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ORDER IN THE COURT: A STRATEGIC ASSESSMENT OF THE USE OF MILITARY COMMISSIONS IN THE WAR ON TERRORISM

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ABSTRACT

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The September 11, 2001 attacks on the World Trade Center and the Pentagon, perpetrated on American soil and resulting in thousands of deaths, are watershed events. Institutions are scrambling to transform to meet the new crisis. The President has created an Office of Homeland Defense, the military services are rapidly transforming to meet the new threat, and the Department of Defense is on the verge of creating a new unified command responsible for homeland security. Similarly, the law must respond to these new challenges. These changes are both in the domestic and international arenas. Amid these efforts, the President authorized the use of military commissions to try any non-citizen terrorists that the United States captures. Civil libertarians and international jurists raged at the prospect of military trials. The proposed military trials raise constitutional and international legal issues, and raise serious policy and strategic considerations. This paper examines some historical military commissions, explores the legal basis for them and assesses the policy from a strategic perspective. The paper concludes that military commissions are historically appropriate, lawful and strategically sound.

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PREFACE

I selected this topic shortly after the events of 11 September 2001. At the time, it never occurred to me that President Bush would actually implement military commissions as a course of action. I recalled reading about the story of the German saboteurs in World War II who were captured on American beaches and were subsequently tried by military commissions. I realized that perhaps Osama bin Laden's smartest move would be to turn himself into U.S. authorities, defy the U.S. to try him in federal district count, hire several expensive lawyers, and wage a spirited defense. This course of action would afford him several advantages. He would avoid being killed, injured, or captured by the pending U.S. attack on his compounds in Afghanistan. He would reap a propaganda coup by being able to communicate his message is a forum that would receive unprecedented publicity. Finally, given the American judicial system past track record, bin Laden stood a reasonable shot at an acquittal. Surely, the evidence against him was somewhat tenuous, circumstantial, and any "smoking gun" of damning evidence was unlikely. The prosecution would face many daunting hurdles. Who would be willing to sit on the jury? Who would be able to be impartial to qualify as a juror? How would the prosecutor introduce evidence that was classified without compromising collection means? The military commission seemed like a solution for many of these problems.

On 15 November 2001, when President Bush signed the order authorizing the use of military commissions, reaction by other nations, pundits, and scholars was widely negative. Commentators as respected as William Safire and legal experts such as Jonathan Turley, came out against the use of military commissions. It appeared that President Bush made his first political mistake in the current war on terrorism. Surely, the administration failed to "prep the battlefield" for the use of military commissions and they failed to win the information campaign. The administration appeared to make little effort to explain what a military commission is, what its purpose is, its historic and legal basis, and its relationship to other legal systems. One scholar privately called the announcement "crude and premature." This perception was on the international front as well. European powers, many of which do not have the exemplary record of democracy and due process, as does the United States, were harshly critical of the military commissions. For example, Spain, which until recently was a dictatorship, refused to extradite terrorist suspects to the United States. While the administration recovered somewhat from the initial onslaught of criticism, much of the initial damage was irrevocable.

This is a story that changes daily. At this writing, no one is facing military commissions and it is unclear whom, if any, military commissions will try. Regardless of how this story unfolds, it is important for the reader to understand the strong historical and legal basis for such military commissions. Whether the United States should use military commissions, rather than other forums, is another question. A question involves strategy and considerations of U.S. interests. Surely, in the end, the Administration will find that the military commission is an important tool in the war on terrorism.

ORDER IN THE COURT: A STRATEGIC ASSESSMENT OF THE USE OF MILITARY COMMISSIONS IN THE WAR ON TERRORISM

> To subject an enemy belligerent to an unfair trial, to charge him with an unrecognized crime, or to vent on him our retributive emotions only antagonizes the enemy nation and hinders the reconciliation necessary to a peaceful world.
>
> —Justice Murphy, Application of Yamashita

Just as Franklin D. Roosevelt called December 7, 1941 a "date which will live in infamy,"[1] September 11, 2001 is a date with historic implications. Shortly after the destruction of the World Trade Center, President George W. Bush mobilized all the instruments of national power in what he called a global war against terrorism (GWAT). The war to date involved both military and law enforcement aspects. In addition, the United States has used informational, diplomatic and economic elements of power.[2] As the Federal Bureau of Investigation (FBI) arrested more and more suspects, the question arose: how would the United States dispose of any criminal allegations arising out of this war? Domestic law enforcement would arrest suspects within the United States and military forces would capture combatants on battlefields abroad. Many of those combatants would be possible unlawful belligerents or suspected terrorists.

How should the United States dispose of these allegations of criminality? This problem is not new. In almost every war, the United States has dealt with the problem of unlawful belligerents. Typically, military commissions tried these cases and imposed appropriate punishment.

This paper will examine the history of military commissions, the legal authority found in statutes and the U.S. Constitution, and, finally, the strategic implication of using military commissions. The military commission will be an important instrument in the GWAT. History and the law justify their use. The Department of Defense must ensure that the commission's procedures are fair and comply with international and, specifically, European standards of due process. The procedures must achieve the appropriate balance between fairness and justice, e.g., while allowing relaxed (by U.S. standards) rules of evidence. The U.S. must wage an aggressive and well thought out information campaign so that other nations perceive the military commissions for what they are: a valid means of justice. Perception is as important as reality. If the U.S. ensures fairness and the perception of fairness, the military commission will prove useful in administering justice, achieving U.S. strategic goals, and protecting national security.

The recent terrorist attacks on the United States raised the specter of the trial of the century, with incredibly high stakes. Conceivably, the U.S. could capture the mastermind of the attacks, Osama bin Laden, and bring him to the bar of justice for the mass murders of thousands of Americans. This prospect raises concerns for both the legal professional and the layperson. First, the danger would be real that an American jury would reach an "incorrect" verdict given the paucity of evidence available to convict the terrorist. Second, intelligence gathering presenting evidence in open court might compromise techniques. Third, providing security for the court personnel would be a daunting task. Who would be willing to sit as judge or jury knowing that a guilty verdict could result in a large criminal organization relentlessly seeking revenge against judges, jury members and their families? Finally, there is a real danger that a public trial would become a propaganda show and create a martyr who would inspire thousands of other terrorists in the Islamic world to continue the *jihad* against America and the western world. Given these dangers, the President rightfully sought an alternate solution.

THE ORDER AUTHORIZING MILITARY COMMISSIONS

On 13 November 2001, President Bush signed an order covering the detention and possible trial of any non-citizen in the war on terrorism.[3] The order justified the use of military commissions with unique rules of evidence. It stated in part:

> (E) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order … to be detained, and when tried, to be tried for violations of the law of war and other applicable laws by military commissions.
>
> (F) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find … that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.[4]

Immediately, pundits, libertarians and politicians debated the merits of the presidential plan.[5] The highly respected and conservative William Safire fired an explosive rhetorical salvo:

> Misadvised by a frustrated and panic-stricken attorney general, a president of the United States has just assumed what amounts to dictatorial power to jail or execute aliens. Intimidated by terrorists and inflamed by a passion for rough justice, we are letting George W. Bush get away with the replacement of the American rule of law by military kangaroo courts.[6]

Safire's gratuitous insult of military justice is one of the harshest sentiments expressed since William O. Douglas penned his anti-military justice opinion in the Supreme Court case of O'Callahan v. Parker.[7] Detractors of military justice often quote from O'Callahan: "While the

Court of Military Appeals takes cognizance of some constitutional rights of the accused … courts-martial as an institution are singularly inept in dealing with the nice subtleties of constitutional law."[8] Alan Dershowitz parroted many of Douglas's concerns in a Village Voice editorial appropriately subtitled, "Military Justice Is to Justice as Martial Music Is to Music." Dershowitz called President Bush's order "tyrannical" and stated:

> The war against terrorism—unlike previous wars—will not end on a date specific. We may never declare victory. The military approach to justice reflected in the Bush order may well persist indefinitely, and perhaps even expand in its scope. Its visible successes, undiscounted by its less visible failures, will encourage many Americans to view the military approach to trials—which favors efficiency and certainty over fairness and resolution of doubts in favor of the accused—as the norm rather than the exception. This must never be allowed to happen, if our liberties are to be preserved.[9]

Are William Safire and Alan Dershowitz correct? Are military commissions kangaroo courts? Do military commissions constitute an unlawful and overreaching act in the war on terrorism? History and the law provide ample precedent for military commissions. Thus, even Dershowitz concedes that "secret military trials of Bin Laden and his foreign associates may be unwise, [but] they would be constitutional."[10]

EX PARTE QUIRIN: THE CASE OF THE NAZI SABOTEURS

In his article, Dershowitz describes how the U.S. Supreme Court resolved the constitutional issues raised by military commissions a World War II case. According to Dershowitz, "the Supreme Court upheld a military tribunal's conviction and execution of Nazi spies who had landed in the United States, but they were German soldiers out of uniform, and a long tradition of military justice makes such spies subject to military tribunals."[11] He is a bit loose with the facts of the case, but his description of the outcome is correct.

