense counsel. Crucial differences in civilian counsel from UCMJ practice is that, beyond simply being admitted to practice in a civilian jurisdiction, these counsel must be from a pre-established “pool” of such counsel and they must qualify for SECRET clearance, a process requiring a background investigation.¹⁰⁸ The SECRET clearance is not automatic: disqualifiers include an applicant’s associations, memberships, mental health, or sexual habits, which rather limits an attorneys’ pool.¹⁰⁹

Military Commission *Order No. 3* provides, at the behest of the combatant command (e.g., SOUTHCOM if the venue is Guantánamo) for the monitoring of communications between defense counsel and their clients. It does provide for notification of counsel – maybe – when that will take place, and does assert that whatever is garnered thus, won’t be used “in proceedings” against the personnel involved in the communication or against the defendant. As to whether this will inhibit counsel who know they are so monitored, or whether the safeguards also extend to the military or civilian counsel’s professional well-being, the Order is silent.

Beyond that, the tribunals can withhold evidence from the defense, can restrict counsels’ public statements, and can stick counsel with costs of obtaining SECRET clearance. And, by agreeing to these and other conditions, civilian counsel could have an ethical dilemma: go along with a travesty of justice, or stay away and leave defendants with only military lawyers?¹¹⁰

Due Process, denial of: Fifth Amendment and the commissions

It sometimes happened that the first plea was not read by the court at all. They simply filed it among the papers and pointed out that for the time being the observation and interrogation of the accused was more important than any formal petition. If the petitioner pressed them, they generally added that before the verdict was pronounced all the material accumulated ... would be carefully examined. But unluckily even that was not quite true in most cases ...¹¹¹ —Kafka

The creation, by executive decree, of triable offenses, rules of procedure and evidence, and unusual qualifications of counsel, suggest a denial of due process. This was raised, though not directly addressed, in the *Yamashita* case and subsequent wartime courts (e.g., *Hamdi*)¹¹² have held that this can be “tailored” in wartime but that minimum standards of due process still apply. Previous courts have held that if the combatant was captured outside the U.S., due process and the Constitution would not apply to them.¹¹³

¹⁰⁷ Kafka, *supra* note 1, at 146.

¹⁰⁸ *Military Commission Instruction No. 5, supra*, ¶ 3A(2)(d).

¹⁰⁹ DoD Directive 5200.2R, ¶ C2.2.1

¹¹⁰ Louis Fisher, *MILITARY TRIBUNALS, supra* at 186-8.

¹¹¹ Kafka, *supra* note 1, at 145.

¹¹² *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S. Ct. 2633, 2649 (2004).

¹¹³ *Eisentrager*, 339 U.S. at 778. Distinguished (contradicted) somewhat by *Hamdi, supra*.

In re Guantanamo Detainee Cases, in January 2005, did provide a rationale for due process for foreign prisoners in wartime; at least, it resisted the idea that non-U.S. citizens captured outside the U.S. were outside the Fifth Amendment due-process clause.¹¹⁴

Due Process, denial of: Geneva Convention and other international law

Spurred first by the Great War, and then the Second, civilized nations have banded together to prescribe acceptable norms of international behavior. ... Though many of these aspirations have remained elusive goals, that circumstance cannot diminish the true progress that has been made. In the modern age, humanitarian and practical considerations have combined to lead the nations of the world to recognize that respect for fundamental human rights is in their individual and collective interest. Among the rights universally proclaimed by all nations, as we have noted, is the right to be free of physical torture. Indeed, for purposes of civil liability, the torturer has become like the pirate and slave trader before him *hostis humani generis*, an enemy of all mankind.¹¹⁵ –*Filartiga v. Pena-Irala*, 1980

U.S. courts have asserted that enemy combatants have no cognizable rights under the Geneva Convention; this appellation, say some courts, also can justify detention of U.S. citizens.¹¹⁶ However, Common Art. 3¹¹⁷ of the Conventions, which mandates certain minimums of due process in non-international conflicts, is enforced by 18 U.S.C. § 2441(c)(3) – violation of which, by U.S. citizens, is a war crime under this statute, a statute last amended by Congress in 2002 with this provision still intact.¹¹⁸ The wording is broad:

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by **a regularly constituted court**, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

¹¹⁴ *In re Guantanamo Detainee Cases*, 355 F.Supp.2d at 454.

¹¹⁵ *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2nd Cir., 1980).

¹¹⁶ See, e.g., *Khalid v. Bush*, 355 F.Supp.2d 311, 326 (D.C. Dist. Ct., Jan. 2005). This exclusion extends to U.S. citizens; *Padilla v. Hanft*, --- F.3d ---, 2005 WL 2175946 (4th Cir., Sept. 9, 2005).

¹¹⁷ The “common articles,” Art. 1-3, are identical in each of the four Geneva Conventions. Emphasis added.

¹¹⁸ P.L. 107-273, 116 Stat. 1758 (Nov. 2, 2002).

Also, when seeking to punish enemy combatants, the Military Commissions' "offenses triable" are "violations of the law of war."¹¹⁹ This is a distinction tracing back to the Civil War tribunals, which tried offenders according to the "laws of war," customary international standards of warfare (e.g., against spying) – not by the statutory enactments of Congress. "Customary" international law has, however, evolved since 1862 or 1942 – tribunals that the Bush Administration now mimics. If Bush tribunals rely on "law of war" as an authority it is the 2005 customary law that might apply, and if they try personnel who have been abused in custody, and admit "for probative value" any evidence elicited under torture, the tribunal is itself a party to war crimes, in violation of that very law of war as it has evolved.

Nobody repealed it: Protections and prohibitions under 10/18 U.S. Code

Although the military commissions order may exclude enemy combatants from the protections of the UCMJ, the culpability of U.S. military personnel to certain punitive UCMJ statutes remains; Congress has made no provision for excusing U.S. custodial, legal and military police personnel from:

Art. 92,¹²⁰ Failure to Obey Order or Regulation

Art. 93, Cruelty and Maltreatment

Art. 97, Unlawful Detention.

Art. 119, Manslaughter, and Art. 118, Murder. Of possible relevance in a wrongful execution.

Art. 120, 124, 125, 128 against various forms of physical harm. Of possible relevance where U.S. personnel engage in coercive prison or interrogation business.

Some other relevant provisions of the U.S. Code:

10 U.S.C. §§ 161-168, Goldwater-Nichols Act. President and the Secretary of Defense are in the direct military chain of command, which goes directly from them to the unified and special commands (e.g., CENTCOM). Under the command-responsibility doctrine established in *Yamashita*, they become possibly liable for atrocities committed by the lower chain of command, including *ultra vires* (i.e., travesty-of-law) proceedings.

18 U.S.C. §§ 1203. Hostage taking. Applies to acts outside the United States where the individual or perpetrators are U.S. citizens and the hostage status is to compel some action by the U.S. government. (Of possible relevance with detainees, e.g., where they're being kept outside the U.S. or in the brig to sequester them from Federal court jurisdiction.) No case law on this statute, involving U.S. Government actors, as of October 13, 2005. There should be.

18 U.S.C. §§ 2340, 2340A, 2340B. Torture. Forbidden by U.S. citizens where carried out under color of authority; forbidden to U.S. citizens. No exceptions where enemy combatants are the victims. Maximum punishment is death. No case law on this statute as of October 13, 2005.¹²¹ There should be.

(Note: U.S. personnel on trial for breaching this statute will have the benefit of prefabricated justification defenses – necessity, self-defense, et al – set forth in an infamous 2002 fifty-page memorandum from one Jay S. Bybee, head of the Justice Dept. Office of Legal Counsel, to

¹¹⁹ *President's Military Order, supra*, § 1(e).

¹²⁰ Note: the UCMJ, Art. 1-146, is 10 U.S.C. §§ 801-946 respectively, so Art. 92 is § 892, Art. 93 is § 893, etc.

¹²¹ "When Bush says that his government does not practise 'torture,' he is doing exactly the same as Clinton did when he said he did not have 'sexual relations' with Monica Lewinsky. It all depends on what the meaning of 'torture' or 'sexual relations' is."—[Andrew Sullivan](#), online blog (Oct. 3, 2005).

then-White House Counsel Alberto Gonzalez¹²² – defenses both for individual interrogators and for the President himself. This was the memo that sought to redefine the word “torture.” This document might be useful for counsel as a preview of Administration pleadings in a habeas action; it might also be Exhibit A in some future criminal trial of Administration officials on this statute.)

18 U.S.C. § 2441. War crimes. No U.S. citizen shall commit a war crime in violation of international treaty, including specifically Geneva common article 3 on minimal standards of treatment and due process (see below). Maximum penalty: death. No case law currently on this statute as of October 13, 2005. There should be.

