BRIEFING PAPER.

TO: Military Law Project

FROM: Bob Harmon, 415/388-3980, bobnbob@pacbell.net

RE: Military Commission Trials and Detentions

DATE: November 18, 2006[1]

Questions considered:

What is the current state of military commissions, i.e., their current authorities, the various forms they have taken, the impact on due process, the constraints on defense counsel and discovery, their historical/legal context and how the Administration thinks it can "get away with it?"

Brief Answer:

Military commissions, newly re-established by the Military Commissions Act of 2006,[2] are a type of extraordinary wartime tribunal, very unlike courts-martial – and with a flimsy basis in statutes and case law. Unlike courts-martial, which try soldiers, these military courts **can try anybody, anywhere** on this planet, for offenses created by military custom and Executive order, not statutory law; try them on rules of evidence and procedure they can make up as it suits them; and try them without judicial appeal – essentially, a latter-day Court of Star Chamber.

These military commissions are not yet fully operational but present a very real possibility of secret and arbitrary trials that mock due process and make judicial murder a real possibility. The accused are subject to this by being designated, on the President's say-so, "enemy combatants" outside the protections of U.S. and international law. The tribunals are – so far – aimed at non-U.S. citizens, though U.S. citizens could very easily face these drumhead proceedings. Those who participate in these "trials" as court members, custodial personnel, or in the chain of command – up to the Secretary of Defense and the President – are committing a crime.

Facts:

<u>The definition; the differences</u>

A special and hitherto unusual proceeding, military commissions were once similar to courts-martial, though courts-martial have since evolved into a formal court system, with rules of evidence, procedure and appeal, very much resembling civilian courts, particularly in General Courts-Martial.[3] Military commissions are special military tribunals[4] by which the U.S.

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[1] This Paper supersedes "Military Commission Trials," Briefing Papers, Military Law Project (National Lawyers' Guild, Military Law Task Force, October 13, 2005 and Nov. 14, 2006) and is updated to incorporate relevant legal activity up to the passage of the Military Commissions Act of 2006, *infra*).

[2] S. 3930, "Military Commissions Act of 2006." Copy of bill, as passed, *online* at http://www.loc.gov/rr/frd/Military_Law/pdf/S-3930_passed.pdf . U.S. Code sections modified or created by this Act denoted *infra* as (MCA).

[3] 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.

military may try *any* persons, particularly non-U.S. military (e.g., spies, "enemy combatants," etc.); the authority for these courts is currently the Military Commissions Act (MCA) of 2006.[5] As currently authorized, these courts may determine rules of evidence, may adjudge verdict and pass sentences of imprisonment or death, and appeals to any U.S. or international court, including most habeas appeals, are forbidden.[6]

Some of the differences from standard courts-martial:

Courts-Martial	**Military Commissions**
Have jurisdiction over those persons, usually service members, who are subject to the Uniform Code of Military Justice (UCMJ),[7] worldwide.[8]	Have jurisdiction over "enemy combatants," i.e., any person who "purposefully and materially supported hostilities against the United States", US citizens or not.[9] (Expanded from the pre-MCA definition of enemy combatants as non-U.S., al-Qaeda-affiliated persons.)[10] The Executive branch designation of such a person is "dispositive."[11]
Courts-martial are established and operate as integral to the UCMJ, and are bound by military case law.[12]	Created by the Military Commissions Act (MCA) under a separate section of 10 U.S.C. and are not bound by case law.[13]
Court-martial panel appointed per UCMJ; presiding judge and defense counsel from independent (outside chain of command) sources.[14] Defendant can retain civilian counsel who need only be licensed to practice in civilian jurisdiction.[15]	Military commission judges and counsel (including military defense counsel) are detailed by the Secretary of Defense.[16] No provision for independent or permanently-assigned defense counsel as such. Civilian counsel must have no bar complaints and must have SECRET clearance.[17]
Guided by the Manual for Courts-Martial (MCM), which includes (procedural) Rules for Courts-Martial (RCM) and the Military Rules of Evidence therein.	Guided by the MCA and regulations created by the Secretary of Defense. MCM doesn't apply.
Must follow the Military Rules of Evidence in	Secretary of Defense can set rules "practicable or consistent with military or intelligence activities,

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[4] Hereinafter, the word "tribunal" is a synonym for military commissions.
[5] Pub. L. No. 109-366, 120 Stat. 2600 (Oct. 17, 2006), enacting Chapter 47A of Title 10 of the United States Code.
[6] Contravening *ex parte Quirin,* 317 U.S. 1, 24 (1942).
[7] Art. 2, 3 & 5, UCMJ (10 U.S.C. §§ 802-803, 805 respectively).
[8] Art. 5, UCMJ.
[9] (MCA) 10 U.S.C. § 948a(1).
[10] *Military Order of November 13, 2001,* 66 F.R. 57833, 57834 (Nov. 16, 2001), § 2(a) defining "persons subject to this order." Hereinafter, "President's Military Order." *Available online at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html. *See also id.,* § 7(b)(1).
[11] (MCA) 10 U.S.C. § 948d(c). "Providing material support" to terrorism and "aiding the enemy" are also punishable offenses under this Act. (MCA) 10 U.S.C. §§ 950v(b)(25, 26).
[12] Art. 1-146 is the UCMJ (10 U.S.C. §§ 801-946 respectively). *See esp.* Arts. 16-29 on courts-martial composition and jurisdiction.
[13] (MCA) 10 U.S.C.§ 948b(c).
[14] Art. 6a, 26, 27 UCMJ (10 U.S.C. §§ 806a, 826-827).
[15] Art. 26(b) UCMJ. *See online* www.nlg.org/mltf, click on "Military Law" and then "General" for qualification of civilian counsel.
[16] (MCA) 10 U.S.C.§§ 948j & 948k.
[17] (MCA) 10 U.S.C.§ 949c.

the MCM and evidentiary case law.	as well as rules of evidence that the military judge deems of "probative value"; evidence *may not* be excluded because it wasn't under search warrant; hearsay evidence is admissible (unless the party opposing it "demonstrates" its unreliability.[18] Could include *ex parte, in camera* evidence under a new evidentiary "National Security Privilege.[19] Makes military case law (e.g., Military Reports generated by military appellate courts) irrelevant,[20] excludes UCMJ Articles on speedy trial, rights against compulsory self-incrimination, and pretrial due process.[21]
Must comply with Art. 31 limitations on pretrial interrogations[22] Prisoners may not be subjected to punishment, or confinement "any more rigorous than the circumstances required to insure his presence" before trial.[23]	Art. 31 specifically excluded, along with other procedural UCMJ protections.[24] Evidence obtained under duress may be admissible.[25]
Tries accused for statutory offenses specified in the UCMJ punitive articles (Art. 77-134). Includes crimes of common-law nature, e.g., rape, murder, larceny, solicitation et al.	Includes "law of war" traditional offenses such as pillaging, denying quarter, taking hostages, murder "in violation of the law of war". Torture by the accused is triable. Rape and sexual assault[26] clauses name offenses already in the UCMJ[27] but the wording is different. "Terrorism" is one offense named.[28] Much language from customary law of war, e.g., misusing a flag of truce, "pillaging," "treachery or perfidy," etc.[29].
Penalty specified by MCM; death penalty only where punitive statute[30] on the offense charged expressly provides for it.	Penalties as prescribed by the MCA which include death or confinement – the latter can be served at prisons run by the U.S. "or its allies."[31]
New: "lawful enemy combatants"[32] under Art. 2(a)[33] subject to normal courts-martial.	Persons subject to the MCA may not invoke the Geneva Conventions in any proceeding involving

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[18] (MCA) 10 U.S.C.§ 949a.
[19] *(*MCA*)* 10 U.S.C. § 949d(f).
[20] (MCA) 10 U.S.C.§ 948b(c).
[21] 10 U.S.C.§§ 810, 831(a, b, d) and 832 (UCMJ Arts. 10, 31 and 32 respectively). Mentioned at (MCA) 10 U.S.C. § 948b(d).
[22] Art. 31 (10 U.S.C. § 831). Military courts have construed Art. 31 to be broader than *Miranda.* U.S. v. Baird, 851 F.2d 376, 383 (D.C. Cir., 1988).
[23] Art. 13 UCMJ.
[24] (MCA) 10 U.S.C.§ 948b(c).*see* § 948b generally.
[25] (MCA) 10 U.S.C.§§ 948r, 949a.
[26] (MCA) 10 U.S.C. §§ 950v(b)(21-22).
[27] 10 U.S.C. § 920 (UCMJ Art. 120).
[28] (MCA) 10 U.S.C. § 950v(b)(24-26). albeit defining terrorism with less precision than 18 U.S.C. §§ 2331 *et seq.,* under which terrorism is already a Federal criminal offense, in a body of statutes (Chapter 113B, Title 18) with enactments in 1990 and 1996.
[29] That tribunals try customary law of war, and courts-martial the statutory offenses set by Congress, was a divergence noted as far back as the Civil War. Louis Fisher, MILITARY TRIBUNALS AND PRESIDENTIAL POWER 48 (University Press of Kansas, 2005).
[30] Punitive statutes are Art. 77-134 (10 U.S.C. §§ 877-934).
[31] (MCA) 10 U.S.C. § 950g(c). Emphasis added.
[32] See Geneva Convention, Article 3 and 4 discussion, *infra.*

MCA inserts a new UCMJ provision in Art. 81 (conspiracy) that adds "to commit an offense under the law of war" to the definitions.[34]	the U.S. or current or former U.S. officials, in any U.S. or State court. President is the sole interpreter of all four Geneva conventions.[35]
Findings and sentence appealed through military appellate system and (ultimately, via *cert.*) to U.S. Supreme Court.	Executive review; judicial appeals sharply limited.[36] D.C. Circuit may review matters of law, i.e., only if the tribunal was consistent with the MCA or "**to the extent applicable**, the Constitution and the laws of the United States."[37]
Military courts may hear common-law writs, including habeas corpus.[38]	The MCA forbids habeas corpus appeals generally to those subject to the MCA, particularly to non-U.S. citizens.[39]

"Enemy Combatants": Personal jurisdiction *para bellum:*

The UCMJ and the MCA create "status-based" jurisdiction over the people they will try: the former, to military servicemembers and those who in some way accompany them;[40] the latter, to those designated as "enemy combatants," i.e., who "materially and purposefully" aid enemies of the United States (unlike the original post-9/11 military-commission orders, this is not limited to al Qaeda or Taliban members or non-US citizens). Since "enemy combatants" are not legal combatants as defined by the Administration's notions about the Geneva Convention[41] these persons are, by their decree, illegal; "outlaw" – outside the law – in the original common-law sense.

This labeling is important. "[T]he power of the executive branch to declare persons unlawful or enemy combatants, thereby denying them constitutional rights to due process and the rights afforded under the laws of war."[42]

Thus:

> It is the government's position that once someone has been properly designated as such, that person can be held indefinitely until the end of America's war on terrorism or until the military determines on a case by case basis that the particular detainee no longer poses a threat to the United States or its allies. Within the general set of "enemy combatants" is a subset of individuals whom the administration decided to prosecute for war crimes before a military commission established pursuant to a Military Order issued by President Bush on November 13, 2001. … Should individuals be prosecuted and convicted in accordance with the Military Order, they would be subject to sentences with fixed terms of incarceration or other specific penalties.[43]

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[33] UCMJ, 10 U.S.C. § 802(a), which provides for jurisdiction over certain categories of military personnel, including, prior to the MCA, prisoners of war.
[34] MCA, Sec. 4(a) and 4(b).
[35] MCA, Sec. 5 and 6.
[36] (MCA) 10 U.S.C. §§ 950c, 950d, 950f, 950g, 950i, 950j.
[37] Emphasis added.
[38] U.S. Navy-Marines Court of Appeal v. Carlucci, 26 M.J. 328 (1988).
[39] (MCA) 10 U.S.C. § 950j and (MCA) 28 U.S.C. § 2241(e). *But see* 8 U.S.C. § 1226a (originally, § 412 of the Patriot Act), which provides habeas for detained aliens subject to the Patriot Act.
[40] Art. 2, 3, and 5 UCMJ (10 U.S.C. §§ 802, 803, 805). Art. 5 makes this status worldwide.
[41] Convention (No. III) Relative to the Treatment of Prisoners of War, Concluded at Geneva, 12 August 1949, T.I.A.S. 3362.
[42] 185 A.L.R. Fed. 475, *Designation as Unlawful or Enemy Combatant.*
[43] In re Guantanamo Detainee Cases, 355 F.Supp. 2d 443, 447 (Jan. 31, 2005).

The UCMJ does confer court-martial jurisdiction over prisoners of war.[44] A "prisoner of war" is a precise legal term, which, under the III Geneva Convention, are those who were captured while lawfully serving as members of enemy armed forces, or members of militias or resistance movements, as defined in III GC's Article 4.[45] This might not fit those accused of being one of the extra-national groups affiliated with al-Qaeda, or, for that matter, those irregulars continuing to fight in Afghanistan and Iraq after the removal of their pre-9/11 governments.[46]

Military/national-security proceedings parallel to, or auxiliary to, military commissions.

