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THE GUANTANAMO BAY MILITARY COMMISSIONS:  
A HISTORICAL PERSPECTIVE

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*The use of military commissions in the United States has a history as old as the country itself. This history makes it clear that military commissions are tribunals of necessity, appropriately used in circumstances where traditional tribunals are unavailable or inappropriate. The Guantanamo Bay military commissions, however, challenge this history. The purpose of this article is to place the Guantanamo Bay military commissions in a historical context and contrast with their eponymous predecessors. This article reviews the use of military commissions throughout United States history, noting how each prior use of commissions was found to be appropriate or inappropriate depending on the perceived need. This article then highlights how the Guantanamo Bay military commissions are unique when compared to prior military commissions and concludes that the historic need for a trial would be better served if defendants charged with terrorism-related offenses were tried in traditional federal Article III courts rather than military commissions.*

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INTRODUCTION

The Guantanamo Bay military commissions have been, to put it mildly, controversial since their creation in 2001. Supporters of the commissions contend they are both necessary and appropriate tribunals for those brought before them, while detractors see the commissions as an open wound on the American *corpus juris*.<sup>1</sup> What is seldom mentioned in the debates over the commissions is that this is far from the first time the United States government has used such tribunals. In fact, the history of military commissions in the United States dates to the country’s founding and the Revolutionary War: commissions have repeatedly been

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<sup>1</sup> Compare, e.g., Edwin Meese III, *Guantanamo Bay prison is necessary*, CNN.COM, Jan. 11, 2012, (available at <https://www.cnn.com/2012/01/11/opinion/meese-gitmo/index.html>) with Vince Warren, *Gitmo: 10 years of injustice and disgrace*, CNN.COM, Jan. 11, 2012, (available at <https://www.cnn.com/2012/01/10/opinion/warren-close-gitmo/index.html>).

used when there was a need for trial, but no alternative forum was deemed appropriate. Moreover, the Guantanamo Bay commissions are not the first ones to stoke significant controversy. Rather, prior uses of commissions have involved interesting – if not concerning – interactions between the three branches of the federal government. Understanding this history and how the Guantanamo Bay commissions compare to their predecessors – and thus how well the commissions satisfy their intended purpose – is an important piece of the current debate over the commissions, a debate that is likely to continue for years to come.

The purpose of this article is to provide a review of military commissions throughout American history and to analyze how the current commissions at Guantanamo Bay compare to their eponymous predecessors. Specifically, this article discusses how commissions have traditionally been used in three types of situations: to try violations of the law of war, in territories under martial law, and in response to a need resulting from the lack of alternative civilian or military tribunals. This article further contends that the current commissions are unique in American history and raises questions as to their true necessity.

Part II of this article explores the foundational need in the Anglo-American system for a trial in some form to be held before punishment is inflicted. Part III provides an overview of modern courts-martial and military commissions. Part IV traces the use of military commissions throughout United States history. Part V juxtaposes the current military commissions operating at Guantanamo Bay with the historical use of military commissions. Finally, this article concludes that because federal Article III courts can successfully handle terrorism-related cases, the Guantanamo Bay commissions, in contrast to their historical counterparts, are not necessary to ensure the effective prosecution of certain categories of cases.

## I. THE NEED FOR TRIALS

The use of a trial to establish guilt and punishment for a violation of law can be traced back to the earliest human

civilizations, such as the Sumerians.<sup>2</sup> Societies have held trials since that time not only to establish guilt in situations where culpability is unclear, but also to ease the moral burdens that come with judging and sentencing another person: a trial can act as “a kind of moral safe harbor in administering punishment, by allowing us to declare that the accused was convicted according to impersonal procedures, and not according to our own individual whim.”<sup>3</sup>

In order to alleviate the moral qualms that came with judging, the English, from whom America’s judicial procedures are derived, “invented a considerable number of methods of purgation or trial, to preserve innocence from the danger of false witnesses, and in consequence of a notion that God would always interpose miraculously to vindicate the guiltless.”<sup>4</sup> These methods included the *corsned*, or morsel of execration, the ordeal by fire (hot iron) or cold water, compurgation or wager of law, and combat (which evolved into the duel).<sup>5</sup>

However, in 1215, the Fourth Lateran Council forbade clerical participation in the ordeals, declaring them to be “no different from blood surgery or blood warfare: it polluted any clergyman who took part in it, and therefore no blessings could be pronounced over the ordeal.”<sup>6</sup> Four years later, in response to the Church’s ban on the use of the ordeals, King Henry III directed that a new method of judging be established.<sup>7</sup> The solution decided upon was the jury, an institution that had a presence in England at least as far back as the tenth century.<sup>8</sup> “[B]y 1220 the twelfth-century jury of presentment . . . was converted into a thirteenth-century

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<sup>2</sup> See SAMUEL NOAH KRAMER, HISTORY BEGINS AT SUMER 56-59 (3d. ed. 1981) (recounting a murder trial from 1850 B.C.E.). Requirements for criminal trials can also be found in the Bible. See, e.g., *Deuteronomy* 17:8-9 (King James).

<sup>3</sup> JAMES Q. WHITMAN, THE ORIGINS OF REASONABLE DOUBT: THEOLOGICAL ROOTS OF THE CRIMINAL TRIAL 13 (2008).

<sup>4</sup> 4 WILLIAM BLACKSTONE, COMMENTARIES \*341 (Oxford, Clarendon Press, 1765).

<sup>5</sup> *Id.*; Sanjeev Anand, *The Origins, Early History and Evolution of the English Criminal Trial Jury*, 43 ALTA. L. REV. 407, 409-15 (2005).

<sup>6</sup> Whitman, *supra* note 4, at 126.

<sup>7</sup> *Id.* at 126-27; Anand, *supra* note 6, at 415.

<sup>8</sup> 3 WILLIAM BLACKSTONE, COMMENTARIES \*349-50.

form of the criminal jury we know today, charged with the duty of declaring accused persons guilty or not guilty.”<sup>9</sup> Initially these juries consisted of thirty-two people: twelve “hundredors” drawn from the medieval subdivision of a county, and twenty villagers from the towns surrounding the alleged offense.<sup>10</sup> However, shortly after 1222, the use of villagers ceased, leaving a jury of twelve from the local area.<sup>11</sup> Thus, jury trials as we know them today came about as a way for judges to continue avoiding the moral and religious qualms that came with passing judgment over man.<sup>12</sup>

By the 18th century, however, society’s focus shifted from the judge to the defendant. Trials came to be seen as critical to the protection of individuals’ rights. Blackstone described the trial by jury as a “palladium” that would protect “the liberties of England” as long as it “remains sacred and inviolate.”<sup>13</sup> And at the birth of the United States, Alexander Hamilton wrote in Federalist No. 83,

The friends and adversaries of the plan of the convention, if they agree in nothing else, concur at least in the value they set upon the trial by jury; or if there is any difference between them it consists in this: the former regard it as a valuable safeguard to liberty; the latter represent it as the very palladium of free government. For my own part, the more the operation of the institution has fallen under my observation, the more reason I have discovered for holding it in high estimation; and it would be altogether superfluous to examine to what extent it deserves to be esteemed useful or essential in a representative republic, or how much more merit it may be entitled to, as a defense against the oppressions of an hereditary monarch, than as a barrier to the tyranny of popular magistrates in a popular government. Discussions of this kind would be more curious than

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<sup>9</sup> Whitman, *supra* note 4, at 138.

<sup>10</sup> Anand, *supra* note 6, at 416.

<sup>11</sup> *Id.*

<sup>12</sup> See Whitman, *supra* note 4, at 150.

<sup>13</sup> 4 BLACKSTONE, *supra* note 5, at \*350.

beneficial, as all are satisfied of the utility of the institution, and of its friendly aspect to liberty.<sup>14</sup>

Thus, for many centuries now, the trial has provided a way to resolve questions of guilt and punishment; although it initially served as a means to avoid the religious ramifications of passing judgment over man, it has come to be seen as a bulwark protecting individual liberty. This need exists even when the established trial forum is unavailable (i.e., when there is no federal Article III court), thus creating a need for an alternative forum to address such situations.

## II. THE CURRENT MILITARY TRIAL OPTIONS: COURTS-MARTIAL AND MILITARY COMMISSIONS

In the United States military system, the court-martial is the standard trial mechanism to prosecute criminal offenses. Courts-martial operate according to the Manual for Courts-Martial ("MCM"). The MCM sets forth a full set of procedures and rules that must be adhered to, including requirements such as an accused's right to counsel and pre-trial discovery, creating a strong resemblance to a standard federal Article III civilian court in many ways.<sup>15</sup> Courts-martial have jurisdiction over any person subject to a court-martial under the Uniform Code of Military Justice (mostly active duty personnel of the domestic armed forces), and persons accused of violations of the law of war.<sup>16</sup> This second category includes

any person who by the law of war is subject to trial by military trial for any crime or offense against: (a) The law of war; or (b) The law of the territory occupied as an incident of war or belligerency whenever the local civil authority is

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<sup>14</sup> THE FEDERALIST No. 83, at 521-22 (Alexander Hamilton) (Benjamin F. Wright ed., 1961).

