MILITARY TRIALS OF TERRORISTS: FROM THE LINCOLN CONSPIRATORS TO THE GUANTANAMO INMATES[1]

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I. INTRODUCTION

Military commissions, born of military necessity, have long been a feature of war.[2] They are neither mentioned in the United States Constitution nor created by statute, but derive their authority from powers vested in both and are recognized by this nation as a vital aspect of war. Military commissions are special courts operated by the military, not the civilian judiciary and are used to adjudicate extraordinary cases during wartime.

During the Civil War, Attorney General James Speed justified the existence and purpose of military commissions. In a powerful explanation, he opined that "military tribunals exist under and according to the laws and usages of war, in

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1. Portions of this article were previously published in Frank J. Williams, Nicole J. Dulude and Kimberly A. Tracey, *Still a Frightening Unknown: Achieving a Constitutional Balance between Civil Liberties and National Security during the War on Terror*, 12 ROGER WILLIAMS U. L. REV. 675 (2007), and are recited herein with permission of the Roger Williams University Law Review.

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After five years as a Superior Court Judge, he was appointed and unanimously confirmed as Rhode Island's 50th Chief Justice. Chief Justice Williams has been named one of the top 500 American judges by Lawdragon Inc., an organization that rates judges throughout the United States.

In December 2003, President Bush invited Chief Justice Williams to be a member of the then-Military Commission Review Panel for tribunals held in Guantanamo Bay, Cuba where he served with the rank of Major General. Subsequently, The Military Commissions Act of 2006 created the Court of Military Commission Review on which Justice Williams served as a civilian judge. In November 2007, the Secretary of Defense appointed Chief Justice Williams Chief Judge of the United States Court of Military Commission Review, where he served until December 2009.

Chief Justice Williams is also a nationally recognized authority and author on the life and times of Abraham Lincoln. He has been a leader in the Lincoln community for the past thirty years publishing numerous articles and lectures on Abraham Lincoln. Lastly, he is the founding chair of the Lincoln Forum.

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2. Hamdan v. Rumsfeld, 548 U.S. 557, 590 (2006) (citing W. WINTHROP, MILITARY LAW AND PRECEDENTS 831 (rev. 2d ed. 1920)).

the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible."[3]

Although Attorney General Speed was able to justify the existence of military commissions during the Civil War, the military commissions to which he referred were almost no comparison to those in place today. Today's military commissions are noticeably distinct from the military commissions of the past, yet the stigma associated with them has carried forward to today. This article will demonstrate that military commissions are justified, authorized and, most importantly, fair. This article examines the evolution of military commissions from the dark days of the Civil War to our nation's current war on terror. In so doing, this article will show the progression of military commissions from those totally lacking in procedural safeguards to those of today, which afford a full panoply of the rights that, overtime, we have come to understand are afforded under the Due Process clause of the Constitution. Part II of this article identifies the war powers afforded under the United States Constitution that have been viewed as a source of authority for the establishment of military commissions.[4] Part III introduces the first United States military commissions that were established during the Mexican War.[5] Part IV details the military commissions that were established as the Civil War was fought on United States soil and includes discussion on the Lieber Code.[6] Part V sets forth the military commission trial of those accused of co-conspirators in President Abraham Lincoln's assassination.[7] Part VI details the military commissions of the Second World War.[8] Part VII explains the institution of military commissions during the War on Terror.[9] Part VIII brings the article to the present with its explanation of the military commissions that are currently being used to try those accused of terrorism.[10]

II. WAR POWERS AS AUTHORITY FOR ESTABLISHMENT OF MILITARY COMMISSIONS

The United States Constitution affords the government broad powers to protect and safeguard the United States during times of war.[11] Military

3. Opinion of the Constitutional Power of the Military to Try and Execute the Assassins of the President, 11 Op. Att'y Gen. 297 (1865).

4. *See infra* Part II.

5. *See infra* Part III.

6. *See infra* Part IV.

7. *See infra* Part V.

8. *See infra* Part VI.

9. *See infra* Part VII.

10. *See infra* Part VIII.

11. United States v. Hamdan, CMCR 09-002, 2011 U.S. CMCR LEXIS 1, at *33-34 (U.S. Ct. Mil. Comm. Rev. June 24, 2011).

commissions have been justified under nine separate provisions of the Constitution,[12] in addition to the Define and Punish Clause.[13]

Authority for military commissions often is justified pursuant to the Constitution's War Powers.[14] The United States Supreme Court has recognized that those war powers include:

> the power to wage war successfully. . . . Since the Constitution commits to the Executive and to Congress the exercise of the war power in all the vicissitudes and conditions of warfare, it has necessarily given them wide scope for the exercise of judgment and discretion in determining the nature and extent of the threatened injury or danger and in the selection of the means for resisting it.[15]

It is these powers that are used to justify the establishment of military commissions to try persons for offenses against the law of war.[16] Indeed, in the words of Colonel William Winthrop, who the United States Supreme Court has dubbed the "Blackstone of Military Law"[17]:

> it is those provisions of the Constitution which empower Congress to "declare war" and "raise armies," and which, in authorizing the initiation of *war*, authorize the employment of all necessary and proper agencies for its due prosecution, from which this tribunal derives its original sanction. Its authority is thus the same as the authority for the

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12. *Ex parte Quirin*, 317 U.S. 1, 25-26 (1942). ([O]ne of the objects of the Constitution, as declared by its preamble, is to "provide for the common defence." As a means to that end, the Constitution gives to Congress the power to "provide for the common Defence," Article I, Section 8, Clause 1; "To raise and support Armies," "To provide and maintain a Navy," Article I, Section 8, Clauses 12 & 13; and "To make Rules for the Government and Regulation of the land and naval Forces," Article I, Section 8, Clause 14. Congress is given authority "To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water," Article I, Section 8, Clause 11; and "To define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations," Article I, Section 8, Clause 10. And finally, the Constitution authorizes Congress "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." Article I, Section 8, Clause 18. The Constitution confers on the President the "executive Power," Article II, Section 1, Clause 1, and imposes on him the duty to "take Care that the Laws be faithfully executed." Article II, Section 3. It makes him the Commander in Chief of the Army and Navy, Article II, Section 2, Clause 1, and empowers him to appoint and commission officers of the United States. Article II, Section 3, Clause 1).

13. *Hamdan*, 2011 U.S. CMCR LEXIS 1, at *33-34 (The Define and Punish Clause provides, "The Congress shall have Power . . . [t]o define and punish Piracies and Felonies committed on the high Seas, and Offences against the Law of Nations." U.S. CONST. art. I, § 8, cl. 10).

14. *Hamdan*, 2011 U.S. CMCR LEXIS 1, at *33-34.

15. Lichter v. United States, 334 U.S. 742, 767 n. 9 (1948) (citations omitted).

16. *Hamdan*, 2011 U.S. CMCR LEXIS 1, at *33-34 (citing *Ex parte Quirin*, 317 U.S. 1, 26-31 (1942)).

17. United States v. Hamdan, 548 U.S. 557, 597 (2006) (Stevens, Souter, Ginsburg, and Breyer, JJ., concurring) (referring to Winthrope's "Military Law and Precedents," as "[t]he classic treatise penned by Colonel William Winthrope, whom we have called the 'Blackstone of Military Law.'").

> making and waging of war and for the exercise of military government and martial law. *The commission is simply an instrumentality for the more efficient execution of the war powers vested in Congress and the power vested in the President as Commander-in-chief in war.*[18]

III. MILITARY COMMISSIONS DURING THE MEXICAN WAR

The genesis of American military commissions dates back to the Mexican War of 1846-1848. Concerned about the lack of discipline and misconduct among American soldiers (especially volunteer soldiers), General Winfield Scott drafted an order that called for a declaration of martial law in Mexico.[19] Scott was particularly troubled by the behavior of "wild volunteers" who, as soon as they crossed the Rio Grande, "committed, with impunity, all sorts of atrocities on the persons and properties of Mexicans."[20] Scott was well aware that such actions, if left undisciplined, could incite guerilla uprisings.[21] In Scott's thinking, if he could discipline American soldiers for such actions, he potentially could avert guerilla warfare.[22] With martial law and military tribunals in place, a strong message would be sent to Mexican citizens and United States soldiers - misconduct by either side would result in "swift and severe punishment."[23]

On February 19, 1847, Scott issued General Order No. 20, which proclaimed martial law and established military commissions for prosecution of a variety of offenses, including "murder, poisoning, rape, or the attempt to commit either; malicious stabbing or maiming; malicious assault and battery, robbery [and] theft."[24] Although these crimes were punishable under common law, American soldiers who committed such crimes on foreign soil went unpunished. There was "no legal punishment for any of those offences, for by the strange omission of Congress, American troops take with them beyond the limit of their own country, no law but the Constitution of the United States, and the rules and articles of war."[25] Crimes such as murder, rape and theft are not addressed by any of these authorities, and, therefore, they go unpunished no matter by whom, or when they are committed.[26]

Thus, Scott saw it necessary to create military commissions specially designed to try those on foreign soil.[27] The military commissions established

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18. WILLIAM WINTHROPE, MILITARY LAW AND PRECEDENTS 831 (2d ed. 1920).
19. LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM 32 (2005).
20. *Id.* at 33 (citing 2 WINFIELD SCOTT, MEMOIRS OF LIEUT.-GENERAL SCOTT, LL.D. 392 (1864)).
21. *Id.* at 32.
22. *Id.*
23. *Id.* at 33.
24. 2 WINFIELD SCOTT, MEMOIRS OF LIEUT. GENERAL SCOTT, LL.D. 540-41 (1864).
25. *Id.* at 393.
26. *Id.*
27. *Id.*

during the Mexican War tried over 117 in Mexico.[28] Although the majority of those tried were American soldiers, several officers of the Mexican army were tried by officers of the United States army and, upon convictions, were shot to death.[29]

The tribunals were helpful in maintaining peace between United States soldiers and Mexican civilians. One American soldier was tried by military commission for drunkenly beating a Mexican woman. For this crime he received twelve lashes and confinement at hard labor, in ball and chain, for the remainder of the war.[30] Another was hanged for having raped and robbed a Mexican woman.[31]

The commissions did not operate in secrecy and contained procedural safeguards to ensure fairness.[32] For example, the proceedings were recorded (using transcripts much like our modern day courts), reviewed, and either approved or disapproved.[33]

IV. MILITARY COMMISSIONS DURING THE CIVIL WAR

Less than two decades after the war with Mexico, war took on a new meaning as it was fought on American soil, where the whole country was a war zone. This time, the justification for the use of military commissions was different. During the Mexican War military commissions were necessary because crimes committed by United States soldiers while on foreign soil could not be punished by United States courts because they lacked jurisdiction. However, that was not a problem during the Civil War. Although war Confederates – civilian and military – were subject to the jurisdiction of American courts, those courts that were loyal to the Confederates States of America could not be trusted and were, therefore, ill suited to try those who were guilty of disloyalty to the Union and the President. Civil offenses that could be tried by a *loyal* court would be so tried and the need for a military commission trial was unnecessary. Conversely, civil offenses that could not be tried by a *loyal* court were ripe for trial by military commission. This system was not perfect, however. Importantly, it failed to define the term "loyal" and due to the term's ambiguity, any court could conceivably be deemed a disloyal court if it operated in a manner inconsistent with the Union.

After the Confederates had bombarded Fort Sumter in the Charleston Harbor in April 1861, newly elected President Abraham Lincoln called for

28. FISHER, *supra* note 19, at 35.
29. 1 U.S. WAR DEP'T, ANN. REP. OF THE SECRETARY OF WAR FOR THE YEAR 1892 219 (1892).
30. FISHER, *supra* note 19, at 34.
31. *Id.*
32. *Id.* at 35.
33. *Id.*

reinforcements to protect Washington, D.C.[34] The Civil War was underway and the nation's capital was in jeopardy, given that it bordered Virginia, a secessionist state, and Maryland, whose threats to secede were widely known.[35] The Massachusetts militia soldiers endured horror as they passed through Baltimore, facing attacks by fellow citizens.[36] Giving America a glimpse of that horror, The New York Times reported: "It is said there have been 12 lives lost. Several are mortally wounded. Parties of men half frantic are roaming the streets armed with guns, pistols and muskets ... a general state of dread prevails."[37] In the days and weeks that followed, the city of Washington was virtually severed from the states of the North.[38] Troops stopped arriving,[39] telegraph lines were slashed,[40] and postal mail from the North reached the city only infrequently.[41]

Lincoln immediately perceived the grave danger that the war would be lost if the Confederates seized the capital or caused it to be completely isolated.[42] Prompted by the urging of Secretary of State William H. Seward, Lincoln, a former attorney, concluded that it was necessary to suspend the Great Writ of habeas corpus.[43] Although Congress was in recess, Lincoln, relying on the constitutional authorization that the framers had perceptively included years before, authorized General Winfield Scott to suspend the writ, believing that his presidential duty to protect the capital and the Union required such an action.[44]

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34. *See also* ABRAHAM LINCOLN: A DOCUMENTARY PORTRAIT THROUGH HIS SPEECHES AND WRITINGS 160-62 (Don E. Fehrenbacher ed., 1964). Responding to the fact that Confederate troops had opened fire on Fort Sumter, Lincoln called out the militia of the several states of the Union and convened a special session of Congress.

35. DANIEL FARBER, LINCOLN'S CONSTITUTION 16 (2003).

36. LINCOLN IN THE TIMES: THE LIFE OF ABRAHAM LINCOLN AS ORIGINALLY REPORTED IN THE NEW YORK TIMES 110-11 (David Herbert Donald & Harold Holzer eds., 2005) [hereinafter LINCOLN IN THE TIMES].

37. *Id.*

38. Frank J. Williams, *Abraham Lincoln and Civil Liberties: Then and Now - The Southern Rebellion and September 11*, 60 N.Y.U. ANN. SURV. AM. LAW 463, 466 (2004).

39. MICHAEL LIND, WHAT LINCOLN BELIEVED: THE VALUES AND CONVICTIONS OF AMERICA'S GREAT PRESIDENT 174 (2004).

40. LINCOLN IN THE TIMES, *supra* note 36, at 110-11.

41. WILLIAM H. REHNQUIST, ALL THE LAWS BUT ONE 22 (1998); *see also* Abraham Lincoln, Annual Message to Congress (Dec. 1, 1862), *reprinted in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 518, 524 (Roy P. Basler ed., Rutgers Univ. Press 1953).

42. *See* Abraham Lincoln, Order to General Winfield Scott (Apr. 27, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 344 (Roy P. Basler ed., Rutgers Univ. Press 1953).

43. REHNQUIST, *supra* note 39, at 23 (quoting A Day with Governor Seward at Auburn, *reprinted in* F.B. Carpenter, Seward Papers, No. 6634 (July 1870)).

44. On April 27, 1861 Abraham Lincoln reluctantly ordered General Winfield Scott to suspend habeas corpus where necessary to avoid the overthrow of the government and to protect the nation's capital:

> To The Commanding General of the Army of the United States:
> You are engaged in suppressing an insurrection against the laws of the United States. If at any point on or in the vicinity of any military line which is now or which shall be used between the city of Philadelphia and the city of Washington you find resistance which renders it necessary to suspend the writ of habeas corpus for the public safety, you personally, or through the officer in

The effect enabled military commanders to arrest and detain individuals indefinitely in areas where martial law had been imposed.[45] Many of those detained were individuals who attempted to halt military convoys.[46] Lincoln saw that immediate action and a declaration of martial law was necessary to divest civil liberties from those who were disloyal and whose overt acts against the United States threatened its survival without the rights explicit in our usual judicial process.[47]

To Lincoln, there was no tolerable middle road. He was acutely aware that some citizens would sharply criticize him for suspending the Great Writ. The alternative, however, was far worse in his estimation. In Lincoln's judgment nothing would be worse than allowing the nation to succumb to Confederate forces. Even some of those who deemed Lincoln's actions unconstitutional have noted the real-world emergency with which he was faced. One commentator has noted: "Lincoln's unconstitutional acts during the Civil War show that even legality must sometimes be sacrificed for other values. We are a nation under law, but first we are a nation."[48]

Lincoln's actions were challenged through the judicial process and, ultimately, United States Supreme Court Chief Justice Roger Brooke Taney authored *Ex parte Merryman*, in which he opined that Congress alone had the power to suspend the writ of habeas corpus.[49] Unfortunately for Chief Justice Taney, his words carried no precedential value as an in-chambers opinion.[50] Chief Justice Taney recognized this but forwarded his in-chambers opinion to President Lincoln.[51] Ironically, it was Taney who, only a month before, had

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> command at the point where resistance occurs, are authorized to suspend the writ.
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> ABRAHAM LINCOLN.

