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Military Commissions: The Forgotten Reconstruction Chapter

Detlev F. Vagts

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ARTICLES

MILITARY COMMISSIONS: THE FORGOTTEN RECONSTRUCTION CHAPTER

DETLEV F. VAGTS*

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* Bemis Professor of Law, emeritus, Harvard Law School. I acknowledge with thanks the helpful advice of Eugene Fidell, Robert Kaczorowski, Kenneth Mack, and Gary Solis, as well as the research work of Carley Andrews and Andrew Gaies. Jill Abraham guided me through the National Archives.

INTRODUCTION

Reflecting on his experience as commander in Louisiana and Texas during Reconstruction, General Philip Sheridan wrote:

Therefore, when outrages and murders grew frequent, and the aid of military power was an absolute necessity for the protection of life, I employed it unhesitatingly—the guilty parties being brought to trial before military commissions—and for a time, at least, there occurred a halt in the march of the terrorism inaugurated by the people whom [President] Johnson had deluded.¹

Military commissions and terrorism came together again when President Bush on November 13, 2001 authorized the use of such tribunals in the war on terrorism.² Seeking precedents, lawyers looked to World War II for guidance and made some references to earlier experiences during the Mexican War and the Civil War.³ One important but neglected repository of practice in this field is the work of military commissions during the military phase of Reconstruction, that is, the effort through regime change to establish racially just governments in the South after the Civil War. Commissions were used in this endeavor, starting with the recapture of New Orleans in 1862 and ending in 1868 or 1870 as the federal government

1. 2 PHILIP SHERIDAN, PERSONAL MEMOIRS OF P.H. SHERIDAN 262 (1999) (1881).

2. See Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism, 66 Fed. Reg. 57,833, 57,834-35 (Nov. 16, 2001). Military commissions are now governed by the Military Commissions Act, 10 U.S.C. § 948b (2006).

3. See Hamdan v. Rumsfeld, 126 S. Ct. 2749, 2775-76 (2006) (proffering the history of military commissions in circumstances where “sparse legal precedent exists”). For studies which provide portions of the history of commissions, see Detlev F. Vagts, *Military Commissions: A Concise History*, 101 AM. J. INT'L L. 35, 37-43 (2007); LOUIS FISHER, MILITARY TRIBUNALS AND PRESIDENTIAL POWER: AMERICAN REVOLUTION TO THE WAR ON TERRORISM 32, 50, 95 (2005); MAROUF HASIAN, JR., IN THE NAME OF NECESSITY: MILITARY TRIBUNALS AND THE LOSS OF AMERICAN CIVIL LIBERTIES 114-15, 167 (2005); David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 31-47, 66-73 (2005); Michal R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 442-69, 471-79 (2002); Michael O. Lacey, *Military Commissions: A Historical Survey*, 2002 ARMY LAW. 41, 43-47 (2002).

recognized state regimes as legitimate.⁴ Scholarly treatment of these tribunals and their work has been scanty.⁵ It was too legalistic a field for historians of the period; it was too military for most lawyers and the sources were not contained within the standard civilian legal research system.⁶

One can ask various questions about the lessons that one can derive from this experience. Does it shed any light on when and under what circumstances military commissions are constitutionally permissible? Was resort to such bodies rather than to regular civilian courts justified?⁷ Does it tell us whether the commissions can perform their tasks to the satisfaction of interested critics? More generally, what do we learn about the capacity of the United States to undertake the task of rebuilding a nation at home or abroad?

In pursuit of these questions, Part I starts with a summary of the teachings about Reconstruction as a chapter of American history. The next section describes the role of the army in the process as a whole. Part II considers the struggle over the constitutionality of military commissions during that time. Part III examines the commissions' procedures and the impact of their work. Part IV briefly surveys the civilian effort at reconstruction that followed the military episode and evaluates it as an alternative. Finally, Part V attempts some conclusions.

I. RECONSTRUCTION AND THE U.S. ARMY

A. THE HISTORY OF RECONSTRUCTION

Few chapters of American history have been fought over by historians as vigorously as Reconstruction. It has been called the

4. In this Article we generally use the term "military commission" to include variants such as provost marshal courts, freedmen's courts and the provisional court established in 1862 in New Orleans. *See infra* note 23.

5. *See, e.g.,* Vagts, *supra* note 3, at 39-41 (demonstrating the lack of scholarship on the topic of Civil War commissions).

6. For the record, I served in the Judge Advocate General's Department of the U.S. Air Force between 1954 and 1956.

7. *See* HASIAN, *supra* note 3, at 188 (characterizing the current view on military tribunals as "filled with contradictions, ambivalences, and dilemmas").

“dark and bloody ground of American historiography.”⁸ For decades, history writing was dominated by a Southern, “unreconstructed,” view. The occupation of the states that had seceded was harsh, arbitrary, and oppressive. It kept in power corrupt and inefficient governments controlled by ignorant Negroes and rapacious white scallywags and carpetbaggers. Southern resistance, even that of the Klu Klux Klan, was noble and principled; and ultimately succeeded in removing tyrannical regimes and restoring democratic state rule. The academic presentations of this view by such historians as William Dunning⁹ and Claude Bowers¹⁰ were complemented by popular productions such as D.W. Griffiths’ *Birth of a Nation* and Margaret Mitchell’s *Gone With the Wind*. It prevailed even in the North after the generation of soldiers who had put down the rebellion passed away.

In the 1960s, this mindset was strongly challenged by a view more favorable to Reconstruction. This perception had been kept alive by a minority of scholars, mostly black, even during the 1930s.¹¹ The new historiography begins with an emphasis on the enormity of the problems faced by the new regimes.¹² The losses of property in the

8. Bernard A. Weisberger, *The Dark and Bloody Ground of Reconstruction Historiography*, 25 J. S. HIST. 427 (1959).

9. See 22 WILLIAM ARCHIBALD DUNNING, RECONSTRUCTION: POLITICAL AND ECONOMIC 1865–1877, at 215 (1907) (describing the influence of resistance groups as instilling “rottenness and chaos” in Southern governments).

10. See CLAUDE GERNADE BOWERS, THE TRAGIC ERA: THE REVOLUTION AFTER LINCOLN 307 (1929) (describing the organization of the Ku Klux Klan as a “society, formed for amusement, and found effective in controlling the negroes, soon developed into an agency to combat” leagues developed for the Northern cause).

11. See, e.g., JOHN HOPE FRANKLIN, RECONSTRUCTION AFTER THE CIVIL WAR 151 (Daniel J. Boorstin ed., 1961) (demonstrating a favorable view of Reconstruction in a discussion of the issues that opponents of Reconstruction highlighted); W.E. BURGHARDT DU BOIS, BLACK RECONSTRUCTION IN AMERICA: AN ESSAY TOWARD A HISTORY OF THE PART WHICH BLACK FOLK PLAYED IN THE ATTEMPT TO RECONSTRUCT DEMOCRACY IN AMERICA 1860–1880, at 713 (Russell & Russell 1956) (1935) (describing the efforts of black individuals during Reconstruction to integrate the South back into the Union, create public schools, and establish “the new democracy, both for white and black”).

12. ERIC FONER, RECONSTRUCTION: AMERICA’S UNFINISHED REVOLUTION 1863–1877 (1988). For a review of the literature, see JAMES M. MCPHERSON, ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION B55-B63 (McGraw-Hill 3d ed. 2000) (1982).

South had been staggering, amounting to two-thirds of the assessed wealth in that region, including two-fifths of its livestock and more than half of its farm machinery. The Union armies had devastated the railroad system.¹³ Major cities such as Atlanta, Columbia, and Richmond had been largely destroyed by fire. State and local governments were bankrupt. Many individuals, particularly those who had loyally invested in securities of the Confederacy, were also bankrupt. The human losses were immense. Thousands of those who had taken arms on behalf of the “late wicked Rebellion”¹⁴ had lost their lives, and others were disabled by wounds.¹⁵ Meanwhile, the labor system had been thrown into disarray by the abolition of slavery. Former slaves had taken over plantations that their former owners were unable to defend, had taken new jobs, or had moved away from their workplaces.

The new governments sought to cope with these difficulties. They were accused of wastefulness and corruption, although it has been noted that they had vastly smaller opportunities to steal than those, like Boss Tweed in New York, who preyed upon wealthier governments in the North during the “era of good stealing.”¹⁶ The federal government did not institute a Marshall Plan to help revive the South’s economy. Help was limited to the distribution of emergency rations, largely to freedmen.¹⁷ It should be held to the credit of Reconstruction governments that they began to create basic institutions of modern civil government in the South.¹⁸ In some of the

13. See FONER, *supra* note 12, at 124-25 (describing the physical devastation that the Civil War caused in the South, while Northern cities continued to enjoy wealth and “optimism”).

14. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 109 (1866).

15. Confederate casualties resist enumeration. The leading source estimates 276,00 deaths from wounds and disease and compares that number with some 1.2 million Confederate males of military age. See THOMAS L. LIVERMORE, *NUMBERS & LOSSES IN THE CIVIL WAR IN AMERICA: 1861-65*, at 9, 21 (Ind. Univ. Press 1957) (1901).

16. See John F. Decker, *Legislating New Federalism: The Call for Grand Jury Reform in the States*, 58 OKLA. L. REV. 341, 347 (2005) (describing the corruption of both Northern and Southern public officials during the Reconstruction era in the context of grand juries).

17. See MCPHERSON, *supra* note 12, at 654-55 (stating that attempts to provide federal aid for education in the South persisted from 1867 to 1890 but never became law).

18. See John A. Powell, *The Race and Class Nexus: An Intersectional*

states they created the first public school systems ever. They supported private endeavors to rebuild and expand the infrastructure. Blacks filled positions that they were not to see again for more than a century; these included two U.S. senators, fourteen U.S. representatives, two ambassadors, one state governor, six lieutenant governors, nine state secretaries of state, and one state supreme court justice.¹⁹

B. THE ROLE OF THE ARMY IN RECONSTRUCTION

Army personnel were deeply involved in many aspects of Reconstruction. They took a leading role in the work of the Freedmen's Bureau led by General Oliver Otis Howard.²⁰ Generals chose and displaced public officials, supervised voter registration and elections, and attempted to settle property disputes. They tried to work out labor contract systems to displace slavery. However, the army's chief task was to maintain law and order, as well as to protect blacks and white unionists from attack by unreconciled Southern partisans. Like Baathist Sunnis in present-day Iraq,²¹ those who had enjoyed privileged status in the ancien regime of the South resented their displacement. The level of violence in the Southern states, often perpetrated by the Klu Klux Klan or similar secret groups, was astonishing.²² Blacks, carpetbaggers, and scallywags were lynched

Perspective, 25 LAW & INEQ. J. 355, 375 (2007) (discussing legislative reforms by Southern Reconstruction governments, including improvements in the areas of public education, health care, social services, and corrections).

19. See ERIC FONER, FREEDOM'S LAWMAKERS: A DIRECTORY OF BLACK OFFICEHOLDERS DURING RECONSTRUCTION, at xv-xvi, xxv (1993) (noting that 129 of the black officeholders had served in the Union Army, nine of whom served in the two black Massachusetts regiments).

20. See DONALD G. NIEMAN, TO SET THE LAW IN MOTION: THE FREEDMEN'S BUREAU AND THE LEGAL RIGHTS OF BLACKS 199-209 (Harold M. Hyman ed., 1979). The Bureau becomes part of the military commission story primarily through the efforts of its agents to get the generals to start commission proceedings to protect the Bureau's constituents. The Bureau did, however, maintain its own provost courts from time to time to handle petty offenses by and against freedmen. *Id.* at 8, 205.

