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ESSAY

A PUTRID PEDIGREE: THE BUSH ADMINISTRATION'S MILITARY TRIBUNALS IN HISTORICAL PERSPECTIVE

MICHAL R. BELKNAP*

On September 11, 2001, terrorists destroyed the World Trade Center and badly damaged the Pentagon in the first large-scale attack on American territory in nearly sixty years.¹ A week later, the House and Senate adopted a joint resolution authorizing the President to “[u]se all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed or aided” these attacks or “harbored such organizations or persons.”²

On October 7, 2001, the United States commenced aerial bombardment of Osama bin Laden’s al Qaeda organization and its Taliban supporters in Afghanistan, and less than two weeks later, on the night of October 19-20, American special operations troops initiated ground operations against the terrorist organization and its Afghan protectors.³ Today, for the first time since it withdrew from Vietnam a generation ago, the United States finds itself involved in a protracted war abroad.

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1. The United States had experienced nothing comparable to the September 11 attack since the Japanese air raid on Pearl Harbor and other targets in Hawaii on December 7, 1941. A Japanese submarine did attack California on February 23, 1942, surfacing near Santa Barbara and firing a score of shells into a petroleum complex, but this attack inflicted only a few hundred dollars damage. LEE KENNETT, *FOR THE DURATION: THE UNITED STATES GOES TO WAR - PEARL HARBOR -1942*, at 61 (1985). The Japanese had plans to shell a number of West Coast shore objectives on Christmas Eve, 1941, but the Imperial Navy’s Combined Fleet Headquarters canceled this operation. *Id.*

2. Authorization for Use of United States Armed Forces, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001).

3. See The White House, President George W. Bush, *President Issues Military Order*, Nov. 13, 2001, available at <http://whitehouse.gov/news/release/2001/11/20011113-27.html>.

That war has produced legal reverberations at home.⁴ Probably the most controversial of these is President Bush's November 13, 2001 order providing for the trial before military commissions of aliens suspected of involvement in terrorist activities or membership in al Qaeda or believed to have knowingly harbored such individuals.⁵ Spokesmen for the Bush Administration and defenders of its decision to resort to military justice to fight the legal war on terrorism have offered a number of justifications for that policy. Vice President Dick Cheney promptly announced that, in his opinion, terrorists did not deserve the guarantees and safeguards afforded to defendants by the civilian judicial system,⁶ a theme Attorney General John Ashcroft echoed when he declared: "Foreign terrorists who commit war crimes against the United States, in my judgment, are not entitled to, and do not deserve, the protections of the American Constitution."⁷ Military tribunals, their proponents claimed, would bring these dangerous criminals to justice quickly. "At a time of warfare, expedition is critical," argued Bruce Fein, once an associate deputy attorney general in the Reagan administration.⁸ Resort to military

4. *E.g.*, Declaration of National Emergency by Reason of Certain Terrorist Attacks, Proclamation No. 7463, 66 Fed. Reg. 48199 (Sep. 14, 2001); Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act (USA PATRIOT ACT) of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001) (authorizing the use of new intelligence collection techniques and the detention and removal of aliens engaging in terrorist activities, changing criminal law and procedure relating to terrorism, and facilitating destruction of the financial infrastructure of terrorism).

5. Military Order—Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57833 (Nov. 16, 2001) [hereinafter Military Order]. The order defines the class of persons subject to military trial to include "any individual who is not a United States citizen" with respect to which the President determines in writing that:

- (1) there is reason to believe that such individual, at the relevant times,
 - (i) is or was a member of the organization known as al Quida [sic];
 - (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefore, that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy or economy; or
 - (iii) has knowingly harbored one or more individuals described in subparagraphs (i) or (ii). . . .

Id. § 2. On February 8, 2002, the American Bar Association reported: "The use of military tribunals is one of the most controversial elements in the Administration's response to the terrorist attacks." James Podgers, *ABA Tackles Tribunals Issue*, 1 A.B.A. J. e-Report, Feb. 8, 2002, at <http://www.abanet.org/journal/ereport/f8midtribus.html>.

6. Kelly Wallace et al., *Bush Officials Defend Military Trials in Terror Cases*, CNN.com, Nov. 14, 2001, available at <http://www.cnn.com/2001/LAW/11/14/inv.military.court/>.

7. *Id.*

8. Molly McDonough, *Rumsfeld Has Power to Shape Military Tribunals*, 1 ABA J. e-Report, Nov. 30, 2001, at <http://www.abanet.org/journal/ereport/n29court.html>. Administration officials also say Bush's order "is aimed at swiftly bringing terrorists to justice instead of allowing them to meander through the courts." Rebecca Carr, *Critics Attack Bush's Tribunal Order, Cheney Comes to Defense*, Cox News Service, Nov. 15, 2001, available at

tribunals would also prevent reprisals against jurors by supporters of terrorist defendants, backers of Bush's order insisted.⁹ Furthermore, unlike civilian trials, these proceedings could be held in secret, making it possible for the government to avoid disclosing classified information and the methods used to obtain it.¹⁰ "[F]rankly, you don't want to compromise intelligence information in times of war," Ashcroft told NBC's Tom Brokaw.¹¹ The secrecy of military trials would also ensure that these proceedings could not become the sort of political trials in which defendants exploit a courtroom as a forum to publicize their views and build support for their movement.¹² Former Solicitor General Robert Bork warned readers of *National Review*, "An open trial . . . covered by television, would be an ideal stage for Osama bin Laden to spread his propaganda to all the Muslims in the world."¹³

Despite the advantages that the Bush administration and its supporters saw in the use of military tribunals, the President's order evoked immediate and widespread criticism. Leaders of the Arab-American Institute and People for the American Way both condemned it.¹⁴ The American Civil Liberties Union also attacked the President's order.¹⁵ Academic critics included a prominent authority on international war crimes prosecutions,¹⁶ a Harvard

<http://www.coxnews.com/washingtonbureau/staff/carr/111501TER-TRIBUNAL.html>.

9. See Carr, *supra* note 8; Robert H. Bork, *Having Their Day in (a Military) Court*, *National Review*, Nov. 30, 2001, available at 2001 WL 10667472.

10. See Bork, *supra* note 9; William Galbeson, *Closer Look at New Plan for Trying Terrorists*, *N.Y. TIMES*, Nov. 15, 2001, § B6, col. 1, available at 2001 WL 30061792.

11. *Ashcroft Defends Military Tribunals: Attorney General Talks with NBC's Tom Brokaw About Decision*, *Lightspeed (MS/NBC)*, Nov. 19, 2001, available at <http://www.msnbc.com/news/660191.asp?cp1=1>.

12. See generally MICHAL R. BELKNAP, *AMERICAN POLITICAL TRIALS xvii-xviii* (2d ed. 1994) [hereinafter BELKNAP, *AMERICAN POLITICAL TRIALS*].

13. Bork, *supra* note 9. It is worth noting that, although the September 13, 1993 trial of the terrorists accused of bombing the World Trade Center on February 26, 1993 lasted six months, it did not turn into the sort of political spectacle feared by Bork. Anti-Defamation League Law Enforcement Agency Resource Network, *The World Trade Center Bombing*, available at http://www.adl.org/learn/jttf/wtcb_jttf.asp. Nor, my colleague, William Aceves reminds me, did that case produce any of the other consequences that proponents of military tribunals have insisted would result from civilian trials of terrorists.

14. See George Lardner, Jr., *On Left and Right, Concern Over Anti-Terrorism Moves*, *WASH. POST*, Nov. 16, 2001, at A40, available at <http://www.washingtonpost.com/wp-dyn/articles/A37718-20001Nov15.html> [hereinafter Lardner, *On Left and Right*].

15. The ACLU decried Bush's order as "further evidence that the administration is totally unwilling to abide by the checks and balances that are so central to our democracy." McDonough, *supra* note 8. The director of its Washington office, Laura W. Murphy, called the order "disturbing" and expressed the opinion that Bush must "justify why the current system does not allow for the timely prosecution of those accused of terrorist activities." Kelly Wallace, *Military Trials Possible for Terror Suspects*, *CNN.com*, Nov. 14, 2001, at <http://cnn.com/2001/US/11/13/inv.military.trials>.

16. See Interview by Jennifer Barrett with David Scheffer, *Our Credibility is on the Line Here*, *NEWSWEEK*, Nov. 28, 2001, available at <http://www.msnbc.com/news/664569.asp?cp1=1>. See also Jordan J. Paust, *Antiterrorism Military Commissions: Courting Illegality*, 23 *MICH. J. INT'L L.* 1 (2001) (international law scholar and expert on My Lai case contending Bush's order must be amended because substantial portions of it violate interna-

constitutional law scholar,¹⁷ another Harvard professor who had formerly served as a deputy attorney general in the Justice Department,¹⁸ a leader of the American Bar Association's Criminal Justice Section,¹⁹ and a legal historian.²⁰ A professor of international law, Ved P. Nanda of the University of Denver, characterized Bush's order as "an affront to the rule of law."²¹ On Capitol Hill, the President's plan to try suspected terrorists before military commissions drew fire from both the chairman of the Senate Judiciary Committee, Patrick Leahy (D. Vt.),²² and the chairman of its subcommittee on the courts, Charles Schumer (D. N.Y.).²³ "President Bush's executive order is a broad proposal that has enormous potential for abuse," Senator Ted Kennedy (D. Mass.) complained.²⁴

Not all of the criticism came from liberals and the Democratic opposition. While some prominent members of the President's own party, such as Senator Orin Hatch (R. Utah), the ranking Republican on the Senate Judiciary Committee, supported Bush,²⁵ the impeccably conservative Representative Robert Barr (R. Ga.), a member of the House Judiciary Committee, decried the Administration's thirst for power and its lack of respect for civil liberties.²⁶ Tim Lynch, director of the Cato Institute's project on criminal justice, accused Bush of "arrogance" and his Administration of trying to take presidential power "farther than it has gone before."²⁷ Even the Heritage Foundation warned the Administration to proceed with caution.²⁸

Newspapers across the country carried denunciations of the Administration's plan to try terrorists before military commissions. "It is a good sign for

tional law).

17. See Laurence H. Tribe, *Trial by Fury*, THE NEW REPUBLIC, Jan. 28, 2002, at 4.

18. Henry Weinstein, Daren Briscoe, & Mitchell Landsberg, *A Changed America: Civil Liberties Take Back Seat to Safety Law: Some Hard-Won Freedoms Give Way to More Police Powers and Self-Censorship*, L.A. TIMES, Mar. 10, 2002, at A31, col. 2. Although strongly supporting most of what the Bush Administration has done in the war on terrorism, Professor Phillip B. Heymann says of its plans to utilize military tribunals: "I think they must have gone absolutely crazy." In his opinion, the President's order shows that he "deeply misunderstands what the U.S. is about." *Id.*

19. See comments by Professor Stephen Allan Saltzburg of the George Washington University School of Law, *quoted in* McDonough, *supra* note 8.

20. Michal R. Belknap, *Military Tribunals: Legal but Dubious*, SAN DIEGO UNION-TRIBUNE, Nov. 25, 2001, at G5.

21. Ved P. Nanda, *Let U.N. Tribunal Try Terrorists*, DENVER POST, Nov. 25, 2001, available at 2001 WL 27672488.

22. See Lardner, *On Left and Right*, *supra* note 14.

23. See Stephen Dinan & Jerry Seper, *Schumer to Probe Order for Tribunals*, WASHINGTON TIMES, Nov. 28, 2001, at Part A, Nation, A6.

24. Kevin Freking, *Ashcroft: Tribunal Critics Aid Terrorists*, ARKANSAS DEMOCRAT-GAZETTE, Dec. 7, 2001, at A1.

25. *Id.*

26. Lardner, *On Left and Right*, *supra* note 14.

27. *Id.*

28. Morton H. Halperin, *Stockade Justice: Why We Don't Need Military Tribunals*, AMERICAN PROSPECT, Nov. 17, 2001, available at 2001 WL 7681338.

American democracy that voices are being raised against President Bush's attempt to scuttle due process by sending foreign terrorist suspects to military tribunals," the *Boston Globe* editorialized.²⁹ Writing in the *Cornell Daily Sun*, two college students excoriated the President's plan as "a Bad Idea for America—and Racist too."³⁰ Noting that Timothy McVeigh, the domestic terrorist who blew up a federal building in Oklahoma City, had been tried "in a regular court of law," the *Greensboro (North Carolina) News and Record* asked, "Why in the world do they need to use military tribunals [to try non-citizens accused of terrorism]?"³¹ The *News and Record* suspected "the real reason for this action is that the government wants to make sure it convicts these men, whether they are truly guilty or not. . . ."³² Writing in *The (Bergen County) Record*, Kevin Lantry of Ridgewood, New Jersey argued that the type of trials Bush had authorized would serve only to strengthen America's enemies by enabling them to portray themselves as martyrs.³³ "Rarely, but inevitably, there comes a time when the American people must tell a president 'enough,'" Charles Levendosky, of the *Casper (Wyoming) Star-Tribune*, declared in a piece he wrote for the *Milwaukee Journal-Sentinel*. "That time is now."³⁴

Although vigorously condemned by Levendosky and an array of other highly vocal critics, the President's scheme appeared to enjoy overwhelming public support. A poll conducted for *Newsweek* magazine discovered, "Americans are solidly behind the Bush Administration's plan to try terrorists in military tribunals."³⁵ Pollsters found that sixty-eight percent of them approved of it, while only twenty-two percent disapproved.³⁶ Although those numbers must have cheered Bush and his backers, pollsters also discovered that the public's ideas about how military tribunals should operate differed substantially from those of the Administration.³⁷ Thirty percent thought the proceedings should be conducted entirely in public, and another twenty-eight percent believed they should be mostly public.³⁸ Fifty-five percent of those

29. *The Tribunal Fallacy*, THE BOSTON GLOBE, Dec. 1, 2001, available at 2001 WL 31229903.

30. Jordan Erenrich & Adam Crouch, *Why Military Tribunals are a Bad Idea*, CORNELL DAILY SUN, Dec. 3, 2001, available at <http://www.cornelldailysun.com/articles/4098/>.

31. *Military Tribunals Cannot be Justified*, NEWS & RECORD (Greensboro, NC), Dec. 22, 2001, at A12.

32. *Id.*

33. Kevin Lantry, *Secret Trials are a Bad Idea*, THE RECORD, Nov. 20, 2001, at L12, available at 2001 WL 5278531.

34. Charles Levendosky, *Are Military Tribunals Appropriate? No, They Shred the Constitution*, MILWAUKEE JOURNAL-SENTINEL, Nov. 24, 2001, at 15A, available at 2001 WL 27436639.

35. Jennifer Barrett, *Newsweek Poll: Public Backs Military Tribunals*, Dec. 1, 2001, available at <http://www.msnbc.com/news/666040.asp?cp1=1>.

36. *Id.*

37. *Id.*

38. *Id.* Twenty-seven percent of those interviewed thought military tribunal trials should be mostly in secret, while eleven percent thought they should be entirely secret. *Id.*

surveyed believed the tribunals should have some international involvement, while only forty percent agreed with the Bush Administration that they should be run entirely by Americans.³⁹ An overwhelming seventy-four percent majority said military commissions should be used to try foreign suspects captured elsewhere in the world, but fifty-seven percent opposed using them to try non-citizens who had lived in this country for many years.⁴⁰ Indeed, a very substantial minority (forty-two percent) did not even want the commissions to consist entirely of military personnel, expressing the opinion that civilian federal judges should play some role in their proceedings.⁴¹ Ominously, fifty-nine percent of those interviewed considered it somewhat likely that the government would overuse military tribunals in cases involving non-citizens that belonged in the regular criminal court system, while another eighteen percent considered this highly likely.⁴²

The widespread criticism that Bush's plan evoked and the public's substantial reservations about it caused the Administration to back away from what the President had authorized on November 13. The draft rules for military tribunals that were leaked to the press in December 2001 were significantly more protective of defendants' rights than his order required.⁴³ Fur-

39. *Id.*

40. *Id.*

41. *Id.* In mid-January 2002, *USA Today* reported that lawyers in the office of the general counsel at the Defense Department, who were drafting rules for the military tribunals, were considering a plan to allow alleged terrorists convicted by these commissions to appeal their convictions to a panel of state and federal judges who were also military reservists. See Toni Locy, *Reservist Judges Could Hear Terror Appeals*, USA TODAY, Jan. 11, 2002, at 8A, available at 2002 WL 4717107.

42. *Id.* Twelve percent thought it not at all likely this would occur, and twenty-five percent considered it "not too likely." *Id.*

43. See *Toward Fairness*, ST. LOUIS POST-DISPATCH, Jan. 3, 2002, at B6, available at 2002 WL 25382. These draft rules granted the accused terrorists the presumption of innocence, required proof beyond a reasonable doubt, allowed defendants to hire their own lawyers, opened most of the proceedings to the public, and required a unanimous vote to impose the death penalty. *Id.* The President's November 13 order did none of these things. It failed to mention the presumption of innocence or the traditional Anglo-American requirement of proof beyond a reasonable doubt. The President's order at least implied that accused alien terrorists might have to accept counsel designated by the Secretary of Defense. See *Military Order*, *supra* note 5, § 4(c)(5). It authorized the Secretary of Defense to provide for closure of the proceedings of a military tribunal. *Id.* § 4(c)(4). It also clearly allowed the death penalty to be imposed by a two-thirds vote of the members of the commission. See *id.* §§ 4(a) and 4(c)(7).

