

MILITARY-COMMISSION RESOURCES¹

CASE LAW

Historic military commission cases²

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

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

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

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

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

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

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

Kasi v. Commonwealth, 256 Va. 407, 508 S.E.2d 57 (Va., 1998), *cert. denied*, Kasi v. Johnson, 537 U.S. 1025 (2002). How a "terrorist," pre-9/11, could be captured overseas, brought to the U.S. and stand trial before a duly constituted American civilian court, not a military tribunal. Mir Aimal Kasi (/aka/ Kansi) was the person who made an assault-rifle attack on CIA employees outside the CIA headquarters in Langley, Va., 1993. *See also, e.g.*, U.S. v. Rahman, 854 F.Supp. 254 (1994) and subsequent case history on the first World Trade Center conspiracy in Federal court. Possible arguments here that Islamic terrorism, of which 9/11 was a continuation, went through American courts without compromising national security or official secrets and without the tribunals created after 9/11.

¹ Extracted from Robert D. Harmon, NLG/MLTF Briefing Paper, "Military Commissions and Detention" (Nov. 17, 2006).

² Case issues flagged **in bold** in case discussions.

³ Plaintiff was great-grandson of Dr. Samuel Mudd; a military commission convicted Dr. Mudd in 1865 for his role (treating John Wilkes Booth's broken leg) in the Lincoln assassination. The descendant sought to overturn Dr. Mudd's conviction.

U.S. Trials Overseas: Jurisdiction

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

“Cases of The Murdering Wives”⁴

- Madsen v. Kinsella, 343 U.S. 341 (1952), *rehearing denied* 356 U.S. 925. Civilian courts weren’t available when Mrs. Yvette Madsen (a U.S. citizen, a military dependent in occupied Germany) murdered her husband in their quarters and faced a military commission (not a court-martial, as would have happened to Lt. Madsen if *he* had murdered *her* instead) on charges of violating the then-current German law against murder. ⁵ German courts were defunct; *Madsen* pre-dates 1950 passage of the UCMJ by Congress.
- Kinsella v. Krueger, 351 U.S. 470 (1956); Reid v. Covert, 351 U.S. 491 (1956); *reversed*, Reid v. Covert, 354 U.S. 1 (1957). Military-dependent wives court-martialled overseas after murdering their serviceman husbands. Court ultimately ruled that U.S. [non-UCMJ] citizens charged by the U.S. Government overseas must be tried under the U.S. Constitution, in Art. III courts.

United States v. Tiede, 86 F.R.D. 227 (U.S. Court for Berlin, 1979). Hijackers tried by a U.S. “Article II” court in the American Zone of West Berlin. Issue: whether right to jury and other Constitutional rights apply in U.S. trials in “occupied territory.” Ruling cited *Milligan* in saying it did. Of possible merit in a post-9/11 proceeding.⁶

International law issues

Bas v. Tingy, 4 U.S. (7 Dall.) 37 (1800). Congress’ and civilians’ legal prerogatives in “partial,” i.e., non-declared-war conflicts. Early Court recognition of non-declaratory war.

The Paquete Habana, 175 U.S. 677 (1900). Current customary **international law**, e.g., “law of war”, *jus cogens*, is part of U.S. law and is enforceable by U.S. courts. Supremacy clause.

Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64 (1804). U.S. law cannot be interpreted to violate international law; U.S. commanders could be liable to U.S. citizens therefor.

Dow v. Johnson, 100 U.S. 158 (1879): U.S. forces in occupied territory are not liable to that country’s law (e.g., in this case, the Confederate States of America) but to U.S. law.

Sampson v. Federal Republic of Germany, 250 F.3d 1145 (7th Cir., May 2001): *Habana* and *Betsy* partially questioned; *jus cogens* should not infer or create U.S. jurisdiction over foreign sovereignties.

⁴ So noted by Fisher, MILITARY TRIBUNALS *supra* at 158-9.