18 U.S.C. § 3261-3267. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA). Extends Federal criminal jurisdiction over civilians “accompanying or employed by” the military, e.g., contractors working with U.S. detention facilities. Does not preclude jurisdiction by a military tribunal or court-martial but may fill a gap left by case law on 10 U.S.C. § 802(a)(10) (Art. 2, UCMJ).¹²³ Also, § 3264 places heavy procedural requirements on “removal” of persons, arrested under this Act, to or from foreign territory.¹²⁴ No case law on §§ 3261-4 as of October 13, 2005. There should be.

18 USC § 4001(a). “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.” This statute has been raised in wartime detention cases involving U.S. citizens (*e.g.*, *Padilla*,¹²⁵ *Hamdi*) and the Court declined to exclude a class of citizens from its protection.¹²⁶

28 U.S.C. § 2241. Habeas statute. Habeas has been a traditional method of challenge of a military-commission proceeding, and was the basis for *Milligan*, *Quirin*, and *Yamashita* in the original uses of the Great Writ. Upheld for foreign nationals in detention cases in *Rasul*.¹²⁷

Detentions

III. Prisoners taken to Germany are subjected to military procedure only if particular military interests require this. In case German or foreign authorities inquire about such prisoners, they are to be told that they were arrested, but that the proceedings do not allow any further information.

–Field Marshal Wilhelm Keitel, army chief of staff, “Night and Fog” decree, Dec. 7, 1941.¹²⁸

As of October 1, 2005, only four enemy combatants were pending military-commission trials, at Guantánamo. The remainder of those detained by U.S. forces since 9/11 have, in a few cases (*e.g.*, Yaser Hamdi) been released,¹²⁹ or have simply remained in custody indefinitely, usually incommunicado, not as prisoners of war but as “enemy combatants,” including U.S. citizens (notably José Padilla). The Supreme Court’s major rulings so far on these cases were in June

¹²² Memorandum from Jay Bybee to Alberto Gonzalez, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), noted in Fisher, *MILITARY TRIBUNALS*, *supra* at 202-206. Memo available online at the Washington Post [archive](#) and elsewhere.

¹²³ Criminal liability under the UCMJ for “persons accompanying” is to be narrowly construed. *Robb v. U.S.*, 456 F.2d 768 (U.S. Ct.Cl., 1972), *see also* *Cole v. Laird*, 468 F.2d 829, 831 (5th Cir., 1972).

¹²⁴ “Removal” is also a general term, post-9/11, for the informal transfer of detained prisoners from U.S. custody to third-party nations with little or no publicity or guarantee of humane treatment.

¹²⁵ *Padilla v. Rumsfeld*, 542 U.S. 426 (2004). *See also* *Padilla v. Hanft*, --- F.3d ---, 2005 WL 2175946 (4th Cir., Sept. 9, 2005).

¹²⁶ *Fisher*, *MILITARY TRIBUNALS*, *supra*, at 226 and 232.

¹²⁷ *Rasul v. Bush*, 542 U.S. 466 (2004).

¹²⁸ 7 NAZI CONSPIRACY AND AGGRESSION, Document No. L-90, *see online at* [Avalon Project](#), Yale Law School.

¹²⁹ “U.S. to Free Hamdi, Send Him Home,” *WASHINGTON POST* (Sept. 23, 2004) at A01. Mr. Hamdi was released in Saudi Arabia; so much for Government pleadings naming him a threat to U.S. national security.

2004, *Padilla*¹³⁰, *Hamdi*¹³¹, and *Rasul*¹³², respectively addressing a U.S. citizen captured in the U.S., a U.S. citizen captured overseas, and foreign enemy combatants captured overseas. So far the courts have upheld detention but detainees can pursue habeas in District Court. The *Rasul* court strongly limited *Eisentrager*'s applicability to the post-9/11 world.¹³³

Remedies to Military Commissions and detentions

38. In the future no bailiff shall upon his own unsupported accusation put any man to trial without producing credible witnesses to the truth of the accusation.

39. No free man shall be taken, imprisoned, disseised, outlawed, banished, or in any way destroyed, nor will We proceed against or prosecute him, except by the lawful judgment of his peers and by the law of the land.

40. To no one will We sell, to no one will We deny or delay, right or justice.

—King John, *Magna Carta*, June 15, 1215

Court-martial and military commission findings are not normally reviewable by Federal (civilian) courts under the Administrative Procedures Act, 5 U.S.C. § 701(b)(1)(F).¹³⁴ However, collateral attack, usually in the form of a habeas challenge, has been a frequent method of reaching outside the military commissions, the method for putting the *Milligan*, *Quirin*, *Yamashita* and *Eisentrager* defendants, among others, before the Court.

Counsel might also complicate a tribunal by filing applicable criminal charges against U.S. custodial personnel under the sections of 10 and 18 U.S.C. noted above – where appropriate – and taking care, of course, that the charges are sworn in good faith.

Ultra vires liabilities for the tribunal members

The U.S. military must disobey an order calling for a patent illegality. Such an order would be *ultra vires* and constitute a war crime if issued during an armed conflict. At least for military lawyers, the present Military Order, in part, is such an order and places present and future U.S. military personnel in harms way.¹³⁵ —Jordan J. Paust, *Antiterrorism Military Commissions, Courting Illegality* (2001)

If the military commissions are one day found to be without merit due to lack of legality, constitutionality or in violation of due-process guarantees of our Constitution, international common law, or international treaty, would become culpable for the results.¹³⁶ Penal or capital sentences would now be extrajudicial imprisonment, or homicide, and expose the participating jurists to prosecution, not least for violations of, or complicity in, violations of 10 and 18 U.S.C. and would include those higher authorities in the Defense and Justice Departments who organized the commissions, justified them by internal memoranda¹³⁷ or convened them by command authority.

¹³⁰ *Padilla*, *supra*, 542 U.S. 426.

¹³¹ *Hamdi*, *supra*.

¹³² *Rasul*, *supra*.

¹³³ Fisher, *MILITARY TRIBUNALS*, *supra* at 247.

¹³⁴ *See, e.g.*, *McKinney v. White*, 291 F.3d 851 (D.C. Cir., 2002). Also, 5 U.S.C. § 701(b)(1)(G) also excludes “military authority exercised in the field in time of war or in occupied territory”.

¹³⁵ Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 *MICH. J. INT’L L.* 1, 28 (Fall 2001).

¹³⁶ *See* Jordan J. Paust, *supra* at 28. The warning to military jurists is explicit: “The U.S. military must disobey an order calling for a patent illegality. Such an order would be *ultra vires* and constitute a war crime if issued during an armed conflict. At least for military lawyers, the present Military Order, in part, is such an order and places present and future U.S. military personnel in harms way.”

¹³⁷ For memoranda implicating now-Attorney General Alberto Gonzalez, e.g., *see* Findlaw’s [torture page](#).

Beyond that, those participants who are attorneys incur professional liability. It would not be hard to find where military-commission panelists and prosecutors, *if* they're lawyers, breaching the ABA Model Rules; *a fortiori*, military lawyers are subject to ethics rules that are quite similar.¹³⁸ Such breaches, at the Nuremberg trial, were part of the indictments of Nazi jurists like Hans Frank, Party general counsel, and Wilhelm Frank, interior minister, both of them architects of the Nazi system of special courts, detentions without trial, and executions without due process – partly why both men were hanged for crimes against humanity.¹³⁹

Finally, the commanders face the legal doctrine of command responsibility for crimes committed by their subordinates. This doctrine, established in the *Yamashita* precedent,¹⁴⁰ requires a finding that “(a) the commander had a superior-subordinate relationship with the troops that committed the human rights abuses; (b) the commander knew, or should have known, that these troops were committing such offenses; and (c) the commander failed to prevent or repress the abuses. Once these three elements are met, a commander may be held criminally and civilly liable for the human rights violations committed by subordinates unless he presents affirmative defenses to overcome the presumption of liability.”¹⁴¹ The chain of command under the 1986 Goldwater-Nichols Act¹⁴² runs from the President and Secretary of Defense (“National Command Authority”) directly to the unified (regional) and specified combatant commands, e.g., CENTCOM in the Middle East and SOUTHCOM (including the detainee camp at Gitmo), so the higher commanders, Rumsfeld and Bush are all liable even if they signed no orders, personally ordered no abuse, convened no tribunals themselves. (The Justice Department malefactors are not in the chain of command but the memoranda – if their names are on them – will implicate them).

Kafka v. Bush et al: An Analysis.

“What are your papers to us?” cried the tall warder. “... we're quite capable of grasping the fact that the high authorities we serve, before they would order such an arrest as this, must be quite well informed about the reasons for the arrest and the person of the prisoner. ... How could there be a mistake in that?” “I don't know this Law,” said K. “All the worse for you,” replied the warder. “And it probably exists nowhere but in your own head,” said K.¹⁴³ —Kafka

George W. Bush's military commission is a guillotine: swift, efficient, deadly, anachronistic, and un-American.