Abraham Lincoln, Order to General Winfield Scott (Apr. 27, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 344 (Roy P. Basler ed., Rutgers Univ. Press 1953).

45. LIND, *supra* note 39.

46. LINCOLN IN THE TIMES, *supra* note 36, at 117.

47. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 45 (2006).

48. RICHARD A. POSNER, THE TRUTH ABOUT OUR LIBERTIES, IN RIGHTS VS. PUBLIC SAFETY AFTER 911: AMERICA IN THE AGE OF TERRORISM 27 (Amitai Etzioni & Jason H. Marsh eds., 2003).

49. *Ex parte Merryman*, 17 F. Cas. 144, 147 (C.C.D. Md. 1861). The Chief Justice pointed to the suspension clause found in Article I of the Constitution, which outlines congressional duties. *See also* BRIAN MCGINTY, THE BODY OF JOHN MERRYMAN: ABRAHAM LINCOLN AND THE SUSPENSION OF HABEAS CORPUS (2011).

50. Typically, a Circuit Justice would either grant or deny the application before him. Occasionally, however, Circuit Justices would issue an in chambers opinion explaining the reasons for their decisions. Cynthia J. Rapp, *In Chambers Opinions by Justices of the Supreme Court*, 5 GREEN BAG 2D 181, 182 (2002). These opinions were typically brief and were not circulated to the full court before release. *Id.*

51. DANIEL FARBER, LINCOLN'S CONSTITUTION 17 (2003); *see also* JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 12 (2007) (stating that "Taney went out of his way to mock the president, circulating his opinion as widely as possible to embarrass the administration.").

administered the President's oath,[52] which the President now relied upon to justify his actions.

If one thing is certain, it is that Chief Justice Taney's opinion did not deter Lincoln. Rather, Lincoln turned to Attorney General Edward Bates for confirmation that his decision to suspend habeas corpus was within his authority.[53] Bates responded as follows:

> I am clearly of opinion that, in a time like the present, when the very existence of the nation is assailed, by a great and dangerous insurrection, the President has the lawful discretionary power to arrest and hold in custody persons known to have criminal intercourse with the insurgents, or persons against whom there is probable cause for suspicion of such criminal complicity.[54]

Disregarding the in chambers opinion of Chief Justice Taney, Lincoln boldly broadened the scope of the suspension of the writ.[55] In the draft of Lincoln's report to Congress (the only extant copy of his July 4, 1861 speech),[56] he passionately defended his position:

> The provision of the Constitution that "the privilege of habeas corpus, shall not be suspended unless when, in cases of rebellion or invasion, the public safety may require it," is equivalent to a provision - is a provision - that such privilege may be suspended when, in cases of rebellion, or invasion, the public safety does require it. It was decided that the public safety does require the qualified suspension of the privilege of the writ which was authorized to be made. Now it is insisted that Congress, and the Executive, is vested with this power. But the Constitution itself, is silent as to which, or who, is to exercise the power; and as the provision was plainly made for a dangerous emergency, it cannot be believed that the framers of the instrument intended, that in every case, the danger should run its course, until Congress could be called together; the very assembling of which might be prevented, as was intended in this case, by the rebellion . . . The

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52. *See* BRIAN MCGINTY, LINCOLN AND THE COURT (2008).

53. Abraham Lincoln, Letter to Edward Bates (May 30, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 390 (Roy P. Basler ed., Rutgers Univ. Press 1953).

54. 10 OFFICIAL OPINIONS OF THE ATTORNEY GENERAL OF THE UNITED STATES, ADVISING THE PRESIDENT AND HEADS OF DEPARTMENTS IN RELATION TO THEIR OFFICIAL DUTIES 81 (W.H. & O.H. Morrison 1868).

55. Abraham Lincoln, Letter to Henry W. Halleck (Dec. 2, 1861), *reprinted in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 35 (Roy P. Basler ed., Rutgers Univ. Press 1953); Abraham Lincoln, Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), *reprinted in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 436-37 (Roy P. Basler ed., Rutgers Univ. Press 1953); Abraham Lincoln, Proclamation Suspending Writ of Habeas Corpus (Sept. 15, 1863), *reprinted in* 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 451-52 (Roy P. Basler ed., Rutgers Univ. Press 1953).

56. No official copy of Lincoln's speech of July 4, 1861 has been found. The cited text is Lincoln's second proof, which contains his final revisions. *See* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 421, n.1 (Roy P. Basler ed., Rutgers Univ. Press 1953).

> whole of the laws which were required to be faithfully executed, were being resisted, and failing of execution, in nearly one-third of the States. Must they be allowed to finally fail of execution? ... Are all the laws, but one, to go unexecuted, and the government itself go to pieces, lest that one be violated?[57]

Lincoln explained that his actions were not only justified, but were required of him pursuant to his oath to preserve, protect, and defend the Constitution of the United States.[58] In August 1861, Congress ratified the President's actions in all respects.[59]

That same year the first military commissions were convened. Initially, trials took place in Virginia where United States soldiers charged with common law crimes were tried.[60] It was thought that such trials would serve as a deterrent for future misconduct.[61] Particularly it targeted United States soldiers who had perpetrated crimes on one another or upon civilians.[62] Military commission trials also commenced in Missouri in 1861. Thirty three individuals – mostly civilians – were brought before the commissions that year, most of whom were charged with treason against the government.[63] Although many were either acquitted or released, twelve were convicted and sentenced to hard labor for the duration of the war.[64]

Later that year, in August 1861, General John C. Fremont declared martial law in Missouri, purportedly giving him the authority to try by court martial all persons captured bearing arms.[65] In Fremont's estimation, the circumstances in Missouri were of "sufficient urgency to render it necessary that the commanding general of this department should assume the administrative powers of the

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57. Abraham Lincoln, Speech to Special Session of Congress (July 4, 1861), *reprinted in* 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 430-31 (Roy P. Basler ed., Rutgers Univ. Press 1953).

58. *Id.* (Lincoln's actual words were: "Even in such a case, would not the official oath be broken, if the government should be overthrown, when it was believed that disregarding the single law, would tend to preserve it?"). *See also* JAMES M. MCPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR 211 (2007) (noting that Lincoln's argument that military courts cannot try civilians outside the war zone was that the whole country was a war zone). The oath that every president must take before entering on the execution of that high office is explicitly set forth in Article II, Section 1 of the Constitution. It should also be recalled that the Preamble to the Constitution specifically states that providing "for the common defence" and "securing the blessings of liberty" are among the goals which the Constitution is intended to serve.

59. Act of August 6, 1861, ch. 63, § 3, 12 Stat. 326. Although this language did not expressly ratify the President's suspension of habeas corpus, it was widely understood as having done so.

60. Gideon M. Hart, *Military Commissions and the Leiber Code: Toward a New Understanding of the Jurisdictional Foundations of Military Commissions*, 203 MIL. L. REV. 1, 9 (2010).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. 2:1 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 221 (1894) [hereinafter THE WAR OF THE REBELLION].

State."[66] Fremont described the conditions he observed as disorganized, lacking in civil authority, and replete with bands of murders and marauders who were devastating property.[67] Fremont believed that "public safety and success of [the Union's] arms require[d] unity of purpose."[68] Therefore, Fremont declared martial law to "suppress [such] disorders, maintain the public peace and give security to persons and property of loyal citizens."[69] Fremont proclaimed that all persons found guilty of bearing arms within certain prescribed territory "will be shot."[70] Importantly, Fremont noted that the object of his declaration was:

> [T]o place in the hands of military authorities power to give instantaneous effect to the existing laws . . . but it [was] not intended to suspend the ordinary tribunals of the country where law will be administered by civil officers in the usual manner and with their customary authority while the same can be peaceably administered.[71]

Upon receiving word of Fremont's proclamation, Lincoln acted immediately, instructing Fremont that no one should be shot without his consent.[72] Lincoln feared - and correctly so - that shooting Confederates in these circumstances could lead to further insurrection and the shooting of Union soldiers. Lincoln wrote to Fremont:

> Two points in your proclamation of August 30th give me some anxiety. First, should you shoot a man, according to the proclamation, the Confederates would very certainly shoot our best man in their hands in retaliation; and so, man for man, indefinitely. It is therefore my order that you allow no man to be shot, under the proclamation, without first having my approbation or consent.[73]

With Fremont's order in place, military commission trials began and focused on trying individuals - mostly civilians - who were caught bearing arms, sabotaging infrastructure - mostly railroad tracks and telegraph lines - or recruiting or enlisting Confederate forces.[74] The effect of Fremont's proclamation declaring martial law was unclear. On November 20, 1861, Halleck sent a telegraph to McClellan, which read: "No written authority is found here to declare and enforce martial law in this department. Please send me

66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.* at 222.
72. 4 THE COLLECTED WORKS OF ABRAHAM LINCOLN 506 (Roy P. Basler ed., Rutgers Univ. Press 1953).
73. *Id.*
74. LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM 46 (2005).

such written authority and telegraph me that it has been sent by mail."[75] On November 21, 1861, Lincoln responded to this request with one simple statement: "If General McClellan and General Halleck deem it necessary to declare and maintain martial law at Saint Louis the same is hereby authorized. A. LINCOLN."[76] Having not received the President's message, on November 30, 1861, Halleck again informed McClellan that without the requested authorization, "I cannot arrest such men and seize their papers without exercising martial law for there is no civil law or civil authority to reach them . . . . if the President is not willing to intrust [*sic*] me with it he should relieve me from the command. . . ."[77] To this Lincoln responded:

> General: As an insurrection exists in the United States and is in arms in the State of Missouri, you are hereby authorized and empowered to suspend the Writ of Habeas Corpus within the limits of the military division under your command and to exercise martial law as you find it necessary in your discretion to secure the public safety and the authority of the United States.[78]

With the climate in Missouri worsening, on December 26, 1861, Halleck declared martial law in Saint Louis.[79] Hallack's order read:

> In virtue of the authority conferred in me by the President of the United States, martial law, heretofore issued in this city, will be enforced. In virtue of authority, martial law is hereby declared and will be enforced in and about all the railroads in this State. It is not intended by this declaration to interfere with the jurisdiction in the court which is loyal to the Government of the United States, and which will aid the military authorities in enforcing order and punishing crimes.[80]

Although Halleck was quick to note that his order was not intended to interfere with the jurisdiction of civil courts, like many military officers he had little trust for the civil court system. In a letter to the Hon. Thomas T. Ewing, one of Ohio's delegates to a peace conference designed to stave off the Civil War, Halleck wrote, "[t]he civil courts can give us no assistance as they are very generally unreliable."[81] In Halleck's estimation, "[t]here [was] no alternative but

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75. 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 27 (Roy P. Basler ed., Rutgers Univ. Press 1953).

76. *Id.*

77. *Id.*

78. *Id.* at 35.

79. *Order From Gen. Halleck*, N.Y. TIMES (Dec. 27, 1861), *available at* http://www.nytimes.com/1861/12/27/news/order-from-gen-halleck.html (last visited October 10, 2011).

80. *Id.*

81. THE WAR OF THE REBELLION, *supra* note 65, at 247.

to enforce martial law."[82] A general order communicated from Halleck's headquarters later that day stated:

> Crimes and military offenses are frequently committed which are not triable or punishable by courts-martial and which are not within the jurisdiction of any existing civil court. Such cases, however, must be investigated and the guilty parties punished. The good of society and the safety of the army imperiously demand this. They must therefore be taken cognizance of by the military power."[83]

However, "civil offenses cognizable by civil courts whenever such loyal courts exist will not be tried by a military commission."[84]

As the Civil War progressed and while the Union and Confederate armies fought on the battlefield, a sideshow of guerilla-style hit and run attacks began to develop. Like the Mexican War, many officers were volunteers and knew little about the laws of war, which led to the rise of guerilla warfare. In recognition of the increasing problem of guerilla warfare, in August 1862, Major General Henry Halleck, who was then the General-in-Chief of the Union Army, engaged Dr. Francis Lieber, a political philosopher and a political science professor who had immersed himself in the study of early nineteenth century warfare, to craft instructions on how soldiers should conduct themselves in wartime. Interestingly, three of Lieber's sons fought in the war – two for the North and one for the South.[85] Halleck explained to Lieber the problem of whether such guerillas should be treated as ordinary belligerents and be given the same rights as prisoners of war. In response, Dr. Lieber drafted a pamphlet entitled, "Guerrilla Parties Considered with Reference to the Laws and Usages of War," in which he defined "guerrilla party" as "an irregular band of armed men, carrying on an irregular war, not being able, according to their character as a guerrilla party, to carry on what the law terms a *regular war*."[86] Dr. Lieber explained that "[t]he irregularity of the guerrilla party consists in its origin, for it is either self-constituted or constituted by the call of a single individual, . . . and it is irregular as to the permanency of the band, which may be dismissed and called again together at any time."[87] In Dr. Lieber's opinion, guerilla parties, due to the nature in which they operate, do not enjoy all of the protections of the law of war because they "cannot encumber themselves with prisoners of war; they have, therefore, frequently, perhaps generally, killed their prisoners . . . thus

82. *Id.*
83. *Id.*
84. *Id.* at 248.
85. FISHER, *supra* note 74, at 72. Lieber's son Oscar, who fought for the Confederacy, died in battle. Lieber once remarked that he had known war as a soldier and as a wounded man, "but I had yet to learn it in the phase of a father searching for his wounded son, walking through the hospitals, peering in the ambulances." *Id.* (citing FRANK FREIDEL, FRANCIS LIEBER NINETEENTH-CENTURY LIBERAL 325 (1947)).
86. RICHARD SHELLY HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR 32 (1983).
87. *Id.* at 33.

introducing a system of barbarity which becomes [more intensive] in its demoralization as it spreads and is prolonged."[88]

Dr. Lieber's *Guerrilla Parties Considered with Reference to the Laws and Usages of War*, set the stage for his next contribution as the primary author of "Instructions for the Government of Armies of the United States in the Field," which was released as Army General Order 100, and is now commonly referred to as the Lieber Code. On April 24, 1863, President Lincoln approved what Dr. Leiber had written and directed that it be published. The Lieber Code was the first comprehensive list of instructions on the laws of war. The instructions included ten sections and 157 articles.[89] The sections ranged from martial law to property of the enemy and insurrection. The code was intended to be malleable enough so that wars could be won but also included more rigid standards designed to reflect basic human dignity.

In the wake of the Lieber Code, military commissions sprang up across the United States. Unlike those utilized during the Mexican war, the military commissions of the civil war were designed to try civilians. By mid-1862, nearly two bloody years had passed since the onset of the Civil War. Political conflicts roiled the nation, driving both sides to fight fiercely for a cause in which each strongly believed. Despair cast a dark cloud over the country, and causalities would reach over 200,000 by the start of the next year.[90] As the Civil War droned on, on September 24, 1862, Lincoln, like Gen. Scott during the Mexican War, saw it necessary to convene military tribunals. Responding to the grave political and military climate, Lincoln issued a proclamation which declared martial law and authorized the use of military tribunals to try civilians within the United States believed "guilty of disloyal practice" or who "afforded aid and comfort to Rebels."[91] The following March, Lincoln appointed Major General Ambrose Burnside as commanding general of the Department of the Ohio.[92] After only one month in that position, Burnside issued General Order No. 38, authorizing imposition of the death penalty for those who aided the Confederacy and who "declared sympathies for the enemy."[93]

With this order as justification, and at Gen. Burnside's direction, 150 Union soldiers arrived at the home of anti-war former congressman Clement L.

