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Recommended Citation

Timothy C. MacDonnell, Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts, Army Law., Mar. 2002, at 19.

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Military Commissions and Courts-Martial: A Brief Discussion of the Constitutional and Jurisdictional Distinctions Between the Two Courts

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On 13 November 2001, President George W. Bush signed Military Order 222, authorizing the trial of non-U.S. citizens for war crimes by military commission.[1] Since the signing of that order, a contentious debate has raged over the possible use of military commissions to try suspected terrorists. As part of that debate, the media has used various terms to describe the proposed military commissions. They have called them "Secret Military Trials,"[2] "Military Tribunals,"[3] and "U.S. Military Court[s]."[4] A Cable News Network internet story described military commissions as "essentially a courts-martial, or a military trial, during a time of war."[5] This quotation illustrates the underlying misperception that military commissions and courts-martial are the same.[6] They are not.

In fact, substantial differences exist between military commissions and courts-martial. Although both courts have existed since the beginning of the United States, they have existed for different purposes, based on different sources of constitutional authority, and with different jurisdictional boundaries. These differences can affect who may order a trial, who may be tried, what types of cases the court can hear, and the pretrial, trial, and appellate procedures applied in a particular case.

This article examines two of the major distinctions between military commissions and courts-martial: the constitutional authority to create each court and their respective jurisdictional limitations. Due to the complicated constitutional and jurisdictional issues presented by military commissions, as compared to the relatively straightforward courts-martial, this article is devoted primarily to discussing this generally misunderstood court.

Section I: Constitutional Authority for Courts-Martial and Military Commissions

Most illustrative of the distinction between military commissions and courts-martial is the constitutional authority for the creation of these two courts. The Supreme Court has held, "Congress and the President, like the courts, possess no power not derived from the Constitution."[7] Thus, no branch of the government may convene a court without some source of authority from the Constitution. This section identifies and contrasts the constitutional authority for the creation of military commissions and courts-martial, and discusses the significance of these differences.

Courts-Martial

The Constitution vests Congress with the authority to create courts-martial and establish rules for their operation. This power is derived from Article I, section 8, clause 14 of the Constitution, which states: "The Congress shall have Power . . . To make Rules for the Government and Regulation of the land and naval Forces."[8] Congress first exercised its authority under Article I, section 8, in 1789, when it expressly recognized the then existing Articles of War and made them applicable to the Army.[9] In 1950, Congress dramatically revised the Articles of

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1. Military Order 222, Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833 (Nov. 13, 2001).

2. Neil King, Jr., *Bush's Plan to Use Tribunal Will Hurt U.S. in Human-Rights Arena, Some Say*, WALL ST. J., Nov. 27, 2001, at A-2.

3. Mona Charen, *Presidential Power and Military Tribunals*, WASH. TIMES, Nov. 26, 2001, at A-17.

4. Dennis Byrne, *Can They Get a Fair Trial?; Sweet Justice in a U.S. Military Court*, CHI. TRIB., Nov. 19, 2001, at 23.

5. Kevin Drew, *Tribunals Break Sharply from Civilian Courts*, CNN.com/LAWCENTER (Dec. 7, 2001), *at* http://www.cnn.com/2001/LAW/12/06/inv.tribunals.explainer/index.html.

6. *See generally* William Glaberson, *A Nation Challenged: The Law; Tribunal v. Courts-Martial: Matter of Perception*, N.Y. TIMES, Dec. 2, 2001, at B-6 (describing the misperception and the reaction of former military attorneys to the misperception).

7. *Ex parte* Quirin, 317 U.S. 1, 25 (1942).

8. U.S. CONST., art. I, § 8.

9. *See* WILLIAM WINTHROP, MILITARY LAW AND PRECEDENTS 23 (2d ed., 1920 reprint).

War, creating the Uniform Code of Military Justice (UCMJ).[10] Through the UCMJ, Congress established courts;[11] defined their jurisdiction;[12] identified crimes;[13] delegated authority to create pre-trial, trial, and post-trial procedures;[14] and created an appellate system.[15]

Military Commissions

Although the constitutional authority for courts-martial is easy to identify, the power to establish military commissions is not. Military commissions are a recognized method of trying those who violate the law of war,[16] but the power to create them lies at a constitutional crossroad. Both Congress and the President have authority in this area.[17] Congress's authority lies in Article I, section 8, clauses 1, 10, 11, 14, and 18.[18] Particularly given Congress's authority "to define and punish Piracies and Felonies committed on the high seas, and Offense against the Law of Nations,"[19] there is little question that Congress could, under appropriate circumstances, establish a military commission.

Presidential Authority

The more controversial question concerns the President's authority to establish military commissions based upon his Article II powers. The President's authority regarding commissions is derived from Article II, section 2, clause 1, of the Constitution, which states, "The President shall be Commander in Chief of the Army and Navy of the United States."[20] The President's power to appoint a military commission without an express grant of that authority from Congress is inherent to his role as the Commander in Chief of the armed forces. This argument has support from the UCMJ, international law, and Supreme Court precedent.

Statutory Authority

While the UCMJ discusses military commissions,[21] it does not specifically grant the President the authority to create military commissions.[22] Instead, Articles 18 and 21, when taken together, recognize the jurisdiction of military commissions to try violations of the law of war, and articulate Congress's intent that the UCMJ not preempt that jurisdiction. Article 18 grants courts-martial the authority to try anyone suspected of committing war crimes, including civilians. It states: "[g]eneral courts-martial . . . have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[23] Article 21 expresses Congress's intent not to interfere with the existing jurisdiction of military commissions over war crimes:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other 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.[24]

If the UCMJ and other statutes do not vest the President with the authority to create military commissions, that authority, if it

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10. 10 U.S.C. §§ 801-946 (2000). The UCMJ is a comprehensive collection of statutes that are the skeleton and much of the flesh of today's military justice system.

11. UCMJ art. 16 (2000).

12. *Id.* arts. 2-3, 17-21.

13. *Id.* arts. 77-134.

14. *Id.* art. 36.

15. *Id.* arts. 59-76.

16. Winthrop, *supra* note 9, at 831; *see In re* Yamashita, 327 U.S. 1, 10 (1946); *Ex parte* Quirin, 317 U.S. 1, 27 (1942).

17. *Quirin*, 317 U.S. at 26.

18. U.S. Const. art. I, § 8, cls. 1, 10-11, 14, 18.

19. *Id.* art. I, § 8, cl. 10.

20. *Id.* art. II, § 2, cl. 1.

21. *See* UCMJ arts. 18, 21, 28, 36-37, 47-50, 58 (arguably), 104, 106 (2000).

22. *See id.*

23. *Id.* art. 18.

24. *Id.* art. 21.

exists, must be inherent to the President as Commander in Chief of the military.

Critical to this position is the concurrent jurisdiction language of Article 21. Given the significance of this Article, it bears further discussion. Article 21 was enacted in 1950 as part of the original UCMJ, and was derived verbatim from Article of War 15.[25] Perhaps because Article 21 was a wholesale adoption of Article of War 15, there was little discussion of it in the legislative history of the UCMJ.[26] Thus, to understand the intent of Article 21, it is necessary to examine the legislative history of Article of War 15.

Article of War 15 came into existence as part of the 1916 revisions to the Articles of War.[27] The chief proponent of Article 15 was Major General Enoch H. Crowder, the Judge Advocate General of the U.S. Army between 1911-1923.[28] General Crowder testified before the House of Representatives and the Senate on the necessity of Article 15. General Crowder described the military commission as a "common law of war" court.[29] He pointed out that the "constitution, composition, and jurisdiction of these courts have never been regulated by statute,"[30] but "its jurisdiction as a war court has been upheld by the Supreme Court of the United States."[31] General Crowder argued that Article 15 was necessary to make clear that expansion of courts-martial jurisdiction did not preempt the jurisdiction of military commissions.[32] General Crowder concluded his testimony before the Senate by stating that Article 15 would insure that military commissions would "continue to be governed as heretofore by the laws of war rather than statute."[33]

General Crowder's testimony before Congress supports the argument that Article of War 15, and thus Article 21 of the UCMJ, is a recognition of the jurisdiction of military commissions to try alleged violations of the laws of war. By recognizing the jurisdiction of military commissions without an express statutory grant of authority, Congress has effectively acknowledged the constitutional authority of the President to convene commissions.

Customary International Law

Although customary international law cannot bestow upon the President any authority he does not already possess through the Constitution, it can help to explain what powers are generally considered inherent to military command. International law recognizes the authority of a nation, and in particular, military commanders, to try war criminals by military commission.[34] Military courts have been used to try violators of the laws of war from medieval times,[35] including the American Revolutionary War,[36] the Mexican American War,[37] the Civil War,[38] and World War II.[39] Besides the United States, Great Britain,[40] Germany,[41] France,[42] Italy,[43] the Soviet Union,[44] Australia, the Philippines,[45] and China have all used military commissions to try individuals accused of war crimes.[46]

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25. H.R. Doc. No. 81-491, at 17 (1949); S. Rep. No. 81-486, at 13 (1949).

26. The House and Senate hearings discussed military commissions, however, the discussion focused on little more than defining the meaning of the term "military commission." The House and Senate reports mention commissions, but only indicate that military commissions have been recognized by the Supreme Court and that Article 21 is derived from Article of War 15.

27. *Revision of the Articles of War, Hearing on H.R. 23,628 Before the House Comm. on Military Affairs*, 62d Cong. 35 (May 21, 1912) (statement of Brigadier General Enoch H. Crowder, Judge Advocate General, U.S. Army) [hereinafter Crowder Testimony]; Revision of the Articles of War, S. Rep. No. 63-229, at 53 (1914).