As of 2006, these other proceedings include:

- Combatant Status Review Tribunals.[47] Created subsequent to the 2004 *Rasul* and *Hamdi* Supreme Court rulings, DoD set up Combatant Status tribunals to permit detainees to contest their designation as an enemy combatant. DoD conducted the hearings in the latter part of 2004 to Jan. 2005. Of the cases, 520 detainees were determined to be enemy combatants; 38 were exonerated.[48] DoD must obtain detainees' permission, by questionnaire, to detainees to release their names and get those questionnaires back to the court not later than Oct. 26, 2005.[49] Whether the information used by this panel, to make its determinations, was elicited by torture was an issue in *In re Guantanamo Detainee Cases,* along with the validity of this panel itself and the very designation of "enemy combatant."[50]
- Administrative Review Boards. DoD has created "Administrative Review Procedures" for prisoners at Guantánamo; this process is an administrative panel to determine individual detainees' status on the recommendation of the custodial authorities, and whether the U.S. should continue to detain them. It does *not* review those who are designated for military commission trials. It is an administrative panel but does guarantee counsel – to the review board, not those it reviews.[51]
- FISA Court. The Foreign Intelligence Surveillance Act or 1978, 50 U.S.C. §§ 1801 et seq, provides for a FISA court, of judges appointed by the Chief Justice, to meet in secret (if need be) and approve Government applications for surveillance where espionage, terrorism or other national-security threats are involved. While not a component of the President's military commissions, intelligence developed by FISA

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[44] Art. 2(a)(9) (10 U.S.C. § 802(a)(9)).
[45] Includes who are "(a) That of being commanded by a person responsible for his subordinates; (b) That of having a fixed distinctive sign recognizable at a distance; (c) That of carrying arms openly; (d) That of conducting their operations in accordance with the laws and customs of war," or merchant ship crews or those accompanying an enemy force, e.g., journalists, contractors, etc. III Geneva Convention (III GC) *supra*, Art IVA(2). MCA proponents often cite this four-prong test **but tend to *omit* the other categories** of legal combatants in Art. IVA & B.
[46] *See esp*. III GC Art. 4A(6), which covers a wide category of resistance and irregular fighters, post-invasion.
[47] Deputy Secretary of Defense Order of July 7, 2004, *see online at* http://www.dod.gov/news/Jul2004/d20040707review.pdf. *See also* Combatant Status Implementation Guidelines, July 30, 2004, *online at* http://www.defenselink.mil/news/Jul2004/d20040730comb.pdf.
[48] Associated Press v. U.S. Department of Defense, --- F.Supp.2d ----, 2005 WL 2065171 (S.D.N.Y, Aug. 29, 2005).
[49] Press v. U.S. Dept. of Defense, --- F.Supp.2d ----, 2005 WL 2348477 (S.D.N.Y., Sept. 26, 2005).
[50] *In re Guantanamo Detainee Cases, supra,* 355 F.Supp.2d at 468-472 .
[51] "Administrative Review Procedures for Enemy Combatants in the Custody of the Department of Defense at Guantanamo Bay Naval Base, Cuba," DOD Order, May 11, 2004; *see* online at http://www.defenselink.mil/news/May2004/d20040518gtmoreview.pdf. See *also online* "Making Sense of the Guantanamo Bay Tribunals," Human Rights Watch's summaries of the different panels at Gitmo, *at* http://hrw.org/english/docs/2004/08/16/usdom9235.htm

can lend itself to determining a prisoner's capture, enemy-combatant designation, detainment or tribunal, and the evidence might be admissible in the latter, perhaps *ex parte* or *in camera*.

- Terrorist Removal Court. 8 U.S.C. §§ 1531-1537 provides for the removal of aliens found to be terrorists, after public hearings before a court created for that purpose, under the same rules as FISA.[52] This court does not seem to have been convened, at least since 9/11.

Fall 2006: The Military Commissions Act

In response to *Hamdan,* the Administration sought legislation from Congress. On Sept. 28-29, 2006, after one hour of debate in the Senate (no filibuster, amendments defeated), Congress passed the MCA, signed into law by George W. Bush on Oct. 17.[53] Most of its provisions amend 10 U.S.C. and other U.S. Code titles.

Its salient provisions – beyond those cited above[54] – now include:

10 U.S.C. §§ 948a(1 & 2). Defines "enemy combatants" and lawful enemy combatants, i.e., those who can be treated as prisoners of war protected under the Geneva Conventions et al. The wording is parallel to Article 4 of Geneva Convention (III) on Treatment of Prisoners of War[55] but omits the Article 4 categories of persons accompanying the enemy, irregular resistance fighters, and civilian internees.[56]

10 U.S.C.§ 948b. Military commissions generally. Makes military case law (e.g., Military Reports generated by military appellate courts) irrelevant,[57] excludes UCMJ Articles on speedy trial, rights against compulsory self-incrimination, and pretrial due process.[58] [N.B. No provision for venue, *forum non conveniens* or siting.]

10 U.S.C. §§ 948b(f) & (g). Deems MCA commissions to afford, *ipse dixit,* all judicial guarantees required by Geneva Common Article 3,[59] but asserting that enemy combatants may not invoke the Geneva Conventions.

10 U.S.C. §§ 948d & 949m. Jurisdiction. Can try any offenses before, on or after 9/11.[60] "Enemy combatant" designation by the Executive branch – their say-so – is "dispositive" to subject the person to the tribunal. May adjudge the death penalty either under this statute "or the law of war." *Law of war* is customary international law – military custom – and not statutory.[61]

10 U.S.C. § 948j. Judges are designated by Defense regulations – "detailed" and not necessarily from an independent agency. The *convening authority* of a military commission –

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[52] Per 8 U.S.C. § 1532.
[53] See Wikipedia page, "Military Commissions Act," *at* http://en.wikipedia.org/wiki/Military_Commissions_Act_of_2006.
[54] In this Briefing Paper's contrast of courts-martial and military commissions in general, *supra*.
[55] Geneva Convention (III) on Treatment of Prisoners of War, 1956 WL 54809, T.I.A.S. No. 3364, 6 U.S.T. 3316. Hereinafter GCIII.
[56] *Id.,* Article 4A5-6 and 4B.
[57] (MCA) 10 U.S.C.§ 948b(c).
[58] 10 U.S.C.§§ 810, 831(a, b, d) and 832 (UCMJ Arts. 10, 31 and 32 respectively).
[59] GCIII, *supra,* Article 3. "Common Article 3" is Art. 3 in all four Geneva Conventions of 1949, which, in Art. 3(d) forbids "The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. "
[60] Possibly a violation of Ex Post Facto, U.S. CONST. Art. I, § 9, cl. 3. Flouts a finding in *Hamdan, supra*.
[61] Louis Fisher, MILITARY TRIBUNALS AND PRESIDENTIAL POWER 98 (University Press of Kansas, 2005).

but only that person – is forbidden to use the judge's efficiency report to reflect trial performance.[62]

10 U.S.C. § 948k. Secretary of Defense gets to detail trial counsel and military defense counsel. No provision for independent defense counsel.

10 U.S.C. § 948r. Excludes statements obtained by "torture" – however the Executive defines torture.[63] Statements elicited before the Detainee Treatment Act (Dec. 2005) may be admissible if the judge finds them of sufficient probative value.

10 U.S.C. § 949a. Rules. Secretary of Defense can set rules "practicable or consistent with military or intelligence activities, as well as rules of evidence that the military judge deems of "probative value"; evidence *may not* be excluded because it wasn't under search warrant; hearsay evidence is admissible (unless the party opposing it "demonstrates" its unreliability.

10 U.S.C. § 949c. Civilian defense counsel must not have been the subject of "any sanction of disciplinary action" (including accusations?) and must have a SECRET clearance.

10 U.S.C. § 949d(d & e). Proceedings may be closed if national security information is involved, including exclusion of the defendant.

10 U.S.C. § 949d(f). Major new "National Security Privilege." Executive branch or military department can assert this new evidentiary privilege to withhold evidence from the defense, or alternatively present redacted portions or a "summary." Effectively, *ex parte* evidence, along with *ex parte* consultation with the Executive department raising the privilege. "Protection of sources" clause could potentially screen off witnesses as well if the evidence is testimonial.

10 U.S.C. § 949l. Rulings of law by the judge are conclusive, that is, there will be no interlocutory appeals to higher courts (but the judge may change his ruling during the trial).

10 U.S.C. § 949u. Confinement. Those found guilty may serve sentences of confinement in armed forces facilities (e.g., the brig), or any prison under the U.S. *or its allies*.

10 U.S.C. §§ 950c, 950d, 950f, 950g. Appeal. Beyond Executive branch review of trial and sentence, the MCA creates a new Court of Military Commission Review, appointed by the Secretary of Defense (not Congress). The United States (only that party) may take interlocutory appeals to the CMCR. The D.C. Circuit may review matters of law, i.e., only if the tribunal was consistent with the MCA or "**to the extent applicable**, the Constitution and the laws of the United States."[64] Supreme Court may review if it grants cert.[65]

10 U.S.C. §§ 950i, 950j. Execution of sentence and appeals. Secretary of Defense can prescribe procedures; President must approve death sentences. Accused must file a "timely petition" for review or cert. (no definition as to "timely.") No court, justice or judge has habeas jurisdiction on any MCA matter.

10 U.S.C. § 950v. Crimes triable. Includes "law of war" traditional offenses such as pillaging, denying quarter, taking hostages, murder "in violation of the law of war". Torture by

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[62] *Contrast to* 10 U.S.C. §§ 826(c) and 837 (UCMJ Art. 26(c) & 37).
[63] *See, e.g.*, Jay Bybee, Memorandum, Office of Legal Counsel, U.S. Dept. of Justice, August 1, 2002, or Draft memorandum, Alberto Gonzalez to the President, Jan. 25, 2002, being coy about the definition of torture. Both documents hyperlinked in Appendix 3 *infra*.
[64] (MCA) 10 U.S.C. § 950g(c).
[65] Emphasis mine.

the accused is triable. Rape and sexual assault[66] name offenses already in the UCMJ[67] but the wording is different. Defines "spying" differently than the UCMJ;[68] as with "conspiracy"[69] A military commission is left to interpret this on its own, given the deliberate exclusion of military or other case law (*see* MCA § 948b discussion, above).

10 U.S.C. § 950v(b)(24-26). Terrorism, which includes activity calculated to influence government or to retaliate against government conduct. "Material support" to terrorism or "wrongfully aiding the enemy" are also offenses, though the statute provides no clear *mens rea* and, with no case law (see above) the definitions may not be apparent to counsel preparing for trial.

18 U.S.C. § 2441(3). The MCA strikes out a jurisdictional clause[70] and adds a lengthy new subsection defining breaches of Geneva Common Article 3. This might not agree with customary international law on Common Article 3 since the Geneva Conventions' creation in 1949.

28 U.S.C. § 2241. New subsection (e) added, stripping courts of jurisdiction to hear habeas.

Amendments to UCMJ.[71] Adds "lawful enemy combatants" to Art. 2(a)[72] as subject to normal courts-martial; excludes military commissions from UCMJ Arts. 21, 28, 48, 50(a), 904, and 906. Inserts a new UCMJ provision into Article 81 (conspiracy) that adds "to commit an offense under the law of war" to the definitions.

Geneva exclusion and interpretation. Sec. 5 of the MCA forbids any person from invoking the Geneva Conventions in any proceeding involving the U.S. or current or former U.S. officials, in any U.S. or State court. Sec. 6 leaves the President as the sole interpreter of all four Geneva conventions. (N.B., the MCA does not mention other applicable treaties to invoke, e.g., the International Covenant on Civil and Political Rights (1966), [73] with its provisions on torture, cruel treatment, arbitrary arrest or detention, due process, or the UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1987),[74] or the Inter-American Convention on the Forced Disappearance of Persons (1994).[75]

Problems with Military-Commission Defense Counsel

The President's pre-*Hamdan* orders[76] provided for the monitoring of communications between defense counsel and their clients. The MCA requires civilian counsel to have "signed

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[66] (MCA) 10 U.S.C. §§ 950v(b)(21-22).
[67] 10 U.S.C. § 920 (UCMJ Art. 120).
[68] *Compare* (MCA) 10 U.S.C. § 950v(b)(27) with 10 U.S.C. §§ 906 & 906A (UCMJ Arts. 106/106A on spying and espionage).
[69] (MCA) 10 U.S.C. § 950v(b)(38); *compare with* 10 U.S.C. § 881 (UCMJ Art. 81), the latter making "effects an act" as an element, while the former adds "overt act" – and makes conspiracy a capital offense.
[70] The former 18 U.S.C. § 2441(3), which said, "~~**(3)** "United States" means the several States of the United States, the District of Columbia, and the commonwealths, territories, and possessions of the United States.~~'
[71] The Uniform Code of Military Justice is 10 U.S.C. §§ 801-946.
[72] UCMJ, 10 U.S.C. § 802(a), which provides for jurisdiction over certain categories of military personnel, including, prior to the MCA, prisoners of war.
[73] Available online at http://193.194.138.190/html/menu3/b/a_ccpr.htm as of Jan. 27, 2003.
[74] *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."
[75] 33 I.L.M. 1529. See "relevant statutes and treaties," Appendix 2.
[76] Military Commission Order No. 3. See Appendix 1 *infra* for the history of military commissions from 1862 to 9/11.

a written agreement to comply with all applicable regulations or instructions for counsel."[77] Civilian counsel representing MCA clients will no doubt remember defense counsel Lynne Stewart, whose Federal conviction arose from, among other things, violation of "Special Administrative Measures", which she had to sign, a prerequisite for her to deal with her client in the course of representation.[78]

A crucial difference in civilian counsel from UCMJ practice is that, beyond simply being admitted to practice in a civilian jurisdiction, these counsel must qualify for SECRET clearance, a process requiring a background investigation.[79] The SECRET clearance is not automatic: disqualifiers include an applicant's associations, memberships, mental health, or sexual habits, which rather limits an attorneys' pool. [80]

Beyond that, the tribunals can withhold evidence from the defense, can restrict counsels' public statements, and can stick counsel with costs of obtaining SECRET clearance. And, by agreeing to these and other conditions, civilian counsel could have an ethical dilemma: go along with a travesty of justice, or stay away and leave defendants with only military lawyers?[81]

Beyond that, counsel will face evidentiary rules that mock their training. When an MCA tribunal offers hearsay evidence "not otherwise admissible under the rules of evidence applicable in … courts-martial",[82] how is counsel to demonstrate the evidence is unreliable, something no law school or bar exam has considered?[83] Especially when an MCA tribunal can admit evidence admissible if the trial judge "determines that the evidence would have probative value to a reasonable person" or that "evidence shall not be excluded … on the ground that the evidence was not seized pursuant to a search warrant"?[84] And under rules created by the Secretary of Defense that apply principles of law and evidence "practicable or consistent with military or intelligence activities"?[85]

Due Process, denial of: Geneva Convention and other international law

U.S. courts – and now the MCA – sometimes allege that enemy combatants have no cognizable rights under the Geneva Convention; designation as "enemy combatants" might somehow justify detention of U.S. citizens.[86] However, Common Art. 3[87] of the Conventions, which mandates certain minimums of due process in non-international conflicts, was enforced by 18 U.S.C. § 2441(c)(3) – violation of which, by U.S. citizens, is a war crime under this statute. The Art. 3 wording is broad:

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[77] (MCA) 10 U.S.C. § 949c(b)(3)(E).
[78] *See online at* www.lynnestewart.org; the site includes legal filings and documents in her case.
[79] *Military Commission Instruction No. 5* , ¶ 3A(2)(d), *online at* http://www.defenselink.mil/news/Aug2004/commissions_instructions.html. See Appendix 5 for hyperlinks to all pre-*Hamdan* military-commission Orders and Instructions.
[80] DoD Directive 5200.2R, ¶ C2.2.1. *See online* at http://www.dtic.mil/whs/directives/corres/html/52002r.htm .
[81] Louis Fisher, MILITARY TRIBUNALS, *supra at* 186-8.
[82] I.e., the Military Rules of Evidence, a version of the Federal Rules of Evidence used by standard law-school curricula and the Multistate Bar Exam as a standard.
[83] (MCA) 10 U.S.C. § 949a(b)(2)(E)
[84] (MCA) 10 U.S.C. §§ 949a(b)(2)(A & B).
[85] (MCA) 10 U.S.C. § 949a(a).
[86] See, e.g., Khalid v. Bush, 355 F.Supp.2d 311, 326 (D.C. Dist. Ct., Jan. 2005). This exclusion extends to U.S. citizens; Padilla v. Hanft, --- F.3d ---, 2005 WL 2175946 (4th Cir., Sept. 9, 2005).
[87] A "common article," here, is identical in each of the four Geneva Conventions, identical in wording and in Article numbering.

