

**ENEMIES FOREIGN AND DOMESTIC: A HISTORICAL LOOK AT THE USE
OF MILITARY COMMISSIONS BY THE UNITED STATES AND THE CASE FOR
USING THEM AGAINST AMERICAN CITIZENS.**

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I. INTRODUCTION

In the world in which we live today, the line between a friend and an enemy has become blurred. No longer do the good guys wear white hats and the bad guys wear black, and no longer is there a simple distinction between democratic and communist ideologies. Today's world is one where it is not the nation state that must concern our national security, but the individual.

The September 11th, 2001 attacks on our nation validate that point of view. Until that time, we as a nation were caught up in our own illusory dream of invincibility. However, we were shaken from our dormant sleep to live in the reality that we are not invincible and that a small group of determined men could shake our nation to its core. This is a reality that the rest of the world has been living with for years. They know the devastating cost of such a reality. It is a cost that bears most heavily on the civilians as well as the soldiers. Civilians must come to understand that the world and their lives must change.

Part of the change began when President Bush signed Military Order 222 on November 13 2001.¹ The order authorized military commissions to be utilized for trying non-citizens for war crimes.² But the question arises; why limit the use of military commissions to non-citizens?

¹ Major Timothy C. MacDonnell, *Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts*, 2002 Army Law 19,19 (2002)

² 66 Fed. Reg. 222, Nov. 13, 2001. Under Section 2(a) the president limited the jurisdiction of the order to non-citizens.

The term 'individual subject to this order' shall mean any *individual* who is not a United States citizen with respect to whom I determine from time to time in writing that: (1) There is reason to believe that such *individual*, at the relevant times, (I) is or was a member of the organization known as al Qaida; (ii) has engaged in, aided or abetted, or conspired to commit, acts of international terrorism, or acts in preparation therefor, that have caused, threaten to cause, or have

An enemy is an enemy regardless of their nationality. Black's Law dictionary defines an enemy as an antagonist or an opposing military force.³ Should we not use the military to try all our enemies?

The use of military commissions has a long history in the United States, and it is not unprecedented to try American citizens in these tribunals. As late as 1950 the United States employed a military commission to try an American citizen for the murder of her husband, an Army Officer.⁴ The use of military commissions against American citizens can be found as early as the Revolutionary War.⁵ In 1814, during the War of 1812, General Andrew Jackson used a commission to try an American newspaperman for espionage.⁶

Part II of this comment will explore the sources of power to convene a military commission, the types of military commissions, and the limitations on the use of military

as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy, or (iii) has knowingly harbored one or more individuals described in subparagraphs (I) or (ii) of subsection 2 (a)(1) or this order.

Id.

³ BLACKS LAW DICTIONARY,433 (7th ed. 2002). "Enemy. 1. One who opposes or inflicts injury on another; an antagonist. 2. An opposing military force. 3. A state with which another state is at war." *Id.*

⁴ *Madsen v. Kinsell, Warden*, 343 U.S. 341, (1952). After the end of World War II the Americans occupied a zone on Germany along with the British, French, and Russians. During the occupation the American Military used Military Commissions for dispensing of justice. The jurisdiction of these courts included jurisdiction over American Citizens in the occupied areas. The Supreme Court of the United States heard a Habeas Corpus petition by an American woman who had been convicted by a Military Commission while in occupied Germany. She had been convicted for the murder of her husband, an Army Officer. *Id.*

⁵ MacDonnell, *supra* note 1, at 26

⁶ MacDonnell, *supra* note 1, at 27

[G]eneral Andrew Jackson ordered the trial of a non citizen at one of the first martial law courts in the United States. In December of 1814, prior to the Battle of New Orleans, General Jackson declared a state of martial law in the city of New Orleans. Jackson prepared the city for a siege, and to that end, he established curfews and pass policies. individuals found in violation of Jackson's curfew or pass police faced arrest. Jackson also ordered military personnel to enter private homes to commandeer entrenching tools or other supplies he deemed necessary to the war effort. After winning the Battle of New Orleans, General Jackson maintained the city in a state of Martial law, despite the retreat of the British forces. Jackson's actions drew widespread criticism throughout New Orleans. One of Jackson's critics was Lois Louaillier, a member of the Louisiana Legislature. Louaillier wrote an editorial in the local newspaper declaring that the continued state of martial law was inappropriate and unnecessary. Jackson ordered that Louaillier be arrested and tried by military commission for a number of offenses, including espionage and inciting mutiny." During the trial the commission determined they did not have jurisdiction of Louaillier for six of the seven charges and acquitted Louaillier for the seventh.

commissions. In so doing, this comment will examine how commissions have been used historically and the restraints placed on their use by International law, Domestic law and Supreme Court precedents. Part III will examine the barriers of trying Americans and argue for the reversal of the barrier. Part IV of this comment will examine the current cases of American citizens being detained in connection with terrorist activities. Finally this comment will conclude with an argument that both enemies foreign and domestic should be tried by military commissions when detained as an enemy combatant for a terrorist act, acts of belligerency, or war crimes.

II. MILITARY COMMISSIONS

A. *Power to Convene a Commission*

Military Commissions conjure up many images in the minds of Americans. Some think of the tribunals used at the end of World War II to try former Nazis.⁷ Others may think of the tribunals still taking place, such as Yugoslavia War Crimes Tribunal.⁸ But for many Americans these are not the images that come to mind.

Images of secretive trials where men in uniform hand down speedy justice with little regard to evidence or the rights of the defendant are the more common images Americans have of military commissions.⁹ Why else would the idea of trying an American in such a forum be so repugnant to the common American?¹⁰ It is because of the sacred liberties and freedoms that we deem so important to our way of life that we cannot tolerate an American to be subjected to such

Id.

⁷ The History Place, World War II, available at <http://www.historyplace.com/worldwar2/timeline/nurem.htm> last visited on Oct. 9, 2002. (On file with the TULSA J. COMP. & INT'L L.)

⁸ International Criminal Tribunal for the former Yugoslavia at <http://www.un.org/icty/glance/index.htm> last visited on Oct. 9, 2002. (On file with the TULSA J. COMP. & INT'L L.)

⁹ See *Ex Parte Quirin*, 317 U.S. 1 (1942) 317 U.S. 1, 46

¹⁰ See *Id.*

a horrid and secretive proceeding.¹¹ Although, it seems we do not mind so much when military commissions are used against non-citizens. These images are not accurate and should be laid to rest.

To begin with we ask the question of who has the authority of convening a military commission. As with any questions over the control of the United States Military the answer lies in the misty haze between the powers of the Congress and the powers of the President.

Congress' powers are derived from the United States Constitution Article 1, section 8, clauses 1, 10, 11, 12, 13, 14, 16, and 18.¹² These powers to raise an Army and a Navy naturally contain the power to regulate them as well. This power is specifically mentioned in clause 14, which states, "To make rules for the Government and regulations of the land and naval forces."¹³ This is reinforced by clause 16, which states, "To provide for organizing, arming, and disciplining, the Militia..."¹⁴ One tool commonly recognized for the disciplining of armies by the international community is that of military commissions.¹⁵

¹¹ See *President wrongly rejects court review of detainees*, USA Today, Aug. 22, 2002, at 10A available at <http://www.usatoday.com/usatoday/20020822/4382284s.htm> last visited on Oct. 15 2002. (On file with the TULSA J. COMP. & INT'L L.)

¹² Article 1 Section 8 of the United States Constitution is often called the enumerated powers section for the United States Congress. Here the forefathers listed certain powers that are solely in the domain of the Congress. These include: "The Congress shall have the power to lay and collect taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common defence and general welfare of the United States. U.S. CONST. art. I § 8, cl.1. "To define and punish piracies and felonies committed on the high seas, and offences against the law of nations. U.S. CONST. art. I § 8, cl.10. "To declare war, grant letters of Marque and reprisal, and make rules concerning captures on land and water. U.S. CONST. art., I § 8, cl.11. "To raise and support Armies, but no appropriation of money to that use shall be for a longer term than two years. U.S. CONST. art. I § 8, cl.12. "To provide and maintain a Navy" U.S. CONST. art. I § 8, cl.13. "To make rules for the government and regulation of the land and naval forces." U.S. CONST. art. I § 8, cl.14. "To provide for calling forth Militia to execute the laws of the union, suppress insurrections and repel invasions." U.S. CONST. art. I § 8, cl.15. "To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the service of the United States, reserving the States respectively, the Appointment of the officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. CONST. art. I § 8, cl.16.

¹³ U.S. CONST. art. I § 8, cl. 14

¹⁴ U.S. CONST. art. I § 8, cl. 16

¹⁵ MacDonnell, *supra* note 1 at 20, "Military commissions are a recognized method of trying those who violate the law of war." *Id.*

The President's authority to convene a military commission is in the broad powers as Commander in Chief of the United States Military.¹⁶ This power of being a commander has the inherent power to convene a commission. It is the commander who the commission is most useful during a time of war to preserve discipline and in expediting that discipline.¹⁷ It is also evident throughout history that it is the commander's choice to convene a commission.¹⁸

Thus the power to convene Military Commissions rests both with the President of the United States and with the Congress of the United States. It falls within the zone of twilight Justice Jackson spoke of in *Youngstown Sheet & Tube Co. et al v. Sawyer*: "When the President acts in absence of either a congressional grant or denial of authority, he can only rely upon his own independent powers, but there is a zone of twilight in which he and Congress may have concurrent authority, or in which its distribution is uncertain."¹⁹ This zone is the area where the President and Congress may have concurrent authority.²⁰ While in this 'zone' of powers the Congress acquiesces to the deeds of the President and this acquiescence occurs over time; the

¹⁶ The United States Constitution provides:

The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual service of the United States; he may require the opinion, in writing, of the principal Officer in each of the executive departments, upon any subject relating to the duties of their respective offices, and he shall have power to grant reprieves and pardons for offences against the United States, except in cases of Impeachment.

U.S. CONST. Art. 2, § 2. See also MacDonnell, *supra* note 1, at 22. "Under customary international law, the right of a military commander to establish and use military commissions to try suspected war criminals is inherent to his authority as a commander. By making the President the command of the U.S. military forces, the Constitution vests the President with that authority generally associated with command, including the authority to create military commissions. *Id.*

¹⁷ MacDonnell, *supra* note 1 at 40, "Military Commissions are 'an important incident to the conduct of war' whereby a military commander can 'subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war.'" *Id.*

¹⁸ *Id.* at 27

¹⁹ *Youngstown Sheet & Tube Co. et al v. Sawyer*, 343 U.S. 579, at 636 (1952)

²⁰ *Id.*

President's actions may become more permanent.²¹ In other words, his actions would be considered constitutional.

On November 13, 2001 President George W. Bush exercised his authority as the Commander in Chief, as discussed above, and signed Military Order 222.²² In this order that is directed against non-citizens he authorized the use of military commissions. Section four of the order states:

Authority of the Secretary of Defense regarding trials of individuals subject to this order. (a) Any individual subject to this order shall, when tried, be tried by military commission for any and all offenses triable by military commission that such individual is alleged to have committed, and may be punished in accordance with penalties provided under applicable law, including life imprisonment or death. (b) As a military function and in light of the findings in section 1, including subsection (f) thereof, the Secretary of Defense shall issue such orders and regulations, including orders for the appointment of one or more military commissions, as may be necessary to carry out subsection (a) of this section.²³

²¹ *Id.* "Therefore, congressional inertia, indifference or quiescence may sometimes, at least as a practical matter, enable, if not invite, measures on independent presidential responsibility. In this area, any actual test of power is likely to depend on the imperatives of events and contemporary imponderables rather than on abstract theories." *Id.*

²² 66 Fed Reg. 222

²³ *Id.* Section one of this order gave the extensive findings that the President used as justification of the order.