<sup>15</sup> See generally, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2016 ed.).

<sup>16</sup> *Id.* at R.C.M. 202.

superseded in whole or part by the military authority of the occupying power.<sup>17</sup>

Military commissions, on the other hand, are tribunals “born of military necessity,” whose authority “can derive only from the powers granted jointly to the President and Congress in time of war.”<sup>18</sup> They have traditionally been *ad hoc* tribunals turned to when courts-martial or civilian courts were unavailable, but the need for a trial still existed, and would typically dissolve after a specific offense had been addressed. As detailed further below, three different forms of military commissions have been used throughout American history: (1) for crimes committed by civilians where martial law has been declared; (2) in places where, and during times when, civil courts were not open and functioning, including in conquered territory controlled by the military; and (3) for unlawful enemy combatants accused of violating the law of war.

An important feature of the third type of commission is that they historically do not employ the full panoply of procedures found in civilian courts and courts-martial. However, such procedures are not necessary because this type of commission’s purpose is “primarily a factfinding one – to determine, typically on the battlefield itself, whether the defendant has violated the law of war.”<sup>19</sup> The facts will be easy to determine because the commission would commence almost immediately after the alleged crime and near the crime scene, thus eliminating the need for a pre-trial discovery process and procedures designed to control the evidence considered.

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<sup>17</sup> *Id.* at R.C.M. 201(f)(1)(B).

<sup>18</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 590-91 (2006); *see also Ex parte Vallandigham*, 68 U.S. 243, 249 (1863) (contrasting courts-martial and military commissions in the context of military jurisdiction, explaining that while courts-martial try cases created by statute, military offenses that fall outside of statute “must be tried and punished under the common law of war” by military commissions).

<sup>19</sup> *Id.* at 596-97.

According to a – if not *the* – leading military historian, William Winthrop,<sup>20</sup> the common law governing military commissions requires that five conditions be met in order for this type of commission to have jurisdiction: (1) unless authorized by statute, the offense must have been “committed within the field of the command of the convening commander”; (2) unless authorized by statute, the field of command must be in “the theatre of war or a place where military government or martial law may legally be exercised”; (3) “the trial must be had within the theatre of war, military government, or martial law”; (4) the offense “must have been committed within the period of the war or of the exercise of military government or martial law”; and (5) the defendant can only be a member of the enemy’s army charged with violating the law of war, individuals of a conquered and occupied territory, individuals in a territory under martial law, or a member of the United States military who, during a time of war, is charged “with crimes or offences not cognizable, or triable, by the criminal courts or under the Articles of war.”<sup>21</sup> As explained below, Winthrop’s criteria can be used as a guide to determine the appropriateness of a military commission trying a violation of the law of war. Historically, each time Winthrop’s criteria were satisfied, the commission was uncontroversial; however, when the criteria were not satisfied, the commission proved to be controversial and its legality questioned.

### III. MILITARY COMMISSIONS THROUGHOUT UNITED STATES HISTORY

#### A. *Early use of Commissions*

The first use of a tribunal resembling a military commission appears to be in 1474, when a commission tried Peter von Heigenbach, governor of the territory of Breisbach, Germany, for ordering murder, arson, and rape while he was in command of the

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<sup>20</sup> See *Reid v. Covert*, 354 U.S. 1, 19 n.38 (1957) (plurality opinion) (stating that Winthrop is considered by some as the “Blackstone of Military Law”).

<sup>21</sup> WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 836-38 (rev. 2d ed. 1920).

Winthrop notes that the third condition is not always complied with. *Id.* at 836. Justice Stevens recognizes an implied sixth condition that must be met for this type of commission to have jurisdiction: the charged offense must be a violation of the law of war. *Hamdan*, 548 U.S. at 597.

city.<sup>22</sup> Later, during the Thirty Years War in the 17th century, Swedish King Gustavus Adolphus turned to commissions when he needed a way to enforce discipline in his army.<sup>23</sup> Commissions became “an alternative to the exercise of [commanders’] unlimited power on the battlefield,”<sup>24</sup> and a means of prosecuting mercenaries for committing “war crimes outside the umbrella of the law of war.”<sup>25</sup>

By the latter part of the 18th century, the use of military commissions to try soldiers for war crimes was “well established.”<sup>26</sup> According to some authors, in 1776, the British used a military commission – but called it a court-martial – to try American spy Nathan Hale.<sup>27</sup> Others contend that it is more likely that Hale was never tried because British military law at the time did not require foreign spies to be tried.<sup>28</sup> During the American Revolution, George Washington ordered a “Board of General Officers” be used to try former American soldier Thomas Shanks and British Major John André for spying.<sup>29</sup> André’s Board consisted of six major-generals

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<sup>22</sup> LEON FRIEDMAN, *THE LAW OF WAR* 775 (Random House 1972).

<sup>23</sup> Michael Lacey, *Military Commissions: A Historical Survey*, 2002 ARMY LAW 41, 42 (2002).

<sup>24</sup> *Id.* at 41.

<sup>25</sup> FRIEDMAN, *supra* note 23, at 776 (“Although the charges were treason or murder, the essence of their offenses was that they committed war crimes outside the umbrella of the law of war.”).

<sup>26</sup> Timothy MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 ARMY LAW 19, 27 (2002). Today, soldiers would be tried by courts-martial.

<sup>27</sup> Lacey, *supra* note 24, at 42 (citing Wigall Green, *The Military Commission*, 42 AM. J. INT’L L. 832 (1948)). The British used ‘court-martial’ to refer both to what would be a court-martial in today’s terms as well as to refer to what would be called a military commission. They did not distinguish between the two until the Boer War in 1899. *Id.* at n.14. Hale would likely have been considered to be an unlawful enemy combatant in modern terms because he was captured in civilian clothing, like the Nazi saboteurs in the *Quirin* case, discussed *infra*.

<sup>28</sup> David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT’L L. 5, 14-15 (2005).

<sup>29</sup> Lacey, *supra* note 24, at 42; Edward G. Lengel, ed., *The Papers of George Washington: Revolutionary War Series*, vol. 15, May–June 1778 (University of Virginia Press 2006); see also *Ex parte Quirin*, 317 U.S. 1, 42 n.14 (1942) (listing many instances of military tribunals being used to try spies during the

and eight brigadier-generals who were charged with deciding how to classify André and determine his punishment. The commission concluded that André should be considered a spy and, in accordance with “the law and usages of nations,” put to death.<sup>30</sup>

It is unclear why Washington chose to subject the two men to Boards of General Officers, since he believed he “retained customary authority for the summary treatment of spies” and sent more than two dozen accused spies to courts-martial.<sup>31</sup> With respect to André, Washington’s September 30, 1780 letter to British General Clinton states only that Washington “determined. . . to refer his case to the examination of a Board of General Officers,” even though “Major Andre was taken under such circumstances as would have justified the most summary proceedings against him.”<sup>32</sup> It is important to note the correlation between the apparent lack of controversy surrounding Washington’s treatment of these men, and the fulfillment of Winthrop’s criteria.

### *B. War of 1812*

During the War of 1812, General Andrew Jackson took control of New Orleans and declared martial law.<sup>33</sup> Following the cessation of hostilities, but before word of completed peace negotiations had reached New Orleans, Jackson maintained martial

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Revolutionary War). Glazier notes that the commission for Hale was not really a court but merely an advisory panel charged with investigation. Glazier, *supra* note 29, at 19.

<sup>30</sup> Benson J. Lossing, *THE TWO SPIES: NATHAN HALE AND JOHN ANDRE* 99-100 (1886) (citing the order of Washington and the verdict of the commission). Because André was a spy, he would have faced a military commission rather than a court-martial; however, it is interesting to note that the commission also functioned as what would today be called a Combatant Status Review Tribunal.

<sup>31</sup> Glazier, *supra* note 29, at 21-22; *see also* Robert McConnell Hatch, *MAJOR JOHN ANDRÉ: A GALLANT IN SPY’S CLOTHING* 259 (Houghton Mifflin Co. 1986) (detailing the fascinating history of the British officer who assisted General Benedict Arnold commit his treason).

