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A Comparative Historical Analysis of War Time Procedural Protections and Presidential Powers: From The Civil War To The War on Terror

*Kyndra Rotunda**

It was a new kind of war, and the U.S. faced a new kind of enemy. Clandestine saboteurs operated in the shadows waiting for the perfect opportunity to strike. Our country was not secure. Our homeland was under siege. Our military hunted an enemy it called “enemy combatants.” It brought some of these enemy combatants before special Military Commissions instead of before civilian criminal courts. Public debate ensued about the procedures that should be applied to these captured enemy combatants. What was their status? What were their rights? What should be their fate? U.S. courts, including the Supreme Court, became embroiled in the controversy as it struggled to answer these questions from on-high. The year was 1863. We were at war—the Civil War.

Some say that the issues arising in the present-day War on Terror are unprecedented, and that the procedures to deal with captured enemy combatants are novel. In reality, there is nothing new under the sun. Many of the legal issues arising in the current War on Terror arose over one hundred years ago, during the Civil War.

This article compares and contrasts the military trials that brought the Lincoln conspirators to justice with the present day Military Commissions. It concludes that, over time, the President and Congress, through statutes and treaties and executive orders, have created procedural rules that extend more rights to captured enemy soldiers today than would have been imagined in Lincoln’s time.

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There are important differences. From Lincoln's time through FDR, Congress and the President together decided what those rights would be. In modern times, the Court (even though it is fiercely divided) has stood firm against the President, even when he has the full support of Congress. And, the more things change, the more they are the same. In the military trials of Lincoln conspirators, and the trials of Nazi saboteurs during World War II, there was what today we would call "unlawful command influence." That remains true today, by people who claim to have the best interests of the detainees at heart.

In discussing modern day judicial branch involvement with military trials, this article analyzes the role of the Supreme Court vis-à-vis the President during a time of war. In *Youngstown Sheet & Tube Co. v. Sawyer*,¹ the Supreme Court made clear that a President's executive authority is at its *highest* when both the President and Congress act in concert, and at its *lowest* when the President acts contrary to the will of Congress.² Consistent with this test, in previous conflicts, the Supreme Court has deferred to Congress and the Executive about war-time procedures, especially when the two branches agreed. However, one unique feature of the current conflict is that the Supreme Court has stepped in even when Congress and the President were united. Thus, in *Boumediene v. Bush*, the Court invalidated the Detainee Treatment Act of 2005, which had established procedures for detaining enemy combatants captured abroad in the Global War on Terror.³

One feature of Military Commissions that has not changed over the years is that Presidents have a tendency to interfere with ongoing Military Commissions. For instance, during the Civil War, President Johnson refused to follow the Military Commission's request for clemency in ordering one of the Lincoln conspirators (Mary Surratt) to be hanged. During World War II, FDR made clear that he would execute Nazi prisoners regardless of what the Supreme Court decided. These earlier interferences came before the *Youngstown* standard evolved. But, similar infractions have occurred even after *Youngstown*. In the current war, President Obama has unilaterally halted trials in Guantanamo Bay, which contradicts existing federal law, the Military Commissions Act of 2006.⁴

1 *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

2 *Id.* at 592.

3 *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

4 10 U.S.C.A. § 948b (West 2006).

According to the test that Justice Jackson's concurring opinion articulated in *Youngstown*, President Obama's executive authority is at its lowest ebb, because his decision to halt trials is contrary to an existing federal statute (The Military Commissions Act of 2006). Yet, he has halted the trials, which not only runs afoul of Justice Jackson's power analysis in *Youngstown*, but may amount to unlawful command influence.

To see where we are today and to put the present situation in perspective, let us first consider the role of Military Commissions in the Civil War.

I. LINCOLN'S ASSASSINATION, BOOTH'S CO-CONSPIRATORS, AND THE HUNTER COMMISSION

On April 14, 1865, actor John Wilkes Booth shouted, "Sic simper tyranus!"⁵ as he vaulted from the box seating that overlooked the Ford's Theater Stage. He had just assassinated President Lincoln. But, he did not act alone and President Lincoln was not the only target.

John Wilkes Booth had conspired with other Confederate sympathizers to topple the federal government by assassinating President Lincoln and other national leaders, including Vice President Andrew Johnson, Secretary of State William H. Seward and General Ulysses S. Grant.⁶ Booth succeeded, but by some twist of fate, the other attackers were unsuccessful. One would-be assassin, George Atzerdot, lost his nerve and retreated before attacking Andrew Johnson. Another co-conspirator, Lewis Powell, carried out the assault on William Seward and stabbed Seward multiple times. But, Seward miraculously survived. General Grant fortuitously canceled his plans to attend the Ford's Theatre Production with the Lincolns, where he would have faced the same fate as Abraham Lincoln.⁷

Booth escaped through the rear door of the theater, where he took his horse's reins from a stage-hand named Peanuts and disappeared into the Washington darkness and across the Potomac River.⁸ Later, Union troops would corner Booth in a

⁵ W.P. CAMPBELL, THE ESCAPE AND WANDERINGS OF J. WILKES BOOTH UNTIL ENDING OF THE TRAIL BY SUICIDE IN OKLAHOMA, TRAVELERS SER. NO. 7 (1922), available at <http://ia341037.us.archive.org/1/items/johnwilkesbooth00camp/johnwilkesbooth00camp.pdf>.

⁶ Edward Steers, Jr., *Introduction to THE TRIAL: THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS XI, XI* (Edward Steers, Jr. ed., 2003) [hereinafter *THE TRIAL*].

⁷ *Id.*

⁸ HARLOD HOLZER, THE PRESIDENT IS SHOT: THE ASSASSINATION OF ABRAHAM LINCOLN 100, 118, 123 (2004), available at <http://www.highlightskids.com/Lincoln/pdfs/PresidentisShot.pdf>.

Maryland farm-house barn and he would surrender his life for his crime. Booth's final words were, "Say to my mother that I died for my country."⁹ But his co-conspirators would face a military court—a Military Commission.

Within a few weeks of Lincoln's assassination the government had arrested eight suspects.¹⁰ On May 1, 1865, President Johnson, by Executive Order, established a Military Commission to try eight suspected co-conspirators in the assassination of President Lincoln.¹¹ One of them was a woman named Mary Surratt.¹² She owned a guest-house where the conspirators allegedly met and hatched their plot.¹³

The Military Commission that heard the case of Booth's eight co-conspirators was comprised of nine military officers, headed by the Army Judge Advocate General (JAG).¹⁴ It came to be known as the "Hunter Commission," named after its ranking member Major General David Hunter.¹⁵ The Commission established its own procedural rules with a few guiding principles established by President Johnson. The President ordered that the "trials be conducted with all diligence consistent with the ends of justice."¹⁶ The Order also required "the said Commission to sit without regard to hours."¹⁷ He said the orders should "avoid unnecessary delay, and conduce to the ends of public justice."¹⁸

The Hunter Commission rules consisted of eleven succinct points that ranged from providing prisoners some procedural

⁹ *Id.* at 155; James Speed, U.S. Attorney General, *Opinion on the Constitutional Power for the Military to Try and Execute the Assassins of the President*, July, 1865, in THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS 403, 409 (Benn Pitman, comp., 1865) [hereinafter THE ASSASSINATION].

¹⁰ The eight co-conspirators were David Herold, Mary Surratt, Lewis Powell, Edman Spangler, Samuel Arnold, Michael O'Laughlen, George Atzerodt, and Samuel Mudd. The ninth conspirator, John Surratt Junior remained at large. Steers, *supra* note 6, at XII.

¹¹ Proceedings of a Military Commission, May 1, 1865, in THE ASSASSINATION, *supra* note 9, at 17.

¹² While in prison, and during the Military Commission, Mary Surratt received some special privileges because of her gender. She was not shackled in court, as the other prisoners were, and she was allowed to choose which foods she would eat. The male conspirators were shackled in court (two of them also wore a seventy-five pound ball around their ankles), and the male conspirators were fed only military rations. OSBORN H. OLDROYD, THE ASSASSINATION OF ABRAHAM LINCOLN: FIGHT, PURSUIT, CAPTURE, AND PUNISHMENT OF THE CONSPIRATORS 119–20, 132 (The Lawbook Exchange, Ltd. 2001).

¹³ HOLZER, *supra* note 8, at 70.

¹⁴ Proceedings of a Military Commission, *supra* note 11, at 17.

¹⁵ See ROBERT AITKEN & MARILYN AITKEN, LAW MAKERS, LAW BREAKERS AND UNCOMMON TRIALS 77 (2007).

¹⁶ Proceedings of a Military Commission, *supra* note 11, at 17.

¹⁷ *Id.*

¹⁸ *Id.*

protections, to specifying petty details, such as what time they would break for lunch each day. The rules were as follows:

1. The Commission would convene daily at 10 A.M., recess at 1.P.M. for an hour.
2. The prisoners would be allowed legal counsel, who would take an oath prescribed by Congress before being permitted to appear.
3. The examination of witnesses would be conducted on the part of the Government by one Judge Advocate, and by counsel on the part of the prisoners.
4. The testimony would be taken in short-hand by reporters, who would take an oath that they would "record the evidence faithfully and truly." They would also be required to swear that they would not communicate any part of the proceedings of trial, except by authority of the presiding officer.
5. A copy of the evidence would be taken each day and given to the Judge Advocate General, and one to the prisoners' lawyers.
6. Only official reporters would be admitted to the court-room. The rule specified that the Judge Advocate General would furnish daily, at his discretion, to an agent for the Associated Press, "a copy of such testimony and proceedings as may be published, pending the trial, without injury to the public and the ends of justice. All other publication of the evidence and proceedings is forbidden, and will be dealt with as contempt of Court, on the part of all persons or parties concerned in making or procuring such publication."¹⁹ [Ultimately, the testimony of three witnesses was taken in secret session.²⁰]
7. The presiding officer would furnish a pass to those permitted to attend the trial. No person without a pass would be allowed into the trial.
8. The argument of any motion, unless otherwise ordered by the Court, would be limited to five minutes for each side.
9. After the argument was closed, the Court would immediately deliberate and make its decision.
10. The Provost Marshal would ensure the prisoners attended the trial, and would be responsible for their security. Their lawyers could have access to them in the presence, but not in hearing, of a guard.
11. Counsel for the prisoners would be required to "immediately furnish" a list of defense witnesses.²¹

While the Commission allowed the defendants to have legal counsel, it only gave them a few days to find lawyers. All of the

¹⁹ Steers, *supra* note 6, at 21.

²⁰ *Id.*

²¹ *Id.*

defendants managed to find lawyers, but some were not able to appear by the time the trial started.²² These lawyers came later, after the trial had already begun.²³

For instance, testimony began in the trial on May 12th but it was not until the next day, May 13th, that Reverdy Johnson (counsel for Mary Surratt) appeared in court and was unprepared.²⁴ He said:

I am here at the instance of that lady [pointing to Mrs. Surratt], whom I never saw until yesterday, and never heard of, she being a Maryland lady, and thinking that I could be of service to her, protesting, as she has done, her innocence to me. Of the facts I know nothing, because I deemed it right, I deemed it due to the character of the profession to which I belong, and which is not inferior to the noble profession of which you are a member, that she should not go undefended. I knew I was to do it voluntarily, without compensation; the law prohibits me from receiving compensation; but if it did not, understanding her condition, I should never have dreamed of refusing upon the ground of her inability to make compensation.²⁵

The trial was, for all intents and purposes, secret. The Commission controlled what information was released to the public. Only approved reporters were allowed to attend the trials, and at the end of each day, the Commission specified what information the reporters could report.²⁶ Additionally, the Commission closed the trial on three distinct occasions, to take testimony from three Government witnesses.²⁷

The Military Commission charged the defendants with conspiracy to murder President Lincoln, and other members of his administration including Vice President Andrew Johnson, Secretary of State William H. Seward and Ulysses S. Grant,

²² OLDROYD, *supra* note 12, at 127. Mary Surratt obtained a very able defense lawyer, Reverdy Johnson. He was a former attorney general, a sitting U.S. Senator and he went on to hold the post of minister to Great Britain from 1868–1869. Lawyers for the other defendants were also distinguished. One was a Congressman from Maryland, and two others went on to become judges. Steers, *supra* note 6, at XVIII; Thomas Reed Turner, *The Military Trial*, in *THE TRIAL*, *supra* note 6, at XXI, XXVI.