This seminal case is Ex parte Quirin.[12] The case involved eight Nazi saboteurs who landed on the shores of the United States in 1942. All of the men were born in Germany, lived in the United States, had extensive knowledge of America, and returned to Germany before the war.[13] One of the saboteurs, Haupt, claimed to be an American citizen. He argued that he became an American citizen when his parents received naturalized citizenship during his minority. The United States contended that he was not a citizen because he either elected to maintain German allegiance when he reached his majority or he renounced his citizenship by virtue of his actions. The others were undisputedly German citizens.

When the war broke out between the United States and Germany, the eight received training in Germany on sabotage tactics and techniques. The eight departed from France by

submarine. Four landed on Long Island and four arrived, by another submarine, at Vedra Beach, Florida. At the time of the landing, they were dressed in German Marine Infantry uniforms but they quickly changed into civilian clothes and buried their uniforms. They intended to sabotage industrial targets in the United States and possessed myriad explosives and fuses. The German government paid them or their families for their sabotage services. They possessed some of that currency at their arrest. Before they could bring their plans to fruition, however, the FBI arrested the eight.

President Roosevelt issued an executive order that would later serve as a model for President Bush's own military commission order:

> [A]ll persons who are subjects, citizens or residents of any nation at war with the United States or who give obedience to or act under the direction of any such nation, and who during time of war enter or attempt to enter the United States … through coastal or boundary defenses, and are charged with committing or attempting or preparing to commit sabotage, espionage, hostile or warlike acts, or violations of the law of war, shall be subject to the law of war and to the jurisdiction of military tribunals.[14]

The order further stated that such persons did not have access to civilian courts.[15]

The Attorney General gave custody of the prisoners to the Provost Marshal, Military District of Washington. The Army Judge Advocate General proceeded to try the eight for violating the law of war, giving intelligence to the enemy, spying, and conspiring to commit those offenses. Seven of the eight sought to file *writs of habeas corpus*[16] in district court, which the court denied. They appealed contending that the President was without authority to order a military trial since it would denied them a trial by jury as guaranteed by the Fifth and Sixth Amendments.

The Supreme Court articulated the standard of review governing Presidential exercise of his power as Command in Chief "in time or war and of grave public danger."[17] It stated the judicial branch would not disturb the presidential acts "without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."[18] The Court justified this standard of review by looking to one of the main purposes of the Constitution: "to provide for the common defence."[19] Constitutionally, Congress may raise armies, maintain a navy, regulate the navy and army, declare war, grant letters of Marque and Reprisal,[20] make laws governing captures on land and water, define and punish piracies, and make laws defining offenses against the law of nations. The Constitution gives the President the power to wage war in the role as Commander in Chief. The Court explained that from the beginning of its history, it had recognized the authority of military commissions to try certain offenses against the

law of nations by military commission. By authority of the Articles of War (the precursor to the current Uniform Code of Military Justice), the Court reasoned, Congress sanctioned and provided for trials by military commission. The Court concluded:

> An important incident to the conduct of war is the adoption of measures by military command to not only 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.[21]

The Court noted that there was a distinction between lawful and unlawful combatants. The latter, if captured, were subject to detention and to trial and punishment by military commission. What makes one an unlawful combatant? One can become an unlawful combatant based on status or based on one's actions. According to customary international law, lawful combatants must meet the following conditions:

(a) That they are under the direction of a responsible chief;

(b) That they must have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps; [and]

(c) That they carry arms openly.[22]

The Hague Conventions on Land Warfare of 1899 and 1907 codified these requirements in Article 1, Section I:

> The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions: 1. To be commanded by a person responsible for his subordinates; 2. To have fixed distinctive emblem recognizable at a distance; 3. To carry arms openly; and 4. To conduct their operations in accordance with the laws and customs of war.[23]

Even if a person is a lawful belligerent that status may be lost through engaging in acts that violate the law of war. For example, spying is considered a violation of the law. Thus, an otherwise lawful combatant who acquires information behind enemy lines without wearing a distinctive uniform is a lawbreaker and subject to punishment.[24] The Nazi saboteurs were charged with spying.

The first specification alleged:

> [The eight captured persons,] being enemies of the United States and acting for … the German Reich, a belligerent enemy nation, secretly and covertly passed, in civilian dress, contrary to the law of war, through the military and naval lines and defenses of the United States … and went behind such lines, contrary to the law of war, in civilian dress … for the purpose of committing … hostile acts, and, in particular, to destroy certain war industries, war utilities and war materials within the United States.[25]

The Court stated that on its face the specification alleged a law of war violation. The eight argued that they did not carry conventional arms and did not intend to attack the armed forces of the United States; therefore, they did not violate the law of war and were entitled to civilian trials. The Court dismissed this argument. The Court rightly held that the law of war treats belligerent enemies the same, whether their purpose is to attack armed forces or war industries and supplies.[26] Thus, the eight were belligerent and their covert actions, such as wearing civilian clothing, was unlawful under the law of war.

The Court held that citizenship in the United States was not a defense to unlawful belligerency.[27] Thus, the one defendant who claimed citizenship, albeit disputed by the government, did not have a defense to the charge. The Court held that his citizenship was irrelevant to the charge. [28]

Finally, the eight argued that the Fifth and Sixth Amendments entitled them to an indictment by grand jury and a trial by jury in a civil court. The Constitution states: "The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[29] The Court noted that at the time of the Constitution, trial by jury was engrained in the common law. Some trials were not by jury such as trials for certain petty offenses and trials by military commission. The Court noted that the intent of the Constitution was not to expand the right of a jury trial to forums where it did not exist, but rather to preserve the common law right to jury trial.[30] Thus, the Court concluded that the eight were not entitled to a jury trial. It noted that the Fifth Amendment specifically does not apply to "cases arising in the land or naval forces."[31] Similarly, by implication, the Sixth Amendment does not include such cases.[32]

The Court noted that the Constitution specifically excluded from the coverage of the Fifth and Sixth Amendments, the right to trial by jury for offenses arising under the land forces. While the case at bar is not one that "arises in the land … forces," since the defendants were not members of the military. The Court, however, reasoned that it would make no sense for Congress to have intended the Fifth and Sixth Amendments to expand the right to jury trial to unlawful belligerents who violated the law of war while denying the right to a jury trial to soldiers and sailors. Any other interpretation would lead to the bizarre result would be that the authors of the Constitution would have intended to abolish otherwise lawful military commissions except in cases involving our own soldiers and sailors. The Constitutional authority to try unlawful belligerents, however, is not based on their alien status but rather their status as unlawful belligerents.

Haupt, the one defendant claiming American citizenship status, relied heavily on Ex Parte Milligan.[33] The Milligan case arose during the Civil War. Military authorities arrested

Lamdin P. Milligan, a citizen of Indiana and the United States, for aiding the rebellion against the United States, inciting insurrection, disloyal practices and violations of the law of war.[34] The gist of these charges arose from his membership in a secret society designed to aid the Confederate cause and overthrow the United States. A military commission tried Milligan in October 1864 and sentenced him to death by hanging. Milligan filed a writ of *habeas corpus* in federal court. Milligan was not associated with any land or naval force nor was he in any territory that was rebelling against the United States.[35] A grand jury, held while he was in military detention, found that Milligan was 'wholly out of his power to have acquired belligerent rights, or to have placed himself in such relation to the government as to have enabled him to violate the laws of war."[36] The 1866 Supreme Court held in that case that military commissions could not try U.S. citizens when civilian courts are open and available. It stated:

> Military commissions organized during the late civil war, in a State not invaded and not engaged in rebellion, in which the Federal courts were open, and in the proper and unobstructed exercise of their judicial functions, had no jurisdiction to try, convict, or sentence for any criminal offence, a citizen who was neither a resident of a rebellious State nor a prisoner of war, nor a person in the military or naval service. And Congress could not invest them with any such power.[37]

Congress authorized the President to suspend the writ of *habeas corpus.* President Lincoln did so in cases where military or civil officials:

> hold persons in their custody either as prisoners of war, spies, or aiders and abettors of the enemy, … or belonging to the land or naval forces of the United States, or otherwise amenable to military law, or the rules and articles of war, or the rules or regulations prescribed for the military or naval services, by authority of the President, or for resisting a draft, or for any other offence against the military or naval service.[38]

Despite this prohibition, the Court took jurisdiction and resolved the issue in Milligan's favor.

The 1943 Supreme Court, however, distinguished Milligan on its facts. Haupt, unlike Milligan was a belligerent. He had resided in Germany and returned to the United States for the express purpose of engaging in acts of violence. He was charged with violations of the laws of war. Thus, the principles articulated in Milligan were not applicable.