<sup>32</sup> Letter from George Washington to Henry Clinton (Sept. 30, 1780), *reprinted in* *ANDREANA. CONTAINING THE TRIAL, EXECUTION AND VARIOUS MATTER CONNECTED WITH THE HISTORY OF MAJOR JOHN ANDRE, ADJUTANT GENERAL OF THE BRITISH ARMY IN AMERICA*, 29-30 (Horace W. Smith, ed. 1865).

<sup>33</sup> 5 *THE LOUISIANA HISTORICAL QUARTERLY* 560 (1922).

law in the city because, to him, the threat from the British was not over and the need for control was still very much alive.<sup>34</sup>

During this time, Louis Louallier, a New Orleans resident of French origin and state legislator, wrote an article “deliberately and wickedly misrepresent[ing] the order” of continued martial law.<sup>35</sup> According to Jackson, Louallier’s publication “occasioned the desertion of the soldiary from their posts, mutiny within my camp and a perfect state of disorganisation and insubordination within my camp.”<sup>36</sup> In response, Jackson had Louallier arrested, arguing that “to have silently looked on such an offense without making any attempt to punish it, would have been a formal surrender of all discipline, all order, all personal dignity and public safety.”<sup>37</sup> Jackson charged Louallier with inciting mutiny and disaffection in the army, and decided that Louallier was “liable to be tried by a Court Martial, by virtue of a general order issued by him [Jackson], declaring martial law to exist in the city of New Orleans.”<sup>38</sup> Thus,

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<sup>34</sup> *Id.* at 563.

<sup>35</sup> *Id.* at 565.

<sup>36</sup> Andrew Jackson, Letter from Andrew Jackson to Editors of the *Globe* 4 (Feb. 1843) (manuscript) (on file with Library of Congress) [hereinafter Jackson Notes].

<sup>37</sup> *Id.*

<sup>38</sup> Louis Fisher, *Military Tribunals: Historical Patterns and Lessons*, CRS Report for Congress 7 (July 9, 2004); Deposition of Major William O. Winston, 22 March 1815, Transcript of the Record of the United States District Court in *United States v. Major Andrew Jackson* (1815), printed in 5 *THE LOUISIANA HISTORICAL QUARTERLY* 544 (1922). There is some dispute as to whether this tribunal would constitute a court-martial or military commission in the modern understanding of the terms. Compare Lacey, *supra* note 24, at 42 with Fisher, *supra* note 39, at 7; W. Winthrop, *MILITARY LAW AND PRECEDENTS* 832 (rev. 2d ed. 1920); and Jonathan Lurie, *Andrew Jackson, Martial Law, Civilian Control of the Military, and American Politics: An Intriguing Amalgam*, 126 *MIL. L. REV.* 133, 136 (1989). Andrew Jackson also referred to the tribunal as a court-martial, *see supra* note 37. Because Louallier was a civilian being tried under martial law, rather than a member of the armed forces, in today’s terms the tribunal is better classified as an occupation or martial law military commission, rather than a court-martial. Though not relevant for purposes of this article, the conclusion of this incident presents a fascinating story in American history, and an interesting example of a conflict between civilian and military authorities: after Louallier was arrested, District Court Judge D. A. Hall issued a writ of *habeas corpus* to Jackson. Because Jackson did not want to ignore or disobey the writ – that would “have increased the evil” – but also because he did not want to obey the writ – since that would have been “wholly repugnant to

the use of the military tribunal was directly tied to a specified necessity, namely, that there was still a threat from the British forces. A committee of the Louisiana Senate that later investigated this incident also specifically focused on whether “the necessity for the continuance of martial law ceased on the 5th day of March, when Louallier was arrested, and the order for a *habeas corpus*, directed to Gen. Jackson, was issued by Judge Hall.”<sup>39</sup> Further, because the territory was under martial law, Winthrop’s criteria were still satisfied.

### C. War with the Seminoles

General Jackson again used military tribunals in 1818 while commanding troops against the Seminoles. Jackson ordered the creation of a “special court” to try two British citizens, Robert Ambrister and Alexander Arbuthnot, for inciting the Creek Indians.<sup>40</sup>

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[Jackson’s] ideas of the public safety and his own sense of duty” – Jackson decided the best middle ground was simply to confine the judge, so he ordered the judge arrested. *Cause Shewn by A. Jackson, Major General in the Army of the United States, Commanding the Seventh Military District, on the rule hereunto annexed, reprinted in* 5 THE LOUISIANA HISTORICAL QUARTERLY 566 (1922). After a court-martial acquitted Louallier, Jackson ignored the court-martial’s ruling and kept Louallier in jail anyway. Jackson also decided that since a military court probably would not convict a federal judge, he was better off just ordering the judge out of the city. Thus, Jackson had his troops march the judge a few miles out of the city and leave him there with instructions that the judge was not to return until the British had left the coast or there was a declaration of peace. Fisher, *supra* note 39, at 7; Jackson Notes. After Judge Hall returned to his court, he ordered Jackson to appear and held him in contempt for disobeying the *habeas* writ. Judge Hall imposed a fine of \$1,000, which Jackson promptly paid. Ladies of New Orleans offered to pay the fine, but Jackson asked that the money offered be given to the relief of “the children and widows of those who fell whilst fighting for their country.” Jackson Notes; Letter from J. B. Plauché to Hon. G. W. Philips (Jan. 17, 1843), *reprinted in* 5 THE LOUISIANA HISTORICAL QUARTERLY 524.

<sup>39</sup> Report of the Committee of the Senate (of the State of Louisiana, 1843) in Relation to the Fine Imposed on Gen. Jackson, Together with the Documents Accompanying the Same, *reprinted in* 5 Louisiana Historical Quarterly 510. The Committee concluded that necessity did exist, and urged passage of a resolution that would ask Louisiana’s federal congressional delegation to seek a law reimbursing Jackson for the \$1,000, with 6% interest. *Id.* at 513.

<sup>40</sup> Fisher, *supra* note 39, at 8 (citing 1 American State Papers: Military Affairs 721). The charges against Robert Ambrister were aiding and abetting the enemy and

The court found both men guilty, and both were executed. Jackson justified the death of the men by saying, “[i]t is an established principle of the law of nations, that any individual of a nation, making war against the citizens of another nation, they being at peace, forfeits his allegiance and becomes an outlaw and a pirate.”<sup>41</sup>

Following the incident, the House Committee on Military Affairs investigated Jackson’s actions. The Committee’s report specifically questioned Jackson’s justification for use of a military tribunal given the absence of congressional authorization for the tribunal to hear the charged offenses, the lack of any apparent “exigency,” and the fact that the conflict had ended.<sup>42</sup> The Committee ultimately submitted a Resolution to the House disapproving the trials.<sup>43</sup> Thus, as with prior examples, the appropriateness of a military tribunal again turned on the existence of exigent circumstances. Additionally, a correlation can be seen between the situation’s failure to satisfy Winthrop’s criteria and the controversy that arose from the military tribunal’s use.

#### *D. Mexican-American War*

The Mexican-American War in 1847 is generally regarded as the first time military commissions – both in form and name – were used by the United States. As with the prior occurrences, these commissions were created in response to a specific need.

Before heading to Mexico to take command, General Winfield Scott sought to establish a military tribunal to enforce

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leading the Lower Creeks in carrying on a war against the United States. 1 American State Papers: Military Affairs 731. The charges against Alexander Arbuthnot were “[e]xciting and stirring up the Creek Indians to war against the United States and her citizens . . . [a]cting as a spy, aiding, abetting, and comforting the enemy, and supplying them with the means of war . . . [and e]xciting the Indians to murder and destroy William Hambly and Edmund Doyle, confiscate their property, and causing their arrest with a view to their condemnation to death, and the seizure of their property. . . .” *Id.* at 734.

<sup>41</sup> 1 American State Papers: Military Affairs 735.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

disciplinary measures. General Scott was aware of the dangers military invasion could bring and the need to avert a guerrilla war sparked in response to “lawless and undisciplined action by American soldiers.”<sup>44</sup> However, there was no reliable civilian judicial system in the area.<sup>45</sup> Moreover, “the Articles of War did not cover crimes committed by the indigenous population against the occupying American forces,” and courts-martial, as they existed at the time, could not be used because of their very limited jurisdiction.<sup>46</sup> Thus, General Scott felt there was a need to set up a new military tribunal, which he termed a military commission.

