Military Commissions: A Historical Survey

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On 13 November 2001, in response to the tragic events of 11 September, President Bush issued Military Order 222 concerning the Detention, Treatment and Trial of Certain Non-Citizens in the War Against Terrorism.[1] The order provides for the detainment of international terrorists for violating the law of war and other applicable laws, subject to the order, and subsequent trial by military commission.[2] Since the release of the order, military commissions, or tribunals, have received widespread media and public attention, much of it unfavorable.[3]

Much of the unfavorable publicity stems from a serious misunderstanding of the history, nature, and purpose of these commissions. Far from being the new kid on the judicial block, military commissions have provided commanders with an effective method for investigating and punishing violations of the law of war since before the existence of the United States.[4] A short survey of the history of such commissions provides valuable insight on why and how warriors have imposed their unique justice upon their fellow warriors, and upon those individuals who seek to engage in combat, but are unwilling to present themselves as warriors. To understand the commission's possible role today, one must first understand its history. Or, as Justice Holmes said of the law: "[T]o know what it is, we must know what it has been."[5]

Origin of Military Commissions

There is much speculation on the origin of military commissions. Most scholars agree that commanders initially created military commissions as an alternative to the exercise of their unlimited power on the battlefield.[6] From warfare's earliest origins, commanders have held the authority of life and death over any individual captured on the battlefield who qualified as an unlawful combatant, spy, or pirate.[7] Some commanders have exercised this unique war power unflinchingly, without regard to traditional western notions of due process of law.[8] Others have sought to use the same power to punish their fellow warriors or the unlawful combatant for violations of the law of war when the conflict is over. Accordingly, the Supreme Court has recognized this "war power":

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1. Military Order of November 13, 2001, 66 Fed. Reg. 57,831 (Nov. 16, 2001), *reprinted supra* p. 5.

2. *Id.* sec. 1(e).

3. *See, e.g.*, Anne Gearan, *Military Court Would Mean Faster Trials, More Secrecy, Fewer Rights in Terrorism Cases*, AP, Nov. 15, 2001 (stating that such commissions would violate basic civil liberties), *available at* http://www.law.com; Tony Mauro, *Historic High Court Ruling Is Troublesome Model for Modern Terror Trials*, AM. LAW. MED., Nov. 19, 2001, at 1 (stating that prior Supreme Court decisions validating the military commission concept are flawed and examples of wartime paranoia), *available at* http://www.law.com; J.D. Tuccille, *Trying Terrorists Before Military Tribunals Plays into Our Enemies Hands* (Nov. 19, 2001) (stating that any use of military commissions for captured Al Qaeda terrorists could threaten basic civil liberties), *at* http://civilliberty.about.com/library/weekly/aa111501a.htm; David Graves & Ben Fenton, *Al-Qa'eda Fighters 'Flown to Island'*, LONDON DAILY TELEGRAPH, Nov. 29, 2001 (stating that the use of military tribunals is inconsistent with international law); Laurence H. Tribe, *Why Congress Must Curb Bush's Military Courts, Trial by Fury*, THE NEW REPUBLIC ON LINE (Nov. 29, 2001) (stating that President Bush's order and the entire military commission concept are riddled with flaws), *at* http://www.thenewrepublic.com/tribe121001.html.

4. THE ARMY LAWYER: A HISTORY OF THE JUDGE ADVOCATE GENERAL'S CORPS, 1775-1975, 17 (1975) [hereinafter JAG CORPS HISTORY].

5. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1948).

6. *See, e.g.*, Wigall Green, *The Military Commission*, 42 AM. J. INT'L L. 832 (1948); *see also* Lieutenant Colonel Thomas Marmon, Major Joseph Cooper & Captain William Goodman, Military Commissions 8 (1953) (unpublished LL.M. thesis) (on file with the U.S. Army Judge Advocate General's School, Charlottesville, Virginia).

7. *See* INGRID DETTER DE LUPIS, THE LAW OF WAR (1987).