28. Jonathan Lurie, Arming Military Justice 47 (1992).

29. *Id.* at 35.

30. *Id.*

31. Revision of the Articles of War, *supra* note 27, at 53.

32. *Id.* General Crowder argued that Article 15 was necessary because proposed changes to the Articles of War would give jurisdiction to courts-martial to try "persons subject to military law." *Id.* If courts-martial jurisdiction was expanded to included "persons subject to military law," then courts-martial, in addition to military commissions, would have jurisdiction over those who violate the laws of war. General Crowder urged that without Article 15, the question would arise whether Congress had ousted the jurisdiction of military commissions. *Id.*

33. *Id.* at 35.

34. Wigfall Green, *The Military Commission*, 42 Am. J. Int'l L. 832, 832 (1948).

35. Harold Wayne Elliott, Trial and Punishment of War Criminals 46 (1998) (unpublished S.J.D. dissertation, University of Virginia) (on file with author).

36. Green, *supra* note 34, at 832.

37. Winthrop, *supra* note 9, at 832.

38. *Id.* at 833.

During the twentieth century, when the international community joined together to try war criminals, it relied upon the jurisdictional authority of military courts as the platform for its trials. After World War I, the allies demanded that Germans suspected of committing war crimes be turned over for trial before a military court.[47] After World War II, over ten nations took part in the International Military Tribunals in the Far East.[48] The Tribunals in the Far East were provided for in the Potsdam Declaration and convened by order of General Douglas McArthur, the Supreme Commander of Allied Powers.[49] The international war crimes trials at Nuremberg were military tribunals. Although France, Great Britain, the United States, and the Soviet Union agreed upon the trials in the London Agreement of 8 August 1945, military officers signed the orders that actually established the International Military Tribunal,[50] and the trials were before military courts.[51]

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 commander 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.

Supreme Court Precedent

The Supreme Court confirmed the President's inherent authority to establish military commissions. The Court discussed this authority in three landmark cases. In *Ex parte Quirin*[52] and *In re Yamashita*,[53] the Court acknowledged that both the President and Congress have authority regarding military commissions, but neither case defines the President's authority to establish military commissions in the absence of an express grant from Congress.[54] The Court took this further step in *Madsen v. Kinsella*,[55] concluding that absent congressional action to the contrary, the President has the authority as Commander in Chief to create military commissions.[56]

Perhaps the most well-known case regarding military commissions, *Ex parte Quirin* involved the trial of eight German soldiers who had infiltrated the United States in 1942 with the intent to sabotage war facilities.[57] After being captured, the soldiers were tried before a military commission in accordance

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

40. Winthrop, *supra* note 9, at 831 n.64; Howard S. Levie, Terrorism in War: The Law of War Crimes 105 (1993).

41. Levie, *supra* note 40, at 20.

42. *Id.* at 19.

43. *Id.* at 119.

44. *Id.* at 127.

45. *Id.* at 176.

46. *Id.* at 177.

47. *Id.* at 26-27. Although the Germans were never turned over, the fact that the Allies intended to try the Germans before a military court supports the position that international law recognizes the jurisdiction of military courts to try war criminals. *Id.*

48. United States and Ten Other Nations v. Araki and Twenty-Seven Other Defendants, Transcripts of the International Japanese War Crimes Trials, vol. I, 1 (1946) (on file with the U.S. Army Judge Advocate General's School, Charlottesville, Virginia).

49. *Id.* at 105-06, 123.

50. I Trials of War Criminals Before the Nurenberg Military Tribunals Under Control Council Law No. 10, 1946-1949; Trials of War Criminals Before the Nurenberg Military Tribunal, vol. 1, The Medical Case, XVI (1949); Military Government—Germany, United States Zone, Ordinance No. 7, Feb. 17, 1947.

51. John A. Appleman, Military Tribunals and International Law 12 (1954).

52. 317 U.S. 1 (1942).

53. 327 U.S. 1 (1946).

54. *Quirin*, 317 U.S. at 29; *Yamashita*, 327 U.S. at 10.

55. 343 U.S. 72 (1952).

56. *Id.* at 348.

57. *Quirin*, 317 U.S. at 21.

with an order from President Franklin D. Roosevelt. The government charged the saboteurs with violating the law of war; Article of War 81, relieving intelligence to the enemy; and Article of War 82, spying. The saboteurs were also charged with conspiracy to violate Articles 81 and 82.[58] The petitioners filed a writ of habeas corpus in federal court, and the Supreme Court heard the writ on an expedited review. The proceedings before the military commission were suspended pending the Supreme Court's ruling.[59]

The petitioners in *Quirin* claimed that the President's order appointing a military commission was without constitutional or statutory authority. The Court disagreed, principally on statutory grounds. Although the Court discussed the President's constitutional authority regarding military commissions, it stated that "[i]t is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation. For here Congress has authorized trial of offenses against the law of war before such commissions."[60] Pointing to several Articles of War, the Court ruled that Congress had authorized military commissions by recognizing their jurisdiction and authorizing the President to establish rules for their conduct.[61]

Although the *Quirin* Court did not resolve to what extent the President had the authority to appoint military commissions, it set the stage for the case that eventually would. In *Quirin*, the Court discussed the President's constitutional role in the creation of military commissions. The Court pointed out that "the Constitution . . . invests the President, as Commander in Chief, with the power to wage war which Congress has declared."[62] It also observed, "An important incident to the conduct of war is the adoption of measures by the military commander . . . to seize and subject to disciplinary measures those enemies who in their attempt to thwart or impede our military effort have violated the law of war."[63] Thus, when the President is executing a military action specifically authorized by Congress, he is permitted to create military commissions incident to the execution of that military operation.[64]

The Court's conclusions and reasoning in *Quirin* regarding the President's authority to appoint military commissions were echoed in *In re Yamashita*.[65] *Yamashita* involved the prosecution of General Tomoyuki Yamashita, the Commanding General of the Imperial Japanese Army in the Philippines. General Yamashita was tried and convicted by military commission for violations of the law of war in connection with his command of the Fourteenth Japanese Army Group.[66]

One of General Yamashita's allegations of error was that the commission that tried him was not lawful.[67] In answering this question, the Court reiterated its position in *Quirin* that Congress, through Article 15, had recognized the authority of military commanders to try violations of the law of war at a military commission.[68]

Based on this premise, the only question left to the Court regarding the lawfulness of the commission was whether it had been properly convened. The Court found that the President

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58. *Id* at 23.

59. *Id.* at 20.

60. *Id.* at 29.

61. *Id.* at 26.

62. *Id.*

63. *Id.* at 28.

64. *Id.* The *Quirin* Court stated:

> By his [the President's] Order creating the present commission he has undertaken to exercise the authority conferred upon him by Congress and also such authority as the Constitution itself give the Commander in Chief, to direct the performance of those functions which may constitutionally be performed by the military arm of the nation in time of war.

Id. Some may argue that the President's authority in *Quirin* to create a military commission was critically linked to Congress's declaration of war. The Court gave no indications, however, that Congress's declaration of war carried with it any greater significance than an authorization to conduct a military action that was something less than war. This issue is discussed at length by Professor Curtis A. Bradley and Jack L. Goldsmith in an upcoming article entitled *The Constitutional Validity of Military Commissions*, 5 Green Bag 2d (forthcoming Spring 2002). Bradley and Goldsmith point out in that article: "A congressional declaration of war is not necessary in order for the President to exercise his independent or statutorily-delegated war powers." *Id.*

65. 327 U.S. 1 (1946).

66. *Id.* at 5.

67. *Id.* at 6.

68. *Id.* at 7.

had directed General Yamashita be tried by military commission and the commission itself was convened by order of General Wilhelm D. Styer.[69] General Styer was Commanding General of the U.S. Army Forces in the Western Pacific, which included the Philippines. The Philippines was the location where the petitioner had committed his offenses, surrendered, was detained pending trial, and where the military commission was conducted.[70] Based on these facts, the Court concluded, "[I]t . . . appears that the order creating the commission for the trial of [the] petitioner was authorized by military command, and was in complete conformity to the Act of Congress sanctioning the creation of such tribunals."[71] Thus, the Court found it unnecessary to discuss the President's authority regarding military commissions in any greater detail then it had in *Quirin*.

Seven years after *Yamashita*, the Supreme Court decided *Madsen v. Kinsella*,[72] and resolved the question of the President's inherent authority to create military commission. The *Madsen* case came to the Supreme Court through a petition for a writ of habeas corpus submitted by Mrs. Yvette J. Madsen. In 1950, a military commission convicted Mrs. Madsen, a native-born U.S. citizen, of murdering her husband, a lieutenant in the U.S. Air Force, in their military quarters in Frankfurt, Germany. Mrs. Madsen was tried before a military commission in the American Zone of Occupied Germany.[73]

Madsen made a number of jurisdictional attacks on the military commission that convicted her. Among the errors alleged were that: (1) Madsen should have been tried by a courts-martial rather than a military commission, (2) the commission lacked jurisdiction over the offenses for which Madsen was tried, and (3) the commission itself was unconstitutional.[74] The Court rejected each of these claims, stating, "[i]n the absence of attempts by Congress to limit the President's power, it appears that, as Commander in Chief of the Army and Navy of the United States, he may, in time of war, establish and prescribe the jurisdiction and procedure of military commissions."[75] The Court emphasized that Congress had made no attempt to limit the President's power regarding commissions. Rather than attempting to limit the President's authority to appoint military commissions, Congress recognized and sanctioned this authority in Article of War 15.[76]

In *Madsen* the Supreme Court clarified an issue that hung conspicuously unanswered in *Quirin* and *Yamashita*. Both *Quirin* and *Yamashita* emphasized that Congress and the President had authority in the area of military commissions, but the Court did not articulate the extent of the President's authority.[77] In *Madsen*, the Court resolved the issue, concluding that, absent congressional action to the contrary, the power to create military commissions is inherent in the President as Commander in Chief.