The final version of the rules, issued by the Department of Defense on March 21, 2002, did in fact embody the protections leaked earlier. See Department of Defense, *Military Commission Order No. 1* (Mar. 21, 2002) (copy on file with the author) [hereinafter Department of Defense]. The rules provide: "The Accused shall be presumed innocent until proven guilty." *Id.* § 5(B). A member of a Commission may vote to convict of an offense "if and only if that member is convinced beyond a reasonable doubt, based on the evidence admitted at trial, that the Accused is guilty of the offense." *Id.* § 6(F). A unanimous vote of a Commission is required to impose a death sentence. *Id.* The accused is allowed to retain, at his own expense, the services of a civilian attorney. This right is, however, subject to a number of qualifications, including the fact that the lawyer selected must be "eligible for access to in-

thermore, when the government prosecuted the first alien accused of terrorist activities after the order was issued, it brought the case in a civilian court, rather than before a military commission.⁴⁴ Officials acknowledged that recent criticism of military tribunals had helped shape that decision.⁴⁵

Despite the fact that the Bush Administration seemed to be backing away from the position the President had staked out on November 13, at its February 2002 Midyear Meeting, the American Bar Association weighed in on the issue of military tribunals.⁴⁶ Following an impassioned debate,⁴⁷ the ABA's House of Delegates adopted by a vote of 286-147 a resolution urging that these special commissions not be used to try alleged violations of the laws of war by U.S. citizens, lawful resident aliens, or other aliens who were in the United States legally.⁴⁸ The ABA also called upon the Department of

formation classified at the level of SECRET or higher" and that he or she must never have been subjected to any sanction or disciplinary action "by any court, bar, or other competent governmental authority for relevant misconduct." *Id.* § 4(C)(3)(b). The rules provide that the accused "shall be afforded a trial open to the public." *Id.* § 5(O). Again, however, this right is subject to numerous qualifications, the most important of which is that "[t]he Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative . . ." *Id.* § 6(B)(3).

44. On December 11, 2001, the government indicted Zacarias Moussaoui for conspiring with Osama bin Laden and other members of al Qaeda (including the nineteen men who hijacked the airliners that crashed into the World Trade Center, the Pentagon, and a Pennsylvania field on September 11) to murder thousands of innocent Americans. David Johnston & Philip Shenon, *Man Held Since August is Accused of Helping in Sept. 11 Terror Plot*, N.Y. TIMES, Dec. 12, 2001, at A-1, col. 2. Under the President's order Moussaoui could have been tried before a military tribunal, for he was a French citizen of Moroccan descent. "Administration officials said the decision to prosecute Mr. Moussaoui in federal court followed a contentious debate between the Pentagon, which wanted to try him in an overseas military tribunal, and the Justice Department, which has secured convictions in several important terrorist cases in American courts." *Id.* According to the White House, the decision to indict Moussaoui came after Attorney General Ashcroft met with President Bush. According to Press Secretary Ari Fleischer, the Attorney General recommended that the cases be heard in a civilian criminal court, and the President concurred. *Id.* at B-7, cols. 2-3.

In the opinion of Elisa Massimino of the Lawyers Committee for Human Rights: "The Moussaoui indictment makes it hard to imagine a case that could justify the use of military courts inside the United States." *Alien Justice: What's Wrong with Military Trials of Terrorist Suspects?*, 25 HUM. RTS. 14, 14 (2002).

45. Johnston & Shenon, *supra* note 44, at A-1, col. 2. Rich Lowry of *National Review* maintained that the forthcoming civilian trial of Moussaoui in Alexandria, Virginia could "best be thought of as Patrick Leahy's revenge—the fruit of the Democrats' assault on the idea of military tribunals. *Show Trial*, NATIONAL REVIEW ONLINE, Jan. 4, 2002, available at <http://www.nationalreview.com/lowry/lowry010402.shtml>.

46. A few weeks earlier, its Task Force on Terrorism and the Law had issued a report endorsing the use of military tribunals with some restrictions. Podgers, *supra* note 5.

47. *Id.* One of the participants in the debate was Solicitor General Theodore Olson, whose wife (a passenger on the plane that hit the Pentagon) was one of the victims of the September 11 attacks. "We are still learning about the enemy we are facing," said Olson. "Unless we're sure this resolution won't have unintended consequences for those efforts, we shouldn't put it forth as the definitive [ABA] statement on the issue." *Id.* ABA President-elect Alfred P. Carlton, Jr. of Raleigh, North Carolina took a similar position. "We need to leave some flexibility," he said. *Id.*

48. *Id.* The House of Delegates also adopted another resolution generally supporting

Defense to require that military tribunals observe fair trial standards.⁴⁹ Apparently chastened, it did so. The rules governing the operation of the tribunals that the Pentagon released on March 21, 2002⁵⁰ closely matched the recommendations of the ABA.⁵¹ Although taking issue with a few of them, which he felt needed more work, the organization's president, Robert Hirshon, declared, "This is a giant step forward, and it's a positive step."⁵²

The Bush Administration, which had gone along with the ABA, after trying unsuccessfully to persuade the House of Delegates to delay action on the tribunals issue,⁵³ had obviously underestimated the apprehension that its plan would arouse among lawyers as well as laypersons. Had the President and his advisors paid more attention to the unsavory history of American military commissions, they might have anticipated the furor that the President's November 13 order evoked. That history is the focus of this Essay. It concedes that the sort of military tribunals the President has authorized are probably not unlawful, at least when used to try certain kinds of offenses committed in certain places. They may even represent an appropriate method of prosecuting terrorists apprehended outside the United States for war crimes committed in other countries. It is my contention, however, that the many abuses and injustices associated with past military commission trials suggest that utilizing this device to try individuals for crimes committed within the United States would be unwise.

In Part I, I discuss the legality of Bush's order, examining Supreme Court decisions which suggest that while military tribunals are constitutional, certain details of the President's plan are not. Part II deals with the use of military commissions to prosecute war crimes committed abroad. Noting that there are historical precedents for employing them for that purpose, it concedes that in this context, resort to military tribunals may be appropriate, but warns that such proceedings can easily tarnish the image of American justice. Part III discusses the use of military commissions to try offenses committed within the United States. Taking a close look at a series

President Bush in his war on terrorism. *Id.*

49. *Id.* House of Delegates member Brooksley E. Born of Washington, D.C. declared, "This is where the legal profession needs to be heard—on the importance of these core values." *Id.* The resolution that the House of Delegates adopted urged that Defense Department regulations governing the operation of these tribunals incorporate procedures and guidelines contained in the Uniform Code of Military Justice [which are followed in courts-martial of American military personnel] and the International Covenant on Civil and Political Rights. *Id.* The ABA's Section on Individual Rights and Responsibilities joined several local bar associations in co-sponsoring the resolution. *Id.*

50. See Department of Defense, *supra* note 43.

51. Molly McDonough, *Pentagon Releases Rules on Tribunals*, 1 A.B.A. J. e-Report, Mar. 22, 2002, available at <http://www.abanet.org/journal/ereport/m22trib.html>.

52. *Id.*

53. Podgers, *supra* note 5. According to ABA President Robert E. Hirshon, a high-ranking Justice Department official contacted Robert A. Clifford, chair of the organization's Task Force on Terrorism and the Law, urging that the House of Delegates delay action on the issue. *Id.*

of notorious trials between 1862 and 1942, Part III shows that they were rife with procedural irregularities and substantive injustice. The history of these proceedings, I suggest, raises grave doubts about the wisdom of the Bush Administration's plans to employ military commissions to combat terrorism at home.

I. LEGALITY OF PRESIDENT BUSH'S ORDER

Foolishness is not synonymous with illegality, and while the issue is certainly debatable,⁵⁴ President Bush probably does possess the authority to create the kind of courts for which his November 13 order provides. The reason is not that Congress gave it to him. The statutory basis for military commissions is so thin as to be almost invisible. The Uniform Code of Military Justice (UCMJ),⁵⁵ enacted by Congress in 1950,⁵⁶ does little more than acknowledge the existence of such tribunals. It has only a tiny bit to say about the power of military commissions and neither confers jurisdiction on them nor prescribes the manner of their operation.⁵⁷

While the lack of any real statutory foundation for these tribunals may be a political problem for the Administration, it probably does not affect the

54. See David B. Rivkin, Jr. et al., *Bringing Al-Qaeda to Justice: The Constitutionality of Trying Al-Qaeda Terrorists in the Military Justice System*, HERITAGE FOUNDATION, Nov. 5, 2001, available at <http://www.heritage.org/library/legalmemo/Im3.html>.

55. 10 U.S.C. §§ 801-950 (Supp. 2001).

56. Pub. L. 81-506, 64 Stat. 107 (1950).

57. Art. 21 of the UCMJ provides:

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

10 U.S.C. § 821 (2002) (emphasis added). Art. 104 of the UCMJ, which deals with the punishments for aiding the enemy, also mentions military commissions. It provides:

Any person who:

(1) aids, or attempts to aid, the enemy with arms, ammunition, supplies, money, or other things; or

(2) without proper authority, knowingly harbors or protects or gives intelligence to, or communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly;

shall suffer death or such other punishment as a court-martial or *military commission* may direct.

18 U.S.C. § 904 (2002) (emphasis added). Art. 36 leaves it to the President to prescribe the rules of procedure to be followed in "military commissions and other military tribunals. . . ." 10 U.S.C. § 836 (2002). Also relevant is Art. 2, which includes among those made subject to the UCMJ, "prisoners of war in custody of the armed forces." 10 U.S.C. § 802(a)(9) (2002). This article does not, however, refer at all to military commissions.

legality of Bush's November 13 directive. His Military Order refers to several statutes, but in issuing it, he seems to have relied primarily on the inherent powers of his office, especially his authority as Commander-in-Chief of the armed forces.⁵⁸ The Commander-in-Chief clause does not empower the President to subject anyone he suspects of terrorist activity to a military trial. Such a sweeping order would run afoul of *Ex parte Milligan* (1867).⁵⁹ In that case, the Supreme Court granted a writ of habeas corpus to an Indiana man who had been convicted by a military commission of treason, allegedly committed during the Civil War.⁶⁰ It held that trying a citizen who was not a member of the armed forces before such a tribunal, rather than in a civilian federal court authorized by Congress, in an area where such courts were open and satisfactorily administering criminal justice, violated both the Sixth Amendment's guarantee of a speedy and public trial before an impartial jury and the Fifth Amendment's requirement that all prosecutions not involving members of the military be initiated by grand jury indictment.⁶¹ The Court rejected the contention that the emergency created by a war justified using military commissions in areas not within a theater of operations.⁶²

58. The preamble of the November 13, 2001 Military Order declares:

By the authority vested in me as President and as Commander in Chief of the Armed Forces of the United States by the Constitution and the laws of the United States of America, including the Authorization for Use of Military Force Joint Resolution (Public Law 107-40, 115 Stat 224) and sections 821 and 836 of title 10 United States Code, it is hereby ordered as follows. . . .

Military Order, *supra* note 5. Jordan Paust contends that there are significant limitations on the President's authority to set up military commissions pursuant to his Commander-in-Chief power: "The President's Commander-in-Chief power to set up military commissions applies only during actual war within a war zone or relevant occupied territory and apparently ends when peace is finalized." Paust, *supra* note 16, at 5.

59. 71 U.S. (4 Wall.) 2 (1867).

60. In fact, although convicted of treason, Milligan and those tried with him almost certainly were not guilty of that offense. The defendants, all of whom were Democrats, were the victims of a highly political prosecution, initiated by the Republican governor of Indiana for partisan purposes. See notes 167-98 and accompanying text *infra*. See generally Frank L. Klement, *The Indianapolis Treason Trials and Ex Parte Milligan*, in BELKNAP, AMERICAN POLITICAL TRIALS, *supra* note 12, at 99-118.

61. 71 U.S. at 210-14. Cf. *Duncan v. Kahanamoku*, 327 U.S. 304 (1946). While *Duncan* also held unlawful the use of military tribunals to try individuals charged with a crime who were not connected with the armed forces, the legal basis of that decision was different from the legal basis of *Milligan*. Taking the position that it was unnecessary to address the constitutionality of the military tribunals whose jurisdiction was challenged in that case, *id.* at 312-13, the Supreme Court held that the statute under which the government of the then-Territory of Hawaii operated, the Hawaiian Organic Act, did not authorize the military to try and punish civilians. *Id.* at 324. In a concurring opinion in *Duncan*, Justice Frank Murphy emphasized that, "[a]bhorrence of military rule is ingrained in our form of government," *id.* at 325, and insisted that there should be no retreat from *Milligan's* open court rule. *Id.* at 334.

62. See 71 U.S. at 209-10, 215-22. In what is probably the most famous passage in its *Milligan* opinion, the Court declared:

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

On the other hand, the Supreme Court has endorsed the use of such tribunals to try foreign military personnel in places where there has been actual combat.⁶³ In *In re Yamashita*,⁶⁴ it refused to issue a writ of habeas corpus to a Japanese general who had been convicted by a military commission, which was convened by the commanding general of U.S. armed forces in the Western Pacific for the transgressions of his troops during the final stages of World War II in the Philippines. The Court asserted that,

[a]n important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort, have violated the law of war.⁶⁵

Four years later, in *Johnson v. Eisentrager* (1950),⁶⁶ it affirmed the action of a federal district court that had dismissed habeas corpus petitions filed by former German soldiers convicted by a military commission of continuing to engage in belligerent activity against U.S. forces in China after the

times 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.

Id. at 209.

63. For a fuller discussion of military commission trials of this type, see Part II *infra*.

64. 327 U.S. 1 (1946).

65. *Id.* at 11. It should be noted that the Court believed that Congress had authorized the trial and punishment of enemy combatants for violation of the laws of war. *Id.* The laws of war proscribe conduct that is considered criminal even when committed within the context of a war, as the simple killing and wounding of others is not, although it would be in peacetime. See TELFORD TAYLOR, *NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY* 19 (1970).

What then are the 'laws of war'? They are of ancient origin, and followed two main streams of development. The first flowed from medieval notions of chivalry. . . . [I]t survives today in rules (often violated) prohibiting various deceptions such as the use of the enemy's uniforms or battle insignia, or the launching of a war without fair warning by formal declaration.

The second and far more important concept is that the ravages of war should be mitigated as far as possible by prohibiting needless cruelties, and other acts that spread death and destruction and are not reasonably related to the conduct of hostilities. The seeds of such a principle must be nearly as old as human society, and ancient literature abounds with condemnation of pillage and massacre. In more recent times, both religious humanitarianism and the opposition of merchants to unnecessary disruptions of commerce have furnished the motivation for restricting customs and understandings. In the 17th century, these laws began to find expression in learned writings, especially those of the Dutch jurist-philosopher Hugo Grotius.

The formalization of military organization in the 18th century brought the establishment of military courts empowered to try violations of the laws of war as well as other offenses by soldiers.

Id. at 19-20.

66. 339 U.S. 763 (1950).

May 8, 1945 surrender of Germany to the Allies. "The jurisdiction of military authorities, during or following hostilities, to punish those guilty of offenses against the laws of war is long-established," the Court maintained.⁶⁷ It characterized as "well-established" the power of the military to exercise jurisdiction over "enemy belligerents, prisoners of war, or others charged with violating the laws of war."⁶⁸

While the petitioners in *Yamashita* and *Eisentrager* committed their crimes in overseas theaters of operation, those in *Ex parte Quirin* (1942)⁶⁹ were tried by a military commission for World War II offenses committed within the United States. They had come to this country from Germany on a sabotage mission.⁷⁰ After landing in two groups, one in Florida and the other on Long Island, the so-called "Nazi saboteurs" disposed of their military uniforms,⁷¹ thus forfeiting the right to be treated as prisoners of war.⁷² President Roosevelt ordered them tried before a military commission in Washington, D.C., although the civil courts there were open and functioning.⁷³ Arguing that, since their clients were not members of the American armed forces, under *Ex parte Milligan*, they were entitled to a civilian trial, the appointed counsel representing the Nazi saboteurs petitioned for a writ of habeas corpus and carried their case quickly up to the Supreme Court.⁷⁴ It rejected their

67. *Id.* at 786. As in *Yamashita*, the Court was not ruling here on the authority of the President to create military commissions to try enemy belligerents. It was instead commenting on the legality, under international law, of punishing enemy military personnel for war crimes. *Id.*

68. *Id.* (quoting Duncan, 327 U.S. at 312, 313-14).

69. 317 U.S. 1 (1942).

70. See generally EUGENE RACHLIS, *THEY CAME TO KILL* (1961) (popular account of the misadventures of the Nazi saboteurs); George Lardner, Jr., *Nazi Saboteurs Captured! FDR Orders Secret Military Tribunal*, WASH. POST MAG., Jan. 13, 2002, at W12 [hereinafter Lardner, *Nazi Saboteurs Captured*] (recent journalistic account which draws on scholarship on the case, including work by this Author).

71. See David J. Danelski, *The Saboteurs' Case*, J. SUP. CT. HIST. SOC'Y 61, 63-64 (1996).

72. Geneva Convention Related to the Treatment of Prisoners of War, opened for signature Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135, Art. 4A(1), (3), Art. 5, Art. 13, Art. 25, Art. 82, Art. 84, Art. 105, available at 1956 WL 54809 (U.S. Treaty).