The military commissions were, until 9/11, a freakish event in U.S. history, brief departures from the rule of law, usually in heat of wartime emotion. These tribunals were a means of denying the suspects – usually non-white or otherwise disfavored – all the usual guarantees of due process, evidentiary propriety, appeal rights and clear, statutory charges: in short, a court that could make up its own rules and – from Mrs. Mary Surratt to Gen. Yamashita – get the accused to the hangman as fast as possible, rarely with any judicial appeals or perfunctory appeals at best. The tribunals – Lincoln's, FDR's, George Bush's, the latter two copying from the previous – began with, *are* frozen in, 19th Century notions of military customs. This lends

¹³⁸ See, e.g., Army Regulation [AR] 27-26, Rules of Professional Conduct for Lawyers. See also Navy JAG INSTR 5803.1C, Professional Conduct of Attorneys.

¹³⁹ For key elements of the prosecution of Frick, see 4 IMT 328; for Hans Frank's indictment, see 4 IMT 136 (Jan. 10, 1946).

¹⁴⁰ Application of Yamashita, 327 U.S. 1 (1946).

¹⁴¹ 96 AM. J. INT'L L. 719, 721, Sean D. Murphy, *Doctrine of Command Responsibility in U.S. Human Rights Cases* (July, 2002).

¹⁴² See esp. 10 U.S.C. §§ 161-168.

¹⁴³ Kafka, *supra* note 1, at 10.

a certain irony to Attorney-General Alberto Gonzalez' describing the 1949 Geneva Conventions as "quaint".¹⁴⁴ George Bush has reanimated these old corpses while military courts-martial and international law have long since evolved.

The legal scholar knows Article III courts – those Federal courts created under that part of the Constitution providing for a Judiciary branch. "Article I" courts are those established by Acts of Congress, notably the courts-martial and military appellate courts set forth in Title 10, U.S. Code (UCMJ). We might term the military commission, however, an "Article II court," a conjuring of Executive war power. The offenses it tries, the rules that govern it, the court personnel and the accused are all designated by Executive order.

National emergency – 9/11— was the excuse for re-creating these tribunals. Congress' Authorization for the Use of Military Force, and the President's Order, came in the aftermath of the attack and cite it as the basis for emergency powers. Note, however, that the U.S. did *not* resort to these tribunals in World War I, the Cold War or during the outbreaks of terror prior to 9/11. Indeed, the first World Trade Center attack and the Oklahoma City bombing were both tried in U.S. Federal Court; the 1993 Langley, Va., attack on CIA employees, by the Commonwealth of Virginia.¹⁴⁵ For protection of national secrets, the U.S. had the FISA courts from 1978. The Republic survived all this without abandoning the rule of law.

(Note: post-9/11, the Bush Administration saw fit to go to U.S. civilian courts to try John Walker Lindh, Richard Reid (the so-called "shoe bomber"), the "Lackawanna Six", and Zacarias Moussaoui (the alleged surviving 9/11 hijacker), but with considerably poorer results than the pre-9/11 prosecutions. It's also curious why Mr. Moussaoui, who above all others is the type of subject the *President's Military Order* had in mind, was tried thus. Judging by the outcomes, it seems like the Administration relies on Defense Department tribunals simply because the Bush Justice Department can't put a decent prosecution together.)¹⁴⁶

The President's Order rests on thin statutory ground, though they will insist the case law, flimsy as it is, notably *Quirin*, *Eisentrager*, and *Yamashita*, backs them, at least for non-U.S. citizens in a war or foreign setting (or emerging from one, be it a U-boat or an al-Qaeda training camp). These three precedents gave the D.C. Circuit the excuses it needed for its July 2005 *Hamdan* ruling, allowing the Gitmo trials to proceed. Nonetheless: *the President's Military Order's* exclusion of court review would not – *should* not – be constitutional.¹⁴⁷

A fortiori. A bad precedent, Supreme Court or otherwise, should not stand unchallenged by counsel seeking a habeas writ. *Quirin*, *Yamashita*, *Korematsu*, *Eisentrager* generated regrets at the time. They all have angry and often-eloquent detractors, either in the dissents or in later reviews and later negative-citing references. Sure, they're precedent. So is *Dred Scott* and *Plessey v. Ferguson*. We owe these precedents no loyalty, and given the harm they've

¹⁴⁴ [Draft memorandum](#), Alberto Gonzalez to the President, Jan. 25, 2002, *see online* at Findlaw's [torture page](#).

¹⁴⁵ See, e.g., *U.S. v. McVeigh*, 153 F.3d 1166. Court of appeals noted among its findings that the attack did involve what it termed a "weapon of mass destruction" at 1166. See also, e.g., *U.S. v. Rahman*, 854 F.Supp. 254 (1994) and subsequent case history on the first WTC conspiracy. For the CIA/Mir Aimal Kansi (/aka/ Kasi) case, see *Kasi v. Commonwealth*, 256 Va. 407, 508 S.E.2d 57 (Va., 1998), *cert. denied*, *Kasi v. Johnson*, 537 U.S. 1025 (2002); *see also* PBS NewsHour transcript, "[Facing Justice](#)" (June 18, 1997).

¹⁴⁶ See Fisher, *MILITARY TRIBUNALS*, *supra* at 210-220.

¹⁴⁷ Belkin, *supra*, 38 Cal. W. L. Rev.. at 441-445. If the Administrative Procedures Act, 5 U.S.C. § 701(b)(1)(F), provision against Federal review of military commissions serves to perpetrate a miscarriage of justice, then counsel should challenge *that* as an unconstitutional separation of powers as well.

done to the Constitution and to later generations of prisoners, we have a duty to overturn them, particularly *Quirin*, *Yamashita*,¹⁴⁸ *Korematsu*, and *Eisentrager*.

Louis Fisher's assessment of *Quirin* might very well damn the case before a future Court:

The saboteur case of 1942 represented an unwise and ill-conceived concentration of power in the executive branch. Roosevelt appointed the tribunal, selected the judges, prosecutors, and defense counsel, and served as the final reviewing authority. The generals on the tribunal, the colonels serving as defense counsel, and the two prosecutors were all subordinates of the President. "Crimes" related to the law of war came not from the legislative branch, enacted by statute, but from executive interpretations of the "law of war." ... Congress was not a participant in helping to define the jurisdiction and procedures of the tribunal. The judiciary was largely shut out as well. ... There was little expectation that the Court would do anything than what it did: Deny the petition for a writ of habeas corpus.¹⁴⁹

This serves to discredit *ex parte Quirin* and the subsequent case law resting on it. More to the point: since George Bush's commissions are based on the FDR model – and Fisher's quote above, word for word, has Bush's tribunals to a T – then they're as dead as *Quirin* if *Quirin* goes down. **Attack *Quirin*.**

As for the denial of Geneva Convention rights,¹⁵⁰ counsel should note that the only reservation the U.S. had to ratifying them, notably III Geneva Convention on prisoners of war, was to Art. 68 on the death penalty. Otherwise, the Conventions – and the 1987 Convention Against Torture¹⁵¹, which the U.S. also ratified – are the supreme law of the land under the Supremacy Clause,¹⁵² and the President has not withdrawn the U.S. from them. A trial that flouts these is invalid, and thus the pre-trial detention, interrogation, and executions would be extrajudicial, and a breach of Geneva. Further, if the tribunals can admit, "for probative value," confessions elicited under torture, does that make the tribunal members a party to that crime as well?

Assuming, however, that the Conventions do *not* apply to enemy combatants, then, what about the various protections in the U.S. Code, notably Titles 10, 18, and 28 cited above? Those who detain (hold hostage), interrogate (torture), imprison (maltreat) and execute (extrajudicial killing, to wit: premeditated murder) are in violation of U.S. law – *a talking point hardly raised in this national debate* – and are committing Federal crimes, some of them capital.¹⁵³

The military commission orders mock several Constitutional provisions:

- Fourth Amendment evidentiary guarantees. The "probative value" rule on admission of evidence, by a court president who can be removed at any time, is a singular provision and not really challenged in *Yamashita*.
- The denial of Fifth Amendment rights of due process, for foreigners, at least by Court omission, is something of a precedent [worth challenging], though counsel may want

¹⁴⁸ Although, perhaps, we should not seek to overturn the command-responsibility part of *Yamashita*, not while Bush and Rumsfeld are in command.

¹⁴⁹ Louis Fisher, *MILITARY TRIBUNALS*, *supra*, at 124-125.

¹⁵⁰ I.e., the 1949 Conventions I-IV of the Geneva Conventions. Note: the later Protocols 1 and 2 Additional to the Geneva Conventions (1977) were signed, but not ratified, by the U.S.

