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## MILITARY COMMISSIONS AND THE LIEBER CODE: TOWARD A NEW UNDERSTANDING OF THE JURISDICTIONAL FOUNDATIONS OF MILITARY COMMISSIONS

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### I. Introduction

Over the past eight years, the use of military commissions at Guantanamo Bay has thrust this rarely used military venue into the forefront of public attention.<sup>1</sup> Legal scholars have increasingly looked to the history of the commissions when addressing the debates over the proper and appropriate manner for their use.<sup>2</sup> Despite this heightened

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<sup>1</sup> For example, displaying the public interest, *Time* magazine has even compiled a brief history of military commissions, complete with a description of procedures used and a discussion of the current debate over continued use of commissions in the Obama Administration. See Randy James, *A Brief History of Military Commissions*, May 18, 2009, <http://www.time.com/time/nation/article/0,8599,1899131,00.html>.

<sup>2</sup> See, e.g., Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 *YALE L.J.* 1259 (2001–2002); Michal R. Belknap, *Putrid Pedigree: The Bush Administration's Military Tribunals in Historical Perspective*, 38 *CAL. W. L. REV.* 433 (2002); John M. Bickers, *Military Commissions Are Constitutionally Sound: A Response to Professors Katyal and Tribe*, 34 *TEX. TECH L. REV.* 899 (2003); David Glazier, *Kangaroo Court or Competent Tribunal?: Judging the 21st Century Military Commission*, 89 *VA. L. REV.* 2005 (2003); Scott L. Silliman, *On Military Commissions*, 36 *CASE W. RES. J. INT'L L.* 529 (2004); LOUIS FISHER, *MILITARY*

interest in the history of these tribunals, scholars and commentators have assumed the underlying jurisdiction of commissions to try violations of the laws of war, devoting little attention to this topic.<sup>3</sup> For example, in *Hamdan v. Rumsfeld*, the Supreme Court debated at length whether particular offenses fell within the laws of war, but did not ever question or seriously investigate the bases for this particular type of military commission jurisdiction.<sup>4</sup> Contrary to various assumptions, military commissions have not always had jurisdiction over violations of the laws of war. Prior to the American Civil War, military commissions had been used only by General Winfield Scott to try a small number of American Soldiers during the Mexican-American War, primarily for common law crimes committed on foreign soil.<sup>5</sup> Violations of the laws of war were tried previously only before Councils of War, a short-lived venue that was called only a handful of times in Mexico.<sup>6</sup>

In August 1861, Henry Halleck, a graduate of the U.S. Military Academy<sup>7</sup> and veteran of the Mexican-American War,<sup>8</sup> reentered the U.S. Army to fight in the Civil War.<sup>9</sup> An author of a treatise on international law,<sup>10</sup> Halleck had successfully practiced law in San

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TRIBUNALS AND PRESIDENTIAL POWER 33 (2005); Captain Brian Baldrate, *The Supreme Court's Role in Defining the Jurisdiction of Military Tribunals: A Study, Critique, & Proposal for Hamdan v. Rumsfeld*, 186 MIL. L. REV. 1 (2005); MAROUF HASIAN JR., IN THE NAME OF NECESSITY (2005); David Glazier, *Precedents Lost: The Neglected History of the Military Commission*, 46 VA. J. INT'L L. 5, 36–37 (2006); Louis Fisher, *Military Commissions: Problems of Authority and Practice*, 24 B.U. INT'L L.J. 15 (2006); Hardimos V. Thravalos, Comment, *The Military Commission in the War on Terrorism*, 51 VILL. L. REV. 737 (2006); Anthony F. Renzo, *Making a Burlesque of the Constitution: Military Trials of Civilians in the War Against Terror*, 31 VT. L. REV. 447 (2007); Detslev F. Vagts, *Agora: Military Commissions Act of 2006*, 101 AM. J. INT'L L. 35, 37 (2007); Kyandra Rotunda, *A Comparative Historical Analysis of War Time Procedural Protections and Presidential Powers: From the Civil War to the War on Terror*, 12 CHAP. L. REV. 449 (2009).

<sup>3</sup> See sources cited *infra* note 323.

<sup>4</sup> 548 U.S. 557, 590 (U.S. 2006).

<sup>5</sup> See *infra* Part II.A.

<sup>6</sup> Councils of War were established in Mexico by General Scott. The panels consisted of a trial panel of five officers and a judge advocate, whereas military commissions were more similar to courts-martial. Overall, twenty-one individuals were tried in the Councils of War, with eleven convicted. See Glazier, *Neglected History of the Military Commission*, *supra* note 2, at 36–37.

<sup>7</sup> STEPHEN AMBROSE, HALLECK: LINCOLN'S CHIEF OF STAFF 5 (1962).

<sup>8</sup> *Id.* at 7–8.

<sup>9</sup> *Id.* at 8–9.

<sup>10</sup> HENRY WAGER HALLECK, INTERNATIONAL LAW, OR, RULES REGULATING THE INTERCOURSE OF STATES IN PEACE AND WAR 783 (S.F., H.H. Bancroft & Co. 1861).

Francisco during the previous decade.<sup>11</sup> By November, the newly commissioned Major General had been assigned to command the Department of Missouri.<sup>12</sup> Upon arrival, General Halleck was faced with a dire situation: an increasingly violent guerrilla war threatened to spiral out of control as Union authorities attempted to maintain authority in this critical border state. A legal scholar, Halleck creatively combated guerillas with a legal solution, expanding the jurisdiction of military commissions to include all those offenses constituting violations of the laws of war, an innovation that allowed for the prosecution of those involved in the guerilla war before a military venue. Interestingly, Halleck's operations in Missouri are one of the earliest examples in American history of "lawfare" being used to combat insurgents.<sup>13</sup> Before 1862 had come to a close, the Lincoln Administration realized the useful role that commissions could play nationwide and began encouraging their use outside of Missouri, based not on Scott's model from Mexico, but rather, on Halleck's more versatile Missouri model.

Most important to the expansion of the commissions throughout the entire country was the promulgation of the Lieber Code in late April, 1863, by the Department of War.<sup>14</sup> The Lieber Code, building upon Halleck's innovation in Missouri, more fully delineated the laws of war<sup>15</sup> and, for the first time, definitively granted military commissions subject matter and *in personam* jurisdiction to try violations of the laws of war.<sup>16</sup> Soon after the promulgation of the Lieber Code, military commissions began appearing all over the United States.<sup>17</sup> By the end of the Civil

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<sup>11</sup> AMBROSE, *supra* note 7, at 8.

<sup>12</sup> *Id.* at 13.

<sup>13</sup> See *infra* note 99 and accompanying text.

<sup>14</sup> See Headquarters, War Dep't, Gen. Orders No. 100 (1863) [hereinafter 1863 War Dep't Gen. Orders No. 100] (on file with Library of Cong., Wash., D.C.), reprinted in RICHARD HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (Precedent 1983).

<sup>15</sup> *Id.* art. 13.

<sup>16</sup> Subject matter jurisdiction refers to the authority of the tribunal to try a particular type or class of cases. In the context of military commissions, this generally refers to the ability to try particular types of offenses. See 2 WILLIAM WINTHROP, *MILITARY LAW* 70–72 (Wash., W.H. Morrison 1886). Prior to the Lieber Code, the entire U.S. military had yet to receive authorization to try offenses that constituted violations of the law of war before a military commission. *In personam* (or personal) jurisdiction refers to the authority of the tribunal to try a particular individual. *Id.* at 68–70. Again, prior to the Lieber Code, the various military departments also did not have explicit authority to try civilians and enemy combatants before commission. The enormity of the grant of jurisdiction is made clear when the two are combined—jurisdiction to try U.S. Soldiers, civilians, and enemy combatants for violations of the laws of war.

<sup>17</sup> See *infra* Part III.C.

War, over 3000 individuals were tried by commission for an enormous variety of different offenses under the jurisdictional authority of the Lieber Code.<sup>18</sup>

The Lieber Code has been enormously important in international law, serving as the foundation for similar law of war codifications in Prussia,<sup>19</sup> the Netherlands,<sup>20</sup> France,<sup>21</sup> Russia,<sup>22</sup> Spain,<sup>23</sup> and Great Britain.<sup>24</sup> It was also an important influence at the conferences of Brussels in 1874 and at The Hague in 1899 and 1907.<sup>25</sup> But, despite this great influence abroad following Civil War, the Lieber Code has generally been viewed as having had almost no effect on the conduct of the combatants during the Civil War itself.<sup>26</sup> While scholars recognized that the Code's flexible provisions on military necessity provided an ethical justification for a harder war, they generally agree that it failed to

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<sup>18</sup> It is not possible to identify the precise number of defendants tried by commission due to the record-keeping during the War and the scattering of many of the records since. The 3000 figure comes from extensive research in the General Orders Volumes at the Library of Cong., the U.S. Military Academy, Columbia University, the National Archives, the New York Historical Society, the New York Public Library, and from a large sampling of the commission files at the National Archives. In all, I found records for about 3000 defendants, with 1600 reported for the Department of Missouri. The 3000 estimate is likely lower than the actual number of commissions tried due to the often inaccurate records maintained during the Civil War. In his fine work, *The Fate of Liberty*, historian Mark Neely, stated that he found records for 4271 defendants, 1940 of which were from Missouri. See MARK NEELY, *THE FATE OF LIBERTY: ABRAHAM LINCOLN AND CIVIL LIBERTIES* 168 (1991). This figure may be a little large because Neely's figure includes some court-martial files. William Winthrop, writing soon after the Civil War, observed that there were "upwards of two thousand cases promulgated in the G.O. of the War Department and of the various military departments and armies." See 2 WINTHROP, *supra* note 16, at 63. In justifying this figure, Winthrop provided almost no indication of what sources he used. Based on a survey of the General Orders volumes, a sampling of the records at the National Archives, and Neely's figures, the best estimate is that there were somewhere between 3500 and 4000 defendants tried by commission, about 1900 of which were tried in the Department of Missouri.

<sup>19</sup> See L. LYNN HOGUE, *Lieber's Military Code and Its Legacy*, in FRANCIS LIEBER AND THE CULTURE OF THE MIND 51, 58 (Henry H. Lesesne & Charles R. Mack eds., 2005).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* See also James F. Childress, *Francis Lieber's Interpretation of The Laws of War: General Orders No. 100 in the Context of His Life and Thought*, 21 AM. J. JURIS. 34, 35 (1976); Jordan F. Paust, *Dr. Francis Lieber and the Lieber Code*, 95 AM. SOC'Y INT'L L. PROC. 112, 114 (2001).

<sup>26</sup> See *infra* pp. 46–48.

limit Soldiers' conduct in the field.<sup>27</sup> What has been neglected under this view is the Code's enormous impact on the use of military commissions in the same time period. Here, the Code provided the first nationwide authorization for the trial of violations of the laws of war before military commission. In context, the evolution of commissions arising from the Code provides a new and necessary view.

The value of the Lieber Code in shaping Civil War commissions also extends to the system of contemporary military commissions. The Lieber Code was the primary basis for expanding military commission jurisdiction over those individuals accused of violations of the laws of war.<sup>28</sup> Modern day commissions, including those used during World War II and those currently in use at Guantanamo Bay, can directly trace their lineage to the Lieber Code.<sup>29</sup> Although the merger of military commission jurisdiction—combining Winfield Scott's limited Mexican-American War military commissions (designed to try ordinary crimes committed on foreign soil) with his Councils of War (designed to try violations of the laws of war)—has been noted by legal historians<sup>30</sup> and the U.S. Supreme Court,<sup>31</sup> no serious explanation has been given for why or how this important transformation occurred.<sup>32</sup> As this article explains, the two prongs of this jurisdiction were set forth together for the first time by Henry Halleck in Missouri, a development that was later repeated nationwide in the Lieber Code, fundamentally linking the Lieber Code to the modern system of military commissions.<sup>33</sup>

This article provides a historical context for the evolution of military commissions following the American Civil War. With knowledge gained from archival research, it offers the first comprehensive description of the role of the Lieber Code in expanding military commission jurisdiction over violations of the laws of war. Part II explores the early experiments with commissions during the first two years of the Civil War, primarily in Missouri, and also briefly discusses connections to lawfare and modern counterinsurgency efforts. Part III addresses the jurisdictional innovations of Henry Halleck and Francis Lieber, focusing particularly on the important role of the Lieber Code in expanding

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<sup>27</sup> *Id.*

<sup>28</sup> *See infra* III.B.

<sup>29</sup> *See infra* pp. 51–54.

<sup>30</sup> *See infra* note 323.

<sup>31</sup> *Hamdan v. Rumsfeld*, 548 U.S. 557, 590 (2006).

<sup>32</sup> *See infra* Parts III.A, III.B.

<sup>33</sup> *See infra* Part III.B.

military commission jurisdiction. Part IV considers the formation of a more centralized and modern military justice system, which allowed the Lieber Code to be quickly and consistently applied in the various military departments and the transition in 1865 to the Reconstruction. This entire article provides insight into the previously unexplored expansion of commission jurisdiction over law of war violations, which laid the foundation for almost all of the post-Civil War commissions.

## II. Historical Foundations and Early Experiments

### A. Military Commissions in the Mexican-American War

The use of military commissions in the United States can be traced back to the Revolutionary War, where they were mostly used to try spies.<sup>34</sup> However, the generally accepted view is that the military commission did not assume a developed form until the Mexican-American War.<sup>35</sup> On 19 February 1847, General Winfield Scott issued General Order No. 20, providing for martial law and the ability to try a number of offenses, including “murder, poisoning, rape . . . malicious

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<sup>34</sup> These Revolutionary War hearings, despite the status of “military tribunals” in loose sense of the term, were not, at a fundamental level the same venue as the commissions utilized, first, in the Mexican-American War, and later during the Civil War. See Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2027:

A key difference between those trials and later use of military commissions, however, was a specific statutory grant of court-martial jurisdiction over spies enacted by Congress in 1776. The early spy trials thus do not share the “common law” basis of later tribunals that were used to extend jurisdiction to persons not otherwise subject to American military justice. The conclusion that military jurisdiction was strictly limited to persons subjected to military authority by Congress was specifically endorsed by the early commentators on American military justice.

See also Fred Borch, *The Historical Role of Military Lawyers in National Security Trials*, 50 S. TEX. L. REV. 717, 719 (2009) (“Although it is sometimes said that Andre was court-martialed or tried by military commission, this is incorrect. Rather, General George Washington appointed a Board of General Officers headed by Major General Nathaniel Greene to inquire into the facts and circumstances surrounding Andre's capture and then make recommendations to him.”).

<sup>35</sup> 2 WINTHROP, *supra* note 16, at 59–60; Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2027; Vagts, *supra* note 2, at 37; Erika Myers, *Conquering Peace: Military Commissions as a Lawfare Strategy in the Mexican War*, 35 AM. J. CRIM. L. 201, 206 (2008).

assault and battery . . . robbery, theft . . . whether committed by Mexicans or other civilians in Mexico . . . or against Mexicans or civilians” by military commission.<sup>36</sup> Scott was faced with a problem; the legal rules governing military justice did not provide a venue for the “trial or punishment of murder, rape, [and] theft” while American forces were in Mexico.<sup>37</sup>

Scott, in creating the military commission, was responding to a unique problem. When American soldiers were no longer on American soil, a gap appeared in the military justice system, which would allow, most problematically, American Soldiers to commit crimes against Mexican civilians and go unpunished.<sup>38</sup> Courts-martial are a statutorily created and defined military court.<sup>39</sup> They were first constituted in the United States during the American Revolution by the Articles of War of 1775,<sup>40</sup> and have existed since.<sup>41</sup> Congress has, from time to time, issued articles of war and other regulations governing the jurisdiction, procedure, and other topics related to courts-martial.<sup>42</sup> However, the Articles of War that were operative during the Mexican-American War did not include provisions for the trying of American Soldiers outside of U.S. soil before a court-martial, as, at that early date, Congress did not foresee the extensive campaigning of American armies on foreign soil.<sup>43</sup> Under the new system of commissions, designed to fill this hole, over 400 individuals were tried in Mexico, with the majority being American Soldiers.<sup>44</sup>

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<sup>36</sup> 2 WINTHROP, *supra* note 16, at 59–60.

<sup>37</sup> FISHER, *supra* note 2, at 33.

<sup>38</sup> Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2027.

<sup>39</sup> See 1 WINTHROP, *supra* note 16, at 49–51.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*; STEPHEN VINCENT BENET, A TREATISE ON MILITARY LAW AND THE PRACTICE OF COURTS-MARTIAL 17 (N.Y., D. Van Nostrand 2d ed. 1862).

<sup>43</sup> See *id.* at 32–33; Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2028. 2 WINFIELD SCOTT, MEMOIRS OF LIEUT. GEN. SCOTT, 392–94, 540–43 (N.Y., Sheldon & Co. 1864). For example, when an American Soldier killed a Mexican civilian, the only remedy available was to discharge the killer and send him home. Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2027–28.

<sup>44</sup> Glazier, *Neglected History of the Military Commission*, *supra* note 2, at 37.

In Mexico, the commissions were used almost exclusively to regulate the conduct of American Soldiers, committing mostly common law crimes in a situation where no existing court had jurisdiction to try them.<sup>45</sup> Stephen Vincent Benet, in his 1862 treatise on military law, explained the role of commissions in the Mexican-American War, writing, “these courts [court-martial] have a very limited jurisdiction, both in regard to persons and offenses. Many classes of persons cannot be arraigned before such courts for any offence whatever, and many crimes committed, even by military officers, enlisted men or camp retainers, cannot be tried under the ‘rules and articles of war.’ Military commissions must be resorted to for such cases . . . .”<sup>46</sup> The military commissions in the Mexican-American War were borne out of necessity, as a class of offenses that threatened to undermine the discipline of American armies, which were not cognizable before any other tribunal.

In Mexico, General Scott had not defined the jurisdiction of the military commissions to include offenses against the laws of war committed by civilians.<sup>47</sup> Instead, these crimes were tried before “Councils of War,” a brief experiment that tried only twenty-one individuals (by comparison, commissions tried over 400 individuals in Mexico).<sup>48</sup> These tribunals had procedures that were distinct from the military commissions, and tried mainly guerrillas who had committed violations of the laws of war and individuals who had enticed U.S. Soldiers to desert (but who were not tried before commissions).<sup>49</sup> Although short lived and little used, these Councils of War would later be a core piece of the foundation for the Civil War commissions.<sup>50</sup>

#### B. The First Civil War Commissions: Experiments in Missouri & Virginia

The first commissions in the Civil War were held in 1861 in Missouri, which was at that time part of the Western Department (a huge pre-Civil War Department spanning all areas west of the Mississippi

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<sup>45</sup> Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2027 (describing the commissions as an interim common law).

<sup>46</sup> BENET, *supra* note 42, at 15. *See also* HALLECK, *supra* note 10, at 783 (describing the rationale behind the development of commissions in Mexico).

<sup>47</sup> Glazier, *Neglected History of the Military Commission*, *supra* note 2, at 33, 36.

<sup>48</sup> *Id.* at 37.

<sup>49</sup> Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2033.

<sup>50</sup> *See infra* Part III.A.



River),<sup>51</sup> and in Virginia.<sup>52</sup> The trials in Virginia, much like those in the Mexican-American War, were targeted at U.S. Soldiers committing common law crimes.<sup>53</sup> One of the early trials in Virginia targeted a group of Union Soldiers involved in an armed robbery of another group of Soldiers.<sup>54</sup> It is not entirely clear why a military commission, rather than a regular court-martial proceeding, was used to try these Soldiers. Unlike in Mexico, this offense was committed on American soil and would have been within the jurisdiction of a court-martial.<sup>55</sup> Regardless of the specific reasons for choosing commissions to try offenses in Virginia, all military commissions were limited in scope, and were used to try Union Soldiers.<sup>56</sup> Even though these commissions varied from those in Mexico—primarily in the absence of international jurisdictional issues in Virginia—both commissions were functionally serving identical roles: the commissions were used as a means of controlling the conduct of U.S. Soldiers who perpetrated crimes upon each other or upon civilians.<sup>57</sup>

In Missouri, where the bulk of the hearings occurred thirty-three individuals were brought before commissions in 1861.<sup>58</sup> Most of these men were either released without trial or were acquitted.<sup>59</sup> Of the thirty-three brought before commissions, only twelve were convicted, seven of whom were sentenced to hard labor for the duration of the war.<sup>60</sup> One of the earliest commissions tried Ulysses C. Vannosdoff in St. Louis,

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<sup>51</sup> RAPHAEL P. THIAN, NOTES ILLUSTRATING THE MILITARY GEOGRAPHY OF THE UNITED STATES 1813–1880, at 106 (John M. Carroll ed., Univ. of Tex. Press 1979) (1881).

<sup>52</sup> Headquarters, W. Dep't, Gen. Orders (1861) [hereinafter 1861 W. Dep't, Gen. Orders] (on file with the Library of Cong., Wash., D.C.); Headquarters, Dep't of Potomac, Gen. Orders (1861) [hereinafter 1861 Dep't of Potomac, Gen. Orders] (on file with the N.Y. Hist. Soc'y); 2 WINTHROP, *supra* note 16, at 61.

<sup>53</sup> 1861 Dep't of Potomac, Gen. Orders, *supra* note 52.

<sup>54</sup> Records of the Office of The Judge Advocate General, Nat'l Archives, Record Group 153, Case II-0766 [hereinafter case transcripts at the National Archives will be designated simply by their alpha-numeric code, for example, "Case II-0766"].

<sup>55</sup> See 1 WINTHROP, *supra* note 16, at 130–34 (describing court-martial jurisdiction over common law crimes, such as robbery).

<sup>56</sup> All of the defendants were U.S. Soldiers or were serving with the U.S. Army as teamsters in the eleven commissions in 1861 and 1862 in Virginia. See 1861 Dep't of Potomac, Gen. Orders, *supra* note 52.

<sup>57</sup> See *supra* Part II.A.

<sup>58</sup> 1861 W. Dep't, Gen. Orders, *supra* note 52.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

Missouri, on 8 September 1861.<sup>61</sup> Vannosdoff was charged with violating the 56th and 57th Articles of War—specifically, he was accused of various acts of disloyalty, including taking up arms, enlisting in a Confederate unit, and encouraging others to enlist in the Confederate Army.<sup>62</sup> Vannosdoff was captured soon after enlisting in a Confederate unit and was found guilty of all charges and sentenced to hard labor for the duration of the war.<sup>63</sup> His sentence was confirmed by General John Fremont, commander of the Western Department, on 20 September 1861.<sup>64</sup> Interestingly, it is very probable that Vannosdoff was the first individual tried by military commission in the Civil War whose sentence was upheld and actually carried into effect.<sup>65</sup>

Those tried in Missouri under General Fremont were generally charged with “Treason against the Government of the United States.”<sup>66</sup> All eleven of the individuals tried for treason were found guilty, despite their likely failure to meet the specific requirements of treason as defined in the U.S. Constitution.<sup>67</sup> The commissions in Missouri were taking on

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<sup>61</sup> Case II-0473; Headquarters, W. Dep’t, Gen. Orders No. 14 (1861) [hereinafter 1861 W. Dep’t, Gen. Orders No. 14] (on file with the Library of Cong., Wash., D.C.).