The Court resolved one last issue. The defendants argued that the military commission failed to follow the procedures that Congress outlined in the Articles of War for courts-martial and "military commissions." Therefore, the issue was: Did the Articles of War apply to this military commission and can Congress limit the power of the President to order the trial of unlawful belligerents under the law of war? The Court unanimously agreed that the Articles of War did not afford a basis for issuing the writ of Habeas Corpus. The Court could not agree on

a rationale. Some justices believed that the Articles of War were not applicable to these types of "commissions." Other justices believed that the Articles of War did apply, but as properly construed did not preclude the procedures ordered by the President. Therefore, the Court held:

> Accordingly, we conclude that Charge I, on which petitioners were detained for trial by the Military Commission, alleged an offense which the President is authorized to order tried by military commission; that his Order convening the Commission was a lawful order and that the Commission was lawfully constituted; that the petitioners were held in lawful custody and did not show cause for their discharge. It follows that the orders of the District Court should be affirmed, and that leave to file petitions for habeas corpus in this Court should be denied.

EARLY MILITARY COMMISSIONS

History is replete with constitutionally permissible instances of military commissions. One of the more famous military commissions was the trial of Major John André.[39] General George Washington appointed a Board of General Officers[40] to try Major André for spying. He wore civilian clothing and used a false name behind American lines. His intended purpose was to meet with General Benedict Arnold who was attempting to betray the American cause to the British. The board concluded that André was a "Spy from the enemy, and that agreeably to the law and usage of nations … he ought to suffer death." The Americans hung Major André three days later on the orders of General Washington.[41]

During the occupation of Mexico in 1847, General Winfield Scott ordered trial by military commission for anyone who engaged in:

> [a]ssassination, murder, poisoning, rape, or the attempt to commit either, malicious stabbing or maiming, malicious assault and battery, robbery, theft, the wanton desecration of churches, cemeteries, or other religious edifices and fixtures, the interruption of religious ceremonies, and the destruction, except by order of a superior officer, of public or private property, whether committed by Mexicans or other civilians in Mexico against individuals of the U.S. military forces, or by such individuals against other such individuals or against Mexicans or civilians; as well as the purchase by Mexicans or civilians in Mexico, from solders, of horses, arms, ammunition, equipments or clothing.[42]

Many of these offenses were the types of crimes prohibited by civil law. Scott, however, used a separate, albeit similar forum, for "Guerilla warfare or Violation of the Laws of War by Guerillas, or Enticing or Attempting to entice soldiers to desert the U.S. Service."[43] He called this forum a "council of war." The terms "commission" and "council of war" evolved into the designation "war court."[44] By 1861, the Army used the designation "military commission" almost exclusively.[45]

William Winthrop, the great expounder of military law, described the classes of person over whom a military commission would have jurisdiction:

> (1) Individuals of the enemy's army who have been guilty of illegitimate warfare or other offences in violation of the laws of war; (2) Inhabitants of enemy's country occupied and held by the right of conquest; (3) Inhabitants of places or districts under martial law; (4) Officers and soldiers of our own army, or persons serving with it in the field, who, in time of war, become chargeable with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.[46]

Military law clearly provided for jurisdiction by military commissions of persons who engaged in "illegitimate warfare."

MILITARY COMMISSIONS IN THE CIVIL WAR

During the Civil War, commanders made ample use of military commissions. Toward the end of the war, T.E. Hogg and some other Confederates, in civilian clothing, boarded a Union merchant ship in Panama and attempted to capture the ship to convert it into a Confederate vessel. The tribunal found them guilty and sentenced them to death. The reviewing authority reduced the punishment to life imprisonment. The military commission had jurisdiction even though it convened in San Francisco, well outside any war theater.[47] Similarly, John Y. Beall, a Confederate Naval officer in civilian clothing, took a U.S. merchant ship from a Canadian port. He also attempted to derail passenger trains in New York.[48] A military tribunal sentenced him to death. A military tribunal sentenced Robert C. Kennedy to death for attempting to burn New York City by setting fire to Barnum's Museum and ten hotels on November 24, 1864.[49] He was in disguise.

Other military commissions tried persons accused of attempting to assist Confederate prisoners to escape, resisting the draft and enticing others to resist, and altering the "U.S." brand on public animals.[50] Perhaps two of the most famous military commissions were the trials of Captain Henry Wirz, the commandant at the Andersonville, Georgia prison camp, and the Lincoln assassination conspirators.[51] Captain Henry Wirz was convicted in a historically controversial trial of conspiring against the lives and health of Union prisoners.[52] The court sentenced him to death and the Army carried out the sentence.[53]

Litigation concerning involving the military commission that tried the Lincoln assassins continues to this day. The commission tried the conspirators including Dr. Samuel Mudd.[54] Dr. Mudd, who had previously met John Wilkes Booth on at least three separate occasions, treated his broken leg following the Lincoln assassination. Booth paid Mudd for his services and fled. At trial, Mudd was charged with conspiring to assassinate Lincoln and aiding Booth's escape.

He was convicted and sentenced to life imprison (he avoided the death penalty by one vote). Mudd's descendents[55] have waged a spirited campaign in federal court, seeking to vindicate Dr. Mudd.[56]

The previously discussed Milligan case provides the Mudd scions legal ammunition. Dr. Mudd was a citizen of Maryland, a non-secessionist state, and his alleged criminal acts occurred in Maryland. Maryland courts were open and able to try Mudd. Therefore, Milligan, Mudd's descendents contend that a civilian court should have tried Mudd and failure to do so violated the Fifth and Sixth Amendments to the U.S. Constitution. Dr. Mudd apparently never challenged the constitutionality of his conviction at the time because President Andrew Johnson pardoned him in early 1867.[57] The case has a rather long history, however, the latest ruling by the U.S. District Court for the District of Columbia has dismissed the plaintiff's case because the commission had jurisdiction under the law of war. If so, Ex parte Quirin would provide a military commission proper jurisdiction over Dr. Mudd. If not, Ex parte Milligan would preclude it.

The Court stated:

> Reading Milligan and Quirin together, this Court therefore concludes that if Dr. Samuel Mudd was charged with a law of war violation, it was permissible for him to be tried before a military commission even though he was a United States and Maryland citizen and the civilian courts were open.[58]

The Court concluded that the Army charged Dr. Mudd with a violation of the law of war because the conspirators assassinated Lincoln for military reasons and targeted him in his role as Commander in Chief. Therefore, the Court declined to overturn the constitutionality of Dr. Mudd's conviction.

WORLD WAR I AND THE LLANDOVERY CASTLE

In the aftermath of World War I, U.S. President Woodrow Wilson wanted an international tribunal to try war criminals. The Treaty of Versailles[59] embodied this principle by obligating Germany to surrender suspected war criminals to the Allies for trial. The Allies asked Germany for almost 900 suspects. Germany refused. Rather than enforce the treaty and create a showdown, the Allies acquiesced to Germany's request to conduct the war trials. The Germans brought only twelve suspects, none of whom was a senior leader, to trial in Leipzig, Germany. The German courts acquitted half of the twelve. Among the guilty, the longest sentence was four years in prison. Protesting Allied trial observers left Leipzig in disgust and the Germans held no further trials.

The Treaty of Versailles held Germany and Kaiser Wilhelm responsible for the war[60] and envisioned trying him before an international tribunal comprised of five judges, one from each of

the Allied victors. The Treaty gave the Kaiser the "essential right of defence" and permitted the tribunal to impose any punishment "it considers should be imposed."[61] President Wilson and the authors of the Treaty were not successful in bringing Kaiser Wilhelm to justice. The Netherlands offered asylum to the Kaiser and refused to extradite him to stand trial. He died there in 1941.

One particular trial in Leipzig illustrates the unsatisfactory results of the each side being responsible for trying its own war criminals in the *post bellum* period. One of the more notorious war crimes involved the hospital ship, "Llandovery Castle." This ship, marked with a large red cross, carried medical supplies, soldiers recovering from wounds, and medical personnel on the Atlantic sea-lanes. A German submarine, U-86, torpedoed the Llandovery Castle. The ship exploded violently when hit and the Llandovery Castle sank within ten minutes. Many of the crew and passengers managed to escape drowning in lifeboats. The U-86 surfaced, ordered the Llandovery Castle's captain aboard and Captain Paatz repeatedly questioned the captain about the nature of the cargo. The British captain insisted that he was not carrying any war munitions or soldiers, just medical personnel and wounded. After releasing the captain, the U-86 machine-gunned several of the lifeboats in an apparent attempt to silence any of the witnesses to the illegal sinking.

In the German trial, the defense attempted to show that the UK violated the law of war by using medical ships to carry munitions and soldiers in violation of the law of war. The defense also attempted to show that the UK inflicted unnecessary suffering on the German people with an economic embargo. The court found the first and second officers guilty of violations of the law of war for their roles in sinking the lifeboats and sentenced them to four years in prison.