¹⁵¹ See online at UN High Commissioner for Human Rights, <http://www.ohchr.org/english/law/cat.htm> .

¹⁵² U.S. CONST. Art. VI, cl. 2.

¹⁵³ For one rare "j'accuse" on Administration criminal liabilities, see Elizabeth Holtzman, "Torture and Accountability," *THE NATION* (July 18, 2005), [online](#).

to revisit the *Wong Wing* case.¹⁵⁴ That case, in which the Court said that superimposition of a criminal penalty on top of (an otherwise permissible) deportation is not permissible if it flouts the Fifth Amendment, has not had much case history since 1896, and not in the tribunal context. And besides the due-process mockeries of procedure and evidence rules, what about *forum non conveniens*? A tribunal sitting at Guantánamo (in Cuba) or at some U.S. air base in, say, Kazakhstan, is not *conveniens*.

- Fifth Amendment guarantee against self-incrimination. The widespread use of coercion in U.S. handling of enemy-combatant suspects may be at issue if “probative value” extends to admissions extracted under duress. The *Instructions* have nothing that would stop a tribunal from admitting it if it felt like it.
- Sixth Amendment right to counsel. It would be worth inquiring if a “pool” of defense counsel contravenes this right. Military counsel, in UCMJ proceedings, usually come from a military trial-defense service outside the chain of command and the UCMJ and MCM protect them from repercussions; here, they’re drawn from a pool that is very much in the command chain. What’s more, civilian counsel here must not only pre-qualify by obtaining a SECRET clearance – a laborious process¹⁵⁵ – but may be subject to disqualification if the clearance is denied. Would the lawyer’s associations, or membership in certain political organizations, be grounds for denial, and if so, would that include dissenting groups like the **National Lawyers’ Guild**? If so, attorneys interested in representing defendants in these proceedings should apply to the pool **now** and find out if they have a First Amendment case in their own right. And they should apply now so that they will be *in* the pool when a client’s life is in peril.
- Sixth Amendment right to counsel, further. The monitoring of counsel, set out by Order No. 5, may have a chilling effect on counsel’s communications with his/her client. This, too, is worth raising. If the military tells counsel it will monitor them, rather than monitor surreptitiously, it may still inhibit the defense. The notification itself may raise this as well, in its own right.
- The Bill of Attainder clause.¹⁵⁶ The courts have ruled, albeit inconsistently, that the President’s Art. II power can suffice to apprehend and detain suspects. However, the President’s Order relies heavily on Congress’ Sept. 2001 Authorization for the Use of Military Force¹⁵⁷ as the basis for jurisdiction over the individuals it would try.¹⁵⁸ If the basis not simply Art. II authority but Congressional enactment, it may be a bill of attainder if the statute causes nonjudicial punishment, lack of a judicial trial, and specificity in identification of the individuals affected.¹⁵⁹ If the detentions or tribunals are nonjudicial, esp. if the tribunals are *ultra vires*, illegal proceedings, *and* if those enemy combatants thus ensnared by the AUMF and the Order are a cognizable class,

¹⁵⁴ *Wong Wing v. U.S.*, 163 U.S. 228 (1896), as well as its 14th Amendment predecessor, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886), were both emphatic about foreign citizens’ rights under the due-process clauses of the 5th and 14th Amendments.

¹⁵⁵ DoD Directive [5200.2R](#), *Personnel Security Program supra*, stipulated for civilian counsel by Military Commission Instruction No. 5, *supra*. Disqualifiers in 5200.2R under ¶ C2.2.1 include applicant’s associations, memberships, mental health, or sexual habits, which rather limits an attorneys’ pool.

¹⁵⁶ U.S. CONST. Art. I, § 9, cl. 3.

¹⁵⁷ P.L. 107-40, *supra*, in relevant part: “all necessary and appropriate force against those [who] ... planned, authorized, committed, or aided the terrorist attacks ... in order to prevent any future acts of international terrorism.”

¹⁵⁸ *President’s Military Order, supra*, preamble and § 1.

¹⁵⁹ 16B Am. Jur. 2d Constitutional Law § 671, *Generally; nature and definition of bills of attainder*.

counsel might argue, albeit against a strong standard of proof, that they are thus attained. But for the President’s reliance on a Congressional enactment, worded as it is, and not on his own powers solely, this argument would not apply.

- The Supremacy Clause¹⁶⁰ making treaties – duly ratified – the supreme law of the land. Unless the President formally withdraws the U.S. from them, e.g., the Geneva Convention, the Convention Against Torture, etc., the U.S. is still a party to them. A treaty in question may not be self-executing, the U.S. may have entered reservations on the treaty upon ratification, but the Supremacy Clause is still worth raising. Even absent a treaty, the doctrine of *jus cogens* – certain absolute norms of international law – may also apply under some construction of this clause, especially given the *President’s Military Order’s* reliance on the “law of war” – i.e., a form of customary international law. The *Military Order* rules out international tribunals¹⁶¹ but relies on international law (“the law of war”), which U.S. courts might still consider if they hear a military-commission case, and *jus cogens*, more strongly than ever, condemns torture¹⁶² as well as extrajudicial killing, denial of due process *et al.*
- The Ex Post Facto Clause¹⁶³ forbids making an offense a crime after the fact and was a defense in arguments before the Court on *Quirin*. A future military commission might breach this if it tries a detainee on a offense in the *Instructions* that was committed before the *Instructions* came out, or perhaps was not a statutory crime at all.

The President’s Order, and the various military-commission orders and instructions, envision jurisdiction over non-U.S. nationals.¹⁶⁴ However, however badly decided, case law **does support the trial of U.S. citizens before such tribunals**. *Milligan* and *Duncan* argue against this, but *Madsen*, *Quirin*, *Colepaugh* and the current *Padilla* case say yes.¹⁶⁵

The tribunal litigation will rely, at least in part, on the wartime-detention cases, notably the various *Padilla* and *Hamdi* precedents, which, along with the older *Korematsu* case, can justify Federal detention of suspects, although not necessarily trial. Even there, however, counsel can find useful arguments among the dissenters, notably the dissents in *Korematsu*¹⁶⁶ and in *Hamdi*¹⁶⁷, the latter’s dissent being a soaring tribute to habeas corpus, by Antonin Scalia, of all people. “The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.”¹⁶⁸

The Administration, four years after 9/11, has crafted this military-commission proceeding but, at least on the public record, has only four cases pending at Guantánamo. For a series of crimes and conspiracies as allegedly heinous as those of al-Qaeda, the trial record so far is

¹⁶⁰ U.S. CONST. Art. VI, cl. 2, *cited supra*.

¹⁶¹ Along with U.S. courts, *President’s Military Order*, *supra* note 5, at § 7(b).

¹⁶² *Filartiga v. Pena-Irala*, 630 F.2d 876 (2nd Cir., 1980).

¹⁶³ U.S. CONST. Art. I, § 9, cl. 3.

¹⁶⁴ *President’s Military Order*, *supra*, § 2(a).

¹⁶⁵ Note: the Supreme Court 2004 detention cases, involving U.S. citizens – *Padilla* (542 U.S. 426) and *Hamdi*, *supra*, addressed the Government’s right to *detain* citizens à la *Korematsu*, not try them. But detention – the legal right to the *corpus* – can be one preparatory step to establishing the right to try them. *Quirin* is ample precedent.

¹⁶⁶ *Korematsu v. U.S.*, 323 U.S. 214, 225 et seq (1944). Compare Justice Jackson’s dissent here to his concurrence later in *Youngstown* on his doubts on Presidential war power.

¹⁶⁷ *Hamdi v. Rumsfeld*, 542 U.S. 507, 124 S.Ct. 2633 (2004). Dissent by Scalia, J. at 124 S.Ct. 2660 et seq.

¹⁶⁸ *Id.*

thin. Four years after Pearl Harbor, the U.S. had tried the Quirin, Colepaugh, Eisentrager, Yamashita and Homma high-profile cases, as well as 67 assorted battlefield cases.

It's worth noting that the courts, lately in *Padilla v. Hanft*, have deferred to the President's say-so ("determination") that national security is at stake, and more generally, to Government assertions, however unsupported. Counsel should note that Federal courts deferred to the Government's assertions in the *Korematsu* and *Hirabayashi* cases only to find out 40 years later that the Government's case was selective and misleading – a sham, essentially.¹⁶⁹ The Supreme Court *did* say, in *Hamdi*, that simply asserting a national-security need is not enough.¹⁷⁰

Beyond that, when confronting a Government assertion that national security can trump due process, it's worth comparing it to the Nazi legal rationales for extraordinary tribunals and wartime expediency.

Coda: Shouting "fire" in a crowded Reichstag.