21. See, e.g., Yaroslav Trofimov, *Sunni Power Play Stalls Iraqi Talks On Sharing Posts—Shouting Matches Erupt After Disgruntled Minority Refuses Top Parliament Job*, WALL ST. J., Mar. 20, 2005, at A14 (reporting on the resentment of former Sunni Baathists toward Shiites, fostered by the reallocation of power in Iraq).

22. See, e.g., ALLEN W. TRELEASE, WHITE TERROR: THE KU KLUX KLAN

and tortured in large numbers. Violence was particularly prominent at elections. The burden of containing this violence fell upon the military governors of the districts into which the South was divided. The names of these generals are familiar to aficionados of Civil War history—Philip Sheridan, George Gordon Meade, John Pope, Winfield Scott Hancock, Daniel Sickles, John Schofield and the like. Those generals and their subordinates took varying stances in pursuing law and order. Some, like Sheridan in Louisiana and Sickles in South Carolina, incurred local unpopularity by vigorous enforcement action. They were, to the displeasure of Radical Republicans, removed by President Johnson.²³ Others were more sympathetic to the displaced white elite and looked forward to a speedy end of Reconstruction. The work of the army was influenced by changing attitudes towards blacks on the part of army personnel. Many were unfamiliar with blacks before the war and were not particularly sympathetic. For some, the experience of fighting alongside black soldiers or support personnel was transformative. Southerners' mistreatment of black soldiers, such as the massacre of prisoners of war at Fort Pillow or the re-enslavement of recaptured black soldiers, aroused the sympathies of northern soldiers. The ongoing Klan violence against blacks and others did as well. The acceptance of black soldiers, partial as it was, was dramatized by the choice of black units to lead the parades into captured Charleston and Richmond.²⁴

To carry out these reconstruction measures, army leaders had only limited forces. Some 200,000 troops were on hand in the South when hostilities ended, but by April 1866, there were less than 40,000, and in October 1866 only 20,000.²⁵ There were particular shortages of cavalry needed to pursue Klansmen because mounted troops were

CONSPIRACY AND SOUTHERN RECONSTRUCTION 28 (1971) (characterizing the violence inflicted by Ku Klux Klan members on black citizens as "whatever violence it pleased them to inflict").

23. See BROOKS D. SIMPSON, *LET US HAVE PEACE: ULYSSES S. GRANT AND THE POLITICS OF WAR AND RECONSTRUCTION, 1861–1868*, at 184–97 (1991); 3 GIDEON WELLES, *DIARY OF GIDEON WELLES, JANUARY 1, 1867–JUNE 6, 1869*, at 149–56 (1911).

24. See MCPHERSON, *supra* note 12, at 510, 517.

25. See JAMES E. SEFTON, *THE UNITED STATES ARMY AND RECONSTRUCTION 1865–1877*, at 260–62 (La. State Univ. Press 1967) (compiling the numbers and locations of Southern Civil War troops from the Adjutant General's reports).

diverted to fight Indians in the West. In some districts, the large majority of the troops were black. Along with this general shrinkage of the military forces came the "mustering out" of black regiments raised in the North.²⁶ As in modern-day Iraq, army sources complained about the inadequacies of military staffing.²⁷

In their attempts to maintain law and order and protect freedmen and Republicans, the commanders were hampered by the confusing, and at times contradictory, instructions they received from Washington. The relatively mild treatment of the South delivered by President Johnson was replaced by the harsher congressional reconstruction which often involved overrides of presidential vetoes. General Ulysses S. Grant found himself caught in the middle of diverse politics and unsolvable crises almost more difficult than defeating Lee's armies.²⁸ His difficulties continued when he became president just as Reconstruction started to wind down.

Commissions played an important role in military Reconstruction. They were regarded by the generals and by northern Republicans as indispensable tools. Southerners thought of them as instruments of tyranny and drew upon a general antipathy towards military justice across the country.

II. THE CONSTITUTIONAL BASIS OF COMMISSIONS

One comes away from studying the question of authority for Reconstruction military tribunals with a sense of unease. The argument that the commissions were all unconstitutional is very persuasive, and one's lawyerly instincts are frustrated by the fact that the Supreme Court's acceptance of legislation cutting off appeals in

26. See SIMPSON, *supra* note 23, at 113-14 (noting that Grant kept black regiments, raised in the South in the army largely to prevent them from providing militants and aggravating tensions).

27. See David E. Sanger, *Bush Adding 20,000 U.S. Troops; Sets Goal of Securing Baghdad*, N.Y. TIMES, Jan. 10, 2007, at A1 (reporting President George W. Bush's recognition in early 2007 that troop levels in and around Baghdad were insufficient).

28. See SIMPSON, *supra* note 23, at 194-98 (outlining the disagreements between Grant and President Johnson over the military occupation of the South during Reconstruction).

such cases prevented the issue from ever being authoritatively decided.

A. COMMISSIONS BEFORE APPOMATTOX

Military commissions during the Civil War dealt with some 2000 cases.²⁹ These chiefly involved spies and irregular fighters (often termed “bushwhackers”) and took place near to the front, for example in Missouri. The most notorious commission case under the laws of war was that of Confederate Captain Wirz, the commandant of the lethal Andersonville camp for prisoners of war. The proceedings generated a significant amount of negative commentary.³⁰ Cases behind the lines in the North such as those of Milligan and Vallandigham aroused the most contemporary interest and later commentary.³¹ Notoriety also centered on the case of those who conspired with John Wilkes Booth to murder President Lincoln and members of his cabinet.³² After vigorous debates, government officials decided to refer their cases to a military commission. Most were swiftly executed, but Dr. Samuel Mudd was sentenced only to life imprisonment. He instituted habeas corpus proceedings but lost in the circuit court, which held that the commission in question was

29. See WILLIAM WINTHROP, *MILITARY LAW AND PRECEDENTS* 834 (Wash. Gov't Printing Office 2d ed. 1920) (1896) (noting the large number of cases taken by military commissions after statutes, Presidential proclamations, other official proclamations, and court rulings “sanctioned” them).

30. See Lewis L. Laska & James M. Smith, “*Hell and the Devil*”: *Andersonville and the Trial of Captain Henry Wirz, C.S.A., 1865*, 68 *MIL. L. REV.* 77, 130 (1975) (citing Wirz’s execution, in addition to discontent with the use of military commissions, as reasons not to try former Confederate leaders by military commission); see also Carol Chomsky, *The United States-Dakota War Trials: A Study in Military Injustice*, 43 *STAN. L. REV.* 14-15 (1990) (criticizing another set of wartime trials—those of the Dakota Indians).

31. See, e.g., Stephen I. Vladeck, *Deconstructing Hirota: Habeas Corpus, Citizenship, and Article III*, 95 *GEO. L.J.* 1497, 1506-07, 1519 (2007) (discussing the holdings of Supreme Court cases that dealt with federal court jurisdiction to hear habeas corpus petitions of individuals detained by U.S. military forces).

32. See, e.g., ELIZABETH D. LEONARD, *LINCOLN’S AVENGERS: JUSTICE, REVENGE, AND REUNION AFTER THE CIVIL WAR* 66 (2004) (reproducing an announcement in a daily newspaper regarding the conspirators’ trial and promising to recount the daily events of the proceedings); EDWARD STEERS, JR., *BLOOD ON THE MOON: THE ASSASSINATION OF ABRAHAM LINCOLN* 12-13 (2001) (recounting in detail listeners’ fascination with the events surrounding the assassination of President Lincoln).

appropriately constituted to treat crimes rising under the laws of war.³³ The court essentially treated the conspiracy as a final lunge of the Confederate army, a bit like the incursion of the Nazi saboteurs who were doomed eighty years later in *Ex parte Quirin*.³⁴ The Supreme Court heard Mudd's appeal on February 20, 1869, but did not render a decision because President Johnson pardoned Mudd and two others, pointing to Mudd's faithful service in treating yellow fever victims in the Dry Tortugas—the Guantanamo of the nineteenth century—where he was imprisoned.³⁵ In the year 2000, Mudd's grandson sought to raise these issues by a proceeding to correct the army records involved. The district court concluded that the military proceedings had been justified under the laws of war, but the appeal was frustrated when the court discovered that the claimant lacked standing under the relevant statute.³⁶

The use of military commissions to support Reconstruction begins in 1862 when Admiral Farragut brought Union troops up the Mississippi River to seize New Orleans. A highly controversial figure, General Benjamin Butler, took command; Southerners referred to him as “Beast Butler” or “Spoons Butler” because of claims that he looted the silverware of New Orleans elite.³⁷ Lincoln established a provisional court; although its presiding officer was a civilian lawyer, the court was constituted under the commander-in-

33. See *Ex parte Mudd*, 17 F. Cas. 954 (Dist. Ct. Fla. 1868) (No. 9899) (classifying the crime as a military one because it was directed toward the Commander-in-Chief and therefore properly tried before a military commission).

34. See *Ex parte Quirin*, 317 U.S. 1, 20-23, 48 (1942) (chronicling the capture and subsequent trial by military commission of eight Nazi saboteurs who entered U.S. territory with plans to destroy U.S. war industries and war facilities in violation of the law of war). The *Quirin* court upheld the saboteurs' commission as lawful. *Id.*

35. See Todd David Peterson, *Congressional Power Over Pardon & Amnesty: Legislative Authority in the Shadow of Presidential Prerogative*, 38 WAKE FOREST L. REV. 1225, 1225 (2003) (discussing President Johnson's pardon of Mudd “as a reward for his work during the epidemic”).

36. See *Mudd v. White*, 309 F.3d 819, 824 (D.C. Cir. 2002) (denying an appeal on the basis that that the claimant's interests were not sufficiently related to the purposes of the challenged statute).

37. See William H. Rehnquist, *The Impeachment Clause: A Wild Card in the Constitution*, 85 Nw. U. L. Rev. 903, 916 (1991) (discussing the origins of General Butler's nicknames and noting the General's negative opinion of President Johnson).

chief authority.³⁸ A confrontation with a New Orleans mob led to a drastic commission action. William B. Mumford was sentenced to death for tearing the U.S. flag from its staff atop the mint building and then handing the shreds to the crowd.³⁹ The reaction in the South was furious. Protests and threats of retaliation were sent to federal authorities.⁴⁰ Years later, the Supreme Court affirmed the legitimacy of military rule in Louisiana in sweeping terms:

Although the city of New Orleans was conquered and taken possession of in a civil war waged on the part of the United States to put down an insurrection and restore the supremacy of the National government in the Confederate States, that government has the same power and rights in territory held by conquest as if the territory had belonged to a foreign country and had been subjugated in a foreign war. In such cases the conquering power has a right to displace the pre-existing authority, and to assume to such extent as it may deem proper the exercise by itself of all the powers and functions of government There is no limit to the powers that may be exerted in such cases, save those which are found in the laws and usages of war.⁴¹

B. COMMISSIONS IN 1865 TO 1867

After the surrender at Appomattox on April 9, 1865 and the President's proclamations of peace, the legal status of military justice seemed to change and challenges to commissions soon followed. In the summer of 1865, General Thomas Ruger ordered three citizens of

38. See *United States v. Reiter*, 27 F. Cas. 768, 769-71 (Prov. Ct. La. 1865) (No. 16,146) (affirming the President's authority to establish such a tribunal under the circumstances of "armed belligerent occupation").

39. See JOSEPH G. DAWSON III, *ARMY GENERALS AND RECONSTRUCTION* 8-9 (1982) (explaining that the Military Court ordered Mumford's execution as an example that federal authority could not be violated); HANS TREFOUSSE, *BEN BUTLER: THE SOUTH CALLED HIM BEAST!* 114-16 (1957) (expounding upon General Butler's determination to carry out Mumford's execution in order to preserve peace in New Orleans).

40. See 4 RUSSELL A. ALGER ET AL., *THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES* 134, 170, 328, 350, 770, 793, 805, 937 (1899) (reproducing some of the correspondence between federal authorities and Southerners). I find no indication of a courts martial record on file in the Office of the Judge Advocate General.