The new commissions were created through General Orders, No. 20, of February 19, 1847, which also declared martial law in all areas of Mexico occupied by American troops. General Orders, No. 20 gave the military commissions jurisdiction over cases of “[m]urder, premeditated murder, injuries or mutilation, rape, assaults and malicious beatings; robbery, larceny, desecration of Churches, cemeteries or houses, and religious buildings; and the destruction of public or private property that was not ordered by a superior officer.”<sup>47</sup> General Scott further decreed that the commissions would operate in accordance with the Articles of War, would have written records that would be reviewed to ensure that no defendant who should be tried before a court-martial was instead tried by a commission, and that all punishments conformed to what would be expected in a similar case in a civilian court in the United States.<sup>48</sup> In practice, the procedures used for the commissions were nearly identical to those used for courts-martial and similar to civilian criminal trials at the time; the primary

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<sup>44</sup> Fisher, *supra* note 39, at 12.

<sup>45</sup> *Id.* at 11.

<sup>46</sup> Lacey, *supra* note 24, at 43; Erika Myers, *Conquering Peace: Military Commissions As A Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201, 206 (2008); *Hamdan*, 548 U.S. at 590-91.

<sup>47</sup> Headquarters, U.S. Dep’t of Army No. 2 (19 February 1847) [hereinafter Gen. Orders, No. 20].

<sup>48</sup> *Id.*

differences were the larger role for the judge advocate and limitations on defense counsel.<sup>49</sup>

General Scott separately ordered the creation of councils of war to deal with violations of the law of war.<sup>50</sup> These councils dealt with two groups of defendants: first, Mexican recruiters who tried to convince American soldiers to desert; and second, guerrillas.<sup>51</sup> While councils for recruiters followed similar procedures to those used in military commissions and courts-martial, those for guerrillas did not. Instead, councils prosecuting guerillas operated as “battlefield courts”: they could be convened by commanders in the field, were not subject to the rules of evidence, and required a lower threshold for a finding of guilt.<sup>52</sup> Additionally, unlike the military commissions created by General Orders, No. 20, there was no requirement that written records of council proceedings be made and reported to headquarters.<sup>53</sup>

General Scott’s military commissions proved uncontroversial: “[a]pparently, the only one to ‘object to the legality of the court and deny the authority of Gen. Scott to constitute it’ was an accused murderer charged before a commission, who understandably wanted to be sent home.”<sup>54</sup> Significantly, there is a notable correlation between the lack of controversy and the fulfillment of Winthrop’s criteria: the military commissions set up by General Scott were operating during a declared state of martial law in response to an expected need resulting from the lack of reliable courts or other tribunals. All five of Winthrop’s criteria were satisfied.

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<sup>49</sup> Myers, *supra* note 47, at 216-19.

<sup>50</sup> Headquarters, U.S. Dep’t of Army, Gen. Orders No. 372 (12 December 1847) [hereinafter Gen. Order No. 372].

<sup>51</sup> Myers, *supra* note 47, at 229.

<sup>52</sup> *Id.* at 231-32.

<sup>53</sup> *Id.* at 233 (noting no records of any councils of war exist today).

<sup>54</sup> *Id.* at 225-26 (quoting Letter from J.H. Forster to Col. Hunt (May 2, 1848), National Archives, Record Group 94, Records of the Adjutant General’s Office, Letters Received Mar. 13, 1848-July 3, 1848).

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*E. The Civil War*

The heaviest use of military commissions was during the Civil War,<sup>55</sup> when approximately 2,000 cases were tried.<sup>56</sup> Commissions were viewed as necessary due to the “then very limited jurisdiction of courts-martial” and the exigencies of the war.<sup>57</sup> During this time, “the terms ‘council of war’ and ‘military commission’ merged to form the . . . meaning of military commission”<sup>58</sup> that held until the Military Commissions Act. Despite the enormous number of tribunals that took place during the Civil War, only a few cases are prevalent among historical literature. These few cases demonstrate how military commissions have always been tribunals of necessity.

First, in 1861, Major General John C. Frémont declared martial law in Missouri after he decided that circumstances were “sufficiently urgent.”<sup>59</sup> Hybrid military commissions were set up to deal with a wide range of crimes, including “destruction of railroad ties, tracks, railroad cars, and telegraph lines,” all of which fell within the broad category of the “laws of war.”<sup>60</sup> Although civilian courts were still operating, Major General Henry Halleck, the Commander of Union forces in the West, deemed them to be “very generally unreliable,” leaving no choice but to use a military court.<sup>61</sup> Moreover, General Halleck concluded that the Articles of War “were inadequate for administering justice during the rebellion,”<sup>62</sup> necessitating an alternative form of tribunal.

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<sup>55</sup> Fisher, *supra* note 39, at 16.

<sup>56</sup> Detlev F. Vagts, *Military Commissions: The Forgotten Reconstruction Chapter*, 23 AM. U. INT’L L. REV. 231, 239 (2008).

<sup>57</sup> *Hamdan*, 548 U.S. at 590-91.

<sup>58</sup> Lacey, *supra* note 24, at 43.

<sup>59</sup> Fisher, *supra* note 39, at 18.

<sup>60</sup> *Id.* (citing [1894] 2 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 282-89, 402-05, 407).

<sup>61</sup> *Id.* at 19 (citing [1894] 2 THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES 247).

<sup>62</sup> Lacey, *supra* note 24, at 43.

Second, in 1865, based on the opinion of Attorney General James Speed, President Andrew Johnson convened a military commission to try the individuals charged with the assassination of President Lincoln and the attempted assassination of Secretary of State William Seward.<sup>63</sup> This decision was controversial because civil courts in Washington, D.C. were open and operational. However, Attorney General Speed considered the conspirators to be “secret active public enemies,” and assassination to be a violation of the law of war.<sup>64</sup> The conclusion Attorney General Speed drew from these facts was that

if the persons who are charged with the assassination of the President committed the deed as public enemies. . . they not only can, but ought to be tried before a military tribunal. If the persons charged have offended against the laws of war, it would be as palpably wrong for the military to hand them over to the civil courts, as it would be wrong in a civil court to convict a man of murder who had, in time of war, killed another in battle.<sup>65</sup>

Part of Attorney General Speed’s analysis deals with the state of the city of Washington at the time of the assassination. To him, the city was still very much at war: “. . . a civil war was flagrant, the city of Washington was defended by fortifications regularly and constantly manned, the principle police of the city was by federal soldiers. . . [and] [m]artial law had been declared in the District of Columbia. . . .”<sup>66</sup> Thus, once again, the use of a military commission was justified on a finding that the crime at issue was a violation of the law of war and that the geographic region was not secure. These findings also show that Winthrop’s criteria were (mostly) satisfied.

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<sup>63</sup> 8 Comp. Messages & Papers Pres. 3532 (New York, Bureau of Nat’l Literature 1897).

<sup>64</sup> 11 Op. Atty Gen. 297, 316 (1865).

<sup>65</sup> *Id.* at 317.

<sup>66</sup> *Id.*

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*F. Reconstruction*

Reconstruction saw the continued use of military commissions throughout the southern states. Consistent with history, the resort to commissions continued to be justified on a perceived need for them. For example, in the summer of 1865, General Thomas Ruger had three civilians arrested for assaulting a freedman. Ruger refused to turn the men over to civilian courts, saying that “the restraining influence of prompt trial and punishment of offenders, particularly those guilty of homicide, by military commissions is the only adequate remedy for the existing evils.”<sup>67</sup> In other words, General Ruger perceived a need for a tribunal which could administer justice in a far swifter manner than a civilian court.

Another significant example occurred the following year when General Daniel Sickles convened a military commission in South Carolina to try several men accused of attacking an army guard and killing several soldiers.<sup>68</sup> The charges levied against the men were that, “while martial law was in force . . . [they] did voluntarily associate with an armed band, and acting therewith, with unlawful force attack and overcome a certain guard detailed and on duty at Brown’s ferry” and killed three soldiers.<sup>69</sup> Following a 30-day trial with a full defense of the accused, the commission found four men guilty and sentenced them to death.<sup>70</sup> General Sickles explained his decision to utilize a military commission during testimony before a congressional select committee investigating the incident afterwards. According to General Sickles, “there were no civil courts that could have tried [the defendants]. Neither the United States district nor circuit court, nor the States courts, were

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<sup>67</sup> Vagts, *supra* note 57, at 242.

<sup>68</sup> H.R. Rep. No. 39-23 at 3.

<sup>69</sup> *Id.* at 35-36.