Although the Kaiser never faced justice for Germany's role in the war and the Leipzig trials failed, firm legal principles emerged in the aftermath of World War I. Violations of the law of war carried sanctions that victors could and would impose. Nations were no longer free to wage war as a sovereign act. Nations would be accountable for violations of treaties and the international law. Contrary to prevailing history, even heads of state could be brought to the bar of justice. After the next world war, the victors would bring these principles to maturation.

"JUDGMENT AT NUREMBERG"[62]

Early in World War II, President Roosevelt stated: "It is our intention that just and sure punishment shall be meted out to the ringleaders [of Nazi Germany] responsible for the organized murder of thousands of innocent persons in the commission of atrocities which have violated every tenet of Christian faith."[63] The other Allies joined this call for post-war justice in

the Moscow Declaration in 1943 and established the United Nations War Crimes Commission.[64] The Commission, comprised of fifteen nations, began meeting in London on October 26, 1943. Despite Roosevelt's call that "[n]one who participate in these acts of savagery shall go unpunished,"[65] the Allies would sharply debate how to administer that justice. The different methods reflect each nation's own perception of how best to achieve the strategic end-state of ensuring punishment for the guilty. History and differing legal systems influenced these strategic assessments.

The Nuremberg and Military Commissions in the Far East set the standard for all military commissions and became the genesis of the current international courts today. Throughout the war, the Allied Powers debated how to handle enemy leadership after the war. The United States, although its position varied, generally pushed for execution of top Nazi leaders. The U.S. was concerned that any trial, especially a trial of Hitler, would become an international propaganda show for the Nazi leadership. Roosevelt and Truman later believed that there was sufficient justification to punish top leaders without a trial. Ironically, it was Stalin and the Soviet Union that pushed hardest for a trial. Of course, the types of trials that characterized Stalinism had pre-determined outcomes. Once Hitler and Joseph Goebbels[66] committed suicide, the prospects of a trial became more palatable to the U.S. and it agreed to an International Tribunal.

The legacy of Nuremberg is still influential today. Thus, when Nations wish to punish war criminals, Nuremberg is the international standard for all war crimes trials. It is important, therefore, to look at the background and history of the Nuremberg trials and its counterpart in the Far East. The Allies held an International Conference on Military Trials that drafted the London Charter. The Charter defined the following crimes:

> (a) CRIMES AGAINST PEACE: namely, planning, preparation, initiation, or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing:
>
> (b) WAR CRIMES: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity;
>
> (c) CRIMES AGAINST HUMANITY; namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war or persecution on political, racial or religious grounds in execution or in connection with any crimes within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.[67]

The Allies believed that each of these acts was criminal under international law under the 1928 Pact of Paris (Kellogg-Briand Pact)[68], The Hague and Geneva Conventions or under customary international law. The weakest charge was the "Crime Against Peace" based on the Kellogg-Briand Pact. The Pact permitted Nations to act in self-defense, which the defendants in the Far East would claim. Moreover, several legal authorities believed that the Pact was a contract amongst Nations, rather than a proscription to individuals, since it did not have criminal sanctions attached.

The United States considered several measures, some rather draconian, to mete out justice after the war. An Army legal advisor, Lieutenant Colonel Murray C. Bernays devised a plan whereby the Allied would declare certain organizations, such as the *Gestapo*, criminal. Courts could adjudge Germans guilty simply by proof of membership in the organization. Bernays suggested one large trial for the top leaders and smaller, individual trials for the so-called common variety war criminal. The Army's Judge Advocate General, Myron B. Cramer, pushed a straightforward plan in which war criminals would be tried, using court-martial procedures, for acts that were criminal under current international agreements.

Initially legal experts widely scoffed at the Bernays plan. The massacre at Malmédy, Belgium convinced top U.S. leaders of the existence of a German war criminal conspiracy. Shortly after the massacre, Roosevelt attended the Yalta Conference carrying a recommendation from his top advisors endorsing the Bernays plan. Despite the expectations that Yalta would produce a plan for trying war criminals, the Big Three demurred and told their Foreign Secretaries to reach an agreement. The resulting compromise called for summarily executing Hitler and Göring and trying the other Nazi leaders. Churchill rejected the plan on April 12, 1945, the day that President Roosevelt died.

The new President, Harry Truman, immediately agreed to the Bernays plan and appointed Supreme Court Justice Robert H. Jackson as the Chief Counsel for the United States. The four powers—France, the United States, the Soviet Union, and the United Kingdom—agreed to meet in London at the International Conference of Military Trials to write the procedures for the war crimes trials. The subsequent document, the London Charter, provided the specifics for the coming Nuremberg trials.

The Conference ran into difficulties immediately. The legal systems of the U.S. and the U.K., based on the common law, were fundamentally different from the continental legal systems in the Soviet Union and France. The latter did not presume innocence and considered the court as an arm of the state. Thus, the prosecutor in the continental system was a member

of the court. This is somewhat similar to the current administrative board procedures in the U.S. Army where the recorder is a member, albeit non-voting, of the board.

There was a vigorous disagreement concerning the "Crimes Against Humanity" charge. Policy makers were concerned that the crime violated *ex post facto* principles. Sufficient evidence existed in international law, however, that aggressive war was a violation of customary international law. The dispute threatened to stalemate the talks and Justice Jackson threatened to conduct separate trials for the alleged war criminals in U.S. custody. The Soviet Union, who had only Grand Admiral Erich Raeder in custody, found this prospect particularly distressing. The threat was effective because the four powers agreed to the Charter of the International Tribunal on August 8, 1945.

The Allies were determined not to repeat the mistakes of the Versailles Peace Conference that helped to create the conditions that launched the Nazi regime and served as the genesis of World War II. The Nuremberg indictments, therefore, "targeted not just Nazis and their party apparatus but also bankers and industrialists and longer-lived organizations such as 'the General Staff of the High Command of the German Armed Forces.'"[69]

Each Allied nation sent a judge, an alternate judge and a prosecution staff. The trial began in the Palace of Justice in Nuremberg, in the American Sector. After over four hundred open sessions of court, the tribunal convicted 19 of the 22 defendants and sentenced 12 to death. The remainder of the guilty received sentences from ten years to life in prison. Denied any type of appeal process, the condemned met their rendezvous with the noose fifteen days later. Herman Göring cheated the hangman by committing suicide.

The Nuremberg Trials stand as the high water mark of international justice. The Nuremberg results permeate the international conscious and give the impetus for the current trend toward international tribunals dealing with war criminals. Recent examples would include the International Criminal Tribunal for the Former Yugoslavia and the Treaty of Rome or Rome Statute that will internationalize the law of war.

THE THRILLA IN MANILA

As the war in the Pacific ended, the victorious Allies faced the same question: how to bring justice to those responsible for the war and its attendant atrocities. The course adopted in the Pacific Theater paralleled the Nuremberg Tribunals with some notable differences. The principles established in both tribunals are the same and the effects remain with the international legal community today.

Unlike the Nuremberg Tribunal, which received substantial publicity and scholarly interests, the historians and the public have paid scant attention to the International Military Tribunal for the Far East.[70] According to one scholar, the trial presents a wealth of potential scholarly research and thought on the following topics:

> The political context of the Tokyo Trial Proceedings, its Charter and limited jurisdiction, the evidence presented in court, the disequilibrium in the power balance between the two opposing sides, the tables of legal authorities on which the respective sides relied, the one-sided *exclusion* of evidence to the detriment of the defence (on spurious grounds), the forensic skills or inadequacies of Counsel or Members of the Tribunal, the differing structures of the prosecution and the defence cases, the soundness or otherwise of rulings made by the Tribunal during the course of the Tokyo Trial, the second-round production of evidence-in-chief by the prosecution in a rebuttal stage, followed eventually by a defence surrebuttal, the ten-thousand pages of closing arguments found in the summations, the curious way in which evidence in mitigation had to be offered by the defence prior to the Court's verdict on the guilt or innocence of the accused….[71]

In many respects, the case arose in the struggle between Douglas MacArthur and General Tomoyuki Yamashita following the U.S. invasion at Leyte in October 1944 and at Luzon, in January 1945. Yamashita's 14th Area Army fought ferociously causing immense U.S. and Japanese casualties. Until Japan surrendered in August 1945, the Japanese Army went on a rampage in the Philippines, killing approximately 35,000 Filipino civilians. MacArthur and the rest of the world were appalled by these atrocities and the failure of Yamashita to exercise better control of his army.[72]

While the Allies focused on meting out justice in Europe, signing the London Charter on August 8, 1945, they ignored the Pacific Theater. Perhaps, policy-makers assumed that the principles of the London Charter would apply, with some slight modifications, to the Pacific. When the State Department discovered that it had no policy for war crimes trials in the Pacific, it consulted the War Department. The Army in turn asked MacArthur for his input on the policy.[73] MacArthur turned his attention to the difficult task of formulating a policy on war crimes. Colonel Alva Carpenter, his acting Theater Judge Advocate General, began to work on the problem. MacArthur realized that he had plenary power to establish military commissions to try war criminals within his command.[74] Ex parte Quirin clearly established the constitutional authority for this exercise of power. In addition, the President and other high government officials reiterated this authority.[75] The Army's Judge Advocate General, Myron Cramer, stated "there are no limitations of the jurisdiction of a military commander in the field to try and punish, by military tribunals, offenses against the law of war which affect the interest of his nation and which are committed by enemy personnel."[76]

With President Harry Truman and General George C. Marshall urging him to act quickly, MacArthur issued regulations entitled, "Regulations Governing the Trial of War Criminals," on September 24, 1945 to govern military commissions.[77] MacArthur wanted to immediately try Japanese field and area commanders who might be guilty of traditional war crimes. He would leave until later the trials of senior policy-makers. The U.S. government preferred trying those officials by a Nuremberg-style international tribunal. Under the 24 September regulations, MacArthur ordered General Wilhelm D. Styer, commander of the U.S. Army Forces, Western Pacific to bring Yamashita before a military commission.