<sup>62</sup> Stat. 366 arts. 56, 57 (1806) (art. 56) (“Whosoever shall relieve the enemy with money, victuals, or ammunition, or shall knowingly harbor or protect an enemy, shall suffer death, or such other punishment as shall be ordered by the sentence of a court martial.”) (art. 57) (“Whosoever shall be convicted of holding correspondence with or giving intelligence to the enemy either directly or indirectly, shall suffer death or such other punishment as shall be ordered by the sentence of a court martial.”).

<sup>63</sup> Case II-0473; 1861 W. Dep’t, Gen. Orders No. 14, *supra* note 61.

<sup>64</sup> Case II-0473; 1861 W. Dep’t, Gen. Order Nos. 14, *supra* note 61.

<sup>65</sup> Joseph Aubuchon was likely the first individual actually tried by commission, although his sentence was remitted by General Fremont because the offense occurred prior to the declaration of martial law in Missouri. *See* Case II-0471; Headquarters, W. Dep’t, Gen. Orders No. 12 (1861) [hereinafter W. Dep’t, Gen. Orders No. 12] (on file with the Library of Cong., Wash., D.C.). Aubuchon was tried on 5 September 1861, three days before Vannosdoff.

<sup>66</sup> 1861 W. Dep’t, Gen. Orders No. 12, *supra* note 65; 1861 W. Dep’t, Gen. Orders No. 14; Headquarters, W. Dep’t, Gen. Orders No. 20 (1861) [hereinafter 1861 Gen. Orders No. 20] (on file with the Library of Cong., Wash., D.C.).

<sup>67</sup> Not all eleven individuals were sentenced. *See* 1861 W. Dep’t, Gen. Orders, *supra* note 52. One was released because he committed the offense before the declaration of martial law in Missouri. 1861 W. Dep’t, Gen. Orders No. 12, *supra* note 66. Two were excused due to their youth. 1861 W. Dep’t, Gen. Orders No. 20, *supra* note 66. One was excused due to the circumstances surrounding the offense. 1861 W. Dep’t, Gen. Orders No. 20, *supra* note 66. Another was excused due to his low intelligence. *Id.* The other six individuals were sentenced to hard labor for the duration of the war. 1861 W. Dep’t, Gen. Order No. 14, *supra* note 61; 1861 W. Dep’t, Gen. Orders No. 20, *supra* note 66. *See* U.S. CONST. art. III, § 2 (“No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court”). It is

a role that was wholly unique from those in Mexico and Virginia, a role that would become much more clearly defined during 1862.<sup>68</sup> Most of the Missouri commissions were directed not at U.S. Soldiers, as were those in Virginia,<sup>69</sup> but rather, were directed squarely at disloyal civilians.

On 30 August 1861, General Fremont declared martial law in the State of Missouri, which Fremont claimed allowed the trying of all persons captured bearing arms by court-martial, and if found guilty, to be shot.<sup>70</sup> Although President Abraham Lincoln soon afterwards expressed his disapproval of Fremont's proclamation (most famously for reversing the portion emancipating slaves in Missouri), Lincoln, in fact, did not voice opposition to the trying of civilians by military court.<sup>71</sup> Rather, he simply stated that no person could be shot without his consent.<sup>72</sup> The first military commissions in Missouri occurred just days after Fremont's proclamation of martial law.<sup>73</sup> Fremont indicated that the commissions were being used as a means of combating those who opposed federal authority in Missouri.<sup>74</sup> Accordingly, the commissions were focused on trying individuals who were caught bearing arms, committing sabotage against infrastructure, or engaging in the recruiting and enlistment of Confederate forces.<sup>75</sup> Unlike General Scott's commissions, or even the commissions occurring in Virginia at the same time, these commissions were used to combat a part of the Confederate war effort that could not be countered with Northern armies.<sup>76</sup>

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unlikely that the prosecution met the burden of proving treason in these cases. *See also* NEELY, *supra* note 18, at 42; *see also* 8 U.S. WAR DEP'T, THE WAR OF THE REBELLION: A COMPILATION OF THE OFFICIAL RECORDS OF THE UNION AND CONFEDERATE ARMIES, ser. 1, at 822 (U.S. Gov't Prtg. Office, 1880–1902) [hereinafter O.R. with series number in Roman numerals, volume in Arabic, followed by page number] (Halleck explaining that treason cannot be tried before a military commission in a letter to General Pope).

<sup>68</sup> *See infra* Part II.C.

<sup>69</sup> *See supra* pp. 8–9.

<sup>70</sup> O.R., II, 1, 221–22 (“All persons who shall be taken with arms in their hands within these lines shall be tried by court-martial and if found guilty will be shot.”).

<sup>71</sup> *See* 4 COLLECTED WORKS OF LINCOLN 506 (Roy P. Basler et al. eds., 1953–55); *see also* BURRUS M. CARNAHAN, ACT OF JUSTICE: LINCOLN'S EMANCIPATION PROCLAMATION & THE LAW OF WAR 80 (2007).

<sup>72</sup> *See supra* note 71.

<sup>73</sup> *See, e.g.*, Case II-0471.

<sup>74</sup> *See supra* note 70.

<sup>75</sup> *See generally* 1861 W. Dep't, Gen. Orders, *supra* note 52.

<sup>76</sup> MICHAEL FELLMAN, INSIDE WAR: THE GUERRILLA CONFLICT IN MISSOURI DURING THE AMERICAN CIVIL WAR 81–89, 112–17 (1989) (describing the difficulties that Union

It is not actually clear why Fremont began using military commissions to try civilians.<sup>77</sup> The first reference to military commissions actually appears in the correspondence of General John Pope, in a letter written on 17 August 1861.<sup>78</sup> In this letter, Pope instructed a subordinate that commissions should be used to try snipers and marauders harassing Union forces near Palymra, Missouri.<sup>79</sup> It is not possible to tell, though, whether Fremont was influenced by, or was even aware of this order. Regardless of Pope's influence, the commissions under Fremont were, legally speaking, questionable. The actual order authorizing trials was over-broad to the point that it seemed to authorize execution of all Confederate prisoners.<sup>80</sup> Further, even though Fremont used trials called "military commissions" to try violations of martial law, the order did not actually mention commissions at all; instead, it only authorized use of courts-martial to try those captured bearing arms.<sup>81</sup> Additionally, many of the charges used in the actual commissions, such as the charge of treason, were legally defective and not appropriate for the offenses at issue.<sup>82</sup>

#### C. Halleck in Missouri: The "Missouri Explosion" of 1862

The trial of civilians by commission continued until the replacement of General Fremont by General Henry Halleck, who arrived in Missouri on 19 November 1861.<sup>83</sup> Upon the promotion of Halleck to command in Missouri (a change that also saw the renaming of the Department from the Western to the Missouri), the trial of civilians by commission abruptly halted.<sup>84</sup> The author of *International Law, or, Rules Regulating the Intercourse of States in Peace and War*,<sup>85</sup> a treatise on international

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authorities faced in formulating a coherent military policy with traditional arms and the struggles that Union commanders faced in the field).

<sup>77</sup> CARNAHAN, *supra* note 71, at 72 (suggesting that Fremont may have gotten the idea from his subordinate, General John Pope, or from time spent in California during the Mexican-American War).

<sup>78</sup> O.R., II, 1, 212; CARNAHAN, *supra* note 71, at 72.

<sup>79</sup> O.R., II, 1, 212.

<sup>80</sup> *See supra* note 70.

<sup>81</sup> *Id.* Interestingly, the order had no legal effect, as the jurisdiction of courts-martial can only be expanded by statute.

<sup>82</sup> *See sources cited supra* note 67.

<sup>83</sup> AMBROSE, *supra* note 7, at 13.

<sup>84</sup> Headquarters, Dep't of Mo., Gen. Orders (1861) [hereinafter 1861 Dep't of Mo., Gen. Orders] (on file with the Library of Cong., Wash., D.C.).

<sup>85</sup> *See HALLECK, supra* note 10.

law, Halleck was more careful than Fremont about the procedural and jurisdictional formalities required to try civilians by commission, a fact that explains the brief lull. The only commissions occurring for about a month were the trials of two Union Soldiers charged with murder.<sup>86</sup> Although both Soldiers were found guilty, General Halleck, Commander of the Department of Missouri, overturned one sentence because the defendant should have been tried by a court-martial,<sup>87</sup> while upholding another sentence because a commission was an appropriate venue.<sup>88</sup> It was not until after an exchange of letters and telegraphs between General George McClellan, President Lincoln, Halleck, and Secretary of State William Seward, that, on 2 December 1861, Seward authorized Halleck to suspend habeas corpus and declare martial law to the extent that Halleck found it necessary “to secure public safety and authority of the United States.”<sup>89</sup> This grant of authority was critical to the expansion of commissions in Missouri starting at the end of 1861. The military commissions in Missouri earlier in 1861 could be viewed as an anomaly caused by the overzealous General Fremont, if the story ended there. However, when viewed through the lens of the remainder of the war, it seems more accurate to view Fremont’s commissions in Missouri as a rough and legally suspect experiment that foreshadowed the manner by which commissions would be used later in the war, especially in Missouri.<sup>90</sup>

On 4 December 1861, just three days after Halleck was granted authority to declare martial law, General Order No. 13 was issued by his headquarters.<sup>91</sup> This order authorized the trial of civilians by military commission, reading, “[c]ommissions will be ordered from these headquarters for the trial of persons charged with aiding and assisting the enemy, the destruction of bridges, roads, and buildings, and the taking of

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<sup>86</sup> Headquarters, Dep’t of Mo., Gen. Orders No. 16 (1861) [hereinafter 1861 Dep’t of Mo., Gen. Orders No. 16] (on file with the Library of Cong., Wash., D.C.); Headquarters, Dep’t of Mo. Gen Orders No. 18 (1861) [hereinafter 1861 Dep’t of Mo., Gen. Orders No. 18] (on file with the Library of Cong., Wash., D.C.).

<sup>87</sup> 1861 Dep’t of Mo., Gen. Orders No. 16, *supra* note 86.

<sup>88</sup> 1861 Dep’t of Mo., Gen. Orders No. 18, *supra* note 86. Due to the specific circumstances surrounding the commission of each crime, the appropriateness of a military commission differed based upon a very legalistic interpretation of the Articles of War.

<sup>89</sup> NEELY, *supra* note 18, at 37.

<sup>90</sup> See *infra* Part III.C.

<sup>91</sup> Headquarters Dep’t of Mo., Gen. Orders No. 13 (1861) [hereinafter 1861 Dep’t of Mo., Gen. Orders No. 13] (on file with the Library of Cong., Wash., D.C.).

public or private property for hostile purposes. . . .”<sup>92</sup> Overall, in 1862, there were at least 237 defendants tried by commission in the Missouri area.<sup>93</sup> The “Missouri explosion,” a term used to signify the sudden increase in the number of commissions in the Department, began almost immediately after Halleck authorized the use of commissions to try guerrillas, saboteurs, and other insurgents.<sup>94</sup> In General Order No. 1, promulgated by Halleck’s headquarters on 1 January 1862, the grant of authority in General Order No. 13 was repeated, and more specific information regarding jurisdiction, procedure, and the role of the commissions was described at some length.<sup>95</sup> The commissions commenced in Missouri within days of the granting of authority by the Department headquarters, and ultimately, did not relent in Missouri until mid-1865 at the end of the war.<sup>96</sup>

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<sup>92</sup> *Id.*

<sup>93</sup> This figure includes one hundred defendants tried by commission in the Department of the Mississippi, 135 defendants in the Department of Missouri, and two defendants from the District of Western Tennessee tried soon after the dissolution of the Department of the Mississippi. The Department of the Mississippi existed from 11 March 1862 to 19 September 1862, and was comprised of almost the entire United States west of Knoxville, Tennessee. See THIAN, *supra* note 51, at 72–74. The Department of the Missouri existed independently until 11 March, when it was subsumed into the Mississippi, and then was reconstituted on 19 September 1862, upon dissolution of the Mississippi. *Id.* at 74–75. All of the commissions sampled from the Department of the Mississippi occurred in the state of Missouri or in Memphis, Tennessee. The commissions held in Memphis seem most related to the trends occurring in Missouri due to the close proximity to Missouri and the command of General Halleck over the area. Rather than counting these as an independent group of files, they are more accurately included in the Missouri totals. See Headquarters, Dep’t of Mo., Gen. Orders, Series 1 (1862) [hereinafter 1 1862 Dep’t of Mo., Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dep’t of Mo., Gen. Orders, Series 2 (1862) [hereinafter 2 1862 Dep’t of Mo., Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dep’t of the Miss., Gen. Orders (1862) [hereinafter 1862 Dep’t of the Miss., Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, War Dep’t, Gen. Orders (1862) [hereinafter 1862 War Dep’t, Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, War Dep’t, Gen. Orders (1863) [hereinafter 1863 War Dep’t, Gen. Orders]; Headquarters, Dist. of Mo., Gen. Orders (1862) [hereinafter 1862 Dist. of Mo., Gen. Orders] (on file with N.Y. Hist. Soc’y); Headquarters, Army of the Southwest, Gen. Orders (1862) [hereinafter 1862 Army of the Southwest, Gen. Orders] (on file with Columbia Univ. Rare Book Room, New York, N.Y.).

<sup>94</sup> See generally 1 1862 Dep’t of Mo., Gen. Orders, *supra* note 93.

<sup>95</sup> Headquarters, Dep’t of Mo., Gen. Orders No. 1, Series 1 (1862) [hereinafter 1 1862 Dep’t of Mo., Gen. Orders No. 1] (on file with Library of Cong., Wash., D.C.); O.R., I, 8, 476. See *infra* Part III.A for analysis of General Orders No. 1.

<sup>96</sup> Headquarters, Dep’t of Mo., Gen. Orders No. 160 (1865) (on file with Library of Cong., Wash., D.C.).

These trials by commission present a picture of military authorities struggling to maintain order in an area rapidly devolving into chaos. The trials were focused on retaining authority and combating guerrillas, and accordingly, they targeted bridge-burners, saboteurs, guerrillas, and other individuals who were responsible for the spreading violence west of the Mississippi.<sup>97</sup> Indeed, the trials appear to be a legal arm of the war effort and were being used to wage a counterinsurgency effort. As such, these commissions in Missouri are actually one of the first instances in American history where “lawfare”<sup>98</sup> was actively applied in the field.<sup>99</sup>

Halleck, of course, did not describe his legal solution to the guerilla insurgency as “lawfare”; Halleck did recognize, however, that he was fighting guerillas with legal processes. For example, on 1 January 1862, Halleck wrote to General Ewing that he was “satisfied that nothing but the severest punishment can prevent the burning of railroad bridges and the great destruction of human life . . . I have determined to put down these insurgents and bridge-burners with a strong hand.”<sup>100</sup> On the same day that Halleck made this pledge to punish the guerillas, his headquarters promulgated General Order No. 1, which specifically

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<sup>97</sup> For example, the offenses in just a single general order include “destroying railroad property,” “destroying telegraph lines,” “inciting insurrection,” and “inciting unlawful war.” Headquarters, 1862 Dep’t of Miss., Gen. Orders No. 15 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>98</sup> A simple definition of “lawfare” is “[a] strategy of using or misusing law as a substitute for traditional military means to achieve military objectives.” See Lawfare, the Latest in Asymmetrics, Council on Foreign Relations, Mar. 18, 2003, <http://www.cfr.org/publication.html?id=5772>; see also Major General Charles J. Dunlap, Jr., *Lawfare Today: A Perspective*, 3 YALE J. INT’L. AFF. 146, 146 (2008) (also defining lawfare as “the strategy of using—or misusing—law as a substitute for traditional military means to achieve an operational objective.”).

<sup>99</sup> See generally Meyers, *supra* note 35. In her article, Meyers discusses how General Scott’s military commissions and councils of war in the Mexican-American War were a form of lawfare. This significant finding refutes the view that lawfare is a modern invention. See, e.g., Glenn Sulmasy & John Yoo, *Challenges to Civilian Control of the Military: A Rational Choice Approach to the War on Terror*, 54 UCLA L. REV. 1815, 1836, 1841 (2007); Major General Charles J. Dunlap, Jr., *Law and Military Interventions: Preserving Humanitarian Values in 21st Century Conflicts* (Nov. 29, 2001) (Carr Center for Human Rights, John F. Kennedy Sch. of Gov’t, Harvard Univ., Working Paper), available at <http://www.hks.harvard.edu/cchrp/Web%20Working%20Papers/Use%20of%20Force/Dunlap2001.pdf>. The activities of Halleck in Missouri also support the conclusion that lawfare has a lengthier tradition in American warfare. The commissions used in Missouri (and elsewhere during the Civil War) were used not only to punish misconduct, but also to strategically reach military objectives via legal processes.

<sup>100</sup> O.R., I, 8, 475–76.

authorized Union armies in Missouri to begin trying civilians for violations of the laws of war.<sup>101</sup>

Consistent with Halleck's goal of using commissions to counter guerillas and other irregular combatants, the commissions were almost exclusively directed at individuals who were actively at arms against the U.S. Government.<sup>102</sup> The commissions provided Union authorities a means of targeting guerillas and other insurgents, who could not be easily countered with traditional armies.<sup>103</sup> In these trials, the charge "Violation of the Laws of War" was liberally used to capture a wide variety of violent offenses.<sup>104</sup> This was especially true toward the end of the year. Although the commissions in Missouri were disorganized, and are themselves a reflection of the confused state of affairs in 1862 Missouri, their function was unmistakable. Of the 237 individuals tried in the Departments of Missouri and Mississippi, only twenty-seven were U.S. Soldiers (and fourteen of those were tried in the same commission

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<sup>101</sup> 1 1862 Dep't of Mo., Gen. Orders No. 1, *supra* note 95. Less than a month after Halleck took command in Missouri, he wrote in General Orders No. 13 (which was the first order issued in Missouri authorizing the trial of insurgents) that "the mild and indulgent course heretofore pursued toward this class of men has utterly failed . . . The safety of the country and the protection of the lives and property of loyal citizens justify and require the enforcement of a more severe policy . . . They have forfeited their civil rights as citizens by making war against the Government, and upon their own heads must fall the consequences." See 1861 Dep't of Mo., Gen. Orders No. 13, *supra* note 91.

<sup>102</sup> In the Missouri and Mississippi Departments, only twenty-three of the civilian defendants were charged with a non-insurrection related crime in 1862 (out of a total of 237). See, e.g., Headquarters, Dep't of Mo., Gen. Orders No. 19, Series 1 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Miss., Gen. Orders No. 11 (1862) [hereinafter 1862 Dep't of Miss., Gen. Orders No. 11] (on file with Library of Cong., Wash., D.C.). See also Headquarters, Dep't of Mo., Gen. Orders No. 31 (1861) (on file with Library of Cong., Wash., D.C.) (stating the goal of the commissions and describing treatment of insurgents and bridge burners, reading, "these men are guilty of the highest crime known to the code of war and the punishment is death. Anyone caught in the act will be immediately shot, and any one accused of this crime will be arrested and . . . examined by a military commission, and, if found guilty, he also will suffer death.").

<sup>103</sup> See FELLMAN *supra* note 76.

<sup>104</sup> For example, in a commission which convened in Westville, Missouri, on 7 February 1862, John H. Bently was convicted for violating the laws of war following capture while in arms against the U.S. Government. The trial itself was extremely brief: only one witness testified on behalf on the prosecution—a man who was also a member of "Meyer's Company" of guerrillas. After a brief deliberation, the commission found the defendant guilty and sentenced him to hard labor for the duration of the war. The sentence was later mitigated to imprisonment for the duration of the war by General Halleck. See Case KK-0823.



stemming from a single incident of burglary).<sup>105</sup> The remainder was nominally civilians, who more accurately could be classified as guerrillas, bushwhackers, or other irregular soldiers.<sup>106</sup> They were almost exclusively tried for committing acts of overt, and, at times, extreme violence or subterfuge against Union Soldiers, northern loyalists, or important infrastructure.<sup>107</sup> No longer directed at common law crimes and offenses committed by American Soldiers as in the Mexican-American War, the commissions had transformed into a tool by which Union authorities counteracted the activities of guerrillas.<sup>108</sup>

Often the sentences were harsh—death sentences were not uncommon<sup>109</sup>—but so too were many of the offenses.<sup>110</sup> In a particularly gruesome case, two guerrillas tricked a Union lieutenant into following them into the woods where they disarmed and stripped him.<sup>111</sup> The guerrillas forced the officer to kneel and then one of them brutally executed him at point blank range.<sup>112</sup> One of the guerrillas escaped, but the other, Smith Crim, was convicted in August 1862, on charges of murder and violation of the laws of war.<sup>113</sup> Crim was sentenced to death, while the other guerrilla's identity remained unknown throughout the trial.<sup>114</sup>

The harsh punishments reflected the goal of the commissions: removing and disabling troublesome individuals who were involved in the guerrilla war to stabilize Missouri. For example, on 18 February 1862, William Lisk was tried for violating the laws of war and for aiding and abetting the rebellion by arming guerrillas.<sup>115</sup> The commission

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<sup>105</sup> See Headquarters, Dep't of Mo., Gen. Orders No. 42, Series 1 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>106</sup> See sources cited *supra* note 93.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> There were close to fifty death sentences imposed in Missouri in 1862. Of these, about half were upheld. See sources cited *supra* note 93. For the post-trial review process of the commissions, see *infra* Part IV.A.

<sup>110</sup> For example, many common offenses were violent crimes, such as murder, arson, or robbery charged as violations of the laws of war. See sources cited *supra* note 93.

<sup>111</sup> Case MM-0136; Headquarters, War Dep't, Gen. Orders No. 151 (1863) (on file with Library of Cong., Wash., D.C.).

<sup>112</sup> See sources cited *supra* note 111.

<sup>113</sup> *Id.*

<sup>114</sup> The death sentence was ultimately upheld by President Lincoln. See sources cited *supra* note 111.