- (a) International terrorists, including members of al Quida have carried out attacks on United States diplomatic and military personnel and facilities abroad and on citizens and property within the United States on a scale that has created a state of armed conflict that requires the use of the United States Armed Forces.
- (b) In light of grave acts of terrorism and threats of terrorism, including the terrorist attacks on September 11, 2001, on the headquarters of the United States Department of Defense in the national capital region, on the World Trade Center in New York, and on civilian aircraft such as in Pennsylvania, I proclaimed a national emergency on September 14, 2001 (Proc. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks).
- (c) Individuals acting alone and in concert involved in international terrorism possess both the capability and the intention to undertake further terrorist attacks against the United States that, if not detected and prevented, will cause mass deaths, mass injuries, and massive destruction of property, and may place at risk the continuity of the operations of the United States Government.
- (d) The ability of the United States to protect the United States and its citizens, and to help its allies and other cooperating nations protect their nations and their citizens, from such further terrorist attacks depends in significant part upon using the United States Armed Forces to Identify terrorists and those who support them, to disrupt their activities, and to eliminate their ability to conduct or support such attacks.
- (e) To protect the United States and its citizens, and for the effective conduct of military operations and prevention of terrorist attacks, it is necessary for individuals subject to this order pursuant to section 2 hereof to be detained, and, when tried, to be tried for violations of the laws of war and other applicable laws by military tribunals.
- (f) Given the danger to the safety of the United States and the nature of international terrorism, and to the extent provided by and under this order, I find consistent with section 836 of title

B. Types of Military Commissions

Throughout the history of the United States three types of military commissions have been used: martial law courts, military government courts, and war courts.²⁴ Martial Law courts are convened during a state of emergency when the local government cannot function properly and are subservient to military control.²⁵ Military government courts are used when the military is occupying and/or governing a foreign land such as after World War II.²⁶ War Courts are courts convened to address specific charges of violations of the laws of war, such as the War Crimes Tribunals convened after World War II.²⁷

The Martial Law courts have been used by the United States during most of the wars conducted on our native soil; such as the War of 1812,²⁸ and the Civil War²⁹ which both used

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- 10, United States Code, that it is not practicable to apply in military commissions under this order the principles of law and the rules of evidence generally recognized in the trial of criminal cases in the United States district courts.
- (g) Having fully considered the magnitude of the potential deaths, injuries, and property destruction that would result from potential acts of terrorism against the United States, and the probability that such acts will occur, I have determined that an extraordinary emergency exists for national defense [[Page 57834]] purposes, that this emergency constitutes an urgent and compelling government interest, and that issuance of this order is necessary to meet the emergency.

Id.

²⁴ MacDonnell, *supra* note 1, at 26

²⁵ BLACK'S LAW DICTIONARY, 791 (7th ed. 2002).

Martial Law. 1. The law by which during wartime the army, instead of civil authority governs the country because of a perceived need for military security of public safety. The military assumes control purportedly until civil authority can be restored. 2. A body of firm, strictly enforced rules that are imposed because of a perception by the country's rulers that civil government had failed, or might fail, to function. Martial law is usu. Imposed when the rulers foresee an invasion, insurrection, economic collapse, or other breakdown of the rulers' social order.

Id.

²⁶ American Bar Association Task Force on Terrorism and the Law Report and Recommendations on Military Commissions, at 10 (2002) "In Germany, over 1600 persons were tried for war crimes by U.S. Army military commissions. In the Far East nearly 1000 persons were tried by such commissions." *Id.*

²⁷ History Place, *supra* note 7

²⁸ MacDonnell, *supra* note 1, at 27.

²⁹ *Id.* at 28.

The Civil War and the subsequent four years entail the most extensive use of military commissions in U.S. history. The government conducted of 4,000 military commissions during the war and 1435 more between 1865 and 1869. These commissions, used in the North and the South, tried both military personnel and civilians. The charges they heard ranged from crimes against the laws of war, to acts in violation of President Lincoln's 24 September 1862 proclamation, to crimes usually cognizable by civil criminal courts. Functioning as war courts,

marital law courts to try military and civilians.³⁰ These courts are fewer due to the limited battles fought on American soil and the limited use of Martial Law by the United States government.

Military government Courts have been used during our history primarily after the conflict had been settled. After the Civil War military commissions were used throughout the reconstruction period in the south.³¹ Also, after the end of World War II the United States employed military commissions during the occupation of Germany.³²

However, since the end of World War II, the growing use of military commissions has been in the War Courts, as evident in the recent use of the Yugoslavia War Tribunal.³³ These courts hear the violation of the Law of War governed by the Hague Convention of 1910.³⁴

Section II of the annex to the Hague Convention outlines the law of hostilities.³⁵ It has been the violation of these laws; particularly using force against unarmed soldiers; and civilians

martial law courts, and military government courts, receptively, each type of military court was called a military commission.

Id.

³⁰ *Id.* at 28

³¹ *Id.*

³² *Madsen*, at 342

³³ Yugoslavia, *supra* note 8

³⁴ *See generally*, Convention for the Laws and Customs of War on Land, Oct. 18, 1907, 1907 U.S.T. LEXIS 29.

³⁵ Hague convention annex, section II provides:

HOSTILITIES CHAPTER I. *Means of Injuring the Enemy, Sieges, and Bombardments*

ARTICLE 22 The right of belligerents to adopt means of injuring the enemy is not unlimited.

ARTICLE 23 In addition to the prohibitions provided by special Conventions, it is especially forbidden: (a) To employ poison or poisoned weapons; (b) To kill or wound treacherously individuals belonging to the hostile nation or army; (c) To kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion; (d) To declare that no quarter will be given; (e) To employ arms, projectiles, or material calculated to cause unnecessary suffering; (f) To make improper use of a flag of truce, of the national flag, or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention; (g) To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war; (h) To declare abolished, suspended, or inadmissible in a Court of law the rights and actions of the nationals of the hostile party.

A belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war.

ARTICLE 24 Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

ARTICLE 25 The attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited.

that many of the war courts have been convened.³⁶ It is in these War Courts that the trial of American citizens for war crimes such as the September 11, 2001 attacks can and should take place. To determine the use of War Courts as the proper venue we must look at the restrictions placed on the trial of American citizens in military commission by the United States Supreme Court, Domestic law, and by International Law.

C. Limitations on the Jurisdiction of Military Commissions

1. International Law

International Law plays a role in the establishment and minimal due process procedures for military commissions; specifically the Geneva Convention III Relative to the Treatment of Prisoners of War³⁷ and Geneva IV Relative to the Protection of Civilian Persons in Time of War.³⁸ Articles 84, 85, and 102 of Geneva III set out the certain limitations of trying a prisoner of war.

ARTICLE 26 The officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities.

ARTICLE 27 In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

ARTICLE 28 The pillage of a town or place, even when taken by assault, is prohibited.

CHAPTER II. *Spies* ARTICLE 29 A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party. Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, intrusted with the delivery of dispatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying dispatches and, generally, of maintaining communications between the different parts of an army or a territory. ARTICLE 30 A spy taken in the act shall not be punished without previous trial.

ARTICLE 31 A spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage.

Id. at 31.

³⁶ History Place, *supra* note 7.

³⁷ *See generally*, Convention for the Protection of War victims: Prisoners of War, Aug 12, 1949, 6 U.S.T. 3316.

³⁸ *See generally*, Convention on Protection of War Victims: Civilian Persons, Aug. 12, 1949, 6 U.S.T. 3516.

Article 84 restricts a trial to be conducted by a military court unless the laws of the detaining power allow for trial by a civilian court.³⁹ The article goes on to speak of providing impartiality for the prisoner and trying him in an independent court; it states, “In no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized, and in particular, the procedure of which does not afford the accused the rights and means of defence provided for in Article 105.”⁴⁰

Article 105 provides the prisoner with a choice of counsel by choosing a fellow prisoner of war and to call witnesses in his defense.⁴¹ The article also provides for an advocate to be provided for the prisoner if he does not choose a comrade and it sets out time limits for the trial in order to provide time to prepare for the trial by the defendant.⁴²

Article 85 of the convention retains the rights codified by the convention for those prisoners of war tried for acts committed prior to capture.⁴³

Article 102 of the convention provides that a prisoner of war can only be validly sentenced if he is sentenced by the same procedure that tries the Detaining Powers military.⁴⁴ This

³⁹ Geneva III art. 84, *supra* note 37, at 64.

⁴⁰ *Id.*

⁴¹ *Id.* art 105, at 76 “The prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice, to the calling witnesses...” *Id.*

⁴² Article 105 provides

Failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel, and shall have at least one week at its disposal for the purpose. The detaining power shall deliver to the said Power, on request, a list of persons qualified to present the defence. Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence. The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused.

Id. art. 105, at 75.

⁴³ *Id.* art 85, at 64

article is damaging to the prospect of trying any detainees from the war on terrorism in military commissions since they are not used to try American soldiers. However, the Bush Administration has been careful not to designate these detainees as prisoners of war, thus, taking them out of the protections of this convention.⁴⁵

As with any international convention these conventions limit their applicability to certain parties. The conventions apply to armed conflicts between two or more of the contracting nations, even if a state of war is not recognized by one of them.⁴⁶ Thus, this limits the applicability of the Geneva Conventions during the War against Terrorism since there is no official state that United States is fighting. Also, the Geneva Conventions restrictions are primarily concerning the treatment and trial of Prisoners of War. The Geneva Conventions limits Prisoners of War to members of the armed forces of a party to the conflict.⁴⁷ Again, this denotes

⁴⁴ Geneva III art. 102, *supra* note 37, at 74. “A prisoner of war can be validly sentence only if the sentence has been pronounced by the same courts according to the seam procedure as in the case of members of the armed forces of the Detaining power....” *Id.*

⁴⁵ President, *supra* note 11.

⁴⁶ Article 2 provides:

In addition to the provisions which shall be implemented in peace time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance. Although one of the powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

Geneva III art. 2, *supra* note 37, at 2.

⁴⁷ Article 4 proscribes who is subject to the convention:

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces. (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations in accordance with the laws and customs of war.(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power. (4) Persons who accompany the armed

a member of a nation-state's military, not an individual involved in a terrorist network claiming no allegiance to a State. For these reasons the international convention regulating prisoners of war do not regulate the treatment of terrorist who have been caught and deemed to be unlawful enemy combatants; therefore, the convention is not a stumbling block to the use of military commissions against American citizens.