<sup>70</sup> *Id.* at 3. It is not clear how many men were on trial for the murders – one witness identified six people but there is no mention of anyone being acquitted by the commission. *Id.* at 2-3.

open. Steps were in progress to that end, but they had not been consummated.”<sup>71</sup>

The case ultimately came before District Court Judge Willard Hall in the United States District Court for the District of Delaware on a petition for a writ of *habeas corpus*.<sup>72</sup> In his opinion, Judge Hall examined the question of whether the military commission had jurisdiction to hear the case.<sup>73</sup> Judge Hall concluded that there was no need to “subject[] the accused to the disadvantages” of a military commission because the authority of the United States had been restored and, contrary to General Sickles’ contention, civilian courts were operating.<sup>74</sup>

Judge Hall’s opinion is also noteworthy for its response to two of the government’s arguments defending the use of a military commission. First, Judge Hall addressed the case of *The King v. John Suddis*, 102 Eng. Rep. 119 (1801), which had been proffered to support the argument that “in the absence of all civil judicature, the military may try offenders.”<sup>75</sup> Judge Hall found that case to be distinguishable because it concerned an offense (i) by a soldier (ii) at a distant military fortress.<sup>76</sup> Second, Judge Hall rejected a comparison to General Scott’s use of commissions in Mexico,

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<sup>71</sup> Murder of Union Soldiers Before the Select Comm. to Investigate the Charges for Murder of Union Soldiers in South Carolina, 39th Cong. (1867) (testimony of Major General Daniel E. Sickles) (“Sickles Testimony”) printed in H.R. Rep. No. 39-23 at 10.

<sup>72</sup> See *United States v. Commandant of Fort Delaware*, 25 F. Cas. 590, 590 (D. Del. 1866).

<sup>73</sup> See *id.*

<sup>74</sup> *Id.* at 590-91. It is not clear whether Judge Hall or General Sickles was correct about the operational status of the federal civil court at the relevant time. Although South Carolina Provisional Governor Perry reappointed all judicial officers who would swear allegiance to the United States in his proclamation of July 20, 1865, thus technically re-opening the federal civilian court, it is not clear that the court was able to conduct any significant operations due to the destruction that General Sherman and Union troops had inflicted on the state during its conquest. See Warren Moise, *REBELLION IN THE TEMPLE OF JUSTICE: THE FEDERAL AND STATE COURTS IN SOUTH CAROLINA DURING THE WAR BETWEEN THE STATES* 119-22 (iUniverse, Inc. 2003). A WestLaw search of cases from the South Carolina federal district court returns no opinions prior to January 1, 1868. Thus, it is possible that both men were correct.

<sup>75</sup> *Commandant of Fort Delaware*, 25 F. Cas. at 590.

<sup>76</sup> *Id.* at 590-91.

explaining that “Mexico was a foreign country, conquered, its language and institutions unknown; South Carolina, a state of the Union rescued from rebellion, its laws and institutions restored.”<sup>77</sup> In sum, both sides of this case relied on necessity to reach their conclusions about the appropriateness of using a military commission: General Sickles believed that the commission was necessary to provide a trial because there were no civilian courts available, while Judge Hall found the commission to be unnecessary since the civilian court was operating.

A circuit court in New York issued a similar opinion in a case involving the imprisonment of an 80-year-old South Carolina farmer who had been convicted by a military commission of killing a boy. Like Judge Hall, the court explained that South Carolina’s state courts, which had jurisdiction over the state crime of murder, “were in the full exercise of their judicial functions at the time of this trial.”<sup>78</sup> As such, “[n]o necessity for the exercise of this anomalous power [the use of a military commission] is shown.”<sup>79</sup>

In Virginia, Brevet Major General J. M. Schofield also clashed with civilian courts when he refused to comply with a writ of *habeas corpus* in a case involving Dr. James L. Watson, a white man, who shot a freedman. Although Dr. Watson had appeared before a civilian court and was set free, General Schofield had Dr. Watson arrested and convened a military commission. In his view, a commission was necessary because the civilian court’s refusal to bring Dr. Watson before a jury essentially justified his killing of a black man, and thus “endanger[ed] the personal security of all people of color living within the jurisdiction of the court.”<sup>80</sup> President Johnson ordered the commission be dissolved before it

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<sup>77</sup> *Id.* at 591.

<sup>78</sup> *In re Egan*, 8 F. Cas. 367, 368 (C.C.N.D.N.Y. 1866).

<sup>79</sup> *Id.*

<sup>80</sup> Andrew Johnson, Message of the President of the United States regarding Violations of the Civil Rights Bill, S. Exec. Doc. No. 39-29, at 29 (1867) (Memoranda from Brevet Maj. Gen. J. M. Schofield to Maj. Gen. O. O. Howard); General Schofield also conceded that he was using the incident as a test case to find “the best practical way” to hand “the important questions involved.” *Id.* at 20 (Letter to Maj. Gen. O. O. Howard from Brevet Maj. Gen. J. M. Schofield dated Dec. 8, 1866).

had made any progress, so the situation was resolved without further incident.<sup>81</sup>

The conflict between generals and the civilian courts ended for a brief period following the Supreme Court's decision in *Ex parte Milligan*. In 1864, Brevet Major General Hovey in Indiana ordered the arrest of Lambdin P. Milligan on charges of conspiracy, affording aid and comfort to rebels, inciting insurrection, disloyal practices, and violating the laws of war. Even though the civilian courts were fully operational, Milligan was brought before a military commission convened by Major General Hovey and convicted.<sup>82</sup>

The Supreme Court began its decision by noting how, during the Civil War, normal procedures could not be followed:

During the late wicked Rebellion, the temper of the times did not allow that calmness in deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Then, considerations of safety were mingled with the exercise of power; and feelings and interests prevailed which are happily terminated.<sup>83</sup>

The Court concluded that "the laws and usages of war can never be applied to citizens in states where the civilian courts are open and their process unobstructed . . . [and] that the statute of March 3, 1863 gave federal courts 'complete jurisdiction to adjudicate upon this case.'"<sup>84</sup> In discussing limitations on the use of martial law and military commissions, the Court specifically focused on necessity:

. . . [T]here are occasions when martial rule can be properly applied. . . . As necessity creates the rule, so it limits its duration; for, if this government [by the military under

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<sup>81</sup> *Id.* at 30 (Message from E. D. Townsend to Gen. Schofield dated Dec. 21, 1866).

<sup>82</sup> *Ex parte Milligan*, 71 U.S. 2 (1866). Because Indiana was not under martial law at time of the case, Milligan's tribunal would be a military commission under today's definition as well.

<sup>83</sup> *Id.* at 109.

<sup>84</sup> Fisher, *supra* note 39, at 24 (citing *Milligan*, 71 U.S. at 117).

martial law] is continued after the courts are reinstated, it is a gross usurpation of power.<sup>85</sup>

The Supreme Court unanimously held that the military commission lacked jurisdiction, explaining that there was “[n]o reason of necessity” that explained why Milligan could not have been brought before the civilian court.<sup>86</sup>

The following year, though, Congress passed the Act to Provide for the More Efficient Government of the Rebel States.<sup>87</sup> The Act explicitly authorized the general officer of each district in the South to create military commissions “when in his judgment it may be necessary for the trial of offenders. . . .”<sup>88</sup> The preamble of the Act explains that this authority was being granted in response to a specifically perceived necessity:

Whereas no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said states until loyal and republican State governments can be legally established. . . .<sup>89</sup>

The Supreme Court never ruled on the constitutionality of this statute. However, these examples show that the propriety of the use of military commissions was always tied to a perceived need, and whether such a need existed determined whether the commission’s use was proper.

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<sup>85</sup> *Milligan*, 71 U.S. at 127.

<sup>86</sup> *Id.* at 122.

<sup>87</sup> Vagts, *supra* note 57, at 244-45.

<sup>88</sup> *Id.* (quoting Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, Preamble (1867)). The Act divides the South into five districts and places a general officer in charge of each district.

<sup>89</sup> Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428, Preamble (1867).

### G. Reconstruction to World War II

Military commissions were not widely used during the time between Reconstruction and World War II.<sup>90</sup> During World War I, military commissions were not used to prosecute war crimes committed within American territory.<sup>91</sup> There are, however, two items of note from this period that reflect the link between military commissions and the necessity for a trial mechanism.

The first item is the revised Articles of War. Beginning in 1912, Congress revised the Articles of War from 1806.<sup>92</sup> The Army Judge Advocate General at the time, Brigadier General Enoch H. Crowder, played a notable role in crafting the new Articles.<sup>93</sup> In his testimony concerning the revised Articles, General Crowder provided his view on the history of military commissions, noting that commissions grew out of “usage and necessity.”<sup>94</sup>

The second item is the case of Pable Waberski. Waberski was a Russian national and German spy during World War I. On his way to the United States, he told two men – who happened to be American and British secret service agents – that he was going to the United States to “blow things up.”<sup>95</sup> Immediately upon touching American territory, military authorities arrested Waberski.<sup>96</sup> The question faced by the government was whether a military

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<sup>90</sup> Fisher, *supra* note 39, at 32.

<sup>91</sup> Jennifer Elsea, Cong. Research Serv., RL31191, *Terrorism and the Law of War: Trying Terrorists as War Criminals before Military Commissions* 21 (2001).