²³ OLDROYD, *supra* note 12, at 127.

²⁴ See *id.*; Douglas Linder, *The Trial of the Lincoln Conspirators* 6 (Univ. Mo. at Kan. City Sch. of Law), available at <http://ssrn.com/abstract=1023004>.

²⁵ OLDROYD, *supra* note 12, at 127–28 (emphasis added).

²⁶ See James H. Johnston, *Swift and Terrible: A Military Tribunal Rushed to Convict after Lincoln's Murder*, WASH. POST, Dec. 9, 2001, at F1; *Trial of the Assassins*, N.Y. TIMES, May 16, 1865, at 1, available at http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9903E6DC1E3DE53BBC4E52DFB366838E679FDE.

²⁷ Proceedings of a Military Commission, *supra* note 11, at 21 n.* (unnumbered).

Lieutenant General of the Army of the United States.²⁸ The prosecution maintained that the Lincoln conspirators were part of a much larger conspiracy orchestrated by the President of the Confederacy, Jefferson Davis in 1864.²⁹ It said that Davis had deployed Confederate Secret Service agents to Canada to disrupt the war efforts and demoralize U.S. citizens. Davis' plans involved attacking civilian populations, burning northern cities, bombing factories and ships, and using germ warfare to infect the civilian population. Prosecutors presented the testimony of three government witnesses that linked Booth and his conspirators to Jefferson Davis and the Confederate Secret Service.³⁰

Although not required under the rules, the military hooded the prisoners with gray wool hoods that tied at their neck and had a small opening for their mouths. The prisoners were hooded twenty-four hours a day, except for when they were in court and it was in session.³¹ Eventually (around June 6, 1865,

²⁸ *Id.* at 18–19. The charges read:

For maliciously, unlawfully, and traitorously, and in aid of the existing armed rebellion against the United States of America, on or before the 6th day of March, A.D. 1865, and on divers other days between that day and the 15th day of April, A.D. 1865, combining, confederating, and conspiring together with one John H. Surratt, John Wilkes Booth, Jefferson Davis, George N. Sanders, Beverly Tucker, Jacob Thompson, William C. Cleary, Clement C. Clay, George Harper, George Young, and others unknown, to kill and murder, within the Military Department of Washington, and within the fortified and intrenched lines thereof, Abraham Lincoln, late, and at the time of said combining, confederating, and conspiring, President of the United States of America, and Commander-in-Chief of the Army and Navy thereof; Andrew Johnson, now Vice-President of the United States aforesaid; William H. Seward, Secretary of State of the United States aforesaid; and Ulysses S. Grant, Lieutenant-General of the Army of the United States aforesaid, then, in command of the Armies of the United States, under the direction of the said Abraham Lincoln; and in pursuance of and in prosecuting said malicious, unlawful, and traitorous conspiracy aforesaid, and in aid of said rebellion, afterward, to-wit, on the 14th day of April, A.D. 1865, within the Military Department of Washington aforesaid, and within the fortified and intrenched lines of said Military Department, together with said John Wilkes Booth and John H. Surratt, maliciously, unlawfully, and traitorously murdering the said Abraham Lincoln, then President of the United States and Commander-in-Chief of the Army and Navy of the United States, as aforesaid; and maliciously, unlawfully, and traitorously assaulting, with intent to kill and murder, the said William H. Seward, then Secretary of State of the United States, as aforesaid; and lying in wait with intent maliciously, unlawfully, and traitorously to kill and murder the said Andrew Johnson, then being Vice-President of the United States; and the said Ulysses S. Grant, then being Lieutenant-General, and in command of the Armies of the United States, as aforesaid.

Id.

²⁹ Edward Steers, Jr., *General Conspiracy*, in *THE TRIAL*, *supra* note 6, at XXIX–XXX.

³⁰ *Id.* at XXX–XXXV.

³¹ OLDROYD, *supra* note 12, at 120.

or roughly six weeks after their capture), the Judge in charge of the Military Commissions decided that the prisoners were suffering too greatly from the hooding and ordered the guards to remove the prisoners' hoods.³²

The trial lasted for nearly two months, and included testimony from hundreds of witnesses. Together, the defense and prosecution subpoenaed 483 witnesses and examined 361 of them at trial.³³ The trial transcript exceeded 4,500 pages and stood over twenty-six inches tall.³⁴ According to these transcripts, members of the Commission visited the crime scene where Booth shot President Lincoln.³⁵ It also briefly recessed the trial in order to survey the sanity of one defendant, Lewis Payne.³⁶ At another point in the trial, defendant Mary Surratt developed "severe sickness" and was taken from the courtroom. However, it appears from the trial transcript that the trial continued in her absence.³⁷

The Military Commission ultimately convicted all eight conspirators. The Commission sentenced four defendants to prison terms and four (Herold, Atzerodt, Payne and Surratt) to death by hanging within two days of the verdict.³⁸ It recommended clemency for defendant Mary Surratt, based on her age (she was almost forty-two years old) and her gender. President Johnson refused to grant her clemency, and insisted that she be hung for her role in the conspiracy. He said that she "kept the nest that hatched the egg."³⁹

Hours before Mary Surratt was to face the gallows, her lawyer filed an emergency writ of habeas corpus. The basis of Surratt's habeas petition, like petitions filed today, sought to defeat the jurisdiction of the Commission by appealing to the Constitution. Surratt's petition argued that she was a private citizen of the United States, in no manner connected with the Armed Forces, who had not crossed enemy lines and who had not

³² THOMAS REED TURNER, *BEWARE THE PEOPLE WEEPING: PUBLIC OPINION AND THE ASSASSINATION OF ABRAHAM LINCOLN* 148–49 (1991).

³³ *TRIAL OF THE ALLEGED ASSASSINS AND CONSPIRATORS AT WASHINGTON CITY, D.C., MAY AND JUNE 1865, FOR THE MURDER OF PRESIDENT ABRAHAM LINCOLN* 16 (T.B. Peterson & Bros. 1865) [hereinafter *TRIAL OF THE ASSASSINS AT WASHINGTON*].

³⁴ *Id.*

³⁵ *Id.* at 47 (noting that on May 16, 1865, "the Court paid an informal visit, at half past nine o'clock this morning, to the scene of the President's assassination. The visit was made at the suggestion of the Judge Advocate-General . . .").

³⁶ *Id.* at 155.

³⁷ *Id.* at 166.

³⁸ LOUIS FISHER, *MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM* 66 (2005).

³⁹ See Joseph M. Perillo, *Screed for a Film and Pillar of Classical Contract Law: Shuey v. United States*, 71 *FORDHAM L. REV.* 915, 922–23 (2002).

committed any war crime. As a private citizen, she alleged, she was entitled to an open public trial, before a jury, in a U.S. Criminal Court and not before a military tribunal. For these reasons, her petition argued that the Military Commission was unlawfully convened and that the court could not allow the Commission's judgment to stand.⁴⁰

The Court ordered the military to produce the defendant Surratt and answer the writ. But, the Military did not comply and instead presented an Executive Endorsement, dated that very morning, July 7, 1865, 10.a.m., drafted and signed by President Johnson. It suspended the writ of habeas corpus.⁴¹

The Judge deferred to President Johnson's suspension of the writ, stating: "This Court finds it powerless to take any further action in the premises, and therefore declines to make orders which would be vain for any practical purpose."⁴² The Court went on to state: "The Court has no further power in the case . . . for if the petitioner be executed this day, as designed, the body cannot be brought into Court, and therefore is an end to the case."⁴³ Just a few hours later, the United States hanged Mary Surratt and the other three defendants.⁴⁴ The executions, of course, mooted further appeals.

II. LAW GOVERNING MILITARY TRIBUNALS: FROM THE REVOLUTIONARY WAR TO THE CIVIL WAR

At the time of the trial of the Lincoln conspirators, America was a young country, less than 100 years old. While the country was young, its experience with Military Commissions was not. It had previously used Military Commissions to try war criminals during the War of Independence. In 1780, George Washington used Military Commissions (then called the "Court of Inquiry") to try British intelligence officer John Andre for spying.⁴⁵ Americans captured Major Andre, who was out of uniform,

⁴⁰ Fisher, *supra* note 38, at 209–10.

⁴¹ The endorsement stated:

To Major General W.S. Hancock, Commander, &c.—I, Andrew Johnson, President of the United States, do hereby declare that the writ of habeas corpus has been heretofore suspended in such cases as this, and I do hereby especially suspend this writ, and direct that you proceed to execute the order heretofore given upon the judgment of the Military Commission, and you will give this order in return to the writ. Andrew Johnson, President.

TRIAL OF THE ASSASSINS AT WASHINGTON, *supra* note 33, at 210.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See OLDROYD, *supra* note 12, at 205.

⁴⁵ MAROUF HASIAN, IN THE NAME OF NECESSITY: MILITARY TRIBUNALS AND THE LOSS OF AMERICAN CIVIL LIBERTIES 40 (2005).

dressed in civilian clothes, and carrying documents (which were stuffed inside his boots) from West Point Commandant, Benedict Arnold.⁴⁶ The documents revealed that Benedict Arnold was conspiring with British Forces to surrender West Point in exchange for a bribe.⁴⁷

General George Washington's fourteen member court of inquiry faced the question of whether to try Major Andre as a soldier, or a spy.⁴⁸ It found sufficient evidence to treat him as a spy and it concluded that he should suffer death.⁴⁹ Major Andre appealed to General Washington and urged Washington to view him instead as a common soldier. Andre claimed that he had not been behind enemy lines, but instead was traveling on "neutral ground," a fact he believed was dispositive in whether he was a soldier or a spy, and thereby subject to a Military Commission.⁵⁰ General Washington maintained that Andre was a spy because he substituted civilian clothes for his military uniform and adopted an assumed name.⁵¹ Major Andre was hanged on October 2, 1780⁵² about two weeks after American soldiers had captured him.⁵³

General Andrew Jackson also used Military Commissions, both during the War of 1812 and during the Indian War in 1818.⁵⁴ Jackson imposed martial law in New Orleans, which included restrictions on civilians leaving the city and a curfew.⁵⁵ One defendant was acquitted by a Military Commission, in part because he maintained that the Commission did not have jurisdiction to try him because he was a civilian. Jackson disagreed with the acquittal and refused to release the defendant. The defendant, despite having won acquittal by the Military Commission, remained in jail.⁵⁶

The United States built on these historical precedents when it created Military Commissions during the Civil War. Beginning in 1863, Union forces used Military Commissions to

⁴⁶ *Id.* at 35–40; FISHER, *supra* note 38, at 11.

⁴⁷ FISHER, *supra* note 38, at 11.