<sup>115</sup> Case KK-0825.

focused on an incident where a group of guerrillas fired on a boxcar.<sup>116</sup> Even though Lisk's connection to the actual assault was apparently limited to allowing one of the shooters to borrow his gun, he was found guilty on all charges and sentenced to hard labor for the duration of the war—a sentence later approved by General Halleck and which lasted for approximately four years.<sup>117</sup>

Although 1862 was the year in which military commissions were the roughest in terms of procedure,<sup>118</sup> the conviction rate was comparable to other years, and was actually lower than in 1863.<sup>119</sup> Of 237 defendants brought before a commission in the Departments of Mississippi and Missouri, forty-eight<sup>120</sup> were acquitted or ultimately not charged, a conviction rate of about eighty percent (not counting uncharged individuals, the conviction rate increases to about eighty-five percent<sup>121</sup>). Of the 189 individuals convicted by the commission, fifty-one of those convictions were reversed by either General Halleck, General Samuel Curtis, or by the War Department (a total of twenty-seven percent), and another thirteen individuals had their convictions upheld but had the sentence mitigated to a much less severe punishment.<sup>122</sup> Overall, a little

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<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> See Appendix B.

<sup>119</sup> Compare these statistics with Department of Missouri conviction rate in 1863 (around eighty-five percent), *infra* note 265.

<sup>120</sup> See *supra* note 93.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* In an interesting case, and likely the first reviewed by President Lincoln, Sely Lewis was convicted for spying and smuggling and sentenced to death. Lincoln reversed the spying conviction because the offense was outside of the jurisdiction of military commissions and reduced the punishment to six months imprisonment. Lewis was tried on 21 Aug 21, 1862, in Memphis, in the District of Western Tennessee. Upon reversal, Lewis was released. See case KK-0825; Headquarters, War Dep't, Gen. Orders No. 170 (1862) (on file with Library of Cong., Wash., D.C.). At that time the District was part of the Department of the Mississippi. THIAN, *supra* note 51, at 72–73. The convictions of another seventeen defendants tried in or near Missouri were reversed by the War Department. See Headquarters, War Dep't, Gen. Orders No. 91 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 95 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 135 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 151 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 162 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 239 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 255 (1863) (on file with Library of Cong., Wash., D.C.), Headquarters, War Dep't, Gen. Orders No. 267 (1863) (on file with Library of Cong., Wash., D.C.).

over half of the defendants tried in 1862 were convicted and had their sentence executed in full.<sup>123</sup>

In the opening month of 1862, the broad charge of “treason” was again used, but Halleck, unlike Fremont, reversed all of these convictions because the specific offense of treason could not be tried before military commission.<sup>124</sup> Offenses that could constitute treason could be tried before military commission as military offenses themselves, but the charge of treason itself could not be brought before a commission.<sup>125</sup> Removal of the commissions reviewed during the period in which judge advocates and generals were confused about the charge of treason reveals the true acquittal and reversal rates for approximately the last eleven months of the year.<sup>126</sup> Of the commissions tried from roughly late-January onwards (about 193), the conviction rate increases slightly to about eighty-two percent, and of the approximately 160 convictions, forty-two were reversed (about twenty-six percent).<sup>127</sup> About sixty-one percent of the individuals tried from that point were found guilty and had their sentence upheld in full, a figure noticeably higher than the fifty percent figure created when including the first confused trials for the year.<sup>128</sup> Although the number of acquittals and reversals suggests that these commissions were not kangaroo courts,<sup>129</sup> the fact that over sixty

<sup>123</sup> See *supra* note 93.

<sup>124</sup> Headquarters, Dep’t of Mo., Gen. Orders No. 20, Series 1 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>125</sup> 1 1862 Dep’t of Mo., Gen. Orders No. 1, *supra* note 95 (Halleck writing “Treason, as a distinct offense, is defined by the Constitution, and must be tried by courts duly constituted by law; but certain acts of a treasonable character, such as conveying information to the enemy, acting as spies, &c., are military offenses, triable by military tribunals, and punishable by military authority). See also O.R., I, 8, 822 (General Halleck, writing to General Pope, explained the proper use of the treason charge: “[T]reason is an offense technically defined by the Constitution, and is not triable by a military commission.”).

<sup>126</sup> 1 1862 Dep’t of Mo., Gen. Orders, *supra* note 93 (removing Gen. Orders Nos. 1–38); 2 1862 Dep’t of Mo., Gen. Orders, *supra* note 93; 1862 Dep’t of the Miss., Gen. Orders, *supra* note 93; 1862 War Dep’t, Gen. Orders 1862, *supra* note 93; 1862 Dist. of Mo., Gen. Orders, *supra* note 93; 1862 Army of the Southwest, Gen. Orders, *supra* note 93.

<sup>127</sup> See sources cited *supra* note 126.

<sup>128</sup> *Id.* See also NEELY, *supra* note 18, at 43 (noticing the same trend and removing these commissions from his analysis).

<sup>129</sup> The surge of interest over the past several years has given many some legal historians a skewed conception of the Civil War commissions. Many researchers have focused their attention on the famous trials of the era, such as that of Clement Vallandigham, Henry Wirz (the commander of Andersonville), or those implicated in the assassination of President Lincoln. Those trials have received the most academic attention. See Vagts, *supra* note 2, at 35 (describing this trend). However, like many “show trials,” these cases

percent of the individuals tried were convicted and had their sentences fully upheld<sup>130</sup>—often to imprisonment until the end of the war—reflects how serious the Union authorities were about removing dangerous individuals from Missouri as a core component of the war effort.

Notably, the aggressive use of military commissions in Missouri as an offensive weapon to counter guerillas is a lesson that can be applied to modern counterinsurgency efforts, particularly in the context of the war on terror. Many of the recent articles on lawfare focus on how law limits the ability of the United States to wage effective wars and how increased reliance on the law in the military has hampered combat operations.<sup>131</sup>

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are also very atypical and have led to conclusions about the Civil War commissions that are not entirely fair. A criticism among some of these articles is that the Civil War commissions were little more than kangaroo courts. For example, Professor Belknap, basing his conclusions almost entirely on high profile cases, wrote that “abuses and injustice pockmark the domestic record of these tribunals” and that

[f]ar too often, the principal reason for employing [military commissions] has been political . . . they have been utilized because they could be counted on not only to impose harsher penalties than the civilian courts but also to return convictions more easily and on the basis of less evidence . . . their proceedings have been marred by gross procedural irregularities, perjury, and corruption.

Belknap, *supra* note 2, at 452, 480; *see also e.g.*, Renzo, *supra* note 2, at 476–85 (assessing the fairness of the trial of civilians using *Vallandigham*, the Lincoln Conspirators, and *Milligan* as examples); Rotunda, *supra* note 2, at 451–62 (assessing procedural protections given during the Civil War by considering the trial of Clement Vallandigham and the Lincoln Conspirators). Many of the conclusions reached in these articles would be accurate if they were discussing only the specific trials that were researched, but they are not accurate when they discuss the commissions at large. Although the goal of this article is not to prove that the Civil War commissions were fair, a close study of typical commission trials and their review process does show that these trials were not kangaroo courts. *See infra* Part IV.A and Appendix A for discussions of the commission review process; *see also* Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2037–38, 2092 (describing the similarity in procedure and review to courts-martial in Civil War commissions).

<sup>130</sup> *See supra* note 126.

<sup>131</sup> *See, e.g.*, Sulmasy & Yoo, *supra* note 99, at 1836, 1844 (“Our adherence to law and process within warfare has risen to a level that some now assert interferes with the efforts of military commanders to achieve victory on the battlefield. One area in which we can see these developments at work is the military lawyer’s newfound involvement in combat operations.”); Scott Sullivan, *International Law and Domestic Legitimacy: Remarks Prepared for Lincoln’s Constitutionalism in Time of War: Lessons for the Current War on Terror?*, 12 CHAP. L. REV. 489, 496 (2009); William G. Hyland Jr., *Law v. National Security: When Lawyers Make Terrorism Policy*, 7 RICH. J. GLOBAL L. & BUS. 247, 249–50 (2008); Dunlap, *supra* note 99 (describing the view that hyper-legalism in the Kosovo

Yet, Halleck's use of commissions in Missouri is an example of legal processes being used by the more organized party against one of the most violent insurgencies in American history.<sup>132</sup> For example, in Missouri, guerillas were destroying bridges and telegraph lines, assaulting Union Soldiers, burning towns, and otherwise terrorizing towns and civilians.<sup>133</sup> Similar to modern insurgents, the guerillas in Missouri were difficult to control because they often used friendly towns as bases and were difficult to distinguish from the rest of the population.<sup>134</sup> However, the use of legal processes allowed guerillas to be quickly tried and detained, often for the duration of the war, without the collateral damage that would have been caused by more traditional violent reprisals and counter-raids.<sup>135</sup> Moreover, Halleck's commissions—which held legal formalities in high regard<sup>136</sup>—were actually more effective than those of General Fremont, which did not.<sup>137</sup>

Today, it is not difficult to imagine the Obama Administration facing similar concerns as General Halleck faced in Missouri. These concerns could arise, for example, in the current counterinsurgency operations in Iraq and Afghanistan or in response to a theoretical increase in terrorist activity and cells within the United States. Rather than limiting the military's counterinsurgency efforts, the law can actually assist the armed forces.<sup>138</sup> Although some commentators suggest that lawyers and

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campaign seriously constrained combat operations) (citing Richard K. Betts, *Compromise Command*, FOREIGN AFF., July/Aug. 2001, at 126).

<sup>132</sup> See also Meyers, *supra* note 35 (describing similar use by Winfield Scott in Mexico).

<sup>133</sup> See *supra* notes 97, 100.

<sup>134</sup> See FELLMAN, *supra* note 76, at 23–29 (describing the variety of tactics used by guerillas which made operations against them particularly difficult).

<sup>135</sup> See Ganesh Sitaraman, *Counterinsurgency, The War on Terror, and the Laws of War*, 95 VA. L. REV. 1745, 1747 (2009) (describing similar goals in modern war, which is dominated by counterinsurgency efforts:

Instead, counterinsurgents follow a win-the-population strategy that is directed at building a stable and legitimate political order. Winning the population involves securing the population, providing essential services, building political and legal institutions, and fostering economic development. Killing and capturing the insurgents is not the primary goal, and it may often be counterproductive, causing destruction that creates backlash among the population and fuels their support for the insurgency.).

<sup>136</sup> See *supra* pp. 12–14.

<sup>137</sup> See *supra* pp. 11–12.

<sup>138</sup> See, e.g., Dunlap, *supra* note 98, at 147 (describing the use of lawfare as part of a successful counterinsurgency strategy in Iraq); see also Michael Kramer & Michael

legal advisors may handicap the military,<sup>139</sup> the historic example of Missouri shows that legal tools can significantly expand the arsenal of potential weapons available.<sup>140</sup> If it had not been for Halleck's legal expertise, he likely would not have been able to devise such a creative legal solution to irregular warfare in Missouri in 1862.<sup>141</sup> His legal oversight also demonstrates the central role of attorneys in devising global and ground strategy in wars during the 21st century if American armies are to fight at maximum capacity.

#### D. Commissions Outside of Missouri in 1862

In other military departments, the approximately forty commissions that rounded out the total of at least 280 commissions in 1862 were largely similar to those seen in 1861 in Virginia.<sup>142</sup> At least ten of the defendants were Union Soldiers, and most of the remaining Soldiers were either tried for committing common law offenses or for some type of disloyal conduct.<sup>143</sup> Rather than being used as an organized legal component of the war effort, such as the Missouri commissions, the commissions elsewhere were more closely related to those in Mexico.

In general, the commissions used in 1862 display confusion about the role of military commissions and many of the defendants tried could

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Schmitt, *Lawyers on Horseback? Thoughts on Judge Advocates and Civil-Military Relations*, 55 UCLA L. REV. 1407, 1432–33 (2008).

<sup>139</sup> See *supra* note 131.

<sup>140</sup> See Colonel Kelly Wheaton, *Strategic Lawyering: Realizing the Potential of Military at the Strategic Level*, ARMY LAW., Sept. 2006, at 1, 6–7 (instructing military attorneys to not “cede to the enemy the use of law as a weapon of war” and that “military attorneys must embrace the concept of lawfare”).

<sup>141</sup> See *infra* Part III.A (describing the expansion of military commission jurisdiction over violations of the laws of war in Gen. Orders No. 1).

<sup>142</sup> I located records of thirty-nine non-Missouri defendants tried by commission in 1862; however, there were surely more. I estimate that in total there were between fifty and seventy-five individuals tried. See 1862 War Dep't, Gen. Orders, *supra* note 93; 1863 War Dep't, Gen. Orders, *supra* note 93; Headquarters, Dep't of the S., Gen. Orders (1862) [hereinafter 1862 Dep't of the S., Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Mountain Dep't, Gen. Orders (1862) [hereinafter 1862 Mountain Dep't, Gen. Orders] (on file with N.Y. Hist. Soc'y.); Headquarters, Dep't of the Gulf, Gen. Orders (1862) [hereinafter 1862 Dep't of the Gulf, Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Cumberland, Gen. Orders (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Potomac, Gen. Orders (1862) [hereinafter 1862 Dep't of Potomac, Gen. Orders] (on file with N.Y. Hist. Soc'y); O.R., II, 3, 616 & 645; O.R. II, 4, 63.

<sup>143</sup> See *supra* note 142.

actually have been tried before a court-martial. For example, in the Department of the Gulf, Private K.M. Kostarbater was tried before a commission for insubordination.<sup>144</sup> Major General Benjamin Butler, commander of the Department of the Gulf, approved the conviction and sentence of forfeiture of two months wages.<sup>145</sup> However, the offense fell squarely within the jurisdiction of a court-martial and trial before a military commission was inappropriate.<sup>146</sup> Another case that displays the confusion is the trial of Jose Maria Rivas, convicted for spying in Santa Fe, New Mexico, on 18 July 1862.<sup>147</sup> Rivas was a Mexican from Chihuahua who had acted as a scout for several Confederate commanders during the winter of 1861–62, and was captured in civilian clothes near Union lines.<sup>148</sup> Rivas was sentenced to death, and his file was forwarded to President Lincoln for approval.<sup>149</sup> Although Lincoln did not address the jurisdictional problem in the case, he disapproved the sentence due to the hearsay evidence admitted and because Rivas's admission to spying seemed to be the result of confusion, rather than an actual confession.<sup>150</sup> Lincoln reversed the sentence and ordered that Rivas be treated as a Prisoner of War.<sup>151</sup> However, a problem not addressed by Lincoln was that the offense of spying could not be brought before a military commission at that point, and instead, properly belonged before a court-martial under the 101st Article of War.<sup>152</sup>

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<sup>144</sup> Headquarters, Dep't of the Gulf, Gen. Orders No. 103 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>145</sup> *Id.*

<sup>146</sup> 2 Stat. 367 (1806) (art. 99) ("All crimes not capital, and all disorders and neglects which officers and soldiers may be guilty of, to the prejudice of good order and military discipline, though not mentioned in the foregoing articles of war, are to be taken cognizance of by a general or regimental court martial, according to the nature and degree of the offence, and be punished at their discretion."). The conduct could also have fallen within a number of other specific provisions of the Articles of War depending upon its exact character.

<sup>147</sup> Case KK-0829; Headquarters, War Dep't, Gen. Orders No. 174 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>148</sup> See sources cited *supra* note 147.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.* It is likely that Lincoln did not reach the jurisdictional problem because on the same day he addressed the issue of spies tried by commission in the case of Sely Lewis. See *supra* note 147. See also 2 Stat. 371 (1806) (art. 101, § 2) ("That in time of war, all persons not citizens of, or owing allegiance to the U.S. of America, who shall be found lurking as spies, in or about the fortifications or encampments of the armies of the United States, or any of them, shall suffer death, according to the law and usage of nations, by sentence of a general court martial.").

### III. Legal Innovations and the National Explosion

#### A. Halleck's Innovation: The Legal Theory behind the Commissions

Although Halleck, upon his appointment to command of the Department of the Missouri, immediately ended the legally suspect trials used by Fremont to target disloyal civilians, it was ultimately under Halleck's guidance that the commissions were first utilized in an organized manner for trying guerillas and other insurgents.<sup>153</sup> In Halleck's work on international law, published in 1861, Halleck set forth his views on martial law and the authority of the military to try individuals for violations of the laws of war. He wrote in his treatise:

[M]artial law is quite a distinct thing. It exists only in times of war, and originates in military necessity. It derives no authority from the civil law, nor assistance from the civil tribunals, for it overrules, suspends, and replaces both. It is, from its very nature, an arbitrary power and extends to all inhabitants (whether civil or military) of the district where it is in force . . . The right to declare, apply and enforce martial law . . . resides in the governing authority of the state.<sup>154</sup>

Halleck's actions in Missouri were, not surprisingly, consistent with the views espoused in his work.<sup>155</sup> Halleck did not try individuals by commission until, unlike Fremont, he had the authority to do so from Washington, which was granted on 2 December 1861.<sup>156</sup> Soon

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An interesting case, which is more in line with Scott's Mexican commissions, was the commission that tried Henry Kuhl, Conrad Kuhl, and Hamilton Winder for the murder of a Union soldier (whose name remained unknown throughout the trial). In a trial marked by admission of questionable evidence, all three men were convicted. Both Conrad and Henry Kuhl pled guilty; Henry was sentenced to death, while Conrad was sentenced to hard labor for the duration of the war. *See* Case II-0832; Headquarters, Mountain Dep't, Gen. Orders No. 17 (1862) (on file with N.Y. Hist. Soc'y). Quite interestingly, the main prosecution witness at Conrad's trial was Winder, who testified that Conrad and Henry killed the young Union soldier. The third defendant, Winder, pled not guilty, but was convicted on the testimony of none other than Conrad, who testified that Henry and Winder committed the murder (creating a strange triangle of blame). Winder, upon conviction, was sentenced to death. The convictions and sentences were approved and carried into effect. Of the three, only Conrad survived. *Id.*

<sup>153</sup> *See* Part II.C.

<sup>154</sup> HALLECK, *supra* note 10, at 373 (parenthetical in original) (internal citations omitted).

<sup>155</sup> *Id.*

<sup>156</sup> *See supra* note 89 and accompanying text.



afterwards, trials of civilian insurgents commenced.<sup>157</sup> Halleck's views on martial law explain how he could, with a firm theoretical basis, extend the use of military commissions to target civilian insurgents whose offenses were outside of the jurisdiction of courts-martial, in a way likely not imagined in Mexico when commissions were first used. Halleck, through a grant of authority from the executive, had the authority to replace civil law with martial law and, accordingly, could try individuals violating the laws of war.<sup>158</sup>

The text of General Order No. 1 is a revealing window into Halleck's rationale and justification for using commissions.<sup>159</sup> Halleck, in his correspondence with other commanders, defined the jurisdiction of the commissions as that outside of the jurisdiction of courts-martial and of civil courts, which was the same definition used in Mexico by General Scott.<sup>160</sup> However, unlike in Mexico, where the commissions were used primarily to try American Soldiers committing crimes outside of the jurisdiction of courts-martial, these commissions were focused on trying crimes by civilians. Most of these civilian crimes involved offenses, such as arson, robbery, or assault, which, unlike in Mexico, could have been tried by civil courts as the crimes were committed on American soil by American civilians.<sup>161</sup>

Halleck provided some insight into this apparent problem in the order where he made two critical moves to provide a basis for the jurisdiction of these commissions. First, the order reads, "[c]ivil offenses cognizable by civil courts, whenever such *loyal* courts exist, will not be tried by a military commission."<sup>162</sup> Here, in distinguishing between loyal and non-loyal civil courts, Halleck carved out a jurisdictional hole similar to that existing in Mexico, necessitating the use of military commissions.<sup>163</sup> Additionally, and quite importantly, the determination

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<sup>157</sup> Stephen Bontwell is an example of the type of individual tried soon after the proclamation of martial law. He was tried on 14 January 1862 in Cape Girardeau, Missouri. See Case KK-0821. Bontwell was charged with robbery and violating the laws of war because he was a member of a band of guerrillas called "Jeff Thompson's Men," which had held a civilian hostage and violently robbed him in August, 1861. *Id.*

<sup>158</sup> See *supra* note 154.

<sup>159</sup> 1 1862 Dep't of Mo., Gen. Orders No. 1, *supra* note 95.

<sup>160</sup> O.R., I, 8, 476; O.R. I, 8, 822 (writing that "military commissions should, as a general rule, be resorted to only for cases which cannot be tried by a court-martial or by a proper civil tribunal.").

<sup>161</sup> See *supra* Part II.C.

<sup>162</sup> 1 1862 Dep't of Mo., Gen. Orders No. 1, *supra* note 95 (emphasis added).

<sup>163</sup> *Id.*

of what constituted a “loyal” civil court would likely fall upon either Union officers in the field or upon Halleck himself. Under this system, any court that did not operate as Union authorities liked could be deemed disloyal, providing an easy way to sidestep the court system entirely. Halleck wrote at about the same time regarding the situation in Missouri: “The civil courts can give us no assistance, as they are very generally unreliable. There is no alternative but to enforce martial law. Our army here is almost as much in hostile territory as it was in Mexico.”<sup>164</sup> Under this logic, the lack of loyal courts prevented trial by civilian courts in most parts of Missouri, necessitating the use commissions to try a wide variety of offenses like in Mexico. This first move provided a foundation for using commissions based on the solid precedent of Scott in Mexico, with a slight adjustment for the unique situation in Missouri.<sup>165</sup>

Just sentences later, Halleck makes another important move in establishing a legal basis for the commissions: “It must be observed, however, that many offenses which in time of peace are civil offenses become in time of war military offenses, and are to be tried by a military tribunal, even in places where civil tribunals exist.”<sup>166</sup> Halleck here states, consistent with his own earlier stated views on martial law, that martial law could largely subsume much civil authority if the need arose.<sup>167</sup> This rationale provides a legal justification for using trials to prosecute civilians on U.S. soil, even where loyal civil courts did exist. The grant of authority here is enormous, particularly in that it specifically authorizes trials of civilians for all acts that would constitute violations of the laws of war. Halleck specifically extended subject matter and *in personam* jurisdiction to those offenses explaining that, for offenses not falling under court-martial jurisdiction, “we must be governed by the general code of war.”<sup>168</sup> On this view, almost all of the activities of guerrillas in Missouri, including the very act of being a guerrilla, could constitute a violation of the laws of war, and could be tried before a

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<sup>164</sup> O.R., I, 8, 476.

<sup>165</sup> See *supra* Part II.A for Mexican precedent.

<sup>166</sup> 1 1862 Dep’t of Mo., Gen. Orders No. 1, *supra* note 95.

<sup>167</sup> See *supra* note 154 and accompanying analysis.