Q. [Justice Robert Jackson] Was it also necessary, in operating this system, to deprive persons of the right to public trials in independent courts? And you immediately issued an order that your political police would not be subject to court review or to court orders, did you not?

A. [Reichsmarshal Hermann Göring] You must differentiate between the two categories; those who had committed some act of treason against the new State were naturally turned over to the courts. The others, however, of whom one might expect such acts, but who had not yet committed them, were taken into protective custody and these were the people who were taken to concentration camps. ... Likewise, if for political reasons - to answer your question - someone was taken into protective custody, that is, purely for reasons of State, this could not be reviewed or stopped by any court. ...

Q. ... You did prohibit all court review, and considered it necessary to prohibit court review of the causes for taking people into what you called 'protective custody'?

A. That I answered very clearly ... These people were simply to be given an opportunity of making a protest.¹⁷¹

In 1933, as in 2001, an attack on a major national building (i.e., the Reichstag) raised allegations of a national emergency, and the creation of special courts to try offenses under the resulting decree. It's worth adding here that the German special courts did not spring from a dictatorship but from a republican system:

"Irregular" courts of special jurisdiction were not invented by the National Socialists ... On March 21, 1933, when the new regime issued its decree on the formation of Special Courts, it was in fact authorized to do so by an ordinance dating from the republican era, granting the government powers to determine the courts' personnel, procedures and jurisdiction.

To start with, a Special Court was created in each of the twenty-six Courts of Appeal Districts, with jurisdiction over violations of the Reichstag Fire Decree ... and the procedures established satisfied the wishes of most conservatives for a drastic reduction in the rights of defendants and a stronger position for the prosecution. ... [T]he court could determine the extent of evidence to be considered entirely as it saw fit. Defendants had no right to appeal verdicts, which became enforceable at once. The speedy trials made possible by these regulations met the wishes that had often been voiced for "eliminating formalism" in criminal proceedings.¹⁷²

¹⁶⁹ *Hirabayashi v. U.S.*, 828 F.2d 591 (9th Cir., 1987), a *coram nobis* decision overturning Gordon Hirabayashi's wartime convictions, after the court found that the original pleading

¹⁷⁰ *Hamdi v. Rumsfeld*, 124 S.Ct. 2633, 2636-7 (2004).

¹⁷¹ Cross-examination, 84th day, Monday, March 18, 1946, 9 IMT 187.

¹⁷² Müller, *supra* at 153.

The language of the Feb. 1933 “Decree of the Reich President for the Protection of the Nation and State” (Reichstag Fire Decree) and the President’s Order of 2001 are similar in their justification by declaring a national emergency, triggering the resulting legal doctrine of state necessity. Thus,

Today we are proud to have formulated our legal principles from the very beginning in such a way that they need not be changed in the case of war. For the rule, that right is that which is useful to the nation, and wrong is that which harms it, which stood at the beginning of our legal work, and which established this collective term of nation as the only standard of value of the law — this rule dominates also the law of these times.¹⁷³

— Hans Frank, general counsel, National Socialist Party, Nov. 1939, to the German Academy of Law.¹⁷⁴

(The two administrations – 1933 and 2001 – are not, of course, *exactly* identical. The Reichstag Fire Decree suspended numerous civil-liberty sections of the republic’s constitution itself, and for all citizens of the republic, while the President’s Order simply removes a class of suspects from normal U.S. Constitutional protection, creating a class of legal *untermenschen*. However, the Weimar courts had created courts of special jurisdiction, and types of national-security offenses, **long** before 1933. Hitler merely took this trend, and the state-necessity doctrine, to its next logical level).¹⁷⁵

Finally, this: beyond the Bill of Rights arguments, counsel should re-visit Art. I, II and III questions of balance of powers. The President’s **Art. II** Commander-in-Chief powers are broad but have limits: the *Youngstown* steel-seizure case¹⁷⁶ speaks to that. Indeed, Justice Jackson’s *Youngstown* concurrence now carries far more urgency, given Bush’s penchant for aggressive war, drumhead tribunals and torture: “[T]his loose appellation [“Commander in Chief”] is sometimes advanced as support for any Presidential action, internal or external, involving use of force, the *642 idea being that it vests power to do anything, anywhere, that can be done with an army or navy. But no doctrine ... would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge **his mastery over the internal affairs of the country** by his own commitment of the Nation’s armed forces to some foreign venture.”¹⁷⁷

Next, even in the most deferential cases, the Judiciary (see, e.g., *Quirin*) has said that it still expects to be the final arbiter of Constitutionality of such tribunals, and counsel should ask them if they intend to abdicate now. The *President’s Military Order* specifically excludes them; at issue is **Art. III**, not the Bill of Rights.

Then there is the issue of Congress’ **Article I** power of lawmaking. Indeed, the President’s justification of his tribunals begins with the Congressional Authorization for Use of Military Force.¹⁷⁸

¹⁷³ 2 NAZI CONSPIRACY AND AGGRESSION (U.S. Gov’t Printing Office, Washington, 1946), documents pertaining to Frank at 624-653, here cited document 3445-PS, [available online](#).

¹⁷⁴ See further Frank’s personal indictment (court session of Jan. 10, 1946) at 4 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS SITTING AT NUREMBERG, GERMANY 136 (His Majesty’s Stationery Office, London, 1946). (hereinafter cited as IMT). IMT Nuremberg available online at <http://www.nizkor.org/hweb/imt/>.

¹⁷⁵ See generally Ingo Müller, HITLER’S JUSTICE, *supra*. The German legal system was considerably different from the Anglo-American common-law model, particularly in *stare decisis* and the German practice of stretching crime elements by “analogy,” but the book is still instructive in how a legal system could abandon the rule of law – worse, that the abandonment was a continuum prior to, during, and after the Nazi period.

¹⁷⁶ *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

¹⁷⁷ *Id.* at 641-2 (Jackson, J., concurring). Emphasis added.

¹⁷⁸ Noted in *Hamdi*, *supra*, 124 S.Ct. at 2639.

Since 9/11, Congress has enacted no exceptions to Titles 10 and 18 for U.S. personnel who detain, interrogate or try enemy combatants, even if the combatants have no cognizable rights themselves under the Constitution or Geneva. The liabilities for U.S. citizens remain if they maltreat a prisoner; whether the prisoner/suspect has any cognizable rights may be less decisive than **whether U.S. citizens, military or civilian, are still liable under U.S. law as written** for what they do to those in their custody, i.e., in the chain of guilt from the President down to the PFCs at the Guantánamo and Abu Ghraib lockups. The question for us to ask, then, is whether Congress' Art. I power, expressed in the U.S. Code, still exists, and whether they're serious about it – or whether Congress should adjourn *sine die*.

It's worth remembering, also, that under command influence doctrine, noted above, George Bush and Donald Rumsfeld, even if they never signed the orders and instructions creating these drumhead trials, are still guilty under *Yamashita*. This is bedrock U.S. case law – it would now be a delicious irony if the type of tribunal that murdered General Yamashita is to be the precedent that puts Bush, Rumsfeld and the commanders of SOUTHCOM and CENTCOM before a strict-liability trial, for convening the same sort of tribunals. “Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision.”¹⁷⁹

Finally, how can the Administration believe it can get away with it? Partly because the Lincoln and FDR Administrations held these drumhead trials and have not been judged too harshly by history, partly because the Supreme Court has overlooked the more egregious trials or excused them (e.g., *Quirin*) after the fact. More to the point, as the late Chief Justice Rehnquist liked to point out, *inter armis silent leges*, in war the law is silent.¹⁸⁰ Whether that law, the courts, and Congress are also deaf, dumb and blind remains to be seen.

The Constitution of the United States is a law for rulers and people, **equally in war and in peace**, and covers with the shield of its protection **all classes of men, at all times, *121 and under all circumstances**. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence... —*ex parte Milligan* (1866)¹⁸¹

¹⁷⁹ Justice Frank Murphy, dissenting, *Yamashita* at 28.

¹⁸⁰ Rehnquist, *ALL THE LAWS BUT ONE*, *supra*, *passim*.

¹⁸¹ *Milligan*, *supra* at 120. Cited in *Guantanamo Detainee Cases*. Emphasis added.

Appendix 1: Military-Commission Case Law

Alert legal experts recognized at the time just how far the Supreme Court had gone in perverting justice with its fatal message that the (presumed) interest of the state stood above the law. By implication, even the most heinous crimes were not punishable if they were committed in the interest of the state, while legal actions were punishable if they ran counter to it.¹⁸² —Ingo Müller

Historic cases

ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866). Military could not deny habeas corpus to the courts, nor try U.S. citizens when Federal courts are open and available. Silent on foreigners. Still quoted.

ex parte Quirin, 317 U.S. 1 (1942). Supreme Court upheld the military commissions' legality and jurisdiction over German spies arrested in the U.S. in wartime, but reserved the courts' right of ultimate review on military commissions and on Constitutional aspects generally, following *Milligan*. Cited in the Guantánamo detention cases of 2004.