⁴⁸ HASIAN, *supra* note 45, at 40.

⁴⁹ *Id.* at 44.

⁵⁰ *Id.* at 45.

⁵¹ FISHER, *supra* note 38, at 11–12.

⁵² HASIAN, *supra* note 45, at 44.

⁵³ *Id.* at 44 (noting that Major Andre was captured on September 21, 1780; that the Board of Inquiry decided to treat him as a spy on September 29, 1780; and that it hanged Major Andre on October 2, 1780).

⁵⁴ John Yoo, *An Imperial Judiciary at War: Hamdan v. Rumsfeld*, CATO SUP. CT. REV. 83, 89 (2006).

⁵⁵ FISHER, *supra* note 38, at 25.

⁵⁶ *Id.* at 25–26.

try Confederate spies found in Union ranks.⁵⁷ Military Commissions tried approximately 2,000 cases during the Civil War, and went on to try another 200 cases during Reconstruction.⁵⁸

While the notion of using Military Commissions during war was not unprecedented, President Johnson received criticism for trying U.S. civilians before military courts.⁵⁹ Did not their status as U.S. civilians entitle them to trial before U.S. civilian courts? U.S. Attorney General, James Speed, prepared a legal opinion for President Johnson on the *Constitutional Power of the Military to Try and Execute the Assassins of the President*.⁶⁰ In that opinion, he differentiated between open, active participants who wear uniforms, and secret but active participants who operate as spies and do not wear uniforms. He considered open participants to be legitimate combatants and secret participants to be illegitimate combatants—"enemy belligerents."⁶¹ It is interesting that one hundred forty years later, the U.S. uses the same definition, though some people say that the term originated with the Bush administration, but the history dates to the Civil War.⁶²

While Attorney General Speed may have been the first American to refer to detainees who violated the laws of war as "enemy belligerents" or "enemy combatants," the notion of treating enemy soldiers who refuse to follow the laws of war differently from those who do follow the laws of war was not, even then, a novel concept. To reach his conclusions, Speed cited to writings by Cicero and also to Wheaton's *Elements of International Law*, which drew distinctions between legitimate combatants and illegitimate combatants. Speed concluded that "[t]hese banditti that spring up in a time of war are respecters of no law, human or divine, of peace or of war, are *hostes humani generis*, and may be hunted down like wolves."⁶³ Though not required, the military can opt to take banditti prisoners and

⁵⁷ *Id.* at 50–51.

⁵⁸ WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 834, 853 (2d ed. rev. & enl. 1920).

⁵⁹ Detlev F. Vagts, *Military Commissions: A Concise History*, 101 AM. J. INT'L LAW 35, 40 (2007).

⁶⁰ Speed, *supra* note 9, at 403.

⁶¹ *Id.* at 404–05. Speed also referred to these enemy belligerents interchangeably as "banditti," "public enemies," "secret foes," and "spies." *Id.* at 405–07.

⁶² See Megan Gaffney, *Boumediene v. Bush: Legal Realism and the War on Terror*, 44 HARV. C.R.-C.L.L. REV. 197 (2009); Daniel Williams, *After the Gold Rush—Part I: Hamdi, 9/11, and the Dark Side of Enlightenment*, 112 PENN. ST. L. REV. 341, 408 (2007); Jules Lobel, *The Preventative Paradigm & The Perils of Ad Hoc Balancing*, 91 MINN. L. REV. 1407, 1420–21 (2007); Daniel Nasaw, *Obama Administration to Abandon Bush term "Enemy Combatants"*, THE GUARDIAN, March 13, 2009, <http://www.guardian.co.uk/world/2009/mar/13/enemy-combatant-guantanamo-detainees-obama>.

⁶³ Speed, *supra* note 9, at 406.

punish them by military tribunals for “any infraction of the laws of war.”⁶⁴ He opined that:

[S]urely no lover of mankind, no one that respects law and order, no one that has the instinct of justice, or that can be softened by mercy, would, in time of war, take away from the commanders the right to organize military tribunals of justice, and especially such tribunals for the protection of persons charged or suspected with being secret foes and participants in the hostilities.⁶⁵

He argued that Booth’s statement after assassinating Lincoln “sic semper tyrannis” and Booth’s dying statement, “[s]ay to my mother that I died for my country,” illustrated that Booth (and his co-conspirators) was not “an assassin from private malice, but that he acted as a public foe.”⁶⁶

Attorney General Speed’s opinion differentiating prisoners of war (POWs) and non-POW enemy combatants was not only backed by historical precedent, but it also reflected what was already *actually happening* on the Civil War battlefield. General Order Number 100 specified that enemy soldiers captured in uniform were treated as prisoners of war.⁶⁷ Spies, defined as “a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy,” were not treated as POWs and were punishable by death, regardless of whether the spy successfully communicated the information.⁶⁸ Similarly:

[A] messenger or agent who attempts to steal through the territory occupied by the enemy, to further in any manner the interests of the enemy, if captured, is not entitled to the privileges of the prisoner of war, and may be dealt with according to the circumstances of the case.⁶⁹

Did it matter that civilian courts remained open? According to Attorney General Speed, the fact that civilian courts remained open was not dispositive on whether Lincoln’s assassins could be tried by Military Tribunals.⁷⁰ He concluded that military tribunals *can* operate when civil courts are open for the limited purpose of trying “offenders and offenses against the laws of war.”⁷¹ Speed explained:

⁶⁴ *Id.*

⁶⁵ *Id.* at 407.

⁶⁶ *Id.* at 409.

⁶⁷ *Instructions for the Government of the Armies of the United States in the Field*, General Order No. 100, Apr. 24, 1863, § 3, nos. 49, 56, 63, in *THE ASSASSINATION*, *supra* note 9, at 410, 413–14.

⁶⁸ *Id.* § 5, no. 88, at 416.

⁶⁹ *Id.* § 5, no. 100, at 416.

⁷⁰ Speed, *supra* note 9, at 409.

⁷¹ *Id.* at 407.

The fact that the civil courts [i.e. Article III courts] are open does not affect the right of the military tribunal to hold as a prisoner and to try. The civil courts have no more right to prevent the military, in a time of war, from trying an offender against the law of war than they have a right to interfere with and prevent a battle. . . . 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 a time of war, killed another in battle.⁷²

United States Supreme Court precedent at the time supported Speed's view of the issue. In *Ex parte Vallandigham*, the Supreme Court refused to hear a case challenging the conviction of a U.S. citizen and resident of Ohio by Military Commission, on the grounds that it lacked jurisdiction.⁷³ It said that Vallandigham's petition was not "within the letter or spirit of the grants of appellate jurisdiction to the Supreme Court."⁷⁴ The Court deferred entirely to the Military Commission, finding that it had no original jurisdiction to review, reverse, or revise proceedings of Military Commissions.⁷⁵

The defendant, Clement L. Vallandigham was a trial lawyer and a former Ohio Congressman. Vallandigham's crime was sympathizing with the South and uttering "disloyal sentiments" in a public speech.⁷⁶ For instance, he called the Civil War "wicked, cruel and unnecessary" and said it was waged "for the purpose of crushing our liberty" and that it was a "war for the freedom of the blacks and enslavement of the whites . . ."⁷⁷

Vallandigham ably represented himself at his trial, and insisted that the Military Commission lacked jurisdiction to try him. He maintained that only a civilian court would have jurisdiction over him.⁷⁸ The Military Commission disagreed with his argument, found him guilty, and ordered Vallandigham to be confined in a military prison for the remainder of the war.⁷⁹ Three days after the Commission found Vallandigham guilty and sentenced him, President Lincoln commuted Vallandigham's sentence, and ordered his troops to release Vallandigham outside

⁷² *Id.* at 409.

⁷³ *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 254 (1863).

⁷⁴ *Id.* at 251.

⁷⁵ *Id.* at 253.

⁷⁶ FISHER, *supra* note 38, at 56–58.

⁷⁷ *Vallandigham*, 68 U.S. (1 Wall.) at 244–45 (1863).

⁷⁸ FISHER, *supra* note 38, at 57.

⁷⁹ *Id.*

of the Union's military lines.⁸⁰ In effect, Lincoln deported Vallandigham to the Confederacy.

III. LAW GOVERNING MILITARY TRIBUNALS: RECONSTRUCTION THROUGH WWII

In 1866, the year after the Hunter Commission tried and convicted Lincoln's assassins, and after the Civil War was over, the Supreme Court revisited the question of whether and when the law required civilian defendants to be tried by civilian authorities during a time of war. In *Ex parte Milligan*,⁸¹ the Supreme Court drew a line to clarify which cases could come before Military Commissions.

The case involved Lambdin P. Milligan.⁸² Union forces arrested him in 1864, in Indiana, for crimes of conspiracy.⁸³ It charged Milligan with joining and aiding a secret society known as the "Order of American Knights" or "Sons of Liberty."⁸⁴ This secret society aimed to overthrow the government and it conspired with the enemy to seize war supplies and to liberate prisoners of war, among other violations.⁸⁵ Milligan was not a Confederate soldier and Indiana was not at war with the Union.⁸⁶ He had not been behind enemy lines.

Consistent with President Lincoln's suspension of habeas corpus, a Military Commission found Milligan guilty and sentenced him to death.⁸⁷ He filed for a writ of habeas corpus. Eventually his case reached the Supreme Court in 1866, after the Civil War was over.⁸⁸ The Supreme Court, in a 5-to-4 decision, held that Military Commissions could not try civilians, who had not associated with the enemy and were "nowise connected with military service,"⁸⁹ if the civilian courts were open.⁹⁰ In setting out this distinction, the Court left open the possibility that Milligan *could* have been tried by Military Commission for his war crimes if deemed an enemy combatant—that is, if he had

⁸⁰ *Id.*

⁸¹ *Ex parte Milligan*, 71 U.S. (4 Wall.) 2 (1866).

⁸² *Id.* at 107.

⁸³ *Id.* at 6.

⁸⁴ *Id.*

⁸⁵ *Id.* at 6–7.

⁸⁶ *Id.* at 7–8.

⁸⁷ *Id.* at 107.

⁸⁸ FISHER, *supra* note 38, at 58.

⁸⁹ *Ex parte Milligan*, 71 U.S. (4 Wall.) at 118–27.

⁹⁰ *Id.*

associated with the enemy⁹¹ or if he were in some way connected with military service.⁹² The Court stated:

On her soil [in Indiana, where the defendant was arrested], there was no hostile foot; if once invaded, that invasion was at end, and with it all pretext for martial law. Martial law cannot arise from a threatened invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration.⁹³

Milligan had never been in the military, had no connection to the military or the state militia, and had never been in any state involved in the rebellion.

The minority opined that Congress “had power, though not exercised, to authorize the Military Commission which was held in Indiana.”⁹⁴ In a reference to Lincoln’s assassination and the conviction of eight conspirators, the Supreme Court dissenters in *Milligan* deferred to the Executive authority. It stated that the Military Commission “was approved by [President Lincoln’s] successor [President Andrew Johnson] in May, 1865, and the sentence was ordered to be carried into execution. The proceedings therefore had the fullest sanction of the executive department of the government.”⁹⁵

Congress regarded the Supreme Court decision in *Milligan* as an act of judicial lawmaking and, in 1867, responded to what it regarded as an activist court, by limiting the Court’s jurisdiction to hear cases involving military law.⁹⁶

Some commentators argue that *Milligan* prohibited civilians from ever being tried before Military Commissions, so long as civilian courts were open.⁹⁷ Others maintain that the test in *Milligan* is not such a simple one and that it would permit the military to try civilian enemy belligerents before Military Commissions.⁹⁸ Many years later, during World War II, the

⁹¹ Yoo, *supra* note 54, at 90 (“By implication, if Milligan had been an enemy combatant, not a civilian, a military commission *could* have tried him for war crimes.”).