> To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
> (b) Taking of hostages;
>
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
>
> (d) The passing of sentences and the carrying out of executions without previous judgment pronounced by **a regularly constituted court**, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The MCA re-wrote 18 U.S.C. § 2441 to define Common Article 3 in its own way, not necessarily in conformity with current (or ongoing) international law or *jus cogens*. It narrows the definition of torture and cruel or inhuman treatment to include only severe physical or mental pain or suffering – which does not, under Justice Department interpretations such as the Bybee Memorandum[88], include such practices as waterboarding. This preemptive definition of Common Article 3 might preclude future interpretations under U.S. case law – and does not interpret "severe emotional distress" otherwise. (Note: if MCA proceedings do not proceed under existing U.S. case law, how would a future military commission define it?)

Also, the MCA defines murder, under the statute[89], as a killing "in the course of committing any other offense under this subsection" (e.g., torture or cruel or inhuman treatment as defined by the revised 18 U.S.C. § 2441) but, implicitly, only those killings *and not any other deaths in U.S. custody*. The revised § 2441 also narrows the definitions of maiming, rape, sexual assault and taking hostages – at the very least, does not cover forced nudity, sexual humiliation, but only penetration or permanent mutilation. Whether this comports with current international law, it does make Common Article 3 considerably weaker as applied to U.S. prisoners. What's more, the MCA retroactively protects U.S. personnel from § 2441 breaches.[90]

Note that, when seeking to punish enemy combatants, the Military Commissions' "offenses triable" include violations of the "law of war"[91] as well as writing traditional "law of war" offenses into the substantive-offenses sections of the MCA.[92] "Law of war" prosecution traces back to the Civil War tribunals, which tried offenders according to the "laws of war," customary international standards of warfare (e.g., against spying) – not by the statutory enactments of Congress. "Customary" international law has, however, evolved since 1862[93] or 1942 – tribunals that the Bush Administration now mimics. If Bush tribunals rely on "law of war" as an authority it is the 2006 customary law that might apply, and if they try personnel who have been abused in custody, and admit "for probative value" any evidence elicited under

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[88] Memorandum from Jay Bybee to Alberto Gonzalez, *Re: Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A* (Aug. 1, 2002), noted in Fisher, MILITARY TRIBUNALS, *supra at* 202-206. Memo available online at the Washington Post archive — http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf — and elsewhere.

[89] Now (MCA) 18 U.S.C. § 2441(3)(d)(1)(D).

[90] (MCA) 18 U.S.C. § 2441(3)(d)(2) titled "Retroactive Applicability."

[91] (MCA) 10 U.S.C. §§ 948d and 949m.

[92] (MCA) 10 U.S.C. § 950v.

[93] Indeed, Franz Lieber drew up the "Lieber Code" of law of war at the request of the Lincoln Administration, published as General Order No. 100, which became the basis for international law of war from the Franco-Prussian War of 1870-1, to the first Convention at The Hague in 1899. Louis Fisher, Military Tribunals, *supra,* at 71-82.

torture, the tribunal is itself a party to war crimes, in violation of that very law of war as it has evolved.

Still in force: Protections and prohibitions under 10 & 18 U.S. Code

Although the military commissions order may exclude enemy combatants from the protections of the UCMJ, the culpability of U.S. military personnel to certain punitive UCMJ statutes remains; Congress has made no provision for excusing U.S. custodial, legal and military police personnel from:
Art. 92,[94] Failure to Obey Order or Regulation
Art. 93, Cruelty and Maltreatment
Art. 97, Unlawful Detention.
Art. 119, Manslaughter, and Art. 118, Murder. Of possible relevance in a wrongful execution.
Art. 120, 124, 125, 128 against various forms of physical harm. Of possible relevance where U.S. personnel engage in coercive prison or interrogation business.

Some other relevant provisions of the U.S. Code:

8 U.S.C. § 1226a.[95] Detained aliens subject to the Patriot Act – and presumably, under the MCA, likely "enemy combatants" -- 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). Under the command-responsibility doctrine established in *Yamashita,* they become possibly liable for atrocities committed by the lower chain of command, including *ultra vires* (i.e., travesty-of-law) proceedings.

18 U.S.C. §§ 1203. Hostage taking. Applies to acts outside the United States where the individual or perpetrators are U.S. citizens and the hostage status is to compel some action by the U.S. government. (Of possible relevance with detainees, e.g., where they're being kept outside the U.S. or in the brig to sequester them from Federal court jurisdiction.) No case law on this statute, involving U.S. Government actors, as of November 1, 2006. There should be.

18 U.S.C. §§ 2331-2339B.[96] Terrorism. Multinational jurisdiction already provided for and the various terrorist acts anticipated by Congress.[97]

18 U.S.C. §§ 2340, 2340A, 2340B.[98] Torture. Forbidden to U.S. citizens where carried out under color of authority. No exceptions where enemy combatants are the victims. Maximum punishment is death. No case law on this statute as of November 1, 2006. There should be.[99]

(Note: U.S. personnel on trial for breaching this statute will have the benefit of prefabricated justification defenses – necessity, self-defense, et al – set forth in an infamous 2002 fifty-page memorandum from one Jay S. Bybee, head of the Justice Dept. Office of Legal Counsel, to

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[94] Note: the UCMJ, Art. 1-146, is 10 U.S.C. §§ 801-946 respectively, so Art. 92 is § 892, Art. 93 is § 893, etc.
[95] Orig. § 412 of the USA-Patriot Act of 2001.
[96] Title 18, Part I, Chapter 113B of the U.S. Code.
[97] *Obiter dictum:* Did any of the drafters of the MCA bother to *read* the U.S. Code?
[98] Title 18, Part I, Chapter 113C of the U.S. Code.
[99] Note: the MCA does cross-reference some § 2340 definitions of torture (as offenses by the accused) from this chapter, but does not amend this chapter. (MCA) 10 U.S.C. § 950v(b)(11)(B). *But see id.,* § 950v(b)(12) on "cruel or inhuman treatment"; *compare* with 18 U.S.C. § 2340 definitions of torture.

then-White House Counsel Alberto Gonzalez[100] – defenses both for individual interrogators and for the President himself. This was the memo that sought to redefine the word "torture." This document might be useful for counsel as a preview of Administration pleadings in a habeas action; it might also be Exhibit A in some future criminal trial of Administration officials on this statute.)

18 U.S.C. § 2441.[101] War crimes. No U.S. citizen shall commit a war crime in violation of international treaty, including specifically Geneva common article 3 on minimal standards of treatment and due process (see below). Maximum penalty: death. No case law currently on this statute as of Nov. 2006. There should be. N.B., the MCA retroactively applies itself to this statute (i.e., from Nov. 26, 1997).[102]

18 U.S.C. § 3261-3267. The Military Extraterritorial Jurisdiction Act of 2000 (MEJA). Extends Federal criminal jurisdiction over civilians "accompanying or employed by" the military, e.g., contractors working with U.S. detention facilities. Does not preclude jurisdiction by a military tribunal or court-martial but may fill a gap left by case law on 10 U.S.C. § 802(a)(10) (Art. 2, UCMJ).[103] Also, § 3264 places heavy procedural requirements on "removal" of persons, arrested under this Act, to or from foreign territory.[104] No case law on §§ 3261-4 as of October 13, 2005. There should be.

18 USC § 4001(a). "No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." This statute has been raised in wartime detention cases involving U.S. citizens (*e.g., Padilla,*[105] *Hamdi*) and the Court declined to exclude a class of citizens from its protection.[106]

28 U.S.C. § 2241. Habeas statute. Habeas has been a traditional method of challenge of a military-commission proceeding, and was the basis for *Milligan, Quirin,* and *Yamashita* in the original uses of the Great Writ. Upheld for foreign nationals in detention cases in *Rasul.*[107] The MCA forbids any court from hearing habeas appeals by those brought under this statute.[108]

Detentions[109]

As of November 5, 2006, only a handful of enemy combatant-detainees awaited formal military-commission trials, at Guantánamo. Of the remainder of those detained by U.S. forces since 9/11 have, a few (e.g., Yaser Hamdi) have been released;[110] the rest have simply remained in custody indefinitely, usually incommunicado, not as prisoners of war but as

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[100] Bybee Memorandum, *supra, see online at* http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf .
[101] Title 18, Part I, Chapter 118 of the U.S. Code, of which § 2441 is the only section.
[102] MCA, Sec. 6(b)(2).
[103] Criminal liability under the UCMJ for "persons accompanying" is to be narrowly construed. Robb v. U.S., 456 F.2d 768 (U.S. Ct.Cl., 1972), *see also* Cole v. Laird, 468 F.2d 829, 831 (5th Cir., 1972).
[104] "Removal" is also a general term, post-9/11, for the informal transfer of detained prisoners from U.S. custody to third-party nations with little or no publicity or guarantee of humane treatment. Specifically forbidden by Article 3 of the Convention Against Torture (United Nations, 1465 *Treaty Series* 85, *see* online at http://www.ohchr.org/english/law/cat.htm), to which the U.S. is a signatory.
[105] Padilla v. Rumsfeld, 542 U.S. 426 (2004). *See also* Padilla v. Hanft, --- F.3d ---, 2005 WL 2175946 (4th Cir., Sept. 9, 2005).
[106] Fisher, MILITARY TRIBUNALS, *supra,* at 226 and 232.
[107] Rasul v. Bush, 542 U.S. 466 (2004).
[108] (MCA) 10 U.S.C. §§ 950i, 950j.
[109] See also the history of detention in U.S. history, Appendix 1 *infra*.
[110] "U.S. to Free Hamdi, Send Him Home," WASHINGTON POST (Sept. 23, 2004) at A01. Mr. Hamdi was released in Saudi Arabia; so much for Government pleadings naming him a threat to U.S. national security.

"enemy combatants," including U.S. citizens (notably José Padilla). The Supreme Court's major rulings in June 2004, *Padilla*[111], *Hamdi*[112], and *Rasul*[113], respectively addressing a U.S. citizen captured in the U.S., a U.S. citizen captured overseas, and foreign enemy combatants captured overseas. The *Rasul* court strongly limited *Eisentrager's* applicability to the post-9/11 world.[114]

(Note: Padilla's attorney has since alleged that Padilla was subjected to various forms of torture during 2002-2004. That he was a U.S. citizen, and confined in a brig on U.S. soil – not Guantánamo – did not prevent this.)[115]

In re Guantanamo Detainee Cases, in January 2005, did provide a rationale for due process for foreign prisoners in wartime; at least, it resisted the idea that non-U.S. citizens captured outside the U.S. were outside the Fifth Amendment due-process clause.[116]

The Military Commissions Act of 2006 specifically forbids any court or judge to hear a habeas appeal by "an alien detained by the United States to have been properly detained as an enemy combatant or is awaiting such determination."[117]

The CIA has also established holding and interrogation facilities for terror suspects, according to two as-yet-classified documents signed by the President. This was the result of FOIA lawsuits by the ACLU on detainee matters.[118]

Remedies to Military Commissions and detentions

Court-martial and military commission findings are not normally reviewable by Federal (civilian) courts under the Administrative Procedures Act, 5 U.S.C. § 701(b)(1)(F).[119] However, collateral attack, usually in the form of a habeas challenge, was a frequent method of reaching outside the military commissions, the method for putting the *Milligan, Quirin, Yamashita, Eisentrager* and *Hamdan* defendants, among others, before the Court, and military courts can issue habeas and other extraordinary common-law writs (e.g., coram nobis, audita querela, etc.).[120]

Counsel might also complicate a tribunal by filing applicable criminal charges against U.S. custodial personnel under the sections of 10 and 18 U.S.C. noted above – where appropriate – and taking care, of course, that the charges are sworn in good faith.[121]

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[111] *Padilla, supra,* 542 U.S. 426.
[112] Hamdi, *supra*.
[113] *Rasul, supra*.
[114] Fisher, MILITARY TRIBUNALS, *supra at* 247.
[115] "Motion to Dismiss for Outrageous Government Conduct," (U.S. Dist. Ct., S. Dist. Fla., Oct. 4, 2006), Case No. 04-60001-CR.
[116] *In re Guantanamo Detainee Cases,* 355 F.Supp.2d at 454.
[117] (MCA) 28 U.S.C. § 2241(e).
[118] "C.I.A. Tells of Bush's Directive on the Handling of Detainees," New York *Times* (Nov. 15, 2006), *online at* http://www.nytimes.com/2006/11/15/washington/15intel.html. *See also* the ACLU site on the ongoing FOIA suit at http://www.aclu.org/safefree/torture/ .
[119] *See, e.g.,* McKinney v. White, 291 F.3d 851 (D.C. Cir., 2002). Also, 5 U.S.C. § 701(b)(1)(G) also excludes "military authority exercised in the field in time of war or in occupied territory".
[120] U.S. Navy-Marines Court of Appeal v. Carlucci, 26 M.J. 328 (1988). Art. I courts (i.e., created by Congressional act, which includes courts-martial, military appellate courts and military commissions) can issue extraordinary writs. See also Burns v. Wilson, 346 U.S. 137 (1953), civilian courts may not review courts-martial but this does not preclude ***habeas***.
[121] *See, e.g.,* "Detainee lawyers set sights on Rumsfeld", *San Francisco Chronicle* (Nov. 14, 2006) at A-17, a proceeding initiated in Germany against Bush Administration figures on war-crimes charges. *See online* at http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/11/14/MNGL3MC41B1.DTL.