73. Danelski, *supra* note 71, at 65-66. He did so primarily because he wanted the defendants to be given the death penalty, and had they been convicted in a civilian court on the most obvious charge, attempted sabotage, the maximum sentence they could have received was thirty years in prison. Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 63 (1980) [hereinafter Belknap, *Supreme Court*].

74. See Belknap, *Supreme Court*, *supra* note 73, at 67-73. The defendants were represented by Colonel Cassius M. Dowell, a career Judge Advocate General's Corps officer, and Kenneth Royall, a wartime volunteer with a distinguished record as a trial lawyer in North Carolina. *Id.* at 67. Dowell and Royall challenged not only the constitutionality of the military trial but also what they contended was the failure of the presidential proclamation creating it to comply with several procedural provisions of the Articles of War. *Id.* at 68. See generally Boris I. Bittker, *The World War II German Saboteurs' Case and Writs of Certiorari Before Judgment by the Court of Appeals: A Tale of Nunc Pro Tunc Jurisdiction*, 14 CONST. COMMENT. 431 (1997) (discussing the procedural aspects of the case from the perspective of a

argument.⁷⁵ Noting that Milligan had been a non-belligerent, who was neither part of nor associated with the armed forces of the enemy, the Court maintained that its opinion in his case was inapplicable to this one.⁷⁶ Because these petitioners had passed military lines out of uniform for purposes of committing sabotage, they were unlawful belligerents.⁷⁷ As such, a military commission could constitutionally try them for violation of the laws of war. The Court proclaimed, "We have no occasion now to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries."⁷⁸

Thus, to the extent that what President Bush has authorized is military trials of non-citizens for war crimes committed abroad and of alien terrorists for acts of unlawful belligerency committed within the United States, his November 13 order has the support of Supreme Court precedent.⁷⁹ To be sure, one facet of it is probably unconstitutional. Bush proclaimed that "military tribunals shall have exclusive jurisdiction with respect to offenses" committed by the individuals to whom his Military Order applies, and that those individuals "shall not be privileged to seek any remedy or maintain any proceeding, directly or indirectly, or to have any such remedy or proceeding sought on the individual's behalf, in . . . any court of the United States. . . ."⁸⁰ This provision replicates one Franklin Roosevelt included in his 1942 proclamation setting up the commission that tried the Nazi saboteurs, and its purpose, like that of its model, seems to be to prevent those subjected to trial by military commissions from challenging those tribunals by petitioning civilian courts for writs of habeas corpus.⁸¹ In *Quirin*, the gov-

junior attorney who participated in it).

75. See *Ex parte Quirin*, 317 U.S. at 45.

76. *Id.*

77. *Id.* at 31.

78. *Id.* at 45-46.

79. Whether the *Quirin* precedent would support the use of a military commission to try a citizen accused of acts of unlawful belligerency is highly problematic. One of the petitioners in that case, Hans Haupt, had immigrated to the United States when he was five, and his attorneys contended he had become a United States citizen when his parents were naturalized while he was still a minor. See 317 U.S. at 20. Haupt was recruited for the sabotage mission after finding himself in Germany at the end of an ill-fated odyssey that began when he fled Chicago for Mexico after impregnating his girlfriend. Royall insisted that Haupt had never taken an oath of allegiance to Germany, joined the German army or the Nazi party, or in any other way renounced his United States citizenship, and hence he remained a United States citizen. See Belknap, *Supreme Court*, *supra* note 73, at 85, 71. Since the Supreme Court declined to resolve the issue of Haupt's citizenship status (317 U.S. at 20), it is possible to argue either that *Quirin* does or that it does not stand for the proposition that a United States citizen who has acted as an unlawful belligerent can be tried before a military commission.

80. Military Order, *supra* note 5, § 7(b)(2).

81. Attorney General Francis Biddle told Roosevelt that this portion of his proclamation would produce the same practical results in the saboteur case as suspending the writ of habeas corpus without raising the broad policy questions that would follow a suspension of the writ. Belknap, *Supreme Court*, *supra* note 73, at 65. Bush's Military Order actually creates a more

ernment contended that Roosevelt's proclamation precluded any court from granting the saboteurs a hearing, even on the issue of whether his decree applied to their case. Bending over backwards to avoid conflict with the President, the Supreme Court denied that his directive had that effect, then went on to assert that "neither the Proclamation nor the fact that they are enemy aliens forecloses consideration by the courts of petitioners' contentions that the Constitution and laws of the United States constitutionally enacted forbid their trial by military commission."⁸² In *Yamashita*, while affirming that Congress had given civilian judges no authority to review the determinations of such tribunals, the Court noted that there was one exception: it had authorized them to grant writs of habeas corpus for the purpose of inquiring into the causes of restraints of liberty.⁸³ "If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts," it acknowledged.⁸⁴ But civilian courts might "inquire into whether the detention complained of is within the authority of those detaining the petitioner."⁸⁵ Although the Supreme Court carefully avoided in *Quirin* and *Yamashita* both confrontation with the Executive and the articulation of a precise constitutional rule, the message of those decisions is clear: the President may not (at least without suspending the Great Writ) deny those he subjects to trial by military commission access to the civilian courts via habeas corpus. The Court's recent decision in *Immigration and Naturalization Service v. St. Cyr*⁸⁶ makes even more dubious Bush's attempt to do this without explicitly

impregnable barrier to civilian judicial review than did its model, for Roosevelt's proclamation forbade those to whom it applied to "seek any remedy or maintain any proceeding" in the courts of the United States, *except as authorized by the Attorney General or the Secretary of War. Id.*

Habeas corpus is the only possible way of obtaining civilian judicial review of a conviction returned by a military commission or a sentence imposed by one of these tribunals. An American serviceman convicted by a court-martial can appeal his conviction to a military appellate court, called the Court of Criminal Appeals, then to the civilian capstone of the military legal system, the United States Court of Appeals for the Armed Forces, and finally (if it grants him a writ of certiorari), to the U.S. Supreme Court. *See* 10 U.S.C. §§ 866(b), 867, 867a (Supp. 2001). However, the provision in the UCMJ which confers jurisdiction on the Courts of Criminal Appeals does not mention military commissions, providing only that the Judge Advocate General shall refer to these courts "the record in each case of trial by court-martial. . . ." 10 U.S.C. § 866(b) (Supp. 2001). Consequently, there is no way to bring a case that originates in a military commission before a Court of Criminal Appeals, and thus no way to get it into the appellate system that leads on to the civilian Court of Appeals for the Armed Forces and the civilian Supreme Court.

82. 317 U.S. at 9.

83. 327 U.S. at 8.

84. *Id.*

85. *Id. Cf. Hirota v. MacArthur*, 338 U.S. 197, 200 (1948) (Douglas, J., concurring) (a U.S. District Court has jurisdiction to entertain a petition for habeas corpus filed by a foreign national convicted by an international military tribunal convened by the United States and other countries).

86. 533 U.S. 289 (2001).

saying so.⁸⁷ Although attempting to insulate his military tribunals from all oversight by the civilian federal judiciary is at best constitutionally questionable,⁸⁸ those tribunals themselves, at least if used to try only unlawful belligerents and foreigners accused of war crimes abroad, really are not.

II. USE OF MILITARY COMMISSIONS TO TRY TERRORISTS APPREHENDED ABROAD FOR CRIMES COMMITTED OVERSEAS

The use of such tribunals to try terrorists apprehended outside the United States for war crimes committed in other countries, such as Afghanistan, makes a good deal of sense. It is certainly not an unavoidable necessity, for general courts-martial appear to have the authority to hear all such cases,⁸⁹ and Congress has given the civilian federal courts jurisdiction in a large percentage of those that might arise.⁹⁰ Military commissions, however, have been employed for similar purposes in the past. The first use of something comparable to what President Bush has authorized following the adoption and ratification of the Constitution occurred during the Mexican War.⁹¹

87. In *St. Cyr*, the Court, interpreting a statute in such a way as to avoid the problem, asserted that Congress could not preclude judicial consideration on habeas corpus of an important question of law without making "a clear, unambiguous, and express statement" of its intent to do so. *Id.* at 314. If the same rule applies to the Executive, Bush's Military Order, which does not even explicitly mention habeas corpus, falls far short of satisfying it.

88. Anthony D'Amato, a professor of international law at Northwestern University and a former defense attorney at the International Criminal Tribunal for the Former Yugoslavia at The Hague, says of the section of the Military Order that attempts to deny defendants the opportunity to raise the issue of the illegality of the proceedings as a collateral matter in the civilian U.S. courts, "This is so bad to me that it sounds unconstitutional." McDonough, *supra* note 8.

89. See Michael A. Newton, *Continuum Crimes: Military Jurisdiction over Foreign Nationals Who Commit International Crimes*, 153 MIL. L. REV. 1, 4 (1996). Art. 18 of the UCMJ provides that general courts-martial "have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war." 10 U.S.C. § 818 (Supp. 2001).

90. 18 U.S.C. § 2441 (2001) makes punishable "a war crime" committed either inside or outside the United States, provided that either the perpetrator or the victim is a member of the American armed forces or that either is a U.S. national. There are other statutes that would also provide a basis for punishing certain kinds of war crimes in the civilian federal courts. For example, 18 U.S.C. § 2340A (2001) gives these courts jurisdiction in cases of torture committed outside the United States, regardless of whether the perpetrator or victim is a U.S. national. Another statute, 18 U.S.C. § 1203, provides similar jurisdiction for acts of hostage taking. The United States Court of Appeals for the District of Columbia Circuit has affirmed a conviction under 18 U.S.C. § 1203. See *United States v. Yunis*, 924 F.2d 1086 (D.C. Cir. 1991).

91. Andrew Curry reports that "there are a few famous cases of British agents brought up before military tribunals during the Revolutionary War. . . ." Andrew Curry, *Liberty and Justice: Military Tribunals in America: A Controversial Tool with a Storied Past*, U.S. NEWS & WORLD REP., Dec. 10, 2001, at 52, 53. President Franklin Roosevelt considered one of these, the case of Major John André (the British officer apprehended out of uniform and in disguise and subsequently executed as a spy for receiving papers concerning the fortifications at West Point from the American traitor, Benedict Arnold) an "absolute parallel" to the World War II Nazi saboteur case. Danelski, *supra* note 71, at 65. However, André was not tried by a mili-

After invading central Mexico, General Winfield Scott declared martial law and, without any sort of congressional authorization, issued a general order providing that certain crimes against American soldiers committed by Mexican civilians (including murder, malicious stabbing and maiming, and malicious assault and battery, robbery, and theft) should be punished by military commissions. Scott also prescribed their use to try members of his own army for the same crimes, because the Articles of War authorized courts-martial only for the offenses they enumerated, and those were mostly breaches of discipline.⁹² As Carol Chomsky explains, "In essence, these military commissions [utilized also by General Zachary Taylor] replaced the civilian criminal courts in occupied, hostile territory after the declaration of martial law."⁹³ Scott employed another type of tribunal to punish violations of the "laws of war" (i.e. the emerging customary standards concerning the proper conduct of warfare). It is these court-martial-like bodies, then called "councils of war," that provided the real models for subsequent military commissions.⁹⁴

During the Civil War, the Union Army made extensive use of that type of tribunal to punish war crimes.⁹⁵ It was less than clear whether these military commissions were legal, as statutory authority for them remained meager.⁹⁶ Even at high levels within the War Department there was disagreement about whether they could properly be employed to try civilians accused of violating the laws of war.⁹⁷ Such tribunals were extensively used for that purpose, however, especially in hotly contested border states, such as Mis-

tary commission. What George Washington utilized in his case was a Court of Inquiry, which he charged with studying the incident to determine whether André was a spy. WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 518 (1920, reprinted 1979).

92. Carol Chomsky, *The United States—Dakota War Trials: A Study in Military Justice*, 43 *STAN. L. REV.* 13, 63 (1990).

93. *Id.* at 64.

94. *Id.* at 65.

95. *Id.* at 66. Military commissions were also used as part of military government in occupied rebel territory. *Id.* Confederate territory occupied by Union forces accounted for 31.9 percent of trials by military commission. MARK E. NEELY, JR., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 169 (1991). Over half of these were in Tennessee. *Id.*

96. Chomsky, *supra* note 92, at 66.

97. In 1864, a commission, headed by General John A. Dix, commander of the Department of the East, concluded

that no persons except such as are in the military or naval service of the United States are subject to trial by military courts, spies only excepted, and that except in districts under martial law, a military commission cannot try any person whatsoever not in the U.S. military or naval service for any offense whatever.

NEELY, *supra* note 95, at 144. On the other hand, Francis Lieber, the pioneering political scientist who drafted the War Department's General Order 100, "Instructions for the Government of the Armies of the United States in the Field," *id.* at 153, took the position that "undoubtedly a citizen under these conditions can, or rather must, be tried by military courts, because there is no other way to try him and repress the crime which may endanger the whole country. . . ." *Id.* at 160.

souri.⁹⁸ Most of those tried by military commission in these areas were accused of guerrilla activities, horse stealing, and bridge burning.⁹⁹ After the fighting ended, Captain Henry Wirz, the commandant of the infamous Confederate prison camp at Andersonville, Georgia, was also tried by a military commission on charges of violating "the laws and customs of war."¹⁰⁰

After World War II, the United States government again made extensive use of military commissions and specially constituted military tribunals staffed by civilian lawyers and judges to try enemy soldiers, sailors, and civilians for war crimes.¹⁰¹ Some of these tribunals, such as those that tried the leading German war criminals at Nuremberg¹⁰² and top leaders of Imperial Japan in Tokyo,¹⁰³ were international bodies, in which the defendants were prosecuted and judged by representatives of a number of Allied nations. Other tribunals were purely American operations.¹⁰⁴ For example, the United States alone tried thirteen senior German generals and admirals at Nuremberg for war crimes, as well as for initiating wars of aggression and invasions of other countries,¹⁰⁵ and also prosecuted a bevy of bureaucrats from

98. *See id.* at 168-69. There were 1,940 military commission trials in Missouri, and only 1,339 in all eleven Confederate States combined. *Id.* at 168. The border states of Kentucky and Maryland had 200 and 193 military commission trials, respectively. *Id.* at 168-69.

99. *Id.* at 169. It is because there was no guerrilla warfare there, and because it was never subjected to military invasion, that Delaware, although a border state, produced no military commission trials at all. *Id.*

100. *See* Lewis L. Laska & James M. Smith, *Hell and the Devil: Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865*, 68 *Mil. L. Rev.* 77, 95-98 (1975). The prosecution alleged that Wirz had violated the laws and customs of war by conspiring with others to injure the health and destroy the lives of prisoners at Andersonville and by himself murdering thirteen of these prisoners. *Id.* at 97-98.

101. *See generally* LEON FRIEDMAN, *THE LAW OF WAR: A DOCUMENTARY HISTORY - VOL. 2* (1972); PETER MAGUIRE, *LAW AND WAR: AN AMERICAN STORY* 101-201 (2000).

102. *See* BRADLEY F. SMITH, *REACHING JUDGMENT AT NUREMBERG* (1979); ROBERT F. CONOT, *JUSTICE AT NUREMBERG* (1983); WERNER MASER, *NUREMBERG: A NATION ON TRIAL* (1979); ANN TUSA & JOHN TUSA, *THE NUREMBERG TRIAL* (1984); TELFORD TAYLOR, *THE ANATOMY OF THE NUREMBERG TRIALS: A PERSONAL MEMOIR* (1992) (written by one of the top American prosecutors).

103. *See* RICHARD H. MINEAR, *VICTOR'S JUSTICE: THE TOKYO WAR CRIMES TRIALS* (1977). The Supreme Court ruled that the body which tried these defendants was "not a tribunal of the United States" and consequently that the courts of the United States had no power or authority to review, affirm, set aside, or annul the judgments and sentences imposed upon them. *Hirota v. MacArthur*, 338 U.S. 197, 198 (1948).

104. American lawyers and judges tried 185 Germans in twelve cases at Nuremberg between 1947 and 1949. MAGUIRE, *supra* note 101, at 14. The U.S. Army tried 1,672 at the Dachau concentration camp. *Id.* at 134. In the Pacific theater, American military courts tried 215 Japanese in Manila, 966 at Yokohama, and 116 at Kwajalein Atoll and Guam. *Id.*

105. FRIEDMAN, *supra* note 101, at 1421-70. Of these all-American Nuremberg trials, Peter Maguire writes that, like the international one, they were intended

to create an irrefutable record of Hitler's Third Reich. Defendants were not simply charged with violations of the customary rules of war, they were subject to the same unprecedented standards of international conduct as the defendants at the [International Military Tribunal]. Military leaders, politicians, lawyers, doctors, businessmen, and bankers faced charges of aggression, conspiracy, and crimes against

the Economic and Administrative Main Office (WVHA) for war crimes and crimes against humanity.¹⁰⁶ In the Far East, it tried officers of the Japanese Imperial Navy for killing unarmed American prisoners of war in the Marshall Islands¹⁰⁷ and an army general for outrages perpetrated by his soldiers in the Philippines between December 12, 1941 and August 5, 1942.¹⁰⁸ The most famous of these purely American post-World War II trials was that of General Tomoyuki Yamashita. A military commission sentenced Yamashita to death for atrocities committed by his troops, which included exterminating Filipino civilians and cruelly and inhumanely mistreating both civilian detainees and prisoners of war.¹⁰⁹

Thus, the use of military commissions to try enemies of the United States for war crimes and related violations of international law, such as crimes against humanity, committed abroad (or in the case of the Civil War, in a theater of operations that, while theoretically within the United States, was in reality not under the control of the U.S. government) has a long history. It is also legal under international law, because all nations have jurisdiction to punish war criminals, and the Geneva Convention requires each signatory to search them out and bring them to justice in its own courts.¹¹⁰ The United States shares with other countries jurisdiction over war criminals,¹¹¹ and in theory it could exercise that jurisdiction through civilian federal district courts. Congress, however, has authorized these courts to try war crimes only when either the perpetrator or the victim is a U.S. national.¹¹² While an International Criminal Court recently was established, it does not have the authority to prosecute acts committed in Afghanistan prior to July 1, 2002.¹¹³ For some cases, military forums are the only workable option, and

humanity.