2. Domestic Law

a. Statutory

Congress enacted the Uniform Code of Military Justice to govern its military.⁴⁸ The code prescribes who is subject to its jurisdiction of courts-martial in Article 2.⁴⁹ This personal

forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model. (5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law. (6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

- B. The following shall likewise be treated as prisoners of war under the present Convention: (1) Persons belonging, or having belonged, to the armed forces of the occupied country, if the occupying Power considers it necessary by reason of such allegiance to intern them, even though it has originally liberated them while hostilities were going on outside the territory it occupies, in particular where such persons have made an unsuccessful attempt to rejoin the armed forces to which they belong and which are engaged in combat, or where they fail to comply with a summons made to them with a view to internment. (2) The persons belonging to one of the categories enumerated in the present Article, who have been received by neutral or non-belligerent Powers on their territory and whom these Powers are required to intern under international law, without prejudice to any more favourable treatment which these Powers may choose to give and with the exception of Articles 8, 10, 15, 30, fifth paragraph, 58-67, 92, 126 and, where diplomatic relations exist between the Parties to the conflict and the neutral or non-belligerent Power concerned, those Articles concerning the Protecting Power. Where such diplomatic relations exist, the Parties to a conflict on whom these persons depend shall be allowed to perform towards them the functions of a Protecting Power as provided in the present Convention, without prejudice to the functions which these Parties normally exercise in conformity with diplomatic and consular usage and treaties. C. This Article shall in no way affect the status of medical personnel and chaplains as provided for in Article 33 of the present Convention.

Geneva III art. 4, *supra* note 37, at 4

⁴⁸ Article 1, Uniform Code of Military Justice

⁴⁹ Article 2, Uniform Code of Military Justice

jurisdiction ranges from members of the active components, reserve components, retired personnel, cadets, and prisoners of war.⁵⁰ But it is clause 10 of subsection (a) of this article that provides some wiggle room in trying a person by courts-martial. It states, “In time of war, persons serving with or accompanying an armed force in the field.”⁵¹ This language could make persons who are serving or accompanying an armed force subject to courts-martial. It does not limit jurisdiction to a State’s army, only to an “armed force.”⁵² In the case of the American Taliban, John Walker Lindh, this clause is very persuasive.⁵³ He was serving with the Al Qaeda network, an armed force, or in the alternative at least accompanying them.⁵⁴ It follows that he would then be subject to the jurisdiction of courts-martial under this act.

However, the UCMJ does not claim sole jurisdiction of these people to courts-martial.

Article 21 of the Uniform Code of Military Justice states:

The provisions of this chapter [10 USCS §§ 801 et seq.] conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.⁵⁵

This section of the act allows for the retention and use of military commissions over the same personnel if they are tried under a statute allowing for military commissions or under the law of war. John Lindh is subject to courts-martial, and if he were to be tried for violations of the laws of war, would it not be reasonable to try him in a military commission?

⁵⁰ Article 2, UCMJ

⁵¹ Article 2, UCMJ

⁵² Article 2, UCMJ

⁵³ See Profile: John Walker Lindh, BBC News, available at <http://news.bbc.co.uk/1/hi/world/americas/177955.stm> last visited on Oct. 15 2002 (On file with the TULSA J. COMP. & INT’L L.)

⁵⁴ *Id.*

⁵⁵ Article 21, Uniform Code of Military Justice

In sum, the statutory limitations of a military commission are not clear. The Uniform Code of Military Justice regulates the operations of courts-martial.⁵⁶ But the UCMJ does leave room for the use of a military commission. In truth it leaves ‘concurrent’ jurisdiction for the use of a military commission.⁵⁷

b. Mexican-American War Limitations

The first formal limitations of military commissions began appearing during the Mexican-American War.⁵⁸ These restrictions on the jurisdiction of the commissions were placed on the subject matter of the commission. “Offenses tried before a commission must have been committed: (1) in a theater of war, (2) within the territory controlled by the commander ordering the trial and (3) during a time of war.”⁵⁹ The trial also had to be conducted within the theater of war.⁶⁰ These restrictions took place during the occupation of parts Mexico during the war.⁶¹ It is arguable that they pertain to the military government and martial law courts alone since they are more geographically controlled. The boundaries of a military government are precise as is the order and area to be placed under martial law.⁶² The violations of the Laws of War however, are less restricted by this territorial landscape.⁶³ Even if these restrictions to geography apply to the War Courts the question becomes, what are the boundaries of the “theater of war.”⁶⁴ As seen in both World Wars the entire planet was at war, and with the United States’

⁵⁶ Article 1, UCMJ

⁵⁷ Article 21, UCMJ

⁵⁸ MacDonnell, *supra* note 1, at 28

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.* “Lincoln’s proclamation authorized the use of military commissions to try U.S. citizens in areas that were not in a zone of occupation or under insurrection, and suspended the writ of habeas corpus for anyone confined by military authorities.” MacDonnell, *supra* note 1 at 28.

⁶³ The International Criminal Tribunal for the Former Yugoslavia is set in the Hague, Netherlands not in Yugoslavia. Yugoslavia, *supra* note 8. The war crimes tribunal established to try former Nazis after World War II was made up from two judges each from the United States, Britain, France, and Russia. History Place, *supra* note 7

⁶⁴ MacDonnell, *supra* note 1, at 28

current War of Terrorism, where the enemy is not from a Nation-State, what constitutes the theater? To limit it to solely Afghanistan, Iraq, or even the entire Middle East would be naive.

c. The Supreme Court Weighs In

(1). *Ex Parte Milligan*⁶⁵

This case arose out of the Civil War and President Lincoln's suspension of the writ of habeas corpus.⁶⁶ Milligan was a citizen of the United States and the state of Indiana.⁶⁷ He had lived in Indiana for twenty years and had never been in the Army or the Navy.⁶⁸ General Alvin Hovey, commander of the military district of Indiana arrested and confined Milligan.⁶⁹ He was tried and convicted by a military commission for various alleged acts, primarily aided the rebellion.⁷⁰ Milligan insisted the military commission did not have jurisdiction to try him because he was a citizen of the United States and not a member of the rebellion.⁷¹

The court found his argument persuasive and ruled that a civilian could not be tried by a military commission while the civilian courts were still open.⁷² The court believed that martial law was not necessary in the state of Indiana, stating, "It is difficult to see how the safety of the country required martial law in Indiana."⁷³ They also viewed the threat of invasion not sufficient to justify the use of martial law.⁷⁴

In the end, the court gives us one standing principle relating to military commission and their use for United States citizens; not while the civilian courts are open. In the court's words,

⁶⁵ *Ex Parte Milligan*, 71 U.S. 2., 107 (1866)

⁶⁶ MacDonnell, *supra* note 1, at 29

⁶⁷ *Milligan*, at 107

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 108

⁷² *Milligan*, at 127

⁷³ *Id.*

⁷⁴ *Id.*

If follows, from what has been said on this subject, that there are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer justice according to law, then on the theatre of active military operations, where war really prevails, there is a necessity to furnish a substituted [sic] for the civil authority, thus overthrown, to preserve the safety of the army and society; and as not power is left but the military it is allowed to govern by martial rule until the laws can have their free course. As necessity creates the rule, so it limits its duration; for, the government is continued after the courts are reinstated, it is a gross usurpation of power. Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction.⁷⁵

(2). *Ex Parte Quirin*⁷⁶

The next case arose from World War II and it involved three German Nationals.⁷⁷ All of the Germans had lived in the United States at one point and all returned to Germany between 1933 and 1941.⁷⁸ All but one was admittedly part of the German Reich.⁷⁹ The one denying he was part of the German Reich lived in the United States since the age of five and claimed he was a United States citizen by naturalization while he was a minor.⁸⁰ The United States government claimed he lost his citizenship with adulthood and chose to align himself with the German Reich; alternatively, the government contended his actions renounced his citizenship.⁸¹

After war was declared by the United States on the German Reich the men received sabotage training near Berlin.⁸² The men then boarded a submarine on the coast of France and sailed to the eastern coast of the United States.⁸³ These men wore German uniforms, and were paid by the German government during their training, and their families were paid while they

⁷⁵ *Id.*

⁷⁶ *Ex Parte Quirin*, 317 U.S. 1 (1942) 317 U.S. 1

⁷⁷ *Id.* at 20

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Quirin*, at 20

⁸² *Id.*

⁸³ *Id.* at 21

were in the United States.⁸⁴ Upon arriving in the United States the men discarded their uniforms and proceeded their operations as if they were civilians.⁸⁵ The men were arrested and the President ordered a military commission to try them for violations of the law of war.⁸⁶ While being detained, prior to the judgement of the commission, the men filed a petition of leave for writ of habeas corpus in federal district court.⁸⁷ These were denied by the District Court.⁸⁸

The Supreme Court faced the underlying question of whether a person detained inside the United States could be tried in a military commission while the civilian courts were still open, thus violating *Milligan*.⁸⁹ To resolve the conflict the court looked at the detainees and determined they were unlawful combatants and not within the realm of *Milligan*.⁹⁰ The court announced,

By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful. The spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war, but to be offenders against the law of war subject to trial and punishment by military tribunal.⁹¹

This distinction between combatant and unlawful combatant hinged on the fact the men were not in uniform at the time the acts were committed.⁹² This laid the groundwork for the court

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Quirin*, at 22

⁸⁷ *Id.* at 23

⁸⁸ *Id.* at 24

⁸⁹ *Milligan*, at 127

⁹⁰ *Quirin*, at 30

⁹¹ *Id.*

⁹² Geneva III art. 4 states:

to take this case out of the *Milligan* requirement of civilian courts.⁹³ The court went on to skirt the issue of outlining the complete boundaries of military tribunals but did find that people designated as belligerents or enemies are within those boundaries and trial by military commission was lawful.⁹⁴

The court also addressed the petitioner's claim that they were entitled to the protections of the Fifth and Sixth amendments of the United States Constitution; particularly the Fifth Amendment's requirement of a grand jury⁹⁵ and the Sixth Amendment's right to trial by a jury.⁹⁶ The Court rejected these arguments, stating: "We cannot say that Congress in preparing the Fifth and Sixth Amendments intended to extend trial by jury to the cases of alien or citizen offenders against the law of war otherwise triable by military commission, while withholding it from members of our own armed forces charged with infractions of the Articles of War punishable by death."⁹⁷ Indeed, this seems the logical conclusion when given the language of the Fifth

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy: (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly...

Geneva III art. 4, *supra* note 37, at 4

⁹³ *Milligan*, at 127

⁹⁴ *Quirin*, at 46

We have no occasion not to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war. It is enough that petitioners here, upon the conceded facts, were plainly within those boundaries, and were held in good faith for trial by military commission, charged with being enemies who, with the purpose of destroying war materials and utilities, entered, or after entry remained in, our territory without uniform-an offense against the law of war. We hold only that those particular acts constitute an offense against the law of war which the Constitution authorizes to be tried by military commission.

Id.

⁹⁵ "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury." U.S. CONST. amend V. However, the same amendment goes on to limit this right, stating: "[e]xcept in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;..." *Id.*

⁹⁶ U.S. CONST. amend VI. "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed..." *Id.*

⁹⁷ *Quirin*, at 44

amendment, "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger...."⁹⁸

The court concluded its discussion about the amendments by stating, "We conclude that the Fifth and Sixth Amendments did not restrict whatever authority was conferred by the Constitution to try offenses against the law of war by military commissions, and that petitioners, charged with such an offense not required to be tried by jury at common law, were lawfully placed on trial by the commission without jury."⁹⁹

(3) *In re Yamashita*¹⁰⁰

This case also arose from the Second World War. The petitioner in this case was the Commanding General of the Fourteenth Army Group of the Imperial Japanese Army.¹⁰¹ After the Japanese surrender to the United States he became a prisoner of war.¹⁰² Lieutenant General Wilhelm Styer, Commanding General of the United States Army Forces, Western Pacific ordered the Judge Advocate General to prepare and serve charges to petitioner for violations of the law of war.¹⁰³ After hearing two hundred and eighty-six witnesses and hearing over three thousand pages of testimony the petitioner was found guilty and sentenced to death by hanging.¹⁰⁴ The petition for habeas corpus set out four claims that the trial was unlawful; (1) the commission did not have jurisdiction because of hostilities had ceased, (2) the commission failed to charge petitioner with a violation of the law of war, (3) the commission did not have

⁹⁸ U.S. CONST. amend V.