Ultra vires liabilities for the tribunal members

If the military commissions are one day found to be without merit due to lack of legality, constitutionality or in violation of due-process guarantees of our Constitution, international common law, or international treaty, would become culpable for the results.[122] Penal or capital sentences would now be extrajudicial imprisonment, or homicide, and expose the participating jurists to prosecution, not least for violations of, or complicity in, violations of 10 and 18 U.S.C. and would include those higher authorities in the Defense and Justice Departments who organized the commissions, justified them by internal memoranda[123] or convened them by command authority.

Beyond that, those participants who are attorneys incur professional liability. It would not be hard to find where military-commission panelists and prosecutors, ***if*** they're lawyers, breaching the ABA Model Rules; *a fortiori,* military lawyers are subject to ethics rules that are quite similar.[124] Such breaches, at the Nuremberg trial, were part of the indictments of Nazi jurists like Hans Frank, Party general counsel, and Wilhelm Frank, interior minister, both of them architects of the Nazi system of special courts, detentions without trial, and executions without due process – partly why both men were hanged for crimes against humanity.[125]

Finally, the commanders face the legal doctrine of command responsibility for crimes committed by their subordinates. This doctrine, established in the *Yamashita* precedent,[126] requires a finding that "(a) the commander had a superior-subordinate relationship with the troops that committed the human rights abuses; (b) the commander knew, or should have known, that these troops were committing such offenses; and (c) the commander failed to prevent or repress the abuses. Once these three elements are met, a commander may be held criminally and civilly liable for the human rights violations committed by subordinates unless he presents affirmative defenses to overcome the presumption of liability."[127] The chain of command under the 1986 Goldwater-Nichols Act[128] runs from the President and Secretary of Defense ("National Command Authority") directly to the unified (regional) and specified combatant commands, e.g., CENTCOM in the Middle East and SOUTHCOM (including the detainee camp at Gitmo), so the higher commanders, Rumsfeld and Bush are all liable even if they signed no orders, personally ordered no abuse, convened no tribunals themselves. (The Justice Department malefactors are not in the chain of command but the memoranda – if their names are on them – will implicate them).

Analysis.

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[122] See Jordan J. Paust, *supra* at 28. The warning to military jurists is explicit: "The U.S. military must disobey an order calling for a patent illegality. Such an order would be *ultra vires* and constitute a war crime if issued during an armed conflict. At least for military lawyers, the present Military Order, in part, is such an order and places present and future U.S. military personnel in harms way."

[123] For memoranda implicating now-Attorney General Alberto Gonzalez, e.g., *see* Findlaw's torture page *online* at http://news.lp.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb.html .

[124] *See, e.g.,* Army Regulation [AR] 27-26, Rules of Professional Conduct for Lawyers, *see online* at http://docs.usapa.belvoir.army.mil/jw2/xmldemo/r27_26/cover.asp . *See also* Navy JAG INSTR 5803.1C, Professional Conduct of Attorneys, *online* at http://www.jag.navy.mil/Instructions/5803_1c.pdf .

[125] For key elements of the prosecution of Frick, *see* 4 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS SITTING AT NUREMBERG, GERMANY 328, *Published Under the Authority of H.M. Attorney-General By* HIS MAJESTY'S STATIONERY OFFICE, LONDON: 1946, (hereinafter cited as IMT Nuremberg), 4 IMT 328; for Hans Frank's indictment, *see* 4 IMT 136 (Jan. 10, 1946).

[126] Application of Yamashita, 327 U.S. 1 (1946).

[127] 96 AM. J. INT'L L. 719, 721, Sean D. Murphy, *Doctrine of Command Responsibility in U.S. Human Rights Cases* (July, 2002).

[128] See esp. 10 U.S.C. §§ 161-168.

George W. Bush's military commission is a guillotine: swift, efficient, deadly, anachronistic, and un-American.

The military commissions were, until 9/11, freak events in U.S. history, brief departures from the rule of law, usually in heat of wartime emotion.[129] These tribunals were a means of denying the suspects – usually non-white or otherwise disfavored – all the usual guarantees of due process, evidentiary propriety, appeal rights and clear, statutory charges: in short, a court that could make up its own rules and – from Mrs. Mary Surratt to Gen. Yamashita – get the accused to the hangman as fast as possible, rarely with any judicial appeals, or with perfunctory appeals at best. The tribunals – Lincoln's, FDR's, George Bush's, the latter two copying from the previous – began with, *are* frozen in, 19th Century notions of military customs. This lends a certain irony to Attorney-General Alberto Gonzalez' describing the 1949 Geneva Conventions as "quaint".[130] George Bush has reanimated these old corpses while military courts-martial and international law have long since evolved.

The legal scholar knows Article III courts – those Federal courts created under that part of the Constitution providing for a Judiciary branch. "Article I" courts are those established by Acts of Congress, notably the courts-martial and military appellate courts set forth in Title 10, U.S. Code (UCMJ). We might term the military commission, however, an "Article II court," a conjuring of Executive war power, albeit with the statutory cover that a passive Congress provided in the MCA with barely an hour's debate. The offenses these tribunals try, the rules that govern them, the court personnel all came via the Executive: executive order, bill-drafting, regulations.

National emergency – 9/11— was the excuse for re-creating these tribunals. Congress' Authorization for the Use of Military Force, and the President's Order, came in the aftermath of the attack and cited it as the basis for emergency powers. Note, however, that the U.S. did *not* resort to these tribunals in World War I, the Cold War or during the outbreaks of terror prior to 9/11. Indeed, the first World Trade Center attack and the Oklahoma City bombing were both tried in U.S. Federal Court; the 1993 Langley, Va., attack on CIA employees, by the Commonwealth of Virginia.[131] The Republic survived all this without abandoning the rule of law.

(Note: post-9/11, the Bush Administration saw fit to go to U.S. civilian courts to try John Walker Lindh, Richard Reid (the so-called "shoe bomber"), the "Lackawanna Six", and Zacarias Moussaoui (the alleged surviving 9/11 hijacker), but with considerably poorer results than the pre-9/11 prosecutions. It's also curious why Mr. Moussaoui, who above all others is the type of subject the *President's Military Order* had in mind, was tried thus. Judging by the outcomes, it seems like the Administration relies on Defense Department tribunals simply because the Bush Justice Department can't put a decent prosecution together.)[132]

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[129] See Appendix 1, *infra,* for the full history of military commissions throughout U.S. history.
[130] Draft memorandum, Alberto Gonzalez to the President, Jan. 25, 2002, *see online* at http://news.lp.findlaw.com/hdocs/docs/torture/gnzls12502mem2gwb.html.
[131] See, e.g., *U.S. v. McVeigh,* 153 F.3d 1166. Court of appeals noted among its findings that the attack did involve what it termed a "weapon of mass destruction" at 1166. See also, e.g., U.S. v. Rahman, 854 F.Supp. 254 (1994) and subsequent case history on the first WTC conspiracy. For the CIA/Mir Aimal Kansi (/aka/ Kasi) case, see Kasi v. Commonwealth, 256 Va. 407, 508 S.E.2d 57 (Va., 1998), *cert. denied,* Kasi v. Johnson, 537 U.S. 1025 (2002); *see also* PBS NewsHour transcript, "Facing Justice" (June 18, 1997).
[132] *See* Fisher, MILITARY TRIBUNALS, *supra at* 210-220.

The President's pleadings in defense of the MCA will insist that past case law, flimsy as it is, notably *Quirin, Eisentrager,* and *Yamashita*, backs them, at least for non-U.S. citizens in a war or foreign setting (or emerging from one, be it a U-boat or an al-Qaeda training camp). These three precedents gave the D.C. Circuit the excuses it needed for its own *Hamdan* ruling in 2005, short-lived as it was. Nonetheless: the MCA's exclusion of court review would not – *should* not – be constitutional.[133]

A fortiori. A bad precedent, Supreme Court or otherwise, should not stand unchallenged by counsel seeking a habeas writ. *Quirin, Yamashita, Korematsu, Eisentrager* generated regrets at the time. They all have angry and often-eloquent detractors, either in the dissents or in later reviews and later negative-citing references. Sure, they're precedent. So is *Dred Scott* and *Plessey v. Ferguson*. We owe these precedents no loyalty, and given the harm they've done to the Constitution and to later generations of prisoners, we have a duty to overturn them, particularly *Quirin, Yamashita,*[134] *Korematsu,* and *Eisentrager*.

As for the denial of Geneva Convention rights,[135] counsel should note that the only reservation the U.S. had to ratifying the Conventions, notably III Geneva Convention on prisoners of war, was to Art. 68 on the death penalty. Otherwise, the Conventions – and the 1987 Convention Against Torture,[136] which the U.S. also ratified – are the supreme law of the land under the Supremacy Clause,[137] and the President has not withdrawn the U.S. from them. A trial that flouts these is invalid, and thus the pre-trial detention, interrogation, and executions would be extrajudicial, and a breach of Geneva. Further, if the tribunals can admit, "for probative value," confessions elicited under torture, does that make the tribunal members a party to that crime as well?

Barring any person from invoking Geneva Conventions,[138] in any proceeding involving the U.S. or current or former U.S. officials, makes the Geneva Conventions unenforceable (a "non-executing" treaty, as it were) and thus flouts the Supremacy Clause. The MCA also makes the President, *not the courts,* the sole interpreter of Geneva obligations, standards and interpretation – an insult to judicial Art. III prerogatives, not just the Supremacy Clause.

Note: the MCA makes the President the sole interpreter of **all four Geneva conventions,** not just Common Article 3.[139] This includes all provisions for dealing with all wounded and sick, all prisoners of war, all civilian persons. This is over and above the provision excluding the enemy combatants from **all four** Geneva conventions.[140]

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[133] Belkin, *supra,* 38 Cal. W. L. Rev.. at 441-445. If the Administrative Procedures Act, 5 U.S.C. § 701(b)(1)(F), provision against Federal review of military commissions serves to perpetrate a miscarriage of justice, then counsel should challenge *that* as an unconstitutional separation of powers as well.

[134] Although, perhaps, we should not seek to overturn the command-responsibility part of *Yamashita,* not for those periods when Bush and Rumsfeld were in command.

[135] I.e., the 1949 Conventions I-IV of the Geneva Conventions. Note: the later Protocols 1 and 2 Additional to the Geneva Conventions (1977) were signed, but not ratified, by the U.S.

[136] *See online at* UN High Commissioner for Human Rights, http://www.ohchr.org/english/law/cat.htm . Note that (MCA) 18 U.S.C. § 2441(e) redefines the UNCAT as that cruel, inhuman or degrading punishment prohibited by the 5th, 8th and 14th Amendments – somewhat mooted by the fact that the MCA forbids military commissions from applying case law.

[137] U.S. CONST. Art. VI, cl. 2.

[138] MCA, Sec. 5(a) and 5(b). By defining "Geneva Conventions" as the four 1949 Conventions – to which the U.S. is a signatory – it does single out treaties that are part of the Supremacy Clause, as opposed to the Protocols Additional to the Geneva Conventions, which the U.S. has not signed on to.

[139] MCA (S. 3930), Sec. 6(a)(3).

[140] (MCA) 10 U.S.C. § 948b(g).

Assuming, however, that the Conventions do *not* apply to enemy combatants, then, what about the various protections in the U.S. Code, notably Titles 10, 18, and 28 cited above? Those U.S. personnel who detain (hold hostage), interrogate (torture), imprison (maltreat) and execute (extrajudicial killing, to wit: premeditated murder) may still be in violation of U.S. law – *a talking point hardly raised in this national debate* – and are committing Federal or military crimes, some of them capital.[141]

The military commission orders mock several Constitutional provisions:

- Fourth Amendment evidentiary guarantees. The "probative value" rule on admission of evidence, by a court judge appointed by the Executive branch, is a singular provision and not really challenged in *Yamashita*. The provisions of MCA §§ 948r and 949a permitting admission of evidence seized without warrant, evidence obtained under possible duress, as well as hearsay evidence under loose new rules, make a mockery of rules of evidence.
- Fourth Amendment: the new "National Security Privilege." This is a monstrous new provision that allows the Executive branch, *ipse dixit,* to create *ex parte* evidence on the simple say-so that it is detrimental to national security, as well as screen off witness as well in violation of the Confrontation clause. Besides being an insult to the Constitution in its own right, there is very real danger that this privilege could apply in military, Federal or other courts. Will this poison the Federal Rules of Evidence?[142] What's more, if the "protection of sources" subsection applies to testimony, the right to confront witnesses is flouted as well.
- The denial of Fifth Amendment rights of due process, for foreigners, at least by Court omission, is something of a precedent in *Yamashita* [worth challenging], though counsel may want to revisit the *Wong Wing* case.[143] That case, in which the Court said that superimposition of a criminal penalty on top of (an otherwise permissible) deportation is not permissible if it flouts the Fifth Amendment, has not had much case history since 1896, and not in the tribunal context. And besides the due-process mockeries of procedure and evidence rules, what about *forum non conveniens?* A tribunal sitting at Guantánamo (in Cuba) or at some U.S. air base in, say, Kazakhstan, is not *conveniens*. Beyond that, the MCA rules sections -- §§ 948r, 949a – make mockeries of the rules of evidence.
- Fifth Amendment guarantee against self-incrimination. The widespread use of coercion in U.S. handling of enemy-combatant suspects may be at issue if "probative value" extends to admissions extracted under duress. The MCA has nothing that would stop a tribunal from admitting it if it felt like it.
- Sixth Amendment right to counsel. Military counsel, in UCMJ proceedings, usually come from a military trial-defense service outside the chain of command and the UCMJ and MCM protect them from repercussions; here, they're "detailed" by the

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[141] For one rare "j'accuse" on Administration criminal liabilities, *see* Elizabeth Holtzman, "Torture and Accountability," THE NATION (July 18, 2005), *online* at http://www.thenation.com/doc/20050718/holtzman .