8. MICHAEL HOWARD, GEORGE J. ANDREOPOULOS & MARK SHUMAN, THE LAWS OF WAR (1994). During the Dutch revolt from Spain in the mid-sixteenth century, the Spanish commander, the Duke of Alba, implemented a policy to hang any member of the rebellion captured by Spanish forces. *Id.* at 55. During the American Revolution in 1780, British Lieutenant Colonel Banastre Tarleton was renowned for vicious atrocities, committed not only against combatants, but also against anyone else found on the battlefield. The Americans considered him so bloodthirsty that eventually the term "Tarleton's Quarter" became synonymous for no quarter. *Id.* at 80. During Napoleon's invasion of Russia in 1812, the French took several hundred prisoners after the Battle of Bordino. When Russian soldiers were unable to keep up with the marching columns, the French ruthlessly ordered many of the Russian soldiers killed. Similarly, the French ordered other Russian prisoners of war to be shot when the prisoners became too great a burden after the retreat from Moscow began. *Id.* at 91.

> The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced.[9]

While it is impossible to point to the first modern commission, during the Reformation in Europe in the early seventeenth century, at least one commander sought an alternate method for resolving the status of the unlawful belligerent.[10] Gustavus Adolphus is often hailed as the father of modern warfare.[11] As the King of Sweden and the Field Commander of Swedish forces during the Thirty Years War (1618-1648), he introduced myriad new technological and training techniques. Adolphus was also among the first to institute the use of a panel of officers to hear law of war violations and make recommendations on their resolution. The use of the military commission was one of the many revolutionary reforms Gustavus Adolphus instituted for the successful enforcement of discipline and administration in his army.[12]

The British adopted a similar system, and used a military commission in 1776 to try Captain Nathan Hale for spying during the American Revolution.[13] The British did not call the proceeding a military commission, but rather a court-martial.[14] In fact, the military commission, or tribunal, has been known by a variety of names. Court-martial, war court, military court under martial law, military court, court of inquiry, special court-martial, and common law war court are just a few of the terms for military commissions throughout their history.[15] As the Supreme Court stated in *Madsen v Kinsella*, military commissions have taken many forms and borne many names.[16]

American Use of Military Commissions

The United States early military traditions were, in many respects, carbon copies of their former colonial masters, the British. These traditions continued when the Continental Congress drafted the Articles of War for the Continental Army in 1775.[17] In addition to an almost exact duplication of the British Articles of War, which only applied to courts-martial of their own servicemen, the young republic implemented the established tradition of the military commission with a court of inquiry to try British officer and suspected spy—Major John André.[18]

American forces captured Major André in 1780. When captured, Major André was wearing civilian clothing and carrying the defensive schematics for West Point. General George Washington ordered that a court of inquiry try Major André for spying.[19] The court found Major André guilty and sentenced him to death by hanging—the same fate that befell Nathan Hale under similar circumstances.[20]

In the early nineteenth century, a future American President made extensive use of the military commission. Andrew Jackson convened a commission against Louis Louaillier after the Battle of New Orleans in 1815, which resulted in Louaillier's acquittal.[21] During the first Seminole War (1817-1818), Jackson again used the commission to try Alexander Arbuthnot and Robert Ambrister, two British Indian traders who Jackson accused of inciting and assisting the Creek Indians.[22] The com-

9. *In re* Yamashita, 327 U.S. 1, 12 (1946).

10. Marmon, s*upra* note 6.

11. The Dawn of Modern Warfare, West Point Military History Series 57 (Thomas Griess ed., 1984).

12. H.W. Kock, The Rise of Modern Warfare 30 (1981).

13. Green, *supra* note 6, at 832.

14. *Id.* Before the Boer War in 1899, the British Army had the confusing habit of referring to both commissions and traditional courts-martial as courts-martial. In fact, one scholar noted, "In England both descriptions of courts are called courts-martial, and the general public are consequently not able to discriminate between the two." Captain Douglas Jones, Notes on Military Law 3 (1880), *cited in* William Winthrop, Military Law and Precedents 831 (2d ed. 1920 reprint).

15. *See generally* Marmon, *supra* note 6.

16. 343 U.S. 348 (1951).