<sup>168</sup> See WILLIAM WINTHROP, DIGEST OF OPINIONS OF THE JUDGE ADVOCATE GENERAL 334 (U.S. Gov’t Prtg. Office 1880) (defining military offense as, in part, violations of the laws of war). 1 1862 Dep’t of Mo., Gen. Orders No. 1, *supra* note 95. Halleck, when using the term general code of war means those offenses against the laws of war; see HALLECK, *supra* note 10, at 830 (using “code of war” and “the laws of war”); see also 1 WINTHROP, *supra* note 16, at 42 (describing military offenses under the “unwritten customs and laws of war”).

military rather than by a civil court.<sup>169</sup> The order describes a number of acts that constituted violations of the laws of war, including “murder, robbery, theft, arson,” and expressly stated that guerrillas could not receive a “military exemption to the crimes they may commit.”<sup>170</sup>

This provision sets forth a broad swath of authority by which guerrillas and other insurgents could be tried. The main intellectual leap from the commissions of the Mexican War to those of the Civil War is contained within the cited line of the order.<sup>171</sup> In Mexico, General Scott had not defined the jurisdiction of military commissions to include offenses against the laws of war. Instead, as discussed previously, these crimes were tried before the experimental “Councils of War,” which were called only three times and tried only twelve individuals.<sup>172</sup> Halleck, by contrast, added to the jurisdiction of the military commission all breaches of the laws of war, expanding the authority of the commissions enormously. Essentially, Halleck subsumed Scott’s Councils of War into Scott’s military commissions, but used the commissions to try primarily those offenses that would have been tried before Councils of War. This creative innovation allowed for the broad application of military commissions in Missouri, and later across much of the United States, to try the many different offenses deemed to violate the laws of war.

The overall impact of General Order No. 1 was enormous. Halleck, although using jurisdictional language that harked back to the commissions in Mexico, was actually using martial law to authorize a very different sort of commission that he intended to use to “put down these insurgents and bridge-burners with a strong hand.”<sup>173</sup> In short, he was setting forth a broad legal basis for using the commissions as a weapon by which he could root-out the guerrillas and insurgents wreaking havoc in Missouri.<sup>174</sup> In Missouri, Halleck created a powerful

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<sup>169</sup> See 2 WINTHROP, *supra* note 16, at 10–11 (describing guerilla activity and being a guerilla as among the most typical violations of the law of war).

<sup>170</sup> 1 1862 Dep’t of Mo., Gen. Orders No. 1, *supra* note 95.

<sup>171</sup> *Id.*

<sup>172</sup> See 2 WINTHROP, *supra* note 16, at 60; Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2033 (these councils tried, primarily, guerrillas committing violations of the laws of war and individuals caught enticing U.S. Soldiers to desert); see also Myers, *supra* note 35, at 228 (tracing the foundation of modern commissions to the councils of war).

<sup>173</sup> O.R., I, 8, 476.

<sup>174</sup> *Id.*

hybrid commission,<sup>175</sup> using his legal expertise to devise a very innovative solution to a problem that could not easily be countered with armies in the field.<sup>176</sup> The commissions used in Missouri, from the start, were designed to try civilian insurgents, whereas those in Mexico were designed primarily to try American Soldiers. The commissions in Missouri were more closely related to Halleck's conceptions of martial law, which allowed for the complete suspension or overriding of civil courts, than to any previous American military precedent, particularly Scott's commissions in Mexico.

#### B. The Expansion of Commissions Beyond Missouri: Support from Washington and the Promulgation of the Lieber Code

In the middle of 1862, the war sat at a crossroads. The period from the middle of 1862 through the middle of 1863 is often described as a moment that marked a philosophical transition in the Union war effort. For example, military historian Mark Grimsley describes this period as marking the end of a war on conciliation and the beginning of a hard

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<sup>175</sup> Although Halleck's commissions in Missouri stemmed from two previous tribunals—the military commissions and councils of war used in Mexico—the modern military commission was truly born in Missouri in 1862. The creation of a tribunal tailored to the specific conditions of a military theater is a precedent that we cannot afford to ignore today. For example, currently, policymakers are grappling with difficulties that will arise trying terrorist suspects, such as Khalid Sheikh Mohammed, in federal district courts. See, e.g., Scott Shane & Benjamin Weiser, *U.S. Drops Plan for a 9/11 Trial in New York City*, N.Y. TIMES, Jan. 29, 2010, at A1 (potentially moving terror trials outside of New York City due to political opposition and cost of security associated with them). Rather than viewing the current decision as binary—either the military will try the suspected terrorists in military courts or federal district courts will try them as criminals—a hybrid approach must be reached that recognizes and addresses the unique issues that will arise when trying terrorists. See Myers, *supra* note 35, at 237–40 (making similar suggestions and observations based on the creation of new military tribunals in Mexico under General Scott). Following in the footsteps of Henry Halleck and Winfield Scott, the creation a tribunal that affords sufficient procedure to satisfy the Constitution but that also can also respond to changing national security concerns that will arise in these types of trials must be seriously considered if the United States is going to respond to the terrorist threat adequately.

<sup>176</sup> See FELLMAN, *supra* note 76. Halleck's creation and use of a legal weapon reinforces the idea that military lawyers can enhance the fighting capabilities of the armed forces and that lawfare is not necessarily a strategy that can only be used to the disadvantage of the United States. See *supra* pp. 20–22. The fruitful role that military lawyers could potentially play is particularly true as the military devises strategies to deal with insurgencies and terrorists in the 21st century; like it did in Missouri, the military must learn to use the law to its advantage.

war.<sup>177</sup> This shift can be seen in many areas, such as the emancipation of slaves, some of the first sieges of and bombardments of major cities, the first major conscription in American history, and the increased targeting of civilian property by northern armies. The Civil War had transformed from a “gentleman’s war” involving uniformed armies, to a much harder, more modern war, affecting the entire population. In the words of contemporary newspapers, the “Kid Gloves” had been abandoned and Union armies had begun to “wage war in downright, deadly earnest.”<sup>178</sup>

As part of this trend towards a harder war, military commissions expanded from an almost exclusive use in Missouri in 1862 to widespread use across almost every military department by 1864. Beginning in the middle of 1862, the administration in Washington began to lend support to the expansion of military commissions and to exercise centralized control over the trials via the Judge Advocate General’s Office.<sup>179</sup>

On 5 April 1862, Secretary of War Stanton wrote to General Halleck, expressing his approval of several military commissions that had recently taken place in Missouri.<sup>180</sup> Stanton wrote that he “heartily approved” of the commissions and stated that the form of procedure used in Missouri should be copied in other departments.<sup>181</sup> Importantly, the two trials for which Stanton voiced approval were both cases in which the jurisdictional foundation for the commissions stemmed from Halleck’s innovation in General Order No. 1 to expand the jurisdiction of military commissions to include those offenses against the laws of war (offenses that would have been tried by a Council of War, if at all, in Mexico).<sup>182</sup>

The first case mentioned was the trial of Edmund Ellis, in which a commission convicted him on 25 February 1862, for “violating the laws of war by publishing intelligence to enemy” in his local newspaper, *The Boone County Standard*.<sup>183</sup> Interestingly, this was one of the few non-violent offenses tried in Missouri in 1862.<sup>184</sup> The second trial of which

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<sup>177</sup> For description, examples and extensive discussion, see MARK GRIMSLEY, *THE HARD HAND OF WAR* 67–151 (1995).

<sup>178</sup> *Id.* at 89 (quoting the *Chicago Tribune* and *New York Times* from July 1862).

<sup>179</sup> See *infra* Part IV.

<sup>180</sup> O.R., II, 1, 276.

<sup>181</sup> *Id.*

<sup>182</sup> *Id.*

<sup>183</sup> 1862 Dep’t of Miss., Gen. Orders No. 11, *supra* note 102.

<sup>184</sup> See *supra* note 93.

Stanton approved was similar to the standard fare for Missouri—the prosecution of William Kirk for his role in a guerrilla band known as “Jeff Thompson’s band” under the general charge “violation of the laws of war.”<sup>185</sup> The specifications of the charge indicate that Kirk was involved in a variety of illegal activities beyond being a member of the band, such as robbery and pillaging of civilians.<sup>186</sup> Both individuals were found guilty; Kirk was ultimately sentenced to three years imprisonment, and Ellis had his press materials confiscated and was banished from Missouri.<sup>187</sup> More important than the fate of these two individuals is the strong signal of approval from the War Department for the broad application of the military commissions against offenses that were violations of the laws of war—offenses that were not within the jurisdiction of military commissions until just four months earlier.<sup>188</sup>

As further evidence of Washington’s approval of the Missouri trials, Stanton forwarded Halleck’s General Order No. 9 from the Department of the Mississippi to General Fremont—now commanding the Mountain Department in modern day West Virginia<sup>189</sup> (an area that was also experiencing growing difficulties with guerrillas).<sup>190</sup> This order contained Kirk’s trial and information on the trials of thirteen other men, all of whom were involved with guerrillas or who had violated the laws of war in some way.<sup>191</sup> The message states that, “[t]he Secretary approves of this form of procedure in like cases, especially in regard to guerrillas of which there are several instances in this order.”<sup>192</sup> Although the order was possibly partially a rebuke of Fremont for his actions in Missouri the previous year,<sup>193</sup> it also shows that the military administration in Washington supported the commissions occurring in Missouri, to the point that they actually were instructing other department commanders to mimic them in countering guerrillas and other violators of the laws of war.<sup>194</sup>

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<sup>185</sup> O.R., II, 1, 276.

<sup>186</sup> Headquarters, Dep’t of the Miss., Gen. Orders No. 9 (1862) [hereinafter 1862 Dep’t of Miss., Gen. Orders No. 9] (on file with Library of Cong., Wash., D.C.).

<sup>187</sup> *Id.*

<sup>188</sup> See 1 1862 Dep’t of the Mo., Gen. Orders No. 1, *supra* note 95.

<sup>189</sup> O.R., II, 2, 283.

<sup>190</sup> SEAN MICHAEL O’BRIEN, MOUNTAIN PARTISANS, at xxiii (1999).

<sup>191</sup> 1862 Dep’t of Miss., Gen. Orders No. 9, *supra* note 186.

<sup>192</sup> O.R., II, 2, 283.

<sup>193</sup> See *supra* pp. 9–12.

<sup>194</sup> See, e.g., O.R., II, 1, 276; O.R., II, 2, 283.

Further support for the use of military commissions again came from the Lincoln Administration in September 1862. On 24 September 1862, President Lincoln suspended habeas corpus for all individuals who had been arrested or who were confined by military authority, court-martial, or military commission.<sup>195</sup> In addition to this widespread suspension of habeas corpus, Lincoln also extended the authority of military commissions nationwide:

[B]e it ordered . . . that during the existing insurrection and as a necessary measure for suppressing the same, all Rebels and Insurgents, their aiders and abettors within the United States, and all persons discouraging volunteer enlistments, resisting militia drafts, or guilty of any disloyal practice, affording aid and comfort to Rebels against the authority of the United States, shall be subject to martial law and liable to trial and punishment by Courts Martial or Military Commission.<sup>196</sup>

This order swept into the jurisdiction of military commissions a variety of offenses that could be categorized as disloyal, focusing particularly on interference with the war effort, as opposed to outright violent rebellion (as was already being tried in Missouri).<sup>197</sup>

As is seen in Lincoln's habeas corpus decree and in Stanton's instructions to department commanders to use commissions, the bulk of the authority for military commissions came from the executive branch; however, Congress did, on several occasions, expand the jurisdiction of military courts during the war. On 2 March 1863, Congress authorized the trial of a number of common law crimes committed by U.S. Soldiers and for the trial of spies or other individuals captured lurking about Union lines.<sup>198</sup> Except for those individuals captured spying and lurking,

<sup>195</sup> 5 COLLECTED WORKS OF LINCOLN 436–37 (Roy P. Basler et al. eds., 1953–55); *see also* O.R. III, 2, 587.

<sup>196</sup> *See* source cited *supra* note 195.

<sup>197</sup> Additionally, although this order reads as though it expands both the jurisdiction of military commissions and courts-martial, in reality it just expanded the jurisdiction of military commissions, as the jurisdiction of courts-martial could only be altered via statute. *See* 1 WINTHROP, *supra* note 16, at 101.

<sup>198</sup> 12 Stat. 736–37 (1863) (reading, in pertinent part, “in time of war, insurrection, or rebellion, murder, assault and battery with intent to kill, manslaughter, mayhem, wounding by shooting or stabbing with an intent to commit murder, robbery, arson, burglary, rape, assault and battery with intent to commit rape, and larceny shall be punishable by the sentence of a general court-martial or military commission when

this act did not authorize jurisdiction over civilian citizens (who ultimately comprised a significant portion of those tried by commission). Additionally, through a series of statutes passed between 1862 and 1864, Congress authorized trial of contractors, suppliers, and inspectors by military trial.<sup>199</sup>

However, the absence of authorization by Congress for trials of civilians by commission in the Act of 2 March 1863 was not interpreted by the military to limit their ability to try these individuals in areas where trials were already occurring. Rather, this statutory authorization was simply viewed as additional authorization beyond that already possessed through the departmental general orders.<sup>200</sup> This stands in clear contrast with the view of General Scott in Mexico, who authorized the commissions to “suppress these disgraceful acts abroad until Congress could be stimulated to legislate on the subject.”<sup>201</sup>

The view of General Scott—that military commissions existed only in areas where Congress had yet to legislate—is much more in line with

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committed by persons who are in the service of the United States, and subject to the Articles of War . . .”).

<sup>199</sup> In 1862, Congress passed legislation that allowed military suppliers to be subject to military justice as “part of the land or naval forces of the United States” by court-martial. *See* 12 Stat. 596, § 16 (1862). Additionally, in 1863, this act was expanded to make contractors and others subject to court-martial, in an act entitled an “Act to prevent and punish Frauds upon the Government of the United States.” 12 Stat. 696 (1863). In 1864, legislation dealing with the Quartermaster’s Department made inspectors faced with charges of corruption, willful neglect, or fraud triable before either a court-martial or military commission. 13 Stat. 397, § 6 (1864). This series of statutes created a confusing collage of concurrent jurisdiction resulting in trials of contractors, inspectors, and suppliers before both courts-martial and military commissions.

<sup>200</sup> This viewpoint is clearly displayed in General Orders No. 13, Department of Missouri, promulgated on 22 April 1863, by the headquarters of General Samuel Curtis. *See* Headquarters, Dep’t of Mo., Gen. Orders (1863) (on file with Library of Cong., Wash., D.C.). The order described the manner by which individuals committing different types of crimes would be tried, addressing spies, guerrillas, those corresponding with the enemy, those giving aid to the enemy, those making disloyal statements, and those violating the laws of war more generally. The order prescribed trial by military commission for all but those corresponding with the enemy, for which trial by court-martial was instructed. The order also, in addition to these instructions, quoted the portions of the congressional legislation of 2 March 1863, dealing with U.S. Soldiers committing common law crimes and spies. Rather than viewing this act as some instruction from Congress that conflicted with what had been occurring in Missouri for over a year, the Act was viewed as an additional jurisdictional basis for military commissions, standing alongside the jurisdiction authorized by Halleck in General Orders No. 1 of 1862.

<sup>201</sup> FISHER, *supra* note 2, at 33.



the modern view of the power of the executive during wartime. Although the exact locus of the power to authorize military commissions still remains unclear, in *Hamdan v. Rumsfeld*<sup>202</sup> and *Hamdi v. Rumsfeld*<sup>203</sup> the Supreme Court seemed to agree that these types of constitutional issues should be decided within the tripartite framework of Justice Jackson's concurrence in *Youngstown Sheet & Tube Co. v. Sawyer*, which places great weight on Congressional authorization.<sup>204</sup> However, in *Hamdan* and *Hamdi*, the Justices disagreed exactly where in that framework the modern military commissions and other executive action was situated at various times over the past decade.<sup>205</sup> Although application of the modern formula remains vague, it is much closer to Scott's, which places great weight on the actions of Congress, than to Lincoln and Halleck's, which viewed the authorization of military commissions as squarely within the power of the executive.<sup>206</sup>

The strongest measure of support from Washington for military commissions came in the form of the Lieber Code, which was promulgated in April 1863 by the Department of War.<sup>207</sup> Several months earlier, in August 1862, General Halleck (soon after being made General-in-Chief of the U.S. Armies) wrote to Francis Lieber, a Professor at

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<sup>202</sup> 548 U.S. at 593.

<sup>203</sup> 542 U.S. 507, 536 (2004).

<sup>204</sup> See *Hamdan v. Rumsfeld*, 548 U.S. 557, 593 (2006) ("Whether or not the President has independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers.") (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 637 (1952)); *Hamdi v. Rumsfeld*, 542 U.S. 507, 536 (2004) ("We have long since made clear that a state of war is not a blank check for the President when it comes to the rights of the Nation's citizens.") (O'Connor plurality) (citing *Youngstown*, 343 U.S. at 587).

<sup>205</sup> *Hamdan*, 548 U.S. at 567 (holding that military commissions lacked the power to proceed because they violated the Uniform Code of Military Justice and four Geneva Conventions); *Hamdi*, 542 U.S. at 518 (O'Connor plurality) (finding that Congress had authorized detention of unlawful combatants in its Authorization for Use of Military Force); see also Peter J. Spiro, *Hamdan v. Rumsfeld*, 126 S.Ct. 2749, 100, AM. J. INT'L L. 888, 889-895 (2006); Samuel Estreicher & Diarmuid O'Scannlain, *Hamdan's Limits and the Military Commissions Act*, 23 CONST. COMMENT. 403, 407 (2006); see generally William G. Howell, *Wartime Judgment of Presidential Power: Striking Down but Not Back*, 93 MINN. L. REV. 1778 (2009).

<sup>206</sup> Interestingly, although the Lincoln administration viewed the establishment of military commissions within the power of the executive, it deferred without protest to congressional legislation mandating the process by which these commissions were reviewed. See *infra* Part IV.A.

<sup>207</sup> See 1863 War Dep't, Gen. Orders No. 100, *supra* note 14, reprinted in RICHARD HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (Precedent 1983).

Columbia College and an expert on the laws of war, for guidance on how to deal with the guerillas plaguing Missouri.<sup>208</sup> Francis Lieber was born in Germany in 1798<sup>209</sup> and immigrated to the United States in 1826.<sup>210</sup> While living in Europe, Lieber served in the Colbert Regiment and fought in the Hundred Days War and was also seriously wounded at the Battle of Namur.<sup>211</sup> Upon settling in the United States, Lieber spent nearly twenty years as a Professor of History and Political Economy at South Carolina College and later moved to New York in 1857, where he took up a post at Columbia College as a Professor of History and Political Economy.<sup>212</sup> Already well-known prior to the Civil War, Lieber, in the winter of 1861–62 presented a series of lectures on “The Laws and Usages of War,” which garnered much public attention and displayed his expertise in the area.<sup>213</sup>

The initial letter from Halleck began a chain of correspondence and discussion that culminated in the promulgation of the Lieber Code several months later.<sup>214</sup> In his response, Lieber spoke at great length regarding the difficulties that irregular enemy soldiers could create and discussed means of dealing with them.<sup>215</sup> Lieber again wrote to Halleck in November 1862, urging the passage of a more comprehensive code defining the “Laws and Usages of War, and on which Our Articles of War are silent.”<sup>216</sup> Indeed, if this project had been completed as it was originally envisioned, it would have more clearly defined the types of

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<sup>208</sup> See also HOGUE, *supra* note 19, at 53.

<sup>209</sup> See FRANK FREIDEL, FRANCIS LIEBER: NINETEENTH CENTURY LIBERAL 2 (1947).

<sup>210</sup> *Id.* at 46.

<sup>211</sup> Captain William S. Shepard, *One Hundredth Anniversary of the Lieber Code*, 21 MIL. L. REV. 157, 157 (1963).

<sup>212</sup> *Id.* at 158.

<sup>213</sup> See FREIDEL, *supra* note 209, at 322–24; see also, HOGUE, *supra* note 19, at 51, 53; Shepard, *supra* note 211, at 157. See Childress, *supra* note 25, at 37 (observing that Henry Halleck personally requested 5000 copies of the lecture for distribution among the northern armies).

<sup>214</sup> HOGUE, *supra* note 19, at 53.

<sup>215</sup> Lieber created a fine distinction between partisans, authorized by the Confederate government, from non-authorized guerrillas, similar to those in Missouri. Partisans would be “answerable for the commission of those acts which the law of war grants no protection, and by which the soldier forfeits being treated as a prisoner of war.” Otherwise, partisans would be treated as prisoners of war. However, guerrillas, which Lieber characterized as “self-constituted sets of armed men in times of war, who form no integrant part of the organized army . . . take up arms and lay them down at intervals and carry on petty war [guerrilla] chiefly by raids, extortion, destruction, and massacre.” O.R., III, 2, 307–08.

<sup>216</sup> See FISHER, *supra* note 2, at 74.

offenses and punishments that Halleck had assumed the authority to try by military commission in Missouri under General Order No. 1 almost a year earlier.<sup>217</sup> Initially, Halleck seemed to dismiss the proposal, but about a month later, on 17 December 1862, the Secretary of War, by Special Order No. 399, authorized a committee of five people—four U.S. generals and Professor Lieber—to “propose amendments or changes in the Rules and Articles of War, and a Code of Regulations for the government of armies in the field, as authorized by the laws and usages of war.”<sup>218</sup>

The code was primarily drafted by Lieber and drew upon material he had previously prepared for his lectures on the laws and usages of war at Columbia and in his earlier correspondence with Halleck regarding guerillas.<sup>219</sup> The final code was approved and issued as General Order No. 100 and was entitled “Instructions for the Government of Armies of the United States in the Field.”<sup>220</sup> It consisted of 157 articles organized into ten sections and was promulgated on 24 April 1863.<sup>221</sup> The instructions were issued without Congressional approval, and rather, took something more in the form of an executive order.<sup>222</sup> The Code as ultimately approved did not, in fact, alter the Articles of War; rather, it limited itself to more generally delineating the common law of war.<sup>223</sup>

The Lieber Code did not specifically address the commissions occurring in Missouri.<sup>224</sup> However, the Code provided strong authority

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<sup>217</sup> 1 1862 Dep’t of Mo., Gen. Orders No. 1, *supra* note 95.

<sup>218</sup> George Davis, *Doctor Francis Lieber’s Instructions for the Government of Armies in the Field*, 1 AM. J. INT’L L. 13, 19 (1907); *see also* O.R., III, 2, 951. The remainder of the committee consisted of Generals. George Hartstuff, John Martindale, George Cadwalader, and Ethan Allen Hitchcock. Shepard, *supra* note 211, at 159.

<sup>219</sup> HOGUE, *supra* note 19, at 55; Childress, *supra* note 25, at 38.

<sup>220</sup> 1863 War Dep’t Gen. Order No. 100, *supra* note 14, *reprinted in* RICHARD HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR (Precedent 1983).