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88. *Id.*

89. FRANCIS LIEBER, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD (The Lawbook Exchange, Ltd. 2005).

90. American Civil War, Battle Statistics, Commanders and Causalities, http://www.AmericanCivilWar.com/cwstats.html.

91. *See* Proclamation Suspending the Writ of Habeas Corpus (Sept. 24, 1862), *reprinted in* 5 THE COLLECTED WORKS OF ABRAHAM LINCOLN 436-37 (Roy P. Basler ed., Rutgers Univ. Press 1953).

92. *See* Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105, 119 (1998).

93. General Order No. 38, as reprinted in Benjamin Perley Poore, The Life and Public Services of Ambrose E. Burnside, Soldier-Citizen-Statesman 206-07 (1882).

Vallandigham in Dayton, Ohio at 2:40 a.m. on May 5, 1963.[94] When Vallandigham refused to let the soldiers in, they broke down his front door and forced their way inside.[95] Vallandigham was arrested for a public speech he delivered in Mount Vernon, which lambasted President Lincoln, referred to him as a political tyrant, and called for his overthrow.[96] Vallandigham was escorted to Kemper Barracks, a military prison in Cincinnati.[97]

Specifically, Vallandigham was charged with having proclaimed, among other things, that "the present war was a wicked, cruel, and unnecessary war, one not waged for the preservation of the Union, but for the purpose of crushing out liberty and to erect a despotism; a war for the freedom of the blacks and the enslavement of the whites."[98]

Although he was a United States citizen who would ordinarily be tried for criminal offenses in the civilian court system, Vallandigham was tried before a military tribunal a day after his arrest.[99] Vallandigham, an attorney, objected that trial by a military tribunal was unconstitutional, but his protestations to the Lincoln administration fell on deaf ears.[100] The military tribunal found the Ohio "Copperhead"[101] in violation of General Orders No. 38 and ordered him imprisoned until the war's end.[102] Subsequent to this sentence, Vallandigham petitioned the United States Circuit Court sitting in Cincinnati for a writ of habeas corpus, which, perhaps much to Chief Justice Taney's dismay, was denied.[103] In a final attempt, Vallandigham petitioned the United States Supreme Court for a writ of certiorari, but his petition to the Court was unsuccessful, the court ruling that it was without jurisdiction to review the military tribunal's

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94. Curtis, *supra* note 92, at 105, 107, 122; *see also Vallandigham Arrested*, ATLAS & ARGUS, May 6, 1863.

95. *Id.* at 107.

96. BENJAMIN PERLEY POORE, THE LIFE AND PUBLIC SERVICES OF AMBROSE E. BURNSIDE, SOLDIER-CITIZEN-STATESMAN 208 (1882); REHNQUIST, *supra* note 41, at 65-66.

97. POORE, *supra* note 96, at 208-09; REHNQUIST, *supra* note 41, at 65-66.

98. *Ex parte Vallandigham*, 68 U.S. 243, 244 (1864).

99. *Id.*; *see* Curtis, *supra* note 92, at 121.

100. *Vallandigham*, 68 U.S. at 246.

101. Copperheads were Northern Democrats who sided with the South and opposed the Civil War. Republicans dubbed such war opponents Copperheads because of the copper liberty-head coins they wore as badges. 1 ENCYCLOPEDIA OF THE AMERICAN CIVIL WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY 498-99 (David S. Heidler & Jeanne T. Heidler eds., 2000). The term Copperhead was "borrowed from the poisonous snake of the same name that lies in hiding and strikes without warning. However, "Copperheads' regarded themselves as lovers of liberty, and some of them wore a lapel pin with the head of the Goddess of Liberty cut out of the large copper penny minted by the Federal treasury." FRANK J. WILLIAMS, ABRAHAM LINCOLN AND CIVIL LIBERTIES IN WARTIME, HERITAGE LECTURES 5, n.18 (May 5, 2004), *available at* http://www.heritage.org/Research/lecture/abraham-lincoln-and-civil-liberties-in-wartime.

102. THE TRIAL OF HON. CLEMENT L. VALLANDIGHAM BY A MILITARY COMMISSION AND THE PROCEEDINGS UNDER HIS APPLICATION FOR A WRIT OF HABEAS CORPUS IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO 33 (Cincinnati, Rickey & Carroll 1863).

103. *Id.* at 37-39, 272.

proceedings.[104] Although it declined to take up Vallandigham's case, the Court offered some perspective on its view of the merits of Vallandigham's case. The Court suggested that the Lieber Code was dispositive of the matter and that the general who arrested Vallandigham had acted in conformity with the Code.[105] In so suggesting, the Court noted the Lieber Code's recognition that military commission jurisdiction was "applicable, not only to war with foreign nations, but [also] to rebellion."[106]

Not surprisingly, the trial of Vallandigham by a military tribunal subjected Lincoln to yet more criticism. His critics bemoaned his decision, deeming it "a palpable violation of the ... Constitution."[107] Lincoln insisted, however, that civilians captured away from the battlefield could lawfully be tried by a military tribunal because the whole country, in his opinion, was a war zone.[108] Lincoln further defended his suspension of habeas corpus:

> If I be wrong on this question of constitutional power, my error lies in believing that certain proceedings are constitutional when, in cases of rebellion or Invasion, the public Safety requires them ... The constitution itself makes the distinction; and I can no more be persuaded that the government can constitutionally take no strong measure in time of rebellion, because it can be shown that the same could not be lawfully taken in time of peace, than I can be persuaded that a particular drug is not good medicine for a sick man, because it can be shown to not be good food for a well one.[109]

President Lincoln, concerned about the harshness of Vallandigham's punishment and the potential criticism over Vallandigham's arrest, detention, and trial by military tribunal, commuted his sentence to banishment to the Confederacy.[110]

In 1866, the war having ended, the Supreme Court was called upon to consider the legality of Lincoln's suspension of habeas corpus and his use of military tribunals.[111] The Supreme Court, upon which Taney no longer sat, proceeded to conclude, as Taney had in *Merryman*, that the President could not

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104. *Vallandigham*, 68 U.S. at 251.

105. *Id.* at 249.

106. *Id.*

107. *See* Annotation to Lincoln's Letter to Matthew Birch and Others, *reprinted in* 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 300 (Roy P. Basler ed., Rutgers Univ. Press 1953).

108. JAMES M. MCPHERSON, THIS MIGHTY SCOURGE: PERSPECTIVES ON THE CIVIL WAR 217 (2007) (noting that Lincoln's oath imposed a larger duty that "overrode his obligation to heed a lesser specific provision in the Constitution").

109. Letter from Abraham Lincoln to Erastus Corning and Others (June 12, 1863), *reprinted in* 6 THE COLLECTED WORKS OF ABRAHAM LINCOLN 300 (Roy P. Basler ed., Rutgers Univ. Press 1953).

110. *See* Curtis, *supra* note 92, at 121. The Confederacy was not happy to see Vallandigham, who made his way to Winsor, Ontario, opposite Ohio, where he ran unsuccessfully for Governor of Ohio.

111. *Ex parte Milligan*, 71 U.S. 2, 108-09 (1866).

unilaterally suspend the writ of habeas corpus.[112] The Court also held that citizens captured off the battlefield could only be properly tried in a civilian court and not by a military tribunal.[113]

On October 5, 1864, Lambdin P. Milligan, a lawyer and Indiana citizen, was arrested by the military commander for that military district.[114] Although Milligan was not captured on the battlefield, he was tried by a military commission and sentenced to death even though the civilian courts were functioning in Indiana.[115] Before the sentence was carried out, Milligan petitioned the Circuit Court of the United States for the District of Indiana for a writ of habeas corpus.[116] The Circuit Court certified the question to the Supreme Court, which assumed jurisdiction and issued the writ.[117]

The Supreme Court reasoned that the suspension of habeas corpus was permissible, but that such a suspension did not apply to Milligan because he had not joined the Confederate forces and was captured away from the battlefield in an area where civilian courts were still operating.[118] According to the Court, Milligan was simply a person who was ideologically aligned with the Confederates and not an enemy combatant who should be tried by a military tribunal.[119] Therefore, Milligan could only be properly tried in a civilian court and not by a military tribunal.[120]

Milligan did make clear, however, that the right of American citizens to seek a writ of habeas corpus may be suspended during wartime so long as those citizens have joined enemy forces or have been captured on the battlefield. Indeed, without such a ruling, "the Union could not have fought the Civil War, because the courts would have ordered President Lincoln to release thousands of Confederate prisoners of war and spies."[121]

In total, during the Civil War, the Union Army conducted at least 4,271 trials of U.S. citizens by military commission and another 1,435 during the reconstruction period that followed.[122] Most of those tried by military commission were charged with guerilla activity, horse stealing, and bridge-burning.[123] The issue to be decided by those who presided over the military commission was not whether the prisoner was guilty or innocent, but rather, whether the prisoner was under the orders of a regularly organized military unit

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112. *Id.* at 139-40.
113. *Id.* at 121-22.
114. THE MILLIGAN CASE 64 (Samuel Klaus, ed., Gaunt, Inc. 1997).
115. *Milligan*, 71 U.S. at 107.
116. *Id.* at 107-09.
117. *Id.* at 110-11.
118. *Id.* at 127, 131.
119. *Id.* at 131.
120. *Id.*
121. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 146 (2006).
122. *Hamdan*, 2011 U.S. CMCR LEXIS 1, at *135-36.
123. MARK E. NEELY, JR., THE FATE OF LIBERTY 169 (1991).

at the time he committed the crime.[124] These military commission trials, unlike those today, lacked procedural safeguards and the guarantees of due process. Prisoners languished without trial by military commission or otherwise. The trials were described as lacking the appearance of impartiality and exhibiting vengeance;[125] and in the summer of 1863, the army developed a form of water torture that was widely used.[126]

Nevertheless, a presidential check on the military commission system was prominent in the Lincoln Administration. President Lincoln personally reviewed certain cases that came before the military commissions during the Civil War.[127] After the Sioux uprising in Minnesota that killed hundreds of white settlers in 1862, the military court had sentenced 303 Sioux to death.[128] These cases came before Lincoln to review as final judge.[129] Yet, despite great pressure to approve the verdicts, Lincoln ordered that the complete records of the trial be sent to him.[130] Working deliberately, Lincoln reviewed each case, one-by-one.[131] For a month, Lincoln carefully worked through the transcripts to sort out those who were guilty of serious crimes.[132] Ultimately, Lincoln commuted the sentences of 265 defendants, and only thirty-eight of the original 303 were executed.[133] Although Lincoln was criticized for this act of clemency, he responded, "I could not afford to hang men for votes."[134]

V. MILITARY COMMISSIONS TO TRY THE LINCOLN ASSASSINATION CONSPIRATORS

In the wake of President Lincoln's assassination and the attempted murder of Secretary of State William H. Seward, on May 1, 1865, President Andrew Johnson authorized the establishment of a military commission to try those accused of these crimes and of conspiring to assassinate other government officers.

President Johnson ordered nine military officers to serve on a commission, which became known as the Hunter Commission, to try those suspected of conspiring to assassinate President Lincoln.[135] Pursuant to the President's order, the tribunal convened eight days later to try David Herold, G. A. Atzerodt, Lewis

124. *Id.*
125. LOUIS FISHER, MILITARY TRIBUNALS: A SORRY HISTORY 5, *available at* http://www.soc.umn.edu/~samaha/cases/FisherSorryHistory.pdf.
126. NEELY, *supra* note 123, at 110.
127. DAVID HERBERT DONALD, LINCOLN 394 (1996).
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. DONALD, *supra* note 127.
133. *Id.*
134. *Id.* at 394-95.
135. ANTHONY S. PITCH, THEY HAVE KILLED PAPA DEAD!: THE ROAD TO FORD'S THEATRE, ABRAHAM LINCOLN'S MURDER, AND THE RAGE FOR VENGEANCE 313-14 (2008).

Payne, Mary Surratt, Michael O'Laughlin, Edward Spangler, Samuel Arnold, and Dr. Samuel A. Mudd. Each was charged with conspiring with intent to kill President Lincoln, Vice President Johnson, Secretary of State William H. Seward, and Gen. Ulysses S. Grant.

Joseph Holt, the Judge Advocate General of the Army, led the prosecution team. All of the alleged conspirators were represented by counsel before the commission and were afforded the right to call witnesses in their defense.

One commissioner, Major General C. B. Comstock, was unhappy at the first meeting on May 8, 1865. He was upset that the court was to meet in secret, and believed that the defendants should be tried in a civilian court. During the next day's session, he raised those issues.[136] Holt responded that the Attorney General had decided they had jurisdiction.[137] On the next morning, when Comstock appeared at the court, he, as well as another officer unhappy with the prospect of a military trial of civilians, received an order relieving both from their assignments.[138] Later that day, Stanton sent word through General Ulysses S. Grant that the action represented no reflection on the officers, but that there may have been a conflict as both men were members of Grant's staff, and the General, too, had been an object of the assassination.[139] The secret sessions only lasted until May 13, when, responding to pressure in the press, President Johnson ordered the trial opened to the public.[140]

The trial itself displayed little evidence of a presumption of innocence of the accused and strict impartiality on the part of the judges.[141] From the beginning, members of the military commission presumed the accused to be guilty. In their first appearance in court the accused were chained and their faces almost entirely covered with black linen masks.[142]

The military officers comprising the court displayed their prejudice on several occasions. When Confederate General Edward Johnson was called to testify, one officer on the commission moved that Johnson be "ejected from the court as an incompetent witness on account of his notorious infamy."[143] Because Johnson had been educated at West Point and then had resigned from the Army and borne arms against the United States, he appeared before the court with hands "red with the blood of his loyal countrymen."[144] The motion to oust him

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136. *Id.* at 315.
137. *Id.*
138. *Id.*
139. *Id.*
140. James H. Johnston, *Swift and Terrible: A Military Tribunal Rushed to Convict After Lincoln's Murder*, WASH. POST, Dec. 9, 2001, at F01.
141. Thomas R. Turner, *What Type of Trial? Civil Versus a Military Trial for the Lincoln Assassination Conspirators*, 4 J. ABRAHAM LINCOLN ASS'N 35, 37 (1982); VAUGHAN SHELTON, MASK FOR TREASON: THE LINCOLN MURDER TRIAL 60-61 (1965).
142. PITCH, *supra* note 135, at 314.
143. BENN PITMAN, THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 64 (2003).
144. *Id.*

was seconded, but before Johnson could be removed, Judge Advocate Joseph Holt intervened.[145] He advised the commission that the "rule of law" would not authorize the court to declare the ex-Confederate an incompetent witness, "however unworthy of credit he may be."[146] Holt was also obliged to intervene when a member of the court challenged the right of Maryland Senator Reverdy Johnson to appear as counsel for one of the defendants. After some debate the commission allowed a stunned Senator Johnson to represent his client.

Nevertheless, Holt presented testimony that had nothing to do with the charges against the defendants but would serve to influence adversely the judges and the public at large against the Confederacy and the defendants. Evidence was introduced that concerned plots by the Confederate Secret Service to stage raids from Canada on United States cities, the attempt to burn New York City, and the effort to spread disease throughout the Union Army by use of contaminated clothing.[147] Perhaps most unfair of all, the government introduced witnesses and evidence dealing with the starvation of federal Army prisoners at Libby, Belle Isle, and Andersonville prisons.[148] The chained and hooded prisoners accused of complicity in the murder of President Lincoln were somehow connected with these atrocities, if one could believe Holt. Over 350 witnesses testified in the conspirators' trial, a more generous number than many defendants would be afforded by civilian courts today.[149]

During the attorneys' closing statements, Reverdy Johnson challenged the right of the military to sit in judgment of the eight defendants.[150] The Constitution allowed the writ of habeas corpus to be suspended, but in no way permitted the suspension of other rights belonging to the accused. The Constitution and the laws determined which courts would try civilians. But the defendants in the Lincoln conspiracy trial were doomed. The Judge Advocates strongly influenced the decisions of the untrained military officers.