⁵ German Crim. Code § 211, Sept. 1941, cited in *Madsen* at 344. Just as well for Mrs. Madsen that she faced a U.S. military court and not a German civilian one, as German practice in 1941 would have involved the longstanding method of death by beheading for civilian capital cases. German Crim. Code § 13 (to 1945).

⁶ Fisher, MILITARY TRIBUNALS *supra*, at 160-167.

Separation-of-powers issues

Dynes v. Hoover, 61 U.S. (20 How.) 65 (1857). **Congress** has more authority, and the courts less, in military matters. Congress' power to provide for trial and punishment of military offenses is independent of Art. III judicial power (i.e., courts-martial as "Art. I" courts). Courts may not review courts-martial *if* the court was properly convened and conducted.

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). Limits on the President's **Art. II "Commander in Chief"** powers. Landmark case.

Rostker v. Goldberg, 453 U.S. 57 (1981), judicial **deference** to Congress' judgment on military affairs. Necessary & Proper clause. At issue here: statutory exemption of women from draft registration but deference doctrine raised here is widely applicable.

McKinney v. White, 291 F.3d 851 (D.C. Cir., 2002), Federal Courts do not have jurisdiction under the Administrative Procedures Act (5 U.S.C. § 701(b)(1)(F)) **to review or set aside** court-martial or military-commission findings where it is a court-martial matter and not, collaterally, that of the "agency."

Runkle v. United States, 122 U.S. 543 (1887), military courts and law must follow **Congress'** specifications.

Weiss v. United States, 510 U.S. 163 (1994), **military judges** not significantly different than other military personnel. Appointments Clause. *See also* *U.S. v. Ryder*, 515 U.S. 177 (1995), improperly appointed military judges' decisions not valid. Appointments Clause.

U.S. Navy-Marines Court of Appeal v. Carlucci, 26 M.J. 328 (1988). **Art. I courts** can issue extraordinary writs; military judges must adhere to the ABA Code of Judicial Conduct; military judges must maintain the integrity of their court against the chain of command, on pain of prosecution for dereliction of duty.

Burns v. Wilson, 346 U.S. 137 (1953), civilian courts may not review courts-martial but this does not preclude ***habeas***. *See also* *Schlesinger v. Councilman*, 420 U.S. 738 (1975),⁷ **Art. III courts** can hear collateral *habeas* attacks on courts-martial, suits for damages or equitable relief. *But see* *Hartikka v. U.S.*, 754 F.2d 1516 (9th Cir., 1985) for criteria on irreparable harm and **injunctive relief** that servicemember plaintiffs must raise.

Post-9/11 cases

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

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

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

⁷ *Councilman* overruled on other grounds by *Solorio v United States*, 483 US 435(1987). Note: *Councilman* cited often in *Hamdan*.

Al-Marri v. Hanft, 378 F.Supp.2d 673 (U.S.D.C., Dist. S.C., July 8, 2005). Qatari national, on trial for credit card fraud, was transferred to military custody after the President designated him an enemy combatant, alleging that petitioner had previously attended an al-Qaeda training camp. *Held*: Authorization for Use of Military Force does permit such detainment.

Hamdan v. Rumsfeld, 415 F.3d 33 (D.C. Cir., July 15, 2005). *Held*: separation-of-powers doctrine not violated by President's designation of a military commission to try an Al Qaeda suspect. Further, the Geneva Convention of 1949 is not enforceable in court by an enemy combatant, and even if it was, a military-commission trial does not violate it. However, *reversed* by:

Hamdan v. Rumsfeld, Docket No. 05-184, 548 U.S. ____ (June 29, 2006); 126 S. Ct. 2749; 165 L. Ed. 2d 723; 2006 U.S. LEXIS 5185; 19 Fla. L. Weekly Fed. S 452. Discussed in main Briefing Paper above. *Held*, among other things: that the Court had jurisdiction, that the federal government did not have authority to set up these particular military commissions, and that the military commissions were illegal under both the Uniform Code of Military Justice and the Geneva Convention.