<sup>92</sup> The 1806 Articles of War were mostly copied from the 1776 Articles of War, which were copied from the British Articles of War from 1765. Many of the British Articles could be traced back to the code of Gustavus Adolphus. *Revision of the Articles of War Before the Subcomm. on Mil. Affairs of the United States Senate*, 64th Cong. 27-28 (1916) (Statement of Brig. Gen. Enoch H. Crowder, United States Army, Judge Advocate General of the Army) [hereinafter Crowder Testimony].

<sup>93</sup> Fisher, *supra* note 39, at 33; Crowder Testimony, *supra* note 93, at 27-28 (“The revision now before you [the Committee] was submitted by me to the Secretary of War . . . The pending bill . . . is substantially identical with that bill . . .”).

<sup>94</sup> Crowder Testimony, *supra* note 93, at 40-41.

<sup>95</sup> Opinion of Hon. Thomas Watt Gregory, Att’y Gen, “Trial of Spies by Military Tribunals,” 31 Op. Att’y Gen. 356, 357 (1918).

<sup>96</sup> *Id.*

commission could try an alleged spy who had never been on any military installation or battlefield, and who was arrested in a place operating under normal civilian law with functioning civilian courts.

The military's argument rested on § 1341 of the United States Revised Statutes and Article of War 82, both of which have similar language. Article 82 reads:

Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of any of the armies of the United States, or elsewhere, shall be triable by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.<sup>97</sup>

The military asserted that the language "or elsewhere" in Article of War 82 gave the military jurisdiction over Waberski. Attorney General Thomas Watt Gregory, however, came to a different conclusion. Gregory first explained that *Milligan* was controlling precedent for this case, and it clearly stated that a military court did not have jurisdiction. Second, Gregory argued that even if *Milligan* did not exist, the military would still not have jurisdiction. "[I]n this country," he wrote, "military tribunals . . . can not constitutionally be granted jurisdiction to try persons charged with acts or offenses committed outside the field of military operations or territory under martial law or other peculiarly military territory."<sup>98</sup> To find otherwise would render the Constitution "nugatory in the cases of the most grave class of crimes."<sup>99</sup> Attorney General Gregory's conclusion is wholly consistent with the requirement that some necessity exist before a military commission may properly be used. Commissions, as he understood them, denied defendants the constitutionally guaranteed due process rights provided in a civilian court. Such a deprivation could not be allowed to occur except where there was no other choice, namely,

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<sup>97</sup> *Id.* at 358. Note how the rule concerning spies is the same as the one applied during the Colonial Era to the cases of Hale and André: spies are considered unlawful combatants and are to be punished with death.

<sup>98</sup> *Id.* at 361-62.

<sup>99</sup> *Id.*

in the middle of a military conflict or a situation where civilian courts were simply not present or operating.<sup>100</sup>

#### *H. World War II*

World War II brought with it a resurgence of military commissions and additional examples of commissions falling into two historic groups: commissions for violations of the law of war, and commissions to replace civilian courts where those courts were not operating.

During and after the war, military commissions “operated with quiet efficiency in the United States, France, Germany, Austria, Italy, Japan, and Korea in bringing to trial individuals and organizations engaging in terrorism, subversive activity, and violation of the laws of war.”<sup>101</sup> Perhaps the most famous example of the many commissions is that of Japanese General Tomoyuki Yamashita, who was accused of permitting atrocities against civilians and prisoners of war.<sup>102</sup> The Supreme Court ultimately reviewed General Yamashita’s case. Writing for the majority, Chief Justice Harlan Fiske Stone upheld the validity of the commission because, *inter alia*, General Yamashita had been charged with violating the law of war.<sup>103</sup> Conversely, in dissent, Justice Frank Murphy focused on the lack of necessity, explaining that “[t]he trial was ordered to be held in territory over which the United States has complete sovereignty. No military necessity or other emergency demanded the suspension of the safeguards of due process.”<sup>104</sup> Accordingly, both sides of the Court looked to the traditional roles of military commissions to justify their conclusions: the majority focused on the violation of the law of war, while the dissent focused

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<sup>100</sup> The following year the new Attorney General, A. Mitchell Palmer, was provided with different facts of the case, leading him to author a second opinion concluding that Waberski had been acting as a spy and thus could be tried by military commission under Article of War 82. 40 Op. Att’y Gen. 561 (1942) (1919).

<sup>101</sup> Wigall Green, *The Military Commission*, 42 AM. J. INT’L L. 832, 833 (1948).

<sup>102</sup> Fisher, *supra* note 39, at 52-53.

<sup>103</sup> *In re Yamashita*, 327 U.S. 1, 25 (1946).

<sup>104</sup> *Id.* at 27 (Murphy, J., dissenting).

on the lack of necessity for a commission to hear this charge when civil courts were capable of doing so.

In the United States, military commissions were held in Hawaii following the attack on Pearl Harbor in 1941. On December 7, 1941, Governor J. B. Poindexter declared martial law, suspended the writ of *habeas corpus*, and transferred control of the territory to the military until the danger of invasion was over. The Commanding General of the Hawaiian Department established two types of military tribunals – one for cases with sentences up to five years in prison and a fine of up to \$5,000, and another for more severe sentences up to capital punishment.<sup>105</sup> Two commission decisions were appealed to the Supreme Court and demonstrate the necessity requirement. In one case, Harry White was convicted of embezzlement; in the second, Lloyd C. Duncan was convicted of assaulting two Marine Corps sentries. District courts granted writs of *habeas corpus* for both men. On appeal, the United States Court of Appeals for the Ninth Circuit reversed, noting that “martial rule was in effect and the civil courts were disabled from functioning.”<sup>106</sup> The Supreme Court, though, disagreed, and held that “since the courts were open and able to function, the military trials of the petitioners were in violation of the Constitution.”<sup>107</sup> In his dissent, Justice Harold Burton focused on the fact that a very real threat still existed in the territory: “In this case Hawaii was not only in the theater of operations, it was under fire.”<sup>108</sup> Thus, these cases again show the importance of necessity to military commissions.

This time also saw what is likely one of the most controversial uses of military commissions in American history. The case – known as the Nazi Saboteur or the *Quirin* Case – has a troubling background and exemplifies what can happen when commissions are used without a genuine need.

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<sup>105</sup> Fisher, *supra* note 39, at 47.

<sup>106</sup> *Ex parte Duncan*, 146 F.2d 576, 581 (9th Cir. 1944).

<sup>107</sup> *Duncan v. Kahanamoku*, 327 U.S. 304, 328 (1946).

<sup>108</sup> *Id.* at 344 (Burton, J., dissenting).

The basic facts of this case are well known: in 1942 eight Germans, who had been sent to the United States to blow up various targets, were captured. Although civilian courts in the United States were operating, President Roosevelt decided to try the men before a military commission for two reasons: first, to keep secret the fact that the reason the saboteurs were apprehended so easily is because one of them turned himself into the government and helped authorities capture the others, rather than the government's claim that it captured the Germans on its own;<sup>109</sup> and second, because the Germans never had the chance to actually carry out their plans, they had never actually committed sabotage, leaving only a conspiracy charge.<sup>110</sup> United States Army Judge Advocate General Cramer advised that the punishment for a conspiracy charge would be minimal, a result that did not satisfy a president determined to execute the Germans.<sup>111</sup> Thus, to protect facts and obtain the punishment he wanted, President Roosevelt created a military commission to try the men, citing the law of war (but not the Articles of War) as his justification.<sup>112</sup> In establishing the commission, President Roosevelt gave it broad authority "to do anything it pleases."<sup>113</sup> The commission did not have to adhere to the Manual for Courts-Martial or procedures created by Congress; rather, the commission could make up rules as it went along. Moreover, instead of a traditional review process, the judgments of the commission were sent directly to President Roosevelt.<sup>114</sup>

Almost two weeks into the commission's hearings, defense attorney Col. Royall defied orders from President Roosevelt and turned to the civil courts.<sup>115</sup> Through some backroom meetings, an

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<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*; Brief of Legal Scholars and Historians as Amici Curiae in Support of Petitioner at 3-4, *Hamdan v. Rumsfeld*, 548 U.S. 557 (Sept. 7, 2005) (No. 05-184) (hereinafter Brief of Legal Scholars).

<sup>112</sup> Fisher, *supra* note 39, at 37-38.

<sup>113</sup> *Id.* at 38 (quoting RG 153, Records of the Office of the Judge Advocate General (Army), Court-Martial Case Files, CM 3341178, 1942 German Saboteur Case, National Archives, College Park, Md., at 991).

<sup>114</sup> Fisher, *supra* note 39, at 37.