Using the printed transcript of the fifty-three day trial, Professor Joe George found that either the Judge Advocate or the Special Judge Advocate, John A. Bingham, raised objections to evidence introduced by the defense on thirty-four occasions.[151] In all instances the objections were sustained.[152] Defense attorneys raised objections fifteen times. They were overruled on thirteen occasions.[153]

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145. *Id.*
146. *Id.*
147. BEN PITMAN, compl., THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 46-62 (The Notable Trials Library 1989).
148. *Id.*
149. *See generally id.*
150. THE TRIAL OF THE ASSASSINS AND CONSPIRATORS AT WASHINGTON CITY, D.C., MAY AND JUNE 1865 FOR THE MURDER OF PRESIDENT ABRAHAM LINCOLN 158 (1865).
151. Pitman, *supra* note 147, at 42-62.
152. *Id.*
153. *Id.*

When the military officers, along with Holt and Bingham, deliberated the fate of the defendants behind closed doors at the end of the trial, the Judge Advocates were persevering and wanted all eight defendants hanged, according to General A.V. Kautz, one of the judges. The commission voted, however, to condemn four to the gallows and the remaining four to prison terms. The Judge Advocates were also quite surprised when five of the officers sitting on the commission signed a paper recommending clemency for Mary E. Surratt, one of the defendants sentenced to be hanged.

The next step was for the Judge Advocate General to take the commission's findings either to the Secretary of War, or, as in this instance, to the President himself, as capital offenses were involved. As customary, Judge Holt added a statement of his own to the court record, for the benefit of his superiors. In this case Holt made a slight, but significant change in this procedure.

In two military trials before July, 1865, Holt specifically included in his comments accompanying the records sent to the President, information that the commissions had found the defendants guilty, but had also recommended clemency. Holt's note to President Johnson dealing with the conviction of the Lincoln conspirators, however, urged the President to approve the findings of the court, saying nothing of the recommendation for clemency on behalf of Mrs. Surratt.[154] Holt wrote:

> Having been personally engaged in the conduct of the foregoing case, . . . I deem it unnecessary to enter . . . into an elaborate discussion of the immense mass of evidence submitted to the consideration of the court. After a trial continuing for fifty-three days, in which between three and four hundred witnesses were examined for the prosecution and defense, and in which the rights of the accused were watched and zealously guarded by seven able counsel of their own selection, the commission have arrived at the conclusions presented above . . ..
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> The opinion is entertained that the proceedings were regular, and that the findings of the commission were fully justified by the evidence. It is thought that the highest consideration of public justice, as well as the future security of the lives of the officers of the government, demand that the sentences based on these findings, should be carried into execution.[155]

Holt later insisted that he had included the clemency petition with the trial record when he delivered the documents to the President, while Johnson claimed that he never saw the petition. Whether or not Holt included the request for clemency, he should have informed the President of that fact in his covering

154. ELIZABETH STEGER TRINDAL, MARY SURRATT: AN AMERICAN TRAGEDY 203 (1996).
155. ROBERT WATSON WINSTON, ANDREW JOHNSON, PLEBEIAN AND PATRIOT 288-289 (1928).

statement, as he had done on previous occasions. His failure to do so was a serious dereliction of duty.

The trial resulted in convictions and four were sentenced to death by public hanging and four others received prison sentences. On the morning of the scheduled executions, lawyers for Mary Suratt, who was sentenced to death, sought and received a writ of habeas corpus from United States District Court Judge Andrew Wylie. However, that writ was almost immediately suspended by President Johnson. Following the instructions of the President, General Winfield Scott Hancock, accompanied by Attorney General James Speed, returned the writ and refused to surrender Mrs. Surratt. When Hancock refused to give up his prisoner, Judge Wylie declared himself powerless to take any further action. Subsequently, four of the conspirators - Herold, Atzerodt, Payne and Surratt - were executed on July 7, 1865.

Two months after the commissions were convened and after the executions of the conspirators, President Johnson asked Speed for a legal opinion on whether the persons charged could be tried before a military tribunal.[156] In response to President Johnson's request, Speed delivered to the President what was titled "Opinion on the Constitutional Power of the Military To Try and Execute the Assassins of the President." Setting the stage for his analysis, Attorney General Speed set forth the relevant facts:

> The President was assassinated at a theater in the city of Washington. At the time of the assassination a civil war as flagrant, the city of Washington was defended by fortifications regularly and constantly manned, the principal police of the city was by Federal soldiers, the public offices and property in the city were all guarded by soldiers, and the President's House and person were, or should have been, under the guard of soldiers. Martial law had been declared in the District of Columbia, but the civil courts were open and held their regular sessions, and transacted business as in times of peace.[157]

Against this backdrop, Attorney General Speed began his analysis by recognizing the importance of the question to which he was called upon to opine.[158] Speed acknowledged that the issue implicated the clash between citizens' constitutional guarantees and the security of the army and government during a time of war.[159] Nevertheless, Speed offered his opinion "that the conspirators not only may but ought to be tried by a military tribunal."[160] According to Speed,

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156. James Speed, *Legality of the Conspiracy Trial: Opinion of Attorney General Speed*, N.Y. TIMES, Aug. 13, 1865, at 3.

157. Opinion of the Constitutional Power of the Military to Try and Execute the Assassins of the President, 11 Op. Att'y Gen. 297 (1865).

158. *Id.*

159. *Id.*

160. *Id.*

> [a] military tribunal exists under and according to the Constitution in time of war. Congress may prescribe how all such tribunals are to be constituted, what shall be their jurisdiction, and mode of procedure. Should Congress fail to create such tribunals, then, under the Constitution, they must be constituted according to the laws and usages of civilized warfare. They may take cognizance of such offences as the laws of war permit; they must proceed according to the customary usages of such tribunals in time of war, and inflict such punishments as are sanctioned by the practice of civilized nations in time of war.[161]
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> . . .
>
> The legitimate use of the great power of war, or rather the prohibitions against the use of that power, increase or diminish as the necessity of the case demands. When a city is besieged and hard pressed, the commander may exert an authority over the non-combatants which he may not when no enemy is near. . . . [M]ilitary tribunals exist under and according to the laws and usages of war, in the interest of justice and mercy. They are established to save human life, and to prevent cruelty as far as possible. The commander of an army in time of war has the same power to organize military tribunals and execute their judgments that he has to set his squadrons in the field and fight battles. His authority in each case is from the laws and usages of war.[162]
>
> That the laws of war authorized commanders to create and establish military commissions, courts or tribunals, for the trial of offenders against the laws of war, whether they be active or secret participants in the hostilities, can not be denied. That the judgments of such tribunals may have been sometimes harsh, and sometimes even tyrannical, does not prove that they ought not to exist, nor does it prove that they are not constituted in the interest of justice and mercy.[163]

Speed also recognized what war would look like without the ability to convene military commissions:

> War in its mildest form is horrible; but take away from the contending armies the ability and right to organize what is now known as a Bureau of Military Justice, they would soon become monster savages, unrestrained by any and all ideas of law and justice. Surely no lover of mankind, no one that respects law and order, no one that has the instinct of justice, or that can be softened by mercy, would, in time of war, take away from the commanders the right to organize military tribunals of justice, and especially such tribunals for the protection of persons charged or suspected with being secret foes and participants in the hostilities.

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161. *Id.*
162. *Id.*
163. Opinion of the Constitutional Power of the Military to Try and Execute the Assassins of the President, 11 Op. Att'y Gen. 297 (1865).

> . . .
>
> The fact that the civil courts are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in time of war, from trying an offender against the laws of war than they have a right to interfere with and prevent a battle. A battle may be lawfully fought in the very view and presence of a court; so a spy, or bandit or other offender against the law of war, may be tried, and tried lawfully, when and where the civil courts are open and transacting the usual business.[164]

Thus, Speed concluded:

> [T]hat if the persons who are charged with the assassination of the President committed the deed as public enemies, as I believe they did, and whether they did or not is a question to be decided by the tribunal before which they are tried, they not only can, but ought to be tried before a military tribunal. If the persons charged have offended against the laws of war, it would be as palpably wrong of the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle.[165]

This was not a universally accepted opinion.[166] Secretary of the Navy, Gideon Welles, was of the opinion that Secretary of War Edwin M. Stanton had pressured Speed into this position. Welles wrote in his diary on May 9, 1865: "[T]he rash, impulsive, and arbitrary measures of Stanton are exceedingly repugnant to my notions, and I am pained to witness the acquiescence they receive."[167]

Former Attorney General Bates shared the view that Stanton was behind Speed's opinion. He wrote in his diary on May 25, 1865: "I am pained to be led to believe that my successor, Atty Genl. Speed, has been wheedled out of an opinion, to the effect that such a trial is lawful. If he be, in the lowest degree, qualified for his office, he must know better . . . ."[168] Bates then summed up the problem with a remarkable prophesy: "[I]f the offenders be done to death by that tribunal, however truly guilty, they will pass for martyrs with half the world."[169]

Dr. Samuel Mudd was among those sentenced to prison for his involvement with the conspiracy to assassinate the President. Dr. Mudd was convicted by the

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164. *Id.*
165. *Id.*
166. *Compare* Opinion of the Constitutional Power of the Military to Try and Execute the Assassins of the President, 11 Op. Att'y Gen. 297 (1865) *with* 2 GIDEON WELLES, DIARY OF GIDEON WELLES, SECRETARY OF THE NAVY UNDER LINCOLN AND JOHNSON 304 (1911).
167. *See* WELLES, *supra* note 166, at 304.
168. HOWARD K. BEALE, THE DIARY OF EDWARD BATES 1859-1866 483 (1933).
169. *Id.*

commission and sentenced to life in prison for providing shelter and medical assistance to conspirators John Wilkes Booth and David Herold on the night of the President's assassination.[170] Dr. Mudd also was convicted of having supplied the conspirators with horses the following day so that they could continue in their escape.[171] During his trial, Dr. Mudd argued that the Hunter Commission lacked jurisdiction and that his trial before the Commission violated his constitutional right to a trial by jury in a civilian court with all its protections.[172] The Commission itself, Attorney General James Speed, and Judge Thomas Jefferson Boynton of the United States District Court for the Southern District of Florida all rejected this argument.[173]

President Andrew Johnson fully and unconditionally pardoned Dr. Mudd for his service in battling yellow fever that had spread in the prison.[174] More than a century later, Mudd's great-grandson, Dr. Richard D. Mudd, filed an application with the Army Board for Correction of Military Records ("ABCMR"), which sought a declaration that his great-grandfather was innocent and that the military commission lacked jurisdiction to try a Maryland citizen when there were fully functioning civil courts in Maryland that were competent to have tried Dr. Mudd.[175] After a hearing, the ABCMR found that it was not authorized to consider the actual innocence or guilt of Dr. Mudd, but it unanimously concluded that the Commission did not have jurisdiction to try him and recommended that his conviction therefore be set aside.[176] Nonetheless, the United States District Court for the District of Columbia dismissed the great-grandson's appeal, finding 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 at the time of the trial."[177]

VI. MILITARY COMMISSIONS DURING WORLD WAR II.

Almost a century later, President Franklin D. Roosevelt, like Lincoln, faced the momentous decision of to how to try those detailed at the height of World War II.[178] In June 1942, several months after Congress had declared that a state of war existed between Germany and the United States, eight German saboteurs, acting for the German Reich, a belligerent enemy nation, boarded two submarines in occupied France and traveled to Long Island, New York, and

170. Mudd v. Caldera, 134 F. Supp. 2d 138, 140 (D.D.C. 2001).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.*
175. *Mudd*, 134 F.Supp. 2d at 140.
176. Mudd v. Caldera, 26 F.Supp. 2d 113, 117 (D.D.C. 1998).
177. *Mudd*, 134 F.Supp. 2d at 146.
178. LOUIS FISHER, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 37-44 (2005).

Ponte Vedra Beach, Florida, respectively.[179] The German-born saboteurs were engaged in a plot to destroy war facilities in the United States.[180] The President declared that:

> [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.[181]

Roosevelt justified his proclamation by specifying that:

> [T]he safety of the United States demands that all enemies who have entered upon the territory of the United States as part of an invasion or predatory incursion, or who have entered in order to commit sabotage, espionage or other hostile or warlike acts, should be promptly tried in accordance with the law of war.[182]

Roosevelt also made clear that he was issuing the order by virtue of the authority vested in him, as President of the United States and Commander in Chief of the Army and Navy, through the United States Constitution and the statutes of the United States.[183]

That same day, Roosevelt issued a military order appointing seven generals to sit on the tribunal and two colonels to serve as defense counsel. He also directed the Attorney General and a judge advocate to conduct the prosecution.[184] Roosevelt's order gave the commission the power to "make such rules for the conduct of the proceeding, consistent with the powers of military commissions under Articles of War, as it shall deem necessary for a full and fair trial of the matters before it."[185] Roosevelt further directed that "evidence shall be admitted as would, in the opinion of the President of the Commission, have probative value to a reasonable man."[186] At least two-thirds of the members of the commission present were needed for a conviction or sentence.[187] Finally, unlike the ordinary appeals process that would follow a conviction in the civilian

179. *Ex parte Quirin*, 317 U.S. 1, 21 (1942).
180. *Id.* at 20-21.
181. 7 Fed. Reg. 5101 (July 2, 1942).
182. *Id.*
183. *Id.*
184. 7 Fed. Reg. 5103 (July 7, 1942).
185. *Id.*
186. *Id.*
187. *Id.*

court system, the President's order directed the commission to transmit its judgment to the President for his action thereon.[188]

Upon their capture, the eight saboteurs were tried by a secret military tribunal, which resulted in a guilty verdict and a death sentence for each.[189] The prisoners petitioned the United States District Court for the District of Columbia for a writ of habeas corpus, which was denied.[190] The prisoners then petitioned the United States Supreme Court for certiorari to review the district court's decision and additionally petitioned the Supreme Court for leave to file their petitions for habeas corpus in that Court as well.[191] The Supreme Court had not yet issued a decision when the prisoners also petitioned the United States Court of Appeals for the District of Columbia Circuit.[192] Before a decision was issued by the Court of Appeals, the prisoners again petitioned the Supreme Court for certiorari, which the Court granted.[193]

The Supreme Court considered whether the detention of the petitioners by the United States was consistent with the laws and Constitution of the United States.[194] The Court explained that "military tribunals ... are not courts in the sense of the Judiciary Article [of the Constitution]."[195] Instead, the Court noted that such Article I tribunals are administrative bodies within the military that are utilized to determine the guilt or innocence of declared enemies and to subsequently pass judgment.[196]

Upholding the jurisdiction of the military tribunals to hear the cases of the German saboteurs, the Court emphatically stated:

> The law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by 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.[197]

In so ruling, the Court went to great lengths to distinguish its holding from that rendered years before in *Milligan*.[198] The Supreme Court emphasized that the holding in *Milligan* should be limited to the facts of that case.[199] As the *Quirin*

188. *Id.*
189. *Quirin*, 317 U.S. at 22; FISHER, *supra* note 178, at 43-44.
190. *Quirin*, 317 U.S. at 18.
191. *Id.*
192. *Id.* at 19-20.
193. *Id.*
194. *Id.* at 24-25.
195. *Id.* at 39.
196. *Quirin*, 317 U.S. at 39-40.
197. *Id.* at 30-31.
198. *Id.* at 29.
199. *Id.* at 45.