41. *New Orleans v. Steamship Co.*, 87 U.S. 387, 393-94 (1874). The case in fact involved the power of General Canby in 1865 to issue an order regulating the disposition of city property. *Id.*

North Carolina arrested and held for trial for assaulting a freedman. Governor Holden requested that General Ruger return them to civilian jurisdiction, but Ruger refused.⁴² He spoke of those who gave up slavery with reluctance and who felt hostility towards freedmen. He concluded that "the restraining influence of prompt trial and punishment of offenders, particularly those guilty of homicide, by military commissions is the only adequate remedy for the existing evils."⁴³ Another clash emerged in 1866 from South Carolina where General Daniel Sickles had convened a military commission to try individuals for attacking an army guard and killing several soldiers. The judge of the U.S. District Court issued a contempt citation to the general for not responding to a writ of habeas corpus.⁴⁴ Sickles proceeded with the commission after being advised by Secretary of War Stanton, "you will neither give up the prisoner or submit to arrest."⁴⁵ The commission found the accused guilty of assault and sentenced them to death,⁴⁶ but the punishment was commuted to imprisonment and they were moved to the Dry Tortugas. The prisoners were later moved to Delaware where they filed for habeas corpus. The writ was granted by District Judge Hall. His opinion said:

In so small a body, comparatively, as the army, so associated, with so much in common, so sensitive, there must be an esprit de corps that will not allow us to expect impartial justice from them in collision with citizens, while the broad ground of citizenship is not liable to this objection.⁴⁷

A congressional investigation of the case produced a report entitled "Murder of Union Soldiers."⁴⁸ After reviewing the proceedings it concluded that civilian courts could not be relied upon to do justice in such cases and that the military authorities had to be

42. See 16 *DICTIONARY OF AMERICAN BIOGRAPHY* 219 (1935) (noting that Ruger commanded North Carolina for a year after the Civil War).

43. 3 *ARMY & NAVY J.* 25 (Sept. 2, 1865).

44. See H.R. REP. NO. 39-23, at 3 (1867).

45. 3 *ARMY & NAVY J.* 758 (July 21, 1866).

46. The case is filed as Byron, MM 3888. The president of the commission was Major General Charles Devens, later of the Massachusetts Supreme Judicial Court.

47. *United States v. Commandant of Fort Del.*, 25 F. Cas. 590, 591 (Dist. Ct. Del. 1866) (No. 14,842).

48. H.R. REP. NO. 39-23 (1867).

empowered.⁴⁹ Not long thereafter Congress enacted legislation to that effect.⁵⁰

A third episode came from Virginia where General John Schofield ordered a commission trial for Dr. James Watson, a white man, for having shot and killed a freedman who had been involved in an incident with him. A local state court had released Dr. Watson from its custody and, when General Schofield had him arrested, issued a writ of habeas corpus to the general. Schofield refused to comply, but President Johnson interceded and, on the advice of Attorney General Stanbery, dissolved the commission.⁵¹ This action threw the generals into confusion as to what powers they had to carry out the reconstruction mission. President Johnson moved against commissions and directed reference of cases to civilian courts. Although it was not unambiguous, his General Order No. 26 of May 1, 1866⁵² seemed to stand in the way of further commission trials.⁵³

In a fourth case a conviction for the alleged murder of a negro boy handed down by a commission convened by General Sickles in South Carolina was set aside by Justice Nelson and the Circuit Court in New York. The judge failed to see any power on the part of the

49. See *id.* at 5 (clarifying that that military forces should withdraw their control once “life and the rights of property can be safely trusted to the local governments”).

50. See Act to Provide More Efficient Government of the Rebel States, ch. 153, § 3, 14 Stat. 428 (1867) (empowering Army officials with the discretion to organize military commissions, and declaring all interference by the state null and void).

51. See SIMPSON, *supra* note 23, at 167 (asserting that Watson’s case exemplified the Southern civil courts’ reluctance to protect freedmen); see also ROBERT J. KACZOROWSKI, THE POLITICS OF JUDICIAL INTERPRETATION: THE FEDERAL COURTS, DEPARTMENT OF JUSTICE, AND CIVIL RIGHTS, 1866–1876, at 42–43 (2005) (noting that Johnson relied on Attorney General Stanbery’s opinion that *Milligan* prevented the trial of civilians by military tribunals when the government was functioning).

52. See JAMES D. RICHARDSON, A COMPILATION OF THE MESSAGES AND PAPERS OF THE PRESIDENTS, 1789–1897, at 440–42 (1897) (reproducing President Johnson’s General Order, which states that military tribunals do not have jurisdiction to hear a case where a competent civil tribunal exists, but lists a number of exceptions under which military tribunals are permissible).

53. See NIEMAN, *supra* note 20, at 117–19 (asserting that, under the General Order, Johnson “categorically denied commanders the right to convene military commissions”).

military to exercise such jurisdiction now that a governor and a legislature were functioning in South Carolina.⁵⁴

Meanwhile in December 1866 the Supreme Court handed down its decision in *Ex parte Milligan*, ruling that a military commission could not lawfully exercise jurisdiction in Indiana, a state not caught up in the rebellion and one where civilian courts were open for business.⁵⁵ The prospects for military commissions seemed bleak indeed.

C. COMMISSIONS UNDER THE ACT OF MARCH 2, 1867

The Republican-dominated Congress took up the challenge and authorized military commissions. They were motivated in particular by the well-publicized riots in New Orleans and Memphis during May and July 1866 that left many blacks and unionists dead or maimed.⁵⁶ The Act of March 2, 1867, passed over President Johnson's veto, was termed the Act to Provide for the More Efficient Government of the Rebel States.⁵⁷ Its preamble sought to lay the groundwork for the commissions:

Whereas no legal State governments or adequate protection for life or property now exists in the rebel States of Virginia, North Carolina, South Carolina, Georgia, Mississippi, Alabama, Louisiana, Florida, Texas, and Arkansas; and whereas it is necessary that peace and good order should be enforced in said states until loyal and republican State governments can be legally established.⁵⁸

The Act then proceeded to divide the South into five districts, each to be commanded by a general officer. It provided for military commissions as follows:

54. See *In re Egan*, 8 F. Cas. 367, 368 (C.C. N.D. N.Y. 1866) (No. 4303) (holding that the restoration of state government removes the power of the military to convene a military commission within a state).

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

56. See GEORGE RABEL, *BUT THERE WAS NO PEACE: THE ROLE OF VIOLENCE IN THE POLITICS OF RECONSTRUCTION* 37-42 (1984) (describing the riots and noting their use by Republicans in Congress as evidence of the need for stricter safeguarding of freedmen).

57. Act to Provide for the More Efficient Government of the Rebel States, ch. 153, 14 Stat. 428 (1867).

58. *Id.* at pmbl.

That it shall be the duty of each officer assigned as aforesaid to protect all persons in their rights of person and property, to suppress insurrection, disorder and violence, and to punish or cause to be punished, all disturbers of the public peace and criminals and to this end he may allow local civil tribunals to take jurisdiction of and try offenders, or, when in his judgment it may be necessary for the trial of offenders, he shall have power to organize military commissions or tribunals for that purpose, and all interference, under color of State authority with the exercise of military authority under this act, shall be null and void.⁵⁹

President Johnson opposed the new regime. After obtaining an opinion from Attorney General William Stanbery that found the legislation in various respects unconstitutional, particularly as to the military commission provision, Johnson used his presidential powers to undermine it.⁶⁰ In August 1867, he removed Generals Philip Sheridan and Daniel Sickles from their commands and replaced them with more sympathetic generals. The local press and politicians greeted the arrival of General Winfield Scott Hancock to replace Sheridan with effusive adulation.⁶¹ Hancock issued a famous General Order No. 40⁶² proclaiming his pro-civilian policy:

In war it is indispensable to repel force by force, and overthrow and destroy opposition to lawful authority. But when insurrectionary force has been overthrown and peace established, and the civil authorities are ready and willing to perform their duties, the military power should cease to lead, and the civil administration resume its natural and rightful dominion.

59. *Id.* § 1 (stating that the First Military District would consist of Virginia, the Second of North and South Carolina, the Third of Georgia, Alabama, and Florida, the Fourth of Arkansas and Mississippi, and the Fifth of Louisiana and Texas). For a table showing the successive commanding generals of the districts, see SEFTON, *supra* note 25, at 255-59.

60. *See* 12 Op. Att'y Gen. 182, 198 (1867) (arguing that the accused before a military commission does not receive certain constitutional rights, such as the right to a jury trial).

61. *See* DAVID M. JORDAN, *WINFIELD SCOTT HANCOCK: A SOLDIER'S LIFE* 201 (1988) (quoting reports from a local newspaper that area conservatives found Hancock to be impartial and unbiased and were "fully satisfied" with his appointment).

62. *See* FREDERICK E. GOODRICH, *LIFE OF WINFIELD SCOTT HANCOCK* 245-47 (1886) (providing the text of the General Order which was "hailed as the presage of a return from the anarchy of war to the safe rule of peaceful law"). The author is effusive in his praise of Hancock and criticism of the "high-handed" Sheridan. *Id.* at 240-41. Hancock was the Democratic nominee for president in the election of 1880. *Id.* at 313.

Solemnly impressed with these views, the General announces the great principles of American liberty are still the lawful inheritance of this people, and ever should be. The right of trial by jury, the habeas corpus, the liberty of the press, the freedom of speech, the natural rights of persons and the rights of property must be preserved. Free institutions, while they are essential to the prosperity and happiness of the people, always furnish the strongest inducements to peace and order. Crimes and offences committed in this district must be referred to the consideration and judgment of the regular civil tribunals, and those tribunals will be supported in their lawful jurisdiction.⁶³

But Hancock warned Louisianans that he was there to enforce order: "While the General thus indicates his purpose to respect the liberties of the people, he wishes all to understand that armed insurrection, or forcible resistance to law, will be instantly suppressed by arms."⁶⁴

A judicial challenge to the new statute came soon. William McCardle, editor of the *Vicksburg Daily Times*, in Mississippi, published articles in October and November 1867 attacking union generals as "infamous, cowardly and abandoned villains" and urging Southerners to stay away from the polls.⁶⁵ Major General E.O.C. Ord ordered his trial on four charges: (1) disturbance of the public peace in violation of the Act of Congress of March 2, 1867, (2) inciting insurrection, disorder and violence, (3) libel, and (4) impeding reconstruction of the Southern states.⁶⁶ The specifications set forth extensive quotations from the newspaper. For example, McCardle wrote:

There is not a single shade of difference between Schofield, Sickles, Sheridan, Pope and Ord, and that they are each and all infamous, cowardly, and abandoned villains, who instead of wearing shoulder straps and ruling millions of people, should have their heads shaved, their ears

63. *Id.* at 245-46.

64. *Id.* at 246.

65. Transcript of Record at 11, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

66. 6 CHARLES FAIRMAN, HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION, 1864-88, PART ONE 437-38 (Paul A. Freund ed., 1971).

cropped, their foreheads branded, and their precious persons lodged in a penitentiary.⁶⁷

An order from Headquarters 4th Military District on November 16, 1867 directed the trial of McCardle before a commission that had already been constituted. On November 20, 1867, at 11 a.m., the commission met; it consisted of a colonel, a major and three captains with a lieutenant as Judge Advocate. McCardle declined to plead on the ground that his case was set for hearing before the Circuit Court on the next day. The commission entered a “not guilty” plea for him and adjourned.