17. Winthrop, *supra* note 14, at 17. The Articles of War were the precursors to the modern Uniform Code of Military Justice passed by Congress in 1950. *See* H.R. Doc. No. 81-491 (1949); S. Rep. No. 81-846 (1940). The early American articles (and their British counterparts) only dealt with the punishment of offenses committed by American soldiers. There was no thought of incorporating unlawful combatants, enemy civilians, or spies under the umbrella of the articles. Winthrop, *supra* note 14, at 17-24. The traditional venue for trying these individuals was the military commission. *See* De Lupis, *supra* note 7.

18. Green, s*upra* note 6, at 832.

19. Marmon, s*upra* note 6, at 4.

20. Green, *supra* note 6, at 832.

mission (which Jackson called a special court-martial) convicted both Arbuthnot and Armbister, and gave them death sentences. The executions caused a flurry of protests in both Great Britain and the President's cabinet, but no action was taken against the ever-popular Jackson.[23]

The first recorded use of the term "military commission" occurred during the Mexican-American War in 1847. After the conflict, General Winfield Scott, Commander of the U.S. Army, recognized that the Articles of War did not cover crimes committed by the indigenous population against the occupying American forces.[24] To fill the void, General Scott issued General Order Number 20: "Assassination, murder, poisoning, rape or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft . . . whether committed by Mexicans or other civilians in Mexico against U.S. military forces . . . should be brought to trial before military commissions."[25]

After establishing military commissions, General Scott and his subordinate commanders, Generals Wool and Taylor, used them repeatedly. The commissions were not only used to try and convict common criminals for the above offenses, but also to try unlawful combatants for violations of the law of war, such as "threatening the lives of soldiers" and "riotous conduct."[26] If a lawful combatant committed a law of war violation, however, General Scott used a separate proceeding called a "council of war" to determine guilt.[27]

Civil War

It was not until the American Civil War (1861-1865) that the terms "council of war" and "military commission" merged to form the modern day meaning of military commission. General Henry Halleck, Commander of Union forces in the West (as well as an attorney and an author of a textbook on international law), was among the first to recognize that the Articles of War were inadequate for administering justice during the rebellion.

General Halleck's command faced two difficult issues early in the war. First, Union forces occupied large areas of hostile territory—containing an unfriendly populous—whose transgressions against Union forces were not covered by the Articles of War. Second, General Halleck's operational base in southern Illinois, Indiana, and Ohio, contained large numbers of Southern sympathizers. Called "Copperheads" or "Butternuts," some of these Northerners with Southern sympathies had formed covert paramilitary organizations, such as the infamous "Knights of the Golden Circle," and sought to derail the Union war effort.[28]

To address these challenges, on 1 January 1862 General Halleck issued General Order Number 1. Well written and narrowly tailored, General Order Number 1 established the nature and jurisdictional basis for the commissions used by Halleck—other commanders soon followed.[29] The military commission soon became the accepted venue for dealing with the troublesome issue of how to punish unlawful combatants; the North convened over two thousand commissions during the Civil War.[30]

Among the Civil War military commissions, the Supreme Court heard two convictions on appeal, thus making American legal history. The first case concerned Clement Laird Vallandigham, who had been an ardent critic of the Lincoln administration when he lost his congressional reelection campaign in Ohio in 1862. Due to his hatred of the Republicans and Lincoln's war aims, Vallandigham attempted to become the leader of the extreme Democrats and Copperheads in the old Northwest by running for the governorship of Ohio in 1863.[31] Vallandigham's rhetoric and campaign speeches became so vehemently anti-Union and pro-Confederate that General Ambrose Burnside ordered Vallandigham's arrest and trial by a military commission. The commission found Valladigham guilty of

21. *Id.*

22. GEORGE C. KOHN, DICTIONARY OF WARS 413 (1986).

23. *Id.* at 414.

24. WINTHROP, *supra* note 14, at 832.

25. *Id*.

26. *Id*.

27. Harold Wayne Elliot, The Trial and Punishment of War Criminals 173 (1998) (unpublished S.J.D. dissertation, University of Virginia) (on file with University of Virginia Law Library).