⁹² *Ex parte Milligan*, 71 U.S. (4 Wall.) at 122.

⁹³ *Id.* at 126–27.

⁹⁴ *Id.* at 137 (Chase, C.J., concurring in part, dissenting in part).

⁹⁵ *Id.* at 132.

⁹⁶ Act of Mar. 2, 1867, ch. 155, 14 Stat. 432, 433; Ronald D. Rotunda, *Congressional Power to Regulate the Jurisdiction of the Lower Federal Courts in School Busing*, 64 GEO. L.J. 839 (1976).

⁹⁷ See David L. Franklin, *Enemy Combatants and the Jurisdictional Fact Doctrine*, 29 CARDOZO L. REV. 1001, 1028 (2008); Gregory H. Shill, *Enemy Combatants and a Challenge to the Separation of War Powers in al-Marri v. Wright*, 487 F.3d 160 (4th Cir. 2007), 31 HARV. J. L. & PUB. POL’Y 393, 398–99 (2008).

⁹⁸ See Yoo, *supra* note 54, at 90 (“By implication, if Milligan had been an enemy combatant, not a civilian, a military commission *could* have tried him for war crimes.”); *al-Marri v. Pucciarelli*, 534 F.3d 213, 301 (2008) (Wilkinson, J., concurring in part,

Supreme Court, in *Ex parte Quirin*,⁹⁹ agreed with the later view. That is, it made clear that enemy belligerents (including a U.S. citizen) can be tried before Military Commissions even when civilian courts are open. It made clear that *Milligan* is narrow.

The *Quirin* Case considered whether Nazi saboteurs could be tried before Military Commissions. The year was 1942, and the United States was at war with the German Reich. Only six months after the attack on Pearl Harbor,¹⁰⁰ eight German saboteurs boarded two submarines in French ports, and began their trip to the United States.¹⁰¹ Hidden under miles of dark water, they made the journey across the Atlantic ocean undetected.¹⁰² At least one of them was a U.S. citizen.¹⁰³

Their submarines came ashore in the middle of the night, under the cover of darkness.¹⁰⁴ One landed in New York, the other in Florida.¹⁰⁵ Each four-man team unloaded explosives, fuses, and timing devices.¹⁰⁶ Some wore German uniforms.¹⁰⁷ They buried their uniforms in the sand, and dressed as civilians in order to blend-in and escape detection.¹⁰⁸ At this point, they became spies, unprivileged combatants under the laws of war. Roving among unsuspecting civilians, they began surveying buildings.¹⁰⁹ Their plan was to attack the United States, from within its own borders.¹¹⁰

Within days of coming ashore, they contacted two Americans.¹¹¹ They met for drinks and discussion with one of

dissenting in part) (stating and explaining that the principles of *Milligan* do not apply because al-Marri “plainly qualifies as an enemy combatant.”). See also Christina D. Elmore, *An Enemy Within Our Midst: Distinguishing Combatants From Civilians in the War Against Terrorism*, 57 U. KAN. L. REV. 213, 221–22 (2008) (discussing proponents of both views). See also *Ex Parte Quirin*, in which defendant Hans Haupt argued that *Milligan* stood for the proposition that his U.S. citizenship insulated him from trial before Military Commission. 317 U.S. 1, 45 (1942). The Supreme Court settled that question in the *Quirin* case and decided that the *Milligan* case would allow enemy belligerents, who had taken an active part in hostilities, to face trial before a military tribunal. *Id.* at 45–46. Therefore, citizenship and whether civilian courts were open were not dispositive.

⁹⁹ 317 U.S. 1 (1942).

¹⁰⁰ On the morning of December 7, 1941, the Japanese navy launched a stealth attack against the United States naval base at Pearl Harbor, Hawaii, which resulted in the United States becoming militarily involved in World War II. H.P. WILLMOTT, *THE SECOND WORLD WAR IN THE FAR EAST* 68 (Smithsonian Books 2002) (1999).

¹⁰¹ *Ex parte Quirin*, 317 U.S. at 21.

¹⁰² *Id.*

¹⁰³ *Id.* at 20.

¹⁰⁴ *Id.* at 21.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ See FISHER, *supra* note 38, at 35.

¹¹⁰ *Ex parte Quirin*, 317 U.S. at 21.

¹¹¹ See *Cramer v. United States*, 325 U.S. 1, 5 (1945); *Haupt v. United States*, 330

them, Anthony Cramer.¹¹² However, even years later it remains unclear whether Cramer knew of their plan or whether he helped them carry it out. The other American was Hans Haupt, whose son was one of the saboteurs.¹¹³

On the verge of their planned attacks, one of the saboteurs lost his nerve and decided to abandon the plan.¹¹⁴ He took a train to Washington, D.C., intending to confess.¹¹⁵ After a long wait, he met with officials at the Federal Bureau of Investigation (FBI) and informed them of the plan.¹¹⁶ However, when FBI Director J. Edgar Hoover announced their capture, he left out the untidy fact that the FBI only knew about the plan because of the voluntary admission of one of the participants.¹¹⁷ Instead, Hoover credited the FBI's investigatory powers for discovering the saboteurs.¹¹⁸ The trials were held in secret.¹¹⁹ If they had been public, the entire nation would have known that the FBI caught the saboteurs by accident.¹²⁰ The Nazis would have known that this plan failed by happenstance, and they would have been more likely to try to infiltrate saboteurs again.¹²¹

The United States tried and convicted Cramer for treason, but the Supreme Court later reversed that conviction.¹²² Hans Haupt was also tried.¹²³ He had provided shelter and a car for his saboteur son and, unlike Cramer, definitely knew about the plan.¹²⁴ The United States convicted him for providing shelter, sustenance and supplies, and the Supreme Court upheld his

U.S. 631, 634 (1947).

¹¹² See *Cramer*, 325 U.S. at 5.

¹¹³ *Haupt*, 330 U.S. at 632.

¹¹⁴ FISHER, *supra* note 38, at 93.

¹¹⁵ *Id.*

¹¹⁶ See Morris D. Davis, *The Influence of Ex Parte Quirin and Courts-Martial on Military Commissions*, 103 NW. U. L. REV. 121, 122 (2008).

¹¹⁷ Tony Mauro, *A Mixed Precedent for Military Tribunals*, LEGAL TIMES, Nov. 19, 2001, at 15.

¹¹⁸ *Id.*

¹¹⁹ Charles Lane, *Liberty and the Pursuit of Terrorists*, WASH. POST, Nov. 25, 2001, at B1 ("The trial was held in secret not only to protect legitimate intelligence sources and methods, but also to conceal the embarrassing fact that J. Edgar Hoover's FBI had failed to uncover the plot until one of the Germans came to Washington and offered a detailed confession.").

¹²⁰ *Id.*

¹²¹ LOUIS FISHER, CONG. RESEARCH SERV., REPORT NO. RL31340, MILITARY TRIBUNALS: THE *QUIRIN* PRECEDENT 3-4 (2002).

¹²² *Cramer v. United States*, 325 U.S. 1, 48 (1945).

¹²³ *Haupt v. United States*, 330 U.S. 631, 632 (1947).

¹²⁴ *Id.* at 633 ("Sheltering his son, assisting him in getting a job, and in acquiring an automobile, all alleged to be with knowledge of the son's mission, involved defendant in the treason charge."); *Cramer*, 325 U.S. at 3 ("There was no evidence, and the Government makes no claim, that he had foreknowledge that the saboteurs were coming to this country or that he came into association with them by prearrangement.").

conviction.¹²⁵ The government tried Cramer and Hans Haupt in Civilian Article III Courts.¹²⁶

The government tried the saboteurs in military courts—including the U.S. citizen saboteur.¹²⁷ The U.S. citizen (the son of Hans Haupt) had been behind enemy lines, unlike Hans Haupt and unlike Mr. Milligan. A war crime tribunal convicted the saboteurs of the following crimes: (1) Violating the laws of war; (2) Relieving or attempting to relieve, or corresponding with or giving intelligence to, the enemy; (3) Spying; and (4) Conspiracy to commit the former three crimes.¹²⁸

On an expedited schedule, the Supreme Court decided to hear the saboteurs' appeals.¹²⁹ The main question was whether prosecutors could try the saboteurs by Military Commissions or whether they were entitled to trial by civil courts with all the rights afforded to U.S. citizens.¹³⁰ FDR made his views abundantly clear. He told Attorney General Francis Biddle, "One thing I want clearly understood" is that "I won't give them up . . . I won't hand them to any United States Marshal armed with a writ of habeas corpus."¹³¹

The Supreme Court understood FDR's position, loud and clear. Understanding that FDR planned to execute the prisoners no matter what decision the Supreme Court reached, it yielded to his view and validated the trial by Military Commissions.¹³² The Court first issued a short opinion rejecting the claims of Quirin and the others.¹³³ The Court said it would write a full opinion in the fall, after returning from vacation.¹³⁴ A few days after the Court issued this initial opinion, the Government executed six of the eight German saboteurs, long before the Supreme Court

¹²⁵ *Haupt*, 330 U.S. at 633, 644.

¹²⁶ Article III of the United States Constitution vests judicial power in the Supreme Court and "such inferior courts as the Congress may from time to time ordain and establish." U.S. Const. art. III, § 1.

¹²⁷ See Exec. Order No. 9185, 7 Fed. Reg. 5103 (July 7, 1942) (appointing a Military Commission to try the eight saboteurs, including Herbert Haupt).

¹²⁸ *Ex parte Quirin*, 317 U.S. 1, 23 (1942).

¹²⁹ *Id.* at 19.

¹³⁰ *Id.* at 18–19, 24.

¹³¹ Andrew C. McCarthy, *The End of Discretion*, THE NEW CRITERION, January 2008.

¹³² *Id.* referencing JACK GOLDSMITH, THE TERROR PRESIDENCY (2007); see also David J. Danelski, *The Saboteurs' Case*, 1 J. SUP. CT. HIST. 61, 69 (1996) (describing Supreme Court discussions during pre-argument conferences of Biddle's view that FDR would execute the saboteurs regardless of how the Supreme Court ruled).

¹³³ *Ex parte Quirin*, 63 S. Ct. 1, 2 (1942); Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT'L L. J. 15, 38 (2006).

¹³⁴ See *Ex parte Quirin*, 63 S. Ct. at 2; Fisher, *supra* note 133, at 38–39.

issued its lengthier opinion.¹³⁵ FDR commuted the sentence of two saboteurs because they cooperated with the investigation.¹³⁶

The Supreme Court upheld the convictions in a full opinion that it issued the next fall.¹³⁷ The Supreme Court held:

[T]he detention and trial of [the saboteurs]—ordered by the President in the declared exercise of his powers as Commander in Chief of the Army in time of war and of grave public danger—are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted.¹³⁸

In a unanimous opinion, the Court found no such conflict.¹³⁹ The Court determined that the President's constitutional power to wage war necessarily included the power to hold war crimes trials, and punish war criminals.¹⁴⁰ Further, Congress had explicitly sanctioned Military Commissions in its articles of war.¹⁴¹

Aside from deciding that the President could initiate Military Commissions, the Supreme Court also discussed the specific charges brought against the saboteurs.¹⁴² Looking to military history, it found that wearing a uniform was central to lawfully waging war, and that historically spies lurking around behind enemy lines were put to death.¹⁴³ The Court did not define the outside jurisdictional boundaries of Military Commissions, but found that clandestinely entering the United States to wage war, without wearing a uniform, most certainly violated the laws of war.¹⁴⁴

In *Quirin*, the Supreme Court revisited *Milligan* and clarified that even U.S. citizens can be brought to trial before Military Commissions when U.S. courts are open, *if* they are unlawful enemy combatants.¹⁴⁵ The American citizen saboteur was not insulated from being tried by a military court because he had crossed enemy lines, which made him an unlawful enemy belligerent.¹⁴⁶ His father, Hans Haupt, and Anthony Cramer received civilian trials because, although they aided the

¹³⁵ Davis, *supra* note 116, at 124.