McCardle appeared before the U.S. District Judge for Mississippi, Robert A. Hill, who had been appointed by President Johnson in 1866 and was regarded as too lenient in Ku Klux Klan cases and too concerned with avoiding alienating local elites.⁶⁸ He denied relief and wrote a brief opinion. Since it is the only opinion on the merits as to the constitutionality of commissions under the Act of April 1867 and was not reported,⁶⁹ it is worth quoting at some length. Although Judge Hill never refers to the Guarantee Clause, it is apparent that he relies on that provision. He noted that the President had appointed a provisional governor, and that tribunals of justice were established and other governmental institutions put in place.

Congress, however, refused to give [the provisional government] sanction, and set about devising some other plan to enable the citizens of the State to re-establish civil government, and to resume practical relations to the Union. Whether or not Congress has acted wisely or unwisely, is not a question which can be inquired into by this court

If it is the duty of the government of the United States in any one or all of its departments, to protect the citizens in their rights of person and

67. Transcript of Record at 11, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869).

68. See KACZOROWSKI, *supra* note 51, at 56, 60 (recounting Judge Robert A. Hill’s desire for acceptance by Southern communities as representing the larger problem of the lack of harmony between federal laws and local priorities in the South).

69. Transcript of Record at 16, 19-20, *Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869) (holding that the court could not clearly find that military commissions are unconstitutional).

property, and as a means of doing which, to provide for the punishment of disorder and crime, in the absence of a practical State government, then the choice of the means must be made by the power conferring such authority.

Being satisfied, first, that the government is bound under the Constitution to provide such security and that there is no judicial tribunal in the State not subject to the military commander, practically possessing such power, those offences not being cognizable in the Federal courts, I cannot come to that clear conviction of mind necessary under the decision made by the Supreme Court to pronounce this act repugnant to the constitution and void. Had I that clear conviction of mind, it would be my duty so to declare it.⁷⁰

The opinion then dealt with the argument that “the arrest was in violation of that provision of the Constitution which guarantees the freedom of speech and the press.”⁷¹ The Court held that alleged publications were libelous, abused public officers, and were not immune from punishment. Finally, the Court reviewed military commission procedures, concluding:

It may be supposed that those who passed the act, believed that domestic disturbances and crime could be best suppressed by the commanding general and his subordinates, who might be presumed to be impartial and more efficient. Whether in this they were right or wrong it is not for this court to declare.⁷²

McCardle at once appealed. The appeal seemed to be authorized by an Act of February 5, 1867 that had been designed to give relief to former slaves who were being unlawfully held captive.⁷³ As Professor Fairman comments, “[l]ike the rain, the law impartially blesses the just and the unjust.”⁷⁴ Distinguished counsel argued for both McCardle and the United States. These arguments took place March 2-9, 1868, and the Supreme Court took the case under advisement. On March 27, 1868, Congress passed a statute, over

70. *Id.* at 19-20.

71. *Id.* at 20.

72. *Id.*

73. See FAIRMAN, *supra* note 66, at 448 (pointing out that the Congress intended the February 1867 Act to protect black soldiers' families).

74. *Id.*

presidential objections, that repealed “so much of the act approved February five, eighteen hundred and sixty seven . . . as authorizes an appeal from the judgment of the circuit court to the Supreme Court of the United States . . . on appeals which have been or may hereafter be taken”⁷⁵ Refusing to inquire into the motives of Congress, the Court, through Chief Justice Chase, ruled that the statute was a legitimate exercise of the power of Congress to make exceptions to the appellate jurisdiction of the Supreme Court and dismissed the case.⁷⁶ That ruling makes the case a centerpiece in works on federal courts and federal jurisdiction and produced a substantial body of commentary by eminent scholars about Congress’s power to engage in “jurisdiction stripping.”⁷⁷ It is not necessary to investigate that question because the focus of this article is on what the court decided that it could not decide.⁷⁸

In May 1869 the new attorney general, Ebenezer Hoar, delivered an opinion regarding the legality of commissions.⁷⁹ It referred to a case in which General Reynolds ordered a commission to try one Weaver for a “wanton and cruel” murder of a former slave who had gone to work for another employer. He acted at the request of the

75. 15 Stat. 44 § 2 (1868) (amending the Judiciary Act of 1789 and stripping the Supreme Court of appellate jurisdiction to review circuit court decisions stemming from the February 1867 Act).

76. *Ex parte McCardle*, 74 U.S. (7 Wall.) at 514-15 (finding that the repeal of the February 1867 Act withdrew the Court’s jurisdiction to hear the case even though the February 1867 Act lawfully allowed McCardle’s appeal).

77. See generally RICHARD H. FALLON, JR. ET AL., *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 334-43 (5th ed. 1996) (presenting cases that demonstrate Congress’ ability to remove the Supreme Court’s jurisdiction over certain issues).

78. *McCardle* does not appear further in the military archives. See WILLIAM C. HARRIS, *THE DAY OF THE CARPETBAGGER: REPUBLICAN RECONSTRUCTION IN MISSISSIPPI 18* (1979) (stating that “General Gillem, Ord’s successor and a protégé of President Johnson, quietly dropped the charges against him”). He appears later as an unrepentant advocate of racial violence. See, e.g., CHRISTOPHER WALDREP, *ROOTS OF DISORDER: RACE AND CRIMINAL JUSTICE IN THE AMERICAN SOUTH, 1817-80*, at 158-59 (1998) (recounting McCardle’s role in calling whites together to violently oust a local sheriff who had support from the black community); WILLIAM MCCARDLE & ROBERT LOWRY, *A HISTORY OF MISSISSIPPI* (R. H. Henry 1891).

79. See 13 Op. Att’y Gen. 59 (holding that President’s declaration that the insurrection was over was not contradictory to the March 1867 Act, which authorized military commissions and military control of the former Confederate states).

local judge in Austin, Texas, who did not believe that the case could be fairly tried in his court. The commission found Weaver guilty and sentenced him to be hanged. The Judge Advocate General approved the outcome, saying that the trial had been "fairly and carefully conducted."⁸⁰ The Attorney General concurred. His opinion found that the question of when the war ended was for Congress to decide and that its decision was not reviewable. Therefore *Milligan* was not on point.⁸¹

In 1869 another case came to the Supreme Court that seemed likely to resolve the issue. Major General Granger in Mississippi ordered one Yerger to be tried by a military commission on a charge of murder. His victim was a Union major who was mayor of the town and who had ordered Yerger's piano seized for debt.⁸² The commission found Yerger guilty and sentenced him to death by hanging. The Judge Advocate General of the Army approved the sentence.⁸³ The District Court determined that the custody of Yerger was lawful.⁸⁴ Yerger appealed, and this time the Supreme Court affirmed that it had jurisdiction to grant the writ.⁸⁵ It concluded that, though the Act of 1868 had repealed the appeals provision of the Act of 1867, it had not set aside earlier legislation giving appellate powers to the Court. Unfortunately for lawyers, the case was

80. *Id.*

81. *See id.* (arguing that although *Milligan* proposes that military governance is appropriate when courts are "closed," the military commander may employ local tribunals at his discretion during wartime).

82. *See* FAIRMAN, *supra* note 66, at 564-65 (recounting how Yerger's plea that, as a civilian, he was entitled to be tried before a grand jury or a trial jury was overruled by the commission).

83. *See* 16 THE PAPERS OF ULYSSES S. GRANT 530-31 (John Y. Simon ed., So. Ill. Univ. Press 1988) [hereinafter GRANT].

84. *See Ex parte Yerger*, 75 U.S. (8 Wall.) 85, 99 (1868) (delving into the lower court's holding of the lawfulness of detention by the military). That decision was handed down by Judge Robert A. Hill, who had denied McCardle's petition.

85. *See id.* at 106 (finding that the March 1868 Act repealing the February 1867 Act did not change the Judiciary Act of 1789 and thus holding that the Court had jurisdiction). *Yerger* also disposed of the case of Benjamin Brown and associates who were tried for murder in Texas by order of General Reynolds. The petition was denied by U.S. District Judge T.H. Duval—a pre-war appointee. *See* Transcript of Record at 6-7, *Ex parte Brown*, 116 U.S. 401 (1886) (Duval J., presiding) (following *Yerger* and denying the petition).

resolved by the army, releasing Yerger and rendering the case moot.⁸⁶

D. THE ISSUES NEVER DECIDED

What would the Court have decided if it had been able to sink its teeth into the case? The modern legal scholar who had the broadest and deepest knowledge of the Court during this period believes that the government would have lost.⁸⁷ The statements of views from justices which he has assembled—including Justice Nelson's opinion on circuit⁸⁸—support that assertion. The strenuous efforts of the government to keep the issue from being decided tend to support this view.

Analysis starts with the idea that the Fifth and Sixth Amendments generally ban military courts since they involve neither grand juries nor trial juries. A first exception is created by those Amendments—cases arising in the land and naval forces. *Ex parte Milligan* recognizes another exception, implied from the power in Article I, Section 9, to suspend the writ of habeas corpus in cases of rebellion or invasion.⁸⁹ A third exception, for cases arising under the laws of war, as we have seen, was extensively utilized during the Civil War and was confirmed by *Ex parte Quirin* during World War II.⁹⁰

The first issue, one stressed by opponents of commissions, is that the matter was governed by *Ex parte Milligan*: military commissions cannot sit where civilian courts are open for business.⁹¹ In each of the

86. See FAIRMAN, *supra* note 66, at 589 (quoting correspondence stating that the military released Yerger with the consent of the Attorney General).

87. See *id.* at 509 (pointing out that Justices Clifford, Grier, Field, Davis, and Nelson were opposed to the Reconstruction legislation).

88. See *In re Egan*, 8 F. Cas. 367, 368 (C.C. N.D. N.Y. 1866) (No. 4303) (arguing that once a new government was organized and new officials appointed, the military commanders no longer had the power to try civilians in military commissions).

89. See *Ex parte Milligan*, 71 U.S. (4 Wall.) 2, 126-27 (1866) (recognizing that where, as in Virginia, the national authority is overturned and courts are driven out, martial law may be imposed).

90. See *Ex parte Quirin*, 317 U.S. 1, 48 (1942) (holding that a military commission convened by the President to try law of war offenses was permissible).

91. See *Ex parte Milligan*, 71 U.S. at 140-41 (Chase, C.J., dissenting) (attacking the notion that Congress can exercise its power to form a military

states under occupation, courts were sitting, both state and federal, and were handling both civil and criminal matters. They argued that in the Southern states, local governments had been fully restored under new state constitutions, governors and legislatures had been elected and regular civilian courts, both state and federal,⁹² were open for business. In support of the commissions, one could point out that the concurring opinion in *Milligan* stressed the fact that the commissions were not authorized by Congress. Those four justices said, "In times of rebellion and civil war it may often happen, indeed, that judges and marshals will be in active sympathy with the rebels, and courts their most efficient allies."⁹³

The second issue is whether the war power still sustained commissions as it had during the pre-Appomattox period. The opposition argued that the Union's effort to suppress the rebellion had been successful and the attempt at secession was void. That meant that powers that could be exercised by conquering states were no longer in effect. The sweeping judicial assertions about the powers of the United States as conqueror that were found in earlier cases arising from Louisiana before Appomattox now had no applicability. The case was not distinguishable from *Ex parte Milligan*. The government's response centered on the findings Congress had made in the Act of March 2, 1867, which were conclusive and not judicially reviewable. In other words, the war had not truly ended despite President Johnson's proclamations to that effect in 1866.⁹⁴ The links of allegiance that bound Mississippi to the United States had not been fully restored. *Milligan* therefore was not decisive. The question—is the war over for these purposes—was

commission only during a public emergency and stressing that even an open court may lack the competency of a military commission).

92. See *In re Egan*, 8 F. Cas. at 368 (finding that the newly formed civil government of South Carolina, not a military commission, should try a man for the murder of a black boy because the local courts "were in the full exercise of their judicial functions"). By 1866 federal judges were in place throughout the South; two who had not resigned at secession and others newly appointed by Lincoln or Johnson. See 1 F. Cas. xiii (listing judicial appointments by district).

