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Military Commissions Throughout U.S. History

Constitutional problems with the Bush (and now Obama) military commissions were accurately explained by Chad DeVeaux of Western State University Law School:

> Such commissions, which may most accurately be categorized as "Article II courts," deviate widely from civilian courts. Ordinarily inviolate procedural protections are disregarded. Juries are denied. The right of appellate review is circumscribed. The universal common-law prohibition against the admission of hearsay, even multiple hearsay, and un-sworn evidence is not honored. Most critically, the structural independence enjoyed by Article III courts and even state jurists is wholly absent. Military commissions are inquisitorial in nature. Military judges and even the commission members themselves fall within the direct chain of command of the President and his proxies and ultimately depend on favorable reviews from these superiors for promotion and career advancement.

Congress has twice authorized the President to create military commissions, passing laws in 2006 and 2009, but the bodies have come under increasing criticism from civil libertarians for alleged lack of legal safeguards. Some have even claimed that military commissions are unconstitutional on their face, but the truth is almost as complex as the history of military commissions in America. Military commissions in the United States began before the colonies became a nation, drawing heavily from British common law and Parliament's "Mutiny Acts" in the late 1600s, which traditionally authorized military commissions for the trial of uniformed soldiers for crimes.

American War for Independence

Military commissions during the American war for independence weren't called "military commissions," but they took place nonetheless. American patriot and spy Nathan Hale was hanged without a trial by British General William Howe in 1776, as spies caught in the act needed no trial under British law at the time (though the British signed the 1899 Hague convention guaranteeing spies trials). But George Washington sometimes gave accused spies the benefit of a proper trial — and sometimes not. Upon capturing Benedict Arnold's British handler — Major John André — out of uniform, Washington

condemned him to death after a "Board of General Officers," following the rules of military courts-martial, had recommended death by hanging. Washington's Board of General Officers was an advisory board only, as international law of war at that time did not guarantee spies a trial. Washington also sent about 20 spies to formal courts-martial for trial, so his record on the matter is not consistent — even though it was consistent with British common law that preceded the U.S. Constitution.

War of 1812 and Seminole War (1819)

During the War of 1812, the U.S. government ordered no formal military commissions. But under his own volition, Andrew Jackson (pictured above), after taking control of New Orleans in 1814, declared martial law, suspended *habeas corpus*, and censored the press. Jackson repelled the British in the most lopsided battle of the war, achieving almost 100-1 casualty rates in the Battle of New Orleans. The battle began two weeks after the war formally ended, but news of the peace treaty from Ghent, Belgium, had not reached New Orleans by the time of the battle. After the battle and the British withdrawal, State Legislator Louis Louaillier wrote anonymously in a newsletter that martial law should be lifted. Jackson found out Louaillier's identity and had him arrested and held without trial. When U.S. District Court Judge Dominick Hall ordered Louaillier released on *habeas corpus* grounds, Jackson had the federal judge arrested too.

Though Jackson's second in command, Brigadier General Edmund Gaines, doubted Jackson's authority to create the military commissions, for some reason Jackson put him in charge of the commissions. The commission acquitted Louaillier, a verdict Jackson protested; and Jackson's dictatorial actions subsequently earned a sharp rebuke from President James Madison's Secretary of War, Alexander J. Dallas, who wrote to Jackson:

> In the United States there is no authority to declare and impose Martial law, beyond the positive sanction of the Acts of Congress. To enforce the discipline and to ensure the safety, of his garrison, or his camp, an American Commander possesses indeed, high and necessary powers; but all his powers are compatible with the rights of the citizens, and the independence of the judicial authority. If, therefore, he undertakes to suspend the writ of *Habeas Corpus*, to restrain the liberty of the Press, to inflict military punishments, upon citizens who are not military men, and generally to supercede the functions of the civil magistrate, he may be justified by the law of necessity, while he has the merit of saving of his country, but he cannot resort to the established law of the land, for the means of vindication.

Jackson was fined $1,000 for insubordination, but the popular general later lobbied Congress to reimburse him, which it did, earning Jackson his "vindication."