¹³⁶ McCarthy, *supra* note 131.

¹³⁷ *Ex parte Quirin*, 317 U.S. at 48.

¹³⁸ *Id.* at 25.

¹³⁹ *Id.* at 48.

¹⁴⁰ *Id.* at 28–29.

¹⁴¹ *Id.* at 29.

¹⁴² *Id.* at 29–31.

¹⁴³ *Id.* at 31–32.

¹⁴⁴ *Id.* at 45–46.

¹⁴⁵ *Id.* at 45.

¹⁴⁶ *Id.* at 37–38.

saboteurs, they had not crossed enemy lines and thus were not unlawful belligerents.¹⁴⁷ Therefore, *Quirin* rejected the view that civilians are always entitled to Article III civilian trials when civilian courts are open.¹⁴⁸ It clarified the reach of *Milligan* once and for all.

In 1946, four years after Military Commissions convicted and executed the Nazi saboteurs, another Military Commission case made its way to the Supreme Court.¹⁴⁹ General Yamashita was a commanding general of the Imperial Japanese Army in the Philippines during WWII. He eventually surrendered to the United States and became a POW.¹⁵⁰ A Military Commission tried, convicted, and sentenced him to death by hanging for allowing his soldiers to commit brutal atrocities against people of the U.S. and its allies.¹⁵¹ On over one hundred occasions, his soldiers attacked unarmed civilians and POWs, and destroyed public, private, and religious property.¹⁵²

Yamashita's defense at trial, and on appeal, was that he could not be held responsible for crimes committed by his soldiers.¹⁵³ The Supreme Court disagreed, and determined that international law permits holding commanders responsible for "permitting [their soldiers] to commit the extensive and widespread atrocities."¹⁵⁴ Justices Murphy and Rutledge authored strongly worded dissents, criticizing the Court for permitting "revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander."¹⁵⁵ They argued that General Yamashita could not be held responsible for acts without proving he specifically committed, ordered, or condoned, the atrocities.¹⁵⁶

Despite the spirited disagreement about whether General Yamashita formed the requisite criminal intent to be held liable, the Court reaffirmed *Quirin* and made clear that trial by Military Commission was permissible.¹⁵⁷ It concluded that the articles of war, authorized by Congress, allowed Military Commissions.¹⁵⁸

¹⁴⁷ *Id.* at 37–38.

¹⁴⁸ George Lardner, Jr., *Nazi Saboteurs Captured!*, WASH. POST, Jan. 13, 2002, (Magazine), at 12.

¹⁴⁹ See *In re Yamashita*, 327 U.S. 1 (1946).

¹⁵⁰ *Id.* at 5.

¹⁵¹ *Id.* at 5, 13–14.

¹⁵² *Id.* at 14.

¹⁵³ See *id.* at 6.

¹⁵⁴ *Id.* at 14, 17.

¹⁵⁵ *Id.* at 41 (Murphy, J., dissenting).

¹⁵⁶ See *id.* at 40; *Id.* at 43–44 (Rutledge, J., dissenting).

¹⁵⁷ *Id.* at 7–9.

¹⁵⁸ *Id.* at 11.

The Court called Military Commissions “an appropriate tribunal for the trial and punishment of offenses against the law of war.”¹⁵⁹ It acknowledged significant judicial deference to Military Commissions:

If the military tribunals have lawful authority to hear, decide and condemn, their action is not subject to judicial review merely because they have made a wrong decision on disputed facts. Correction of their errors of decision is not for the courts but for the military authorities which are alone authorized to review their decisions.¹⁶⁰

Considering *Quirin* and *Yamashita*, the United States entered the Global War on Terror backed by significant legal precedent to hold Military Commissions and even to prosecute before military courts an “enemy combatant” who “passes the military lines.”¹⁶¹

IV. LAW GOVERNING MILITARY TRIBUNALS IN THE GLOBAL WAR ON TERROR

After September 11th, the President ordered the Department of Defense to establish Military Commissions, which would try enemy combatants for war crimes.¹⁶² President Bush patterned his Order after Roosevelt’s order during WWII,¹⁶³ which the Supreme Court had unanimously upheld in *Ex parte Quirin*.¹⁶⁴ President Bush made a few departures from FDR’s order, to give the detainees more rights. For instance, do not apply to citizens and the trials are public.

Just as Presidents Johnson, Lincoln, and Roosevelt had issued Executive Orders during the Civil War and WWII eras calling for military trials, President Bush issued an Executive Order laying the groundwork for Military Commissions.¹⁶⁵ President Bush’s November 13, 2001 order instructed the Secretary of Defense to draft rules governing the Commissions.¹⁶⁶ At a minimum, the president directed “full and fair” trials with a Commission that decides both fact and law, admission of any evidence having probative value to a reasonable person, protection of classified information, conviction and sentence by a two-thirds majority, and review of the trial record by either the secretary of defense or the President himself.¹⁶⁷

¹⁵⁹ *Id.* at 7.

¹⁶⁰ *Id.* at 8.

¹⁶¹ See *Ex parte Quirin*, 317 U.S. 1, 31 (1942).

¹⁶² Military Order of Nov. 13, 2001, 66 Fed. Reg. 57833 (Nov. 13, 2001).

¹⁶³ See Proclamation No. 2561, 7 Fed. Reg. 5101 (July 7, 1942).

¹⁶⁴ *Ex parte Quirin*, 317 U.S. at 48.

¹⁶⁵ Military Order of Nov. 13, 2001, *supra* note 162.

¹⁶⁶ *Id.* § 4.

¹⁶⁷ *Id.*

Responding to the President, the Secretary of Defense then drafted Military Commission Order Number One, which set forth Military Commission procedures.¹⁶⁸ Section five, *Procedures Accorded the Accused*, guaranteed the accused several rights:

- A copy of charges in defendant's language
- The presumption of innocence until proven guilty beyond a reasonable doubt
- Detailed military defense counsel
- Access to information the prosecution intends to use at trial and any evidence tending to exculpate the defendant
- Guarantees that the defendant is not required to testify against himself, but may testify on his own behalf (the right to remain silent)
- The defendant's right to be present except when it violates laws governing classified information or when the defendant is disruptive
- Access to information used in sentencing
- The right to present evidence and make a statement at a sentencing hearing
- Open public trials
- The protection against double jeopardy, i.e., prosecutors cannot charge defendants twice for the same crime (double jeopardy).¹⁶⁹

Military Commission Order Number One provided substantially greater procedural protections for detainees captured during the Global War on Terror than the Hunter Commission provided for Lincoln's assassins.¹⁷⁰ It provided appointed legal counsel, incorporated the presumption of innocence, guaranteed the guilt beyond a reasonable doubt standard, ensured defendants the right to remain silent, and protected defendants against double jeopardy (being tried twice for the same crime).¹⁷¹

Military Commission Order Number One granted defendants more rights than criminal defendants presently receive in many European countries, which routinely accept hearsay and do not require proof beyond a reasonable doubt in order to convict.¹⁷² Further, its guarantee of "open public trials" allowed more

¹⁶⁸ U.S. Dep't of Defense, Military Commission Order No. 1, Aug. 31, 2005, available at <http://www.defenselink.mil/news/Sep2005/d20050902order.pdf>.

¹⁶⁹ *Id.* § 5.

¹⁷⁰ See discussion *supra* Part I.

¹⁷¹ *Id.*

¹⁷² See generally John R. Spencer, *The Concept of "European Evidence,"* 4 ERA FORUM 29 (2003).

protections that the Nazi saboteurs received in the *Quirin*, where the saboteurs were tried in secret.¹⁷³

In 2006, the Supreme Court in *Hamdan v. Rumsfeld* rejected the rules governing President Bush's Military Commissions by narrowly construing Congress' Authorization for the Use of Military Force (AUMF).¹⁷⁴ It found that, as a statutory matter, Congress had *not* authorized Military Commissions,¹⁷⁵ but invited Congress to authorize them:

Nothing prevents the President from returning to Congress to seek the authority he believes necessary. . . . If Congress, after due consideration, deems it appropriate to change the controlling statutes, in conformance with the Constitution and other laws, it has the power and prerogative to do so.¹⁷⁶

Congress did as the Supreme Court suggested and passed the Military Commissions Act of 2006 (MCA).¹⁷⁷ The MCA authorized Military Commissions and codified several procedural protections.¹⁷⁸ For instance, under the MCA, defendants can only be convicted by a two-thirds majority of the Commission and for sentences exceeding ten years, including the death penalty, a three-fourths majority is required to convict.¹⁷⁹ The Military Commissions Act also adopted a robust appeals process, which includes an internal appeal to the Convening Authority, an appeal to the Court of Military Commission Review, an appeal to the D.C. Circuit Court, and ultimately an appeal to the U.S. Supreme Court.¹⁸⁰ The Military Commissions Act of 2006 represents another instance where both Congress and the President acted in concert to authorize Military Commissions.

V. THE SUPREME COURT, CONGRESS AND THE PRESIDENT DURING A TIME OF WAR

A brief walk through time reveals that significant historical precedent dating back to the Revolutionary War supports using Military Commissions. It also reveals, not surprisingly, that the procedural protections have evolved to provide substantially more due process over time. The Hunter Commission seemed

¹⁷³ See Lane, *supra* note 119.

¹⁷⁴ *Hamdan v. Rumsfeld*, 548 U.S. 557, 593–95 (2006).

¹⁷⁵ *Id.*; see also Glenn Sulmasy, John Yoo & Martin Flaherty, Debate, *Hamdan and the Military Commissions Act*, 155 U. PA. L. REV. (PENNUMBRA) 146, 146–47 (2007), http://www.pennumbra.com/debates/pdfs/sulmasy_yooflaherty.pdf.

¹⁷⁶ *Hamdan*, 548 U.S. at 636–37 (Kennedy, J., concurring in part).

¹⁷⁷ Pub. L. No. 109-366, 120 Stat. 2600 (codified at 10 U.S.C. §§ 948a–950p (Supp. 2008)).

¹⁷⁸ 10 U.S.C. § 948b(a)–(f) (Supp. 2008).

¹⁷⁹ *Id.* § 949m(a), (b)(2).