The shared power to create military commissions is unusual in a government predicated on the necessity of a separation of powers; it lies in what Justice Jackson called "a zone of twilight in which [the President] and Congress may have concurrent authority."[78] Although this authority appears to be concurrent, it is not equal. The President's authority to establish military commissions is subject to Congress's power to limit that authority."[79] This hierarchy of power is logical given that the Constitution expressly grants Congress the authority to create military commissions,[80] while the President's authority must be implied from his role as Commander in Chief of the armed forces.[81]

This brief examination of constitutional authority for the creation of courts-martial and military commissions demonstrates that these two types of courts are fundamentally different. The authority to create courts-martial jurisdiction rests with Congress alone. The Constitution vests in Congress alone the authority to create rules and regulations for the governance of the armed forces. In contrast, the authority to create military commissions is vested in both Congress and the President.

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69. *Id.* at 11.

70. *Id.* at 10.

71. *Id.* at 11.

72. 343 U.S. 341 (1952).

73. *Id.* at 343.

74. *Id.* at 342.

75. *Id.* at 348.

76. *Id.* at 354.

77. *Ex parte* Quirin, 317 U.S. 1, 26 (1942); *In re* Yamashita, 327 U.S. 1, 7 (1946).

78. Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635 (1952).

79. *Madsen*, 343 U.S. at 348.

80. U.S. Const. art. I, § 8.

Based on the UCMJ's legislative history, international law, and Supreme Court precedent, this shared authority arises from military commissions' function as a tool for the execution of war.

Section II: Jurisdiction of Courts-Martial and Military Commissions

In addition to a distinctly different source of constitutional authority, the respective jurisdictions of military commissions and courts-martial are also different. Jurisdiction is a fundamental issue in every case. No criminal trial may proceed unless the court conducting the trial has jurisdiction over the person being tried and the subject matter in issue.[82] The fact that the jurisdiction of courts-martial overlaps with military commissions in some areas may contribute to the misconception that courts-martial and military commissions are one in the same. To remove any confusion and to highlight the differences between the two courts, this section will discuss and describe the jurisdiction of courts-martial and military commissions.

Courts-Martial

The UCMJ establishes personal jurisdiction for courts-martial at Articles 5 and 17. Article 17 states that "[e]ach armed force has courts-martial jurisdiction over all persons subject to this chapter,"[83] and Article 5 states that this jurisdiction "applies to all places."[84] This general grant of jurisdiction can be exercised at three levels of courts-martial: general, special, or summary. Articles 18, 19, and 20 define the jurisdictional limitations of these courts. The main distinction between these courts is the maximum punishment each is authorized to impose.[85] The UCMJ authorizes general courts-martial to impose "any punishment not forbidden by [the Code], including the penalty of death,"[86] while special and summary courts martial punishments are considerably more limited.[87]

The phrase "persons subject to this chapter" appears in Articles 17 through 20, and describes the individuals over whom courts-martial jurisdiction may be exercised. Article 2 of the UCMJ defines this phrase as including individuals in the military on active duty,[88] members of the National Guard and Reserves in certain circumstances,[89] enemy prisoners while in custody,[90] retired service members,[91] and individuals accompanying a military force in times of war.[92] In addition to individ-

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81. Congress has exercised its authority regarding defining and punishing violations of the law of nations by, among other actions, authorizing the trial of violations of the law of war at courts-martial or military commission. By expressly recognizing the jurisdiction of military commissions in Article 21, UCMJ, and authorizing the President to prescribe rules for their conduct in Article 36, UCMJ, Congress has provided express authorization for the commissions. As noted by Justice Jackson in *Youngstown Sheet*: "When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate." 343 U.S. at 635.

82. *See, e.g.*, United States v. Baucum, 80 F.3d 539, 540 (D.C. Cir. 1996), *cert. denied*, 519 U.S. 879 (1996); United States v. Verdugo-Urquidez, 939 F.2d 1341, 1344 (9th Cir. 1999), *vacated on other grounds*, 508 U.S. 1201 (1992).

83. UCMJ art. 17 (2000).

84. *Id.* art. 5.

85. *Id.* arts. 18-20. In addition to distinctions in the maximum punishment each court is authorized to impose, there are due process and composition differences as well. As the maximum punishment a soldier is exposed to decreases so does the process due. For example, all contested general courts-martial must go through an Article 32 investigation before being brought to trial, while special and summary courts-martial do not. *Id.* art. 32. The minimum number of panel members necessary to create a quorum at a general court-martial is five, at a special it is three, while summary courts-martial are presided over by one officer. *Id.* art. 16.

86. *Id.* art 18.

87. *Id.* arts. 18-20. According to UCMJ article 19, special courts-martial may impose no punishment greater than a bad conduct discharge, one year in confinement, hard labor without confinement for three months, and two-thirds forfeiture of pay for one year. *Id.* art. 19. This jurisdiction has been further limited by the President, as authorized by Congress, in Rule for Courts-Martial (R.C.M.) 201(f)(2)(B)(i). MANUAL FOR COURTS-MARTIAL, UNITED STATES, R.C.M. 201(f)(B)(i) (2000) [hereinafter MCM]. Summary court-martial jurisdiction is discussed in UCMJ article 20. The maximum punishment at a summary court-martial is confinement for one month, hard labor without confinement for forty-five days, restriction for two months, and forfeiture of two-thirds pay for one month. UCMJ art. 20. Neither a special nor a summary courts-martial may impose the death penalty, dismissal, or a dishonorable discharge. *Id.* arts. 19-20.

88. *Id.* arts. 2(a)(1)-(2).

89. *Id.* arts. 2(a)(3), (5)-(6).

90. *Id.* art. 2(a)(9).

91. *Id.* art. 2(a)(4).

92. *Id.* arts. 2(a)(10)-(11). Article 2 also defines "persons subject to this chapter" as including "persons in custody of the armed forces serving a sentence imposed by a courts-martial" and people occupying an area which the United States has leased, reserved, or otherwise acquired which is outside the United States, the Canal Zone, Puerto Rico, Guam, and the Virgin Islands. *Id.* art. 2.

uals described in Article 2, general courts-martial have personal jurisdiction over those accused of violating the laws of war. Article 18 provides that "[g]eneral courts-martial . . . have jurisdiction to try any persons who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."[93]

Besides describing the three levels of courts-martial, Articles 18, 19, and 20, also describe the subject-matter jurisdiction of those courts. Each court has jurisdiction to try "any offense made punishable by this chapter."[94] Articles 77 through 134 describe the offenses that are made punishable by the UCMJ. General courts-martial also have the added subject-matter jurisdiction over any violation of the laws of war that could be tried at a military commission.[95]

Military Commissions

Because court-martial jurisdiction is established by statute, it is a relatively simple task to read the statute and understand who can be tried for what crimes by courts-martial. This task is more complex with military commissions. To determine the jurisdiction of military commissions, three zones of jurisdiction must be considered: customary international law, international treaties, and the Constitution. These three zones of jurisdiction must be considered and laid over one another to determine the jurisdiction of military commissions.

Jurisdictional Limitations Imposed by Custom and History

Military commissions have been used throughout American and international history. These courts have not always been called military commissions; before the term military commission came into use they were called courts-martial, courts of inquiry, or special courts-martial.[96] From the historical use of these commissions, customary international law regarding their jurisdiction can be discerned. The jurisdictional boundaries of these tribunals have evolved and been refined, arguably to accommodate the changing nature of warfare. This evolution and refinement is illustrated particularly well in U.S. history.

As explained by General Crowder in his testimony before Congress, and by the Supreme Court in *Ex parte Quirin*, *In re Yamashita*, and *Madsen*, U.S. military commissions have drawn their jurisdiction to try cases from customary international law.[97] (General Crowder and the Supreme Court often used the term "international common law" when referring to what is more commonly referred to as "customary international law.") Therefore, a historical examination of the evolution and refinement of American military commissions reflects the evolving nature of customary international law.

The United States has used military commissions since before the ratification of the Constitution[98] and as late as 1950 in occupied Germany.[99] Customary international law, Supreme Court precedent, and U.S. history indicate that three distinct types of military commissions have been used: martial law courts, military government courts, and war courts.[100] Each type of military commission has unique jurisdictional characteristics. Martial law courts refer to courts established by a military commander whose forces have occupied a particular area within the United States and displaced the civil government. Military government courts are the same as martial law courts, except they are established either outside of the United States or in areas within the United States in a state of rebellion. Finally, war courts are established by military commanders strictly for the purpose of trying violations of the laws of war.[101]

American Commissions in Their Infancy

One of the first and most famous military commissions in the United States, the trial of Major John André, was a war court. André, the Adjutant General to the British Army in North America, was captured after meeting with Major General Benedict Arnold in September 1780.[102] At the meeting, General Arnold gave André copies of the defense plans for the military post at West Point.[103] André still possessed the plans at the

93. *Id.* art. 18.

94. *Id.* arts. 18-20.

95. *Id.* art. 18.