The 24 September regulations permitted MacArthur to select the court members or he could authorize his subordinate commanders to do so. Conviction required a two-thirds vote of the commission's members. The accused had the right to counsel, cross-examination, translation of court documents, and the right to remain silent. The procedures emphasized speed and efficiency:

> A Commission shall: a) Confine each trial to a fair, expeditious hearing on the issues raised by the charges, excluding irrelevant issues or evidence and preventing any unnecessary delay or interference. B) Deal summarily with any contumacy or contempt, imposing any appropriate punishment therefor.[78]

The regulations also permitted the admission of any evidence that a reasonable person would find probative. The normal rules of authenticating documents or using the original were relaxed. The regulations provided that the convening authority had to approve any sentence of the commission. MacArthur had to review and approve any death sentence before its execution.

The military commission trying Tomoyuki Yamashita met in Manila, the situs of many of the atrocities. The Army charged Yamashita under a theory of command responsibility since no evidence directly linked him to any of the brutal crimes in the Philippines. The charge sheet alleged that he "unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes."[79] Thus, Yamashita did not face any traditional war crime but arguably a new crime based on his responsibility for his subordinates' actions.[80]

Despite the evidence that Yamashita did not order, or even have knowledge of these crimes, the court found Yamashita guilty and sentenced him to death by hanging.[81] The court rendered its verdict on December 7, 1975, a date that resonates in American history. The defense team, anticipating the verdict and fearing that MacArthur would execute any death sentence before an appeal could reach the United States, already sent appeals into the Philippines Supreme Court and the U.S. Supreme Court. The fear was not without foundation;

MacArthur believed that neither court had jurisdiction to review a military commissions' judgment. The War Department, however, ordered MacArthur not to execute any sentence until after Supreme Court review.

The Supreme Court held that it did have jurisdiction to review the case under its *habeas* power. Presumably, if the Philippines were not American territory, the Supreme Court might have declined even such limited review. The Court addressed five issues:

- Did MacArthur lawfully create the commission?
- Was the trial lawful since hostilities ceased?
- Did dereliction of command responsibility violate the law of war?
- Did the relaxed rules of evidence violate the Articles of War or Article 63 of the Geneva Convention of 1929?[82]
- Did the Due Process Clause of the U.S. Constitution apply?[83]

None of the issues precluded affirmation of the verdict. The Court found that Yamashita had an affirmative duty to protect the civilian population and prisoners of war.[84] Although hostilities had ceased, Japan and the United States did not sign a formal peace treaty until 1952. The Court found that the political branches of Government should decide when to exercise the power to prosecute war crimes before military commissions after hostilities and before a formal peace.[85]

Justices Rutledge and Murphy dissented vigorously. Justice Murphy, who believed that the 5th Amendment applied to "any person," stated:

> International law makes no attempt to define the duties of a commander of an army under constant and overwhelming assault; nor does it impose liability under such circumstances for failure to meet the ordinary responsibilities of command. The omission is understandable. Duties, as well as ability to control troops, vary according to the nature and intensity of the particular battle. To find an unlawful deviation from duty under battle conditions requires difficult and speculative calculations. Such calculations become highly untrustworthy when they are made by the victor in relation to the actions of a vanquished commander. Objective and realistic norms of conduct are then extremely unlikely to be used in forming a judgment as to deviations from duty. The probability that vengeance will form the major part of the victor's judgment is an unfortunate but inescapable fact. So great is that probability that international law refuses to recognize such a judgment as a basis for a war crime, however fair the judgment may be in a particular instance. It is this consideration that undermines the charge against the petitioner in this case. The indictment permits, indeed compels, the military commission of a victorious nation to sit in judgment upon the military strategy and actions of the defeated enemy and to use its conclusions to determine the criminal liability of an enemy commander. Life and liberty are made to depend upon the biased will of the victor rather than upon objective standards of conduct.[86]

Once the Supreme Court affirmed the conviction, the case returned to MacArthur for review. Not surprisingly, he affirmed the conviction and order the sentence executed:

> Rarely has so cruel and wanton a record been spread to public gaze. Revolting as this may be in itself, it pales before the sinister and far reaching implication thereby attached to the profession of arms. The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason for his being. When he violates this sacred trust he not only profanes his entire cult but threatens the very fabric of international society. The traditions of fighting men are long and honorable. They are based upon the noblest of human traits—sacrifice. This officer, of proven field merit, entrusted with high command involving authority adequate to responsibility, has failed this irrevocable standard; has failed his duty to his troops, to his country, to his enemy, to mankind; has failed utterly his soldier faith. The transgressions resulting therefrom as revealed by the trial are a blot upon the military profession, a stain upon civilization and constitute a memory of shame and dishonor that can never be forgotten.[87]

On February 23, 1946, the Army executed Yamashita. The story does not end there. As Justice Murphy correctly observed: "No one in a position of command in an army, from sergeant to general, can escape those future Indeed, the fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision."[88] Murphy's words would later prove prescient in another Asian war, at a Vietnamese hamlet called My Lai 4.

JUDGMENT IN TOKYO

In early 1946, MacArthur established the International Military Tribunal for the Far East (IMTFE) to bring justice to the strategic policy makers.. Joseph Keenan, a former Assistant Attorney General, was the "Chief Counsel." Assisting him were 72 "Associate Counsels" that MacArthur appointed from the Allied nations. MacArthur appointed Australian William Webb as the President of the IMTFE.

The prosecutors carefully selected defendants from all sections of the Japanese government and against whom the evidence was overwhelming. MacArthur wanted to make a statement to Japan with the trial and that statement was not an acquittal. Eventually, the prosecutors selected 28 defendants, two of whom would die during the trial and one would be deemed mentally incompetent to stand trial. The most famous of the defendants was Tojo who headed up the Japanese cabinet at the beginning of the war. The prosecutors charged the defendants with crimes against peace and humanity, war crimes, murder, and conspiring to commit these crimes. The gravamen of the charges was that the defendants waged aggressive war, including the attack on Pearl Harbor without an ultimatum or declaration of war, contrary to

international law. Unlike the Nuremberg trial, both American and Japanese counsel represented the defendants.

After over 48,000 pages of testimony, the prosecution and defense completed their cases. The tribunal rendered a verdict, finding all the defendants guilty. The court sentenced seven to death, sixteen to life in prison, and the remainder to lesser periods of confinement. Unlike the Nuremberg trial, the defendants could appeal—to MacArthur, the authority that appointed the court. The U.S. Supreme Court denied all appeals.[89] The Allies carried out the sentences in December 1948.

Both the IMTFE and the Nuremberg Tribunals stand out as monuments to international justice. Waging aggressive war is now clearly criminal in international law. The trials also demonstrated to the Japanese and Germans the criminal nature of their wartime leaders. The trials, essentially fair, public, and open, revealed to the people that their emperors were wearing no clothes. The trials did not create martyrs but destroyed myths. In this respect, they fulfilled their mission.

THE CURRENT MILITARY COMMISSIONS

On March 21, 2002, the Secretary of Defense issued "Military Commission Order No. 1," implementing the Presidential order authorizing military commissions in the GWAT.[90] The order grants substantial due process to any accused brought before a military commission and should do much to placate the Safires and Dershowitzs of the world.