Application of Yamashita, 327 U.S. 1 (1946). Military commissions, trying foreign nationals, can proceed with abridged evidentiary and due process rights. Dissenters objected bitterly to denial of Fifth Amendment due process. This case also the origin of the **command-responsibility** doctrine: commanders are strictly liable for any atrocities committed by members of their command.

Duncan v. Kahanamoku, 327 U.S. 304 (1946). U.S. military did not have the power to try U.S. citizens for non-military offenses while U.S. civilian courts were available.

in re Territo, 156 F.2d 142 (9th Cir., 1946). U.S. citizen, captured in enemy (Italian) uniform during WWII. Ruling: that those captured in uniform who are not spies or "other non-uniformed plotters" are legal PWs. Discussed during post-9/11 cases, notably *Hamdi*. "The object of capture is to prevent the captured individual from serving the enemy. He is disarmed and from then on must be removed as completely as practicable from the front, treated humanely, and in time exchanged, repatriated, or otherwise released." However, U.S. and neutral citizens, in enemy territory, are presumed to be enemies and may be held.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Limits on Commander-in-Chief authority. Not directly on point to military commissions but crucial to arguments on the President's Art. II "Commander in Chief" powers.

Colepaugh v. Looney, 235 F.2d 429 (10th Cir., Kansas, 1956); *cert. denied*, 77 S.Ct. 568 (1957). U.S. citizen tried by a military commission in wartime (as a spy, following *Quirin*) need not be afforded a full (treason) trial.

Mudd v. White, 309 F.3d 819 (D.C. Cir., 2002). Issue of standing to challenge a military tribunal finding; only a member of the armed forces or his heir or legal representative may seek to alter a military record.¹⁸³

Kasi v. Commonwealth, 256 Va. 407, 508 S.E.2d 57 (Va., 1998), *cert. denied*, *Kasi v. Johnson*, 537 U.S. 1025 (2002). How a "terrorist," pre-9/11, could be captured overseas, brought to the U.S. and stand trial before a duly constituted American civilian court, not a military tribunal. Mir Aimal Kasi (/aka/ Kans) was the person who made an assault-rifle attack on CIA

¹⁸² Müller, *supra* at 23. The case he mentions was in Germany in 1928.

¹⁸³ Plaintiff was great-grandson of Dr. Samuel Mudd; a military commission convicted Dr. Mudd in 1865 for his role (treating John Wilkes Booth's broken leg) in the Lincoln assassination. The descendant sought to overturn Dr. Mudd's conviction.

employees outside the CIA headquarters in Langley, Va., 1993. *See also, e.g.*, U.S. v. Rahman, 854 F.Supp. 254 (1994) and subsequent case history on the first World Trade Center conspiracy in Federal court. Possible arguments here that Islamic terrorism, of which 9/11 was a continuation, went through American courts without compromising national security or official secrets and without the tribunals created after 9/11.

U.S. Trials Overseas: Jurisdiction

Johnson v. Eisentrager, 339 U.S. 763 (1950). U.S. *did* have the power to try enemy “illegal combatant” nationals in a military commission when the defendants were captured and tried outside the U.S.; distinguished (limited) considerably by Supreme Court in its 2004 *Rasul* ruling, below.

“Cases of The Murdering Wives”¹⁸⁴

- Madsen v. Kinsella, 343 U.S. 341 (1952), *rehearing denied* 356 U.S. 925. Civilian courts weren’t available when Mrs. Yvette Madsen (a U.S. citizen, a military dependent in occupied Germany) murdered her husband in their quarters and faced a military commission (not a court-martial, as would have happened to Lt. Madsen if *he* had murdered *her* instead) on charges of violating the then-current German law against murder.¹⁸⁵ German courts were defunct; pre-dates 1950 passage of the UCMJ by Congress.
- Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 491 (1956); *reversed*, Reid v. Covert, 354 U.S. 1 (1957). Military-dependent wives court-martialled overseas after murdering their serviceman husbands. Court ultimately ruled that U.S. [non-UCMJ] citizens charged by the U.S. Government overseas must be tried under the U.S. Constitution, in Art. III courts.

United States v. Tiede, 86 F.R.D. 227 (U.S. Court for Berlin, 1979). Hijackers tried by a U.S. “Article II” court in the American Zone of West Berlin. Issue: whether right to jury and other Constitutional rights apply in U.S. trials in “occupied territory.” Ruling cited *Milligan* in saying it did. Of possible merit in a post-9/11 proceeding.¹⁸⁶

Post-9/11 cases

Gherebi v. Bush, 374 F.3d 727 (9th Cir., July, 2004). Habeas jurisdiction for “enemy combatants” is valid wherever the U.S. has “exclusive jurisdiction”; proper venue for habeas appeals from Guantánamo is at the D.C. Circuit.

Khalid v. Bush, 355 F.Supp.2d 311, 2005 WL 100924 (D.C. Dist. Ct., Jan. 2005). Held: enemy combatants captured outside the U.S. have no cognizable constitutional rights.

In re Guantanamo Detainee Cases, 355 F.Supp.2d 443, 2005 WL 195356 (D.C. Dist. Ct., Jan. 2005). Due process and the Fifth Amendment do apply to “enemy combatants.”

Al-Marri v. Hanft, 378 F.Supp.2d 673 (U.S.D.C., Dist. S.C., July 8, 2005). Qatari national, on trial for credit card fraud, was transferred to military custody after the President designated

¹⁸⁴ So noted by Fisher, *MILITARY TRIBUNALS supra* at 158-9.

¹⁸⁵ German Crim. Code § 211, Sept. 1941, cited in *Madsen* at 344. Just as well for Mrs. Madsen that she faced a U.S. military court and not a German civilian one, as German practice in 1941 would have involved the longstanding method of death by beheading for civilian capital cases. German Crim. Code § 13 (to 1945).

¹⁸⁶ Fisher, *MILITARY TRIBUNALS supra*, at 160-167.

him an enemy combatant, alleging that petitioner had previously attended an al-Qaeda training camp. *Held*: Authorization for Use of Military Force does permit such detainment.

Hamdan v. Rumsfeld, 415 F.3d 33, 2005 WL 1653046 (D.C. Cir., July 15, 2005). *Held*: separation-of-powers doctrine not violated by President's designation of a military commission to try an Al Qaeda suspect. Further, the Geneva Convention of 1949 is not enforceable in court by an enemy combatant, and even if it was, a military-commission trial does not violate it. Military commission trial of Mr. Hamdan at Gitmo now [pending](#) along with other cases¹⁸⁷ named by Dept. of Defense.

Associated Press v. U.S. Department of Defense, --- F.Supp.2d ----, 2005 WL 2065171 (S.D.N.Y, Aug. 29, 2005). DoD, after the *Hamdi* and *Rasul* rulings, held Combatant Status Review Tribunals for 558 detainees, exonerating 38 and naming the rest as "enemy combatants." AP filed a FOIA action to obtain full transcripts, one reason being that the detainees' names were redacted from what DoD did release. *Reconsideration denied to DoD*, *Press v. U.S. Dept. of Defense*, --- F.Supp.2d ----, 2005 WL 2348477 (S.D.N.Y., Sept. 26, 2005); DoD must submit questionnaires to each detainee on the court's order, getting their permission to release their names, and get them back to court not later than Oct. 26, 2005.

David Hicks, alias "the Australian Taliban", currently [on trial](#) at Gitmo.

Command-responsibility cases

Application of Yamashita (cited above). Origin of command-responsibility doctrine: strict criminal liability for commanders for all acts of their subordinates, presumably including subordinates' conduct of extrajudicial imprisonment and killings, including *ultra vires* tribunals.

Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir., 1980). Torture under color of official authority ruled as being beyond any norm of international law; applicable here to foreign nationals under the Alien Tort Claims Act but broad language possibly applicable where the defendant (s) are U.S. citizens.

Kadic v. Karadzic, 70 F.3d 232 (2nd Cir., 1995). Murder, rape, torture, arbitrary detention of citizens, whether or not under color of authority, violate the law of war; commanders are required to prevent such acts; all parties must apply to minimum law of war requirements in common Art. 3, Geneva Conventions.

Prosecutor v. Blaskic, Judgment (Trial Chamber, Int'l Criminal Tribunal for the former Yugoslavia, March 3, 2000), ¶¶ 295, 302. Further development of the *Yamashita* command-responsibility doctrine. The commander must be in *effective control*.

Ford ex rel. Estate of Ford v. Garcia, 289 F.3d 1283 (11th Cir.(Fla.), Apr 30, 2002). Families of U.S. churchwomen tortured and killed in Salvadoran civil war brought civil against former Salvadoran general. 11th Circuit overturned their case on technical grounds but recognized the applicability of the *Yamashita* doctrine in U.S. jurisprudence.