Hamdan v. Rumsfeld, No. 04-CV-01519 (JR) (November 17, 2006), [Hamdan's] Opposition to Motion to Dismiss for Lack of Subject Matter Jurisdiction, *see online* at http://www.pegc.us/archive/Hamdan_v_Rumsfeld/pet_opp_20061117.pdf, *see also* Exhibits *online* at http://www.pegc.us/archive/Hamdan_v_Rumsfeld/pet_opp_20061117_ex.pdf, *see also* AMICUS BRIEF OF General Merrill A. McPeak (ret.), Milt Bearden, Rear Admiral Donald J. Guter (ret.), Rear Admiral John D. Hutson (ret.), Brigadier General David M. Brahms (ret.), Brigadier General James P. Cullen (ret.), Brigadier General Richard O'Meara (ret.) IN SUPPORT OF PETITIONER, *online* at http://www.pegc.us/archive/Hamdan_v_Rumsfeld/ret_jag_amicus_20061117.pdf

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

Command-responsibility cases

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

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

Kadic v. Karadzic, 70 F.3d 232 (2nd Cir., 1995). Murder, rape, torture, arbitrary detention of citizens, whether or not under color of authority, violate the law of war; commanders are

required to prevent such acts; all parties must apply to minimum law of war requirements in common Art. 3, Geneva Conventions.

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

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

Wartime Detention Cases⁸

Hirabayashi v. U.S., 320 U.S. 81 (1943). Upheld wartime detentions. However, *vacated on a writ of coram nobis*,⁹ *Hirabayashi v. U.S.*, 828 F.2d 591 (9th Cir., 1987). Government's assertions of national security at time of *Hirabayashi* and *Korematsu* arguments here found in 1987 to be selective and misleading. "The Court's divided opinions in *Korematsu* demonstrate beyond question the importance which the Justices in *Korematsu* and *Hirabayashi* placed upon the position of the government that there was a perceived military necessity, despite contrary arguments of the defendants in those cases."¹⁰

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

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

Padilla v. Rumsfeld, 542 U.S. 426 (2004). U.S. citizen arrested on U.S. soil on orders from Federal Court in Manhattan and then seized from them by the U.S. military, needed to file for *habeas* in the district that included his brig (South Carolina), not the Southern District of New York (the Government may have been forum shopping when it pleaded thus).¹¹ Mr. Padilla thus kept in detention on jurisdictional grounds. Different Circuit than *Padilla v. Hanft*, below.

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

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

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

⁸ Detentions without trial or prior to trial. Detainment can be prior to a military commission trial or can be indefinite; usually involving the same groups of enemy combatants.

⁹ *Coram nobis* is a writ of error sent by an appellate court to a trial court to review the trial court's judgment based on an error of fact. BLACK'S LAW DICTIONARY 338 (7th ed., West Group, 1999). Or, translated into layperson's vernacular, "WTF was this court *thinking* of!?"

¹⁰ *Hirabayashi*, 828 F.2d at 603.

¹¹ See Fisher, MILITARY TRIBUNALS, *supra*, at 238 on this quirk.

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

Fifth Amendment and foreign nationals

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

RELEVANT STATUTES AND TREATIES

Relevant statutes

8 U.S.C. § 1226a.¹² Detained aliens subject to the Patriot Act must be criminally charged, or removal proceedings begun, within seven days of detention. Provision for habeas corpus.

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

18 U.S.C. §§ 2331-2339D. Terrorism. (Pre-dating MCA).

18 U.S.C. §§ 2340, 2340A, 2340B. Torture.

18 U.S.C. § 2441. War crimes. No citizen shall commit a war crime in violation of international treaty, including Geneva. Heavily re-written by the MCA to re-interpret Geneva Common Article 3 *and* the UN Convention Against Torture.