The order provides that commission will consist of between three and seven members.[91] The members will be commissioned officers, including reserve component officers on federal active duty and retired officers recalled to active duty.[92] A "Presiding Officer" will preside over the proceedings and ensure the "discipline, dignity, and decorum of the proceedings are maintained."[93] Qualified judge advocates will serve as prosecutors and defense counsel.[94]

The accused has many rights. Most notably, the law presumes his innocence until proven guilty based on the evidence admitted in court.[95] He may remain silent and the court will draw no adverse inference from his silence.[96] The commission may only convict the accused if at least two-thirds of the members are convinced of his guilt *beyond a reasonable doubt*.[97] The commission may only impose the death penalty if it is composed of seven members and all concur the death penalty is appropriate.[98] The accused may ask another judge advocate to replace his detailed defense counsel and he may hire a civilian defense counsel at no expense to the United States.[99]

The accused may appeal any adverse verdict to a review panel consisting of three military officers.[100] The commission may admit any evidence that, in the opinion of the Presiding Officer has probative value to a reasonable person.[101] Like the procedures that MacArthur used in the Yamashita trial, the order emphasizes the need for prompt justice: "The Presiding Officer shall ensure the expeditious conduct of the trial. In no circumstances shall accommodation of counsel be allowed to delay proceedings unreasonably."[102]

William Safire has weighed in on this new order. He opines: "Those of us who denounced the Bush executive order last year setting up military tribunals for non-citizens … now feel somewhat reassured by Defense Secretary Rumsfeld's "refinement" of the hasty order.[103] Although Safire lambastes the lack of a jury, the use of hearsay, and the lack of civilian review, he lauds the new order.[104] His point that Congress should be involved in the passing the statutory foundation for military commissions is well taken.[105]

THE CASE AGAINST MILITARY COMMISSIONS

MILITARY COMMISSIONS ARE ARTICLE I COURTS

Critics of using military commissions to try unlawful belligerents argue that such courts are part of the executive branch of the government and therefore do not have the independence needed to ensure fairness. Herman Schwartz, a professor of constitutional law, summarizes the argument:

> The fundamental problem is that the proposed system, including all its "judicial" elements, still lies entirely within the military chain of command and subordinate to the President, who is the ultimate authority over every aspect of the proceedings. But independent impartial judges who are not beholden to any side are the indispensable bedrock of any credible system of justice. They must be the ones to make the basic decisions or at least to review them. Without such a tribunal to monitor them, the various "protections" provided by the proposed regulations-the presumption of innocence, guilt beyond a reasonable doubt, even outside counsel-mean little or nothing.[106]

Schwartz is, of course, correct in that military commissions fall under the Department of Defense and not the judicial branch. He does seem to admit that the provisions in the Uniform Code of Military Justice that provide for appeal to a "civilian" Court of Appeals for the Armed Forces provides the requisite due process.[107] Schwartz states that "Congress and the military have recognized how indispensable an independent judiciary is to a meaningful system of justice" by providing appeals to such a court.[108]

THE PRESIDENT DETERMINES THE EVIDENTIARY RULES AND PROCEDURES

The Presidential Order permits the commission to hear evidence that would not necessarily be admissible before a federal court. The standard is whether the evidence would have "probative value to a reasonable person."[109] The Department of Defense has developed rules of evidence that relax some of the federal evidentiary restrictions on hearsay, chain of custody, and authentication. Similarly, evidence gathered in violation of a constitutional provision would be admissible; the federal exclusionary rule would not exclude otherwise probative evidence.

CIVILIAN COURTS ARE ADEQUATE

Why should the United States use military commissions when civilian federal courts exist and are available to try war criminals?[110] Does the use of military commissions mean that civilian courts are inadequate? Jonathan Turley, a respected professor of law at George Washington University and an expert on military justice has stated:

> [The military tribunal] is based on many aspects that are the antithesis of the Madisonian democracy. And that is particularly the case in the court system. The court system seems designed with a rejection of many of the elements seen as essential by the framers. It suggests the Bush administration doesn't trust our own system."[111]

This argument looks primarily at the result of the trials for the earlier bombings of the U.S. Embassies in Kenya and Tanzania. In that trial, styled United States v. Osama bin Laden et. al, began with very tight security measures. Three defendants, Mohamed Sadeek Odeh, Mohamed Rashed Daoud al-'Owhali, Khalfan Khamis Mohamed, were charged with killing over two hundred people in the bombings of U.S. Embassies in Nairobi, Kenya, and Dar es Salaam, Tanzania, on August 7, 1998.[112] Wadih el Hage, a fourth defendant was charged with his role in the bombing conspiracy.[113] Allegedly, he is a personal secretary to Osama bin Laden.[114] The four were convicted and sentenced to life imprisonment after the jury apparently deadlocked over the death penalty.[115] According to U.S. Attorney Mary Jo White, the sentences "send the unmistakable message of our country that it will be relentless in its response to terrorist acts around the world."[116]

The argument that federal courts are sufficient to handle the trials of Al Qaeda members is contrary to the findings of the President who stated:

> Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law

> and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.[117]

ARGUMENTS FAVORING COMMISSIONS

The military commission is an important tool in the war on terrorism. Policy makers, however, must consider the second and third order effects of the commission before using them. In other words, are military commissions a feasible and suitable means of reaching the President's strategic end-state?

In a recent article on the historical overview of terrorism, Dr. Douglas Johnson and Colonel John Martin make the point that it is important to maintain the U.S. will to fight terrorism.[118] They write:

> Continuing information operations should be conducted to affirm the justice of U.S. intentions and the reasonableness of military and other actions…. [I]ntrusions on civil liberties must be balanced against the need to gather intelligence and take action against the terrorists; terrorists' popular support base must be reduced, and state support choked off.[119]

This is not an easy task. Any judicial procedure that is unfair or that people perceive as unfair will elicit popular support rather than cut it off. Thus, it is in the U.S. strategic interest to conduct trials that are above reproach.

This approach is best even if the United States would be on the moral high ground by dealing with the unlawful belligerents in a summary fashion. Dr. Martin Cook makes clear that terrorists are not soldiers and not entitled to the protections of the Geneva Convention. He recommends:

> For the purposes of effective response to these [unlawful belligerents], as well as future deterrence, it may be highly undesirable even if they are captured to carry out the extensive due process of criminal proceedings. If we can identify culpable individuals to a moral certainty, their swift and direct elimination by military means is morally acceptable and probably preferable…."[120]

While Dr. Cook's approach is the surest means of eliminating the unlawful belligerent, his recommended course of action does not sever the terrorist from his popular support. This is a key element of winning the war against terrorism. The United States should not make martyrs of the unlawful belligerents that it captures. Therefore, providing appropriate due process--trials that are fair and that the international community perceives as fair--before punishment is the appropriate course of action.

CONCLUSION

The military commission is an important tool in the war against terrorism. Its foundations run deep in legal precedent, history and the law. Use of military commissions to try the myriad "detainees" resulting from the war in Afghanistan would ensure justice while minimizing concerns about security and delay. In addition, the rules and procedures for the military commission will streamline procedures while ensuring that the trials would be fair and impartial. These procedures, as currently promulgated by the Department of Defense, include many of the safeguards afforded to accused soldiers under the Uniform Code of Military Justice and those afforded war criminals in the International Criminal Tribunal for Rwanda and the Former Yugoslavia in The Hague. These safeguards include the right to an attorney, the right to appeal to military panels, the presumption of innocence, and unanimous verdicts before imposing capital sentences. The rules of evidence to permit evidence gathered on the battlefield without many of the formal restrictions pertaining to hearsay and authentication. The rules protect classified information and protect the techniques for gathering such information. The rules also permit an accused access to evidence, compulsory process and give him the tools to wage a defense. These rules are consistent with, if not more protective, than the rules governing the International Criminal Tribunal for the Former Yugoslavia and other international fora.

It is important for the United States to wage an aggressive information campaign to ensure that the trials are not only fair but that the world perceives them as fair. History teaches that mistreating prisoners of war is not in the best interests of the country holding those prisoners. Whether it was the Union prisoners held by the Confederate government at Andersonville, the American prisoners held by the Japanese during World War II, or the treatment of Soviet prisoners by Nazi Germany and the reciprocal treatment afforded by the Soviets, any mistreatment or perceived mistreatment strengthens the will of the enemy and it discourages future combatants to surrender. At the strategic level, how the United States treats the detainees it captures will be an important method to reach its strategic goals.

WORD COUNT = 10,110

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ENDNOTES

[1] Roosevelt, Franklin D. Address to a Joint Session of Congress, Dec 8, 1941. Internet. Available at http://www.nara.gov/education/teaching/fdr/pg1.gif. Accessed 8 Feb 2002.

[2] Sometimes these strategies backfire. The Office of Strategic Influence (OSI) was a short-lived attempt to win the information campaign. In November 2001, the Department of Defense created OSI to influence other nations to support the U.S. in the war on terrorism. The New York Times reported that OSI intended to plant false stories in the press to sway foreign public opinion. Secretary Rumsfeld announced the closing of OSI shortly thereafter emphasizing that the Department was not in the business of fabricating news stories. Gerry J. Gilmore, "Strategic Influence Office 'Closed Down,' Says Rumsfeld," Armed Forces Information Service, February 26, 2002. Internet. Available at http://www.defenselink.mil/news/Feb2002/n02262002_200202263.html

[3] Military Order of November 13, 2001, "Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism," 66 F.R. 57833 (November 16, 2001), hereinafter cited as President's Military Order.