<sup>221</sup> *Id.*

<sup>222</sup> *See* FISHER, *supra* note 2, at 74 (describing the Lieber Code as an executive decree). Despite carrying the term “code” in its name, the Lieber Code was actually not a statute passed by Congress. Rather, it was a General Orders promulgated by the War Department under the authority of Secretary of War Edwin Stanton. *See* 1863 War Dep’t, Gen. Orders No. 100, *supra* note 14, *reprinted in* RICHARD HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR (Precedent 1983).

<sup>223</sup> For a detailed account of the drafting of the Code, *see* FREIDEL, *supra* note 209, at 332–34.

<sup>224</sup> *See generally* 1863 War Dep’t, Gen. Orders No. 100, *supra* note 14, *reprinted in* RICHARD HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR (Precedent 1983).

and support for the Missouri commissions. First, the Code expressly provided for the suspension of civil and criminal courts, reading:

Martial law in a hostile country consists in the suspension by the occupying military authority of the criminal and civil law . . . and in the substitution of military rule and force for the same, as well as in the dictation of general laws, as far as military necessity requires this suspension, substitution, or dictation.<sup>225</sup>

This concept of martial law is very similar to Halleck's, as expressed in his treatise, which was the definition that provided the theoretical foundation for expanding the authority of military commissions in Missouri.<sup>226</sup> Halleck's General Order No. 1 is entirely consistent with this provision, as it similarly expanded military jurisdiction to all "military offenses" (meaning violations of the laws of war), even where loyal civil tribunals exist.<sup>227</sup>

Second, in Articles 12 and 13, the Code even more clearly expresses approval of the Missouri commissions.<sup>228</sup> Article 12 reads, "[w]henver feasible, martial law is carried out in cases of individual offenders by military courts."<sup>229</sup> While there were two types of military courts during the Civil War—courts-martial and military commissions, Article 13 went further to delineate the types of offenses which could be tried by these courts: "Military jurisdiction is of two kinds: First, that which is conferred and defined by statute; second, that which is derived from the common law of war."<sup>230</sup> Article 13 continues, "[m]ilitary offenses under the statute law must be tried in the manner therein directed; but military offenses which do not come within the statute must be tried and punished under the common law of war."<sup>231</sup> Lieber then applied this broader concept to the United States, writing, "[i]n the armies of the United States the first [statutory law] is exercised by courts-martial; while cases which do not come within the Rules and Articles of War, or the jurisdiction conferred by statute on courts-martial, are tried by military

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<sup>225</sup> *Id.* art. 3.

<sup>226</sup> *See supra* note 154.

<sup>227</sup> 1863 War Dep't, Gen. Orders No. 100, art 3, *supra* note 14, reprinted in RICHARD HARTIGAN, LIEBER'S CODE AND THE LAW OF WAR (Precedent 1983).

<sup>228</sup> *Id.* arts. 12 & 13.

<sup>229</sup> *Id.* art. 12.

<sup>230</sup> *Id.* art. 13.

<sup>231</sup> *Id.*

commissions [common law of war].”<sup>232</sup> Article 13 almost exactly repeated the distinction made between offenses triable by courts-martial and those triable by military commissions in Halleck’s General Order No. 1 description of violations of the “general code of war.”<sup>233</sup>

This provision of the Lieber Code served to expand military commission jurisdiction nationwide in the same manner that General Order No. 1 did in Missouri, providing an authoritative grant of subject matter and *in personam* jurisdiction to military commissions for the trial of those individuals who violate the laws of war.<sup>234</sup> The provisions in the Lieber Code on military commission jurisdiction seem to not only have built upon the precedent of Halleck’s orders in Missouri, but were actually shaped directly by Halleck himself. A draft of the Code, submitted to Halleck by Lieber for comments in February 1863, reveals Halleck’s influence.<sup>235</sup> The original provision in the draft written by Lieber, reads, “Whenever feasible, Martial Law is carried out, in cases of individual offences, by courts-martial.”<sup>236</sup> In this provision, Lieber made no distinction between courts-martial and other types of military courts, suggesting that Lieber was not aware of the inability of courts-martial to try many offenses due to the statutory limits on their jurisdiction.<sup>237</sup>

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<sup>232</sup> *Id.*

<sup>233</sup> These offenses were to be tried before military commissions, while violations of statutory code were to be tried before courts-martial. See 1 1862 Dep’t of Mo., Gen. Orders No. 1, *supra* note 95. Halleck wrote:

No case which, by the Rules and Articles of War, is triable by a court-martial will be tried by a military commission. Charges, therefore, preferred against prisoners before a military commission should be “Violation of the laws of war,” and never, “Violation of the Rules and Articles of War,” which are statutory provisions, defining and modifying the general laws of war in particular cases and in regard to particular persons and offenses. They do not apply to cases not embraced in the statute; but all cases so embraced must be tried by a court-martial. In other cases we must be governed by the general code of war.

*Id.*

<sup>234</sup> 1863 War Dep’t, Gen. Orders No. 100, art. 13, *supra* note 14, reprinted in RICHARD HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* (Precedent 1983).

<sup>235</sup> Francis Lieber, Preliminary Draft of the Lieber Code 5 (Feb. 1863) (unpublished draft, on file with The Huntington Library, San Marino, Ca.).

<sup>236</sup> *Id.*

<sup>237</sup> *Id.* Article 13, which specifically divided military jurisdiction between courts-martial and military commission in the completed Code, did not exist in the draft. *Id.*

Halleck, in his comments to the draft, points out this problem, scratching out “courts-martial,” and replacing it with the more general term “military courts.”<sup>238</sup> Additionally, Halleck added a comment “courts-martial in our system is a court of limited jurisdiction. Military courts in general are here intended.”<sup>239</sup> Article 12, in the completed version, follows Halleck’s comment, and speaks in more general terms, reading, “martial law is carried out in cases of individual offenders by military courts.”<sup>240</sup> Additionally, in the completed Code, an additional article is added—Article 13—which repeats the substance of Halleck’s comment, describing the very limitation in court-martial jurisdiction pointed out by Halleck.<sup>241</sup> The Code, in its final form, noted the division between statutory and common law military offenses and, for the first time, granted nationwide subject matter and *in personam* jurisdiction to military commissions for the violations of the common law of war.<sup>242</sup>

In other sections, the Lieber Code discusses some common offenses that are violations of the common law of war. The Code retains the distinction between partisans and guerrillas from Lieber’s letter in August, reading in Article 82 that, “[m]en, or squads of men, who commit hostilities, whether by fighting, or inroads for destruction or plunder . . . without commission . . . if captured, are not entitled to the privileges of prisoners of war, but shall be treated summarily as highway robbers or pirates.”<sup>243</sup> In Article 84, the code also addresses irregular combatants, stating, “[a]rmed prowlers . . . who steal within the lines of the hostile army for the purpose of robbing, killing, or of destroying bridges, roads, or canals, or of robbing or destroying the mail, or of cutting the telegraph wires, are not entitled to the privileges of the prisoner of war.”<sup>244</sup> The code proceeded to discuss treatment of those who give information to the enemy, defining a “traitor” as “a person in a place or district under martial law who, unauthorized by the military commander, gives information of any kind to the enemy, or holds intercourse with him” in Article 90, and, then in Article 91, states that the punishment for war-traitors is severe, and that if it consists of “betraying to the enemy anything concerning the condition, safety, operations, or

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.*

<sup>240</sup> 1863 War Dep’t, Gen. Orders No. 100, art. 12, *supra* note 14, reprinted in RICHARD HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR (Precedent 1983).

<sup>241</sup> *Id.* art. 13.

<sup>242</sup> *Id.*

<sup>243</sup> *Id.* art. 82.

<sup>244</sup> *Id.* art. 84.

plans of the troops holding or occupying the place or district, [the] punishment is death.”<sup>245</sup> The code also makes, in Article 88, spying a violation of the common law of war.<sup>246</sup>

The Lieber Code, when viewed as a whole, sets forth a broad basis for trial by military commission—expressing clear approval by the Department of War for the commissions then occurring in Missouri. Aside from adopting the same bases the Missouri commissions adopted for jurisdiction, the Code also expressly stated that many of the commonly occurring offenses, such as being a guerrilla or having intercourse of the enemy, were violations of the common law of war and triable by military commission.<sup>247</sup> By setting forth a much fuller description of the laws of war than had previously existed, the Lieber Code can be viewed as an important criminal directive, providing individual judge advocates guidance over the types of offenses that could be charged as violations of the laws of war.

Although the Code did not comprehensively overhaul the Articles of War by definitively setting forth the laws of war (which was one of the initial goals of the project), the completed Code was actually more useful in practice. The Code left many of the details of which offenses were triable by commission up to the individual department commanders, judge advocates, and the War Department, while still providing general guidance.<sup>248</sup> The broad definition of the common law of war in the Code allowed the commissions to become a tool that could be molded to the particular needs of each department, rather than being closely defined in a limiting sort of way.<sup>249</sup>

In 1864, Lieber wrote to Halleck describing earlier correspondence between him and General John Dix regarding the jurisdiction of military commissions.<sup>250</sup> Prompted by a recent decision in which a blockade

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<sup>245</sup> *Id.* arts. 90–91.

<sup>246</sup> *Id.* art. 88.

<sup>247</sup> *See, e.g.*, arts. 82, 84 (guerilla warfare) & arts. 90–91 (intercourse with enemy).

<sup>248</sup> *See generally* 1863 War Dep’t, Gen. Orders No. 100, *supra* note 14, *reprinted in* RICHARD HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* (Precedent 1983).

<sup>249</sup> Compare the commissions held in the Middle Department, focusing on intercourse with the enemy, see *infra* pp. 44–45, with those held in the Department of the Cumberland, where many of the defendants were guerillas or other irregular combatants, see *infra* pp. 43–44. The broad definition of the law of war enabled this flexible tailoring to local conditions.

<sup>250</sup> *THE LIFE AND LETTERS OF FRANCIS LIEBER* 347–48 (Thomas Sargent Perry ed., Boston, James R. Osgood & Co. 1882).

runner was released due to lack of jurisdiction, General Dix, Commander of the Department of the East, wrote to Lieber, asking, “Can any military court or commission, in a department not under martial law, take cognizance of, and try a citizen for, any violation of the law of war, such citizen not being connected in any wise with the military service of the United States?”<sup>251</sup> Lieber’s response pointedly describes the type of jurisdiction that he envisioned his Code would grant military commissions. Lieber responded:

undoubtedly a citizen under these conditions can, or rather must, be tried by military courts, because there is no other way to try him and repress the crime which may endanger the whole country; it is very difficult to say how far martial law extends . . . it must never be forgotten that the *whole country* is always at war with the enemy.<sup>252</sup>

In 1864, Halleck described the jurisdiction of military commissions in even more expansive terms, writing, “Congress has not defined or limited their jurisdiction, which remains coextensive with the objects of their creation, that is, the trial of offenses under the common laws of war . . . there is nothing in the Constitution or laws, or in the nature of these tribunals to limit them to districts under martial law.”<sup>253</sup>

These quotes very aptly describe the directives issued to Union armies in the middle of 1863 in General Order No. 100: the Lieber Code allowed for the trial before military commission of almost any offense, except those under statutory court-martial jurisdiction (which were already triable by the military), committed almost anywhere in the United States. That military commissions became common all over the United States almost immediately afterwards should not come as a surprise.

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<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> Henry Wager Halleck, *Military Tribunals and Their Jurisdiction*, 5 AM. J. INT’L L. 958, 966 (1911) (letter found among Halleck’s papers detailing the expansive authority of military tribunals in wartime).



## C. The “National Explosion” &amp; the Role of the Lieber Code

The enormous grant of authority given by the War Department to individual department commanders in the Lieber Code almost immediately had a marked impact on the use of military commissions. In 1863 there were at least 200 defendants tried by military commission outside of Missouri.<sup>254</sup> However, this number does not tell the entire story—almost all of these commissions occurred from May 1863 onwards. For example, in the Department of the Cumberland (Eastern Tennessee),<sup>255</sup> in the first half of 1863, only a handful of commissions occurred (probably under ten defendants).<sup>256</sup> However, by the middle of the year, and particularly towards its close, the pace of trials had quickened (at least thirty-five defendants were tried).<sup>257</sup> In the Middle Department (Maryland and Delaware),<sup>258</sup> no military commissions occurred until near the end of the year, when, at the close of 1863, at least fifteen defendants were suddenly tried.<sup>259</sup> The change was also pronounced in the Department of Ohio, consisting of Ohio, Illinois, Michigan, Indiana, and parts of Kentucky.<sup>260</sup> Prior to April 1863, there

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<sup>254</sup> I found records of 186 non-Missouri commissions in 1863. While this number is smaller than the actual figure, it still provides a fairly complete picture of the commissions for the year. See 1863 War. Dep’t, Gen. Orders, *supra* note 93; Headquarters, War Dep’t, Gen. Court-Martial Orders 1864 [hereinafter 1864 War Dep’t, Gen. Court-Martial Orders] (on file with N.Y. Hist. Soc’y); Headquarters, War Dep’t, Gen. Court-Martial Orders 1865 [hereinafter 1865 War Dep’t, Gen. Court-Martial Orders] (on file with N.Y. Hist. Soc’y); XVI Corps, Gen. Orders (1863); Headquarters, Middle Dep’t, Gen. Orders (1863) [hereinafter 1863 Middle Dep’t, Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dep’t of the Potomac, Gen. Orders (1863) (on file with N.Y. Hist. Soc’y); Headquarters, Dep’t of the Cumberland, Gen. Orders (1863) [hereinafter 1863 Dep’t of Cumberland, Gen. Orders] (on file with Library of Cong., Wash., D.C.); U.S. Forces, Gen. Orders (1863) (on file with Nat’l Archives, Wash., D.C.); Headquarters, Dep’t of Va., Gen. Orders (1863) (on file with N.Y. Pub. Library); Headquarters, Dep’t of Va. and N.C., Gen. Orders (1863) (on file with N.Y. Pub. Library); Headquarters, Dep’t of the Gulf, Gen. Orders (1863) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep’t of the S., Gen. Orders (1863) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep’t of Ohio, Gen. Orders (1863) [hereinafter 1863 Dep’t of Ohio, Gen. Orders] (on file with N.Y. Pub. Library); Headquarters, Dist. of S.C., Gen. Orders (1863) (on file with U.S. Military Acad., West Point, N.Y.); O.R. II, 5, 536; O.R. II, 6, 218.

<sup>255</sup> THIAN, *supra* note 51, at 56.

<sup>256</sup> 1863 Dep’t of the Cumberland, Gen. Orders, *supra* note 254; 1863 War. Dep’t, Gen. Orders, *supra* note 93; 1864 War Dep’t, Gen. Court-Martial Orders, *supra* note 254.

<sup>257</sup> See sources cited *supra* note 256.

<sup>258</sup> THIAN, *supra* note 51, at 73.

<sup>259</sup> 1863 Middle Dep’t, Gen. Orders, *supra* note 254; 1863 War. Dep’t, Gen. Orders, *supra* note 93; 1864 U.S. War Dep’t, Gen. Court-Martial Orders, *supra* note 254.

<sup>260</sup> THIAN, *supra* note 51, at 84.

were likely no military commissions in this department.<sup>261</sup> However, beginning approximately around the time of the promulgation of the Lieber Code, there were at least forty defendants tried by commission through the end of the year.<sup>262</sup>

Nationwide, from the beginning of the war to the end of April 1863—a period of almost two years—outside of Missouri there were likely fewer than 150 defendants tried by commission.<sup>263</sup> By contrast, in the last eight months of 1863, alone, there were at least 150 defendants tried by commission outside of Missouri.<sup>264</sup> This pattern, starting in the middle of 1863, is difficult to discern if the commissions occurring in Missouri are included in the totals, as the large number of commissions held in Missouri in 1863 masks the sudden growth in commissions elsewhere (in Missouri the commission steadily increased in volume until the end of 1864).<sup>265</sup>

The commissions outside of Missouri accelerated in pace towards the end of 1863, setting the stage for 1864—the year when, by far, the most military commissions were held.<sup>266</sup> In 1864, an astounding 750 defendants were tried by commission outside of Missouri.<sup>267</sup> Very

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<sup>261</sup> 1863 Dep't of Ohio, Gen. Orders, *supra* note 254; 1863 War. Dep't, Gen. Orders, *supra* note 93; 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>262</sup> See sources cited *supra* note 261.

<sup>263</sup> See 1861 Dep't of Potomac, Gen. Orders, *supra* note 52 and notes 142 (1862 non-Missouri commissions), 254 (1863 non-Missouri commissions).

<sup>264</sup> See *supra* note 254.

<sup>265</sup> Approximately 500 of commissions occurred during 1863 in the Department of the Missouri. See Headquarters, Dep't of Mo., Gen. Orders (1863) (on file with the Library of Cong., Wash., D.C.); Headquarters, Dist. of Neb., Gen. Orders (1863) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Southwest Mo., Gen. Orders (1863) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Cent. Mo., Gen. Orders (1863) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of St. Louis, Gen. Orders (1863) (on file with N.Y. Hist. Soc'y); 1863 War. Dep't, Gen. Orders, *supra* note 93; 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254; O.R. II, 6, 753. By 1863 the commissions in Missouri had truly become a machine—of the almost 500, defendants about 450 were convicted (a conviction rate of eight-five percent). Of the approximately 450 convictions, only twenty-seven were reversed at the departmental or War Department level (less than six percent). See 1863 War. Dep't, Gen. Orders, *supra* note 93; 1864 U.S. War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>266</sup> See *infra* note 267.

<sup>267</sup> Based on the likely number of commissions contained in the General Orders Volumes not located, there were likely somewhere between 750 and 1000 defendants tried in all departments, not including Missouri, during 1864. See 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254; 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254; Headquarters, Middle Dep't, Gen. Orders (1864) [hereinafter 1864 Middle Dep't,

clearly highlighting the change in national policy toward commissions that occurred over the second half of 1863 is the drastic shift in geographic distribution of the commissions. Whereas, up until the middle of 1863, the vast majority of commissions were held in Missouri, by the end of 1864, the majority of commissions were being held outside of Missouri.<sup>268</sup> However, it is not surprising that the Lieber Code had a disparate impact outside of the Department of Missouri. The provisions in the Lieber Code that granted subject matter jurisdiction to military commissions were actually almost identical the provisions that already had been in effect in Missouri for over a year (in the form of Halleck's General Orders No. 1).<sup>269</sup> It should also not be surprising that a broad grant of authority nationwide would have a profound effect on the number of military commissions in 1863 and 1864 when, in early 1862,

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Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Potomac, Gen. Court-Martial Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dep't of Ark., Gen. Orders (1864) (on file with U.S. Military Acad., West Point, N.Y.); Headquarters, Dep't of the Cumberland, Gen. Orders (1864) [hereinafter 1864 Dep't of Cumberland, Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dist. of St. Mary's, Gen. Orders (1864) (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Pa., Gen. Orders (1864) [hereinafter 1864 Dep't of Pa., Gen. Orders] (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Va. and N.C., Gen. Orders (1864) (on file with N.Y. Pub. Library); Headquarters, Dep't of the Gulf, Gen. Orders (1864) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Kan., Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dep't of the Susquehanna, Gen. Orders (1864) [hereinafter 1864 Dep't of Susquehanna, Gen. Orders] (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Ohio, Gen. Orders (1864) [hereinafter 1864 Dep't of Ohio, Gen. Orders] (on file with N.Y. Pub. Library); O.R. II, 7, 1214; O.R. II, 8, 502.

Additionally, there were approximately another approximately 652 of individuals tried in Missouri in 1864. To place this figure in context: by 1864 the commissions had reached the point where if spread evenly across the year, there were about two defendants tried by commission per day in the Department of Missouri alone. *See* Headquarters, Dep't of Mo., Gen. Orders (1864) [hereinafter 1864 Dep't of Mo., Gen. Orders] (on file with Library of Cong., Wash., D.C.); Headquarters, Dist. of St. Louis, Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Cent. Mo., Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Rolla, Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Southwest Mo., Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Neb., Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of N. Mo., Gen. Orders (1864) (on file with N.Y. Hist. Soc'y); 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254; 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>268</sup> Over fifty percent of the defendants tried in 1864 were tried outside of the Department of Missouri in 1864. *See supra* note 267. By comparison, in 1863, about seventy-five percent of those tried were tried in the Department of Missouri. *See supra* notes 254 (1863 non-Missouri commissions) & 265 (1863 Missouri commissions).

<sup>269</sup> *See supra* p. 37.

almost identical provisions had already had an enormous and sudden impact in Missouri.<sup>270</sup>

The types of offenses tried before commissions that appear throughout the country in 1863 and 1864 are very diverse, a testament to broad subject matter jurisdiction granted by the Lieber Code.<sup>271</sup> For example, the commissions held in the western departments were similar to those already occurring in Missouri. Most of the defendants in these commissions had been implicated in irregular warfare. In these western departments, guerrillas were a constant problem. For example, during General William Sherman's Atlanta campaign in the summer of 1864, the number of men assigned to protecting the supply line to Chattanooga from guerrillas nearly equaled the number of men actively serving on the front.<sup>272</sup> Of the approximately 150 individuals tried in the Cumberland in 1864, only about fifty were tried for offenses not related to the guerrilla war.<sup>273</sup> The Department of Ohio, at this point made up only of parts of Eastern Tennessee and Kentucky, also had a similar distribution of trials.<sup>274</sup> Most of the remainder of the individuals tried in these western departments in 1864 were charged with a variety of fraud-based offenses against the U.S. Government.<sup>275</sup>

Standing in contrast to the commissions in Tennessee and Kentucky, where the majority of the defendants were captured in open rebellion,<sup>276</sup> are those of the Middle Department and Washington, D.C.<sup>277</sup> In these

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<sup>270</sup> See *supra* Part II.C.

<sup>271</sup> See *supra* pp. 39–40.

<sup>272</sup> JAMES MCPHERSON, *BATTLE CRY OF FREEDOM* 719 (Oxford University Press 1988).

<sup>273</sup> 1864 Dep't of Cumberland, Gen. Orders, *supra* note 267; 1864 U.S. War Dep't, Gen. Court-Martial Orders, *supra* note 254; 1865 U.S. War Dep't, Gen. Court-Martial Orders, *supra* note 254. About ten percent of the total defendants tried by commission in 1864 were from the Cumberland. Overall, the total conviction rate in the Cumberland commissions was approximately seventy percent. 1864 Dep't of Cumberland, Gen. Orders, *supra* note 267.

<sup>274</sup> 1864 Dep't of Ohio, Gen. Orders, *supra* note 267 (fourteen out of fifteen trials were for guerrilla related offenses).