⁹⁹ *Quirin*, at 45

¹⁰⁰ *In re Yamashita*, 327 U.S. 1 (1946)

¹⁰¹ *Id.* at 5

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.*

jurisdiction because it allowed otherwise inadmissible evidence, and (4) the commission did not have jurisdiction because it failed to give notice.¹⁰⁵

To the first claim the Court relied upon *Quirin* stating “[T]he Articles of War (10 U.S.C. §§ 1471-1593) recognized the ‘military commission’ appointed by military command, as it had previously existed in United States Army practice, as an appropriate tribunal for the trial and punishment of offenses against the law of war.”¹⁰⁶

As to the contention that the commission was unlawful because of a cessation of arms the Court looked United States history and international practice. The Court reasoned that the termination of military commissions at the time of cessation of arms was not be practical or supported by history.¹⁰⁷ In their words,

The war power, from which the commission derives its existence, is not limited to victories in the field, but carries with it the inherent power to guard against the immediate renewal of the conflict, and to remedy, at least in ways Congress has recognized, the evils which the military operations have produced. See *Stewart v. Kahn*, 11 Wall 493,507.

We cannot say that there is no authority to convene a commission after hostilities have ended to try violations of the law committed before their cessation, at least

¹⁰⁵ *Id.*

The petitions for habeas corpus set up that the detention of petitioner for the purpose of the trial was unlawful for reasons which are now urged as showing that the military commission was without lawful authority or jurisdiction to place petitioner on trial, as follows: (a) That the military commission which tried and convicted petitioner was not lawfully created, and that no military commission to try petitioner for violations of the law of war could lawfully be convened after the cessation of hostilities between the armed forces of the United States and Japan; (b) That the charge preferred against petitioner fails to charge him with a violation of the law of war; (c) That the commission was without authority and jurisdiction to try and convict petitioner because the order governing the procedure of the commission permitted the admission in evidence of depositions, affidavits and hearsay and opinion evidence, and because the commission's rulings admitting such evidence were in violation of the 25th and 38th Articles of War ([10 U. S. C. §§ 1496](#), 1509) and the Geneva Convention (47 Stat. 2021), and deprived petitioner of a fair trial in violation of the due process clause of the Fifth Amendment; (d) That the commission was without authority and jurisdiction in the premises because of the failure to give advance notice of petitioner's trial to the neutral power representing the interests of Japan as a belligerent as required by Article 60 of the Geneva Convention, 47 Stat. 2021, 2051.

Yamashita, at 6

¹⁰⁶ *Id.* at 7

¹⁰⁷ *Id.* at 12

until peace has been officially recognized by treaty or proclamation of the political branch of the Government. In fact, in most instances the practical administration of the system of military justice under the law of war would fail if such authority were thought to end with the cessation of hostilities. For only after their cessation could the greater number of offenders and the principal ones be apprehended and subjected to trial.

No writer on international law appears to have regarded the power of military tribunals, otherwise competent to try violations of the law of war, as terminating before the formal state of war has ended. In our own military history there have been numerous instances in which offenders were tried by military commission after the cessation of hostilities and before the proclamation of peace, for offenses against the law of war committed before the cessation of hostilities.¹⁰⁸

The second claim of the petitioner, that the charge was not a violation of the law of war failed because the Court reasoned that as a military commander the petitioner was responsible for the actions of his subordinates.¹⁰⁹ Petitioner was accused of failing to control the men under his command and allowing those men to commit atrocities against the people of the Philippines.¹¹⁰

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 15 "Hence the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates." *Id.*

¹¹⁰ *Yamashita*, at 13

The charge, so far as now relevant, is that petitioner, between October 9, 1944 and September 2, 1945, in the Philippine Islands, 'while commander of the armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against people of the United States and of its allies and dependencies, particularly the Philippines; and he ...thereby violated the laws of war.

Bills of particulars, filed by the prosecution by order of the commission, allege a series of acts, one hundred and twenty-three in number, committed by members of the forces under petitioner's command during the period mentioned. The first item specifies the execution of "a deliberate plan and purpose to massacre and exterminate a large part of the civilian population of Batangas Province, and to devastate and destroy public, private and religious property therein, as a result of which more than 25,000 men, women and children, all unarmed noncombatant civilians, were brutally mistreated and killed, without cause or trial, and entire settlements were devastated and destroyed wantonly and without military necessity." Other items specify acts of violence, cruelty and homicide inflicted upon the civilian population and prisoners of war, acts of wholesale pillage and the wanton destruction of religious monuments. It is not denied that such acts directed against the civilian population of an occupied country and against prisoners of war are recognized in international law as violations of the law of war. Articles 4, 28, 46, and 47, Annex to the Fourth Hague Convention, 1907, 36 Stat. 2277, 2296, 2303, 2306-7. But it is urged that the charge does not allege that petitioner has either committed or directed the commission of such acts, and consequently that no violation is charged as against him. But this overlooks the fact that the gist of the charge is an unlawful breach of duty by petitioner as an army commander to control the operations of the members of his command by "permitting them to commit" the extensive and widespread atrocities specified. The question then is whether the law of war imposes on an army commander a duty to take such appropriate measures as are within his power to control the troops

The Court looked to the Fourth Hague Convention¹¹¹ and found it to be controlling as to the issue of violating the law of war; which, "These provisions plainly imposed on petitioner, who at the time was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population."¹¹²

The third claim of the petitioner is that the commission allowed evidence that is otherwise inadmissible under the rules of evidence.¹¹³ This claim is based on the 25th and 38th Articles of War.¹¹⁴ These articles allow for the reading of testimony taken by deposition to be

under his command for the prevention of the specified acts which are violations of the law of war and which are likely to attend the occupation of hostile territory by an uncontrolled soldiery, and whether he may be charged with personal responsibility for his failure to take such measures when violations result. That this was the precise issue to be tried was made clear by the statement of the prosecution at the opening of the trial.

Id. at 13

¹¹¹ *Id.* at 15

This is recognized by the Annex to the Fourth Hague Convention of 1907, respecting the laws and customs of war on land. Article 1 lays down as a condition which an armed force must fulfill in order to be accorded the rights of lawful belligerents, that it must be "commanded by a person responsible for his subordinates." 36 Stat. 2295. Similarly Article 19 of the Tenth Hague Convention, relating to bombardment by naval vessels, provides that commanders in chief of the belligerent vessels "must see that the above Articles are properly carried out." 36 Stat. 2389. And Article 26 of the Geneva Red Cross Convention of 1929, 47 Stat. 2074, 2092, for the amelioration of the condition of the wounded and sick in armies in the field, makes it "the duty of the commanders-in-chief of the belligerent armies to provide for the details of execution of the foregoing articles, [of the convention] as well as for unforeseen cases . . ." And, finally, Article 43 of the Annex of the Fourth Hague Convention, 36 Stat. 2306, requires that the commander of a force occupying enemy territory, as was petitioner, "shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Id.

¹¹² *Id.* at 16

¹¹³ *Yamashita*, at 16

¹¹⁴ *Id.* at 18, n.5 "A duly authenticated deposition taken upon reasonable notice to the opposite party may be read in evidence before any military court or commission in any case not capital, or in any proceeding before a court inquiry or military board, . . . Provided, That testimony by deposition may be adducted for the defense in capital cases." *Id.* Article 38 *provides*: "the President may, by regulations, which he may modify from time to time, prescribe the procedure, including modes of proof, in cases before courts-martial, courts of inquiry, military commissions, and other military tribunals, which regulations shall insofar as he shall deem practicable, apply the rules of evidence generally recognized in the trial of criminal cases in the district courts of the United States: Provided, That nothing contrary to or inconsistent with these articles shall be prescribed: . . ." *Id.* at 18, n.6

entered into the record as evidence only if it is introduced by the defense in a capital case,¹¹⁵ and gives the President of the United States the authority to proscribe the procedures, “including modes of proof” for military courts.¹¹⁶ The court viewed these articles as not applicable to the current case or petitioner.¹¹⁷ The court determined that these articles governed courts used against members of our military not an enemy combatant,¹¹⁸ stating:

We think that neither Article 25 nor Article 38 is applicable to the trial of an enemy combatant by a military commission for violations of the law of war. Article 2 of the Articles of War enumerates “the persons ... subject to these articles,” who are denominated, for purposes of the Articles, as “persons subject to military law.” In general, the person so enumerated are members of our own Army and of the personnel accompanying the Army. Enemy Combatants are not included among them.¹¹⁹

The Court further distinguished the current commission from the applicability of the Articles of War because the commission was a “common-law war court.”¹²⁰ Based on this reasoning the Court stated that the Articles of War did not govern a military commission trying an enemy combatant for violations of the common laws of war. The court stated,

By thus recognizing military commissions in order to preserve their traditional jurisdiction over enemy combatants unimpaired by the Articles, Congress gave sanction, as we held in *Ex parte Quirin*, to any use of the military commission contemplated by the common law of war. But it did not thereby make subject to the Articles of War persons other than those defined by Article 2 as being subject to the Articles, nor did it confer the benefits of the Articles upon such persons. The Articles recognized but one kind of military commission, not two. But they sanctioned the use of that one for the trial of two classes of persons, to one of which the Articles do, and to the other of which they do not, apply in such trials. Being of this latter class, petitioner cannot claim the benefits of the Articles, which are applicable only to the members of the other class. Petitioner, an enemy combatant, is therefore not a person made subject to the Articles of War by Article 2, and the military commission before which he was tried, though

¹¹⁵ Yamashita, at 18, n.5

¹¹⁶ *Id.* at 18, n.6

¹¹⁷ *Id.* at 19

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Yamashita*, at 19, n.7. General Crowder, the Judge Advocate General, “A military commission is our common-law war court.” *Id.*

sanctioned, and its jurisdiction saved, by Article 15, was not convened by virtue of the Articles of War, but pursuant to the common law of war. It follows that the Articles of War, including Articles 25 and 38, were not applicable to petitioner's trial and imposed no restrictions upon the procedure to be followed. The Articles left the control over the procedure in such a case where it had previously been, with the military command.¹²¹

Therefore, since this was a trial of an enemy combatant for violations of the common law of war by a military commission, the court found the power to proscribe the procedure and admissibility of evidence in the military commander who convened the commission.