[4] Ibid.

[5] Ironically, the enemy's system of justice was violent and summary. The Taliban held public executions and amputations in the Kandahar Sport Stadium. In accordance with Islamic law, the relative of the victim executed defendants convicted of murder. Those accused of stealing had their right hand amputated. If the amount of the theft was large, the alleged thief could lose the other hand as well. The first victim in the Kandahar amputations was a 14-year old boy who was accused of stealing. He never even saw the judge that sentenced him. Eckholm, Erik. "Taliban Justice: Stadium Was Scene Of Gory Punishment" The New York Times. Accessed on 26 Dec. 2001 http://ebird.dtic.mil/Dec2001/e20011226taliban.htm

[6] Safire, William. The New York Times, 15 November 2001, A 31.

[7] O'Callahan v. Parker, 395 U.S. 258 (1969).

[8] O'Callahan, 395 U.S. 298.

[9] Dershowitz, Alan M. "Assault on Liberty." The Village Voice, Nov 21-27, 2001. Internet. Available at http://www.villagevoice.com/issues/0147/dershowitz.php. Accessed 8 February 2002.

[10] Ibid.

[11] Ibid.

[12] Ex parte Quirin, 317 U.S. 1, (1942). The case was argued on July 29, 1942 and decided two days later on July 31, 1942. The Per Curium opinion of the court was filed on October 29, 1942. Seven, Quirin, Haupt, Kerling, Burger, Heinck, Thiel, and Neubauer, attempted to file *writs of habeas corpus* in district court. The cases were consolidated before the Supreme Court. The eighth defendant, Dasch, did not join the proceedings.

[13] 317 U.S. 20.

[14] 317 U.S. 22-23.

[15] 317 U.S. 23.

[16] *Habeas Corpus* is a Medieval Latin term that literally means, "you should have the body." It is a judicial order from the courts issued to the government official with custody ordering that person to bring the prisoner before the court. The purpose of the writ is to determine the lawfulness of the incarceration. Petitions for a *writ of habeas corpus* must allege a factual or legal basis for release of the prisoner. Merriam-Webster's Dictionary of Law (1996).

Article I, Section 9, of the U.S. Constitution provides that the "Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Case of Rebellion or Invasion the public Safety may require it." The British Parliament passed the Habeas Corpus Act of 1679 in response to governmental detention of persons without legal authority. The Founding Fathers wrote this Act into the Constitution. Interestingly, the Founding Fathers wrote this individual right into the body of the Constitution rather than as an "afterthought" in the "Bill of Rights." This indicates the importance placed on what Sir William Blackstone calls "The Great Writ." Actually, the origin of the *writ* is far older and even precedes the Magna Carta in 1215. The Magna Carta states: "...no free man shall be taken or imprisoned or disseised or exiled or in any way destroyed except by the lawful judgment of their peers or by the law of the land."

[17] Ibid, 5.

[18] Ibid.

[19] Preamble, U.S. Constitution.

[20] Letters of marque and reprisal were a means by which Colonial Governments could wage war on the cheap. The government would issue the letters to private persons who would then have the authority to attack enemy shipping and keep a substantial percentage of any booty captured. The letters normally gave detailed instructions to the holder on which areas he could patrol, which ships he could attack, the use of force and rules governing any prisoners. The Constitution gives the authority to issue letters of marque and reprisal solely to Congress because nations considered the issuance of these letters to be acts of war.

[21] 317 U.S. 7.

[22] Oxford Manual 1880 (Oxford: Institute of International Law, 1880), *reprinted in* The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents. Edited by Dietrich Schindler and Jiřī. (Geneva: Henry Dunant Institute, 1981), p. 37.

[23] Hague Conventions on Land Warfare 1899/1907. Ibid, 65.

[24] Ibid. *See also,* Winthrop, William. Military Law, 2d Ed., (Washington: Government Printing Office, 1920), sections 1196-97, 1219-21; Instructions for the Government of Armies of the United States in the Field, approved by the President, General Order No. 100, April 24, 1863, sections IV and V. Paragraph 83, General Order 100 states: "Scouts or single soldiers, if

disguised in the dress of the country, or in the uniform of the army hostile to their own, employed in obtaining information, if found within or lurking about the lines of the captor, are treated as spies, and suffer death." Paragraph 84 states: "Armed Prowlers, by whatever names they may be called, or persons of the enemy's territory, who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires are not entitled to the privileges of the prisoner of war." These two articles appear in Section IV, which is entitled, "Partisans—Armed enemies not belonging to the hostile army—Scouts—Armed prowlers—War-rebels." Lieber Instructions 1863*, reprinted in* The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents. Edited by Dietrich Schindler and Jiřī. (Geneva: Henry Dunant Institute, 1981), p. 14. Therefore, when Lieber refers to "armed prowlers" he is not including soldiers who are in uniformed. Armed soldiers belonging to an army are permitted to go behind enemy lines and "destroy bridges, roads or canals."

[25] 317 U.S. 9.

[26] Ibid.

[27] Ibid.

[28] Ibid. In the war against terrorism, American forces captured an American, John Walker. He appears to be ineligible for trial by military commission since the President's order precluded citizens from being tried in any forum but a civilian court. However, under the law articulated in Quirin, there would be no legal impediment to such a military trial.

[29] U.S. Constitution, Art. III, Sec. 2, part 3.

[30] 317 U.S. 10.

[31] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation. U.S. Constitution, Amendment V.

[32] Ibid.

[33] Ex Parte Milligan, 71 U.S. 2 (1866).

[34] 71 U.S. 4.

[35] 71 U.S. 6-7.

[36] 71 U.S. 7.

[37] 71 U.S. 11.

[38] 71 U.S. 3-4.

[39] The Army's Judge Advocate General's Corps recently commissioned a Regimental print of this famous trial to celebrate the 225th birthday of the Corps. The first Judge Advocate General was appointed on July 29, 1775. Don Stivers, the renowned artist, painted the scene of the Judge Advocate General, Colonel John Laurence, cross-examining Major André on September 30, 1780. The print is entitled, "You, Sir, Are a Spy."

[40] The board consisted of six major generals, Greene, Lord Sterling, St. Clair, Lafayette, Howe and von Steuben, and eight brigadier generals, Parsons, Clinton, Knox, Glover, Patterson, Hand, Huntington, and Starke. Winthrop, 518.

[41] Lecklie, Robert, George Washington's War, 576-81 (1992).

[42] Winthrop, William. Military Law and Precedents. 2nd Edition. (Washington, Government Printing Office, 1920), 832.

[43] Ibid., 833.

[44] Ibid.

[45] Ibid., 833 and 839.

[46] Ibid., 838.

[47] Winthrop, William. Military Law and Precedents. 2nd Edition. (Washington, Government Printing Office, 1920), 837.

[48] Ibid., 769, n 19.

[49] Ibid.

[50] Ibid., 839.

[51] Ibid.

[52] For a brilliant discussion of the treatment of prisoners of war during the Civil War see Richard A. Hack, The Civil War Prison System. Individual Study Project. Carlisle Barracks: U.S. Army War College, February 5, 1993. Hack notes: "Prison policies generated intense suffering an death. The resultant acrimony over the maladministration of the prison system lasted until well after the conflict had terminated." Ibid., 1.

[53] Glen W. LaForce, "The Trial of Major Henry Wirz—A National Disgrace." The Army Lawyer, June 1988, p. 3. Wirz claimed that conditions at Andersonville were as good as could be expected given the situation in the south at the time.

[54] The others were Lewis Powell (Paine), George Atzerodt, Mary Surratt, David Herold, Ned Spangler, Samuel Arnold, and Michael O'Laughlen.

[55] Dr. Richard Mudd appears to be the instigator of this litigation. He recently celebrated his 101st birthday on January 24, 2002. He is the grandson of Dr. Samuel Mudd and is utterly convinced of his grandfather's innocence. He has enlisted the support of U.S. Presidents, including Jimmy Carter and Ronald Reagan, both of whom have expressed their belief that Dr. Samuel Mudd was innocent. In 1997, Representative Steny Hoyer of Maryland introduced the "The Samuel Mudd Relief Act" that would have directed the Secretary of the Army to set aside Dr. Mudd's conviction. Despite the support of several other members of Congress, the proposal never became law. There is also a proposal to create a Dr. Samuel Mudd commemorative postage stamp.

The historic controversy surrounding Dr. Mudd, his trial and the question of his guilt or innocence will probably never be satisfactorily resolved. In 1993, a mock trial held at the University of Richmond, acquitted Dr. Mudd. His defense counsel at the trial was none other than F. Lee Bailey.

[56] *See* Mudd vs. Caldera, 26 F.Supp 2d 113 (D.D.C. 1998).