[142] The one Federal Rule of Evidence on privilege – Rule 401 – is a general provision governed by common law or State law. Rule 401 might require other Federal courts to import this new "privilege".

[143] *Wong Wing v. U.S.,* 163 U.S. 228 (1896), as well as its 14th Amendment predecessor, *Yick Wo v. Hopkins,* 118 U.S. 356 (1886), were both emphatic about foreign citizens' rights under the due-process clauses of the 5th and 14th Amendments.

MCA.[144] What's more, civilian counsel must not only pre-qualify by obtaining a SECRET clearance – a laborious process[145] – but may be subject to disqualification if the clearance is denied. Would the lawyer's associations, or membership in certain political organizations, be grounds for denial, and if so, would that include dissenting groups like the **National Lawyers' Guild**? If so, attorneys interested in representing defendants in these proceedings should apply for SECRET clearance ***now*** and find out if they have a First Amendment case in their own right. And they should apply now so that they will be *in* the pool when a client's life is in peril.

- Sixth Amendment right to counsel, further. Order No. 5 provided for monitoring of counsel. The MCA now requires counsel to sign an agreement to comply with military-commission rules,[146] which, if they include when and how counsel communicates with his/her client, could chill counsel's jailhouse discussions with the client. This, too, is worth raising as an issue. The example the U.S. made of defense counsel Lynne Stewart, whose alleged noncompliance with "Special Administrative Measures" got her a felony conviction, might also intimidate counsel who see this MCA provision as a trap.[147] Meantime, military defense counsel might be intimidated by the fate of Selim Hamdan's military defense counsel, Lt. Cdr. Charles Swift, passed over for promotion and thus ending his military career.[148]
- More Sixth Amendment: civilian defense counsel is now required to "protect any classified information received during the course of representation of the accused."[149] If Government conduct in the Majid Khan case is any indication,[150] this might include the prisoner's knowledge, e.g., of the conditions under which s/he was imprisoned and interrogated. If counsel cannot communicate with the prisoner, or cannot re-divulge information about the prisoner's situation in, say, appellate pleadings, or cannot divulge the location or existence of the client, it makes a mockery of effective representation of counsel. And if the prisoner's status as a prisoner itself becomes a secret, s/he could disappear, in the permanent sense of the word.
- More Sixth Amendment: evidentiary rules. MCA § 949a flouts traditional hearsay rules on evidence, particularly hearsay. Law curricula and bar exams follow a precise set of rules and analysis on hearsay – reflected in the Federal and Military Rules of Evidence – but how the devil is a trained attorney supposed to defend against hearsay brought in under this Alice in Wonderland rule? Or, worse yet, "demonstrate" its unreliability? This makes defense counsel considerably more ineffective, hence, raises a Sixth (as well as Fourth) Amendment issue.

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[144] (MCA) 10 U.S.C. § 948k.
[145] (MCA) 10 U.S.C. § 949c(b)(3)(D); the likeliest method of obtaining SECRET clearance would be DoD Directive 5200.2R, *Personnel Security Program supra* (*see online* at http://www.dtic.mil/whs/directives/corres/html/52002r.htm) stipulated for civilian counsel by Military Commission Instruction No. 5, *supra*. Disqualifiers in 5200.2R under ¶ C2.2.1 include applicant's associations, memberships, mental health, or sexual habits, which rather limits an attorneys' pool.
[146] (MCA) 10 U.S.C. § 949c(b)(3)(E).
[147] http://en.wikipedia.org/wiki/Lynne_Stewart; *see* also www.lynnestewart.org .
[148] Opinio Juris, http://www.opiniojuris.org/posts/1160456344.shtml .
[149] (MCA) 10 U.S.C. § 949c(b)(4).
[150] Memorandum in Opposition to Counsel, Majid Khan v. George W. Bush (Case 1-06-CV-01690-RBW, D.C. Dist.Ct., Oct. 26, 2006), *online* at http://ccr-ny.org/v2/legal/september_11th/docs/Memorandum_in_Opposition_to_Counsel_10_26_06.pdf .

- The Bill of Attainder clause.[151] The courts have ruled, albeit inconsistently, that the President's Art. II power can suffice to apprehend and detain suspects. However, MCA, a Congressional enactment, may *be* a bill of attainder if the statute causes nonjudicial punishment, lack of a judicial trial, and specificity in identification of the individuals affected,[152] and the MCA names a class – enemy combatants – as worthy of separation from Art. III courts. If the detentions or tribunals are non- or extra-judicial, esp. if the tribunals are *ultra vires,* illegal proceedings, *and* if those enemy combatants thus ensnared by the AUMF and the MCA are a cognizable class, counsel might argue, albeit against a strong standard of proof, that they are thus attainted. But for the President's reliance on a Congressional enactment, worded as it is, and not on his own powers solely, this argument would not apply.
- The Supremacy Clause[153] making treaties – duly ratified – the supreme law of the land. Unless the President formally withdraws the U.S. from them, e.g., the Geneva Conventions, the Convention Against Torture, etc.[154], the U.S. is still a party to them. A treaty in question may not be self-executing, the U.S. may have entered reservations on the treaty upon ratification, but the Supremacy Clause is still worth raising. Even absent a treaty, the doctrine of *jus cogens* – certain absolute norms of international law – may also apply under some construction of this clause.[155], especially given the MCA's reliance on the "law of war" – i.e., a form of customary international law. The MCA relies on international law ("the law of war"), which U.S. courts might still consider if they hear a military-commission case, and *jus cogens,* more strongly than ever, condemns torture[156] as well as extrajudicial killing, denial of due process *et al.*
- More on the Supremacy Clause. If the MCA makes the President the sole arbiter of the four Geneva Conventions,[157] which Congress consented to and the courts are the arbiters of as the supreme law of the land under Art. VI, then this encroaches on the other branches' prerogatives under Art. I and Art. III.
- The Ex Post Facto Clause[158] forbids making an offense a crime after the fact and was a defense in arguments before the Court on *Quirin.* A future military commission might breach this if it tries a detainee on an offense in the *Instructions* committed before the *Instructions* came out, or perhaps was not a statutory crime at all.
- Federalism issues. Forbidding any person from invoking Geneva in any U.S. or State courts invites a challenge. While the Constitution[159] does prevent States from meddling in foreign affairs, it does not either estop State courts from hearing certain arguments,

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[151] U.S. CONST. Art. I, § 9, cl. 3.
[152] 16B Am. Jur. 2d Constitutional Law § 671, *Generally; nature and definition of bills of attainder.*
[153] U.S. CONST. Art. VI, cl. 2, *cited supra.*
[154] The MCA may also put the U.S. in breach of the UN Charter, the Covenant on Civil and Political Rights, the Inter-American Convention on the Forced Disappearances of Persons, all of which it is also signatory to.
[155] See the *Charming Betsy, Paquete Habana* and related cases in the Appendices, below.
[156] Filartiga v. Pena-Irala, 630 F.2d 876 (2nd Cir., 1980).
[157] MCA, Sec. 6.
[158] U.S. CONST. Art. I, § 9, cl. 3.
[159] See esp. U.S. CONST. Art. I, §§ 8 and 10 on Congressional prerogatives and States' limitations, and Art. IV, § 3, cl. 2 on States' claims. The MCA might also encroach on the 11th Amendment.

or estop State attorneys from pleading them.[160] And it may also breach the due-process clause of the 5th Amendment.

- Habeas corpus. The Constitution provides for suspension of the Great Writ only in time of insurrection (rebellion) or invasion.[161] Denying it without either criterion is unconstitutional on its face. Note that the only previous suspensions of habeas were in the Territory of Hawaii during World War II[162] -- very much at risk of invasion – and during the Civil War, during a slaveholders' rebellion in which an enemy government (the C.S.A.) occupied all or part of 13 U.S. states.[163]

The President's (pre-*Hamdan)* Military Commission Order, and the various military-commission orders and instructions, envisioned jurisdiction over non-U.S. nationals.[164] One of the legislative "compromises" to the MCA was a new provision making any person (including U.S. citizens), and not just those who were Taliban or al Qaeda, eligible to be "enemy combatants" subject to detention, interrogation and/or trial under the MCA.[165] What's more: case law, however badly decided, **does support the trial of U.S. citizens before such tribunals.** *Milligan* and *Duncan* argue against this, but *Madsen, Quirin, Colepaugh* and *Padilla* cases say yes.[166]

The tribunal litigation will rely, at least in part, on the wartime-detention cases, notably the various *Padilla* and *Hamdi* precedents, which, along with the older *Korematsu* case, can justify Federal detention of suspects, although not necessarily trial. Even there, however, counsel can find useful arguments among the dissenters, notably the dissents in *Korematsu*[167] and in *Hamdi*[168]*,* the latter's dissent being a soaring hymn to habeas corpus, by Antonin Scalia, of all people. "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive."[169]

The Administration, four years after 9/11, has crafted this military-commission proceeding but, at least as far as we know, has only a few cases pending at Guantánamo. For a series of crimes and conspiracies as allegedly heinous as those of al-Qaeda, the trial record so far is thin. Five years after Pearl Harbor (e.g., by Dec. 1946), the U.S. had tried the *Quirin, Colepaugh, Eisentrager, Yamashita* and *Homma* high-profile cases, as well as 67 assorted battlefield cases, and the first major Nuremberg trial.

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[160] *But see* American Insurance Association v. Garamendi, 537 U.S. 1100 (2003), where the State was itself a litigant on an international matter – compensation of Holocaust victims – in violation of the President's conduct of foreign policy.
[161] U.S. CONST. Art. I, § 9, cl. 2.
[162] See *Duncan, supra*. *See also* Louis Fisher, MILITARY TRIBUNALS, *supra,* at 130-139. Note that Duncan and his co-litigants still, ultimately, got to the U.S. Supreme Court on a habeas complaint; the Kahanamoku named as respondent was, in the classic habeas pattern, the prisoners' jailer, Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu.
[163] Louis Fisher, *id.,* at 42-45.
[164] *President's Military Order, supra,* § 2(a).
[165] (MCA) 10 U.S.C. § 948a(1).
[166] Note: the Supreme Court 2004 detention cases, involving U.S. citizens – *Padilla* (542 U.S. 426) and *Hamdi, supra,* addressed the Government's right to *detain* citizens à la *Korematsu,* not try them. But detention – the legal right to the *corpus* – can be one preparatory step to establishing the right to try them. *Quirin* is ample precedent.
Note also that *Padilla* was turned back on a technicality: *Padilla* sued in the Southern District of New York, not in South Carolina, location of the Navy brig holding him. Louis Fisher, MILITARY TRIBUNALS, *supra* at 237-238.
[167] Korematsu v. U.S., 323 U.S. 214, 225 et seq (1944). *Compare* Justice Jackson's dissent here to his concurrence later in *Youngstown* on his doubts on Presidential war power.
[168] Hamdi v. Rumsfeld, 542 U.S. 507, 124 S.Ct. 2633 (2004). Dissent by Scalia, J. at 124 S.Ct. 2660 et seq.
[169] *Id.*

It's worth noting that the courts, e.g., *Padilla v. Hanft,* sometimes deferred to the President's say-so ("determination") that national security is at stake, and more generally, to Government assertions, however unsupported. Counsel should note that Federal courts deferred to the Government's assertions in the *Korematsu* and *Hirabayashi* cases only to find out 40 years later that the Government's case was selective and misleading – a sham, essentially.[170] The Supreme Court *did* say, in *Hamdi,* that simply asserting a national-security need is not enough.[171]

Beyond that, when confronting a Government assertion that national security can trump due process, it's worth comparing it to the Nazi legal rationales for extraordinary tribunals and wartime expediency.

In 1933, as in 2001, an attack on a major national building (i.e., the Reichstag) raised allegations of a national emergency, and the creation of special courts to try offenses under the resulting decree. It's worth adding here that the German special courts did not spring from a dictatorship but from a republican system:

> "Irregular" courts of special jurisdiction were not invented by the National Socialists ... On March 21, 1933, when the new regime issued its decree on the formation of Special Courts, it was in fact authorized to do so by an ordinance dating from the republican era, granting the government powers to determine the courts' personnel, procedures and jurisdiction.
>
> To start with, a Special Court was created in each of the twenty-six Courts of Appeal Districts, with jurisdiction over violations of the Reichstag Fire Decree ... and the procedures established satisfied the wishes of most conservatives for a drastic reduction in the rights of defendants and a stronger position for the prosecution. ... [T]he court could determine the extent of evidence to be considered entirely as it saw fit. Defendants had no right to appeal verdicts, which became enforceable at once. The speedy trials made possible by these regulations met the wishes that had often been voiced for "eliminating formalism" in criminal proceedings.[172]

The language of the Feb. 1933 "Decree of the Reich President for the Protection of the Nation and State" (Reichstag Fire Decree) and the President's Order of 2001 are similar in their self-justification by declaring a national emergency, triggering the resulting legal doctrine of state necessity. Thus,

> Today we are proud to have formulated our legal principles from the very beginning in such a way that they need not be changed in the case of war. For the rule, that right is that which is useful to the nation, and wrong is that which harms it, which stood at the beginning of our legal work, and which established this collective term of nation as the only standard of value of the law — this rule dominates also the law of these times.[173]
>
> — Hans Frank, general counsel, National Socialist Party, Nov. 1939, to the German Academy of Law. [174]

(The two administrations – 1933 and 2001 – are not, of course, *exactly* identical. The Reichstag Fire Decree suspended numerous civil-liberty sections of the republic's constitution itself, and for all citizens of the republic, while the President's Order simply removes a class of

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[170] Hirabayashi v. U.S., 828 F.2d 591 (9th Cir., 1987), a *coram nobis* decision overturning Gordon Hirabayashi's wartime convictions, after the court found that the original pleading

[171] Hamdi v. Rumsfeld, 124 S.Ct. 2633, 2636-7 (2004).