96. WINTHROP, *supra* note 9, at 831-32; WINTHROP SERGENT, THE LIFE OF MAJOR ANDRE 347 (1871).

97. Madsen v. Kinsella, 343 U.S. 341, 346 (1952); *In re* Yamashita, 327 U.S. 1, 20 (1946); *Ex parte* Quirin, 317 U.S. 1, 30 (1942); Crowder Testimony, *supra* note 27.

98. WINTHROP, *supra* note 9, at 831-32.

99. *See, e.g.*, *Madsen*, 343 U.S. at 341.

100. *See* MCM, *supra* note 87, pt. I, ¶ 2. Part I, paragraph 2 of the *MCM* describes military jurisdiction. The *MCM* lists four distinct areas within military jurisdiction: military law, martial law, military government, and the law of war. *Id.*

101. *Id.*

102. SERGENT, *supra* note 96, at 347.

time of his capture. General George Washington ordered Major André tried for the offense of spying. A military commission found André guilty and sentenced him to death.[104]

Although the trial of Major André was controversial, this was not due to jurisdictional issues. The jurisdiction to try enemy soldiers for war crimes at a military commission was well established by 1780. Indeed it would be difficult for the British to claim that the trial ordered by General Washington lacked jurisdiction, given Britain's use of a less formal proceeding to find Nathan Hale guilty and execute him four years earlier for the same offense.[105]

A more controversial use of a military commission occurred when General Andrew Jackson ordered the trial of a non-military U.S. 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.[106] Jackson prepared the city for a siege, and to that end, he established curfews and pass policies.[107] Individuals found in violation of Jackson's curfew or pass policy 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.[108] 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.[109]

Jackson's actions drew widespread criticism throughout New Orleans. One of Jackson's critics was Louis Louaillier, a member of the Louisiana Legislature. Louaillier wrote an editorial in a local newspaper declaring that the continued state of martial law was inappropriate and unnecessary.[110] Jackson ordered that Louaillier be arrested and tried by military commission for a number of offenses, including espionage and inciting mutiny.

An attorney who witnessed Louaillier's arrest filed a petition for a writ of habeas corpus on behalf of Louaillier in federal court. Louaillier's attorney claimed the military court had no jurisdiction over his client since Louaillier was a civilian. Federal judge Dominick A. Hall granted the writ, and ordered Louaillier be presented to his court the next day. Jackson, who was an attorney by trade, refused to honor the court order, and had Hall arrested on a charge of aiding and abetting and exciting mutiny.[111] A military commission tried Louaillier, but he was not found guilty of any charge. The commission determined it did not have jurisdiction to try Louaillier for six of the seven charges in the case. As to the seventh charge—espionage—the commission found Louaillier not guilty. Jackson refused, however, to accept the findings of the commission, and placed Louaillier back into confinement.[112]

Shortly after the military commission acquitted Louaillier, news that Britain and the United States had signed a peace treaty finally reached New Orleans. Upon receiving notice of the peace agreement, General Jackson lifted the state of martial law. Jackson also ordered the release of Louaillier and all the other individuals whom he had ordered arrested based on violations of martial law.[113]

Judge Hall wasted little time in issuing an order for Jackson to show cause why he should not be held in contempt of Judge Hall's earlier order to release Louaillier. General Jackson made a number of responses to the court's show cause order, but they were all rejected. The court found Jackson in contempt and ordered him to pay a $1000 fine as punishment. Judge Hall effectively summarized the case of *United States v. Jackson* by stating: "The only question was whether the Law should bend to the General, or the General to the Law."[114]

The declaration of martial law in New Orleans and the trial of Louis Louaillier, along with the subsequent contempt proceedings against Jackson in federal court, are historically valu-

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103. Robert Hatch, Major John Andre 243-48 (1986).

104. Sergent, *supra* note 96, at 347. The convening order from Washington tasked the court to examine whether "[h]e came within our lines in the night on an interview with Major General Arnold, and in assumed character; and was taken within our lines, in a disguised habit, with a feigned name, and with the enclosed papers concealed upon him." *Id.*

105. Hatch, *supra* note 103, at 68-69.

106. Lurie, *supra* note 28, at 12.

107. Marquis James, Andrew Jackson: The Border Captain 226 (1933).

108. *Id.* at 244.

109. *Id.* at 275.

110. *Id.* at 282.

111. Lurie, *supra* note 28, at 12.

112. James, *supra* note 107, at 283.

113. *Id.*

able for two reasons. First, Jackson's use of martial law and a military court to try Louaillier provides one of the first examples of a martial law court being used in the United States to try a non-military U.S. citizen. Second, the trial of Louis Louaillier illustrates one of the most fundamental jurisdictional issues in the area of military commissions in the United States: when may a military commission be used against a U.S. civilian? This question, raised by the events of 1815, arose again in 1866, 1946, and in 1952 with varying results.[115]

The trials of Major André and Louis Louaillier are examples of American military commissions in their infancy. They demonstrate that as early as 1780 and 1815, the United States had employed military commissions as both war courts and martial law courts. Although these early cases establish the United States had used military commissions in the Revolutionary War and the War of 1812,[116] it was not until the Mexican-American War and the Civil War that the United States employed military commissions on a large scale.[117] It was also during these larger conflicts that the distinction between military government courts, martial law courts, and war courts achieved greater clarity.

Mexican-American War

During the Mexican-American War in 1847, the U.S. Army occupied large sections of Mexico. General Winfield Scott, the commander of those occupied areas, declared a state of martial law and suspended the authority of the civil government. Individuals who committed crimes in those occupied areas could be brought to one of two kinds of military courts: a military commission or a council of war. In 1847, these two military courts were generally alike, except for their names and the type of cases they heard. Military commissions were essentially military government courts. They were used to try individuals for crimes that would normally be brought before a civilian criminal court during peacetime. Councils of war were war courts. They were used to try violations of the law of war.[118]

During the Mexican American War the jurisdictional limitations of military commissions began to crystallize.[119] Both military government courts and war courts faced territorial and temporal limitations to their subject-matter jurisdiction. 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.[120] Additionally, the trial itself had to be conducted within a theater of war.[121] These jurisdictional limitations are arguably still in place today, but the meaning of the term "theater of war" has evolved.

Civil War

The Civil War and the subsequent four years entail the most extensive use of military commissions in U.S. history. The government conducted over 4000 military commissions during the war[122] and 1435 more between 1865 and 1869.[123] 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.[124] Functioning as war courts, martial law courts, and military government courts, respectively, each type of military court was called a military commission.[125]

One of the most controversial uses of military commissions during the Civil War stemmed from President Lincoln's 24 September 1862 declaration of a state of limited martial law throughout the country.[126] Lincoln's proclamation authorized the use of military commissions to try U.S. civilians in areas that were not in a zone of occupation or under insurrection, and

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114. *Id.* at 286.

115. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); Duncan v. Kahanamoku, 327 U.S. 304 (1946); Madsen v. Kinsella, 343 U.S. 341 (1952).

116. Winthrop, *supra* note 9, at 832.

117. *Id.* at 832-34.

118. Winthrop, *supra* note 9, at 832.

119. *Id.* at 837.

120. *Id.* at 836-37.

121. *Id.* at 836.

122. Mark Neely, The Fate of Liberty: Abraham Lincoln and Civil Liberties 168 (1991).

123. *Id.* at 176.

124. *Id.* at 168.

125. Winthrop, *supra* note 9, at 832.

suspended the writ of habeas corpus for anyone confined by military authorities.[127] The use of military commissions in this context was so questionable that at least one military commission declared that it did not have jurisdiction to try U.S. civilians outside of a zone of occupation or insurrection.[128] Others, like noted law of war scholar Francis Lieber, believed the commissions proper, arguing that because the whole country was at war, the whole country was within the theater of war.[129]

Some might argue that the Supreme Court resolved this debate in 1866 when it decided *Ex parte Milligan*.[130] In *Milligan*, the Court ruled that military commissions lacked the jurisdiction to try U.S. civilians when the civil courts were still in operation. The Court also held that the authority to use military commissions could not arise "from a threatened invasion."[131] Rather, "the necessity must be actual and present" and the jurisdiction was limited to "the locality of actual war."[132] The majority in *Milligan* based this ruling not just on an interpretation of the Constitution, but also on the traditions of England.[133]

Despite the Supreme Court's strongly worded denunciation of military commissions, the scope of the Court's ruling in *Ex parte Milligan* was surprisingly limited. The only jurisdictional limitation placed on military commissions by the Court regarded their use against civilians in areas not under valid marital law or occupation.[134] Thus, the ruling had no effect on the use of commissions in the occupied South or in the case of military personnel.[135] In fact, the United States conducted well over two hundred military commissions after the *Milligan* decision.[136]

Post-Civil War

After the Civil War, it was not until World War II that it was necessary for the United States to resort to the large-scale use of military commissions.[137] Once again, the United States used these commissions as war courts, military government courts, and martial law courts.[138] Customary international law standards for jurisdiction remained in place, but, given the global nature of World War II, the limitation of "the theater of war" lost much of its relevance. This evolution in the jurisdiction of military commissions is best illustrated by *Ex parte Quirin*.

In *Quirin*, the United States tried the petitioners for sabotage, spying, attempting to give intelligence to the enemy, and conspiracy to commit those crimes. The government alleged the saboteurs committed these offenses in Florida, New York, and arguably other states on the east coast of the United States. After being captured, the petitioners were tried by military commission in Washington D.C.[139]

The location of the petitioners' offenses and their trial are both significant because neither appears to be within the theater

126. The widespread use of military commissions, military arrests, and the suspension of the writ of habeas corpus are some of President Lincoln's most controversial acts during the Civil War.