[57] Dr. Mudd was sent to Ft. Jefferson, Florida, near Key West. After an unsuccessful attempt to escape, he was assigned to the prison's carpentry shop. In 1867, during a yellow fever epidemic, the prison doctor died. Dr. Mudd filled in by assisting the sick. He contracted the disease himself but recovered. All the soldiers and noncommissioned officers at Fort Jefferson signed a petition to President Johnson asking that Dr. Mudd be pardoned in light of his actions in assisting the sick.

[58] Richard D. Mudd, M.D. vs. Louis Caldera, Secretary of the Army, D.D.C. (Civil Action No. 97-2946), March 14, 2001.

[59] Treaty of Versailles, June 28, 1919, 2 Bevans 43-240 (1919).

[60] This was the so-called "guilt clause" that proved to be a factor in the causes of the Nazi rise to power and origins of World War II.

[61] Article 227, Treaty of Versailles.

[62] "Judgment at Nuremberg" is a 1961 film about the trial of four German judges who assisted in the Nazi sterilization and cleansing policy. Retired American Judge, Judge Dan Haywood, played by Spencer Tracey, presides. Several years passed since the trials of the major Nazi leaders. The Cold War has begun and both Germany and the United States are anxious to forget the past. Haywood struggles with ethical questions of right and wrong. The all-star cast includes Judy Garland, Burt Lancaster, Richard Widmark, Marlene Dietrich, Maximilian Schell, and Montgomery Clift. Werner Klemperer, who play Colonel Wilhelm Klink on the television show, "Hogan's Heroes," and a very young William Shatner, star of "Star Trek" both have minor roles in the film. The Academy of Motion Picture Arts and Sciences nominated the film for several "Oscars." Maximilian Schell won the Best Actor Category for his role in the film.

[63] Conot, Robert E. Justice at Nuremberg. New York: Harper & Row, 1983, 9.

[64] Ibid., 10.

[65] Ibid., 10.

[66] Joseph Goebbels was one of Hitler's closest and most avid confidents. He advocated total and complete war to the very end. Hitler's political testament appointed Goebbels as the Reich Chancellor after Hitler's suicide. Instead, Goebbels ordered an SS doctor to kill his six children by lethal injection. He then ordered an SS soldier to shoot himself and his wife, Magda Goebbels. Shortly before his death, he stated: "We shall go down in history as the greatest statesmen of all time, or as the greatest criminals." Wistrich, Robert S. Who's Who in Nazi Germany, New York: Routledge, 2001.

[67] Art. 6, Nuremberg Charter, I IMT 10, 11.

[68] The Kellogg-Briand Pact renounced war as an instrument of national policy. U.S. Secretary of State, Frank B. Kellogg, and Mr. Aristide Briand, the French Minister for Foreign Affairs, were primarily responsible for negotiating the treaty. It was signed in Paris on August 27, 1928. The United States ratified the treaty shortly thereafter. The following countries ratified the Pact: the United States of America, Australia, Dominion of Canada, Czechoslovakia, Germany, Great Britain, India, Irish Free State, Italy, New Zealand, and Union of South Africa, Poland, Belgium, France, Japan, when the treaty was declared effective. Thirty-two countries later deposited instruments of ratification including some that are in the news today such as Afghanistan, Albania, the Kingdom of the Serbs, and the Kingdom of the Croats and Slovenes.

The treaty specifically states:

The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it, as an instrument of national policy in their relations with one another.

The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

1928 Pact of Paris, Articles I and II. United States Statutes at Large, Vol. 46, Part 2, page 2343.

[69] Franklin, Joshua D. The International Military Tribunals: An Overview and Assessment. Honors Thesis, Ouachita Baptist University, Arkadelphia, AR, 15 April 2001, 8, *citing,* "Indictment Against Hermann Göring et al." International Military Tribunal, *Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945-1 October 1946,* 42 vols. (Nuremberg: International Military Tribunal). Available 12 October 2000 http://www.yale.edu/lawweb/avalon/imt/proc/031846.htm

[70] R. John Pritchard, "The International Military Tribunal for the Far East and Its Contemporary Resonances." Military Law Review, Vol. 149, Summer 1995, 25.

[71] Ibid., 25.

[72] Lael, Richard L. The Yamashita Precedent: War Crimes and Command Responsibility. Wilmington, Delaware: Scholarly Resources, Inc., 1982, xi. *Hereinafter cited as* The Yamashita Precedent.

[73] Ibid., 59-60.

[74] Ibid., 60.

[75] The War Department's field manual stated that theater commanders had the right to establish military commission and could determine the commission's jurisdiction and procedures. U.S. Army and Naval Field Manual of Military Government and Civil Affairs (FM 27-5), (Washington: Government Printing Office, 1945), p. 50.

[76] The Yamashita Precedent, 61, *quoting* Major General Myron Cramer.

[77] The Yamashita Precedent, 70-72.

[78] Ibid., 74.

[79] Ibid., 80.

[80] Ibid., 84.

[81] Ibid., 95.

[82] Article 63, Convention on Treatment of Prisoners of War (1929) states: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the Detaining Power."

Article 38 of the Articles of War stated: "The President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts on inquiry, military commissions, and other military tribunals, which regulations shall, insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States…."

[83] The Yamashita Precedent, 109.

[84] Ibid., 110.

[85] Ibid.

[86] Application of Yamashita, 327 U.S. 1 (1946), 35-36.

[87] The Yamashita Precedent, 118.

[88] 327 U.S. 28.

[89] Hirota v. MacArthur, 338 U.S. 197 (1948).

[90] Department of Defense, "Military Commission Order No. 1, Subject: Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism, March 21, 2002. (Military Commission Order).

[91] Ibid., Section 4A(2)

[92] Ibid., Section 4A(3).

[93] Ibid., Section 4A(3)(b).

[94] Ibid., Section 4B and C.

[95] Ibid., Section 5A.

[96] Ibid., Section 5F.

[97] Ibid., Sections 5C and 6F (emphasis added).

[98] Ibid., Section 6G.

[99] Ibid., Section 4C(3).

[100] Ibid., 6H(4). The panel may also include a civilian commissioned under 10 U.S.C. Section 603.

[101] Ibid.. Section 6D.

[102] Ibid., 4A(5)(c).

[103] Safire, William, "Military Tribunals Modified," The New York Times, March 21, 2002, p. A33.

[104] Ibid.

[105] Ibid.

[106] Schwartz, Herman, "Tribunal Injustice," The Nation, 21 January 2002, Vol. 274, Issue 2. p. 5.

[107] Ibid.

[108] Ibid.

[109] Presidential Order, Section 4c(3), 15 November 2001.

[110] The American public has grown cynical of the judicial process. Recent examples include the O.J. Simpson trial in which a majority of the public viewed the defendant as guilty yet the outcome of the trial resulted in a "not guilty" verdict. After almost nine months of legal wrangling on national television, the jury acquitted Mr. Simpson in a remarkably short time. Regardless of one's opinion on the verdict, it was clear that the process was ugly. It took too long, it was too expensive and it was clear that there were two standards of justice in America: one for the poor and one for the rich who could afford the Johnny Cochrans and the F. Lee Baileys of the legal profession. Another recent example is the four police officers tried in

California state court for their actions in the alleged beating of Rodney King. Again, the televised trial treated the American public to the unpleasant spectacle of legal sparring and gamesmanship. Since the videotape of the incident was widely broadcast, the majority of Americans concluded that Stacey Koon, William Whitt, et al, were guilty. The resulting acquittal of the four police officers staggered the American public. Outrage inflamed the population of Los Angeles County and the resulting riots were the worst in American history.

[111] Turley, Jonathan *cited by* Michael "Rocket" Richards, "Be Very Afraid." The Daily Illini Online. 5 December 2001. Internet. Available at http://www.dailyillini.com/dec01/dec06/opinions/stories/opinions_column01.shtml. Accessed 19 January 2002.

[112] Hirschkorn, Phil. "Tight Security Blankets Embassy Bombings Trial." January 10, 2001. CNN.com/Law Center. Internet. Available at http://www.cnn.com/2001/LAW/01/10/embassy.bombings.security.crim/

[113] Ibid.

[114] Ibid.

[115] Hirschkorn, Phil. "Four Embassy Bombers Get Life." October 21, 2001. CNN.com/Law Center. Internet. Available at http://www.cnn.com/2001/LAW/10/19/embassy.bombings/index.html

[116] Ibid.

[117] Presidential Order, 15 November 2001, Section 1f.

[118] Johnson, Douglas V. and Martin, John R. "Terrorism Viewed Historically." Defeating Terrorism: Strategic Issue Analyses. Colonel John E. Martin, Editor. Strategic Studies Institute, Carlisle, PA, 2002. 5.

[119] Ibid.

[120] Cook, Martin L. "Ethical Issues in Counterterrorism Warfare." Defeating Terrorism: Strategic Issue Analyses. Colonel John E. Martin, Editor. Strategic Studies Institute, Carlisle, PA, 2002. 73-74.

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