[172] Müller, *supra* at 153.

[173] 2 NAZI CONSPIRACY AND AGGRESSION (U.S. Gov't Printing Office, Washington, 1946), documents pertaining to Frank at 624-653, here cited document 3445-PS, available online.

[174] *See further* Frank's personal indictment (court session of Jan. 10, 1946) *at* 4 THE TRIAL OF GERMAN MAJOR WAR CRIMINALS SITTING AT NUREMBERG, GERMANY 136 (His Majesty's Stationery Office, London, 1946). (hereinafter cited as IMT). IMT Nuremberg available online at http://www.nizkor.org/hweb/imt/.

suspects from normal U.S. Constitutional protection, creating a class of legal *untermenschen*. However, the Weimar courts had created courts of special jurisdiction, and types of national-security offenses, **long** before 1933. Hitler merely took this trend, and the state-necessity doctrine, to its next logical level).[175]

Finally, this: beyond the Bill of Rights arguments, counsel should re-visit Art. I, II and III questions of balance-of-powers. The President's **Art. II** Commander-in-Chief powers are broad but have limits: the *Youngstown* steel-seizure case[176] speaks to that. Indeed, Justice Jackson's *Youngstown* concurrence now carries far more urgency, given Bush's penchant for aggressive war, drumhead tribunals and torture: "…[T]his loose appellation ["Commander in Chief"] is sometimes advanced as support for any Presidential action, internal or external, involving use of force, the ***642** idea being that it vests power to do anything, anywhere, that can be done with an army or navy. But no doctrine … would seem to me more sinister and alarming than that a President whose conduct of foreign affairs is so largely uncontrolled, and often even is unknown, can vastly enlarge **his mastery over the internal affairs of the country** by his own commitment of the Nation's armed forces to some foreign venture."[177]

Next, even in the most deferential cases, the Judiciary (see, e.g., *Quirin*) has said that it still expects to be the final arbiter of Constitutionality of such tribunals, and counsel should ask them if they intend to abdicate now. The MCA specifically excludes them; at issue is **Art. III,** not the Bill of Rights.

Then there is the issue of Congress' **Article I** power of lawmaking. Since 9/11, Congress has enacted, at least for military personnel subject to the U.C.M.J., no exceptions for those who detain, interrogate or try enemy combatants, even if the combatants have no cognizable rights themselves under the Constitution or Geneva.[178] The liabilities for U.S. citizens remain if they maltreat a prisoner; whether the prisoner/suspect has any cognizable rights may be less decisive than **whether U.S. citizens, military or civilian, are still liable under U.S. law as written** for what they do to those in their custody**,** i.e., in the chain of guilt from the President down to the PFCs at the Guantánamo and Abu Ghraib lockups. The question for us to ask, then, is whether Congress' Art. I power, expressed in the original U.C.M.J. parts of the U.S. Code (and in the consent to treaties now surrendered to the President's re-interpretation), still exists, and whether they're serious about it – or whether Congress should adjourn *sine die*.

It's worth remembering, also, that under command influence doctrine, noted above, George Bush and Donald Rumsfeld, even if they never signed the orders and instructions creating these drumhead trials, are still guilty under *Yamashita*. *Yamashita* is bedrock U.S. case law – it would now be a delicious irony if the type of tribunal that murdered General Yamashita is to be the precedent that puts Bush, Rumsfeld and the commanders of SOUTHCOM and CENTCOM before a strict-liability trial, for convening the same sort of tribunals. "Indeed, the

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[175] *See generally* Ingo Müller, HITLER'S JUSTICE: THE COURTS OF THE THIRD REICH *passim* (Harvard University Press, 1991). The German legal system was considerably different from the Anglo-American common-law model, particularly in *stare decisis* and the German practice of stretching crime elements by "analogy," but the book is still instructive in how a legal system could abandon the rule of law – worse, that the abandonment was a continuum prior to, during, and after the Nazi period.

[176] Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952).

[177] *Id. at* 641-2 (Jackson, J., concurring). Emphasis added.

[178] The MCA did not craft exceptions to the U.C.M.J. punitive Articles, Art. 77-134 (10 U.S.C. §§ 877-934).

fate of some future President of the United States and his chiefs of staff and military advisers may well have been sealed by this decision."[179]

Finally, how can the Administration believe it can get away with it? Partly because the Lincoln and FDR Administrations held these drumhead trials and have not been judged too harshly by history, partly because the Supreme Court has overlooked the more egregious trials or excused them (e.g., *Quirin*) after the fact. More to the point, as the late Chief Justice Rehnquist liked to point out, *inter armas silent leges,* in war the law is silent.[180] Whether that law, the courts, and Congress are also deaf, dumb and blind remains to be seen.

> The Constitution of the United States is a law for rulers and people, **equally in war and in peace**, and covers with the shield of its protection **all classes of men, at all times,** ***121*** **and under all circumstances**. No doctrine, involving more pernicious consequences, was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government. Such a doctrine leads directly to anarchy or despotism, but the theory of necessity on which it is based is false; for the government, within the Constitution, has all the powers granted to it, which are necessary to preserve its existence… —*ex parte Milligan* (1866)[181]

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[179] Justice Frank Murphy, dissenting, *Yamashita* at 28. A postscript: the Center for Constitutional Rights has initiated war-crimes proceedings against Rumsfeld, Yoo, Bybee and others in a German court. "Detainee lawyers set sights on Rumsfeld", *San Francisco Chronicle* (Nov. 14, 2006) at A-17. *See online* at http://sfgate.com/cgi-bin/article.cgi?file=/c/a/2006/11/14/MNGL3MC41B1.DTL.

[180] William H. Rehnquist, ALL THE LAWS BUT ONE: CIVIL LIBERTIES IN WARTIME (Vintage, 1998).

[181] *Milligan, supra*. Cited in *Guantanamo Detainee Cases*. Emphasis added.

Appendix 1: Military Commissions, A History, 1862-2006

Counsel with clients facing such military commissions should review the commissions' U.S. history, not least because the case history (key cases in **bold)** is the major, perhaps primary, basis for the Administration's current pleadings on detention and military tribunals. The case history – bizarre as it is – is what the Administration relies on, more than it does the meager statutory basis for the tribunals.[182]

The military commission, as now understood, originated in the Civil War, though similar courts, termed as commissions, councils of war, or provost courts did convene in wartime from the Revolution to the 1845-1848 war with Mexico. This was against the inclinations of the Framers whose itemized "abuses and usurpations", in the Declaration of Independence, noted that King George III "has affected to render the Military Independent of and superior to the Civil Power, … [and] depriving us in many cases, of the benefits of Trial by Jury."[183]

The Lincoln Administration systematized these informal military courts at the start of the Civil War.[184] Executive Order No. 1, Relating to Political Prisoners provided for arrest, detention, parole or trial, by military authorities, of persons suspected of disloyalty or spying; the legal justification being the rebellion of half the country and the subsequent suspension of habeas corpus.[185] As in 2001, the military would supplement the Order with its instructions, in this case General Order 100 (1862) establishing not only military trials but martial law: virtually unlimited jurisdiction anywhere in the presence of the enemy.[186]

"Tribunals were instruments to enforce not so much the Articles of War[187] enacted by Congress and delegated to courts-martial, but rather the customary international standards known as the 'laws of war.' It was a well-established principle, said [Army Chief-of-Staff] Gen. Halleck, that ' insurgents and marauding predatory and guerrilla bands are not entitled' to an exemption from military tribunals."[188] Thus a pattern that would echo in later such military commissions to the present day: exclusion of a class of combatants from statutory law and due process, on the say-so of military officials, to be tried on notional military customs of offenses and tradition.

Many of the military commissions sat in occupied (Southern) territory, in war zones with few functioning civil courts.[189] However, military arrests and, later, military-commission trials also snared Northern citizens expressing pro-rebel or anti-war sentiment.[190] The most decisive, in legal history, were the Indianapolis trials of late 1864, the basis for ***ex parte***

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[182] Michael Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 441-442 (Spring 2002).
[183] Declaration of Independence *quoted in* Henry Steele Commager, DOCUMENTS OF AMERICAN HISTORY 100-101 (Crofts & Co., 3rd ed., 1944). For the evolution of U.S. military tribunals from Revolutionary times to 1862, see Louis Fisher, MILITARY TRIBUNALS 1-40, *supra*.
[184] This history is recounted, and argued, in Application of Yamashita, 327 U.S. 1, 66-72 (Rutledge, J., dissenting).
[185] Executive Order No. 1 (Feb. 14, 1862), 115 O.R. 221-223, Series II, Vol. 2.
[186] General Orders No. 100, INSTRUCTIONS FOR THE GOVERNMENT OF ARMIES OF THE UNITED STATES IN THE FIELD: PREPARED BY FRANCIS LIEBER, PROMULGATED AS GENERAL ORDERS NO. 100 BY PRESIDENT LINCOLN, 24 APRIL 1863 (Gov't Printing Office, 1898), *available online*. Rationale : "To save the country is paramount in all other considerations."—Art. 5, G.O. 100.
[187] Predecessor to the Uniform Code of Military Justice.
[188] Louis Fisher, MILITARY TRIBUNALS 48, *supra,* quoting from THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES (hereinafter "O.R.") 242-243, Series II, Vol. 1 (Government Printing Office, 1880).
[189] Belknap, *supra,* 38 CAL. W. L. REV. at 448-449.
[190] Mark E. Neely, Jr., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 51-68 (New York: Oxford Univ. Press, 1991, paperback).

Milligan[191], in which a U.S. military court tried several suspected members of a rebel fifth-column group, despite the fact that Indiana had functioning civil courts. Lamdin Milligan, sentenced to hang, brought a habeas corpus action before the Federal district court, and in 1866 the U.S. Supreme Court ruled that civilian courts did not give up their right to review habeas corpus, that "[m]artial rule can never exist where courts are open, and in the proper and unobstructed exercise of their jurisdiction," and that the military could not try a "citizen in civil life, not connected with the [U.S.] military or naval service, by a military tribunal, for any offense whatever."[192] Although it addressed the wrongs to a U.S. citizen, it was silent on the issue of foreign nationals.

While *Milligan* was pending, military commissions tried two high-visibility 1865 cases, of the Lincoln assassination conspirators and of Capt. Henri Wirz, commandant of the Confederate prison camp at Andersonville, Ga.[193] The Lincoln trial, held in Washington before a Union Army panel with little legal experience, and marked by irregularities in evidence and procedure (e.g., the prisoners wore canvas hoods till midway through the trial), ended in the hanging of four of the conspirators, including the first woman executed by U.S. jurisprudence[194] – and it only emerged, much later, that a majority of the court recommended clemency for Mrs. Surratt, who was hanged anyway.[195] The trial's notoriety and *Milligan* notwithstanding, a descendant of Dr. Samuel Mudd was unable to get a post-9/11 court to change the trial verdict.[196] Except for this 2002 case, U.S. courts apparently never got to review the Wirz or Lincoln-conspirator defendants before they were hanged.

The military commissions were also used in the judicial murder of Native Americans taken in battle with U.S. forces. After a major Dakota (eastern Sioux) uprising in Minnesota in 1862, 38 of the Dakota were convicted on charges of rape, robbery and murder of Minnesota settlers, and were hanged *en masse*.[197]

> The death penalty was not unusual in 1862, and other American Indians have been tried and convicted in American courts. But the Dakota trials and executions were different. The Dakota were tried, not in a state or federal criminal court, but before a military commission. They were convicted, not for the crime of murder, but for killings committed in warfare. The official review was conducted, not by an appellate court, but by the President of the United States. Many wars took place between Americans and members of the Indian nations, but in no others did the United States apply criminal sanctions to punish those defeated in war.[198]

In the winter of 1872-3, Kientpoos ("Captain Jack") with about 150 other Modoc men, women and children, withstood over 1,000 U.S. Army troops in what is now the Lava Beds National Monument in far northern California. During the six-month siege, a peace parley between the Modocs and Gen. E. R. S. Canby ended with the death of Canby and another negotiator[199].

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[191] Ex parte Milligan, 71 U.S. (4 Wall.) 2 (1866).
[192] *Id. at* 60.
[193] J. Holt, Adjutant-General, Bureau of Military Justice report to Secretary of War Edwin Stanton, Nov. 13, 1865, 126 O.R. 489-494, Series III, Vol. 5.
[194] Belknap, *supra,* 38 CAL. W. L. REV. at 462-467. For more on the Lincoln conspiracy trial *see online* http://www.law.umkc.edu/faculty/projects/ftrials/lincolnconspiracy/lincolnconspiracy.html.
[195] Louis Fisher, MILITARY TRIBUNALS, *supra, at* 68-69.
[196] Mudd v. White, 309 F.3d 819 (D.C. Cir., 2002).
[197] See 43 STAN. L. REV. 13, Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*
[198] Id. at 13
[199] The Modocs guessed wrongly that the deaths of such dignitaries would end the war. It may not be the last time that enemies of the U.S. find themselves on trial for violating Western concepts that they might not have understood before the event. Cultural misunderstandings can cut both ways. For further thoughts and references on cultural relativism *see* Steven

The Army charged Kientpoos and several other Modoc leaders with the Canby killings as well as killings of local ranchers at the start of the war. Washington instructed Canby's replacement, Gen. Jefferson C. Davis, to convene a military commission at Ft. Klamath, Oregon, the nearest post. The Modocs did not have counsel, though Kientpoos did attempt to cross-examine witnesses. He noted, "I hardly know how to talk here. I do not know how white people talk in a place such as this, but I will do the best I can."