When Jackson invaded Spanish Florida with a militia in 1818 pursuing Creek and Seminole tribes, he summarily executed two Creek leaders and held a military commission trying British soldiers who were accused of stirring up the native tribes against American settlers. The bloodthirsty Jackson confirmed the "advisory" death sentence of one commission and overruled another (which had recommended a whipping) to condemn the second British officer to death. Many in Washington were outraged over the act, but Jackson was too popular for Congress to formally condemn him.

Mexican-American War

The term "military commissions" was first coined in the United States during the aftermath of the Mexican-American War as General Winfield Scott, the American commander in occupied Mexico, struggled to stop rampant crime and looting in Mexico, where he had eliminated the only government in

place. Scott set up military commissions to settle criminal issues among both American soldiers and militiamen, who were plundering Mexicans, and among Mexican civilians, who were plundering each other. He also convened "councils of war" to adjudicate more serious war crimes. The military commissions tried more than 400 individuals, about three-quarters of whom were Americans, and the councils of war tried 21 men, mostly Mexicans.

Scott ordered the military commissions to mirror the procedures set up by the congressionally enacted military courts-martial used to judge U.S. military personnel stateside. The commanding general pleaded military necessity as the rationale for creating the bodies, as Congress had not passed any law respecting enforcement of law in an occupied country. Without the commissions, Scott argued, anarchy would ensue.

The U.S. Supreme Court unanimously condemned Gen. Winfield Scott's 1847 military commissions in Mexico a couple of years later in the case of *Jecker v. Montgomery* (1851), proclaiming that "neither the President nor any military officer can establish a court in a conquered country, and authorize it to … administer the laws of nations." The *Jecker* court went on to characterize the military tribunals as bodies of military necessity rather than judicial bodies: "The courts established or sanctioned in Mexico during the war by the commanders of the American forces were nothing more than the agents of the military power, to assist it in preserving order in the conquered territory and to protect the inhabitants in their persons and property while it was occupied by the American arms. They were subject to the military power and their decisions under its control whenever the commanding officer thought proper to interfere. They were not courts of the United States, and had no right to adjudicate."

Civil War

Soon after the Civil War began, President Abraham Lincoln unconstitutionally suspended *habeas corpus* (later made constitutional by the acquiescence of Congress, which is authorized by the Constitution to suspend *habeas corpus* in times of war or rebellion). Lincoln also suspended freedom of the press, closing down some 300 newspapers in the North that had either expressed sympathy for Southern independence or had criticized Lincoln's harsh suppression of the Bill of Rights.

In addition to Lincoln's crimes against the Constitution, the war against secession also produced a cash crunch for the federal government, and it delayed gold payments to the Dakota Indians as part of a treaty to purchase 90 percent of the current state of Minnesota from the Dakotas. Facing starvation and bankruptcy from loss of both their lands and income, the Dakotas rebelled in 1862 and claimed their land back in a violent rampage. American military officials put down the justifiable Dakota rebellion and held sham military commission trials. The Dakota military commissions convicted 323 Dakota Indians, handing the death sentence to 303. The judicial process included the trial and sentencing of as many as 42 in a single day. Lincoln ordered a review of many of the sentences and, in the face of the massive and obvious injustice, demanded that no death penalty be carried out without his explicit approval.

Lincoln's suspension of the freedom of the press did not prevent everyone in the North from speaking out against the war, so the President had General Ambrose Burnside issue General Order #38 on April 13, 1863, which ordered the trial by military commission of anyone who had the "habit of declaring sympathies for the enemy," followed by death. Within weeks of the implementation of General Order #38, retiring Ohio Congressman Clement Vallandigham was arrested and put on trial. The Ohio Democrat, who had lost a reelection attempt in 1862, bitterly criticized Lincoln's suppression of rights clearly enumerated in the Constitution, but he hadn't elicited any specific sympathy for Southern independence. Lincoln's military commission, which — unlike Scott's Mexican commissions — contained

none of the ordinary civilian protections, sentenced Vallandigham to two years imprisonment for uttering "disloyal statements."