<sup>115</sup> Brief of Legal Scholars, *supra* note 112, at 5.

agreement was made with the Justices of the Supreme Court to hear the case.<sup>116</sup> The evening before the Court was scheduled to hear the case, Col. Royall convinced a district judge to deny a writ of *habeas corpus*; the following day, the attorneys submitted 165 pages of briefs to the Supreme Court.<sup>117</sup> Royall promised to get papers to the appellate court, and oral arguments began.<sup>118</sup>

If the process was not enough to raise some doubts about the *Quirin* precedent, the conflicts-of-interest affecting four of the Justices certainly does. Justice Felix Frankfurter was intimately involved with the Roosevelt Administration as an advisor, specifically offering guidance on how to structure military commissions with a Supreme Court challenge in mind. Justice Frank Murphy was an active reserve army officer during the case, showing up at the conference in his uniform. However, recognizing the conflict, Murphy recused himself before oral arguments began.<sup>119</sup> Justice James F. Byrnes, like Frankfurter, was a close advisor of the Roosevelt Administration: in fact, the Attorney General thought Justice Byrnes was on leave from the Court for a time.<sup>120</sup> Finally, Chief Justice Stone's son was part of the defense team.<sup>121</sup> In addition to these conflicts, at least two of the Justices – Stone and Frankfurter – were openly hostile to the defendants' interests.<sup>122</sup>

Despite these circumstances, the Court heard the case and, breaking with precedent, issued a *per curiam* order upholding the validity of the commission before releasing – or even writing – a full opinion. The Court held that the Articles of War – specifically Articles 12, 15, 38, 46, 81 and 82 – provided authorization from Congress to the President to convene a military commission, and that the commission had the jurisdiction to try violations of the law

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<sup>116</sup> Fisher, *supra* note 39, at 39. The meetings between the attorneys and Justices took place at the home of Justice Black and the farm of Justice Roberts, while other Justices were called on the phone.

<sup>117</sup> *Id.* at 39-41.

<sup>118</sup> *Id.*

<sup>119</sup> Brief of Legal Scholars, *supra* note 112, at 10.

<sup>120</sup> *Id.*

<sup>121</sup> Fisher, *supra* note 39, at 40.

<sup>122</sup> Brief of Legal Scholars, *supra* note 112, at 8-9.

of war.<sup>123</sup> Moreover, the Court rejected the claims of the defense attorneys that the Fifth and Sixth Amendments to the Constitution, as well as Section 2 of Article III, should extend to military commissions and require a trial by jury in this case.<sup>124</sup>

Both the order and the full opinion have been heavily criticized, not only by scholars, but by the Justices themselves.<sup>125</sup> Justice Frankfurter asked Frederick Bernays Wiener to analyze the case, resulting in a critical series of essays pointing out “serious constitutional problems.”<sup>126</sup> Justice Jackson expressed his general sense of the *Quirin* case when considering whether the Court should sit in a summer session to hear the *Rosenberg* case, saying “the *Quirin* experience was not a happy precedent.”<sup>127</sup> The lesson of this case appears to be that when there is no genuine necessity owing to the lack of alternative civil or military courts, military commissions are not the best vehicles for ensuring justice in conformity with American standards. Rather, commissions may provide an opportunity for the government to abuse its power to the defendants’ detriment. Notably, Winthrop’s criteria were not satisfied in the *Quirin* case.<sup>128</sup>

#### IV. COMPARATIVE HISTORICAL ANALYSIS OF GUANTANAMO BAY MILITARY COMMISSIONS

With the historical use of commissions set forth, it is now possible to examine how the Guantanamo Bay commissions fit into the commission lineage.<sup>129</sup> Of the three historic functions of

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<sup>123</sup> *Quirin*, 317 U.S. at 27-28.

<sup>124</sup> *Id.* at 40 (“[W]e must conclude that § 2 of Article III and the Fifth and Sixth Amendments cannot be taken to have extended the right to demand a jury to trials by military commission, or to have required that offenses against the law of war not triable by jury at common law be tried only in the civil courts.”).

<sup>125</sup> See, e.g., Brief of Legal Scholars, *supra* note 112.

<sup>126</sup> *Id.* at 13-14.

<sup>127</sup> Fisher, *supra* note 39, at 45 (quoting “Memorandum Re: Rosenberg v. United States, Nos. 111 and 687, October Term 1952,” July 4, 1953, at 8 in FRANKFURT PAPERS, Part I).

<sup>128</sup> See *supra* Part III.

<sup>129</sup> It is important to note that this article is not arguing for or against the closure of the detention center at Guantanamo Bay. That center presently houses individuals

commissions, the Guantanamo Bay commissions fall squarely into the third category: to punish violations of the law of war. In this way, the commissions are not entirely without precedent, as they serve the same purpose as the military commissions used by George Washington during the Revolutionary War, General Scott in Mexico (with his Council of War), and the *Quirin* Commission ordered by President Roosevelt. However, the Guantanamo Bay commissions are also quite different from these prior examples in important ways.

First, although initially created by President George W. Bush's Military Order of November 13, 2001 concerning Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism,<sup>130</sup> after the Supreme Court struck down the commissions in *Hamdan*, Congress resurrected them with the Military Commissions Act of 2006 ("MCA").<sup>131</sup> Never before have law of war military commissions had a statutory authorization such as the MCA. During the Mexican-American War, Secretary of War William Marcy recommended legislation to authorize military tribunals, and General Scott tried to obtain clarifying authority from Congress for his commissions.<sup>132</sup> However, Congress failed to act in both instances.<sup>133</sup> Later, General Sickles claimed to derive the authority to convene a military commission during Reconstruction from his position as commander on the battlefield, as well as "various acts of Congress."<sup>134</sup> Even in the *Quirin* decision during World War II, the Supreme Court looked to the 1914 revision of the Articles of War to find a *general* grant of congressional authority to the President to create military commissions.<sup>135</sup> The lack of specific guidance from

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who are not awaiting trial because they have been deemed to be active enemy combatants who still present a threat to the United States. Whether these individuals should continue to be held, or where they should be held, is beyond the scope of this article.

<sup>130</sup> Military Order--Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 37 WCPD 1665, 66 Fed. Reg. 57833 (Nov. 13, 2001).

<sup>131</sup> The MCA was amended by the Military Commissions Act of 2009.

<sup>132</sup> Fisher, *supra* note 39, at 11-12.

<sup>133</sup> *Id.*

<sup>134</sup> H.R. Rep. No. 39-23, at 10.

<sup>135</sup> *Quirin*, 317 U.S. at 27 (referencing Articles 12, 15, 38, 46, 81, and 82).

Congress essentially made prior law of war military commissions Article II courts, created through the President as Commander in Chief. After the MCA, though, the Guantanamo Bay commissions are essentially Article I courts, placing them in the same family as federal bankruptcy courts.

A second distinction between the Guantanamo Bay commissions and their predecessors is that, in addition to having jurisdiction over individuals subject to the MCA for violations of the law of war, the commissions can also hear cases involving offenses made punishable by the MCA: aiding the enemy, and spying.<sup>136</sup> While spying has been punishable by a law of war commission since at least George Washington's time, never before has such a commission been authorized to try federal statutory offenses.<sup>137</sup>

Third, the permanency of the Guantanamo Bay commissions makes them unique. Prior law of war commissions were *ad hoc* tribunals and lasted only for a brief period. Indeed, the Supreme Court's decision in *Quirin* was issued less than two months after the defendants were arrested. In contrast, the Guantanamo Bay commissions are run through the Office of Military Commissions, a firmly established office within the Department of Defense that even has its own official seal. Commissions have now been occurring for nearly two decades, with some individual cases lasting for many years. The Guantanamo commissions are now the longest-running law of war commissions in American history.

A specific example of the length of time involved in the Guantanamo Bay commissions is the case of Abd al-Rahim al-Nashiri. Al-Nashiri is charged with the bombing of the USS Cole, which took place in 2000. His commission was not convened until

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<sup>136</sup> Military Commissions Act of 2009, Pub. L. No. 111-84, § 948(d), 123 Stat. 2576 (2009) [hereinafter MCA].

<sup>137</sup> Stephen I. Vladeck, *The Long Reach of Guantánamo Bay Military Commissions*, N.Y. TIMES, Oct. 4, 2017, (available at <https://www.nytimes.com/2017/10/04/opinion/the-long-reach-of-guantanamo-bay-military-commissions.html>).