93. *Ex parte Milligan*, 71 U.S. (4 Wall.) at 141.

94. See Michael R. Belknap, *A Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 CAL. W. L. REV. 433, 461 (2002) (stating that the enactment of the March 1867 Military Reconstruction Act "revitalized" military commissions).

answered in other contexts. The courts universally concluded that the war ended when President Johnson said it did. Thus, in *The Protector*,⁹⁵ the Supreme Court decided that the dates on which President Johnson proclaimed the war ended were the dates on which the wartime suspension of the statute of limitations ended.⁹⁶

The third question is whether Congress had the authority to authorize the use of commissions under the Guarantee Clause.⁹⁷ There are many issues about the Guarantee Clause that have never been decided. Research turns up little more than statements that issues under the clause are political questions not reviewable by the courts.⁹⁸ What deficiencies in a state's system mean that it does not have a republican form of government? The Founders seemed to have been most concerned that some state might try to revert to a monarchical system. Before the Civil War, abolitionists argued unsuccessfully that a government that countenanced slave-holding was not republican.⁹⁹ As Congress began during the War to plan for

95. *The Protector*, 79 U.S. (12 Wall.) 700, 701 (1871) (concluding that the proclamation of April 2, 1866 marked the end of hostilities in Alabama).

96. Other cases dating the end of the war to April 2, 1866 for most states and August 20, 1866 for Texas and the war as a whole include *United States v. Anderson*, 76 U.S. (9 Wall.) 56, 70 (1869); *McKee v. Rains*, 77 U.S. (10 Wall.) 22, 25 (1869); *Lamar v. Brown*, 92 U.S. 187, 193 (1875); *Raymond v. Thomas*, 91 U.S. 712, 714 (1876); *McElrath v. United States*, 102 U.S. 426, 438 (1880); *United States v. Corson*, 114 U.S. 619, 621 (1885). Many years later in *Madsen v. Kinsella*, 343 U.S. 341, 360 (1952), the Court decided that, although combat had ceased in 1945, holding a commission trial of an American woman in Germany in 1951 was still permissible since there had been no treaty of peace. For a description of post-1945 courts in Germany, see Eli E. Nobleman, *American Military Government Courts in Germany*, 40 AM. J. INT'L L. 803, 805 (1946).

97. See HERMAN BELZ, *RECONSTRUCTING THE UNION: THEORY AND POLICY DURING THE CIVIL WAR* 4-5 (Cornell Univ. Press 1969) (discussing the complications involved in applying the Guarantee Clause to the Reconstruction-era South, whose governments were previously not "republican" in nature); see also WILLIAM M. WIECEK, *THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION* 208 (1972) (emphasizing that the course of Reconstruction was paralleled by the debates surrounding the Guarantee Clause because "[a] vigorous policy of Reconstruction would require an expansion of all available constitutional bases to support it").

98. *But see* 1 LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 908-20 (3d ed. 2000) (analyzing whether the Guarantee Clause grants rights to state and federal government, as well as to individuals).

99. See SEFTON, *supra* note 25, at 253 (noting that state policy following the Civil War was the preservation of Republican state governments and protection of blacks, whose votes were necessary for the success of the Republican regime).

the aftermath, arguments were made that the Guarantee Clause authorized reconstruction activities. A state where free elections could not be held and where blacks were, notwithstanding emancipation, routinely denied their rights was not republican. Although it never cites the Guarantee Clause or Article IV, Section 4, the opinion by District Judge Hill in *McCardle* seems to accept that argument.¹⁰⁰ In 1869, the Supreme Court of Georgia held that Congress validly insisted upon the inclusion in that state's constitution of a clause forbidding suits relating to property in slaves. It said that at the end of the war "it became the duty of Congress, in whom not only the war power but the power to admit new States is vested by the Constitution, to interpose, and re-establish and guarantee to the State a republican form of government."¹⁰¹ It cited Chief Justice Taney "who was one of the ablest and truest exponents of the doctrine of the States' right school,"¹⁰² as saying that it is Congress's power to decide what constitutes a republican form of government. Shortly after *McCardle*, in the same volume of reports as *Yerger*, the Supreme Court paid deference to Congress's choice: "In the exercise of the power conferred by the guaranty [sic] clause . . . a discretion in the choice of means is necessarily allowed."¹⁰³ Perhaps that covered commissions. But the argument remains impressive that Congress could pursue that goal only by means consistent with the Bill of Rights.

E. THE APPLICABLE SUBSTANTIVE LAW

A puzzle not addressed in depth in the contemporary argumentation was the issue of what substantive criminal law the military courts could apply consistent with the Constitution and legislation. This issue was part of a profound and painful change in conceptions of states' rights brought about by the war and the Reconstruction amendments. The army did a variety of things that

100. *See Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869).

101. *Shorter v. Cobb*, 39 Ga. 285, 294 (1869).

102. *See id.* at 300; *see also Luther v. Borden*, 48 U.S. (7 How.) 1, 42 (1849) (asserting that when state representatives are admitted into the federal legislature, the republican nature of the state government is "recognized by the proper constitutional hierarchy").

103. *Texas v. White*, 74 U.S. (7 Wall.) 700, 729 (1869).

would have been beyond federal power in normal times—removing and replacing state officials, managing elections, etc.¹⁰⁴

Typically, military commissions apply the customary law of war, which Congress has the power to define, although it has done so in the most exiguous way.¹⁰⁵ But that resort was not available in the typical Reconstruction case and it is not clear what the officers involved thought they were doing. Many of those responsible for commission practice were not lawyers but some officers were—Generals Butler and Sickles, for example—and each command had its professional judge advocate. Those who were lawyers, like Major John Chipman Gray, complained that they were handicapped by the lack of books.¹⁰⁶ The charges filed against defendants did not, unlike those in modern military practice, generally specify the statutory provision that was applicable. One set of commission charges did include a count of violating an Alabama statute on lynching.¹⁰⁷ Take, for example, a case in which state officials ordered the punishment of a freedman for teaching black children to read in violation of the old local rules.¹⁰⁸ The army filed assault and battery charges against

104. See Gary Felicetti & John Luce, *The Posse Comitatus Act: Setting the Record Straight on 124 Years of Mischief and Misunderstanding Before Any More Damage is Done*, 145 MIL. L. REV. 86, 97-109 (2003) (pointing to the Posse Comitatus Act as the turning point away from using the military in domestic affairs).

105. See *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2775-76 (2006) (establishing a three-fold division among commissions—law of war commissions, martial law commissions, and military government tribunals). The commissions here studied were a mixture of the second and third types. See *Yamashita*, 327 U.S. 693 (1945) (providing a classic example of the law of war commission).

106. See JOHN CHIPMAN GRAY & JOHN CODMAN ROPES, *WAR LETTERS 1862-1865 OF JOHN CHIPMAN GRAY AND JOHN CODMAN ROPES* 407 (Worthington Ford ed., 1927) (noting with regret that since statutes were not always available, lawyers would sometimes rely on their idea of what the law should be).

107. General Order 72, Third Mil. Dist. (1868). Alabama Code § 3684 then read:

Lynching. Any two or more persons who abuse, whip, or beat any person, upon any accusation, real or pretended, or to force such a person to confess himself guilty of any offense, or to make any disclosures, or to consent to leave the neighborhood, county, or state, must on conviction, each be fined not less than five hundred dollars; and may be imprisoned in the county jail, or sentenced to hard labor for the county, for not more than twelve months.

In another case, a charge was dismissed because the Texas statute of limitations had run. General Order 46, Fifth Mil. Dist. (1870) (on file with author).

108. See Edward John Harcourt, *Who Were the Pale Faces? New Perspectives*

these officials. Such charges could not have been based on state law alone, but required some superseding federal element.

The case for the use of state law can rely on several arguments. First, army officers would have been aware of the Lieber Code, promulgated as General Order 100, which provided in Article 6 that “[a]ll civil and penal law shall continue to take its usual course in the enemy’s places and territories under martial law, unless interrupted or stopped by order of the occupying military power.”¹⁰⁹ When President Lincoln established a provisional court in Louisiana, the order prescribed that the court should adhere “so far as possible to the course of proceedings and practice which has been customary in the courts of the United States and Louisiana.”¹¹⁰ The modern law of belligerent occupation prescribes that local law shall in general prevail.¹¹¹ A century later, *Madsen v. Kinsella* approved a military commission proceeding in occupied Germany in which an American citizen was charged with violation of § 211 of the Strafgesetzbuch, the German criminal code.¹¹² If one looked for federal law to supersede obnoxious provisions of state law, one found a great shortage of federal statutory law to apply. The Civil Rights Act of 1866 did create a number of crimes involving denial of rights.¹¹³ General Sickles seems to have derived authorization from the Thirteenth Amendment to set aside state rules later observers would term “badges of slavery.” The drafter of the charges against McCardle extracted from the statute authorizing commissions the words “disturbance of the public peace.”¹¹⁴ In reality, the

on the Tennessee Ku Klux Klan, 51 CIV. WAR HIST. 23, 40 (2005) (explaining that freedman Cap Jordan was sentenced to be stripped and flogged but that the findings were set aside due to procedural lapses).

109. General Order 100, art. 6, Apr. 24, 1863, reprinted in RICHARD SHELLY HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* 46 (1983).

110. *Reiter*, 27 F. Cas. at 770; see also David J. Bederman, *Article II Courts*, 44 MERCER L. REV. 825, 841-43 (1993) (providing the language of the Executive Order and commenting on the broad jurisdiction of the court over state and federal issues).

111. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 64.

112. See *Madsen*, 343 U.S. at 361-62 (asserting that the German Criminal Code was expressly adopted by the United States Military Government, and was therefore applicable to the petitioner).

113. Civil Rights Act of 1866, ch. 31, 14 Stat. 27, § 2 (1866).

114. *Ex parte McCardle*, 73 U.S. (7 Wall.) at 320.

commissions seem to have been operating under a variety of criminal common law norms. In defiance of teachings that said there could be no such thing at the federal level, it still flourished among the states.¹¹⁵ The one civilian case to pass on the issue ruled that state criminal law should have been applied.¹¹⁶

III. THE OPERATIONS OF MILITARY COMMISSIONS

A. THE NUMBER AND SUBJECTS OF COMMISSION CASES

We now turn to an endeavor to develop a picture of what military commission operations looked like and how fair and effective they were. First, the overall numbers are elusive. Professor Mark Neely, who did the most extensive search, finds the number to have been about 1400.¹¹⁷ In his calculation, the number drops from 921 in 1865 to 229 in 1866, 181 in 1867 and 104 in 1868, with only a few cases from Texas and Mississippi in 1869 and 1870. William Winthrop, the author of the authoritative nineteenth century text on military law, puts the number of cases under the Reconstruction laws at only around 200; this number is reconcilable with Neely's since it excludes cases before the spring of 1867.¹¹⁸ Other sources produce numbers for particular commands that are at some variance with these calculations.¹¹⁹ My own search of the general order files of the

115. See generally 1 WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW § 2.1(e) (Thomson West 2d ed., 2003) (providing an overview of criminal common law and noting various recognized crimes without any statutory basis).

116. See *Ex parte Hewitt*, 12 F. Cas. 73, 74 (S.D. Miss. 1869) (No. 6,442). A military commission sentenced defendants to one year's imprisonment for assaulting a teacher at a "school for colored children." Judge Hill released them on the ground that the maximum penalty under state law—six months confinement—was the appropriate amount and the commission had exceeded its authority.

117. See MARK E. NEELY, JR., THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES 176-77 (1991) (providing specific numbers of military trials carried out per year to illustrate that though they continued, instances of such trials declined).