MAGUIRE, *supra* note 101, at 14.

106. FRIEDMAN, *supra* note 101, at 1254-80. The defendants in this case were accused of murder, plundering public property, torture, illegal imprisonment and enslavement, and deportation to slave labor of, and brutalities, atrocities, and other inhumane and criminal acts against, prisoners of war and the civilian populations of occupied countries. *Id.* at 1256-57.

107. *Id.* at 1471-81.

108. *See* *Homma v. Patterson*, 327 U.S. 759 (1946).

109. FRIEDMAN, *supra* note 101, at 1596-98. In approving the findings and sentence of the commission, General Douglas MacArthur said he considered it appropriate to punish General Yamashita for crimes actually committed by his subordinates because four days after the landing of American forces in Leyte, it had been publicly proclaimed that he would "hold the Japanese military authorities in the Philippines immediately liable for any harm which may result from the failure to accord to prisoners of war, civilian internees or civilian non-combatants the proper treatment and protection to which they of right are entitled." *Id.* at 1599.

110. Newton, *supra* note 89, at 47-48.

111. *See id.* at 48.

112. *See* 18 U.S.C. § 2441 (2001).

113. *See* Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9 (1998). More than the required sixty nations ratified this agreement on April 11, 2002, establishing the International Criminal Court, and the agreement enters into force on

at least within the context of an international armed conflict, deployed commanders have the authority to convene them.¹¹⁴ As of April 2002, the Bush Administration was making plans to employ a military commission to try Abu Zubaydah, al Qaeda's chief of operations, who had been apprehended in Pakistan.¹¹⁵

Even when employed against members of the enemy's armed forces accused of war crimes committed in a theater of operations abroad, military commissions can make American justice look bad. Frank Reel, who as a U.S. Army lawyer defended General Yamashita,¹¹⁶ echoes those who insisted that in the Yamashita case the United States missed a great opportunity. Rather than using it to demonstrate why this country had fought a war against totalitarianism, "[w]e adopted their judicial techniques."¹¹⁷ Justice Frank Murphy found that "[t]he failure of the military commission to obey the dictates of the due process requirements of the Fifth Amendment . . . [was] apparent in this case,"¹¹⁸ and his colleague, Wiley Rutledge, could not "believe in the face of this record that the petitioner has had the fair trial our Constitution and laws command."¹¹⁹ Rutledge had no sympathy for anyone who would commit the atrocities of which Yamashita was accused, but he believed there was more at stake in this case than the fate of a Japanese general. "[T]here can and should be justice administered according to law,"¹²⁰ Rutledge insisted. He was concerned that this country was forsaking "the basic standards of trial which, among other guarantees, the nation fought to

July 1, 2002. *Nations Approve First Permanent World War Crimes Tribunal*, CNN.com Law Center, at <http://www.cnn.com/2002/LAW/04/11/international.court.ap/index.html>.

114. Newton, *supra* note 89, at 78.

115. According to the *New York Times*:

A senior administration official said that although there had been no final decision, it seemed certain that Mr. Zubaydah would be tried before one of the military tribunals established under rules approved by the Pentagon last month. The official, who spoke on condition of anonymity, said his capture could end a debate simmering within the administration over whether any of the prisoners now in custody in Guantánamo would be suitable candidates for a tribunal.

Philip Shenon & Neil A. Lewis, *U.S. Says a Key Detainee Had Planned More Attacks*, N.Y. TIMES, Apr. 3, 2002, at A10.

Jordan Paust would clearly consider the trial of Zubaydah before an American military commission sitting at Guantánamo Bay unlawful. According to him, "[O]utside of . . . occupied territory, it is apparent that military commissions can only be constituted in an actual war zone . . ." Paust, *supra* note 16, at 9.

116. See A. FRANK REEL, THE CASE OF GENERAL YAMASHITA 8-9 (1949).

117. *Id.* at 241. General Yamashita was convicted by a commission consisting of five generals appointed by his victorious opponent, General Douglas MacArthur, none of whom was a lawyer. MAGUIRE, *supra* note 101, at 135. This military commission did not follow the technical rules of evidence, and indeed accepted as evidence of Yamashita's guilt a "pseudo-documentary movie" depicting a Japanese order for the destruction of Manila that apparently never existed. See *id.* at 135-36.

118. *Yamashita*, 327 U.S. at 27 (Murphy, J., dissenting).

119. *Id.* at 42 (Rutledge, J., dissenting).

120. *Id.*

keep. . . .”¹²¹ The result of doing that, Reel believed, was that “[d]amage was done—affirmative damage, to ourselves and to the faith of men the world over in the honesty and objectiveness of our legal structure.”¹²²

III. DOMESTIC MILITARY COMMISSION TRIALS

Potentially damaging to American interests even when employed to try foreign enemies for war crimes committed overseas, military commissions are far more menacing when employed at home. Abuses and injustice pockmark the domestic record of these tribunals.

A. *The Dakota War Trials*

During the Civil War, the Union used military commissions not only to prosecute pro-Confederate guerrillas, but also to condemn over 300 Dakota Sioux to death. The defendants in those trials had participated in an 1862 uprising against whites in the State of Minnesota, which began after the Dakota refused to hand over four of their young men who had murdered five American settlers.¹²³ During the course of this war, the Native Americans engaged in several battles with United States volunteer troops, twice attacked a town in which citizen-soldiers fought to defend more than a thousand weaponless men, women, and children, and took by surprise a number of isolated settlements where they killed unarmed men and carried off women and children as prisoners.¹²⁴ During thirty-seven days of fighting, the Dakota killed seventy-seven American soldiers, twenty-nine citizen-soldiers, and approximately 358 settlers, while losing an estimated twenty-nine of their own warriors.¹²⁵ When they surrendered, Brigadier General Henry H. Sibley, commander of the volunteer forces that fought against them, assured their leaders that he would punish only those Indians who had committed “murder and outrages upon the white settlers.”¹²⁶

Many of the 392 Dakota tried between September 28 and November 3 by the six-member military commission that Sibley appointed, however, were accused of nothing more than participation in the fighting.¹²⁷ The

121. *Id.*

122. REEL, *supra* note 116, at 241. In a critique of President Bush’s Military Order, Jordan Paust makes a similar point:

[T]he United States has told the world that it is fighting terrorism for democratic values and freedom. Certain forms of military commissions would appear to be most inappropriate in view of what the United States stands for and what it has told the world it is fighting for and against.

Paust, *supra* note 16, at 10.

123. See Chomsky, *supra* note 92, at 17-18.

124. *Id.* at 19-20.

125. *Id.* at 21-22.

126. *Id.* at 22.

127. See *id.* at 23-27. Most of the defendants were charged with murder, but a few were

Commission nevertheless convicted all but sixty-nine of them, and sentenced 303 to death.¹²⁸ As Chomsky reports, "All defendants found to have participated in any fighting, whether against soldiers or against settlers, whether in a pitched battle or in a raid, were convicted and sentenced to be hanged."¹²⁹ That is perhaps not surprising, for all of the officers who sat on the commission were local residents who had themselves taken part in the fighting against the Dakota.¹³⁰ They carried out their bloody work with incredible rapidity, trying as many as forty-two Native Americans in a single day.¹³¹ Most of the accused did not have counsel,¹³² and most of the testimony on the basis of which they were convicted and condemned came from individuals who were themselves on trial for their lives.¹³³ Local ministers and officials who reviewed transcripts of the proceedings for President Lincoln criticized what they found there,¹³⁴ and even General Sibley, while seeking to defend these military commission trials, acknowledged obvious unfairness in the way they were conducted.¹³⁵ Lincoln was concerned enough about potential injustice to the accused that he commuted the death sentences of all but thirty-nine of the convicted men.¹³⁶ As Chomsky points out, "It has become a

also charged with robbery or rape. *Id.* at 27.

128. *Id.* at 28. Those the commission found to have engaged only in plundering, rather than fighting against whites, it sentenced to imprisonment for terms ranging from one to ten years. *Id.*

129. *Id.*

130. *Id.* at 55.

131. *Id.* at 46-47. "The Commission conducted the trials very rapidly, with as many as thirty or forty trials in a single day. After hearing the evidence, the Commission would clear the room, deliberate for a few minutes, and announce the verdict." *Id.*

132. *See id.* at 53. "In the absence of counsel, the Judge Advocate was responsible both for prosecuting the case and assisting the accused in preparing his case. Even in a normal court-martial, this assistance was recognized as inadequate." *Id.*

133. *Id.* at 50. Most of these self-interested witnesses were half-bloods and Indians who had adopted American ways. *Id.*

134. *See id.* at 53.

135. *See id.* at 54. In a letter to Assistant Secretary of the Interior John Usher, which he wrote on December 19, 1862, Sibley stated:

The degree of guilt [of the defendants] was not one of the objects to be attained [by the commission], and indeed it would have been impossible to devote as much time in eliciting the details in each of so many hundred cases, as would have been required while the [American military] expedition was in the field. Every man who was condemned was sufficiently proven to be a voluntary participant, and no doubt exists in my mind that a least seven-eighths of those sentenced to be hung have been guilty of the most flagrant outrages. . . .

Id.

136. *See id.* at 30, 32-33. In determining which prisoners he would grant clemency and which he would allow to be hung, Lincoln drew a distinction between those who had participated in "battles" and those who had participated in "massacres." Only the latter were executed. *Id.*

commonplace observation that the United States—Dakota war trials were unfair.”¹³⁷

B. *The Vallandigham Case*

The cases tried before many other Civil War military commissions were also unfair, for “the proceedings were marred by irregularities in trial procedure and overzealousness in prosecuting and sentencing.”¹³⁸ Some of these trials, unlike the Dakota ones (which at least involved defendants who had actually borne arms against American soldiers and civilians) were blatantly political prosecutions that targeted men whose principal offense was opposition to the policies of those in power. A particularly gross example of this was the 1863 case of Clement L. Vallandigham.¹³⁹

Vallandigham, a pro-Southern “Copperhead”¹⁴⁰ Democrat, called openly for an end to the Civil War.¹⁴¹ In addition to opposing Lincoln’s efforts to preserve the Union by force, he condemned the military draft and the abolition of slavery and criticized the Administration for suspending the writ of habeas corpus and subjecting civilians to arbitrary military arrest.¹⁴² After losing his Ohio congressional seat in 1862, because the state legislature had redrawn the boundaries of his district, and the Republicans had targeted him for defeat,¹⁴³ Vallandigham decided to run for governor.¹⁴⁴ Apparently believing that martyrdom would endear him to his fellow Democrats, and thus help him secure his party’s nomination, he blatantly defied the Lincoln administration’s policy of curtailing political speech critical of its programs.¹⁴⁵ As part of that policy, the commanding general of the Department of the Ohio,

137. *Id.* at 46.

138. *Id.* at 59.

139. See generally FRANK L. KLEMENT, *THE LIMITS OF DISSENT: CLEMENT L. VALLANDIGHAM & THE CIVIL WAR* (1970) [hereinafter KLEMENT, *LIMITS*]; WILLIAM H. REHNQUIST, *ALL THE LIBERTIES BUT ONE: CIVIL LIBERTIES IN WARTIME* 59-74 (1998).

140. The epithet “Copperhead” was used to describe Northerners who were sympathetic to the South and who allegedly manifested overt disloyalty to the Union. See REHNQUIST, *supra* note 139, at 102. Not all Democrats were Copperheads. So-called “War Democrats,” although opposing the Republican Lincoln Administration on other issues, supported its effort to preserve the Union by force of arms. See JOEL H. SILBEY, *A RESPECTABLE MINORITY: THE DEMOCRATIC PARTY IN THE CIVIL WAR ERA, 1860-1868*, at 56-59 (1977).

141. Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL OF RTS. J. 105, 113 (1998). The opposition of such men to the war was often extreme. “The *Dayton Daily Empire*, a newspaper Vallandigham influenced heavily, described Ohio governor Denison’s efforts to raise Union troops after Fort Sumter as a scheme to ‘butcher men, women and children’ of the South.” *Id.* at 114.

142. See *id.* at 112-14. On the Lincoln Administration’s suppression of civil liberties through the arbitrary military arrest of civilians, see generally *id.* at 115-17, and NEELY, *supra* note 95. Like many of his contemporaries, especially in the Democratic Party, “Vallandigham was a racist.” Curtis, *supra* note 141, at 113.

143. Curtis, *supra* note 141, at 113.

144. *Id.*

145. KLEMENT, *LIMITS*, *supra* note 139, at 154.

Ambrose Burnside, had issued General Orders No. 38, which proclaimed: "The habit of declaring sympathies for the enemy will not be allowed in this Department. Persons committing such offenses will be at once arrested."¹⁴⁶ On May 1, 1863, Vallandigham delivered a speech to a Knox County Democratic political rally at Mount Vernon, in which he branded the war a wicked, cruel and unnecessary struggle, being fought to crush out liberty, and to erect a despotism that would mean freedom for blacks but enslavement for whites. He also excoriated General Orders No. 38, which he characterized as "a base usurpation of arbitrary authority," and called upon his listeners to resist Burnside's directive.¹⁴⁷

Military agents in civilian clothes had monitored Vallandigham's speech,¹⁴⁸ and in the early morning hours of May 5, soldiers arrested him.¹⁴⁹ His trial before a military commission, comprised of seven officers, began the next day.¹⁵⁰ Vallandigham immediately denied that such a body had any jurisdiction over him; refusing to plead, he forced the Judge Advocate to enter a not-guilty plea for him.¹⁵¹ The commission adjourned briefly to enable Vallandigham to procure counsel, but the three lawyers he retained chose to remain in an adjacent room throughout his brief trial, while the defendant

146. Curtis, *supra* note 141, at 119. Although it is tempting to credit General Order 38 to the stupidity of General Burnside, whose most notable achievement up to the time when he issued it was losing the Battle of Fredricksburg, that order was clearly in line with and served to implement the policies of President Lincoln. On September 24, 1862, Lincoln issued a proclamation providing that "all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice" were to be "subject to martial law and liable to trial and punishment by Courts-Martial or Military Commission." *Id.* at 117.

147. *Id.* at 121-22. The specification to the charge against him, filed by the army, alleged:

Clement L. Vallandigham, a citizen of the State of Ohio, on or about the first day of May, 1863, at Mount Vernon, Knox County, Ohio, did publicly address a large meeting of citizens, and did utter sentiments in words, or in effect, as follows, declaring the present war "a wicked, cruel and unnecessary war;" "a war not being waged for the preservation of the Union;" "a war for the purpose of crushing out liberty and erecting a despotism;" "a war for the freedom of the blacks and the enslavement of the whites;" stating "that if the Administration had so wished, the war could have been honorably terminated months ago;" that "peace might have been honorably obtained by listening to the proposed intermediation of France;" . . . charging "that the Government of the United States was about to appoint military marshals in every district, to restrain the people of their liberties, to deprive them of their rights and privileges;" characterizing General Orders No. 38, from Headquarters department of the Ohio "as a base usurpation of arbitrary authority;" inviting his hearers to resist the same, by saying, "the sooner the people inform the minions of usurped power that they will not submit to such restrictions upon their liberties, the better. . . ."

Id. at 122-23.

148. *Id.* at 121.

149. *Id.*

150. *Id.*

151. *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 245 (1863).

conducted his own cross-examination.¹⁵² The proceedings were so speedy that Vallandigham did not even have time to subpoena one of his witnesses.¹⁵³ The only person to testify for the defense was Samuel S. Cox, a Democratic congressman, who had been present during the Mt. Vernon speech and insisted he had heard no advocacy of forcible resistance to laws or military orders.¹⁵⁴ The army officers who testified for the prosecution did not disagree; one of them admitted the defendant had said he would not counsel resistance to military or civil law.¹⁵⁵ Nevertheless, the commission convicted Vallandigham and sentenced him to close confinement for the duration of the war.¹⁵⁶

Although it took this action on May 16, the commission had finished hearing evidence and arguments by May 7.¹⁵⁷ The intervening nine days had been consumed by a battle over whether it had jurisdiction to try Vallandigham. At the conclusion of his brief trial, the defendant read a statement in which he contended that, because he was neither in the land or naval forces of the United States, nor a member of the militia in federal service, he was “not triable for any cause by any such court.”¹⁵⁸ Vallandigham contended that he could properly be tried only upon an indictment or presentment of a grand jury before a “court of competent jurisdiction for the trial of citizens,” operating in accordance with the rules of the common law, where he would have an impartial jury and enjoy the rights of confrontation, compulsory process, and assistance of counsel.¹⁵⁹ On May 9, George Pugh, a leading Democratic lawyer and former U.S. senator from Ohio, filed in federal court an application for habeas corpus on Vallandigham’s behalf.¹⁶⁰ Representing General Burnside, Cincinnati lawyer Benjamin F. Perry argued that the arrest and military trial of the petitioner had been justified under the President’s war power and his authority as Commander in Chief. These existed alongside and superseded the civil law for the duration of the conflict, Perry maintained.¹⁶¹ Siding with him, Judge Humphrey H. Leavitt refused to issue Vallandigham a writ of habeas corpus.¹⁶² After Burnside confirmed his conviction and sentence, Vallandigham challenged the jurisdiction of the

152. *Id.* Since Vallandigham was an experienced trial lawyer, he was perfectly competent to represent himself. Curtis, *supra* note 141, at 121.