28. JAMES MCPHERESON, THE BATTLE CRY OF FREEDOM 493 (1988).

29. WINTHROP, *supra* note 14, at 833.

30. Marmon, *supra* note 6, at 6.

31. JULIUS J. MARKE, VIGNETTES OF LEGAL HISTORY 116 (1965).

violating General Order Number 38 and "declaring disloyal sentiments and opinions with the object and purpose of weakening the power of the government."[32] He was sentenced to confinement for the duration of the conflict.[33]

Although Vallandigham's conviction and confinement led to widespread dissent and disapproval in the North, the Supreme Court denied the writ of certiorari, stating:

> The appellate powers of the Supreme Court as granted by the Constitution, are limited and regulated by the acts of Congress, and must be subject to the exceptions and regulations made by Congress. In other words, the petition before us we think not to be within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court. It is not in law or equity within the meaning of those terms as used in the 3d article of the Constitution. Nor is a military commission a court within the meaning of the 14th section of the Judiciary Act of 1789.[34]

In short, the *Valladigham* Court stated that it was not given the power to review the results of a military commission by the Constitution. The Court would come to a radically different view in 1866, however, when the Court decided *Ex parte Milligan*.

Lambdin P. Milligan was another charismatic leader of the Copperhead movement in Indiana from 1862-1864. A military commission convicted Milligan of planning and organizing an attack upon the Democratic convention, which was to be held in Chicago in 1864.[35] General Alvin Hovey approved the death sentence for Milligan, and in April 1865, forwarded the sentence to President Andrew Johnson for final approval. Simultaneously, Milligan filed a petition for a writ of habeas corpus with the Federal Circuit Court in Indiana and subsequently to the Supreme Court.[36]

The Supreme Court granted the writ, releasing Milligan. The Court's landmark decision set the first clear boundaries for the future jurisdiction of military commissions:

> The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances . . . it cannot be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism . . . . Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.[37]

Two other Civil War military commissions are notable, even though they did not receive review by the Supreme Court. These are the Lincoln assassination and Henry Wirz commissions.

Less than one month after the assassination of President Lincoln on 14 April 1865, military commissions tried eight individuals for the crime.[38] Pursuing federal troops had killed the actual assassin, John Wilkes Booth. The defense attorneys argued that the commission did not have jurisdiction because the war was over and the defendants were U.S. citizens. Both arguments failed, however, because the *Milligan* decision was still a year away. The commission sentenced four of the eight defendants to death by hanging and gave the other four prison sentences.[39]

The military commission against confederate officer Henry Wirz convened on 23 August 1865.[40] Wirz was the commandant of the notorious Andersonville prison camp in southern

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32. *Id.* at 119.

33. *Id.*

34. *Ex parte* Vallandigham, 68 U.S. 243, 251 (1863).

35. MARKE, *supra* note 31, at 130-31.

36. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121 (1866).

37. *Id.* Although the writ of habeas corpus was granted to Milligan on 10 April 1866, the Court did not issue its formal opinion until 17 December 1866. MARKE, *supra* note 36, at 137.

38. JAG CORPS HISTORY, *supra* note 4, at 63.

39. *Id.* The sentences of some of the accused continue to evoke debate even today. Mrs. Mary Surratt was one of those sentenced to death—the only woman ever tried by a commission and given a death sentence. Although she admitted to housing some of the conspirators in her boarding house before the assassination attempt, there was little evidence that she was aware of their plans or participated in any way. Five of the members of the commission signed a letter asking President Johnson to reduce or suspend her sentence. Much controversy remains over whether President Johnson ever saw the request. The Judge Advocate General, General Holt, said he delivered the petition to the President, who rejected it. President Johnson denied ever seeing the petition. Mrs. Surratt was executed on 7 July 1865. Dr. Samuel Mudd, the physician that set the break in John Wilkes Booth's leg, received a sentence of imprisonment at hard labor for life. The scant evidence of Dr. Mudd's knowledge of his patient's prior acts, as well as his obligations as a medical professional, have led many to question the wisdom of Dr. Mudd's sentence. *Id.*