Court noted, Milligan was a citizen of Indiana and had never been a resident of any state involved in the rebellion nor had he been an enemy combatant who would qualify as a prisoner of war.[200] *Quirin*, however, involved "enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform - an offense against the law of war."[201] Those critical distinctions allowed the Court to rule in the government's favor.[202]

Having resolved in *Quirin* the appropriateness of trying unlawful enemy combatants by military tribunal within the United States, the Court next considered the related question of whether alien prisoners seized overseas during wartime had the right to petition the courts of the United States for a writ of habeas corpus.[203]

The case of *Johnson v. Eisentrager*[204] involved one Ludwig Eisentrager, who had operated a German intelligence office in Shanghai and, with his cohorts, had contracted to aid the Japanese during World War II in return for money and food.[205] Specifically the spies agreed, inter alia, to intercept American naval communications and transmit them to the Japanese forces.[206]

In 1946, the United States military captured Eisentrager and twenty-six other foreign intelligence officers in China.[207] The officers were tried and convicted by a United States military commission.[208] They were then imprisoned in a German prison then controlled by the United States Army.[209]

Seeking to challenge their detention, Eisentrager and twenty other German nationals petitioned the United States District Court for the District of Columbia for a writ of habeas corpus.[210] The district court dismissed the petition for lack of jurisdiction, but the Court of Appeals subsequently reversed, reinstating the petition for habeas corpus and remanding the case for further proceedings.[211]

When the case finally reached the United States Supreme Court on the government's petition for certiorari, the high court agreed with the district court and held that the petitioners had no right to petition for a writ of habeas corpus.[212] Finding the location of the prisoners' capture, conviction, and detention dispositive, the Supreme Court stated that "these prisoners at no

200. *Id.*
201. *Id.* at 46.
202. *Quirin*, 317 U.S. at 48.
203. Johnson v. Eisentrager, 339 U.S. 763, 765 (1950).
204. *Id.*
205. LEONARD CUTLER, THE RULE OF LAW AND THE LAW OF WAR: MILITARY COMMISSIONS AND ENEMY COMBATANTS POST 9/11 4, 37 (2005).
206. *Id.*
207. *Id.*
208. *Id.*
209. *Id.*
210. *Johnson*, 339 U.S. at 765.
211. Eisentrager v. Forrestal, 174 F.2d 961, 968 (D.C. Cir. 1949).
212. *Johnson*, 339 U.S. at 791.

relevant time were within any territory over which the United States is sovereign, and the scenes of their offense, their capture, their trial and their punishment were all beyond the territorial jurisdiction of any court of the United States."[213]

VII. MILITARY COMMISSIONS DURING THE WAR ON TERROR

In 2001, issues of the habeas corpus rights of enemy combatants, markedly similar to those that arose during the Lincoln and Roosevelt administrations appeared once again on the Supreme Court's docket. The events of September 11, 2001, were inhumane and unanticipated by most Americans and individuals throughout the world. On that autumn morning, nineteen Islamic terrorists hijacked four commercial jet airliners, intentionally flying two of the planes into the twin towers of New York City's World Trade Center and one into the Pentagon in Arlington, Virginia.[214] The fourth plane, believed to have been aimed at the White House in Washington, D.C., crashed in Shanksville, Pennsylvania, when its passengers attempted to retake control of the plane to avert further mass murder.[215] In one morning, almost 3,000 innocent civilians perished on American soil as victims of horrific depredations committed by nihilistic barbarians.[216]

President Bush, aware of his solemn duty to take action to defend and protect the United States, responded.[217] As a nation, we responded with a War on Terror in the hope that it would serve to secure our borders.[218]

The President's critics wasted no time in declaring that September 11th did not constitute the commencement of a war.[219] They argued that President Bush

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213. *Id.* at 778.

214. *See* THE 9/11 COMMISSION REPORT: FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 1-4, 7, 8, 10 (2004).

215. *Id.* at 14.

216. *See* September 11, 2001 Victim's List, *available at* http://www.foxnews.com/story/0,2933,62151,00.html (last visited Oct. 30, 2011).

217. George W. Bush, Radio Address (Sept. 15, 2001), *available at* http://georgewbush-whitehouse.archives.gov/news/release/2001/09/20010915.html ("We are planning a broad and sustained campaign to secure our country and eradicate the evil of terrorism."); *see also* George W. Bush, Radio Address (Dec. 17, 2005), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2005/12/20051217.html ("The American people expect me to do everything in my power under our laws and Constitution to protect them and their civil liberties. And that is exactly what I will continue to do, so long as I'm the President of the United States.").

218. George W. Bush, Address to a Joint Session of Congress and the American People (Sept. 20, 2001), *available at* http://www.historyplace.com/speeches/gw-bush-9-11.htm.

219. *See, e.g.*, *Bush Says it's Time for Action*, CNN, *available at* http://archives.cnn.com/2001/US/11/06/ret.bush.coalition/index.html (last visited Oct. 30, 2011). This criticism continues today. See, e.g., BRUCE ACKERMAN, BEFORE THE NEXT ATTACK: PRESERVING CIVIL LIBERTIES IN AN AGE OF TERRORISM 13 (2006) (describing the War on Terror as a "preposterous expression."); Samantha Power, *Our War on Terror,* N.Y. TIMES, July 29, 2007, at § 7 (Book Review), at § 8 (describing the War on Terror as metaphorical).

generalized the War on Terror, likening it to the so-called war on drugs, war on poverty, gang wars, or war of the sexes.[220] Nevertheless, the President, the Congress, and the terrorists made it abundantly clear that we were a nation at war.[221]

Three days after the attacks that compromised our nation's security, President Bush declared a national emergency,[222] to which Congress responded by enacting an Authorization for Use of Military Force (AUMF) on September 18, 2001.[223] The AUMF empowered the President to take action and prevent acts of international terrorism against the United States.[224] It further authorized the President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks."[225] Congress's authorization was, in all respects, a ratification of the President's actions as Commander-in-Chief and checkmated any potential criticism he might have otherwise been subjected to for acting unilaterally.[226] Further confirming the existence of a state of war, approximately two months later the President issued an order permitting the establishment of military commissions to detain and prosecute suspected terrorists.[227] The effect of that order was to convene the first United States military commission in over fifty years.[228] President Bush emphasized that trial by military commission was necessary to protect the United States and its citizens "in light of grave acts of terrorism and threats of terrorism."[229] His order made it clear that it was not practical for such tribunals to apply without modifying the principles of law and the rules of evidence generally recognized in federal criminal trials.

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220. *See, e.g.*, Todd Richissin, *"War on terror" difficult to define*, BALTIMORE SUN, Sept. 2, 2004, *available at* http://community.seattletimes.nwsource.com/archive/?date=20040902&slug=russanal02 (The War on Terror has been deemed analogous to the War on Drugs because the "enemy" is unascertainable and terrorism, like drugs, will not likely end as a result of a war.).

221. JOHN YOO, WAR BY OTHER MEANS: AN INSIDER'S ACCOUNT OF THE WAR ON TERROR 11 (2006).

222. George W. Bush, Declaration of National Emergency by Reason of Certain Terrorist Attacks (Sept. 14, 2001), *available at* http://www.law.cornell.edu/uscode50/usc_sec_50_00001621----000-notes.html.

223. Authorization for Use of Military Force, S.J. Res. 23, 107th Cong. (2001) (enacted).

224. *Id.*

225. *Id.*

226. CUTLER, *supra* note 205, at 23.

227. Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001). Military tribunals are constitutionally and statutorily authorized special courts composed of military personnel and/or civilians who are commissioned to sit as both trier of fact and of the law. In such proceedings, any evidence deemed to have probative value will be admitted.

228. *See* Press Release, U.S. Department of Defense, Office of the Assistant Secretary of Defense, No. 820-04, First Military Commission convened at Guantanamo Bay, Cuba (Aug. 24, 2001), *available at* http://www.defenselink.mil/releases/release.aspx?releaseid=7667.

229. Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 16, 2001).

The President's order establishing military commissions was suspect in the eyes of some legal commentators.[230] The American Bar Association (ABA) convened a task force on terrorism and the law, which eventually issued a report and recommendation on military commissions.[231] Although the ABA conceded that the President's order did not expressly suspend the writ of habeas corpus, the ABA, fearing that the order might be interpreted as having done so, took the position that even if the President desired to suspend the writ "it is most unlikely that [he] could."[232] In its recommendation, the ABA urged the government to afford habeas corpus relief in the federal courts for those tried by military commission in the United States.[233]

A. The Supreme Court Trilogy: Padilla, Rasul, and Hamdi

Against this backdrop, detainees held captive by the United States in Guantanamo Bay, Cuba, petitioned the federal courts for habeas corpus relief. June 2004 marked a turning point for those detained in Guantanamo as the United States Supreme Court, in a trilogy of cases, spelled out what was required of the United States government in its efforts to properly achieve the necessary constitutional balance between civil liberties and national security.

1. Rumsfeld v. Padilla[234]

On May 8, 2002, acting pursuant to a previously issued arrest warrant, federal law enforcement agents arrested Jose Padilla, a United States citizen, at O'Hare International Airport in Chicago.[235] Padilla was considered to be a material witness with respect to the September 11, 2001 attacks, and he was also believed to have been engaged in plotting to plant a radiological dispersal device in the United States.[236] Within one month of his arrest, Padilla was designated an enemy combatant who posed a grave threat to national security.[237] Accordingly, he was placed in the custody of the Department of Defense, and he was held in a United States Navy brig in Charleston, South Carolina.[238] Padilla

230. *See* Alberto R. Gonzales, Op-Ed., *Martial Justice, Full and Fair*, N.Y. TIMES, Nov. 30, 2001, at A27 (noting that "some in Congress and some civil libertarians remain skeptical of the military commissions").

231. American Bar Association, Task Force on Terrorism and the Law, *Report and Recommendations on Military Commissions*, Jan. 4, 2002, at 1, *available at* http://www.abanet.org/leadership/military.pdf.

232. *Id.* at 11.

233. *Id.* at 17.

234. Rumsfeld v. Padilla, 542 U.S. 426 (2004).

235. *Id.* at 430-31.

236. *See* William Glaberson, *Judges Question Detention of American*, N.Y. TIMES, Nov. 18, 2003, at A19.

237. *Rumsfeld,* 542 U.S. at 430*; see also* James Risen & Philip Shenon, *Traces of Terror: The Investigation; U.S. Says It Halted Qaeda Plot to Use Radioactive Bomb*, N.Y. TIMES, June 11, 2002, at A1.

238. *Rumsfeld,* 542 U.S. at 432.

immediately petitioned the United States District Court for the Southern District of New York for habeas corpus relief pursuant to 28 U.S.C. § 2241.[239]

In denying Padilla's petition, the district court held that the President of the United States was authorized to designate and detain an American citizen captured on American soil as an "enemy combatant."[240] Therefore, Padilla could only challenge a subsequent conviction by way of appeal.[241]

Dissatisfied, Padilla appealed to the United States Court of Appeals for the Second Circuit, which reversed the district court's ruling.[242] The Second Circuit ruled that the executive branch could not detain American citizens in military detention facilities without congressional authorization.[243] Ultimately, the court remanded the case to the district court with instructions to grant the writ of habeas corpus and directed the Secretary of Defense to release Padilla within thirty days unless either criminal charges were brought against him or he was deemed a material witness in connection with grand jury proceedings.[244] The case reached the United States Supreme Court on the government's appeal.[245]

In a 5-4 decision, the Court ruled on jurisdictional grounds and held that Padilla's habeas corpus petition had been improperly filed.[246] Because Padilla was held at the Navy brig in Charleston, South Carolina, the habeas petition was faulty because it should have been filed in the United States District Court for the District of South Carolina.[247] Moreover, the petition should have named the Navy facility's commander as the defendant, not the Secretary of Defense.[248] Accordingly, the Court reversed the Second Circuit's decision and remanded the case so that it could be dismissed without prejudice.[249]

Padilla promptly filed a new petition for a writ of habeas corpus, this time appropriately invoking the jurisdiction of the United States District Court for the District of South Carolina.[250] Agreeing with the petitioner, the district court ruled that the President lacked the authority to detain Padilla and his detention was therefore in violation of the Constitution.[251] The district court ordered that the government either bring federal criminal charges against Padilla or release

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239. *Id.*
240. Padilla v. Bush, 233 F. Supp. 2d 564, 569 (S.D.N.Y. 2002).
241. *See* Padilla v. Rumsfeld, 352 F.3d 695 (2d Cir. 2003).
242. *Id.* at 724.
243. *Id.*
244. *Id.*
245. *Rumsfeld,* 542 U.S. at 434.
246. *Id*. at 451.
247. *Id.*
248. *Id.* at 442. The Court so ruled because the facility commander was Padilla's immediate custodian. Secretary Rumsfeld, therefore, was improperly named as a defendant in the original filing.
249. *Id.* at 451.
250. Padilla v. Hanft, 423 F.3d 386, 390 (4th Cir. 2005).
251. *Id.*

him.[252] However, when the case reached the United States Court of Appeals for the Fourth Circuit on the government's appeal, that court reversed the district court and held that the AUMF authorized Padilla's detention without prosecution for the duration of hostilities.[253] Padilla then petitioned the Supreme Court for a writ of certiorari.[254] While this petition was pending, however, the government indicted Padilla[255] and in late 2005 the Bush administration filed a motion in the Fourth Circuit seeking the court's approval of Padilla's transfer from military custody in Charleston to a federal detention center in Miami, Florida.[256] Concerned that, if the appellate court were to approve the transfer, the Supreme Court's consideration of Padilla's pending petition for certiorari would be affected, the Fourth Circuit deferred consideration of the issue and denied the request. The court concluded that the Supreme Court ought to decide the case.[257] Dissatisfied with the Fourth Circuit's ruling, the Bush administration petitioned the Supreme Court for the same authorization.[258]

On January 4, 2006, the Supreme Court ordered Padilla's transfer from Charleston to Miami, this time to face criminal conspiracy charges in civilian court.[259] After slightly more than a day of deliberations, on August 16, 2007, a federal jury found Padilla guilty of terrorism conspiracy charges.[260] Although Padilla was ultimately sentenced to seventeen years in prison, a three-judge panel of the United States Court of Appeals for the Eleventh Circuit ruled that

252. *Id.*
253. *Id.* at 391, 397.
254. *See* Padilla v. Hanft, 547 U.S. 1062 (2006).
255. *See* Hanft v. Padilla, 546 U.S. 1084 (2006).
256. Hanft v. Padilla, 432 F.3d 582, 583 (4th Cir. 2005). The government's motion was made pursuant to Supreme Court Rule 36, which authorizes the transfer of a prisoner in a habeas corpus proceeding only upon the authorization of the court or judge who entered the decision under review.
257. *Id.* at 583-84.
258. Hanft v. Padilla, 126 S. Ct. 978 (2006) (mem.).
259. *Id.*; *see also* Terry Aguayo, *Padilla Pleads Not Guilty; Bail is Denied*, N.Y. TIMES, Jan. 13, 2006, at A14.
260. Abby Goodnough & Scott Shane, *Padilla is Guilty on All Charges in Terror Trial*, N.Y. TIMES, Aug. 17, 2007, at A1. Some commentators suspect that critics of the Military Commission system will point to the Padilla verdict in support of their position that the civilian criminal justice system is suitable to try detainees during the War on Terror. However, as the editorial staff of the Wall Street Journal was quick to note, the Padilla verdict is "not a model for the future handling of enemy combatants." Editorial, *The Padilla Verdict*, WALL ST. J., Aug. 17, 2007, at A12. As discussed further infra, it would be unrealistic to try alien enemy combatants in the civilian criminal justice system. *See infra* Part VI.A. While it is easy to require law enforcement agents to afford protections required of our criminal justice system such as Miranda warnings when arresting citizens in a local airport, for example it would be wholly unrealistic to expect that such protections could be afforded to alien enemy combatants arrested in a desert in the Middle East. *See The Padilla Verdict*, *supra*. Failing to afford such protections would result in defendants tried in the civilian criminal justice system being set free. *See also id.*

the sentence was too lenient and sent the case back for a new sentencing hearing.[261]