<sup>275</sup> See 1864 Dep't of the Cumberland, Gen. Orders, *supra* note 267. Some examples are prosecutions for embezzlement and fraud (Gen. Orders No. 42), selling U.S. property (Gen. Orders No. 13) (Case NN-3275).

<sup>276</sup> See *supra* pp. 43–44.

<sup>277</sup> See 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254 (for D.C. commissions in 1864); 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254 (same). In 1864, there were at least 150 defendants tried by commission in Washington D.C. There are only records for four trials in Washington, D.C., prior to 1864 (and all of these were held in December, 1863). See Headquarters, War Dep't, Gen. Court-Martial

areas, where guerrillas were less common, the commissions focused mainly on fraud and non-violent forms of disloyalty, such as communications with the enemy or sedition.<sup>278</sup> Additionally, a large number of individuals were tried after being caught aiding in the desertion of U.S. Soldiers.<sup>279</sup> As most Union Soldiers attempting to return home from Virginia had to travel through the railroad hubs of Washington and Baltimore, a small industry cropped up around this constant northward flow of deserters.<sup>280</sup>

Additionally, the military commissions occurring in 1864 were not limited to areas around and near the warring armies. In fact, there were a surprising number of commissions held deep inside the Northern States. Many of the defendants in these trials were actually southerners captured or tried while imprisoned in the north. For example, N.C. Trowbridge was tried in Boston Harbor in June 1864, after he was captured traveling from Mississippi to New York without authority.<sup>281</sup> Overall, the number of commissions in the North was rather small—likely somewhere between three percent and six percent of commissions in 1864.<sup>282</sup> Although a minority of commissions, the presence of a not insignificant number of trials in the Northern States supports Francis Lieber’s statement about nationwide military jurisdiction when he wrote that “it is very difficult to say how far martial law extends . . . it must never be forgotten that the *whole country* is always at war with the enemy.”<sup>283</sup> For

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Orders No. 5 (1864) (on file with N.Y. Hist. Soc’y); Headquarters, War Dep’t, Gen. Court-Martial Orders No. 7 (1864) (on file with N.Y. Hist. Soc’y).

For Middle Department commissions in 1864, see 1864 Middle Dep’t, Gen. Orders, *supra* note 267; 1864 War Dep’t, Gen. Court-Martial Orders, *supra* note 254; 1865 War Dep’t, Gen. Court-Martial Orders, *supra* note 254.

<sup>278</sup> See sources cited *supra* note 277.

<sup>279</sup> See, e.g., Case NN-3154; Case NN-3156; Headquarters, Middle Dep’t, Gen. Orders No. 129 (1864) (on file with Library of Cong., Wash., D.C.); Case NN-2846; Headquarters, War Dep’t, Gen. Court-Martial Orders No. 362 (1864) (on file with N.Y. Hist. Soc’y).

<sup>280</sup> Overall, of the approximately ninety-nine individuals tried in total in the Middle Department in 1864, twenty-nine were acquitted, creating a conviction rate of just over 70% for the year. See 1864 Middle Dep’t, Gen. Orders, *supra* note 267; 1864 War Dep’t, Gen. Court-Martial Orders, *supra* note 254; 1865 War Dep’t, Gen. Court-Martial Orders, *supra* note 254.

<sup>281</sup> Headquarters, War Dep’t, Gen. Court-Martial Orders No. 269 (1864) (on file with N.Y. Hist. Soc’y). Boston was home to a number of trials, all located at Fort Warren, in Boston Harbor. See NEELY, *supra* note 18, at 173.

<sup>282</sup> See NEELY, *supra* note 18, at 173 (finding that five percent of the commissions were held north of the border states and the District of Columbia).

<sup>283</sup> See *supra* note 252 and accompanying text.

example, in the Department of Pennsylvania, commissions were used primarily to counter several outbreaks of draft resistance among Irish coalworkers and suspected Copperheads.<sup>284</sup> Approximately sixty individuals were tried in Pennsylvania during 1864.<sup>285</sup> Although the offenses tried in the Northern States did not seriously threaten the Union war effort, the flexible jurisdiction of the commissions, particularly considering the expansive scope of martial law and military jurisdiction under the Lieber Code, made these commissions a useful tool for rooting out disloyal individuals and countering threats deep within the Union.

Although there is strong evidence that the Lieber Code deeply impacted the military justice system during the Civil War, providing the legal authority for the trial of thousands of individuals throughout the entire country, the generally accepted view among recent historians is that the Lieber Code had little or no effect on conduct during the Civil War.<sup>286</sup> The Lieber Code has been viewed since the war as an important milestone in international humanitarian law,<sup>287</sup> but it is also accepted that, during the Civil War, the combatants paid little attention to it. Historian Harry Stout writes, “Union generals showed scant interest in the code and soldiers none. Confederates probably studied it more closely for its vagueness in preventing ‘retaliation’ or revenge on enemies and its wide-open definition of ‘military necessity’ that, if necessary enough, could justify just about anything.”<sup>288</sup>

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<sup>284</sup> See 1864 Dep’t of the Susquehanna, Gen. Orders, *supra* note 267; 1864 Dep’t of Pa., Gen. Orders, *supra* note 267. The term “copperhead” was applied to northerners who secretly favored the Confederacy.

<sup>285</sup> See Case NN-3348; Case NN-1478; Case NN-1400. One of the outbreaks of resistance occurred in the coal mining regions of eastern Pennsylvania, and involved a group called the “Buckshots,” which, interestingly, was predecessor to the Molly Maguires (a clandestine Irish organization that would become famous in the late 1870s due to a series of sensational trials related to coalfield crimes). See generally KEVIN KENNY, MAKING SENSE OF THE MOLLY MAGUIRES (1998). The Buckshots, comprised almost entirely of Irish-Catholic coal miners, organized to resist the draft, harbor deserters, and commit a variety of other disloyal acts. Case NN-1400; Headquarters, Dep’t of the Susquehanna, Gen. Orders No. 23 (1864) (on file with Nat’l Archives, Wash., D.C.); Headquarters, Dep’t of the Susquehanna, Gen. Orders No. 24 (1864) (on file with Nat’l Archives, Wash., D.C.). This particular series of commissions tried twenty-one defendants in Reading—twelve were found guilty and eventually sentenced to hard labor for the duration of the war. *Id.* Most defendants were acquitted as they could only be connected to the meetings in an extenuated manner. *Id.*

<sup>286</sup> See, e.g., HARRY S. STOUT, UPON THE ALTAR OF THE NATION 193 (Viking 2006); GRIMSLEY, *supra* note 177, at 149–51.

<sup>287</sup> See, e.g., HOGUE, *supra* note 19, at 58–59; Childress, *supra* note 25, at 70; Paust, *supra* note 25, at 114; GRIMSLEY, *supra* note 177, at 149.

<sup>288</sup> STOUT, *supra* note 286.

Professor Stout is undoubtedly correct that when Sherman shelled Atlanta in 1864, or when Sherman's armies systematically pillaged South Carolina in 1865, neither he nor his men were referring to a pocket edition of the Lieber Code.<sup>289</sup> Professor Mark Grimsley writes, "[O]ften touted as a humanitarian milestone, Lieber's code was thoroughly dedicated to providing the ethical justification for a war aimed at the destruction of the Confederacy . . . . The range of permissible activities was . . . made, in large degree, a matter of the motivations of Union commanders."<sup>290</sup> The generally held view on the Code is that during the Civil War the combatants most likely paid little attention to it as there is very little evidence that it was ever used in the field, and, even if the combatants were using it, it had little effect as the Code's flexible notions of necessity and retaliation allowed for almost any conduct to arguably fit within the its confines.<sup>291</sup>

However, the impact of the Lieber Code on the system of military commissions seems to have been enormous,<sup>292</sup> a finding that seemingly contrasts starkly with commonly held views on the Code. A possible explanation for these disparate findings is one of focus. Previous historians have not noticed the profound effect on the military justice system because they directed their attention almost exclusively on the impact of the Lieber Code as a code of conduct (which it was intended to be).<sup>293</sup> In doing so, they failed to consider the impact of the Lieber Code as a legal code (which it was also intended to be).<sup>294</sup> In the field, a code of conduct is an *ex ante* measure used to prevent and shape future conduct. In this respect, as recent historians have clearly and accurately

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<sup>289</sup> *Id.* at 368, 420; HOGUE, *supra* note 19, at 57.

<sup>290</sup> GRIMSLEY, *supra* note 177, at 149–51.

<sup>291</sup> *See, e.g.*, FREIDEL, *supra* note 209, at 336–37; *see supra* note 286.

<sup>292</sup> *See supra* pp. 41–46.

<sup>293</sup> Most prominently, Professors Grimsley and Stout analyze the impact of the Code as a restraining force (or more accurately, lack thereof) on the conduct of the armies in the field. *See supra* note 286. For example, Professor Stout describes the code as a "liberal code of military conduct." STOUT, *supra* note 286, at 193.

<sup>294</sup> Professor Stout suggests the Code had little legal impact, writing, "The code protected American officers and soldiers from virtually any reprisal. While a few soldiers were tried and executed for rape during the war, there would be no trials for destruction of civilian property or lives." *See* STOUT *supra* note 286, at 193. However, this view of the Code entirely ignores the thousands of trials held under its authority throughout the country beginning in the middle of 1863, and instead focuses on those cases that punished Union soldiers whose conduct violated its provisions. Professor Grimsley describes the code as having "legal purposes," but when using the term he focuses on the specific provisions that prohibited or authorized particular conduct in the field. *See* GRIMSLEY, *supra* note 177, at 149–50.

recorded, the Lieber Code had almost no effect on individual conduct in the field.<sup>295</sup> Here, the Lieber Code was “hazy at best,” and did indeed leave the “discernment of its exact location . . . to the commander on the scene.”<sup>296</sup> Rather than defining permissible conduct in a manner that could easily be applied, it was instead a flexible document that allowed almost any conduct to be justified under the rubric of military necessity and retaliation.<sup>297</sup>

A legal code is, however, an entirely different creature. As a legal code, the Lieber Code was incredibly effective because it granted enormous power to military courts by setting forth a broad and flexible foundation for military jurisdiction.<sup>298</sup> This jurisdictional foundation stemmed, at least indirectly, from the theories of military law held by Henry Halleck, which allowed civilian criminal law to be subsumed into the military justice system in all areas where martial law had been declared.<sup>299</sup> The Lieber Code repeated this grant of jurisdiction and was the first nationwide authoritative jurisdictional basis—both *in personam* and subject matter—for military commissions.<sup>300</sup> This was an expansive grant of power that was essentially a *carte blanche* for the military justice system.

The Supreme Court upheld this grant of authority in *Ex parte Vallandigham*.<sup>301</sup> Clement Vallandigham was convicted by commission in Ohio, in May 1863, for giving an inflammatory and disloyal speech.<sup>302</sup> He was initially sentenced to imprisonment for the remainder of the war, but this sentence was commuted to banishment—a punishment he challenged in federal court.<sup>303</sup> The Supreme Court held that it did not have the jurisdiction to review a decision of a military commission, writing that “the authority to be exercised by a military commission is

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<sup>295</sup> See, e.g., *supra* note 286.

<sup>296</sup> GRIMSLEY, *supra* note 177, at 151.

<sup>297</sup> STOUT, *supra* note 286, at 192. See Headquarters, War Dep’t, Gen. Orders No. 100, *supra* note 14, arts. 16, 27 (1863), reprinted in RICHARD HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR (Precedent 1983).

<sup>298</sup> See *supra* Part III.B.

<sup>299</sup> See *supra* note 154 and accompanying text.

<sup>300</sup> See *supra* Part III.B.

<sup>301</sup> 68 U.S. 243 (1864).

<sup>302</sup> Fisher, *supra* note 2, at 56–58.

<sup>303</sup> Headquarters, Dep’t of Ohio, Gen. Orders No. 68 (1863) (on file with N.Y. Pub. Library); Belknap, *see supra* note 2, at 456–57.



[not] judicial.”<sup>304</sup> Additionally, the Court quoted approvingly from the 13th Article of the Lieber Code, which described the difference between court-martial and military commission jurisdiction.<sup>305</sup> With the Supreme Court essentially deferring to the Lieber Code’s interpretation of the authority of military commissions, almost any offense, committed almost anywhere in the country, which could not be tried before a court-martial, could now be tried before a military commission.<sup>306</sup>

Additionally, as a criminal code, the Lieber Code very conveniently defines and describes those offenses that violate the laws of war (which were now firmly within the jurisdiction of military commissions nationwide).<sup>307</sup> The Code sets forth a much needed description of the laws of war, providing a framework within which individual judge advocates could operate.<sup>308</sup> Indeed, there is evidence that within the Judge Advocate General’s Office the Lieber Code was already being used in 1863 to define the contours of offenses and sentences. For example, on 20 November 1863, when reviewing the conviction and sentence of Francis Armstrong, a Confederate soldier charged with being a “military insurgent” after he was captured recruiting inside Union lines, Judge Advocate General Joseph Holt referred to the Code when upholding the conviction and sentence:

The offenses committed by the accused are such as have been frequently committed by perfidious men in the border states, and such as have in many cases been adjudged by Military Commissions as fully meriting the enforcement of the death penalty . . . . Professor Lieber

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<sup>304</sup> *Ex parte Vallandigham*, 68 U.S. (1 Wall.) 243, 253 (1864). The Supreme Court wrote, “Nor can it be said that the authority to be exercised by a military commission is judicial in that sense. It involves discretion to examine, to decide and sentence, but there is no original jurisdiction in the Supreme Court to issue a writ of habeas corpus ad subjiciendum to review or reverse its proceedings, or the writ of certiorari to revise the proceedings of a military commission.” *Id.*

<sup>305</sup> *See id.* A great deal of literature has already been published on *Vallandigham*. *See, e.g.*, GEOFFREY R. STONE, *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004); Michael Kent Curtis, *Lincoln, Vallandigham, and Anti-War Speech in the Civil War*, 7 WM. & MARY BILL RTS. J. 105 (1998); Belknap, *supra* note 2, at 455. As *Vallandigham* is only related to this article in the sense that in it the judiciary ceded authority to the military, it is unnecessary to delve into the details of this already thoroughly analyzed decision (which was relatively atypical for a military commission).

<sup>306</sup> *See supra* pp. 38–40.

<sup>307</sup> *See* 1863 War Dep’t, Gen. Orders No. 100, *supra* note 14, *reprinted in* RICHARD HARTIGAN, *LIEBER’S CODE AND THE LAW OF WAR* (Precedent 1983).

<sup>308</sup> *Id.*

in his code . . . expressly lays it down, that such offenders, if captured are not entitled to the privilege of prisoners of war, but may be dealt with according to the circumstances of the case.<sup>309</sup>

Although Major General Holt was the most senior figure in the military justice system, it is quite likely that the judge advocates who prosecuted all of the military commissions in the field were also using the Lieber Code as a guide, since their superiors were using it as a reference during the appellate process.<sup>310</sup>

In fact, there is evidence that defendants were actually charged in some military departments for violations of actual provisions of the Lieber Code. In the Middle Department, where the commissions often targeted the flow of information between the citizens of Maryland and the Confederate armies campaigning just miles away in northern Virginia, of the approximately ninety-nine individuals tried in the Middle Department in 1864, over half of those were tried for offenses related to communication with the enemy.<sup>311</sup> It is in this Department that the Lieber Code's facilitation of commissions in the second half of the war is most clear: Of the fifty-five individuals charged with an offense related to communication with the enemy, forty-nine were actually charged with violating the applicable provision of the Lieber Code (the 86th Article).<sup>312</sup> In these trials, the commissions explicitly stated that their authority to try this particular offense derived directly from the Lieber Code, as the offense was one that was recognized in the Code as a violation of the laws of war.<sup>313</sup>

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<sup>309</sup> Case MM-0617; Headquarters, War Dep't, Gen. Court-Martial Orders No. 23 (1864) (on file with N.Y. Hist. Soc'y); *see also* NEELY, *supra* note 18, at 171. O.R. II, 6, 1031.

<sup>310</sup> *See supra* note 309.

<sup>311</sup> *See* 1864 Middle Dep't, Gen. Orders, *supra* note 267; 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254; 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>312</sup> *See supra* note 311. The charges generally read, "Intercourse with the enemy in violation of the 86th article of General Orders No. 100."

<sup>313</sup> The 86th Article of the Lieber Code was potentially an incredibly powerful tool—under its provisions "All intercourse between the territories occupied by belligerent armies, whether by traffic, by letter, by travel, or in any other way, ceases" and "[c]ontraventions . . . are highly punishable." *See* 1863 War Dep't, Gen. Orders No. 100, *supra* note 14, reprinted in RICHARD HARTIGAN, *LIEBER'S CODE AND THE LAW OF WAR* (Precedent 1983). In reality, this provision could never have been enforced to its fullest; however, it was a convenient charge for the prosecution of individuals whose contact with the Confederacy potentially threatened the war effort. In a number of the cases this charge was paired with a charge of spying or recruiting for the Confederacy. If a spying

By expanding the military commission to include violations of the laws of war, the Lieber Code laid a fundamental foundation for the modern day military commission. The innovations of Henry Halleck and Francis Lieber in 1862 and 1863 transformed the military commission, previously only a venue for trying crimes committed in occupied territory where courts-martial did not have jurisdiction, into one that had specific jurisdiction to try violations of the laws of war.<sup>314</sup> In the modern era, it is unquestioned that military commissions have subject matter and *in personam* jurisdiction to try violations of the laws of war,<sup>315</sup> and most of the commissions used following the Civil War, most notably many of those used during World War II and currently at Guantanamo Bay, are direct descendents of the Civil War commissions.<sup>316</sup>

Although the modern commissions are quite different from those of the Civil War, most of these modern commissions would not be jurisdictionally possible if the Councils of War had not been merged into Scott's military commission in Halleck's General Orders No. 1 and in the Lieber Code. For example, the Military Commissions Act of 2006, defined the subject matter jurisdiction of the commissions as "any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001."<sup>317</sup> Likewise, the Military Commissions Act of

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or recruiting charge could not be proven, often the more simple charge of communication with the enemy could be proven. *See, e.g.*, Headquarters, Middle Dep't, Gen. Orders No. 3 (1864) (on file with Library of Cong., Wash., D.C.); Headquarters, Middle Dep't, Gen. Orders No. 26 (1864) (on file with Library of Cong., Wash., D.C.); Headquarters, Middle Dep't, Gen. Orders No. 28 (1864) (on file with Library of Cong., Wash., D.C.); Headquarters, Middle Dep't, Gen. Orders No. 43 (1864) (on file with Library of Cong., Wash., D.C.); Headquarters, Middle Dep't, Gen. Orders No. 61 (1864) (on file with Library of Cong., Wash., D.C.); Headquarters, War Dep't, Gen. Court-Martial Orders No. 152 (1864) (on file with N.Y. Hist. Soc'y); Headquarters, War Dep't, Gen. Court-Martial Orders No. 248 (1864) (on file with N.Y. Hist. Soc'y).

<sup>314</sup> *See supra* pp. 27–28, 38–40.

<sup>315</sup> *See* Glazier, *Neglected History of the Military Commission*, *supra* note 2, at 80 ("The use of military commissions to try violations of the laws of war that Congress has not statutorily 'defined and punished' seems well established.")

<sup>316</sup> *See infra* pp. 51–54.

<sup>317</sup> 10 U.S.C.S § 948d (Lexis 2010) (amended by the Military Commissions Act of 2009). The Uniform Code of Military Justice also recognizes that a major role of the modern military commission is the trying violations of the laws of war, reading,

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

2009, the current regime governing military commissions, defines commission subject matter jurisdiction in similar terms. Commissions currently have jurisdiction to try offenses “made punishable by this chapter [10 USCS § 948a et seq.], sections 904 and 906 of this title [10 USCS § 904 and 906] (articles 104 and 106 of the Uniform Code of Military Justice), or the law of war,”<sup>318</sup> when committed by an alien unprivileged enemy belligerent. Although separated from the Lieber Code by nearly 150 years and multiple Supreme Court decisions in the area, the connection between the Military Commissions Acts of 2006 and 2009 and the Lieber Code (which authorized trials for violations of the “common law of war”), or Halleck’s General Orders No. 1 (which authorized trials for violations of the “general code of war”), is inescapably clear.

In *Hamdan v. Rumsfeld*, the Supreme Court delved into the history of the military commission to determine the constitutionality of the military commissions held at Guantanamo Bay during the first half of this decade.<sup>319</sup> Justice John Paul Stevens, writing for the Court, noted that, during the Civil War, General Winfield Scott’s military commissions (designed to try “ordinary crimes committed in occupied territory”) and Councils of War (designed to try “offenses against the law of war”) were merged into a unified commission.<sup>320</sup> Later in his opinion, Justice

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war may be tried by military commissions, provost courts, or other military tribunals.

10 U.S.C. § 821 (2006).

<sup>318</sup> 10 U.S.C.S. § 948d (Military Commissions Act of 2009). Additionally, many of the offenses specifically codified in the Military Commissions Act of 2009 were either already violations of the laws of war already (such as “spying,” “rape,” “pillaging,” or “wrongfully aiding the enemy”), or are offenses that define their contours with reference to the laws of war (for example, “murder in violation of the law of war,” or “destruction of property in violation of the law of war”). *See id.* § 950t.

<sup>319</sup> 548 U.S. 557, 590 (2006).

<sup>320</sup> *Id.* (internal citations omitted).

The military commission, a tribunal neither mentioned in the Constitution nor created by statute, was born of military necessity . . . the commission “as such” was inaugurated in 1847 . . . As commander of occupied Mexican territory, and having available to him no other tribunal, General Winfield Scott that year ordered the establishment of both ‘military commissions’ to try ordinary crimes committed in the occupied territory and a “council of war” to try offenses against the law of war . . . When the exigencies of war next gave rise to a need for use of military commissions, during the Civil War, the dual system favored by General Scott was not adopted. Instead, a single tribunal often took jurisdiction over ordinary crimes,

Stevens, writing at this point for himself, stated that, thanks to this merger of jurisdiction, modern military commissions may try “[v]iolations of the laws and usages of war cognizable by military tribunals only,” and “[b]reaches of military orders or regulations for which offenders are not legally triable by court-martial under the Articles of [W]ar.”<sup>321</sup> Justice Stevens, however, does not mention the important role of the Lieber Code in his analysis of this transformation, instead suggesting that the change was more organic and less centralized.<sup>322</sup>

Although recent scholars have also noted that this transformation in jurisdiction during the Civil War was an important development that provided for the trial of violations of the laws of war before commissions, they too provide little explanation for why or how this important development occurred.<sup>323</sup> As discussed above, the two prongs of this subject matter jurisdiction were set forth together for the first time in Halleck’s General Order No. 1 in 1862, and were expanded nationwide in the Lieber Code in 1863.<sup>324</sup> Largely overlooked by the legal historians and constitutional law scholars who have analyzed the history of the military commissions over the past few years, the Lieber

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war crimes, and breaches of military orders alike. As further discussed below, each aspect of that seemingly broad jurisdiction was in fact supported by a separate military exigency.