¹⁸⁰ *Id.* §§ 950d(b)–(d), 950g.

more concerned with efficiency than with affording due process. FDR granted more rights than the Hunter Commission offered. The Military Commissions Act of 2006 incorporated fundamental procedural protections, including the right to remain silent and protection against double jeopardy.¹⁸¹

In all of the incidents discussed above, the President and Congress acted in concert. But, does it matter? Is it relevant that both democratic branches of government agree on the proper course of action? The Supreme Court answered these questions in *Youngstown Sheet & Tube Co. v. Sawyer*.¹⁸²

The year was 1951 and the U.S. was embroiled in the Korean War. At the same time, steel companies were in a dispute with their employees. Being unable to reach a resolution, the Steel Union announced a nationwide strike, which would halt steel production.¹⁸³ President Truman responded by issuing Executive Order 10340, which directed the Secretary of Commerce to possess and operate various steel mills around the United States.¹⁸⁴ Based on the fact that steel was necessary for weapons and other war materials, the President considered it within his role as Commander in Chief to keep the steel mills operational.¹⁸⁵

The steel companies filed suit in the District Court, claiming that the President lacked authority to seize the steel mills and that the seizure was not authorized by Congress.¹⁸⁶ Writing for the Supreme Court, Justice Black concluded, in a pithy opinion, that the President's actions were not sanctioned by Congress and were not specifically authorized by the Constitution.¹⁸⁷ It said that seizing private property to ensure continuing production "is a job for the Nation's lawmakers, not for its military authorities."¹⁸⁸

Justice Jackson filed a separate concurring opinion,¹⁸⁹ which explored the contours of Presidential power and presented the notion that, in each instance, Presidential Power is either strengthened or weakened by whether Congress agrees or disagrees. Jackson said that the President's "powers are not fixed but fluctuate, depending upon their disjunction or

¹⁸¹ See *id.* §§ 948r, 949h.

¹⁸² 343 U.S. 579 (1952).

¹⁸³ *Youngstown* at 582–83.

¹⁸⁴ *Id.* at 583.

¹⁸⁵ *Id.* at 582.

¹⁸⁶ *Id.* at 583.

¹⁸⁷ *Id.* at 586–87.

¹⁸⁸ *Id.* at 587.

¹⁸⁹ *Id.* at 634 (Jackson, J., concurring).

conjunction with those of Congress.”¹⁹⁰ Justice Jackson created three groupings to express the notion of progressive Presidential power.¹⁹¹

In the first grouping, the President’s power is at its height when he acts in accordance with Congress, whether express or implied. In this instance, his power includes “all that he possesses in his own right plus all that Congress can delegate.”¹⁹² In the second grouping, Congress is silent and neither affirms nor denies his authority, leaving the President with only his specified, independent powers. Justice Jackson explained that “there is a zone of twilight in which he and Congress may have concurrent authority or in which its distribution is uncertain.”¹⁹³ When Congress fails or refuses to act, the President’s actual power depends on the circumstances—“imperatives of events and contemporary imponderables rather than on abstract theories of law.”¹⁹⁴ In the third grouping, the President acts against the express or implied will of Congress. In this instance, his power is at its “lowest ebb” and “he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter.”¹⁹⁵ Presidential claim to power in this instance must be “scrutinized with caution” because the balance of power is at stake.¹⁹⁶

Justice Jackson placed the President’s steel seizure in group three, because President Truman acted contrary to the will of Congress.¹⁹⁷ He concluded that the President’s powers as Commander in Chief were not large enough to encompass controlling internal affairs of the country, including seizing the steel mills,¹⁹⁸ particularly because the Constitution delegates to Congress the power to “raise and *support* Armies” and to “*provide* and *maintain* a Navy” that leaves Congress, not the President, with the burden of supplying the armed forces.¹⁹⁹ In this case, Congress specified procedures for seizing private property; and the President, without any authority, flouted those procedures.²⁰⁰ For these reasons, the Supreme Court did not sanction the President’s decision to seize the steel mills.²⁰¹

¹⁹⁰ *Id.* at 635.

¹⁹¹ *Id.* at 635–38.

¹⁹² *Id.* at 635.

¹⁹³ *Id.* at 637.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 638.

¹⁹⁷ *Id.* at 639–40.

¹⁹⁸ *Id.* at 642.

¹⁹⁹ *Id.* at 643.

²⁰⁰ *Id.* at 639.

²⁰¹ *Id.* at 585, 587–88.

The Supreme Court in *Hamdan v. Rumsfeld* adopted Justice Jackson's opinion in *Youngstown*, and reiterated that a President's authority is "at its maximum" when he acts in concert with Congress and at its "lowest ebb" when he acts incompatibly with Congress.²⁰² In 2008, the Supreme Court again reaffirmed *Youngstown's* twilight analysis in *Medellin v. Texas*,²⁰³ quoting from *Youngstown*: "[w]hen the President takes measures incompatible with the expressed or implied will of Congress, his power is at its lowest ebb."²⁰⁴ It went on to say, "The President's authority to act must come from an act of Congress or the Constitution itself."²⁰⁵ Both *Hamdan* and *Medellin* make clear that the twilight analysis in *Youngstown* is still the law today.

But, sandwiched between *Hamdan* and *Medellin*, is *Boumediene v. Bush*, where a divided Supreme Court did not follow the *Youngstown* analysis but instead invalidated a joint war time decision by Congress and the President.²⁰⁶

The *Boumediene* case concerned the Detainee Treatment Act of 2005 ("DTA"), a set of procedures passed by Congress that governed status hearings of detainees captured abroad in the War on Terror.²⁰⁷ The DTA gave the Court of Appeals for the District of Columbia Circuit "exclusive jurisdiction" to review the Military's Combatant Status Review Tribunals ("CSRTs").²⁰⁸ In *Hamdan v. Rumsfeld*, the Supreme Court held that the DTA did not apply to pending cases.²⁰⁹ Congress responded to *Hamdan* by amending the law to clarify that it did apply to pending cases.²¹⁰ That is, Congress made clear that the Court of Appeals for the District of Columbia Circuit, and only the Court of Appeals for the District of Columbia Circuit would have jurisdiction to hear CSRT appeals stemming back to September 11, 2001.²¹¹

Rejecting the judgment of Congress and the Executive, the Supreme Court in *Boumediene* invalidated the DTA. But the Court was sharply divided. The dissent criticized the Court for decreeing that there was "no good reason to accept the judgment of the other two branches" and it argued that the court was not competent to "second-guess the judgment of Congress and the

²⁰² *Hamdan v. Rumsfeld*, 548 U.S. 557, 638 (2006) (Kennedy, J., concurring in part).

²⁰³ *Medellin v. Texas*, 128 S. Ct. 1346 (2008).

²⁰⁴ *Id.* at 1368.

²⁰⁵ *Id.*

²⁰⁶ *Boumediene v. Bush*, 128 S. Ct. 2229 (2008).

²⁰⁷ Detainee Treatment Act of 2005, Pub. L. No. 109-148, 119 Stat. 2739 (2005) (codified at 28 U.S.C. 2241).

²⁰⁸ *Id.*

²⁰⁹ *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).

²¹⁰ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

²¹¹ *Id.*

President.”²¹² It went on to opine that the Court “must leave undisturbed the considered judgment of the coequal branches.”²¹³ In *Boumediene*, the Court stood firm against the other two branches of government, and to Justice Jackson’s test articulated in *Youngstown*.

VI. PRESIDENTIAL ORDERS IN THE CONTEXT OF *QUIRIN*,
YOUNGSTOWN, *HAMDAN* & *BOUMEDIENE*

In November 2008, Barack Obama was elected President of the United States. On January 22, 2009, shortly after taking office, President Obama issued an Executive Order closing (eventually) the United States military detention facility at Guantanamo Bay and halting the Military Commissions presently underway.²¹⁴ His order called for a committee to review whether and how the detainees should be prosecuted.²¹⁵ The Executive Order declares that it “shall be implemented consistent with applicable law.”²¹⁶ However, the present Military Commissions are not a creature of the Executive Branch. They exist in the present format because of an act of Congress.²¹⁷ The new Presidential Order commands the impossible. How can an order to disregard a federal law be consistent with that law?

The twilight zone test set out in Justice Jackson’s concurring opinion in *Youngstown*, and adopted in *Hamdan* and *Medellin*, makes clear that the President may not unilaterally stop Military Commissions and craft his own, novel procedures, outside of the democratic process. Because Congress has already spoken, and has passed a federal statute that governs Military Commissions, the President’s power is at its “lowest ebb.” When President Truman unconstitutionally refused to follow the Taft Hartley Act, and attempted to substitute his own procedures,²¹⁸ the Court enjoined Truman’s attempted seizure of the steel mills.

²¹² *Boumediene v. Bush*, 128 S. Ct. 2229, 2296 (2008) (Scalia, J., dissenting).

²¹³ *Id.* at 2297.

²¹⁴ Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009), *available at* <http://edocket.access.gpo.gov/2009/pdf/E9-1893.pdf>.

²¹⁵ *Id.* § 4(c)(3):

Determination of Prosecution. In accordance with United States law, the cases of individuals detained at Guantánamo not approved for release or transfer shall be evaluated to determine whether the Federal Government should seek to prosecute the detained individuals for any offenses they may have committed, including whether it is feasible to prosecute such individuals before a court established pursuant to Article III of the United States Constitution, and the Review participants shall in turn take the necessary and appropriate steps based on such determinations.

²¹⁶ *Id.* § 8(b).

²¹⁷ Military Commissions Act of 2006, Pub. L. No. 109-366, 120 Stat. 2600.

²¹⁸ *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

President Obama now refuses to follow the Military Commissions Act, and substitute his own, yet to be determined, procedures. The problem is that a federal statute already governs these procedures.

Justice Burton's concurrence in *Youngstown* reflected Justice Jackson's twilight zone analysis. Burton observed that "[i]n the case before us, Congress authorized a procedure which the President declined to follow."²¹⁹ Justice Burton further stated that "[t]he controlling fact here is that Congress, within its constitutionally delegated power, has prescribed for the President specific procedures, exclusive of seizure, for his use in meeting the present type of emergency."²²⁰ He went on to conclude that, under those circumstances, the President's order "invaded the jurisdiction of Congress. It violated the essence of the principle of the separation of governmental powers."²²¹ President Obama's Order halting Military Commissions does the same thing and should receive the same treatment as President Truman's Executive Order.

President Truman's steel seizure case involved private property. The seizures impacted U.S. citizens and were not akin to decisions made on the battlefield. Yet those factual distinctions are constitutionally irrelevant. Can the President's power as Commander in Chief override a specific federal statute that governs how the President can conduct Military Commissions? The President does not have more authority under his Commander in Chief role to act contrary to federal statute when it comes to holding Military Commissions in a time of war. In *Youngstown*, the Court acknowledged a long line of cases that upheld "broad powers" for Commanders during a time of war.²²² But, it distinguished those cases:

Such cases need not concern us here. Even though "theatre of war" be an expanding concept, we cannot with faithfulness to our constitutional system hold that the Commander in Chief of the Armed Forces has the ultimate power as such to take possession of private property in order to keep labor disputes from stopping production.²²³

Under *Quirin*, *Yamashita* and *Youngstown*, the Commander in Chief's role during an active war was expansive. However, the Supreme Court in *Hamdan* found that the *Youngstown* twilight analysis *does* apply to a President's decision to hold Military

²¹⁹ *Id.* at 659 (Burton, J., concurring).

²²⁰ *Id.* at 660.

²²¹ *Id.*

²²² *See id.* at 587.

²²³ *Id.*

Commissions during war-time.²²⁴ It said that President Bush's Executive Order calling for Military Commissions (which was identical to FDR's order in *Quirin*) now required specific Congressional endorsement.²²⁵ It found that Congress's Authorization for the Use of Military Force (AUMF) did not clearly grant authority for Military Commissions.²²⁶ As noted above, the *Hamdan* case led to Congress to enact the Military Commissions Act of 2006. That law consequently ties the hands of the Commander in Chief. That is why President Obama cannot waive away the statute by issuing an Executive Order.