118. See WINTHROP, *supra* note 29, at 853 (indicating that the number was low because military courts, though a substitute for local courts, passed on certain cases to the state judiciary).

119. See, e.g., SEFTON, *supra* note 25, at 193 (reporting 216 cases in the Second District in 1867 and 59 cases in Texas from October 1868 to October 1869); see also JAMES WILFORD GARNER, RECONSTRUCTION IN MISSISSIPPI 169 (1902)

1867 districts produced the following: First District with 2, Second District with 35, Third District with 7, Fourth District with 24, and Fifth District with 14.¹²⁰ These files are obviously incomplete and in any case do not account for cases before the establishment of the district.¹²¹ Numbers are complicated by the fact that sometimes there were quite a few defendants in the same trial,¹²² and further by the practice of the Fourth Military District of referring several separate cases to the same commission and then including the outcomes of all of them in the same order. I also checked the index of the Judge Advocate General's files for 1868 to 1870 and found listings for seventy defendants.

Many of the cases had little to do with Reconstruction and resistance. Some of them had to do with maintaining military discipline—punishing civilians who sold liquor to soldiers or purchased military gear from them. There was some ambiguity at the time about the power of courts-martial to try even soldiers for civilian crimes in peacetime, so some commission cases involved offenses by soldiers.¹²³ There were cases of burglary, disorderly conduct and malicious mischief. In 1865 there were still some cases

(reporting 41 cases under General Ord); CLARA MILDRED THOMPSON, *RECONSTRUCTION IN GEORGIA: ECONOMIC, SOCIAL, POLITICAL* 165 (Ayer Publishing 1991) (stating that General Meade only constituted 32 military commissions and carried out only one sentence in Georgia, Florida and Alabama).

120. General Schofield later said, "No case arose in Virginia in which it was found necessary, in my opinion, to supersede the civil authorities in their administration of justice. Not a single citizen of that State was tried by military commission." JOHN M. SCHOFIELD, *FORTY-SIX YEARS IN THE ARMY* 399 (1998). He had, however, referred the Watson case for commission trial in 1865, and in 1868, he referred Thomas Goode for trial on charges of assaulting an agent of the Freedmen's Bureau. General Canby referred the other case, that of George Cady, in 1869 for trial on charges of embezzling state tax funds.

121. *Id.*

122. Thus, thirty-four defendants associated with the Knights of the Rising Sun were tried together for breaking past military guards into a prison in Jefferson, Texas, and murdering prisoners. General Order 175, Fifth Mil. Dist. (1869).

123. *See* Act of March 3, 1863, chs. 74-75, 12 Stat. 736, § 30 (1863) (conferring court-martial jurisdiction over military personnel accused of various criminal offenses "in time of war, insurrection, or rebellion"); *see also* O'Callahan v. Parker, 395 U.S. 258, 268-303 (1969) (outlining the history of the jurisdiction of courts-martial to conclude that a soldier could not be tried by court-martial for a crime that was not service connected). *But see* Solario v. United States, 483 U.S. 435, 439-51 (1987) (using past case law to overrule *O'Callahan* and hold that servicemen may be tried by court-martial for crimes not connected to the service).

involving charges of unlawful belligerency during the Civil War.¹²⁴ Overall, one estimates the number of “real” Reconstruction cases as in the area of 500.

B. CASES INVOLVING VIOLENCE

The prosecutions directly in support of Reconstruction were mostly murder cases, such as Yerger’s and Weaver’s, as well the cases against the prisoners ordered released by the federal courts before the Act of 1867. Such episodes began before Appomattox. John Chipman Gray wrote to his Boston friend John Ropes about a case in 1864:

I have just carried in to the General for his signature an order approving the sentence of a citizen in Florida, who was tried for murder and is to be hung within a week. The murdered man by name Whitney was hung by the prisoner Murray for being a Union man; several others were present at the execution (one of the singular name of Anguish Britt) and they gave conclusive evidence on the trial. One of the witnesses described the murder in such a horribly grotesque and graphic manner that it struck me and I copied it from the record *verbatim*. “Mr. Murray took Mr. Whitney, put him on his horse and Mr. Clifton climbed a tree and tied one end of the rope to the tree. Then Mr. Murray and Mr. Clifton put the rope around Mr. Whitney’s neck. Mr. Hull was standing behind the critter with a stick. Mr. Murray or Mr. Clifton said ‘Clack him off’ and he slapped the critter with the stick; it ran from under him and the old man hung right there.”¹²⁵

A particularly controversial murder case followed the assassination of George Ashburn, a black political activist, by a group of disguised men. The army rounded up suspects and sent them to Fort Pulaski, near Savannah. The local press alleged that they were tortured in the dungeons of the fort. The proceedings before the commission were cut off when Congress enacted a statute readmitting Georgia to the union.¹²⁶ There were a large number of

124. See *In re Murphy*, 17 F. Cas. 1030, 1031 (C.C.D. Mo. 1867) (No. 9,947) (holding that since the civil courts were open when a military commission proceeded against Murphy, it was not relevant that the courts were closed when the acts of which he was accused were committed).

125. See GRAY & ROPES, *supra* note 106, at 411-12; see also General Order 2, Dep’t of the South (1864). In 1865, there were at least fourteen other commission cases involving violence against Negroes in North Carolina.

126. See SEFTON, *supra* note 25, at 172 (recounting that, after the termination of

violent cases in Texas between October 1868 and September 1869, resulting in twenty-nine convictions in fifty-nine cases. One of them in 1869 aroused considerable controversy with widespread demonstrations of support for the accused. The commission's proceedings were, like other cases, cut off by the readmission of Texas.¹²⁷ As one reads the court martial orders in murder and assault cases, one can sometimes discern the army's motives. For example, in the case of Abram Jenkins and others, it is apparent that they were in "consternation and rage" that a black girl had resisted an assault by a daughter of one of the defendants. They took the victim out of school and beat her savagely. In approving the prison sentences, General Sickles labeled it a "revolting crime."¹²⁸ In another case, defendants were found guilty of assaulting visitors who had come from Washington for a political convention on the basis that "decent amenities of hospitality were violated."¹²⁹ Sometimes one can draw an inference from the specification that a group of white citizens killed or injured a black. Sometimes one cannot discern why the army chose to prosecute a given crime of violence. For example, in January 1866, a commission in South Carolina convicted Joe Wade, a freedman, for manslaughter in the death of Scipio Sherrer, who was black. The death arose from an altercation over gambling fueled by alcohol.¹³⁰ Presumably, the army took control of such cases because of concern that a white court would not do justice to a black defendant.¹³¹

C. OTHER RECONSTRUCTION CASES

Other prosecutions were obviously in support of Reconstruction goals. As we have seen, McCardle's case arose from charges of obstructing Reconstruction. Another such case involved a charge that

the commission, the Army handed over the detainees to local officials, who never tried the defendants).

127. See *TRELEASE*, *supra* note 22, at 173 (noting that once Texas elected a new state government, the state took control of the justice system).

128. General Order 75, Second Mil. Dist. (1867).

129. General Order 69, Second Mil. Dist. (1867).

130. See *GRANT*, *supra* note 83, at 448 (noting that these facts appear from Wade's application for a pardon in 1869, which was denied).

131. See *Aaron v. State*, 40 Ala. 307, 311 (1867) (preventing the execution of a freedman convicted of stealing two horses by invoking an intervening repeal of the law under which the prisoner was convicted and sentenced).

the accused, W.C.M. McNulty, captain of the steamer Pilot Boy, had refused to sell a first class steamboat ticket, from Charleston to Beaufort, to Miss Frances Rollins, a “respectable” black woman.¹³² This refusal violated a General Order of General Sickles prohibiting discrimination in public accommodations on account of “caste or color.” General Sickles approved the proceedings, including a substantial fine: “Such disabilities and usages have ceased with slavery to have any legal sanction. Whatsoever belongs of common right to citizens necessarily follows the recognition of the blacks as citizens and belongs to them.” Another case found the accused, a justice of the peace, guilty of inflicting upon a black a punishment of lashing different from that imposed on whites.¹³³ Furthermore, another case convicted Aaron Logan, a registrar for elections, and sentenced him to two years confinement for misconduct in office consisting of threatening a crowd of people trying to vote.¹³⁴ In all, both whites and blacks were tried, but very few defendants were women.¹³⁵

D. COMMISSION PROCEDURES

A fair evaluation of military commission procedures requires a comparison between their activities in the 1860s and the work of Southern civilian courts at that time. One must try to do this without falling into the prejudices against military courts that are common among civilian lawyers. Both military and civilian criminal procedures have evolved over time. In the 1860s, the military was still governed by the articles of war of 1806.¹³⁶ Congress has since then drastically reformed court-martial procedure several times—after World War I, World War II, and Vietnam.¹³⁷ Military

132. General Order 74, Second Mil. Dist. (1867).

133. General Order 94, Second Mil. Dist. (1867).

134. General Order 126, Second Mil. Dist. (1867).

135. See WINTHROP, *supra* note 29, at 854 n.15 (stating that, “[t]rials of women were very few compared to the number of those tried during active hostilities”).

136. See Frederick Bernays Wiener, *Courts-Martial and the Bill of Rights: The Original Practice I*, 72 HARV. L. REV. 1, 27-42 (1958); Gordon D. Henderson, *Courts-Martial and the Constitution: The Original Understanding*, 71 HARV. L. REV. 293, 297-316 (1957) (providing background on early court-martial procedures).

137. See generally Joseph Ross, *The Military Justice Act of 1968*, 23 JAG J. 121 (1969) (providing background on the 1968 statute); Earnest L. Langley, *Military*

commission proceedings have always been governed by the rules pertaining to courts-martial.¹³⁸ The military commission rules promulgated by President George W. Bush for the first time attempted to cut back on the rights of the accused.¹³⁹ State procedures have evolved in more diffuse ways. For example, as military commissions were sitting, the first states, one after the other, were departing from the old rule that prevented the accused from giving sworn testimony on his personal behalf.¹⁴⁰ Unfortunately, we do not have a contemporary observer's comparison. John Chipman Gray is critical of army procedures in 1865, but mostly in terms of their sloth and cumbersomeness.¹⁴¹ Writers on Southern criminal law tend to see

Justice and the Constitution—Improvements Offered by the New Uniform Code of Military Justice, 29 TEX. L. REV. 651 (1951) (analyzing the 1950 Uniform Code of Military Justice effect on constitutional rights).

138. See General Order 1, reprinted in 1 THE WAR OF THE REBELLION 248 (2d Series 1894) (calling for commissions to “be constituted in a similar manner and their proceedings be conducted according to the same general rules as courts-martial . . .”); David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 VA. L. REV. 2005, 2035-44 (2003) (providing detail as to the correspondence of commission and court martial practice, particularly as they have evolved from the Civil War period); see also HENRY COPPÉE, FIELD MANUAL OF COURTS-MARTIAL 105 (1863) (“Such commissions are appointed by the same authorities as those which may order courts-martial. They are constituted in a manner similar to such courts, and their proceedings are conducted in exactly the same way, as to form, examination of witnesses, etc.”).

139. Compare DEPARTMENT OF DEFENSE, THE MANUAL FOR MILITARY COMMISSIONS II-29, R. 506 (Jan. 18, 2007) (outlining the right of the accused to be represented by one detailed defense counsel or pro bono civilian counsel, the right to excuse defense counsel, to waive the right to representation, and to have other people present subject to the discretion of a military judge), with DEPARTMENT OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES II-35, R. 405(f) (2005 ed.) (outlining the right of the accused to be informed of the charges, to be informed of the accuser's identity, to be present when evidence is taken except in certain circumstances, to be represented by counsel, to be informed of witnesses and other evidence, to be informed of the right against self-incrimination, to cross-examine witness and to produce witnesses, to present evidence, to present a defense, and to make a statement).