2. Rasul v. Bush

In a decision rendered the same day as the Padilla decision, the Supreme Court was called upon to answer a single question: "whether the habeas corpus statute[262] confers a right to judicial review of the legality of Executive detention of aliens [at Guantanamo]."[263] In contrast to the *Padilla* case, the Supreme Court reached the merits of the case and answered the question in the affirmative.[264]

Under American law, detained individuals seeking habeas corpus relief must first invoke the court's jurisdiction by establishing either they are citizens of the United States or the Court has jurisdiction over such a petition.[265] Because the detainees in *Rasul v. Bush* were not, in fact, citizens, the issue was narrowed to whether there was federal court jurisdiction over the Guantanamo Bay facility.[266]

Relying on *Johnson v. Eisentrager*,[267] the United States District Court for the District of Columbia ruled that no court in the United States has jurisdiction to hear habeas petitions filed by aliens detained outside the United States.[268] On appeal to the United States Court of Appeals for the District of Columbia Circuit, the district court's ruling was affirmed, with the appellate court also relying on *Eisentrager*.[269]

When the case reached the United States Supreme Court, the government again urged that *Eisentrager* controlled.[270] As further support for its position, the government cited the treaty between the United States and Cuba regarding Guantanamo Bay.[271] Pointing to that portion of the treaty specifying that the United States maintains "complete jurisdiction" while Cuba has "ultimate sovereignty,"[272] the government argued that habeas corpus would not be available because no federal court would have jurisdiction over such a

261. United States v. Joyyousi, No. 08-10494, 2011 U.S. App. LEXIS 19215 (11th Cir. Sept. 19, 2011).
262. 28 U.S.C. §§ 2241(a), (c)(3) (2000).
263. Rasul v. Bush, 542 U.S. 466, 475 (2004).
264. *Id.* at 484.
265. *Id.* at 475.
266. *Id.*
267. *Johnson*, 339 U.S. at 763.
268. Rasul v. Bush, 215 F. Supp. 2d 55, 66 (D.D.C. 2002).
269. Al Odah v. United States, 321 F.3d 1134, 1145 (D.C. Cir. 2003).
270. *Rasul,* 542 U.S. at 475.
271. Brief for the Respondents in Opposition at 3-4, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03-334).
272. *See* Agreement Between the United States and Cuba for the Lease of Lands for Coaling and Naval stations, Feb. 23, 1903, *available at* http://avalon.law.yale.edu/20th_century/dip_cuba002.asp.

petition.[273] For their part, however, the detainees pointed to the government's concession that, if the prisoners were being held in the United States, the federal courts would be open to them.[274] According to the detainees, there was "no persuasive reason why an area subject to the complete, exclusive, and indefinite jurisdiction and control of the United States, where this country alone has wielded power for more than a century, should be treated the same as occupied enemy territory, temporarily controlled as an incident of wartime operations."[275]

In the Court's 6-3 decision, the majority quickly rejected the government's contentions, noting the difference between those detained in Guantanamo and the *Eisentrager* detainees.[276] The Court explained:

> [The detainees in *Rasul*] are not nationals of countries at war with the United States, and they deny that they have engaged in or plotted acts of aggression against the United States; they have never been afforded access to any tribunal, much less charged with or convicted of wrongdoing; and for more than two years they have been imprisoned in territory over which the United States exercises exclusive jurisdiction and control.[277]

Writing for the majority, Justice Stevens opined that a detainee need not be within the territorial jurisdiction of a district court for the court to have jurisdiction pursuant to the habeas statute. Citing *Milligan* and *Quirin*, the Court noted that federal courts have, in fact, reviewed applications for habeas relief during wartime.[278] The Court recalled that in *Milligan* it entertained the habeas petition of an American who plotted to attack military installations during the Civil War, and in *Quirin*, the petition of self-proclaimed enemy combatants who were convicted of war crimes and detained in the United States during World War II.[279]

Holding that the district court did, in fact, have jurisdiction over such challenges made by detainees with respect to their indefinite detention in a facility under the control of the United States,[280] the Supreme Court remanded the matter to the district court.[281]

In a vehement dissent, in which Chief Justice Rehnquist and Justice Thomas joined, Justice Antonin Scalia described the majority's opinion as "a wrenching

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273. Brief for the Respondents in Opposition at 15-16, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03-334).

274. Brief of Petitioners at 41, Rasul v. Bush, 542 U.S. 466 (2004) (No. 03-334).

275. *Id.* at 41-42.

276. *Rasul,* 542 U.S. at 476 (Justice Kennedy concurred in the judgment but not in Justice Stevens' opinion).

277. *Id.*

278. *Id.* at 474-75.

279. *Id.*

280. *Id.* at 483.

281. *Id.* at 485.

departure from precedent."[282] According to Justice Scalia, the majority impliedly overruled *Eisentrager* and ignored the plain language of the habeas statute, which requires that at least one federal district court have territorial jurisdiction over detainees.[283] Because Guantanamo detainees are not located within the territorial jurisdiction of any federal district court, Justice Scalia concluded that jurisdiction pursuant to the habeas statute was improper.[284]

3. Hamdi v. Rumsfeld

A third case heard by the Supreme Court in April of 2004 involved Yaser Esam Hamdi, an American citizen captured on the battlefield in Afghanistan in 2001.[285] Because Hamdi was captured overseas in a combat zone, the case presented a far different issue from that in *Padilla*,[286] and his status as a United States citizen distinguished the issues in his case from those before the Court in *Rasul*.[287]

Although Hamdi was born in Louisiana, he moved with his family when he was a young child to Saudi Arabia.[288] He eventually affiliated with the Taliban and was captured when his unit surrendered to Northern Alliance forces during a battle in Afghanistan.[289]

After Hamdi's capture, he was detained in Afghanistan and later transferred to the United States Naval Base at Guantanamo Bay, where he remained for four months.[290] Upon learning that Hamdi was an American citizen, the government transferred him to a Navy brig in Norfolk, Virginia and then to a similar brig in Charleston, South Carolina.[291] The government designated him an "illegal enemy combatant" on the basis of its belief that he had been aiding the Taliban in combat against American forces in Afghanistan.[292] Hamdi's detention prompted his father to petition the United States District Court for the Eastern District of Virginia for a writ of habeas corpus.[293]

Before the district court, Hamdi argued that, as an American citizen, he was entitled to the full panoply of constitutional protections, including the right to

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282. *Rasul,* 542 U.S. at 505 (Scalia, J., dissenting).
283. *Id.* at 488-506.
284. *Id.* at 505.
285. Hamdi v. Rumsfeld, 542 U.S. 507, 510 (2004).
286. *See* Hamdi v. Rumsfeld, 337 F.3d 335, 344 (4th Cir. 2003) (Wilkinson, J., concurring) ("To compare this battlefield capture to the domestic arrest in Padilla v. Bush is to compare apples and oranges.").
287. *Hamdi,* 542 U.S. at 577 (Scalia, J., dissenting).
288. *Hamdi,* 542 U.S. at 510.
289. *Id.*
290. *Id.*
291. *Id.*
292. *Id.* at 510-11.
293. *Id.* at 511.

petition for a writ of habeas corpus.[294] The United States government, not convinced, moved to dismiss Hamdi's petition.[295] In support of its motion, the government attached the affidavit of Michael Mobbs, Special Advisor to the Under Secretary of Defense for Policy.[296] Mobbs attested to the fact that Hamdi had been captured in Afghanistan during armed hostilities and that a series of American military screening procedures had determined that he met the criteria for an unlawful enemy combatant.[297]

However informative the Mobbs affidavit might have been, the district court believed that it fell short of containing enough information to justify Hamdi's detention.[298] Not surprisingly, the government sought interlocutory review of the district court's ruling in the United States Court of Appeals for the Fourth Circuit.[299] When the case reached that court, the panel expressly indicated that deference, in the conduct of war, should be afforded to the President.[300] It stated: "The judiciary is not at liberty to eviscerate detention interests directly derived from the war powers of Articles I and II."[301] The court upheld the President's authority to detain a United States citizen captured on the battlefield and to designate such an individual an unlawful enemy combatant.[302]

The case reached the United States Supreme Court[303] and, in stark contrast to the Fourth Circuit's opinion, eight of the nine justices[304] rejected the government's position that great deference should be afforded to presidential decisions regarding national security.[305] Writing for a plurality,[306] Justice Sandra Day O'Connor explained that "[w]e have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the nation's citizens."[307]

The plurality decision in *Hamdi* is illustrative of the concept of separation of powers that is so deeply rooted in the American system of government. Most notable is the judiciary's ability to review executive branch actions that allegedly infringe upon a citizen's constitutional rights. According to the Court, such judicial review is available, even in times of national emergency. The Court's

294. Petition for Writ of Habeas Corpus, at 6, Hamdi v. Rumsfeld, No. 2:02cv439 (E.D. Va. 2002), *available at* http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/hamdi/hamdirums61102pet.pdf.
295. Hamdi v. Rumsfeld, 316 F.3d 450, 461 (4th Cir. 2003).
296. *Id.*
297. *Id.* at 461-62.
298. *Id.* at 462.
299. *Id.*
300. *Hamdi*, 316 F.3d at 471-72.
301. *Id.* at 466.
302. *Id.* at 474-75.
303. *Hamdi*, 542 U.S. 507.
304. Justice Clarence Thomas was the only justice to side entirely with the government.
305. *Hamdi,* 542 U.S. at 535-36.
306. The plurality consisted of Justices O'Connor, Kennedy, Rehnquist, and Breyer. *Hamdi,* 542 U.S. at 509.
307. *Hamdi*, 542 U.S. at 536.

decision in *Hamdi* maintained individual civil liberties while simultaneously divesting the White House of its power to limit the rights of United States citizens who had been designated unlawful enemy combatants during a national emergency.[308]

The plurality of the Court in *Hamdi* was also greatly concerned that detaining individuals indefinitely would deprive such persons of their due process rights.[309] Although cognizant of the consideration that national security interests militate in favor of more lenient procedural rules, the Court nonetheless opined that the government had failed to achieve the appropriate constitutional balance.[310] The Court reasoned that "the risk of an erroneous deprivation of a detainee's liberty is unacceptably high under the Government's proposed rule."[311] Justice O'Connor's opinion mandated that citizen-detainees receive notice of the government's factual basis for their classification as enemy combatants and a fair opportunity to rebut that assertion before a neutral decision maker.[312] Expressing the *Hamdi* plurality's due process concerns, Justice O'Connor wrote: "An interrogation by one's captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate fact-finding before a neutral decision-maker."[313] Furthermore, the plurality indicated that Hamdi "unquestionably has the right of access to counsel in connection with the proceedings on remand."[314]

According to the plurality, "it is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[315] The plurality perceived irony in the denial by the United States of personal liberties at home while simultaneously fighting for such liberties abroad.[316] The plurality's decision officially repudiated the United States government's suspension of certain individual liberties[317] because, in Hamdi's case, due process should have afforded him a meaningful opportunity to contest his detention before a neutral decision maker.

Justices Scalia and Stevens dissented, maintaining that Hamdi was entitled to habeas corpus relief unless criminal proceedings were promptly brought, or Congress had suspended the writ of habeas corpus.[318] Although conceding that Hamdi's case was not an easy one in light of the competing demands of national

308. *Id.*
309. *See Hamdi*, 542 U.S. 507.
310. *Id.* at 532.
311. *Id.*
312. *Id.* at 533.
313. *Id.* at 537.
314. *Id.* at 539.
315. *Hamdi*, 542 U.S. at 532.
316. *Id.*
317. *Id.* at 533.
318. *Id.* at 573.

security and the rights of citizens to personal liberties, the two justices tilted towards the side of personal liberty.[319]

Nonetheless, the government had reason to be pleased with other aspects of the *Hamdi* decision. Five members of the court agreed that citizens of the United States could be held as enemy combatants,[320] and four of them also believed that the President had the authority to designate specific persons as enemy combatants.[321] However, whatever hope remained for the Bush administration's policies in the wake of *Hamdi*, it was eviscerated by a decision of the Supreme Court two years later.[322]

B. Hamdan v. Rumsfeld

As one journalist described as "the most significant setback yet for the administration's broad expansions of presidential power,"[323] the United States Supreme Court in *Hamdan v. Rumsfeld*[324] ruled that President Bush's first attempt at establishing military commissions violated both the Uniform Code of Military Justice (UCMJ) and the Geneva Convention of 1949.[325] As such, the Court struck down the military commissions, leaving Congress and the President to reconsider their approach to this gathering storm.[326]

Salim Ahmed Hamdan, a Yemeni national originally charged with conspiracy to commit "offenses triable by military commission," petitioned the United States District Court for the District of Columbia for a writ of habeas corpus in response to his impending military commission trial.[327] The district court granted Hamdan's petition.[328] In November 2004, the court barred the military commission from trying Hamdan.[329] The court reasoned that the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949

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319. *Id.* at 554.

320. The members of the court who were of that opinion were Chief Justice Rehnquist and Justices O'Connor, Kennedy, Thomas, and Breyer.

321. The members of the court who were of that opinion were Chief Justice Rehnquist and Justices O'Connor, Kennedy, and Breyer.

322. *See* Hamdan v. Rumsfeld, 548 U.S. 557 (2006).

323. Linda Greenhouse, *Justices, 5-3, Broadly Reject Bush Plan to Try Detainees*, N.Y. TIMES, June 30, 2006, at A1. But see James Taranto, Op-Ed, *The Truth About Guantanamo*, WALL ST. J., June 26, 2007 (labeling some of Greenhouse's coverage of the *Hamdan* decision as "purple prose"). Taranto notes that "journalists have falsely portrayed Guantanamo as an affront to the Constitution and international law." Specifically, he points to the New York Times's coverage of Hamdan, which he believes rather dramatically overplayed the significance of the Supreme Court's decision. *Id.*

324. *Hamdan*, 548 U.S. 557.

325. *Id.* at 567.

326. *See id.*

327. Hamdan v. Rumsfeld, 344 F. Supp. 2d 152, 155 (D.D.C. 2004) (mem.).

328. *Id.* at 173.

329. *Id.*

(Geneva III)[330] mandates that those tried by military commission must first be designated a prisoner of war, and a "competent tribunal" had not yet determined whether Hamdan fit this criterion.[331] The district court also ruled that the military commission that sought to try Hamdan was formed in violation of the Uniform Code of Military Justice (UCMJ).[332] Setting out the precise requirements, the district court explained that before a prisoner may be tried by a military tribunal there must first be a hearing in order to determine whether the terms of the Geneva Convention apply.[333] If the Geneva Convention does apply, the defendant is entitled to have his case heard under the UCMJ. Thus, the defendant would receive the same procedural safeguards as any member of the American armed forces.[334] The Bush administration appealed.[335]

In July 2005, the United States Court of Appeals for the D.C. Circuit granted a victory, although temporary, for the government and overturned the district court's decision.[336] The Circuit Court stated unequivocally that the Geneva Convention did not apply to members of the al Qaeda terrorist network.[337]

Responding to the Circuit Court's decision, the military commission prepared to try Hamdan, but its efforts were again thwarted when the United States Supreme Court granted review of Hamdan's case.[338] In a blow to the Bush administration, the Court rendered a 5-3 decision,[339] holding that the military commissions, as then structured, violated the UCMJ and the Geneva Convention.[340] In the end, the Court did not take issue with the existence of the military tribunals per se, but rather focused its concern on the procedural means employed to convene them.[341]

Four members of the Court explicitly advised the President to reconsider his strategy and to seek authorization from Congress.[342] "Nothing prevents the President from returning to Congress to seek the authority he believes necessary," Justice Breyer noted in his concurring opinion, which was joined by

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330. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135.

331. *Hamdan,* 344 F. Supp. 2d at 160.

332. *Id.* at 165-66.

333. *Id.* at 161-62.

334. *Id.* at 160.

335. Hamdan v. Rumsfeld, 415 F.3d 33, 36 (D.C. Cir. 2005).

336. *Id.* at 44.

337. *Id.* at 40. The present Chief Justice, John Roberts, at that time a judge on the Court of Appeals for the District of Columbia Circuit, was one of those who ruled in favor of the government's position.