¹⁸⁷ See <http://www.defenselink.mil/news/commissions.html>, "links to information about particular military cases."

Wartime Detention Cases¹⁸⁸

Hirabayashi v. U.S., 320 U.S. 81 (1943). Upheld wartime detentions. However, *vacated on a writ of coram nobis*,¹⁸⁹ *Hirabayashi v. U.S.*, 828 F.2d 591 (9th Cir., 1987). Government's assertions of national security at time of *Hirabayashi* and *Korematsu* arguments here found in 1987 to be selective and misleading. "The Court's divided opinions in *Korematsu* demonstrate beyond question the importance which the Justices in *Korematsu* and *Hirabayashi* placed upon the position of the government that there was a perceived military necessity, despite contrary arguments of the defendants in those cases."¹⁹⁰

ex parte Mitsuye Endo, 323 U.S. 283 (1944). Balancing of wartime security and individual liberty; "clear statement" needed before infringing the latter. Distinguished by *Padilla v. Rumsfeld* on matters of jurisdiction but not on "clear statement." Ms. Endo's release was on narrower grounds than decided in *Korematsu* and, since she was detained by a civil and not military agency (the Relocation Authority), distinguishable from *Milligan*.

Korematsu v. U.S., 323 U.S. 214 (1944). U.S. can detain U.S. nationals in wartime, on a racial or other basis, with national security meeting the strict-scrutiny test. Possibly useful language for counsel in dissents on matters of *habeas* and on judicial deference to military decisions.

Padilla v. Rumsfeld, 542 U.S. 426 (2004). U.S. citizen arrested on U.S. soil on orders from Federal Court in Manhattan and then seized from them by the U.S. military, needed to file for *habeas* in the district that included his brig (South Carolina), not the Southern District of New York (the Government may have been forum shopping when it pleaded thus).¹⁹¹ Mr. Padilla thus kept in detention on jurisdictional grounds. Different Circuit than *Padilla v. Hanft*, below.

Hamdi v. Rumsfeld, 542 U.S. 507 (2004). U.S. citizen arrested in an overseas war zone (Afghanistan) and held in the brig did have right to review his detention, but *Korematsu* not mentioned. Split decision, with possibly useful language on *habeas corpus* by Scalia, J., dissenting.

Rasul v. Bush, 542 U.S. 466 (2004). Foreign nationals (albeit from "friendly" nations, i.e., Kuwait and Australia) detained in Gitmo did have access to Federal district courts via *habeas corpus*, Alien Tort Claims Act and federal-question statute. *Eisentrager* strongly distinguished as it involved subjects in a declared war who were actually put on trial, among other differences from the 9/11 foreign detainees.

Padilla v. Hanft, --- F.3d ---, 2005 WL 2175946 (4th Cir., Sept. 9, 2005). President's determination of José Padilla, U.S. citizen, as an "enemy combatant" and his detention as such is constitutional, building on *Hamdi* and *Quirin*. President's determination, that it is necessary in the interest of national security, merits deference by courts. *Milligan* not applicable because Padilla here is an "enemy combatant." Government right to try Padilla by military commission not held but, citing Herbert Haupt in *Quirin*, clearly implied. "Clear

¹⁸⁸ Detentions without trial or prior to trial. Detainment can be prior to a military commission trial or can be indefinite; usually involving the same groups of enemy combatants.

¹⁸⁹ *Coram nobis* is a writ of error sent by an appellate court to a trial court to review the trial court's judgment based on an error of fact. BLACK'S LAW DICTIONARY 338 (7th ed., West Group, 1999). Or, translated into layperson's vernacular, "WTF was this court thinking of!?"

¹⁹⁰ *Hirabayashi*, 828 F.2d at 603.

¹⁹¹ See Fisher, MILITARY TRIBUNALS, *supra*, at 238 on this quirk.

statement” rule n/a. *But see* Brief, Rutherford Institute and People for the American Way, 2005 WL 1656802.

Fifth Amendment and foreign nationals

Wong Wing v. U.S., 163 U.S. 228 (1896). *See also* its predecessor case, *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) on denial of due process to foreign nationals.

Appendix 2: Relevant statutes and treaties

Relevant statutes

10 U.S.C. §§ 161-168, Goldwater-Nichols Act. President and the Secretary of Defense are in the direct military chain of command, which goes directly from them to the unified and special commands (e.g., CENTCOM). Possibly useful in applying *Yamashita* command-responsibility doctrine.

18 U.S.C. §§ 2340, 2340A, 2340B. Torture. Under color of authority; forbidden to U.S. citizens.

18 U.S.C. § 2441. War crimes. No citizen shall commit a war crime in violation of international treaty, including Geneva.

18 U.S.C. §§ 3261-3267. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA). Extends Federal jurisdiction over civilians “accompanying or employed by” the military, e.g., contractors.

18 USC § 4001(a). “No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.”

28 U.S.C. § 1350, Torture Victims’ Protection Act. Civil liability against torturers accorded to non-U.S. citizens.

28 U.S.C. § 2241. Habeas statute.

Authorization for Use of Military Force Joint Resolution (Sept. 18, 2001), S.J.Res. 23, 50 U.S.C. § 1541, [Pub. L. No. 107-40, 115 Stat. 224 \(2001\)](#) (common abbrev. AUMF). Armed-force authorization, including [Bush-inferred] basis for “enemy combatants” actions. See P.L. 107-40 *also online at* The [Avalon Project website](#).

Relevant international treaties.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)¹⁹²

Geneva Convention (III) on Treatment of Prisoners of War (1949):¹⁹³

[Common] ARTICLE 3¹⁹⁴,

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

¹⁹² See online at Office of UN High Commissioner for Human Rights, <http://www.ohchr.org/english/law/cat.htm> . The U.S. ratified the Convention Against Torture in 1994 only with the reservation that “... *nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.*”

¹⁹³ 1956 WL 54809, T.I.A.S. No. 3364, 6 U.S.T. 3316; Ratified by the U.S. with a reservation to Article 68: “The United States reserves the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.”

¹⁹⁴ Violation of which is specifically forbidden, by U.S. nationals, in 18 U.S.C. § 2441(c)(3).

- (b) Taking of hostages;
- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. ***

ARTICLE 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

- (a) That of being commanded by a person responsible for his subordinates;
- (b) That of having a fixed distinctive sign recognizable at a distance;
- (c) That of carrying arms openly;
- (d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

2. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

Appendix 3: Source material

Official documents:

- Defenselink [page](#) on [military commission documents](#). Comprehensive site; includes updates, Pentagon briefings, publicly-announced trials, military commission [orders](#) and procedural [instructions](#). Also:
[Official Defenselink history](#)¹⁹⁵ of military commissions, Aug. 19, 2004
Jay Bybee torture memo to Alberto Gonzalez at Washington Post [archive](#).
“Defense Department Policy,” Global Security.com [collection](#), includes all key Military Commission documents.
“DoD Military Commission instructions,” Global Security.com [index page](#). Procedural material.
Pentagon official news accounts (selective):
[News Article](#), DoD, “Military Review Panel Takes Office” (Sept. 22, 2004).
[Briefing](#), DoD, appointments of appointing authorities and review panel, also Instruction No. 9 on review (Dec. 30, 2003)
Maj. Gen. John Altenburg, Military Commissions appointing authority:
[Aug. 31, 2005 briefing](#) (transcript)
[Aug. 17, 2004 briefing](#) (transcript)
[Aug. 18, 2004](#) Pentagon news story, “Military Commissions to Begin at Guantanamo”
[Jan. 21, 2004](#), Pentagon news story, “Officials Explain Military Commissions”.
Findlaw: White House internal memoranda on detainees, torture, enemy combatants: [web page](#).
Office of the UN High Commissioner for Human Rights: [International Law webpage](#).
Index of human-rights and law-of-war treaties, Geneva Conventions et al. Note: often includes current status of U.S. ratification, reservations, or declarations on certain treaties.

Monitoring Groups:

[Center for Constitutional Rights](#).

Human Rights Watch, [www.hrw.org](#), excellent material, see esp.

HRW [Briefing Paper](#) on Military Commissions, also this [backgrounder](#), same subject, including the combatant-status and administrative-review proceedings.
HRW general [subpage](#) on Guantánamo detainees.

[Military Law Task Force](#) of the National Lawyers’ Guild.

[ACLU](#).