Before *Hamdan*, no Congressional statute existed that governed Military Commissions; *Quirin* was the law, and it accepted that the establishment of Military Commissions was within the President's discretion. After *Hamdan*, however, Congress drafted a federal law governing Military Commissions in the Global War on Terror. Given *Youngstown's* twilight analysis, President Obama's power to adopt rules for Military Commissions inconsistent with the Military Commissions Act is now at its lowest ebb. The Court has never invalidated the Military Commissions Act.

While the Supreme Court has definitely pruned the Commander in Chief's power during a time of war, it has not left President Obama without a remedy. When the U.S. entered the War on Terror in 2001, *Quirin* was the law, and the President enjoyed extensive war time power, including the wide discretion regarding Military Commissions. *Youngstown* had limited the President's war-time power in some instances, by finding that the President did not have power to take private possession of property, but had left *Quirin* intact.

In 2006, in *Hamdan v. Rumsfeld*, the Supreme Court applied Justice Jackson's twilight zone test in *Youngstown* to evaluate Military Commissions. It found that the President's Executive Order calling for Military Commissions required specific endorsement from Congress—something not required under *Quirin*. It invited Congress to pass legislation endorsing the President's plan for Military Commissions.²²⁷

The President has only one alternative. Just as the Court in *Hamdan* invited Congress to endorse President Bush's Military Commissions plan, Congress can endorse President Obama's plan. President Obama must persuade Congress to amend (or do

²²⁴ See *Hamdan v. Rumsfeld*, 548 U.S. 557, 594–95 (2006).

²²⁵ *Id.* at 595.

²²⁶ *Id.* at 594.

²²⁷ See discussion *supra* Part IV.

away with) the Military Commissions Act of 2006. But, he cannot act alone. Disregarding existing, controlling federal law all together runs afoul of *Youngstown* and *Hamdan* and violates “the essence of the principle of separation of powers,” just as Truman violated the separation of powers in the *Youngstown* steel seizure context.²²⁸ What impact the *Boumediene* case may have on President Obama’s decisions regarding Military Commissions remains to be seen.

VII. PRESIDENTIAL ORDERS & UNLAWFUL COMMAND INFLUENCE

President Obama’s Executive Order halting military trials may amount to unlawful command influence. President Obama directed the Secretary of Defense to refrain from charging any additional detainees under the Military Commissions Act of 2006, and halted trials already underway.²²⁹ His order also declared: “Nothing in this order shall prejudice the authority of the Secretary of Defense to determine the disposition of any detainees not covered by this order.”²³⁰ But saying it does not make it so.

Because meddling commanders threaten the independence of Military Trials, the Uniform Code of Military Justice (UCMJ) makes certain levels of command influence illegal.²³¹ It is a punishable crime, and (among other things) prohibits any Commander from influencing an action of any military tribunal.²³²

Congress included the same prohibition in the recently enacted Rules for Military Commissions. Under the Military Commissions Act, it is unlawful for any official to improperly influence the action of Military Commissions in the Global War on Terror.²³³ In fact, the Military Commissions Rule is actually

²²⁸ See *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 660 (1952) (Burton, J., concurring).

²²⁹ Exec. Order No. 13492, 74 Fed. Reg. 4897 (Jan. 22, 2009). Section 7 states:

Military Commissions. The Secretary of Defense shall immediately take steps sufficient to ensure that during the pendency of the Review described in section 4 of this order, no charges are sworn, or referred to a Military Commission under the Military Commissions Act of 2006 and the Rules for Military Commissions, and that all proceedings of such Military Commissions to which charges have been referred but in which no judgment has been rendered, and all proceedings pending in the United States Court of Military Commission Review, are halted.

Id. § 7, at 4899.

²³⁰ *Id.* § 8, at 4899.

²³¹ See Rules for Courts Martial, Manual for Courts-Martial, pt. II, ch. I, R. 104, at II-4 (2008), available at <http://www.au.af.mil/au/awc/awcgate/law/mcm.pdf> [hereinafter Rules for Courts-Martial].

²³² See *id.*

²³³ See Rules for Military Commissions, Manual for Military Commissions, pt II, ch.

more broad than the Courts Martial Rule because it covers “*all persons*” and specifies that “*no person* may attempt” to unlawfully, or by unauthorized means, influence the Military Commission.²³⁴ The Courts Martial Rule only applies to “all persons subject to the code.”²³⁵

Courts consistently recognize the deleterious impact of unlawful command influence on military trials. One court called it the “mortal enemy of military justice.”²³⁶ Another referred to it as “a malignancy that eats away at the fairness of our military justice system.”²³⁷ Military Courts have interpreted the crime of unlawful command influence to include even *the appearance* of unlawful command influence.²³⁸ Tests include “whether a reasonable member of the public . . . would have a loss of confidence in the military justice system and believe it to be unfair.”²³⁹ Another query is whether the command influence placed “intolerable strain on public perception” of the military justice system.”²⁴⁰ Figuratively speaking, the test for unlawful command influence asks whether the Commander was “brought into the deliberation room”—whether he controlled the trial or the court.²⁴¹

After President Obama’s order to halt military trials, most judges and prosecutors in Guantanamo Bay dutifully complied although the statute gives no president the power to order prosecutors to ask for, or order a judge to grant, a continuance.²⁴² They accepted the unlawful command influence.

Prosecutors filed motions to stop the trials, and judges granted them, with one lone exception.²⁴³ Army Colonel Judge James Pohl, who was presiding over the prosecution of al-Nashiri, the alleged mastermind of The Cole bombing in 2000,

I, R. 104, at II-8 (2007), available at <http://www.defenselink.mil/pubs/pdfs/The%20Manual%20for%20Military%20Commissions.pdf> [hereinafter Rules for Military Commissions].

²³⁴ *Id.* R. 104(a)(2) (emphasis added).

²³⁵ See Rules for Courts-Martial, R. 104(a)(2).

²³⁶ Teresa K. Hollingsworth, *Unlawful Command Influence*, 39 A.F. L. REV. 261, 263 (1996) (citing *United States v. Thomas*, 22 M.J. 388, 394 (C.M.A. 1986)).

²³⁷ *Id.* (citing *United States v. Gleason*, 39 M.J. 776, 782 (A.C.M.R. 1994)).

²³⁸ See *id.* at 264–65 (citing *United States v. Allen*, 31 M.J. 572, 590 (N-M C.M.R.1990)).

²³⁹ *United States v. Allen*, 31 M.J. 572, 590 (N-M.C.M.R. 1990).

²⁴⁰ *United States v. Simpson*, 58 M.J. 368, 374 (C.A.A.F. 2003).

²⁴¹ *Allen*, 31 M.J. at 590.

²⁴² Carol J. Williams, *Judge Says He’s Forging Ahead*, L.A. TIMES, Jan. 30, 2009, at A9.

²⁴³ *Id.*

refused to stop the trial.²⁴⁴ Pohl said that the Military Commissions Act of 2006 governed the proceedings, and stated that, “[t]he public interest in a speedy trial will be harmed by the delay in the arraignment.”²⁴⁵ Pohl also stated: “The Commission is bound by the law as it currently exists not as it may change in the future.”²⁴⁶ Judge Pohl pointed out that the Military Commissions Act of 2006 gave the military judges “sole authority” to grant delays once charges had been referred for trial.²⁴⁷

On the heels of his refusal, the Pentagon issued a statement. Pentagon spokesman Geoff Morrell said that “Pohl would soon be told to comply with Obama’s executive order.”²⁴⁸ He went on to explain, “all I can really tell you is that this department will be in full compliance with the president’s executive order. There’s [sic] no if, ands or buts about that.”²⁴⁹ He then added, “while that executive order is in force and effect, trust me that there will be no proceedings continuing, down at Gitmo, with Military Commissions.”²⁵⁰ As predicted, a few days later, the charges against al-Nashiri were dropped.²⁵¹ Colonel Pohl was not involved in that decision.²⁵² Normally, unlawful command influence occurs in the shadows. This time it occurred while the Pentagon celebrated it in a press release.

These Pentagon orders make clear that President Obama was not just “brought into the deliberation room,” but that he blocked the deliberation room door and sent the judge and jurors home. The Executive Order left no room for Judge Pohl to exercise judicial discretion or to issue rulings in a case before him. This interference undermined the integrity of the judicial system and is precisely why the military has laws prohibiting unlawful command influence.

²⁴⁴ *Id.*; *Military Judge Refuses to Halt Trial of USS Cole Bombing Suspect*, FOXNEWS, Jan. 29, 2009, <http://www.foxnews.com/politics/2009/01/29/military-judge-refuses-halt-trial-uss-cole-bombing-suspect> (last visited Mar. 24, 2009).

²⁴⁵ Ruling on Government Motion to Continue Arraignment, *United States v. Al-Nashiri*, (Jan. 29, 2009), available at http://www.defenselink.mil/news/Jan2009/DelayArraignment_MJ.pdf.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ Williams, *supra* note 242.

²⁴⁹ Geoff Morrell, Pentagon Press Secretary, U.S. Dep’t of Defense News Briefing with Geoff Morrell from the Pentagon (Jan. 29, 2009), available at <http://www.defenselink.mil/transcripts/transcript.aspx?transcriptid=4345>.

²⁵⁰ *Id.*

²⁵¹ *Charges Dropped in USS Cole Terror Trial*, MSNBC, Feb. 5, 2009, <http://www.msnbc.msn.com/id/29042139> (last visited Mar. 25, 2009).

²⁵² *Id.*

Military Courts have repeatedly held that almost any interference with military trials amounts to unlawful command influence. For instance, one court found that a hospital commander committed unlawful command influence when he criticized witnesses (after the military trial was over) for testifying on behalf of alleged drug offenders.²⁵³

Another court held that an Army General committed unlawful command influence when he told his subordinate officers that they should not recommend a trial or bad conduct discharge for a soldier, and then testify that that same convicted soldier is a “good soldier” at the sentencing hearing.²⁵⁴ The General believed that the two positions were inconsistent. The court found unlawful command influence and said: “. . . in this area [unlawful command influence] the band of permissible activity by the commander is narrow, and the risks of overstepping its boundaries are great. Interference with the discretionary functions of subordinates is particularly hazardous.”²⁵⁵

In another case, after a military judge ruled leniently in three cases, the Judge Advocate General of the Air Force, and other senior JAG Officers, launched an informal inquiry into whether the judge had been subjected to unlawful command influence by his chain of command. The U.S. Court of Military Appeals barred such inquiries and said that only investigations that were “outside the adversary process” and “made by an independent judicial Commission established in strict accordance with the guidance contained in section 9.1(a) of the AGA Standards . . .” were permitted. The court was concerned that the inquiry itself could amount to unlawful command influence.²⁵⁶

In *United States v. Lewis*, a military prosecutor and his supervising lawyer (the Staff Judge Advocate, or SJA) aggressively sought to recuse a Marine Corps judge on the grounds that the judge had a personal relationship with the defendant’s lawyer (who was a former Marine). The prosecutor alleged that the judge and civilian defense counsel had interacted socially, even while the trial was ongoing.²⁵⁷ The prosecutor introduced evidence that the military judge and defense counsel were seen together at a play, while the case was ongoing.²⁵⁸

²⁵³ *United States v. Sullivan*, 26 M.J. 442 (CMA 1988).

²⁵⁴ *United States v. Treakle*, 18 M.J. 646 (A.C.M.R. 1984).

²⁵⁵ *Id.* at 653.

²⁵⁶ *United States v. Ledbetter*, 2 M.J. 37, 42 (C.M.A. 1976).