338. Hamdan v. Rumsfeld, 546 U.S. 1002 (2006).

339. Chief Justice Roberts' earlier involvement in the case resulted in his recusal at the Supreme Court level.

340. Editorial, *No Blank Check for Bush*, BOSTON GLOBE, June 30, 2006, at A16.

341. *Review & Outlook: Affirming Military Tribunals*, WALL ST. J., Feb. 20, 2007, at A14.

342. *Hamdan*, 548 U.S. at 653 (Kennedy, J., concurring). Justices Souter, Ginsberg, and Breyer joined Justice Kennedy's concurrence.

Justices Kennedy, Souter, and Ginsburg.[343] Beyond their suggestion to the President, these four justices also made clear that Congress had authority to revisit the issue and to ultimately grant the President the power to convene such tribunals.[344] Lastly, Justice Kennedy noted that Hamdan's military commission exceeded the bounds Congress had placed on the President's authority and because Congress prescribed the limits, Congress could change them.[345]

C. Military Commissions Act of 2006

Following the Supreme Court's advice in *Hamdan*, President Bush returned to Congress to seek the necessary authorization. This time, with Congress's authorization, President Bush signed into law the Military Commissions Act of 2006 (MCA of 2006).[346] The act's stated purpose was to bring "to justice terrorists and other unlawful enemy combatants through full and fair trials by military commissions . . .."[347] Moments before signing the MCA of 2006 into law, President Bush explained that his original attempt at establishing a system of military commissions for the trial of alien detainees failed when the Supreme Court held that military commissions needed to be expressly authorized by Congress.[348]

The primary effect of this new legislation was to establish the jurisdiction of military tribunals. Specifically, by way of a section titled "Habeas Corpus Matters," the act abrogated federal court jurisdiction with respect to petitions for writs of habeas corpus filed by or on behalf of alien unlawful enemy combatants detained anywhere by the United States.[349] The section, in relevant part, provided:

> No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.[350]

Maintaining our nation's commitment to the Geneva Convention, the MCA of 2006 accentuated the importance of a just system to prosecute suspected

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343. *Id.* at 636 (Breyer, J., concurring).
344. *Id.* at 653 (Kennedy, J., concurring).
345. *Id.*
346. United States Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600 (2006) (to be codified at 10 U.S.C. §§ 948(a)- 950(w) and other sections of titles 10, 18, 28, and 42).
347. *Id.*
348. George W. Bush, Speech, President Bush Signs Military Commission Act of 2006, (Oct. 17, 2006), *available at* http://georgewbush-whitehouse.archives.gov/news/releases/2006/10/20061017-1.html.
349. United States Military Commissions Act of 2006, *supra* note 346.
350. *Id.*

terrorists.[351] Accordingly, the act conferred jurisdiction on military commissions that "extends solely to aliens who have engaged in hostilities against the United States or who have purposefully and materially supported hostilities against us."[352]

Importantly, the act afforded alien enemy combatants a full panoply of protections. Specifically, the act first authorized a Combatant Status Review Tribunal or another competent tribunal established under the authority of either the President of the United States as Commander-in-Chief or the Secretary of Defense, to designate unlawful enemy combatants.[353] Charges against those individuals fell within the jurisdiction of military commissions, special trial-level courts established to hear those cases involving offenses punishable under the act or the laws of war.[354] This second stage consisted of procedures that were more protective of detainees' rights than any other military commission in American history.[355] Additionally, the MCA of 2006 authorized the Secretary of Defense to prescribe rules of evidence and procedure for use by military commissions.[356]

Equally as important, the act provided for a Court of Military Commission Review, a special appellate-level court, with a three-member panel to review the decision of the commission.[357] As a third-level check, the act confirmed the Detainee Treatment Act's authorization of an appeal to the United States Court of Appeals for the D.C. Circuit.[358] The act otherwise eliminated federal court jurisdiction over alien detainee petitions for habeas corpus.[359] Finally, in addition to the foregoing, the act conferred a fourth level of review, authorizing the United States Supreme Court's review, by certiorari, of the federal circuit court's decision.[360]

Admittedly, the MCA of 2006 precluded alien detainees from seeking immediate review of their detention, but it did so by exchanging that opportunity for protections that include four separate levels of judicial review.

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351. Geneva Convention Relative to the Treatment of Prisoners of War, Part I, art. III, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135. The MCA, in effect, affords greater protections than those mandated by Geneva III. *See* United States Military Commissions Act of 2006, *supra* note 346, at § 948(a).

352. *See* United States Military Commissions Act of 2006, *supra* note 346, at § 948(d).

353. United States Military Commissions Act of 2006, *supra* note 346, at § 948(a).

354. *Id.* at § 948(b).

355. David B. Rivkin, Jr. & Lee A. Casey, Op-Ed, *Opposing View, Leave well enough alone; Existing laws give Guantanamo detainees all the rights they need*, U.S.A. TODAY, May 11, 2007, at 14A.

356. United States Military Commissions Act of 2006, *supra* note 346, at § 949(a)(a).

357. *See* United States Military Commissions Act of 2006, *supra* note 346, at § 948(f).

358. *See id.* at § 950(g).

359. *See id.*

360. *See id.* at § 950(g)(d).

D. Boumediene v. Bush

On February 20, 2007, a three-member panel of the United States Court of Appeals for the District of Columbia Circuit ruled that the Military Commissions Act forecloses the opportunity for aliens detained at Guantanamo to seek habeas corpus relief.[361] The decision was the first to uphold the constitutionality of a central tenet of the MCA since its passage in October 2006. Not only was this a significant victory for the Bush administration, but the decision also was thought to have heralded a new era for national security.

The issue before the *Boumediene* court was whether federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as unlawful enemy combatants at Guantanamo.[362] The detainees argued that the Supreme Court's decision in *Rasul* settled the question and conferred on alien detainees a right to seek a writ of habeas corpus.[363] The government, however, urged the court to recognize that *Rasul* was decided strictly on the basis of the habeas corpus statute then in place.[364] According to the government, the Constitution does not afford alien detainees a right to petition for a writ of habeas corpus, nor would such a right have been available at common law. Therefore, Congress could decide whether to afford such a right to those presently detained at Guantanamo.[365] By enacting the MCA of 2006, Congress made clear that it would not afford such a right to detainees. Ultimately, the government hoped that the court would conclude that federal courts do not have jurisdiction over such petitions, thereby validating the provision of the Military Commissions Act which denied federal courts jurisdiction to review the detention of foreign nationals.

The majority opinion, authored by Judge Randolph,[366] immediately recognized that recent changes in the law sharply distinguished the *Rasul* decision from the issue before the court.[367] The majority explained that *Rasul* was decided pursuant to the habeas corpus statute then in effect, which was first altered by the passage of the Detainee Treatment Act and then again by the passage of the MCA of 2006.[368]

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361. Boumediene v. Bush, 476 F.3d 981, 986 (D.C. Cir.), *cert. denied*, 127 S. Ct. 1478 (2007), *cert. granted*, Boumediene v. Bush, 75 U.S.L.W. 3707 (U.S. June 29, 2007) (No. 06-1195).

362. *Id.* at 984.

363. Corrected Joint Brief for Appellants, at 10-11, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007) (Nos. 05-5062 & 05-5063).

364. Brief for the Federal Government Appellees, at 21-24, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007) (Nos. 05-5062 & 05-5063).

365. Reply/Cross-Appellee Brief for the United States, at 12-13, Boumediene v. Bush, 476 F.3d 981 (D.C. Cir. 2007) (Nos. 05-5062 & 05-5063).

366. Judge David B. Sentelle concurred in Judge Randolph's majority opinion.

367. *Boumediene,* 476 F.3d at 984-86.

368. The MCA reads:

> (1) No court, justice, or judge shall have jurisdiction to hear or consider an application for a writ of habeas corpus filed by or on behalf of an alien detained by the United States who has been determined by the United States to have

Judge Randolph began with the Supreme Court's proposition in *INS v. St. Cyr*,[369] that the Suspension Clause should be interpreted, at minimum, to protect the writ of habeas corpus as it existed in 1789 when the first Judiciary Act established the federal court system and conferred upon the courts jurisdiction to issue writs of habeas corpus.[370] Accordingly, his opinion navigated the history of the Great Writ, tracing it back to its origins in medieval England and found it compelling that, at that time, the writ of habeas corpus extended only to the King's dominions.[371] Furthermore, the court's examination of history revealed that the privilege of habeas corpus would not have been available to aliens at the time the first Judiciary Act was passed unless the detainee was physically present in the United States or owned property therein.[372]

Examining more recent United States case law, the majority was particularly convinced that the Supreme Court's decision in *Johnson v. Eisentrager*[373] "ended any doubt about the scope of common law habeas."[374] In *Eisentrager*, the Supreme Court stated:

> We are cited to no instance where a court, in this or any country where the writ is known, has issued it on behalf of an alien enemy who, at no relevant time and in no stage of his captivity, has been within its territorial jurisdiction. Nothing in the text of the Constitution extends such a right, nor does anything in our statutes.[375]

Judge Judith W. Rogers argued in dissent that it was unconstitutional to deprive alien detainees the right to seek habeas corpus.[376] According to Judge Rogers, aliens have a right to petition for a writ of habeas corpus and that right may only be suspended by Congress upon a finding that the public safety requires it in cases of rebellion or invasion.[377] She reasoned that, because Congress failed to make the requisite findings to properly invoke the suspension

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> been properly detained as an enemy combatant or is awaiting such determination.
>
> (2) Except as provided in [section 1005(e)(2) and (e)(3) of the DTA], no court, justice, or judge shall have jurisdiction to hear or consider any other action against the United States or its agents relating to any aspect of the detention, transfer, treatment, trial, or conditions of confinement of an alien who is or was detained by the United States and has been determined by the United States to have been properly detained as an enemy combatant or is awaiting such determination.

United States Military Commissions Act of 2006, *supra* note 346, at § 7(a).

369. INS v. St. Cyr, 533 U.S. 289, 301 (2001) (superseded by statute).
370. *Boumediene,* 476 F.3d at 988.
371. *Id.* at 989-90.
372. *Id.* at 990.
373. Johnson v. Eisentrager, 339 U.S. 763 (1950).
374. *Boumediene*, 476 F.3d at 990.
375. *Id.* (quoting *Eisentrager*, 339 U.S. at 768).
376. *Id.* at 995 (Rogers, J., dissenting).
377. U.S. CONST. art. I, § 9.

of habeas, removal of federal court jurisdiction over such petitions was unconstitutional.[378]

Once the *Boumediene* decision was issued, it was expected that the hundreds of habeas cases already filed in the federal courts would not be heard, leaving alien unlawful enemy combatants to challenge their detention in federal courts only after the culmination of military proceedings and appeals. At the time there were approximately 400 habeas petitions pending that had been filed on behalf of unlawful enemy combatants detained at Guantanamo.[379]

In a final effort to strike down the Military Commissions Act of 2006, the alien detainees petitioned the Supreme Court for a writ of certiorari.[380] The Supreme Court initially denied the detainees' petition and, in an unusual move,[381] published a statement of two justices respecting the denial, along with the opinion of three dissenting justices who would have granted the petition.[382] In their opinions, Justices Stevens and Kennedy wrote, despite the obvious importance of the matter, it was not ripe for the Court's review until the detainees had exhausted all other avenues of appeal provided for by the MCA of 2006.[383] However, Justices Breyer, Souter, and Ginsburg disagreed, contending that immediate review by the Court was warranted to diminish the legal uncertainty surrounding the application of this fundamental constitutional principle to Guantanamo detainees.[384]

It was thought that the Supreme Court's denial of certiorari would allow the high court to defer consideration of the question until after the alien detainees exhausted the appeal procedures provided in the MCA of 2006.[385] In a surprising turn of events, the Supreme Court changed course and granted the petition which it denied only three months earlier.[386] Despite the unusual nature of the Supreme Court's abrupt change of position, it offered no explanation. In

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378. *INS*, 533 U.S. at 995.

379. Josh White, *Guantanamo Detainees Lose Appeal; Habeas Corpus Case May Go to High Court*, WALL ST. J., Feb. 21, 2007, at A1.

380. Boumediene v. Bush, 549 U.S. 1328 (2007). The Court consolidated the petition for certiorari by the Boumediene detainees with the petition filed by the detainees in Al Odah v. United States. *See* Letter from Neal Katyal to The Honorable William K. Suter (Mar. 28, 2007), *available at* http://www.scotusblog.com/archives/Hamdan%203-28-09%20letter.pdf (last visited Oct. 30, 2011).

381. *See* ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 301 (8th ed. 2002). "Most orders of the Court denying petitions for writs of certiorari do no more than announce the simple fact of denial, without giving any reasons therefore." *Id.*

382. *Boumediene*, 549 U.S. 1328.

383. *Id.* at 1329.

384. *Id.* at 1330 (quoting Brief for United States Senator Arlen Specter as Amicus Curiae Supporting Petitioners, at 19, Boumediene v. Bush, 127 S. Ct. 1478 (2007) (Nos. 06-1195, 06-1196)).

385. Linda Greenhouse, *Supreme Court Turns Down Detainees' Habeas Corpus Case*, N.Y. TIMES, Apr. 3, 2007, at A18.

386. Boumediene v. Bush, 551 U.S. 1160 (2007).

the view of some commentators, it was the result of Justice Anthony M. Kennedy's change of heart despite his initial opposition to granting certiorari.[387]

Others suspect that the Court's reversal of its previous order was in response to an affidavit submitted by a military insider.[388] In support of their petition for a rehearing on whether the court would grant certiorari, lawyers for the detainees filed the seven-page affidavit of Lieutenant Colonel Stephen E. Abraham, who had been assigned to the Pentagon unit overseeing the hearings at Guantanamo.[389] In his affidavit, Abraham described the hearings as flawed and likened the review process to a rubber-stamp system.[390]

Still, others have speculated that the Supreme Court's order constitutes a signal that the Court is seeking an opportunity to dissolve the facility at Guantanamo Bay altogether.[391] If this was indeed the motivation behind the Supreme Court's grant of certiorari, it would be quite remarkable given the fact that three justices in the *Hamdan* majority joined Justice Breyer's concurrence and expressly invited Congress to authorize the military commissions.[392] Nevertheless, because the Supreme Court did not indicate how the individual justices voted to grant certiorari, it is impossible to know with certainty what prompted such a change of course.[393]

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387. *See* William Glaberson, *In Shift, Justices Agree to Review Detainees' Case*, N.Y. TIMES, June 30, 2007, at A1. The Supreme Court will grant plenary review of a certiorari case if a minimum of four justices favor granting the petition.

388. *See* William Glaberson, *Unlikely Adversary Arises to Criticize Detainee Hearings*, N.Y. TIMES, July 23, 2007, at A1.

389. Appendix to Reply Brief of Petitioners to Opposition to Petition for Rehearing, at i-viii, Al Odah v. United States, 75 U.S.L.W. 3707 (U.S. 2007) (No. 06-1196).

390. *Id.* Even assuming the truth of Abraham's allegations, these allegations do not make the process itself unlawful. If there are abuses of the system, these need to be corrected but they do not invalidate the system itself.

391. Carol Rosenberg, *Supreme Court to Review Guantanamo Detainee Case*, CHATTANOOGA TIMES FREE PRESS, June 30, 2007, at A1. It is the view of the writers of this law review article that significant harm would result from closing the Guantanamo Bay facility and integrating detainees into American prisons. Consider, for example, the mayhem that resulted when Irish Republican Army members were interned at the Maze Prison near Lisburn, County Antrim. The Maze Prison, which housed the bulk of the paramilitary prisoners among some of the "most hardened killers and bombers," is known for events that "reverberated far beyond the walls of its notorious H-blocks," including the dirty protest, hunger strikes, murders, riots, and, most notably, the largest break-out of prisoners. *See Doors closing for last time at "unique" prison*, CNN, *available at* http://www.cnn.com/SPECIALS/2000/n.ireland/maze.html.