The last claim by the petitioner was that the commission failed because of failure to give proper notice. This claim is based on Article 60 of the Geneva Convention.¹²² However, in a long analysis the court determined that the convention only applied to prisoners of war for offenses committed while a prisoner.¹²³ Thus taking *Yamashita* out of this realm since he was

¹²¹ *Id.* at 20

¹²² *Id.* at 23

¹²³ *Id.* As part of the courts analysis for the admission of evidence they looked at Article 63 of the Geneva Convention and determined it merely applied to Prisoners of War of offenses committed while a prisoner. They expanded this line of thought to the failure of notice argument, stating:

Petitioner further urges that by virtue of Article 63 of the Geneva Convention of 1929, 47 Stat. 2052, he is entitled to the benefits afforded by the 25th and 38th Articles of War to members of our own forces. Article 63 provides: "Sentence may be pronounced against a prisoner of war only by the same courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining Power." Since petitioner is a prisoner of war, and as the 25th and 38th Articles of War apply to the trial of any person in our own armed forces, it is said that Article 63 requires them to be applied in the trial of petitioner. But we think examination of Article 63 in its setting in the Convention plainly shows that it refers to sentence "pronounced against a prisoner of war" for an offense committed while a prisoner of war, and not for a violation of the law of war committed while a combatant. Article 63 of the Convention appears in part 3, entitled "Judicial Suits," of Chapter 3, "Penalties Applicable to Prisoners of War," of § V, "Prisoners' Relations with the Authorities," one of the sections of Title III, "Captivity." All taken together relate only to the conduct and control of prisoners of war while in captivity as such. Chapter 1 of § V, Article 42 deals with complaints of prisoners of war because of the conditions of captivity. Chapter 2, Articles 43 and 44, relates to those of their number chosen by prisoners of war to represent them. Chapter 3 of § V, Articles 45 through 67, is entitled "Penalties Applicable to Prisoners of War." Part 1 of that chapter, Articles 45 through 53, indicate what acts of prisoners of war, committed while prisoners, shall be considered offenses, and defines to some extent the punishment which the detaining power may impose on account of such offenses. n8 Punishment is of two kinds -- "disciplinary" and "judicial," the latter being the more severe. Article 52 requires that leniency be exercised in deciding whether an offense requires disciplinary or judicial punishment. Part 2 of Chapter 2 is entitled "Disciplinary Punishments," and further defines the extent of such punishment, and the mode in which it may be imposed. Part 3, entitled "Judicial Suits," in which Article 63 is found, describes the procedure by which "judicial" punishment may be imposed. The

being tried for offenses committed prior to becoming a prisoner of war, not for offenses committed while a prisoner of war.

The *Yamashita* case held one more important line of reasoning by the Court, the question of whether or not a verdict by a military commission is reviewable by domestic courts other than by a writ of habeas corpus. The court found that they are not,

We also emphasized in *Ex parte Quirin*, as we do here, that on application for habeas corpus we are not concerned with the guilt or innocence of the petitioners. We consider here only the lawful power of the commission to try the petitioner for the offense charged. In the present cases it must be recognized throughout that the military tribunals which Congress has sanctioned by the Articles of War are not courts whose rulings and judgments are made subject to review by this Court. [Citations omitted] They are tribunals whose determinations are reviewable by the military authorities either as provided in the military orders constituting such tribunals or as provided by the Articles of War. Congress conferred on the courts no power to review their determinations save only as it has granted judicial power "to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty." [Citation omitted]. The courts may inquire whether the detention complained of is within the authority of those detaining the petitioner. 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. [Citation omitted]¹²⁴

three parts of Chapter 3, taken together, are thus a comprehensive description of the substantive offenses which prisoners of war may commit during their imprisonment, of the penalties which may be imposed on account of such offenses, and of the procedure by which guilt may be adjudged and sentence pronounced. We think it clear, from the context of these recited provisions, that part 3, and Article 63, which it contains, apply only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war. Section V gives no indication that this part was designed to deal with offenses other than those referred to in parts 1 and 2 of Chapter 3. *Effect of failure to give notice of the trial to the protecting power.* Article 60 of the Geneva Convention of July 27, 1929, 47 Stat. 2051, to which the United States and Japan were signatories, provides that "At the opening of a judicial proceeding directed against a prisoner of war, the detaining Power shall advise the representative of the protecting Power thereof as soon as possible, and always before the date set for the opening of the trial." Petitioner relies on the failure to give the prescribed notice to the protecting power n9 to establish want of authority in the commission to proceed with the trial. For reasons already stated we conclude that Article 60 of the Geneva Convention, which appears in part 3, Chapter 3, § V, Title III of the Geneva Convention, applies only to persons who are subjected to judicial proceedings for offenses committed while prisoners of war. n10

Yamashita, at 20.

¹²⁴ *Yamashita*, at 8

(4) *Madsen v. Kinsella, Warden*¹²⁵

Finally there is the case of *Madsen*. This case established a precedent of trying American citizens by military commissions in certain circumstances. Madsen was a citizen of the United States and wife of a United States Army Officer.¹²⁶ In 1947 she moved to Germany, then occupied by the United States, where her husband was stationed.¹²⁷ In October 1949 she was arrested and charged with the murder of her husband.¹²⁸ She was tried and convicted by the United States Court of the Allied High Commission for Germany, Fourth Judicial District.¹²⁹ She was convicted and sentenced to the Federal Reformatory for Women at Alderson, West Virginia.¹³⁰ Madsen petitioned for a writ of habeas corpus claiming the military commission did not have jurisdiction to try her.¹³¹ The Federal District court rejected this claim and the Court of Appeals affirmed.¹³² The United States Supreme Court accepted the Writ of Certiorari to answer the question of trying an American citizen by a military commission, or in their words

The principal question here is whether a United States Court of the Allied High Commission for Germany had jurisdiction, in 1950, to try a civilian citizen of the United States, who was the dependent wife of a member of the United States Armed Forces, on a charge of murdering her husband in violation of § 211 of the German Criminal Code. The homicide occurred in October, 1949, within the United States Area of Control in Germany. For the reasons hereafter stated, we hold that such court had that jurisdiction.¹³³

Madsen did not dispute her conviction nor did she contend that a civilian court of the United States should have tried her.¹³⁴ She contended that a court martial should have been used

¹²⁵ *Madsen v. Kinsella, Warden*, 343 U.S. 341 (1952)

¹²⁶ *Id.* at 343.

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 343.

¹³⁰ *Madsen*, at 344

¹³¹ *Id.* at 342

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.* at 345

instead of the commission.¹³⁵ The court rejected this argument by an analysis of America's history using military commissions, and the Articles of war.¹³⁶ Particular Article 15, which allows for concurrent jurisdiction, the court stated, "Article 15 thus forestalled precisely the contention now being made by petitioner."¹³⁷

Madsen is important because it shows that under certain circumstances a military commission may try American citizens. In this case it was simplified by the fact that the United States was an occupying power of Germany and had established a military government there. Whether this would necessarily translate to today's situation of American born citizens being tried for violations of war is yet to be seen.

(5) Synthesizing the Rules

From these four cases we can ascertain the overriding constitutional principals that govern the use of military commissions. From *Milligan* it can said that no United States citizen can be tried by a military commission while the civilian courts are open.¹³⁸ But, it can also be implied that this applies to commissions held in the United States because as we saw in *Madsen*

¹³⁵ *Madsen*, at 345

¹³⁶ *Id.* at 350

Finally, in 1916, when Congress did revise the Articles of War so as to extend the jurisdiction of courts-martial to include civilian offenders in the status of petitioner, it expressly preserved to "military commissions, provost courts, or other military tribunals" all of their existing concurrent jurisdiction by adding a new Article which read in part as follows:

"II. COURTS-MARTIAL.

...."

C. JURISDICTION.

....

"ART. 15. NOT EXCLUSIVE. -- The provisions of these articles conferring jurisdiction upon courts-martial shall not be construed as depriving military commissions, provost courts, or other military tribunals of concurrent jurisdiction in respect of offenders or offenses that by the law of war may be lawfully triable by such military commissions, provost courts, or other military tribunals." 39 Stat. 651, 652, 653. n17,

Id.

¹³⁷ *Id.* at 351

¹³⁸ *Milligan*, at 127

a United States citizen can be tried by commission while residing in an occupied area.¹³⁹ This *Milligan* rule is also limited by historical events such as the trial of Louaillier for allegedly violating martial law.¹⁴⁰ Therefore the rule from *Milligan* is best stated as no American citizen shall be tried by a military commission while the civilian courts are open unless the citizen is residing in a militarily occupied area of the United States or in an area under martial law of the United States.¹⁴¹

The *Quirin* case gave us three principles about the use of military commissions.¹⁴² First, there is difference between a prisoner of war and a unlawful combatant.¹⁴³ The Geneva Convention Relative to the Treatment of Prisoners of War governs the treatment of prisoners of war.¹⁴⁴ This convention is specific as to who shall be considered a prisoner of war. If a person does not fall within the definition, then they are some sort of belligerent or unlawful combatant and are not able to avail themselves of the protections of the convention.¹⁴⁵ The court also left the door open to consider an American citizen as a belligerent and, as such, not immune from trial by military commission for the violation of the law of war.¹⁴⁶ Second, the rule set forth in *Milligan* does not apply to non-citizens of the United States.¹⁴⁷ Third, the Fifth and Sixth amendments to the United States Constitution do not apply when using a military commission.¹⁴⁸

¹³⁹ See generally *Madsen*

¹⁴⁰ MacDonnell, *supra* note 1, at 27.

¹⁴¹ This is a restatement of the rules laid down in *Mulligan* and *Madsen* as well as the incorporation of the historical event of General Jackson during the War of 1812. This formulation of the rule is the thought of the author.

¹⁴² See generally *Quirin*

¹⁴³ *Id.* at 30

¹⁴⁴ Geneva III, *supra* note 37, art. 4

¹⁴⁵ *Id.*

¹⁴⁶ *Quirin*, at 37. "Citizenship in the Unites States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war." *Id.*...

¹⁴⁷ See *Quirin* (The court never questioned the use of commissions against non-citizens).

¹⁴⁸ *Quirin* at 45.

In *Yamashita* the court gave us seven important principles for the use of military commissions.¹⁴⁹ One, the power to convene a military commission is inherent in the power of a commander.¹⁵⁰ Two, the cessation of arms does not affect the commander's ability to convene a military commission; if the cessation of arms did block the commander from the use of a military commission then most of the higher enemy command echelon when be immune from their use.¹⁵¹ Three, a commander is responsible for the actions of his subordinates and can be held responsible for their actions.¹⁵² Fourth, the President of the United States has inherent power as commander in chief to proscribe the procedures for the commission even the rules of admissible evidence.¹⁵³ This rule could also be expanded to the commander who has convened the commission.¹⁵⁴ Fifth, the court determined the Articles of War did not apply to enemy combatants in the sense of trial by courts martial.¹⁵⁵ The court also determined that the Articles of War left concurrent jurisdiction over courts martial and military commissions.¹⁵⁶ Sixth, The Geneva Convention did not apply in this case because the court determined it governs only offenses committed while a prisoner of war; not those committed prior to becoming a prisoner.¹⁵⁷ Lastly, the court determined that the judgments of the military are not reviewable by the civilian

¹⁴⁹ *See generally Yamashita*

¹⁵⁰ *Yamashita*, at 11. "An important incident to the conduct of war is the adoption of measures by the military commander, not only to repel and defeat the enemy, but to seize and subject to disciplinary measures those enemies who, in their attempt to thwart or impede our military effort." *Id.*

¹⁵¹ *Id.* at 12.