153. KLEMENT, LIMITS, *supra* note 139, at 166.

154. *See Vallandigham*, 68 U.S. at 245-46; Curtis, *supra* note 141, at 124. The Judge Advocate stipulated that if the other three persons whom Vallandigham had summoned as witnesses had appeared, they would have given evidence substantially the same as that presented by Congressman Cox. 68 U.S. at 246.

155. Curtis, *supra* note 141, at 123-24.

156. *Id.* at 131.

157. *Id.*

158. *Id.* at 124.

159. 68 U.S. at 246.

160. Curtis, *supra* note 141, at 125.

161. *See id.* at 128-29.

162. *Id.* at 130.

military commission in the Supreme Court. The Court refused to grant his petition for a writ of certiorari, holding that it lacked the authority under applicable jurisdictional statutes and the Constitution "to review or pronounce any opinion upon the proceedings of a military commission."¹⁶³

Although surviving legal challenge, the Vallandigham prosecution excited massive protest by Democrats and even evoked criticism from many Republicans.¹⁶⁴ Forced to defend his policy of military arrests of civilians, Lincoln wrote a letter to Erastus Corning and other New York Democrats, in which he conceded it would have been wrong to arrest the former congressman merely for giving a speech that damaged the political prospects of the Administration, but insisted Vallandigham had been hurting the army by encouraging desertion and discouraging enlistments.¹⁶⁵ The whole affair was sufficiently embarrassing to the Administration that Lincoln changed the Ohio Copperhead's punishment from imprisonment to banishment, ordering that he be "put beyond our military lines."¹⁶⁶

C. *Ex Parte Milligan*

Unlike Vallandigham's case, the 1864 trial of Lamdin P. Milligan generated not only public protest but also a judicial decision limiting the jurisdiction of military commissions. An Indiana Democrat, Milligan espoused views similar to those of Vallandigham.¹⁶⁷ Although one of his Copperhead allies, Harrison Horton Dodd, probably committed treason when he accepted money from Confederate agents to subsidize a revolt by an organization he had created, called the "Sons of Liberty,"¹⁶⁸ Milligan had no involvement in Dodd's treasonous activities. Dodd had appointed him a major general in the military branch of the Sons of Liberty, but he apparently never bothered to tell his appointee about his supposed position in what remained largely a pa-

163. 68 U.S. at 251-52.

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

165. NEELY, *supra* note 95, at 66-67. To his credit, Lincoln failed to sign a military order, drafted by Secretary of War Edwin Stanton, that would have suspended the privilege of the writ of habeas corpus solely in Vallandigham's case, as a way of preventing a civilian court from ruling on whether the military commission had jurisdiction to try him. *Id.* at 66.

166. Curtis, *supra* note 141, at 131.

167. See Frank L. Klement, *The Indianapolis Treason Trials and Ex Parte Milligan*, in BELKNAP, AMERICAN POLITICAL TRIALS, *supra* note 12, at 97, 100 [hereinafter Klement, *Treason Trials*]. According to Klement, Milligan "hated New England and the 'isms'—protectionism, abolitionism, and Puritanism. . . ." In addition, he believed Lincoln had violated the Constitution by transforming the Union into a centralized government and feared civil liberties were in danger. *Id.* at 100.

168. See *id.* at 101-02. The Constitution defines treason as "levying War against [the United States], or . . . adhering to their Enemies, giving them aid and Comfort." U.S. CONST., art. III, § 3. Interestingly, Dodd and an ally, Dr. Thomas C. Massey of Ohio, managed to persuade Vallandigham, then living in exile in Windsor, Canada West, to accept nominal leadership of the Sons of Liberty, as a way of recruiting his defenders and followers into the organization. Klement, *Treason Trials*, *supra* note 167, at 101.

per organization, which most Democrats shunned after an *Indianapolis Daily Journal* exposé of its subversive character.¹⁶⁹

Milligan found himself on trial for treason before a military commission not because he had committed that crime, but because the Republican governor of Indiana, Oliver P. Morton, hoped to discredit the Democratic opposition on the eve of the 1864 elections. Morton asked one of his aides, Brigadier General Henry B. Carrington, and the commanding general of the Northern Department to dig up evidence against top Democrats and make arrests. Utilizing a half-dozen detectives, Carrington put Dodd, Milligan, and several others allegedly associated with the Sons of Liberty under surveillance, raided Dodd's office, and passed everything incriminating that he found along to the editor of the Republican-oriented *Daily Journal* for publication.¹⁷⁰ When his star detective, Felix Stidger, learned that Dodd was expecting a shipment of revolvers, intended for use in a "rebellion" for which he was trying without much success to enlist support, Carrington pounced. A military posse arrested Dodd and several acquaintances, including Milligan.¹⁷¹ According to historian Frank Klement, "Morton was most anxious that [the] trial before a military commission begin in September, in time to grind grist for the October state elections."¹⁷² Major Henry L. Burnett, the Judge Advocate of the Northern Department, who came over from Ohio "to draft the charges and specifications and direct Morton's show . . . selected seven army officers, several of whom were personal friends of the governor and strong partisans, to comprise the military commission."¹⁷³

The commission started with Dodd, but in the middle of his trial, the only real traitor among the defendants escaped from the second floor of the Indianapolis post office, where he was being confined, and fled to Canada. His flight was a political bonanza for the Republicans, who exploited it effectively to substantiate charges of a Democratic conspiracy.¹⁷⁴ On October 11, one day after the military commission met briefly to convict Dodd in absentia and sentence him to death, Governor Morton won re-election.¹⁷⁵

169. Klement, *Treason Trials*, *supra* note 167, at 101-02. Of the defendants in this case other than Dodd, Chief Justice William Rehnquist writes that they "had engaged in little more than talk." REHNQUIST, *supra* note 139, at 100-01.

170. See Klement, *Treason Trials*, *supra* note 167, at 102.

171. See *id.* at 102-03. Several Democratic leaders, including Joseph Bingham (the chairman of the Democratic State Central Committee) and Joseph McDonald, knew about Dodd's "proposal" to stage a rebellion on August 16, during a scheduled Democratic mass meeting in Indianapolis. Rather than report it, however, they took steps to quash his plan and cover it up, because they realized that if Governor Morton heard of it, "he would make political hay." *Id.* This probably made them guilty of misprision of treason. See 18 U.S.C.A. § 4 (2002).

172. Klement, *Treason Trials*, *supra* note 167, at 103.

173. *Id.*

174. *Id.* at 104.

175. See *id.*

Judge Advocate Burnett then added five more Indiana officers to the commission (some of whose original members had spent the recess in the Dodd proceeding giving political speeches) and brought the remaining prisoners, including Milligan, to trial.¹⁷⁶ As was customary in a military commission proceeding, the defendants had been arraigned on a series of general charges (“Conspiracy Against the Government of the United States,” “Affording Aid and Comfort to Rebels Against the Authority of the United States,” and “Inciting Insurrection”), each of which was followed by more particularized specifications of the conduct that allegedly made them guilty of that offense. Neither the charges against Milligan and his co-defendants nor the specifications enumerated under them made reference to any federal statute criminalizing their alleged misconduct.¹⁷⁷ As Chief Justice William Rehnquist has pointed out, because “a military commission could simply decide for itself what acts were criminal, and what sentence was appropriate upon conviction, a defendant before such a commission suffered [a] serious deprivation, compared with his counterpart in a civil court.”¹⁷⁸ Also handicapping Milligan and his co-defendants was the fact that, in a military commission trial, the Judge Advocate (in this case the highly partisan Major Burnett) functioned in effect as both judge and prosecutor.¹⁷⁹

In his role as prosecutor, Burnett presented as his star witness Detective Stidger. According to Klement, some of Stidger’s testimony against Milligan was based on rumor, rather than fact; in addition, the detective cribbed information from published reports and made a number of allegations that were “outright falsehoods.”¹⁸⁰ Nevertheless, the far from impartial military commission convicted all of the accused and sentenced all but one of them to be executed.¹⁸¹ Although Governor Morton had publicly pronounced Milligan and the others guilty even before the trial began,¹⁸² once the defendants were condemned to death, he began seeking clemency for them.¹⁸³ The reason was simple. “He had used the arrests and trials as a stratagem to insure his own and Lincoln’s reelection, but now he did not want the blood of

176. *Id.* at 104-05.

177. REHNQUIST, *supra* note 139, at 84-85. The specifications to the Conspiracy Against the Government charge recited various hostile activities of the defendants, while the Inciting Insurrection one had two specifications dealing with efforts to induce persons to revolt against the authority of the United States and to cooperate with an armed enemy of the United States. *Id.*

178. *Id.* at 86.

179. See Klement, *Treason Trials*, *supra* note 167, at 107.

180. *Id.* at 106.

181. *Id.* at 107. Those convicted along with Milligan were Andrew Humphrey, Stephen Horsey, and Dr. Samuel Bowles. See *id.* at 107-08. The only one not to receive the death penalty was Humphrey, against whom “the evidence . . . was especially flimsy.” *Id.* at 108.

The prosecutor released several others from among the group of Democrats who were originally arrested, including Bingham, in order to obtain their testimony as witnesses. See *id.* at 105.

182. *Id.* at 107.

183. *Id.* at 108.

the convicted men upon his hands. Political expediency called for clemency.”¹⁸⁴ Andrew Johnson, who became President when Lincoln was assassinated, commuted the sentence of one of the three condemned men, but initially refused to spare Milligan, forcing him to seek deliverance in the civil courts.¹⁸⁵

Milligan filed a petition for a writ of habeas corpus in the U.S. Circuit Court for Indiana, contending that the military commission that had sentenced him to death had been without jurisdiction to try him.¹⁸⁶ One of the judges who heard the case was Justice David Davis of the Supreme Court. Davis had become increasingly concerned about the propriety of trying civilians before military commissions.¹⁸⁷ So had both houses of Congress, which had passed a resolution in March 1865 condemning the practice.¹⁸⁸ Davis and U.S. District Judge Thomas Drummond formally disagreed on the issue Milligan had raised, thus certifying it to the Supreme Court.¹⁸⁹ In 1866, with Davis writing the opinion, the Court handed down a landmark ruling limiting the jurisdiction of military commissions. In *Ex parte Milligan*,¹⁹⁰ it rejected as unsound the proposition that, in time of war, the commander of an armed force, when convinced that the exigencies of the country demanded such action, might suspend all civil rights and their remedies and subject citizens as well as soldiers to his will, limited only by such restraints as a superior officer or the President might impose.¹⁹¹ Except for members of the military, all “citizens of states where the courts are open, if charged with a crime, are guaranteed the inestimable privilege of trial by jury,” the Court declared.¹⁹² Martial rule might be employed when, due to foreign invasion or civil war, the courts were closed, and it was “impossible to administer criminal justice according to law.”¹⁹³ But only in a “theater of active military operations, where war really prevails,” was it necessary to furnish a substitute for civil

184. *Id.* An advisor wrote to Morton: “From a political point of view, it can do our party no good to shed more blood; but on the contrary, if we are merciful, the child is not yet born who will see the defeat of the Republican party.” *Id.*

185. *Id.* at 108-09. Two days before his scheduled execution (and after the May 10, 1865 filing of his petition for a writ of habeas corpus) Johnson finally commuted the sentences of Milligan and his co-defendant, Samuel Bowles, to life imprisonment. *See id.* at 109; *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

186. *See* 71 U.S. at 185-86.

187. Klement, *Treason Trials*, *supra* note 167, at 109. Justice Davis took the unusual step of writing a confidential letter to President Andrew Johnson, urging him to postpone Milligan’s execution. In this letter he asserted that Milligan had been sentenced by “a new tribunal unknown to the common law.” JONATHAN LURIE, *MILITARY JUSTICE IN AMERICA* 24 (2001).

188. Klement, *Treason Trials*, *supra* note 167, at 109, 117 n.83.

189. *Id.* at 109-10; REHNQUIST, *supra* note 139, at 117.

190. 71 U.S. (4 Wall.) 2 (1866).

191. *Id.* at 124.

192. *See id.*

193. *Id.* at 127.

authority.¹⁹⁴ “Martial rule” was impermissible where “the courts are open, and in the proper and unobstructed exercise of their jurisdiction.”¹⁹⁵ Klement lauds the Court for proclaiming “in sweeping terms and living prose that the constitutional rights of citizens would be protected by the federal courts, in times of war as well as in peace.”¹⁹⁶ So does Chief Justice Rehnquist, who writes, “The *Milligan* decision is justly celebrated for its rejection of the government’s position that the Bill of Rights has no application in wartime.”¹⁹⁷ In his magisterial history of the Supreme Court, Charles Warren celebrated *Milligan* as “one of the bulwarks of American liberty.”¹⁹⁸

Pulitzer Prize-winning historian Mark Neely points out, however, that despite the *Milligan* decision, “[T]rials by military commission continued.”¹⁹⁹ There were 1,435 of them between the end of April 1865 and January 1, 1869, “and still more in 1869 and 1870.”²⁰⁰ Some, such as a series of trials in Louisville, Kentucky, were prosecutions for guerrilla activity during the war.²⁰¹ Others involved civilians accused of illegally selling liquor to soldiers and of defrauding the government.²⁰² Military commissions were used in the occupied South, as they had been earlier in conquered Mexican territory, to restrain undisciplined soldiers.²⁰³ After President Johnson proclaimed the war officially over on April 2, 1866, the army announced that such tribunals would no longer be used “where justice can be attained through the medium of civil authority,” and the number declined to about three per month between June 1866 and April 1867.²⁰⁴ Congressional passage of the Military Reconstruction Act of March 2, 1867 revitalized military commissions. Section 3 of that law authorized the commanders placed in charge of the Southern states to employ such tribunals when they considered them necessary to suppress insurrection, disorder, and violence, or to punish criminals and

194. *Id.*

195. *Id. Accord In re Egan*, 8 F. Cas. 367 (C.C.N.D.Y. 1866). In ordering the release of a civilian from South Carolina, who had been convicted of murder and sentenced to a life term at the federal penitentiary in Albany, New York by a military commission, Supreme Court Justice Samuel Nelson took the position that the party seeking to exercise military jurisdiction over someone who was not a member of the armed forces had the burden of affirmatively proving the “necessity . . . to exercise this extraordinary and irregular power over the life, liberty and property of the citizen. . . .” *Id.* at 368. *Egan* was decided June 22, 1866. Justice Nelson thus made his ruling between the announcement of the decision in *Milligan*, which came in April 1866, and the publication of the opinion in that case, which did not occur until December. See NEELY, *supra* note 95, at 178.

196. Klement, *Treason Trials*, *supra* note 167, at 112.

197. REHNQUIST, *supra* note 139, at 137.

198. 3 CHARLES WARREN, *THE SUPREME COURT IN UNITED STATES HISTORY* 149 (1926).

199. NEELY, *supra* note 95, at 176.

200. *Id.* at 176-77.

201. *Id.* at 177.

202. *See id.*

203. *See id.* at 177-78.

204. *Id.* at 178.

breachers of the public peace.²⁰⁵ The number convened in May 1867 exceeded the total for the previous eleven months combined.²⁰⁶ Then on June 12, Attorney General Henry Stanberry issued an opinion, which proclaimed that, because hostilities had ceased, any act conferring military authority over civilians must be strictly construed, and consequently that commanders might properly supersede civil jurisdiction by the institution of military tribunals only in extreme emergencies.²⁰⁷ The number of military commission trials decreased, and they ended entirely when all of the Southern states were readmitted to the Union.²⁰⁸ Thus, while the *Milligan* decision did not put an end to military commission trials, by 1877, they were a thing of the past.

D. The Lincoln Conspiracy Case

By then, the nation had witnessed two more trials that have helped give military commissions a bad name. One (clearly unconstitutional had *Milligan* been decided a year earlier) was the 1865 trial of eight civilians accused of conspiring with John Wilkes Booth to assassinate President Lincoln on April 14, 1865. Twelve days after the assassination, Booth was killed by Union soldiers at the Garrett farm near Port Royal, Virginia,²⁰⁹ but by then an investigation, personally directed by Secretary of War Edwin Stanton and Judge Advocate General Joseph Holt, had resulted in the arrest of several individuals who had allegedly assisted him. All of them were charged with conspiring to kill Lincoln, Vice President Andrew Johnson, Secretary of State William Seward, and Lieutenant General Ulysses S. Grant.²¹⁰ Their roles in the plot differed greatly. Lewis Powell and David Harold had attempted to murder Seward.²¹¹ George Atzerodt agreed to kill Johnson, and

205. 14 Stat. 428, 428 (1867).