140. See *Ferguson v. Georgia*, 365 U.S. 570, 577-87 (1961) (recounting the history of the rule preventing the accused from giving sworn testimony on his own behalf).

141. See GRAY & ROPES, *supra* note 106, at 313 (suggesting that the exceeding slowness of the court-martial process necessitated a speedier and fairer mode of trial if the war drags on).

the state systems as lax and incompetent.¹⁴² If this was true of pre-Civil War conditions, it was even more true of the Reconstruction years, when personnel and funding were in short supply and the tasks faced by the courts grew since slave-owners no longer handled their own disciplinary problems.

Taking the comparison in parts, one observes that a civilian trial would have been presided over by a judge. Looking at a military commission record, one would be surprised that there was not necessarily a lawyer in the room. Occasionally, we can identify a distinguished lawyer-soldier such as Charles Devens or G. Norman Lieber, son of the founder of the modern law of war. John Chipman Gray served as a command judge advocate, though he resigned shortly after Appomattox.¹⁴³ There may have been other lawyers whose names we do not recognize either sitting on courts or acting as judge advocates.¹⁴⁴ Nevertheless, there was no law officer or military judge as required by twentieth century statutes. The role of the judge advocate seems strange and unfortunate; that officer is charged both with presenting the prosecution's case and safeguarding the rights of the accused. Such a mixture of tasks would be judged impossible nowadays. The assignment of government-provided counsel, a current commonplace, was not known then, though civilian counsel sometimes turned up.¹⁴⁵ Counsel was not provided in state court proceedings either.

142. See, e.g., MICHAEL STEPHEN HINDUS, *PRISON AND PLANTATION: CRIME, JUSTICE, AND AUTHORITY IN MASSACHUSETTS AND SOUTH CAROLINA, 1767–1878*, at 161 (Morris S. Arnold ed., Univ. of N.C. Press 1980) (arguing that trials were not held simply to deter criminal behavior but to support the dominance of whites over blacks); see also EDWARD L. AYERS, *VENGEANCE AND JUSTICE: CRIME AND PUNISHMENT IN THE 19TH-CENTURY AMERICAN SOUTH* 111-12 (1984) (noting that in Southern state courts, property offenders received harsher sentences than offenders convicted of violent crime, cases were backlogged over six months, and cases were put together carelessly).

143. GRAY & ROPES, *supra* note 106, at 313-21.

144. See EZRA J. WARNER, *GENERALS IN BLUE: LIVES OF THE UNION COMMANDERS*, at xix (1964) (noting that of 583 Union generals, 126 were lawyers).

145. See Transcript of Record at 6, *Ex parte McCardle*, 74 U.S. (7 Wall.) 506 (1869); *Ex parte Milligan*, 71 U.S. (4 Wall.) at 8 (recognizing the presence of counsel at the respective military tribunals). See generally Wiener, *supra* note 136 (detailing the history of the right to counsel in court-martial proceedings, including the inconsistency of military tribunals).

There were then no formal military bodies to review trial records, no boards of review or reviewing court staffed with civilians. However, all commission proceedings were subject to review by the convening general who generally had a professional judge advocate on his staff.¹⁴⁶ The general then issued a general order promulgating the charges, findings, and sentence; a copy of one such order appears in Appendix A. Records were reviewed by the Judge Advocate General in Washington.¹⁴⁷ In cases involving the death penalty, the President had to approve.

The unchanging difference between civilian and military trials is the absence of the jury. It is this fact that constitutionally limits the use of military courts to cases arising in the land and naval forces and certain other categories.¹⁴⁸ Military courts are constituted by the officer convening the court and preferring charges. The members are not randomly chosen from the vicinage, but selected according to the commander's sense of who can be spared from other duties and who would judge the case in a satisfactory manner.¹⁴⁹ In the context of Reconstruction, this meant that the facts were to be found by Union officers with some sense of the value of Reconstruction and sympathy for black victims of terrorism. But such sympathies were not universal within the army; we have seen the different attitudes of the commanding generals toward Reconstruction. We do come upon

146. See GRAY & ROPES, *supra* note 106, at 396 (“My main business is the revision of proceedings of courts martial, which is work requiring care and often requiring considerable knowledge of law. The articles of war and the other statutes affecting the army are very loosely written, and their interpretation is sometimes quite difficult.”). *But see id.* at 406 (noting that his work took him only four hours a day and the “mere reviewing of Courts Martial takes but a brief time”).

147. See Act of July 17, 1862, ch. 75, 12 Stat. 597 (1868) (creating the office of judge advocate general and directing that the records of courts-martial and military commissions be filed in his office); *see also* Act of March 18, 1863, ch. 75, 12 Stat. 735 (1863) (repealing the requirement of presidential approval for death penalty sentences in certain cases); Act of July 2, 1864, ch. 215, 13 Stat. 356 (1864) (giving field commanders the power to execute all sentences in the field).

148. See *Reid v. Covert*, 354 U.S. 1, 19 (1957) (holding that although Article I, Section 8 of the Constitution empowered Congress to authorize military trials of members of the armed services without all the safeguards of Article III and the Bill of Rights, that power does not extend to civilians, even if they are dependents of servicemen living on a military base).

149. 10 U.S.C. § 825(d)(2) (1970) (setting forth the factors a commander is to take into account in choosing court-martial personnel).

a number of not guilty findings.¹⁵⁰ In civilian courts, the presence of black jurors was highly contested and depended on whether Republican or Democratic regimes prevailed.¹⁵¹

One particular rule is significant here: whether or not black witnesses were disqualified from testifying against a white defendant. The general rule in the South, and some Northern states as well, was that they could not testify.¹⁵² But Congress, in the Civil Rights Act of 1866,¹⁵³ guaranteed all persons the right to give evidence and required by an act in 1864 that “in the courts of the United States there shall be no exclusion of any witness on account of color.”¹⁵⁴ We will examine one case in which a commission did hear a black witness and defense counsel; rather than try to object to the admissibility of the testimony, the commission attacked its credibility.

Military commissions were subject to vigorous attack by lawyers and publicists in the South and by many in the North.¹⁵⁵ This played upon “the known hostility of the American people to any interference by the military with the regular administration of justice in the civil courts.”¹⁵⁶ It was coupled with the rhetoric of states’ rights, a rhetoric which survived the defeat of secession. All of this clearly weakened political support for military reconstruction.

IV. COMMISSION CASE STUDIES

With this background established, we are ready to look in detail at the transcripts of some military commission cases. While I have

150. See, e.g., General Order 124, Second Mil. Dist. (1867) (stating that a sheriff was found not guilty of misbehavior in office and mistreating prisoners); General Order 135, Fourth Mil. Dist. (1868) (holding a defendant as acquitted of murder).

151. See KACZOROWSKI, *supra* note 51, at 63 (explaining how the inclusion of blacks on juries undermined a court’s legitimacy).

152. See WALDREP, *supra* note 78, at 33 (confirming that the rule prohibiting blacks from testifying caused difficulties in the administration of justice, for example, in attempts to prosecute whites for selling liquor to slaves).

153. Civil Rights Act of 1866, ch. 31, 14 Stat. 27 (1866).

154. H.R.J. Res. 14, 39th Cong. (1886) (repealed 1906); see STEPHEN BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 248-51 (D. Van. Norstrand 1862) (providing case law affirming this sentiment).

155. DAWSON, *supra* note 39, at 122-23.

156. *Coleman v. Tennessee*, 97 U.S. 509, 514 (1878).

looked at a variety of transcripts, I here describe one in particular.¹⁵⁷ I chose it because more background information is available and because it is more clearly a Reconstruction case in that it involves the murder of a freedman by a white Southerner. *United States v. Pender*¹⁵⁸ comes from Vicksburg, Mississippi. On July 4, 1863—the day that Lee began the retreat from Gettysburg—General Pemberton surrendered Vicksburg to General Grant. On the morning of the 28th of June 1864, armed whites went to the Blake Plantation and “did drive off, and force away, a number of unoffending colored persons living in said Plantation.”¹⁵⁹ In the process, they shot and killed one Richmond then living on the plantation. The file starts in a fashion still recognizable to modern military lawyers. Major General Henry Slocum issued a special order from the District of Vicksburg Headquarters referring Pender’s case to trial and detailing a major and two captains, all of the 46th Illinois Infantry.¹⁶⁰ Next came, in military style, charges and specifications that detail the alleged crime to some extent. The commission convened on August 10th at 9 a.m. The accused was asked if he had any objections to any member of the court and the court was then duly sworn. The accused introduced Mr. Barnet, his counsel, and pleaded not guilty. There follow 56 handwritten pages of transcript of testimony, 25 of them from witnesses for the prosecution and the rest by the defense. The testimony leaves one with a blurred impression as to the involvement of Pender. Witnesses testified that he was sick and there were problems relating to the identification. The defense filed a twelve-page brief and the prosecution replied. The defense went over the testimony, noting the atmosphere of fear and confusion that had prevailed at the scene of the crime and pointing to contradictions. It

157. I also have in hand the files of *United States v. Robert Turnbull* (1864) (No. MM 1615) (unpublished manuscript, on file with author), where Turnbull was tried for resistance acts, as well as *United States v. Rebecca Field* (1864) (No. LL 3117) (unpublished manuscript, on file with author), where Field was tried for smuggling activities at Vicksburg on December 7, 1864.

158. *United States v. Pender* (1864) (No. LL2409) (unpublished manuscript, on file with author).

159. *Id.* at 3.

160. *See id.* at 2 (containing the signature of Major General Henry Slocum who was still in command in Mississippi in 1865 when he clashed with President Johnson over the creation of a white Southern militia in the state and was reproved by the President for not trusting the local government). That episode contributed to the movement in Congress for impeachment.

urged the commission to minimize the weight given testimony by blacks:

The proof on behalf of the prosecution the court will not fail to remember, is from those who but a few months since were and had ever been in absolute bondage and slavery; by the fate of war and the policy of the United States Government they have been raised to the condition of free men. Their shackles have been broken and they now stand forth with the privileges of freemen. Their status has been changed but have their intellects or morals been effected, are they not the same illiterate stupid degraded race they were before their freedom was achieved. Time with its healing influences can alone change this. Years of patient labor must be spent in instructing the manumitted slave in Religion, Morality and letters before he can stand equal to the white man. His liberation is the act of a brief period, but centuries will hardly suffice for the Culture, Religion, Moral and Literacy which can raise the African race to the standard of the white. We must never forget that whilst the Negro is made a competent witness we must scrutinize well his credibility. The Mythologist informs us that Minerva sprang, armed full grown & perfect from the brain of Jove. But there is no power that can perform such wonders now. The future of the colored race in the United States is yet involved in Egyptian darkness. No eye, so far seeing, as to penetrate it. Let these facts be remembered by all tribunals before which the life or liberty of the White Man is imperiled by Negro evidence.¹⁶¹

On this point the Judge Advocate replied:

Fully agreeing in the philosophical remarks of Judge Barnet upon the present degraded condition of the black race, and the hopes of the philanthropist of their future education, I beg leave to say that nothing will so quickly, so powerfully tend to give them hope for the future, quicken them to new life and energy, inspire them with confidence in men and respect for themselves, nothing will so tend to elevate them to that position, which he and all good men to desire them to occupy, as to fully understand, that though humble, though poor, ignorant and degraded they have rights that the mightiest in the land may not trample upon with impunity, and the boldest malefactor in the land who tramples upon these poor people understand that where waves the American flag, there its justice shall be found, and if need be its vengeance too.¹⁶²

161. Brief of Defendant at 6-7, *United States v. Pender* (1864) (No. LL2409) (unpublished manuscript, on file with author).

162. Argument of Judge Advocate, *United States v. Pender* (1864) (No. LL2409) (unpublished manuscript on file with author).