Georgia where one out of every four Union prisoners died. Although Wirz made the traditional defenses of superior orders and necessity, he was convicted for violations of the law of war and hanged on 10 November 1865.[41]

Post-Civl War Commissions

Almost every American conflict between the Civil War and the Second World War used military commissions in some way. Commanders used military commissions to punish law of war violations the Articles of War did not cover in the Indian Wars (a Mococ Indian in 1873), the Spanish American War (Rafael Ortiz in 1899), and the First World War (Pablo Waberski in 1918).[42] Not until the Second World War, however, did the Supreme Court again review the legitimacy of using military commissions.[43]

In early 1942, two Nazi U-boats landed eight German saboteurs on Long Island, New York and Ponte Vedra, Florida. Although the eight individuals wore German naval marine infantry uniforms when they landed, they quickly changed into civilian clothes and buried their military uniforms along with explosives and supplies. The saboteurs had received extensive military training in Germany, and were intent upon the destruction and sabotage of critical U.S. wartime industries. Within days, all eight were in custody. President Roosevelt ordered that a military commission try the saboteurs for spying and violations of the law of war, as described in his order convening the commission on 2 July 1942[44]—an order similar in many respects to the 13 November 2001 order promulgated by President Bush.[45]

United States Attorney General Francis Biddle and the defense attorneys for the Germans convinced the Supreme Court to review the legitimacy of the tribunal even before filing a writ of habeas corpus.[46] The defense team launched a variety of attacks on the commission, including its jurisdiction, the lack of constitutional safeguards, and the issue of the alleged citizenship of one of the defendants (Haupt), similar to *Milligan*. They failed on all fronts. The Court reaffirmed the jurisdiction and legitimacy of the military commission: "By the Articles of War, and especially Article 15, Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offenses against the law of war in appropriate cases."[47]

In *Quirin*, the Court also discussed the important difference between the lawful and unlawful combatant—in language as relevant today as it was sixty years ago:

> By universal agreement and practice, the law of war draws a distinction between . . . those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by the opposing military forces. Unlawful combatants are likewise subject to capture and detention, but, in addition, they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.[48]

In response to the defense's contention that such a tribunal lacked constitutional safeguards, the *Quirin* Court stated:

> [W]e must conclude the sec[tion] 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commissions, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.[49]

40. *Id*. at 64.

41. McPhereson, *supra* note 28, at 797. Interestingly, Andersonville did not have the highest mortality rate of all Southern prisoner of war camps. Andersonville's mortality rate of twenty-nine percent pales in comparison to the thirty-four percent death rate of Salisbury, North Carolina. Thirteen thousand of the 45,000 Union soldiers imprisoned in Andersonville died of disease or starvation. *Id.*

42. Marmon, *supra* note 6, at 6.

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

44. *Id*. at 22.

45. Roosevelt's order, like President Bush's, authorized the appointment of military commissions for those citizens or residents of nations at war with the United States. The order also gave the commission the power to make rules for the conduct of the proceedings and closed the civilian courts. *See* Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the NAZI Saboteur Case*, 89 Mil. L. Rev. 59 (1980).

46. Mauro, *supra* note 3, at 1.

47. *Quirin*, 317 U.S. at 28.

48. *Id*. at 31.

49. *Id*. at 40.

The Court did not rule on the citizenship status of defendant Haupt. The Court suggested, however, that even if Haupt were a U.S. citizen, *Ex parte Milligan* would not apply because of Haupt's status as an unlawful combatant:

> Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because it is in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction, enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war.[50]

Subsequently, six of the eight defendants were executed in the electric chair and the remaining two were given long prison sentences.[51]

Another World War II military commission reviewed by the Supreme Court is *In re Yamashita*.[52] Tomoyuki Yamashita was one of Japan's most successful generals during the Second World War. Known as the "Tiger of Malaya," Yamashita was known for his daring and flexibility on the battlefield, which resulted in the quick capture of the Malaysian peninsula as well as the British Fortress of Singapore in 1941-1942.[53] In 1944 he was the Commander of the Japanese Fourteenth Army Group in charge of the defense of the Philippine Islands against attack from the United States. On 20 October 1944, shortly after Yamashita had taken command, U.S. forces landed on the island of Leyte and began the liberation of the Philippines. After a long and bitter campaign, Yamashita surrendered on 3 September 1945.[54]