Vallandigham's sentence was later commuted to banishment to the Confederacy by Lincoln. Vallandigham appealed his case to the U.S. Supreme Court, but the court demurred in 1864 on technical grounds. The court ruled that because military commissions could not be considered courts or judicial bodies, they were in fact Article II "courts," and the judicial power of the United States under Article III of the U.S. Constitution could not hear an appeal from a military commission.

Likewise, a military commission in 1865 convicted Maryland Congressman Benjamin G. Harris for harboring two paroled Confederate soldiers in his home. Harris denied the charges, but was convicted anyway and sentenced to three years in prison and given a lifetime ban on serving in public office. But shortly after his conviction by the military commission, President Andrew Johnson found that evidence had tended to vindicate Harris and commuted the sentence. Harris subsequently returned to Congress, and no court appeal was needed in his case.

The Supreme Court finally issued a clear ruling on military commissions in the case of *Ex Parte Milligan* in 1866, which was a full-blown rebuke of the pretended authority of the President to deny Americans a trial by jury during a time of conflict. In that case, Lambdin P. Milligan and four co-conspirators were accused in 1863 of plotting to steal guns from a federal armory and to liberate Confederates in Indiana prisoner-of-war camps. Milligan and his compatriots were convicted and sentenced to death by a military commission in 1864, but execution was delayed until after the war while Milligan — a civilian — appealed his case to the U.S. Supreme Court on *habeas corpus* grounds. The Supreme Court ruled that with a functioning civil court system in Indiana, the federal government could not create a new court and infringe on the judicial power of the United States under Article III of the U.S. Constitution. The court ruled in *Ex Parte Milligan* that "martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction."

But even the clear ruling of the Supreme Court in the *Milligan* case was muddied by a Congress insistent upon imposing military rule in the South after the Civil War. Congress responded to Milligan with the Reconstruction Act of 1867, which prohibited the Supreme Court from deciding cases on military commissions, based on the congressional power to limit the appellate jurisdiction of the Supreme Court (Article III, Section 2). The Supreme Court ruled in the case of *Ex Parte McCardle* that, because of the Reconstruction Act, it had no jurisdiction to free William McCardle. McCardle was a Mississippi newspaper editor and former confederate sergeant who had used his newspaper to agitate against federal reconstruction legislation, and had been sentenced to prison by a military commission.

Spanish-American War

After the war against Spain, the United States was left with new colonial possessions, especially Puerto Rico and the Philippines. The United States faced a bloody guerrilla war for independence (partly by a Muslim minority) in the Philippines between 1899 and 1902, where terrible atrocities were committed by both sides (including waterboarding by the Americans, then called the "water cure"). The U.S. government instituted many military commission trials during the insurgency, both for U.S. personnel and for rebels, but the United States used regular rules of evidence in civilian trials almost exclusively. Then, as now, military courts-martial — that is, the ordinary military legal system — used virtually identical rules of evidence as the civilian system.

World War II

World War II marked the first time since the Civil War when a President created a military commission that would remove most of the civil-liberties protections guaranteed by the U.S. Constitution from those accused of war crimes. And like Lincoln, President Roosevelt made no exemption for U.S. citizens. Eight Nazi spies and saboteurs came ashore on Long Island, New York, and Ponte Vedra Beach, Florida, in early 1942, four at each location. All eight had lived in the United States and been trained as saboteurs by the Nazis. One of the eight, Herbert Hans Haupt, was a U.S. citizen. One man in each landing had second thoughts and went to the FBI, foiling both plots. President Roosevelt created a military commission out of thin air, appointing the military judges, banning appeals (other than to himself), changing the rules of evidence, and making a two-thirds vote (rather than unanimity required in courts-martial and civilian courts) necessary for a death sentence.

When an appeal to the Supreme Court was made known to Roosevelt — a flagrant challenge to his executive order — Roosevelt made it clear he would ignore the law and any ruling by the courts. "I want one thing clearly understood, Francis," Roosevelt told Attorney General Francis Biddle, according to Biddle's memoirs. "I won't hand them over to any United States marshal armed with a writ of *habeas corpus*." Justice Harlan Stone was apparently visibly shaken when Roosevelt's intentions were revealed to the court.