2011, and, because of various appeals and legal proceedings, remains in the pretrial stages as of late 2018.<sup>138</sup>

Fourth, the Guantanamo commissions are different from their predecessors in that they are subject to an extensive set of rules and procedures, as well as levels of appeals through the civilian judicial system. Typically, military commissions trying law of war violations are held on the battlefield in the middle of a conflict, and the charged offense is straightforward. At such times, full trial procedures cannot and need not be employed. Even the *Quirin* case, a law of war commission that was not in the middle of a battlefield, lacked an extensive set of trial rules and procedures. The MCA, however, provides that the same rules of evidence applicable to courts-martial shall apply to the commissions, and that the Secretary of Defense may prescribe additional procedural rules.<sup>139</sup> The rules have been set forth not just in a single manual, but in multiple editions of manuals.<sup>140</sup>

One final distinguishing feature of the Guantanamo commissions is that, but for their unique statutory basis, they would fail to satisfy more of Winthrop's requirements than any prior law of war commission. With respect to the first, second, and third conditions, although there is not a clearly defined battlefield in the conflict against terrorism or violent extremism, it is difficult to contend that the Guantanamo Bay naval base is within the theatre of war: none of the charged offenses occurred at the base. Whether the fourth condition is satisfied is also challenging to discern since there is no definitive commencement to the conflict: although the attacks on September 11, 2001, are often viewed as the start, there were previous attacks on American embassies in Africa, the USS Cole, and the World Trade Center that could also serve as the start of the conflict. It is also unclear when the conflict

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<sup>138</sup> Sarah Grant, *Abatement in Al-Nashiri is Reversed*, LAWFARE, Oct. 15, 2018, (available at <https://www.lawfareblog.com/abatement-al-nashiri-reversed>) ("[w]hen precisely proceedings will resume, however, remains unknown").

<sup>139</sup> MCA at § 949a(a).

<sup>140</sup> See, e.g., Manual for Military Commissions United States 2016 Revised Edition (2016).

will end, or even if the conflict can be considered an actual war to which the laws of war apply. Thus, it is difficult to determine whether Winthrop's fourth criterion is met. Finally, the defendants in the Guantanamo commissions are not members of a foreign army. Rather, their alleged offenses were committed under the flag of a non-state entity. Hence, Winthrop's fifth criterion is not met.

Never in the history of the United States has the military used (on its own or on the order of the President) a military commission to try violations of the law of war where the commission likely does not meet all five of Winthrop's criteria. While the most controversial of commissions, such as the *Quirin* commission, have failed to meet one or two of Winthrop's criteria, only the Guantanamo Bay military commissions fail to meet all five.

In short, the Guantanamo Bay military commissions are unprecedented, and in reality have far more in common with a federal bankruptcy court than any other military commission in American history.

#### V. AN ALTERNATIVE SOLUTION: FEDERAL ARTICLE III COURTS

Military commissions are tribunals of necessity. George Washington and Andrew Jackson turned to commissions to deal with spies, who were unlawful combatants according to the custom of war. General Scott created commissions in response to a need to enforce discipline and control over a foreign territory. Presidents Johnson and Roosevelt used commissions because they believed the alternative forms of trial available would not lead to their desired result. These tribunals were used to fill a void during a military conflict between courts-martial subject to the Articles of War and Uniform Code of Military Justice, and civilian courts subject to the Constitution and Bill of Rights. According to historical usage and the common law, when either of these two established courts are

available options, a military commission is unnecessary, and thus, inappropriate.<sup>141</sup>

As the United States approaches the seventeenth anniversary of the Guantanamo Bay commissions, it has become evident that there is no true necessity for their use because the federal Article III courts – which have always remained fully operational – can handle terrorism cases. Indeed, not only have the federal courts shown that they are capable of handling terrorism-related cases, but that they excel at it. Since September 2001, more than 600 individuals have been convicted of terrorism-related charges in federal Article III courts.<sup>142</sup> As just one example, in May 2017, Tairod Pugh was sentenced to 35 years in prison by United States District Judge Nicholas G. Garaufis in the Eastern District of New York. Pugh was convicted, following a jury trial, of attempting to provide material support to a foreign terrorist organization and obstruction of justice.<sup>143</sup> Even Attorney General Jeff Sessions, who criticized President Obama’s attempts to use the federal courts for terrorism cases, has permitted the Department of Justice to continue using the federal courts.<sup>144</sup> The federal courts also feature

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<sup>141</sup> Though not directly on point, Blackstone recognized the inappropriateness of martial law when civilian tribunals are available, writing that “it ought not to be permitted in time of peace, when the king’s courts are open for all persons to receive justice according to the laws of the land.” 1 WILLIAM BLACKSTONE, COMMENTARIES \*400.

<sup>142</sup> Human Rights First, *Federal Courts Continue to Take Lead in Counterterrorism Prosecutions*, Feb. 14, 2018, (available at <https://www.humanrightsfirst.org/resource/federal-courts-continue-take-lead-counterterrorism-prosecutions>); see also Laura K. Donohue, *Terrorism Trials in Article III Courts*, 38 HARV. J.L. & PUB. POL’Y 105, 105-06 (2015) (reporting even higher numbers).

<sup>143</sup> Press Release, United States Dep’t of Justice, *Air Force Veteran Sentenced To 35 Years In Prison For Attempting To Join ISIS And Obstruction Of Justice*, May 31, 2017, (available at <https://www.justice.gov/usao-edny/pr/air-force-veteran-sentenced-35-years-prison-attempting-join-isis-and-obstruction>).

<sup>144</sup> See *United States v. Damache*, No. 11-CR-00420-PBT (E.D. Pa. July 28, 2011) (Indictment); Rebecca R. Ruiz, Adam Goldman & Matt Apuzzo, *Terror Suspect Is Brought to the U.S. as Trump’s Stance Shifts*, N.Y. TIMES, July 21, 2017, at A1.

prosecutors who have developed expertise in investigating and prosecuting terrorism-related cases.<sup>145</sup>

The capability of the federal Article III courts stands in stark contrast to the track record of the Guantanamo Bay military commissions. Since 2001, only eight convictions have been secured in Guantanamo Bay; only one has been upheld on appeal.<sup>146</sup> In addition to unresolved questions of constitutionality<sup>147</sup> and the continuing creations of new controversies,<sup>148</sup> it seems that the one thing the Guantanamo Bay military commissions have not been able to provide is precisely what military commissions are designed for: swift justice.

Thus, if the last seventeen years have shown anything, it is that not only do the federal Article III courts undercut any assertion of necessity in favor of the Guantanamo Bay commissions, but in fact that they are the far better choice for terrorism-related cases.

## CONCLUSION

Military commissions have a legitimate role to play in the American justice system. Where circumstances present a true need

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<sup>145</sup> See, e.g., William Finnegan, *Taking Down Terrorists in Court*, THE NEW YORKER (May 15, 2017) (profiling then-Assistant United States Attorney Zainab Ahmad, who has successfully prosecuted more than a dozen international terrorism cases) (available at <https://www.newyorker.com/magazine/2017/05/15/taking-down-terrorists-in-court>).

<sup>146</sup> Scott R. Anderson, *Something is Rotten with the State of the Military Commissions*, LAWFARE, Mar. 2, 2018, (<https://lawfareblog.com/something-rotten-state-military-commissions>); Laura King, *Trump's Guantanamo Bay order may be largely symbolic, but it renews debate*, L.A. TIMES (Jan. 31, 2018) (available at <http://www.latimes.com/nation/la-na-guantanamo-background-20180131-story.html>).

<sup>147</sup> See, e.g., *Bahlul v. United States*, 840 F.3d 757 (D.C. Cir. 2016), *reh'g denied* (Nov. 28, 2016), *cert. denied sub nom. al*, 138 S. Ct. 313 (2017) (discussing constitutionality of military commissions' statutorily conferred jurisdiction over offenses that are not violations of the law of war).

<sup>148</sup> See, e.g., Carol Rosenberg, *Now we know why defense attorneys quit the USS Cole case. They found a microphone.*, MIAMI HERALD, Mar. 8, 2018, (available at <http://www.miamiherald.com/news/nation-world/world/americas/guantanamo/article203916094.html>).

because an established civilian court or court-martial is unavailable, commissions have been appropriately used. The current conflict with international terrorism, however, does not present such a need. Rather than providing an *ad hoc* forum for swift battlefield justice, the Guantanamo Bay commissions are slow and full of procedural requirements. In fact, and notwithstanding what they were originally intended to be, today they are nothing more than controversial and inefficient Article I courts created for a single purpose that, after seventeen years, they have been unable to fulfill.

The continuing failure of the Guantanamo Bay commissions is perhaps the most damning way in which they are historic anomalies. These lengthy and largely unsuccessful commissions make it clear that the historic need for a trial would be far better satisfied using federal Article III courts, which have already convicted hundreds of individuals of terrorism-related charges through fair trials and without incident since 2001.<sup>149</sup>



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<sup>149</sup> See Human Rights First, *supra* note 143.