127. NEELY, *supra* note 122, at 65. President Lincoln's proclamation ordered that

> during the existing insurrection and as a necessary measure for suppressing the same, all rebels and insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission.

Id.

128. *Id.* at 144.

129. *Id.* at 160.

130. 71 U.S. (4 Wall.) 2 (1866).

131. *Id.* at 127.

132. *Id.* at 128; NEELY, *supra* note 122, at 176.

133. *Milligan*, 71 U.S. at 128.

134. *Id.*

135. LURIE, *supra* note 28, at 42.

136. NEELY, *supra* note 122, at 177.

137. *Id.* at 182-83.

138. REPORT OF THE DEPUTY JUDGE ADVOCATE FOR WAR CRIMES: EUROPEAN COMMAND, JUNE 1945 TO JULY 1948 52 (1948) [hereinafter JAG WAR CRIMES REPORT].

139. *Ex parte* Quirin, 317 U.S. 1, 22-23 (1942).

of war as that term was defined in the Civil War.[140] The Court discussed the petitioners' claim that the military commission had no jurisdiction over them because they had committed no "act of depredation or entered the theatre or zone of active military operations."[141] The Court resolved the petitioners' claim by concluding the petitioners completed their crimes when they passed through U.S. military lines and remained in this country.[142] This answer tacitly agreed with the Attorney General's brief in *Quirin* which argued, "The time may now have come . . . when the exigencies of total and global war must force a recognition that every foot of this country is within the theatre of operations."[143]

From the earliest moments of U.S. history to World War II, the United States has applied customary international law to define the jurisdiction of military commissions. Therefore, the expansion of "the theater of operations" illustrates that American military commission jurisdiction, and thus the jurisdictional limitations imposed by customary international law, have evolved over time with the changing nature of warfare.

Jurisdictional Limitations Imposed by International Treaties

International treaties further restrict the jurisdiction of military commissions. Even if the United States has the authority under customary international law to conduct a military commission, it would be unable to exercise that authority if it had entered into a treaty which precluded the use of commissions. Although the United States is not a signatory to any treaty expressly forbidding the use of military commissions, it has entered into several treaties that affect how or when it can use commissions and the minimum due process necessary at a commission. The most significant of these treaties regarding military commissions are the four 1949 Geneva Conventions, particularly, Geneva Convention III Relative to the Treatment of Prisoners of War,[144] and Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.[145]

All four of the 1949 Geneva Conventions were enacted in response to the events of World War II. The international community created the Conventions in an effort to establish universal rules for the protection of the victims of war.[146] The Conventions specifically addressed the treatment of the wounded and sick in the field and at sea,[147] prisoners of war,[148] and civilians.[149] Among the safeguards provided by these Conventions were due process obligations imposed on any nation seeking to prosecute individuals during a time of armed conflict.[150]

140. WINTHROP, *supra* note 9, at 832.

141. *Quirin*, 317 U.S. at 38. Although the Court did address the theater of war issue relating to where the petitioners crimes were committed, it did not address the theater of war issue relating to the location of the commission. *See id.*

142. *Id.*

143. *Id.* at 46; Michal R. Belknap, *The Supreme Court Goes to War: The Meaning and Implications of the Nazi Saboteur Case*, 89 MIL. L. REV. 59, 75 (1980).

144. Geneva Convention Relative to the Treatment of Prisoners of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III].

145. Geneva Convention Relative to the Treatment of Civilian Persons in Time of War, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV].

146. JEAN DE PREUX ET AL., COMMENTARY, IV GENEVA CONVENTION: RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIME OF WAR, forward (Jean S. Pictet ed., 1958) [hereinafter DE PREUX]. The forward sections of all of 1949 Geneva Convention commentaries are the same.

147. Geneva Convention for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3314, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, *opened for signature* Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85.

148. Geneva Convention III, *supra* note 144.

149. Geneva Convention IV, *supra* note 145.

150. Geneva Convention I, *supra* note 147, art. 3 [hereinafter Common Article 3] (this provision is in all four Conventions, thus referred to as Common Article 3); Geneva Convention III, *supra* note 144 ch. 3; Geneva Convention IV, *supra* note 145, arts. 64-78. These provisions address the trial or punishment of individuals during armed conflict.

With the exception of Common Article 3, all the articles of the four 1949 Geneva Conventions, apply only to "international armed conflicts."[151] Thus, the provisions of Geneva Conventions III and IV regarding the jurisdiction of military commissions are only applicable to the situation where a "difference between two States . . . [leads] to the intervention of members of the armed forces."[152]

Geneva Convention III

Before the 1949 Conventions, several international agreements had laid substantial groundwork regarding the treatment of prisoners of war.[153] Geneva Convention III built upon this foundation. The trial of prisoners of war was one area of particular concern after World War II. The Convention devotes twenty-eight of its 143 articles to the trial and punishment of prisoners. Articles 4, 84, 85, and 102 are particularly relevant to the jurisdiction of military commissions.

Under Geneva Convention III, the term "prisoner of war" does not apply to all those captured by our military during a time of war. Prisoner of war is defined at Article 4 of Geneva Convention III, and includes, among others "members of the armed forces of a party to the conflict;"[154] "members of militias, . . . volunteer corps, . . . and organized resistance movements" who meet certain conditions;[155] and "persons accompanying the force without actually being members thereto."[156] If persons do not meet the definition contained in Article 4 of the Convention, then they are not considered to be a prisoner of war and are not entitled to the protections provided by Geneva Convention III beyond Common Article 3.[157]

For those entitled to prisoner of war status, the Convention recognizes the competency of military courts to try them, with limitations. Article 84 states that "[a] prisoner of war shall be tried only by a military court, unless the existing laws of the Detaining Power expressly permit the civil courts to try a member of the armed forces of the Detaining Power in respect of the particular offense alleged."[158] Although Article 84 recognizes and even favors the use of military courts to try prisoners of war, Article 102 limits the kind of military court that may be employed. Under Article 102 "a prisoner can be validly sentenced only if the sentence has been pronounced by the same courts according the same procedure as in the case of members of the armed forces of the Detaining Power."[159] Article 85 makes it clear that the limitations established in Article 102 were intended to apply regardless of when a prisoner of war's crimes were committed. Article 85 states: "[P]risoners of war prosecuted under the laws of the Detaining Power for acts committed prior to capture shall retain, even if convicted, the benefits of the present Convention."[160]

Thus, based on Articles 84, 85, and 102, the United States could only use military commissions to try prisoners of war when they are used to try U.S. military personnel. Because the United States does not currently use commissions to try its military personnel, it could not use them to try prisoners of war.

Some may argue the above conclusion is flawed, claiming the United States can use military commissions to try enemy prisoners of war so long as we *could* use them to try our own military. Thus, even if the United States does not customarily try its own service members by military commissions, the simple fact that it has the authority to do so is sufficient to meet the requirements of Articles 84, 85, and 102. This argument fails for two reasons.

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151. Common Article 3, *supra* note 150.

152. De Preux, *supra* note 146, at 23.

153. *Id.* at 3-4.

154. Geneva Convention III, *supra* note 144, art. 4(A)(1).

155. *Id.* art. 4(A)(2).

156. *Id.* art. 4(A)(4).

157. When the status of an individual is in question, the Convention provides a mechanism for resolving the issue. Article 5 provides:

> Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.

Id. art. 5. Thus, when it is unclear whether an individual meets Article 4's definition of prisoner of war, the detaining power can conduct a tribunal to determine that individual's status.

158. *Id.* art. 84. Thus, Article 84 "establishes the competence of military courts." De Preux, *supra* note 146, at 412.

159. Geneva Convention III, *supra* note 144, art. 102.

160. *Id.* art. 85.

First, the language of Article 102 is inconsistent with such an interpretation. Article 102 states: "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same courts according to the same procedure as in the case of the members of the armed forces of the Detaining Power."[161] Those supporting the argument that we *can* use military commissions to try prisoners of war even when we are not using them to try our own service men and women seek to rewrite Article 102. This new Article 102 would read: "A prisoner of war can be validly sentenced only if the sentence has been pronounced by the same court *that could be used to try the armed forces of the Detaining Power*, according to the same procedure *that could be used* in the case of members of the armed forces of the Detaining Power." Nothing in Article 102 or the Commentary to the Article supports such an interpretation.

The second reason such an argument fails is that it would undercut the objectives of Article 85. Article 85 was created, at least in part, to address the situation when members of the armed forces of a nation were not afforded the protections of the 1929 Geneva Convention because their crimes were alleged to have been committed before capture.[162] The Commentary to Article 85 specifically cites to *In re Yamashita* as an example of what the drafters of Article 85 sought to avoid. Those that would argue that Article 85 only requires a nation to try prisoners of war by those courts that it could have used to try its own service members ignore the objectives of Article 85, to include the objective of preventing a repeat of *Yamashita*. In 1946, the United States could have used military commissions to try its own personnel, it simply did not. Accordingly, if General Yamashita were tried today, a military commission could still try him. It seems extremely unlikely that the drafters and signatories of Geneva Convention III intended Article 85 to be so impotent.