¹⁵² *Id.* at 16. "[A]n affirmative duty to take such measures as were within his [military commander] power to protect prisoners of war and the civilian population. The duty of a commanding officer has heretofore been recognized..." *Id.*

¹⁵³ *Yamashita*, at 18 n.6

¹⁵⁴ This expansion is based on the inherent power of the commander. It was the President who gave the order to convene the commission in *Yamashita*. However, it was General MacArthur who proscribed the procedures for the commission. *Yamashita*, at 18

¹⁵⁵ *Yamashita*, at 19

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 21

courts, only by the military authorities.¹⁵⁸ They determined to give deference to the operations of the military and the only reviewable aspect of the commission was the detention by writ of habeas corpus.¹⁵⁹ During the habeas corpus hearing the guilt or innocence of the defendant was not an issue but merely the legality of their detention.¹⁶⁰

As already mentioned the *Madsen* case sets a precedent for the trial of American citizens by military commissions and shows one exception of the *Milligan* rule.¹⁶¹ *Madsen* also reinforces the idea of concurrent jurisdiction between military commissions and courts-martial.¹⁶²

In sum, the Court has given these guidelines for the use of military commissions. One, commissions cannot try American citizens while the civilian courts are open.¹⁶³ Two, prisoners of War are treated differently than unlawful belligerents.¹⁶⁴ Three, the *Milligan* rule does not apply to non-citizens of the United States.¹⁶⁵ Four, the Fifth and Sixth Amendments of the United States Constitution does not apply to military commissions.¹⁶⁶ Five, the power to convene a commission resides in the commander.¹⁶⁷ Six, cessation of arms does not eliminate the use of military commissions¹⁶⁸ Seven, a military commander is responsible for the actions of their subordinates.¹⁶⁹ Eight, the President of the United States or the convening commander

¹⁵⁸ *Id.* at 8

¹⁵⁹ *Id.*

¹⁶⁰ *Yamashita*, at 8

¹⁶¹ *See generally Madsen*

¹⁶² *Id.* at 350

¹⁶³ *Milligan*, at 127

¹⁶⁴ *Quirin*, at 30

¹⁶⁵ *See Id.*

¹⁶⁶ *Id.* at 45

¹⁶⁷ *Yamashita*, at 11

¹⁶⁸ *Id.* at 12

¹⁶⁹ *Id.* at 16

proscribes the procedures and rules of the commission.¹⁷⁰ Nine, the Uniform Code of Military Justice (formerly the Articles of War) do not apply to unlawful enemy combatants.¹⁷¹ Ten, the Geneva Convention Relative to the Treatment of Prisoners of War only applies to trials for an offense committed while a prisoner.¹⁷² Eleven, judgements of the commission are only reviewable by military authorities and the civilian courts only look at the legality of the detention under a writ of habeas corpus.¹⁷³

These are the principles that the United States Supreme Court has established for the use of military commissions. Together with the domestic law of the United States and International law the use of military commissions is well established. This comment will now turn to the proposition of trying American citizens for violations of the laws of war by military commissions and will show why international law, domestic law, and prior Supreme Court precedent support this procedure.

III. TRYING AMERICAN CITIZENS BY MILITARY COMMISSIONS

A. *The Rule of Milligan and why it should be overruled*

The ruling in *Milligan* is the only true barrier for trying American citizens. Indeed the subsequent rulings by the Supreme Court have demonstrated a departure from the hard line

¹⁷⁰ *Id.* at 18, n.6

¹⁷¹ *Id.* at 19

¹⁷² *Yamashita*, at 21

¹⁷³ *Id.* at 8

ruling in *Milligan*,¹⁷⁴ and neither the domestic nor international law speaks to forbidding the use of military commissions against a State's own citizens.¹⁷⁵

The rule in *Milligan* is simple; military commissions cannot try American citizens while the civilian courts are open.¹⁷⁶ This is first and foremost the highest hurdle to overcome in using military commissions to try American citizens. This threshold issue is one of life or death, if it cannot be overcome there is not case for using military commissions to try American citizens. Yet, this case was decided one hundred and thirty six years ago.¹⁷⁷ The question then turns to, should *Milligan* be overruled?

The Supreme Court abides by stare decisis,¹⁷⁸ and is reluctant to overrule a prior decision. However, the court has laid out a set of standards to look to when considering overruling a prior decision in the case of *Planned Parenthood v. Casey*.¹⁷⁹ The court stated:

[W]hen this Court reexamines a prior holding, its judgment is customarily informed by a series of prudential and pragmatic considerations designed to test the consistency of overruling a prior decision with the ideal of the rule of law, and to gauge the respective costs of reaffirming and overruling a prior case. Thus, for example, we may ask whether the rule has proven to be intolerable simply in defying practical workability, [Citation omitted] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, *e. g.*, [Citation omitted]

¹⁷⁴ In *Quirin* the court opened the door to Americans losing their citizenship for belligerent acts. The Court also expressed but did not hold that the court would be willing to consider a citizen differently if their acts were belligerent. *Quirin*, at 15.

¹⁷⁵ The UCMJ provides for "concurrent" jurisdiction. 10 U.S.C. §821 (2002). The international conventions only speak to who is a combatant and those who do not fit in the definition are unlawful combatants who do not fall under the conventions. *See Geneva III, supra* note 37, art. 4

¹⁷⁶ *Milligan*, at 127

¹⁷⁷ *Milligan* was decided in 1866, *See Milligan*.

¹⁷⁸ This is the concept of adhering to precedent. The Black's Law Dictionary defines it as "The doctrine of precedent, under which it is necessary for a court to follow earlier judicial decisions when the same points arise again in litigation." BLACK'S LAW DICTIONARY, 1137 (7th ed. 2002). However this concept of stare decisis is not absolute, if it were then the concept of separate but equal would still be law. The court also makes this observation in *Planned Parenthood v. Case*, stating: "[I]t is common wisdom that the rule of *stare decisis* is not an 'inexorable command,' and certainly it is not such in every constitutional case, ..." *Casey, infra* note 160, at 854.

¹⁷⁹ *Planned Parenthood of Southeastern Pennsylvania, et al., Petitioners 91-744 v. Robert P. Casey, et al, etc. Robert P. Casey, et al., Petitioners 91-902 v. Planned Parenthood of Southeastern Pennsylvania et al.*, 505 U.S. 833 (1992)

whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, [Citation omitted] or whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[Citation omitted]¹⁸⁰

In other words the Supreme Court will overrule a prior decision if any of these factors have occurred. One, if the rule has become unworkable by the lower courts.¹⁸¹ Two, if the laws and decisions after the case have abandoned the holding.¹⁸² Third, if the facts have changed so much to remove the justification or significance of the rule.¹⁸³

These guidelines come from a case dealing with substantive due process rights.¹⁸⁴ Are these the same types of rights being dealt with in *Milligan*? Not in the sense that we now know substantive due process rights today. Substantive Due Process rights are traditionally derived from the liberty clauses of the Fifth and Fourteenth Amendments;¹⁸⁵ however, the Fourteenth Amendment was not adopted until 1868,¹⁸⁶ two years after *Milligan* was decided. The court in *Milligan* did look to the due process clause of the Fifth Amendment, stating: “The fifth declares ‘that no person shall be . . .deprived of life, liberty, or property, without due process of law.’”¹⁸⁷ Therefore, the rights examined in the *Milligan* case are in the same line of cases concerning substantive due process rights exposed by the Fifth and Fourteenth Amendment. As such the criteria for overrule prior decisions set fourth in *Casey* should be applied.

1. Has the Rule in *Milligan* become unworkable?

¹⁸⁰ *Id.* at 854

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Substantive due process rights are rights that are not expressly writing in the constitution but have been found in the liberty clause of the fourteenth Amendment to United State Constitution. It is defined as, “The doctrine that the Due Process Clauses of the 5th and 14th Amendment require legislation to be fair and reasonable in content and to further a legitimate governmental objective.” BLACK’S LAW DICTIONARY, 406 (7th ed. 2002).

¹⁸⁵ *Id.*

¹⁸⁶ U.S. CONST. Amend XIV.

¹⁸⁷ *Milligan* at 119

This criterion is one that is one that is disposed of quickly due to the lack of cases involving American citizens since the *Milligan* case.¹⁸⁸ Examples of cases since *Milligan* are the cases of *Quirin*, *In re Territo*, and *Madsen*.¹⁸⁹ However these cases were dealt with quite differently than *Milligan* and none of them raise the same issues as *Milligan*.¹⁹⁰ The rule itself remains in theory workable by the lower courts; however, the Supreme Court has shown that the rule in *Milligan* is applied so narrowly and will not apply to American citizens or claims of American citizenship blindly to make the rule effectively unworkable.¹⁹¹

2. The Court Since *Milligan* have abandoned the rule of *Milligan*

The cases following *Milligan*, which are discussed in section II of this comment, have shown a steady progression away from *Milligan*'s central holding. Starting with *Quirin* the court opened the door for the distinction between unlawful belligerents and prisoners of war.¹⁹² The court also showed that they would not blindly accepted a defendant's claim of United States citizenship.¹⁹³ The court went further by stating it could be possible for a citizen to lose his or her citizenship or effectively nullify their citizenship by an act of an unlawful belligerent.¹⁹⁴ They based this decision on the act being charged, a violation of the law of war, not on the sole basis of citizenship.

Citizenship in the United States of an enemy belligerent does not relieve him from the consequences of a belligerency which is unlawful because in violation of the law of war. Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country

¹⁸⁸ See *Quirin*, See *In re Territo* 156 F.2d 142 (1946), See also *Madsen*

¹⁸⁹ *Id.*

¹⁹⁰ Citizenship did not save the defendants in *Quirin* or *Madsen*. See *Quirin*. See also *Madsen*.