*Id.*

<sup>321</sup> *Id.* at 597 (quoting W. WINTHROP, *MILITARY LAW AND PRECEDENTS* 839 (2d rev. ed. 1920)).

<sup>322</sup> *Id.*

<sup>323</sup> Legal historians, most notably William Winthrop and David Glazier, have noted the merger of Scott’s Councils of War and Scott’s military commissions during the Civil War, but have spent little time explaining the development of this process. See, e.g., Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2033 (noting merger); 2 WINTHROP, *supra* note 16, at 60–61 (mentioning the merger and the role of Halleck’s General Orders No. 1); Myers, *supra* note 35, at 237 (briefly noting the influence of Councils of War during the Civil War); Glazier, *Neglected History of the Military Commission*, *supra* note 2, at 39–43 (briefly noting the role of the Lieber Code and Halleck’s General Orders No. 1 in the development of the laws of war and the merger of military commission jurisdiction); David Glazier, *Turmoil Over the Guantanamo Commissions*, 12 LEWIS & CLARK L. REV. 131, 136–37 (2008) (noting the merger of the jurisdiction during the Civil War); George Gordon Battle, *Military Tribunals*, 29 VA. L. REV. 255, 263–64 (1943) (same); Bickers, *supra* note 2, at 908–09 (same); Alissa J Kness, Note, *The Military Commissions Act of 2006: An Unconstitutional Response to Hamdan v. Rumsfeld*, 52 S.D. L. REV. 382, 391–92 (2007) (same); Thravalos, *supra* note 2, at 745 (same); Major Michael O. Lacey, *Military Commissions: A Historical Survey*, ARMY LAW., Mar. 2002, at 41, 43 (same).

<sup>324</sup> See *supra* Parts III.A, III.B.

Code revolutionized the American military commission in 1863.<sup>325</sup> In this regard, the Lieber Code is directly connected to the modern commissions on a deeply fundamental level, as it definitively established for the first time that military commissions have subject matter and *in personam* jurisdiction to try violations of the laws of war. For better or worse, if it was not for Henry Halleck and Francis Lieber, the military commissions used in World War II and over the past decade at Guantanamo Bay would not have been possible, or even imaginable.

#### IV. The Creation of a Commissions Framework and The Transition to Reconstruction

##### A. Military Commissions in the War Department: The Review Process and the Creation of the Judge Advocate General's Office

The second important element that greatly shaped the expansion of the commissions during the Civil War—the first being the jurisdictional expansion under the Lieber Code—was the growth of the Judge Advocate General's Office, and later, the Bureau of Military Justice.<sup>326</sup> The increased centralization of the military justice system was one of the primary reasons that the Lieber Code had such a profound and immediate impact on the commissions in 1863.<sup>327</sup>

From the earliest commissions in 1861, the general procedural rules used in courts-martial were replicated in the commissions.<sup>328</sup> Additionally, the basic procedure for reviewing courts-martial also was followed by commissions.<sup>329</sup> By comparison, if a parallel method of review were to be followed today, military commissions could potentially be reviewed by the U.S. Court of Appeals for the Armed Forces and, possibly, by the U.S. Supreme Court on certiorari.<sup>330</sup>

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<sup>325</sup> See *supra* Part III.B.

<sup>326</sup> See *infra* pp. 57–58, 62–63.

<sup>327</sup> See *supra* Part III.C.

<sup>328</sup> 2 WINTHROP, *supra* note 16, at 63–65; Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2037–38; BENET, *supra* note 42, at 12 (describing the manner by which the commissions in the Mexican-American War followed court-martial procedure).

<sup>329</sup> Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2037–38.

<sup>330</sup> See 10 U.S.C. §§ 867–867a (2006). By contrast, military commissions held under the authority of the Military Commissions Act of 2009 will follow a review procedure separate from courts-martial. Military commissions will be reviewed in most cases, first, by a special Court of Military Commission Review, second, by the U.S. Court of Appeals

The basic system for the review of courts-martial at the beginning of the Civil War was defined by the Articles of War.<sup>331</sup> Without delving into unnecessary details, after a prisoner was convicted and sentenced, according to the 65th Article of War:

No sentence of a court-martial shall be carried into execution until after the whole proceedings shall have been laid before the officer ordering the same, or the officer commanding the troops for the time being; neither shall any sentence of a general court martial, in the time of peace, extending to the loss of life, or the dismissal of a commissioned officer, or which shall, either in time of peace or war, respect a general officer, be carried into execution, until after the whole proceedings shall have been transmitted to the Secretary of War, to be laid before the President of the United States for his confirmation or disapproval, and orders in the case.<sup>332</sup>

Article 65 lays out two important rules: first, no sentence may be carried into execution until the entire record is reviewed by the commanding or reviewing officer, and second, no death sentences in time of peace may be carried into effect until the record has been transmitted to the Secretary of the War and approved by the President.<sup>333</sup> In the Civil War, court-martial (and military commission) files were ultimately reviewed by the district or department commander who authorized the court-martial and their order was promulgated in the general orders for that department or district.<sup>334</sup> Aside from those sentences requiring Presidential approval, the proceedings of a court-martial did not need to be reviewed by any authority beyond the commanding officer before the sentence was executed.<sup>335</sup> The proceedings of the court-martial were then forwarded to the Department of War, where the record was filed and

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for the District of Columbia Circuit, and finally, by the U.S. Supreme Court on writ of certiorari. *See id.* § 950c–g (Military Commissions Act of 2009).

<sup>331</sup> 2 Stat. 367 (1806) (art. 65).

<sup>332</sup> *Id.*

<sup>333</sup> *Id.*; *see* WILLIAM C. DE HART, OBSERVATIONS ON MILITARY LAW, AND THE CONSTITUTION AND PRACTICE OF COURTS MARTIAL 203 (New York, D. Appleton & Co. 1861). *See also* 1 WINTHROP, *supra* note 16, at 651. Here, Winthrop incorrectly reads this provision as requiring that death sentences be approved by the President only during time of war. *Id.*

<sup>334</sup> 2 Stat. 367 (1806) (art. 65); DE HART, *supra* note 333, at 203–04; Appendix B.

<sup>335</sup> *See* DE HART, *supra* note 333, at 226.

saved.<sup>336</sup> Even for those sentences that did not require presidential approval, the President could still step in and mitigate the sentence (as could happen if, say, a mother or local official wrote to the President requesting leniency).<sup>337</sup>

During the first two years of the Civil War, only a small number of military commissions were reviewed in Washington.<sup>338</sup> In 1861, no commissions were reviewed.<sup>339</sup> In 1862, only three commissions were reviewed, all of which were death sentences reviewed personally by President Lincoln.<sup>340</sup> However, none of those sentences were reviewed by Lincoln until Congress altered the operation of the 65th Article of War to require presidential review of all death sentences during both war and peacetime.<sup>341</sup> It was not until the second half of 1862 that any sort of regular system was put in place for centralized review of commissions.<sup>342</sup>

Despite the review of only a few commissions by the War Department, by the middle of 1862 hundreds of military commissions—and even more courts-martial—were starting to be held in the field,<sup>343</sup> and the organizational structure to process and try this many cases was

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<sup>336</sup> *Id.* at 227.

<sup>337</sup> *Id.* at 222.

<sup>338</sup> See Headquarters, War Dep't, Gen. Orders (1861) [hereinafter 1861 Dep't of War, Gen. Orders] (on file with N.Y. Hist. Soc'y); 1862 War Dep't, Gen. Orders, *supra* note 93.

<sup>339</sup> See 1861 War Dep't, Gen. Orders, *supra* note 338.

<sup>340</sup> See Headquarters, War Dep't, Gen. Orders No. 170 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, War Dep't, Gen. Orders, Gen. Orders No. 174 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, War Dep't, Gen. Orders No. 206 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>341</sup> See *infra* pp. 59–60.

<sup>342</sup> Because President Lincoln was not required to review death sentences until the middle of 1862, there were death sentences upheld at the department level in 1862 that never appear in the War Department General Orders and that bear no evidence that they were ever reviewed by President Lincoln due to the operation of the 65th Article of War. See, e.g., Case II-0832 (trials of Henry Kuhl and Hamilton Windon); Headquarters, Dep't of the Miss., Gen. Orders No. 6 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Miss., Gen. Orders No. 12 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Miss., Gen. Orders No. 15 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Miss., Gen. Orders No. 19 (1862) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Miss., Gen. Orders No. 37 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>343</sup> See, e.g., 2 1862 Dep't of Mo., Gen. Orders, *supra* note 93; 1862 Dep't of Potomac, Gen. Orders, *supra* note 142; 1862 Dep't of the S., Gen. Orders, *supra* note 142; 1862 Dep't of the Gulf, Gen. Orders, *supra* note 142; 1862 War Dep't, Gen. Orders, *supra* note 93; 1863 War Dep't, Gen. Orders, *supra* note 93.



sorely lacking. For example, in 1862, Brigadier General John Schofield, wrote from Missouri:

I am really very much concerned as to the means of getting rid of the large number of prisoners already held in this division, which number is daily and hourly being most alarmingly increased. Generally speaking the officers are required for field service and in the majority of cases they are illiterate and wholly unacquainted with the duties of military commissions. On an average I think I may safely assert that not one out of a dozen is capable of writing out the proceedings of a commission .

. . .<sup>344</sup>

In another instance, commanders from the Mountain Department wrote several letters to Washington, repeatedly requesting approval to execute the sentence of several prisoners who had been tried by commission.<sup>345</sup> The letters display clear frustration at a lack of response in Washington regarding the prisoners (at one point the War Department was not even aware that commission files had been forwarded to Washington).<sup>346</sup>

Responding to this lack of review, Congress authorized the appointment of a judge advocate “to whose office shall be returned, for revision, the records and proceedings of all courts-martial and military commissions, and where a record shall be kept of all proceedings had thereupon.”<sup>347</sup> The Act also created a corps of judge advocates, who “shall perform the duties of judge advocate for each army to which the respectively belong, under the direction of the judge advocate general.”<sup>348</sup> Under this authority, by the end of the war, thirty-nine officers were appointed in the corps, most of whom had prior legal training, (among them, the now famous “Blackstone of military law,” William Winthrop).<sup>349</sup> This legislation created the basic framework by which military commissions and courts-martial would be both prosecuted and reviewed. Without the creation of this office and corps it is unlikely

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<sup>344</sup> O.R., II, 4, 55.

<sup>345</sup> *See id.* O.R. II, 4, 63, 354–55.

<sup>346</sup> *Id.*

<sup>347</sup> 12 Stat. 598, § 5 (1862).

<sup>348</sup> *Id.* § 6.

<sup>349</sup> THEOPHILUS FRANCIS RODENBOUGH ET AL., *THE ARMY OF THE UNITED STATES: HISTORICAL SKETCHES OF STAFF AND LINE WITH PORTRAITS OF GENERALS-IN-CHIEF* 37 (Maynard, Merrill, & Co. 1896).

that even a fraction of the commissions ultimately tried could have been held.

Under the authority of this Act, Lincoln appointed Joseph Holt to the Office of The Judge Advocate General in early September.<sup>350</sup> Lincoln's appointee, Joseph Holt, likely shaped the physical administration of military justice more than any other individual. Although the theoretical footwork necessary to lay the legal foundations for the commissions was masterminded mostly by Henry Halleck and Francis Lieber, first in Missouri, and then later nationwide,<sup>351</sup> Holt's played an important role in the day-to-day operation of the military justice system. Indeed, almost every court-martial and military commission file would have passed through his office<sup>352</sup>—often through his very hands.<sup>353</sup>

Under the legislation of 1862, Holt's office was responsible for reviewing the proceedings of all military commissions and courts-martial and then maintaining a record of each.<sup>354</sup> After a commission was approved by a department commander, the majority of cases passed through the office without comment and the convictions and sentence stood. Sometimes, however, cases would be passed from Holt's office to Lincoln for review. These files generally included a description of the case and a recommended course of action, which Lincoln generally followed. Some of these reviews were mandated by law—in cases such as death penalties—and others were reviewed due to letters, requests, recommendations, or appeals mailed to the White House, the Office of The Judge Advocate, or the War Department.<sup>355</sup> The impact of the new organization was quickly apparent. During 1863, fifty-four military commissions were formally reviewed by Lincoln, with twenty-four

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<sup>350</sup> ELIZABETH LEONARD, LINCOLN'S AVENGERS 26 (2004).

<sup>351</sup> See *supra* pp. 27–28, 38–40.

<sup>352</sup> 12 Stat. 598, § 5 (1862).

<sup>353</sup> See Appendix B.

<sup>354</sup> *Id.*

<sup>355</sup> Other than the requirement under the legislation of 1862 that the Office of The Judge Advocate General review and approve each commission, see *supra* note 347 and accompanying text, and the variety of statutes requiring Presidential review of death sentences, see *infra* pp. 59–60, there was not a formally written review process. However, each file now housed at the National Archives bears a number of dated arrival, departure, and approval stamps made by the different military departments and offices in Washington as the file was reviewed. This record makes tracing the path of a particular commission file possible. This description of the “typical” review process is based off of observations made while reviewing a broad sample of files at the National Archives. See *supra* Appendix B.

reversed by Lincoln.<sup>356</sup> Of the commissions reviewed, forty-seven were reviews of death sentences.<sup>357</sup> Following the President's approval or disapproval, the President's order would be promulgated as a War Department General Order to be issued to the various departments.<sup>358</sup> The Judge Advocate General's Office surely expedited this process—rather than having to review an entire file, Lincoln could use Holt's summary and recommendation as a guide and reference.

The regulations regarding mandatory Presidential review were altered several times during the war. In July 1862, Congress modified the operation of Article 65, requiring the approval of the President in all cases of death sentences during both peace and wartime, rather than just during peacetime.<sup>359</sup> In fact, the first commission reviewed by Lincoln in 1862 explicitly made mention of this act.<sup>360</sup> The second change, in March 1863, created some exceptions to newly created mandatory Presidential review of all death sentences.<sup>361</sup> Congress authorized the execution of death sentences upon approval of the general commanding in the field for cases in which the defendant was “convicted as a spy or deserter, or of mutiny or murder.”<sup>362</sup> For military commissions, this exception would be most felt in cases of murder and spying (soon after transferred by Congress into military commission jurisdiction).<sup>363</sup> Additionally, in July 1864, the exception for those death penalty offenses tried by commission that did not need to be approved by the President was further broadened to include all those sentences imposed upon “guerrilla-marauders for robbery, arson, burglary, rape, assault with intent to commit rape, and for violations of the laws and customs of war.”<sup>364</sup> Although the President could still invoke his right to mitigate sentences, most of the offenses tried before military commission no longer needed to be reviewed by the President, even if the defendant was sentenced to death.<sup>365</sup> Interestingly, although the executive branch

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<sup>356</sup> See 1863 War Dep't, Gen. Orders, *supra* note 93.

<sup>357</sup> *Id.*

<sup>358</sup> See generally 1862 War Dep't, Gen. Orders, *supra* note 93; 1863 War Dep't, Gen. Orders, *supra* note 93; 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254; 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>359</sup> 12 Stat. 598, § 5 (1862).

<sup>360</sup> See Headquarters, War Dep't, Gen' Orders No. 170 (1862) (on file with Library of Cong., Wash., D.C.).

<sup>361</sup> 12 Stat. 737, § 38 (1863).

<sup>362</sup> *Id.*

<sup>363</sup> See *id.* at 736–37.

<sup>364</sup> 13 Stat. 356, ch. 215, § 1 (1864).

<sup>365</sup> *Id.*

powered the jurisdictional expansion of the military commissions during the Civil War, it was Congress that determined the manner by which the military commissions would be reviewed within the executive once the trials were held.

The number of cases reviewed in Washington in 1864 and 1865 and promulgated in the War Department General Orders was quite large. In 1864, 289 cases were reviewed in the War Department after being forwarded by the Office of The Judge Advocate General or Bureau of Military Justice.<sup>366</sup> Of those cases, only ten were reversed in full (well under five percent).<sup>367</sup> Although only a handful of judgments were overturned, it was common for the sentence to be mitigated to a less severe punishment—eighty-seven of the sentences were mitigated (about thirty percent of those reviewed).<sup>368</sup> Additionally, most of the cases reviewed at the War Department level had already been reviewed at least once by a department or district commander, and sometimes by both.<sup>369</sup> Therefore, the truly defective trials or charges had generally already been filtered out, and most of their review at this level was focused on whether the actual sentence was deserved.<sup>370</sup>

In 1865, 341 commission files for crimes committed during the war were reviewed by President Lincoln or the War Department.<sup>371</sup> Many of these files were for defendants tried during 1864, the year in which the most defendants were tried.<sup>372</sup> The rate at which judgments and sentences were reversed or mitigated increased in 1865.<sup>373</sup> Of the 341 files reviewed, forty-eight were reversed entirely, and 169 sentences were mitigated to some lesser punishment (rates of about fifteen and fifty percent respectively).<sup>374</sup> However, the reversal rate is slightly misleading—of those files, twenty-nine were from a single commission

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<sup>366</sup> See 1864 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.*

<sup>369</sup> See *id.* About one-third of the commissions reviewed in 1864 were actually reviewed the first time by the Department of War. *Id.* These commissions, called "special military commissions," were authorized directly by the orders of the Secretary of War, and therefore, also needed to be approved directly by him. *Id.* All of these commissions were tried in Washington, D.C. and are a significant portion of the commissions held in Washington in 1864 and 1865. *Id.*

<sup>370</sup> *Id.*

<sup>371</sup> See 1865 War Dep't, Gen. Court-Martial Orders, *see supra* note 254.

<sup>372</sup> See *supra* note 267.

<sup>373</sup> 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>374</sup> *Id.*

that was overturned due to problems in procedure.<sup>375</sup> After files from that commission are removed the reversal rate falls to five percent, much closer to the reversal rate for 1864.<sup>376</sup>

Likely, two of the main reasons for the increased number of mitigated sentences were the assassination of President Lincoln and the end of the war. Lincoln's successor, President Andrew Johnson, was far more liberal in mitigating sentences than Lincoln ever had been.<sup>377</sup> The ink on many sentences had barely dried before they were mitigated by Johnson, often to nothing.<sup>378</sup> This policy of reconciliation and leniency was a factor in the growing conflict between Johnson and the radical wing of the Republican Party.<sup>379</sup> In all likelihood, however, with hostilities at a close, Lincoln may also have mitigated many of the harsher sentences to encourage reconciliation and closure as part of the broader reconstruction plans.<sup>380</sup>

Although the sheer number of commissions reviewed makes the process sound rather inhuman and cold, in actuality, the files were reviewed quite carefully by Lincoln, Holt, and others.<sup>381</sup> Franklin S. Williams, tried in March 1864, in Tennessee, was convicted of violating an oath of allegiance and of being a guerrilla and was sentenced to death.<sup>382</sup> The crux of the case was the determination of whether Williams was a voluntary participant in the ravages of his guerrilla band or whether he was forced into the unit.<sup>383</sup> The testimony on the subject was conflicting, and the commission convicted him based largely on the testimony of the prosecution's witnesses.<sup>384</sup> Holt carefully considered the case, writing to Lincoln about the testimony of each witness—

<sup>375</sup> See Case OO-0663; Headquarters, War Dep't, Gen. Court-Martial Orders No. 267 (1865) (on file with N.Y. Hist. Soc'y) (disapproving commission due to highly irregular procedure).

<sup>376</sup> 1865 War Dep't, Gen. Court-Martial Orders, *supra* note 254.

<sup>377</sup> *Id.*

<sup>378</sup> *Id.*

<sup>379</sup> See Detlev Vagts, *Military Commissions: The Forgotten Reconstruction Chapter*, 23 AM. U. INT'L L. REV. 231, 241–51 (2008) (describing the politics of the commissions during Reconstruction); KENNETH STAMPP, *THE ERA OF RECONSTRUCTION, 1865–1877* 83–86 (1965) (describing the disintegrating relationship between President Johnson and the increasingly radical Republic Congress).

<sup>380</sup> STAMPP, *supra* note 379, at 48 (describing Lincoln's Reconstruction plans).

<sup>381</sup> See Appendix B.

<sup>382</sup> Case MM-1408; Headquarters, War Dep't, Gen. Court-Martial Orders No. 210 (1864) (on file with N.Y. Hist. Soc'y).

<sup>383</sup> See sources cited *supra* note 382.

<sup>384</sup> *Id.*

highlighting the contradictions—and closed by expressing doubt as to whether a death sentence on such deeply conflicting evidence was just.<sup>385</sup> Several weeks later, on 9 July, Lincoln followed Holt's advice, disapproving of the sentence and sparing the prisoner's life.<sup>386</sup> Williams was ultimately sentenced to hard labor for the duration of the war, a sentence that ultimately lasted about one year.<sup>387</sup>

Holt and Lincoln were also willing to not only delve into the record to probe the factual findings of the commission, but also to review the commissions for procedural correctness.<sup>388</sup> Although, in individual cases, the overturning of a case due to neglect of procedural technicalities may seem like a minor technicality, this type of review ensured that the commissions followed uniform procedure that had been designed to ensure reasonably fair and efficient trials. Nathan Wilson and John Eller were both convicted in Missouri on charges including murder, horse stealing, and "being a bad and dangerous man."<sup>389</sup> The convictions were overturned due to procedural details. Wilson hanged a neighbor, and (not to be outdone) Eller murdered a man and stole his horse.<sup>390</sup> The evidence in the commission was strong and both men were sentenced to death.<sup>391</sup> However, Holt recommended that the sentences not be carried out because the commission had neglected to include a notation that two-thirds of the commission approved of the death sentence—a procedural requirement under the 87th Article of War.<sup>392</sup> Lincoln approved the recommendation and both men were released.<sup>393</sup> Although the citizens of northern Missouri surely would have preferred Eller and Wilson dead, their release suggests that the commissions were hardly kangaroo courts.<sup>394</sup>

A final change by Congress slightly altered the regular path of commission cases through the offices of Washington, and further strengthened the administrative framework of the military justice system.

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<sup>385</sup> *Id.*

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*

<sup>388</sup> See sources cited *supra* Appendix B.

<sup>389</sup> Case MM-0517; Headquarters, War Dep't, Gen. Orders No. 230 (1863) (on file with Library of Cong., Wash., D.C.).

<sup>390</sup> See sources cited *supra* note 389.

<sup>391</sup> *Id.*

<sup>392</sup> *Id.*

<sup>393</sup> *Id.*

<sup>394</sup> See *supra* note 129 (for discussion of claims that Civil War commissions were kangaroo courts).