206. NEELY, *supra* note 95, at 178.

207. WINTHROP, *supra* note 91, at 849-50. Stanberry was an opponent of the Military Reconstruction Acts, who attempted to hamstring their operation and refused to appear to defend them in the famous case of *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869). See HAROLD M. HYMAN, A MORE PERFECT UNION: THE IMPACT OF THE CIVIL WAR AND RECONSTRUCTION ON THE CONSTITUTION 502, 504 (1975).

208. NEELY, *supra* note 95, at 179.

209. See EDWARD STEERS, JR., BLOOD ON THE MOON: THE ASSASSINATION OF ABRAHAM LINCOLN 202-04 (2001). The man who killed Booth was Sergeant Boston Corbett, who felled him with a single shot from a Colt revolver. *Id.*

210. REHNQUIST, *supra* note 139, at 144-46. On the night of April 14, defendant Lewis Thornton Powell seriously injured Seward in an attack on him at his house, but failed to kill the Secretary of State. See STEERS, *supra* note 209, at 126. Defendant George Atzerodt was supposed to kill Vice President Johnson in his room at the Kirkwood Hotel, but he lost his nerve and fled from Washington without ever actually trying to do so. See *id.* at 112, 166-67. General Grant, who was invited by Lincoln to accompany him to Ford's Theater, where Booth attacked the President, did not do so because his wife wanted to leave Washington that evening to visit their children, who were attending school in New Jersey. See *id.* at 96-98.

211. While Powell entered Seward's house and attacked him, Herold, who was supposed to serve as his guide, waited outside for him. However, when he heard screams, Herold panicked and fled. STEERS, *supra* note 209, at 112, 126, 130.

got as close as the bar in the Vice President's hotel before losing his nerve and running away.²¹² Michael O'Laughlin and Samuel Arnold were participants in an earlier unsuccessful plot to kidnap Lincoln, but had apparently returned to their homes in Baltimore by the time Booth changed the objective of the conspiracy to murder.²¹³ Edman Spangler was a stagehand at Ford's Theater, who, at Booth's request, had briefly held his horse outside the theater while he was inside killing Lincoln.²¹⁴ Dr. Samuel Mudd had set the assassin's broken leg while he was a fugitive.²¹⁵ Mary E. Surratt was the proprietor of a Washington, D.C. boarding house, where one of the other conspirators, Lewis Powell, had lived under an assumed name and where Booth had met with other members of his team.²¹⁶ She had allegedly delivered a message for the assassin on April 14,²¹⁷ and her son John was deeply involved in the conspiracy.²¹⁸

At the urging of Stanton and Holt, President Johnson determined to try Mrs. Surratt and the other alleged conspirators before a military commission.²¹⁹ The reason for this decision was fear that a civilian jury, comprised of pro-Southern residents of Washington, D.C., would not convict them.²²⁰ Secretary of the Navy Gideon Wells believed that because the civil courts were open and functioning in the capital, they should try the accused,²²¹ and

212. *See id.* at 112, 166.

213. *See id.* at 84-88.

214. *See id.* at 113-14.

215. *Id.* at 144-45. Mudd always claimed to have been an unsuspecting doctor who innocently provided medical care to an injured stranger in need of his assistance, but Steers contends he was in fact part of a conspiracy to remove Lincoln as president, and had met with Booth on several occasions prior to the one on which Mudd set his broken leg. *Id.*

216. *See id.* at 83.

217. *Id.* at 110. Mary delivered a package that Booth had given her to John Lloyd, a tavern-keeper in Surrattsville, Maryland. In addition, according to Lloyd, she gave him a message that he should "have those shooting irons" ready that night because someone would call for them. *Id.* Defenders of Mary Surratt point out that Lloyd was a drunk and contend that he lied, but defendant George Atzerodt provided corroboration for his claim when he reported that Booth had told him Mrs. Surratt went to Surrattsville to get the guns. *Id.*

218. *See id.* at 81-84, 137-39. At the time of the Lincoln Conspiracy Trial, John Surratt was a fugitive from justice. He had fled to Canada, and after being hidden there for several weeks by a Confederate agent and a Catholic priest, journeyed to London and on to Rome. Surratt was apprehended at the Vatican, but managed to escape and was later captured in Egypt and returned to the United States on February 19, 1867. *Id.* at 210, 231-32.

219. *See* REHNQUIST, *supra* note 139, at 145.

220. *See* STEERS, *supra* note 209, at 211. Most of the pro-Union men in the District of Columbia were in the Army, and the native civilian population held strong Southern sympathies. Part of the government's case was aimed at Jefferson Davis and other members of the Confederate government, and, "[b]ecause of the climate in the city, Stanton and his colleagues feared jury nullification." *Id.* This concern was justified, for when John Surratt was tried before a civil jury in Washington in 1867, it hung. *See* John W. Curran, *Lincoln Conspiracy Trial and Military Jurisdiction over Civilians*, 9 NOTRE DAM. LAW. 26, 46 (1933). Steers believes that Stanton's fears of jury nullification justify his resort to a military commission. *See* STEERS, *supra* note 209, at 211. I disagree with him about that.

221. GUY W. MOORE, *THE CASE OF MRS. SURRETT* 30 (1954).

former Attorney General Edward Bates considered a military trial unconstitutional.²²² Wells thought Bates's successor, James Speed, also leaned toward a civilian proceeding, but Stanton was emphatic, and Speed eventually issued an opinion affirming the legality of the kind of trial the Secretary of War wanted.²²³ The Attorney General justified his endorsement of a military commission by pointing out that Washington was a war zone, ringed by fortifications, that martial law existed in the District of Columbia, and that while the civilian police and courts were functioning there, the principal police authority was the armed forces. Speed characterized the accused as "enemy belligerents," whose actions were designed to thwart the government's military effort. As such, they not only could be tried by a military commission, but must be. Many offenses against the laws of war were not crimes under the civil code, and hence a civilian trial for them was impossible.²²⁴

Two defense attorneys, Senator Reverdy Johnson and Thomas Ewing, argued vigorously that because the regular courts were open and functioning, the commission that President Johnson authorized on May 1 had no jurisdiction over their clients.²²⁵ The nine officers detailed by the War Department to hear the case,²²⁶ met in closed session to consider the defense argument. Then, citing Speed's opinion, they ruled in favor of their own authority to hear the case.²²⁷ Precisely because it had been handed down by a military commission, the defendants could not appeal this ruling to a civil court.²²⁸ Although Edward Steers, a defender of the commission, insists that "[t]here was little opposition—and considerable public support—for a military trial of the accused conspirators. . .,"²²⁹ the fact of the matter is that most of the

222. STEERS, *supra* note 209, at 212. "Bates based his opposition to a military trial on his beliefs that the accused conspirators were civilians, not members of a military organization, and that their alleged crime was not military in nature." *Id.*

223. See MOORE, *supra* note 221, at 30. According to Steers: "A military trial would insure that the process would remain in loyal hands under government control—and more important, under Stanton's control." STEERS, *supra* note 209, at 212.

224. STEERS, *supra* note 209, at 212-13. Steers agrees with this characterization. See *id.* at 213. As he notes, however: "Subsequent critics of the military commission have sided with [former Attorney General] Bates, believing the accused were civilians with no ties—directly or indirectly—to any clandestine or military effort by the Confederate government." *Id.*

225. See *id.* Senator Johnson, a Maryland Democrat, was counsel for Mary Surratt. Ewing represented Samuel Mudd and Samuel Arnold. *Id.* He was a Major General and former Chief Justice of the Kansas Supreme Court. *Id.* at 218. Chief Justice Rehnquist reports the date on which Johnson issued the order directing the War Department to set up a commission for the trial of the conspirators. See REHNQUIST, *supra* note 139, at 145.

226. See REHNQUIST, *supra* note 139, at 145. The senior officer on the commission, and thus its president, was Major General David Hunter. The best known is Major General Lew Wallace, who gained fame as the author of *Ben Hur*. *Id.*

227. STEERS, *supra* note 209, at 213.

228. *Id.*

229. *Id.* at 214. A leading historian of the military legal system, Jonathan Lurie, disagrees. He reports that "newspaper commentary reflected a basic mistrust of military commissions." LURIE, *supra* note 187, at 22.

New York press joined Bates in denouncing the proceedings.²³⁰ Critics found particularly objectionable the fact that they were to be closed to the public.²³¹ Under heavy pressure, on May 11 the government opened the trial to newspaper reporters.²³²

Secrecy was far from the only problem with this military commission. As even Steers concedes, "The defendants were at a clear disadvantage in being tried by military officers, none of whom had served previously as judges or attorneys."²³³ They were also handicapped by the fact that they were not permitted to testify in their own defense, although they could not have done that in a civilian court either.²³⁴ What was unique about this proceeding was that it "often appeared to be two trials in one."²³⁵ The first was a prosecution of Jefferson Davis and various Confederate agents operating out of Canada for plotting to kill Lincoln and to do such things as start epidemics on the East Coast.²³⁶ As Chief Justice Rehnquist has pointed out, the evidence of these activities and Booth's connections to them at most tended to establish that he had assassinated the President, something no one disputed; what the government needed to prove was that the defendants had conspired with Booth or aided and abetted him.²³⁷ Besides being highly prejudicial to the accused, this part of the government's case was based on perjured testimony.

All three of the witnesses it called to prove its contentions lied.²³⁸ The government's case in the second trial, the one of the eight defendants, was stronger. Although it may not have established that they conspired to kill Lincoln, Rehnquist thinks the prosecution proved at least four of them were guilty of *some* crime.²³⁹ The evidence against a fifth, stagehand Edman Spangler, was a good deal less clear, but if the jury believed one government witness, it could have found that he made a slight effort to hinder the pursuit

230. See MOORE, *supra* note 221, at 31.

231. *Id.* at 32. It was Judge Advocate General Holt's idea to keep the proceedings secret. STEERS, *supra* note 209, at 222.

232. MOORE, *supra* note 221, at 32.

233. STEERS, *supra* note 209, at 222.

234. See REHNQUIST, *supra* note 139, at 156. In 1864, Maine became the first state to make defendants in criminal trials fully competent to testify. Over the next twenty years, every state but Georgia, along with the federal government, followed suit. *Id.* at 156-57.

235. See STEERS, *supra* note 209, at 223.

236. See *id.* at 222-23.

237. See REHNQUIST, *supra* note 139, at 153-54.

238. See STEERS, *supra* note 209, at 224-25. One of these witnesses, Sanford Conner, wound up being sentenced to ten years in the Albany Penitentiary for perjury. MOORE, *supra* note 221, at 32-33.

239. REHNQUIST, *supra* note 139, at 160-61. Rehnquist thinks Powell (also known as Lewis Payne) undoubtedly attempted to murder Seward. Harold had been associated with the conspirators at various times in ways that incriminated him, and he clearly had helped Booth escape from Washington. Arnold and O'Laughlin had been involved in a conspiracy to kidnap Lincoln, although they had abandoned the enterprise before the assassination. *Id.*

of Booth from Ford's theater.²⁴⁰ The Chief Justice does not seem to find the proof against Atzerodt persuasive,²⁴¹ and he considers "the evidence against Mudd . . . too sketchy to have convicted him as a conspirator in the plot to kill Lincoln."²⁴² Nevertheless, the military commission convicted all of the defendants, including Atzerodt and Mudd.²⁴³ It sentenced the doctor, O'Laughlin, and Arnold to life in prison and gave Spangler six years in prison. The commission condemned the other four defendants to death by hanging.²⁴⁴

Five of its nine members had reservations about executing Mary Surratt, but those did not save her from the gallows. Reportedly, when these officers proposed acquitting Surratt, or at least sparing her life, the Judge Advocate objected. At the request of one of the wavering members, the Assistant Judge Advocate drafted for their signature a petition asking President Johnson to commute her sentence to life in prison.²⁴⁵ Johnson approved the commission's sentencing recommendations and did not sign the clemency plea. He claimed later he had never seen it.²⁴⁶ There is reason to believe that Judge Advocate General Holt deliberately placed the petition where the President would be likely to overlook it.²⁴⁷

The execution under such dubious circumstances of a woman who may have been guilty of nothing more than looking the other way while her son and his friends plotted criminal activity has helped give the Lincoln Conspiracy trial a bad name,²⁴⁸ as have other suspicious features of the case. For example, Secretary of War Stanton helped one of the key witnesses against Mary Surratt get a government job soon after the trial ended.²⁴⁹ A source of criticism at the time, and since, is the prosecution's failure to introduce Booth's diary into evidence along with other items taken from his body, an

240. *Id.* at 162.

241. He summarizes it, but does not include Atzerodt among those he says the government proved guilty of some crime. *See id.* at 155-56, 151-62.

242. *Id.* at 167.

243. STEERS, *supra* note 209, at 227.

244. *Id.*

245. *See* MOORE, *supra* note 221, at 105.

246. STEERS, *supra* note 209, at 226.

247. *See* MOORE, *supra* note 221, at 111-12.

248. According to Moore, there was and is a reasonable doubt about whether Mary Surratt was guilty of conspiring to kill the President. *Id.* at 105. With respect to the earlier plot to kidnap Lincoln, he writes,

[T]here is no proof that Mrs. Surratt knew what was being plotted in her boarding-house. . . . There is no stronger evidence against her than this: that she suspected something but could not imagine why strange men kept calling on her son. Her involvement in the abduction plot cannot be more than a guess.

Id. at 100. Chief Justice Rehnquist, on the other hand, believes that "it is difficult to fault the commission for having found Mary Surratt guilty of conspiracy." REHNQUIST, *supra* note 139, at 165.

249. *See* MOORE, *supra* note 221, at 94.

omission that looks all the more suspicious because there were pages missing from a document that, even as it stood, would have weakened the government's case.²⁵⁰ Finally, there was the fact that this was a military trial of civilians. In 1990, in a case brought by descendants of Samuel Mudd, the Army Board for the Correction of Military Records ruled that the Hunter Commission had been without jurisdiction to try the doctor. By doing so it had violated his due process rights.²⁵¹ The Board concluded, "Mudd should have been tried in a civil court and not before a military commission."²⁵²

E. The Trial of Captain Henry Wirz

While they considered the trial of the Lincoln conspirators improper, War Department lawyers in 1865 viewed it as a valuable precedent upon which they could rely in trying Captain Henry Wirz for the crimes he had allegedly committed as commandant of the Confederacy's Andersonville prisoner-of-war camp.²⁵³ To a considerable extent, Wirz was a scapegoat, whose political trial provided people in the North with an outlet for the anger they felt over the assassination of Lincoln. Stanton, along with *The New York Times* and much of the Northern public, believed not only that Jefferson Davis and other high Confederate officials were responsible for the President's death, but also that they had conspired to murder Union prisoners of

250. See *id.* at 72-73; WILLIAM HANCHETT, *THE LINCOLN MURDER CONSPIRACIES* 85 (1983). According to Hanchett,

[The] revelation that Booth had carried a diary [caused] lasting damage to the reputations of Stanton, Holt, and Special Judge Advocate [John] Bingham, for it helped to establish the facts—so scornfully rejected and ridiculed at the 1865 conspiracy trial—that there really had been a plot to kidnap Lincoln, and that Booth's decision to kill was made at the last moment.

Id.

251. John W. Dean, *Stranger than Fiction*, MSNBC, Dec. 15, 2001, available at <http://www.msnbc.com/news/672765.asp?cp1+1>. The Army rejected the board's recommendation. Although a federal court found the Army had acted arbitrarily and capriciously and ordered it to address again the board's recommendation, the Army turned that recommendation down a second time. *Id.* A federal district judge in Florida had ruled against Mudd himself on this issue in the immediate aftermath of the *Milligan* decision. See *Ex parte Mudd*, 17 F. Cas. 954 (D.D. Fla. 1868) (No. 9,899). See also REHNQUIST, *supra* note 139, at 168.

252. REHNQUIST, *supra* note 139, at 168-69.

253. See Laska & Smith, *supra* note 100, at 95. Between February 1864 and May 1865, 13,000 Union soldiers perished at Andersonville under conditions of "unspeakable squalor." *Id.* at 78. Hundreds had no shelter, while others lived in patchwork tents or bush huts that did not keep them dry. Unable to supply its own soldiers adequately, the Confederacy had no clothing for the prisoners, and many were forced to wear tatters or even nothing at all. Food was meager and often served raw, and until some prisoners dug their own wells, the only source of water for the entire camp was a polluted creek filled with waste from the prison cookhouse and hospital, as well as human excrement. At least 150 captives were shot for allegedly trespassing over the "dead line" erected to discourage prisoners from approaching the walls. *Id.* at 81-82.

war.²⁵⁴ According to the Secretary of War and Judge Advocate General Holt, the man who carried this plot into execution was Captain Wirz.²⁵⁵ The government charged him with conspiring to injure the health and destroy the lives of prisoners of war and also with murdering thirteen prisoners.²⁵⁶

Murder and conspiracy were, of course, crimes under civilian law, but Stanton and Holt maintained that because they had been committed in pursuit of military objectives, Wirz's offenses were violations of the common law of war, and hence triable in a military court.²⁵⁷ The defense insisted that resort to a military commission was not warranted by martial law, and that such a body had no authority to try someone who was not a member of the U.S. armed forces. Although the fighting had ended and the crimes Wirz was alleged to have committed were cognizable by state and federal courts then sitting, the commission rejected these arguments.²⁵⁸

The trial the government afforded Wirz was far from fair. The Judge Advocate, Colonel Norton Chipman, dominated the proceedings, for it was his job not only to prosecute the defendant, but also to give the commission "impartial" advice on the correct application of the law. As Lewis Laska and James M. Smith have written, "It was an immense difficulty, perhaps an insuperable one, to be the prosecuting officer and the judge at the same time."²⁵⁹ Further unbalancing the scales of justice was the fact that two members of the commission were friends of Chipman.²⁶⁰ Entries in the diary of one of them, Major General Lew Wallace, who served as president of the commission, reveal that he was not only prepared to defer without reservation to the Judge Advocate, but was also biased against the accused.²⁶¹ During the trial, a member of the commission recommended one of the prosecution's two most important witnesses, who called himself Felix de la Baume, for a position in the Department of the Interior. Baume, who claimed to be a Frenchman and the grand-nephew of the Marquis de Lafayette, later turned out to be an army deserter from New York named Felix Oeser.²⁶² Chipman's

254. *See id.* at 132, 83, 89-90. Those with whom Wirz was alleged to have conspired included Davis, General Robert E. Lee (commander of the Army of Northern Virginia), and Major General Howell Cobb (commander of the Department of Georgia), as well as R. R. Stevenson and Isaiah White, who were surgeons at the prison hospital. *Id.* at 97.