It would be irresponsible to integrate those detained at Guantanamo into the United States prison system. According to John B. Bellinger III, senior legal advisor to Secretary of State Condoleezza Rice, roughly ten percent of the hundreds of individuals who have been released from Guantanamo have returned to fight against the United States in Afghanistan. Embassy of the United States, Press Release, Releasing Guantanamo Detainees Would Endanger World, U.S. Says, May 25, 2006, *available at* http://london.usembassy.gov/terror670.html.

392. *Hamdan*, 548 U.S. at 652. The four justices joining in Justice Breyer's concurrence were Justices Kennedy, Souter, and Ginsburg. *See also* Sheryl Gay Stolberg, *Justices Tacitly Backed Use of Guantanamo, Bush Says*, N.Y TIMES, July 8, 2006, at A14, *available at* http://www.nytimes.com/2006/07/08/washington/08bush.html.

393. *Hamdan*, 548 U.S. 557, 652.

A year later, in June 2008, the United States Supreme Court heard Boumediene's case,[394] Justice Kennedy delivered the opinion for the 5-4 majority, which held that federal courts have jurisdiction over petitions for writs of habeas corpus filed by aliens captured abroad and detained as unlawful enemy combatants at Guantanamo.[395] According to the Court, the portion of the MCA of 2006 that deprived detained prisoners of the right to seek habeas corpus in the federal courts violated the Suspension Clause of the United States Constitution.[396] The Suspension Clause provides: "The Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[397] After tracing the historical roots of the Suspension Clause, the majority noted that:

> [A]t least three factors are relevant in determining the reach of the Suspension Clause: (1) the citizenship and status of the detainee and the adequacy of the process through which that status determination was made; (2) the nature of the sites where apprehension and then detention took place; and (3) the practical obstacles inherent in resolving the prisoner's entitlement to the writ.[398]

Critical to the Court's analysis was the status of the detainees.[399] Although not American citizens, the detainees vigorously disputed that they are enemy combatants.[400] In the absence of a finding (presumably after a full trial) that they were enemy combatants, this factor weighs against a conclusion that the detainees have rights under the Suspension Clause.[401] The court next noted that a second factor relevant to its analysis was that the detainees, while technically outside the sovereign territory of the United States, were for all practical purposes within the constant jurisdiction of the United States.[402] This factor further weighed in favor of a finding that the detainees have rights under the Suspension Clause.[403] Finally, with respect to the third factor, the Court recognized the costs of holding the Suspension Clause applicable in a case of military detention abroad; however, while noting its sensitivity to these concerns, the Court did not find them dispositive.[404] For these reasons, the Court held that "Art. I, § 9, cl. 2, of the Constitution has full effect at Guantanamo

394. Boumediene v. Bush, 553 U.S. 723, 732-33 (2008).
395. *Boumediene*, 553 U.S. 723.
396. *Id.* at 733.
397. U.S. CONST. art. I, § 9, cl. 2.
398. *Boumediene*, 553 U.S. at 766.
399. *Id.*
400. *Id.* at 766-767.
401. *Id.* at 767.
402. *Id.* at 768.
403. *Id.*
404. *Boumediene*, 553 U.S. at 769.

Bay."[405] Therefore, the detainees are "entitled to the privilege of habeas corpus to challenge the legality of their detention."[406]

E. Military Commissions Act of 2009

After the 2008 presidential election and Barack Obama's inauguration as the forty-fourth President of the United States, the United States' policy with respect to those accused of terrorism and detailed at Guantanamo changed ever so slightly. After taking office in 2009, President Obama temporarily stayed military commissions so that he and Congress could review the procedures in place.[407] The newly elected President vowed that he would close Guantanamo by January 2010 and issued an Executive Order requiring that the detention facility be closed no later than a year from the date of the Order, which was signed on January 22, 2009.[408] The Order instructed officials to review those detained at Guantanamo and to assess whether the detainee should be "returned to their home country, released, transferred to a third country, or transferred to another United States detention facility in a manner consistent with law and the national security and foreign policy interests of the United States."[409]

In May 2009, the Obama Administration announced that it was considering lifting its stay of the military commission system.[410] In response, the House of Representatives passed the Military Commissions Act of 2009 (MCA of 2009), which amended the MCA of 2006, and was aimed at affording detainees enhanced due process protections.[411] Although the MCA of 2006 was enacted by President Bush and was the subject of sharp criticism from Democrats, the new law enacted by President Obama did not make any radically different changes. Rather, the MCA of 2009 retained the basic structure of the existing commissions. The new law excluded from evidence statements obtained through torture or cruel, inhuman or degrading treatment – likely aimed at preventing statements resulting from waterboarding. Importantly, however, the law empowered the Secretary of Defense to enact rules permitting admission of coerced statements and hearsay evidence. The MCA of 2009 gave each defendants the right to attend his trial in its entirety, the right to examine all evidence presented against him, and the right to call his own witnesses or cross-examine the government's witnesses.

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405. *Id.* at 771.
406. *Id.*
407. Jennifer Elsea, Cong. Res. Service, The Military Commissions Act of 2009: Overview and Legal Issues, R41163, at 3 (2010).
408. Exec. Order No. 13492, Review and Disposition of Individuals Detained at the Guantánamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 16, 4,897 (Jan. 22, 2009).
409. *Id.* at §§ 3-4.
410. Elsea, *supra* note 407, at 2.
411. Pub. L. No. 111-84, H.R. 2647, 123 Stat. 2190 (October 28, 2009).

The MCA of 2009 permits defendants who are found guilty to appeal that finding to the United States Court of Military Commission Review, to further appeal to the United States Court of Appeals for the District of Columbia, and then finally to the United States Supreme Court by writ of certiorari.

In enacting the new law, Congress granted the commission jurisdiction over thirty two crimes, which include pillaging, taking hostages, torture, mutilation, rape, conspiracy and providing material support for terrorism.[412] In accordance with the newly enacted law, on May 4, 2010, a 281-page set of procedures was released, specifying the manner in which military commissions may be conducted.[413]

F. Hamdan's Trial by Military Commission

Although the United States Supreme Court in *Hamdan* had held that Hamdan's military commission was unconstitutional, in light of the MCA, Hamdan was tried by military commission and sentenced to sixty-six months of confinement.[414] Hamdan received sixty-one months and seven days credit for time already served and, in November 2008, was released to his native Yemen for the remaining weeks of his confinement.[415] Meanwhile, however, Hamdan's lawyers sought review of his conviction in the United States Court of Military Commission Review.[416] On appeal, they argued that the military commission established pursuant to the Define and Punish clause of the Constitution lacked jurisdiction over the offense with which Hamdan was charged – providing material support for terrorism – because such a crime is not a violation of the international law of war.[417] They further argued that Hamdan's conviction was the result of an *ex post facto* prosecution prohibited by the Constitution and the international law because the MCA was signed into law after the conduct that formed the basis of the charges against Hamdan.[418] Finally, they claimed that the MCA violates the Constitution by making aliens but not citizens subject to trial by military commission.[419]

The United States Court of Military Commission Review rejected Hamdan's challenges and affirmed his conviction and sentence.[420] In rejecting Hamdan's challenges, the court went to great length to detail in its 86-page decision the

412. United States Military Commissions Act of 2009, Pub. L. No. 111-84, 123 Stat. 2190 (2009) (to be codified at 10 U.S.C. § 950(t)(1)-(32)).

413. Manual for Military Commissions United States (2010 Edition), *available at* http://www.defense.gov/news/d2010manual.pdf.

414. United States v. Hamdan, CMCR 09-002, 2011 U.S. CMCR LEXIS 1, at *19 (U.S. Ct. Mil. Comm. Rev. June 24, 2011).

415. *Id.* at *20.

416. *Id.* at *19-20.

417. *Id.* at *20.

418. *Id.*

419. *Id.* at *20.

420. *Hamdan*, 2011 U.S. CMCR LEXIS 1, at *221-22.

history of the use of military commissions, which informed the basis for its decision.[421] The court held that "Congress exercised authority derived from the Constitution to define and punish offenses against the law of nations by codifying an existing law of war violation in a clear and comprehensively defined offense of providing material support to terrorism."[422] The court looked by analogy to historical treatment of the laws of war and concluded that crimes equivalent to the offense of providing material support for terrorism have long been tried by military commissions.[423]

With respect to Hamdan's *ex post facto* argument, the Court held that changes to judicial tribunals, venue and jurisdiction do not violate the Ex Post Facto Clause because "[c]reation of a new court to assume the jurisdiction of an old court does not implicate ex post facto prohibitions so long as the 'substantial protections' of 'the existing law' are not changed to the prejudice of the accused."[424] The court reasoned that application of a new jurisdictional rule does not take away any substantive rights of the accused and, therefore, does not constitute a violation of the Ex Post Facto Clause.[425]

The court also declined to find a violation of the Equal Protection Clause by virtue of the fact that aliens are treated different than United States citizens. The court held that Congress had a rational basis for the disparate treatment of aliens and that disparate treatment does not violate the Equal Protection Clause of the Constitution.[426]

VIII. TODAY'S MILITARY COMMISSIONS

Markedly different from the military commissions of the Mexican War and the Civil War, today's military commissions bear a striking resemblance to proceedings before the United States district courts.[427] Military commission judges are required to have the same qualifications as judges who preside over courts-martial.[428] Those who come before the court are automatically assigned military counsel, who are required to have the same credentials as defense counsel in court-martial proceedings.[429] The accused also may elect to be represented by civilian counsel.[430] The jury is comprised of active-duty commissioned officers who are detailed to a commission based on a belief that

421. *See generally Hamdan*, 2011 U.S. CMCR LEXIS 1.
422. *Id.* at *189.
423. *Id.* at *189-92.
424. *Id.* at *186 (citing Duncan v. Missouri, 152 U.S. 377, 382-83 (1894)).
425. *Id.* at *187.
426. *Id.* at *221.
427. *See generally Hamdan*, 2011 U.S. CMCR LEXIS 1.
428. *Id.* at *28.
429. *Id.*
430. *Id.*

they are "best qualified for the duty by reason of their age, education, training, experience, length of service and judicial temperament."[431]

Military commission trials, like trials in the civilian court system, commence with opening statements, followed by the presentation of the Government's case, and conclude with the accused's defense.[432] After both sides are permitted to make closing arguments, the military commission judge will instruct the commission members about the elements of the offenses, evidentiary matters and burden of proof.[433] The members of the commission will then, like members of a jury, deliberate and decide in closed session over whether the Government has proven the accused's guilt beyond a reasonable doubt.[434] If the accused is found guilty, the commission members must determine the sentence.[435] In those cases where the trial results in a finding of guilt, the record is then reviewed by the United States Court of Military Commission Review and the United States Court of Appeals for the District of Columbia Circuit.[436]

Importantly, those accused and tried before military commissions are afforded a full panoply of rights. The compendium of rights to which an accused is entitled includes the right to: (1) be represented by counsel; (2) a public trial; (3) a panel of officer members, selected after a process of voir dire and challenge; (4) compulsory process for the production of witnesses in his defense; (5) limitations on the admissibility of evidence under rules similar to the Military Rules of Evidence; (6) raise affirmative defenses such as are common in criminal trials; (7) be found guilty only if two-thirds of the members present at the time of balloting find him guilty beyond a reasonable doubt; (8) have the assistance of counsel in submitting a position for clemency to the convening authority and filing an appeal; (9) have the findings and sentence reviewed by a convening authority and his or her legal advisor, who in the convening authority's sole discretion can grant clemency (including setting aside the findings of guilt, charging them to findings of guilt to a lesser offense, and reducing or setting aside the sentence) for any reason or for no reason at all; (10) an automatic appeal to the United States Court of Military Commission Review; and (11) review by the United States Court of Appeals for the District of Columbia Circuit.[437] The United States Supreme Court is authorized to review by writ of

431. *Id.* (citing 2007 M.M.C., Rule for Military Commissions 502(a)(1); MMC (2008), Rule for Courts-Martial 502(a)(1)).

432. *Id.* at *28.

433. *Hamdan*, 2011 U.S. CMCR LEXIS 1, at *29.

434. *Id.*

435. *Id.*

436. *Id.* at *29 (citing 2006 and 2009 M.C.A. § 950(b), § 950(f) and § 950(g)).

437. *Hamdan*, 2011 U.S. CMCR LEXIS 1, at *200-01 (citing Jennifer Elsea, Cong. Res. Service, Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Courts, R40932, at 8-24 (Jan. 26, 2010); Jennifer Elsea, Cong. Res. Service, Selected Procedural Safeguards in Federal, Military and International Courts, RL31262, at 11-34 (Sept. 18, 2006).

certiorari the final judgment of the United States Court of Appeals for the D.C. Circuit.[438]

IX. CONCLUSION

Today, the nation finds itself questioning the Government's policies concerning military tribunals. Despite the passage of time, the questions themselves are the same as those asked during the Civil War: Are we at war? Is it appropriate to try enemy combatants, removed from the field of battle, in military, as opposed to civilian courts? And, if so, what would constitute constitutional due process? How can we ensure that trials protect the civil liberties of the accused, while protecting our national security?

Arguably, we are a nation at war. In an age when wars are not always fought on battlegrounds and often involve covert underground intelligence operations, to assume that we are not at war because the government has difficulty defining those entities against which we are fighting would surely transform the Suspension Clause into a hollow provision. There is no basis for believing that the framers of the Constitution intended that habeas corpus be suspended only after a formal declaration of war or during a civil war. In its history, the United States has only formally declared war five times.[439] It strains credulity to believe that President Bush's Authorization for Use of Military Force was not a declaration of war.

Although military commissions have evolved considerably from the dark days of the Civil War, they still face sharp criticism, perhaps due to the stigma associated with them, as well as alleged acts of torture and indefinite detention of detainees at Guantanamo Bay. Nevertheless, in the current wartime climate, amidst the terror that has jeopardized our country and other nations, it is necessary and appropriate to try enemy combatants, removed from the field of battle, in military, as opposed to civilian courts. Today's critics advocate for the closure of Guantanamo but it is important to recognize that it is not Guantanamo that is the lightening rod. Whether such trials take place in Guantanamo, on United States soil, or anywhere else, the rights afforded during those trials are what matter. It is nearly impossible when a nation is at war to afford enemy combatants all rights available to civilian courts,[440] but, this does not mean that all rights must or should be sacrificed.

The MCA of 2009 affords enemy combatants a panoply of rights and rights far more abundant than were afforded to enemy combatants during the Civil War. As an additional procedural safeguard, President Obama has maintained a

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438. *Id.* at 29 (citing 2006 and 2009 M.C.A. § 950(g)(e)).

439. There were declarations of war with respect to the War of 1812, the Mexican War, the Spanish-American War, World War I, and World War II. *Congress' role in war*, U.S.A. TODAY (May 18, 2005), *available at* http://www.usatoday.com/news/nation/2002-10-08-congress-war.htm.

440. For example, it is impossible to afford enemy combatants the right to a trial by a jury of his or her peers in a wartime climate.

presidential check on the military commission system just as Lincoln did during the Civil War. He has directed that each detainee's case be reviewed to determine those who can be repatriated to third-party nations or referred to American civilian courts.[441] For example, Obama personally reviewed the case of Ali al-Marri who was detained without a charge in a military jail in South Carolina.[442]

As Justice Oliver Wendell Holmes wisely noted, "[w]hen a nation is at *war* many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."[443] This was true during the Civil War, during the subsequent trials of President Lincoln's conspirators and it remains true today.

441. Jess Bravin & Siobhan Gorman, *Obama Closes Detention Network*, WALL ST. J., Jan. 23, 2009, at A.3.

442. Scott Shane, *Obama Reverses Key Bush Policy, but Questions on Detainees Remain*, N.Y. TIMES, Jan. 23, 2009, at A16, *available at* http://www.nytimes.com/2009/01/23/us/politics/23obama.html?pagewanted=all.

443. Schenck v. United States, 249 U.S. 47, 52 (1919) (emphasis added).