The chief prosecution witness, a Modoc warrior named "Hooker Jim," turned state evidence and avoided serious penalty, even though Hooker Jim was the one who shamed Kientpoos into ambushing the negotiators, and who led the initial attacks on local farms without Kientpoos' knowledge. Kientpoos and five other Modocs were sentenced to hang; President Grant spared two but ordered that they be informed only at the foot of the scaffold. After the hanging, the heads of Kientpoos and the other three were cut off and sent to Washington as part of an ongoing "craniology" study of native skulls, ending up in the Smithsonian.[200] He deserved better.[201]

The Wilson Administration avoided military commissions in the First World War, even given the spy hysteria of the day. The Administration doubted the legality of such a tribunal, and the Espionage and Sabotage Acts were draconian enough.[202]

The next major military commission trials were in World War II; indeed, except for *ex parte Milligan,* the major case law dates from this conflict, *Quirin, Yamashita* and *Eisentrager* being particularly oft-cited now, the former two arising on U.S. territory.

ex parte Quirin.[203] In June 1942, eight German saboteurs, landed by submarines on the U.S. coast, were quickly captured by the FBI. (None of the agents were particularly bright, and several had reasons to defect). FDR insisted on a quick trial and execution, so, by executive order, created a military commission to do so. The case, although mostly *in camera,* was fully publicized (J. Edgar Hoover wanted publicity for the FBI) and U.S. Attorney-General Francis Biddle was prosecutor.[204] The defense was vigorous but somewhat irregular (i.e., the eight defendants had two (Government-appointed) defense counsel between them, despite conflict-of-interest problems, including two defendants turning state's evidence against the others.[205]

The defendants (Richard Quirin et al) appealed on a habeas petition to the U.S. Supreme Court, who ruled in *ex parte Quirin*[206] that FDR's executive order, the trial, the verdict, and the statutory authority were all valid, even given two naturalized American citizens among the German defendants, nor did their prosecution as "unlawful belligerents" (i.e., spies) contravene the U.S. Constitution Art. III § 2 (treason) or the Fifth and Sixth Amendments.[207]

R. Ratner and Jason S. Abrams, ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY 24 (2nd edition, Oxford University Press, 2001).

[200] See RICHARD DILLON, BURNT-OUT FIRES: CALIFORNIA'S MODOC INDIAN WAR (Prentice-Hall, Inc., 1973) for an authoritative account of the war and the trial, the latter beginning at 305. See also DEE BROWN, BURY MY HEART AT WOUNDED KNEE (Holt, Rinehart and Winston, 1970), the chapter "The Ordeal of Captain Jack" being a concise account of the whole sorry episode.

[201] The Dakota and Modoc cases here extracted from Robert D. Harmon, *General Yamashita's Revenge: A Judicial Murder and its Implications for U.S. Military Commissions in Current Warfare,* 4 N.C.C. L.REV. 13, 32 (May 2003)

[202] Jack Goldsmith and Cass R. Sunstein, *Military Tribunals and Legal Culture: What A Difference Sixty Years Makes*, 19 CONST. COMMENT. 261, 285 (Spring 2002).

[203] 317 U.S. 1 (1942).

[204] Michael Dobbs, SABOTEURS : THE NAZI RAID ON AMERICA 207-229 (Knopf, February 2004).

[205] *Id.* at 229.

[206] 317 U.S. 1 (1942).

[207] *Id.* at 18 *et seq*. Since it was not treason, their offense was espionage, not a capital offense till FDR made it so, *ex post facto*.

However, the Court retained "the duty which rests on the courts, in time of war as well as in time of peace, to preserve unimpaired the constitutional safeguards of civil liberty." The courts' right of review with or without habeas corpus, and access to the courts by the accused, drew on *Milligan,* "Constitutional safeguards for the protection of all who are charged with offenses are not to be disregarded in order to inflict merited punishment on some who are guilty."[208] However, it's worth noting that the Court published the decision almost three months *after* six of the defendants[209] were electrocuted and the rest sent to prison.[210]

The *Quirin* ruling, exhumed after 9/11, is proving a particularly nasty weapon in Bush Administration pleadings. At least one expert on the *Quirin* case, Louis Fisher, has stated that the *Quirin* defendants' rights, truncated as they were, may be far more than George W. Bush would accord those tried under the MCA, even though the Bush tribunals derive from the 1942 model.*[211]*

Louis Fisher, pre-eminent legal historian on the subject of commissions, regards *Quirin* thus,

> The legal mind has a lazy habit of looking for "precedents" to justify what has been done or is about to be done. Little effort is made to scrutinize the precedent to determine whether it was acceptable then or worth repeating. The fact that something has been done before does not mean it should be done again. There is nothing "apt" about the *Quirin* decision. As Justice Frankfurter later remarked, it "was not a happy precedent." The American legal system would do well not to see its like again. [212]

Louis Fisher's assessment of *Quirin* might very well damn military commissions before a future Court, even given Congress' 2006 signoff on Bush's trials:

> The saboteur case of 1942 represented an unwise and ill-conceived concentration of power in the executive branch. Roosevelt appointed the tribunal, selected the judges, prosecutors, and defense counsel, and served as the final reviewing authority. The generals on the tribunal, the colonels serving as defense counsel, and the two prosecutors were all subordinates of the President. "Crimes" related to the law of war came not from the legislative branch, enacted by statute, but from executive interpretations of the "law of war." … Congress was not a participant in helping to define the jurisdiction and procedures of the tribunal. The judiciary was largely shut out as well. … There was little expectation that the Court would do anything than what it did: Deny the petition for a writ of habeas corpus.[213]

This serves to discredit *Quirin* justification of military commissions, and the subsequent case law resting on *Quirin*. More to the point: since George Bush's commissions are based on the FDR model – and Fisher's quote above has Bush's tribunals to a T – then they're as dead as *Quirin* if *Quirin* goes down**.** Given the legislative history of the MCA – a Congressional rubber stamp of Bush's pre-*Hamdan* tribunals with no real debate – counsel should argue that Congress' assent to the MCA was a sham.

Colepaugh. [214] A second spy case echoed *Quirin*. Two German agents, one of them a defector, William C. Colepaugh (born in Connecticut), landed on the Maine coast in November 1944. They were quickly picked up by the FBI, tried by a military commission as

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[208] All *id. at* 9
[209] Including one of the two U.S. citizens, Herbert Haupt.
[210] 19 CONST. COMMENT, *supra, at* 270
[211] Fisher, MILITARY TRIBUNALS *supra,* at 258 on *Quirin's* impact; *at* 168-9 on the FDR/Bush comparison.
[212] Louis Fisher, NAZI SABOTEURS ON TRIAL: A MILITARY TRIBUNAL AND AMERICAN LAW 161 (University Press of Kansas, 2nd ed., Landmark Law Cases and American Society, 2005)
[213] Louis Fisher, MILITARY TRIBUNALS, *supra, at* 124-125.
[214] *Colepaugh v. Looney,* 235 F.2d 429 (10th Cir., Kansas, 1956); *cert.* denied, 77 S.Ct. 568 (1957)

spies,[215] and sentenced to death (FDR died before their execution; the two were subsequently commuted to life). Colepaugh filed for habeas corpus from Leavenworth in 1956 and was turned down. The Federal court ruled that, as a spy, he was subject to a military commission under the *Quirin* precedent, with no right to a civilian treason trial.[216]

***Duncan** v. Kahanamoku.*[217] The WWII-period Court did overturn one type of military commission, those trying U.S. citizens on U.S. soil for non-military offenses. On December 7, 1941, U.S. authorities declared martial law in the territory of Hawaii. The U.S. military fortunes recovered after Midway but military commissions remained in business in Hawaii for the rest of the war. Two defendants – both of them civilians, both convicted by tribunals for non-military offenses (embezzlement and brawling) — were vindicated, albeit on narrow grounds. "Our question does not involve the well-established power of the military to exercise jurisdiction over members of the armed forces, … those directly connected with such forces, … or enemy belligerents, prisoners of war, or others charged with violating the laws of war… We are not concerned with the recognized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot and does not function."[218]

Overseas, U.S. field commands also used military commissions, in the more traditional battlefield settings, for drumhead trials of 67 foreign nationals (usually accused as spies), of whom they executed 32.[219] One such trial became another important Court case—

***Eisentrager**.*[220] Twenty-one German nationals continued to serve in Japanese-occupied China after the surrender of Nazi Germany on 8 May 1945. Captured after the Japanese surrender in September of that year, they were not repatriated as prisoners of war. Rather, as "unlawful combatants" on the *Quirin* pattern, they faced a U.S. military commission in Nanking and drew prison terms. The Court refused habeas corpus, inasmuch as they were not U.S. citizens and were captured in another country – a decision that may haunt current detainees held outside the U.S. homeland.

The Court majority seemed to find less privilege in non-citizens than U.S. citizens, as JJ. Black, Douglas and Burton noted in partial dissent:

> As the Court points out, Paul was fortunate enough to be a Roman citizen when he was made the victim of prejudicial charges; that privileged status afforded him an appeal to Rome, with a right to meet his 'accusers face to face.'[221] But other martyrized disciples were not so fortunate. Our Constitution has led people everywhere to hope and believe that wherever our laws control, all people, whether our citizens or not, would have an equal chance before the bar of criminal justice.[222]

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[215] With none of the PR horn-tooting of the 1942 trial; FDR and the Secretary of War seem to have opted for a more discreet trial than 1942. Louis Fisher, NAZI SABOTEURS, *supra, at* 116-120; *see also* Louis Fisher, MILITARY TRIBUNALS xi, *supra.*
[216] *Colepaugh*, 235 F.2d at 432.
[217] Duncan v. Kahanamoku, 327 U.S. 304 (1946). The Kahanamoku here is Duke Paoa Kahanamoku, Sheriff of the City and County of Honolulu.
[218] *Id. at 313-314.*
[219] DoD news article, "Long History Behind Military Commissions," *online at* http://www.defenselink.mil/news/Aug2004/n08192004_2004081903.html .
[220] Johnson v. Eisentrager, 339 U.S. 763 (1950). *Eisentrager* is now in question by *Hamdan v. Rumsfeld.*
[221] Acts 25:16.
[222] *Eisentrager* at 798.

Another important trial and judicial murder, that of Japanese Gen. **Yamashita**,[223] convened in Manila at the same time, albeit on what was then U.S. territory, the Philippines. The case[224] is important in that it established the doctrine of a commander's responsibility for his/her subordinate's actions (subsequently echoed as an offense in Bush's Military Commission *Instructions*),[225] permitted verdict and punishment on that responsibility though it was an offense not in the statute-books,[226] and established the legality of a military-commission trial even where denial of Fifth Amendment due process was an issue. None of five tribunal members were lawyers; they were subject to heavy lobbying by Gen. MacArthur, they admitted *ex parte* and hearsay evidence as they saw fit and they condemned the defendant for simply being in command – not an offense until then – not for committing war crimes himself, which the Prosecution never alleged and which Gen. Yamashita may not have done. None of this bothered the Supreme Court majority. As a dissenting Justice noted,

> Wholly apart from the violation of the Articles of War and of the Geneva Convention, I am completely unable to ***79** accept or to understand the Court's ruling concerning the applicability of the due process clause of the Fifth Amendment to this case. Not heretofore has it been held that any human being is beyond its universally protecting spread in the guaranty of a fair trial in the most fundamental sense. That door is dangerous to open. I will have no part in opening it. For once it is ajar, even for enemy belligerents, it can be pushed back wider for others, perhaps ultimately for all.
>
> ... I cannot accept the view that anywhere in our system resides or lurks a power so unrestrained to deal with any human being through any process of trial. What military agencies or authorities may do with our enemies in battle or invasion, apart from proceedings in the nature of trial and some semblance of judicial action, is beside the point. Nor has any human being heretofore been held to be wholly beyond elementary procedural protection by the Fifth Amendment. I cannot consent to even implied departure from that great absolute.
>
> It was a great patriot who said:
>
> 'He that would make his own liberty secure must guard even his enemy from oppression; for if he violates this duty he establishes a precedent that will reach himself.'[227]

The Court thus denied Gen. Yamashita's *habeas* appeal on Feb. 1, 1946 and he was promptly hanged.

The United States participated, at war's end, in international tribunals in Germany and Japan of war criminals: enemy commanders, cabinet members, jurists. These differed from U.S. military commissions in that these proceedings were on the basis of international charters and with different rules of procedure, including full Anglo-American rights of evidence, due process and counsel; indeed, the treatment meted out to the likes of Hermann Göring was far more considerate than what Gen. Yamashita suffered.[228]

Between the end of WWII and 9/11, the U.S. military tried only a handful of such cases, usually of U.S. dependents (see Appendix 2 under "U.S. Trials Overseas"). While not usually discussed in this context they may be useful to counsel in a 9/11 tribunal or detention case.

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[223] Application of Yamashita, 327 U.S. 1 (1946).
[224] Recounted elsewhere; *see, e.g.,* 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).
[225] *Military Commission Instruction No. 2, Crimes and Elements for Trial by Military Commission,* ¶¶ 6B(c)(3) and (4), which classes command responsibility as a collateral offense along with aiding & abetting and conspiracy.
[226] Breaching the maxim *nulla crimen et nulla poena sin lege,* no crime or punishment without a pre-existing statute.
[227] Application of Yamashita, 327 U.S. 1, 78-81 (Rutledge, J., dissenting).
[228] Noted in Hirota v. MacArthur, 69 S.Ct. 197 (majority decision)(1948); concurring and dissenting opinions at 69 S.Ct. 1238. For an example of the post-WWII charters and safeguards s*ee also* Charter of the International Military Tribunal, London, 8 August 1945, 82 U.N.T.S. 279.

Detention or detainment often was an end in itself, and has occurred before, distinguished by U.S. military authorities' naming of a class of persons to be detained (or, alternatively, excluded from a region), as opposed to a finding of individual guilt. This determination followed a military decree, not necessarily synonymous with martial law, rather than any judicial proceeding. Examples included Civil War-era Missouri, in which U.S. authorities detained designated as disloyal several thousand non-military residents and confined them, or, under the notorious General Order No. 11, banished them from large areas of western Missouri.[229] (As distinguished from General Order No. 11 of Gen. Grant's Department of the Tennessee – a theater that, in Dec. 1862, included much of Kentucky, Tennessee and Mississippi – in which Grant excluded Jews in general and Jewish traders in particular).[230] Litigation at the time focused on individual arrests – i.e., at issue in *Merryman,*[231] *Vallandigham*[232] and *Milligan* – rather than on the issue of wholesale roundups. That would wait till World War II.