In June 1864, the Bureau of Military Justice was established to further aid in the effective management of the tens of thousands of court-martial and commission files submitted to Washington.<sup>395</sup> This department was made permanent following the war in 1866, and was given responsibility for reviewing commissions.<sup>396</sup> Holt, not surprisingly, was promoted to the head of the Bureau.<sup>397</sup> Under General Order No. 270, all communications pertaining to questions of military justice were required to be addressed to The Judge Advocate General in the Bureau.<sup>398</sup> Additionally, department commanders were required to forward to the Office of The Judge Advocate General list of all cases tried and to be tried within their department.<sup>399</sup> Generally, the creation of this office did not materially alter the route of commission files; rather, the main difference now was additional stops before the Secretary of War. Holt could report irregularities in proceedings or deficient sentences directly to the Secretary of War for action. Additionally, petitions for leniency were often forwarded directly to the Secretary of War for consideration.<sup>400</sup>

The creation of the Office of The Judge Advocate General and Bureau of Military Justice constructed an administrative framework by which the commissions could be centrally controlled, directed, and managed. Like a regiment on the battlefield, the more regulated and disciplined justice system was actually more efficient and effective in practice. It is doubtful that the existing military justice system could have ever managed to try 3000 to 4000 defendants by commission and even greater numbers by court-martial.<sup>401</sup> Prior to the creation of the Office of The Judge Advocate General, most cases were prosecuted by

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<sup>395</sup> 13 Stat. 144, ch. 144, § 5 (1864).

<sup>396</sup> RODENBOUGH, *supra* note 349, at 37.

<sup>397</sup> LEONARD, *supra* note 350, at 26.

<sup>398</sup> Headquarters, War Dep't, Gen. Court-Martial Orders No. 270 (1864) (on file with N.Y. Hist. Soc'y).

<sup>399</sup> *Id.*

<sup>400</sup> *See supra* note 355 & app. B.

<sup>401</sup> *See supra* note 18. In March 1865, Holt wrote to Secretary of War, Edwin Stanton, and reported that 33,896 court-martial and commission files had been reviewed in Washington since November, 1863. O.R. III, 5, 1216. The report also stated that in the period from September, 1862 to November 1863, that another 17,357 files had been reviewed. *Id.* Additionally, in November 1865, Holt wrote to Stanton again, and stated that 16,591 court-martial and military commission files had been "received, reviewed, and filed" since March, 1865. *See* O.R. III, 5, 490. In all, from the creation of the Judge Advocate's Office in September 1862, to November 1865, Holt reported that 67,844 court-martial and commission files were reviewed in Washington.

an ad hoc arrangement of volunteer judge advocates who were quickly shown to be incapable of handling the growing caseload.<sup>402</sup> Toward the end of 1862, these volunteers were replaced with a group legally trained and far more skillful judge advocates who were responsible for prosecuting offenses under the direct control of Holt.<sup>403</sup> These judge advocates contributed to the creation of the machine-like commission system that existed from 1863 onwards.

Procedurally speaking, the commissions later in the war resemble one another. Almost without exception, the military commissions had procedural and evidentiary rules that were very similar or identical to those used in courts-martial.<sup>404</sup> Any variation later in the war exists only between different departments rather than between the type of military trial.<sup>405</sup> Rather than being viewed as a separate entity, distinct from the court-martial system (as the current commissions are), the Civil War commissions were very closely related to courts-martial.<sup>406</sup> Likely, if it had not been for the limited jurisdiction of courts-martial, courts-martial, rather than military commissions, would have been used to try most of the commission defendants during the Civil War. By contrast, although clearly related, there were a number of significant differences between the procedure used in modern courts-martial and the procedure used in the military commissions held under the authority of the Military Commissions Act of 2006.<sup>407</sup>

The more centralized system that was formed later in the war allowed for coordinated application of commissions across various

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<sup>402</sup> Consider the quote of General Schofield, *supra* note 344 (describing the ineffective management of cases in 1862).

<sup>403</sup> 12 Stat. 598, § 5 (1862).

<sup>404</sup> See 2 WINTHROP, *supra* note 16, at 64–65 (describing the similar procedure). The actual transcripts of the cases often can only be distinguished from each other by checking whether a particular trial was assembled as a court-martial or as a military commission. See Appendix B.

<sup>405</sup> See Appendix B.

<sup>406</sup> Glazier, *Kangaroo Court or Competent Tribunal?*, *supra* note 2, at 2037–38.

<sup>407</sup> See, e.g., Richard V. Meyer, *When a Rose Is Not a Rose: Military Commissions v. Courts-Martial*, 5 J. INT'L CRIM. JUST. 458 (2007) (discussing and analyzing the differences between court-martial and military commission procedure under the Military Commissions Act of 2006). Commissions held under the authority of the Military Commissions Act of 2009 also likely will vary from those used in courts-martial, although to what extent is currently unclear. See 10 U.S.C. § 949a(a) (2006) (Military Commissions Act of 2009) (“Pre trial, trial, and post-trial procedures, including elements and modes of proof, for cases triable by military commission under this chapter may be prescribed by the Secretary of Defense.”).



military departments—a fact that helps explain the sudden explosions of commissions in the middle of 1863 following the promulgation of the Lieber Code.<sup>408</sup> With a corps of judge advocates in place, the Code could be implemented almost immediately.<sup>409</sup> Additionally, the increased involvement of the War Department in military justice as the war progressed, particularly after the creation of the Bureau of Military Justice (part of the War Department), allowed for closer coordination between department commanders and judge advocates.<sup>410</sup> The creation of more developed and integrated military justice system enabled the application of commissions in almost every war department, forming a conduit by which policy could easily be transferred to the ground and molded to departmental needs by individual judge advocates.

This military justice establishment created by Congress was the second crucial piece standing behind the growth of military commissions in the Civil War (the first being the legal groundwork laid by Halleck and Lieber). The critical role that judge advocates and the Office of The Judge Advocate General played in applying and tailoring this new weapon cannot be overstated. As displayed by the experience of officers in Missouri in 1862, the military justice system would have quickly choked upon itself had a mechanism for trying defendants quickly and predictably not been put in place.<sup>411</sup> Although, in 1862, a few hundred defendants could be squeezed through this bottleneck, it would not have been possible to try the enormous number of defendants nationwide in 1864 without this more organized system.<sup>412</sup> The authorization in the Lieber Code to use commissions broadly would have been without teeth had it not been for the administrative framework already in place to implement the policy. The legal weapon was crafted by Henry Halleck and Francis Lieber, but it was wielded, quite effectively, by The Judge Advocate General's Office.

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<sup>408</sup> See *supra* Part III.C.

<sup>409</sup> 12 Stat. 598, § 5, 6 (1862).

<sup>410</sup> See *supra* pp. 63–64.

<sup>411</sup> See *supra* note 344.

<sup>412</sup> See *supra* note 401.

## B. The End of the War and Reconstruction

The last year of the Civil War, 1865, saw the commissions continue much as those in 1863 and 1864, with new trials slowing in the middle of the year. In the first few months of 1865, there were at least 609 defendants tried by commission, a total number that is quite high considering it only includes commissions for offenses committed through approximately May 1865.<sup>413</sup> Although Missouri again had the most commissions for a single department (at least 143),<sup>414</sup> this figure is greatly outnumbered by the commissions outside of Missouri (close to 500).<sup>415</sup> This is a continuation of the trend seen in 1864, with the commissions becoming increasingly important to the war effort throughout the country, rather than remaining a Missouri phenomenon.

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<sup>413</sup> This study stops in May, 1865. Often the General Orders volumes do not include the date of the original trial or of the offense. Included in the total of "Civil War commissions" are all those that had an underlying offense that was more likely than not committed prior to the end of May, 1865. This end point is admittedly arbitrary, but slight changes in the methodology, such as using trial date, would not seriously alter the data. See 1865 U.S. War Dep't, Gen. Court-Martial Orders, *supra* note 254; Headquarters, War Dep't, Gen. Court-Martial Orders (1866) (on file with the N.Y. Hist. Soc'y); Headquarters, Military Div. of the Tenn., Gen. Orders (1865) (on file with N.Y. Hist. Soc'y); Headquarters, Middle Dep't, Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Middle Dep't, Gen. Orders (1866) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Ark., Gen. Orders (1865) (on file U.S. Military Acad., West Point, N.Y.); Headquarters, Dep't of the Cumberland, Gen. Court-Martial Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the Pacific, Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of the E., Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Fla., Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Ga., Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Va., Gen. Orders (1865) (on file with N.Y. Pub. Library); Headquarters, Dist. of E. Va., Gen. Orders (1865) (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Va. and NC., Gen. Orders (1865) (on file with N.Y. Pub. Library); Headquarters, Dep't of the Gulf, Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dep't of Kansas, Gen. Orders (1865) (on file with N.Y. Hist. Soc'y); Headquarters, Dep't of N.C., Gen. Orders (1865) (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of the S., Gen. Orders (1865) (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dist. of E. S.C., Gen. Orders (1865) [hereinafter 1865 Dist. of E. S.C.] (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Pa., Gen. Orders (1865) (on file with Nat'l Archives, Wash., D.C.); Headquarters, Dep't of Mo., Gen. Orders (1865) (on file with Library of Cong., Wash., D.C.); Headquarters, Dist. of N. Mo., Gen. Orders (1865) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Rolla, Gen. Orders (1865) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of Cent. Mo., Gen. Orders (1865) (on file with N.Y. Hist. Soc'y); Headquarters, Dist. of St. Louis, Gen. Orders (1865) (on file with N.Y. Hist. Soc'y).

<sup>414</sup> See *supra* note 413.

<sup>415</sup> See *id.*

The main trend present in the 1865 commissions that distinguishes them from the earlier commissions is the transformation of the Union armies from armies of conquest to armies of peacekeeping and occupation. An increasing number of commissions were directed at the trial of civilians who, unlike those in Missouri, were not acting under the color of military authority.<sup>416</sup> Instead, the trials were taking the place of civilian law in areas where military occupation was already necessary. The trials did not stop at the end of the Civil War.<sup>417</sup> Rather, they continued in this form well into Reconstruction, ending only after the readmission of the Confederate States into the Union.<sup>418</sup> However, the total number of commissions following the war was much lower. Overall, there were at possibly 1500 more commissions held during Reconstruction. These commissions were used to reestablish authority in the southern states and to try a host of different offenses.<sup>419</sup>

## V. Conclusion

On the night of 20 September 1863, near Mound City, Kansas, William Pitman and three other men broke into the home of Thomas Scott.<sup>420</sup> Pitman and his fellow robbers were all members of a guerrilla band that was known for terrorizing the local area;<sup>421</sup> consistent with their dubious reputation, Pitman's group held the entire Scott family hostage, only sparing their lives after being paid \$78.<sup>422</sup> Although this type of shocking behavior would clearly be illegal in any era of

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<sup>416</sup> For example, Anthrum McConnell was tried for murder and attempted murder stemming from an incident where McConnell and several other African-American men assaulted the home of Joseph Ford, a plantation owner in early May in the Georgetown District. The men killed one man, J.W. Skinner, and also attempted to murder Ford and Ford's nephew. The men chased Skinner from the home and shot him in nearby woods, and fired upon Ford and his nephew in the home. McConnell was convicted in July 1865, and was sentenced to be hanged. However, his sentence was later mitigated to ten year's hard labor. See Case MM-2696; Dist. of E. S.C., Gen. Orders No. 12 (1865) (on file with Nat'l Archives, Wash., D.C.).

<sup>417</sup> NEELY, *supra* note 18, at 178–79.

<sup>418</sup> *Id.*

<sup>419</sup> For discussions of the Reconstruction trials, see Detlev Vagts, *Military Commissions: The Forgotten Reconstruction Chapter*, 23 AM. U. INT'L L. REV. 231 (2008); Vagts, *supra* note 2, at 40; NEELY, *supra* note 18, at 178–79. As the current study cuts off in May 1865, these commissions are mentioned only because the transition into the Reconstruction commissions can already be in some departments during the Civil War.

<sup>420</sup> Case LL-1231.

<sup>421</sup> *Id.*

<sup>422</sup> *Id.*

American history, Pitman normally could expect to be tried in a civilian criminal court. However, as Pitman's offense occurred during wartime in an area where martial law had been declared, it became a war crime—a violation of the laws of war. Accordingly, like thousands of other individuals during the Civil War, Pitman was tried and convicted before a military commission, which was held in October 1863, in the Department of Missouri.<sup>423</sup>

To the modern observer, it does not necessarily seem surprising that individuals violating the laws of war, such as William Pitman, were tried before military commissions during the Civil War. Indeed, the military commission has become the primary venue by which modern war crimes are tried. However, it was actually not until the Civil War that the subject matter and *in personam* jurisdiction of the military commission was expanded so as to allow for the trial of violations of the laws of war.<sup>424</sup> Previously, military commissions only had the jurisdiction to try violations of military orders or criminal law committed by American Soldiers when courts-martial or civilian criminal courts lacked jurisdiction. Violations of the laws of war had only been tried in Scott's short-lived Councils of War in the Mexican-American War.<sup>425</sup> A testament to the relative youth of the United States during the Civil War, it had previously been unnecessary to develop a venue with specific jurisdiction over these kinds of offenses.

As noted in this article, the merging of these two types of jurisdiction occurred, first, in Missouri in 1862 through Henry Halleck's General Order No. 1<sup>426</sup> and, second, nationwide in 1863 through the Lieber Code.<sup>427</sup> Despite modern recognition as a milestone in international law, the Lieber Code has generally been regarded as having had almost no effect on the Civil War itself.<sup>428</sup> However, a close analysis of the records of the military commissions in the Civil War shows that, in fact, the Lieber Code was the primary source of jurisdictional authorization for the thousands of military commissions that were held during the second

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<sup>423</sup> The testimony of several eyewitnesses and the victims not surprisingly trumped that of Pitman's mother and brother (who both testified that William was home sick in bed on the night of the robbery), and Pitman was sentenced to hard labor for two years. *Id.*

<sup>424</sup> See *supra* Part III.A, III.B.

<sup>425</sup> See *supra* Part II.A.

<sup>426</sup> See *supra* Part III.A.

<sup>427</sup> See *supra* Part III.B.

<sup>428</sup> See *supra* pp. 46–47.

half of the Civil War.<sup>429</sup> Further, the Code was also an important criminal directive, providing individual judge advocates in the field with a useful guide for charging violations of the laws of war. In this regard, the writing and promulgation of the Lieber Code was an incredibly important moment in the war effort that very tangibly affected thousands of individuals. This finding requires that historians reconsider some of their basic conclusions about the role of the Lieber Code in the Civil War.

Additionally, as the primary basis for the expansion of military commission jurisdiction to violations of the laws of war, the promulgation of Lieber Code was a revolutionary moment in the history of the military commission. Even though the trials held in the Civil War under the authority of the Lieber Code were very different from those that are being held today at Guantanamo Bay, the modern commissions are fundamentally linked to the Lieber Code on a deep level. Previously overlooked by legal historians and the Supreme Court in *Hamdan v. Rumsfeld*, it was in fact Halleck's and Lieber's jurisdictional innovations in 1862 and 1863 that laid the foundation for almost all of the military commissions held after the Civil War.<sup>430</sup> Discovering this fundamental connection to the Lieber Code does not necessarily alter conceptions of the efficacy or legality of the modern commissions, but it does provide a much richer picture of the historical foundations of one of the most controversial areas of modern military law.

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<sup>429</sup> See *supra* Part III.B, III.C.

<sup>430</sup> See *supra* pp. 51–54.

## Appendix A

### Description of Research Methodology

During the American Civil War, the records of military commissions were maintained at several levels of the War Department. As a result, a record exists, in theory, for each commission file in at least two, and often more, locations. The process by which commission files were reviewed during the war created this duplicative record-keeping system.

The original transcript of each trial is currently stored in Record Group 153 at the National Archives in a collection of folios labeled using an alphanumeric system. During the Civil War, the record of each trial would be forwarded to the commanding officer of the military district or department, who would then review the file and issue a general order either approving or disapproving the findings and sentence of the commission. These general orders would usually be collected and issued in yearly volumes for each district and department. The records usually included the name of the defendant, the date and location of the trial, the charges and specifications against the defendant, the findings and sentence of the commission, and the specific orders of the commanding officer. Additionally, some trials were also reviewed at the U.S. War Department, where a similar general order would be produced.

For example, Aaron Alderman was tried on 20 September 1864 and was charged with “Robbery” and “Being a Guerilla.”<sup>431</sup> The commission found Alderman guilty of all charges and sentenced him to hard labor for a term of twenty years.<sup>432</sup> The commission file was forwarded to Major General Dodge, Commander of the Department of Missouri, who reviewed the proceedings and affirmed the findings and sentence.<sup>433</sup> A general order was then promulgated recording this review.<sup>434</sup> Afterwards, the file was forwarded to Washington for review and record-keeping.<sup>435</sup> As the proceedings were not overturned, no further action was taken on this file in the War Department for almost a year.<sup>436</sup> However, based on

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<sup>431</sup> See Case NN-3356.

<sup>432</sup> *Id.*

<sup>433</sup> See Headquarters, Dep’t of Mo., Gen. Orders No. 243 (1864) (on file with Library of Cong., Wash., D.C.).

<sup>434</sup> *Id.*

<sup>435</sup> 12 Stat. 598, § 5 (1862).

<sup>436</sup> See Case NN-3356.

petition for clemency, President Johnson reviewed the file and released both Aaron Alderman and his brother, Charles Alderman, in June 1865.<sup>437</sup> When the men were released, an additional general order was issued from the Department of War ordering the release.<sup>438</sup> This process has created a paper record of the trial of Aaron Alderman in three separate locations.

In my research, I compiled data from a number of these sources. As data recorded in the department general orders volumes can be compiled more quickly and in a more organized fashion than can the data recorded in the full case transcripts at the National Archives, the bulk of my research was completed using the district, department, and War Department general orders records. Fortunately, I was able to locate and review all of the War Department general orders volumes, most of the department level general orders volumes, and many of district level general orders volumes. This research process allowed me to compile basic information on a large percentage of the military commissions held during the Civil War. This information provided the statistical framework through which I was able to make broad conclusions on the timing and the location of the commissions.

Additionally, I surveyed a relatively large number of the trial transcripts (about 150) from the National Archives. I pulled specific files that contained the trials for which I already had basic information from the general orders volumes. I also pulled random files. I surveyed the files at the National Archives for two primary reasons: first, to confirm that the information recorded in the general orders volumes was in fact accurate; and second, to provide a richer picture of the trials themselves. To my relief, the information in the general orders accurately reflected the transcripts at the National Archives.

Throughout the article, references to the total number of defendants tried or commissions held represent the number reported in the Departmental General Orders volumes for the respective year. While some of the cumulative numbers represent estimates, and hence some inaccuracy, the discrepancy is not significant. It was not possible to compensate for original delays in reporting that would allow all cases to be placed in the year which they were actually decided. Some of the

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<sup>437</sup> *Id.*

<sup>438</sup> See Headquarters, War Dep't, Gen. Court-Martial Orders No. 320 (1865) (on file with the N.Y. Hist. Soc'y).

commissions appearing in the first weeks of a particular year's General Orders may have in fact been tried in the last weeks of the previous year. For example, the trial of Neptune was recorded in the 1863 General Orders for the Department of the South.<sup>439</sup> The defendant was actually tried on 22 December 1862.<sup>440</sup> Such small discrepancies are not problematic, however, because the total figures are still useful in describing and evaluating overall trends with which this article is primarily concerned. However, whenever possible, this article counted commissions appearing in the General Orders of the War Department within the year when the trial actually occurred to compensate for the lag between trial and War Department review, which, in those records, was often several months.

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<sup>439</sup> Headquarters, Dep't of the S., Gen. Orders. No. 1 (1863) (on file with Library of Cong., Wash., D.C.).

<sup>440</sup> See Case KK-0504.



**Appendix B****Summary of National Archive Files Surveyed**

**Note:** Each of the alpha-numeric codes below refers to a folio of case transcripts. Generally, each of these folios contains somewhere between five and fifteen actual trials, usually all related to each other in both time and geography.<sup>441</sup>

**1861:****Department of the Missouri:**

KK-0824

**Department of the Potomac:**

II-0766

**Western Department:**

II-0471

II-0473

**1862:****Department of the Gulf:**

KK-0693

**Department of the Missouri:**

KK-0821

KK-0822

KK-0823

KK-0825

MM-0517

MM-0136

NN-0008

NN-0009

**Mountain Department:**

II-0832

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<sup>441</sup> See Records of the Office of The Judge Advocate General, National Archives, Record Group 153.

**Department of New Mexico:**

KK-0289

**Department of the South:**

KK-0504

**Department of Tennessee:**

KK-0285

**Department of Virginia:**

KK-0435

**1863:****XVI Corps:**

LL-1165

**XVII Corps:**

NN-2840

**Department of the Cumberland:**

LL-1155

NN-1076

NN-1078

NN-1403

NN-1487

**Department of the Gulf:**

LL-1655

**Department of the Missouri:**

LL-1231

LL-1238

LL-1267

LL-1268

LL-1275

LL-1277

LL-1302

LL-1304

MM-0617

MM-0642

MM-1005

NN-0100  
NN-0105  
NN-1391  
NN-1410

**Department of Ohio:**  
MM-0079

**Department of Virginia:**  
LL-0391

**1864:**

**Department of Alabama:**  
NN-1816

**Department of Arkansas:**  
MM-1406  
MM-1407  
NN-1966

**Department of the Cumberland:**  
MM-1408  
NN-1403  
NN-1487  
NN-1820  
NN-3275

**Department of Kansas:**  
NN-2161

**Middle Department:**  
NN-3154  
NN-3156

**Department of the Missouri:**  
LL-1277  
LL-2638  
NN-1389  
NN-1410  
NN-1815  
NN-1967

NN-2224  
NN-2733  
NN-3352  
NN-3353  
NN-3356  
NN-3520

**Department of Ohio:**

NN-2404

**Department of Pennsylvania:**

NN-3348

**St. Mary's District:**

NN-1975

**Department of the Susquehanna:**

NN-1400

**Department of Tennessee:**

NN-2841

**U.S. Department of War:**

NN-2163  
NN-2674  
NN-2846  
NN-2847

**Department of the East:**

NN-3642

**1865:**

**Department of the Cumberland:**

OO-0662

**Department of the East:**

NN-3642

**Department of Florida:**

MM-3028

**Department of the Missouri:**

MM-1912

NN-3352

NN-3520

OO-0255

**Department of the Shenandoah:**

MM-2094

**Department of South Carolina:**

MM-2696

**Department of Virginia:**

OO-0663