The interplay between Articles 84, 85, and 102 are particularly significant for the United States. During World War II, the United States used military commissions to try prisoners of war for violations of the laws of war committed prior to capture.[163] The United States, however, did not use military commissions to try its own soldiers, regardless of when the infractions were alleged to have been committed.[164] This distinction was significant. The Manual for Courts-Martial in effect in 1945 placed restrictions on the use of hearsay evidence and deposed testimony; military commissions were not bound by these restrictions.[165] This fact was highlighted by De Preux in his Commentary on Article 85 and cited to as one of the reasons for Article 85.[166] Thus, based on Articles 84, 85, and 102, it seems that the United States could not exercise military commission jurisdiction today as it did during the Second World War. If the United States wished to take an enemy prisoner of war to a military commission, it could do so only if it used military commissions to try its own soldiers.

Geneva Convention IV

In addition to the new restrictions on military commissions established in Geneva Convention III, Geneva Convention IV also places greater limitations on the use of military commissions in an international armed conflict. While the restrictions placed on the use of military commissions by Geneva Convention III seem to be directed to war courts, the restrictions in Geneva Convention IV go principally to military government courts. This focus is logical given the Convention's objective of protecting civilians in the time of war.

Civilians are perhaps at their most vulnerable when in the hands of an occupying military force. Thus, Geneva Convention IV provides detailed provisions regarding the trial of civilians in occupied territories.[167] The provisions of Geneva Convention IV relevant to the jurisdiction of military commissions are Articles 64, 66, and 70.

Article 64 demonstrates the strong preference to try civilians in an occupied territory before their own courts: "[S]ubject to the latter consideration of justice and to the necessity of ensuring the effective administration of justice, the tribunals of the occupied territory shall continue to function in respect of all offenses covered by the said laws."[168] By encouraging the continued use of court systems in operation before occupation, the Convention allows civilians in occupied areas to avoid facing "a lack of understanding or prejudice on the part of a people of foreign mentality, traditions or doctrines."[169]

161. *Id.* art. 102.

162. De Preux, *supra* note 146, at 413-16.

163. JAG War Crimes Report, *supra* note 138, at 46-51.

164. *In re* Yamashita, 327 U.S. 1, 20-21 (1946); Johnson v. Eisentrager, 339 U.S. 763, 790 (1950).

165. *Yamashita*, 327 U.S. at 20-21.

166. De Preux, *supra* note 146, at 413.

167. *See* Geneva Convention IV, *supra* note 145, arts. 64-78.

168. *Id.* art. 64.

169. De Preux, *supra* note 146, at 336.

Although Article 64 demonstrates a preference for maintaining the preexisting courts of an occupied area, this preference is not without restriction. The preexisting courts will not be used: (1) if the court system itself is contrary to Geneva Convention IV or has "been instructed to apply inhumane or discriminatory laws,"[170] or (2) if the preexisting court system cannot administer justice effectively.[171] Thus, except when the preexisting courts of an occupied territory are unwilling or unable to provide justice, those courts should be used to try offenses that were criminal before occupation.

Besides establishing the presumption that the criminal courts in operation before an occupation will continue to administer the civilian criminal justice system, Article 64 also contains provisions that enable an occupying force to create laws necessary for the efficient conduct of the military government and for the protection of the occupying force. The second paragraph of Article 64 states:

> [T]he Occupying Power may, however, subject the population of the occupied territory to provisions which are essential to enable the Occupying Power to fulfill its obligations under the present Convention, to maintain the orderly government of the territory, and to ensure the security of the Occupying Power, of the members and property of the occupying forces or administration, and likewise of the establishments and lines of communication used by them.[172]

De Preux characterized the above section as the "legislative powers of the occupant.[173] This legislative power is particularly important with regard to the jurisdiction of military commissions under the Convention.

Although Geneva Convention IV favors trials of civilians in their country's own courts, this is not true of offenses made criminal under the occupying power's legislative authority. Under Article 66 of Geneva Convention IV, "[i]n cases of a breach of the penal provisions promulgated by it in virtue of the second paragraph of Article 64, the occupying power may hand over the accused to its properly constituted, non-political military courts, on condition that said courts sit in the occupied country."[174] Article 66 allows the occupying power the jurisdiction to punish those who violate the legislation created by that power.

The last section of Geneva Convention IV regarding the jurisdiction of military commissions is Article 70, which states: "[P]rotected persons shall not be arrested, prosecuted or convicted by the Occupying Power for acts committed or for opinions expressed before the occupation, or during a temporary interruption thereof, with the exception of breaches of the laws and customs of war."[175] This Article limits the occupying power's jurisdiction to offenses committed during the time of actual occupation. The one exception to this general rule is for "breaches of the laws and customs of war."[176] This exception is based on the principle of universal jurisdiction, under which an individual who violates the law of war, violates international law.[177] "The punishment of such crimes is therefore as much the duty of a State which becomes the Occupying Power as of the offender's own home country."[178]

The limitations imposed by Articles 64, 66, and 70 of Geneva Convention IV restrict the customary international law jurisdiction of a military commission operating in an occupied territory. In an occupied territory, the United States can only try civilians at a military commission for violations of the rules the United States established after becoming an occupying force, or for violations of the law of war.

The four 1949 Geneva Conventions represent a turning point in the international law of armed conflict. Their provisions touch a wide variety of issues regarding the conduct of war to include the subject of military commissions. The significance of Geneva Conventions III and IV to the jurisdictional boundaries of military commissions is considerable. Both Conventions create limitations on the exercise of military commission jurisdiction, whether that commission is in the form of a military government court or a war court. Depending on the status of the individual the United States is seeking to try, U.S. practices that were arguably permissible during World War II are likely no longer acceptable.

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170. *Id.*

171. *Id.*

172. Geneva Convention IV, *supra* note 145, art. 64.

173. De Preux, *supra* note 146, at 337.

174. Geneva Convention IV, *supra* note 145, art. 66.

175. *Id.* art. 70.

176. *Id.*

177. De Preux, *supra* note 146, at 350.

178. *Id.*

Constitutional Restrictions on the Exercise of Military Commission Jurisdiction

This article has already discussed several landmark Supreme Court decisions regarding military commissions. These cases have been discussed as they related to the constitutional authority to create commissions and the historical evolution of the use of military commissions in the United States. This section revisits these Supreme Court opinions and others that define the jurisdiction of military commissions under the Constitution. This section will examine these opinions as they relate to two critical jurisdictional issues. First, under what circumstances may a military commission exercise jurisdiction over a U.S. civilian? Second, when may a commission try foreign nationals?

Jurisdiction of Commissions Over U.S. Civilians

The trial of U.S. civilians by military commission is perhaps the most controversial issue in any discussion of the jurisdiction of military commissions. When American civilians are subjected to the jurisdiction of U.S. military courts, it strikes a disharmonious chord in the American psyche. The United States was born out of the struggle to throw off the oppression imposed by the British government through its military.[179] The Framers of the Constitution feared the military, some believing that standing armies posed a threat to a free society. Thus, in drafting the Constitution, the Framers strictly subordinated the military to civilian control.[180] Based on this historical and constitutional construction, the Supreme Court has stated that military commissions can be used to try U.S. civilians only under specific extreme circumstance during war.[181]

The Supreme Court has addressed the jurisdiction of military commissions to try U.S. civilians in numerous cases, four of which are particularly relevant. In *Ex Parte Milligan*,[182] *Duncan v. Kahanamoku*,[183] *Madsen v. Kinsella*,[184] and *Ex parte Quirin*,[185] the Supreme Court provides some clear boundaries for the application of military commission jurisdiction over U.S. civilians. These boundaries vary depending on where the commission is held and what type of commission is being conducted. The Court subjects martial law courts to the greater restrictions than military government courts conducted in occupied territories[186] and war courts.

Martial Law Courts

As mentioned above, martial law courts conducted against U.S. civilians face greater restriction on their exercise of jurisdiction than other types of military commissions. These restrictions are discussed and illustrated in *Ex parte Milligan* and *Duncan v. Kahanamoku*.[187] Although some have argued that "the *Milligan* decision had little practical effect,"[188] this criticism is directed principally at the Court's failure to address the use of military commissions in the occupied South, the military detentions authorized by the President, or the President's act of suspending the writ of habeas corpus.[189] For the purposes of establishing jurisdictional boundaries for military commissions, *Milligan* still has relevance.

Members of the U.S. military arrested Lambdin P. Milligan on 5 October 1864 and tried him by military commission on the 21st of that month.[190] Military authorities alleged that Milligan conspired against the government of the United States, afforded aid and comfort to the enemy, incited insurrection, violated the laws of war, and engaged in disloyal practices. The commission found him guilty and sentenced him to death. All of the criminal acts alleged against Milligan were committed in the state of Indiana, and stemmed from his membership in an organization called the Order of American Knights or Sons of Lib-

179. BERNARD BAILYN, THE ORIGINS OF THE AMERICAN REVOLUTION 95, 112-19 (1967).

180. *Id.* at 61-63.

181. *Ex Parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); Duncan v. Kahanamoku, 327 U.S. 304 (1946). The Supreme Court has never said that a declared state of war was necessary for the use of military commissions. Rather, the extreme circumstances created by warfare may necessitate and justify the use of military commissions.

182. *Milligan*, 71 U.S. at 2.

183. *Duncan*, 327 U.S. at 304.

184. 343 U.S. 341 (1952).

185. 317 U.S. 1 (1942).

186. The phrase "occupied territories" is intended to refer to locations outside of the United States and its territories.

187. 71 U.S. at 126-27; 327 U.S. at 319-23.

188. NEELY, *supra* note 122, at 176.

189. *Id.*

190. *Milligan*, 71 U.S. at 107.

erty.[191] At the time the U.S. military tried Milligan by commission, the civilian courts in Indiana were open and in operation.

