

Introduction

The difference between a rough and a civilized society is not that force is used in the one case and persuasion in the other, but that force is (or ought to be) guided with greater care in the second case than in the first.

—James Fitzjames Stephen

The al-Qaeda terror attacks of September 11, 2001, aroused a number of extraordinary counter-measures in response. Among the more controversial of these is the executive order issued November 13, 2001, authorizing the creation of special military tribunals—“commissions” for the trial of al-Qaeda terrorists.¹ The presidential order provoked a barrage of criticism that continues to surge and subside with events. Critics from left and right condemned the measure as an unnecessary and dangerous extension of government powers, as “dictatorial” usurpation, a “power grab” designed to undermine precious procedural liberties. Others upheld the President’s order as a necessary policy maneuver in furtherance of vital national security interests, defending its validity in terms of international practices and local norms. Given the manifestly extraordinary nature of the practice, it is no simple matter to evaluate the effort to reestablish military commissions.

As Justice Robert Jackson famously observed in his *Terminiello* dissent, the United States Constitution is not “a suicide pact.” It is probably safe to say that most constitution-makers would eschew such descriptions for their work. Extreme conditions require careful and deliberate attention to that balance between liberty and order permeating, in James Madison’s view, every line of the American Constitution. It is precisely at these points of extremity that dangers to the commonwealth tend to multiply. The possibility for withdrawal of hard-won liberties

rises in proportion to the perceived gravity of an external threat to a nation's security. The balance becomes more delicate, precarious.

On the one hand there is always the potential danger of overstating an external threat to national security, through excess of caution, ignorance, suspicion, or in the mere pursuit of power. In this event, civil liberties collapse under the call for extraordinary measures. The executive vests with new expansions of authority; precedents arise, difficult to undo upon clearer reflection. All this occurs for the sake of an exaggerated threat.²

And yet the seriousness of the threat may in fact prove genuine. Drastic action may be the only responsible option; after all, "necessity dictates the exercise of emergency powers, at times, in any republic."³ The difficulty lies in the fact that partial information is often the best that can be obtained in assessing the magnitude of the hazard. In such times, further complications attend the need for maintaining secrecy on behalf of a nation committed in principle to transparency, democratic accountability, and open government process. Once a given danger has been overcome, hindsight's benefit and relative safety make it a difficult trick to evaluate the actual severity of a threat as it appeared to those who succeeded in putting it down. Is it possible that some lesser exertion of force, some less drastic measures, could have secured the same or even better results? What was the deterrent effect of the measures actually taken?

It is always very difficult to say what might have happened in history if events had taken a different turn. To take a salient recent example: is there a causal connection between the Bush administration's robust security measures after September 11, 2001, and the absence of subsequent attacks on American soil? Certainty evades the argument from silence. Yet policy makers can ill afford the exacting standards of proof applicable in courts of law. Nor do they enjoy the luxuries of the academic researcher who enjoys relatively limitless time and resources, ensuring that no stone remains unturned in the pursuit of an accurate distribution of historical causes and effects. Too often, the lessons of history, which ought to guide prudential leadership, become mere tools, selected and reshaped for use in partisan struggles over policy. Passionate rhetoric in time of war, as Thucydides long ago remarked, is never in short supply.

Within the panoply of potential emergency measures, the mechanism of the military juridical response—i.e., one that takes place outside of the normal Article III judicial process—has played an important part.⁴ The assertion of occasional necessity raises questions that surface with every major conflict that precipitates the use of emergency measures. Why is it

ever the case that ordinary courts are insufficient to the task of administering justice in crisis conditions? What are the necessary preconditions for calling extraordinary judicial forums into existence? As a matter of historical record, did these courts-in-extremity advance the ends for which they were created?

For leaders in time of national security crisis, military tribunals have offered a number of advantages over other methods. The persistence of the custom rested in part on the premise that there is no intrinsic moral or legal justification for granting all types of enemy military forces in time of war the identical range of protections given to members of one's own military. Warring enemy forces are less likely to be able to turn such tribunals to their own advantage, by manipulation of security leaks or communications media. In conditions shaped by the stern demands of military necessity, speedy means of adjudication ensure that critical resources, time, and personnel are not siphoned away in a painstaking judicial process oblivious to the larger circumstance of war. Military forums allow greater provisions for secrecy and thus may help protect sensitive information—a protection that is less available in the open discovery process of the civilian trial. In the more immediate sense, the military courts also allow for tighter courtroom security, as well as protection of witnesses, jurors, and others. Moreover, since they operate on a regular basis in the world defined by the rules of armed conflict, military professionals, rather than civilian outsiders, are found to be better equipped to adjudicate alleged violations of such standards.⁵