On August 17th, the trial concluded and the commission found Pender not guilty. Accordingly, there was no review of the proceedings in Washington, or a formal court-martial order issued.

On the whole, one is favorably impressed by the proceedings. They were not rushed, stretching over six days, and counsel had every opportunity to cross-examine prosecution witnesses and to call their own. Counsel asked intelligent questions and made eloquent closing arguments. The verdict seems justified in the light of the requirement of proof beyond reasonable doubt.

Another hotly and skillfully contested case was that of Edward Yerger, which wound up in the Supreme Court.¹⁶³ It was clear that Yerger had killed Major Crane, who was the acting mayor of Jackson, Mississippi, in an argument over the seizure of Yerger's piano for unpaid taxes. Defendant was a person of some distinction, having been nominated for governor and having just been a delegate to the Democratic national convention. The issue was one of Yerger's mental capacity and the defendant's lawyers produced extensive testimony by acquaintances and by doctors. The parties argued about the admissibility of that testimony, backed by citations of American and British cases. Judge Advocate General Holt approved the findings and sentence.¹⁶⁴ Another hard-fought case was the trial of James and Robert Keyes and Elisha Byron, presided over by Major General Charles Devens, later part of the Massachusetts Supreme Judicial Court. They were convicted of murdering Union soldiers on guard duty; this case eventuated in the release of the prisoners on habeas corpus.¹⁶⁵ Other records seem brusque and almost casual by comparison; the absence of defense counsel is an obvious difference. The murder case that Major Gray approved runs only a few pages and there were no defense witnesses. On the other hand, the elements of the case seem amply proved. Some cases from Mississippi that were really wartime trials seem hasty. The questioning was uninformed, and the commissions admitted much extraneous and prejudicial material about the accused's character and

163. *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868).

164. Record of Proceedings, *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868) (on file with author); Proceedings on Appeal, *Ex parte Yerger*, 75 U.S. (8 Wall.) 85 (1868).

165. The record is filed as MM 3888. See *supra* note 46 for the subsequent proceedings.

reputation.¹⁶⁶ One suspects that a review of civilian trials in the South during this period would have disclosed a similar range of quality in trial performances.

V. EPILOGUE: CIVILIAN RECONSTRUCTION

As we have seen, generals such as Ruger and Sheridan asserted that military commissions were essential to the task of reconstruction.¹⁶⁷ Congress took the same view.¹⁶⁸ Fairman sums up his review of the problem:

But the trouble was that the white citizens of the South were so associated, with so much in common, so sensitive, with such esprit de corps, that their courts would not punish those who murdered or otherwise injured Union soldiers or white Unionists or Negroes. No constitutional theory could budge that hard fact.¹⁶⁹

Were they right in that view? Repressing the Klan would not have been possible with the office of the Attorney General staffed as it was in 1865. The Department of Justice was created by Congress only in 1870 and received, for the first time, significant financial resources.¹⁷⁰ It was able to prosecute quite a number of civil rights cases in 1871 and 1872 and to obtain a respectable number of convictions even from Southern juries.¹⁷¹ The army continued to provide policing resources but no more commission trials were held. The results varied substantially from state to state. As a consequence, the election of 1872 was the fairest one for nearly a century.¹⁷² Suffering from lack of continued congressional and popular support,

166. *United States v. Robert Turnbull* (1864) (No. MM 1615) (unpublished manuscript, on file with author).

167. *See supra* notes 1, 42 and accompanying text.

168. *See* H.R. REP. NO. 39-23, at 5 (1867) (“[I]t would seem to be conclusively established that the best material interests of the country . . . call for the intervention of the authority of the general government in the only practicable mode in which it can be exerted, and that is through its military forces.”).

169. FAIRMAN, *supra* note 66, at 150. This passage inverts the comments of Judge Hall about military commissions. *See Commandant of Fort Del.*, 25 F. Cas. at 591.

170. Act to Establish the Department of Justice, ch. 150, 16 Stat. 162 (1870).

171. *See* KACZOROWSKI, *supra* note 51, at 87 (noting that the Department won convictions in 74% of their cases in 1870 and 41% in 1871).

172. *See generally id.* at ch. 5.

the effort died down and 1876 marked a final end to the Reconstruction endeavor. One is left unsure whether, in the conditions between 1865 and 1868, civilian prosecutors and juries could have handled the violence cases swiftly and effectively, and thus negated the need for military action. It would have been a novelty in that period to confer on federal district courts the power to try ordinary criminal cases.

CONCLUSION

Some generalizations from the military reconstruction use of commissions seem appropriate. It is likely that they would have been held unconstitutional had cases come before the Supreme Court. This, we have seen, is the conclusion of an expert on the period.¹⁷³ The continuing American antipathy to military courts would make such a result likely in new cases in similar fact situations. The experience provides little support for the idea that a “war on terror” confers powers equivalent to those in a traditional state-to-state conflict.¹⁷⁴ One notes, however, that the use of commissions to back nation-building in some occupied country outside the United States would involve the use of the war power on a basis not dealt with by the Reconstruction cases.

As to their necessity, one concludes that commissions are needed where the civilian system is not in a position to press criminal cases. This was the conclusion of Congress and most commanding generals. Commissions would be necessary in another occupation experience where local courts were not functioning, though it might be wise to use civilian judges.

In general, commissions can perform adequately and swiftly. The experiment of 2001 with reviving commissions ran into difficulties because it took a long time to adapt established courts-martial

173. See FAIRMAN, *supra* note 66, at 1480 (stating that the issues of the war and the Reconstruction were so unprecedented, complex, and so surrounded by “deep-seated” notions, that the Court allowed “superficial and inconsistent” judgments that it would otherwise not); see also Michael Les Benedict, *Salmon P. Chase and Constitutional Politics*, 22 LAW & SOC. INQUIRY 459, 481 (1997) (reporting Justice Chase’s communication to Judge Robert A. Hill that the Supreme Court would have ruled the trial unconstitutional).

174. Even after military reconstruction came to an end, federal officers fighting the Klan regarded it as the rearguard of the Civil War.

practices to the supposed needs of the new assignment. That adaptation was hotly contested, since it involved the first step backward in the history of military justice.¹⁷⁵ The twenty-first century commission system thus negated a major advantage of military courts—that they can convene swiftly and at the scene of the crime.¹⁷⁶ The cases examined seem to have been careful and fair, with convictions not automatic. The crowning injustice—the execution of Mumford in New Orleans in 1862 for tearing down a U.S. flag—was more the fault of the convening commander, General Butler, than of the commission.¹⁷⁷ Shortly after Mumford’s execution, Congress passed a statute requiring the approval of the President before an execution. It is hard to imagine Lincoln failing to commute that sentence.¹⁷⁸ The death penalty would presumably have been avoided if the later statute mandating presidential review of death sentences had been in force.

Overall, one sees that Reconstruction was afflicted with the same problem that Niall Ferguson identifies in our overseas efforts at nation-building—a lack of persistence and stamina in seeing through an unpleasant and costly task.¹⁷⁹ Thus, Reconstruction stands alongside the Philippines, Haiti, and Nicaragua as examples of nation-building work left incomplete. The cases of Germany and Japan are different, due to the total lack of the type of armed resistance that the army encountered from the Klan in the South and militants in Iraq.¹⁸⁰ The costs of the reversion of the South to

175. See *Hamdan v. Rumsfeld*, 415 F.3d 33, 35 (D.C. Cir. 2005), *rev'd*, 126 S. Ct. 2749 (2006) (recalling that two years passed between the time Hamdan was detained and the time he was granted trial before a military commission).

176. See DEPARTMENT OF DEFENSE, MANUAL FOR COURTS-MARTIAL UNITED STATES II-35, R. 201(a)(2) (2005 ed.) (providing that “jurisdiction of courts-martial does not depend on where the offense was committed”).

177. See TREFOUSSE, *supra* note 39, at 114 (recounting that General Butler ordered the execution to the surprise of both Confederates and Unionists).

178. Act of July 17, 1862, ch. 201, 12 Stat. 597 (1862).

179. See NIALL FERGUSON, *COLOSSUS: THE PRICE OF AMERICA'S EMPIRE* 28, 169-70 (2004) (arguing that modern politicians view the empire, which consists of long-term “nation-building,” as a temporary occupation during which the country builds a form of self-government).

180. See EDWARD L. AYERS, *WHAT CAUSED THE CIVIL WAR? REFLECTIONS ON THE SOUTH AND SOUTHERN HISTORY* 145 (2005) (offering examples of social transformations in various parts of the world, including the Philippines, Iraq, Japan, Germany, and Afghanistan, where the United States has been the “great

institutionalized racism and of the second reconstruction that began in the 1950s were immense.

agent” of change); *see also* Edward L. Ayers, *The First Occupation: What the Reconstruction Period After the Civil War Can Teach About Iraq*, N.Y. TIMES MAG., May 29, 2005, at 20, *available at* <http://www.nytimes.com/2005/05/29/magazine/29RECON.html> (last visited Sept. 27, 2007) (comparing the current situation in Iraq with the South during the Reconstruction era and noting the lessons that the experience in the South teaches). General Nathan Bedford Forrest, Imperial Wizard of the Klan, might qualify as the al-Zarqawi of the South. *See* TRELEASE, *supra* note 22, at 19-20 (detailing General Nathan Bedford Forrest’s extensive military background and leadership ability).

APPENDIX A: A MILITARY COMMISSION ORDER

HEADQUARTERS FIFTH MILITARY DISTRICT

GENERAL ORDERS, NEW ORLEANS, LA.

MAY 8, 1867

No. 15

I. Before a military commission which convened in this city, in accordance with Special Orders No. 16, current series, from this Headquarters, and of which Brevet Major General A. Beckwith, Commissary Subsistence, U.S. Army, is President, was arraigned and tried:

II. JOHN W. WALKER. Citizen

CHARGE—"Assault with attempt to commit murder"

PLEA—"Not Guilty"

FINDING—"Guilty, with the exception of the words 'With attempt to commit murder'"

SENTENCE—To be confined, at hard labor, at such place as the Commanding General may direct for the period of six months.

The proceedings, finding and sentence of the Commission in the above case, are approved and confirmed; the Post at Ship Island is designated as the place of confinement, where the prisoner will be sent under a suitable guard.

III. The Military Commission of which Brevet Major General A. Beckwith, Commissary Subsistence, U.S. Army, is President is hereby dissolved.

BY COMMAND OF MAJOR GENERAL P.H. SHERIDAN:

GEO. L. HARTSUFF
Assistant Adjutant General

[s] George Lee
Lieutenant, 21st U.S. Cavalry
Acting Assistant Adjutant General

[Note: Most files of General Orders are handwritten. Such orders included announcements of major appointments, the deaths of senior officers and instructions to the general populace, such as rules for the conduct of elections.]

APPENDIX B: NOTE ON ARCHIVAL RESEARCH

The military records of the Reconstruction period are in the National Archives at 700 Pennsylvania Avenue, Washington, D.C. 20108-0001, in the Old Military Records, Textual Archives Service Division. I have worked with two portions. The general orders and general court martial orders are filed according to the military district or department involved. They can be located in Record Group 393, Part I. The orders are filed by number in ledger books. The other source is an index to the records of courts martial deposited with the office of the Judge Advocate General listed by defendant's last name. The index gives the name, military unit ("citizen" in commission cases), the date and place of the order and a serial number—generally LL, MM, or NN in cases up to 1868 and PP thereafter. In general commission cases can be distinguished from court martial cases by the absence of a designation of defendant's rank and military unit and a substitution of the word "citizen" with a reference to the state. These documents are almost always handwritten in ink that has largely faded and they are difficult to read or copy. Some records relating to military commissions before April 1865 are reproduced in *War of the Rebellion: Official Records of the Union and Confederate Armies* (1880), especially Series 2.