18 U.S.C. §§ 3261-3267. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA).

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

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

28 U.S.C. § 2241. Habeas statute. Barred to aliens detained under the MCA.¹³

Authorization for Use of Military Force Joint Resolution (Sept. 18, 2001), S.J.Res. 23, 50 U.S.C. § 1541, Pub. L. No. 107-40, 115 Stat. 224 (2001) (common abbrev. AUMF), *online* at http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ040.107 and also *online* at http://www.yale.edu/lawweb/avalon/sept_11/sjres23_eb.htm. Armed-force authorization for war that Administration has construed as [inferred] basis for “enemy combatants” actions.

32 C.F.R. §§ 9.1-9.12. Originally identical to the Military Commission Orders and Instructions. Might be updated to reflect MCA guidance.

¹² Orig. § 412 of the USA-Patriot Act of 2001.

¹³ (MCA) 28 U.S.C. § 2241(e).

RELEVANT INTERNATIONAL TREATIES.

Nuremberg Charter.¹⁴ *See also* the Nuremberg Principles (1950).¹⁵

UN Charter.¹⁶

International Covenant on Civil and Political Rights (1966).¹⁷ Provisions on torture, cruel treatment, arbitrary arrest or detention, due process.

UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987)¹⁸ Includes provision against “an absence of information or a refusal to acknowledge that deprivation or freedom or to give information of the whereabouts of that person, thereby impeding his or her recourse to the applicable legal remedies and procedural guarantees.”¹⁹

Inter-American Convention on the Forced Disappearance of Persons (1994).²⁰

Geneva Convention (III) on Treatment of Prisoners of War (1949)²¹

¹⁴ Nuremberg Rules, in Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.S. 279, *entered into force* Aug. 8, 1945. Nuremberg tribunal charter and transcripts *online* at <http://www.yale.edu/lawweb/avalon/imt/proc/imtconst.htm> .

¹⁵ <http://deoxy.org/wc/wc-nurem.htm> .

¹⁶ U.S.T.S. 993, 59 Stat. 1031.

¹⁷ Available online at http://193.194.138.190/html/menu3/b/a_ccpr.htm as of Jan. 27, 2003.

¹⁸ *See online* at Office of UN High Commissioner for Human Rights, <http://www.ohchr.org/english/law/cat.htm> . The U.S. ratified the Convention Against Torture in 1994 only with the reservation that “... *nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.*”

¹⁹ *Id.*, Art. II.

²⁰ 33 I.L.M. 1529. .

²¹ 1956 WL 54809, T.I.A.S. No. 3364, 6 U.S.T. 3316; Ratified by the U.S. with a reservation to Article 68: “The United States reserves the right to impose the death penalty in accordance with the provisions of Article 68, paragraph 2, without regard to whether the offences referred to therein are punishable by death under the law of the occupied territory at the time the occupation begins.”

SOURCE MATERIAL

Official documents:

Authorization for Use of Military Force Joint Resolution (Sept. 18, 2001), Pub.L. 107-40, S.J.Res. 23, 115 Stat. 224, 50 U.S.C. § 1541, construed to confer jurisdiction over enemy combatants; *see online at* http://www.yale.edu/lawweb/avalon/sept_11/sjres23_eb.htm.

Military Order of November 13, 2001, Federal Register Nov. 16, 2001 (Vol. 66, No. 222) at 57831-57836 (also listed as 66 F.R. 57833 (Nov. 16, 2001)).

Library of Congress research page on the Military Commissions Act, including debate and amendments, http://www.loc.gov/rr/frd/Military_Law/MC_Act-2006.html. Final bill at http://www.loc.gov/rr/frd/Military_Law/pdf/S-3930_passed.pdf.

Defenselink page on military commission documents, *online at* <http://www.defenselink.mil/news/commissions.html>. Comprehensive site; includes updates, Pentagon briefings, publicly-announced trials; seems to be updated regularly.

“Defense Department Policy,” Global Security.org collection, includes all key Military Commission documents, at <http://www.globalsecurity.org/security/library/policy/dod/index.html>.

Jay Bybee torture memo²² to Alberto Gonzalez at Washington Post archive, <http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf>.

Alberto Gonzales’ torture memo to the President²³, *see online at* <http://news.lp.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb.html>.