Given the extensive use of various types of military courts in the past, and the urgency imposed by current national and international comment, it is remarkable that the practice, especially before 9/11, received so little scholarly attention.⁶ Part of the relative obscurity that still enshrouds the subject of the military tribunal arises from its hybrid nature, a quasi-judicial function operating as a military response in time of war. Military historians neglect the subject because of its limited, tangential impact on the activity of warfare itself. Rare is the work of military history that fixes on a practice that usually takes place, if at all, on the sidelines, often in the aftermath of hostilities.⁷ Equally, its dislocation from the ordinary functions of the civil judicial process leaves it outside the sights of the legal analyst. Regular military courts-martial tend to fall within the exclusive domain of specialized military practitioners. For the civilian public, the scope and function of such courts remains unclear. Another ingredient for confusion may rest in the fact that the United States Congress

has not actually issued a formal declaration of war in any of the nation's recent military engagements. Perhaps the fluidity of the very concept of "war" since 1945 contributes to the neglect.⁸

Moreover, though it was not always so, the subject of military law receives little if any coverage in the curricula of the nation's law schools. The neglect parallels a larger (and widening) social gap. In the words of one recent work on military law,

Today, fewer and fewer Americans have served in the armed forces. This includes our elected representatives and senior members of the executive branch. The result is that many Americans know almost nothing about the military justice system. They are unaware of the many similarities between the military justice system and civilian criminal law and procedure, or of the considerable protections afforded a military accused, many of which exceed those enjoyed in civilian courts. At the same time, many do not know about the differences between military and civilian justice or appreciate why they exist. This lack of knowledge about military justice inhibits critical examination by those who are ultimately responsible for it and who depend on the armed forces it governs.⁹

In American law schools, one is more likely to find courses dedicated to the subject of fashionable post-modern legal theories than to the law of war.¹⁰

Yet, notwithstanding the earnest efforts observed a hundred years ago by Joseph Conrad, aimed at "dragging the scourge down from the skies" to transform it "into a calm and regulated institution," the ferocity of war appears to have remained a regular feature of the human condition in the fifty-odd years since the conclusion of the Nuremberg trials and the founding of the United Nations. Attempts to avoid the consequences of this reality by the enlistment of labored euphemisms tends merely to cloud decisions of policy and strategy that must be faced. Clarity and discrimination in the use of language would greatly help. In the current conflict against al-Qaeda jihadist forces, a similar obfuscation attends the use of the general, albeit religiously neutral phrase, "war on terror," the vagueness of which stirs up fears of equally vague and boundless intrusions against precious liberties.

It would be helpful to remove the veil of obscurity covering practices that have exerted significant impact on the development of the international law of war. In the studies that follow, it is my intention to examine

the workings of the mechanism of what in American parlance has come to be known as the military commission, as it fits within the larger framework of extraordinary responses to national emergency.

It is helpful to begin with some working definitions. I do so with awareness of the late Karl Popper's warnings as to the value of the process of definition as a means of resolving contentious problems of policy and practice. In this case, the question becomes, how do you define "terrorism," "justice," "due process," or "the state of war"? As Popper warned, the answers to such questions often tend to produce a further series of calls for definitional clarity. The quest for a definition satisfactory to all interested parties can lead to unending, fruitless regression.¹¹ Academic cottage industries form in the gaps among competing formulations. The subject at hand is not immune to such problems. One scholar asks, how can an offense committed by means of box cutters, though "productive" of three thousand deaths, be categorized as an "armed attack"?¹² The question, of course, is posed with full awareness of the consequences hinging on such definitional distinctions. Still, this reasoning runs the risk of "proving" far more than its author intends, for in a technological age, many an "armed attack" ostensibly reduces to the manipulation of switches, buttons, data, and levers—none of which in isolation is tied intrinsically or necessarily to the use of military force. This is to fix on one link at the expense of an entire chain of purposeful acts by knowing human agents. Lawyers tend to revel in this kind of argument and thereby, perhaps, overestimate its value.¹³

Another "interpretive" approach treats the events surrounding 9/11 as a kind of "unreal" symbolism, in which distinctions between action and response become reversible components to the same meaningless "spectacle": "The repression of terrorism spirals around as unpredictably as the terrorist act itself. No one knows where it will stop, or what turnabouts there may yet be. There is no possible distinction, at the level of images and information, between the spectacular and the symbolic, no possible distinction between the 'crime' and the crackdown. And it is this uncontrollable unleashing of reversibility that is terrorism's true victory."¹⁴ Such "post-modern" essays in moral equivalence may or may not tell more about their author than about the events they purport to understand. Nevertheless, as efforts at accurate, meaningful verbal description, they give the lie to the professed incommensurability between words and events.