¹⁹¹ *Quirin*, at 37

¹⁹² *Id.* at 30

¹⁹³ In *Quirin* one of the defendants claimed he had been born in the United States and lived here during his early childhood. He moved to Germany with his parents shortly afterwards and became a citizen of Germany as well. *Quirin*, at 20

¹⁹⁴ *Id.* at 37

bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war. [Citation omitted] It is as an enemy belligerent that petitioner Haupt is charged with entering the United States, and unlawful belligerency is the gravamen of the offense of which he is accused.¹⁹⁵

In a similar case arising from the same war as *Quirin*, a Mr. Territo claimed his birth in the United States entitled him to be released from being held as a prisoner of war.¹⁹⁶

When the defeated armies of Mussolini began to retreat Mr. Territo threw off his uniform and began to run to his home.¹⁹⁷ He was captured by an American tank patrol and sent with 50,000 other prisoners of war being held in the United States.¹⁹⁸ He was different from his comrades because he had been born in West Virginia in 1915.¹⁹⁹ In 1920 his father took him to Italy leaving his mother here in the United States.²⁰⁰ His mother did not see him again until 1945 when she was informed he was being held as a prisoner of war only 100 miles from her home.²⁰¹ She contacted a lawyer and Mr. Territo got his day in court.²⁰²

The trial lasted two days.²⁰³ The judge ruled that since Mr. Territo entered the United States as a prisoner of war he would be deported as a prisoner of war.²⁰⁴ The case was appealed with the Ninth U.S. Circuit Court of Appeals affirming the District court, citing that no official treaty had been signed to end the state of war between the two countries.²⁰⁵ Once again the courts refused to abide by the *Milligan* rule or have so narrowly restricted the rule to abandon the

¹⁹⁵ *Id.*

¹⁹⁶ *In re Territo*, 156 F.2d 142 (1946). See also Jess Braven, *How a Ditchdigger for Mussolini plays a role in terror war*, Wall Street Journal, Oct 28 2002 at A1

¹⁹⁷ Braven, *supra* note 194

¹⁹⁸ *Id.*

¹⁹⁹ *Territo*, at 143

²⁰⁰ Braven, *supra* note 194, at A11

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ *Territo*, at 148

central holding of *Milligan*.²⁰⁶ In truth the court relied upon *Quirin*, for the determination of the significance of citizenship.²⁰⁷

In *Madsen* the court relied on the defendant living in an occupied zone of Germany controlled by the United States, thus availing herself to the military law.²⁰⁸ The question of her citizenship was undeniable but the status of living in an occupied area where the civilian courts were closed effectively disqualified her for the *Milligan* rule.²⁰⁹

The central holding of *Milligan* is that a military commission shall try no American citizen while the civilian courts are open.²¹⁰ Yet, consistently this comment has shown that claims of citizenship do not save you from trial by military commission for the violations of the law of war.²¹¹

3. American society has changed since *Milligan*.

Milligan was decided in 1866, over one hundred years ago.²¹² The American society and the world have changed dramatically since that time. At the time of *Milligan* the United States was still a wilderness country with only thirty-six states.²¹³ Since that time the United States has

²⁰⁶ The rule is simple; if you are an American citizen the you are tried by the civilian courts. Yet in both *Quirin* and *Territo* the court did not accept their claim of citizenship or in the alternative considered their actions to have relieved them of that claim. See *Quirin*, See also *Territo*.

²⁰⁷ *Territo*, at 145

²⁰⁸ *Madsen* , at 343

²⁰⁹ *Id.*

²¹⁰ *Milligan*, at 127

²¹¹ See *Quirin*, See *Territo*, See also *Madsen*

²¹² See *Milligan*

²¹³ See Chronological History of the United States at <http://www.geocities.com/Athens/Atrium/1977>, last visited Nov. 15 2002. (On file with the TULSA J. COMP. & INT'L L.)

fought six wars,²¹⁴ emerged from World War II as one of two superpowers, and fought a cold war.²¹⁵

The world has become smaller since 1866 with the developments of cars, planes, computers and the Internet. The resulted globalization has given rise to small groups of people able to rage terror against giant nations.²¹⁶ Beginning in the 1970s the world has seen and lived through the terrorist age. In 1970 five airplanes were hijacked by a group of Palestinians.²¹⁷ In 1972 terrorists attacked the Israeli delegation to the Munich Olympics.²¹⁸ In 1979 Iran took fifty-two American hostages in Tehran; they were not released until 1981.²¹⁹ In 1983 the U.S. Embassy in Beirut was bombed.²²⁰ In 1988 Pan Am flight 103 was bombed over Lockerbie, Scotland.²²¹ In 1995 a federal building in Oklahoma City, Oklahoma was bombed.²²² In 1998 two U.S. Embassies were bombed in Kenya and Tanzania.²²³ Finally, on September 11, 2001 the greatest terrorist attack in the United States history occurred when four planes were hijack; two flown into the twin towers of the World Trade center, one flown into the Pentagon, and one crashed eighty miles outside Pittsburgh.²²⁴

²¹⁴ *Id.* The Spanish-American War in 1898, World War I in 1917, World War II in 1941, the Korean War in 1950, the Vietnam War in 1963, the Persian Gulf War in 1990.

²¹⁵ *Id.*

²¹⁶ See 20th Century History at <http://history1900s.about.com/library/time> , last visited on Nov. 5 2002. (On file with the TULSA J. COMP. & INT'L L.)

²¹⁷ *Id.* at <http://history1900s.about.com/library/time/bltime1970.htm> last visited on Nov. 5 2002. (On file with the TULSA J. COMP. & INT'L L.)

²¹⁸ *Id.*

²¹⁹ History, *supra* note 213

²²⁰ Century, *supra* Note 216, at <http://history1900s.about.com/library/time/bltime1980.htm> last visited on Nov. 5 2002. (On file with the TULSA J. COMP. & INT'L L.)

²²¹ *Id.*

²²² *Id.* at <http://history1900s.about.com/library/time/bltime1990.htm> last visited on Nov. 5 2002. (On file with the TULSA J. COMP. & INT'L L.)

²²³ History, *supra* Note 213

²²⁴ 2001, Infoplease, available at <http://www.infoplease.com/year/2001.html> last visited on Nov. 5, 2002. (On file with the TULSA J. COMP. & INT'L L.)

Have the facts changed since *Milligan*; without a question. Today is a very different world where terrorism is a constant threat and allegiance is not necessarily to your country but to your ideology.

Following the criteria of *Casey*²²⁵ the argument to overrule *Milligan* is this. One, the ruling has become unworkable because of the unclear guidance in which the courts have dealt with it. The holding has become viewed as so narrow that the same circumstances will never again appear.²²⁶ Two, subsequent holdings from the Supreme Court have consistently strayed the holding in *Milligan*.²²⁷ The Court now looks to *Quirin* as controlling.²²⁸ Three, the world and American society is vastly different than that of 1866.

By overruling *Milligan* and officially eliminating the only barrier to trying American citizens by military commissions the country and military would be better equipped to wag the war against terrorism we face today. This comment will not turn to some examples of these strange days that face the nation.

B. *These Strange Days*

1. The “Cajun Taliban”

The recent case of Yasser Hamdi is analogous to *Quirin* and *Territo*.²²⁹ Both cases concern defendants who were captured committing an overt act against the United States,²³⁰

²²⁵ The criteria are: (1) Has the rule become unworkable; (2) Has subsequent cases abandoned the central ruling; (3) have the facts changed significantly to undercut the ruling. *Casey*, at 854

²²⁶ The circumstances of *Milligan* arose from the American Civil War. It is unlikely that such an event would occur again for the same set of facts to appear in front of a court. *Milligan*, at 107

²²⁷ See *Quirin*, See *Territo*, See also *Madsen*.

²²⁸ In both *Territo* and *Hamdi* the court has based its ruling in *Quirin*. *Territo*, at 145. See also *Hamdi*, *infra* note 242

²²⁹ Hamdi was born in Baton Rouge, Louisiana but was taken back to his parents homeland of Saudi Arabia when he was still a toddler. ‘US Citizen’ in *Camp X-Ray*, BBC News available at <http://news.bbc.co.uk/1/hi/world/americas/1910080.stm> last visited on Oct. 15 2002. (On file with the TULSA J. COMP. & INT’L L.) See also *Pentagon: Another American Taliban in custody*, available at

Hamdi was captured in Afghanistan on the field of battle during American military operations.²³¹ American officials claim he holds dual citizenship of the United States and of the Kingdom of Saudi Arabia.²³² He was born in Baton Rouge, Louisiana and was taken to his parent's homeland of Saudi Arabia when he was still a toddler.²³³ His birth in Louisiana has given rise to him being dubbed the "Cajun Taliban."²³⁴

Hamdi was captured in Afghanistan fighting with the Al Qaeda forces during the prison revolt at Mazar-I-Sharif.²³⁵ He has yet to have his day in court and is being held by the military with no access to an attorney.²³⁶ A case has been filed on his behalf with plans of using the *Territo* case a justification to gain Mr. Hamdi's release to the civilian authorities.²³⁷ However, access to the civilian courts gained nothing for Mr. Territo,²³⁸ he was not allowed to stay in the United States and was treated like every other prisoner of war.²³⁹

The *Territo* case presents little help to Hamdi. In truth these cases have cases generally rise from a petition for writ of habeas corpus and as we have seen the courts will only rule upon the legality of the detention not the merits of the case.²⁴⁰ The goal in these habeas petitions is to

<http://www.cnn.com/2002/US/04/03/ret.american.taliban/> last visited on Oct. 15 2002. (On file with the TULSA J. COMP. & INT'L L.)

²³⁰ Quirin was in the United States out of uniform trying to commit sabotage. See *Quirin*. Territo was captured on the battlefield of Italy at the end of World War II. *Territo*, at 143

²³¹ Citizen, *supra* note 229

²³² *Second American Taliban on U.S. soil*, CNN, available at

<http://www.cnn.com/2002/US/04/05/ret.sexond.american.taliban/> last visited on Oct. 15, 2002. (On file with the TULSA J. COMP. & INT'L L.)

²³³ *Id.*

²³⁴ John Donovan, *Enemy Combatants: Is it Right to Deny legal Privileges, Even for U.S. Citizens?* Aug 17, 2002 available at <http://abcnews.go.com/sexotions/nightline/DailyNews/combatants020817.html> last visited on Oct. 15 2002. (On file with the TULSA J. COMP. & INT'L L.)

²³⁵ Citizen, *supra* note 229

²³⁶ Donovan, *supra* note 234

²³⁷ Braven, *supra* note 196 at A11

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Yamashita*, at 8

be released into civilian courts where the merits could be decided with more constitutional safeguards.²⁴¹

A case has been filed on behalf of Mr. Hamdi by his father as next of friend; *Yasser Esam Hamdi v. Rumsfeld*.²⁴² The District court in this case appointed a federal public defender and ordered him to have access to Mr. Hamdi.²⁴³ However the Court of Appeals reversed and remanded the case for further proceedings.²⁴⁴ The Court of Appeals stressed that the District court give deference to the executive branch due to the foreign relations aspects, war powers aspects, and the congressional backing of the actions contested.²⁴⁵ Reasoning that the court has consistently giving this deference in the foreign relations and war powers arena, stating, “In accordance with this constitutional text, [Art. I and II] the Supreme Court has shown great deference to the political branches when called upon to decide cases implicating sensitive matters of foreign policy, national security, or military affairs.”²⁴⁶ This case is still unresolved but demonstrates how unlikely that these detentions, if truly from national security, intelligence, or military operations, will be deemed illegal.

2. The “Dirty” Bomber

The case of Jose Padilla is slightly different. He was arrested in the Chicago.²⁴⁷ Mr. Padilla, an American citizen, was arrested for attempting to construct a radioactive bomb.²⁴⁸ He

²⁴¹ More safeguards in the sense that the Fifth and Sixth Amendments would then apply since *Quirin* ruled they did not apply to military commissions. *Quirin*, at 45

²⁴² *Yasser Esam Hamdi; Esam Fouad Hamdis as next of friend of Yasser Esam Hamdi v. Donald Rumsfeld; W.R. Paulette, Commander*, 296 F.3d 278 (2002)

²⁴³ *Id.* at 279

²⁴⁴ *Id.* at 284

²⁴⁵ *Id.* at 281

²⁴⁶ *Id.* See also U.S. CONST. art. I § 8 and art. II § 2 (These articles contain the shared power over the military).

²⁴⁷ Donvan, *supra* note 234

²⁴⁸ *Id.*

too has yet to have his day in court and has not been given access to an attorney.²⁴⁹ This type of conduct by the government has brought some criticism.