The issue that occupied the majority of the Court's opinion was "upon the facts stated [did] . . . the military commission [have] jurisdiction legally to try and sentence . . . Milligan."[192] The Court answered this question with a resounding "no."[193] In arriving at that answer, the Court used what one author called "thunderously quotable language."[194] The majority concluded, "[M]artial rule can never exist where the courts are open."[195] Although "there are occasions when martial rule can be properly applied,"[196] those occasions are limited to when due to "foreign invasion or civil war, the courts are actually closed."[197] The thrust of the majority opinion is that military courts created in a state of martial rule to try civilians are courts of necessity and "as necessity creates the rule, so it limits its duration; for, if this government is continued after the courts are reinstated, it is a gross usurpation of power."[198]

Despite claims that the *Milligan* opinion is irrelevant, it is still significant where martial law courts are established within the borders of the United States. The decision creates strict guidelines intended to limit the jurisdiction of martial law courts to the smallest physical area for the briefest period of time. The Court created these limitations based on the recognition that "civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and in the conflict, one or the other must perish."[199] Eighty years after the *Milligan* decision, the Supreme Court once again visited the question of whether a martial law court had the jurisdiction to try U.S. civilians.

In *Duncan v. Kahanamoku*,[200] the Court reached the same conclusions as in *Milligan*, although for slightly different reasons. Two days after the Japanese attack on Pearl Harbor, Hawaii, President Roosevelt approved the Governor of Hawaii's declaration of martial law in accordance with the Hawaiian Organic Act.[201] After this declaration, the commanding general in that area declared himself the Military Governor and ordered the civil and criminal courts to close. The Military Governor then established military tribunals in the place of the civilian criminal courts.[202] *Duncan* arose out of two prosecutions conducted by these military commissions. The two petitioners were convicted in unrelated cases of embezzlment and assault, respectively. One of the petitioner's trial was conducted over eight months after the Pearl Harbor attack, while the other was tried over two years after that attack.[203]

Although the *Duncan* Court faced very similar issues as those in *Milligan*, there was a significant distinction. In *Milligan*, the President, without any express approval from Congress, declared martial law.[204] In *Duncan*, Congress had passed the Hawaiian Organic Act. This Act granted the Governor of Hawaii the authority, in certain specified emergencies,[205] to declare martial law. This Act also granted the President the authority to approve the governor's decision and thus continue the state of martial law. Therefore, the *Duncan* Court had to address an issue not present in *Milligan*: whether the Organic Act had empowered the military "to supplant all civilian laws and to substitute military for judicial trials."[206] If the Act had

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191. *Id.* at 107.

192. *Id.* at 109.

193. *Id.* at 127.

194. NEELY, *supra* note 122, at 176.

195. *Milligan*, 71 U.S. at 127.

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.* at 124-25.

200. 327 U.S. 304 (1946).

201. *Id.* at 307.

202. *Id.* at 308.

203. *Id.* at 310.

204. NEELY, *supra* note 122, 65, 68.

205. *Id.* at 308. The governor was authorized to declare martial law in Hawaii when it was necessary "to prevent or suppress lawless violence, invasion, insurrection, or rebellion in the said Territory." *Id.*

not so empowered the military, then the Court could rely on *Milligan* to resolve the granted issue.

In addressing this issue, the Court pointed out that the term martial law was open to a variety of definitions. Because the Organic Act was unclear on its face, and the Act's legislative history was inadequate, the Court stated, "[I]t must look to other sources in order to interpret that term."[207] The other sources the Court considered were those embodied "in the birth, development and growth of our governmental institutions."[208] Based on these other sources the Court concluded Congress "did not wish to exceed the boundaries between military and civilian power."[209] Congress intended instead "to authorize the military to act vigorously for the maintenance of an orderly civil government and for the defense of the Islands against actual or threatened rebellion or invasion [and] was not intended to authorize the supplanting of courts by military tribunals."[210]

After determining that Congress did not intend to authorize military trials to supplant civilian criminal trials, the Court stated simply: "[W]e hold that both petitioners are now entitled to be released from custody."[211] The majority did not do an additional "*Milligan*" analysis to determine whether martial law was permissible under an argument of necessity. This lack of an examination, however, does not suggest that the standards created in *Milligan* no longer exist. In the Court's statement of the facts at the beginning of the *Duncan* opinion, the Court noted that at the time of both petitioners' convictions the civilian courts were open in some capacity. Additionally, the Court indicated that "at the time the alleged offenses were committed the dangers apprehended by the military were not sufficiently imminent to cause them to require civilian evacuation or even to evacuate the buildings necessary to carry on the business of the courts."[212] Thus, it was unnecessary for the Court to discuss the *Milligan* "open court" test. The Court had already concluded in the accepted facts of the case that the Hawaiian courts were capable of being in operation at the time the petitioners were tried by military commission.

Milligan and *Duncan* stand for the proposition that martial law courts will not be permitted to supplant the jurisdiction of U. S. civilian courts where those civilian courts are capable of operation. Both *Milligan* and *Duncan* point out that the roots of this rule run as deeply as those of the Constitution. These decisions also stand for the proposition that even in the extreme circumstances of war, the subordination of the military to civilian control must, to the greatest extent possible, continue.

Military Government Court

As discussed above, the constitutional restrictions on military commissions are at their zenith when the military seeks to subject U.S. civilians to the jurisdiction of martial law courts within the United States. These constitutional restrictions are at their lowest ebb, however, when U.S. civilians or others are subjected to these same courts outside of the United States. As early as 1853, in *Cross v. Harrison*,[213] the Supreme Court announced its acceptance of the principle that military governments in occupied territories had the right to govern the population of that territory in accordance with "the lawful exercise of a belligerent right over a conquered territory."[214] The Court reiterated this proposition in 1879 in the case of *Dow v. Johnson*,[215] when the Court once again upheld the lawfulness of a military government court in an area outside of the United States.[216]

In *Duncan v. Kahanamoku*,[217] the Court made it clear that one of the authorities given to the military government in an occupied territory is the power to try civilians. The Court distinguished military government courts operating in occupied territories from that of martial law courts operating in the United States, stating: "[W]e are not concerned with the recog-

206. *Id.* at 313.

207. *Id.* at 319.

208. *Id.*

209. *Id.* at 324.

210. *Id.*

211. *Id.* at 324.

212. *Id.* at 313.

213. 57 (16 How.) 164 (1853).

214. *Id.* at 192.

215. 100 U.S. 158 (1879).

216. *Id.* at 166.

217. 327 U.S. 304 (1946).

nized power of the military to try civilians in tribunals established as a part of a temporary military government over occupied enemy territory or territory regained from an enemy where civilian government cannot or does not function."[218]

The most recent case on this point is *Madsen v. Kinsella*.[219] In *Madsen*, the petitioner was a U.S. civilian convicted of murder by a military government court in occupied Germany.[220] The petitioner claimed she had the right to trial by courts-martial rather than military commission. The Court disagreed. In reaching its conclusion that military commissions in Germany had jurisdiction to try U.S. civilians, the Court stated: "Since our nation's earliest days, such commissions have been constitutionally recognized agencies for meeting many urgent governmental responsibilities related to war."[221] One of these responsibilities is "the President['s] . . . urgent and infinite responsibility . . . of governing any territory occupied by the United States by force of arms."[222]

Law of War Court

The final circumstance to be discussed regarding the jurisdiction of military commissions is the use of a law of war court to try a U.S. civilian. This particular jurisdictional circumstance is thorny and not fully developed. The boundaries of military commission jurisdiction in this context appears to straddle the line between jurisdiction over military personnel, when jurisdiction is not in doubt, and jurisdiction over U.S. civilians violating laws heard by civilian courts, when jurisdiction is reluctant.

The Supreme Court addressed this issue, at least in part, in *Ex parte Quirin*.[223] In *Quirin*, the Court qualified the broad language of *Milligan*, concluding that although military commissions in the United States cannot try U.S. civilians, they can try U.S. citizens who engage in belligerent acts.[224]

One of the petitioners in *Quirin*, Haupt, claimed U.S. citizenship.[225] Based on this claim, Haupt asserted that *Milligan* prohibited his trial before a military commission so long as the civilian courts were open.[226] The government opposed Haupt's claim, arguing that through his conduct he had effectively renounced his U.S. citizenship. The Court concluded it did not have to resolve the issue of Haupt's citizenship "because citizenship 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."[227] The Court went on to state: "Citizens who associate themselves with the military arm of the enemy government, and with its aid, guidance and direction enter this country bent on hostile acts, are enemy belligerents within the meaning of the Hague Convention and the law of war."[228] Thus, according to *Quirin*, a U.S. citizen who is an unlawful belligerent exposed himself to the potential penalties associated with that violation of the law of war,[229] including trial by military commission.

These statements represent at least a partial departure from the holding in *Milligan* that military commissions "can never be applied to citizens in states which have upheld the authority of the government, and where the courts are open and their process unobstructed."[230] Recognizing this departure, the *Quirin* court distinguished *Milligan* by emphasizing that, unlike the petitioners in *Quirin*,[231] the petitioner in *Milligan* was not "a

218. *Id.* at 314.

219. 343 U.S. 341 (1952).

220. *Id.* at 343.

221. *Id.* at 346.

222. *Id.* at 348.

223. 317 U.S. 1 (1942).

224. *Id.* at 37-38.

225. *Id.* at 20.

226. *Id.* at 45.

227. *Id.* at 37.

228. *Id.*

229. *Id.* at 37-38.

230. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 121(1866).