Soon after his capture, General Douglas MacArthur decided to try Yamashita by military tribunal. The order for the tribunal was issued by General Styer, Commander of the U.S. Army, Western Pacific.[55] General Yamashita's indictment alleged sixty-four crimes committed by troops under his command.[56] During the U.S. campaign to liberate the Philippines, Japanese soldiers committed numerous violations of the law of war against the local civilian population. The bill of particulars filed against Yamashita stated that he was responsible for the execution of

> a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of the Batangas Province, and to devastate and destroy public, private, and religious property therein, as a result of which more than 25,000 men, women, and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial and entire settlements were devastated and destroyed wantonly and without military necessity.[57]

On 7 December 1945, the military commission, consisting of five general officers, found General Yamashita guilty and sentenced him to death by hanging. The commission found that the atrocities were so widespread and egregious, that Yamashita either secretly ordered the acts or that he should have known what was occurring. The Supreme Court agreed to hear the appeal under a writ of habeas corpus filed by Yamashita's defense attorneys.[58]

The defense team made many of the same constitutional and jurisdictional arguments against the commission as the petitioners made in *Quirin*. In addition, they argued that the commission was not legitimate because the conflict was over, the commission's appointment authority did not have that power, and the prosecution had failed to present any evidence showing that General Yamashita had *actual knowledge* of the actions of his soldiers. [59]

The Court did not agree with the defense arguments and upheld Yamashita's death sentence. The Court quoted *Quirin*

50. *Id.* at 37-38.

51. Belknap, *supra* note 45, at 59.

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

53. R.E. Dupuy & T.N. Dupuy, The Encyclopedia of Military History 1130 (1986).

54. *Id.* at 1177-79.

55. *Yamashita*, 327 U.S. at 10.

56. *Id.* at 34. United States prosecutors filed a supplemental bill alleging fifty-nine more crimes committed by Yamashita's troops. The supplemental bill alleged Yamashita had "unlawfully disregarded and failed to discharge his duty as a commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes." *Id.*

57. *Id.* at 14.

58. Major Bruce Landrum, *The Yamashita War Crimes Trial*, 149 Mil. L. Rev. 293, 296 (1995).

59. *In re* Yamashita, 327 U.S. at 1.

as support for the legitimacy of the military tribunal to determine violations of the law of war.[60] Although Yamashita's attorneys had argued that Yamashita had no knowledge of the atrocities, the Court refused to accept the defense. The Supreme Court affirmed the legality of Yamashita's trial by military commission, and in doing so established a new standard for command responsibility.[61]

Conclusion

The use of a military commission to try violators of the law of war is not new. Since before the birth of the United States, warriors have used such tribunals to determine the guilt or innocence of their fellow warriors for law of war violations, as courts of occupation or under martial law. On several petitions for review, the Supreme Court has upheld the legitimacy of such tribunals. Only in *Milligan* did the Court limit the jurisdiction of such tribunals—ruling that U.S. citizens could not be subject to such commissions as long as the local courts were open.

Throughout history, the military commission has filled the void between the commander's absolute authority on the battlefield and the formal legal code that governs what action he can take against his own soldiers. The military commission has proven to be an effective and powerful tool to bridge that gap.

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60. *Id*. at 7.

61. *Id*. at 16. After the Court quoted the relevant law of war articles on the responsibility of a commander, it stated:

> These provisions plainly imposed on petitioner, who at the time specified was the military governor of the Philippines as well as commander of Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian populations.

Id.

Military law widely quotes *Yamashita* as the signature "command responsibility" case. Command responsibility stands for the important supposition that a commander can be held criminally liable if he had actual knowledge or *should have had knowledge* that troops subject to his command have committed a war crime, or if he fails to take the necessary and reasonable steps to insure compliance with the law of war. *See* U.S. DEP'T OF ARMY, FIELD MANUAL 27-10, THE LAW OF LAND WARFARE 178 (1956).