255. *Id.* at 90.

256. *Id.* at 97-98.

257. *Id.* at 90.

258. *See id.* at 96. The defense relied on arguments made on behalf of the defendants in the Lincoln conspiracy trial. In response to its contention that a military commission could not try a case cognizable in a civilian court because the war was over, prosecutor John O. Bingham responded that it had not yet ended. It was not until April 2, 1866 that President Johnson proclaimed the final suppression of the "rebellion" in all of the Southern states except Texas. *Id.*

259. *Id.* at 107.

260. *Id.*

261. *Id.* at 106-07. Wallace had also served on the military commission that convicted the Lincoln conspirators. *Id.* at 102.

262. *See id.* at 119, 129-30.

witnesses often contradicted one another, and some of their testimony was hearsay.²⁶³ Few could actually identify the victims of the murders with which Wirz was charged, and their testimony about those killings was vague.²⁶⁴ Nevertheless, the commission found the defendant guilty of all thirteen homicides, and three more besides, while also convicting him of conspiracy.²⁶⁵ It condemned Wirz “to be hanged by the neck until dead.”²⁶⁶ “Like the *U.S. Dakota* trials,” writes Peter Maguire, “the trial of Captain Henry Wirz provided a dramatic spectacle of vengeance.”²⁶⁷ It did not provide a stirring display of justice.

F. Limitation of Military Tribunals During World War I

Although victimized by procedural unfairness, Henry Wirz was no hero, and he bore at least some responsibility for the prisoner deaths at Andersonville.²⁶⁸ The perception that most of those punished by military commissions during the Civil War and Reconstruction deserved their fates probably accounts for the general acceptance of such tribunals, at least outside the South,²⁶⁹ during the last decades of the nineteenth century and the early years of the twentieth. Writing in America’s first political science encyclopedia in 1881,²⁷⁰ John W. Clappitt justified the use of military commissions “[w]hen war prevails in a portion of the country occupied or threatened by an enemy, whether within or without the territory of the United States. . . .”²⁷¹ But he introduced an important qualification: they should be employed only to try “crimes and military offenses . . . not within the jurisdiction of any existing civil court.”²⁷² It is understandable that Clappitt should have taken that position, for he had been one of Mary Surratt’s defense attorneys.²⁷³ Excepted from the jurisdiction of military commissions, he asserted, were “such offenses as are within the legal cognizance of the criminal courts of the country. . . .”²⁷⁴ Henry Winthrop agreed with Clappitt that such crimes were the

263. *See id.* at 118.

264. *See id.* at 118-20.

265. *Id.* at 126-27.

266. *Id.* at 127.

267. MAGUIRE, *supra* note 101, at 40 (italics in the original omitted).

268. *See* Laska & Smith, *supra* note 100, at 131-32. Peter Maguire captures both the justice of the result and the dubious nature of the proceeding when he declares: “Once again an especially odious war criminal was singled out for ‘summary justice’ and the victors were able to vent their wartime passions in a powerful public display.” MAGUIRE, *supra* note 101, at 42.

269. The actions of military commissions were a chief complaint of Southerners throughout the Reconstruction period. *Id.* at 130 n.183.

270. *See* NEELY, *supra* note 95, at 179-80.

271. *Id.* at 179.

272. *Id.*

273. MOORE, *supra* note 221, at 37.

274. NEELY, *supra* note 95, at 180.

business of the civil courts. In his treatise on military law, Winthrop read *Milligan* as establishing that military commissions could take cognizance only of offenses committed in a theater of war or a place where martial law or military government could be exercised legally.²⁷⁵ “Thus, a commission ordered by a commander exercising *military government*, by virtue of his occupation, by his army, of territory of the enemy, cannot take cognizance of an offence committed without such territory,” Winthrop explained.²⁷⁶

During World War I, there were some who wanted to give military courts home-front jurisdiction as well. For example, a New York attorney, Henry W. Forster, argued that “in a national war with a first-class power, it may not be possible to win the war without court-martialing all enemy spies and some enemy sympathizers.”²⁷⁷ Brushing aside *Milligan* as a statutory interpretation case, rather than a constitutional ruling,²⁷⁸ Forster asserted that during a major war, the Constitution did not “inure to the benefit of the public enemy, of spies, or of enemy sympathizers, whether native or foreign.”²⁷⁹ Such thinking inspired some extreme nationalists to propose removing sedition cases from the civil courts and giving them to military tribunals.²⁸⁰ A Minnesota judge declared: “What we need is a court that can’t be fooled with a lot of technicality and red tape.” He added, “You can’t fool a military court.”²⁸¹ Attorney General Thomas Gregory heard coming “from every section of the country . . . the cry that the disloyal and seditious should be tried by military courts-martial and promptly shot. . . .”²⁸² Although hardly vigorous defenders of civil liberties,²⁸³ Gregory and President Woodrow Wilson opposed what they regarded as constitutionally dubious legislation to authorize such trials and managed to head off congressional enactment of the so-called “court-martial bill.”²⁸⁴

Wilson also commuted the death sentence imposed by a military court on an enemy spy, who was apprehended in 1918 trying to sneak into the United States from Mexico. Although Lothar Witzke was a lieutenant in the German Navy, when arrested, he was wearing civilian clothes and pretending to be a Russian-American. A coded note found in his luggage established conclusively that he was on an espionage mission. Nevertheless, the Presi-

275. WINTHROP, *supra* note 91, at 836.

276. *Id.*

277. Henry W. Forster, *Are Native American Enemy Sympathizers Subject to Court-Martial*, 85 CENT. L. J. 132, 132 (1917).

278. *Id.* at 134.

279. *Id.* at 132.

280. H.C. PETERSON & GILBERT C. FITE, *OPPONENTS OF WAR 1917-1918*, at 216 (1957).

281. *Id.*

282. *Id.*

283. See DAVID M. KENNEDY, *OVER HERE: THE FIRST WORLD WAR AND AMERICAN SOCIETY* 80 (1980); DAVID M. RABBAN, *FREE SPEECH IN ITS FORGOTTEN YEARS* 267, 360 (1997).

284. KENNEDY, *supra* note 283, at 80.

dent spared his life, because the Attorney General advised him that Witzke should have been tried in a civilian court.²⁸⁵

G. The Nazi Saboteur Case

The next wartime President, Franklin D. Roosevelt, behaved very differently when confronted with a similar case.²⁸⁶ Roosevelt's immediate reaction, when he learned about the arrest of the Nazi saboteurs who landed on Long Island and in Florida in June 1942, was that the two who were United States citizens (Hans Haupt and Ernest Peter Burger) should be tried for treason by a military court-martial.²⁸⁷ Rather than attempting to dissuade the President, his legal advisors encouraged him to hand the job of trying the saboteurs over to the Army. The Justice Department foresaw both legal and factual problems if it attempted to prosecute Haupt and Burger for treason, and, of course, that charge could not be filed against the six defendants who were unquestionably German nationals.²⁸⁸ All eight prisoners could be prosecuted in a civilian court for attempted sabotage, but the maximum penalty for that offense was thirty years in prison.²⁸⁹ Secretary of War Henry Stim-

285. See Curry, *supra* note 91, at 52, 53. Witzke was set free in 1923 as a reward for rescuing several fellow inmates from a prison fire. After his return home, the German government decorated him with two Iron Crosses. *Id.*

286. There were actually two military commission trials for offenses committed within the United States during Roosevelt's presidency. The principal defendant in the other, William Colepaugh, was a Connecticut-born United States citizen, who defected to Germany in 1944 and, after graduation from a German spy school, returned to this country on an espionage mission. In February 1945, Colepaugh was tried along with his German accomplice before a military commission consisting of seven colonels and majors. It sentenced both of them to death. See Richard Willing, *The Nazi Spy Next Door*, USA TODAY, Feb. 28, 2002, available at <http://www.usatoday.com/news/nation/2002/02/28/usatcov-traitor.htm>.

287. Danelski, *supra* note 71, at 65. One of the arrested saboteurs, Hans Haupt, seems rather clearly to have been a naturalized United States citizen. See *supra* note 79. The citizenship status of Ernest Peter Burger was more problematic. After participating in Hitler's Munich Beer Hall Putsch in 1923, he immigrated to the United States in 1927 and became a naturalized citizen in 1933. Soon after his naturalization, he returned to Germany, where he became an aide-de-camp to Ernest Reohm, chief of the Nazi Storm Troopers. He subsequently became a private in the German army. Danelski, *supra* note 71, at 62-63. Voluntary service in a foreign army can result in loss of citizenship. See 8 U.S.C. § 1481(a)(3). A 1957 Supreme Court decision renders it doubtful, however, whether that can happen automatically. See *Trop v. Dulles*, 356 U.S. 86 (1957). In *Trop*, the Court declared that so long as a person "does not voluntarily renounce or abandon his citizenship . . . his fundamental right of citizenship is secure." *Id.* at 93. Concurring in that case, Justice Black declared that "[e]ven if citizenship could be involuntarily divested, I do not believe that the power to denationalize may be placed in the hands of military authorities Such forfeiture should not rest on the findings of a military tribunal." *Id.* at 104.

288. Belknap, *Supreme Court*, *supra* note 73, at 63. Attorney General Biddle pointed out to Roosevelt that a treason conviction could be had only upon confession in open court or the testimony of two witnesses to the same overt act. Besides, there was some evidence that the two had forfeited their citizenship, and only a citizen could commit treason. Danelski, *supra* note 71, at 66.

289. Belknap, *Supreme Court*, *supra* note 73, at 63.

son, who was upset that the saboteurs might be convicted only of a minor offense, expected Attorney General Francis Biddle to fight to retain jurisdiction over them, but to his surprise, Biddle favored trial by a special military commission.²⁹⁰ The reason was that he too wanted the defendants punished more severely than would be possible under civil law. "A Military Commission is preferable because of the greater flexibility, its traditional use in cases of this character, and its clear power to impose the death penalty. . . ." Biddle wrote in a June 30, 1942 memorandum to the President.²⁹¹ Roosevelt agreed. In a "Secret and Confidential" memorandum to Biddle, he declared that the accused were "just as guilty as it is possible to be" and added, "the death penalty is called for. . . ."²⁹²

Biddle's proposal to employ a military commission to secure the execution of the saboteurs reflected the thinking of Assistant Solicitor General Oscar Cox, who advised him that "[u]nder the internationally accepted 'law of war,' apart from our Constitution, enemy aliens or domestic citizens who came through the lines out of uniform for the purpose of engaging in hostile acts . . . are subject to trial by military tribunals."²⁹³ Cox was aware that in *Ex parte Milligan*, the Supreme Court had ruled that such tribunals could not be used where the civilian courts were open and functioning.²⁹⁴ He insisted, however, that *Milligan* did not apply to defendants such as these.²⁹⁵ The saboteurs' army lawyers disagreed. They challenged both the proclamation that Roosevelt issued on July 2, 1942, denying their clients access to the civilian courts, and his order appointing a military commission to try them, by petitioning the Supreme Court for a writ of habeas corpus.²⁹⁶

The Court sided with the Roosevelt administration. Taking the position that *Milligan* did not apply because the petitioners were unlawful belligerents, it held that the acts of which they were accused—entering or remaining

290. Danelski, *supra* note 71, at 65-66. Lawyers in the Judge Advocate General's office told Stimson that if the saboteurs were tried in a civil court, they could be convicted of "only a two-year offense at most." *Id.* The Justice Department's Boris Bittker apparently agreed with them. He wrote later:

A military trial would . . . make death sentences possible, whereas the most heinous statutory federal crime for which the saboteurs could be prosecuted in the federal courts was probably conspiracy to commit a federal crime under the general conspiracy [section] (§ 371 of Title 18), which at that time carried only a 2-year sentence.

Bittker, *supra* note 74, at 434.

291. Memorandum from the Attorney General to the President, (June 30, 1942), OF5036, Franklin D. Roosevelt Manuscripts [hereinafter FDR MSS], Franklin D. Roosevelt Library, Hyde Park, New York [hereinafter Roosevelt Library] (copy on file with the Author).

292. Memorandum from FDR to the Attorney General, (June 30, 1942), Box 76, FDR MSS, *supra* note 291 (copy on file with the Author).

293. Memorandum from Oscar Cox to the Attorney General, (June 29, 1942), Box 61, Oscar Cox Papers, Roosevelt Library, *supra* note 291 (copy on file with the Author).

294. *Id.*

295. *Id.*

296. See Belknap, *Supreme Court*, *supra* note 73, at 67-69.

in United States territory out of uniform for the purpose of destroying war materials and utilities—constituted “an offense against the law of war which the Constitution authorizes to be tried by military commission.”²⁹⁷ The Court also rejected²⁹⁸ the contention of the saboteurs’ lawyers “that the President’s order of July 2, 1942, so far as it lays down the procedure to be followed on the trial before the Commission and on the review of its findings and sentence, and the procedure in fact followed by the Commission, are in conflict with Articles of War 38, 43, 46, 50 1/2 and 70” of the Article of War.²⁹⁹ The Articles of War was a statute, enacted by Congress, and the defense position was that, by failing to comply with its procedural requirements, Roosevelt had violated the law. The Justices agreed unanimously that he had not, but as Chief Justice Harlan Fiske Stone acknowledged in his opinion, “a majority of the full Court are not agreed on the appropriate grounds for decision.”³⁰⁰ Some thought Congress had not intended the Articles of War to govern a presidential military commission convened to try enemy invaders, while others, although acknowledging that the Articles of War applied to this case, took the position that the procedures Roosevelt had adopted were not in conflict with the statute.³⁰¹

The Court had little choice but to reach the conclusion that there had been no violation of the Articles of War, for by October 29, 1942, when it published its opinion in *Quirin*,³⁰² six of the eight defendants were dead. The trial, already in progress when defense counsel filed their habeas corpus petition, adjourned temporarily for the Supreme Court hearing.³⁰³ Hence, the Jus-

297. *Ex parte Quirin*, 317 U.S. 1, 46 (1942).

298. *Id.* at 47. Article 38 authorized the President to prescribe the procedures, including modes of proof, to be used by military commissions, but required him, insofar as practicable, to apply the rules of evidence utilized in criminal trials in United States District Courts. Roosevelt’s order, on the other hand, made admissible any evidence that would be of “probative value to a reasonable man.” Counsel for the saboteurs also contended it was inconsistent with Article 38 because that statute directed that “nothing contrary to or inconsistent with these articles” be prescribed by the President. Article 43 required a unanimous vote for a court martial to impose a death sentence or to convict anyone of an offense for which execution was mandatory, and it required a three-fourths vote to impose a prison sentence of more than ten years. Roosevelt’s order, however, authorized the commission to do all of these things by a two-thirds vote. The attorneys representing the saboteurs also contended it violated Article 70’s requirement that there be a thorough and impartial investigation, analogous to a grand jury hearing, before a case could be brought to trial. The final two articles on which they focused, Articles 46 and 50 1/2, set forth procedures for appellate review. They required that every record of trial by a court-martial or military commission be referred by the “convening authority” (in this case the President) to his staff judge advocate or the Judge Advocate General, and that before the execution of any sentence requiring presidential approval, the record be examined by a board of review set up by the Judge Advocate General. Roosevelt, however, had ordered that after the trial of the saboteurs, the trial record be transmitted directly to him for appropriate action. *See* Belknap, *Supreme Court, supra* note 73, at 65, 72.

299. 317 U.S. at 46.

300. *Id.* at 47.

301. *Id.*

302. *Id.* at 1.