The Supreme Court — faced with a choice of making a moral stand for the U.S. Constitution and becoming politically irrelevant or agreeing with executive dictatorship during war and keeping the mere appearance of remaining relevant — chose the latter. The court ruled 8-0 in the case of *Ex Parte Quirin* that the President had the authority to create a military commission under Congress' declaration of war and that "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 justices delayed publishing their decision until months after the executions of six of the defendants had already taken place. (The two informants had received prison sentences). Several Supreme Court justices — including Felix Frankfurter and Robert Jackson — later expressed regret that they had participated in the decision. But the *Quirin* case remains the most-cited case as a precedent for the Bush and Obama military commissions.

After the war, the Supreme Court heard several cases about international war crimes tribunals, such as *Eisentranger v. Johnson* and *In re Yamashima*, but as with the Nuremberg trials, the court denied it possessed jurisdiction because the U.S. government did not technically have custody of the accused. All of the defendants were being held by a four-nation coalition that included the militaries of the United States, the U.K., France, and the Soviet Union.

Bush and Obama Administrations

After the September 11 attacks, President George W. Bush sought to impose military commissions of his own to punish alleged terrorist accomplices. His efforts were struck down by the U.S. Supreme Court in the 2006 decision of *Hamdan v. Rumsfeld*.

When Congress went to Bush's aid and passed the Military Commissions Act of 2006, the Supreme Court struck down that law as unconstitutional in the 2008 decision *Boumediene v. Bush* because the law did not conform with the procedural requirements of the U.S. Constitution's Fifth and Sixth Amendments. The court did not uphold the military commissions' ban on *habeas corpus* appeals to

civilian courts (and lack of an adequate substitute). Implied (but not stated) in the 5-4 decision was that military tribunals must have rules of evidence (and an appeals process) similar to ordinary criminal courts and courts-martial to be constitutional.

President Obama had voted against the Military Commissions Act of 2006 as a Senator and intimated during the 2008 election cycle that he opposed military commission trials for defendants accused of terrorism. But Obama publicly favored military commissions in 2009. Congress responded to Obama's about-face by passing the Military Commissions Act of 2009 into law. The Military Commissions Act of 2009 offers a few more procedural protections than the Bush courts, but all of the major objections outlined by DeVeaux at the beginning of this survey apply to the Obama military commissions, except for judicial review, which is allowed on appeal to the Court of Appeals for the District of Columbia and Supreme Court. Obama's military commissions continue to allow "secret evidence" — where the defense counsel is not allowed to see where the prosecution has obtained evidence — hearsay evidence, denial of juries, and judges whose promotions are based upon decisions the President and military brass favor.

As DeVeaux explains, the historic case for military tribunals (with the exception of Quirin) was based upon the total absence of civilian and ordinary military courts-martial:

> The principle underlying all these tribunals is the need to convene local courts to try local offenses. The Constitution does not compel authorities in remote locales to transport defendants, witnesses, and evidence across distant seas to the United States for trial whenever a crime has been committed. This principle is particularly compelling in the case of military commissions, at least as traditionally organized. Historically, military officers empaneled commissions to conduct trials in the theatre of war itself where the very witnesses, usually soldiers, might be called upon at any moment to restore the peace or repel invaders.

That's not the case today, however. DeVeaux points out that "where, as in the case of Guantanamo, the Government has voluntarily chosen to transport accused offenders thousands of miles from the war zone, the strictures of the separation of powers should apply in full force." U.S. history demonstrates that the military commission may sometimes be necessary in a situation of prolonged anarchy and looting, but that there's no constitutional justification for creating military commissions in today's "war on terrorism." Indeed, arguments for military commissions in today's political climate are flat-out attacks against the U.S. Constitution.

Graphic: Andrew Jackson

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Military Commissions: Rights of Accused Terrorists Under Bush, Obama