Treatises:

78 Am. Jur. 2d War § 18, *Continuance of constitutional guaranties during war*.

185 A.L.R. Fed. 475, *Designation as Unlawful or Enemy Combatant*. Updated weekly.

20 Am. Jur. Trials 1, *Federal Habeas Corpus Practice*.

Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on Terrorism*, 118 HARV. L. REV. 2048 (2005). The Administration cites the war

¹⁹⁵ Rather cursory history; inaccurate in that the post-WWII war crimes trials were tribunals set up by international charter and not a “military commission” as such.

authorization as a basis for the commissions; discussion here of the authorization itself.

Jack Goldsmith and Cass R. Sunstein, *Military Tribunals and Legal Culture: What A Difference Sixty Years Makes*, 19 CONST. COMMENT. 261 (Spring 2002). A comparison of FDR's and GWB's establishment of military commissions.

Sources of International Law, RESTATEMENT 3D OF FOREIGN RELATIONS LAW § 102. See also International Committee of the Red Cross, *Treaties and Customary International Human Rights Law*, available online at [ICRC website](#).

Elizabeth Holtzman, "[Torture and Accountability](#)," THE NATION (July 18, 2005). Criminal culpability of Bush Administration officials, excuses made in memoranda by Alberto Gonzalez, Jay Bybee et al notwithstanding. To appear in IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND (Jeremy Brecher, Jill Cutler, Brendan Smith, eds., Metropolitan Books, due out Nov. 1, 2005).

Military Commissions: Government and supporters' viewpoints.

Maj. Gen. (ret.) Michael J. Nardotti, Jr., *Military Commissions*, 2002-MAR ARMY LAW. 1. Overview from Army standpoint.¹⁹⁶

American Bar Association Task Force on Terrorism and the Law Report and Recommendations on Military Commissions, 2002-MAR ARMY LAW. 8. The ABA has qualms.

Maj. Timothy C. MacDonnell (Prof., Crim. Law), *Military Commissions and Courts-Martial: A brief Discussion of the Constitutional and Jurisdictional Distinctions between the two Courts*, 2002-MAR ARMY LAW. 19. Comparison between traditional courts-martial and the commissions. Instructive.

Military Commissions are Constitutionally Sound: A Response to Professors Katyal and Tribe, 34 TEX. TECH. L. REV. 899 (2003). Quoted in *Hamdan v. Rumsfeld*.

Curtis A. Bradley, Jack L. Goldsmith, *The Constitutional Validity of Military Commissions*, 5 GREEN BAG 2D 249 (Spring 2002). The four bases for Bush's Order: the Art. II Commander-in-Chief power; the Sept. 14, 2001 Congressional force authorization; 10 U.S.C. §§ 821 and 836, all of which are inferential authorities. One of the authors served post-9/11 as a Government advisor on military commissions, so it may be a sample of Government legal thinking on this topic.

Military Commissions: Opposing viewpoints.

Michael Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 Cal. W. L. Rev. 433 (Spring 2002). A comprehensive and useful history of U.S. military commissions and tribunals.

Neal K. Katyal and Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002). Possible *ultra vires* illegalities of such tribunals.

¹⁹⁶ *Army Lawyer* is published by Army JAG and is available online at Westlaw. It is also published as a series of Dept. of the Army Pamphlets (DA Pam 27-50-[#]).

Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 MICH. J. INT'L L. 1 (FALL 2001). A strong warning to military jurists that their participation in these tribunals could be a war crime.

Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 STAN. L. REV. 13 (Nov. 1990). A classic and oft-cited case study: the 1862 military-commission trial, and mass execution, of native American combatants. *See also* Anne English French, *Trials in Times of War: Do the Bush Military Commissions Sacrifice Our Freedoms?*, 63 OHIO ST. L.J. 1225 (2002), for more legal military-commission history, focusing on *Milligan*, *Quirin*, the relevant UCMJ sections and the 1949 Geneva Conventions.

Sean D. Murphy, *Doctrine of Command Responsibility in U.S. Human Rights Cases*, AM. J. INT'L L. 719 (July, 2002). Possible repercussions for any U.S. commanders (including Defense Secretary and the President) convening such trials under this doctrine, i.e., *Yamashita*, which holds commanders strictly accountable.

Robert D. Harmon, *General Yamashita's Revenge: A Judicial Murder and its Implications for U.S. Military Commissions in Current Warfare*, 4 NEW COLL. OF CAL. L.REV. 13 (May 2003). Available from MLTF or the author. Article on the Yamashita military-commission trial, past history of U.S. military tribunals, and command-responsibility doctrine.

Michael P. Scharf, *The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal*, 49 DEPAUL L. REV. 925 (Summer 2000). More proper alternatives to military-commission trials when enemy war criminals need their day in court.

Books:

Louis Fisher, *MILITARY TRIBUNALS & PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* (University Press of Kansas, 2005). Perhaps **the best** single-volume work on the subject, spanning the period from Revolutionary times to the present day. Takes note of post-9/11 military-commission cases but also places, in parallel context, the Nisei/Guantánamo detainee cases and the Abu Ghraib abuses.

Charles A. Shanor, L. Lynn Hogue, *NATIONAL SECURITY AND MILITARY LAW IN A NUTSHELL* (Thomson West, 2003), ISBN 0-314-26357-8 (see [Amazon](#)). Brief overviews of wartime and military law. *See esp.* ch. 2, "National Security Law."

Mark E. Neely, Jr., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (New York: Oxford Univ. Press, 1991, [paperback](#)). Much material on Civil War military commissions and the wartime suspension of habeas, still relevant as *ex parte Milligan* is still quotable case law. *See esp.* Chapter 8 (at 160 *et seq.*), "The Irrelevance of the Milligan Decision". *See also* William H. Rehnquist, *ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME* (Vintage, 1998), a rather selective view of the period and later. The late Chief Justice was fond of the aphorism *silent leges inter armas*, the law is silent amidst arms, while the actual quote from Cicero seems to be *Inter Arma Enim Silent Leges*, in time of war the law falls silent.

Richard L. Lael, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (Scholarly Resources, Inc., 1982), ISBN 0-8420-2202-3. Considerable material on the

conduct of the military-commission trial itself and its miscarriages of justice. One of the very few books on the Yamashita trial in print.

Louis Fisher, *NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW* (Landmark Law Cases and American Society, University Press of Kansas; 2nd updated edition, June 2, 2005). The 1942 *Quirin* military-commission case, which included two U.S. citizens among the defendants, is the direct predecessor of the Bush tribunal, and *ex parte Quirin* is frequently cited in detention and tribunal cases post-9/11. See also Michael Dobbs, *SABOTEURS : THE NAZI RAID ON AMERICA* (Knopf, February 2004). More post-9/11 writing on the *Quirin* case, though less focused on the legal aspects than Fisher. Dobbs does show how Government publicity, particularly from the FBI, affected the investigation and trial. For a trial *in camera* the Government gave it plenty of exposure, trying and convicting the saboteurs in the press as well as by tribunal.

Ingo Müller, *HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH* (Harvard University Press, 1991). How the German legal profession abandoned the rule of law, notably in the special tribunals (Special Courts and People's Courts) in Weimar and Nazi Germany. Müller notes that this trend pre-dated Hitler, that the laws enabling it were in the name of national security, that it followed the replacement of liberal with conservative judges over several decades, that the judges had come to accept public affairs as a "friend or foe" paradigm with no room for loyal opposition. Uncomfortably similar to current events.

Michael Ratner, *GUANTÁNAMO: WHAT THE WORLD SHOULD KNOW* (Chelsea Green Publishing Co., 2004). Our Devil's Island: what a tribunal defendant goes through before getting to "trial." Author is president of the Center for Constitutional Rights.

Military regulations, a selection

Army Regulation [[AR](#)] 27-26, Rules of Professional Conduct for Lawyers. See also, e.g., Navy [JAG INSTR 5803.1C](#), Professional Conduct of Attorneys. Military JAG lawyers also have professional ethics rules, not unlike the ABA's Model Rules. Some of them seem uncomfortably aware of it. Of possible utility in an *ultra vires* proceeding.

[AR 190-55](#), U.S. Army Correctional System: Procedures for Military Executions, 1 November 1999. The Army is a likely destination for capital sentences after military-commission trials. "Only the President of the United States can approve and order the execution of a death sentence ... All death sentences will be carried out by lethal injection at the United States Disciplinary Barracks (USDB) [Ft. Leavenworth, Kan.]."¹⁹⁷

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The result is a stunning transformation from a republican form of government characterized by legislative control and a vigorous system of military tribunals that concentrates power in the executive branch and particularly in the presidency. Tribunals are created by Presidents, staffed by Presidents, and guided by rules and procedures developed by the executive branch, all with little or minimal involvement of the other two branches. It is a form of government that the Framers would find repugnant.¹⁹⁸ — Louis Fisher

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¹⁹⁷ AR 190-55, ¶ 1-4, citing RCM.

¹⁹⁸ Louis Fisher, *MILITARY TRIBUNALS*, *supra*, at 253.