303. *See* Lardner, *Nazi Saboteurs Captured, supra* note 70, at 23.

tices were under pressure to render a quick decision, so it could resume. They did. On July 31, 1942, less than twenty-four hours after the conclusion of oral argument, the Court issued a terse per curiam opinion, holding simply that the President possessed the authority to try the saboteurs before a military commission, that the one he had created was lawfully constituted, and that "petitioners . . . have not shown cause for being discharged by writ of habeas corpus."³⁰⁴ The trial resumed on August 1, and on August 3 the commission found all eight defendants guilty and sentenced them to death.³⁰⁵ It recommended that the death sentences of two of them who had cooperated with the government be commuted to life in prison.³⁰⁶ The others were executed in the electric chair of the District of Columbia jail on August 8.³⁰⁷

Then the Supreme Court set out to write a full opinion in the *Quirin* case. The timing of that enterprise left it with little choice but to resolve, in his favor, the issue of Roosevelt's alleged failure to comply with the procedural provisions of the Articles of War. In the initial draft per curiam order that he wrote following oral argument, Chief Justice Harlan Fiske Stone stated, with respect to Articles 46 and 50 1/2, that the Court should "not assume in advance that the President would fail to conform his actions to the statutory requirements."³⁰⁸ When the Court discussed the case in Conference, however, there was considerable disagreement about whether those articles even applied to the President. Hence, the Justices decided to delete this section.³⁰⁹ By the time he wrote his opinion for the Court, Stone regretted that action, for it would obviously look bad now to say that the issue had not then been properly before them.³¹⁰ Unless they resolved it against the saboteurs, the Court would be left "in the unenviable position of having stood by and

304. Belknap, *Supreme Court*, *supra* note 73, at 76. The Supreme Court's interim per curiam opinion is unpublished. There is a copy in the *Ex parte Quirin*, July Special Term, 1942 file *Ex parte* and Miscellaneous Case Files, 1925-1963, Records of the Supreme Court of the United States, Record Group 267, National Archives, Washington, D.C. Although it decided *Quirin* in less than a day, the Supreme Court held two Conferences on the case. See Danelski, *supra* note 71, at 71.

305. Belknap, *Supreme Court*, *supra* note 73, at 77.

306. *Id.* The two defendants who had cooperated with the government were George John Dasch and Ernest Peter Burger. Apparently concluding that they would inevitably be captured, Dasch and Burger had decided to betray the other saboteurs. Dasch went to the FBI, disclosed the whole operation, and informed the Bureau that Burger too was willing to turn himself in. See Danelski, *supra* note 71, at 64.

307. Belknap, *Supreme Court*, *supra* note 73, at 77. After the trial ended, the 3,000-page record was sent to President Roosevelt for review. After studying it and the findings for two days, Roosevelt accepted all of the commission's recommendations except that concerning Dasch; he decided to sentence him to only thirty years in prison. The only "appellate" review the Saboteur case would receive was conducted by a President who on July 12 had asked (referring to the defendants), "What should be done with them? Should they be shot or hanged?" Danelski, *supra* note 71, at 71. On both August 1 and August 2, Roosevelt told his secretary he hoped the commission would recommend death by hanging. *Id.* at 71-72.

308. Danelski, *supra* note 71, at 71.

309. *Id.*

310. *Id.* at 74.

allowed six men to go to their death without making it plain to all concerned—including the President—that it had left undecided a question on which counsel strongly relied. . . .”³¹¹ As Justice Felix Frankfurter pointed out, saying now that the Court could not decide the issue then because it had been raised prematurely would make a mockery of justice, and besides, the surviving saboteurs could force them to decide the question simply by filing a new habeas corpus petition.³¹² Stone therefore drafted alternative versions of this portion of his opinion, about which he himself could say nothing better than that they would “present the Court all tenable and pseudo-tenable bases for decision.”³¹³ His colleagues found it impossible to unite behind either version,³¹⁴ and in the end opted for announcing that the articles in question could “not at any stage of the proceedings afford any basis for issuing the writ,” even though they could not agree among themselves as to why that was so.³¹⁵

The Court also had trouble with the issue of whether it had been constitutional for the President to try the saboteurs before a military commission. Here the problem was not internal disagreement. When Stone announced in Conference that, as far as he was concerned, the saboteurs were entitled only to “executive justice,” and, therefore, the military commission had jurisdiction to try them, there was almost no objection.³¹⁶ The only one of his colleagues who seems to have questioned the validity of Roosevelt’s proclamation denying the defendants access to the civil courts was Owen Roberts.³¹⁷

Two factors account for this near-unanimity. One is that the Justices strongly supported the war and wanted to do their part to advance the national military effort. Indeed, Justice James Byrnes, Jr. “had been a *de facto* member of the administration for the past seven months, working closely with both Biddle and F.D.R. on the war effort.”³¹⁸ Byrnes would resign from the Court in October to become Director of Economic Stabilization and later Director of War Mobilization.³¹⁹ Justice Frank Murphy was a lieutenant colonel in the army reserve, who was on maneuvers when he was summoned back to Washington to hear the *Quirin* case.³²⁰ Justice Frankfurter (who was

311. Memorandum from H.F.S. [Harlan Fiske Stone] Re Saboteur Cases (Sep. 25. 1942), Box 68, Harlan Fiske Stone Papers, Manuscript Division, Library of Congress, Washington, D.C. (copy on file with the Author).

312. Danelski, *supra* note 71, at 75.

313. *Id.* Stone embodied his alternatives in two memoranda. Memorandum A said the issue was not before the Court. Memorandum B construed the articles in question against the petitioners’ contentions. *See id.*

314. *See id.* at 78-79.

315. 317 U.S. at 47-48.

316. Danelski, *supra* note 71, at 71.

317. *Id.*

318. *Id.* at 69.

319. Walter F. Murphy, *James F. Byrnes*, in 4 THE JUSTICES OF THE UNITED STATES SUPREME COURT 1277 (Leon Friedman & Fred L. Israel eds. 1997).

320. Belknap, *Supreme Court*, *supra* note 73, at 70. Ironically, Murphy wound up dis-

Jewish) considered this “a war to save civilization itself from submergence” and did not want lawyers who were serving in the armed forces asking, “Haven’t we got enough of a job trying to lick the Japs and the Nazis without having you fellows on the Supreme Court dissipate the thoughts and feelings and energies of the folks at home by stirring up a nice row as to who has what power. . . .”³²¹

The second factor uniting the Court behind the decision to uphold Roosevelt’s resort to military justice was an unwillingness to challenge the Commander in Chief. Justice Robert Jackson considered the handling of prisoners “part of the work of waging war” and thought there were the soundest reasons why courts should refrain from reviewing presidential orders regarding them. “I think we are exceeding our powers in reviewing the legality of the President’s Order, and that experience shows the judicial system unfitted to deal with matters in which we must present a united front to a foreign foe,” he wrote to his colleagues.³²² Even if the Court possessed the authority to hold Roosevelt’s military commission unlawful, actually doing so might be a futile gesture. FDR had told Biddle he wanted it clearly understood that he was not going to give up the Nazi saboteurs. “I won’t hand them over to any United States marshal armed with a writ of habeas corpus,” he said.³²³ The Attorney General apparently communicated this information to Justice Roberts, for when the Court discussed the case in Conference, Roberts told his colleagues that Biddle feared FDR would execute the saboteurs, regardless of what the Court did.³²⁴ “That would be a dreadful thing,” Stone exclaimed.³²⁵

Although the Chief Justice and his colleagues readily decided to affirm the legality of Roosevelt’s military commission, writing an opinion that would justify doing so proved difficult. The problem was a lack of law supporting their position. Stone “began with an essentially intuitive justification and then asked his law clerks to find authorities to support it.”³²⁶ His idea was that this case could be distinguished from *Milligan* because the petitioners were unlawful belligerents, and consequently within the jurisdiction of military tribunals that the Commander in Chief could set up independently

qualifying himself after Justice Frankfurter, who apparently did not trust the libertarian Murphy to vote the right way, objected to his participation. See Danelski, *supra* note 71, at 69.

321. Belknap, *Supreme Court*, *supra* note 73, at 80. The quoted question is part of a highly revealing memorandum (most of which is in the form of a hypothetical dialogue between Justice Frankfurter and the saboteurs) that has been reprinted in its entirety with an editorial introduction as Michal R. Belknap, *Frankfurter and the Nazi Saboteurs*, 1982 Y.B. SUP. CT. HIST. SOC. 66.

322. Belknap, *Supreme Court*, *supra* note 73, at 79. Jackson’s stance in *Quirin* supports Jonathan Lurie’s contention that far too often civilian courts have responded to announcements of military interests with “supine deference.” LURIE, *supra* note 187, at 8.

323. Danelski, *supra* note 71, at 68.

324. *Id.* at 69.

325. *Id.*

326. *Id.* at 72.

of the Fifth and Sixth Amendments. "But Stone's clerks could find little authority to support his justification."³²⁷ Consequently, at almost every crucial point in his opinion, the Chief Justice found himself forced to cite analogous cases, rather than ones truly on point.³²⁸ With respect to its central issue—whether the use of a military commission to try enemy agents in an area within the United States where the civilian courts were open and functioning was constitutional—*Ex parte Quirin* was an exercise in judicial fiat.

Even though the decision was without any real legal foundation, Attorney General Biddle loved it. "Practically, . . . the Milligan case is out of the way and should not again plague us," he wrote to Roosevelt the day the Supreme Court published its opinion.³²⁹ In creating an unprincipled exception to its landmark 1866 ruling, the Court fashioned new law pleasing not only to a World War II Attorney General, but also to Vice President Dick Cheney. *Quirin* is one of the primary precedents Cheney cites to justify the military commissions President Bush has authorized to try al Qaeda terrorists.³³⁰

His reliance on *Quirin* is misplaced, not only because the legal basis of that decision is nonexistent, but also because of the questionable character of the proceeding that it upheld. This was a secret trial.³³¹ Biddle insisted on absolute secrecy, Stimson reported, because of "particular evidence which was especially dangerous" that would have to come out during the proceedings.³³² That evidence, however, posed less of a threat to national security than to the reputations of two government agencies.

Following the arrest of all of the would-be saboteurs within two weeks after the first group splashed ashore on Long Island, the FBI basked in the warm glow of commendatory publicity. What the public did not know, and what an open trial would have revealed, is that the Bureau did not deserve the praise it was receiving. The Long Island team was barely ashore when it encountered an unarmed Coast Guard beach patrolman, John Cullen. Although its leader, George Dasch, tried to convince Cullen they were fishermen who had run aground, he nevertheless insisted they accompany him to a nearby Coast Guard station. Dasch, saying he did not want to kill him, offered Cullen \$260 to forget the encounter. Cullen left, and the four German agents headed for New York City. There, Dasch told Burger that he had decided to turn the group in, and Burger agreed to go along with his plan. When Dasch called the local FBI field office, however, the agent who re-

327. *Id.*

328. *Id.*

329. Memorandum from Francis Biddle to the President (Oct. 29, 1942), OF5036, FDR MSS, Roosevelt Library, *supra* note 291.

330. Wallace et al., *supra* note 6. The other precedent cited by Cheney is the military commission trial of those accused of conspiring to assassinate Abraham Lincoln. *Id.*

331. The 1945 military commission trial of William Colepaugh was also held in secret. The courtroom was closed to the public, and an Army information officer briefed the press twice daily. Willing, *supra* note 286.

332. Danelski, *supra* note 71, at 66.

corded his message took no action beyond simply filing what he dismissed as a crank call. Dasch, believing he had paved the way for a meeting with the Bureau's director, J. Edgar Hoover, took a train to Washington, D.C., where he received a somewhat skeptical reception. He nevertheless made a 254-page typed confession and turned over more than \$82,000 in \$50 bills. Utilizing information supplied by Dasch, the invisible writing on a handkerchief he gave them, and some help from Burger, FBI agents tracked down most of the saboteurs.³³³ The Bureau arrested Haupt when he walked into its Chicago office in a bold attempt to clear himself of draft evasion charges.³³⁴ The FBI's publicity-seeking Director Hoover hurried from Washington to New York to announce the capture.³³⁵ Americans, starved for good news about a war that so far had been going badly, went wild, reacting as if the country had just won a major military victory.³³⁶ According to Biddle, it was generally believed that a particularly brilliant FBI agent, probably by attending the sabotage school where the eight Nazi agents trained, had been able to get on the inside and make regular reports to America.³³⁷ Of course, that was nonsense, but Hoover did not bother to correct such convenient mis-impressions. Indeed, according to testimony given during the saboteurs' secret military trial by Agent Norvel D. Willis, FBI officials had offered to arrange a presidential pardon for Dasch if he would plead guilty and not testify about his role in the apprehension of his confederates.³³⁸ Had the trial been public, the feverish adulation the Bureau was receiving would have cooled considerably, for it would have revealed that in the saboteur case, the Bureau had been more blundering than brilliant.

A public trial would also have damaged the reputation of the Coast Guard. Cullen took Dasch's \$260 and left the saboteurs on the beach because he was not in a position to apprehend them. He had no weapon. Although the nation had been at war for six months, the Coast Guard was still using unarmed beach patrols on Long Island.³³⁹ Cullen did the best he could, which was run to his station, where he reported his encounter with the Germans and turned in the money Dasch had given him. By daybreak, the Coast Guard had unearthed the military uniforms and explosives the saboteurs had buried on the beach. Inexplicably, however, it waited until 11:00 a.m. to in-

333. Lardner, *Nazi Saboteurs Captured*, *supra* note 70, at 14-15.

334. Belknap, *Supreme Court*, *supra* note 73, at 62.

335. See Lardner, *Nazi Saboteurs Captured*, *supra* note 70, at 15. Hoover and the FBI had been actively seeking favorable publicity ever since agents, led by Melvin Purvis, gunned down gangster John Dillinger outside a Chicago theater in 1934. See KENNETH O'REILLY, *HOOVER AND THE UN-AMERICANS: THE FBI, HUAC AND THE RED MENACE* 26-34 (1983). By 1938, Attorney General Homer Cummings had become so concerned about the Bureau's publicity activities that he ordered Hoover to limit them. *Id.* at 34. Nevertheless, "The Bureau maintained its high-powered, high-profile self-promotion work in the years to come. . . ." *Id.*

336. Belknap, *Supreme Court*, *supra* note 73, at 62.

337. Lardner, *Nazi Saboteurs Captured*, *supra* note 70, at 15.

338. Belknap, *Supreme Court*, *supra* note 73, at 67.

339. *Id.*

form the FBI. By then the Nazi agents, already on their way to Manhattan, were buying fresh clothes in Jamaica, Queens.³⁴⁰ This display of ineptitude certainly would not have endeared the Coast Guard to the voters and taxpayers of a nation at war.

IV. CONCLUSION

The sort of concealment that enabled the FBI and the Coast Guard to avoid responsibility for their mistakes in the Nazi saboteur case might or might not recur as a result of Bush's resort to military commissions. The procedural rules issued by the Pentagon make it unclear how open the proceedings of these tribunals are going to be.³⁴¹ Democracy depends on openness, while secrecy is the friend of politicians and bureaucrats who wish to avoid accountability. The possibility that military commissions established to try alien members of al Qaeda might be misused to hide from American citizens information that they need to monitor and control their own government is reason enough to be skeptical about the Bush Administration's plans. It suggests that, even if these tribunals are legal, using them to fight terrorism on the home front would be unwise. Military commissions may be necessary to deal with enemy war criminals captured abroad. As instruments

340. Lardner, *Nazi Saboteurs Captured*, *supra* note 70, at 14.

341. Section 5(O) of the procedural rules released by the Pentagon on March 21, 2002 provides: "The accused shall be afforded a trial open to the public (except proceedings closed by the Presiding Officer, consistent with Section 6(B))." Department of Defense, *supra* note 43. Section 6(B)(3) provides that the Commission shall:

Hold open proceedings except where otherwise decided by the Appointing Authority [the Secretary of Defense or his designee] or the Presiding Officer in accordance with the President's Military Order and this Order. Grounds for closure include the protection of information classified or classifiable under reference (d); information protected by law or rule from unauthorized disclosure; the physical safety of participants in Commission proceedings, including prospective witnesses; intelligence and law enforcement sources, methods, or activities; and other national security interests. The Presiding Officer may decide to close all or part of a proceeding on the Presiding Officer's own initiative or based upon a presentation, including an *ex parte*, *in camera* presentation by either the Prosecution or the Defense. A decision to close a proceeding or portion thereof may include a decision to exclude the Accused, Civilian Defense Counsel, or any other person, but Detailed Defense Counsel [an appointed military lawyer] may not be excluded from any trial proceeding or portion thereof Open proceedings may include, at the discretion of the Appointing Authority, attendance by the public and accredited press, and public release of transcripts at the appropriate time. Proceedings should be open to the maximum extent practicable. Photography, video, or audio broadcasting, or recording of or at Commission proceedings shall be prohibited, except photography, video, and audio recording by the Commission pursuant to the direction of the Presiding Officer as necessary for preservation of the record of trial.

Id. Reference (d) refers to Executive Order 12958, "Classified National Security Information," (Apr. 17, 1995), as amended, or any successor Executive Order. *See id.* at "References."

for punishing crimes committed within the United States that could be prosecuted in this country's civilian courts, however, they are badly flawed.

As we have seen, the history of American military commissions is not a happy one. Far too often, the principal reason for employing them has been political. Far too often, they have been utilized because they could be counted on not only to impose harsher penalties than the civilian courts but also to return convictions more easily and on the basis of less evidence. Far too often, their proceedings have been marred by gross procedural irregularities, perjury, and corruption. During World War I, America wisely resisted subjecting those who were not members of the armed forces to military justice. Our generation should follow the example of that one. Military commissions are a facet of America's legal heritage that should not be part of its legal future. Their tainted history suggests that they can only tarnish a just war on terrorism.