231. *Id.* The petitioners in *Quirin* were 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." *Id.* The distinction between the petitioner's status in *Milligan* versus *Quirin* was emphasized by Mr. Patrick Philbin during a panel discussion hosted by the American Bar Association in Washington, D.C., on 16 January 2002.

part of or associated with the armed forces of the enemy"[232] and thus "was a non-belligerent, not subject to the laws of war."[233] The *Quirin* Court ruled that *Milligan* was not intended to address the situation present in *Quirin*.[234]

Although the Court supported the use of military commissions to try the petitioners in *Quirin*, it refused to provide a comprehensive definition of when U.S. military commissions sitting in the United States may try its citizens for violations of the laws of war. Instead, the Court concluded it "had no occasion to define with meticulous care the ultimate boundaries of the jurisdiction of military tribunals to try persons according to the law of war . . . [because] it is enough that petitioners here, upon the conceded facts, were plainly within those boundaries."[235]

The issues at stake when the military takes over the traditional functions of a civilian government within the United States are substantial. According to the Court in *Milligan*, their significance "cannot be overstated; for it involves the very framework of the government and the fundamental principles of American liberty."[236] In *Milligan* and *Duncan* the Court established standards to protect those principles and to ensure that martial law courts are used only in the most extreme circumstances. The fundamental principles at issue in *Milligan* and *Duncan* are not as present in cases where military commissions are operating in occupied territories or as war courts. Military government courts do not raise the same specter of military domination of civilian government as those same courts operating within the United States. Additionally, military commissions in the form of war courts do not present the same concerns as martial law courts operating in the United States. War courts do not seek to subject the entire civilian populace of a given area to trials by military court.

Jurisdiction Over Foreign Nationals

The jurisdictional basis to try foreign nationals by military commission is, in general, the same as that for trying U.S. citizens. The United States can exercise military commission jurisdiction over foreign nationals through martial law courts, military government courts, or war courts. Foreign nationals can be tried for violations of the laws of war or for violations of crimes normally heard by civilian courts when in an area under U.S. military government. Despite the same general jurisdictional authority to try foreign nationals by military commission as that to try U.S. citizens, there are jurisdictional wrinkles. These wrinkles include the application of international treaties that would not be in issue for the trial of U.S. citizens, and issues related to habeas corpus jurisdiction. *In re Yamashita*[237] and *Johnson v. Eisentrager*[238] address these issues.

In re Yamashita involved the prosecution of General Tomoyuki Yamashita for violations of the laws of war. The charges against General Yamashita alleged, in part, that

> while commander of armed forces of Japan at war with the United States of America and its allies, [he] unlawfully disregarded and failed to discharge his duty as commander to control the operations of the member 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.[239]

The prosecution submitted a bill of particulars listing 123 war crimes committed by General Yamashita's troops while under his command.[240]

Among General Yamashita's allegations of error was the claim that the military commission that tried him violated Articles 60 and 63 of the 1929 Geneva Convention.[241] Article 60 of the 1929 Geneva Convention required a detaining power that is about to direct "judicial proceedings . . . against a prisoner of war [to] . . . advise the representative of the protecting power thereof as soon as possible, and always before the date set for the opening of the trial."[242] Article 63 requires that a "sentence may be pronounced against a prisoner of war only by the same

232. *Ex parte* Quirin, 317 U.S. 1, 45 (1945).

233. *Id.* at 46.

234. *Id.* at 45.

235. *Id.* at 45-46.

236. *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 118 (1866).

237. 327 U.S. 1 (1946).

238. 339 U.S. 763 (1950).

239. *Id.* at 13-14.

240. *Id.* at 14.

241. *Id.* at 20-21.

courts and according to the same procedure as in the case of persons belonging to the armed forces of the detaining power."[243] The military commission that tried General Yamashita did not notify his country, nor did the commission apply the same rules of evidence and procedure as applied at courts-martial.

The Court examined both allegations of error, and found no violation of the Convention. The Court held that Articles 60 and 63 were not intended to apply to violations of the laws of war that occurred before an individual became a prisoner of war.[244] According to the Supreme Court, Articles 60 and 63 were intended to "apply only to judicial proceedings directed against a prisoner of war for offenses committed while a prisoner of war."[245]

Although the ultimate conclusion of the Supreme Court in *Yamashita* regarding Article 63 is likely moot based on Article 85 of the 1949 Geneva Convention, the Court's application of international law is significant. In the case of foreign nationals, international treaties, such as the 1949 Geneva Conventions, may restrict the jurisdiction of U.S. military commissions or dictate certain minimum due process rights for those proceedings. This could lead to the counter-intuitive situation where a U.S. citizen being tried for a war crime would be entitled to less due process than a foreign national tried for the same offenses.

In addition to the jurisdictional wrinkles created by international treaties when trying foreign nationals by military commission, there are habeas corpus issues as well. The habeas corpus issues present are not relevant to the military commission's jurisdiction; instead they go to the jurisdiction of U.S. federal courts. *Johnson v. Eisentrager*[246] discussed these issues at length.

The petitioners in *Eisentrager* were German nationals convicted of war crimes by an U.S. military commission conducted in China.[247] After being convicted, the petitioners were sent to serve their respective sentences in a U.S. Army confinement facility in occupied Germany. The petitioners sought a writ of habeas corpus in the federal district court in Washington D.C. The D.C. court ruled it did not have jurisdiction to hear the case because the petitioners were confined outside of the United States. The Court of Appeals for the D.C. Circuit reversed, concluding that jurisdiction existed to hear a writ of habeas corpus where anyone was deprived of liberty based on the authority of the United States.[248] The Supreme Court disagreed, ruling that under the circumstances, "no right to the writ of habeas corpus appear[ed]."[249]

The Court was cautious to limit its ruling that the petitioners in *Eisentrager* did not have the right to the writ of habeas corpus. The Court began by noting that the ruling in the case did not apply to citizens, stating: "[W]ith the citizen we are now little concerned, except to set his case as untouched by this decision and to take measure of the difference between his status and that of all categories of aliens."[250] Next, the Court indicated that resident enemy aliens would still have access to the writ, as the petitioners in *Quirin* and *Yamashita* did.[251] This access was based on territorial jurisdiction.[252] The U. S. military confined the petitioners in *Quirin* and *Yamashita* in the United States or its territories, for crimes committed in the United States or its territories.[253] The Court's ruling, therefore, is directed at one very specific class of people, "the nonresident enemy alien . . . who has remained in the service of the enemy."[254]

The Court denied the petitioners access to the writ of habeas corpus in *Eisentrager* because none of the traditional heads of jurisdiction were present. The petitioners were nonresident enemy aliens, whose crimes, trial, and confinement all occurred

242. Geneva Convention Relative to the Prisoners of War, art. 60, July 27, 1929, 47 Stat. 2051, 118 L.N.T.S. 343.

243. *Id.* art. 63.

244. *In re* Yamashita, 327 U.S. 1, 22-23 (1946).

245. *Id.*

246. 339 U.S. 763 (1950).

247. *Id.* at 765-66. The petitioners were convicted of passing information to the Japanese after Germany had surrendered. *Id.*

248. *Id.* at 767.

249. *Id.* at 781.

250. *Id.* at 769.

251. *Id.* at 779-80.

252. *Id.*

253. *Id.* at 780.

254. *Id.* at 767.

outside of the United States or its territories.[255] The Court expressed concern that granting nonresident enemy aliens in active hostility with the United States access to the writ might adversely affect future U.S. war efforts. The majority argued, "[I]t would be difficult to devise more effective fettering of a field commander than to allow the very enemies he is ordered to reduce to submission to call him to account in his own civil courts and divert his efforts and attention from the military offensive abroad to the legal defensive at home."[256]

Eisentrager and *Yamashita* highlight some of the potential jurisdictional wrinkles when the United States seeks to try foreign nationals at U.S. military commissions. These wrinkles seem to counter-balance one another. On the one hand, based on international treaties, foreign nationals may have rights regarding military commissions that U.S. citizens do not. On the other hand, U.S. citizens will always have access to our federal courts through the writ of habeas corpus, while foreign nationals may not. Despite these wrinkles, the Supreme Court has repeatedly supported the jurisdiction of military commissions to try foreign nationals, both under customary international law and the Constitution.

The jurisdiction for courts-martial and military commissions are as varied and distinct as the constitutional authority for these two courts. Each court's jurisdiction is restricted differently. These jurisdictional boundaries are affected by the location and nature of the crime, the location of the court that tries the offenders, the status of the offenders at the time they committed their offense and at the time of trial, and whether peace has been declared. Yet, despite these variations, courts-martial and military commissions share jurisdiction over violations of the laws of war. This shared jurisdiction can be misleading and give some the impression that courts-martial and military commissions are more alike than they are. A close examination of the jurisdiction of the two courts highlights their different natures.

Conclusion

Military commissions and courts-martial are both valid trial venues, but they serve different purposes. Courts-martial are a part of military law and are intended "to promote justice, to assist in maintaining good order and discipline in the armed forces, [and] to promote efficiency and effectiveness in the military establishment."[257] 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."[258] Military commissions also serve as a valuable part of military government where, as a result of war, no other government exists. These different purposes are reflected in their different constitutional bases and jurisdictional boundaries.

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255. *Id.* at 767-68, 781.

256. *Id.* at 769.

257. MCM, *supra* note 86, pt. I, § 3.

258. *Ex parte* Quirin, 317 U.S. 1, 28 (1942); *In re* Yamashita, 327 U.S. 1, 11(1946).