Still, some ambiguity clings to the notion of a "military tribunal," making necessary a few points of clarification. The term has been used to

describe the unprecedented international trials of Nazi and Japanese war criminals at the end of the Second World War, as well as the international ad hoc forums convened in the 1990s to try war crimes in the former Yugoslavia and Rwanda. The term has also been applied to the courts convened on the part of national military authorities for the trial of wartime offenses on the part of enemy forces. In American practice, at least since the Mexican War, these national military courts have gone by the name of “military commissions.”¹⁵ The term “commission” was first adopted in order to distinguish these types of courts from the “court-martial.” The American military commissions have proved to be a flexible tool adaptable in a wide variety of situations. As we shall see, in the Mexican War, the commissions originated as a means for administering discipline to U.S. Army troops in an unprecedented situation—occupation of a foreign nation by American armed forces. Now, the term “court-martial” is reserved for the internal discipline of United States armed forces around the world.

French military courts for the trial of war crimes are known as *conseils de guerre*, literally, “councils of war.” However, the same term applies to the ordinary trials of members of the French military. Similarly, British practice applies the simple label, “military courts.” As we shall see, this use of one generic name should not be understood to mean that there have not been significant differences in application in historical practice. Potential for confusion exists with any of the available terms. Use of a common universal term carries the danger of blurring important distinctions. I chose not to use “military commissions” in the title to this study, since the term is unique to the American context, even as the type of court it describes extends far beyond the practices of the American military. Given these circumstances, “military tribunal,” while it runs some risk of confusion with the extraordinary international trials of major war criminals, seemed to me the best choice of the lot. In his recent work on the subject, Professor Louis Fisher opts for the same term, for somewhat different reasons, acknowledging that “commission” and “tribunal” are virtually “interchangeable.”¹⁶

Identification of a point of departure for such a study is somewhat arbitrary—the practice of military adjudication of offenses against wartime codes of conduct is almost as old as the practice of war itself. The long reach of custom bears out Maitland’s famous remark about the historian’s plight, forced to tear the “seamless web” of the past by the simple task of *beginning*.¹⁷ The Australian international lawyer Timothy L. H. McCor-

mack notes the markings of an early military tribunal in Xenophon's account of the Spartan commander Lysander's treatment of Athenian prisoners after the naval battle at Lampascus near the close of the Peloponnesian War in 405 B.C.: "by calling together the Allies, Lysander effectively constituted a tribunal for the express purpose of deciding the fate of Athenian prisoners against whom war crimes allegations had been made."¹⁸ The account hints of striking parallels to much later developments: "the calling together of victorious Allies to determine the subject-matter jurisdiction of the tribunal and to set up the processes for the trial of alleged offenders, and the punishment of convicted criminals."¹⁹ The Allied tribunal applied what amounted to an emerging consensus on the law of the Greeks to decide the fate of the Athenian prisoners.²⁰

The historian Maurice Keen found in the medieval chroniclers' accounts of the Hundred Years War clear evidence to support a "striking claim": namely, "that military tribunals at least claimed cognisance of the offences not only of soldiers of their own side, but of soldiers generally, even those of the enemy."²¹ The principle was sourced in a universal chivalric standard, to which all sides were accountable. "War was fought by knights, and in war the rules of honour applied universally, binding princes and men at arms equally. Offenses against these rules could therefore be tried by anyone who had a right to try the offences of soldiers, whatever the offender's allegiance."²²

In the American context, military commissions featured in the War of Independence and in many subsequent military engagements. The theoretical underpinnings of the line of analysis I propose to follow extend back at least to John Locke, the theorist "in whose name the American Revolution was made."²³ Locke, of course, left open the possibility of prerogative executive powers in the course of his outline of government in the *Second Treatise*.²⁴ The following work concentrates on the manner in which this notion of prerogative power worked itself out in the modern era as the Western powers responded to external (and/or internal) threats of varying magnitude. I make no attempt to provide an exhaustive historical catalogue. Rather, a series of discrete, modern examples—from the American Civil War, the Second Boer War, the First World War, and the Second World War—will provide, it is hoped, contextual relief, a background against which current and future responses may be more helpfully evaluated.

Nor do I mean to underestimate lasting and important differences in the conception of political rule as it has arisen among the Western demo-

cratic powers. To be sure, the distinctly American separation of powers sets limits on the value of a comparison with British practices. Yet the British model merits consideration, for—as is the case with so many other features of American political and military institutions—American military justice practices have British roots. Moreover, this feature of the problem, regarding institutional checks on executive authority, has generated a vast amount of political debate and scholarly scrutiny, going back, at least, to the contest between *Helvidius* (Alexander Hamilton) and *Pacificus* (James Madison) over President Washington’s proclamation of neutrality.²⁵ I do not presume to resolve a contest that is perhaps at the end of the day insoluble—at least in the abstract. In the words of Justice Jackson, again, “The actual art of governing under our Constitution does not and cannot conform to judicial definitions of the power of any of its branches based on isolated clauses or even single Articles torn from context.”²⁶