Maj. Gen. Taguba’s report on Abu Ghraib *online at* <http://news.findlaw.com/hdocs/docs/iraq/tagubarpt.html> or at http://www.npr.org/iraq/2004/prison_abuse_report.pdf.

Findlaw: Bush Administration’s internal memoranda on detainees, torture, enemy combatants: <http://news.lp.findlaw.com/hdocs/docs/torture/powtorturememos.html>.

Office of the UN High Commissioner for Human Rights: International Law webpage, <http://www.ohchr.org/english/law/index.htm>. Index of human-rights and law-of-war treaties, Convention against Torture, Geneva Conventions et al. Note: often includes current status of U.S. ratification, reservations, or declarations on certain treaties.

Prior (pre-*Hamdan*) Military Commission Orders at http://www.defenselink.mil/news/Aug2004/commissions_orders.html; prior Military Commission Instructions at http://www.defenselink.mil/news/Aug2004/commissions_instructions.html; Also at Globalsecurity.org at <http://www.globalsecurity.org/security/library/policy/dod/mil-commission-instructions2003.htm>.

²² Jay Bybee, Memorandum, Office of Legal Counsel, U.S. Dept. of Justice, August 1, 2002.

²³ Draft memorandum, Alberto Gonzalez to the President, Jan. 25, 2002.

More pre-*Hamdan* commission material at:

Official Defenselink history²⁴ of military commissions,
http://www.defenselink.mil/news/Aug2004/no8192004_2004081903.html
News Article, DoD, “Military Review Panel Takes Office” (Sept. 22, 2004),
http://www.dod.mil/news/Sep2004/no9222004_2004092207.html.

Human Rights Watch, pre-*Hamdan* material, see esp.

HRW Briefing Paper (2005) on Military Commissions at
<http://www.hrw.org/background/usa/gitmo0705/>, also this [backgrounder](#), same
subject, including the combatant-status and administrative-review proceedings,
<http://hrw.org/english/docs/2004/08/16/usdom9235.htm>.

Observers/Monitoring Groups:

Center for Constitutional Rights, <http://www.ccr-ny.org/v2/home.asp>.

Human Rights Watch, www.hrw.org, HRW general subpage on Guantánamo
detainees, current to Nov. 2006, http://www.hrw.org/doc/?t=usa_gitmo.

Military Law Task Force of the National Lawyers’ Guild, <http://www.nlg.org/mltf>.

ACLU, <http://www.aclu.org/>. See especially <http://www.aclu.org/safefree/torture/>,
which includes information on the ACLU’s ongoing FOIA lawsuits on detainee
matters.

“Balkinization” legal blog, <http://balkin.blogspot.com>, see esp. “Anti-Torture Memos”
roundup on torture, war powers and related matters, at
[http://balkin.blogspot.com/2005/09/anti-torture-memos-balkinization-
posts.html](http://balkin.blogspot.com/2005/09/anti-torture-memos-balkinization-posts.html) .

Treatises:

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

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

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

Curtis A. Bradley & Jack L. Goldsmith, *Congressional Authorization and the War on
Terrorism*, 118 HARV. L. REV. 2048 (2005). The Administration cites the war
authorization as a basis for the commissions; discussion here of the authorization
itself.

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

Sources of International Law, RESTATEMENT 3D OF FOREIGN RELATIONS LAW § 102. See
also International Committee of the Red Cross, *Treaties and Customary International
Human Rights Law*, available online at ICRC website (updated regularly),
[http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian_law:Treaties_and
customary_law?OpenDocument](http://www.icrc.org/web/eng/siteeng0.nsf/iwpList2/Humanitarian_law:Treaties_and_customary_law?OpenDocument).

²⁴ Rather cursory history and outdated (Aug. 19, 2004); inaccurate in that the post-WWII war crimes trials were tribunals set up by international charter and not a “military commission” as such.