In 1942, Franklin D. Roosevelt, under Executive Order 9066 – subsequently confirmed by Congressional legislation – removed over 110,000 Japanese-Americans, most of whom were U.S. citizens, from the West Coast and detained them in "relocation camps" for the duration of the war.[233] The U.S. Supreme Court upheld U.S. citizens' detentions in the *Hirabayashi*[234] and *Korematsu*[235] decisions, although not without heartfelt dissents in the latter. The cases have stood – although decades later, research would reveal that Government filings on the WWII cases misled the Court.[236]

Military commissions, 2001: courts created by decree

On Nov. 13, 2001, the Administration created, by Executive decree, a system of military commissions, although they tried no prisoners prior to the 2006 *Hamdan* ruling overturning them.[237] DoD supplemented the Nov. 2001 decree with Military Commission Orders and Instructions[238], mirrored in 32 C.F.R. §§ 9.1-9.12.[239] The Administration, as statutory authority for the military commissions, [240] cited 10 U.S.C. § 113(d), 140(b), 821, 836, along

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[229] Neely, THE FATE OF LIBERTY *supra*, 44-50.
[230] Neely, *id.*, 107-109.
[231] Ex parte Merryman, 17 F.Cas. 144 (C.C.D. Md. 1861). Chief Justice Roger Taney (author of *Dred Scott*), sitting as a circuit judge, heard the appeal of John Merryman, accused of sabotaging railroad bridges, and ruled that Congress, not President Lincoln, had the right to suspend habeas corpus. Louis Fisher, MILITARY TRIBUNALS 55-56, *supra*.
[232] Ex parte Vallandigham, 68 U.S. (1 Wall.) 243 (1863). Ex-U.S. Rep. Clement Vallandigham, convicted of giving a disloyal speech by a U.S. Army military commission; the Court ruled it had no *certiorari* right in military commission cases. Superseded by *ex parte Milligan*.
[233] Louis Fisher, MILITARY TRIBUNALS, *supra* at 139-143.
[234] Hirabayashi v. U.S., 320 U.S. 81 (1943). See Appendix 1 below for more detail on these and related cases.
[235] Korematsu v. U.S., 323 U.S. 214 (1944).
[236] Louis Fisher, MILITARY TRIBUNALS, *supra* at 143.
[237] *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). *See online at* http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html and, for 66 F.R. 57833, at http://www.law.uchicago.edu/tribunals/docs/exec_order.pdf.
[238] Listed in Appendices below, see "Official Documents" for pre-*Hamdan* documents creating military-commission courts by Executive decree.
[239] Military Commission Orders and Instructions, and 32 C.F.R. §§ 9.1-9.12, were identical and might not reflect the MCA. MLTF memorandum, "Military Commission Trials" (Oct. 13, 2005) at 11-12, had a comparison, in parallel hyperlinked columns, of the two sets of documents.
[240] UCMJ provisions mentioning military tribunals are at 10 U.S.C. §§ 818, 821, 836 (Art. 18, 21, 36). But see 8 U.S.C. § 1226a (orig. § 412 of the USA-Patriot Act). Detained aliens subject to the Patriot Act must be criminally charged, or removal proceedings begun, within seven days of detention. Provision for habeas corpus.

with Congress' Sept. 2001 Authorization for the Use of Military Force,[241] specifically against "all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons."[242] The Administration cites that AUMF language, such that it is, as personal jurisdiction over those they would thus try. The Title 10 statutes mentioned only in passing – and did not create – the tribunals, and not with the specificity of the UCMJ[243].

The Detainee Treatment Act

The Detainee Treatment Act of 2005 (DTA)[244] — included in the Department of Defense Appropriations Act, 2006 and signed by President Bush, December 30, 2005 — incorporated the McCain Amendment and the Graham-Levin Amendment on detainees. It provided for "uniform standards for interrogation of persons" in detention, that standard being the Army Field Manual on the subject.[245] It also included a prohibition on "cruel inhuman or degrading treatment" in violation of the UN Convention Against Torture and the U.S. 5th, 8th and 14th Amendments,[246] and protects U.S. personnel from civil or criminal prosecution if they did not know that the interrogation procedure they were using was illegal (a "good-faith reliance as a factor" being one criterion).[247] The DTA also stripped Federal courts of habeas jurisdiction over detainees.[248]

President Bush appended a signing statement that he would interpret the DTA "in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief," i.e., as he saw fit.[249]

June 2006: The *Hamdan* Ruling

The D.C. Circuit considered the matter of Selim Hamdan, alleged driver to Osama bin Laden in July 2005,[250] holding that the separation of powers doctrine was not violated by President's designation of a military commission to try an Al Qaeda suspect. Further, they ruled, 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.[251]

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[241] 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, *see online at* The Avalon Project website, http://www.yale.edu/lawweb/avalon/sept_11/sjres23_eb.htm.
[242] *Id.,* § 2, apparently a form of jurisdiction *in personam* as well as an authorization for the President to wage battle.
[243] *Contrast* Uniform Code of Military Justice, 10 U.S.C. §§ 801-876 (Art. 1-76) on courts-martial jurisdiction, composition, procedure etc. *with* the authorities cited in this Paper for military commissions.
[244] H.R. 2863, Title X. *See* text *online* at http://jurist.law.pitt.edu/gazette/2005/12/detainee-treatment-act-of-2005-white.php. As mentioned in the MCA, the DTA is at 42 U.S.C. § 2000dd-1.
[245] DTA § 1002, *see also* Army Field Manual 34-42, Intelligence Interrogation. Note that Army Regulations, like Air Force and Navy Secretary Instructions and Marine Corps Orders, are regulations with the force of law, breach of which is violation of Art. 92 (10 U.S.C. § 892). N.B. that an Army Field Manual is a publication that describes tactics or operational doctrine.
[246] DTA § 1003. What the 14th Amendment, which prohibits States from denying due process or equal protection of law, has to do with a Federal branch of government, is difficult to gauge.
[247] DTA § 1004. *But see* the traditional maxims *Ignorantia corum quae quis sciere tenetur non excusat,* Ignorance of that which a person – e.g., trained interrogators – is held to know does not excuse him, and *Ignorantia facti excusat, ignorantia juris non excusat,* Ignorance of fact excuses, but ignorance of law does not excuse. Max Radin, RADIN LAW DICTIONARY 395 (Oceana Publications, 2nd ed., revised, 1970).
[248] *See* discussion of the *Hamdan* ruling below.
[249] *See* "McCain Detainee Amendment," *online at* http://en.wikipedia.org/wiki/McCain_Detainee_Amendment .
[250] Hamdan v. Rumsfeld, 415 F.3d 33, 2005 WL 1653046 (D.C. Cir., July 15, 2005). Current Chief Justice John Roberts was part of the Circuit's majority, which does not bode well for future Court reviews of the tribunal issues.
[251] Note: a full list of historic and current military-commission and detention cases is at Appendix 1. Case law is evolving rapidly and this Briefing Paper can make no this-is-final conclusion.

The U.S. Supreme Court subsequently granted cert. to Hamdan's habeas and mandamus petitions.[252] Rejecting the lower court's approach, the Supreme Court ruled, on June 29, 2006, that:

- It indeed had jurisdiction to hear habeas appeals by prisoners at Guantánamo, contrary to the DTA.[253]
- Military discipline and military efficiency are not served by excluding civilian courts in a case like this, since Mr. Hamdan is not a servicemember, and, further, the military-commission tribunal created to try him was not part of the "integrated system of military courts and review procedures.[254]
- The military commission created by the President's Order was not expressly authorized by Constitutional act, nor did the AUMF or DTA provide such authorization, nor did Congress' authorization of AUMF show Congressional intent to expand the authorization it showed in Art. 21 of the UCMJ.[255]
- The military commission also violated both the UCMJ and the four Geneva Conventions, in its exclusion of the accused and his counsel from certain evidentiary proceedings, in its acceptance of any evidence of "probative value" to the tribunal president.[256]
- The tribunal rules of procedure have diverged from those of courts-martial, which were historically the same but are no longer; further, the procedural rules violate the Geneva Conventions; further, that *Eisentrager* doesn't apply and *Hamdi* does in that the Geneva rights were indisputably part of the law of war.[257]
- Geneva Common Article 3, which affords minimal protection even to those individuals not signatories to Geneva or in a non-international conflict, and is binding.[258]
- Military tribunals must be limited to trying offenses within the convening commander's theater, for offenses charged to have occurred during, not before or after the war.[259] Common Art. 3 must be understood to incorporate the barest trial protections recognized by customary international law, and the Administration's military commissions deviated from them.[260]

Postscript: Mr. Hamdan's military defense counsel, Lt. Cdr. Charles Swift, was passed over for promotion to Commander[261] for his second time in the fall of 2006, thus ending his military career.

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[252] 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.
[253] Overturning DTA § 1005(e). *Id.* at 7-20. All page references to *Hamdan* are from the slip opinion.
[254] *Id.* at 20-25.
[255] *Id.* at 25-30.
[256] *Id.* at 49-72.
[257] *Id.* at 53-62.
[258] *Id.* at 65-70.
[259] *Id.* at Parts V and VI-D, 30-49.
[260] *Id.* at 70-72.
[261] "Gitmo win likely cost Navy lawyer his career", *Seattle Press-Intelligencer* (July 1, 2006) at A01, *online* at http://seattlepi.nwsource.com/national/276109_swift01.html; *see also* "Guantánamo defense lawyer forced out of Navy, "*Seattle Times* (Oct. 8, 2006).

Appendix 2: Military-Commission Case Law

Historic military commission cases[262]

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.[263]

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.

U.S. Trials Overseas: Jurisdiction

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[262] Case issues flagged **in bold** in case discussions.

[263] 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.

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"[264]

- 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. [265] 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.[266]

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.

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

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[264] So noted by Fisher, MILITARY TRIBUNALS *supra at* 158-9.
[265] 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).
[266] Fisher, MILITARY TRIBUNALS *supra, at* 160-167.

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),[267] **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."

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

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

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 Cases[268]

Hirabayashi v. U.S., 320 U.S. 81 (1943). Upheld wartime detentions. However, *vacated on a writ of coram nobis,*[269] 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."[270]

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).[271] 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

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[268] 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.

[269] 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!?"

[270] *Hirabayashi,* 828 F.2d at 603.

[271] 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.

Appendix 3: Relevant statutes and treaties

Relevant statutes

8 U.S.C. § 1226a.[272] 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.[273]

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.

[272] Orig. § 412 of the USA-Patriot Act of 2001.
[273] (MCA) 28 U.S.C. § 2241(e).

Appendix 4: Relevant international treaties.

Nuremberg Charter.[274] *See also* the Nuremberg Principles (1950).[275]

UN Charter.[276]

International Covenant on Civil and Political Rights (1966).[277] 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)[278] 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."[279]

Inter-American Convention on the Forced Disappearance of Persons (1994).[280]

Geneva Convention (III) on Treatment of Prisoners of War (1949):[281]

[Common] ARTICLE 3[282],

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) Taking of hostages;

(c) Outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. ***

ARTICLE 4

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

1. Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.

2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is

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[274] 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 .

[275] http://deoxy.org/wc/wc-nurem.htm .

[276] U.S.T.S. 993, 59 Stat. 1031.

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

[278] *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."*

[279] *Id.,* Art. II.

[280] 33 I.L.M. 1529. .

[281] 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."

[282] Violation of which is specifically forbidden, by U.S. nationals, in 18 U.S.C. § 2441(c)(3).

occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:

(a) That of being commanded by a person responsible for his subordinates;

(b) That of having a fixed distinctive sign recognizable at a distance;

(c) That of carrying arms openly;

(d) That of conducting their operations in accordance with the laws and customs of war.

3. Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

4. Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

5. Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

6. Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

B. The following shall likewise be treated as prisoners of war under the present Convention:

1. Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment.

2. The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties.

Appendix 5: 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 memo[283] to Alberto Gonzalez at Washington Post archive, http://www.washingtonpost.com/wp-srv/nation/documents/dojinterrogationmemo20020801.pdf.

Alberto Gonzales' torture memo to the President[284], *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.

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[283] Jay Bybee, Memorandum, Office of Legal Counsel, U.S. Dept. of Justice, August 1, 2002.
[284] Draft memorandum, Alberto Gonzalez to the President, Jan. 25, 2002.

More pre-*Hamdan* commission material at:
Official Defenselink history[285] of military commissions, http://www.defenselink.mil/news/Aug2004/n08192004_2004081903.html
News Article, DoD, "Military Review Panel Takes Office" (Sept. 22, 2004), http://www.dod.mil/news/Sep2004/n09222004_2004092207.html.
Human Rights Watch, pre-*Hamdan* material, see esp.
HRW Briefing Paper (2005) on Military Commissions at http://www.hrw.org/backgrounder/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 .

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.

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[285] 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.

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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.

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Neal K. Katyal and Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 Yale L.J. 1259 (2002). Possible *ultra vires* illegalities of such tribunals.

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[286] *See* online at http://www.thenation.com/doc/20050718/holtzman.

[287] *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.

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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."

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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,[288] Rules of Professional Conduct for Lawyers. See also, e.g., Navy JAG INSTR 5803.1C,[289] 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,[290] 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.]."[291]

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[288] Available online at http://docs.usapa.belvoir.army.mil/jw2/xmldemo/r27_26/cover.asp .
[289] Available online at http://www.jag.navy.mil/Instructions/5803_1c.pdf .
[290] Available online at http://docs.usapa.belvoir.army.mil/jw2/xmldemo/r190_55/cover.asp .
[291] AR 190-55, ¶ 1-4, citing RCM.

Appendix 6: A Modest Proposal.

A BILL.

The Anti-Global Terrorism Act of 2007.

Sec. 1. The Military Commissions Act of 2006 (S. 3930) is repealed *in toto.*

Sec. 2. Title 10, Subtitle A, Part II, Chapter 47, Subchapter I, § 802(a) of the United States Code (Art. 2(a) of the Uniform Code of Military Justice) is amended to add:

> (13) Subject to any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, persons captured by U.S. military forces, not otherwise covered by this Article, who are not U.S. citizens, and:
>
> (A) who are captured outside the United States in a theater of combat operations, and are charged with an offense against the U.S. Code or against international laws of war, or,
> (B) who during time of war pass surreptitiously from enemy territory into our own, discarding their uniforms upon entry, for commission of hostile acts involving destruction of life or property,[292]
>
> are subject to prosecution under this Chapter, for offenses punishable under this Chapter.
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[292] Per *Quirin.*