Still, it is something of a truism that “it is of the nature of war to increase the executive at the expence of the legislative authority.”²⁷ The breadth and durability of a widespread practice, giving evidence of a “common law” custom of wartime adjudication, lends support to an elastic view of the Constitution’s separation of powers provisions.²⁸ That commanders repeatedly had recourse to the practice of military commissions in the major armed conflicts of American history, and that similar practices characterize the experiences of other Western powers, sets the argument over the extent of executive versus congressional authority—an argument lately renewed in the Supreme Court’s 2006 *Hamdan v. Rumsfeld* decision—in perspective.

History and custom support the notion that Congress’s resolution of September 18, 2001, recognizing the President’s authority “to use all necessary and appropriate force” against enemies responsible for the attacks of 9/11, includes the ancillary authority traditionally ordered among the duties of military commanders to convene military courts for addressing enemy offenses.²⁹ Yet, in *Hamdan*, the Supreme Court’s most recent pronouncement on the subject of military tribunals, a five-member majority rejected this claim. Despite some rather straightforward recent guidance from Congress, the *Hamdan* Court nevertheless held that insufficient legislative warrant exists for the tribunals initiated by President Bush after the 9/11 attacks. The opinion, widely viewed as a stern rebuke to presidential policy, could potentially signal the practical conclusion to a long-standing military practice. But that is not likely. Indeed, with the passage

of the Military Commissions Act of 2006, the judicial assertions of *Hamdan* were countered, less than six months later, by an equally forceful response from Congress, seconded by the President.

The last time public discussion of such matters occurred, George Orwell wrote on the subject of war crimes tribunals on several occasions. In one essay, Orwell recommended “some hurried, unspectacular way” of dealing with the war criminals of the Second World War. The phrase captures one of the principal virtues of the forum, its “unspectacular” quality. At the same time it carries the right note of ambivalence: the “hurried” character of the trials means that wrong judgments do occur, that the choice of military tribunals is hardly an unalloyed good, but a prudential measure for damage control in times of extremity—not necessarily, in the words of Michael Ignatieff, “a lesser evil,” but rather, a device calibrated to the extraordinary circumstances of war for the securing of first-order public goods, the basic necessities of safety and order. “Above all,” Orwell opposed the “solemn hypocritical ‘trial of war criminals,’ with all the slow cruel pageantry of the law, which after a lapse of time has so strange a way of focusing a romantic light on the accused and turning a scoundrel into a hero.”³⁰ In a day when the “slow, cruel” spectacle of Slobodan Milošević in the Hague, a melodrama cut short only by the defendant’s untimely death, vied for the spotlight with the courtroom “histrionics” of a resuscitated Saddam Hussein, such observations deserve another look. Orwell recognized what many of our experts in the law fail to see: that “international justice” is not a kind of zero-sum dream, in which the world surrounding the proceedings remains static, in which there are no important trade-offs or costs involved in maximizing procedural rigor in a given case, and in which the measure of procedural correctness applied becomes the sole test of the wisdom and justice of the event.

I cannot pretend that the problems to which I have referred remain confined to this subject. Neither can this work presume to provide the universal solvent for their correction. Though there is widespread acknowledgment of the fact that law is not generated *ex nihilo*, American understanding of the practices to which international law applies often lingers under the fog of a more general historical and cultural amnesia. My goal is to remove the analysis from the realm of arid legalistic abstraction in order better to evaluate practical consequences. The following study, it is hoped, will offer the vantage point of historical understanding for a widening of perspective, a release from what T. S. Eliot de-

scribed as our “parochial” fixation with the ephemeral present. This cross-section from among the major military conflicts of the past two centuries offers a mass of recent evidence for the existence of what is identified here as a customary “common-law” practice of war crimes adjudication. It also assists, it is hoped, in bringing clarity amidst the disorientation and dismay that still characterize the West, so rudely awakened that clear September morning from its decade of dogmatic slumber. At a time when calls for global American intervention alternate with cries against American imperialist overreaching, examples from the historical experience of once-similarly situated Western forbearers and allies, allowing for differences occasioned by the passage of time, deliver an illuminating prospect. Moreover, the project points the way for further contextual examination of events situated in the shadowy borderlands between academic disciplines. While the activities of military tribunals may not adhere to the tidy lines of discrete scholarly specialties, whether in law, military history, strategy and tactics, or international relations, the history of this custom merits an examination that necessarily transcends such boundaries. Recent political, military, and legal events lend a new note of urgency to the task, underscoring the need for conscientious, dispassionate analysis. Whether the following study fulfills such requirements remains for its readers to decide.