²⁵⁷ *United States v. Lewis*, 63 M.J. 405, 408 (C.A.A.F. 2006).

²⁵⁸ *Id.* at 409.

When initially questioned about attending the play with defense counsel, the Judge failed to disclose that interaction. Later, she explained that it had “slipped [her] mind.”²⁵⁹ She then conceded that she and the defense counsel had “occasional social interaction with no discussions of any military trials pending before me.”²⁶⁰

In addition to the social relationship, the prosecutor also pointed out that the defense counsel had a practice of sending copies of e-mails about pending cases to this particular judge and that the defense counsel had previously expressed a preference for this military judge in other cases.²⁶¹

The prosecutor also introduced evidence that the judge had been voir dired about her personal relationship with defense counsel in several other cases.²⁶² In one instance, after being voir dired by the prosecutor in an earlier case, the judge told a colleague that she felt she had been put “through an inquisition” and that “it would take . . . a few days to get back on good terms with the government.”²⁶³ The prosecutor introduced this prior statement as evidence of partiality toward this particular defense counsel.²⁶⁴

The military judge at first denied the prosecution’s motion to recuse. The prosecutor sought a three-day continuance to determine whether the government would appeal the ruling. The judge denied that request. The prosecutor then amended the request and asked for only a three hour continuance in order to

²⁵⁹ *Id.*

²⁶⁰ *Id.*

²⁶¹ *Id.* at 408–09.

²⁶² *Id.* at 409.

²⁶³ *Id.* at 408.

²⁶⁴ The prosecution’s motion for refusal went as follows:

Ma’am, at this time taken all of the facts that have come to light during this inquiry, your previous involvement with the companion cases, having worked with Colonel [JS] in the past, having a social relationship limited to interactions at the barn, as well as the fact that defense counsel in the Neff case apparently received statements from the assistant civilian defense counsel expressing in the Scamahorn case displeasure with the way that you had been voir dired in the Curiel case; also the fact that civilian defense counsel in this case has made a habit of CC’ing you on electronic mail messages which contained disputed and contested substantial issues relating to suborning perjury, discovery issues, and making recommendations to you as to what would be an appropriate resolution for failure to comply with pretrial milestones: All of that taken together, ma’am, would you agree that creates an appearance of impartiality [sic] that a reasonable person might perceive with respect to this case, ma’am?

Id. at 408–09.

seek a stay of the proceedings. The judge denied that request, too.²⁶⁵

Ultimately, after consulting with other judges in the circuit, the judge changed her mind and recused herself.²⁶⁶ She stated, “I’m emotional about this”²⁶⁷ and explained that she was “mortally disappointed in the professional community that is willing to draw such slanderous conclusions from so little information.”²⁶⁸ She went on to explain, “I now find myself second guessing every decision in this case. Did I favor the government to protect myself from further assault? Did I favor the accused to retaliate against the government[?]”²⁶⁹ She held prosecutors responsible for her inability to be objective, stating “. . . my emotional reaction to the slanderous conduct of the SJA has invaded my deliberative process on the motions.”²⁷⁰

After the sitting judge recused herself, the military assigned a new judge, LTC FD.²⁷¹ Incredibly, he accepted the case only to almost immediately recuse himself, too. What were his reasons for recusal? “The manner in which [trial counsel] handled the voir dire in this case particularly offends me.”²⁷² He characterized the SJA’s voir dire of the former judge as a “crass, sarcastic, and scurrilous characterization of the social interaction between Major [CW] and Ms. [JS] . . .” He explained that he could “neither understand nor set aside” the “ignorance, prejudice, and paranoia on the part of the government.”²⁷³

But, how, exactly did the diligent voir dire of a former judge prejudice the present judge? It seems that the military judges mounted a united, public, front against voir dire directed at them. One can only understand this as a warning to JAG prosecutors that judges are off limits. Arguably, it is this united front that taints the fairness of military trials—not prosecutors doing their jobs.

On appeal, the U.S. Court of Appeals for the Armed Forces held that the prosecutor and the SJA’s diligent attempts to recuse the judge amounted to unlawful command influence.²⁷⁴ Without citing any evidence that the prosecutor, or SJA, were

²⁶⁵ *Id.* at 409–10.

²⁶⁶ *Id.* at 411.

²⁶⁷ *Id.* at 410.

²⁶⁸ *Id.* at 410–11.

²⁶⁹ *Id.* at 411.

²⁷⁰ *Id.*

²⁷¹ *Id.*

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 414–15.

actually influenced by their chain of command, or acted out of anything but professional diligence, the Court of Appeals found unlawful command influence. It said:

*[t]o the extent that the SJA, a representative of the convening authority, advised the trial counsel in the voir dire assault on the military judge and to the extent that his unprofessional behavior as a witness and inflammatory testimony created a bias in the military judge, the facts establish clearly that there was unlawful command influence on the court-martial.*²⁷⁵

That is—the Court simply held that *if* the prosecutors acted as puppets for the Command then unlawful command influence occurred. But, it failed to answer the dispositive question of *whether* the Commander was at all involved.

The Court of Appeals for the Armed Forces agreed with the lower court, also without citing any evidence that the prosecutors were motivated by any commander. It simply said, “a reasonable observer would have significant doubt about the fairness of this court-martial in light of the Government’s conduct with respect to MAJ CW [the military judge].”²⁷⁶ It did not explain why a reasonable observer would reach such a conclusion.

It is unclear how a prosecutor aggressively seeking to recuse a judge, whom the prosecutor reasonably believed was biased, amounts to unlawful command influence. How would it lead one to believe that the procedures were not fair? In fact, the opposite is true. One would think that a military prosecutor facing off against a military judge in open court demonstrates that the proceedings *are* fair; that they *are not* orchestrated; that both prosecutors and defense counsel diligently represent their clients, despite the fact that they all work for the military.

Whether one agrees, or disagrees, with the holding in *Lewis*, one cannot deny the fact that its holding would prohibit President Obama from stopping military trials already underway. If minor interferences with a trial amount to unlawful command influence, then surely halting a trial altogether qualifies as well. If the *mere theoretical possibility* that a Commander encouraged a prosecutor to recuse a judge amounts to unlawful interference, then certainly a President *actually* halting a trial and *involuntarily removing* the judge qualifies as well. Is there any greater “interference” than ordering a judge to stop a trial?

²⁷⁵ *Id.* at 412 (emphasis added).

²⁷⁶ *Id.* at 415.

Ironically, one of the sitting judges [Judge Susan Crawford] who decided the *Lewis*²⁷⁷ case later yielded to, and facilitated, President Obama's order to halt Military Commissions that were already underway in Guantanamo Bay. Only a few months after *Lewis*, Secretary Robert Gates designated Judge Crawford as the convening authority for Military Commissions.²⁷⁸ Her position as the convening authority meant that she would supervise the office of Military Commissions, review and approve charges, and appoint members of the Military Commission, along with other duties.²⁷⁹

When Judge Pohl would not yield to President Obama's order to halt the trials, Judge Crawford intervened and dismissed the charges against al-Nashiri, who was the alleged mastermind of the Cole Bombing.²⁸⁰ The case was not before her.

The same Pentagon official who said approximately one week before the dismissal that "Pohl would soon be told to comply" confirmed that Crawford yielded to the President's order. He stated, "[i]t was her decision, but it reflects the fact that the president had issued an executive order which mandates that the Commissions be halted . . ." ²⁸¹ On the heels of her decision in *Lewis*, in which she took a rigid stand against unlawful command influence with relatively weak facts, she yielded to President Obama's order to halt military trials.²⁸²

That is—the same Judge who believes that diligent *voir dire* directed at military judges amounts to unlawful command influence, holds different, and inconsistent, views when the command influence originates with a sitting President. The precise reason for the inconsistency is unclear. However, one reasonable explanation for the inconsistency is that, perhaps, Judge Crawford herself was a victim of unlawful command influence. That is—perhaps she can *identify* unlawful command influence, but she cannot *resist* it when the order comes from the highest commander—the President and Commander in Chief. Indeed, that is why the Military prohibits unlawful command influence, and defines it broadly.

²⁷⁷ *Id.* at 406; see also News Release, U.S. Department of Defense, Seasoned judge Tapped to head Detainee Trials, www.defenselink.mil/Releases/Reelase.aspx?ReleaseID=10493.

²⁷⁸ News Release, *supra* note 277.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ *Charges Dropped in USS Cole Terror Trial*, MSNBC, Feb. 5, 2009, <http://www.msnbc.msn.com/id/29042139> (last visited Mar. 25, 2009), quoting Geoff Morrell.

²⁸² *Id.*

In *Hamdan v. Rumsfeld*, the Supreme Court criticized President Bush for changing the rules governing Military Commissions after the trials were already underway. It said that changing the rules “at the whim of the Executive” was “irregular.”²⁸³ Surely, if the Supreme Court thinks that changing the rules mid-trial is unfair, it would also conclude that halting the trials all together in violation of a governing federal statute is also unfair.

CONCLUSION

Over time, the procedures that govern military trials have evolved to provide substantially greater due process. For instance, the Hunter Commission, which tried Lincoln’s assassins, afforded defendants few procedural protections, FDR offered more protections and the Guantanamo Bay Military Commissions afford defendants even greater procedural protections. These protections now include the right to remain silent, protections against double jeopardy, appointed counsel, and extensive appellate opportunities, including an appeal to the U.S. Supreme Court.

But, despite the evolution of procedural protections, history shows that Presidents nonetheless have consistently interfered with Military Commissions. For instance, President Johnson disregarded the Hunter Commission’s plea for clemency to spare Mary Surratt’s life, suspended the writ of habeas corpus, and ordered her immediately executed. During the War of 1812, President Jackson disregarded a Military Commission’s acquittal of a defendant and ordered the defendant to remain in jail. During WWII, FDR made it known to the Supreme Court that he planned to execute the Nazi saboteurs, no matter what the Court decided in the *Quirin* case. The Court yielded to his authority and validated the findings of the Military Commission.

In the Global War on Terror, President Obama has halted Military Commissions in violation of the Military Commissions Act, and possibly in violation of the prohibition against unlawful command influence. Executive interference with military trials undermines their legitimacy and cuts against the evolution of procedural protections. What good are procedural protections if the Executive, acting alone, can undo them? What good are independent judges when a President can unseat them, or order cases before them to be dismissed?

What is historically different about what is occurring today

²⁸³ *Hamdan v. Rumsfeld*, 548 U.S. 557, 633 n.65 (2006).

is that the Supreme Court is taking a more active role in war time matters to police Military Commissions. In *Boumediene*, it stood firm against the President, even though he acted in concert with Congress. In *Hamdan*, it found that President Bush's Executive Order calling for Military Commissions did not grant authority for them—despite the fact that it had previously found, in *Quirin*, that FDR's virtually identical order did. It invited Congress to pass laws specifically authorizing Military Commissions. But, when Congress did that, the Supreme Court in *Boumediene* invalidated some aspects of those rules.

What impact *Boumediene* will have on President Obama's decisions, and on future Presidential decisions, remains to be seen. Will its new level of involvement help to curtail unlawful command influence with Military Commissions? Perhaps, but we cannot know for sure. One thing is clear: the Supreme Court's involvement in war time decisions stands in stark contrast to the way it responded in previous wars, including during the Civil War and World War II. Only time will tell whether the Supreme Court's increased involvement regarding Military Commissions is for better or for worse; or whether unlawful command influence will continue to be a constant feature of Military Commissions.