ABC news interviewed Lawrence Tribe, a professor of constitutional law at Harvard Law School, who stated “It bothers me that the executive branch is taking the amazing position that, just on the president’s say so, an American citizen can be picked up not just in Afghanistan but at O’Hare Airport or on the streets of any city in this country and locked up without access to a lawyer or court just because the government says he’s connected somehow with the Taliban or al Qaeda...”²⁵⁰ However, as in the *Yamashita* case the court has consistently held that the procedures for trial and admissibility of evidence rests with the commander.²⁵¹ In a time of war the decisions of the commander are vital and the use of commissions and/or detentions of belligerents reside in him.²⁵²

Jan Ting, a professor of law at Temple University, who was also interviewed by ABC News, gives the counter to Mr. Tribe’s argument.²⁵³ He stated, “They [Hamdi and Lindh] should have been treated like all other enemy belligerents and detained either in Afghanistan, or in U.S. The reason that we detain these individuals, even without bringing criminal charges, is because we don’t want them going back out onto the battlefield and committing additional belligerent acts against us.”²⁵⁴

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Yamashita*, at 18, n.6

²⁵² MacDonnell, *supra* note 1, at 22

²⁵³ Donovan, *supra* note 234

²⁵⁴ *Id.*

In both these cases [Hamdi and Padilla] the defendants have or are trying to gain access to the Federal District by a writ of habeas corpus.²⁵⁵ By doing so the Courts have consistently restrained their judgment to the legality of the detention.²⁵⁶ However, with the recent cases of Hamdi and Padilla even that process may be limited.²⁵⁷ Then when the case of John Walker Lindh is added it becomes more unclear as to how to handle the cases.²⁵⁸

3. The First “American Taliban”

Lindh was the first American captured fighting for the Taliban.²⁵⁹ However, he was not taken to Camp X-Ray in Guantanamo Cuba.²⁶⁰ Instead he was flown to Virginia where U.S. Prosecutors quickly convened a grand jury.²⁶¹ The grand jury produced an indictment and the case was set in the federal District Court.²⁶² However, before the case could go to trial, or even raise any of these issues concerning Mr. Hamdi or Mr. Padilla, Lindh entered into a plea

²⁵⁵ *Hamdi*, at 279

²⁵⁶ *Yamashita*, at 8

²⁵⁷ Mr. Hamdi’s case has already been in Federal District court and the Court of Appeals. It is now on remand back to the District Court to determine if the habeas procedure is proper or deference should be given to the political branches of government. *Hamdi*, at 284

²⁵⁸ See Adam Liptik, *Traces of Terror: Government Strategy—Legal analysis; Accord suggest U.S. prefers to avoid to courts*, New York Times, July 16 2002 available at <http://query.nytimes.com/search/article-page.html?res=9A02EED61739F935A25754C0A9649C8B63> last visited on Nov. 23, 2002. (On file with the TULSA J. COMP. & INT’L L.)

²⁵⁹ Profile, *supra* note 53. See also *The case of the Taliban American*, CNN.com available at <http://www.cnn.com/CNN/Programs/People/shows/walker/profile.html> last visited on Oct. 15 2002. (On file with the TULSA J. COMP. & INT’L L.)

²⁶⁰ Taliban American, *supra* note 259. See also Indictment, *infra* note 262

²⁶¹ Taliban American, *supra* note 259

²⁶² The indictment charged Mr. Lindh with ten counts: Conspiracy to Murder U.S. Nationals (18 U.S.C. § 2332(b))(Count One); Conspiracy to provide Material Support & Resources to Foreign Terrorist Organizations (18 U.S.C. Defendant) § 2339B)(Count Two & Four); providing Material Support & Resources to Foreign Terrorist Organizations (18 U.S.C. §§2339B) & 2) (Count Three & Five); Conspiracy to Contribute Services to al Qaeda (31 C.F.R. §§595.205 & 595.204 & 50 U.S.C. § 1705(b)) (Count Six); Contributing Services to al Qaeda (31 C.F.R. §§595.205 & 595.204 & 50 U.S.C. § 1705(b)) (Count Seven); Conspiracy to Supply Services to the Taliban (31 C.F.R. §§ 545.206(b) & 545.204 & 50 U.S.C. § 1705(b)) (Count Eight); Supplying Services to the Taliban (31 C.F.R. §§545.204 & 545.206 (a), 50 U.S.C. § 1705(b) & 18 U.S.C. §2) (Count Nine); Using and Carrying Firearms and Destructive Devices During Crimes of Violence (18 U.S.C. §§924(c) & 2) (Count Ten) United States of American v. John Phillip Walker Lindh, available at <http://www.usdoj.gov/ag/2ndindictment.htm> last visited on Oct. 15 2002

agreement and received a twenty-year sentence.²⁶³ The question becomes why was Lindh given his day in court while Mr. Hamdi and Mr. Padilla have not.

Some commentators suggest it was just a matter of time.²⁶⁴ Mr. Lindh was found first and there was no question as to his citizenship.²⁶⁵ The others were found later with questionable or weaker links to American citizenship.²⁶⁶ The timing suggests that the later cases were viewed as “[m]ilitary, suggesting that the government may now view ordinary trials as more trouble than they are worth.”²⁶⁷

It is unclear why these cases have been treated differently, and perhaps the timing of the cases do play a role. When the first, Lindh, was captured the country was in shock and involved in a new war.²⁶⁸ The government was not ready for the unlikely capture of an American and reacted quickly with the civilian institutions.²⁶⁹ The others were found later when the Bush Administration seemed more footed for the war they were waging and surer of the powers they wanted.²⁷⁰ Regardless of the anomaly of Mr. Lindh’s case the argument remains that Americans can and should be tried by military commissions for violations of the law of war.

IV. CONCLUSION

In today’s world the line between enemy and friend is unclear. The modern war such as the one the United States is waging against terrorism is a metamorphic enemy changing with

²⁶³ Katharine Q. Seelye, *Regretful Lindh Gets 20 years in Taliban Case*, New York Times Oct. 5, 2002, available at <http://query.nytimes.com/search/restricted/article?res=F93F5F0C768CDDA90994> last visited on Nov. 23 2002. (On file with the TULSA J. COMP. & INT’L L.)

²⁶⁴ Liptik, *supra* note 258

²⁶⁵ *See Profile, supra* note 53

²⁶⁶ *Second American, supra* note 232

²⁶⁷ Liptik, *supra* note 258

²⁶⁸ *Profile, supra* note 53

²⁶⁹ *See id.*

²⁷⁰ *See President, supra* note 11

every minute. They are groups of people not subservient to any nation.²⁷¹ In these circumstances the identity of an enemy is hard to fit into one box. American citizens may well become involved in such terrorist activities as in the case of John Walker Lindh.²⁷² His involvement, although he states it was not against Americans, in a war or jihad with the enemy caused him to take up arms against his own nation.²⁷³

Mr. Lindh claimed he was fighting because of the atrocities committed by the Northern Alliance against women and children.²⁷⁴ He claims he did not join to fight Americans and that he did not know and does not support Osama bin Laden's jihad against the United States.²⁷⁵ This defense of ignorance does not go far considering this was a student of Islam studying in Yemen and Pakistan for nearly a year prior to his joining Al Qaeda.²⁷⁶ Osama bin Laden openly declared a Fatwah²⁷⁷ to kill Americans in 1996.²⁷⁸ How could a student of Islam in the Middle East not know whom Bin Laden was fighting?

Mr. Lindh's adjudication by civilian courts was a mistake. It was a mistake that the government is not willing to make again in the cases against Mr. Hamdi and Mr. Padilla.²⁷⁹ In the time of war decisions to use military detention and commission for unlawful combatants rests

²⁷¹ Al Qaeda is an organization ran by Osama bin Laden; not an arm of the Taliban government. *Bin Laden, millionaire with a dangerous grudge*, CNN, available at <http://cnn.allpolitics.p.../cpt?actions-cpt&expire=1&urlID=956995&fb=Y&partnerID=200> last visited on Nov. 10, 2002. (On file with the TULSA J. COMP. & INT'L L.)

²⁷² Profile, *supra* note 53

²⁷³ He was charged and admitted to openly carrying weapons for the Al Qaeda network. See Indictment, *supra* note 262. See also, 'I made a mistake by joining the Taliban' Apologetic Lindh gets 20 years, Washington Post, Oct. 5, 2002. available at http://n13.newsbank.com/n1-search/we/Archives?p_actions=doc&p_docid=0F67B08A2BF4 last visited on Nov. 23, 2002. (On file with the TULSA J. COMP. & INT'L L.)

²⁷⁴ Excerpts from statement by John Walker Lindh in Court, New York Times, Oct. 5 2002, available at <http://query.nytimes.com/search/restricted/article?res=F60C1EFB3F5F0C768CDDA9099> last visited on Nov. 23, 2002. (On file with the TULSA J. COMP. & INT'L L.)

²⁷⁵ *Id.*

²⁷⁶ *Id.*

²⁷⁷ A fatwah is a religious ruling. Bin Laden, *supra* note 271.

²⁷⁸ *Id.*

²⁷⁹ See President, *supra* note 11

solely in the hands of the commanders.²⁸⁰ The only rule against using them to try American citizens was that of *Milligan* decided in 1866.²⁸¹ This rule is an archaic throwback to a simpler time and culture. The courts have consistently strayed and undermined this rule in their more recent decisions.²⁸² The governing ruling of *Quirin* should guide the courts in today's society and the question of citizenship should take back seat to the question and acts of belligerency.²⁸³

In all cases following *Quirin* the court has looked to it as the pinnacle case; not *Milligan*.²⁸⁴ Mr. Hamdi, Mr. Padilla, and any other person, American citizen or not, should be tried by the military for the overt acts of war against the United States that violate the international law of war. As the Court of Appeals reasoned in *Hamdi* great deference is accorded to the political branches of government, especially the executive, dealing with foreign affairs, national security, and military operations.²⁸⁵

The Bush administration's approach of designating belligerents as enemy combatants²⁸⁶ is correct and supported by domestic law, international law, and Supreme Court precedent. The statutes governing the jurisdiction of courts martial and military commissions allow for 'concurrent' jurisdictions.²⁸⁷ Customary international law fully supports the commanders' ability to use military commissions.²⁸⁸ The governing precedent of *Quirin* looks to the act of belligerency not to citizenship.²⁸⁹ *Quirin* also held that the Fifth and Sixth amendments do not

²⁸⁰ *Yamashita*, at 12

²⁸¹ *See Milligan*

²⁸² *See Quirin, See Territo, See Madsen, See also Hamdi*

²⁸³ *Quirin*, at 37. *See also Hamdi*

²⁸⁴ *Territo*, at 145

²⁸⁵ *Hamdi*, at 281

²⁸⁶ President, *supra* note 11

²⁸⁷ 10 U.S.C. §821 (2002)

²⁸⁸ MacDonnell, *supra* note 1, at 22

²⁸⁹ *Quirin*, at 37

apply to enemy combatants.²⁹⁰ For all these reasons military commissions are a proper venue to try anyone deemed to be an enemy combatant regardless of their citizenship.

A person who openly takes up arms against the United States or tries to commit some act of terrorism with links to a terrorist organization deserves to be treated as the “holy warrior” they believe they are and that is by the military. For soldiers the issue is simple. There is no distinction between citizenship. Indeed the oath of enlistment makes it clear an enemy is an enemy:

I, [Name] do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform code of Military Justice. So help me God.²⁹¹

²⁹⁰ *Quirin*, at 45

²⁹¹ U.S. Dep’t of Defense, DD form 4/3(May 88)