Elizabeth Holtzman, "Torture and Accountability," THE NATION (July 18, 2005).²⁵ Criminal culpability of Bush Administration officials, excuses made in memoranda by Alberto Gonzalez, Jay Bybee et al notwithstanding. Incorporated into IN THE NAME OF DEMOCRACY: AMERICAN WAR CRIMES IN IRAQ AND BEYOND (Jeremy Brecher, Jill Cutler, Brendan Smith, eds., Metropolitan Books, 2005).

Military Commissions: Government and supporters' viewpoints.

Maj. Gen. (ret.) Michael J. Nardotti, Jr., *Military Commissions*, 2002-MAR ARMY LAW. 1. Overview from Army standpoint.²⁶

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

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

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

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²⁵ See online at <http://www.thenation.com/doc/20050718/holtzman>.

²⁶ *Army Lawyer* is published by Army JAG and is available online at Westlaw. It is also published as a series of Dept. of the Army Pamphlets (DA Pam 27-50-[#]).

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

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

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

Mark Denbeaux, et al., *No-Hearing Hearings - CSRT: The Modern Habeas Corpus?*, Seton Hall Law School (2006.11.17), online at http://law.shu.edu/news/final_no_hearing_hearings_report.pdf

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Books:

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

Charles A. Shanor, L. Lynn Hogue, *NATIONAL SECURITY AND MILITARY LAW IN A NUTSHELL* (Thomson West, 2003). Brief overviews of wartime and military law. *See esp.* ch. 2, "National Security Law."

Louis Fisher, *PRESIDENTIAL WAR POWER* (University Press of Kansas, 2nd ed. revised, 2004). A critique of the Commander-in-Chief's wartime powers and limitations, including material on the use-of-force enactments post-9/11 and the George W. Bush approaches. For another view on the limits of executive power *see* Geoffrey Robertson, *THE TYRANNICIDE BRIEF: THE STORY OF THE MAN WHO SENT CHARLES I TO THE SCAFFOLD* (Pantheon Books, 2005), the story of 17th-C. lawyer John Cooke, and his assertion that a head of state was *not* above the law, but subject *to* it – arguably a precedent to the prosecutions of former Presidents Augusto Pinochet of Chile, Slobodan Milošević of Serbia and Saddam Hussein of Iraq.

Mark E. Neely, Jr., *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* (New York: Oxford Univ. Press, 1991, paperback). Much material on Civil War military commissions and the wartime suspension of habeas, still relevant as *ex parte Milligan* is still quotable case law. *See esp.* Chapter 8 (at 160 *et seq.*), "The Irrelevance of the Milligan Decision".

Richard L. Lael, *THE YAMASHITA PRECEDENT: WAR CRIMES AND COMMAND RESPONSIBILITY* (Scholarly Resources, Inc., 1982), ISBN 0-8420-2202-3. Considerable material on the conduct of the military-commission trial itself and its miscarriages of justice. One of the very few books on the Yamashita trial in print.

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

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

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

Military regulations, a selection

Army Regulation [AR] 27-26,²⁷ Rules of Professional Conduct for Lawyers. See also, e.g., Navy JAG INSTR 5803.1C,²⁸ Professional Conduct of Attorneys. Military JAG lawyers also have professional ethics rules, not unlike the ABA's Model Rules. Some of them seem uncomfortably aware of it. Of possible utility in an *ultra vires* proceeding.

AR 190-55,²⁹ U.S. Army Correctional System: Procedures for Military Executions, 1 November 1999. The Army is a likely destination for capital sentences after military-commission trials. "Only the President of the United States can approve and order the execution of a death sentence ... All death sentences will be carried out by lethal injection at the United States Disciplinary Barracks (USDB) [Ft. Leavenworth, Kan.]."³⁰

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²⁷ Available online at http://docs.usapa.belvoir.army.mil/jw2/xmldemo/r27_26/cover.asp .

²⁸ Available online at http://www.jag.navy.mil/Instructions/5803_1c.pdf .

²⁹ Available online at http://docs.usapa.belvoir.army.mil/jw2/xmldemo/r190_55/cover.asp .

³⁰ AR 190-55, ¶ 1-4, citing RCM.